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**CHILD SOLDIERS AND INTERNATIONAL LAW: PROGRESSING
TOWARDS “AN ERA OF APPLICATION”?**

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Thesis submitted for the PhD degree to:

The School of Oriental and African Studies (SOAS)

University of London

DECLARATION

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30 September 2011

Casper August Waschefort

ABSTRACT

Academic legal literature has focused heavily on the creation and content of norms prohibiting the use and recruitment of child soldiers, rather than on how to apply these norms more effectively. In this thesis, I argue that this focus must now be redirected towards a greater emphasis on application. Effective application does not require major changes to any entity or functionary engaged in child soldier prevention; rather, it requires the constant reassessment and refinement of all such entities and functionaries, and here, some changes are required. International judicial, quasi-judicial and non-judicial entities and functionaries most relevant to child soldier prevention are critically assessed. Specific areas where these entities and functionaries can be improved in their effective application of child soldier prohibitive norms are identified, and the implementation of the suggested changes are analysed.

However, prior to analysing the application of the relevant norms, I analyse the enforceability of these norms, to determine whether they can indeed be applied. In this regard, I find that although there are shortcomings in these norms, they are nonetheless enforceable. I further argue that the nature of the legal regime to which a specific norm belongs, impacts on the enforceability of the relevant norm. This is due to the nature of the obligations created, as well as the enforcement mechanisms that belong to the relevant legal regime – in this case,

international human rights law, international humanitarian law and international criminal law.

The conclusions of this study are based, in part, on interviews conducted with individuals engaged with child soldier prevention at the highest level. The Democratic Republic of the Congo (DRC) is used as a case study against which the study's conclusions are tested; based on field research in the DRC.

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CHAPTER 1 INTRODUCTION

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

By 1977, a shift in the *mores* of the international community had occurred and the first instruments directly prohibiting child soldiering had been

¹ Soanes, C. & Stevenson, A. (eds.) *Concise Oxford English Dictionary* (2006).

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

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

⁴ *Ibid*.

⁵ See Chapter 4.

adopted in the form of the Two Additional Protocols to the Geneva Conventions.⁶ For more than a decade after the adoption of the Additional Protocols there were no further developments. During 1989, the UN Convention on the Rights of the Child (CRC) was adopted which (*inter alia*) prohibited child soldiering and mandated the creation of the Committee on the Rights of the Child.⁷ Two vital decisions were taken at the Committee's third session, during 1993. It was decided to submit a request to the Secretary General of the UN to appoint an expert to launch an in-depth investigation into the protection of children during armed conflict.⁸ It was also decided to entrust a member of the Committee with drafting a first preliminary text of a Protocol to the CRC on the involvement of children in armed conflict (CIAC Protocol).⁹

Graça Machel was duly appointed in terms of a General Assembly resolution to investigate and report on the situation of children during armed conflict.¹⁰ Although her mandate included the plight of all children during armed conflict, it was her ground-breaking report, released during

⁶ Article 77(2) of Protocol I Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, adopted 8 June 1977 (entered into force 7 December 1978) 1125 UNTS 17512; and article 4(3)(c) of Protocol II Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, adopted 8 June 1977 (entered into force 7 December 1978) 1125 UNTS 609.

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

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

⁹ *Ibid*, para 176 and Annex VII.

¹⁰ General Assembly Resolution 48/157 (20 December 1993),

1996, that drew the international community's attention to the problem of child soldiering.¹¹ In her report, Machel states:

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

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

As recommended in the Machel report, the office of the Special Representative to the Secretary-General on Children and Armed Conflict (SRSG) was created during 1998, and Olara Otunnu was appointed as the first SRSG.¹³ The SRSG has a multifaceted mandate that, in relation to children in armed conflict, includes: tracking progress, raising awareness, promoting information gathering, working closely with other role players, fostering international cooperation to ensure respect for

¹¹ Machel, G. 'Promotion and Protection of the Rights of Children: Impact of Armed Conflict on Children' UN Doc. A/51/306 (26 August 1996) (Machel Report). See Chapter 5 generally.

¹² *Ibid*, para 316.

¹³ *Ibid*, para 266-269.

children's rights and finally contributing to the coordination of efforts by governments and relevant UN bodies.¹⁴

The Coalition to Stop the Use of Child Soldiers (CSUCS), an NGO collaboratively formed by Amnesty International, Human Rights Watch, the International Save the Children Alliance, the Jesuit Refugee Service, the Quaker United Nations Office, and Terre des Hommes International Federation, was also founded during 1998. By this time Rädda Barnen (Save the Children Sweden), Quaker United Nations Office, the International Committee of the Red Cross and others had already made significant contributions to the prohibition of child soldiering both on an advocacy and research basis. Behind the driving force of the CSUCS, civil society spearheaded the campaign for the drafting and adoption of a protocol to the CRC on the involvement of children in armed conflict, originally the brainchild of the CRC Committee. The campaign called for a protocol that would lift the minimum use and recruitment age to a so-called "straight-18" threshold. Accordingly, the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (CIAC Protocol) was adopted during 2000.¹⁵ However, in my view the final product is very disappointing. The adopted text presents a compromise on the straight-18 threshold allowing states parties to the CIAC Protocol to voluntarily recruit children between sixteen and

¹⁴ General Assembly Resolution 57/77, 12 December 1996.

¹⁵ Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (entered into force 12 February 2002) 2173 UNTS 222. See Chapter 3.

eighteen, but not allowing them to use children younger than eighteen in direct participation in hostilities.

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

By 16 January 2002, the date upon which the Special Court for Sierra Leone was established, there had never been a prosecution for the use and recruitment of child soldiers. To date, that Court has delivered three Trial Chamber judgements on the subject,¹⁷ as well as appeal judgements in each of those cases,¹⁸ while the high-profile *Charles Taylor* case is still underway.¹⁹ All of these cases relate to the war crime of child soldier enlistment, conscription or use. Furthermore, all four

¹⁶ Security Council Resolution 1314 (11 August 2000) operative paragraph 9.

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

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

¹⁹ *The Prosecutor v Charles Taylor*, Prosecutor's Second Amended Indictment, SCSL-03-01-PT (2007).

defendants in the three cases that have proceeded to trial before the International Criminal Court (ICC) are charged with having committed the war crime of enlistment, conscription or use of child soldiers.²⁰ In the Democratic Republic of the Congo (DRC), numerous prosecutions, in national courts have been finalized.²¹ The first was during 2008.

During 2005 a comprehensive Monitoring and Reporting Mechanism (MRM) on child soldiering was established in terms of a Security Council resolution.²² Otunnu, the Special Representative of the Secretary-General (SRSG) on Children and Armed Conflict, first proposed the creation of such a mechanism to the General Assembly during his 2003 annual report.²³ The MRM serves to “collect and provide timely, objective, accurate and reliable information” on those situations affecting children that have been identified by the SRSG as most urgently deserving attention,²⁴ which includes “recruiting or using child soldiers”.²⁵ Accordingly, some direct engagement with the prevention of child soldiering is underway.

²⁰ *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06 (2006); *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07 (2007); and *Prosecutor v Jean Pierre Bemba Gombo*, ICC-01/05-01/08 (2008).

²¹ See Chapter 6.

²² Security Council Resolution 1612, (26 July 2005).

²³ Otunnu, O. ‘Protection of Children Affected by Armed Conflict’ Report of the Special Representative of the Secretary-General for Children and Armed Conflict, A/58/328, (29 August 2003), para 73-78.

²⁴ Security Council Resolution 1612, note 22 above, operative paragraph 5(c).

²⁵ ‘Annual Report of the Secretary-General on Children in Armed Conflict’, A/59/695 S/2005/72, (9 February 2005), para 68.

The exact level of effectiveness of these measures is relatively unclear. What is clear, however, is that the recruitment and use of child soldiers internationally persists and no easily visible inroads have been made as yet. Indeed, at the time of writing, reports are coming in of the use and recruitment of child soldiers in Libya, a new country to be added to the list of states that use child soldiers.²⁶ This is not to say that current measures are wholly ineffective, but it suggests, as is further discussed in Chapter 2, that the scale of the problem may not be diminishing.

1. SITUATING THE DEBATE

The concept 'childhood' is disputed among cultures, and as a result, so too is the concept of 'child soldier'. It is thus necessary to address the legitimacy of creating such age categories. By implication, it is also necessary to address the parameters of the concept 'child soldier' and international law's response thereto. Prior to this analysis, however, the very notion that law can play a role in achieving "an era of application" in the prevention of child soldiering needs to be assessed.

Child soldiering, as a social problem, is deserving of attention and academic treatment for two primary reasons. Firstly, the international community has responded in no uncertain terms that such practices are unacceptable and should cease. There is now significant agreement among states and civil society that it is simply wrong. Secondly, because

²⁶ Sherlock, R. 'Child Soldiers sent by Gaddafi to fight Libyan Rebels' *Channel 4 News* (23 April 2011) <www.channel4.com> (accessed on 15 May 2011).

of the fact that the international community has so strongly condemned the military enlistment, conscription and use of children, child soldiering has been formally prohibited by international law. Formal legal structures and the work of international organizations such as the UN are also focused on the prevention of the use and recruitment of child soldiers.

Legal research on child soldiering is more often than not *status quo* affirming. Commonly, it consists of a thorough legal analysis, including an analysis of international humanitarian law (IHL), international human rights law (IHRL) and international criminal law (ICL).²⁷ Such analysis is usually also framed against the background assumption that current preventative measures are entirely ineffective. Finally, the ineffectiveness of the legal measures analysed is explained by highlighting the structural weaknesses of the international legal order. These structural weaknesses are generally agreed to be attributable to a lack of a central legislative authority binding all states, coupled with the lack of an executive authority with a standing force capable of enforcing the positive law, and lastly, the lack of a judicial authority with compulsory jurisdiction. Happold, for example, contends that “the consensual nature of the international legal system and its lack of centralized enforcement mechanisms has meant that several states have been able to continue to recruit and use child

²⁷ See literature review *infra*.

soldiers by opting out of new legal developments and flouting those binding them”.²⁸

Such studies offer little insight into how children can be better protected from military use and recruitment. These structural weaknesses are very heavily entrenched in the international legal order. Although there is no single theory of international law to explain the system as a whole,²⁹ it is certainly not controversial to argue that the establishment of such legislative, executive and judicial authority is highly unlikely in the near term in a system premised on sovereign equality, as contemporary international law still is.³⁰ Under these circumstances, I argue that to make any real contribution to the knowledge on child soldier prevention, one has largely to work within the confines of such structural weaknesses and wherever possible, identify avenues to alleviate the effects of these structural weaknesses.

i. Conceptualizing “an Era of Application”

During 1999 the SRSG on Children in Armed Conflict at that time, Olara Otunnu reported to the General Assembly that:

²⁸ Happold, M. *Child Soldiers in International Law* (2005) 172.

²⁹ Indeed, D’Amato, a leading commentator on international law theory has stated that “...after four thousand years of being the sole and exclusive set of legal rules among nations, it is nothing short of remarkable that international law has not yet become thoroughly understood and explained” (D’Amato, A. ‘A Few Steps Toward an Explanatory Theory of International Law’ 7 *Santa Clara J. Int’l L.* 1 (2009-2010) 1).

³⁰ Absolute sovereignty has undoubtedly been diminished by concepts such as humanitarian intervention, and membership of intergovernmental organizations, most notably the European Union. Nevertheless, sovereignty still forms the foundation of the international legal order.

The Special Representative believes that the time has come for the international community to redirect its attention and energies from the juridical task of the development of norms to the political project of ensuring their application and respect on the ground. An “era of application” must be launched. Words on paper cannot save children and women in peril. Such a project can be accomplished if the international community is prepared to employ its considerable collective influence to that end.³¹

The year prior to recommending this refocus of attention towards “an era of application”, Otunnu had already reported that “the Special Representative believes that the most important and pressing challenge today is how to translate existing standards and commitments into action that can make a tangible difference to the fate of children exposed to danger on the ground”.³² Almost ten years later, on the occasion when Otunnu received the Harvard Law School Association Award and when he was no longer the SRSG on Children in Armed Conflict, he elaborated further on what “an era of application” entails.³³ On this occasion, he placed specific emphasis on the need that an “era of application” be “embedded within formal, structured and binding compliance mechanisms”. This, however, has to be interpreted together with his earlier statement, quoted above, that a shift has to occur from norm creation to “the political project of ensuring their [norms] application and respect on the ground”. As such, “an era of application” is dependent on a

³¹ ‘Promotion and protection of the rights of children: Protection of children affected by armed conflict Note by the Secretary-General’ A/54/430 (1 October 1999) para 165.

³² ‘Promotion and protection of the rights of children: Protection of children affected by armed conflict Note by the Secretary-General’ A/53/482 (12 October 1998) para 140.

³³ Otunnu, OA. ‘Era of Application’ *Remarks on the occasion of receiving the Harvard Law School Association Award* (15 June 2007).

broad range of mechanisms that has the potential to contribute to child soldier prevention.

My conception of an “era of application” overlaps very much with that of Otunnu. In his work, Cassel speaks of “rights protection”,³⁴ whereas Dror, for example, focuses on “social change”.³⁵ Rights protection is a narrower concept than social change, in that rights protection occurs on individual bases, without necessarily effecting deeper systemic problems that account for the occurrence of the social problem. In this study emphasis is placed on many mechanisms aimed at rights protection. This is done based on the argument that extensive rights protection is one of the primary components of broader social change. Such rights protection is central to “an era of application”.

ii. The Potential Role of International Law in Preventing Child Soldiering

After famously stating that “almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time” Henkin also stated that “the forces that induce compliance with other law ... do not pertain equally to the law of human rights”.³⁶ Unlike most other fields of international law, IHRL is primarily concerned with the manner in which a state treats people within its borders. The

³⁴ Cassel, D. ‘Does International Human Rights Law Make a Difference?’ 2 *Chi. J. Int’l L.* 121 (2001) 126-134.

³⁵ Dror, Y. ‘Law and Social Change’ 33 *Tul. L. Rev.* 787 (1958-1959).

³⁶ Henkin, L. *How Nations Behave* (1979) 47 and 235.

interests of other states are thus not directly at stake, as would be the case in the law of international finance for example. Henkin thus argues that without opposing state interest, the incentive to comply with rules of international law falls away to some extent. Yet, the extraordinary amount of pressure that was placed on South Africa to abandon its policy of *apartheid*, an internal policy, serves as an example that compliance is not wholly dependent on opposing state interest.

Sceptics of IHRL and IHL are quick to cite the massive failures of these regimes, such as the 1994 Rwandan Genocide, the Bosnian Genocide that followed soon thereafter and more recently the killing of tens of thousands of civilians during the closing phases of the civil war in Sri Lanka.³⁷ The visibility of these failures is matched by the invisibility of the potential successes of these regimes. What these sceptics fail to appreciate is that efforts directed at the protection of human rights and those in armed conflict do not take much, if anything, away from any other field or discipline. While IHRL and IHL are less effective than one would hope, their pursuits are worthy and they do not have direct negative consequences.³⁸ Kuper has stated that “it is arguable that the

³⁷ The mass atrocities committed in Rwanda and Bosnia during 1994 and 1995 respectively, are well documented and often referenced. However, the atrocities committed in Sri Lanka during 2009 are only just beginning to be brought to light. See the ‘Report of the Secretary-General’s Panel of Experts on Accountability in Sri Lanka’ (31 March 2011).

³⁸ For opposing points of view see Kennedy, D. ‘The International Human Rights Movement: Part of the Problem?’ 15 *Harv. Hum. Rts. J.* 101 2002; Kennedy, D. *The Dark Sides of Virtue: Reassessing International Humanitarianism* (2004) 3; Simon, WH. ‘Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism’ 46 *Wm. & Mary L. Rev.* 127 (2004-2005).

relevant law serves its purpose if it enables even one child to escape death or injury in armed conflict situations, and clearly it has succeeded in that respect...”³⁹

Dror presents two dimensions to law and social change. He firstly speaks of instances where the law lags behind social change.⁴⁰ He gives the example of the automobile.⁴¹ When cars came about the law was designed to regulate horse-drawn cart traffic. These laws were ill-designed for motor vehicle traffic. Thus, the social reality out-paced legal development, but over time, the law adapted to the social reality. In the municipal law context much research supports the notion that law lags behind social change.⁴²

Dror's second dimension speaks of situations where law is used to “initiate and control directed social change”.⁴³ It is this dimension of law and social change that is the subject of this chapter. Ultimately, viewing law as an instrument of social change is synonymous with Tamanaha's instrumentalist view of law, “... the notion that law is an instrument to

³⁹ Kuper, J. 'Children and Armed Conflict: Some Issues of Law and Policy' in Fottrell, D. *Revisiting Children's Rights: 10 Years of the UN Convention on the Rights of the Child* (2000).

⁴⁰ Dror, Y. 'Law and Social Change' 33 *Tul. L. Rev.* 787 (1958-1959) 794-796.

⁴¹ *Ibid* 795.

⁴² See Rosenberg, GN. *The Hollow Hope: Can Courts Bring About Social Change?* (1991); Stoddard, TB. 'Bleeding Heart: Reflections on Using the Law to make Social Change' *N.Y.U. L. Rev.* 72 (1997) 967, 972.

⁴³ Dror, note 40 above, 796-802.

achieve ends”.⁴⁴ Both these approaches are outcomes-based. As such, neither of these approaches will be of much value should law not be able to direct social change significantly. International law’s ability to do so has, for the most part, been presumed by international lawyers,⁴⁵ whereas international relations scholars have been far more sceptical.⁴⁶ As Schwebel has stated “compliance is a problem which lawyers tend to avoid rather than confront”.⁴⁷ This is even more apparent in the context of IHRL.⁴⁸

Hathaway and others have attempted to gauge compliance with human rights norms quantitatively.⁴⁹ In her extensive study, Hathaway relied “on a database encompassing the experiences of 166 nations over a nearly forty-year period in five areas of human rights law: genocide, torture, fair and public trials, civil liberties, and political representation of women”.⁵⁰

The aims of this study were to:

...examine two separate but intimately related questions. First, do countries comply with or adhere to the requirements of the human rights

⁴⁴ Tamanaha, BZ. ‘The Tension Between Legal Instrumentalism and the Rule of Law’ 33 *Syracuse J. Int’l L. & Com.* 131 (2005-2006) 231.

⁴⁵ Kingsbury, B. ‘The Concept of Compliance as a Function of Competing Conceptions of International Law’ 19 *Mich. J. Int’l L.* 345 (1998) 346. Koh, HH. ‘Why Do Nations Obey International Law?’ 106 *Yale L.J.* 2599 (1997) 2599-2600.

⁴⁶ Hathaway, OA. ‘Do Human Rights Treaties Make a Difference?’ 111 *Yale L.J.* 1935 (2001-2002) 1937-1938.

⁴⁷ Schwebel, SM. ‘Commentary’ in Bulterman, MK. & Kuijer, M. (eds.) *Compliance with Judgements of International Courts* (1996) 39.

⁴⁸ Hathaway, note 46 above, 1937-1938.

⁴⁹ Hathaway, *ibid*, generally. See also Neumayer, E. ‘Do International Human Rights Treaties Improve Respect for Human Rights?’ *The Journal of Conflict Resolution* Vol. 49, No. 6 (December 2005) 925.

⁵⁰ Hathaway, note 46 above, 1936.

treaties they have joined? Second, do these human rights treaties appear to be effective in improving countries' human rights practices – that is, are countries more likely to comply with a treaty's requirements if they have joined the treaty than would otherwise be expected?⁵¹

The conclusions reached in this empirical study suggests that countries do not adhere to their IHRL treaty obligations on a significant scale and states are also not significantly more likely to comply with treaty requirements incumbent upon them as a result of the ratification of an IHRL treaty.⁵² Nevertheless, on a qualitative level Hathaway concludes “we must not jump to conclusions about the worth of human rights treaties based solely on the quantitative analysis above. Even if accurate, the results do not preclude the possibility that human rights treaties have a favourable impact on human rights”.⁵³

These findings are valuable and play an important role in the on-going debate as to the efficacy of IHRL treaties. However, such a broad-based empirical study also has severe shortcomings, which may prove fatal to the veracity of the results.⁵⁴ The five treaty norms incorporated in the study all form part, in some way, of customary international law.⁵⁵ As

⁵¹ *Ibid*, 1939.

⁵² *Ibid*, 2002-2020.

⁵³ *Ibid*, 2020.

⁵⁴ The first shortcoming of such a quantitative study, as Hathaway admits, is flaws in the data relied upon. *Ibid*, 1967.

⁵⁵ The prohibitions against genocide and torture are not only norms of customary international law, but there is general consensus that these norms have attained the status of *jus cogens*. In the case of genocide see *Prosecutor v Zoran Kupreškić et al*, Trial Chamber II, ICTY-IT-95-16 (14 January 2000), para 520; and Wouters, J. & Verhoeven, S. ‘The Prohibition of Genocide as a Norm of *Ius Cogens* and its Implications for the Enforcement of the Law of Genocide’ 5 *Int’l Crim. L. Rev.* 401 (2005). In the case of torture see *Prosecutor v Anto Furundžija*, Trial Chamber II, ICTY-IT-95-17/1-T10 (10 December 1998), paras 155-157; and De Wet, E. ‘The Prohibition of

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

This study also largely fails to take account of the individual circumstances of the relevant state. For example, the US is not a state

Torture as an International Norm of *Jus Cogens* and Its Implications for National and Customary Law' 15 *Eur. J. Int'l L.* 97 (2004). Fair and public trial is a broad concept including various individual rights from a human rights perspective. Some of the most fundamental of these rights have been identified as having crystallised into rules of customary international law. See Doebbler, CFJ. & Scharf, MP. 'Will Saddam Hussein Get a Fair Trial' 37 *Case W. Res. J. Int'l L.* 21 (2005-2006); and Doebbler, CFJ. *Introduction to International Human Rights Law* (2007) 108. In her study Hathaway defined civil liberties as "freedom of expression and belief, association and organizational rights, rule of law and human rights, and personal autonomy and economic rights" (Hathaway, note 46 above, 1975). This definition is also very broad, incorporating various rights, most of which undoubtedly form part of customary international law. Political representation of women was measured "using the percentage of men in each country's legislature" (Hathaway, note 46 above, 1975). There is wide support for the principle of non-discrimination being a *jus cogens* norm, some argue that the *jus cogens* dimensions is limited to racial discrimination (Dugard, J. *International Law: a South African Perspective* (2005) 43), others argue it is broader and includes discrimination based on sex (Makkonen, T. (revised and updated by Kortteinen, J) 'The Principle of Non-Discrimination in International Human Rights Law and EU Law' *Erik Castrén Institute, University of Helsinki* (August 2005) 3). Nevertheless, non-discrimination based on sex undoubtedly forms part of customary international law.

party to the Convention on the Rights of the Child (CRC), whereas the DRC is.⁵⁶ However, the level of compliance by the US to the CRC is significantly higher than that of the DRC. Nevertheless, the CRC may have already had an impact on the rights of children in the DRC, where this is of course not the case with the US.

Quantitative studies, by definition, are limited to treaty norms. In analysing the weaknesses of Hathaway's study I am not attempting to argue that such statistical analysis is irrelevant, but that such findings are not conclusive. The point of convergence between quantitative and qualitative data presents a good starting point from which to assess the ability of IHRL and IHL to achieve social change.

Neumayer's quantitative study's results on whether the ratification of international human rights treaties increases respect for human rights indicate: "in most cases, for [human rights] treaty ratification to work, there must be conditions for domestic groups, parties, and individuals and for civil society to persuade, convince, and perhaps pressure governments into translating the formal promise of better human rights protection into actual reality".⁵⁷ This finding is consistent with Cassel's

⁵⁶ Convention on the Rights of the Child (entered into force 2 September 1990) 1577 UNTS 3.

⁵⁷ Neumayer, note 49 above, 952.

hypothesis of IHRL, which includes IHL in his use of the term,⁵⁸ as a rope:

Where rights have been strengthened the cause is usually not so much individual factors acting independently – whether in law, politics, technology, economics, or consciousness – but a complex interweaving of mutually reinforcing processes. What pulls human rights forward is not a series of separate, parallel cords, but a "rope" of multiple, interwoven strands. Remove one strand, and the entire rope is weakened. International human rights law is a strand woven throughout the length of the rope. Its main value is not in how much rights protection it can pull as a single strand, but in how it strengthens the entire rope.⁵⁹

Law, politics, technology, economics, and consciousness, are referenced. They, among innumerable others, also form strands in this rope. In adhering to an instrumentalist view of law, my approach to child soldier prevention in this study accords with Cassel's metaphor of human rights as a rope. Indeed, the norms and enforcement mechanisms of IHL and ICL also form strands in this rope.

iii. Universalism and Cultural Relativism: "The Politics of Age"⁶⁰

The notion of creating age distinctions for purposes of military recruitment has been challenged on two primary bases: first, it is argued that young people develop at different rates, so that a particular eighteen year old may be less independent and less capable of making informed decisions than a specific sixteen year old. This argument has been further advanced on the basis that children have a greater capacity for making

⁵⁸ Cassel, D. 'Does International Human Rights Law Make a Difference?' 2 *Chi. J. Int'l L.* 121 (2001).

⁵⁹ *Ibid.*, 123. See also Tacsan, J. The Effectiveness of International Law: An Alternative Approach' *Int'l Legal Theory* Vol II (1) (1996) 3.

⁶⁰ This title is quoted from Rosen, note 3 above, 132-158.

important decisions such as enlisting in an armed force or group than they are given credit for, although this in itself is not an argument against the creation of age barriers. Secondly, the competencies of a young person at a given age are determined differently in different cultures.⁶¹

The first point of view takes no account of the fact that today the theory of cognitive ability (which associates age with cognitive ability), or some variations thereof, has become deeply entrenched in not only all municipal legal systems, but also international law in general.⁶² It is inescapable that, although arguably at different ages, all children will, up to a certain phase in her/his development, not be in a position to make an informed decision as to whether or not to join an armed force or group, while many are subject to forced recruitment and adult manipulation. International law cannot be based on a system whereby the unique developmental characteristics of each young person are considered to inform a determination as to whether or not the specific child can make an informed decision whether or not to enlist. This argument is certainly not new: it is endorsed in every municipal criminal justice system, where differentiation based on age is used across the board for purposes of determining criminal capacity, sentencing, and appropriate detention facilities.

⁶¹ Rosen, note 3 above, 132-158.

⁶² See Chapter 3.

In assessing municipal legal systems, Lowe argues that a state's freedom to create its own unique laws and legal systems plays a major role in creating a separate and unique identity and character for the relevant state.⁶³ The pursuits, he argues, of international law are quite the opposite.⁶⁴ International law exists to create a minimum threshold of norms to which all states are bound and in so doing creates a degree of uniformity among states.⁶⁵ Thus, international law is, by definition, universalist. It goes without saying that a degree of dissent generally exists from a minority of states, or even a majority of weaker states, regarding a specific rule.⁶⁶ This dissent has often manifested itself in a divide, or at least in a perceived divide, between western and non-western states and ideas.⁶⁷

Within the human rights paradigm this has lead to tension between a universalist approach to human rights and a culturally relative approach, and the cultural relativity of age goes to the heart of this debate. Sen speaks of "world justice and the rule of law".⁶⁸ Some argue that the notion of child soldiering and the international attention it has generated of late is

⁶³ Lowe, AV. *International Law* (2007) 157.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ In its most extreme form, this results in persistent objectors to the formation of customary international law. In general persistent objectors are not bound by the relevant rule, see for example the *Anglo-Norwegian Fisheries Case* 1951 ICJ Reports 115, 131; *Asylum Case* 1950 ICJ Reports 277; *Nicaragua Case* 1986 ICJ Reports 107. For a contrasting view see Judge Tanaka, Dissenting Opinion, *South West Africa Cases, Second Phase* 1966 ICJ Reports 6, 291.

⁶⁷ See for example, Heckman, JJ. Nelson, RL. & Cabatingan, L (eds) *Global Perspectives on the Rule of Law* (2010).

⁶⁸ Sen, A. 'Global Justice' in Heckman, Nelson & Cabatingan *ibid* 69.

an example of western conceptions of childhood and ideals of child protection being forced upon non-western states.⁶⁹ In this regard, it is again useful to refer to Sen:

I have also argued against considering the question of impartiality in the fragmented terms that apply only within nation states - never stepping beyond the borders. This is important not only for being as inclusive in our thinking about justice in the world as possible, but also to avoid the dangers of local parochialism against which Adam Smith warned nearly two and a half centuries ago. Indeed, the contemporary world offers much greater opportunity of learning from each other, and it seems a pity to try to confine the theorization of justice to the artificially imposed limits of nation states. This is not only because ... "injustice anywhere is a threat to justice everywhere" (though that is hugely important as well). But in addition we have to be aware how our interest in other people across the world has been growing, along with our growing contacts and increasing communication.⁷⁰

Furthermore, in many instances non-western states have subscribed to legal provisions regarding the prohibition of the use and recruitment of child soldiers at a faster rate than western states.⁷¹ Additionally, there are no persistent objectors to the customary international rule prohibiting the use and recruitment of child soldiers. The African Charter on the Rights and Welfare of the Child (hereinafter the 'African Children's Charter') provides an apt example of the global response to child soldiering not only being accepted among some of the most traditional and culturally sensitive societies in the world, but even further developing such prohibitive norms.⁷² This Charter was the first convention to elevate the age threshold for the prohibition of the military use and recruitment of

⁶⁹ Rosen, note 3 above, 4.

⁷⁰ Sen, note 68 above, 69-70.

⁷¹ See Chapter 3.

⁷² The African Charter on the Rights and Welfare of the Child (1990), OAU Doc. CAB/LEG/24.9/49 (entered into force 29 November 1999).

children to eighteen, as opposed to fifteen.⁷³ Furthermore, this convention provides:

States Parties to the present Charter shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular:

(a) those customs and practices prejudicial to the health or life of the child; and

(b) those customs and practices discriminatory to the child on the grounds of sex or other status.⁷⁴

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

iv. Conceptualizing the ‘Child Soldier’

There are soft law instruments providing over-arching definitions of child soldiering, for example, the Paris Principles provide that “a child associated with an armed force or armed group” refers:

...to any person below 18 years of age who is or who has been recruited or used by an armed force or armed group in any capacity, including but not limited to children, boys and girls, used as fighters, cooks, porters, messengers, spies or for sexual purposes. It does not only refer to a child who is taking or has taken a direct part in hostilities.⁷⁵

⁷³ *Ibid*, article 22.

⁷⁴ *Ibid*, article 21(1).

⁷⁵ Article 2(1), Paris Commitments and the Principles and Guidelines on Children Associated with Armed Forces or Armed Groups (2007). See also the Cape Town Principles on Best Practices on the Prevention of Recruitment of Children into the Armed Forces and on Demobilisation and Social Reintegration of Child Soldiers in Africa (1997).

However, it is clear that the customary norm that has crystallised prohibiting the use and recruitment of child soldiers has much less proscriptive content.⁷⁶ Furthermore, in order to assess the legal obligations incumbent upon a specific state, one has to have regard to the treaty norms the state has made itself subject to by acceding to or ratifying relevant treaties. At present there are at least eight international treaties prohibiting the use and recruitment of child soldiers, as opposed to regional treaties.⁷⁷ The obligations created by each of these treaties are different from one another, some only slightly and others more materially. What is more, different states have ratified different combinations of these treaties, further complicating the assessment of the exact nature of the legal obligations to which the relevant state is subject.

There are two ways in which to address this phenomenon. Firstly, one can argue that if the law does not prohibit the enlistment of a child into the military, that child will not be deemed a child soldier. Alternatively, one can argue that the child remains a child soldier, but that no legal norms were violated in recruiting or even using that child in military operations, where the relevant state has not subscribed to a legal obligation to the contrary. IHRL provides that "...a child means every human being below

⁷⁶ See Chapter 3.

⁷⁷ See Chapter 3 and 4 generally for an analysis of such legal obligations. Additional Protocol I and Additional Protocol II, note 6 above; CRC, note 7 above; CIAC Protocol, note 15 above; the Rome Statute of the International Criminal Court (Rome Statute) (entered into force 1 July 2002) 2187 UNTS 90; ILO Forced Labour Convention No. 29 (entered into force 1 May 1932) 39 UNTS 55; ILO Minimum Age Convention No. 138 (entered into force 19 June 1976) 1015 UNTS 297; and ILO Worst Forms of Child Labour Convention No. 182 (entered into force 19 November 2000) 2133 UNTS 161.

the age of eighteen years unless, under the law applicable to the child, majority is attained earlier.”⁷⁸ The United Kingdom, for example, has not subscribed to any legal norm that bars it from recruiting persons of sixteen years of age or older into its armed forces, and indeed, the UK does recruit such persons. *In contra*, states such as Norway have subscribed to such international norms. If one were to favour an interpretation in terms of which the concept of the child soldier is one which inherently denotes the unlawfulness of the child’s enlistment, conscription or use, it would mean that a child would be deemed to be a child soldier if she/he is in the Norwegian Armed Forces, but would not be deemed a child soldier if she/he is in the British Armed Forces. This results in a situation in which one would have to examine the treaty obligations to which a particular state has subscribed in every instance in which one wished to use the term child soldier. Such a state of affairs will further be detrimental to the movement to progressively provide for more stringent prohibitive rules; which will also, over time, affect the content of customary international law.

The term ‘child soldier’ is thus broad and legally imprecise, but its use seems to me unavoidable. All instruments that pre-date the Rome Statute use the terms ‘use’ and ‘recruit’ in defining the proscribed conduct. The Rome Statute and those instruments that were drafted after the Rome Statute use the terms ‘enlist’, ‘conscript’ and ‘use’, which are broader than

⁷⁸ Article 1, CRC, note 7 above.

‘recruit’. This distinction is immaterial for the purposes of the present chapter, as well as chapters two and three. These chapters deal with child soldiering as a social phenomenon, which the international community wishes to regulate. The parameters of this regulation only become relevant in Chapter 3. The term child soldier is therefore employed extensively in the first three chapters, whereas in the later chapters, more precise and legally relevant terminology is employed, which is specific to the relevant legal norm under discussion in the given instance.

The NGO community generally prefers concepts such as “a child associated with an armed force or armed group” over that of a ‘child soldier’.⁷⁹ In order to be a soldier, one has to engage or potentially engage in armed conflict,⁸⁰ whereas the NGO community and soft law instruments advocate for the non-use and recruitment of children in a broader context than direct military engagement only. However, the concept ‘child soldier’ can reasonably be interpreted as being broader than any of the relevant treaty norms or customary rules in existence. When considering international law, there is little use in employing concepts such as “a child associated with an armed force or armed group” unless one wishes to advocate for the adoption of broader or higher legal standards, which I do not wish to do. I will therefore use the

⁷⁹ This phraseology is also used in the Paris Principles, note 75 above.

⁸⁰ See Chapter 3.

term child soldier will be used instead of broader concepts such as those discussed.

Like virtually any problem that is difficult to contain and address, child soldiering is multi-faceted. Today it is clear that children participate, on a significant scale, in gang activity, whether it is on the streets of Los Angeles or in the context of narco-gangs in Mexico and other parts of Latin America.⁸¹ Children are also extensively used in terrorist activities.⁸² This study is limited to the use of children during armed conflict and the recruitment of children into military structures (whether formal or informal).⁸³ This limitation is for two reasons. First, a comprehensive approach, which includes both traditional child soldiering and child gang- and terrorist participation, is too broad given the inherent limitations within which PhD research is conducted. Secondly, the response to child soldiering in armed conflict is very different to that of child gang and terrorist participation. Not only is the application of IHL limited to armed conflict, but the application of IHRL is different during armed conflict, in light of the fact that IHL is the *lex specialis*.⁸⁴ The prevention of the use of

⁸¹ Edgar Jimenez Lugo, who is known as "El Ponchis", is currently standing trial in Mexico for the murder, torture and decapitation of four people. His alleged crimes were all committed when he was fourteen years of age, and within the context of narco-gang warfare. Children participate in such gang activity on a significant scale. See Grillo, I. 'In Teenage Killers, Mexico Confronts a Bloody Future' *Time* (8 December 2010).

⁸² Terrorist activities in this context refers to the nature of the tactics used, for example bombings of civilian markets with the intention to inspire fear in the minds of a civilian population, the term is not used to connote a political determination regarding the nature of a specific group.

⁸³ See for example Singer, PW. *Children at War* (2006) 116-131.

⁸⁴ There is some disagreement as to whether IHL is always the *lex specialis*, and IHRL the *lex generalis*, or whether one has to consider the case at hand before determining which regime's norm is the *lex specialis*. See Chapter 3.

children in gang and terrorist activity is much more reliant on municipal policing and law enforcement. International law does not create obligations for entities such as gangs and groups utilizing terror tactics (outside of the context of armed conflict), whereas IHL does so in relation to state and non-state armed groups during armed conflict.⁸⁵ Outside the context of armed conflict, the international law duties to which states are subject in suppressing crime related to gangs and terror groups emanate from IHRL, not IHL. Therefore, although there is a margin of over-lap, suppressing the use of children by gangs and terrorist entities requires a unique response.

The phenomenon of girl soldiers has rightly received increased attention from within the child soldier discourse. The use of girl soldiers adds several unique dimensions to the problem: most significantly, sexual exploitation.⁸⁶ Girl soldiers can broadly be divided into two categories. First, girls who are recruited to contribute to the war effort, in the same way as boys are recruited and used; and secondly, girls who are specifically recruited for the purpose of sexual exploitation, often called “bush wives” in the African context.⁸⁷ Both groups are equally susceptible to sexual abuse by fellow soldiers, and specifically commanders. Male

⁸⁵ See Chapter 3. In the age of the war on terror, the concept of terrorism has become less precise. News media and the US administration routinely refer to belligerents in the ongoing conflicts in Iraq and Afghanistan as terrorists. These conflicts are conflicts properly falling within the IHL paradigm. As such, children who are used and recruited into structures engaged in these conflicts form part of the subject matter of this study.

⁸⁶ Brett, R. ‘Girl Soldiers Denial of Rights and Responsibilities’ 23 (2) *Refugee Survey Quarterly* 32 (2004).

⁸⁷ See for example *AFRC appeals* case, note 18 above, 186.

child soldiers also sexually abuse young girls.⁸⁸ In many aspects during the prevention of the use and recruitment of child soldiers the needs of girls require specific attention. This is particularly important during disarmament, demobilization and reintegration (DDR) processes. In this study, the particular experiences and needs of girls are acknowledged and addressed whenever this is relevant to the prevention of the military use and recruitment of children. This study has, however, at its heart the concept 'child', not boy or girl. I therefore make no gender distinctions with regard to the reasons why children should not be used and recruited as soldiers.⁸⁹

2. LITERATURE REVIEW

If the international community was initially slow to take up the cause of child soldiering, so too were legal scholars slow to study this phenomenon. Mann's 1987 article 'International Law and the Child Soldier', marked the first legal academic publication on this issue.⁹⁰ In the context of child soldiering, the chronology of literature is important, as the contribution of any given source should be assessed contextually in relation to those legal standards that were in place at the time of the

⁸⁸ Honwana, A. *Child Soldiers in Africa* (2007) 91-92.

⁸⁹ I am of the view that the law cannot create a distinction based on sex for the purpose of prohibiting the enlistment, conscription or use of children. It is highly unlikely that such a differentiation will result in any greater enforcement. On the contrary, it is likely that such a differentiation will add a layer of complexity behind which armed groups can hide their use of boy soldiers. Furthermore, it was a hard fought battle in many states to gain the right for women to join the armed forces and positively contribute to the security and citizenship of their states. As it will be a step backwards to deny women the right to join the armed forces, it will equally be a retrogressive step to prohibit the enlistment, conscription or use of girl soldiers differently or for different reasons than boy soldiers.

⁹⁰ Mann, H. 'International Law and the Child Soldier' 36 *Int'l & Comp. L.Q.* 32 (1987).

relevant publication. For example, the early sources on child soldiering, like Mann's article and Goodwin-Gill and Cohn's seminal study, were largely silent on international criminal law and prosecutions, as these developments regarding child soldiering post-date these publications.⁹¹ Developments in international law more broadly also impact on works on child soldiering more specifically. For example, although the nature of the relationship between IHL and IHRL is still subject to debate, since 1996 it has been clear that IHRL continues to apply during armed conflict.⁹² This, of course, has implications for child soldier prevention, as the prohibitive rules emanate from both these sub-regimes of international law.

A recent collection edited by Gates and Reich commences by noting that "surprisingly, little academic attention has been brought to bear on the issue [child soldiering]".⁹³ This is particularly true in the context of international law.

In as far as the prevention of the use and recruitment of child soldiers is concerned, for practical purposes publications can be divided into four categories: 1) publications that only provide a survey of the legal standards in place; 2) publications by non-lawyers that comment on international law's prohibitions of child soldiering; 3) publications that only

⁹¹ Goodwin-Gill, G. & Cohn, I. *Child Soldiers: The Role of Children in Armed Conflicts* (1994).

⁹² *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 226 (11 July 1996).

⁹³ Gates, S & Reich, S. (eds.) *Child Soldiers in the Age of Fractured States: Security Continuum: Global Politics in the Modern Age* (2009), vii.

focus on specific aspects of the child soldier phenomenon, e.g. girl soldiers, or the individual criminal responsibility of children in international law; and 4) comprehensive studies focusing on the positive law, as well as the enforcement of norms.

i. Publications that Only Provide a Survey of the Legal Standards in Place

Scholarly contributions that only surveyed the positive law were a necessary component in the evolution of the academic treatment of child soldiering. Again, Mann's 1987 article serves as the best example. This article provides an in-depth survey of the rules prohibiting child soldiering. At that time only the Additional Protocols to the Geneva Conventions prohibited child soldiering. Mann thus relied heavily on more general rules protecting civilians during armed conflict. As no attention was paid to this phenomenon at the time, the value of this meticulous study was immense. There are still contributions being published that survey legal obligations. On the one end of the spectrum, some of these contributions provide no added value to the knowledge;⁹⁴ on the other end of the spectrum, novel and valuable interpretations of these rules are presented. Krill's 1992 analysis of the co-application of IHL and IHRL after the coming into force of the CRC is an excellent example of such a

⁹⁴ See for example, Seneviratne, W. 'International Legal Standards Applicable to Child Soldiers' 15 *Sri Lanka J. Int'l L.* 39 (2003).

contribution.⁹⁵ This was the first publication to focus attention on the relationship between IHL and IHRL in preventing child soldiering; to date this issue has received almost no further attention.

ii. Publications by Non-Lawyers that Comment on International Law's Prohibitions of Child Soldiering

This category is not included in an attempt to claim a monopoly for law in the prevention of the use and recruitment of child soldiers. In my view, international law is only one of many disciplines that may contribute thereto.⁹⁶

A number of monographs have been published from within disciplines such as psychology and international relations dealing with the prevention of the use and recruitment of child soldiers with reference to international law.⁹⁷ Often these studies provide cursory accounts of international law, or in more extreme cases technical inaccuracies, which are then framed in the broader debate of child soldier prevention. The shortcoming of this approach is that international law is complex; one has to consider the nature of the relevant norms in order to draw any conclusions on how such norms can be effectively implemented. An example of such

⁹⁵ Krill, F. 'The Protection of Children in Armed Conflict' in Freeman, M. & Veerman, P. (eds.) *The Ideologies of Children's Rights* (1992). In this context, see also Cohn, I. 'The Convention on the Rights of the Child: What it Means for Children in War' 3 *Int'l J. Refugee L.* 100 (1991).

⁹⁶ See generally Meckled-García, S. & Çali, B. (eds.) *The Legalization of Human Rights: Multidisciplinary Approaches* (2005).

⁹⁷ See for example, Singer, note 83 above; and Wessells, M. *Child Soldiers: from Violence to Protection* (2006).

technically inaccurate treatment of international law can be found in the otherwise excellent work of Wessells, where he states that “numerous international legal instruments, such as the 1977 Additional Protocols to the 1949 Geneva Conventions, ban child recruitment. However, the most comprehensive and explicit legal prohibitions against child recruitment are set forth in the 1989 CRC”.⁹⁸ This is said when in fact the prohibition contained in the CRC is a verbatim restatement of the prohibition contained in the First Protocol to the Geneva Conventions, save for the words “state parties” in the CRC that replaced “parties to the conflict”, which in effect weakens the provision somewhat. Furthermore, the prohibition contained in Additional Protocol II to the Geneva Conventions is stronger in virtually every respect than that contained in the CRC. Similarly, with reference to the OPCRC, Singer has made the statement that “this measure specifically targeted the phenomenon by formally raising the minimum age of recruitment and use to eighteen years old”.⁹⁹ This is incorrect. The national armed forces of states are allowed in terms of the OPCRC to recruit children aged between sixteen and eighteen.¹⁰⁰

Wessells further fails to draw a distinction between the prohibition of the use of child soldiers and that of the recruitment of child soldiers. From a legal point of view this distinction is material. The former can, by definition, only occur during armed conflict, in which IHL is the *lex*

⁹⁸ Wessells *ibid*, 233.

⁹⁹ Singer, PW. ‘The Enablers of War: Causal Factors Behind the Child Soldier Phenomenon’ in Gates & Reich, note 93 above, 94.

¹⁰⁰ See Chapter 3.

specialis vis-à-vis IHRL, and as such the Protocols to the Geneva Conventions come to the fore and the CRC takes a back seat. On the other hand, the recruitment of children often occurs during peace-time, and as such human rights law can play a primary role in this regard.

The legal analysis contained in such publications serve a secondary purpose, as the publications relate more specifically to fields other than law. Such publications add little value to a study focused specifically on the international law response to child soldier prevention.

iii. Publications that only Focus on Specific Aspects of the Child Soldier Phenomenon

A significant proportion of commentators focus their work on isolated aspects of the child soldier phenomenon. Most commonly, this includes the relation between the child soldier phenomenon and refugees;¹⁰¹ peacekeeping;¹⁰² specific states and regions;¹⁰³ arms control;¹⁰⁴ DDR;¹⁰⁵

¹⁰¹ Happold, M. 'Excluding Children from Refugee Status: Child Soldiers and Article 1F of the Refugee Convention' 17 *Am. U. Int'l L. Rev.* 1131 (2001-2002).

¹⁰² Cohn, I. 'The Protection of Children in Peacemaking and Peacekeeping Processes' 12 *Harv. Hum. Rts. J.* 129 (1999); Cohn, I. 'U.N. Efforts to Promote Child-Conscious Peacemaking and Peacekeeping: A Step toward Improving the Lives of War-Affected Children' 20 *Ohio St. J. on Disp. Resol.* 99 (2005).

¹⁰³ Cohn, I. 'The Protection of Child Soldiers during the Liberian Peace Process' 6 *Int'l J. Child. Rts.* 179 (1998); Honwana, note 88 above.

¹⁰⁴ Stohl, R. 'Targeting Children: Small Arms and Children in Conflict' (2002) *The Brown Journal of World Affairs* 9(1); Stohl, R. 'Under the Gun: Children and Small Arms' (2002) *African Security Review* 11(3).

¹⁰⁵ Cohn, I. 'Progress and Hurdles on the Road to Preventing the Use of Children as Soldiers and Ensuring their Rehabilitation and Reintegration' 37 *Cornell Int'l L.J.* 531 (2004).

military training;¹⁰⁶ international criminal law;¹⁰⁷ and the individual criminal accountability of the child perpetrator.¹⁰⁸

There are many advantages to this approach. Commentators are able to delve deeper into specific aspects of the problem and in so doing are able to make real contributions to the knowledge on child soldiering. These approaches illustrate that child soldiering cuts across many facets of law and indeed many different disciplines. This approach clearly does not allow, however, for a broader investigation to be conducted into the requisites to effect social change in the context of child soldiering globally.

iv. Comprehensive Studies Focusing on the Positive Law, as well as the Enforcement of Norms

To date, very few commentators have taken this approach to their work. Some of the work by Goodwin-Gill and Cohn,¹⁰⁹ Kuper,¹¹⁰ Rosen,¹¹¹ and

¹⁰⁶ Kuper, J. *Military Training and Children in Armed Conflict: Law, Policy and Practice* (2005); Kuper, J. 'Military Training and International Criminal Accountability', in Arts, K., & Popovski, V. (eds.) *International Criminal Accountability and the Rights of Children* (2006).

¹⁰⁷ Waschefort, G. 'Justice for Child Soldiers? The RUF Trial of the Special Court for Sierra Leone' *International Humanitarian Legal Studies* 1 (2010) 189-204.

¹⁰⁸ Dore, CL. 'What to Do with Omar Khadr - Putting a Child Soldier on Trial: Questions of International Law, Juvenile Justice, and Moral Culpability' 41 *J. Marshall L. Rev.* 1281 (2007-2008); Happold, M. 'Child Soldiers: Victims Or Perpetrators?' 29 *U. La Verne L. Rev.* 56 2008.

¹⁰⁹ Goodwin-Gill & Cohn, note 91 above.

¹¹⁰ Kuper, J. 'Children and Armed Conflict – Some Problems in Law and Policy', in Fottrell, D. (ed.) *Revisiting Children's Rights: 10 Years of the UN Convention on the Rights of the Child* (2000); and Kuper, J. 'Children in Armed Conflict: The law and its uses', *Development* Vol. 43, No.1 (2000), pp.32-39.

¹¹¹ Rosen, note 3 above.

Happold falls into this category.¹¹² Interestingly, all four of these authors have taken very different approaches to the same problem.

Goodwin-Gill and Cohn conducted their 1994 study with a focus on the use of child soldiers in El Salvador, Guatemala, the Israeli Occupied Territories, Liberia and Sierra Leone.¹¹³ Nevertheless, the study aimed at drawing conclusions applicable to most instances where child soldiers were used or recruited, as these authors argued: “we felt that the situations in these countries covered nearly the full spectrum of conflict-types across a wide range of cultural, religious, and social settings”.¹¹⁴

In her doctoral thesis on ‘International Law Concerning Child Civilians in Armed Conflict’, Kuper employed a similar approach.¹¹⁵ She conducted a case study on three distinct conflicts that occurred in Iraq between 1987 and 1991. The rationale for focusing on this cluster of conflicts was that it “... arguably incorporates the three main categories of conflict identified in international humanitarian law...”¹¹⁶

With regard to the prevention of the use and recruitment of child soldiers, the conclusions drawn by Goodwin-Gill and Cohn rest heavily on sociological and ecological factors that influence both the recruit and the

¹¹² Happold, note 28 above.

¹¹³ Goodwin-Gill & Cohn, note 91 above, 5-6.

¹¹⁴ *Ibid*, 6.

¹¹⁵ Kuper, J. ‘International Law Concerning Child Civilians in Armed Conflict’ PhD Thesis (1996), 244-307; see also Kuper, J. *International Law Concerning Child Civilians in Armed Conflict* (1997), 169-215.

¹¹⁶ *Ibid*, Kuper PhD Thesis, 19.

recruiter.¹¹⁷ As such, focus is placed on those factors specific to the relevant situation, and not those factors relevant to all situations where child soldiers are used and recruited. While there is considerable merit in such an approach, it fails to address the role that international law plays and can play in the prevention of the use and recruitment of child soldiers. International law and its implementation mechanisms, by definition, cannot focus on the unique aspects of each party to a conflict or each child.

Much of Kuper's work has focused on child civilians or the protection of children during armed conflict more broadly. Her work is of great value, as she has begun to address key issues with which most other commentators have not yet dealt. Specifically, she has focused her work on questions such as the role of law in effecting social change in the context of children during armed conflict, ways in which the relevant law can be strengthened, and initiatives in implementing the law.¹¹⁸ Indeed, she asks "why, with so much law, it seems generally so ineffective".¹¹⁹ Ultimately, she has begun to address the ineffectiveness of the law by making concrete "recommendations".¹²⁰ However, her primary focus is not the prevention of child soldiering, but rather the protection of child

¹¹⁷ Goodwin-Gill & Cohn, note 91 above, 167-181.

¹¹⁸ See generally, Kuper 'Children and Armed Conflict – Some Problems in Law and Policy', note 110 above; and Kuper *International Law Concerning Child Civilians in Armed Conflict*, note 115 above.

¹¹⁹ Kuper *International Law Concerning Child Civilians in Armed Conflict*, note 115 above, 216; and Kuper PhD thesis, note 115 above, 308.

¹²⁰ Kuper *International Law Concerning Child Civilians in Armed Conflict*, note 115 above, 221-243; and Kuper PhD thesis, note 115 above, 315-345.

civilians during armed conflict. My work has a very similar aim to that of Kuper, but in the context of the prevention of child soldiering.

Where virtually all commentators *assume* the virtue in trying to prevent the use and recruitment of child soldiers, Rosen takes a different approach. With reference to three case studies, “Jewish child soldiers of World War II”, “the child soldiers of Sierra Leone” and “Palestinian child soldiers”,¹²¹ he challenges the “assumptions” that “modern warfare is especially aberrant and cruel; that the world-wide glut of light-weight weapons makes it easier than in the past for children to bear arms; and that vulnerable children become soldiers because they are manipulated by unscrupulous adults”.¹²²

Rosen is uniquely placed in that he is trained as both a lawyer and an anthropologist. Nevertheless, his treatment of international law is very cursory, and his case studies are based on desk research only. His analysis centres on what he calls “the politics of age”.¹²³ In this regard he challenges a number of notions upon which the differentiation between age groups for protective purposes is based, he argues that the development of a child cannot be predicted in clear terms;¹²⁴ “the politics of age” is debated within a cultural and political context;¹²⁵ and that

¹²¹ Rosen, note 3 above, 19-131.

¹²² *Ibid*, 1.

¹²³ *Ibid*, 1-18 & 132-158.

¹²⁴ *Ibid*, 1-4.

¹²⁵ *Ibid*, 4.

children have a far greater agency than they are given credit for by both those driving international law and civil society in general.¹²⁶ Rosen does not argue that the contemporary use of children in armed conflict is acceptable in all circumstances. However, where such use is unacceptable in his view, it is not inherently due to the fact that the child is a soldier, but rather due to the specific circumstances, for example, forced conscription. Consequently, Rosen does not deal in any depth with the issue of preventing child soldiering, whether through the instrumentality of international law or any other mechanism.

Rosen is not the first to focus on what he calls “the politics of age” and to argue that the agency of children elevates their role as active and responsible decision makers. Van Bueren has argued that there is a tension between the protection of children and the participatory rights of children.¹²⁷ Similarly, in an interview I conducted with Zermatten, Deputy Chairperson of the UN Committee on the Rights of the Child, Zermatten expressed the view that there is an on-going paradigm shift from child protection to child rights.¹²⁸ What differentiates Rosen from these commentators is that he places himself on the extreme end of the spectral space between child participation (or agency) and child protection. Rosen expresses the view that

¹²⁶ *Ibid*, 131-138.

¹²⁷ Van Bueren *The International Law on the Rights of the Child* (1995), 335.

¹²⁸ Interview conducted with Mr Zermatten on 2 February 2011, Geneva, Switzerland.

The child soldier “crisis” is a modern political crisis, which is only partly related to the actual presence of children in war. In modern discourse it is difficult to disentangle humanitarian issues from political ones because humanitarian groups increasingly define themselves as political actors, and political groups use humanitarian rhetoric to further their own goals”.¹²⁹

This legal realist posture Rosen takes in relation to child soldiering has the implication that his work does not provide any conclusions on how greater enforcement of legal norms can be achieved, nor does it attempt to. In as far as the shortcomings of international law are concerned, he states, “although more international law has been created, the levels of compliance are increasingly low. A kind of “devil’s bargain” between humanitarian groups and state actors enables the proliferation of international law as long as compliance and enforcement remain feeble”.¹³⁰

More recently, Rosen has begun to explore the link between the increased agency of children and their individual criminal responsibility for deeds committed while being child soldiers.¹³¹

Happold’s monograph, ‘Child Soldiers in International Law’, presents the most complete account of the legal protections in place to prevent the use and recruitment of child soldiers. This study is a comprehensive study of the child soldier phenomenon in international law, covering issues as

¹²⁹ Rosen, note 3 above, 157.

¹³⁰ *Ibid*, 141-142.

¹³¹ Rosen, DM. ‘Who is a Child? The Legal Conundrum of Child Soldiers’ 25 *Conn. J. Int’l L.* 81 (2009-2010).

broad as “the UN and child soldiers” and “child soldiers as asylum seekers and refugees”.¹³² Other than highlighting some positive steps already taken to achieve greater enforcement of legal norms on the last page of the book, Happold does not address the enforcement of legal standards. As such, this study is a well researched, written and argued contribution focusing on the parameters of the *lex lata* on child soldier use and requirement, as it was intended to be.¹³³ No central argument is put forward to address the future effectiveness of the positive law in actively playing a stronger role in preventing the use and recruitment of child soldiers.¹³⁴ In conclusion, Happold highlights the weaknesses of the relevant international law, and states that:

The child soldier phenomenon cannot be addressed simply by promulgation of new standards. Indeed, it could be argued that continued stress on a ‘straight-18’ standard serves to obfuscate the issue. As both the Secretary General’s Representative on Children and Armed Conflict and the Secretary General himself have stressed, what is needed now an “era of application”.¹³⁵

In many ways, my work commences where Happold’s study ended.

As I have indicated, this study forms part of the last of the four categories of literature discussed. The available literature has dealt with the sociological and ecological factors that influence both the recruit and the recruiter’s decision-making process. The *lex lata* has further been

¹³² Happold, note 28 above, 34-53 & 160-169.

¹³³ *Ibid*, 3.

¹³⁴ *Ibid*, 173.

¹³⁵ *Ibid*, 172.

analysed in great detail. Furthermore, the agency of the child has been used as a base from which to argue that child soldiering is a problem of political origins and proportions, and as such the regulation thereof is not in fact the priority suggested by the dominant humanitarian rhetoric. Only Kuper has begun to address questions such as the role of law in effecting social change in the context of children during armed conflict, ways in which the relevant law can be strengthened, and initiatives in implementing the law. However, as noted above, her work has focused predominantly on child civilians during armed conflict, and not child soldiers.

3. THESIS, RESEARCH AIMS AND OBJECTIVES

With reference to the establishment of the child soldier Monitoring and Reporting Mechanism,¹³⁶ SRSG Otunnu contended that this mechanism “marks a turning point in our collective campaign for the ‘era of application’ – for transforming protective standards into compliance, and condemnation into accountability”.¹³⁷

At present, there are in existence at least eight binding international instruments directly prohibiting the use and recruitment of child soldiers. Moreover, every state in the world bar Somalia has ratified at least one of

¹³⁶ See Chapter 5.

¹³⁷ Otunnu, OA. “Era of Application”: Instituting a Compliance and Enforcement Regime for CAAC’ *Statement before the Security Council* (23 February 2005).

these instruments.¹³⁸ In other words, regardless of the fact that the prohibition of the use and recruitment of child soldiers is undoubtedly a norm of customary international law,¹³⁹ all states except Somalia are also under a treaty obligation to refrain from such conduct. Few substantive norms of international law can make this claim. As discussed above, these treaty standards are by no means perfect. Nevertheless, the international community has been unable to ensure compliance with even the weakest of these standards by some of its members.

I argue that international law has a role to play in the prevention of the use and recruitment of child soldiers.¹⁴⁰ Examples are discussed later in this study where the mobilization of international law directly resulted in not only the demobilization of active child soldiers, but also the cessation of their use and recruitment, even while hostilities were on-going.¹⁴¹ The thesis of this study is that in order for international law to be an agent through which “an era of application” can be entered in the context of child soldier prevention, the focus must now be shifted from norm creation to norm enforcement. As President Kennedy said regarding law

¹³⁸ Article 38 of the CRC prohibits the use and recruitment of child soldiers. All states except Somalia and the USA have ratified this instrument. Nevertheless, the USA has ratified the OPCRC, which also prohibits the use and recruitment of child soldiers.

¹³⁹ See Chapter 3.

¹⁴⁰ International law is a broad concept; in this context it means all the rules that emanate from the accepted sources of international law, including soft law that is relevant to the prevention of the use and recruitment of child soldiers. Of particular relevance in this regard are rules belonging to international humanitarian law, international human rights law and international criminal law.

¹⁴¹ See Chapter 6.

reform in the context of civil rights in the USA “...law alone cannot make men see right...”¹⁴²

Buerghenthal, in commenting on the “evolving international human rights system”, has divided this system up into four sequential stages: “the normative foundation”; “institution building”; “implementation in the post cold war era”; and “individual criminal responsibility, minority rights and collective humanitarian intervention”.¹⁴³ In line with Otunnu’s statement, this study is aimed at imagining an “era of application”, which would correspond with stages three and four of Buerghenthal’s evolution. It is important to note that, although it may be significant, the capacity and resources that the international community will expend on child soldier prevention is finite.¹⁴⁴ A rigid divide between these stages is unrealistic, as there will always be further development within each of these stages and a significant degree of overlap.¹⁴⁵ What is more, this debate about evolution within IHRL is framed within the context of IHRL broadly. This is well evidenced from Buerghenthal’s stages, as the fourth stage includes “minority rights”, and as such, the developmental course of these rights lags behind most of the corpus of IHRL. For present purposes, that begs

¹⁴² Kennedy, JF. ‘Civil Rights Address’ (11 June 1963).

¹⁴³ Buerghenthal, T. ‘The Normative and Institutional Evolution of International Human Rights’ 19 *Hum. Rts. Q.* 703 (1997). See also Nikken, P. *La Proteccion Internacional de los Derechos Humanos: Su Desarrollo Progresivo* (1987).

¹⁴⁴ The amount of resources and capacity that are allocated to preventing the use and recruitment of child soldiers is proportional to the level of commitment of states to combat this problem. Nevertheless, it will never be infinite. As such, any departure from a norm creation paradigm to a norm enforcement paradigm requires the reallocation of resources and capacity away from the former to the latter.

¹⁴⁵ Note 114 above, 704.

the question where child rights more broadly, and child soldier prohibitive rules in particular, factor-in on this evolution of IHRL.

The CRC, which directly prohibits the use and recruitment of child soldiers, is the most rapidly and widely ratified human rights treaty.¹⁴⁶ Additionally, as previously stated, there are no less than eight binding international instruments prohibiting the use and recruitment of child soldiers, from within four separate self-contained regimes within international law (IHL, IHRL, ICL and International Labour Law). Finally, such use and recruitment is a violation of customary international law.¹⁴⁷ Cumulatively these factors strongly indicate that the time is ripe to progress from an era of standard setting to an “era of application”, or from Buergenthal’s first two stages to his last two stages.

There is a very big gap between the existence of normative standards and the strength of these normative standards. The relative weakness of normative standards can for practical purposes be divided into two categories. Firstly, those standards that are weak because the content of the norm fails to provide extensive protection, for example, instruments that prohibit the use and recruitment of children younger than fifteen, instead of eighteen. Secondly, those standards that are weak because of bad drafting, or language that is imprecise and hard to apply to a concrete situation, for example, those standards that state that “all

¹⁴⁶ Article 38 of the CRC, note 7 above.

¹⁴⁷ See Chapter 3.

feasible measures” must be employed to ensure that a child does not take a direct part in hostilities. As these examples indicate, instruments prohibiting child soldiering suffer from both these forms of relative weakness.

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

This may cast doubt on whether, in the context of child soldier prevention, the evolution of IHRL has really entered Buergenthal’s third stage. Because of the nature of the law making process on the international

level, there is always compromise in agreeing to treaty norms. As such, no norms are perfect and there is a significant degree of overlap between the different stages.

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

The thesis of this study is not that all capacity and resources should be reallocated to enforcement instead of norm creation, just as all capacity and resources are not currently allocated to norm creation. The thesis is that a critical mass of these resources and capacity should be reallocated to enforcement. I do not argue that we should simply accept the weaknesses of the positive law. Instead, I argue that we should now put greater emphasis on enforcing these imperfect, but necessary standards.

I have identified two principal research questions:

- Are the international law norms that prohibit the use and recruitment of child soldiers capable of enforcement in their current form?

- What changes should be effected to the manner of enforcement of these norms in order to achieve a more significant degree of social change? In other words, what is needed for an “era of application”?

4. METHODOLOGY

In its most basic form, sociology is the study of society, and since law is a product of society, designed, in part, to regulate the conduct of society, drawing a link between these disciplines is uncontroversial.

i. Theoretical Framework: “Law and Sociology”

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

One of the more important devices used to initiate and control directed social change is law, a device the use of which is *prima facie* (and, in most cases, perhaps mistakenly) believed to be cheaper and quicker than education, economic development and other instruments and ways of directed social change.¹⁴⁸

¹⁴⁸ Dror, Y. ‘Law and Social Change’ 33 *Tul. L. Rev.* 787 (1958-1959), 802.

According to Tamanaha, “the instrumentalist view of law is the notion that law is an instrument to achieve ends. At the systemic level, it has often been said that law is an instrument to serve the public good, or an instrument to direct social change”.¹⁴⁹ He further acknowledges that the instrumentalist view of law has led some to argue that the “law is an instrument of domination by one group over another within society ... that lawyers instrumentally manipulate or utilize legal rules and processes to achieve the ends of their clients”.¹⁵⁰ His critique of an instrumentalist approach to law is premised on the importance of balancing interests among parties. If a lawyer manipulates the law to further the interest of her/his client, then the legitimacy of law, it may be argued, is at stake, as the legitimate interests of the opposing party to the dispute will not be safeguarded. However, when the law is used instrumentally to achieve social change by preventing the use and recruitment of child soldiers, there is no tension between such social change and the legitimate interests of the offending party.

Multi-disciplinary scholarship brings with it many advantages; however, one must also be aware of its demerits. Principally, in this regard, most scholars approach a subject from the point of view of the discipline in which they are trained. Very few scholars have the expertise to make any real contribution to a field of study other than her/his own. In many instances, as I have indicated above, this results in a rather superficial

¹⁴⁹ Tamanaha, note 44 above, 231.

¹⁵⁰ *Ibid.*

treatment of issues falling outside the expertise of the relevant scholar. In extreme cases, technical inaccuracies may result. This shortcoming can be seen in the treatment of the legal aspects of child soldiering in the works of Singer and Wessells, an international relations scholar and psychologist respectively.¹⁵¹ The research aims and language employed in the context of international law differ from that used in other disciplines, and this is also true among other disciplines. Ames is of the view that, when studying child soldiering, using the nation-state as the unit of analysis is virtually always a mistake”.¹⁵² Yet, in an international law context, states, by definition, form the entry point in addressing child soldiering, and must be included in the analysis. Nevertheless, this thesis is premised on the understanding that international law is but one contributor to the safeguarding of the rights of the child. The *status quo* is that children are used and recruited militarily on a wholesale basis. Changing this reality means effecting social change.

Accordingly, I adopt a “law and sociology” approach, but not in the true multi-disciplinary sense.¹⁵³ The approach to the work itself is legal – and I take an instrumentalist view of the law. However, linkages between this work and both existing and future works emanating from disciplines other than law can be identified, so as to clearly indicate what contribution this

¹⁵¹ See page 39 above.

¹⁵² Ames, B. ‘Methodological Problems in the Study of Child Soldiers’ in Gates, S. & Rech, Simon. *Child Soldiers in the Age of Fractured States* (2009), 16.

¹⁵³ Cryer, R., Herve, T. & Sokhi-Bulley, B. *Research Methodologies in EU and International Law* (2011), 86-88.

work makes to the greater knowledge and ideally to the efforts to make inroads into the use and recruitment of children. Furthermore, I hope that my work will be of pragmatic significance in achieving social change; the legal approach has sociological aspirations. The role of law in achieving such aspirations is the subject of further investigation in this study.

There are two aspects that are unique in the way the positive law is assessed in the present work. Firstly, the law is always assessed within the paradigm of enhancing the role and rule of law.¹⁵⁴ Secondly, IHL and IHRL are assessed as self-contained legal regimes, i.e. as fragmented aspects of international law. This allows for an analysis of the interplay between these legal regimes, both in terms of mutual reinforcement and potential norm conflict – an analysis which has not previously been undertaken in any detail. My underlying argument is that IHRL is always applicable, but that its application is affected by IHL, the *lex specialis*, during armed conflict.

ii. Research Methods and Data Analysis

As a whole, this study is “evaluative” in nature. However, in addressing the second part of the thesis, the substantive law and legal implementation mechanisms, a close “expository” study is conducted into the relevant international law norms.¹⁵⁵ Accordingly, significant parts of Chapters 3 and 4 are “expository” in nature. Traditional desk research

¹⁵⁴ Chapter 2.

¹⁵⁵ Cryer, Hervey & Sokhi-Bulley, note 153 above, 9-10.

methods into primary and secondary materials were employed throughout this study, in relation to both the “evaluative” and “expository” aspects of the thesis. In addition, interviews were conducted in two separate contexts. Firstly, I undertook a field-research expedition for four months to the DRC from October 2008 to January 2009; additionally, I visited Geneva, New York City, Washington DC, and Boston during February 2011 to conduct interviews with individuals involved at a senior level in the prevention of the use and recruitment of child soldiers.

The practicalities of conducting field work in the DRC and interviewing high-level respondents in Switzerland and the USA is discussed below.

DRC Field Research / Case Study

I had worked in areas plagued by child soldiering before I commenced this study and was always very impressed by the level of commitment of most people working to prevent the use and recruitment of child soldiers in the field. As there is no lack of commitment at this level of the enforcement process, I decided to do field work with the aim of establishing what the real-world requisites are for the effective enforcement of child soldier prohibitive norms. Adopting an instrumentalist approach to law, and a “law and sociology” theoretical basis, enhances the value of field research. Abstract legal reasoning will not necessarily contribute to social change if there are obstacles to change, of which the abstract theorist is unaware.

At present, or recently, virtually every facet of the child soldier problem has occurred within the DRC, including:

- a) The existence of both international and non-international armed conflicts.
- b) The use and recruitment of child soldiers by state armed forces, non-state actors and proxy forces.
- c) The conduct of national prosecutions for the use and recruitment of child soldiers.
- d) The UN has a peace mission in DRC, the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUC) that specifically incorporates child protection officers.
- e) The ICCs first case to have gone to trial (*Lubanga* case), was referred to the ICC by the government of the DRC and alleges the use and recruitment of child soldiers.
- f) Children have been used and recruited very extensively in armed conflict in the DRC.

For these reasons, I identified the DRC as the best case study to offer insight into the current international law response to child soldiering. In relation to the thesis of the study, the case study makes three primary contributions. It offers insights into whether international law has a role to

play in preventing the use and recruitment of child soldiers. It presents a factual scenario against which to determine whether any headway has been made as of yet in the “era of application”. It provides space where the practicalities of conclusions can be tested. The fieldwork I conducted in the DRC played a central role in informing my overall understanding of the practicalities of the child soldier phenomenon, and played an important role in referring the formulation of the thesis and the structure of the study.

The DRC is a very large state, with little to no infrastructure in many regions. At the time of my visit, there were three on-going low intensity armed conflicts or armed insurgencies where children were used and recruited as soldiers. All of these occurred in the North East and the East of the country. In the Nord Kivu and Sud Kivu provinces there were on-going clashes, and indeed an escalation of violence that became the ‘Nord Kivu War’. This war coincided with my visit. Various belligerents were involved on both sides, but essentially, it was an armed conflict between General Laurent Nkunda’s National Congress for the Defence of the People and the armed forces of the DRC.¹⁵⁶

Not very far north of this conflict, in the Ituri region of the DRC, low intensity clashes still occurred in the aftermath of the Ituri Conflict (1999-2007), between the agriculturalist Lendu and pastoralist Hema ethnic

¹⁵⁶ Chapter 6.

groups.¹⁵⁷ Yet, a third armed insurgency was underway even further north from Ituri. The infamous Lord's Resistance Army was operating from bases within the DRC at the time, as they still do frequently.¹⁵⁸ Indeed, the bloody 'Christmas massacre' occurred during my stay in the DRC.¹⁵⁹

I decided to split my time between the Nord/Sud Kivu region, where the Nord Kivu War was on-going, and the Ituri region, using the regional capitals Goma and Bunia as my base. I further decided not to conduct any fieldwork in relation to the Lord's Resistance Army for two primary reasons. There is no way to do it safely, and conclusions drawn in relation to a fringe group without any clear political agenda can only be helpful in relation to the prevention of the use and recruitment of child soldiers in other areas to a very limited extent.

In determining the appropriate research methods and interview styles the most important factors were what the study aimed to do, and what it did not aim to do. It is not an anthropological study into the experiences of children in armed conflict. As such, I decided from the outset that I would not interview children (former or current child soldiers). They would not be able to inform me on how child soldiering should be prevented. Furthermore, I have experience interviewing former child soldiers in Liberia, in a context unrelated to the current study, and have found their

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.*

responses to be unreliable and of little academic value. This also prevented many potential ethical problems from arising in relation to interviewing children, specifically in a context where the interview relates to a child's memories of extremely disturbing events, and information which could indicate the criminal liability of a child for deeds she/he committed. As such, the respondent pool was made up of people working for the UN, in various capacities, and NGOs focused on preventing the use and recruitment of child soldiers. The overriding ethical consideration that no participant must be harmed or be subjected to scrutiny as a result of participation in this study, was observed at all times.¹⁶⁰ The east and northeast of the DRC are very dangerous regions. This was particularly so in the Nord Kivu region during 2008. From an ethical point of view, researchers should not conduct research in circumstances where there is a grave threat to their life or well-being. However, I have extensive experience working in areas affected by armed conflict specifically in Africa, and as a result I also have an extensive network of contacts in the region. These factors meant that I could conduct the fieldwork within acceptable parameters of safety and, in an ethically sound manner.

Before departing for the DRC I was aware that my methodology would have to be flexible. However, I did not anticipate the level of difficulty I encountered in getting respondents to speak on the record. The end of 2008 was a particularly volatile period in the DRC, and the UN, its

¹⁶⁰ Boyden, J. 'Anthropology Under Fire: Ethics, Researchers and Children in War' in Boyden, J & De Berry, J. (eds.) *Children and Armed Conflict* (2004), 238-241.

agencies, and the NGO community had their hands full. These organizations were not keen on sharing information in relation to their deployment at the time, as it could have had safety implications for their personnel. Therefore, while I was provided with very good intelligence on the use and recruitment of children on the ground, this was all done off the record. Nevertheless, I managed to conduct a few very good interviews, and moreover, spending four months in war affected regions of the DRC provided me with an insight into child soldier use and recruitment, and specifically the practicalities involved in preventing such use and recruitment, that I could never have obtained from desk research.¹⁶¹

Interviews

Interviewing leading experts in the field of child soldier prevention presented me with the opportunity to elicit the views of these respondents on a range of issues associated with the thesis and research questions of this study. Although, these interviews always formed part of my methodology, they became more important after I was unable to conduct the number of interviews I anticipated during my fieldwork in the DRC.

Each of the respondents was chosen on the basis of specific expertise and the capacities in which they engage with the prevention of child soldiering. I conducted interviews with:

¹⁶¹ The implications of this experience are discussed in detail in Chapter 6.

- Radhika Coomaraswamy, the current SRSG on Children in Armed Conflict. Ms Coomaraswamy plays the central role internationally in protecting children during armed conflict. Her office has, since its creation, maintained a specific focus on the prevention of child soldiering.
- Jean Zermatten, at the time Deputy Chairperson of the CRC Committee. Mr Zermatten, as a judge and academic, is an internationally acclaimed expert on the rights of the child.
- Awich Pollar, member of the UN Committee on the Rights of the Child. In addition to being a member of the Committee and a lawyer, Mr Pollar is a former child soldier who fought in the Ugandan Bush War for President Museveni's National Resistance Army.
- Philip Alston, Professor of Human Rights Law, New York University. Prof. Alston has served in numerous capacities in the United Nations, most recently as Special Rapporteur on extrajudicial, summary or arbitrary executions. More importantly, Alston is a leading expert in the human rights system and his work specifically includes the treaty and charter based mechanisms of the UN. These mechanisms are particularly relevant to Chapter 5.
- Joost Kooijmans, Special Assistant to the Special Representative of the UN Secretary-General on Violence Against Children, Ms Martha Santos Pais. The purpose of this meeting was to establish

the relevance of the mandate of the Special Assistant to the Special Representative of the UN Secretary-General on Violence Against Children to child soldiering.

Interview Design and Data Analysis

As I anticipated that the respondents targeted in this study would be likely to share experience and knowledge beyond what can be contemplated in a structured or even semi-structured interview design, I adopted an unstructured design. Oppenheim uses the terms “data collection” and “heuristic” to differentiate between the functions of structured and unstructured interviews respectively.¹⁶² The aims of these unstructured interviews are not to draw a comparison between interviewees, but rather to obtain the viewpoint of an authoritative source.

From a qualitative content analysis perspective, the opinions obtained during the interviews have been used and incorporated with direct reference to the author and her/his status in the field of child soldier prevention and not “collapsed together and reported as one”,¹⁶³ described by Fontana and Frey as “polyphonic interviewing”.¹⁶⁴ As the value of these interviews lies in obtaining authoritative opinions, or what has been

¹⁶² Oppenheim, AN. *Questionnaire Design, Interviewing and Attitude Measurement* (1992), 66-67.

¹⁶³ Fontana, A. & Frey, JH. ‘Interviewing – the Art of Science’ in Denzin, NK. & Lincoln, YS. (eds) *Handbook of Qualitative Research* (1994), 368-369.

¹⁶⁴ *Ibid.*

called “incorrigibles”, rather than fact or “corrigible”,¹⁶⁵ no triangulation of outside sources to verify facts is needed, and validation is not an issue.¹⁶⁶

In the context of the DRC, the term ‘case study’ is used in the narrow technical sense of the word.¹⁶⁷ The nature of the fieldwork I conducted in the DRC is, in part, what Hakim terms “policy research” and as such, the contribution this aspect of the research aims to make is to assess “actionable factors”.¹⁶⁸ The construct of policy research also enabled me to interview a respondent as a ‘role holder’ rather than a private individual, and as such her/his authority is contingent on the role she/he plays. Responses from all the respondents in this study have been assessed against the background of the role played by the respondent.

5. THESIS STRUCTURE

The distribution, use and causes of child soldiering in contemporary armed conflict are discussed in Chapter 2 – informing the reader of child soldiering as a social reality. The distribution of child soldiers is relevant to the prevention of child soldiering in that reliance is placed in this regard on international machinery on a geo-specific basis. The capacity in which child soldiers are used in armed conflict is similarly relevant to child soldier prevention, as different legal instruments prohibit only specific

¹⁶⁵ Gomm, R. *Social Research Methodology – a Critical Introduction* (2004), 185-186.

¹⁶⁶ *Ibid*, 187-188.

¹⁶⁷ Hakim, C. *Research Design: Successful Designs for Social and Economic Research* (2000), 59.

¹⁶⁸ *Ibid*, “policy research” has a strong emphasis on the practicality and real world effect of the findings.

degrees of participation in armed conflict by children. Finally, understanding the causes of child soldiering potentially allows for the identification of strategies aimed at child soldier prevention addressing the root causes of the problem, and not only its symptoms.

Chapter 3 commences with an analysis of the relationship between IHL and IHRL. This relationship is particularly important in the context of child soldier prevention, as there is probably a larger degree of overlap between IHL and IHRL prohibitive norms in this regard, than any other proscribed conduct. The prohibition of the use and recruitment of child soldiers in terms of legal instruments forming part of IHL and IHRL is then discussed. Lastly, the customary law nature of the prohibition of child soldiering is also discussed. The purpose of this chapter is to address, in part, the second research question – whether the international law norms that prohibit the use and recruitment of child soldiers are capable of enforcement in their current form.

Chapter 4 is aimed at the war crime of the use and recruitment of child soldiers. The primary contribution of this chapter is first an analysis of this war crime as formulated under the Rome Statute, and the scope for prosecution by the ICC. Second, the role the ICC can potentially play to prevent the use and recruitment of child soldiers. Accordingly, like Chapter 5, this chapter also addresses the first research question in part, but further also addresses the second research question: the changes

required for mechanisms within international law to achieve a more significant degree of success in combating child soldiering.

The contribution of mechanisms forming part of the UN and the African Union (AU) to the prevention of child soldiering is analysed in Chapter 5. These UN mechanisms represent the core of the international communities' response to child soldiering. Therefore, this chapter presents a critical analysis of those UN mechanism best suited to the prevention of child soldiering, with particular attention being paid to areas of potential improvement to the effectiveness of these mechanisms. Conversely, a descriptive account of mechanisms forming part of the AU are presented, as these mechanisms have never before been used in response to child soldiering, but have the potential to contribute to the prevention of the use and recruitment of child soldiers. This chapter is aimed specifically at addressing the second research question; that is, the prospects for more extensive rights protection through enhancements to the mechanisms that exist to apply international law.

Chapter 6 is a case study on the prevention of child soldiering in the DRC, one of the countries the children of which have been most affected by this issue for several decades. The conclusions reached in previous chapters are compared to the practical situation in the DRC in order to establish the accuracy of these conclusions in relation to a concrete situation.

The central thesis of the study is that in order to enter an “era of application” in preventing child soldiering, focus must be shifted from norm creation to norm enforcement. Each of the two research questions addresses a component of the central thesis. In conclusion, Chapter 7 recounts the findings in relation to each of the research questions in order to assess whether the “era of application” is indeed within our grasp.

CHAPTER 2 CONTEMPORARY CHILD SOLDIERING: DISTRIBUTION, USE AND CAUSES

Child soldiering is a reality in many societies. However, speaking of the prevention of this phenomenon is, for those who have not been in armed conflict and have not dealt with the realities of child soldiering, an abstract concept. The reality of child soldiering is a social phenomenon that I argue can be addressed – and prevented – through the instrumentality of international law. To do this, international law must address the social reality and not the *perception* of the reality. This chapter analyses the distribution, the nature of the use, and the causes of child soldiering. In other words, where, when and why child soldiers are recruited and used in hostilities.

The distribution of child soldiers is analysed in order to indicate the scope and geographical spread of the child soldier problem. This is important in the context of this study, as the mobilization of international machinery, such as the United Nations Security Council, is dependent on the scope of a problem. Furthermore, the geographical location of the problem is material in the application of international law. Regional legal regimes such as the African Court on Human and Peoples' Rights are limited to specific geographical regions. As the "era of application" occurs within limited resources and capacity, such resources and capacity must be allocated to regions that are most affected by the phenomenon.

The contemporary use of child soldiers is an issue central to the social reality of what the international community wants to address when referring to “child soldiering”. Yet the definition of “child soldiering” is problematic for a number of reasons. In many conflicts in developing states, non-state armed groups often take the form of extended networks of people that operate on a nomadic basis. In other words, the entire family of combatants travels with the armed group. Children perform domestic chores, which directly benefits the armed group. Are they child soldiers, or is a more proximate role to hostilities required? While the positive law in this regard is discussed in Chapter 3 and 4, this chapter offers one insight in to this facet of the social reality.

Finally, the causes of child soldiering may provide an entry point for addressing the phenomenon through the instrumentality of international law. If clear causes can be identified, the strategies for the enforcement of international law can be focused at addressing such causes.

As these questions are anthropological and socio-geographical in nature, I will heed my own warning regarding multi-disciplinary work and set rather modest aims for this chapter.¹ This Chapter accordingly provides context to the subsequent chapter that aims at addressing these social realities specifically. More generally, it provides context to the thesis as a

¹ See Chapter 1, Methodology, 54.

whole. Indeed, this chapter is a good example of the brand of the “law and sociology” approach that I have adopted, and as such is more “expository” of the works of anthropologists and sociologists.²

1. DISTRIBUTION OF CHILD SOLDIERS

During the late 1990s it was estimated that there were 300 000 child soldiers internationally. Brett and McCallin have been credited with first citing this figure.³ During 1998 these authors acknowledged that “the total number of child soldiers in each country, let alone the global figure, is not only unknown but unknowable”.⁴ From the outset, this figure was nothing more than informed guess work. Nevertheless, to date a majority of academic contributions and reports by non- and inter-governmental organizations (NGOs and IGOs) indicate that there are approximately 300 000 child soldiers.⁵ There are no reliable quantitative data that support this figure and, moreover, the term ‘child soldier’ lacks sufficient content to categorize a given number of people to that genus. The continuous use of this figure without any revision has lead many commentators to

² See Chapter 1.

³ Hart, J. ‘The Politics of Child Soldiers’ 13 *Brown J. World Aff.* 217 (2006-2007), 217.

⁴ Brett, R. & McCallin, M. *Children: The Invisible Soldiers* (1998), 31.

⁵ The International Committee for the Red Cross has committed to a figure of 300 000 <<http://www.icrc.org/Web/eng/siteeng0.nsf/html/p0824>> (last accessed on 22 July 2011). The ‘2001 Global Report on Child Soldiers’ *Coalition to Stop the Use of Child Soldiers* (2001) at 10 & 13 (hereinafter ‘2001 Global Report’) states that there are 300 000 child soldiers, with 120 000 in Sub Saharan Africa. The Coalition moved away from committing to specific figures in its subsequent ‘2004 Global Report on Child Soldiers’ *Coalition to Stop the Use of Child Soldiers* (2004) (hereinafter ‘2004 Global Report’), where it was stated that regardless of the coming to an end of some of the worst conflicts in Africa during the reporting period there were still in the region of 100 000 active child soldiers in Sub Saharan Africa. In a recent publication Singer still adhered to the figure of 300 000 child soldiers globally: Singer, PW. ‘The Enablers of War: Causal Factors Behind the Child Soldier Phenomenon’ in Gates, S. & Reich, S. (eds.) *Child Soldiers in the Age of Fractured States* (2009), 93.

conclude that the number of child soldiers has been very stable for close to fifteen years.⁶ The conclusion may possibly be correct, but the manner in which the conclusion is reached is certainly not.

Indicating the distribution of child soldiers within acceptable parameters of accuracy is challenging enough, not to mention speculating on the number of child soldiers globally. Nevertheless, in order to obtain a sense of the extent of the child soldier problem, the distribution as well as the number of child soldiers needs to be taken into account. Focusing solely on the distribution of child soldiers has the effect that the extent of the problem in a state with a very small number of child soldiers may be equated with that of a state utilizing a significant number of child soldiers. Conversely, focusing solely on the numbers of child soldiers may have the effect that states in which there are not many child soldiers receive little or no attention. Children are not used or recruited in equal measure, by the same methods, or for the same reasons, in each of these countries. A myriad of human rights violations are committed against child soldiers. Nevertheless, the treatment of children and the roles they

⁶ Some organizations have, however, adapted their figures. Human Rights Watch correctly indicates that no exact figures exist; however, until recently they nevertheless committed to a figure of 200 000. They further state that in some conflicts, such as Sri Lanka, more than a third of all child soldiers were female, <http://www.hrw.org/campaigns/crp/fact_sheet.html> (last accessed on 22 July 2011). The United Nations Children's Fund (UNICEF) holds that there are 250 000 active child soldiers internationally, http://www.unicef.org/protection/files/Armed_Groups.pdf (last accessed on 22 July 2011) – UNICEF cites Otunnu, former United Nations Special Representative to the Secretary General on Children and Armed Conflict as authority (see Otunnu, OA. "Era of Application": Instituting a Compliance and Enforcement Regime for CAAC', Statement before the Security Council, New York (23 February 2005) at 3). The '2008 Global Report on Child Soldiers' *Coalition to Stop the Use of Child Soldiers* (2008) (hereinafter '2008 Global Report') did not commit to exact figures.

perform within military structures also differ widely. For example, one of the particularly egregious problems associated with child soldiering is the sexual abuse of children, specifically but not exclusively girls. The sexual misuse of children in Sierra Leone was the norm, whereas in Sri Lanka this practice was unheard of.⁷

A study by Reich and Achvarina indicates that the ratio of child participants in armed groups in different conflicts that overlap temporally and are close in geographic proximity to one another is often very different.⁸ Again, the accuracy of the figures relied on is highly questionable.⁹ Various single-country studies have been conducted on child soldiering. Often these studies include estimates of the number of children who participate or have participated in armed conflict in the

⁷ Hogg, CL. 'The Liberation Tigers of Tamil Eelam (LTTE) and Child Recruitment' *Coalition to Stop the Use of Child Soldiers, Forum on armed groups and the involvement of children in armed conflict, Chateau de Bossey, Switzerland* (4-7 July 2006), 13; Restoy, E. 'The Revolutionary United Front (RUF): Trying to Influence an Army of Children' *Coalition to Stop the Use of Child Soldiers, Forum on armed groups and the involvement of children in armed conflict, Chateau de Bossey, Switzerland* (4-7 July 2006), 5 *et seq.* More recent evidence suggests that government forces raped Tamil women in the final stages of the conflict. However, the sexual abuse of child soldiers by the Liberation Tigers for Tamil Eelam (LTTE) has not been indicated. See 'Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka' (31 March 2011), 152-153 & 176.

⁸ Reich, SF. & Achvarina, A. 'Why do Children Fight? Explaining Child Soldier Ratios in African Intra-State Conflicts' *Ford Institute* (2005). For example, this study indicates that in armed conflict in Sierra Leone (1991-2000) children represented 25% of total combatants, whereas, in armed conflict in neighbouring Liberia (1999-2003) children represented 53% of all combatants. Some caution is, however, called for in relying on these figures. The study is not based on fieldwork conducted by the authors, and includes figure on the number of child soldiers who participated in twelve countries. Never before have there been reliable figures on the number of child soldiers in any of these countries, not to mention, for example, the Angolan conflict (1975-1995) in which the study claims children made up between 10-15% of combatants, and that a total of 8000 child soldiers were used. In this study the definitions accorded to the concepts 'child soldier' and 'armed conflict' do not accord with those definitions as used in law.

⁹ *Ibid.* In fairness to Reich and Achvarina, their quantitative analysis on the causes of child soldiering is of immense value. Although their 'N' was limited, this is defensible.

relevant conflict. The numbers in any one of these studies are estimates at best, as no vigorous quantitative study into the number of child soldiers in any conflict has been conducted. Relying on these various studies to inform a more global figure of child soldiers is very problematic. The methodologies of these studies differ largely and the definition accorded to concepts such as 'child soldier' and 'armed conflict' also differ among them. However, I do not dispute that children are used militarily and recruited on a massive scale.

The geographical distribution and number of active child soldiers is a factual question bound by temporal constraints. Presenting a one-dimensional account of the distribution and numbers of child soldiers in a single time frame yields no usable results. The dynamics of modern conflict are such that many conflicts are short-lived, with high casualty rates, e.g. the 1994 Rwandan genocide.¹⁰ The 1990's are testament to the fact that the laws of probability do not exclude the occurrence of many brutal conflicts in a single short timeframe.¹¹ Using the period 1994-1995 to ascertain the civilian death rate in conflicts the world over will result in grossly unrepresentative results, as this period includes the genocides in

¹⁰ The Rwandan Genocide lasted for approximately 100 days (6 April to mid-July 1994) and it is common cause that at least 500 000 people were killed during this short period. Statistics generally put the death count between 800 000 and 1 million. See Des Forges, A. 'Leave None to Tell the Story: Genocide in Rwanda' *Human Rights Watch* (1999); 'Rwanda: How the genocide happened' *BBC* (1 April 2004) this publication subscribes to a figure of 800 000 deaths; and the 'OAU Inquiry into Rwanda Genocide' *Africa Recovery* Vol. 12 1#1 (August 1998), 4, this report subscribes to a figure of 1 million deaths.

¹¹ 'Human Security Report 2005: War and Peace in the 21st Century' *Human Security Centre, Lui Centre for Global Issues, University of British Columbia* (2005).

Rwanda and Bosnia.¹² Similarly, the effectiveness of the campaign against child soldiering cannot be gauged without taking account of the decline in civil wars.

i. The 'Child Soldier Global Reports'

Table A The 2001 Global Report: countries that used child soldiers between June 1998 and April 2001

	Americas and Caribbean	19	Yugoslavia (former)
1	Colombia		Middle East & North Africa
2	Mexico	20	Algeria
3	Peru	21	Iran
	Asia/Pacific	22	Iraq
4	Afghanistan	23	Israel/Occupied Palestinian Territories
5	East Timor	24	Lebanon
6	India		Sub Saharan Africa
7	Indonesia	25	Angola
8	Myanmar	26	Burundi
9	Nepal	27	Chad
10	Pakistan	28	Democratic Republic of the Congo
11	Papua New Guinea	29	Eritrea
12	Philippines	30	Ethiopia
13	Solomon Islands	31	Republic of the Congo
14	Sri Lanka	32	Rwanda
15	Tajikistan	33	Sierra Leone
16	Uzbekistan	34	Somalia
	Europe and Eurasia	35	Sudan
17	Russia	36	Uganda
18	Turkey		

¹² The Rwandan Genocide took place between 6 April and mid-June 1994 (note 8 above). The term 'Bosnian Genocide' can refer to two separate occurrences. The first and most general is the Srebrenica Genocide (or Srebrenica Massacre) where, during July 1995, approximately 8000 *Bosniak* (Bosnian Muslim) men and boys were killed. The second usage of the term 'Bosnian Genocide' refers to ethnic cleansing that took place during the Bosnian War (1992 – 1995). Both these occurrences overlap with the time period 1994 – 1995.

Table B The 2004 Global Report: countries that used child soldiers between April 2001 and March 2004

	Americas and Caribbean	13	Yemen
1	Colombia		Sub-Saharan Africa
	Asia/Pacific	14	Angola
2	Afghanistan	15	Burundi
3	India	16	Central African Republic
4	Indonesia	17	Chad
5	Myanmar	18	Côte d'Ivoire
6	Nepal	19	Democratic Republic of the Congo
7	Philippines	20	Guinea
8	Sri Lanka	21	Liberia
	Europe and Eurasia	22	Republic of the Congo
9	Russia	23	Rwanda
	Middle East & North Africa	24	Sierra Leone
10	Iran	25	Somalia
11	Iraq	26	Sudan
12	Israel/Occupied Palestinian Territories	27	Uganda

Table C The 2008 Global Report: countries that used child soldiers between April 2004 and October 2007

	Americas and Caribbean		Middle East & North Africa
1	Colombia	10	Iraq
	Asia/Pacific	11	Israel/Occupied Palestinian Territories
2	Afghanistan		Sub-Saharan Africa
3	India	12	Burundi
4	Indonesia	13	Central African Republic
5	Myanmar	14	Chad
6	Nepal	15	Côte d'Ivoire
7	Philippines	16	Democratic Republic of the Congo
8	Sri Lanka	17	Somalia
9	Thailand	18	Sudan
		19	Uganda

Among the activities of the Coalition to Stop the Use of Child Soldiers (CSUCS) is that it releases the 'Child Soldier Global Reports' at three-year intervals. To date, three such reports have been released, dated 2001, 2004 and 2008. These studies are the only studies that produce a global account of the geographical and temporal distribution of child soldiers. Each of these reports addresses child soldiering on a country-by-country basis. The significance of these reports are not only that they represent the only comprehensive data source on the distribution of child soldiers, but also that a single entity is responsible for all three reports, resulting in a high degree of consistency in the methodologies employed among the reports.

Valuable as these studies are, it is important to be aware of their limitations. The 2008 Global Report contained individual country reports for 197 countries.¹³ These country studies are based on desk research. Methodologically, the data on the distribution of child soldiers are more reliable than the statistical figures on the number of child soldiers in each country. Quite simply, it is much easier for non-governmental organizations, inter-governmental organizations and international organizations (IO) to obtain verifiable information that there are child soldiers in an area, than to establish how many child soldiers there are. Furthermore, when compiling these reports, the CSUCS relies on an expansive definition of 'child soldier', which uses eighteen as the age

¹³ 2008 Global Report, 7.

threshold and does not require direct participation in hostilities as the majority of legal instruments do.¹⁴ Thus, some countries that are indicated by CSUS as using or recruiting child soldiers do so without violating any international legal obligation.

The 2001 Global Report indicated that children were used in armed conflict in thirty-six countries and recruited in “more than 85”.¹⁵ For the 2004 reporting period, twenty-seven countries used child soldiers and “at least 60 countries” recruited children.¹⁶ Most recently, during the 2008 reporting period, children were used in nineteen countries and recruited in “at least 86 countries”.¹⁷

A noticeable decline in the number of countries where child soldiers are used is apparent, whereas the number of countries where children are recruited is more erratic. Nevertheless, no available data supports the inference that this decline is primarily due to international law’s prohibition of the use and recruitment of child soldiers. There are many variables involved. Most relevantly, the number of armed conflicts has drastically declined since the mid to late 1990’s.¹⁸ If there are fewer wars, there will be fewer wars in which children are used as combatants. While the ideal will be a reduction in conflict altogether, from a child soldier preventative

¹⁴ 2004 Global Report, 15.

¹⁵ 2001 Global Report, 10 & 27-28.

¹⁶ 2004 Global Report, 2-3 & 14.

¹⁷ 2008 Global Report, 2-3 & 12.

¹⁸ ‘Human Security Report’, note 9 above.

point of view, the aim is a reduction in the use and recruitment of child soldiers despite the existence of conflict. The end of the Cold War has changed the dynamics of civil war in developing countries for good. States engaged in such conflicts no longer have the backing (financial and otherwise) of opposing superpowers to sustain their internal conflict and war economies. On the positive side, this has led to a reduction in civil wars altogether.¹⁹ On the negative side, this has rendered the face of such civil wars more profit-oriented and criminalized.²⁰

In particular, many of the armed conflicts that were specifically known for the prevalence of child combatants have ended. These include Liberia and Sierra Leone, and since the 2008 Global Report the conflict in Sri Lanka has also ended. The anecdotal decline in areas where child soldiers are actively used in hostilities corresponds loosely to such decline in armed conflicts. This alone may possibly account for the greatest reduction in child soldiers. This contention is further substantiated by the less pronounced decline in the number of countries which are not at war but which nevertheless recruit child soldiers. A further effect of the 'new' perception that the use of child soldiers is unacceptable is that offending parties now better hide their use of child soldiers.²¹ Given the late response to child soldiering by international law,

¹⁹ *Ibid*, 150-158.

²⁰ Singer, PW. *Children at War* (2006), 49-52.

²¹ Pollar, A. (member of the United Nations Committee on the Rights of the Child and former child soldier). I interviewed Mr Pollar on 1 February 2011 in Geneva, Switzerland. See also, Singer *Children at War*, 143-145; 'Children and Armed Conflict' *Watchlist on*

it is simply too early to draw any conclusions on the long-term effect of these measures.

Child Soldier Distribution Trends: the 'Global Reports'

The countries that used child soldiers in each of the Global Reports are named and categorised according to region in tables A, B and C.

Early modern warfare marked a turning point in the utility of child soldiers; this period is characterized by the emergence of gunpowder weapons on the battlefield. Before firearms were used in armed conflict, younger children were often used in combat support roles, as opposed to direct combat.²² In the age of slashing and stabbing weapons, younger children would have been vulnerable to older, more experienced soldiers. However, a bullet fired by a child is as deadly as one fired by an adult.

This further substantiates the well-supported argument that the technological advancement of weaponry, specifically the efficient and user-friendly nature of modern weapons, as well as the proliferation of

Children and Armed Conflict Newsletter (November 2001); Mamou, J. 'Soldier Boys and Girls' *Le Monde diplomatique* (November 2001).

²² See Rosen, DM. *Armies of the Young: Child Soldiers in War and Terrorism* (2005), 5-6, who cites: Parker, DB. & Freeman, A. 'David Bailey Freeman' *Cartersville Magazine* (2001) about the boy soldier David Bailey Freeman who enlisted at age 11, initially as an *aide-de-camp*; Banks, MD. 'Avery Brown (1852-1904), Musician: America's Youngest Civil War Soldier' *America's Shrine to Music Newsletter* (February 2001) about the boy soldier Avery Brown who enlisted aged 8 (stated he was 12 upon enlistment) as a drummer boy; Talmadge, R. 'John Lincoln Clem' *The Handbook of Texas Online* (2001) about the boy soldier John Lincoln Clem who enlisted aged 10 as a drummer boy – he was known as the Drummer Boy of Shiloh; Thompson, R. 'Village Honor It's Boy Soldier' *Cincinnati Enquirer* (6 November 1999) about the boy soldier Gilbert van Zandt, who enlisted aged 10.

weapons has had an effect on the number of child soldiers.²³ The development of gunpowder weapons is one of the key developments in this regard. However, the weapons used during early modern warfare were crude and hard to work with. The Kalashnikov of 1947 (AK47) is the weapon that gave birth to the modern child soldier. Thus, child soldiering came into its own with the advent of modern warfare (i.e. post World War Two). This period coincides with the release of the AK47 and the early emergence of 'fourth generation' or 'post-modern' conflict, as discussed below.²⁴

The distinction between the military recruitment and the use of children in armed conflict is very important to maintain, yet it is seriously under recognized by the NGO, IGO and IO sectors and in academia. In less developed states, separate statistics on the military use and recruitment of children are non-existent. This is not true of more developed states that use or recruit children.

²³ Singer *Children at War*, note 18 above, 137; Singer, P.W. 'Talk is Cheap: Getting Serious About Preventing Child Soldiers' (2004) 37 *Cornell Int'l L.J.* 561 at 565; Stohl, R. 'Targeting Children: Small Arms and Children in Conflict' 9 *Brown J. World Aff.* 281 (2002 – 2003), 288; Dhanapala, J. 'Multilateral Cooperation on Small Arms and Light Weapons: From Crisis to Collective Response' 9 *Brown J. World Aff.* 163 (2002 – 2003) generally; Becker, J. "Small Arms and Child Soldiers" Presentation at workshop for "Putting Children First: Building a Framework for International Action to Address the Impact of Small Arms" New York (20 March 2001); Gamba, V. & Cornwell, R. 'Arms, Elites, and Resources in the Angolan Civil War' in Berdal, M. & Malone, DM. (eds) *Greed and Grievance – Economic Agendas in Civil Wars* (2000) 160; Musah, AF. 'Small Arms: A Time Bomb Under West Africa's Democratization Process' 9 *Brown J. World Aff.* 239 (2002-2003); Stohl, R. 'Reality Check – The Danger of Small Arms Proliferation' 6 *Geo J. Int'l Aff.* 71 (2005).

²⁴ The AK47 became commercially available during 1949.

The 2001 Global Report indicated that the UK “routinely sends 17-year-olds into combat”.²⁵ British soldiers under the age of eighteen were killed in combat in the Gulf War, as well as in the Falkland Islands conflict.²⁶ Between 1982 and 1999, ninety-two soldiers aged seventeen and sixteen died during military service with the British Armed Forces.²⁷ It was also reported that, between March 1998 and March 1999, 36.38% of all new recruits into the British Armed Forces were younger than eighteen.²⁸ Similarly, in the US, children younger than eighteen served in combat units in the Gulf War, Somalia and Bosnia.²⁹ By 1999 the Pentagon reported that less than one hundred soldiers younger than eighteen were serving with combat units.³⁰ The recruitment practices of the UK and US have remained the same. Although both these states entered interpretative notes at the time of ratification, both states have ratified the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (CIAC Protocol) and no longer use children in armed conflict.³¹

In some respects the child soldiering problem is more far-reaching than the Global Reports suggest. Many adult soldiers started out as child

²⁵ 2001 Global Report, 19.

²⁶ *Ibid.*

²⁷ *Ibid.*, 13.

²⁸ *Ibid.*, 19.

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (entered into force 12 February 2002) 2173 UNTS 222. See Chapter 4.

soldiers and the psychological wounds sustained by many children who have since been demobilised will take years to heal, if they ever do.

Very often, child soldiering is seen as a uniquely African phenomenon, which is a false and misleading characterization. It is true that the greatest number of child soldiers was found on the African continent during all three of the reporting periods, and this remains true. However, it is apparent that, during the reporting period 2001-2004, children in more countries were actively used in conflicts in Asia than Africa.³² It has also been suggested that the child soldier problem was bigger in Latin America and Asia during the 1980's than in Africa.³³

ii. UN Secretary-General's List of Parties who Use and Recruit Child Soldiers

In 2001, the Security Council called upon the Secretary-General of the United Nations to

... attach to his report a list of parties to armed conflict that recruit or use children in violation of the international obligations applicable to them, in situations that are on the Security Council's agenda or that may be brought to the attention of the Security Council by the Secretary-General, in accordance with Article 99 of the Charter of the United Nations, which in his opinion may threaten the maintenance of international peace and security.³⁴

³² 2004 Global Report. Children were actively used in thirteen countries in Asia and twelve in Sub-Saharan Africa. Children were also used in Algeria, North Africa.

³³ 2001 Global Report, 10.

³⁴ Security Council Resolution 1379 of 2001, operative paragraph 16. Article 99 of the Charter of the United Nations provides 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".

In 2009, the Security Council amended the Secretary-General's mandate to list groups that use and recruit child soldiers, by also requiring the Secretary-General to include in his report "...those parties to armed conflict that engage, in contravention of applicable international law, in patterns of killing and maiming of children and/or rape and other sexual violence against children, in situations of armed conflict, bearing in mind all other violations and abuses against children..."³⁵ This Resolution further expressly requires that the Secretary-General now appends two annexes to his reports, the first dealing with situations on the agenda of the Security Council, and the second with situations not on the agenda of the Security Council.³⁶ The Secretary-General has, however, been doing so on his own initiative since 2003.

The focus of these reports is on naming armed groups that use or recruit child soldiers, including national armed forces, but not states as such, as is indicated by the words "parties to armed conflict" and "parties in situations of armed conflict" used in the relevant Security Council resolutions.³⁷ In the table below I indicate in which states these armed groups are active. To date, eight reports have been filed containing such

³⁵ Security Council Resolution 1882, operative paragraph 3.

³⁶ *Ibid* at operative paragraph 19(a).

³⁷ See Security Council Resolutions 1379 and 1882, operative paragraph 16 and 19(a) respectively.

annexes,³⁸ yet, the criteria for inclusion on the list have changed four times.³⁹ It is thus not possible to draw comparative conclusions from the data contained in the different reports. In the table below, the letters A, B, C, D, E and F indicate the category to which armed groups in the relevant state belong. These categories were defined in the reports themselves and through the relevant Security Council resolutions.⁴⁰

³⁸ 'Report of the Secretary-General on children and armed conflict' Security Council (26 November 2002) S/2002/1299 (2002 Secretary-General's Report), 14; 'Report of the Secretary-General on children and armed conflict' Security Council (10 November 2003) A/58/546-S/2003/1053 (2003 Secretary-General's Report), 20-23; 'Report of the Secretary-General on children and armed conflict' Security Council (9 February 2005) A/59/695-S/2005/72 (2005 Secretary-General's Report), 36-39; 'Report of the Secretary-General on children and armed conflict' Security Council (26 October 2006) A/61/529-S/2006/826 (2006 Secretary-General's Report), 34-38; 'Report of the Secretary-General on children and armed conflict' Security Council (21 December 2007) A/62/609-S/2007/757 (2007 Secretary-General's Report), 40-45; 'Report of the Secretary-General on children and armed conflict' Security Council (26 March 2009) A/63/785-S/2009/158 (2009 Secretary-General's Report), 47-51; 'Report of the Secretary-General on children and armed conflict' Security Council (13 April 2010) A/64/742-S/2010/181 (2010 Secretary-General's Report), 48-51; 'Report of the Secretary-General on children and armed conflict' Security Council (23 April 2011) A/65/820-S/2011/250 (2011 Secretary-General's Report), 52-55.

³⁹ The standard used during 2002 was "parties to armed conflict that recruit or use child soldiers" (2002 Secretary-General Report, 14). The 2003 Secretary-General's Report contained two annexures, the first contained an "updated list of parties to armed conflict that recruit or use children in situations of armed conflict on the agenda of the Security Council" and the second "other parties to armed conflict that recruit or use children in armed conflict" (2003 Secretary-General's Report, 20-23). The 2005, 2006, 2007 and 2009 Reports used the same standard, the first annexure contained a "list of parties that recruit or use children in situations of armed conflict on the agenda of the Security Council, bearing in mind other violations and abuses committed against children" and the second a "list of parties that recruit or use children in situations of armed conflict not on the agenda of the Security Council or in other situations of concern, bearing in mind other violations and abuses committed against children" (2005 Secretary-General's Report, 36-39; 2006 Secretary-General's Report, 34-38; 2007 Secretary-General's Report, 40-45; and 2009 Secretary-General's Report, 47-51). The 2010 and 2011 Secretary-General's Reports include a "list of parties that recruit or use children, kill or maim children and/or commit rape and other forms of sexual violence against children in situations of armed conflict on the agenda of the Security Council, bearing in mind other violations and abuses committed against children" and a "list of parties that recruit or use children, kill or maim children and/or commit rape and other forms of sexual violence against children in situations of armed conflict not on the agenda of the Security Council, or in other situations of concern, bearing in mind other violations and abuses committed against children".

⁴⁰ A: "updated list of parties to armed conflict that recruit or use children in situations of armed conflict on the agenda of the Security Council". B: "other parties to armed conflict that recruit or use children in armed conflict". C: "list of parties that recruit or use children

The first report, of 2002, is not included in the table, as that report only contained situations on the agenda of the Security Council at the time. This had the unhappy effect that conflicts where the most child soldiers were being used and recruited at the time were not included in the list as they were not on the agenda of the Security Council. These included Uganda, Sudan and Sri Lanka.

in situations of armed conflict on the agenda of the Security Council, bearing in mind other violations and abuses committed against children". D: "list of parties that recruit or use children in situations of armed conflict not on the agenda of the Security Council or in other situations of concern, bearing in mind other violations and abuses committed against children". E: "list of parties that recruit or use children, kill or maim children and/or commit rape and other forms of sexual violence against children in situations of armed conflict on the agenda of the Security Council, bearing in mind other violations and abuses committed against children". F: "list of parties that recruit or use children, kill or maim children and/or commit rape and other forms of sexual violence against children in situations of armed conflict not on the agenda of the Security Council, or in other situations of concern, bearing in mind other violations and abuses committed against children".

*Table D Secretary-General Reports to the Security Council
Indicating Groups who Use and Recruit Child Soldiers*

		2003	2004	2006	2007	2009	2010	2011
1	Afghanistan	A			C	C	E	E
2	Burundi	A	C	C	C	C		
3	CAR				C	C	E	E
4	Chad			D	D	C	E	E
5	Chechnya	B						
6	Colombia	B	D	D	D	D	F	F
7	Côte d'Ivoire	A	C	C				
8	DRC	A	C	C	C	C	E	E
9	Iraq					C	E	E
10	Liberia	A						
11	Myanmar	B	D	C	C	C	E	E
12	Nepal	B	D	D	C	C	E	E
13	Northern Ireland	B						
14	Philippines	B	D	D	D	D	F	F
15	Somalia	A	C	C	C	C	E	E
16	Sri Lanka	B	D	D	D	D	F	F
17	Sudan	B	C	C	C	C	E	E
18	Uganda	B	D	D	D	D	F	F
19	Yemen							F
	Total	15	11	12	13	14	13	14

I do not rely on the Secretary-General's reports to present a global account of the geographical distribution of child soldiers for a number of reasons. The SG reports name offending groups and not states as such. Because the categories have changed four times over the course of eight reports, no reliable comparison can be made between the reports. Most importantly, the Secretary-General is not tasked with listing all offending parties, but rather those on the agenda of the Security Council or those that the Secretary-General deems necessary to bring to the attention of

the Security Council. This is rather arbitrary, as is indicated by the inclusion of Northern Ireland in the 2003 report and the exclusion of armed groups in the Central African Republic, for example, in the same report. It is nevertheless of value to note that groups in nineteen countries have been included at least once in the eight Secretary-General's reports to date. Excluding the first report, on average thirteen countries are represented in each report. Thus, even when comparing the results of these reports, there is no indication of either a decline or increase in the number of countries where child soldiers are used or recruited.

These reports do, however, provide a valuable data source to triangulate the data contained in the Global Reports. The 2003 and 2004 Secretary-General's reports loosely overlap with the 2004 Global Report. Similarly, the 2006 and 2007 Secretary-General's reports loosely overlap with the 2008 Global Report. All the states listed in the Secretary-General's reports are also listed in the corresponding Global Reports, except for the inclusion of Northern Ireland in the 2003 Secretary-General's report. However, the Secretary-General's reports are much more conservative than the Global Reports, save for the inclusion of Northern Ireland in the 2003 report, which was questionable at the time. Accordingly, the Global Reports list many more states than the Secretary-General's reports.

iii. Summary

It is to be expected that from a regional perspective the less developed regions of the world will represent the greatest number of child soldiers. At the beginning of this section I stated that, in order to obtain a sense of the extent of the child soldier problem, one should take into account the distribution as well as the number of child soldiers. However, the numbers that are available are not reliable. Nevertheless, it is clear that, even in terms of the most conservative estimates, hundreds of thousands of children have served, or are serving, in armed forces or groups the world over. It is further apparent that countries where children are actively used in conflict are generally clustered together: for example, there were clear clusters in Central Africa, West Africa, East Africa and South-East Asia during the different reporting periods.⁴¹ From a regional perspective, child soldiering is by far most prolific in Africa and Asia.

2. THE CONTEMPORARY USE OF CHILD SOLDIERS

Children perform many different roles in conflict, such as combatants, porters, spies, bodyguards, cooks, domestic servants and sex slaves. This creates problems in assessing when a child is unlawfully used or recruited in terms of the positive law, or when a child is used as a child soldier as opposed to a child labourer. In this regard, there is a disconnect between most international law standards which proscribe child soldier use and recruitment, and the broader, soft law definitions

⁴¹ Honwana, A. *Child Soldiers in Africa* (2005), 45, applies the concept “war-scapes” to account for the influence armed conflicts exert on other conflicts in close proximity.

used by NGOs.⁴² The hard law standards generally require direct or active participation in hostilities, whereas indirect participation in hostilities is sufficient in terms of soft law standards.⁴³

i. Child Soldier Use as an Asymmetric Conflict Structure

“Asymmetric warfare” denotes an armed conflict in which at least two opposing belligerents are engaged with a significant disparity in their military strength.⁴⁴ Where such a conflict exists, both sides cannot be committed to traditional tactics of war. The side with the severe military disadvantage will inevitably lose. “Asymmetric conflict structures” refers to strategies and tactics used by one side to a conflict to level this uneven playing field.⁴⁵ The classic example is the use of guerrilla tactics by the Boers during the two Anglo-Boer Wars. Today, terrorism is most closely associated with the term “asymmetric conflict structures”.⁴⁶

Ancker and Burke speak of asymmetric conflict structures as a classic action-reaction-counteraction cycle.⁴⁷ What this denotes is that asymmetric tactics by definition encompass a large degree of uncertainty,

⁴² See Chapter 1.

⁴³ See Chapter 4 and 5 generally for an analysis of the legal prohibition of the use and recruitment of child soldiers.

⁴⁴ See generally, Benvenisti, E. ‘The Legal Battle to Define the Law on Transnational Asymmetric Warfare’ 20 *Duke J. Comp. & Int’l L.* 339 (2009-2010).

⁴⁵ Geiß, R. ‘Asymmetric Conflict Structures’ Volume 88, Number 864 *International Review of the Red Cross* (December 2006), 757. Recently ‘asymmetric warfare’ has been used more broadly so as to include specific strategies and tactics. Thus in the broad sense ‘asymmetric warfare’ can include ‘asymmetric conflict structures’.

⁴⁶ *Ibid*, 758.

⁴⁷ Ancker III, CJ. & Burke, MD. ‘Doctrine for Asymmetric Warfare’ *Military Review* (July-August 2003), 18.

thus one only knows how to react after the initial action and the same holds true of any counteraction. For example, the armed conflict between the United States (US) and Al Qaeda and associated forces in Afghanistan is very much an asymmetric armed conflict. The US has vastly superior military strength. Al Qaeda and associated forces therefore employ civilian suicide bombings as an asymmetric conflict structure in reaction. In counter action, the US escalates targeted killings by unmanned aerial vehicles. However, this is not necessarily how all such conflicts will play out. Should every reaction to an opposite action merely meet the threshold of the initial action, then there is no asymmetry to speak of.

Again guerrilla tactics serve as an apt example. During the two Anglo-Boer Wars such tactics were novel and were used only by one side to the conflict, hence it being asymmetric. However, guerrilla tactics during warfare are seen as standard today and completely acceptable. Thus once all sides began to benefit from these tactics they were no longer asymmetrical. Military strategists have developed war tactics and strategies to the extent that most armed forces will use conflict tactics to the very edge of permissibility in terms of IHL, i.e. military necessity versus humanitarian considerations. Thus, should an inferior force wish to employ asymmetric tactics, i.e. those not used by its opposition, such tactics, almost without exception, will be in violation of IHL.⁴⁸ The party

⁴⁸ See Geiß generally, note 44 above.

that employs such tactics does so relying on an assumption that its opposition will refrain from doing so. A symmetric landscape will once again be established if the opposition does employ such tactics. Of course, the exception hereto, is if the asymmetry is created as a result of the superior capacity of one participant to the armed conflict, for example, technology in the case of the US in the so-called “war on terror”, or vastly superior manpower, as was the case with Ethiopia in the Ethiopian/Eritrean war.

Traditionally, the use of child soldiers was explained by simply stating that the bigger the age range, the more people there are to replenish the ranks. Today, children are often recruited not because they are soldiers that increase the force numbers, but specifically because they are children. Thus, the use of child soldiers, like terrorism, is an asymmetric conflict structure. The most common illustration of the contribution the unique physical attributes of a child can make to a war effort is the common use of children for intelligence gathering, i.e. as spies.⁴⁹

Beyond intelligence gathering, there are further asymmetries involved in the use of children on the battlefield. Good military strategists and tacticians use their personnel’s individual characteristics to their greatest benefit. For example, in Sri Lanka the Liberation Tigers of Tamil Elam

⁴⁹ Between April 2004 and October 2007 the government armed forces of Burundi, Columbia, the Democratic Republic of the Congo, India, Indonesia, Israel, Nepal and Uganda used children as spies, informants and messengers.

(LTTE) used female child soldiers to execute suicide bombings in urban environments. The reason for using specifically female child soldiers was that they were less subject to thorough body searches by the police.⁵⁰ The most high-profile example was the assassination, by suicide bomb, of former Indian Prime Minister Rajiv Gandhi. Thenmozhi Rajaratnam, is believed to have been younger than eighteen years old when she detonated the bomb.⁵¹

A further example of the battle field advantages children carry with them is that often adult soldiers find it difficult to fire on children, accounting for the title of Dallaire's book on child soldiering 'They Fight Like Soldiers, They Die Like Children'.⁵² The first American military casualty in the US/Afghan war was US Army Special Forces Sergeant Nathan R. Chapman, who was gunned-down by a 14-year-old boy.⁵³

The use of children as an asymmetrical conflict structure has received almost no academic attention and further research into this phenomenon is of great importance. Such use of children adds to the demand for child soldiers, and is thus relevant to the prevention of the recruitment and use of child soldiers.

⁵⁰ Ganguly, D. 'Female Assassins Seen in Sri Lanka' *Associated Press* (5 January 2000); Ganguly, D. 'Female Fighters Used in Sri Lanka' *Associated Press* (10 January 2000); Hogg, note 5 above, 13.

⁵¹ See for example Frey, R.J. *Fundamentalism* (2007), 365.

⁵² Dallaire, R. *They Fight Like Soldiers, They Die Like Children* (2010).

⁵³ Sanger, DE. 'Bush, On Offense, Says He Will Fight to Keep Tax Cuts' *New York Times* (6 January 2002).

ii. Modern Armed Conflict, National Armed Forces and the Use and Recruitment of Child Soldiers

During the era of modern warfare – the emergence of the ‘Kalashnikov generation’ – the dynamics of conflict worldwide have shifted from the old position (pre-World War II), where the targets of conflict were military personnel and wars were fought between nations, to the new position (post-World War II), where civilians are the primary targets and non-international armed conflict represents the great majority of modern conflicts. According to a UNICEF study, before 1900 civilians represented 5% of all conflict deaths, whereas during the 1990’s civilians represented 90% of all war related fatalities.⁵⁴

Models to account for this changing nature of conflict have been developed, such as the “fourth generation conflict” model.⁵⁵ In the context of child soldiering, Singer speaks of ‘post-modern warfare’.⁵⁶ Breaking war down into generations can be misleading: as Echevarria argues, “...the generational model is an ineffective way to depict changes in warfare. Simple displacement rarely takes place, significant developments typically occur in parallel.”⁵⁷ Such theories deal with war on a linear basis and, as such, Singer’s open-ended designation of post-modern warfare is to be preferred. More often than not wars in which

⁵⁴ ‘The State of the World’s Children’ *UNICEF* (2005), 40.

⁵⁵ Lind, WS. *et al* ‘The Changing Face of War: Into the Fourth Generation’ *Marine Corps Gazette* (October 1989), 22.

⁵⁶ Singer *Children at War*, note 18 above, 49-52.

⁵⁷ Echevarria II, AJ. *Fourth Generation War and Other Myths* (November 2005), 10.

children are used as soldiers are fought on battlefields in developing countries; strategies and tactics used are more brutal and, on an increasing basis, legitimate ideology is being replaced with criminal and profit motives. For example, many theorists are of the view that the Revolutionary United Front's (RUF) real motivation in fighting the Sierra Leonean civil war was profit based.⁵⁸ This is purportedly the reason why they used Kono, the diamond-mining district, as their base. In Afghanistan and Colombia, a vicious circle has emerged where poppy fields (for heroin production) and coca plantations (for cocaine production), respectively, are kept to fund the war and the war is perpetuated to protect the drug trade.⁵⁹ In essence the profitability of the drug trade has resulted in a situation where the once defensible ideologies for the initiation of war have been replaced by a desire to protect the various groups' interests in a multi-billion dollar industry. Similarly, in the DRC, a great emphasis in recent conflict has been placed on the control of coltan (columbite-tantalite) mining areas.⁶⁰

In all these countries mentioned, child soldiering is a problem.⁶¹ Asymmetrical tactics are premised on an assumption that one's enemies will not follow suit. Recent experience has shown that this assumption

⁵⁸ Restoy, note 5 above, 2; Florquin, N. & Berman, EG. Eds *Armed and Aimless: Armed Groups, Guns and Human Security in the ECOWAS Region* (May 2005), 370.

⁵⁹ Singer, *Children at War*, note 18 above, 50-51; Wilson, S. 'Columbian Fighters Drug Trade is Detailed' *Washington Post* (25 June 2003); Kaldor, M. *New and Old Wars* (1999), 102; Dao, J. 'The War on Terrorism Takes an Aim at Crime' *New York Times* (7 April 2002).

⁶⁰ Lasker, J. 'Inside Africa's PlayStation War' (8 July 2008) <http://towardfreedom.com> (last accessed on 22 July 2011).

⁶¹ See tables A, B and C.

frequently proves false in the context of child soldiering. Very often, the use of child soldiers by one party to an armed conflict results in their opposition also using child soldiers. The Sierra Leonean government forces had no answer to the military superiority of the RUF, a group infamous for their use of child soldiers. Ultimately, the Sierra Leonean government forces also resorted to child soldier use and recruitment.⁶²

With the advent of globalization, governments and aspiring governments in developing states have had to protect their status as 'legitimate' to a greater extent than in the past. The use of child soldiers by government forces is often seen as bad publicity, it may hamper investment cooperation and foreign aid from developed states. This has led such forces to hide their use of child soldiers, or to use intermediary groups that use child soldiers – so called proxies. The use of proxies enables governments to maintain the benefits of having children among their ranks while still maintaining their position as legitimate. In some cases, however, these aims of legitimacy have led to the abandonment of the use or recruiting of child soldiers.⁶³

Between April 2001 and March 2004 the national armed forces of Burundi, the DRC, Côte d'Ivoire, Guinea, Liberia, Myanmar, Rwanda, Sudan, Uganda and the US all used children younger than eighteen in

⁶² See *Prosecutor v Fofana and Kondewa*, SCSL-04-14-T.

⁶³ See Chapter 7.

armed conflict (as direct or indirect participants).⁶⁴ Furthermore, government-backed militias (proxies) in Colombia, Somalia, Sudan and Zimbabwe also used such children in hostilities.⁶⁵ Between April 2004 and October 2007 the national armed forces of Chad, the DRC, Israel, Myanmar, Somalia, Sudan and Southern Sudan, Uganda, Yemen and the UK used children in armed conflict.⁶⁶ During this period, the governments of Chad, Colombia, Côte d'Ivoire, the DRC, India, Iran, Libya, Myanmar, Peru, Philippines, Sri Lanka, Sudan and Uganda supported militias that used child soldiers.⁶⁷

Today armed conflict in developing states can generally be divided into those conflicts that are profit driven and criminalized, as discussed above, and the more traditional conflicts aimed at regime change. In the case of the former, few entry points exist to engage directly with belligerents to prevent child soldiering. Other avenues of prevention may be more appropriate. However, in the context of the second group, a greater premium is placed on the legitimacy of regimes in international politics than was the case during the Cold War. As such, direct engagement with such regimes provides a very strong and viable entry point. The same holds true for engagement with governments where the national armed forces of a state uses and recruits child soldiers. This is evident in the increasing propensity among states not to use and recruit child soldiers in

⁶⁴ 2004 Global Report, 13.

⁶⁵ *Ibid.*

⁶⁶ 2008 Global Report, 16.

⁶⁷ *Ibid.*

their national armed forces, but instead to support armed groups that do so. By so doing, states evade the negative implications of child soldier use and recruitment, while still enjoying the benefits thereof. It is important that preventative efforts be aimed specifically at proxy forces that use or recruit child soldiers.

3. CAUSES OF CHILD SOLDIERING

There are two facets to the causes of child soldiering. First, there are overarching causes of the phenomenon, which include social constructions like age thresholds and the actual ability of children to make decisions versus the social perception of not only a child's ability to make decisions, but also the role of a child in society. Secondly, there are the more proximate causes of child soldiering, e.g. poverty.⁶⁸

There are two dimensions in relation to the causes of child soldiering. There are those factors that lead to a child to volunteer to join an armed group and those factors that lead to the members of an armed group enlisting or conscripting a child. In this regard, Andvig and Gates speak of the "demand and supply" of child soldiers.⁶⁹ The factors that enhance the supply of child soldiers, i.e. that make children join armed forces and

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⁶⁹ Andvig, JC. & Gates, S. 'Recruiting Children for Armed Conflict' in Gates, S. & Reich, S. (eds.) *Child Soldiers in the Age of Fractured States* (2009) at 77-78. See also Cohn, I. & Goodwin-Gill, GS. *Child Soldiers: The Role of Children in Armed Conflict* (1994), 23-43 for a similar approach.

groups, like poverty and fear, are part of a systemic problem even deeper entrenched than the child soldier phenomenon itself.

i. Overarching Causes of the Child Soldier Phenomenon

On a daily basis child soldiers aged seven to seventeen are recruited and used in armed conflict. Some are abducted at gunpoint, others volunteer, yet others take up arms by their own accord without any adult interference.⁷⁰ Nevertheless, there is a tendency to classify all such children generically as child soldiers.

The extreme disparity between these situations has divided theorists on the causes of child soldiering. The first group argues that universal causes of child soldiering can be identified and highlight the similarities between contemporary conflicts.⁷¹ The second group highlights the *sui generis* nature of each situation and argues that such common causes cannot be identified across the board.⁷² Accordingly, these are referred to as the 'common causes approach' and the '*sui generis* approach' respectively. This division is one that generally coincides with the narrative to which the particular commentator subscribes regarding her/his view of the child soldier phenomenon in broad terms. The 'humanitarian narrative' is dominant in this regard and paints the picture

⁷⁰ Situations have occurred where adults tried to stop children from engaging in conflict, but failed, *ibid*, 30.

⁷¹ Singer *Children at War*, note 18 above, 46; Brett, R. & Specht, I. *Young Soldiers: Why They Choose to Fight* (2004); Wessells, M. *Child Soldiers: From Violence to Protection* (2006).

⁷² Rosen, note 20 above, 132.

of child soldiers as innocent victims of adult manipulation and exploitation, whereas the conflicting narrative, the 'conscious actor narrative', holds that children are conscious decision-makers who exercise a choice to participate in conflict and, moreover, deserve recognition for their accomplishments as soldiers.

Essentially those subscribing to the 'humanitarian narrative' focus on an aspect that ties children in conflict together: their vulnerability and susceptibility to exploitation. It therefore makes sense for them also to subscribe to the 'common causes approach'. Conversely, those subscribing to the '*sui generis* approach' by definition focus on the unique attributes and situation of each child, and accordingly this view lends itself to the 'conscious decision narrative'.

Some commentators argue that both narratives are present and applicable to varying degrees across many conflicts.⁷³ This group's position is best suited to play a meaningful role in assessing the causes of child soldiering for purposes of preventing the phenomenon. This is so due to the flexibility and adaptability of this approach. It is factually incorrect to equate the surrounding circumstances of all conflicts in which children act as soldiers with each other. It is equally incorrect to argue that there are no root causes that affect a majority of child soldiers and specifically their recruitment into conflict.

⁷³ Wessells, note 68 above, 31-32; Cohn & Goodwin-Gill, note 66 above, 23-43.

The Common Causes versus Sui Generis Approach

Rosen is a champion of the *sui generis* approach. He argues that “the specifics of history and culture shape the lives of children and youth during peace and war, creating many different kinds of childhood and many different kinds of child soldier”.⁷⁴ The proponents of the common causes approach do not suggest that the factors they have identified can account for the presence of each and every child soldier in conflict. For example, as root causes, force and poverty have received a great deal of focus, yet it has been noted that in specific instances, such as in Liberia, children were the first eager volunteers in recruitment queues,⁷⁵ and in El-Salvador upper-middle-class children volunteered at young ages.⁷⁶ Both approaches are present and applicable to varying degrees across many conflicts. As Wessells states, “children become soldiers through different channels and for different reasons”, in essence agreeing with Rosen.⁷⁷ However, Wessells goes on to state that each narrative forms part of the bigger picture.⁷⁸

In adhering to specific narratives to account for child soldiering, a ripple effect is created that will ultimately affect issues such as the individual

⁷⁴ Rosen, note 20 above, 132.

⁷⁵ Cohn & Goodwin-Gill, note 66 above, 23.

⁷⁶ *Ibid*, 30.

⁷⁷ Wessells, note 68 above, 32.

⁷⁸ *Ibid*, Wessells also explicitly identifies a third narrative: that children’s sense of patriotic duty accounts for their presence on the battlefield. This narrative is said to be favored by particular governments – obviously those which employ the use of child soldiers.

criminal responsibility of the child soldier, should the relevant child soldier have committed crimes while being a child soldier. In stating that the historical and cultural effects on the child are different on a case-by-case basis, Rosen also challenges the dominant view that the great majority of these children are victims of adult manipulation.⁷⁹ Child soldiers, he argues, deserve more credit for their participation in conflict, as in some instances fighting is the lesser evil as opposed to not fighting.⁸⁰ The reverse of to this argument is that children, as conscious participants, are less deserving of protection, and should be treated as having individual responsibility for their deeds, in contrast with the dominant view which focuses on the child as victim.

Wessells has acknowledged the multiplicity of contributory factors to the child soldier phenomenon, while still being able to identify concern areas or factors regarding the causes of child soldering.⁸¹ He states that even within one conflict child recruitment may vary greatly according to context.⁸² An interesting paradoxical relationship exists in that the circumstances in one conflict can differ so much that two children take part without sharing any common motivational factor, whilst two different conflicts can influence each other to the extent that the use of child

⁷⁹ Rosen, note 20 above, 132.

⁸⁰ This statement seems to have two levels of applicability. The first is in the mind of the child, i.e. she/he should fight to make a difference. It is thus a putative application. The second is in the form of objective necessity – if the child does not fight, she/he will perish. Rosen presents this in his case study of Jewish Partisan children during the Second World War. Rosen, note 20 above, 19-56.

⁸¹ Wessells, note 67 above, 31.

⁸² *Ibid*, 32.

soldiers in the one can account for this phenomenon in the other,⁸³ what Nordstrom calls “war-scapes”.⁸⁴

Forced versus Voluntary Recruitment

The very high proportion of child members in some groups, like the Lord’s Resistance Army (LRA), can be explained by the lack of appeal the group holds for voluntary recruits. The LRA has no clear political objective or ideology and is seen by the communities in the areas where they operate as a threat.⁸⁵ There is not much appeal for voluntary recruits to join the LRA. As such, the LRA has relied very heavily on abduction and forced recruitment tactics. Children are much easier to recruit in this manner than adults. This goes a long way towards accounting for this group’s extreme reliance on child soldiers.

The degree to which a young person can exercise an unfettered discretion in joining armed groups is disputed. In the most extreme cases, like the LRA, children are abducted and forced to be child soldiers. Yet, in a majority of cases, children join voluntarily. In fact, many children who speak of their participation in conflict after demobilization, even years after demobilization, still hold the view that it was a wise choice they

⁸³ Honwana, A, note 40 above, 45.

⁸⁴ *Ibid.*

⁸⁵ Waschefort, G. ‘Child Soldiers: The Legacy of East African Conflict’ *De Kat* (July/August 2009), 70-77.

exercised to join and that it benefited their lives greatly.⁸⁶ In some instances, the survival rate of child soldiers was higher than that of child civilians.⁸⁷

The question which then arises is whether children have the capacity to join an armed group truly voluntarily. Many argue that social factors such as violent environments, poverty or starvation, force the hand of children to the extent that exercising the choice to become a soldier was really never a choice. Yet others argue that adults too are influenced by the same factors,⁸⁸ so the question posed is whether anybody exercises free choice in such circumstances? This argument must fail due to its treatment of children and adults as having the same decision-making and cognitive abilities and its failure to take into account the best interests of the child principle which, by definition, does not apply to adults.

In an interview I conducted with Radhika Coomaraswamy, Under-Secretary-General of the United Nations and Special Representative to the Secretary General for Children and Armed Conflict, she argued that children younger than eighteen generally do not have a “death concept”, and that therefore recruitment and use of such children remains

⁸⁶ Peters, K. & Richards, P. ‘Why we Fight: The Voices of Youth Combatants in Sierra Leone’ 68 *Africa* 2 (1998); West, H. ‘Girls with Guns: Narrating the Experience of War of FRELIMO’s “Female Detachment”’ 73 *Anthropological Quarterly* 4 (2000); Veale, A. *From Child Soldier to Ex-Fighter* (2003).

⁸⁷ Rosen, note 20 above, 19-56.

⁸⁸ Van Bueren, G. *The International Law on the Rights of the Child* (1998), 335-336.

exploitative even if one is sensitive to the participatory rights of children.⁸⁹

This is the preferred construction. In essence, Coomaraswamy argues, children are unable to give informed consent.

The Cognitive Development of Children

Psychiatric and psychologically identified stages of development have been used to determine the cognitive development of a child, most notably Piaget's theory of cognitive ability.⁹⁰ This involves drawing concrete lines between age groups based on general findings.⁹¹ In fact, both international and municipal law in general rely on such categorization of age groups to, for instance, determine criminal responsibility.⁹²

This approach has been challenged by some social scientists arguing that children are more capable in many respects than the theory of cognitive development would suggest, their findings being based on

⁸⁹ I interviewed Ms Coomaraswamy on 7 February 2011 in New York City, USA. I have the interview notes on file.

⁹⁰ See specifically Piaget's work: Piaget, J. & Inhelder, B. *The Growth of Logical Thinking from Childhood to Adolescence* (1958); Piaget, J. & Inhelder, B. *The Early Growth of Logic in the Child: Classification and Seriation* (1964); Piaget, J. *The Child's Conception of the World* (1928); Piaget, J. *The Moral Judgment of the Child* (1932); and Piaget, J. *The Child's Construction of Reality* (1955).

⁹¹ Piaget identified the following categories: sensorimotor stage (birth to age 2); preoperational stage (ages 2 to 7); concrete operational stage (ages 7 to 11); and formal operational stage (age 11 onwards).

⁹² For example, Article 26 of the Rome Statute of the International Criminal Court (Rome Statute) (entered into force 1 July 2002) 2187 UNTS 90 excludes the criminal jurisdiction of the International Criminal Court (ICC) over persons younger than 18. Every municipal criminal justice system also used such age delineations to determine the age of criminal responsibility. To use one example: in terms of s34 of the Crime and Disorder Act 1998, British municipal criminal law provides that age 10 is the minimum age for criminal responsibility. Preceding the Crime and Disorder Act a rebuttable presumption existed in British common law, presuming that children between the ages 10 and 14 were *doli incapax*.

ethnography.⁹³ Rosen sides with the new social-scientific side of this debate, arguing for the voluntary nature of children's decisions.⁹⁴ Those arguing for the decisional abilities of children place a further emphasis on greater participatory rights for children.⁹⁵ Freedom of association and freedom of expression are also used to argue for the autonomy of the child.⁹⁶ Yet, Van Bueren states that "...to regard the issue as only that of protection *versus* participation is too simplistic as some children will not survive unless taken into the armed forces".⁹⁷ When I interviewed Zermatten, deputy-chair (now chair) of the Committee on the Rights of the Child, he emphasised that the paradigm shift from child protection to child rights has not yet been completed.⁹⁸

If it is true that all theorists will agree that at some developmental stage a child cannot make the informed decision to participate freely in conflict, there will be no pragmatic option but to apply the theory of cognitive development. This necessitates determining a yardstick age, to be used to determine whether a child has the ability to exercise free choice to join an armed force or group. This will be the case regardless of the fact that some children develop faster than others.

⁹³ Prout, A. & James, A. 'A New Paradigm for the Sociology of Childhood' in Prout, A. & James, A. *Constructing and Reconstructing Childhood* (1990), 8.

⁹⁴ Rosen, note 20 above, 133.

⁹⁵ Van Bueren, note 85 above 19, 335; *Children of War Report from the Conference on Children in War* (1991) Raoul Wallenberg Institute Report No 10.

⁹⁶ Van Bueren, note 85 above, 335.

⁹⁷ *Ibid.*

⁹⁸ I interviewed Mr Zermatten on 2 February 2011 in Geneva, Switzerland.

Clearly, international law cannot function without determining a cut-off age. However, that cut-off age is subject to criticism on the grounds that neither the fifteen nor eighteen-year-old yardsticks were established in terms of age parameters based upon psychiatric developmental data. Instead these yardsticks were developed arbitrarily in terms of societal constructs of age and corresponding social roles. However, the best interest of the child is a trite principle of international law. It calls for a higher threshold that includes individuals with the decision-making competencies to voluntarily join armed forces or groups. This is so in order to protect those who do not possess comparable decision making competencies.

ii. Proximate Causes of Child Soldiering

With reference to the causes of child soldiering Singer speaks of “enablers of war”,⁹⁹ whereas Ames breaks these causes up into four categories.¹⁰⁰ “Grievance factors” include poverty, loss of parents, ethnicity, political beliefs, etc. “Inducement factors” include pay, glory, future material gain, etc. “Solidarity factors” include group cohesion, village networks, and friends. “Accessibility factors” include presence and vulnerability of refugee camps. These factors are focused more at the supply than the demand of child soldiers.

⁹⁹ Singer ‘Enablers of War’, note 3 above 93-107.

¹⁰⁰ Ames, B. ‘Methodological Problems in the Study of Child Soldiers’ in Gates, S. & Reich, S. (eds.) *Child Soldiers in the Age of Fractured States* (2009), 15.

In employing Andvig and Gates' terminology "supply and demand", a distinction is created between the factors that influence the decision to join an armed group, the supply, and the factors that influence the decision to enlist children, the demand. In abduction cases it is only the recruiter's actions and decisions that are relevant. Nevertheless, with voluntary enlistment, factors associated with the decision of the adult actor to accept the enlistment of the child is still very relevant – specifically from an international law point of view as international law only concerns itself with the decisions and actions of the adult and not the child.

The low cost, convenience and added value of child soldiers coupled with the impunity of commanders, results in broad-based child recruitment. As Singer states, "the costs are outweighed by the benefits".¹⁰¹ In the field, commanders have difficulty in replenishing their ranks and commanders are well aware of the actual or perceived benefits the use and recruitment of child soldiers hold. Therefore it happens that lower-level field commanders recruit children even where the leaders of the group denounce the use of child soldiers. This creates many obstacles for effective prevention.¹⁰² It is also often argued that children are easily programmable to execute the most horrible attacks.¹⁰³ Commentators

¹⁰¹ Singer *Children at War*, note 18 above, 52.

¹⁰² Pollar, note 19 above; Wessells, note 67 above, 32.

¹⁰³ Briggs, J. *Innocents Lost* (2005) at xi; Singer *Children at War*, note 18 above, 87 quotes a former Liberian militia commander as saying "Children make the best and

have paid little attention to the strategic use of child soldiers as an asymmetrical conflict structure. As I have previously argued, this presents the second dimension to the demand for child soldiers.

A multitude of factors have been identified as causes of child soldiering. These include poverty, need for shelter, need for 'family', etc. There is no use in listing each of the factors that have been identified by theorists, as there is no systematic model that presents these factors in any specific order or even data that supports the contention that they do contribute to child soldiering. No existing model adequately takes into account the proximity of specific causes to the problem, nor is the interplay acknowledged between these seemingly independent causes.

In their empirical study, Reich and Achvarina argue that "while poverty may remain a necessary condition for the advent of child soldiers, and thus may possibly have a threshold effect, it certainly does not offer an effective causal explanation for child soldier rates".¹⁰⁴ Similarly, these authors dismiss the suggested link between large pools of orphans and child soldiers.¹⁰⁵ They do, however, find that there is a strong link

bravest... Don't overlook them. They can fight more than we people. It is hard for them to just retreat".

¹⁰⁴ Reich, SF. & Achvarina, A. 'Why do Children Fight? Explaining Child Soldier Ratios in African Intra-State Conflicts' *Ford Institute* (2005), 40.

¹⁰⁵ *Ibid.*

between the access that these armed groups have to IDP and refugee camps and child soldiering.¹⁰⁶

Further similar research can be very beneficial to child soldier preventative strategies, as identifying poverty as a root cause of child soldiering has little effect. One cannot tackle global poverty as a child soldier preventative strategy. It is much more realistic for peacekeeping missions to provide greater protection to refugee camps. However, more research is called for in this regard as there seems to be a disjuncture in Reich and Achvarina's reasoning. Firstly, people in refugee and IDP camps are, virtually without exception, poor. Those with means have the mobility to flee the area in which they are being persecuted and take refuge further afield. As such, one cannot dismiss poverty as a root cause of child soldiering. Indeed, in dismissing poverty as a key cause, Reich and Achvarina state that "richer countries may not have child soldiers in intrastate conflict. But neither do child soldiers serve in all poor ones".¹⁰⁷ This reasoning leaves much to be desired, as by the same token, neither were all child soldiers refugees/IDPs nor are all refugee/IDP camps in conflict affected areas plagued by child soldier recruitment. Virtually all children who become child soldiers live in extreme poverty.

This is not the entire picture. The specific causes of child soldiering cannot be considered without considering the contextual matrix within

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*

which they exert their various influences. Singer employs a more contextual approach by breaking the causes up into three critical factors which, he argues, form a causal chain:

- 1) Social disruptions and failures of development caused by globalization, war and disease that have led not only to a greater global conflict and instability, but also to generational disconnections;
- 2) Technological improvements to small weapons now permit these child recruits to be effective participants in war fare; and
- 3) There has been a rise in a new type of conflict that is far more brutal and criminalized (“post-modern conflict”).¹⁰⁸

These factors form part of the greater context that facilitate the use of child soldiers, and are not the root causes. Thus, this contextual approach is applicable to both forced and voluntary recruitment. Similarly, Honwana’s application of the “war-scapes” concept to child soldiering also finds application.¹⁰⁹

4. SUMMARY

The first of the two research questions identified in this study poses the question whether positive law together with its enforcement mechanisms can contribute social change in the context of the prevention of the use and recruitment of child soldiers. At the start of this Chapter I argued that, in order for international law to act as an agent of social change, attempts at the prevention of the use and recruitment of child soldiers should address the social reality of child soldiering, not the perceived reality.

¹⁰⁸ Singer, note 18 above, 37-38.

¹⁰⁹ Honwana, note 40 above, 42.

Each of the three sections of this Chapter serves to delineate this social reality.

Investigating the distribution of child soldiers serves two purposes. It indicates the scope of the problem and suggests where preventative efforts should be focused geographically. I argued that the extent of the problem cannot be indicated quantitatively, as there are no reliable data. Nevertheless, it is clear that, geographically, child soldiering is a problem of global proportions, affecting hundreds of thousands of children. Works such as Becker's are telling in this regard: "although precise figures are impossible to establish, the number of child soldiers in the region [Asia] is likely to exceed 75 000".¹¹⁰

Children function in a range of different capacities during armed conflict. Some participate directly in hostilities and others indirectly; yet others are recruited during peacetime. The use of child soldiers as an asymmetrical conflict structure indicates that the rationale for the use of child soldiers is not as one-dimensional as traditionally thought. There are more entry points in engaging with governments to end the use and recruitment of child soldiers than with non-state entities. Governments are still among the principal violators of the prohibition against the use and recruitment of child soldiers, whether the national armed forces directly engage in child use or recruitment, or the government supports a proxy force that does

¹¹⁰ Becker, J. 'Child Recruitment in Burma, Sri Lanka and Nepal' in Gates, S. & Reich, S. (eds.) *Child Soldiers in the Age of Fractured States* (2009), 108.

so. This creates a valuable entry point for the enforcement and application of international law rules prohibiting child soldiering that should be pursued in the “era of application”.

Finally, the causes of child soldiering are a contested domain. Unfortunately, there is a strong argument to be made that many children join armed groups in their legitimate pursuit of self-preservation. Undoubtedly, there are many children who have survived because they joined armed forces or groups. For this reason alone, the supply of child soldiers in many regions remains very strong. This speaks to an even deeper structural problem than child soldiering. Nevertheless, international law does not prohibit a child from being a soldier; it prohibits the use and recruitment of children. As such, the law is aimed not at the supply of child soldiers, but at the demand for child soldiers.

CHAPTER 3 HUMAN RIGHTS LAW AND HUMANITARIAN LAW: AN INTEGRATED INTERNATIONAL LAW RESPONSE TO THE PREVENTION OF CHILD SOLDIERING

The history of international humanitarian law (IHL) is vastly different from that of international human rights law (IHRL). Modern IHL's first written incarnations appeared in the form of the Lieber Code and the first Geneva Conventions, of 1863 and 1864 respectively.¹ By that time the law of war, as it then was, had enjoyed a very long history in customary practice.² Indeed, custom has always dictated practice during armed conflict, and by 2000 BC the Egyptians and Sumerians had treaties in place regulating the initiation and conduct of armed conflict.³ The law of war aims at balancing military necessity and prevailing considerations of humanity. By the turn of the century, with the adoption of the Hague Conventions of 1899 and 1907, a slow but steady movement was initiated, progressively shifting this balance towards prevailing considerations of humanity. Conversely, in the case of IHRL, a much more recent legal phenomenon, custom followed treaty obligations. The internationalization of human rights law emerged after the First World

¹ Lieber Code, Instructions for the Government of Armies of the United States in the Field (1863); Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Geneva (22 August 1864).

² Bernhardt, R. *Encyclopaedia of Public International Law Volume 2* (1992) at 933-936; Ober, J. 'Classical Greek Times' in Howard, M. Andreopoulos, G.J. & Shulman, MR (eds.) *The Laws of War: Constraints on Warfare in the Western World* (1994).

³ Friedman, L. (ed.) *The Law of War* (1972), 3; Bassiouni, MC. 'Repression of Breaches of the Geneva Conventions under the Draft Additional Protocol to the Geneva Conventions of August 12, 1949' 8 *Rutgers-Cam L.J.* (1976-1977), 185.

War and was only mainstreamed after the Second World War in the form of the Charter of the United Nations of 1945 and the Universal Declaration of Human Rights of 1948.⁴ Hereafter, state practice followed suit resulting in a large body of customary international law.

Today child soldiering is prohibited by various transnational and municipal legal regimes, among which IHL, IHRL and International Criminal Law (ICL) are most important. This chapter commences by analysing the relationship between IHL and IHRL, which has only recently begun receiving the attention it deserves, and no proper analysis of this relationship has previously been undertaken in relation to child soldier prevention. I anticipate that a thorough understanding of this relationship and the corresponding application of norms belonging to these regimes may yield significant results in the prevention of child soldiering. Hereafter, the proscriptive content of child soldier prohibitive norms belonging to IHL and IHRL are assessed separately. Finally, customary international law norms prohibiting child soldiering are assessed.

1. THE CO-APPLICATION OF IHRL AND IHL IN THE PREVENTION OF THE USE AND RECRUITMENT OF CHILD SOLDIERS

Child soldier prohibitive rules are 'hybrid' in nature, spanning the divide between IHL and IHRL.⁵ Prohibiting the use of children in armed conflict

⁴ Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 (1948).

⁵ Schabas, WA. 'Lex Specialis? Belt and Suspenders? The Parallel Operation of Human Rights Law and the Law of Armed Conflict, and the Conundrum of Jus ad Bellum' 40 *Isr.*

is, by definition, dependent on the existence of armed conflict, and as such relates more to IHL. Yet, the recruitment of child soldiers is also prohibited during times of peace, when IHL is not applicable at all, and thus IHRL is responsible for prohibiting such recruitment. It is not, however, the characteristics of a specific norm that determine whether the norm belongs to IHL or IHRL, but also the nature of the instrument to which the norm belongs.

The child soldier prohibition in the Convention on the Rights of the Child (CRC) is almost a verbatim restatement of the corresponding norm in Additional Protocol I to the Geneva Conventions.⁶ Even though these norms are materially the same, the CRC norm, as an IHRL norm, creates obligations only on state parties and applies during peace and armed conflict, whereas the Additional Protocol I norm, an IHL norm, creates obligations on all parties to the armed conflict and applies only during armed conflict. Assessing the relationship between IHL and IHRL in the context of child soldiering is thus very important as there is potential for norm conflict between the IHL and IHRL regimes as they pertain to child soldier prohibition. The large majority of this section relates to the relationship between IHL and IHRL in general, and not child soldiering

L. Rev. 592 (2007), 603. It is difficult to classify child soldier prohibitive norms as either IHL or IHRL norms. The prohibition of the use of child soldiers is more akin to the IHL regime, whereas the prohibition of the recruitment of children is more akin to the IHRL regime. Schabas contends that these norms are hybrid in nature.

⁶ Article 38 of the Convention on the Rights of the Child (entered into force 2 September 1990) 1577 UNTS 3; and article 77(2) of Protocol I Additional to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of International Armed Conflicts, adopted 8 June 1977 (entered into force 7 December 1978) 1125 UNTS 17512.

specifically. This assessment is necessary in order to address potential norm conflict.

It is trite law that IHL is reserved for the exclusive domain of armed conflict. In the early days of IHRL this led many to believe that IHRL is reserved for the exclusive domain of times of peace.⁷ Time has proven this assumption to be false.⁸ Nevertheless, IHRL instruments and state practice of that era were often premised on the inapplicability of IHRL during times of armed conflict. By 1968 it had become clear that IHRL does apply during armed conflict and so began the growth of substantive IHRL to cover situations of armed conflict.⁹ However, it was only during 1996 that the ICJ found that IHRL continues to apply during armed conflict.¹⁰

After the emergence of IHRL, commentators began drawing parallels between these two legal regimes.¹¹ Over time these parallels resulted in a two-dimensional narrative along the lines that the influence of IHRL is

⁷ See for example Draper, GIAD. 'Human Rights and the Law of War' 12 *Va. J. Int'l L.* 326 (1971-1972) 332 & 338.

⁸ *Legality of the Threat or Use of Nuclear Weapons case (Nuclear Weapons case)* ICJ Reports (1996) para 25.

⁹ 'Human Rights in Armed Conflicts' Resolution XXIII adopted by the International Conference on Human Rights, Teheran (12 May 1968).

¹⁰ *Nuclear Weapons case*, note 8 above, para 25.

¹¹ Early commentators included Draper, GIAD. 'Humanitarian Law and Human Rights' *Acta Juridica* 193 (1979), 199 & 205; Kuntz, JL. 'The Laws of War' 50 *AJIL* 313 (1956), 322; Meron, T. 'A Report on the NYU Conference on Teaching International Protection of Human Rights' 13 *N.Y.U. J. Int'l L. & Pol.* 881 (1980-1981), 914-939. More recent commentators include Orakhelashvili, A. 'The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?' 19 *EJIL* (2008), 161; Arnold, R. and Quenivet, N. (eds) *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law* (2008).

progressively 'humanizing' IHL;¹² and that these two bodies of law are developing towards a 'convergence' or 'fusion'.¹³ However, some commentators were more weary of these arguments – during 1967 Bassiouni wrote that “the humanization of armed conflict has been the object of regulation and concern by every civilization for centuries”;¹⁴ and during 1979, Draper warned against this new movement towards the “fusion” of these legal regimes saying that IHRL and IHL are “diametrically opposed”.¹⁵

Arguing that IHRL is humanizing IHL, speaks to the substantive content of IHL, whereas, the convergence of these regimes speaks not only to the substantive content, but also the formal nature of these regimes, which includes their respective objectives.

i. The 'Humanization' of IHL

IHL is the older of the two regimes, and like IHRL the existence of IHL is dependent on the promotion of principles of humanity – the name 'international *humanitarian* law' is telling. As Meron states: “Chivalry and principles of humanity created a counterbalance to military necessity, serving as a competing inspiration for the law of armed conflict. Indeed, tension between military necessity and restraint on the conduct of

¹² Meron, T. 'The Humanization of Humanitarian Law' 94 *Am. J. Int'l L.* 239 (2000), 239-278.

¹³ Draper, note 11 above.

¹⁴ Bassiouni, note 3 above, 185.

¹⁵ Draper, note 11 above, 199 & 205.

belligerents is the hallmark of that law”.¹⁶ Meron goes on to argue that the balance between these two competing interests has shifted over time; where the bias used to be in favour of military necessity, that bias has shifted in favour of principles of humanity.¹⁷

Nevertheless, there is a cause/effect problem with the broad-based argument that it is primarily the human rights legal regime that inspired or effected the change in this balance. Even though international law has become more individual-focused, it is still states that ‘create’ international law. As such, it is the interests, motives and principles of states that dictate the trends within new law and practice. If principles of humanity become more aligned with state interests, this development will trickle through to virtually all state actions, including the creation and new interpretation of law. Placing the IHRL regime firmly on the agenda is as much an expression of states’ values as is the progressive reform of IHL from a system stacked in favour of military necessity to one stacked in favour of humanitarianism.

Nevertheless, the parallel development of these branches of law, that share an obvious relation to one another, has resulted in a situation where one branch can be influenced by the other. As the parameters of IHL are more restrictive, indeed it is generally considered to be the *lex*

¹⁶ Meron, note 12 above, 243.

¹⁷ *Ibid*, 243-244.

specialis of the two,¹⁸ IHL which will be influenced by IHRL far more often. Still there are examples of IHL provisions that have been included in IHRL instruments.

One further area where IHRL directly influences IHL is through the interpretation of IHL by bodies created by Human Rights instruments.¹⁹ The only judicial bodies directly tasked with the interpretation and application of IHL are the international criminal tribunals, and this function accounts for only part of their duties.²⁰

ii. The Convergence of IHL and IHRL

While the substantive content of the two regimes largely overlap, the *raison d'être* for their existence is different. IHL aims to regulate the conduct of hostilities and protect the victims of war, whereas IHRL aims to provide protection to individuals from the abuse of power by states (this includes the obligation to promote, protect, respect and fulfil fundamental rights). As function dictates form, the structure of each regime is tailored to achieve its specific goals.

While the *ius in bello* realm of law concerns itself not with the lawfulness of conflict, but with its conduct and effects, there are developments within IHRL that view the existence of conflict a violation *per se*. As Schabas

¹⁸ *Nuclear Weapons* case, note 8 above, para 25.

¹⁹ See for example “*Mapiripán Massacre*” v Colombia Inter-American Court of Human Rights (15 September 2005) para 114.

²⁰ See Chapter 4.

states, there is a right to peace, albeit under-developed.²¹ This is affirmed by one of the resolutions adopted at the 1968 UN Conference of Human Rights, entitled 'Human Rights in Armed Conflict' which holds: "considering that peace is the underlying condition for the full observance of human rights and war is their negation".²²

The neutral approach of IHL as regards the unlawfulness of any party to a conflict's acts *ius ad bellum* is dependent on the principle of equality of belligerents. This principle is central to the enforcement of IHL. The equality of belligerents means "the rules of international humanitarian law apply with equal force to both sides to the conflict, irrespective of who is the aggressor".²³ One of the primary effects of this rule is that all parties to a conflict governed by IHL will be bound by IHL, including non-state actors. Sassòli and Olson have identified two constructions that account for this phenomenon. First and foremost, when states ratify treaties or practice custom they implicitly confer the necessary legal capacity on such non-state groups to incur obligations under IHL.²⁴ Second, such obligations will also be founded on municipal law through municipal implementation.²⁵ However, obligations founded on the second

²¹ Schabas, note 5 above, 593; see also Sassòli, M. & Bouvier AA. *How Does Law Protect in War: Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law* (1999), 266.

²² Human Rights in Armed Conflicts, note 9 above.

²³ Greenwood, C. 'Historical Development and Legal Basis' in Fleck, D. *The Handbook of International Humanitarian Law* (2008), 11.

²⁴ Sassòli, M. *How Does Law Protect in War* (1999), 214-217. It is well accepted that non-state groups incur such obligations. However, the reasoning is still somewhat unsound.

²⁵ *Ibid.*

construction are municipal law obligations not international and even the first construction is not wholly satisfactory. Be that as it may, it is well recognized that non-state parties incur such obligations. IHRL on the other hand only provides for obligations on states. As is the case with the contrary position within IHL, this can be traced to the fundamental aims of IHRL. Thus even where IHRL endeavours to dictate the actions of non-state entities this is attempted through the instrumentality of a state, by creating obligations on the state. In order to comply with such an obligation a state party will then, for example, enact municipal criminal legislation that aims to direct the behaviour of non-state entities. Furthermore, IHRL is more concerned with vertical power relationships and IHL more with horizontal power relationships.²⁶

iii. Resolving Norm Conflict

The polar opposite to arguments suggesting the convergence of IHL and IHRL is the conflict of norms within these legal regimes. This problem is only material if two norms apply to the same subject matter and there is an irreconcilable conflict between them;²⁷ or else both may apply in harmony. There are numerous possibilities when there are two or more conflicting rules on the same substantive subject matter in international

²⁶ Bowring, B. 'Fragmentation, Lex Specialis and the Tensions in the Jurisprudence of the European Court of Human Rights' 14 *J. Conflict & Sec. L.* 485 (2009), 490.

²⁷ Fitzmaurice, G. 'The Law and Procedure of the International Court of Justice 1951 – 4: Treaty Interpretation and other Treaty Points' *British Yearbook of International Law* 33 (1957), 237-238.

law.²⁸ However, two specific methods will be discussed, as contemporary international legal practice prefers the second and international law scholars have recently drawn some attention to the first.²⁹ The first approach has its roots in the ‘more favourable principle’ founded in human rights law in terms of which the rule that provides the best protection must prevail. It has been suggested that this rule must be applied, *mutatis mutandis*, to conflicts between IHL and IHRL.³⁰ The second approach calls for the application of the maxim *lex specialis derogat legi generali*. The *lex specialis* rule is a rule of interpretation, accepted in international law, which provides that “where two or more norms deal with the same subject matter, priority should be given to the rule that is more specific”.³¹

The ICJ advisory opinion on the *Threat or Use of Nuclear Weapons* case is now widely regarded as the *locus classicus* dealing with conflict of norms among IHL and IHRL.³² The case has bearing on both the ‘more favourable principle’ as well as the application of the *lex specialis* rule. The Court was called upon by the General Assembly of the United Nations to render an advisory opinion. The General Assembly asked “is

²⁸ Lindroos, A. ‘Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of Lex Specialis’ 74 *Nordic J. Int’l L.* 27 (2005), 41.

²⁹ *Ibid*; Schabas, note 5 above, 593; Sadat-Akhavi, SA. *Methods of Resolving Conflicts between Treaties* (2003) 213-232.

³⁰ Schabas, *ibid*, 593 & 599.

³¹ Koskeniemi, M. ‘Fragmentation of international law: difficulties arising from the diversification and expansion of international law, Report of the Study Group of the International Law Commission’ UN Doc A/CN.4/L.682, 13 April 2006; Report of the International Law Commission (ILC), Fifty-sixth session, UN Doc A/59/10, 408 para 5.

³² *Nuclear Weapons* case, note 8 above, para 25.

the threat or use of nuclear weapons in any circumstance permitted under international law?”³³ The right to life provision under the International Covenant on Civil and Political Rights (ICCPR) is raised as one of the possible treaty provisions that could render the threat or use of such weapons a violation of international law *per se*. This provision holds “every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life”.³⁴ The Court held “the test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities”.³⁵

More Favourable Principle

The more favourable principle is problematic in its application between norms belonging to two different branches of law, as opposed to between two human rights law norms. Within the ambit of human rights law, states’ obligations are generally founded on their agreement to be bound to such norms (or through customary international law). Their undertaking to be so bound draws no distinction between the scope of application of IHRL norms, except for limitations found within treaties. Yet, essentially states undertake obligations to be applied in the same jurisdiction and to be interpreted and applied within the same formal legal framework that

³³ General Assembly Resolution 49/75K (15 December 1994).

³⁴ Article 6 of the International Covenant on Civil and Political Rights (entered into force 23 March 1976) 999 UNTS 171.

³⁵ *Nuclear Weapons* case, note 8 above, para 25.

determine such obligations, i.e. human rights law. The norms within that branch subscribe to the same overarching *ratio*. Thus, applying the most favoured principle within IHRL makes sense – determining that one rule applies *in lieu* of another has no bearing on the state’s consent to be bound, indeed the state agreed to bound to the two provisions equally.

Applying the principle to IHRL and IHL *inter se* provides some problems with regard to the *pacta sunt servanda* principle, “the most basic norm of customary international law”.³⁶ This principle provides that once a state has undertaken a commitment, it must be carried out in good faith as the state expressly agreed to be so bound.³⁷ As has been acknowledged with regard to the *lex specialis* principle, treaties must be interpreted to give the best expression to the state’s consent.³⁸ Applying the most favourable principle between IHL and IHRL in a given case might be *contra* states’ consent. This is well illustrated by the problem the ICJ faced in the *Threat or Use of Nuclear Weapons* case. The application of the most favoured principle would have resulted in a finding that the right to life provision under the ICCPR prevails over the conflicting IHL provisions. This would go completely contrary to the basic existence of the law of war.³⁹ From an individualist perspective IHRL will almost inevitably provide better

³⁶ Gormley, WP. ‘The Codification of *Pacta Sunt Servanda* by the International Law Commission: The Preservation of Classical Norms of Moral Force and Good Faith’ 14 *St. Louis U. L.J.* 370 (1969-1970), 371.

³⁷ *Ibid.*

³⁸ Akehurst, M. ‘The Hierarchy of the Sources of International Law’ *British Yearbook of International Law* XLVII (1974-1975), 273; Lindroos, note 28 above, 36-37.

³⁹ Garraway, C. “To Kill or Not to Kill?” Dilemmas on the Use of Force’, *Journal of Conflict & Security Law* 14 (2009), 500-510.

protection than IHL in a situation where there is a norm conflict between the two regimes. The 'more favourable principle' is accordingly not useful to determine the outcome of a norm conflict between these two regimes.

Lex specialis derogat legi generali

The Court's finding in the *Threat or Use of Nuclear Weapons* case that "the test of what is an arbitrary deprivation of life, [...] then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities",⁴⁰ has two very important implications. First, in instances of armed conflict IHL is always the *lex specialis*. The finding in the *Palestinian Wall Case* supports this contention.⁴¹ Second, the *lex specialis* does not supplant IHRL *in toto*. The ICCPR remains applicable, as does the right to life, but arbitrary deprivation is then determined in terms of the prevailing *lex specialis*. As Koskeniemi states, this is in keeping with the principle of harmonization.⁴² The ICJ had further opportunity to consider these matters in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* case (*Palestinian Wall* case) and the *Armed Activities on the Territories of the Congo (DRC v Uganda)* case.⁴³ In the *Palestinian Wall Case* the Court held:

⁴⁰ *Nuclear Weapons* case, note 8 above, para 25.

⁴¹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* case ICJ Reports (2004) para 106.

⁴² Koskeniemi, note 31 above para 9.

⁴³ *Armed Activities on the Territories of the Congo (DRC v Uganda)* case ICJ Reports (2005).

[...] the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation [...]. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.⁴⁴

Schabas contends that this formulation is incorrect in law. His argument is based on his own paraphrased version of the Court's *dicta*: "three scenarios are possible, namely the application of international human rights law, the application of international humanitarian law, and the application of both branches of law".⁴⁵ The Court found that the case at hand fell into the last category. Schabas states that *lex specialis* is not invoked if both branches apply, and that more properly *lex specialis* relates to the second category. His formulation of the three options is strictly-speaking not correct. The Court did not speak of the possible application of the branches of law, but instead the relevant rights being "exclusively matters of" the specific branches of law. Schabas is correct that in option two the *lex specialis*, being IHL is applicable. However, the basis for its application in option two is not its nature as being *lex specialis*, but instead the fact that it is the only branch that finds application with regard to the specific issue at hand – there is no conflict of norms as IHRL is not applicable and no rule of interpretation is required to decide the applicability of a regime. Schabas goes on to state

⁴⁴ *Palestinian Wall* case, note 41 above para 106.

⁴⁵ Schabas, note 5 above, 597.

that where both systems apply simultaneously the construction will only work if the bodies of law are perfectly compatible.⁴⁶ This is not correct. They will arguably never be perfectly compatible, as the two bodies create obligations for different groups, i.e. IHL creates obligations on non-state groups and IHRL does not. In the final sentence of the Court's judgment quoted, it is said that the Court will consider both branches of law, namely "human rights law and, as *lex specialis*, international humanitarian law".⁴⁷ This brings this judgment completely in line with the *Nuclear Weapons* case. In the *DRC v Uganda* case the Court did deal with violations of both IHL and IHRL, but did not deal with the clash of these branches of law. As such, that judgement is of less relevance and has lead some commentators to suggest that the Court is moving away from the *lex specialis* approach, to resolving norm conflict.⁴⁸ However, this is pure speculation. By virtue of the Court not expressly dealing with the *lex specialis* approach it can equally be interpreted as the Court viewing the matter as having been dealt with. No alternative approach was used or implemented. Indeed, judgement in the *Palestinian Wall* case was rendered on 9 July 2004 whereas judgment in the *DRC v Uganda* case was rendered on 19 December 2005. It is unlikely that in the Court's interpretation the law had developed to that extent in a mere

⁴⁶ *Ibid*, 598.

⁴⁷ *Palestinian Wall* case, note 41 above para 106.

⁴⁸ Scobbie, I. 'Principle or Pragmatics? The Relationship between Human Rights Law and the Law of Armed Conflict' 14 *J. Conflict & Sec. L.* 449 (2009), 453. Prud'homme, N. 'Lex Specialis: Oversimplifying a More Complex and Multifaceted Relationship?' 40 *Isr. L. Rev.* 356 (2007), 385.

18 months. It is more likely that the court did not refer to the *lex specialis* approach as there was no irreconcilable norm conflict in that case.

Where the ICJ held that IHL will always be the *lex specialis*,⁴⁹ some commentators leave room for IHRL to sometimes be the *lex specialis*.⁵⁰ The real distinguishing feature of this argument from that rendered by the ICJ is that the ICJ categorised IHL as an independent “norm system”,⁵¹ or “self-contained regime”.⁵² Thus justifying that IHL as a whole is *lex specialis* and not the specific relevant norm. Proponents of this second approach postulate that this is incorrect, one must not look at the nature of the self-contained regime to determine which of two contesting, but overlapping, rules will prevail. Instead, one must look at the relevant specific rules to determine which one is the *lex specialis vis-a-vis* the other. This interpretation is sound, as *lex specialis* is not a substantive rule of international law, but instead a more mechanical construction of interpretation that lacks clear content.⁵³ *Lex specialis* can be used both in the context of individual rules and different ‘self-contained regimes’. The question thus becomes which approach is appropriate in the case of IHL and IHRL.

⁴⁹ Some commentators suggest that IHL supplants HRL completely, see Dennis, MJ. ‘Application of Human Rights Treaties Extraterritorially to Detention of Combatants and Security Internees: Fuzzy thinking all around?’ 12 *ILSA J. Int’l & Comp. L.* (2005-2006), 472-475.

⁵⁰ Lindroos, note 28 above, 28, Sassòli, M. & Olson, LM. ‘The relationship between international humanitarian and human rights law where it matters: admissible killing and internment of fighters in non-international armed conflicts’ 90 *ICRC Review* Number 871 (2008), 603-605.

⁵¹ Lindroos, *ibid*, 28.

⁵² Koskeniemi, note 31 above, 410-412.

⁵³ Lindroos, note 28 above, 36.

The rationale for holding that IHL, as a self-contained regime, is the *lex specialis vis-a-vis* IHRL, is that IHL is applicable only in the context of regulating the conduct of hostilities and the protection of victims of war. Thus, it is IHL's narrow scope of application that renders it *lex specialis*. There is somewhat of a fallacy in this argument. Only in the event of conflict between two specific norms will the *lex specialis* nature of the one be assessed. Yet, instead of looking at the two relevant norms, the nature of the regime is reverted to to determine the order of the specific norms. When an IHRL norm is applicable to a matter that is relevant to either the conduct of hostilities or the protection of victims of war, and there is no corresponding IHL norm, the nature of the legal regime of IHRL will be immaterial. Thus, the content of the relevant norms should have an impact on the assessment. The limited scope of application of IHL remains a factor in determining which of two norms is the *lex specialis*, and may well be decisive.

International law, with the exception of *jus cogens* and article 103 of the UN Charter, is a regime that knows no hierarchy. Yet, situations can and do arise in terms of which two valid, applicable and binding norms that are mutually exclusive compete for application. In a strict sense, the primacy of one norm over the other, regardless of the legal reasoning, disposes of this foundational aspect of international law, that there are no hierarchies. However, conflict of norms cannot arise where a hierarchical

structure is recognized – there will be no conflict as one norm will take precedence as a matter of law, except if both norms are of the same ranking in the hierarchical structure. How then can the resolution of norm conflict be achieved without resulting in the recognition of a hierarchical norm structure? The *lex specialis* rule ultimately gives greater effect to state consent - *pacta sunt servanda*. Within treaty law, where a state is bound by two conflicting norms it is presumed that the state intended for the rule that is more specific to the situation it applies to to be applicable. This construction does not necessarily affect the nature of the rule itself regarding hierarchy. For example, Sassòli argues that IHL should not always be the *lex specialis* where both IHL and IHRL are applicable. Thus in one situation one norm will be dominant, and potentially in another the other norm would be dominant. The rules are not inherently hierarchical. However, the ICJ *dictum* holds that IHL will always be the *lex specialis*. At least in the strict sense this can be seen as hierarchical preference.

iv. IHL and IHRL: Potential Conflict of Norms

Sadat-Akhavi defines conflict of norms:

A conflict of norms arises when it is impossible to comply with all requirements of two norms. The impossibility of complying with two norms implies that the norms are mutually exclusive; they cannot coexist in a legal order. Compliance with one norm entails non-compliance with the other.⁵⁴

⁵⁴ Sadat-Akhavi, note 29 above, 1.

Although different treaties provide for different standards of protection, there is no conflict of norms between two norms prohibiting child soldiering that prevents such norms from applying in harmony. However, the potential for conflict of norms is not limited to the substantive content of the two relevant norms only. The working of the two legal regimes may make the norms mutually exclusive.

The obligations the Protocol to the CRC creates on non-state actors are stricter than those imposed upon state actors in two material respects. First, non-state actors may not recruit persons younger than eighteen under any circumstances, whereas the Protocol allows for the recruitment of children aged sixteen to eighteen by state parties. Second, state parties must take all feasible measures to ensure that persons younger than eighteen do not take a direct part in hostilities, whereas non-state entities may not under any circumstances use children, directly or indirectly, in hostilities.

The equality of belligerents is a foundational principle central to the enforcement of IHL, specifically in the context of non-international armed conflict (NIAC),⁵⁵ and provides, “the rules of international humanitarian law apply with equal force to both sides to the conflict, irrespective of who

⁵⁵ Sassòli, note 24 above, 214-217; Somer, J. ‘Jungle justice: passing sentence on the equality of belligerents in non-international armed conflict’ Volume 89 Number 867 *ICRC Review* (September 2007) at 655; Olson, LM. ‘Practical Challenges of Implementing the Complementarity between International Humanitarian and Human Rights Law – Demonstrated by the Procedural Regulation of Internment in Non-International Armed Conflict’ 40 *Case W. Res. J. Int’l L.* 437 (2007-2009), 15.

is the aggressor”.⁵⁶ Indeed, the existence of IHL is founded on equal treatment of parties regardless of the causes for the conflict, and specifically who the antagonists are. This in itself is an incarnation of the ‘equality of belligerents’ principle. There is no norm conflict between the different standards of protection created by the Protocol. However, the fact that the Protocol creates different obligations on the basis of the status of the relevant group is in conflict with the IHL principle of the equality of belligerents. The *lex specialis* rule is applicable.⁵⁷ In keeping with the *dictum* in the *Legality of the Use or Threat of Nuclear Weapons* case, the IHRL norms remain applicable even if IHL is the *lex specialis*, but must be interpreted so as not to conflict with the *lex specialis*. In the *Legality of the Use or Threat of Nuclear Weapons* case the impression was created that the right to life was completely supplanted by the more permissive rules of IHL. This has led many to mistakenly conclude that during armed conflict IHL supplants IHRL totally. In relation to the Protocol, the fact that there is conflict of norms does not mean that the Protocol finds no application. Instead, it must be applied in conformity with the *lex specialis*. This means that all parties must take all feasible measures to ensure that children younger than sixteen do not take a direct part in hostilities. This is the lowest common denominator. The continued application of the Protocol is evidenced in that the age

⁵⁶ Greenwood, note 23 above, 11.

⁵⁷ The rule is applicable between treaty and non-treaty standards, as *in casu*, see *INA Corporation v Government of the Islamic Republic of Iran* IRAN-US CTR Vol 8 (1985-I), 378.

threshold is sixteen, and not fifteen as is the case with all IHL child soldier prohibitive norms.

The IHRL nature of the Protocol dictates that the obligation to enforce this stricter obligation on non-state groups lies with the state itself, as IHRL does not create obligations for non-state groups. Thus it may be argued that the equality of belligerents is not violated, due to the obligation being placed on the state. However, in effect, this creates a further inequality on the part of the non-state group. Not only does the non-state group not receive equal treatment of the law, but the duty to enforce this stricter standard lies in the hands of their opponents on the battle field, resulting in enforcement invariably remaining problematic.

2. THE SUBSTANTIVE CONTENT OF CHILD SOLDIER PROHIBITIVE NORMS: INTERNATIONAL HUMANITARIAN LAW

IHL leads the way in prohibiting child soldiering. Although Geneva Convention IV has limited value from a child soldier prevention point of view, the two Additional Protocols to the Geneva Conventions of 1977 form the basis of international law's response to child soldiering. Each of these conventions is discussed in the following section.

Developments within the international criminal law (ICL) realm are the most recent and this branch of law is most active in relation to prohibiting

child soldiering.⁵⁸ The Rome Statute of the ICC criminalises child soldiering both in NIAC and IAC.⁵⁹ War crimes are essentially IHL norms, the violation of which results in criminal sanction on the international plane. Nevertheless, ICL has expanded into a vast legal regime in its own right. Therefore, the war crime of child soldier enlistment, conscription and use, as well as associated developments in ICL is discussed in detail in Chapter 4. However, it should be noted that the SCSL has held that the war crime of child soldier enlistment, conscription and use has crystallised into a norm of customary international law.⁶⁰

i. The Geneva Conventions

Norms prohibiting child soldiering are perhaps some of the best examples of the shift within IHL from military necessity/efficiency to humanitarianism. While humanity has always been a consideration in the 'laws and customs of war', over time the balance between military necessity and humanity has shifted. In IHL of old, military necessity/efficiency enjoyed primacy and humanitarianism played a secondary role. The "humanization of humanitarian law", as Meron terms it was perhaps a more gradual process. However, the Geneva

⁵⁸ See Chapter 4 generally.

⁵⁹ Articles 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Rome Statute of the International Criminal Court (Rome Statute) (entered into force 1 July 2002) 2187 UNTS 90, relevant to international and non-international armed conflict respectively.

⁶⁰ *Prosecutor v Sam Hinga Norman Decision on Preliminary Motion Based on Lack of Jurisdiction* SCSL-2004-14-AR72(E) (31 May 2004) (hereinafter the '*Child Recruitment decision*').

Conventions of 1949 marked the about turn.⁶¹ Child soldiers increase the military capacity of a given armed force, thus military necessity/efficiency provides no basis for prohibiting such conduct. The fact that child soldiering was first directly prohibited by the Protocols Additional to the Geneva Conventions of 1977 perhaps indicates that this 'humanization' process is an on-going one which achieved a greater level of maturity by 1977 as opposed to 1949.

Only in a limited number of cases does Geneva Convention IV relate to protecting children from military recruitment, and indirectly so.⁶² The terms 'children', 'protected persons' and 'protected persons [...] over eighteen years of age' are distinguished by these provisions. It has been argued that for the purposes of Geneva Convention IV 'child' or 'children' denotes a person under fifteen.⁶³ Geneva Convention IV in fact creates many different categories according to age: children; young children; children under seven; children under twelve; children under fifteen; children and young people; protected persons over eighteen years of age; and protected persons under eighteen years of age.

⁶¹ Meron, note 12 above; although this trend to 'humanize' the law of armed conflict was first identified during the early 1960's, Schwarzenberger, G. *The Frontiers of International Law* (1962) 256-273; Bassiouni, note 3 above, 185.

⁶² Article 50 and 51 of Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (entered into force 21 October 1950) 75 UNTS 287.

⁶³ Pictet, J. *Commentary, IV Geneva Conventions Relative to the Protection of Civilian Persons in Time of War* (1958) ICRC, 395; Happold, M. *Child Soldiers in International Law* (2005), 56.

Like “children under seven” and “children under twelve”, “children under fifteen” creates a sub-genus of ‘children’. The concept “children” is used elsewhere in Geneva Convention IV. Interpretively, this indicates that ‘children’ is a broader concept than “children under fifteen”. The category ‘protected persons over eighteen years of age’ may be interpreted to mean that all people below eighteen years of age are protected persons by virtue of their age. The category ‘protected persons under eighteen years of age’ also exists and, *prima facie*, may oppose the former argument, as it may be suggested that there are also unprotected persons under eighteen. However, this category of persons only appears once in Geneva Convention IV, in this context: “In any case, the death penalty may not be pronounced on a protected person who was under eighteen years of age at the time of the offence.”⁶⁴ A viable and reasonable interpretation is that this provision only offers protection to persons who were ‘protected persons’ by virtue of their young age (under eighteen) at the time of commission of the crime. According to the Rapporteur “there should be no precise definition of the term children”.⁶⁵ This is a problematic position. The Geneva Conventions provide protection to people in various circumstances solely based on their age up to persons under eighteen.⁶⁶ It is thus suggested that where the Geneva Conventions use the unqualified term ‘children’, depending on

⁶⁴ Article 68 of Geneva Convention IV.

⁶⁵ O.R. XV. 465. CDDH/407/Rev 1, para 63.

⁶⁶ Of course reference is made here to measures aimed at protecting persons due to their young age, not old.

the circumstances, such children should include people under the age of eighteen.

Academic commentators are quick to dismiss the relevance of Geneva Convention IV to child soldier prevention.⁶⁷ It is generally argued that these Conventions were drafted in response to the Second World War (WW II) and child soldiering was not viewed as an IHL concern at the time.⁶⁸ The provisions of the Geneva Conventions are disassociated from child soldier prevention, as these provisions are generally not framed as ‘child soldier prohibitive norms’. A specific example is that all of the provisions of Geneva Convention VI that relate, albeit indirectly, to child soldier prohibition are limited to occupied territories. This is a significant limitation, and reflects the post WW II thinking. There are no situations at present where an occupying power is recruiting or using child soldiers from within the occupied community.

Article 50 of Geneva Convention IV holds: “The Occupying Power shall take all necessary steps to facilitate the identification of children and the registration of their parentage. It may not, in any case, change their personal status, nor enlist them in formations or organizations subordinate to it”.⁶⁹ This provision has been explained as referring

⁶⁷ For example, neither Rosen nor Wessells mention a single article of the Geneva Conventions as relevant to child soldier prevention in their work; Wessells, M. *Child Soldiers* (2006) at 233; and Rosen, DM. *Armies of the Young* (2005), 139.

⁶⁸ Honwana, A. *Child Soldiers in Africa* (2006), 31.

⁶⁹ Article 50, Geneva Convention IV.

specifically to ideology based youth movements, such as those established in many countries of Europe under Nazi occupation and not to child soldier prevention.⁷⁰ The protected class is ‘children’. Children are only protected from the Occupying Power. Thus, their own forces, and forces not hostile to them can enlist them in such movements. It is true that this article was intended to prohibit enlistment in ideology-based youth movements, however, the terminology employed by the article is “formations or organizations subordinate to it [the Occupying Power]”. Should it be established that armed forces of an occupying power fall within the broad scope of such subordinate formations or organizations; this article will prohibit the occupying power from enlisting children from within occupied territories into its armed forces.

Article 51 of Geneva Convention IV holds: “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”.⁷¹ This article’s relevance to child soldiering is often explained away through the broadness of its scope of application.⁷² It is more specifically aimed at prohibiting the conscription of ‘protected persons’ in general, as opposed to children in particular. Pictet and Happold both point out that this article not only provides protection to protected individual persons, but “it is also concerned with the duties that those

⁷⁰ Happold, note 63 above, 56.

⁷¹ Article 51, Geneva Convention VI.

⁷² Happold, note 63 above, 56.

individuals have to the states of which they are nationals”.⁷³ It should be noted that the protection of an individual’s duty towards his state of nationality remains the protection of the individual person. Happold further points out that both article 50 and 51 are reaffirmations of the Hague Regulations of 1907.⁷⁴ ‘Children’ are protected persons in terms of the Geneva Conventions; it is thus unconvincing to argue that this provision does not protect children from military recruitment merely because it also protects other classes of protected persons from such recruitment. However, once again the protection afforded is limited in that it only extends to protection from the Occupying Power. In child soldier preventative terms the provision is also unique in using the term “serve in its armed [...]” instead of enlistment, recruitment or conscription.

Article 51 of Geneva Convention IV further holds: “[...] The Occupying Power may not compel protected persons to work unless they are over eighteen years of age [...] In no case shall requisition of labour lead to a mobilization of workers in an organization of a military or semi-military character”.⁷⁵ Protected persons may thus be compelled to work, but not in organizations of a military or semi-military character. However, protected persons younger than eighteen years of age may not be compelled to work in any capacity. From a child rights/protection point of

⁷³ *Ibid*, 56; Pictet, J. *Commentary on the Geneva Conventions of 12 August 1949* (1955) Geneva: ICRC Vol IV, 46.

⁷⁴ Happold, note 63 above, 56; Article 45 of The Hague Regulations Concerning the Laws and Customs of War on Land (1907).

⁷⁵ Article 51, Geneva Convention IV.

view this is a significant extension of the Hague Regulations of 1907. Lastly, by employing the language “an organization of a military or semi-military character”, this article, more directly, also prohibits the Occupying Power from forcing such protected persons from serving in paramilitary groups distinct from, but in cohort with the Occupying Power.

The three major shortcomings of Geneva Convention IV’s actual protection of child soldiers are first and foremost that it only protects the occupied people from an occupying power. Second, this also means that protection is limited to international armed conflicts (IAC). Third, there is a distinct lack of specificity in the provisions⁷⁶ since commentators have long argued that the fact that none of the Geneva Convention provisions are aimed specifically at child soldiering relegates the Geneva Conventions to a position of irrelevance. Geneva Convention IV finds very limited application to child soldier prevention. Because reference is never made to child soldiers, awareness of the problem is not promoted at all and such an application of Geneva Convention IV requires more judicial initiative. The provisions of the Additional Protocols to the Geneva Conventions are in every way more suited to child soldier prevention. Thus, since the emergence of these provisions, the application of Geneva Convention IV is hardly at issue.

⁷⁶ However, had they been more specific it may well be that ‘child soldiering’ would positively have fallen outside the scope of these provisions and as such Geneva Convention IV.

ii. Additional Protocol I to the Geneva Conventions

What sets IHL apart from IHRL is the fact that it must be triggered by armed conflict and so applies to regulate the conduct of the related hostilities and the protection of people, both civilian and military, during such conflict. The argument has been made that some provisions of the Geneva Conventions and Additional Protocols apply during “peace-time”, and that if any provision should so apply, the child soldier prohibition should. This argument is ill-conceived both with regard to the Geneva Conventions, and Additional Protocols, in general and with regard to the child soldier prohibitions specifically. Common article 2 to the Geneva Conventions state:

In addition to the provisions which shall be implemented in peace-time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

Obviously, the argument is founded on the reference to peace-time, and in fact there are numerous provisions within the Geneva Conventions and Additional Protocol II that are applicable to times of peace.⁷⁷ No modern treaty can function without provisions applicable during times of peace. For example, denouncing the Conventions will only take effect once peace has been attained, should the denouncing state be at war at the

⁷⁷ Articles 23, 26, 44, 47, 63 and Annex 1, Article 7 of Geneva Convention I; articles 44, 48, 62 of Geneva Convention II; articles 127, 142 of Geneva Convention III; articles 14, 38, 70, 144, 158, Annex 1, Article 7 of Geneva Convention IV; and articles 6, 18, 60, 66, 83 of Additional Protocol I; Additional Protocol II makes no reference to ‘peace’.

time of the denouncement.⁷⁸ However, there is not a single provision applicable to ‘peace-time’ that either regulates the conduct of hostilities or the protection of victims of war, i.e. the law of the Hague and the law of Geneva respectively. The fallacy in an argument that any substantive and proper IHL provision of the Geneva Conventions applies during ‘peace-time’ is well illustrated by attempting to determine the nature of the armed conflict in deciding which Protocol to apply and whether common article 3 is applicable. If there is no armed conflict, it cannot be international in nature, as such, the whole of the Geneva Conventions, save for common article 3, will not be applicable. Furthermore, common article 3 will also not be applicable, as it expressly only applies to “armed conflict not of an international character”. Furthermore, the last part of the provisions, “even if the state of war is not recognized by one of them”, was designed to make it implementable during times when *de facto* conflict exists, but the relevant States deny the existence of an armed conflict; as was the case during the conflict between China and Japan preceding World War II.⁷⁹ As regards the argument that the child soldier prohibitive norms in particular should apply to times of peace, article 77(2) of Additional Protocol I expressly refers to “parties to the conflict.” Additional Protocol II’s roughly corresponding provision makes no such reference, but Additional Protocol II stands alone as the only instrument out of all the Geneva Conventions and Additional Protocols that makes no reference to

⁷⁸ Article 63 of Geneva Convention I; article 62 of Geneva Convention II; article 143 of Geneva Convention III; and article 158 of Geneva Convention IV.

⁷⁹ Gutteridge, JAC. ‘The Geneva Conventions of 1949’ 26 *Brit. Y.B. Int’l L.* 298 (1949), 298-299.

peace-time whatsoever. Thus, the child soldier prohibitive norms in Additional Protocol I/Additional Protocol II only apply during times of armed conflict. An enquiry into the existence of armed conflict primarily aims to determine whether the degree of hostilities/force/violence meets the threshold to amount to an 'armed conflict'; and whether this armed conflict is international or non-international in character.⁸⁰

Prior to the coming into force of Additional Protocol II, the Geneva Conventions made no specific provision for NIAC save for common article 3, which in turn made no specific reference to children or the regulation of participation in armed groups or forces. This is what sets Additional Protocol I and Additional Protocol II apart from each other: the first is applicable to IAC and the second to NIAC. Both Protocols make reference to 'children' and 'children who have not attained the age of fifteen years'. Strictly speaking, where the term 'children' is unqualified, the possibility exists that such protection extends to those under eighteen as well. This is based on the same argument as in relation to the Geneva Conventions above. Furthermore, in recruiting among people older than fifteen, but younger than eighteen, Additional Protocol I endeavours to grant more protection to people the younger they are, and this protection

⁸⁰ For more information on establishing the threshold of armed conflict see the Inter-American Commission on Human Rights communication, *Juan Carlos Abella v Argentina*, Case No. 11, 137, Annual Report 1997, OAS Doc. OAE/Ser.L/V/II.98. Doc. 7 rev (13 April 1998); and for more information on the nature of an armed conflict see the ICTY Appeals Decision in *Prosecutor v Dusko Tadić*, Case No. IT-94-1-AR72, App.Ch (2 October 1995), para 70.

is afforded in the section dealing with “protection of children”;⁸¹ thus giving further credence to the argument that those aged between fifteen and eighteen are still deemed children.

With regard to the prevention of child soldiering in the context of IAC, Additional Protocol I holds:

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 endeavour to give priority to those who are oldest.⁸²

This provision is relatively weak in its protection of children and for legal-analytical purposes it is divided in two parts: first, the prohibition of using and recruiting children younger than fifteen, and second, the provision stating that when recruiting children between fifteen and eighteen, preference should be given to older children.

The language used in the second part of the provision is not contentious and needs little further explanation; it is therefore dealt with first. It is almost impossible to hold an armed force or group to account for a violation of this provision. Where the actual prohibition of the use and recruitment of child soldiers can be seen as a direct child protection measure, this provision is indirect. Should a group use or recruit children

⁸¹ Article 77 of Additional Protocol I.

⁸² Article 77(2) of Additional Protocol I (own emphasis).

under fifteen, they will be in contravention of the Protocol as long as the child remains part of the group and younger than fifteen; this is what is called a 'continuing crime' in criminal law terms. This provision thus aims at the demobilisation of child soldiers which amounts to direct protection. However, where a group fails to give priority to older children when recruiting among those aged between fifteen and eighteen, such a remedy will not be available. It is not unlawful for the group to recruit and use children between fifteen and eighteen; it is 'merely' the group's recruitment practice that violates Additional Protocol I. Thus it is not so much who is recruited but more the context in which they are recruited that is central to this provision. This part of the provision therefore offers very little protection to children.

In the first part of the child soldier prevention provision two distinct forms of conduct are prohibited, first, "the Parties to the conflict shall take all feasible measures to ensure that children who have not attained the age of fifteen years do not take a direct part in hostilities" and secondly "in particular, they shall refrain from recruiting them into their armed forces". It is clear that the age of the protected children is below fifteen. With regard to the 'use' of children in hostilities, the parties' (to the conflict) obligation is limited to taking "all feasible measures" to ensure that children do not take a "direct part in hostilities". The prohibition on recruitment (as opposed to 'use') is not subject to either the "direct part in hostilities" qualifier or the "all feasible measures" qualifier. Children are

thus better protected from recruitment into armed forces than they are from being used in direct hostilities. It is important to note that children can be used in armed conflict without having been ‘recruited’ for purposes of the Additional Protocols (this is discussed further below).

The elements of the child soldier prohibition in Additional Protocol I are analysed below. Although this analysis is undertaken under the heading ‘Additional Protocol I’, they apply *mutatis mutandis* to all other relevant provisions that contain the same elements.

Take all Feasible Measures

Earlier drafts of article 77(2) of the Additional Protocol I contained the standard “all necessary measures”. The word ‘necessary’ was only replaced with ‘feasible’ in the final drafts of the provision. The feasibility of a measure in a given circumstance is a subjective determination when compared to determining what may be ‘necessary’ within the same circumstances. Bothe (*et al*) argues that the ‘feasible’ standard is a determination of what is practically possible or practicable, taking account of all circumstances at the time including the military success of the operations.⁸³ Sandoz (*et al*) argue that the provision should be interpreted in line with the standard dictionary meaning of the word ‘feasible’.⁸⁴ The

⁸³ See also Bothe, M., Partch, K. & Solf, W. *New Rules for Victims of Armed Conflicts* (1982), 372-373.

⁸⁴ Sandoz, Y., Swinarski, C. & Zimmermann, B. (eds.) ‘Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949’ *International Committee of the Red Cross* (1987) 681-682.

dictionary definition they provide is “capable of being done, accomplished or carried out, possible or practicable”. Bothe’s understanding of the standard incorporates this definition, but goes further in holding that circumstances at the time must be taken into account when determining what is practically possible or practicable. The source of this understanding is statements made by various countries in relation to the adoption of article 57 at the Diplomatic Conference. Accordingly, this article does not relate to child soldiering but also contains the ‘feasible’ standard.⁸⁵ The question remains whether the success of military operations, should be a factor in determining what is practically possible or practicable when taking account of the circumstances at the time. Both Mann and Kuper have adopted this definition in relation to child soldiering.⁸⁶

If the success of military operations is indeed a factor that should properly be taken into account when determining what is feasible, it may often not be feasible to demobilize children before military engagement during armed conflict. Thus, ideally this standard is what is practically possible or practicable when taking account of the circumstances at the time, but not including the success of military operations. It appears, however, that the inclusion of military necessity has taken hold in the definition of what is

⁸⁵ These countries were Algeria, Belgium, Canada, Italy, the Netherlands and Spain. See Happold, note 63 above, 61 note 26 and Boudreault, LS. ‘*Les reserves apportees au Protocole additionnel I aux Conventions de Geneve sur le droit humanitaire*’ (1989-1990) 6 *Rev. quebecoise de droit int’l*, 105.

⁸⁶ Mann, H. ‘International Law and the Child Soldier’ 36 *Int’l & Comp. L.Q.* 32 (1987), 46; Kuper, J. *International Law Concerning Child Civilians in Armed Conflict* (1997), 102.

'feasible'. This understanding is further supported by the declarations made by some states in relation to the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (CIAC Protocol) that also contains this standard (see below).⁸⁷

This qualification is not ideal by any measure. However, the actual impact this qualification is likely to have on the prohibition of the use and recruitment of child soldiers is less severe than it may seem. The use and recruitment of child soldiers constitutes a continuing violation, or continuing offence in the ICL sense. Armed forces and groups obliged to take all feasible measures that children do not participate in hostilities are therefore obliged to do so in relation to each military engagement children participate in. The systematic use of children in armed conflict can never be justified on the basis that all feasible measures had been taken to prevent such participation.

Take a Direct part in Hostilities

This standard forms the basis of one of the central tenets of IHL: the principle of distinction. This customary law principle holds that parties to a conflict must distinguish between civilian and military targets, unless the

⁸⁷ Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (entered into force 12 February 2002) 2173 UNTS 222.

civilian directly participates in hostilities.⁸⁸ The war crimes related to the use of child soldiering employ the language “active participation in hostilities” whereas the current provision uses the term “direct participation in hostilities”. Chapter 4, dealing with international criminal law, analyses these concepts and aims to determine whether they represent the same standard; and to give meaning to the concept “active participation” as this is the concept relevant to ICL. Whether these standards are the same is a hotly disputed topic, as there is not even any consensus among the international tribunals on this issue. The Geneva Conventions refer to “active part in the hostilities”;⁸⁹ and Additional Protocol I refers to “direct participation in hostilities”,⁹⁰ however, the French text uses the term “*participent directement*” consistently. The French text carries equal authority to the English text.⁹¹ Thus, as is argued more comprehensively in Chapter 4, ‘direct’ and ‘active’ should be deemed the same. Where the analysis under Chapter 4 traces the position of tribunals who deal with child soldiering, specifically the SCSL and ICC, with regard to ‘active participation’; the present analysis more

⁸⁸ Henckaerts, JM. Doswald-Beck, L. & Alvermann, C. *Customary International Humanitarian Law: Rules* (2007) 2-8.

⁸⁹ Common Article 3 of the Geneva Conventions.

⁹⁰ Articles 51(3), 43(2) and 67(1) of Additional Protocol I; and article 13 (3) of Additional Protocol II.

⁹¹ Article 55 of Geneva Convention I; article 54 of Geneva Convention II; article 133 of Geneva Convention III; article 150 of Geneva Convention IV; article 102 of Additional Protocol I; and article 28 of Additional Protocol II.

generally analyses academic treatment of the concept 'direct participation'.⁹²

"Acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces" has long been the standard definition of 'direct participation'.⁹³ This definition certainly also lacks clarity, but until recently no authoritative source made any attempt at such clarity. During 2005 the *Targeted Killings* case was the first to do so;⁹⁴ and more recently the ICRC published interpretive guidance notes on direct participation.⁹⁵

Perhaps expectedly so the Israeli Supreme Court was very broad in their interpretation of direct participation. The Court cited Schmitt, stating that grey areas should be interpreted in favour of direct participation.⁹⁶

Schmitt argues that:

One of the seminal purposes of the law is to make possible a clear distinction between civilians and combatants. Suggesting that civilians retain their immunity even when they are intricately involved in a conflict is to engender disrespect for the law by combatants endangered by their activities. Moreover, a liberal approach creates an incentive for civilians to remain as distant from the conflict as possible – in doing so

⁹² While these concepts are the same academically, some tribunals like the ICC treat them as having different meanings. As such in the context of Chapter 4 account will be taken of the position of these tribunals when considering future prosecutions by them.

⁹³ Sandoz *et al*, note 42 above, 681-682, para 1944.

⁹⁴ *The Public Committee against Torture in Israel v Government of Israel et al* HCJ 769/02 (11 December 2005) ('*Targeted Killings* case').

⁹⁵ Melzer, N. *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (2009).

⁹⁶ Schmitt, MN. 'Direct Participation in Hostilities and 21st Century Armed Conflict' in Fischer, H. *Crisis Management and Humanitarian Projection: Festschrift Fur Dieter Fleck* (2004) 505-509.

they can better avoid being charged with participation in the conflict and are less liable to being directly targeted.⁹⁷

From a child soldier preventative point of view a liberal interpretation in favour of direct participation will be preferable. The further the child is removed from hostilities while still being deemed to directly participate, the more protection she/he receives. For example, where a child acts as a cook to the armed forces, a more strict interpretation of 'direct participation' will likely find that the child is not directly participating. Therefore, her/his use in hostilities will not be unlawful. A more liberal approach would likely have found that she/he is directly participating and as such her/his use in hostilities is unlawful. However, Schmitt's position is nevertheless strongly contested.

This standard is not used solely in the context of child soldiering, but in the protection of civilians as a whole. A liberal interpretation in favour of greater protection of child soldiers (which was not Schmitt's rationale) will correspondingly place more civilians in harm's way as direct participants. This distinction between civilians and combatants is not an end in itself, but a necessary determination to allow the law to protect civilians and allow armed forces to target combatants. It is this very balance that forms the basis of any argument over whether a 'liberal' or 'conservative' interpretation should be afforded to 'direct'. Lastly, one would expect that the possibility of harm is a greater deterrent to civilians from becoming

⁹⁷ *Ibid.*

involved in hostilities than “being charged with participation in the conflict”; thus this argument is not convincing.

The Court in the *Targeted Killings* case did endeavour to provide examples of what direct participation is, but at the same time the Court acknowledges that a case-by-case determination is called for.⁹⁸ In line with the Court’s acceptance of Schmitt’s liberal interpretation the Court’s only example of direct participation is “a person who [...] provides service to them [weapons], be the distance from the battlefield as it may”.⁹⁹ This application is unacceptably broad in all circumstances, but its unacceptability becomes more apparent when considering the more extreme scenarios. For example, modern weapons are often very technical in nature and technologically advanced. In terms of this view, should such a weapon be shipped a thousand miles from the battlefield for calibration by a civilian expert, the opposing armed forces will act within their rights if they target this civilian technician.

The ICRC has expanded on the definition of ‘direct participation’ originally contained in the commentary to Additional Protocol I:

In order to qualify as direct participation in hostilities, a specific act must meet the following cumulative criteria:

1. The act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm), and

⁹⁸ *Targeted Killings* case, note 94 above para 34.

⁹⁹ *Ibid* para 35.

2. there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), and
3. the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).¹⁰⁰

The example presented by the Israeli Supreme Court does not meet any of the three threshold requirements stated by the ICRC. Direct participation is not necessarily limited to the execution phase of an act meeting the threshold criteria. Measures in preparation of the execution phase are also included in 'direct participation'. Deployment to and return from the location forms part of such preparatory measures, if it constitutes an integral part of such a specific act or operation".¹⁰¹

The ICRC's Guidance on Direct Participation has also created a new category of direct participants, those with a so-called "continuous combat function" (CCF).¹⁰² Direct participation in hostilities (DPH) is a question of function and not status. The CCF category determines direct participation in hostilities on the basis of status, and as such is unsupported in the positive law. Significantly, Alston points out that the relevant treaty language limits direct participation in hostilities to "for such time" and not "all the time".¹⁰³ As with the broad interpretation Schmidt affords to direct participation, the CCF category can enhance protection of child soldiers, as the protection will not be limited to the actual time that the child directly

¹⁰⁰ Melzer, note 95 above, 46.

¹⁰¹ *Ibid*, 65.

¹⁰² Melzer, note 95 above, 46.

¹⁰³ Alston, P. 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions' A/HRC/14/24/Add.6 (2010) para 65.

participates. However, this category may lead to the targeting of people outside of the parameters provided for by IHL and should thus not be supported.

In the context of child soldiering the act performed by the child must meet the threshold of harm, direct causation as well as the belligerent nexus; there is no *numerus clausus* of acts that constitute direct participation in hostilities.¹⁰⁴ It is unfortunate that only children directly participating in hostilities enjoy the protection of instruments such as Additional Protocol II. While it is tempting to embrace concepts such as the CCF category to DPH created by the CRC, and in so doing extend that protection a little more, this should not be done as it has the potential to create deep structural damage to the IHL regime. Instead, the fact that only those children directly participating in hostilities are protected should be addressed through the development of international law.

Shall refrain from recruiting them

The words “accepting their voluntary enlistment” was deleted from an earlier draft of this paragraph. This begs the questions whether the provision is weakened by the deletion of these words, i.e. does ‘recruitment’ encapsulate ‘enlistment’. In terms of the preparatory work on Additional Protocol I and Additional Protocol II the prohibition against ‘recruitment’ contained therein does not prohibit voluntary enlistment. The

¹⁰⁴ See Chapter 4 for an example of direct participation in hostilities specifically in relation to child soldiering.

commentary to article 77(2) of Additional Protocol I also foresees the possibility of enlistment not prohibited by this provision.¹⁰⁵ Furthermore, the Rapporteur of Committee III stated that in some instances it is not realistic to absolutely prohibit “voluntary participation” of children younger than fifteen.¹⁰⁶ However, saying that ‘enlistment’ is not prohibited is not the same as saying ‘voluntary recruitment’ is not prohibited. Schabas states that the replacement of the word ‘recruiting’ in an earlier draft of the Rome Statute with ‘conscripting or enlisting’ “suggests something more passive, such as putting the name of a person on a list”.¹⁰⁷ In other words, he holds the word ‘recruitment’ to include ‘voluntary recruitment’, but voluntary recruitment is not as passive as enlistment. A similar view was adopted by the Secretary-General of the United Nations in his report to the Security Council on the establishment of the SCSL.¹⁰⁸ Van Bueren argues that as Geneva Convention IV explicitly refers to ‘voluntary enlistment’, the use of the word ‘recruitment’ in Additional Protocol I and Additional Protocol II would suggest it has a different meaning, i.e. recruitment is less passive.¹⁰⁹ Finally, in the *Recruitment* case, Justice Robertson, in his dissent, also held that enlistment is more passive than recruitment.¹¹⁰

¹⁰⁵ Sandoz *et al*, note 42 above, 900, para 3184.

¹⁰⁶ O.R. XV, p. 465, CDDH/407/Rev.1, para. 63.

¹⁰⁷ Schabas, W. *An Introduction to the International Criminal Court* (2001) at 50.

¹⁰⁸ ‘Report of the Secretary-General on the establishment of a Special Court for Sierra Leone’ UN S/2000/915 (4 October 2000), para 17-18.

¹⁰⁹ Van Bueren, G. *The International Law on the Rights of the Child* (1998), 337.

¹¹⁰ *Child Recruitment* decision, note 60 above, para 27.

The substitution of the word “recruitment” used in earlier instruments such as Additional Protocol I and Additional Protocol II with the words “conscription or enlistment” used in more recent instruments such as the Rome Statute and Statute of the SCSL, suggests a development of the law. This would mean that recruitment, while overlapping with enlistment, is not as passive at the one extreme end of the spectrum as enlistment. Should this view be upheld, it would mean that the presence of children under fifteen in armed forces is not unlawful *per se* in terms of Additional Protocol I. Thus, as was alluded to earlier, the fact that a child participates in hostilities does not necessarily mean that child was recruited unlawfully. What is more, this would have the implication that when an armed force uses a child enlistee of ten to participate indirectly in an IAC that armed force would not act in violation of IHL.

The commentary to article 4(3)(c) of Additional Protocol II holds that this article also prohibits recruitment where force is not present. In fact, it states that a child cannot enlist himself.¹¹¹ Although this commentary relates to Additional Protocol II, which applies to NIAC, both Protocols use the word ‘recruit’ with reference to child soldier prevention. The meaning of the word cannot differ between the two instruments. It is not unheard of that children eagerly volunteer their services to armed groups.¹¹² Unfortunately, legal authority is stacked against the interpretation presented by the commentary to Additional Protocol II, and

¹¹¹ Sandoz *et al*, note 42 above para 3184 & 4557.

¹¹² See Chapter 2.

indeed if the 'recruiting force' merely included these children's names on their list of soldiers, it is foreseeable that such acquisition of soldiers would not be prohibited by this provision.

Their Armed Forces

The concept "armed forces" is generally defined as "a country's army, navy and air force".¹¹³ As such this concept excludes armed groups that do not represent the force of a nation. Within the ambit of Additional Protocol I there are a number of groups, distinct from state armed forces that can be a party to a conflict over which Additional Protocol I enjoys application. For example, non-state armed groups who participate in an IAC, and peoples fighting against colonial domination, alien occupation or against racist regimes in the exercise of their right of self-determination.¹¹⁴

Aware of this problem, the drafters of Additional Protocol I set out to resolve it:

The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict.¹¹⁵

¹¹³ See for example, Concise Oxford English Dictionary (2004).

¹¹⁴ Article 1(4), Additional Protocol I.

¹¹⁵ Article 43, Additional Protocol I.

Thus non-state armed groups can be deemed 'armed forces' if they are organized; under a command responsible to a party to the conflict; and are subject to an internal disciplinary system. Non-state entities can be party to an IAC, and are bound by the rules of IHL, including the prohibition of the use and recruitment of child soldiers. Of course the degree of organization and quality of command and disciplinary systems can differ greatly. 'Armed forces' are construed relatively broadly.¹¹⁶ Non-state entities are thus deemed parties to the armed conflict in their own right and not by virtue of a relationship to a party to the conflict that is a state.

In summary, Additional Protocol I's treatment of child soldiering is twofold, prohibiting 'use' and prohibiting 'recruitment'. Both the prohibition of use and recruitment are subject to their own limitations. The terms "all feasible measures" and "direct participation in hostilities" limit the degree of protection afforded in relation to the 'use' of child soldiers. Furthermore, the words "refrain from recruit[ing]" and "armed forces" limits the extent of the protection offered in relation to the 'recruitment' of child soldiers. The fifteen-year-old yardstick is regrettable, as the two Protocols set the scene for instruments to come and the development of customary international law. Be that as it may, this limitation affects both use and recruitment and is unambiguous.

¹¹⁶ See Verri, P. 'Combattants armés ne pouvant se distinguer de la population civile' 21 *RDPM DG* No. 1-4 (1982), 345.

iii. Additional Protocol II to the Geneva Conventions

Armed conflicts of a non-international character were long deemed as matters of internal concern to the state within which the conflict occurred. As such, consistent with the doctrine of state sovereignty, such states were left to their own devices in dealing with such conflicts, and those who participated therein. Theoretically IHRL was to be applicable in lieu of IHL, however, in practice a vacuum existed as no IHL rules outside of common article 3 to the Geneva Conventions were applicable, and a large body of human rights law could be derogated from. What is more, IHRL as an international law regime was normatively still very much in the process of development prior to 1977.

By the early 1970's when the need for the Additional Protocols was recognized, it had become apparent that IHL should take a greater interest in NIAC. However, by no means were such conflicts deemed deserving of treatment equal to that of IAC, as they were still largely seen as matters of internal concern. For this reason Additional Protocol II's provisions are generally much less onerous than their corresponding provisions in Additional Protocol I, and the Geneva Conventions. Child soldiering is possibly the only exception to this rule, and is an extreme one at that. Additional Protocol II offers a great deal more protection to children than Additional Protocol I. Indeed, as is clear when considering the comparable human rights provisions (*infra*), this provision – one of the

first child soldier prohibitive provisions – still represents the nearest to absolute prohibition of child soldiering.

The concept NIAC differs between Additional Protocol II and common article 3, and the threshold of violence required to activate the operation of Additional Protocol II exceeds that of Additional Protocol I and the Geneva Conventions in general.¹¹⁷ Additional Protocol II is not applicable to situations of internal disturbances and tensions, such as riots or isolated and sporadic acts of violence. With regard to child soldiers, Additional Protocol II holds:

Children shall be provided with the care and aid they require, and in particular:

[...]

(c) 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;

(d) the special protection provided by this Article to children who have not attained the age of fifteen years shall remain applicable to them if they take a direct part in hostilities despite the provisions of subparagraph (c) and are captured;¹¹⁸

Again the provision is divided into ‘recruitment’ and ‘use’ and the threshold age is set at younger than fifteen. However, no part of this provision serves to limit the degree of protection offered to children younger than fifteen in so far as prohibiting their recruitment and use in hostilities is concerned.

¹¹⁷ States often deny the existence of armed conflict, specifically in the context of internal armed conflict. For example, they are able to enforce a greater level of municipal criminal law on their adversary. Thus, in practical terms, often neither Additional Protocol I nor Additional Protocol II finds application to a situation that meets the threshold criteria as being an armed conflict.

¹¹⁸ Article 4(3), Additional Protocol II.

The words “shall neither be recruited [...] nor allowed...” are prescriptive. This provision is applicable to “armed forces or groups” compared to “armed forces” as used in Additional Protocol I. It is further prohibited to use a child to “take part in hostilities”, compared to “take a direct part in hostilities”. This provision amounts to an absolute prohibition of the use and recruitment of children younger than fifteen. The “all feasible measures” standard is also not used.¹¹⁹

This does not mean that there are no weaknesses in this provision. Most commentators will undoubtedly first point to the retention of the younger than fifteen age standard. However, perhaps more important is the retention of the word “recruit”. As has been argued with reference to Additional Protocol I, recruit is not a concept broad enough to cover all means and methods by which children can become associated with and even members of armed groups. Most notably, enlistment is a broader concept requiring a more passive involvement on the part of the armed group in securing the services of the child. Thus, if the manner in which the child becomes part of the armed groups falls short of ‘recruitment’, the enlistment of the child will be lawful. However, under Additional Protocol I such an enlisted child would lawfully be subject to indirect participation in conflict, whereas in NIAC, such a child may not even be used to take part in hostilities indirectly. As has been discussed, non-state entities incur

¹¹⁹ See the discussion of ‘all feasible measures’ above.

IHL obligations on the international plane, both in the context of IAC and NIAC and are thus equally bound to IHL child soldier prohibitions.

3. THE SUBSTANTIVE CONTENT OF CHILD SOLDIER PROHIBITIVE NORMS: HUMAN RIGHTS LAW

i. Convention on the Rights of the Child

As IHRL traditionally concerns itself with the relationship between the state and its subjects, the international law duties and obligations established by IHRL provisions relevant to child soldiering fall on states. As will be discussed, IHRL instruments are addressed at “state parties” and not “parties to the conflict”, or any other construction that includes non-state actors. Thus, in order for states to comply with their international law obligations they must enact municipal legislation, both criminal and civil, proscribing the use and recruitment of child soldiers within that state’s municipal jurisdiction. IHRL is theoretically applicable at all times, although derogation from some provisions is permitted during states of emergency, and as has been discussed, IHL is the *lex specialis* during armed conflict. IHRL has developed child protection with regard to prohibiting the recruitment of child soldiers significantly in that child soldier recruitment is prevented during times of peace as well.

The CRC is the IHRL treaty that received the most instruments of ratification and accession at the fastest pace ever and came into force on

2 September 1990.¹²⁰ This is a unique IHRL instrument in that it contains provisions which are more akin to those contained in IHL instruments, specifically with regard to the prohibition of the use of child soldiers.¹²¹ However, this extension of the subject-matter jurisdiction of IHRL does not affect the implementation and nature of IHRL as such. With regard to child soldiering the CRC holds:

2. States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.

3. 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 endeavour to give priority to those who are oldest.¹²²

Unlike the Additional Protocols and Geneva Conventions the CRC defines a child as “...every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier”.¹²³ However, only with regard to child soldiering does the CRC deviate from this definition and provide for a lower age threshold, being younger than fifteen. Indeed, the *ratio legis* of paragraph 2 and 3 directly mirror article 77(2) of Additional Protocol I and as such creates exactly the same obligations as Additional Protocol I save for the scope of application (not limited to armed conflict) and parties bound (state parties only), this is due to the different nature of IHL and IHRL and is illustrated

¹²⁰ UN Treaty Collection <http://treaties.un.org> (last accessed on 2 September 2011).

¹²¹ Detrick, S. *A Commentary on the United Nations Convention on the Rights of the Child* (1999) at 655-656; Ang, F. *A Commentary on the United Nations Convention on the Rights of the Child: Article 38 Children in Armed Conflicts* (2005), 3.

¹²² Article 38, CRC.

¹²³ Article 1, CRC.

by the use of “states parties” in the CRC and “parties to the conflict” in Additional Protocol I.¹²⁴ In the context of IHRL the parties bound will always be “states parties”. The language is not a verbatim restatement of Additional Protocol I, but is so similar that there is no legal-technical difference between the obligations created, except for those differences attributable to the nature of the relevant legal regime.¹²⁵

The most material difference is that in Additional Protocol I the prohibition on the ‘use’ of children is separated from the prohibition on ‘recruitment’ by the words “in particular”. This may be interpreted to mean there is a greater obligation in terms of Additional Protocol I to prohibit ‘recruitment’ than ‘use’, which is not mirrored in the CRC. Unfortunately, as the CRC adopted the text of Additional Protocol II, the scope of prohibition of the use of child soldiers has not been extended to situations not amounting to armed conflict. The CRC uses the word “hostilities” in defining the prohibition of the use of child soldiers. Given the broader scope of application of IHL, this provision had the potential to prohibit the use of children during violent situations falling short of armed conflict, such as uprisings and internal disturbances. Furthermore, again due to the different nature of the IHRL and IHL legal regimes, article 38 places a duty on the states party to take all feasible measures to prevent the use

¹²⁴ See discussion below.

¹²⁵ As these provisions materially present the same level of protection, and as the same concepts are used: “all feasible measures”; “direct participation”; and “refrain from recruiting”, the treatment of these concepts relevant to Additional Protocol I as discussed above applies equally to article 38(2) of the CRC.

of children younger than fifteen years old from participating directly in hostilities. This includes preventing such children from participating in conflict on the side of non-state armed forces. The same is not true of recruitment, where the duty on the state party is solely to take all feasible measures not to recruit children younger than fifteen years old themselves.¹²⁶ In my view, this is likely attributable to the direct import of IHL provisions into IHRL instruments without paying due regard to the formal nature of the different legal regimes. Finally, the incorporation of the 'priority rule', to give priority to older children when recruiting among those aged between fifteen and eighteen in the CRC, means that this rule is extended to potentially apply to NIAC as well.

As the disarmament, demobilisation and rehabilitation (DDR) of children is an indirect child soldier preventative measure, article 39 of the CRC deserves mention, as it states:

States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: [...] or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

Article 38 was the subject of considerable debate during the drafting of the CRC. Most of this debate revolved around three issues: the threshold age; whether a distinction should be drawn between "voluntary

¹²⁶ This different treatment of 'use' and 'recruitment' is somewhat comparable to the use of the qualifier 'their armed forces' used in Additional Protocol II. However, because IHRL only creates obligations on states parties, these provisions function somewhat differently.

recruitment" and "conscription"; and whether the provisions should specifically provide for recruitment for the purposes of training and education.¹²⁷ In order to resolve differences between delegates, a text reflecting the provision in Additional Protocol I was agreed upon at the expense of legal development and greater protection to children. What is more, unlike Additional Protocol I, the CRC is not limited to IAC, but may also be applicable during NIAC, and indeed when no armed conflict exists. The CRC's standard, however, falls short of the existing protection offered in such conflicts by Additional Protocol II and even Additional Protocol I considering that the CRC binds state parties only.¹²⁸

ii. Optional Protocol to the Convention on the Rights of the Child

Many states were dissatisfied with the failure of article 38 to develop the law. During 1991, at the first session of the Committee on the Rights of the Child (CRC Committee) it was decided that a day of the session would be dedicated to 'children in armed conflicts'.¹²⁹ By 1994, the Commission on Human Rights adopted a resolution establishing an open-ended inter-sessional working group with the aim of drafting an Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict.¹³⁰ This Protocol was duly adopted and came into force on 12 February 2002. Like the CRC, this instrument

¹²⁷ Breen, C. 'When Is a Child Not a Child? Child Soldiers in International Law' 8(2) *Human Rights Review* (2007), 83-87

¹²⁸ Detrick, note 121 above, 655-656.

¹²⁹ Committee on the Rights of the Child, Report on the Second Session, UN Doc CRC/C/10, para. 61.

¹³⁰ Commission on Human Rights Resolution 1994/91.

forms part of IHRL and as such creates obligations on “states parties”. Unlike the instruments already discussed, it deals exclusively with children’s participation in hostilities. Only the substantive provisions of this instrument are discussed here; the administrative and implementation provisions are discussed elsewhere.¹³¹

Article 1 of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (CIAC Protocol) provides: “States Parties shall take all feasible measures 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”. This provision only deals with ‘use’, not ‘recruitment’. The qualifiers “all feasible measures” and “direct part in hostilities” have been retained, but the age threshold has been lifted to younger than eighteen. The obligation here does not include an obligation to prevent non-state actors from using children in hostilities; such instances are addressed separately. Thus, in as far as the use of children by state parties is concerned; the only area in which the level of protection afforded to children is increased is by raising the age threshold to below eighteen. In their declarations states parties have included their interpretations of when they may use children directly in hostilities without being in breach of article 1. In this regard the UK stated:

¹³¹ See Chapter 5.

The United Kingdom understands that article 1 of the Optional Protocol would not exclude the deployment of members of its armed forces under the age of 18 to take a direct part in hostilities where: -

- a) there is a genuine military need to deploy their unit or ship to an area in which hostilities are taking place; and
- b) by reason of the nature and urgency of the situation:-
 - i) it is not practicable to withdraw such persons before deployment; or
 - ii) to do so would undermine the operational effectiveness of their ship or unit, and thereby put at risk the successful completion of the military mission and/or the safety of other personnel.¹³²

Vietnam's declaration states:

To defend the Homeland is the sacred duty and right of all citizens. Citizens have the obligation to fulfil military service and participate in building the all-people national defence. Under the law of the Socialist Republic of Vietnam, only male citizens at the age of 18 and over shall be recruited in the military service. Those who are under the age of 18 shall not be directly involved in military battles unless there is an urgent need for safeguarding national independence, sovereignty, unity and territorial integrity.¹³³

These provisions highlight the margin of appreciation afforded to states parties by utilising the subjective obligation of means that is created by the language "all feasible measures"; together with the high threshold of hostilities, i.e. "direct part in hostilities".

Article 2 of the CIAC Protocol provides: "States Parties shall ensure that persons who have not attained the age of 18 years are not compulsorily recruited into their armed forces". This provision is again limited to 'states parties', and lifts the compulsory recruitment age to under eighteen. In previous provisions the language used is "... shall refrain from

¹³² Declaration of the United Kingdom of Great Britain and Northern Ireland, upon ratification (24 June 2003) <<http://treaties.un.org>> (last accessed on 2 September 2011).

¹³³ Declaration of Vietnam, upon ratification (20 December 2001) <<http://treaties.un.org>> (last accessed on 2 September 2011).

recruiting...”, which creates a negative obligation, whereas article 2 creates a positive obligation.

‘Voluntary recruitment’ is addressed separately. According to UNICEF, “voluntary recruitment is understood to mean that children are under no compulsion to join armed forces and that safeguards are in place to ensure that any voluntary recruitment is genuinely voluntary”.¹³⁴ As such, a distinction remains between ‘voluntary recruitment’ and ‘enlistment’, and the Protocol failed to extend protection to include enlistment. The Protocol states:

1. States Parties shall raise in years the minimum age for the voluntary recruitment of persons into their national armed forces from that set out in article 38, paragraph 3, of the Convention on the Rights of the Child, taking account of the principles contained in that article and recognizing that under the Convention persons under the age of 18 years are entitled to special protection.
2. Each State Party shall deposit a binding declaration upon ratification of or accession to the present Protocol that sets forth the minimum age at which it will permit voluntary recruitment into its national armed forces and a description of the safeguards it has adopted to ensure that such recruitment is not forced or coerced.¹³⁵

This implies that states parties must lift their voluntary recruitment age by at least one year from that set out in the CRC (younger than fifteen), i.e. the minimum allowable age is younger than sixteen, but it can range up to younger than eighteen. The minimum age is to be raised by depositing a

¹³⁴ According to UNICEF “Voluntary recruitment is understood to mean that children are under no compulsion to join armed forces and that safeguards are in place to ensure that any voluntary recruitment is genuinely voluntary”; UNICEF and Coalition to Stop the Use of Child Soldiers ‘Guide to the Optional Protocol on the involvement of children in armed conflict’ (2003), 16.

¹³⁵ Article 3, CIAC Protocol.

declaration also setting out safeguards adopted to prevent forced or coerced recruitment.¹³⁶ These safeguards, as a minimum, must ensure that the recruitment is genuinely voluntary; informed consent of the person's parents or legal guardians have been obtained; the candidate is fully informed of the duties involved in such military service; and reliable proof of age is provided by the candidate.¹³⁷

Unlike earlier child soldier prohibitions, this provision is silent on the nature and extent of the obligation owed by states parties. The qualifiers “States Parties”; “voluntary recruitment”, and “their national armed forces” are present, but the provision is silent on the strength of the obligation, e.g. whether “all feasible measures” is to be taken; or whether states parties “shall not” do so. Instead, the parameters of the prohibition contained in article 38 of the CRC are incorporated by reference: “taking account of the principles contained in that article [article 38 of the CRC]”. Incorporation by reference is not a new phenomenon in international treaty law, specifically related to IHRL.¹³⁸ However, the possibility exists that a state can ratify the Protocol without having ratified the CRC. This is only possible with regard to the two states who have not ratified the CRC, the US and Somalia, and the US has already ratified the CIAC Protocol. Attached to their article 3 declaration the US added a section titled

¹³⁶ States parties can raise their minimum voluntary recruitment age at any time. Furthermore, the requirement to raise the minimum voluntary recruitment age is not applicable to schools operated by or under the control of the armed forces of the States Parties. Articles 3(4) and 3(5), CIAC Protocol.

¹³⁷ Article 3(3), CIAC Protocol.

¹³⁸ See for example article 15 of European Convention on Human Rights and Fundamental Freedoms 213 UNTS 221.

“understandings”, where it is stated that “The United States understands that the United States assumes no obligations under the Convention on the Rights of the Child by becoming a party to the Protocol”.¹³⁹

Buergenthal argues that such incorporation by reference is only effective if the law so incorporated binds the relevant state party.¹⁴⁰ However, his argument in this regard is relevant to article 15 of the European Convention on Human Rights that incorporates “other obligations under international law”. This non-specific provision will obviously only refer to such obligations to which the relevant state is bound. In the case at hand, the incorporating law is not only specific as regards the instrument that is incorporated, but also the specific provision. As such, *pacta sunt servanda* will dictate that state parties do not assume obligations under other treaties, but that the principles contained in article 38 becomes part of the CIAC Protocol by reference. Thus, all state parties are subject to this reference;¹⁴¹ and the ‘strength’ of the obligation for states parties is to “refrain from recruiting” such persons. Moreover, the priority rule is also applicable.

Being an IHRL treaty, this Protocol places obligations on the state. However, it also endeavours to regulate the use and recruitment of

¹³⁹ Declaration of the United States of America, upon ratification (23 December 2002) <<http://treaties.un.org>> (last accessed on 2 September 2011).

¹⁴⁰ Buergenthal, T. ‘International and Regional Human Rights Law and Institutions: Some Examples of Their Interaction’ 12 *Tex. Int’l L. J.* 321 (1977); see also Meron, T. ‘Norm Making and Supervision in International Human Rights: Reflections on Institutional Order’ 76 *Am. J. Int’l L.* 754 (1982) footnote 5.

¹⁴¹ Ang, note 121 above, 33.

children by non-state armed groups. In such instances the obligation still falls on the state to prevent these groups from using and recruiting children. The standards proscribed for such non-state groups are markedly different to those applicable to the states themselves:

1. Armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years.
2. States Parties shall take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalize such practices.¹⁴²

Such ‘armed groups’ includes all non-state armed groups.¹⁴³ Non-state armed groups may not recruit persons younger than eighteen voluntarily under any circumstances, although states parties may do so, provided they have entered a declaration to that effect. Moreover, in the prohibition of the use of child soldiers, the qualifiers “all feasible measures” and “direct part in hostilities” are omitted. The word “should” instead of “shall” in “...armed forces of a State *should* not...” indicates the nature of the IHRL provision in that the obligation falls on the state to enforce the provision and does not create obligations on non-state armed groups comparable to those created by IHL.¹⁴⁴

¹⁴² Article 4, CIAC Protocol.

¹⁴³ Happold, M. ‘The Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict’ *Yearbook of International Humanitarian Law* (2000), 239.

¹⁴⁴ Helle is of the view that this is indicative of a moral obligation instead of a legal obligation in international law; Helle, D. ‘Optional Protocol on the involvement of children in armed conflict to the Convention on the Rights of the Child’ *ICRC Review* 839 (2000).

The unequal treatment of state parties and non-state armed groups means that states are allowed to recruit persons as young as sixteen on a voluntary basis; non-state groups may only recruit persons aged eighteen or older. In the context of 'use' of children the obligation on state parties is limited to taking "all feasible measures" and the degree of hostilities from which children are protected is "direct part in hostilities". Non-state groups, however, "should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years". This provision does not create an international law obligation on non-state groups (as IHL does), thus the duty lies on the states parties to enforce this grossly unequal standard. What this Protocol has done is allow states to create a further power imbalance between themselves and their non-state adversaries. States are in stronger power positions in a great majority of civil conflicts, increasing this power imbalance places further strain on non-state groups to rely on asymmetrical conflict strategies, of which the use of child soldiers is one example,¹⁴⁵ and terrorist tactics is the best example.¹⁴⁶ As was argued earlier, creating different obligations upon parties to hostilities based on status is inconsistent with the equality of belligerents. Therefore, in the context of armed conflict, where IHL is the *lex specialis*, the lowest standard applicable to all parties to the conflict should be applied.

¹⁴⁵ See chapter 2.

¹⁴⁶ Waschefort, G. 'Drawing the Boundaries between Terrorism and Crimes Against Humanity' *SA Public Law* 22 (2) 457 (2007); Geiß, R. 'Asymmetric Conflict Structures' *International Review of the Red Cross* Vol 88 No 864 (2006), 758.

Article 38(2) of the CIAC Protocol indicates well that, regardless of its substantive content, this is an IHRL instrument, as the obligation remains that of the state.¹⁴⁷ The reference to all feasible measures in this instance refers to the state's duty to prevent non-state armed groups from using and recruiting children, and not to the nature of the duty on such armed groups, as there is no international legal duty incumbent upon them.

iii. International Labour Organization Convention 182

The CIAC Protocol was not the first IHRL instrument that increased the threshold age for 'forced or compulsory recruitment' to eighteen.¹⁴⁸ The International Labour Organization Convention 182 came into force on 19 November 2000 and holds that "Each Member which ratifies this Convention shall take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency";¹⁴⁹ a child being all persons under the age of eighteen.¹⁵⁰ The Convention goes on to define the worst forms of child labour to include "forced or compulsory recruitment of children for use in armed conflict".¹⁵¹

¹⁴⁷ Grunfeld, F. 'Child Soldiers' in Willems, J. *Developmental and Autonomy Rights of Children. Empowering children, caregivers and communities* (2002), 285.

¹⁴⁸ Dennis, MJ. 'The ILO Convention on the Worst Forms of Child Labor' *AJIL* 93(4) (1999), 944.

¹⁴⁹ Article 1, International Labour Organization Convention 182 (entered into force 19 November 2000).

¹⁵⁰ *Ibid* article 2.

¹⁵¹ *Ibid* article 3.

iv. African Charter on the Rights and Welfare of the Child

The African Charter on the Rights and Welfare of the Child, also referred to as the African Children's Charter is the only binding regional human rights law instrument regulating the use and recruitment of children in armed conflict. In many respects the African Children's Charter is revolutionary and in some respects it provides the strongest protection for children in armed conflict;¹⁵² indeed, it generally provides better protection than the CRC.¹⁵³ Its child soldier prohibition holds "States 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".¹⁵⁴ A 'child' is deemed to be every human being below the age of eighteen years.¹⁵⁵

Although this instrument only came into force on 29 November 1999 it was opened for signature during 1990. As such, in drafting terms it is much more a peer of the CRC than the CIAC Protocol. Bearing this in mind, this provision prohibits the use and compulsory and voluntary recruitment of children under eighteen. What is more, the obligation on states parties is to "take all necessary measures". This is an obligation of

¹⁵² Viljoen, F. 'Supra-national Human Rights Instruments for the Protection of Children in Africa: The Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child' (1998) 31 *CILSA* 199; Lloyd, A. 'Evolution of the African Charter on the Rights and Welfare of the Child and the African Committee of Experts: Raising the Gauntlet' 10 *Int'l J. Child. Rts.* 179 (2002) at 184; Olowu, D. 'Protecting Children's Rights in Africa: A Critique of the African Charter on the Rights and Welfare of the Child' 10 *Int'l J. Child. Rts.* 127 (2002), 131.

¹⁵³ Viljoen, F. 'Why South Africa Should Ratify the African Charter on the Rights and Welfare of the Child' 116 *S. African L.J.* 660 (1999), 661.

¹⁵⁴ Article 22(2), African Children's Charter.

¹⁵⁵ *Ibid* article 2.

result rather than an obligation of means as contained in the corresponding provision of the CRC. This provision also treats 'use' and 'recruitment' on a more equal footing, which is a welcome approach, as in practice this distinction can be somewhat contrived: children are often recruited to be used in direct participation in hostilities.¹⁵⁶ The African Children's Charter is the only instrument relevant to child soldiering that directly addresses the tension between a universalist and culturally relative approach to the age of childhood and the associated protection. The African Children's Charter proclaims its supremacy over any custom, tradition and cultural or religious practices, in so far as they may be inconsistent with the rights contained in the African Children's Charter.¹⁵⁷ However this is done while still taking account of nuances peculiar to Africa.¹⁵⁸

The African Children's Charter has four primary shortcomings in as far as it relates to the prevention of child soldiering. First, it has retained the qualifier 'direct part in hostilities' in relation to the 'use' of child soldiers. Second, it prohibits 'recruitment' and not 'enlistment'. Third, it does not contain a provision similar to article 39 of the CRC dealing with physical and psychological recovery and social reintegration for former child

¹⁵⁶ See Chapter 2.

¹⁵⁷ Chirwa, DM. 'The Merits and Demerits of the African Charter on the Rights and Welfare of the Child' 10 *Int'l J. Child. Rts.* 157 (2002), 158; article 1(3) of the African Children's Charter.

¹⁵⁸ Viljoen, note 152 above.

soldiers.¹⁵⁹ Lastly, it does not protect children from 'recruitment' by non-state armed groups.

The founding of the African Committee of Experts on the Rights and Welfare of the Child was mandated by the African Children's Charter. This Committee is discussed in Chapter 5.

A majority of the international instruments discussed, including the CRC, prohibits the use and recruitment of children younger than fifteen. Every other right enshrined in the CRC is afforded to children, being persons younger than eighteen. Regardless of the inherent contradiction hereof, the absurdity of this state of affairs is further illustrated by the fact that in practice child soldiers generally enjoy none of the other rights afforded to them by virtue of being children, or indeed human, for example, the right to health and education. While this work focuses on child soldier prevention specifically, it is important not to lose sight of the plight of child soldiers in relation to all rights children generally enjoy, but to which child soldiers are denied.

¹⁵⁹ Lloyd, A. 'Evolution of the African Charter on the Rights and Welfare of the Child and the African Committee of Experts: Raising the Gauntlet' 10 *Int'l J. Child. Rts.* 179 (2002), 184.

4. THE SUBSTANTIVE CONTENT OF CHILD SOLDIER PROHIBITIVE NORMS: CUSTOMARY INTERNATIONAL LAW

Matheson, speaking during 1987 as Deputy Legal Advisor at the US State Department (*ex officio*) explained that while the US was not ready to ratify Additional Protocol I it did deem many of its provisions as forming part of customary international law.¹⁶⁰ The provisions expressly mentioned included “that all feasible measures be taken in order that children under fifteen do not take a direct part in hostilities”.¹⁶¹ Furthermore, during 2004 the Appeals Chamber of the SCSL held that the international law crime of enlisting, conscripting or using child soldiers, as formulated under the Statute of the SCSL and the Rome Statute had crystallised into a customary international law crime.¹⁶² What is more, no party to the proceedings before the SCSL argued against the existence of such a customary rule at the time of the proceedings (although they will disagree on the scope and nature of the rule and the existence of such a rule was disputed at the time of the commission of the offence).¹⁶³

There is no denying that the prohibition of the use and recruitment of child soldiers has crystallised into a norm of customary international law. This section assesses the nature, scope and definition of this customary rule

¹⁶⁰ Matheson, MJ. ‘The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions’ 2 *Am. U. J. Int’l L. & Pol’y* 415 (1987), 421.

¹⁶¹ *Ibid.*

¹⁶² For an explanation and criticism of this judgement see Chapter 4.

¹⁶³ *Ibid.*

(or rules). The existence of a customary rule or rules relevant to child soldiering is important for two primary reasons: states not party to the relevant international instruments will also be bound, and customary law largely transcends the formal distinction between IAC and NIAC.¹⁶⁴ The fact that non-party states are bound is founded upon the separate existence of the customary norm, i.e. such states will only be bound by the customary norm and states parties will be bound by both the treaty and the customary norm.¹⁶⁵ Furthermore, states cannot withdraw from or denounce customary norms.¹⁶⁶

Customary law is “international custom, as evidence of a general practice accepted as law”.¹⁶⁷ To find the existence of a customary norm both *usus* as well as *opinion juris sive necessitates* is required to be present; that is state practice and the belief that such custom applies as a matter of law.¹⁶⁸

State practice has been defined as “any act, articulation or other behaviour of a state, as long as the behaviour in question discloses the State’s conscious attitude with respect to its recognition of a customary

¹⁶⁴ For example, 149 of the 161 customary international humanitarian law rules identified by the ICRC apply to both IAC and NIAC. See note 88 above.

¹⁶⁵ *Military and Paramilitary Activities in and against Nicaragua (The Republic of Nicaragua v The United States of America)* 1986 ICJ Reports at 95 (hereinafter the ‘*Nicaragua case*’).

¹⁶⁶ *Ibid* at 113-114. Except for the case of persistent objectors, see Chapter 1, note 66.

¹⁶⁷ Article 38(b), Statute of the International Court of Justice, Annexed to the Charter of the United Nations (entered into force 24 October 1945) 1 UNTS XVI.

¹⁶⁸ *Continental Shelf Case (Libyan Arab Jamahiriya v Malta)* 1985 ICJ Reports at 29-30.

rule”.¹⁶⁹ This includes “real” and “verbal” acts, meaning treaty ratification and negotiating positions (*travaux préparatoires*) are included.¹⁷⁰ Furthermore, such practices have to be attributable to states and other states must be able to learn of such behaviour within reasonable time.¹⁷¹ There is no *numerus clausus* as to the manners in which state practice can be expressed, but it includes diplomatic correspondence, declarations on foreign or legal policy and national legislation. State practice must also be ‘general’, thus meaning common, widespread and representative.¹⁷² *Opinio juris* has been held to be conduct exercised by a State by reason of it being “a duty incumbent on them and not merely for reasons of political expediency”.¹⁷³ This duty must be “a belief that this practice is rendered obligatory by the existence of a rule of law requiring it”.¹⁷⁴ It is thus a subjective determination on the part of the relevant state.

The ICRC study on customary international humanitarian law found that there are two customary rules within the IHL branch of law that relate to the prevention of child soldiering. Firstly, rule 136: “children must not be

¹⁶⁹ Villiger, ME. *Customary International Law and Treaties* (1997), 16.

¹⁷⁰ Byers, M. *Custom, Power and the Power of Rules* (1999), 134; Mendelson, MH. *The Formation of Customary International Law* (1998), 204-207; for the *contra* view see Weisburd, AM. ‘Customary International Law: The Problem of Treaties’ 21 *Vand. J. Transnat’l L.* 1 (1988); D’Amato, A. *The Concept of Custom* (1971), 88.

¹⁷¹ *Ibid* 16-17.

¹⁷² *Fisheries case (United Kingdom v Norway)* 1951 ICJ Reports, 131; *North Sea Continental Shelf cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* 1969 ICJ Reports, para 74.

¹⁷³ *Asylum case (Colombia v Peru)* 1950 ICJ Reports at 277; also see the *Lotus case (France v Turkey)* PCIJ (1927) Series A No. 10, 28.

¹⁷⁴ *North Sea Continental Shelf case*, para 77.

recruited into armed forces or armed groups”,¹⁷⁵ and secondly, rule 137: “children must not be allowed to take part in hostilities”.¹⁷⁶

The study found an abundance of state practice supporting both the rule against recruitment as well as the rule against use.¹⁷⁷ Finding state practice to the effect that states do not use and recruit children below a certain age is not a tall order in itself as clearly no state recruits or uses children younger than four, as an arbitrary example. Thus, in as far as state practice is concerned the real question becomes what the age threshold is. Although there is a significant movement towards a straight-eighteen threshold, in terms of the ICRC study current state practice still holds younger than fifteen as the threshold age. However, custom is fluid, thus further legal development may well see a raise in the age threshold to younger than eighteen. I am, however, of the view that studies that aim to codify customary international law, such as this ICRC study, may potentially negatively impact on future interpretations of substantive customary norms, specifically in relation to the development of such norms.

¹⁷⁵ Henckaerts *et al*, note 88 above, 482.

¹⁷⁶ *Ibid*, 485.

¹⁷⁷ Henckaerts, JM. & Doswald-Beck, L. *International Committee of the Red Cross: Customary International Humanitarian Law Volume II: Practice (Part II)* (2005) (hereinafter ‘*Volume II*’) 3109-3142.

General state practice dictates that there can only be one customary rule on one issue.¹⁷⁸ This begs the question whether state practice can be discernibly divided between such practice giving rise to an IHRL rule and such practice giving rise to an IHL rule. The methodology of the ICRC study placed equal reliance on state practice founded on IHRL as it did on state practice founded on IHL. The *Child Recruitment* case followed the same reasoning. Such an approach is warranted as the ICRC study states that IHRL was included in state practice as “international human rights law continues to apply during armed conflicts”.¹⁷⁹ On this basis it is accepted that state practice, in the guise of IHRL obligations, can bolster the threshold state practice required for the existence of a customary IHL rule. The question then is whether this is equally true *vice versa*?

The overlap between IHL and IHRL, in the context of child soldiering is of such a nature that both bodies of law are often applicable to the same situation. However, unlike IHRL’s continued application during times of armed conflict, IHL does not continue to apply during times of peace. Therefore, strictly speaking, if the ICRC argument is followed, reliance should not be placed on state practice emanating from within IHL to find a customary rule in IHRL. Furthermore, the substantive content of state practice within the IHL and IHRL realms should also be considered. For example, the now established IHL customary rule that “children must not be allowed to take part in hostilities” has corresponding IHRL state

¹⁷⁸ Villiger, note 169 above, 30; Sassòli & Olson, note 50 above, 605.

¹⁷⁹ Henckaerts *et al*, note 88 above, xxxi.

practice, and indeed is founded in part, upon such state practice to the same effect. It is impossible for this part of the substantive IHRL to apply during times of peace as it directly speaks to participation in hostilities. Therefore, the degree of overlap between the relevant state practice from within IHL and IHRL is directly proportional to each other. In contrast, recruitment (as opposed to 'use') is prohibited during times of peace. The degree of overlap between state practice within IHL and IHRL is thus reduced, and state practice from within IHL cannot contribute to the existence of a customary IHRL norm applicable during times of peace. However, it can so contribute in relation to that customary norm as it applies during armed conflict. Nevertheless, overwhelming state practice supports the existence of a customary rule to the effect that "children must not be recruited into armed forces or armed groups", during times of peace and armed conflict.

State practice supports the existence of two customary rules: the rule that children must not be recruited into armed forces or armed groups; and the rule that children must not be allowed to take part in hostilities. Due to the fluid nature, and the rule that there cannot be two customary norms on one substantive issue of state practice, there is no distinction between IHL and IHRL within the framing of the rules, but there is in their application. The *opinio juris* requirement is notoriously difficult to comply with. There is an obvious link between *usus* and *opinio juris*, as the latter qualifies the first although care must be taken that they are not equated

and *opinio juris* cannot be presumed on the basis of state practice.¹⁸⁰ Nevertheless, in the context of child soldiering, the sources confirming state practice are stacked overwhelmingly in favour of a finding that states do regard the prohibitions against the use and recruitment of child soldiers as “accepted as law”.

Finally, as customary international law is composed of state practice and *opinio juris*, theoretically the substantive norms contained in treaties relate only to the content of customary law in as far as those treaties dictate state practice and *opinio juris*. In the context of, for example, the prohibition of the use of children younger than fifteen in armed conflict, state practice and *opinio juris* possibly supports the existence of a customary norm of greater proscriptive content than any of the treaty norms discussed. However, in practice the first port of call in defining a customary norm is often widely ratified treaty norms of similar content to that of the envisaged customary norm.

Therefore, in my view treaties often play an undue or superfluous role in defining customary law. In some instances, state practice and/or *opinio juris* falls short of the treaty norms relied upon, resulting in the recognition of a customary law rule, the substantive content of which is not supported by state practice and/or *opinio juris*. In other instances, state practice and *opinio juris* exceeds the substantive content of the treaty norms relied

¹⁸⁰ See the *Nicaragua* case and the *North Sea Continental Shelf* cases, 108-109.

upon, resulting in the recognition of a customary law rule that is more restricted than the relevant state practice and *opinio juris*. Although there are many child soldiers internationally, a relatively small number of states account for all child soldiers. A great majority of states do not use children younger than eighteen in hostilities in any capacity. More states recruit children younger than eighteen, however, a majority of states also refrain from doing so. It is thus likely that state practice and *opinio juris* support a rule or rules of customary law prohibiting the use and recruitment of child soldiers with greater proscriptive content than any current treaty norm.

*Status of Ratification of relevant instruments*¹⁸¹

Instrument	Entry into force	Parties
Geneva Convention IV	21 October 1950	194
Additional Protocol I	7 December 1978	169
Additional Protocol II	7 December 1978	165
Convention on the Rights of the Child	2 September 1990	193
African Children's Charter	29 November 1999	46 ¹⁸²
ILO Convention 182	19 November 2000	171
CIAC Protocol	12 July 2002	142

¹⁸¹ Information correct as at 21 August 2011.

¹⁸² The number of ratifying countries is lower due to the nature of the instrument – regional IHRL instrument. The total number of possible ratifications is 54.

5. CONCLUSION

The first research question this study aims to address is whether the international law norms that prohibit the use and recruitment of child soldiers are capable of enforcement. Should it be necessary that these norms be revised in order for them to be enforceable, international law in relation to child soldier prevention will remain in the first of Buergenthal's stages, "the normative foundation".¹⁸³ The era of application will also then remain out of reach until these norms are capable of enforcement.

The relationship between IHL and IHRL is of great importance in relation to child soldier prevention, and has received very little attention from commentators. The differences between these regimes, and their relationship to one another, has been discussed. The effects hereof are numerous. Most importantly, IHL applies only during armed conflict and creates obligations upon state and non-state actors, whereas IHRL applies at all times, but creates obligations only upon states. There are further practical distinctions that relate directly to application, which will be discussed in Chapters 4 and 5. In a concrete situation, for example, Additional Protocol II provides stronger protection to a thirteen year old who is used in hostilities than the African Children's Charter. However, the African Court on Human and Peoples' Rights has subject-matter jurisdiction over the African Children's Charter and there are no comparable IHL enforcement mechanisms. Reliance may therefore be

¹⁸³ See generally Buergenthal, T. 'The Normative and Institutional Evolution of International Human Rights' 19 *Hum. Rts. Q.* 703 (1997); and Chapter 1.

placed on the African Children's Charter provision instead of the corresponding Additional Protocol II provision.

Great emphasis has been placed on the weaknesses of the substantive norms prohibiting child soldiering. However, these weaknesses mostly relate to the scope of protection offered, that is to say the number of children protected by the relevant provision. The only limitation that relates directly to the legal enforceability of these norms is the qualification that all feasible measures must be taken that children do not participate in hostilities. However, in order to rely on this qualification an armed force or group will have to show that all feasible measures were taken to prevent such participation in each and every military engagement where children were used. As of yet, no armed force or group has relied on this qualification to defend their use of child soldiers. Further refinement of these norms should be pursued with the aim of offering better protection to more children, however, the limitations of the legal provisions in force does not render them unenforceable.

Customary international law largely transcends the distinction between IHL and IHRL. As was discussed, in some cases this approach is more warranted than in others. The drafting and adoption of the CIAC Protocol was a massive undertaking that was first initiated during 1991 and only came into force during 2002. Unfortunately, the text that was finally adopted is rather disappointing for the reasons discussed above.

Considering the magnitude of the process to get such a global instrument adopted, it is unlikely that the treaty provisions prohibiting child soldiering that are in force presently will be revised for many years to come. The development of customary international law presents an avenue through which child soldier prevention can be further refined. However, many enforcement mechanisms have subject-matter jurisdiction over specific treaty norms only. The progressive development of customary norms is still of great value, as some mechanisms do have subject-matter jurisdiction over such norms; customary norms are taken into account in the interpretation of treaty norms; and when the relevant treaty norms are eventually revised, the state of customary law will play a significant role in determining the proscriptive content of such treaty norms.

The final research question this study aims to address relates to the manner of enforcement of these norms. Chapters 5 and 6 specifically address the enforcement of child soldier prohibitive norms. In particular, the requisite changes to enforcement mechanisms relevant to prohibiting child soldiering are addressed in order to achieve a more significant degree of social change – the requisites for an “era of application”.

CHAPTER 4 INTERNATIONAL CRIMINAL TRIBUNALS: PROSECUTING INDIVIDUALS FOR THE ENLISTMENT, CONSCRIPTION AND USE OF CHILD SOLDIERS

Ever since the child soldier phenomenon started receiving critical attention by the international community, the establishment of the International Criminal Court (ICC) – and developments within the ICC – have been the most significant in entering an “era of application”. Indeed, Thomas Lubanga Dyilo, the first person to be prosecuted by the ICC, is charged only with the enlistment, conscription and use of child soldiers.¹ This Chapter deals with international criminal tribunals that operate within technical parameters of jurisdiction, and therefore takes a rather technical form. This is unavoidable, because in order for judicial mechanisms to reach their potential in addressing social problems such as child soldiering, the positive law must be correctly understood and applied. In the case of child soldiering, the judicial interpretation and enforcement of the positive law is in its infancy and therefore requires much analysis.

The Special Court for Sierra Leone (SCSL) will not issue any further indictments, and all matters in relation to which indictments were issued

¹ *Prosecutor v Thomas Lubanga Dyilo, (Warrant of Arrest)*, ICC-01/04-01/06 (2006) (*Lubanga Warrant of Arrest*).

have been disposed of, but one – the high-profile *Charles Taylor* case.² The jurisprudence of the SCSL has contributed significantly to the development of international criminal law (ICL) regarding child soldiering. Indeed, every case that has been finalised before this Court resulted in at least one conviction on the ground of the enlistment, conscription or use of child soldiers. Three of the four defendants in the three cases to have entered the trial phase before the ICC are charged with the enlistment, conscription or use of child soldiers.³

Two aspects of international criminal justice are of specific relevance to child soldier prevention. First, the positive international criminal law (ICL), as it is likely to be applied by the ICC; and, second, the role of international prosecutions in achieving social change. Both aspects are addressed in this chapter; however, more emphasis is placed on the application and enforcement of ICL.

1. THE ENLISTMENT, CONSCRIPTION AND USE OF CHILD SOLDIERS AS A WAR CRIME: BACKGROUND AND DRAFTING HISTORY

The Statute of the SCSL criminalizes “other serious violations of international humanitarian law”, which includes “conscripting or enlisting

² *Prosecutor v Charles Taylor*, Prosecutor’s Second Amended Indictment, SCSL-03-01-PT (2007).

³ *Lubanga Warrant of Arrest*; *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07 (2007) (*Katanga and Ngudjolo Warrant of Arrest*); and *Prosecutor v Jean Pierre Bemba Gombo*, ICC-01/05-01/08 (2008).

children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities”.⁴ The Statute of the ICC criminalizes “war crimes”, which include:

(2)(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

[...]

(xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.⁵

[...]

(2)(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

[...]

(vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities.⁶

For ease of reference the formulation of this crime as contained in both the Statute of the SCSL and the Rome Statute will be referred to as the ‘child soldier crime’.

In his report of 2000 on the establishment of the SCSL, the Secretary-General of the United Nations (UN) stated that it was clear that child recruitment and use was prohibited in terms of customary international law.⁷ He went on to say that it is far less clear whether such use and recruitment had, at the times when the crimes relevant to the SCSL were committed, entailed individual criminal responsibility under customary

⁴ Article 4(c), Statute of the SCSL.

⁵ Article 8(2)(b)(xxvi), Rome Statute.

⁶ *Ibid* article 8(2)(e)(vii).

⁷ ‘Report of the Secretary-General on the establishment of a Special Court for Sierra Leone’ UN S/2000/915 (4 October 2000) para 17 (Secretary General’s Report).

international law.⁸ Accordingly, the article 4(c) crime proposed for the SCSL by the Secretary-General was formulated more restrictively: “abduction and forced recruitment of children under the age of 15 years into armed forces or groups for the purpose of using them to participate actively in hostilities”.⁹ This formulation, in the Secretary-General’s opinion represented customary international law at that time. The President of the Security Council, however, unilaterally and without providing reasons, amended the formulation of the crime to reflect the wording of the Rome Statute.

The temporal jurisdiction of the ICC is strictly prospective.¹⁰ The SCSL is an *ad hoc* tribunal, with retrospective jurisdiction. The doctrine of strict legality (*nullum crimen sine lege/nulla poena sine lege*) holds that one can only be held criminally responsible for a deed if that deed was prohibited as a crime at the time of commission.¹¹ Although the stated

⁸ *Ibid* para 17-18 “owing to the doubtful customary nature of the ICC Statutory crime which criminalizes the conscription or enlistment of children under the age of 15, whether forced or “voluntary”, the crime which is included in article 4(c) of the Statute of the Special Court is not the equivalent of the ICC provision. While the definition of the crime as “conscripting” or “enlisting” connotes an administrative act of putting one’s name on a list and formal entry into the armed forces, the elements of the crime under the proposed Statute of the Special Court are: (a) abduction, which in the case of the children of Sierra Leone was the original crime and is in itself a crime under common article 3 of the Geneva Conventions; (b) forced recruitment in the most general sense — administrative formalities, obviously, notwithstanding; and (c) transformation of the child into, and its use as, among other degrading uses, a “child-combatant”.”

⁹ Report of the Secretary-General, draft Statute of the Special Court for Sierra Leone, article 4(c).

¹⁰ Article 11, Rome Statute.

¹¹ International law has departed from the doctrine of substantive justice and accepted the doctrine of strict legality. This doctrine is entrenched in article 22 of the Rome Statute, and is also accepted by the SCSL, ICTY and ICTR. With regard to the SCSL see *Prosecutor v Sam Hinga Norman, Decision on Preliminary Motion Based on Lack of Jurisdiction*, SCSL-2004-14-AR72E (31 May 2004) para 25 (*Child Recruitment* decision) and Secretary General’s Report, para 22. Furthermore see *Prosecutor v Duško Tadić*,

aims of the drafters of the Rome Statute were to codify existing law, they were not subject to any legal limitation on developing and creating new treaty crimes. Conversely, to comply with the principle of legality, the subject-matter jurisdiction of the SCSL had to be limited to deeds that were deemed criminal in customary or conventional international law binding on Sierra Leone at the time of its commission.

i. The Child Recruitment Decision

Sam Hinga Norman, a defendant in the *CDF* case, brought a preliminary motion before the Appeals Chamber of the SCSL.¹² He challenged the Court's material jurisdiction over the crime of "conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities" on four grounds: First, child recruitment was not a crime under customary law at the times relevant to the indictment.¹³ Second, this violates the principle of legality. Third, while Additional Protocol II to the Geneva Conventions and the Convention on the Rights of the Child (CRC) created obligations on states not to recruit children it did not criminalise such acts. Lastly, the Rome Statute is not a codification of customary international law.¹⁴

Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction IT-94-1-AR-72 (2 October 1995) paras 90-95 (*Tadić jurisdiction* judgement).

¹² *Ibid*, *Child Recruitment* decision.

¹³ The phrase "times relevant to the indictment" lacks clarity. However, the indictment used the same phrase. Thus at the earliest it refers to 30 November 1996.

¹⁴ *Child Recruitment* decision para 1.

The first time an international tribunal dealt with such a challenge to legality in relation to the subject-matter jurisdiction of the tribunal was in the *Hostages* case before the Nuremberg Tribunal.¹⁵ In that case the defendants argued that Control Council Order Number 10 was *ex post facto* law as it did not exist at the time of the alleged crimes. The Court found against the defendants and held that the alleged crimes were already crimes under international law, “some by conventional law and some by customary law”.¹⁶ Some may question whether this was indeed true at that time, nevertheless the Tribunal clearly deemed itself bound by the principle of legality.

In *Prosecutor v Sam Hinga Norman, Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment decision)*, the Court delivered a controversial three to one majority decision finding against the defendants.¹⁷ The Court held that the crime as formulated in article 4(c) had already entailed criminal responsibility as a customary norm by 30 November 1996, and that the principle of legality would therefore not be

¹⁵ *Trial of Wilhelm List and Others* Case No 47 United Nations War Crimes Commission. Law Reports of Trials of War Criminals. Volume VIII (1949) (*Hostages* case) para 634-635.

¹⁶ *Ibid.*

¹⁷ For a commentary in support of the majority decision see generally Smith, A. ‘Child Recruitment and the Special Court for Sierra Leone’ 2 *J. Int’l Crim. Just.* 1141 (2004), where this author argues: “given this preponderance of evidence demonstrating the existence of state practice and *opinio juris*, there can be little doubt that the majority decision was correct in holding that the conscription, enlistment and use in hostilities of children under the age of 15 attracted individual criminal responsibility as at November 1996”. However, Smith fails to draw a distinction between establishing the existence of a norm of customary international law, and whether such a norm entails criminal responsibility.

violated.¹⁸ This judgement was based on an unconvincing exposé of international and municipal legal measures prohibiting the use and recruitment of child soldiers. There are particular aspects to the judgement that are unsatisfactory. First, in finding that the prohibition of the use and recruitment of child soldiers has crystallised into a norm of customary international law, the Court never compared the proscriptive content of article 4(c) with the proscriptive content of the prohibition in customary law, as supported by state practice and *opinio juris*. Second, the Court erred in its approach to determine whether a customary norm entails individual criminal responsibility in international law. Third, the Court largely confused the existence of a customary norm criminalizing child soldier use and recruitment with the principles of legality and specificity. These points of critique are further discussed below, given their relation to one another; the second and third points are discussed together.

The Proscriptive Content of the Relevant Customary Crime

In a strong and convincing dissent Judge Robertson closely assessed the content of the various provisions that formed the basis of the customary norm. He concluded that the more limited crime as initially formulated by the Secretary-General had crystallised under customary international law

¹⁸ Article 1(1), Statute of the SCSL.

by 30 November 1996, but not the more expansive crime as contained in article 4(c).¹⁹

As previously stated, the formulation of the crime as found under the Rome Statute was imported into the Statute of the SCSL. The Rome Statute was the first legal instrument of any kind to have prohibited, not to mention criminalized, the enlistment of children instead of their recruitment. The text of the Rome Statute was adopted on 17 July 1998 and the Statute came into force on 1 July 2002. Even though the Statute of the SCSL was drafted after the Rome Statute, since this Statute has retrospective effect, it was the first instrument with legal force to prohibit and criminalize the enlistment of children instead of merely their recruitment. Throughout this Chapter much attention is paid to the fact that enlistment as opposed to recruitment is criminalized in the Statute of the SCSL. The reason for this is that enlistment is a broader concept than recruitment.²⁰

The temporal jurisdiction of the SCSL commenced on 30 November 1996, and although no express end date is provided, the civil war ended on 18 January 2002.²¹ Even though the Rome Statute was intended to contain customary international law crimes only, during 2000 Bassiouni, the Chairman of the Drafting Committee for the Diplomatic Conference on

¹⁹ *Child Recruitment* case, Judge Robertson's dissent para 4.

²⁰ See Chapter 3.

²¹ This date is also supported by the UN Secretary-General. See Secretary-General's Report, para 27.

the Establishment of an International Criminal Court, stated that article 8(2)(e)(vii) of the Rome Statute was “progressive”.²² Scharf, the US Representative at the Rome Conference stated during the conference that “the use of children under the age of 15 years in hostilities was not currently a crime under customary international law and was another area of legislative action outside the purview of the Conference”.²³ The commencement of the temporal jurisdiction of the SCSL thus predates the adoption of the Rome Statute by almost two years; the *de facto* end date of its temporal jurisdiction also pre-dates the coming into force of the Rome Statute. The Court made an error of law in failing to take account of the proscriptive content of the relevant customary norm at the times relevant to the indictment.

The question remains what the effect would have been, should the Court have found, as Judge Robertson did, that a customary norm had crystallised by 30 November 1996, but that its proscriptive content fell short of the formulation in article 4(c). There are two feasible options. The Court may find that article 4(c) forms part of its subject-matter jurisdiction, but to an extent limited to the proscriptive content of the customary norm, as it existed on 30 November 1996.²⁴ Alternatively, the Court may find

²² Bassiouni, MC. ‘The Normative Framework of International Humanitarian Law: Overlaps, Gaps and Ambiguities’ 75 *Int’l L. Stud. Ser. US Naval War Col.* (2000) 3, 20.

²³ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Committee of the Whole, ‘Summary Record of the 4th Meeting’, A/CONF.183/C.1/SR.4 (20 November 1998) para 54.

²⁴ The Court may also identify specific dates relevant to concrete cases of child enlistment, conscription or use and determine what the proscriptive content of the norm was on that date.

that it lacks the competence to prosecute individuals under article 4(c) altogether. I am of the view that the second option will be correct in law, as the first will lead to judges exercising powers beyond their mandate. Such a finding would have effectively barred the Court from prosecuting individuals for the child soldier crime, which would have had detrimental consequences for the Court, as well as the movement for the prevention of child soldiers. However, this could have been avoided by exercising better judgement at the time of the drafting and adoption of the Statute.

As I argued in Chapter 4, the content of customary international law bears no direct link to treaty law, but is rather dependent on state practice and *opinio juris* – which is often influenced by treaty norms. As such, conventional law plays an indirect role in formulating the content of customary international law.²⁵ Theoretically, state practice and *opinio juris* may have supported the existence of a customary norm materially the same as article 4(c), however, this was never argued by the Court.

Differentiating Between the Existence of a Criminal Norm and the Principles of Legality and Specificity

All war crimes emanate from IHL; however, all violations of IHL norms do not imply criminal responsibility. Thus the mere existence of a customary IHL norm prohibiting the enlistment, conscription or use of child soldiers does not mean that such conduct necessarily entail criminal

²⁵ See Chapter 3.

responsibility. The questions whether the violation of an IHL norm entails criminal responsibility and whether the principle of legality is complied with are closely related, but are not the same. International law has developed rules that dictate the requisites for a norm that did not traditionally entail criminal responsibility to become one that does entail such responsibility. The principle of legality does not concern itself with such development of the law, instead it is a more technical rule that safeguards the rule of law values inherent in criminal law.²⁶ To illustrate the difference between these inter-related rules consider the following: it is possible for a tribunal to find that a particular rule did indeed entail criminal responsibility at a given time, but that there is no way in which a defendant could have reasonably been aware of this.²⁷ As such, the principle of legality would be violated should the person be prosecuted.

No international instruments in force during the temporal jurisdiction of the SCSL contained a prohibition of child soldiering that expressly criminalised the conduct contained in article 4(c). After finding that the enlistment, conscription or use of child soldiers formed part of customary law, the SCSL nevertheless had to determine whether such conduct

²⁶ Van Schaack, B. 'The Principle of Legality in International Criminal Law: Legality & International Criminal Law' 103 *Am. Soc'y Int'l L. Proc.* (2009) 101.

²⁷ I am not arguing that legality is dependent on the subjective knowledge of a particular defendant. The example relates to any defendant within the territorial and temporal jurisdiction relevant to the case at hand.

could result in criminal responsibility. For this purpose the Court relied on the following formulation provided in the *Tadić Jurisdiction (Tadić)* case:²⁸

The following requirements must be met for an offence to be subject to prosecution before the International Tribunal under article 3 [of the ICTY Statute]:

- (i) The violation must constitute an infringement of a rule of international humanitarian law;
- (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met;
- (iii) the violation must be “serious”, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim [...];
- (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.²⁹

This formulation was used in *Tadić* to lay down requirements that “must be met for an offence to be subject to prosecution”,³⁰ which is not the same as determining when individual criminal responsibility attaches to a breach of IHL – as it was used in the *Child Recruitment* decision. Indeed, the fourth requirement specifically asks the question whether individual criminal responsibility attaches to a person who breaches the norm. It is a circular argument at best to state that one holds certain conduct to be criminal in terms of a test in which one of the questions are whether the conduct is criminal.

In *Tadić* the Court does in fact go on to specifically contemplate the fourth requirement.³¹ In so doing, the Court refers to various authorities supporting its ultimate finding that violations of common article 3 to the

²⁸ *Child Recruitment* decision para 26.

²⁹ *Tadić jurisdiction* judgement, paras 90-95.

³⁰ *Ibid* para 94.

³¹ *Ibid* para 128.

Geneva Conventions do entail individual criminal responsibility. This includes various pieces of national legislation; municipal prosecutions for such violations; agreements between parties to the conflict; and Security Council Resolutions.³² Most tellingly, the Court held:

[...] as it applies to offences committed in the former Yugoslavia, the notion that serious violations of international humanitarian law governing internal armed conflict entail individual criminal responsibility is also fully warranted from the point of view of substantive justice and equality ... such violations were punishable under the Criminal Code of the Socialist Federal Republic of Yugoslavia and the law implementing the two Additional Protocols of 1977. The same violations have been made punishable in the Republic of Bosnia and Herzegovina by virtue of the decree-law of 11 April 1992. Nationals of the former Yugoslavia as well as, at present, those of Bosnia-Herzegovina were therefore aware, or should have been aware, that they were amenable to the jurisdiction of their national criminal courts in cases of violations of international humanitarian law.³³

It is important to keep in mind that the defendant did not raise legality as a bar to the exercise of subject-matter jurisdiction by the ICTY.³⁴ Given the importance of the principle of legality, the Court did address this concept briefly, but only after it had concluded that the relevant IHL norms do entail criminal responsibility.³⁵

The present case is clearly and materially distinguishable from the *Tadić* decision in that the enlistment of children under fifteen was not criminalized in Sierra Leone at the relevant times.³⁶ Furthermore, where the *Tadić* Appeals Chamber had an abundance of materials in the nature of those referred to above to rely on, such material was lacking in the

³² *Ibid* para 128-136.

³³ *Ibid* para 135. The conclusion reached in the *Tadić* case has been reaffirmed by the ICTY in *Prosecutor v Blaškić* IT-95-14-A (2004), para 176 (*Blaškić* judgement).

³⁴ *Ibid* para 139.

³⁵ *Ibid* para 133-143.

³⁶ *Ibid* para 133.

Child Recruitment decision.³⁷ The judgment for the majority did go to some lengths to highlight municipal legislation and Security Council Resolutions relevant to child soldiering. However, in most cases these sources either post-dated the temporality of the defendant's alleged criminal conduct, or occurred in very close proximity to such conduct.

At the commencement of this section I highlighted three points of critique against the judgement in the *Child Recruitment* decision. I have since substantiated my arguments that the proscriptive content of article 4(c) did not accord with that of the proscriptive content of the prohibition in customary law; and that the Court erred in its approach to determine whether a customary norm entails criminal responsibility. If these arguments are accepted, the principle of legality would be violated by implication, as the conduct relevant to article 4(c) would not be deemed criminal.³⁸ However, for the sake of completeness the Court's approach to the principle of legality is discussed below.

After it is established that the prohibited conduct entails individual criminal responsibility, the concrete case before the court must still pass scrutiny

³⁷ Cassese, A. *International Criminal Law* (2008) 85 states that in assessing whether a breach of IHL is a war crime one is entitled to examine "military manuals; national legislation of states belonging to the major legal systems of the world; or, if these elements are lacking, the general principles of criminal justice common to nations of the world, as set out in international instruments, acts, resolutions and the like, and the legislation and judicial practice of the state to which the accused belongs or on who's territory the crime has allegedly been committed".

³⁸ This not to say that the questions whether a criminal norm exists and whether legality is complied with are the same. While it is true that if a criminal norm does not exist, the principle of legality will be violated by implication, the reverse does not hold true.

under the legality principle. If the principle of legality is absolute it would imply that in a case such as *Tadić* where a norm was for the first time regarded as entailing criminal responsibility, the principle of legality will be violated. However, the law is a dynamic, living body of rules capable of development; this is particularly true in the case of common law and customary international law. Greenwood contends that the legality principle will not necessarily be violated, as “that principle does not preclude all development of criminal law through the jurisprudence of courts and tribunals, so long as those developments do not criminalise conduct which, at the time it was committed, could reasonably have been regarded as legitimate”.³⁹ Greenwood goes on to argue that the principle of legality will not be violated where the relevant conduct is universally considered as wrongful and doubt only exists as to its wrongfulness under a particular system of law. He specifically refers to *Regina v R*, a House of Lords decision, where it was found that a husband can be convicted of raping his own wife.⁴⁰

The Court further supported its finding that the principle of legality had not been breached, as a prohibition of child enlistment, conscription or use “...is found in the national legislation of the states which includes criminal sanctions as a measure of enforcement”.⁴¹ It was never pertinently argued in the judgement that any state criminalised enlistment of children

³⁹ Greenwood, C. ‘International Humanitarian Law and the *Tadić* Case’ 7 *EJIL* (1996) 265, 281.

⁴⁰ *Ibid*, note 58; *Regina v R* (1992) 1 AC 599 (House of Lords).

⁴¹ *Ibid* para 42.

as opposed to recruitment, conscription or use,⁴² not to mention such criminalisation in Sierra Leone specifically. Significantly, not a single legal provision in effect prior to 30 November 1996 prohibited the enlistment of children under fifteen. The Court went on to say that:

[...] Finally, one can determine the period during which the majority of states criminalised the prohibited behaviour, which in this case, as demonstrated, was the period between 1994 and 1996. It took a further six years for the recruitment of children between the ages of 15 and 18 to be included in treaty law as individually punishable behaviour. The development process concerning the recruitment of child soldiers, taking into account the definition of children as persons under the age of 18, culminated in the codification of the matter in the CRC Optional Protocol II.⁴³

It is patently incorrect that “the majority of states” criminalised the “prohibited behaviour”, which includes child enlistment, between 1994 and 1996.⁴⁴

The Court dealt with the principle of specificity in a cursory manner. This principle is directly related to the principle of legality. Where the latter holds that a crime must exist at the time of commission before someone can be prosecuted for the deed, the former determines the degree to which this pre-existing crime must be clear and defined. The Court argued that the Elements of Crimes (hereinafter EOC) formulated with regard to the Rome Statute together with the legislation of the world

⁴² As Judge Robertson stated in his dissent in the *Child Recruitment* decision at para 40, footnote 51, UNICEF was only able to list 5 states which had a specific criminal law against ‘child recruitment’ prior to July 1998. These states are Columbia, Argentina, Spain, Ireland and Norway. This does not necessarily mean that these states criminalised ‘enlistment’, as opposed to recruitment or conscription.

⁴³ *Child Recruitment* decision para 50.

⁴⁴ See note 42 above.

community specified the elements of the crime.⁴⁵ Firstly, there was not a single state that formally criminalised the enlistment of children younger than fifteen years old as opposed to conscription, recruitment or use prior to 30 November 1996. Furthermore, the EOC of the Rome Statute was only adopted at the first session of the Assembly of States Parties to the Rome Statute during August 2002, after the temporal jurisdiction of the SCSL had ended.

The principle of legality is not absolute. Throughout the history of ICL, tribunals have interpreted this principle rather expansively;⁴⁶ perhaps too expansively. It is nevertheless important that the Court in the *Child Recruitment* decision deemed the doctrine of strict legality as binding upon it.⁴⁷ It is submitted that the enlistment of a child under the age of fifteen years for a non-combat related activity could “reasonably have been regarded as legitimate” at the time of commission of the deed. Thus, the Court’s finding in this regard remains questionable.

The *Child Recruitment* decision cleared the way for all prosecutions before the SCSL where the defendant was charged under article 4(c), which indeed includes every defendant indicted by the SCSL. The criticism levelled at this judgement does not taint any future prosecutions before the ICC. First, the ICC has prospective jurisdiction only. Second, it

⁴⁵ Elements of Crimes of the Rome Statute of the International Criminal Court (2002) ICC-ASP/1/3.

⁴⁶ Van Schaack, note 26 above, 101-104. .

⁴⁷ *Child Recruitment* decision para 25.

is much more likely that the enlistment, conscription or use of children younger than fifteen had crystallised into a criminal norm of customary international law by 1 July 2002 rather than by 30 November 1996.

2. 'USING, CONSCRIPTING OR ENLISTING' CHILDREN IN TERMS OF THE POSITIVE LAW

The jurisprudence of the SCSL was ground-breaking in as far as bringing to account those responsible for the enlistment, conscription and use of children is concerned. Nevertheless, its value for future prosecutions in the context of the ICC should not be overstated. Although the crime proscribed by the SCSL is a verbatim restatement of the Rome Statute, there are various and significant differences between the approaches of the SCSL Statute and the Rome Statute to general principles of ICL. What is more, by definition the SCSL jurisprudence does not take direct account of the different features of child soldier prosecutions in the context of international and non-international armed conflict. This section is focused on contemporary ICL and its prospects in addressing child soldiering. The Rome Statute and ICC thus forms the basis of discussion; the SCSL and its jurisprudence is drawn on only in so far as it contributes to an understanding of the contemporary crime proscribing child soldiering and its scope of prosecution.

The EOC of article 8(2)(b)(xxvi) of the Rome Statute, proscribing the child soldier crime in international armed conflict, are:

1. The perpetrator conscripted or enlisted one or more persons into the national armed forces or used one or more persons to participate actively in hostilities.
2. Such person or persons were under the age of 15 years.
3. The perpetrator knew or should have known that such person or persons were under the age of 15 years.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Similarly, the EOC of article 8(2)(e)(vii) of the Rome Statute, proscribing the child soldier crime in non-international armed conflict, are:

1. The perpetrator conscripted or enlisted one or more persons into an armed force or group or used one or more persons to participate actively in hostilities.
2. Such person or persons were under the age of 15 years.
3. The perpetrator knew or should have known that such person or persons were under the age of 15 years.
4. The conduct took place in the context of and was associated with an armed conflict not of an international character.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

The only difference between the elements of the child soldier crime in IAC and NIAC is found in the first element and the fourth element. In the context of IAC the first element provides “into the national armed forces”, whereas in the context of NIAC the first element provides “into an armed force or group”. Similarly, the fourth element uses the language “an armed conflict not of an international character” in the context of NIAC, and “an international armed conflict” in the context of IAC. These elements account for the *chapeau* requirements, objective requirements (*actus reus*) and the subjective requirements (*mens rea*) of the child soldier crime, the remainder of this section is divided accordingly.

i. *Chapeau* Requirements

Chapeau requirements are those requirements that must be met in order to charge a specific class of international law crimes. The concept of 'war crimes' as a distinct genus of international crimes is premised on the basis that the offence must be committed in the context of either an international or non-international armed conflict.⁴⁸ The *chapeau* requirements of war crimes are formulated under various statutes, most relevantly the Rome Statute. The Statute of the SCSL provides very little in this regard. The *RUF* case has provided some needed clarity on this issue. The Court held that there are two relevant *chapeau* requirements: the existence of an armed conflict at the time of the alleged offence; and the existence of a *nexus* between the alleged offence and the armed conflict.⁴⁹

The existence of such a *nexus* is a question of fact, and is to be determined on a case-by-case basis.⁵⁰ However, the Sierra Leone conflict occurred within the context of non-international armed conflict, and the Court's finding with regard to the relevant *chapeau* requirements is supported by the findings of the ICTR, also in the context of non-

⁴⁸ Green, LC. *The Contemporary Law of Armed Conflict* (2000) 18-19.

⁴⁹ *Prosecutor v Sesay, Kallon and Gbao*, Trial Chamber 1, SCSL-04-15-T (2 March 2009) (*RUF* Trial judgement) para 107. See also *Prosecutor v Fofana and Kondewa* SCSL-04-14-T (2 August 2007) para 138 (*CDF* Trial judgement).

⁵⁰ *Ibid.*

international armed conflict.⁵¹ In the *Tadić Appeals* decision the ICTY held that, in the context of international armed conflict “it is sufficient that the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict”.⁵² The EOC sheds some light on the position before the ICC, without materially differentiating between international and non-international armed conflict:

[...]

4. The conduct took place in the context of and was associated with an international armed conflict [armed conflict not of an international character].

5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.⁵³

No legal evaluation on the part of the perpetrator as to the existence of an armed conflict or its character (as international or non-international) is required.⁵⁴ A perpetrator is also not required to be aware of the facts that established the character of the conflict.⁵⁵ The ICC has held that the Rome Statute criminalizes the same conduct regardless of the characterization of the conflict as international or internal;⁵⁶ giving further credence to the movement to abolish this distinction.⁵⁷ With regard to the existence and *nexus* between the armed conflict and the alleged crime, it was stated in the *Lubanga Confirmation of Charges* decision that:

⁵¹ *Prosecutor v Kayhishema and Ruzindana* ICTR-95-1-T (1999) para 186-188; and *Prosecutor v Rutaganda* ICTR-96-3-T (1999) para 102.

⁵² *Tadić Jurisdiction* judgement para 70, see also *Prosecutor v Delalić, Mucić, Delić and Landžo* IT-96-21-T (1998) para 69-70 (*Čelebići* Trial judgement).

⁵³ EOC, article 8(2)(b)(xxvi) and 8(2)(e)(vii).

⁵⁴ EOC, introduction to article 8.

⁵⁵ *Ibid.*

⁵⁶ *Prosecutor v Lubanga Confirmation of Charges* ICC-01/04-01/06 (2007) para 204.

⁵⁷ Cassese *International Criminal Law*; note 37 above; also see Bassiouni ‘The Normative Framework of International Humanitarian Law’, note 22 above.

[...] chamber follows the jurisprudence of the ICTY, which requires the conduct to have been closely related to the hostilities occurring in any part of the territories controlled by the parties to the conflict. The armed conflict need not be considered the ultimate reason for the conduct and the conduct need not have taken place in the midst of battle. Nonetheless, the armed conflict must play a substantial role in the perpetrator's decision, in his or her ability to commit the crime or in the manner in which the conduct was ultimately committed.⁵⁸

Without disputing the progressive aspects of the Rome Statute, in certain respects the Rome Statute is more restrictive than customary international law.⁵⁹ The ICC has jurisdiction over war crimes “*in particular* when committed as part of a plan or policy or as part of a large-scale commission of such crimes” (own emphasis).⁶⁰ This provision was entered as a compromise as some states were in favour of a ‘high threshold’ that would have seen the words “in particular” replaced with “...only when committed as part of...”.⁶¹ This provision does not provide elements or prerequisites to the exercise of jurisdiction by the Court, but instead provides guidance to the prosecutor in his enquiry whether to launch an investigation into an alleged war crime.⁶²

⁵⁸ *Lubanga Confirmation of Charges* decision para 287. See also *Prosecutor v Katanga and Ngudjolo Confirmation of Charges* ICC-01/04-01/07 (2008) para 247 (*Katanga and Ngudjolo Confirmation of Charges decision*).

⁵⁹ Cassese, note 37 above, 94.

⁶⁰ Article 8(1), Rome Statute.

⁶¹ Dormann, K. ‘War Crimes under the Rome Statute of the International Criminal Court, with a Special Focus on the Negotiations on the Elements of Crimes’ 7 *Max Planck Y.B. U.N. L.* (2003) 343, 349.

⁶² *Ibid.* Kittichaisaree, K. *International Criminal Law* (2001), 133 agrees that this provision does not add a further element to war crimes, but states that it is a jurisdictional threshold. See also Von Hebel, H. & Robinson, D. ‘Crimes within the Jurisdiction of the Court’ in Lee, RS. *The International Criminal Court: The Making of the Rome Statute – Issues, Negotiations, Results* (1999) 79, 107-108.

Within the context of international armed conflict, child soldier enlistment, conscription and use is criminalised and categorized as “other serious violations of the laws and customs applicable in international armed conflict, *within the established framework of international law...*” (emphasis added).⁶³ The equivalent provision in NIAC is the same except “international armed conflict” is replaced by “armed conflicts not of an international character”.⁶⁴ This requirement is repeated in the EOC as well, where it is said that “the elements for war crimes ... shall be *interpreted* within the established framework of the international law of armed conflict...” (emphasis added).⁶⁵ Article 8, as a whole, is categorized according to the nature of the conflict: international or non- international, and according to the applicable law, either conventional or customary.⁶⁶ Bassiouni is of the view that sub-articles 2(b) and 2(e) incorporate “what the drafters believed to be customary law”.⁶⁷ However, he points out that these sections also reflect existing conventional law.⁶⁸ Elsewhere in the same work, Bassiouni contends that the child soldiering provisions under article 8(2)(e)(vii) is “progressive”, indicating that this provision did not form part of customary international law.⁶⁹

⁶³ Article 8(2)(b), Rome Statute.

⁶⁴ *Ibid*, article 8(2)(e).

⁶⁵ EOC, introduction to article 8.

⁶⁶ Bassiouni, MC. ‘The Normative Framework of International Humanitarian Law’ note 22, 21.

⁶⁷ *Ibid*; see also Von Hebel & Robinson, note 62 above, 104.

⁶⁸ Bassiouni, *ibid*.

⁶⁹ *Ibid*, 20 and United Nations Diplomatic Conference, note 23 above, para 54.

Cassese's view on the meaning of the term "within the established framework of the international law" is that the Court has a mandatory duty to determine contemporary customary international law each time it hears a charge under article 8(2)(b) or (e).⁷⁰ Such a charge can only be sustained if contemporary international law recognizes it. Even though the crimes listed in these sub-articles were deemed to be of a customary nature by the drafters at the time of drafting,⁷¹ Cassese's position is sustainable given that the EOC states that war crimes "...shall be *interpreted* within the established framework of international law...". The question ultimately becomes whether the contemporary status of customary international law limits or expands the Court's subject-matter jurisdiction.⁷² I share Cassese's view: a charge should only be sustained if that crime is recognized as such under customary international law. Should the Rome Statute be more conservative than customary law on a particular matter, the Rome Statute definition and elements should be applied. Effectively, this interpretation will be *in favorem libertatis*, although this is not necessarily the rationale for it.

⁷⁰ For the continuous evolution of customary rules of IHL see Meron, T. *War Crimes Law Comes of Age* (1998) 262-277.

⁷¹ Bassiouni, note 22 above, 21.

⁷² Article 21 of the Rome Statute states the applicable law thus:

1. The Court shall apply:

(a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;

(b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;

[...]

ii. Objective Requirements

In IAC the EOC provides “the perpetrator conscripted or enlisted one or more persons into the national armed forces or used one or more persons to participate actively in hostilities”.⁷³ Similarly, in NIAC the EOC provides “the perpetrator conscripted or enlisted one or more persons into an armed force or group or used one or more persons to participate actively in hostilities”.⁷⁴ Regardless of the categorization of the armed conflict, the EOC also provides “such person or persons were under the age of 15 years”.

The *actus reus* element of the use, conscription or enlistment of children can be committed in three different ways.⁷⁵ Firstly, enlistment is the least severe form of the crime; this entails the acceptance and enrolment of a person younger than fifteen when she/he volunteers. Secondly, conscription entails a degree of compulsion on the part of the recruiter. Finally, use is predicated on active participation in hostilities.⁷⁶ All three incarnations of this crime are continuous crimes,⁷⁷ as such, the commission of the crime occurs for as long as the child remains enlisted, conscripted or used for active participation in hostilities; or until the child

⁷³ Element 1, EOC, article 8(2)(b)(xxvi).

⁷⁴ *Ibid*, article 8(2)(e)(vii).

⁷⁵ *RUF* Trial judgement, note 49 above, para 249: “Consistent with established jurisprudence, the Chamber adopts the definition of “committing” a crime as “physically perpetrating a crime or engendering a culpable omission in violation of criminal law”. The *actus reus* for committing a crime consists of the proscribed act of participation, physical or otherwise directly, in a crime provided for in the Statute, through positive acts or culpable omissions, whether individually or jointly with others.”

⁷⁶ *Child Recruitment* case, Judge Robertson’s dissent para 5

⁷⁷ *Lubanga Confirmation of Charges* decision, note 56 above, para 248.

is no longer younger than fifteen. Furthermore, each of the three incarnations of the crime is a complete crime.

The contribution of the ICC to the development and understanding of child soldering in the ICL context is limited to the confirmation of charges decisions in the *Lubanga* case and the *Katanga and Ngudjolo* case.⁷⁸ Lubanga is charged with the enlistment, conscription and use of children, whereas *Katanga and Ngudjolo* are charged only with the use of children.⁷⁹

The *actus reus* of the crime of enlistment of children under fifteen has been a subject of confusion, perhaps because it is the most novel aspect to the formulation of the crime.⁸⁰ Schabas states that the replacement of the word 'recruiting' in an earlier draft of the Rome Statute with 'conscripting or enlisting' "suggests something more passive, such as putting the name of a person on a list".⁸¹ The Secretary-General of the United Nations adopted the same approach in his report to the Security Council on the establishment of the SCSL.⁸² The SCSL was the first Court to pronounce on this matter. Trial Chamber 1 and Trial Chamber 2 heard the *CDF* and *AFRC* matters (respectively) concurrently.⁸³ Trial Chamber 1 found that enlistment encompasses both conscription and

⁷⁸ *Ibid*; and *Katanga and Ngudjolo Confirmation of Charges* decision.

⁷⁹ *Lubanga Warrant of Arrest*; *Katanga and Ngudjolo Warrant of Arrest*.

⁸⁰ See the discussion of the term 'recruitment' in Chapter 3.

⁸¹ Schabas, W. *An Introduction to the International Criminal Court* (2001), 50.

⁸² Secretary-General's Report, note 7 above para 17-18.

⁸³ *Prosecutor v Brima, Kamara and Kanu* SCSL-04-16-T (20 June 2007) para 735 (*AFRC* Trial Judgement).

enlistment.⁸⁴ On the other hand, Trial Chamber 2 held that enlistment means “accepting and enrolling individuals when they volunteer to join an armed force or group”.⁸⁵ Trial Chamber 1’s interpretation was suspect from the beginning, as it renders the word ‘conscription’ superfluous. This issue formed one of the grounds of appeal in the *CDF* case. The Appeals Chamber correctly endorsed Trial Chamber 2’s finding in the *AFRC* case.⁸⁶

On the question of the role of the accused in the enlistment of children, the Appeals Chamber in the *CDF* case held “that for enlistment there must be a *nexus* between the act of the accused and the child joining the armed force or group... Whether such a *nexus* exists is a question of fact which must be determined on a case-by-case basis”.⁸⁷ Furthermore, in the context of a non-state armed group enlistment cannot be narrowly construed as a formal process. It should rather be regarded in a broad sense so as to include any conduct that accepts a child as a part of the militia, which includes making him or her participate in military operations.⁸⁸ The ICC has also held that enlistment is a “voluntary act”, whereas conscription is “forcible recruitment”, which means that consent can never be a defence against a charge of enlistment.⁸⁹

⁸⁴ *CDF* Trial judgement para 192.

⁸⁵ *AFRC* Trial judgement para 733.

⁸⁶ *Prosecutor v Fofana and Kondewa* SCSL-04-14-A (28 May 2008) para 140-144 (*CDF* Appeal judgement).

⁸⁷ *Ibid* para 141.

⁸⁸ *Ibid*, para 144; *RUF* Trial judgement para 185.

⁸⁹ *Lubanga Confirmation of Charges* Judgement para 247. See also *Child Recruitment* case, Judge Robertson’s dissent para 5.

Giving meaning to the 'conscription' of children under fifteen is the least contentious in law of the three incarnations of the child soldier crime. This crime requires an element of force or compulsion to be applied by the recruiter to distinguish it from enlistment.⁹⁰ In some instances such compulsion would be by the force of law.⁹¹ Conscription is usually associated with citizenship duties where governments require their citizens to serve in the governmental armed forces on a mandatory basis. This occurs within many western democracies such as Switzerland, even when not at war. Conscription in the context of the child soldier crime is broader than that, as conscription can occur in the context of an armed group distinct from the state.⁹² In the *AFRC* case it was stated that 'conscription' encompasses coercive acts such as abductions and forced recruitment.⁹³ In distinguishing between enlistment and conscription, which turns on the degree of participation of the child in becoming associated with an armed group or force, the SCSL has consistently argued that this distinction is "contrived" as the ability of a child younger than fifteen to express free will and volition in a conflict setting is a questionable endeavour.⁹⁴ This accords with Coomaraswamy's view that

⁹⁰ *Lubanga* Confirmation of Charges judgement para 246; *Child Recruitment* case, Judge Robertson's dissent para 5.

⁹¹ *Child Recruitment* case, *ibid*; *AFRC* Trial judgement para 734.

⁹² *Ibid*, *AFRC*.

⁹³ *Ibid*; *RUF* Trial judgement para 186.

⁹⁴ *RUF* Trial judgement para 187; *CDF* Trial judgement para 192.

children do not have a “death concept”, however, she places the age threshold at younger than eighteen.⁹⁵

The phrase ‘use of one or more persons to participate actively in hostilities’ raises a number of issues that require analysis. First, can a child be so used in hostilities without having been either conscripted or enlisted? Added to this is the question whether a charge of enlistment or conscription can be sustained together with a charge of use of a child soldier; as this may violate the rule against duplicity.

As it has been held that enlistment should be broadly construed so as to include any conduct that accepts a child as a part of the militia, it is clear that either enlistment or conscription will always occur before the use of the child for participation in active hostilities.⁹⁶ In the *Blockburger* case the US Supreme Court set the test to determine whether a person can be charged with more than one crime where an act simultaneously breached various rules covering the same subject matter.⁹⁷ Such charges will be sustainable “only if each statutory provision involved has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not required by the

⁹⁵ I interviewed Ms Coomaraswamy on 7 February 2011 in New York City, USA. See Chapter 1.

⁹⁶ It is nevertheless theoretically possible for a child to engage in hostilities without forming part of an armed group and without an adult being responsible for using the child, for example, a child spontaneously going to arms.

⁹⁷ *Blockburger*, US, Supreme Court, 1932, 284 US, 299 US S.Ct. 180, 304. This test was endorsed by the ICTY in *Prosecutor v Kupreškić and others* IT-95-16 TC (14 January 2000) para 681 et seq; see also Mundis, D. ‘Blockburger Test’ in Cassese, A. (ed.) *The Oxford Companion to International Criminal Justice* (2009) 257-258.

other.”⁹⁸ Enlistment is a lesser crime than conscription, not an incomplete crime; the same is true of conscription *vis-à-vis* use. There is at least one distinct objective element that needs to be proven with regard to the use of child soldiers on the one hand and enlistment and conscription, on the other. It has to be shown that the child was used to participate actively in hostilities. It is thus submitted that a charge of both enlistment/conscription and use can be sustained against the same defendant with regard to the same victim.⁹⁹

One of the most contentious questions within IHL has long been what constitutes direct/active participation in hostilities. In Chapter 3 I discussed direct participation in hostilities in as far as it relates to IHL and IHRL. This section is focused on the parallel development of this concept within ICL.

I have already argued that ‘direct’ and ‘active’ participation in hostilities amount to the same standard.¹⁰⁰ While I maintain this point of view, on the same reasoning expressed in Chapter 3, there are developments within ICL that must be canvassed. The ICTR held, in the *Akayesu* case, that the wording is so similar that direct and active means the same in so

⁹⁸ *Čelebići* Trial judgement para 412.

⁹⁹ These crimes should be charged in separate counts in the indictment. See *CDF Appeals judgement* para 139, where it is stated that “these modes of recruiting children [enlistment; conscription and use] are distinct from each other and liability for one form does not necessarily preclude liability for the other”. See also *Lubanga Warrant of Arrest*.

¹⁰⁰ Chapter 3.

far as it qualifies the degree of participation in hostilities.¹⁰¹ The SCSL,¹⁰² the *Targeted Killings Case* and the ICRC guidance on direct participation in hostilities supports this view.¹⁰³ The Report of the Preparatory Committee on the Establishment of an International Criminal Court provided:

The words “using” and “participate” have been adopted in order to cover both *direct participation in combat* and also *active participation in military activities linked to combat* such as scouting, spying, sabotage and use of children as decoys, couriers or at military checkpoints. It would not cover activities clearly unrelated to the hostilities such as food deliveries to an airbase or the use of domestic staff in an officer’s accommodation. However, use of children in a direct support function such as acting as bearers to take supplies to the front line, or activities at the front line itself, would be included within the terminology.¹⁰⁴ (emphasis added)

Many commentators as well as the ICC itself have interpreted this to indicate that ‘direct’ and ‘active’ participation in hostilities present different standards. However, this interpretation is not sound. The words ‘direct’ and ‘active’ in this context are not used to qualify participation in hostilities, as is the case in the Rome Statute. Rather it qualifies “participation in combat” and “participation in military activities linked to combat”. Moreover, the quoted passage was not intended to define ‘direct’ and ‘active’, but rather ‘using’ and ‘participate’.

¹⁰¹ *Prosecutor v Akayesu* ICTR-96-4-T (1998) para 629. See also *Prosecutor v Semanza* ICTR-97-20-T (2003) para 365.

¹⁰² *CDF* Trial judgement para 131. See also *RUF* Trial judgement para 102.

¹⁰³ *Public Committee against Torture in Israel v Government of Israel et al* H.C.J. 769/02 (11 December 2005) para 30. Melzer, N. *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (2009), 43.

¹⁰⁴ Report of the Preparatory Committee on the Establishment of an International Criminal Court, A/CONF.183/2/Add.1 (14 April 1998) 21 note 12, cited in *CDF* Trial judgement para 193.

The ICC held in the *Lubanga Confirmation of Charges* decision that these standards are not the same:

“Active participation” in hostilities means not only direct participation in hostilities, combat in other words, but also covers active participation in combat-related activities such as scouting, spying, sabotage and the use of children as decoys, couriers or at military check-points.¹⁰⁵

The incorporation of the language of the Preparatory Committee’s report indicates that the Court endorsed the argument based on the report. Having interpreted active participation more broadly than direct participation, the question remains exactly how widely the Court will interpret this provision in concrete cases.

The ICC has held, in *obiter dictum*, that food deliveries to an airbase and working as domestic staff in the quarters of married officers does not meet the threshold of active participation.¹⁰⁶ On the other hand, it was held in *ratio decidendi*, that the guarding of military objectives and acting as bodyguards meet the threshold.¹⁰⁷ The SCSL has held that the “concept of hostilities encompasses not only combat operations but also military activities linked to combat such as the use of children at military checkpoints or as spies”.¹⁰⁸ Similar to the ICC, the SCSL has held that food finding missions and working as a domestic servant in officers’

¹⁰⁵ *Lubanga Confirmation of Charges* judgement para 261.

¹⁰⁶ *Ibid* para 262.

¹⁰⁷ *Ibid* para 263.

¹⁰⁸ *RUF* Trial judgement para 1720.

quarters do not amount to active participation in hostilities.¹⁰⁹ While acting as bodyguards; mounting ambushes; participation in armed patrols; committing crimes against civilians; guarding military objectives; and children acting as spies may all amount to active participation.¹¹⁰ However, it should be borne in mind that this is not a list that can blindly be followed, whether a specific case meets the threshold depends “on the particularities of each armed conflict and the *modus operandi* of the warring factions”.¹¹¹ Similar to the ICC, the SCSL held in the *AFRC* case that:

[...] the use of children to participate actively in hostilities is not limited to participation in combat. An armed force requires logistical support to maintain its operations. Any labour or support that gives effect to, or helps maintain, operations in a conflict constitutes active participation. Hence carrying loads for the fighting faction, finding and/or acquiring food, ammunition or equipment, acting as decoys, carrying messages, making trails or finding routes, manning checkpoints or acting as human shields are some examples of active participation as much as actual fighting and combat.¹¹²

Thus, in contrast to the *Lubanga Confirmation of Charges* decisions and the *RUF* case, it was held, in *obiter dictum*, that finding or acquiring food may amount to active participation in hostilities. In the *RUF* case the Court argued that children did not carry arms openly while on food finding missions, thus it did not amount to active participation.¹¹³ This again

¹⁰⁹ *Ibid* para 1743. However, in the *AFRC Trial* judgement para 737, it was stated, in *ratio decidendi*, that “finding and/or acquiring food” may amount to active participation.

¹¹⁰ *RUF Trial* judgement para 1714-1743.

¹¹¹ *Ibid* para 1720.

¹¹² *AFRC Trial* judgement para 737.

¹¹³ *RUF Trial* judgement para 1714-1743.

shows that the determination whether acting in a given capacity amounts to active participation needs to be made on a case-by-case basis.

Finally, within the context of international armed conflict the child soldier crime is formulated so as to criminalize the enlistment and conscription of children into “the national armed forces”. This formulation initially leads to uncertainty as to whether this crime can only be committed by the governmental forces of a state in the context of IAC. However, the ICC has held that this provision does not limit this crime to “governmental” armed forces.¹¹⁴ The rationale was firstly that the ICTY has construed the term “national” to refer not only to nationality as such, but also to belonging to the opposing forces in armed conflict.¹¹⁵ Secondly, to interpret “national” to mean “governmental” undermines the object and purpose of the Statute of the Court.¹¹⁶ Finally, Additional Protocol I provides an interpretive basis upon which to interpret “national armed forces” to include non-state groups with certain characteristics of a government.¹¹⁷

¹¹⁴ *Lubanga Confirmation of Charges* judgement para 280. See also Cottier, M. ‘Article 8(2)(b)(xxvi)’ in Triffterer, O. *Commentary on the Rome Statute of the International Criminal Court* (2008) para 232.

¹¹⁵ *Lubanga Confirmation of Charges* judgement, *ibid.* *Prosecutor v Delalić et al* IT-96-21-A Appeal Judgement (2001) para 98. In *Delalić*, the ICTY’s finding was made in the context of article 4(1) of Geneva Convention IV.

¹¹⁶ *Lubanga Confirmation of Charges* judgement para 281.

¹¹⁷ Article 43 of Protocol I Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, adopted 8 June 1977 (entered into force 7 December 1978) 1125 UNTS 17512. See also *ibid* paras 272-285; *Katanga and Ngudjolo Confirmation of Charges* decision para 249.

iii. Subjective Requirements

Mens rea denotes “a state of mind, a psychological element required by the legal order for the conduct to be blameworthy and consequently punishable”.¹¹⁸ The Rome Statute contains a provision devoted exclusively to *mens rea*, and regulates *mens rea* in relation to all crimes over which the ICC has jurisdiction:

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
2. For the purposes of this article, a person has intent where:
 - (a) In relation to conduct, that person means to engage in the conduct;
 - (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.¹¹⁹

The main question is what degree of *mens rea* is required to sustain a conviction before the ICC. In essence fault is comprised of *dolus* (intent) and *culpa* (negligence). Intent is divided into *dolus directus*,¹²⁰ *dolus indirectus*¹²¹ and *dolus eventualis*.¹²² *Culpa* comprises of negligence and gross negligence (*culpa lata*).

¹¹⁸ Cassese, note 37 above, 53.

¹¹⁹ Article 30, Rome Statute.

¹²⁰ The perpetrator foresees and desires the consequences of her/his actions.

¹²¹ The perpetrator foresees secondary consequences that will set in as a certainty in consequence to her/his actions, although these consequences are not desired she/he nevertheless committed the act and those consequences do set in.

¹²² The perpetrator foresees the possibility of harmful consequences, and reconciles her/himself with the possibility of such consequences and nevertheless proceeds with the relevant activity. For an extensive discussion of these definitions see Van der Vyver, JD. 'The International Criminal Court and the Concept of *Mens Rea* in International Criminal Law' 12 *U. Miami Int'l & Comp. L. Rev.* 57 (2004) 62-63.

Cassese is of the view that international criminal law generally requires intent in the strict sense;¹²³ but recognizes lesser forms of *mens rea* in limited cases, e.g. *dolus eventualis* is inherent in command responsibility and common purpose/joint criminal enterprise.¹²⁴ Cassese draws a distinction between ‘intent’ and ‘*dolus eventualis*’, he has further criticised the fault requirement as included in the Rome Statute for requiring a stricter form of *dolus* than *dolus eventualis* (he would argue that “intent” (*dolus directus*) is required and “recklessness” (which he seems to equate to *dolus eventualis*) is insufficient).¹²⁵ There is a tendency among ICL commentators to use the terms ‘*dolus eventualis*’ and ‘recklessness’ as synonymous, when there is in fact a technical difference between the terms.¹²⁶ Van der Vyver argues that the Rome Statute is sound in this regard as the ICC concerns itself with “the most serious crimes of concern to the international community as a whole”.¹²⁷ Considering that the determination of the seriousness of a crime does not lie with *actus reus* alone, but includes *mens rea*, Van der Vyver’s position is to be preferred.

The ICTY held in the *Stakić* case that *dolus eventualis* is sufficient to meet the intent requirement for the *mens rea* element for the crime of

¹²³ Cassese, note 37 above, 60.

¹²⁴ *Prosecutor v Blaškić* IT-95-14-A (2004) para 42.

¹²⁵ Cassese, A. ‘The Statute of the International Criminal Court: Preliminary Reflections’ 10 *Eur. J. Int’l. L.* 144 (1999), 153-154.

¹²⁶ See generally Van der Vyver, note 122 above.

¹²⁷ *Ibid*, 64-65. It should however be noted that this provision is considered to be a provision to guide the discretion of the prosecutor, and not a jurisdictional threshold.

murder as a crime against humanity.¹²⁸ The Trial Chamber specifically and correctly emphasised that *dolus eventualis* does not include a standard of negligence or gross negligence. With regard to the crime of extermination, the Court in *Stakić* dismissed the prosecutor's contention that criminal liability can be founded when intention, recklessness, or gross negligence is present; stating that only *dolus directus* and *dolus eventualis* will be sufficient.¹²⁹ This would also mean that *dolus indirectus* would be sufficient. The prosecutor's contention was based on the ICTR's finding in the *Kayishema* case.¹³⁰ However, little weight should be attached to ICTY jurisprudence where the Anglo-American perception of the fault requirement played a more significant role.¹³¹ The *Blaškić* case indicates the ICTY's adherence to the Anglo-American fault requirement well. This judgement speaks of *dolus eventualis* as "...recklessness which may be likened to serious criminal negligence", which is not the correct definition of *dolus eventualis*.¹³² The fault requirement as included in the Rome Statute can trace its roots to Civil-law lineage where, unlike the case in America, *dolus* is never equated to any form of *culpa* (negligence).¹³³

¹²⁸ *Prosecutor v Stakić* IT-97-24-T (2003) para 587.

¹²⁹ *Ibid* para 642.

¹³⁰ *Prosecutor v Kayishema* ICTR-95-1-T (1999) para 146. See also *Prosecutor v Musema* ICTR-96-13-T (2000) para 215.

¹³¹ Van der Vyver, note 122 above, 59. Van der Vyver further points out that the Anglo-American conception of fault was not as readily adopted by the ICTR.

¹³² *Prosecutor v Tihomir Blaškić* IT-95-14-T para 152.

¹³³ *Ibid*.

Unless the specific crime provides otherwise, the Rome Statute requires “intent and knowledge” for a conviction. Cassese argues that in terms of the standard of construction the grammatical construction must yield to a logical interpretation when the principle of effectiveness (*ut res magis valeat quam pereat*) so requires. The General Introduction to the EOC supports Cassese:

[...] Where no reference is made in the Elements of Crimes to a mental element for any particular conduct, consequence or circumstance listed, it is understood that the relevant mental element, i.e., intent, knowledge or both, set out in article 30 applies. [...]" (emphasis added).

However, the relative ‘weakness’ of the EOC must be highlighted. Article 9 of the Rome Statute states that “Elements of Crimes shall assist the Court in the interpretation and application” and goes on to state that “the Elements of Crimes and amendments thereto shall be consistent with this Statute”. It may well be argued that the General Introduction is inconsistent with the Statute in this regard. What should be remembered is that if the requirements of intent and knowledge are to be interpreted in an either/or fashion, it does not only mean that intent alone will suffice, but also *vice versa*. Therefore I am of the view that both “intent and knowledge” should be present. Taking into account the Rome Statute definition of ‘knowledge’ the only effect of this provision is to limit the fault requirement to *dolus directus* and *dolus indirectus*.

There are various opinions as to which degrees of *dolus* this article encapsulates. There is general agreement that *dolus directus* and *dolus indirectus* are both sufficient. Piragoff and Cassese are of the view that *dolus eventualis* is also sufficient, whereas Van der Vyver opines that *dolus eventualis* is not sufficient.¹³⁴ The wording of the text, which states “awareness that a ... consequence will occur” suggests that Van der Vyver’s position is correct. Thus, I am of the view that in terms of article 30 of the Rome Statute, to sustain a conviction both intent and knowledge are required and that *dolus directus* and *dolus indirectus* are the only forms of intent that will suffice, unless otherwise provided. This approach will surely be deemed conservative, however, when the formulation of the Rome Statute is invoked and considering that the ICC is to hear “the most serious crimes of international concern” this conclusion is warranted.¹³⁵

The Statute of the SCSL provides no guidance on the requisite threshold of *mens rea*. However, it was held in the *RUF* case that the required *mens rea* threshold will be met if the prosecution proves that “the accused acted with intent to commit the crime, or with the awareness of the substantial likelihood that the crime would occur as a consequence of his conduct”.¹³⁶ Thus, *dolus eventualis* is sufficient to meet the *mens rea* requirement before the SCSL. In the context of the child soldier crime, in

¹³⁴ Piragoff, DK. ‘Mental Element’ in Cassese, A. (et al) *Commentary on the Rome Statute of the International Criminal Court* (1999) 533; Cassese, note 37 above, 74; Van der Vyver, note 122 above, 66.

¹³⁵ Article 1, Rome Statute.

¹³⁶ *RUF* Trial judgement para 250.

order to meet the fault threshold, the SCSL has held that the person must be aware that the child is under the age of 15 and that the child may be trained for or used in combat.¹³⁷

The EOC does indeed provide otherwise (than the general *mens rea* provision in article 30 of the Rome Statute) in the context of the child soldier crime, “the perpetrator knew or should have known that such person or persons were under the age of fifteen”. A standard of negligence is thus imported into the child soldier crime.¹³⁸

3. THE POTENTIAL OF INTERNATIONAL CRIMINAL LAW TO COMBAT THE CHILD SOLDIER PHENOMENON

Given its direct link to IHRL and IHL, the existence of ICL is warranted on the basis that such prohibitions entail criminal responsibility. Theories of punishment are thus central to the pursuits of ICL as a discipline. Such theories of punishment have long been debated in the context of municipal criminal law. Some commentators have transplanted these theories *mutatis mutandis* to ICL,¹³⁹ where others warn that the peculiarities of ICL must be borne in mind, and theories of punishment emanating from municipal criminal law must not be transplanted to ICL

¹³⁷ CDF Appeal judgement para 141; RUF Trial judgement para 192.

¹³⁸ Schabas, WA. *The International Criminal Court: A Commentary on the Rome Statute* (2010) 252. *Katanga and Ngudjolo Confirmation of Charges* para 251-252; Bothe, M. ‘War Crimes’ in Cassese, A., Gaeta, P. & Jones, JRWD. *The Rome Statute of the International Criminal Court: A Commentary Volume I* (2002) 416.

¹³⁹ For example, Cryer, R. (et al) *An Introduction to International Criminal Law and Procedure* (2010) 22 argues that the objectives of punishment do not differ that significantly between municipal criminal justice systems and ICL.

blindly and as a matter of course.¹⁴⁰ Theories of punishment are varied. However, in viewing the ICC as a mechanism to achieve social change, two specific aspects of punishment are of importance: deterrence and capacity-building in municipal legal systems.

i. The ICC as a Deterrent to the Enlistment, Conscription or Use of Child Soldiers

In an “era of application” it is necessary that mechanisms such as the ICC play a role in deterring the commission of crimes such as the enlistment, conscription and use of child soldiers. As is the case with municipal criminal justice systems, the deterrence value of criminal prosecutions in international criminal tribunals has been the subject of extensive debate.¹⁴¹ The deterrence debate has been conducted around the parameters of various deterrence theories. The primary pragmatic critique of international criminal prosecutions as a form of deterrence is “approaches that treat people as rational calculators”.¹⁴² Justice Chaskalson, a former Judge President of the South African Constitutional Court, followed such an approach in his majority decision in *S v Makwanyane*.¹⁴³ Chaskalson argued that the death penalty is not a deterrent, as perpetrators do not weigh the punishment they may

¹⁴⁰ See for example, Drumbl, M. ‘Collective Violence and Individual Punishment: The Criminality of Mass Atrocity’ 99 *North-Western L. R.* (2004-2005) 539.

¹⁴¹ See for example, Punyasena, W. ‘Conflict Prevention and the International Criminal Court: Deterrence in a Changing World’ 14 *Mich. St. J. Int’l L.* 39 (2006); Smidt, M. The International Criminal Court: An Effective Means of Deterrence? 167 *Mil. L. Rev.* 156 (2001).

¹⁴² Cryer *et al*, note 139 above, 26. For a more philosophical critique also see Cryer *et al*, 26.

¹⁴³ *S v Makwanyane and Others* 1995 (3) SA 391 (CC).

potentially receive upon conviction at the time of the commission of the crime. Instead, they justify their actions by a belief that they will not be caught.¹⁴⁴

Yet, as Cryer (*et al*) argue, there can be little doubt that criminal justice systems implementing punishment disproportionately to the relevant crime and punishing innocent family members of perpetrators will have a more significant deterrent effect.¹⁴⁵ While there is no place for such unjust criminal justice systems in a rule of law-oriented society, the example illustrates that criminal prosecutions potentially plays a role in deterrence.

Deterrence is one of the Rome Statute's central goals: "determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes".¹⁴⁶ The ICTY has indicated that deterrence is a proper aim of that Tribunal, but that it should not be over-emphasised.¹⁴⁷ Unlike the *ad hoc* tribunals, the ICC has prospective jurisdiction only, and therefore is likely to play a more meaningful role in deterrence. Judge Kirsch, the first President of the ICC, has been joined by many commentators in his view that "by putting potential perpetrators

¹⁴⁴ *Ibid.* This approach is an over-simplification of a complex issue and is better suited, and perhaps more accurate in the debate around appropriate punishment, as it was used in this case.

¹⁴⁵ Cryer *et al*, note 139 above, 26.

¹⁴⁶ Preamble, Rome Statute.

¹⁴⁷ *Tadić Jurisdiction* judgement, para 48; *Prosecutor v Nikolić*, ICTY IT-02-60/1 (12 December 2003) paras 89-90.

on notice that they may be tried before the Court, the ICC is intended to contribute to the deterrence of these crimes”.¹⁴⁸

Cynics of the ICC, and international criminal justice more broadly, may be quick to cite the arrest warrant issued during March 2009 against Sudanese President Omar al-Bashir as an example of the shortcomings of the ICC. To date President al-Bashir is still at large and still in power. This, it may be argued, negatively affects the deterrent value of the ICC. However, today the apprehension, in terms of an ICC arrest warrant, of deposed Libyan Dictator Muammar al-Gaddafi is very likely, if not inevitable. It should also be added, that President al-Bashir has not been unaffected by the warrant for his arrest, for example, his international travel has been severely limited.¹⁴⁹ From a deterrence point of view the value of prosecutions against defendants such as al-Bashir and al-Gaddafi are two-fold. First, other heads of state are placed on notice that their actions are also subject to the jurisdiction of the ICC, even where the relevant state is not a state party to the Rome Statute.¹⁵⁰ Second, the fact that leaders and heads of state are subject to such prosecutions likely

¹⁴⁸ Parliamentarians for Global Action ‘A Deterrent International Criminal Court – The Ultimate Objective’ <<http://www.pgaction.org/uploadedfiles/deterrent%20paper%20rev%20Tokyo.pdf>> (last accessed on 3 September 2011), see this source also for comments by: Chief Prosecutor Ocampo, Bassiouni, High Commissioner Arbour (as she then was) and others. See also Scheffer, DJ. ‘The International Criminal Tribunal Foreword: Deterrence of War Crimes in the 21st Century’ 23 *Md. J. Int’l L. & Trade* 1 (1999).

¹⁴⁹ Stone, L. ‘Implementation of the Rome Statute in South Africa’ in Bhoque, C. & Biegon, J. (eds) *Prosecuting International Crimes in Africa* (2011) 326.

¹⁵⁰ See generally: Lutz, EL. (ed.) *Prosecuting Heads of State* (2008).

has an impact on lower-level commanders who operate in the field. It seems that ICL has progressively more impact on deterrence.¹⁵¹

During my fieldwork in the Democratic Republic of the Congo (DRC), I was routinely viewed with suspicion when I spoke about child soldiering to people who had been involved in the Ituri conflict as fighters (direct participants in hostilities). The complete opposite happened when I spoke to victims. Although this is expected to some extent, the level of engagement by victims was totally polarised to that of fighters. This, I soon discovered was primarily due to a fear on the part of former fighters that I was an ICC investigator, and a corresponding hope on the part of victims. I adapted the way in which I engaged with both victims and fighters, strongly indicating that I am an independent researcher, and I immediately noticed more balanced and less polarised responses from both groups.¹⁵² Fear of prosecution does not necessarily result in deterrence. However, knowledge of the possibility of prosecution is a precondition for deterrence. While in the Ituri district of the DRC, I was very surprised at the level of awareness of the existence of the ICC, and the on-going prosecution of *Lubanga*.

¹⁵¹ Cryer *et al*, note 139 above, 26 quoting Harhoff, F. 'Sense and Sensibility in Sentencing – Taking Stock of International Criminal Punishment' in Engdahl, O. & Wrangé, P. *Law at War: The Law as it was and the Law as it should be* (2008) 128.

¹⁵² In some cases it was hard to convince people that I was indeed an independent researcher. Over time I built up a network with local people and relied upon them to vouch that I was an independent researcher.

i. The Role of the ICC in Building Capacity in Municipal Legal Systems

Much has been written about the fact that the jurisdiction of the ICC operates complementary to that of municipal criminal jurisdictions. Indeed, without this feature the Rome Statute will probably have never come into force. The most important feature of this complementary relationship in as far as criminal deterrence is concerned is the municipal incorporation by states of the Rome Statute.¹⁵³ Indeed, the Rome Statute's potential to prevent child soldiering lies more in the municipal incorporation of the Rome Statute, and resulting municipal enforcement of international criminal norms, than on prosecutions before the ICC. Most importantly, such municipal incorporation results in an increase by many-fold of the capacity of courts to prosecute people for crimes proscribed in the Rome Statute. As is further discussed in Chapter 6, the first municipal prosecutions for the enlistment, conscription or use of child soldiers has already been finalised in the DRC.

Upon municipal incorporation, the jurisdictional scope of enforcement of crimes proscribed by the Rome Statute may be expanded in terms of the relevant municipal legal system. Two areas where this will be of primary relevance in relation to the prevention of child soldiering are the

¹⁵³ Although I argue strongly in favour of the municipal incorporation of the Rome Statute, I do acknowledge that there are significant challenges to the effectiveness of prosecuting ICL crimes in municipal jurisdictions. Nevertheless, although the scope of this chapter and study do not allow for further analysis of this issue, I am of the view that these challenges can largely be overcome and are not fatal to such prosecutions. See generally Ferdinandusse, WN. *Direct Application of International Criminal Law in National Courts* (2005).

expansion of jurisdiction to include universal jurisdiction, and the age of criminal responsibility.

Universal Jurisdiction

Outside of the context of matters that appear before the ICC by way of Security Council referral, the jurisdiction of the ICC is limited to territorial and active personality jurisdiction. However, many states are empowered, in terms of their municipal law,¹⁵⁴ to exercise universal jurisdiction in relation to specific crimes,¹⁵⁵ including genocide, war crimes and crimes against humanity.¹⁵⁶ Some authority suggests that the exercise of universal jurisdiction in relation to war crimes is more limited in NIAC, but is proper in IAC generally.¹⁵⁷ Universal jurisdiction has been defined as: “the right of a state to institute legal proceedings and to try the presumed author of an offence, irrespective of the place where the said offence has been committed, the nationality or the place of residence of its presumed author or of the victim”.¹⁵⁸

¹⁵⁴ In order to exercise universal jurisdiction, the municipal legal system of a state must provide for such jurisdiction, see *R v Bow Street Metropolitan Stipendiary Magistrate and others, Ex Parte Pinochet Ugarte* (Amnesty International and Others Intervening) (No. 3), [1999] 2 All E.R. 97, at 177 (H.L.). For the parameters of universal jurisdiction in terms of international law see also *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* ICJ Reports (2002) 3 *et seq.*

¹⁵⁵ For examples of countries that exercise universal jurisdiction see Green, LC. “‘Grave Breaches’ or Crimes Against Humanity” 8 *USAFA J. Legal Stud.* 19 (1997-1998) 27-28.

¹⁵⁶ See Danilenko, M. ‘ICC Jurisdiction and Third States’ in Cassese *et al*, note 138 above, 1879.

¹⁵⁷ Zimmermann, A. ‘Die Schaffung eines ständigen Internationalen Strafgerichtshofes: Perspektiven und Probleme vor der Staatenkonferenz in Rom’ *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* 47 (1998) 86-91.

¹⁵⁸ Brussels Principles Against Immunity and for International Justice, Principle 13, Combating Impunity: Proceedings of the Symposium held in Brussels from 11-13 March 2002, 157.

In relation to states who have incorporated the Rome Statute municipally and who exercise universal jurisdiction in relation to war crimes, the capacity as well as the reach of prosecution of ICL norms is vastly expanded. Both the United Nations Fact Finding Mission on the Gaza Conflict, as well as the former United Nations Special Rapporteur on Torture, have called upon states to expand their jurisdiction to include universal jurisdiction and to utilize such jurisdiction in order to bring an end to impunity.¹⁵⁹

It is undoubtedly so that the relative deterrent role ICL plays in relation to the commission of war crimes is related to the scope and number of prosecutions of war crimes. Therefore, if universal jurisdiction is utilized by more states progressively in relation to child soldiering, ICL will, over time, operate more effectively as a deterrent to the enlistment, conscription and use of child soldiers. Significant challenges however remain. Most importantly, before prosecution can be initiated, a state will have to secure custody of the alleged perpetrator in a lawful manner. For universal jurisdiction to effectively contribute to the prevention of child soldiering increased international cooperation in the suppression and prosecution of crime will also be required.

¹⁵⁹ Report of the United Nations Fact Finding Mission on the Gaza Conflict UN Doc. A/HRC/12/48 (25 September 2009) para 1975(a). Nowak, M. 'Study on the phenomena of torture, cruel, inhuman or degrading treatment or punishment in the world, including an assessment of conditions of detention' *Human Rights Council* (5 February 2010) A/HRC/13/39/Add.5.

The Age of Criminal Responsibility

The criminal responsibility of children, for crimes committed while being child soldiers is a very contentious issue.¹⁶⁰ The ICC only has jurisdiction in relation to people who were eighteen years of age or older at the time of the commission of the crime.¹⁶¹ However, the age of criminal responsibility in terms of the Statute of the SCSL is more complicated as it provides for three categories of perpetrators.¹⁶² First, the SCSL has no jurisdiction over people aged fifteen or younger at the time of the commission of the crime. Second, the SCSL has ordinary jurisdiction over persons aged eighteen years or older at the time of the commission of the crime. Finally, the Statute of the SCSL makes special provision for people aged between fifteen and eighteen at the time of the commission of the crime. In relation to such perpetrators the Statute of the SCSL provides:

[...] he or she shall be treated with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society, and in accordance with international human rights standards, in particular the rights of the child.¹⁶³

The purpose for such jurisdiction was aimed at the rehabilitation and reintegration of former child soldiers. The SCSL is empowered to make the following orders in relation to youth perpetrators:

¹⁶⁰ See for example: Happold, M. 'Child Soldiers: Victims or Perpetrators' 29 *U. La Verne L. Rev.* 56 (2008); Konge, P. 'International Crimes & Child Soldiers' 16 *Sw. J. Int'l L.* 41 (2010); Seneviratne, L. 'Accountability of Child Soldiers: Blame Misplaced' 20 *Sri Lanka J. Int'l L.* 29 (2008); and Rosen, DM. 'Who Is a Child - The Legal Conundrum of Child Soldiers' 25 *Conn. J. Int'l L.* 81 (2009-2010).

¹⁶¹ Article 26, Rome Statute.

¹⁶² Article 7(1), Statute of the SCSL.

¹⁶³ Article 7(1), *ibid.*

[...] care guidance and supervision orders, community service orders, counselling, foster care, correctional, educational and vocational training programmes, approved schools and, as appropriate, any programmes of disarmament, demobilization and reintegration or programmes of child protection agencies.¹⁶⁴

Shortly after the founding of the SCSL, during 2000, the Chief Prosecutor of the Tribunal David Crane announced at an event while addressing Sierra Leonean students “the children of Sierra Leone have suffered enough both as victims and perpetrators. I am not interested in prosecuting children. I want to prosecute the people who forced thousands of children to commit unspeakable crimes”.¹⁶⁵ He made this decision on the basis of the Tribunal’s mandate, “to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law”.¹⁶⁶

In the context of the administration of international criminal justice, I am of the view that children younger than eighteen should not be prosecuted. Therefore, the debate regarding the criminal responsibility of children for crimes committed while being child soldiers is more relevant in the context of municipal prosecutions. There is no inherent reason why states should not prosecute children. However, such prosecutions must be conducted in strict compliance with the relevant municipal legal system, as well as IHRL provisions regarding the administration of juvenile justice,

¹⁶⁴ 7(2), *ibid.*

¹⁶⁵ Press Release: ‘Special Court Prosecutor Says He Will Not Prosecute Children’ *Special Court for Sierra Leone Public Affairs Office* (2 November 2002).

¹⁶⁶ Article 1, Statute of the SCSL.

and the rights of the child.¹⁶⁷ Children will likely not be criminally responsible for their actions due to factors excluding unlawfulness or wrongfulness, for example, extreme mental distress and intoxication.

The prosecution of children, however, is unlikely to have a deterrent effect on voluntary recruits from joining armed groups, as these children more often than not see no other course of action than joining such groups. Such prosecutions will have no effect on deterring the conscription or use of children in armed conflict.

4. SUMMARY

More than any other single chapter in this study, this chapter directly engages each of the research questions posed:

- Are the international law norms that prohibit the use and recruitment of child soldiers capable of enforcement, or should the norms be changed in order for them to be capable of enforcement?
- What changes should be effected to the manner of enforcement of these norms in order to progress to “an era of application”?

¹⁶⁷ See generally the obligations of states in terms of the Convention on the Rights of the Child (entered into force 2 September 1990) 1577 UNTS 3, articles 37 and 40 are of relevance in juvenile justice.

A consideration of the inter-relationship between the research questions is necessary because one cannot divorce substantive ICL from the ICC as an enforcement mechanism. Notwithstanding my criticism of the *Child Recruitment* judgement, the child soldier jurisprudence that has since developed in the SCSL indicates well that this formulation of the crime is indeed capable of enforcement. The symbolic value of the ICC's first prosecution relating to child soldiering to the exclusion of all other international crimes is significant, as it is an indication that the Prosecutor of the ICC deems the ICC a mechanism capable of contributing to the prevention of child soldiering.

Questions remain as to the inherent ability of the Rome Statute, the ICC and ICL in general to act as a deterrent. Commentators are presenting positive research on this front. Should it be feasible, and after the ICC has built up a jurisprudence of its own, it may be possible to address deterrence from a quantitative point of view. For the time being, the limited qualitative work on this front may be varied, but it is premature to draw overtly negative findings in this regard. Basing the level of potential deterrence of the ICC on the experiences of its predecessor *ad hoc* tribunals is of limited value, as the ICC is the first permanent international criminal tribunal with prospective jurisdiction. More importantly, unlike the Statutes of such predecessor *ad hoc* tribunals, the Rome Statute is to be implemented by state parties into their municipal law.

In relation to the ultimate research question ‘what is needed for “an era of application”’, the capacity of the ICC may be expanded in the future, but the demand for justice will likely always outweigh the ICC’s ability to prosecute and dispense justice. International criminal tribunals are, by definition, in the business of dispensing ‘selective justice’.¹⁶⁸ McCormack and Cryer argue, in their respective works, that such selectivity is two-dimensional.¹⁶⁹ The closed list of crimes that comprise the ICL regime is the first layer of selectivity, where the second layer relates to the decision as to whom will be prosecuted for violations. In the context of child soldiering the first layer has been overcome – the prohibition of the enlistment, conscription and use of child soldiers is now a war crime in terms of ICL. Indeed, it is now recognized as a customary crime. This in itself is significant, specifically considering that the drafters of the Rome Statute set out to codify existing customary international law crimes, of which the child soldier crime was not one at the time. The more expansive definition of the crime, which includes ‘enlistment’ and ‘conscription’ instead of ‘recruitment’ is also very welcome. Many are of the view that the child soldier crime should have employed an age limit of younger than eighteen.¹⁷⁰

¹⁶⁸ See generally Cryer, R. *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (2005).

¹⁶⁹ Cryer, *ibid.*, 191, Cryer also cites McCormack, TLH. ‘Selective Reaction to Atrocity’ 60 *Albany Law Review* (1996-1997) 681, 683.

¹⁷⁰ Several delegations supported the call from non-governmental organizations to lift the age threshold of the child soldier crime to younger than eighteen during the negotiation and drafting of the Rome Statute. This was, however, never strongly pursued, as it was clear that customary international law did not support such a standard. Cottier, note 114 above, 468-469.

Cryer refers to the second level of selectivity as “selectivity *ratione personae*”.¹⁷¹ Here too developments thus far have been extremely positive. As stated, the first defendant to be tried by the ICC is charged solely with the enlistment, conscription and use of child soldiers, so too are two more defendants standing trial before the ICC at the moment.¹⁷² This level of selectivity is, however, endemic to international criminal tribunals. In order to enter “an era of application” states should incorporate the Rome Statute into their municipal law and should show the necessary political will to enforce the child soldier crime in their municipal courts. The level of effectiveness of such prosecutions can and should be further advanced by prosecuting offenders through the instrumentality of universal jurisdiction.

This Chapter did not directly address modes of liability, as modes of liability in ICL are generic. Individuals can be prosecuted for the child soldier crime as direct perpetrators, on the basis of joint criminal enterprise, and finally on the basis of command responsibility, either as military or civilian commanders.¹⁷³ Finally, child soldiers are often subject to various forms of treatment by their own forces that constitute separate complete crimes in ICL, including war crimes and crimes against humanity; for example, torture and sexual crimes. Although both boys and girls are subject to such sexual crimes, girls suffer such abuse

¹⁷¹ Cryer, note 168 above, 191.

¹⁷² *Lubanga Warrant of Arrest; Katanga and Ngudjolo Warrant of Arrest.*

¹⁷³ Articles 25 and 28, Rome Statute.

disproportionately to boys. In a narrow sense, gender does not play a direct role in relation to the child soldier crime; however, it plays a very direct role in the plight of child soldiers. The analysis in this chapter must be viewed against the backdrop of the multiple further crimes that are committed against child soldiers, and offenders must be prosecuted for these crimes in addition to the child soldier crime.

CHAPTER 5 INTERNATIONAL AND REGIONAL ORGANIZATIONS AND THE PREVENTION OF CHILD SOLDIERING: THE UNITED NATIONS AND THE AFRICAN UNION

Outside of the International Criminal Court (ICC) and the Special Court for Sierra Leone (SCSL), the only international judicial and quasi-judicial mechanisms empowered to directly engage with child soldier prevention are mechanisms forming part of either the United Nations (UN) or the African Union (AU). The UN is an international organization, whereas the AU is a regional organization. Functionaries within both have a mandate to ensure that states protect, promote, respect and fulfil their international human rights law (IHRL) obligations.

The ICC and the jurisprudence of the SCSL was the subject of analysis in the previous chapter. Neither of these mechanisms forms part of the UN.¹ The UN has, however, founded a number of *ad hoc* criminal tribunals. These tribunals form part of the UN proper; the most notable examples being the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda. Neither of these tribunals have subject-matter jurisdiction over crimes directly related to child

¹ Although the ICC has a formal relationship with the UN, in terms of article 2 of the Rome Statute of the International Criminal Court (Rome Statute) (entered into force 1 July 2002) 2187 UNTS 90, it is nevertheless an autonomous institution. The SCSL was founded in terms of an agreement between the UN and the Government of Sierra Leone; however, this tribunal also has the status of an independent international organization.

soldiering. Nevertheless, the UN deserves mention in this regard, as these tribunals showcased to the international community the need for a permanent international criminal tribunal, and directly led to significant further developments within substantive international criminal law.

A variety of mechanisms forming part of the UN directly engage with child soldier prevention. These mechanisms span the divide, from political to quasi-judicial, and indeed the International Court of Justice (ICJ), the principal judicial organ of the UN, can also potentially adjudicate matters related to child soldier prevention.² On the regional level, it is only the African Court on Human and Peoples' Rights (African Court) and the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) that has the potential to directly engage with child soldier prevention. Both of these mechanisms have subject-matter jurisdiction over the African Charter on the Rights and Welfare of the Child (African Children's Charter),³ and both form part of the African Union.

² For a dispute relating to child soldiering to be adjudicated by the ICJ a state party to the Charter of the United Nations (entered into force 24 October 1945) (UN Charter) 1 UNTS XVI (who is *ipso facto* a party to the ICJ Statute) will have to submit such a dispute to the Court against another state. Both states will have to agree to the jurisdiction of the Court, and one state will have to allege that another state infringed its rights in using or recruiting child soldiers, and in so doing committed an internationally wrongful act against the state itself. Accordingly, the ICJ cannot be seen as a direct mechanism through which to prevent child soldiering.

³ The African Charter on the Rights and Welfare of the Child (entered into force 29 November 1999) OAU Doc CAB/LEG/24.9/49(1990).

This Chapter is divided into three sections. First, the proper role of the UN in addressing child soldier prevention is analysed. Hereafter, those functionaries within the UN most relevant to child soldier prevention are critically assessed. The aim of this section is not only to critique these functionaries, but more importantly to attempt to identify ways in which to render them more effective. Finally, the African Court and African Children's Committee are assessed within the African Regional Human Rights System.

In writing this chapter I drew substantially on interviews I conducted with the current Special Representative to the Secretary-General on Children in Armed Conflict (SRSG), Radhika Coomaraswamy;⁴ the Chairperson of the UN Committee on the Rights of the Child (CRC Committee), Jean Zermatten (then Deputy-Chairperson of the Committee);⁵ and CRC Committee Member and former child soldier, Awich Pollar.⁶

1. THE PROPER LEVELS OF ENGAGEMENT WITH CHILD SOLDIER PREVENTION WITHIN THE UN

The effective enforcement of even the most basic of laws and the existence of a law-abiding culture are often two of the first casualties of armed conflict. Correspondingly, during armed conflict the prospects of child soldier prevention deteriorate significantly. The Security Council has

⁴ I interviewed Ms Coomaraswamy on 7 February 2011 in New York City, USA.

⁵ I interviewed Mr Zermatten on 2 February 2011 in Geneva, Switzerland.

⁶ I interviewed Mr Pollar on 1 February 2011 in Geneva, Switzerland.

acknowledged that child soldiering may potentially threaten the “maintenance of international peace and security”.⁷ This gives credence to the argument that conflict de-escalation and resolution is the proper method with which to combat the use and recruitment of child soldiers.⁸ Moreover, ideally conflict avoidance can potentially, and arguably, be achieved by creating early warning mechanisms that monitor signs of impending armed conflict, allowing the international community (including the UN) to take action and avoid conflict. Prior to the Rwandan Genocide, for example, then UN Special Rapporteur on extrajudicial, summary or arbitrary executions, Bacre Ndiaye, reported the early warning signs of an impending genocide in Rwanda.⁹ Yet, his pleas for action went unanswered. It is, however, very difficult, both legally and politically, to directly intervene in other sovereign states before armed conflict has commenced.¹⁰ Nevertheless, identifying early warning signs can place the international community on ready alert to respond appropriately to impending conflict situations. The fact that Ndiaye, a UN mandate holder, warned of the potential for genocide renders the international community’s failure to intervene in that situation even more inexcusable.

⁷ Article 24(1), UN Charter.

⁸ Kuper, J. ‘Implementing the Rights of Children in Armed Conflict: Progress and Dilemmas’, Public Lecture, School of Oriental and African Studies, 5 March 2010; and Ironside, P. Protection Specialist, UNICEF Child Protection Section, Stationed in Goma, DRC. I interviewed Ms Ironside in Goma, DRC on 8 November 2008.

⁹ ‘Report by B.W. Ndiaye, Special Rapporteur, on his mission to Rwanda from 8 to 17 April 1993’, E/CN.4/1994/7/Add.1, (11 August 1993).

¹⁰ Chesterman, S. *Law and practice of the United Nations: Documents and Commentary* (2008) 449.

The question remains, which strategy holds the most potential for child soldier prevention, a broad-based approach aimed at the prevention, resolution and avoidance of armed conflict (broad-based approach) or a narrower approach directly aimed at preventing child soldiering notwithstanding on-going armed conflict (direct approach)? Although many commentators and other role players insist that there are, and have since the mid-1990s, been 300 000 child soldiers globally, I am of the view that this figure was likely never accurate.¹¹ This notwithstanding, there has been a marginal reduction in child soldier numbers since the mid-1990s.¹²

There are clear examples where the direct approach has yielded positive results.¹³ Furthermore, when I discussed the pros and cons of the broad-based and direct approaches with SRSG Coomaraswamy, she argued strongly that the direct approach is more successful and holds more potential for further success. Nevertheless, I attribute the marginal decline in child soldier numbers globally primarily to a reduction in armed conflicts where children made up significant proportions of fighters and

¹¹ See Chapter 2.

¹² *Ibid.*

¹³ Numerous such successes have been achieved in the DRC. See Chapter 6 in this regard. More recently, on 16 June 2011, the Chadian Government, after engagement with the SRSG, signed an agreement with the UN, to phase out child soldiering. In particular “the Chadian Government has committed to: step-up efforts to ensure that the Chadian National Forces (ANT) and recently integrated armed groups are child-free; enable verification of military installations by the United Nations to monitor compliance with the action plan; align national legislation with its international obligations for children; take punitive measures against those who continue to violate the agreement; and to put in place other preventive measures”. See ‘Press Release of the Special Representative of the Secretary-General for Children and Armed Conflict - Chad Signs an Action Plan to End Recruitment and Use of Children in its National Army and Security Forces’ OSRSG/061611-12.

combatants, including Sierra Leone, Liberia and Sri Lanka – three conflicts that have become synonymous with child soldiering.¹⁴ This does not mean that the broad-based approach is better suited. One first has to determine what caused the resolution of these conflicts, and what the potential is for the re-escalation of child soldiering elsewhere. In the case of Sri Lanka, the protracted civil war ended with the defeat of the Liberation Tigers of Tamil Eelam, by the Sri Lankan Armed Forces – and not through any form of external peace initiative.¹⁵ In Sierra Leone and Liberia peacekeeping forces from the UN and the Economic Community of West African States Monitoring Group (ECOMOG) played a more direct role in suppressing those conflicts.¹⁶ It is debatable what contribution these forces made to resolving these conflicts. In fairness, these forces may have contributed to preventing these States from falling into a state of virtual perpetual armed conflict, as is the case in Eastern DRC.

In Chapter 2 I differentiated between the ‘supply’ and ‘demand’ of child soldiers.¹⁷ I argued that the supply of child soldiers will likely remain strong due to deeper systemic problems, for example extreme poverty, thus to be effective in preventing child soldiering, international law should

¹⁴ See Chapter 2.

¹⁵ See ‘Report of the Secretary-General’s Panel of Experts on Accountability in Sri Lanka’ (31 March 2011).

¹⁶ Jonah, JOC. ‘The United Nations’ in Adebajo, A. & Rashid, I. *West Africa’s Security Challenges: Building Peace in a Troubled Region* (2004) 319-341, where this author discusses the peace operations by ECOMOG and the UN both in Sierra Leone and Liberia.

¹⁷ Chapter 2.

operate to stem the demand for child soldiers, as it does. The broad-based approach will, however, impact equally on the supply and demand of child soldiers. The Security Council, a principal organ of (and the most powerful mechanism within) the UN has assumed primary responsibility for the maintenance of international peace and security.¹⁸ Indeed, the principle of non-aggression is one of the most central ideals of the UN.¹⁹ The broad-based approach is essential in the context of child soldier prevention and may well yield more future positive results. However, this approach is already implemented across all spheres of the UN on a daily basis. Moreover, it forms the principle business of the UN. This is not to say that there is not still massive scope for improvement in efforts aimed at conflict de-escalation and resolution.

As parallel processes, the broad-based and direct approaches are equally needed to suppress child soldiering. However, the direct approach has received much less attention, and more importantly, taking a vantage point from a child soldier prevention point of view, adds no substantial value to initiatives aimed at conflict de-escalation and resolution. Therefore, this Chapter presents an analysis of the direct approach.

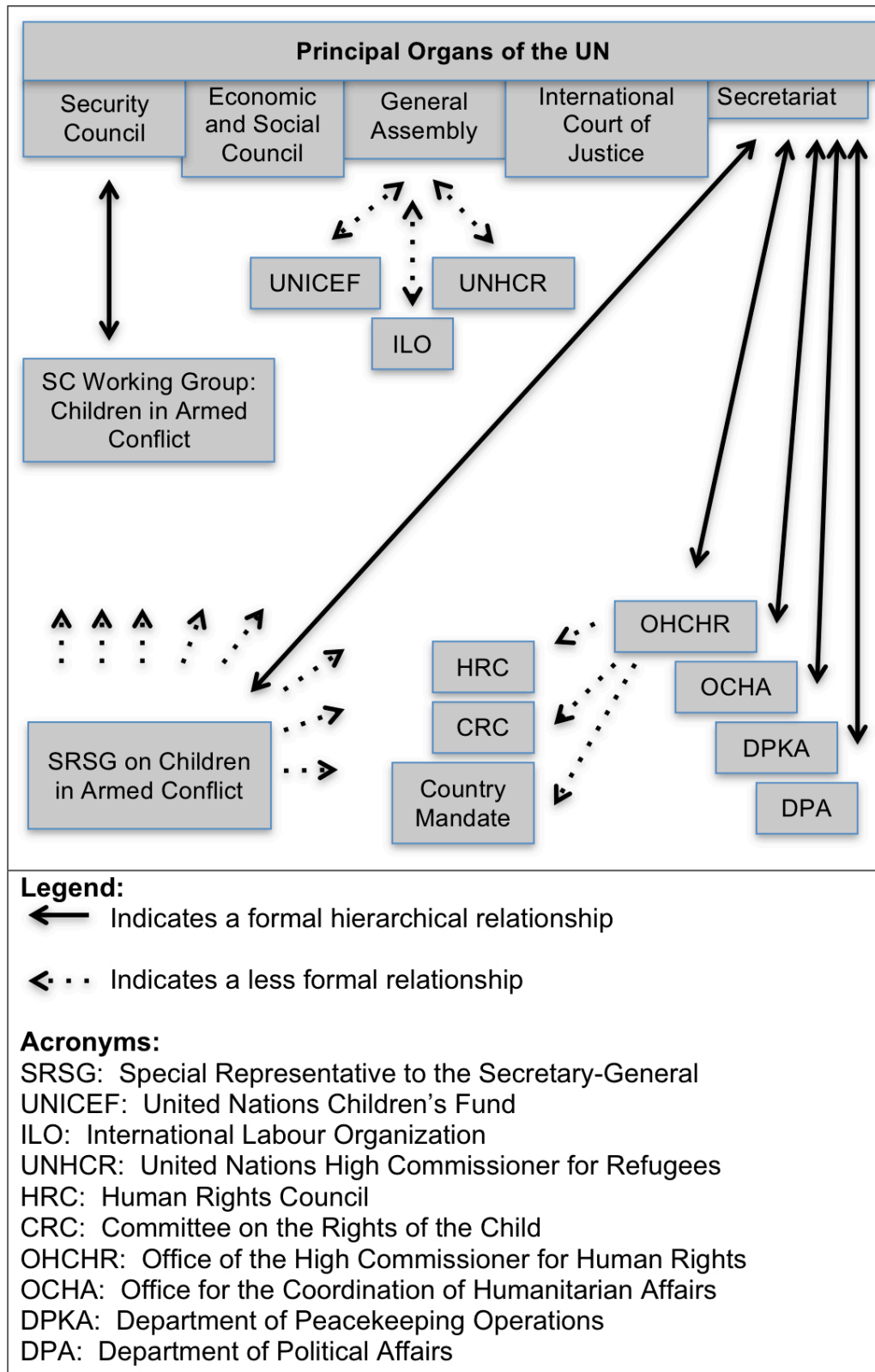
¹⁸ Article 24(1), UN Charter.

¹⁹ *Ibid.*

2. A CRITICAL APPRAISAL OF UN INITIATIVES ENGAGED WITH CHILD SOLDIER PREVENTION

The UN is a vast and enormously complex organization. The status of any given functionary within the UN is best determined in relation to the principal organ that has oversight over the given functionary, as these organs are the apex functionaries within the UN. The first important observation in this regard is that those functionaries that yield the most power have an advantage in as far as potential effectiveness is concerned. Although the Office of the SRSG of Children and Armed Conflict is not a particularly powerful functionary, it is the most important in relation to child soldier prevention, as it is the focal point within the UN of such engagement. Figure 6.1 on the following page, represents a limited organogram of UN functionaries directly or indirectly engaged with child soldier prevention.

Figure 6.1 (Graphic by Gus Waschefort)



There are more functionaries within the UN that relate to child soldier prevention. However, those represented in the diagram are the most active in this regard. The scope of this chapter calls for a selective approach as to which functionaries are included in the analysis. In determining the most appropriate functionaries, I balanced the relative power of each functionary with its potential for direct engagement with child soldier prevention. On this basis, the CRC Committee; the SRSG on Children and Armed Conflict; and the Security Council have been included in this analysis.

The only UN institutions that can render decisions binding upon member states are the Security Council and the ICJ, both of which are principal organs of the UN.²⁰ A number of the functionaries included in the diagram relate to child soldier prevention in narrow, specific circumstances. The work of the Office for the Coordination of Humanitarian Affairs, for example, is relevant specifically to the protection of displaced children from military use and recruitment. Child protection has been prioritised across UN functionaries, including in peace missions.²¹ The mandate of each peace mission is unique, and an abstract analysis of child soldier prevention within the context of peace missions will be of limited value. Instead, the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUC) forms part of the analysis in Chapter 6.

²⁰ Article 7, UN Charter.

²¹ See the section below on the Security Council.

The UN has an exceptionally far reach, as it truly is a global organization – it currently has 193 members, including each fully recognized state internationally, except The Holy See. The newest member, South-Sudan became a member of the UN on 14 July 2011.

i. Historical Background

The quintessential human rights instrument of the 20th Century, the Universal Declaration of Human Rights (UDHR) of 1948, only references the rights of children once, and rather vaguely.²² Yet, the founding of the United Nations Children's Fund (UNICEF) predates even the UDHR – UNICEF was founded during 1946 to provide emergency food and healthcare to children in countries devastated in the aftermath of World War Two.²³ The first UN child rights instrument and the fore bearer to the CRC was the Declaration of the Rights of the Child of 1959.²⁴ The plight of children during armed conflict was, however, only recognized for the first time by a UN organ during 1974, with the adoption of the 'Declaration on the Protection of Women and Children in Emergency and Armed

²² Article 25(2), Universal Declaration of Human Rights, General Assembly Resolution 217A (III), U.N. Doc A/810 (1948). The Declaration was adopted by the United Nations General Assembly on 10 December 1948. Indeed, it is not only the rights of children, but human rights in the broad sense that were not seriously prioritised during the drafting of the UN Charter. The UN Commission on Human Rights was not founded by the Charter, but instead it was founded during 1946 by the Economic and Social Council under article 68 of the UN Charter. See also Chesterman, S. et al *Law and Practice of the United Nations* (2008) 448.

²³ General Assembly Resolution 57 (I) of 11 December 1946.

²⁴ Declaration of the Rights of the Child, General Assembly Resolution 1386 (XIV), 14 U.N. GAOR Supp. (No. 16), 19, U.N. Doc. A/4354 (1959).

Conflict' by the General Assembly.²⁵ 1979, "the international year of the child" as proclaimed by the United Nations Educational, Scientific and Cultural Organization (UNESCO) soon followed.²⁶ None of these early developments addressed the use and recruitment of child soldiers.²⁷ Indeed, the 1974 Declaration expressly excludes children who participate in hostilities from special protection.²⁸ Child rights only infiltrated UN structures on a significant level during 1989 with the adoption of the CRC.²⁹

The first UN institution to recognise the need to act in response to the involvement of children in armed conflict was the CRC Committee, established in terms of the CRC shortly after the adoption of the Convention. During 1992 the Committee held a 'general discussion day' on the question of 'children in armed conflict'.³⁰ The following year it was decided to submit a request to the Secretary-General to appoint an expert to launch an in-depth investigation into the protection of children during

²⁵ Declaration on the Protection of Women and Children in Emergency and Armed Conflict, General Assembly Resolution 29/3318 of 14 December 1974. The plight of children during armed conflict had long been recognized prior to this declaration even in certain ancient societies. The modern humanitarian law recognition of the plight of children during armed conflict is embodied in the Geneva Conventions (see Chapter 3 for details).

²⁶ General Assembly Resolution 31/169 of 1 January 1979.

²⁷ See Chapter 3 for a detailed analysis of applicable international human rights law and international humanitarian law.

²⁸ Preamble, 1974 Declaration.

²⁹ The UN Convention on the Rights of the Child, General Assembly Resolution 44/25 (12 December 1989).

³⁰ 'Report on the Second Session', Committee on the Rights of the Child CRC/C/10 (19 October 1992) para 64.

armed conflict, and report thereon.³¹ This recommendation was endorsed by the delegates to the World Conference on Human Rights, held in Vienna during 1993, and was included in the Vienna Declaration and Programme of Action.³²

The Secretary-General submitted the request to the General Assembly, who then passed Resolution 48/157 during 1993 – the first General Assembly Resolution on children in armed conflict – mandating the appointment of an expert to conduct a study, and report on the situation of children in armed conflict.³³ Ms Graça Machel was duly appointed.³⁴ It is widely recognized that the UN's direct involvement in child soldier prevention came as a result of the ground-breaking 1996 Machel Report. It was also the Committee who first conceived of, and took the initiative to draft a first text of a Protocol to the CRC on the involvement of Children in Armed Conflict, between 1992 and 1993.³⁵

ii. The Committee on the Rights of the Child

The CRC Committee is a UN treaty-body, established in terms of the CRC to assess states parties' progress in meeting their obligations under

³¹ 'Report on the Third Session', Committee on the Rights of the Child CRC/C/16 (5 March 1993) para 176 and Annex VI in terms of article 45(c) of the CRC.

³² 'Vienna Declaration and Programme of Action' A/CONF.157/23 (12 July 1993) para 50.

³³ General Assembly Resolution 48/157 of 20 December 1993.

³⁴ *Ibid.*

³⁵ 'Report on the Second Session', note 30 above para 75. 'Report on the Third Session', note 31 above para 176 and Annex VII.

the Convention.³⁶ The Committee's mandate also extends to both Optional Protocols to the CRC, with the Protocol on Children in Armed Conflict (CIAC Protocol) being relevant for present purposes.³⁷ This has the implication that the Committee has jurisdiction in relation to every state internationally, except Somalia. In order to achieve its mandate, the Committee is tasked with receiving reports from state parties, setting out the measures adopted by the relevant state to give effect to the rights contained in the CRC and the Protocols and on the progress made on the enjoyment of these rights.³⁸ While acknowledging the shortcomings of rigid categorization, the UN's human rights activities are divided between 'charter-based organs' and 'treaty-based organs'.³⁹ Charter-based organs exercise their powers rather widely, and it is sometimes difficult to trace their actions to specific legal bases.⁴⁰ On the other hand, treaty-based organs, such as the Committee, are confined in scope to the mandate bestowed upon it expressly by the relevant international instrument.⁴¹

Technically the Committee's functions are limited to monitoring state compliance.⁴² However, in practice its work extends beyond this. The

³⁶ The Committee was established under article 43(1) of the CRC.

³⁷ 'Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography' (entered into force 18 January 2002) 1577 UNTS 3.

³⁸ Article 44(1), CRC.

³⁹ Alston, P. 'Critical Appraisal of the UN Human Rights Regime' in Alston, P. (ed) *The United Nations and Human Rights: A Critical Appraisal* (1992) 4.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² In terms of article 44(1) of the CRC, states parties are obliged to enter a report within two years of the entry into force of the CRC for the relevant state, and thereafter every five years. With regard to the CIAC Protocol, states parties are to submit a report to the Committee within two years of the entry into force of the Protocol detailing the measures

Committee tends to interpret its role much less restrictively than a textual interpretation of its mandate would suggest.⁴³ Besides monitoring state party reports, being the Committee's main function, the Committee issues general interpretative comments on substantive provisions of the Convention. It also holds general thematic discussion days and it plays an active role in interpreting the Convention, and making recommendations to state parties on how to achieve the goals and ideals of the CRC and the Protocols by issuing "concluding observations" in response to reports filed and presented by state parties.

As stated, the CRC Committee's mandate is defined in terms of an international law instrument: the CRC. By implication, the shortcomings of the Committee relate either to the mandate of the Committee, or the way in which the Committee exercises its mandate, or both. The Committee's limited mandate severely curtails its potential to be pro-active in securing compliance with the Convention and the Protocols – specifically as the Committee has no complaints procedures. Regarding the way in which the Committee exercises its mandate, the inability of the Committee to engage with actors other than state parties impacts on the success of the Committee. Furthermore, the Committee has a tendency to exceed its

it has taken to implement the provisions of the Protocol. Thereafter states are to include in their five-year reports filed in terms of the CRC further information with respect to the implementation of the Protocol.

⁴³ Karp, J. 'Reporting and the Committee on the Rights of the Child' in Bayefsky, AF. *The Human Rights Treaty System in the 21st Century* (2000) 35-37.

mandate, and I am of the view that this may lead to the dismissal of the Committee's recommendations by state parties.

The Limitations of the Mandate of the Committee

The CRC Committee is the only UN human rights treaty-body, the mandate of which does not incorporate an individual complaints procedure.⁴⁴ It also does not provide for inter-state complaints. This is explained with reference to the fact that initially the philosophy was to create a non-antagonistic Committee that would work 'with' states to meet their obligations, instead of 'against' states.⁴⁵ However, it is likely that this reasoning was used to justify the failure of creating such a complaints mechanism during the drafting of the CRC. Zermatten explained to me that the inclusion of such a complaints procedure was hotly debated during the drafting of the CRC, but over time it became clear that states would not ratify the Convention if such a mechanism were to be included.⁴⁶ This gives further credence to Happold's argument that those who participated in the drafting of the CRC were preoccupied with

⁴⁴ Drahošlav Štefánek, D. (Chairperson-Rapporteur) 'Report of the open-ended working group to explore the possibility of elaborating an optional protocol to the Convention on the Rights of the Child to provide a communications procedure' A/HRC/13/43 (21 January 2010) 19.

⁴⁵ Verheyde, M. *A Commentary on the United Nations Convention on the Rights of the Child: Article 43-45: the UN Committee on the Rights of the Child* (2006) 7-8; the *Travaux Préparatoires* of the Convention also supports this contention, see Detrick, S. (ed.) *The United Nations Convention on the Rights of the Child: A Guide to the "Travaux Préparatoires"* (1992) 539. The Committee on Economic, Social and Cultural Rights is the only other UN human rights treaty-body that did not incorporate an individual complaints procedure in terms of its original mandate. However, as of 2008 this Committee can also consider individual complaints (Optional Protocol (General Assembly Resolution A/RES/63/117)).

⁴⁶ Zermatten, note 5 above.

codifying existing state practice, instead of creating stronger, needed norms to safeguard the interests of children.⁴⁷

Recognising the weakness of not having a direct complaints procedure, the Committee began to encourage children and their representatives to use the complaints procedures of other treaty bodies where feasible and possible.⁴⁸ Whether a treaty-body other than the CRC will provide an avenue for redress to a victim is dependent on considerations such as whether the relevant state has ratified the instrument, whether the substantive rights in the instrument covers the nature of the harm the victim had sustained, and whether the admissibility and jurisdictional threshold requirements relevant to the specific complaints procedure have been met. The complaints procedure of the Committee against Torture may, for example, be a viable avenue for redress in some cases of violent recruitment and use of child soldiers,⁴⁹ but certainly not in all such cases.

⁴⁷ Happold, M. *Child Soldier in International Law* (2005).

⁴⁸ Committee on the Rights of the Child – Working Methods, XI, individual Communications <www2.ohchr.org> (last accessed on 25 September 2011). “The Convention on the Rights of the Child has no mandate to accept and review individual complaints. However, the Committee recommends children or their representatives to refer to other treaty bodies [...]. Much the same can be said for the special procedures of the Commission on Human Rights, including the mechanisms for urgent action and appeals, including the Special Rapporteurs on the Sale of Children, Child Prostitution and Child Pornography; on Torture; on Extrajudicial, Summary or Arbitrary Executions, or the Working Group on Arbitrary Detention”.

⁴⁹ Article 17, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (entered into force on 26 June 1987) (CAT) 1465 UNTS 85. Article 22 of the CAT further provides that a state party must enter a declaration to the effect that that state accepts the Committee’s jurisdiction relating to individual complaints. Furthermore, the Committee will not investigate a matter that has already been brought before another committee by the same petitioner, based on the same facts.

During June 2009 an 'open-ended working group to explore the possibility of elaborating an optional protocol to the CRC to provide a communications procedure' (CRC Working Group) was established by the Human Rights Council.⁵⁰ The CRC Working Group first met from 16 to 18 December 2009. The effectiveness of complaints procedures in quasi-judicial international human rights mechanisms is a point of contention. However, the complaints procedures of some treaty-bodies are more effective than others.⁵¹ Therefore, the effectiveness of such a procedure is, in part, dependent on the way it is formulated and the powers it is afforded. It was thus a massive failure not to have included such a procedure in the mandate of the CRC. This has the further implication that the Committee never engages with victims directly, which has far-reaching effects, even on the work of the Committee within its existing mandate. Specifically, in making recommendations to state parties the Committee is privy only to the state party's report, and the information and context as presented therein. Furthermore, instead of having a mandate to actively enforce the CRC, it has a more passive mandate to monitor state compliance with the CRC.⁵² This potentially diminishes the status of the Committee in the eyes of states.

⁵⁰ Human Rights Council Resolution A/HRC/RES/11/1 of 17 June 2009.

⁵¹ The Human Rights Committee, established in terms of article 29 of the International Covenant on Civil and Political Rights (entered into force on 23 March 1976) (ICCPR) 999 UNTS 171, is an example of a relatively effective treaty-body with a complaints procedure.

⁵² Article 44, CRC.

The initiative to elaborate a Protocol to the CRC establishing a complaints procedure should be pursued as a matter of urgency – indeed, the CRC Committee has expressed its hope that the Human Rights Council and the General Assembly approve the final text of the Protocol before the end of 2011.⁵³ The potential of such a procedure is largely dependent on the way it is formulated. As the Chairperson-Rapporteur noted, the accessibility of the procedure to children and their representatives is key to its success.⁵⁴ Creating such a procedure now presents an opportunity to remedy the shortcomings in models for such communications that are already used.

The Chairperson-Rapporteur of the Working Group, Drahoslav Štefánek, released a revised draft of the Protocol during January 2011.⁵⁵ This draft reflects a number of comments made by the CRC on the first draft.⁵⁶ The draft provides for individual communications, by individuals or groups of individuals;⁵⁷ collective communications;⁵⁸ interim measures;⁵⁹ inter-state communications;⁶⁰ and an enquiry procedure for grave or systematic

⁵³ Comments by the Committee on the Rights of the Child on the proposal for a draft optional protocol prepared by the Chairperson-Rapporteur of the Open-ended Working Group on an optional protocol to the Convention on the Rights of the Child to provide a communications procedure, A/HRC/WG.7/2/3 (13 October 2010) 24.

⁵⁴ *Ibid*, 40.

⁵⁵ Revised proposal for a draft optional protocol prepared by the Chairperson-Rapporteur of the Open-ended Working Group on an optional protocol to the Convention on the Rights of the Child to provide a communications procedure, A/HRC/WG.7/2/4 (13 January 2011) (Revised Draft Protocol).

⁵⁶ Comments by the Committee on the Rights of the Child, note 53 above.

⁵⁷ Article 6, Revised Draft Protocol.

⁵⁸ *Ibid*, article 7.

⁵⁹ *Ibid*, article 8.

⁶⁰ *Ibid*, article 15.

violations.⁶¹ While the draft excludes the possibility for states to make reservations to the Protocol,⁶² unfortunately, states may, by declaration, exclude the competence of the Committee to hear individual communications that relate to either of the Protocols to the CRC.⁶³ Furthermore, an 'opt-in' clause limits the Committee's competence to hear collective and inter-state communications to instances where the relevant state accepts such competence expressly, by way of declaration.⁶⁴ This selective ratification regime effectively allows states to enter *de facto* reservations to each of the complaints procedures, except individual complaints in relation to the CRC only (as states can exclude the Protocols by declaration) and the enquiry procedure for grave or systematic violations. The draft makes no provision for states who are party to either of the current Protocols to the CRC, but not to the CRC, such as the US who is a party to the CIAC Protocol, but not to the CRC. The selective ratification regime effectively allows such a state to ratify the Protocol without being subject to any complaints procedure, except for the enquiry procedure for grave or systematic violations.

Zermatten expressed the view that the proposed collective complaints procedure has great potential to be effectively used to prevent child soldiering.⁶⁵ However, he also stated that many states are opposed to

⁶¹ *Ibid*, article 16.

⁶² *Ibid*, article 24.

⁶³ *Ibid*, article 6(2).

⁶⁴ *Ibid*, article 7(1) and 15(1).

⁶⁵ Zermatten, note 5 above.

this procedure – including developed states.⁶⁶ Accordingly, it is unfortunately probable that many states will not accept the Committee's competence in relation to such complaints. Collective communications are formulated in the following terms: "national human rights institutions and ombudsman institutions as well as non-governmental organizations, [...] may submit collective communications alleging recurring violations affecting multiple individuals of any of the rights [in the CRC and its Protocols]".⁶⁷ The proposed inquiry procedure for grave or systematic violations also has potential for addressing child soldier prevention:

If the Committee receives reliable information indicating grave or systematic violations by a State party of rights set forth in the Convention [or its Protocols] the Committee shall invite the State party to cooperate in the examination of the information and, to this end, to submit observations without delay with regard to the information concerned.⁶⁸

One can only hope that the final text will maintain a better balance between securing support from states and creating a mechanism that will be effective in addressing violations by those very states, than was the case with the CRC. Nevertheless, civil society has an immensely important role to play in lobbying states to ratify the Protocol without excluding any part of its operation. Admissibility presents a final stumbling block to many victims in accessing the Committee. The Committee should interpret the exhaustion of local remedies and the unavailability of such domestic remedies expansively, so as to guarantee greater

⁶⁶ *Ibid.*

⁶⁷ Article 7(2), Revised Draft Protocol.

⁶⁸ *Ibid.*, article 16(1).

protection to more children.⁶⁹ This argument is consonant with the recognition that the possibility for child victims of abuses such as military use and recruitment to gain access to municipal courts is a virtual impossibility in many parts of the world.⁷⁰

The Committee's Approach to Exercising its Mandate

During my interview with Awich Pollar, he argued that in relation to child soldiering, the major compliance gap exists in relation to non-state actors.⁷¹ In this regard he said that a *lacuna* exists in the mandate of the CRC, as the Committee engages with state parties, and that non-state actors do not really feature in the mandate of the Committee. This, however, is a limitation inherent to international human rights law (IHRL), and mechanisms that exist to promote and enforce instruments such as the CRC. In Chapter 3 I presented an in-depth analysis of the relationship between IHRL and IHL, which specifically emphasised the distinguishing features of these legal regimes. One such distinguishing feature is the fact that IHRL creates obligations upon states only, whereas, in the context of armed conflict, IHL creates obligations on state and non-state actors alike.⁷² The mandate of the CRC is to monitor state compliance with the CRC and its Protocols, and hopefully soon, to play a more proactive role in enforcing state compliance. This includes the obligation

⁶⁹ *Ibid*, article 9.

⁷⁰ This is one of the key problems I observed in the DRC. Even where there are mechanisms that can effectively address violations committed against children, the children most in need of these mechanisms do not have access to them for a variety of reasons.

⁷¹ Pollar, note 6 above.

⁷² See Chapter 3.

upon states to “undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the [CRC]...”.⁷³ The work of the Committee thus relates to non-state entities indirectly. The Committee aims to ensure that state parties prohibit non-state actors from using and recruiting child soldiers. In many instances this is extremely difficult, as the state party is likely engaged in armed conflict with the very entity in relation to which the state must prevent the use and recruitment of child soldiers. However, there are many states that are allied to non-state entities known for their use and recruitment of child soldiers. In such instances the Committee can pressurize states to ensure compliance. However, within the contemporary framework of IHRL, it is not possible to extend the mandate of the Committee to include direct engagement with non-state actors. This is so primarily because such actors do not incur international law obligations in terms of the CRC or its Protocols and the CRC Committee’s subject-matter jurisdiction extends only the CRC and its Protocols.

As stated above, the Committee actively interprets the Convention, in its “concluding observations” which it makes in response to state party reports. Often, however, the Committee’s concluding observations extend beyond the Committee’s mandate. At the Committee’s 48th session, for example, it considered the initial report on the implementation of the

⁷³ Article 4, CRC.

CIAC Protocol by the United States.⁷⁴ Among many recommendations, the Committee recommended:

... the State party to review and raise the minimum age for recruitment into the armed forces to 18 years in order to promote and strengthen the protection of children through an overall higher legal standard.⁷⁵

[...]

that the United States of America proceed to become a State party to the Convention on the Rights of the Child in order to further improve the protection of children's rights.⁷⁶

[...]

that the State Party consider ratifying the following international instruments, already widely supported in the international community: [...] The Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction 1997.⁷⁷

The first two recommendations relate directly to the subject-matter of the Committee's mandate. Although the US's policy of recruiting children of seventeen on a voluntary basis is within the confines of the Protocol,⁷⁸ the Committee nevertheless encouraged the increase of the minimum age for voluntary recruitment to eighteen. The Committee is justified in making such recommendations, as these comments were made in relation to the CIAC Protocol, the preamble of which provides:

Noting that article 1 of the Convention on the Rights of the Child specifies that, for the purposes of that Convention, a child means every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier... Convinced that an optional protocol to the Convention that raises the age of possible recruitment of persons into armed forces and their participation in hostilities will contribute effectively to the implementation of the principle that the best interests of the child are to be a primary consideration in all actions concerning children.

⁷⁴ Report on the Forty-eighth Session, Committee on the Rights of the Child, CRC/C/48/3, (16 November 2009) para 25.

⁷⁵ *Ibid*, para 25(16).

⁷⁶ *Ibid*, para 25(23).

⁷⁷ *Ibid*, para 25(24)(c).

⁷⁸ 10 U.S.C. § 505.

This Protocol is expressly included in the mandate of the Committee. As such there is no reason why the Committee cannot advocate for state parties to comply not only with the letter of the law, but also with the ultimate goals and aspirations of the instrument.

Conversely, no provision of the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction has direct bearing on any obligations owed by the US in terms of the Protocol.⁷⁹ The enforcement of this Convention does have bearing on the protection of children during armed conflict. Nevertheless, the Committee's recommendation goes beyond its mandate: "examining the progress made by States Parties in achieving the realization of the obligations undertaken".⁸⁰

This of course raises some concerns related to *pacta sunt servanda*. The US ratified the Protocol knowing that it incurs specific obligations, and agreeing to the jurisdiction of a quasi-judicial treaty-body with a specific mandate determined by a legal instrument, nothing more. Recommendations such as the last one made by the Committee regarding the US report are not very useful, and are *ultra vires* the Committee's powers. This treaty-body is already relatively weak, due to not having a complaints procedure. By making such recommendations

⁷⁹ Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (entered into force on 18 September 1997) 2056 UNTS 211.

⁸⁰ Article 43(1), CRC.

the Committee is likely making it easier for states to dismiss their recommendations, as these recommendations may come to be seen as the work of activists, and not interpretations of legal obligations by a quasi-judicial mechanism.

It is very likely that the excessively wide interpretation the Committee employs in discharging its mandate is symptomatic of the very narrow and passive mandate it has been afforded. Once the new Protocol comes into force, the Committee should recreate itself around this more proactive mandate – by staying strictly within the mandate, and at the same time relentlessly pursuing compliance by state parties in terms of its mandate.

iii. The Security Council

The General Assembly was the first political organ of the UN to adopt a resolution on children in armed conflict, during 1993.⁸¹ Three years later, the Security Council began adopting resolutions in relation to specific countries in which it, *inter alia*, addressed child soldiering in the relevant country.⁸² However, the issue of children in armed conflict was placed formally on the agenda of the Security Council during 1998. Since then:

⁸¹ General Assembly Resolution 48/157 20 of December 1993.

⁸² The first such resolution was Security Council Resolution 1071 of 30 August 1996 in relation to the conflict in Liberia.

- The Council has adopted a series of seven resolutions on children in armed conflict⁸³ (the resolutions that have thus far been adopted call various parties to action, including UN institutions and entities distinct from the UN. UN institutions must act in accordance with these resolutions, whereas they are of recommendatory persuasion to external entities);
- The Council devotes a day of debate to children in armed conflict each year;
- The Secretary-General reports annually to the Security Council itself on the situation of children in armed conflict, and directly names parties who act in violation of their obligations in using and recruiting child soldiers;⁸⁴
- Child protection has been integrated into the mandates of peacekeeping missions – and personnel are trained accordingly;⁸⁵
- The “well-being and empowerment of children affected by armed conflict” has been integrated into all peace processes. Furthermore, post-conflict recovery and reconstruction planning, programmes and strategies now prioritize issues concerning children affected by armed conflict;⁸⁶

⁸³ Security Council Resolution 1314 of 11 August 2000; Security Council Resolution 1379 of 20 November 2001; Security Council Resolution 1460 of 30 January 2003; Security Council Resolution 1539 of 22 April 2004; Security Council Resolution 1612 of 26 July 2005; Security Council Resolution 1882 of 4 August 2009; and Security Council Resolution 1998 of 12 July 2011.

⁸⁴ Security Council Resolution 1379, para 16.

⁸⁵ Security Council Resolution 1379, para 2 & 10(a); Security Council Resolution 1460; para 9; Security Council Resolution 1539, para 7; Security Council Resolution 1612; para 12.

⁸⁶ Security Council Resolution 1882, para 15.

- Child protection has been “mainstreamed” in all relevant facets of the work of UN institutions;⁸⁷
- A Monitoring and Reporting Mechanism (MRM) has been created in relation to children in armed conflict.⁸⁸
- A Security Council Working Group (SCWG) on children and armed conflict has been established.⁸⁹

Nevertheless, like the rest of this chapter, the purpose of this section is not to create a narrative account of Security Council engagement with child soldiering.⁹⁰ Instead, it is to extrapolate those areas of engagement best suited to child soldier prevention and critically analyse the effectiveness of their work in this regard.

In terms of its Chapter VII powers, the Security Council can adopt resolutions binding upon UN member states.⁹¹ It is thus the most powerful entity that directly engages with child soldiering. Unfortunately, the Council is yet to adopt such a binding resolution in which it takes targeted action in relation to child soldiering. It does, however, have the potential to do so, as it held during 2000 that:

...the committing of systematic, flagrant and widespread violations of international humanitarian and human rights law, including that relating to

⁸⁷ Security Council Resolution 1539, para 8; Security Council Resolution 1612; para 18.

⁸⁸ Security Council Resolution 1612, para 2-3.

⁸⁹ *Ibid*, para 8

⁹⁰ For such an account see Happold, note 47 above, 34-53

⁹¹ Article 24, UN Charter. For a detailed account of the Chapter VII Powers of the UN, see De Wet, E. *The Chapter VII Powers of the United Nations Security Council* (2004).

children, in situations of armed conflict may constitute a threat to international peace and security, and in this regard reaffirms its readiness to consider such situations and, where necessary to adopt appropriate steps.⁹²

This is a very significant step. First, as has been stated, for the Council to take targeted, binding action against parties who use or recruit child soldiers, it will have to issue a Chapter VII resolution – the situation therefore has to “constitute a threat to international peace and security”.⁹³ Furthermore, for the Security Council to refer a matter to the ICC it must adopt a resolution under Chapter VII of the UN Charter.⁹⁴ The implication of Resolution 1314 is that the Security Council will be able to refer a matter to the ICC where the alleged crimes are limited to the use or recruitment of child soldiers, as such deeds may threaten international peace and security (in a concrete case, however, the Council must be of the view that it does threaten such peace and security). Popovski points out that Resolution 1314’s reference to international peace and security is not an empty threat.⁹⁵ The Security Council has adopted resolutions under Chapter VII related to children in armed conflict since Resolution 1314. For example, the Security Council adopted Resolution 1332 under its Chapter VII powers dealing with the situation in the DRC.⁹⁶ Among other things, the resolution demanded “an effective end to the

⁹² Security Council Resolution 1314 of 2000, para 9.

⁹³ Art 24(1), UN Charter.

⁹⁴ Article 13, Rome Statute.

⁹⁵ Popovski, P. ‘Children in Armed Conflict: Law and Practice of the United Nations’ in Arts, K. & Popovski, P. (eds.) *International Criminal Accountability and the Rights of Children* (2006) 44-45.

⁹⁶ Security Council Resolution 1332, of 14 December 2000. See generally Surhone, LM., Tennoe, MT. & Henssonow, SF. *United Nations Security Council Resolution 1332* (2011).

recruitment, training and use of children”.⁹⁷ It did, however, not impose any targeted measures against violating parties who failed to end the use and recruitment of child soldiers.

Regular and continuous engagement with child soldier prevention from within the Security Council occurs only in the context of the Monitoring and Reporting Mechanism (MRM) and the Security Council Working Group on children and armed conflict (SCWG).

*Monitoring and Reporting Mechanism and the Security Council
Working Group*

The MRM serves to “collect and provide timely, objective, accurate and reliable information” on six situations affecting children that have been identified by the SRSG as most urgently deserving attention,⁹⁸ including “recruiting or using child soldiers”.⁹⁹ The implementation of the MRM is focused at parties to conflict named in the Secretary-General’s report pursuant to Resolutions 1379 and 1882.¹⁰⁰ A country-level task force is set up in each of these countries and must submit a bi-monthly report on “grave violations against children”. The country-level task forces are composed of a variety of actors from within UN functionaries and NGOs. These task force reports are transmitted to the SRSG, who then reviews,

⁹⁷ *Ibid*, para 10. Arts, K. *International criminal accountability and the rights of children* (2006) 44, states that 165 children were returned to UNICEF as a result of this resolution.

⁹⁸ *Ibid*, para 5(c).

⁹⁹ Annual Report of the Secretary-General on Children in Armed Conflict, (9 February 2005), para 68.

¹⁰⁰ For the operation of the MRM see, *ibid*, 58-64.

consolidates and compiles the reports into monitoring and compliance reports. She then submits these reports to the SCWG. As of 3 August 2011, the MRM has been implemented in fifteen countries.¹⁰¹ The work of the DRC country task force is discussed Chapter 6.¹⁰²

The SCWG consists of all members of the Security Council and meets in closed session. The principal function of the SCWG is to review reports of the MRM.¹⁰³ In this context the SCWG is tasked with making recommendations to the Security Council on possible measures to be taken against entities that, in terms of the MRM, violate any of the six grave breaches specifically identified, including recruiting or using child soldiers.¹⁰⁴ The Council has, on numerous occasions, threatened persistent violators with targeted sanctions.¹⁰⁵ In its most recent resolution relevant to child soldiering, the Council requested, “enhanced communication between the Working Group and relevant Security Council Sanctions Committees, including through the exchange of pertinent information on violations and abuses committed against children in armed conflict”.¹⁰⁶ Furthermore, the Council has directed the SCWG, with the support of the SRSG, to “consider, within one year, a broad

¹⁰¹ Report of the Special Representative of the Secretary-General for Children and Armed Conflict A/66/256 (3 August 2011) para 14.

¹⁰² See Chapter 6.

¹⁰³ *Ibid.*

¹⁰⁴ To date the working group has considered reports from 32 different countries and made recommendations relevant to each one.

¹⁰⁵ Security Council Resolution 1539, para 5(c); Security Council Resolution 1612, para 9; Security Council Resolution 1882, para 7(c); and Security Council Resolution 1998, para 9(c-d).

¹⁰⁶ Security Council Resolution 1998, para 9(c).

range of options for increasing pressure on persistent perpetrators of violations and abuses committed against children in situations of armed conflict”.¹⁰⁷ This period will expire on 12 July 2012. In complying with this request, the SRSG has already briefed the Security Council Committee concerning Somalia and Eritrea proposing that grave violations against children be designated criteria for sanctions.¹⁰⁸ The Security Council has acted in this regard, adding such violations as designated criteria for sanctions in relation to Somalia and Eritrea.¹⁰⁹ The SRSG has, however, said “targeted and graduated sanctions should be applied against persistent perpetrators as a measure of last resort, when all other means have failed to end impunity for crimes committed against children”.¹¹⁰

While effect has been given to the first part of Otunnu’s vision of creating a MRM, the second part, that reports produced by the MRM “should, in turn, serve as ‘triggers for action’...” is only just becoming a reality.¹¹¹ I am still sceptically aware that designating grave violations against children as criteria for sanctions does not necessarily mean such sanctions will be imposed. The potential success of monitoring and reporting is wholly based on targeted action being taken once patterns of child soldier use and recruitment have been identified. To be effective in preventing child soldiering, I am of the view that the Security Council must follow-up what

¹⁰⁷ *Ibid*, para 21.

¹⁰⁸ Report of the Special Representative, note 101 above, para 60.

¹⁰⁹ Security Council Resolution 2002 of 29 July 2011.

¹¹⁰ Report of the Special Representative, note 101 above para, 59.

¹¹¹ Otunnu, O. ‘Protection of children affected by armed conflict Report of the Special Representative of the Secretary-General for Children and Armed Conflict’, A/58/328, (29 August 2003), para 82.

can still be construed as political rhetoric – threats of sanction, with targeted action – with actually implementing such sanctions. Within the framework of the Council's Chapter VII powers, it should, where needed and only against persistent violators, adopt targeted action. Such action is similar to Resolution 1332 that was adopted in relation to the DRC and discussed above – but unlike Resolution 1332, targeted action, including sanctions, must be implemented against such persistent violators. Indeed, the first time the Council threatened violating parties with sanctions was during 2004.¹¹² Armed groups within nine specific countries have been consistently included in each of the Secretary-General's six lists of violating parties that have been published since 2004.¹¹³ This indicates well that monitoring and reporting, an important component in the process of child soldier prevention must be followed up with targeted sanctions to be effective in preventing child soldiering. What stands in the way of such sanctions is political will,¹¹⁴ both by members of the Security Council in adopting such sanctions, and members of the UN in complying fully with Security Council resolutions.

¹¹² Security Council Resolution 1539, para 5(c).

¹¹³ See Chapter 2.

¹¹⁴ Vandergrift, K. 'International Law Barring Child Soldiers in Combat: Problems in Enforcement and Accountability, Question and Answer Session' 37 *Cornell Int'l L.J.* 555 (2004) 556.

iv. The Office of the Special Representative to the Secretary-General on Children and Armed Conflict

The Machel report recommended that a Special Representative to the Secretary-General on Children and Armed Conflict (SRSG) be appointed.¹¹⁵ The first SRSG, Olara Otunnu was appointed during 1998, and served in that capacity until 2005. The current SRSG, Radhika Coomaraswamy, took office during April 2006.¹¹⁶ The SRSG is mandated to:

- (a) Assess progress achieved, steps taken and difficulties encountered in strengthening the protection of children in situations of armed conflict;
- (b) Raise awareness and promote the collection of information about the plight of children affected by armed conflict and encourage the development of networking;
- (c) Work closely with the Committee on the Rights of the Child, relevant United Nations bodies, the specialized agencies and other competent bodies, as well as non-governmental organizations;
- (d) Foster international cooperation to ensure respect for children's rights in these situations and contribute to the coordination of efforts by Governments, relevant United Nations bodies, [...] regional and sub-regional organizations, other competent bodies and non-governmental organizations.¹¹⁷

In order to fulfil this mandate, the SRSG identified the following “core activities”:

- (a) Public advocacy to build greater awareness and to mobilize the international community for action;

¹¹⁵ Machel, G. ‘Promotion and Protection of the Rights of Children: Impact of Armed Conflict on Children’ UN Doc. A/51/306 (26 August 1996) (Machel Report), para 266-269. The mandate was created in terms of General Assembly Resolution 51/77 of 12 December 1996.

¹¹⁶ Ms Sham-Poo acted as SRSG on an interim basis from August-October 2005.

¹¹⁷ General Assembly Resolution 57/77 of 12 December 1996, para 36.

- (b) Promoting the application of international norms and traditional value systems that provide for the protection of children in times of conflict;
- (c) Undertaking political and humanitarian diplomacy and proposing concrete initiatives to protect children in the midst of war;
- (d) Making the protection and welfare of children a central concern in peace processes and in post-conflict programmes for healing and rebuilding.¹¹⁸

The SRSG highlighted “participation of children in armed conflict” as a key focus area early on.¹¹⁹ To the credit of both people who have served as SRSG on children and armed conflict, they have engaged much more directly in efforts aimed at preventing child soldiering than their mandate may be interpreted.¹²⁰ Indeed, as was stated earlier, Ms Coomaraswamy expressed to me that her role as SRSG is best fulfilled by addressing grave violations committed against children during armed conflict directly, as opposed to more broad engagement. Unlike the situation with the CRC, this does not create any problems, as the SRSG is not a treaty-body, the mandate of which is determined in narrow terms by international law. Two areas in which the SRSG has been particularly successful in direct action against the use and recruitment of child soldiers are undertaking field missions and obtaining concrete commitments from armed forces and groups to cease the use and

¹¹⁸ Otunnu, O. ‘Protection of children affected by armed conflict Report of the Special Representative of the Secretary-General for Children and Armed Conflict’ A/54/430 (1 October 1999), para 2.

¹¹⁹ Otunnu, O. ‘Protection of children affected by armed conflict Report of the Special Representative of the Secretary-General for Children and Armed Conflict’ A/53/482 (12 October 1998).

¹²⁰ The mandate of the Office speaks generally to the Office’s indirect role, as it utilizes language such as “assesses”, “raise awareness and promote” and “foster international cooperation”.

recruitment of child soldiers.¹²¹ Of course, such concrete commitments are only complied with in limited cases.¹²² On the indirect level, the SRSG remains active in raising global awareness, engaging with civil society, and enhancing legal and normative frameworks.¹²³ NGO groups already champion most if not all of these areas of indirect engagement. Nevertheless, the office of the SRSG brings with it the authority of the Secretary-General of the UN. It may also be argued that this brings with it a degree of circumspection, as the UN is often perceived to be pro-government by non-state armed groups in countries where the UN has an established peace mission.¹²⁴

The Secretary-General has, since 2001, been mandated to attach a list to his annual reports on children in armed conflict of parties to armed conflict that use or recruit child soldiers.¹²⁵ In practice, it is the SRSG that compiles these lists. Popovski is of the view that “this was the end of tactful diplomacy”.¹²⁶ In other words, he asserts that directly engaging

¹²¹ See Chapter 6. During her visit to the Central African Republic during May 2008, the SRSG obtained commitments from the Armée populaire pour la restauration de la République et de la démocratie (APRD) that they will release all children associated with their forces. On 7 July 2009 the APRD lived up to their commitment and released all 182 children associated with their forces to UNICEF. See Coomaraswamy, R. ‘Report of the Special Representative of the Secretary-General for Children and Armed Conflict’ A/64/254 (6 August 2009), para 61.

¹²² Wessells, M. *Child Soldiers: From Violence to Protection* (2006) 236-237; Singer, PW. *Children at War* (2006) 143-144; Happold, note 43 above 40-42.

¹²³ ‘Report of the Special Representative of the Secretary-General for Children and Armed Conflict’ A/66/256 93 (August 2011) para 20.

¹²⁴ See Chapter 6 where the United Nations Mission in the Democratic Republic of the Congo (MONUC) serves as a good example not only of the UN being perceived as biased, but where the UN forces play an active role engaging enemy forces.

¹²⁵ Security Council Resolution 1379, para 16. This mandate has been slightly altered since; see Chapter 2.

¹²⁶ Popovski, note 95 above, 46.

with armed groups and forces and in so doing negotiating the end of the use and recruitment of child soldiers is mutually exclusive with naming and shaming violating parties. This argument is, however, premised on an assumption that violating states and armed groups will be less inclined to engage in “tactful diplomacy” when their names may be put on a published list of offenders, which is questionable. Indeed, violating parties might be more willing to engage with the SRSG and provide concrete commitments in order to be excluded from the Secretary-General’s list.

Although the SRSG has achieved much by way of engaging with governments and arguing for the disarmament demobilisation and reintegration (DDR) of children, this is still a very critical, time-sensitive, phase of ensuring compliance with child soldier prohibitions. The inherent value of legal norms to demand compliance may be lost if the relevant norms, or class of norms, have come to be seen as formal prohibitions, the violation of which has no adverse consequences. The successes of yesterday must not blind us from the suffering of today. As former UNICEF Executive Director, James Grant, said, “as our capacity to do good has increased, it is gradually becoming unacceptable ethically not to use that capacity, or to exclude nations, communities or individuals from the benefits of progress. Morality marches with changing capacity”.¹²⁷ Isolated and anecdotal success does not amount to having entered “an era of application”. The SRSG has functioned very effectively to date.

¹²⁷ Grant, JP. ‘Child Health and Human Rights’ Address to the Committee on Health and Human Rights Lecture Programme, Institute of Medicine (1994).

This is probably largely due to the commitment and competencies of those who have held this position.

The one area in which the SRSG should focus more attention is her function as a focal point among all UN functionaries engaged in child soldiering.¹²⁸ Given the extent of the UN as an Organization, the scope for duplication of work is tremendous. Both Zermatten and Pollar indicated that the CRC Committee has no relationship with the SCWG.¹²⁹ The SRSG on the other hand, remains actively involved with both the CRC Committee and the SCWG. However, she should also facilitate a relationship between these entities, and other key entities engaged with child soldier prevention in light of the fact that these two bodies often engage with the same states on exactly the same subject matter; form part of the same organization; and share the same goals.

4. AFRICAN UNION ENGAGEMENT WITH CHILD SOLDIER PREVENTION

This section analyses the potential of the African Court to engage with child soldier prevention. The African Children's Committee is included in the analysis as it is an African intergovernmental organization with the authority to transmit cases directly to the African Court. Neither of these

¹²⁸ As she is mandated to "foster international cooperation to ensure respect for children's rights in these situations and contribute to the coordination of efforts by Governments, relevant United Nations bodies, [...] regional and sub-regional organizations, other competent bodies and non-governmental organizations", see General Assembly Resolution 57/77, para 36(d).

¹²⁹ Zermatten, note 5 above and Pollar, note 6 above.

bodies has generated any significant jurisprudence, and none specifically on child soldiering.

i. The African Committee of Experts on the Rights and Welfare of the Child

As was stated earlier, the African Children's Committee was created in terms of the African Charter on the Rights and Welfare of the Child, which provides that "States 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".¹³⁰

The African Children's Committee has been in existence since 2001, but was rather inactive until November 2008, when the Committee for the first time examined state reports.¹³¹ The Committee's mandate is much broader than that of the CRC Committee, and includes examining state reports,¹³² undertaking fact-finding missions,¹³³ promoting the African Children's Charter and the rights of the child in general.¹³⁴ It also has a mandate to hear individual and inter-state communications.¹³⁵

¹³⁰ Article 22(2), African Children's Charter.

¹³¹ Sloth-Nielsen, J. & Mezmur, BD. 'Out of the Starting Blocks: The 12th and 13th Sessions of the African Committee of Experts on the Rights and Welfare of the Child' (2009) 9 *AHRLJ* 336 342-5.

¹³² Article 43-44, African Children's Charter.

¹³³ *Ibid*, article 45(1).

¹³⁴ *Ibid*, article 42.

¹³⁵ *Ibid*, article 44.

A “Communication on violations of the Rights of the Child in the North of Uganda” is currently on the agenda of the Committee. A three-person working group has been established by the Committee to deal with the admissibility of this communication. This working group will report to the Committee during its next session.¹³⁶ Among other things, this communication relates to the use and recruitment of child soldiers in Northern Uganda.

The Committee’s findings have the force of recommendations, and the ineffectiveness of the Committee is one indicator of the level of political will among state parties to engage further with child rights. The Committee has recently been rejuvenated and, by mid-2011, it had received eleven state reports.¹³⁷ It is hoped that more extensive use will be made of the Committee, such as the individual communication in relation to Northern Uganda. However, the strongest role of the Committee in relation to the prevention of child soldiering relates to the status of the Committee as an “African intergovernmental organizations”, meaning it is one of the gate-keeper entities that hold the key for access to the African Court.¹³⁸ It is this feature of the Committee that warrants its inclusion in this analysis.

¹³⁶ 16th Session of the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) 9-12 November 2010, Addis Ababa, Ethiopia ACERWC/Rpt. (XVI) para 49.

¹³⁷ See www.acerwc.org (last accessed on 24 September 2011).

¹³⁸ Article 5(1)(e) of the Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights (entered into force 25 January 2004) OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III) (Court Protocol).

ii. African Court on Human and Peoples' Rights

Outside of the war crimes tribunals the only international judicial mechanism that potentially has subject-matter jurisdiction over child soldier prohibitive norms is the African Court, established pursuant to a Protocol to the African Charter on Human and Peoples' Rights (Court Protocol).¹³⁹ The Court commenced its functions during November 2006. The child soldier prohibitive norm in question is article 22 of the African Children's Charter. The African Court's counterparts in Europe and the Americas have a much more established jurisprudence. In fact, to date the African Court has only rendered one judgement where the Court found the matter before it inadmissible,¹⁴⁰ and ordered provisional measures in relation to mass-violations of human rights having been committed by the Gaddafi regime during 2011 in Libya.¹⁴¹ Nevertheless, neither the European Convention on Human Rights,¹⁴² nor the American Convention on Human Rights contains substantive provisions prohibiting child soldiering.¹⁴³ Furthermore neither of these regional systems have a regional human rights instrument comparable to the African Children's Charter.

¹³⁹ *Ibid.*

¹⁴⁰ *Michelot Yogogombaye v The Republic of Senegal* Application No. 001/2008 (2008) para 46.

¹⁴¹ *African Commission on Human and Peoples' Rights v Great Socialist People's Libyan Arab Jamahiriya* (Order for Provisional Measures) Application Number 004/2011 (25 March 2011).

¹⁴² Convention for the Protection of Human Rights and Fundamental Freedoms (entered into force of 3 September 1953) ETS 5, 213 UNTS 222.

¹⁴³ American Convention on Human Rights (entered into force of 18 July 1978) OAS Treaty Series No. 36, 1144 UNTS 123.

Subject-Matter Jurisdiction

The Court has jurisdiction over “all cases and disputes submitted to it concerning the interpretation and application of the [African] Charter, this Protocol and any other relevant human rights instrument ratified by the States concerned”.¹⁴⁴ The Court thus has jurisdiction to interpret and apply the African Children’s Charter in cases where it is relevant. However, the question remains open whether the Court’s subject-matter jurisdiction is broad enough to include the CRC. Even if the Court is not competent to apply and enforce UN human rights treaties, its subject-matter jurisdiction remains the broadest of the three regional human rights courts.¹⁴⁵

The second draft of the Court Protocol contained the words “relevant African human rights instrument” instead of “relevant human rights instrument”,¹⁴⁶ indicating that the subject-matter jurisdiction of the Court was purposefully extended to include UN Human Rights Treaties. According to Viljoen the application of UN Human Rights treaties, such as the CRC, is problematic due to three main reasons:

- Should the relevant UN treaty provide its own enforcement mechanism, the party bringing the case will be in a position to

¹⁴⁴ Article 3(1), Court Protocol. See also article 7 dealing with applicable law.

¹⁴⁵ Viljoen, F. *International Human Rights Law in Africa* (2007), 444, note 141.

¹⁴⁶ Nouakchott Draft of the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights (1997) OAU Doc OAU/LEGAL/EXP/AFCHPR/PRO (2).

‘forum shop’. In turn this could mean a separate jurisprudential development of the same treaty norm by two separate bodies.¹⁴⁷

- Where the relevant state party to the UN treaty did not accept an individual complaints procedure under that treaty, it may find itself answering to individual complaints through the workings of the Court Protocol.¹⁴⁸
- Persons in states party to the Protocol may submit alleged violations of a UN treaty to a court with the power to render binding judgements, whereas persons in states party to the relevant UN treaty, but not party to the Court Protocol, may not even submit individual communications to the applicable UN body, being the Committee on the Rights of the Child in the case of the CRC.¹⁴⁹

The first two points raised do not arise in the context of the CRC, as the Committee on the Rights of the Child established in terms of the CRC does not have direct enforcement capabilities nor does it provide for individual complaints (as discussed above, this may, however, soon change).¹⁵⁰ However, the third reason has direct bearing on the CRC. Viljoen suggests two interpretations of the provision to prevent the “absurd” implications it may have.¹⁵¹ Firstly, that the words “states concerned” should be interpreted to mean “all states parties to the [Court]

¹⁴⁷ Viljoen, note 145 above, 446.

¹⁴⁸ *Ibid.*

¹⁴⁹ *Ibid.*

¹⁵⁰ See Chapter 4.

¹⁵¹ Viljoen, note 145 above, 446-447.

Protocol". In the context of the CRC even such an interpretation would not prevent the Court from exercising jurisdiction over the CRC, as the only state that can potentially ratify the Protocol without having ratified the CRC is Somalia. It is the only African state that has not as of yet ratified the CRC and it is foreseeable that should Somalia be in a position to ratify international instruments it will ratify the CRC before the Court Protocol.¹⁵² In fact, an equal number of African states are party to the CRC as are members of the African Union.¹⁵³ Viljoen's second suggestion is that the word "relevant" should be so interpreted that UN treaties are not relevant or appropriate in the regional African human rights sense of the word.¹⁵⁴

On the other hand many commentators argue that UN Human Rights treaties are included in the Court's subject-matter jurisdiction,¹⁵⁵ which remains problematic. Both the text of the Court Protocol as well as its drafting history suggests that the Court does in fact enjoy such wide

¹⁵² The Transitional Federal Government (TFG) of Somalia announced on 20 November 2009 their plans to ratify the CRC. The previous TFG signed the CRC on 9 May 2002 (see News Note 'UNICEF welcomes decision by the Somali Transitional Federal Government to ratify the Convention on the Rights of the Child' UNICEF (20 November 2009) (<http://www.unicef.org> last accessed on 24 September 2011)).

¹⁵³ In Africa only Somalia is not a party to the CRC and only Morocco is not a member of the African Union.

¹⁵⁴ Viljoen, note 145 above, 446-447.

¹⁵⁵ Duy Phan argues that all Human Rights treaties are included, but that this is undesirable (Duy Phan, H. 'A Blueprint for a Southeast Asian Court of Human Rights' 10 *APLPJ* 384 (2008-2009) 398-399). Others argue that there is merit in such broad subject-matter jurisdiction (Samb, M. 'Fundamental Issues and Practical Challenges of Human Rights in the Context of the African Union' 15 *Ann. Surv. Int'l & Comp. L.* 61 (2009) 69-69; Mukundi Wachira, G. 'African Court on Human and Peoples' Rights: Ten years on and still no justice' (Report of the Minority Rights Group International) (2008) 19; Ubombana, NJ. 'Towards the African Court on Human and Peoples' Rights: Better Late than Never' (2000) 3 *Yale Human Rights and Development Law Journal* 45; Eno, RW. 'The Jurisdiction of the African Court on Human and Peoples' Rights' 2 *AHRLJ* 223 (2002) 226-227.

jurisdiction. Furthermore, a Protocol has been opened for ratification aimed at merging the African Court on Human and Peoples' Rights and the African Court of Justice (Merger Protocol).¹⁵⁶ Although this Protocol is unlikely to enter into force, it is instructive to note that in terms of the Merger Protocol, the Court will definitely have jurisdiction in relation to UN human rights treaties such as the CRC.¹⁵⁷ For the time being, primacy should be afforded to African regional instruments. UN treaties should only be interpreted and applied secondarily, if at all. The Court will surely, as a matter of course, deal with this issue early on. The discussion that follows is not dependent on which substantive child soldier prohibitive norm is applicable (African Children's Charter or CRC), as these treaty norms have been discussed independently in Chapter 4. Rather the practicalities involved in the Court's exercise of jurisdiction over matters related to child soldiering are assessed.

Locus Standi

The African Court has both contentious and advisory jurisdiction.¹⁵⁸ The following entities have access to the Court: the African Commission on Human and Peoples' Rights (the Commission); the State Party which has lodged a complaint to the Commission; the State Party against which the

¹⁵⁶ The Protocol on the Statute of the African Court of Justice and Human Rights was adopted by the Eleventh Ordinary Session of the Assembly, held in Sharm El-Sheikh, Egypt (1 July 2008) (Merger Protocol). For more on the history of this Protocol see Kane, I. and Motala, AC. 'The Creation of a New African Court of Justice and Human Rights' in Evans, MD. and Murray, R. (eds.) *The African Charter on Human and Peoples' Rights: the System in Practice, 1986-2006* (2008) 406-440.

¹⁵⁷ Article 34(1), Merger Protocol.

¹⁵⁸ Article 4, Court Protocol.

complaint has been lodged at the Commission; the State Party whose citizen is a victim of human rights violation; and African Intergovernmental Organizations.¹⁵⁹ State parties who have an interest in a matter may also request the Court to be joined to the proceedings.¹⁶⁰ Lastly, relevant NGOs, with observer status before the Court, and individuals may be allowed to submit cases directly to the Court, provided that the relevant state party has made a declaration in terms of article 34(6) of the Court Protocol accepting direct access by such parties to the Court.¹⁶¹

The likelihood of certain specific entities with standing to submit a matter to the Court is less than others. For example, it is unlikely that a state party against whom a complaint has been lodged at the Commission will submit the matter to the Court,¹⁶² as the Court's judgement will be binding and enforceable, while the Commission's is not. Nevertheless, matters regarding child soldier prevention can be brought before the Court by any party with standing. Importantly, the African Children's Committee can also bring matters before the Court, as it is an African Intergovernmental Organizations.¹⁶³ The African Children's Committee should exercise this competency in serious matters regarding the use and recruitment of child soldiers. It is important to note that individuals have access to the complaints procedures of this Committee, thus the Committee can

¹⁵⁹ *Ibid*, article 5(1)(e).

¹⁶⁰ *Ibid*, article 5(1).

¹⁶¹ *Ibid*, article 5(3).

¹⁶² The Commission was established in terms of Article 30 of the African Charter on Human and Peoples' Rights (entered into force on 21 October 1986) 1520 UNTS 217.

¹⁶³ The African Committee of Experts on the Rights and Welfare of the Child was established in terms of Article 32 of the African Children's Charter.

forward an individual complaint to the Court even where the relevant state had not made a declaration granting direct access to individuals.

In terms of child protection, direct access by NGOs and individuals surely offers the best potential avenue for protection. To date twenty-five out of a total of fifty-four countries have ratified the Court Protocol. Of these countries only four: Burkina Faso, Malawi, Mali and Tanzania have entered a declaration allowing direct access to individuals and relevant NGOs with observer status before the Court.¹⁶⁴ Where the relevant state had not made a declaration, the communication will first have to be submitted to the Commission. However, for a matter to be admissible before the Commission it has to be based on a violation of the African Charter on Human and Peoples' Rights (African Charter)¹⁶⁵ in addition to the other admissibility requirements as stipulated in article 56 of the African Charter. The African Children's Charter is not a protocol to the African Charter, and accordingly, a violation of the African Children's Charter does not amount to a violation of the African Charter.¹⁶⁶

The African Charter contains no explicit provisions on child soldiering.

The question then is whether the matter has to be admissible before the

¹⁶⁴ As at 10 September 2011.

¹⁶⁵ Article 56(2), African Charter; *Frederick Korvah v Liberia* Communication 1/88, *Frederick Korvah v Liberia*, Seventh Activity Report 1993-1994, Annex IX.

¹⁶⁶ The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (entered into force on 25 November 2005) CAB/LEG/66.6 does extend the substantive content of the African Charter as regards state parties to this Protocol, by reason that it is a Protocol (Viljoen, F. 'Communications under the African Charter: Procedure and Admissibility' in Evans & Murray, note 146 above, 96).

Commission for the Commission to submit the matter to the Court. If it has to be, then the Commission will not be able to submit a communication to the Court that alleges the use and recruitment of child soldiers. The Commission's entitlement to submit such matters to the Court is exercised *ex mero motu*. As such, the substantial likelihood is that this determination (i.e. whether the Commission must first determine admissibility, before submitting the matter to the Court) will be subject to the interpretation of the Commission and not the Court. There are three possibilities: the Commission will forward the matter to the Court without having dealt with it at all; the Commission would deal with the matter in part and then submit the matter to the Court; or the Commission will finalise the matter and then submit it.¹⁶⁷ The last option is widely supported by commentators.¹⁶⁸ In order for the Commission to make a decision on whether to submit the matter to the Court, the Commission should apply its mind to the matter at hand. Thus, my position is that at the very least the Commission will have to dispose of the matter partially. This will include a finding on admissibility. As such and in effect, it is likely that the Court's subject-matter jurisdiction will be severely limited in instances where the matter is referred from the Commission – which will likely account for a great majority of cases that reach the court.

¹⁶⁷ For a full discussion of the three possibilities see Viljoen, F. (ed) 'Judiciary Watch Report: the African Human Rights System: Towards the Coexistence of the African Commission on Human and Peoples' Rights and African Court on Human and Peoples' Rights' (Nairobi: Kenyan Section of the International Commission of Jurists, 2006).

¹⁶⁸ See for example Harrington, J. 'The African Court on Human and Peoples' Rights' in Evans & Murray, note 146 above, 305.

The African Court has immense potential in the context of child soldier prevention. The realisation of this potential, however, is subject to numerous factors; the first being the number of states that enter declarations allowing direct access to individuals and NGOs with observer status.

The Court's remedial powers are very broad. It is entitled to make "appropriate orders to remedy the violation" and this includes payment of fair compensation or reparations.¹⁶⁹ The Court is also entitled to adopt provisional measures.¹⁷⁰ In the context of child soldiering the most obvious orders would be for states to cease the use and recruitment of child soldiers; enforce such legal measures on non-state groups; order the DDR of specific children; and to pay reparations. The pessimistic reality remains that even though the Court delivers binding judgements it is still subject to observance by the executive of the relevant state. Where the executive fails to adhere to the Court's findings, the judiciary of the relevant state should safeguard the sanctity of the Court's ruling. However, in many states in Africa the separation of the executive from the judiciary is theoretical at best.¹⁷¹

¹⁶⁹ Article 27(1), Court Protocol.

¹⁷⁰ *Ibid*, article 27(2).

¹⁷¹ Fombad, CM. 'The Separation of Powers and Constitutionalism In Africa: The Case of Botswana' 25 *B.C. Third World L.J.* 301 (2005) 302.

5. SUMMARY

When Otunnu spoke of entering “an era of application” in relation to child soldier prevention, he did so *ex officio*, as a functionary forming part of the UN. As the international organization charged with the maintenance of peace and security, and the safeguarding of the fundamental human rights of those who cannot safeguard their rights themselves, such as child soldiers, the UN forms the core of the international community’s response. This was true in the context of norm creation – both the CRC and the CIAC Protocol were the products of initiatives internal to the UN. It must also be true in the context of norm application. In no way does this suggest that functionaries outside of the UN, such as the ICC and the African Court, play a second-tier role in preventing child soldiering. Instead, the UN should be the core, because, unlike other institutions, it enjoys the universal subscription of states.

Each of the institutions discussed in this Chapter operate on various levels of efficiency in preventing child soldiering. In some cases, such as the CRC Committee, its lack of success is due, in large part, to a weak mandate. In others, such as the African Court and the African Children’s Committee, political will stands in the way of stronger engagement. Yet, other functionaries, such as the SRSG already operate at a very significant level of efficiency – this does not change the fact that child soldiering as a global phenomenon is not diminishing at a noticeable rate. Therefore, all these institutions and functionaries should constantly re-

asses their engagement with child soldier prevention and refine their approaches.

Some of the areas in which these institutions and functionaries can increase their level of engagement with child soldiering are significant, for example, adopting the Protocol to the CRC creating an individual communications procedure in the CRC Committee. Yet, other areas where the level of engagement with child soldiering can be increased are more mundane. For example, the SRSG should pay more attention to her role as a focal point for UN engagement with child soldier prevention, by facilitating a more streamlined relationship, or at least the exchange of reports and knowledge, between the CRC Committee and the SCWG. It must be kept in mind, however, that strengthening any one of the mechanisms analysed in this or any other chapter is unlikely to result in a significant decline in child soldiering. There are no “silver bullet” solutions to issues such as child soldier prevention. However, each mechanism that is strengthened and rendered more effective, even to a limited extent, strengthens a strand in Cassel’s rope that pulls human rights forward – and in this case, protects children from military use and recruitment – effecting social change incrementally.¹⁷² Entering “an era of application” does not require big changes to a few functionaries, but less significant changes to more functionaries, so that many strands of the rope are strengthened.

¹⁷² Cassel, D. ‘Does International Human Rights Law Make a Difference?’ 2 *Chi. J. Int’l L.* 121 (2001) 126-134.

CHAPTER 6 CASE STUDY: THE DEMOCRATIC REPUBLIC OF THE CONGO

This Chapter serves a different purpose to that of the other chapters that make up this study. Instead of investigating the legal environment in which child soldiering is to be prevented, or rendering the mechanisms that aim to prevent child soldiering more efficient, this Chapter considers the engagement of these mechanisms with a contemporary country-situation, where child soldiering is a significant problem. Most of the mechanisms included in this Chapter were previously discussed in Chapters 4 and 5. Accordingly, the conclusions drawn with regard to each of these mechanisms in those chapters, which are aimed at rendering the relevant mechanism more effective in preventing child soldiering, can be assessed in relation to a practical situation. As such, the purpose of this chapter is not to draw new conclusions, but to test conclusions previously drawn.

As is explained more fully below, the Democratic Republic of the Congo (DRC) was identified as the best country-situation for a case study, as virtually every incarnation of the child soldier phenomenon has occurred in the DRC during the last decade. Furthermore, the use and recruitment of child soldiers occurs daily in the DRC.

1. CONDUCTING FIELDWORK DURING ARMED CONFLICT IN THE DRC

The DRC serves as the ideal case study in relation to child soldier prevention, as this country has experienced every dimension of the child soldier problem within the last decade. In order to do a case study within the factual context of events, I conducted a four-month field visit to the DRC from October 2008 to January 2009. I divided my time between the Ituri Region, in the North East of the country, where I was based in the regional capital, Bunia; and the Kivu Provinces (Nord and Sud), in the East of the country. I was based in Goma, in the provincial capital of Nord Kivu, during my stay in the Kivu Provinces.

i. The Contemporary Conflict Landscape in the DRC

The first Congo War began during November 1996 through the escalation of skirmishes on the mountainous borderlands of the DRC and Rwanda.¹ It ended barely seven months later, 2000 kilometers away, with Laurent-Désiré Kabila's march on Kinshasa, and eventual over-throw of President Mobutu Sésé Seko. The DRC has experienced continuous combat ever since it became independent on 30 June 1960. This is specifically true in the east and northeast of the country, and children have been used and recruited in every war fought in the DRC since independence. The Second Congo War, as well as numerous other conflicts that have

¹ For a full account of contemporary armed conflict in the DRC see Clark, JF. (ed.) *The African stakes of the Congo War* (2002).

occurred and are on-going in the DRC subsequently, have at various times had an international and non-international character.²

Ethnicity has been the key factor in conflicts throughout the DRC for many years. At the core of the most recent conflicts lie the distinction between Hutu and Tutsi;³ and the distinction between Hema and Lendu.⁴ There are further ethnic groups who align themselves with one of the above-mentioned groups, or with wholly separate identities, but who play less significant roles in armed conflict. Natural resources and politics create an even more volatile conflict landscape.⁵ The recent conflicts have primarily been categorized as the First Congo War; the Second Congo War; the Kivu Conflict; and the Ituri Conflict. These conflicts overlap with one another and converge to the extent that a single perpetual conflict emerges.

Children are still recruited and used in active participation in hostilities in the DRC on a daily basis. Such use and recruitment occurs primarily in the context of the ongoing, low-intensity hostilities between the Hutu and Tutsi ethnic groups in the Kivu Provinces of the DRC, and the abduction

² See for example, *Armed activities on the territory of the Congo (Democratic Republic of the Congo v Uganda)* 2005 ICJ Reports 168.

³ The Hutus and Tutsis are two rival ethnic groups in the Great Lakes region of Africa. Hutus far outnumber the Tutsis, but the Tutsis have taken up more elite positions in society. There are arguments that there is no longer a discernable difference between these two groups. This rivalry formed the basis of the 1994 Rwandan genocide.

⁴ The Hema and Lendu are two ethnic groups located in the Ituri region of the DRC. The Hema are pastoralists and have a population of approximately 160 000 people. The Lendu number approximately 750 000 and are agriculturalists.

⁵ Ross, ML. 'How Do Natural Resources Influence Civil War? Evidence from Thirteen Cases' Volume 58, Number 1 *International Organization* (2004) 35.

of children by the [Ugandan] Lord's Resistance Army in the northeast of the country.

Many so-called *genocidaires*, the perpetrators of the 1994 Rwandan genocide, crossed the border into the DRC soon after the genocide.⁶ The strongest armed group consisting of former *genocidaires* is the *Forces démocratiques de libération du Rwanda* (FDLR), who are responsible for committing atrocities against people of Tutsi ethnicity on a continuous basis and who aim to ethnically cleans the *Banyamulenge* (ethnic Congolese Tutsis).⁷ The *Interahamwe*, the principal architects of the Rwandan genocide, are also allied with the FDLR. Opposed to the FDLR, was the National Congress for the Defense of the People (CNDP). The CNDP operated under the leadership of General Laurent Nkunda until Nkunda's capture by the Rwandan Armed Forces on 22 January 2009. It is believed that Bosco Ntaganda took over from Nkunda as leader of the CNDP. However, the CNDP has since largely been integrated into the National Armed Forces of the DRC, the *Forces Armées de la République Démocratique du Congo* (FARDC). Many smaller factions, as well as the FARDC itself have been and are involved in these hostilities. Most of them use and recruit child soldiers. This includes Mai Mai groups, who are civilian defense forces operating across the eastern parts of the DRC.

⁶ Dunn, KC. 'A Survival Guide to Kinshasa: Lessons of the Father, Passed Down to the Son' in Clark, JF. (ed.) *The African stakes of the Congo War* (2002) 56.

⁷ Vlassenroot, K. 'Citizenship, Identity Formation & Conflict in South Kivu: The Case of the Banyamulenge' Volume 29, Number 93/94 *Review of African Political Economy* 'State Failure in the Congo: Perceptions & Realities' (September - December 2002) 499.

The Lord's Resistance Army has also, since 2007, been based primarily in the remote jungles of the Garamba National Park in northeastern DRC.⁸ This group continues to thrive purely on the basis of the vicious abduction of children.

ii. The Challenges of Doing Field-Work in the DRC

I started planning the logistics for my field-visit during early 2008. Although the conflict landscape in the DRC is always volatile and never predictable, it appeared, at the time that the de-escalation in hostilities would have lasted until after my field visit. Indeed, my visit took place after the January 2008 peace agreement. Nevertheless, by the time I got ready to depart for the DRC during October 2008, conflict escalated very significantly on two fronts. The 2008 Nord Kivu Conflict commenced on 26 October 2008 and lasted until 23 March 2009, which included my entire stay in the Nord Kivu province. It was also during this time that the Lord's Resistance Army intensified their operations within the DRC. In this context the 2008 Christmas massacre is the most notable example. During the Christmas period of 2008 the LRA orchestrated attacks on several small villages in north-eastern DRC, hacking to death an estimated 500 people and abducting 160 children. The LRA's abduction

⁸ Report of the Secretary-General on Children and armed conflict, A/64/742-S/2010/181 (13 April 2010) (2010 Security Council Report) para 157-159.

of children had strongly increased since the second half of 2008.⁹ For the period September 2008 to the end of March 2009, the LRA were responsible for the murder of 990 Congolese nationals and the abduction of 747 people, mostly children.¹⁰

While the escalation of armed conflict is never desired, it may appear that doing fieldwork during a period of such escalation in armed conflict is well-suited to achieving the research goals. The timing of my fieldwork did hold some advantages. For example, as is discussed below, re-escalation in hostilities presents an opportunity to gauge whether successes that have been achieved in the Disarmament, Demobilisation and Reintegration of child soldiers is attributable to de-escalation in hostilities. These advantages are in fact few and far between. In addressing the protection, or lack thereof, of children in armed conflict, and improvements in such protection, Kuper has stated:

Clearly it is not feasible to conduct reliable empirical research, to stand in the midst of conflict and count child soldiers and/or child casualties, or to observe the treatment of children generally. Nor could such observation be sufficiently objective and comprehensive to be useful. So, how is it possible to ascertain if the relevant international law has any effect? Perhaps the most that can be done besides the painstaking analysis of individual conflicts, is to assess what seems likely to have any impact, and to take note of instances in which progress is made, for example when an army agrees to stop using soldiers under 18 years, or a rebel group agrees to release children it has captured.¹¹

⁹ Fawke, M. 'UNHCR visits Congolese towns attacked by Lord's Resistance Army' *UNHCR* (2008) <www.unhcr.org> (last accessed on 28 September 2011).

¹⁰ Redmond, R. (UNHCR spokesperson) comments made at press briefing at the Palais des Nations in Geneva (24 March 2009).

¹¹ Kuper, J. 'Children and Armed Conflict: Some Issues of Law and Policy' in Fottrell, D. *Revisiting Children's Rights: 10 Years of the UN Convention on the Rights of the Child* (2000).

In a similar vein, the escalation of armed conflict does not present better opportunities for data collection; in fact it seriously hampers such data collection. My research design was such that I aimed to interview a broad range of actors working for international organizations, most notably the United Nations (UN), and civil society, who operate in the field. I managed to arrange interviews with various people within the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUC), the UN Peace Mission in the DRC. In only one of these meetings did the interviewee agree to me recording the interview and use the information publicly. This interview was with Estelle Nandy Ouattara, child protection officer in MOBUC's Bunia office.¹² Each of the other interviews conducted with MONUC staff was done on the basis that I was not to record the interview, or attribute the information to the individual interviewee. This was explained to me on the basis that, because of the escalation in armed conflict and the corresponding use and recruitment of child soldiers, the information is of strategic relevance and may not be published. However, MONUC had been criticised extensively during that same period within the media, and this likely contributed to the trouble I had to interview MONUC personal 'on the record'.

¹² Interview conducted with Ms Ouattara on 13 November 2008, Bunia, DRC.

I did manage to interview various people working within UN entities distinct from MONUC. In particular, I interviewed Ms Pernille Ironside, who was, at the time, a Child Protection Specialist for the United Nations Children's Fund (UNICEF) in Eastern DRC.¹³ At present, Ironside is 'UNICEF Child Protection Specialist in Emergencies', based in New York City. She is a great example that one person can make a huge contribution even in an organization as vast as the UN.

Access to NGOs was equally difficult during this period, but for other reasons. With limited human and financial resources during periods of escalation in conflict, specifically if it occurs on an unpredictable level, NGOs have to utilize all their resources to their full capacity. As was communicated to me frequently, while NGOs fully support research such as this study, they simply do not have the time to commit to an interview. Of the NGOs, representative of whom I did manage to interview, the best data was obtained from Save the Children, *Cooperazione Internazionale* (COOPI), and the Salesian run Don Bosco Ngangi centre for war orphans and at-risk children. In this Chapter I particularly rely on interviews conducted with Marleen Korthais Altes, of Save the Children,¹⁴ and Michel Andretti,¹⁵ of COOPI.

¹³ Interview conducted with Ms Ironside on 22 November 2008, Goma, DRC.

¹⁴ Interview conducted with Ms Korthais Altes on 14 November 2008, Bunia, DRC.

¹⁵ Interview conducted with Mr Andretti on 24 November 2008, Goma, DRC.

2. MUNICIPAL AND INTERNATIONAL CRIMINAL PROSECUTIONS FOR THE USE AND RECRUITMENT OF CHILD SOLDIERS IN THE DRC

The DRC has been the first state, a national of which, is being tried by the ICC. It is also the first state to have prosecuted an individual for the use and recruitment of child soldiers in a municipal court. Chapter 4 dealt with the legal-technical aspects of international prosecution. The purpose of this section is to investigate the role such prosecutions may play in preventing child soldiering in the DRC.

i. The International Criminal Court

As was discussed in Chapter 4, the first case that has proceeded to trial before the ICC, *Prosecutor v Lubanga*, emanates from the DRC.¹⁶ More specifically, *Lubanga* was the leader of the Union of Congolese Patriots (UPC), as well as the *Forces patriotiques pour la libération du Congo* (FPLC), the military wing of the UPC and one of the principal armed groups involved in the Ituri conflict. As was stated, the conflict in Ituri was largely between the Hema and Lendu ethnic groups. The UPC/FPLC was a Hema organisation. It is alleged that Lubanga was the president of the UPC and the Commander-in-Chief of the FPLC, since September 2002 and at least until the end of 2003. He is charged exclusively with the use and recruitment of child soldiers, and significantly he is charged with all

¹⁶ *Prosecutor v Thomas Lubanga Dyilo*, (Warrant of Arrest), ICC-01/04-01/06 (2006) (*Lubanga Warrant of Arrest*); *Prosecutor v Lubanga Confirmation of Charges* ICC-01/04-01/06 (2007) (*Lubanga Confirmation of Charges decision*).

three of the substantive crimes regarding the use and recruitment of child soldiers, being the enlistment, conscription and use of child soldiers. It is specifically alleged that under Lubanga's leadership the FPLC committed repeated acts of enlistment and conscription of child soldiers, and also repeatedly used children for active participation in armed conflict between July 2002 and December 2003.¹⁷

The ICC has issued arrest warrants against four more individuals. The trial of Germain Katanga and Mathieu Ngudjolo Chui, who are being tried jointly, has also commenced.¹⁸ They are both, *inter alia*, charged with the use of children younger than fifteen for active participation in hostilities, but not their enlistment or conscription.

On 24 February 2003, two armed groups predominantly belonging to the Lendu ethnic group, the *Front des nationalistes et intégrationnistes* (FNI) and the *Force de résistance patriotique en Ituri* (FRPI), launched an indiscriminate attack against the inhabitants of Bogoro, a small village in Ituri, the residents of which are mostly of Hema ethnicity.¹⁹ Ngudjolo Chui was the highest-ranking FNI commander and it is alleged that the mass-

¹⁷ In particular, it is alleged that members of the FPLC repeatedly used children for active participation in armed conflict in Libi and Mbau (October 2002), Langu (beginning 2003), Lipiri and Bogoro (February and March 2003), Bunia (May 2003) and Djugu and Mongwalu (June 2003). See *ibid*, *Lubanga Warrant of Arrest*.

¹⁸ *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07 (2007) (*Katanga and Ngudjolo Warrant of Arrest*); and *Prosecutor v Katanga and Ngudjolo Confirmation of Charges* ICC-01/04-01/07 (2008) para 247 (*Katanga and Ngudjolo Confirmation of Charges decision*).

¹⁹ *Ibid*, *Katanga and Ngudjolo Warrant of Arrest*, and *Katanga and Ngudjolo Confirmation of Charges decision*.

atrocities committed during this attack, were committed on his orders. Katanga was the ranking commander of the FRPI forces who participated in the attack. Had it not been for the attack on Bogoro, it is unlikely that arrest warrants for Katanga and Ngudjolo Chui would have been issued. They are nevertheless charged with war crimes and crimes against humanity committed between January 2003 and March 2003, in the broader context of the hostilities in Ituri.

The only one of the five people against whom the ICC has issued an arrest warrant, in the DRC situation, who is still at large, is Bosco Ntaganda.²⁰ Between July 2002 and 8 December 2003 Ntaganda was Deputy Chief of General Staff for Military Operations, ranked third in the hierarchy of the FPLC (of which Lubanga was the leader at the time). Like Lubanga, Ntaganda is charged only with the use and recruitment of child soldiers, and he is also charged with all three substantive crimes, the enlistment, conscription and use of children for active participation in hostilities.

Unlike the above defendants whose alleged criminal conduct was committed during 2002 and 2003 in the Ituri region of the DRC, the arrest warrant issued against Callixte Mbarushimana relates to crimes committed in the Nord Kivu and Sud Kivu provinces between January

²⁰ *Prosecutor v Bosco Ntaganda*, ICC-01/04-02/06 (2006) (*Ntaganda Warrant of Arrest*).

2009 and 20 August 2010.²¹ At the time, Mbarushimana was Executive Secretary of *Forces démocratiques pour la libération du Rwanda – Forces combattantes Abacunguzi* (FDLR). Although child soldiers were used and recruited extensively in the Kivu provinces during this time, Mbarushimana is not charged with the war crime of child soldier use or recruitment. The relevance of including Mbarushimana into this discussion is due to the fact that notwithstanding the fact that he is Rwandan, he is accused of committing crimes within the DRC and secondly, these crimes were perpetrated during my stay in the DRC.

The Court has, as yet, not rendered a single judgment on the merits. As such, it is premature to gauge the effect the ICC may have on deterring crimes in the DRC. A number of valuable observations can, however, already be made. The situation in the DRC was referred to the Court as a state referral.²² This at least shows a level of commitment by the Government of the DRC to ensure that justice prevails. There were, very likely, political considerations that influenced the decision of the DRC to refer the situation to the ICC, and indeed, these political considerations may have been decisive. However, it is only the country-situation that is referred by the state and not the individuals against whom arrest warrants will be issued. This largely mitigates the degree to which the ICC can be used by states to combat elements opposing the state.

²¹ *Prosecutor v Callixte Mbarushimana*, ICC-01/04-01/10 (2010) (*Ntaganda Warrant of Arrest*).

²² ICC Press Release 'Prosecutor receives referral of the situation in the Democratic Republic of Congo' ICC-OTP-20040419-50 (2004).

The emphasis the ICC, and in particular the Office of the Prosecutor, has placed on the use and recruitment of child soldiers as a war crime is of great significance. Of five people charged in the DRC situation, it is alleged that four enlisted, conscripted or used children in armed conflict, and two of these people are charged solely with the enlistment, conscription and use of child soldiers. In a country situation where killings and rape occur daily, along with the constant fear of renewed genocide, the fact that the prevention of child soldiering has emerged as the crime around which the fight against impunity has been rallied indicates that this crime is not a lesser crime when compared to other war crimes and crimes against humanity.

The arrest warrant for Ntaganda was originally issued under seal, as the Court feared that “public knowledge of the proceedings in this case might result in Bosco Ntaganda hiding, fleeing, and/or obstructing or endangering the investigations or the proceedings of the Court”.²³ However, the warrant has been unsealed since April 2008.²⁴ The irony is that not only does Ntaganda, now a General in the Congolese Army, make frequent public appearances without being arrested by either the DRC authorities or MONUC/MONUSCO, strong allegations have been

²³ ICC Press Release ‘Warrant of arrest against Bosco Ntaganda unsealed’ ICC-CPI-20080429-PR310 (2008).

²⁴ *Ibid.*

made that Ntaganda operates as a senior commander in joint UN/FARDC operations.²⁵

While I was in the DRC, and in particularly in Ituri, I was surprised at just how aware of the ICC the local people I spoke to were. Indeed, this was true to the extent that I soon learned that the reluctance on the part of many local people to speak to me at all was due to a fear that I was an ICC investigator, and that speaking to me could lead ultimately to being prosecuted by the ICC. Yet, this awareness of the ICC and fear of prosecution among those who participated in atrocities, may soon be lost if those against whom arrest warrants have been issued are free to maintain their public personas without fear of arrest and surrender. The eventual effect the ICC may have on deterring crime, and entering “an era of application” in preventing child soldiering, is dependent on these initial years of operation of the Court.

ii. Municipal Courts in the DRC

During March 2006 the DRC became the first nation, and remains the only one to date, to prosecute an individual for the use and recruitment of child soldiers.²⁶ The defendant, Major Jean Pierre Biyoyo, an FARDC commander, was initially sentenced to death. However, the sentence was

²⁵ Human Rights Watch Press Release ‘DR Congo: ICC-Indicted War Criminal Implicated in Assassinations of Opponents’ (13 October 2010).

²⁶ ‘Report of the Secretary General on Children and Armed Conflict in the Democratic Republic of the Congo’ *United Nations Security Council S/2007/391* (28 June 2007) (2007 Security Council Report) para 72.

later commuted to 5 years imprisonment, and Biyoyo escaped from prison three months later. During December 2008 Ironside told me that UNICEF, and the UN in general, were aware of Biyoyo's whereabouts, and that he had re-joined his FARDC integrated unit in which he held the rank of Major. Yet, the authorities have not attempted to re-arrest this convicted escapee. The absurdity of this situation was further exacerbated by the promotion of Biyoyo, during 2010, to Colonel in the FARDC.²⁷

The UN Special Representative to the Secretary General on Children and Armed Conflict (SRSG), Ms Radhika Coomaraswamy specifically raised the issue of Colonel Biyoyo with the government during her country visits to the DRC during March 2007 and April 2009.²⁸ The authorities nevertheless still failed to take action. It thus appears that the Government of the DRC is motivated more by the positive appearance created by the ratification and promulgation of conventions and laws prohibiting the use and recruitment of child soldiers than by any genuine political will to end impunity and eradicate child soldiering.

As the party most responsible for protecting children in the DRC, the National Government is the primary destination for change. The

²⁷ Interview conducted with Ms Ironside on 22 November 2008, Goma, DRC.

²⁸ Coomaraswamy, R. 'Press Conference by Special Representative for Children and Armed Conflict' UN Department of Public Information, News and Media Division, New York (16 March 2007); Mission Report 'Visit of the Special Representative for Children and Armed Conflict to The Democratic Republic of the Congo' (14-21 April 2009) 7.

cornerstone of any national government's response to child rights is the enactment of targeted legislation. A more positive development was the coming into force of the DRC Child Protection Code (2009).²⁹ The Secretary-General's annual reports, filed pursuant to Security Council Resolution 1612, have specifically encouraged this development.³⁰ The 2008 report cited three municipal prosecutions related to the use and recruitment of children.³¹ The defendants include Mai Mai Colonel Engangela (aka Colonel 106),³² FARDC Major Bwasolo Misaba,³³ and the notorious Mai Mai commander Kyungu Mutanga (aka Gedeon). Gedeon is *inter alia* charged with the recruitment of at least 300 children.³⁴ The Secretary-General has previously identified two of these individuals as violating parties.³⁵ The prosecution of Gedeon came in the wake of strong recommendations to that effect made by the Security Council Working Group on Children and Armed Conflict.

²⁹ 'Concluding Observations of the Committee on the Rights of the Child: Democratic Republic of the Congo' *Fiftieth Session of the Committee on the Rights of the Child* CRC/C/COD/CO/2 (January 2009) para 3.

³⁰ 'Report of the Secretary-General on Children and Armed Conflict in the DRC' S/2006/389 (13 June 2006) (2006 Secretary-General DRC Report) para 7 & 45; 'Report of the Secretary General on Children and Armed Conflict in the Democratic Republic of the Congo' S/2007/391 (28 June 2007) (2007 Secretary-General DRC Report) para 60.

³¹ 'Report of the Secretary General on Children and Armed Conflict in the Democratic Republic of the Congo' S/2008/693 (10 November 2008) (2008 Secretary-General DRC Report) para 77, 79 & 80.

³² Colonel Engangela (AKA Colonel 106) has been charged with insurrection, with further evidence being collected to sustain charges of forced recruitment of children under 15, abduction and illegal detention. Colonel Engangela (AKA Colonel 106) was identified as Colonel Mabolongo (AKA Colonel 106), in 2007 Secretary-General DRC Report, note 30 above para 30.

³³ Major Bwasolo Misaba was sentenced to 5 years imprisonment for the recruitment of three children aged between 10-14.

³⁴ Kyungu Mutanga (aka Gedeon) is *inter alia* charged with the war crime of the military recruitment or use of children.

³⁵ Colonel Engangela (AKA Colonel 106) was identified as Colonel Mabolongo (AKA Colonel 106) in the 2007 Secretary-General DRC Report, note 30 above, para 38; Gedeon was identified as a child soldier recruitment violator in the 2007 Secretary-General DRC Report, note 30 above, para 58 & 72.

Unfortunately, it appears that both within the context of international and municipal prosecutions, Government authorities in the DRC are inclined to protect individuals from prosecution and punishment where it serves their own interests. This is indicative of a weak rule of law, which renders the utilization of municipal machinery to prevent child soldiering less likely to succeed. It has previously been argued that the ICC operates on a basis of selective prosecution. As such, the necessary capacity to bring a majority of violating parties to justice should come from municipal courts and legal systems.³⁶ This approach, however, is unlikely to succeed where the rule of law in the relevant state is very weak. On a more positive note, on 17 February 2011, the Superior Council of Judiciary of the DRC announced the nomination of 12 judges, assigned to a new tribunal to address cases related to children.³⁷ However, it remains to be seen whether this tribunal would attain any success, notwithstanding the weak rule of law in the DRC and the numerous further systemic problems that render the protection that the law is supposed to offer children, ineffective.

³⁶ See Chapter 4.

³⁷ Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo S/2011/298 (12 May 2011) (Second Secretary-General MONUSCO Report) para 49.

3. THE UNITED NATIONS AND THE PREVENTION OF CHILD SOLDIERING IN THE DRC

Virtually every relevant entity that forms part of the UN has engaged with the armed conflicts in the DRC. On the child soldier prevention front, the day-to-day activities of the UN peace mission in the DRC, the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO), relates to child soldier prevention on many levels. Additionally, the SRSG on Children and Armed Conflict has consistently engaged with child soldiering in the DRC since the first SRSG was appointed during 1998. So too, has the Security Council Monitoring and Reporting Mechanism, and as was noted in the previous section, the recommendations of this mechanism appear to have already shown a margin of success. Finally, in any country-situation such as the DRC, where there are thousands of child soldiers, and thousands more have recently been demobilized, a proper Disarmament, Demobilization and Reintegration (DDR) programme is essential for various reasons. From a child soldier prevention point of view, proper DDR is one of the primary ways in which to prevent the re-enlistment of children. This problem is acute in a situation like the DRC, where the DDR process occurs during ongoing hostilities. Accordingly, DDR activities in the DRC are also specifically assessed in this section.

i. Engagement by the UN Peace Mission in the DRC and UNICEF with Child Soldier Prevention

The UN peace mission in the DRC was formerly known as the United Nations Mission in the Democratic Republic of Congo (MONUC). However, on 1 July 2010, the mission was renamed the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO). This was done “in view of the new phase that has been reached in the Democratic Republic of the Congo”.³⁸ The mandate of MONUSCO provides expressly that it must:

Work closely with the Government to ensure the implementation of its commitments to address serious violations against children, in particular the finalization of the Action Plan to release children present in the FARDC and to prevent further recruitment, with the support of the Monitoring and Reporting Mechanism.³⁹

The reason for discussing MONUSCO and UNICEF in the same section is that MONUSCO does not work with children directly, nor does it ever take charge of children. Instead, after relevant information is gathered within MONUSCO it is shared with implementing partners that are better able to work with children directly. Most notably, these partners include UNICEF, although various NGOs that operate autonomously from the UN System also partner with MONUSCO in this regard.

In as far as child soldiers are concerned, the primary roles of the Child Protection Section are to gather and analyse data on instances of child

³⁸ Security Council Resolution 1925 of 28 May 2010, para 1.

³⁹ *Ibid*, para 12(e).

soldiering; and advocate for and educate people on the end of the military use and recruitment of children and the criminalization of such use and recruitment. The Child Protection Section's function as focal point for the sharing of information related to child soldier prevention in the DRC should not be underestimated. The lack of inter-agency and inter-organizational coordination is one of the major challenges to the effectiveness of many humanitarian programmes. When I interviewed Marleen Korthais Altes, of Save the Children in Bunia, Ituri, one of the primary concerns she raised regarding the prevention of child soldiering in the DRC, was that there is no inter-agency database on child soldiering.⁴⁰ This, she said, has two very negative effects. First, some work is duplicated in an environment where human resources are already over-extended. Second, in some instances a specific entity might be able to act on a situation which they are not aware of. Estelle Nandy Ouattara, Child Protection Officer in the Bunia MONUC office confirmed to me that no such inter-agency database exists.⁴¹

MONUSCO boasts the largest Child Protection Section in any peacekeeping mission. This includes specialized staff based in eastern DRC, Province Orientale and in the mission's Head Quarters in Kinshasa. In addition, there are international and national staff members who are child protection officers based in eight field offices: Goma, Beni, Bukavu, Uvira, Dungu, Bunia, Kisangani and Kalemie.

⁴⁰ Interview conducted with Ms Korthais Altes on 14 November 2008, Bunia, DRC.

⁴¹ Interview conducted with Ms Ouattara on 13 November 2008, Bunia, DRC.

It was reported that during 2010 MONUSCO/MONUC facilitated the release of 2006 children from armed groups.⁴² This figure includes 393 children who were separated from FARDC units. Concern was, however, raised regarding the higher incidence of the re-recruitment of former child soldiers, specifically by integrated former CNDP units, and particularly in the Masisi territory.⁴³ Between January 2011 and the beginning of May 2011, the release of a further 376 children was documented by MONUSCO.⁴⁴

UNICEF's approach in advocating for the protection of children's rights, which is their mandate, is not issue-based, and aims not to categorise children.⁴⁵ Furthermore, UNICEF has an exceedingly strong emphasis on inspiring a collective response to issues on its agenda and therefore places heavy reliance on partners on the implementation level: "UNICEF is expected to take a leadership role on child protection issues. This gives UNICEF a high degree of responsibility to act as an advocate, convener and partner, encouraging and not overshadowing the contributions of

⁴² Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo S/2011/20 (17 January 2011) (First Secretary-General MONUSCO Report) para 53.

⁴³ *Ibid.*

⁴⁴ Second Secretary-General MONUSCO Report, note 37 above, para 49.

⁴⁵ 'UNICEF Child Protection Strategy' E/ICEF/2008/5/Rev.1 (3-5 June 2008) paras 37 & 55.

others.”⁴⁶ Advocacy and education accordingly play a central role in their initiatives.

The five key “focus areas” identified by UNICEF in order to meet its mandate are child survival and development; basic education and gender equality; HIV/AIDS and children; child protection; and policy advocacy and partnerships. The two focus areas most directly relevant to child soldiering are child protection; and policy advocacy and partnerships, with basic education playing an indirect but significant role.

UNICEF’s premise that “successful child protection begins with prevention” signifies their philosophy that sustainable social change can only be achieved if a grassroots environment for the child can be established with sufficient community engagement and support and adequate social networks.⁴⁷ In this regard the importance of education is specifically recognized.⁴⁸

In the DRC UNICEF is instrumental in the implementation of most of the significant initiatives related to children’s protection from military use and recruitment, including the UN Monitoring and Reporting Mechanism, as well as the DDR programme in its relation to children. UNICEF approaches its mandate broadly and sees threats to child rights as all

⁴⁶ *Ibid*, para 54; ‘Core Commitments for Children in Emergencies’ *UNICEF* <www.unicef.org> (last accessed on 28 September 2011) 3.

⁴⁷ UNICEF Child Protection Strategy, note 45 above, 56.

⁴⁸ *Ibid*, paras 3 & 7.

being interlinked. Correspondingly, they avoid categorising children, by for example applying the label 'child soldier'.⁴⁹ With their resultant approach largely being focused on inspiring a collective response to issues on its agenda it is impossible to quantify their actual successes on the ground. However, in the DRC, besides making huge headway in other sectors of child protection,⁵⁰ UNICEF, together with their partners, had begun the process of disarming and reintegrating 4 000 child soldiers during 2007.⁵¹

With an approved budget of more than one billion, four hundred thousand US Dollars for the period 1 July 2011 to 30 June 2012 MONUSCO can do more on the child protection front.⁵² From a political and mandate point of view it will be difficult for MONUSCO to directly enforce child soldier prohibitive norms. The same is true, to a lesser extent, of taking charge of children directly. However, MONUSCO can significantly increase training to grass-roots NGOs on which they rely to take charge of children. This is specifically true regarding the reintegration phase of the DDR process regarding children. During my fieldwork I observed a clear lack of skills regarding the reintegration and social/psychological recovery of former

⁴⁹ Interview conducted with Ms Ironside on 22 November 2008, Goma, DRC.

⁵⁰ For example, UNICEF together with their partners have provided shelter to 180,000 families affected by armed conflict and/or natural disasters; the provision of safe water has been extended to 500 000 people by 2007; 86 therapeutic feeding centres servicing more than 45,000 children.

⁵¹ UNICEF West and Central Africa Office, DRC country profile <http://www.unicef.org/wcaro/Countries_1749.html> (last accessed on 28 September 2011).

⁵² 'Approved resources for peacekeeping operations for the period from 1 July 2011 to 30 June 2012' A/C.5/65/19 (22 July 2011).

child combatants in centres where children are housed. Indeed, in an interview I conducted with a senior representative from COOPI, in Bunia, I was told that if better communication was not achieved between the civilian/humanitarian sector of MONUC (as it then was) and the military sector, limited results would be achieved in preventing child soldiering.⁵³ As the civilian/humanitarian sector is responsible for transmitting the correct information to partners, however, it is the military sector that operates in the field where they observe the presence of children with armed groups. Secondly, and more importantly, in delegating responsibility for matters such as taking charge of children, MONUC does not exercise proper control and safeguards to ensure that the organization is capable of delivering what is required. Indeed, I was told that there were many instances in which MONUC had delegated such responsibility to organizations that exist on paper only.

NGOs such as the Don Bosco Ngangi centre for war orphans and at-risk children, in Goma, are doing remarkable work.⁵⁴ The centre currently houses 3 500 war orphans, which includes a programme for the reintegration of former child soldiers and a further 1 500 refugees. The centre also runs a medical centre which cared for 19 000 thousand patients during 2009, and has recently expanded their capabilities and are now able to do electrocardiograms and basic x-rays.

⁵³ Interview conducted with Mr Andretti on 24 November 2008, Goma, DRC.

⁵⁴ See Project Congo <<http://www.projectcongo.org/donboscongangi.html>> (last accessed on 28 September 2011). I also visited the Don Bosco Ngangi centre numerous times during my stay in Goma.

Nevertheless, the demand for such facilities far exceeds their availability. Also, the geographical location of such facilities determines whether they are available to specific children in need. The effect is that there are many grass-roots NGOs that take charge of children after their demobilization in desperate need of further skills development regarding the reintegration and social/psychological recovery of former child combatants. MONUSCO is well placed, together with other UN agencies and it funds UNICEF, in particular, to contribute to this gap.

ii. The Special Representative to the Secretary-General on Children and Armed Conflict

The SRSG's first field-visit to the DRC took place during February 1999,⁵⁵ a mere sixteen months after the first SRSG was appointed. Most recently, the SRSG visited the DRC during April 2009.⁵⁶

Most of the initial head-way made by the SRSG came in the form of entering into dialogue with violating parties and in so doing obtaining concrete commitments to cease the use and recruitment of child soldiers. As early as 1999 the SRSG had obtained an undertaking from the *Rassemblement Congolais pour la Démocratie* (RCD) in the DRC to

⁵⁵ 'Protection of children affected by armed conflict Note by the Secretary-General' A/54/430 (1 October 1999) para 93-94.

⁵⁶ 'Report of the Special Representative of the Secretary-General for Children and Armed Conflict' A/64/254 (6 August 2009) para 60.

demobilize the child soldiers within its ranks. Of the thirty-six commitments obtained by the SRSG during his initial three year mandate only nine were met. Neither the RCD nor any other group in the DRC falls within this groups of nine complying groups.⁵⁷ A further tactic much utilized by the SRSG is naming and shaming violators. This tactic's merit lies in negating armed groups aspirations to be seen as legitimate by exposing their unacceptable behaviour and methods. In her latest annual report, the SRSG listed seven violating parties within the DRC.⁵⁸ Furthermore, the SRSG has placed a lot of emphasis on global advocacy; supporting and facilitating dialogue between UN actors and parties to the relevant conflict; advocating for the implementation of concrete preventative measures; eliciting commitments to end violations by violating parties; facilitating the Monitoring and Reporting Mechanism; and advocating for the end of impunity in pursuit of fulfilling her mandate.

The DRC is one of only a few situations that have remained on the agenda of the SRSG since the creation of the office. In undertaking country visits the role of the SRSG can best be described as inspiring. In

⁵⁷ Happold, M. *Child Soldiers in International Law* (2005) 40-41.

⁵⁸ Report of the Secretary-General, 'Children and Armed Conflict' A/65/820-S/2011/250 (23 April 2011) Annex 1. *Forces armées de la République démocratique du Congo* (FARDC); *Forces démocratiques de libération du Rwanda* (FDLR); *Front des nationalistes et intégrationnistes* (FNI); *Front de résistance patriotique en Ituri* (FRPI); Mai-Mai groups in North and South Kivu, Maniema and Katanga who have not integrated into FARDC; *Mouvement révolutionnaire congolais* (MRC); and Non-integrated FARDC brigades loyal to rebel leader Laurent Nkunda. 'Annual report of the Special Representative of the Secretary-General for Children and Armed Conflict, Radhika Coomaraswamy' A/HRC/9/3 (27 June 2008) Annex 1.

facilitating and supporting measures aimed at the protection of children during armed conflict:

It is important to stress that such visits are carried out to support the advocacy and programmatic work of operational partners on the ground, to raise the level of global awareness about their work, to help open further space for their protection dialogue and, where appropriate, to assist operational partners in unblocking political impasses to further advance protection agendas.⁵⁹

During the country visit the SRSG undertook to the DRC during 2007, she managed to obtain the following commitments from the DRC authorities:

- (a) To take measures, in consultation with the United Nations, to tackle the issues of child recruitment and sexual violence;
- (b) To take all necessary measures to re-arrest commander Biyoyo;
- (c) To take effective action to fight impunity of armed groups, such as those led by Laurent Nkunda and the *Forces démocratiques de libération du Rwanda*;
- (d) To take steps, in consultation with the United Nations, to fight impunity.⁶⁰

Yet, during 2011, the SRSG reported that the Government of the DRC:

... has not been forthcoming in engaging with the United Nations on an action plan to end the recruitment and use of children by the *Forces armées de la République démocratique du Congo* (FARDC), despite advocacy by child protection actors, including the country task force on monitoring and reporting, over the last several years. While efforts have been ongoing to professionalize FARDC, these efforts have not consistently involved a formal process to remove all children from FARDC units. Many children continue to be recruited and remain associated with FARDC units, particularly within former *Congrès national pour la défense du peuple* (CNDP) units. Many children released in 2010 reported that they had been recruited several times, even after family reunification. This reaffirms the urgent need for a political commitment at the highest levels of the Government in order to move forward on the action plan and ensure its coherence with ongoing security sector reform efforts. In a positive move,

⁵⁹ 'Promotion and protection of the rights of children: Report of the Special Representative of the Secretary-General for Children and Armed Conflict' A/62/228 (13 August 2007) (2007 SRSG General Assembly Report) para 26.

⁶⁰ *Ibid*, para 43.

new military directives were issued by the “*Amani Leo*” chain of command ordering the release of all children remaining in FARDC units.

As stated previously, during my interview with SRSG Coomaraswamy, she was resolute in her view that the proper approach to preventing child soldiering is the direct approach, as opposed to more broad-based approaches that rely on addressing deeper systemic problems such as extreme poverty, and indeed, the existence of armed conflict.⁶¹ Direct engagement with violating parties in countries such as the DRC is the activity in which the SRSG engage most directly with child soldier prevention.

On the positive front, while the FARDC is not yet ‘child free’, and although there was a significant increase in child use and recruitment during late 2008, the mass and systematic recruitment of children by the Government Forces has ceased. Less success has been achieved in engaging with non-state entities. As Awich Pollar told me, such groups often profess not to use child soldiers whatsoever.⁶² Where they acknowledge that there are children among their ranks, they are quick to give undertakings to demobilise these children, and cease the use and recruitment of child soldiers, but slow to comply with their undertakings.

The SRSG has done a remarkable job in engaging with such groups and securing such commitments. However, where these groups persistently

⁶¹ See Chapter 5.

⁶² I interviewed Mr Pollar on 1 February 2011 in Geneva, Switzerland.

fail to comply with their obligations, showing a blatant disregard for international law, the SRSG can do little more than increase advocacy on the matter and name and shame these parties in the Secretary-General's annual report on children in armed conflict to the Security Council, which is prepared by the SRSG. This in itself has proven to be not as effective as was initially hoped. For example, to date the Secretary-General has appended lists of violating parties to seven of his annual reports to the Security Council. Of those parties included in the 2011 report, five have been included consistently in the last four reports, spanning a five-year period.

A more forceful approach is required in order to induce compliance, not only with concrete commitments that have been made by these violating parties, but more importantly with international and municipal law. As was suggested in Chapter 5, the Security Council should take stronger action against such groups. Resolution 1332, adopted under the Chapter VII powers of the Security Council was a welcome development.⁶³ This resolution called for "an effective end to the recruitment, training and use of children".⁶⁴ However, it did not provide for any form of sanction, or targeted action, against persistent violators. This is, in my view, a necessary component to a concerted effort to enter "an era of

⁶³ Security Council Resolution 1332 of 14 December 2000. See generally Surhone, LM., Tennoe, MT. & Henssonow, SF. *United Nations Security Council Resolution 1332* (2011).

⁶⁴ Resolution 1332 *Ibid*, para 10. Arts, K. *International criminal accountability and the rights of children* (2006) 44, states that 165 children were returned to UNICEF as a result of this resolution.

application”. Although the SRSG is the focal point within the UN on children in armed conflict, her ability to force compliance is proportional to the strength of the mandate she has been afforded. Like any other mechanism that contributes to the prevention of child soldiering, her office is also dependent on other mechanisms, in order to create a web of protection.

iii. The Security Council Monitoring and Reporting Mechanism

On 26 July 2005 the Security Council passed a Resolution calling for the creation of a Monitoring and Reporting Mechanism on Children and Armed Conflict (MRM).⁶⁵ The same Resolution also called for the creation of a Security Council Working Group on Children and Armed Conflict (Working Group).⁶⁶ The MRM focuses on six grave violations of child rights, one of which is recruiting or using child soldiers.⁶⁷ No new entities were established in the creation of the MRM; instead several key institutions were included, drawing from their respective strengths and knowledge bases. Ultimately, the MRM functions on three distinct levels: “information-gathering, coordination and action at the country level; coordination, scrutiny and integration of information and preparation of reports at the Headquarters level; and concrete actions to ensure

⁶⁵ Article 3 of UN Security Council Resolution 1612 of 26 July 2005.

⁶⁶ *Ibid.*

⁶⁷ ‘Report of the Secretary-General on Children and Armed Conflict’ A/59/695–S/2005/72 (9 February 2005) (2005 Security Council Report) para 68.

compliance, to be taken particularly by bodies that constitute ‘destinations for action’”.⁶⁸

At the base of the activities of the MRM within any given country lies the Country Task Force. During 2005 seven countries were selected as pilot countries in which to implement the MRM. There are groups who persistently violate international law by using or recruiting child soldiers in each of these countries, and the DRC was included.⁶⁹ The DRC country taskforce was set up the following year and the activities of the MRM began. The taskforce is jointly chaired by the Country Representative of UNICEF and the Deputy Special Representative to the Secretary-General for DRC,⁷⁰ and its membership consists of MONUSCO, UNICEF, UNHCR, ILO, Save the Children UK and CARE.⁷¹ Assessing the role and success of the MRM in the DRC one needs to focus specifically on the three levels on which the MRM functions. The three levels of operation of the MRM are sequenced in such a way that the succeeding level is dependent on its preceding level. Accordingly, only after information gathering can the coordination of information and preparation of reports occur, and only after this can concrete action be taken.

⁶⁸ *Ibid*, para 67

⁶⁹ *Ibid*, annex 1 and 2, These countries included Burundi, Côte d'Ivoire, Democratic Republic of Congo, Somalia, and Sudan from Annex I and Nepal and Sri Lanka from Annex II. Furthermore, subsequently MRM Taskforces have also been set up in Chad, Myanmar, Philippines, and Uganda.

⁷⁰ This is in conformity with 'Report of the Secretary-General on Children and armed conflict' A/59/695-S/2005/72 (9 February 2005) para 83.

⁷¹ 'Getting it Done and Doing it Right: Implementing the Monitoring and Reporting Mechanism on Children and Armed Conflict in the DRC' *Watch List on Children and Armed Conflict* (January 2008) 3.

With regard to “information-gathering, coordination and action at the country level”, the more parties involved, the more information can be collected and the better the verification of such information. However, proper data management is imperative. UN entities operating in the DRC, in particular MONUC and UNICEF have collaborated well in their efforts to contribute to the taskforce.⁷² However, given the vastness of the DRC, it is not possible for the UN to act in isolation. The taskforce has had some difficulty in getting NGOs involved.⁷³

The challenges facing this level do not end with collecting data. Data management and coordination between different agencies and organizations is a key concern. At the time that I conducted fieldwork in the DRC, information sharing between different agencies and organizations and even different sections within MONUC was handled on an *ad hoc* basis and dependent on informal agreements between staff members from the various organization, agency or section. As was stated above, both Marleen Korthais Altes, of the Save the Children in Bunia,⁷⁴ and Estelle Nandy Ouattara, Child Protection Officer in the Bunia MONUC office,⁷⁵ confirmed to me that at that time, there was no centralised data-base on the incidence of child recruitment in the DRC. It

⁷² The 1612 Reports Officer is a UNICEF staff member seconded to MONUC thus facilitating better inter-agency coordination, *ibid*, 4.

⁷³ *Ibid*, 4-7.

⁷⁴ Interview conducted with Ms Korthais Altes on 14 November 2008, Bunia, DRC.

⁷⁵ Interview conducted with Ms Ouattara on 13 November 2008, Bunia, DRC.

seems that the country task force has, to a significant extent, filled this gap. Other initiatives such as the creation of Child Protection Working Groups in Goma, Bukavu and Bunia have created a greater dimension of inter- and intra-agency information sharing, with members from any interested UN agencies and international or national NGOs being permitted to join.⁷⁶ These working groups exist specifically to facilitate information exchange as envisaged by Security Council Resolution 1612. Such initiatives mitigate the challenges posed by the fact that there is a plethora of data collecting entities in the DRC operating within the same areas without knowing the operational details of each other. These include the Kinshasa level protection cluster; the provincial protection clusters; the protection monitoring project; the Humanitarian Advocacy Group; the Joint-Initiative on Sexual Violence; and so forth. The DRC taskforce's strength lies in these various entities' ability to collect, compile and report on the six grave violations to the taskforce.⁷⁷ However, to reap these benefits, the taskforce needs to better facilitate coordination between these data collection entities. When these entities act blind in as far as other agencies are concerned, duplication of data becomes a bigger issue, as does oversights. In the positive front, however, it appears that the DRC country task force has conducted themselves well in this role.

⁷⁶ 2008 Secretary-General DRC Report, note 31 above, para 63.

⁷⁷ 2005 Security Council Report, note 67 above, para 79.

The taskforce has relied heavily on MONUC/MONUSCO's child protection section to report instances of grave violations as an intermediary between the taskforce and the relevant party who reported on the violation to MONUC. This state of affairs is not ideal; specifically with regard to sustainability should MONUSCO's force be further reduced, in line with the changing circumstances in the DRC.⁷⁸ Nevertheless, actionable information has been collected and handed up to the coordination level.

As stated, the second level, the "coordination, scrutiny and integration of information and preparation of reports at the Headquarters level", is dependent on the success of country level information gathering. This level is the least problematic of the three and deserves little discussion in the context of the DRC case study, as the functions performed on this level are not severely affected by the specific country relevant to the taskforce handing up the information. The findings of the latest report compiled by the DRC country task force that was submitted by the Secretary-General to the Security Council during 2010 highlights that there has been a noticeable increase in the grave violations being committed against children in the context of armed conflict.⁷⁹ In total, the MRM documented 1 593 cases of child recruitment. Of this number, the FARDC was allegedly responsible for forty-two percent of cases; the

⁷⁸ *Ibid*, para 81.

⁷⁹ 'Report of the Secretary-General on Children and Armed Conflict in the Democratic Republic of the Congo' S/2010/369 (9 July 2010) (2010 Secretary-General DRC Report) para 15.

various Mai Mai groups accounted for twenty-six percent; the PARECO for sixteen percent; and lastly, the CNDP was responsible for ten percent of cases.⁸⁰ Ninety-two percent of these cases of recruitment took place in the Kivu provinces.⁸¹ Finally a significant increase in the abduction of children for purposes of using them in armed conflict was emphasised. The Lord's Resistance Army was identified as the primary culprit.⁸²

The final level, "concrete actions to ensure compliance, to be taken particularly by bodies that constitute 'destinations for action'" falls within the ambit of the Security Council and its Working Group. The Working Group is tasked primarily with reviewing the reports of the MRM.⁸³ Reporting on these grave violations of child rights is the vehicle used by the MRM to bring such violations to the attention of 'destinations for action', thus the reports are the triggers for action. The main destinations for action are national governments, the Security Council, the General Assembly, the International Criminal Court, the Human Rights Commission; regional organizations; NGOs; and civil society.⁸⁴ The measure for success of the MRM does not lie in the report, but rather what comes of the report.

⁸⁰ *Ibid*, para 17.

⁸¹ *Ibid*, para 22.

⁸² *Ibid*, para 39-41.

⁸³ Article 8, Security Council Resolution 1612.

⁸⁴ 2005 Security Council Report, note 67 above para 107.

The Security Council has called upon its Working Group on Children and Armed Conflict to make recommendations to the Council on the promotion and protection of the rights of children affected by armed conflict.⁸⁵ The Working Group, as primary conduit of information emanating from the Secretary-General's country reports have performed efficiently in making recommendations on the basis of the country reports it reviews. As was stated earlier, the prosecution of Mai Mai commander Gedeon, for the use and recruitment of child soldiers in a municipal DRC court, came in the wake of strong recommendations to that effect made by the Working Group.

By not making concrete actionable and targeted suggestions in the Resolution 1612 Secretary-General's reports, a lot of the MRM's potential is lost. The Working Group itself has also expressed this view.⁸⁶ For example, although various parties have for years failed to observe their obligations in international law to not use or recruit child soldiers, the recommendations made in the latest report on the DRC submitted by the Secretary-General are limited to calls on the parties to comply with their obligations themselves. Targeted action is required against such violating parties; the recommendations to the Security Council should express the

⁸⁵ Article 8(a), Security Council Resolution 1612.

⁸⁶ 'Letter dated 8 September 2006 from the Permanent Representative of France to the United Nations addressed to the President of the Security Council' S/2006/724 (11 September 2006).

need for such action.⁸⁷ Very significantly in this regard, in his latest report to the Security Council, dated 23 April 2011, the Secretary-General reported that:

The Security Council Committee established ... concerning the Democratic Republic of the Congo for the first time invited my Special Representative for Children and Armed Conflict to brief the Committee in May 2010. As a result, several individuals were included on the Committee's list of individuals and entities against whom targeted measures will be imposed on the basis of verified information regarding, inter alia, their recruitment and use of children. Further, on 2 December, the Security Council imposed sanctions on Forces armées de la République démocratique du Congo Colonel Innocent Zimurinda for grave violations against children, including the recruitment and use of child soldiers, the killing and maiming of children, sexual violations and denial of humanitarian access.⁸⁸

This is a significant step, which is in accordance with the conclusions reached in Chapter 5. Furthermore, the development of the central monitoring and reporting database, as well as the country databases significantly adds to the data required to address child soldiering effectively.

iv. The Demobilization, Disarmament and Reintegration of Child Soldiers in the DRC

The DDR programme has a dual role in child soldier prevention. Firstly, it functions as a short-term preventative strategy in that children associated with fighting forces are removed from such. Secondly, it is a long-term preventative strategy in light of the role that DDR plays in conflict

⁸⁷ This is consistent with the argument I presented in relation to the Security Council in Chapter 5.

⁸⁸ 'Report of the Secretary-General on Children and Armed Conflict' A/65/820–S/2011/250 (23 April 2011) (2011 Security Council Report) para 205.

reduction and prevention. The 'National Program for Disarmament, Demobilization and Reintegration' (PNDDR) was preceded by the regional 'Ituri Disarmament and Community Reinsertion Program' (DCR). Before the national programme was initiated, DDR activities, in relation to children, were carried out by UNICEF and NGOs with the assistance of MONUC's Child Protection Section.⁸⁹ The national programme is not a UN initiative, but was rather overseen by CONADER, a DRC state institution, funded by the World Bank and with assistance from the UN and other organizations.⁹⁰ CONADER was dissolved by presidential decree on 14 July 2007 and replaced with UEPNDDR.⁹¹ In the DRC the DDR programme does not exist independently. Because the peace process entails a reform of the national military, all combatants from opposing armed groups are not reintegrated into civilian life. Many are debriefed, retrained and integrated into mixed brigades of the reformed FARDC. This process is known as *bressage*. Thus there is a crucial point in the process where it is decided which route a specific candidate will follow. In the case of children that route will always be DDR.⁹² Child DDR ultimately entails that a given child should be released from the fighting forces, reunited with her or his family and ultimately reintegrated into her

⁸⁹ 'Global Report on Child Soldiers' *The Coalition to Stop the Use of Child Soldiers* (2008) at p 109.

⁹⁰ *Commission nationale pour la démobilisation et la réinsertion*.

⁹¹ *Unité d'exécution du programme national de désarmement, démobilisation et réinsertion*.

⁹² In terms of the Joint Operations plan children below 18 are automatically vetted out of the armed forces and are thus demobilized.

or his home community.⁹³ During the recent past, there have been many different DDR initiatives with involvement from grassroots NGOs to UN agencies and with regard to children, UNICEF has played a most prominent role. However, a lack of inter-agency and inter-organizational coordination has resulted in little success being attained by these programmes.⁹⁴

In the case of foreign nationals, both adults and children, they are repatriated to their home countries after demobilisation and disarmament. There is a significant number of foreign child combatants in the DRC, with the majority coming from Uganda, The Sudan, Rwanda, Burundi and the Central African Republic. The DDR of foreign nationals falls outside of the scope of the national DDR programme. MONUC oversees the DDR of foreign nationals under its Disarmament, Demobilization, Repatriation, Reintegration and Resettlement programme (DDRRR).

Since its inception, the DDR process has been plagued by delays and inadequate service provision.⁹⁵ It was originally planned to be finalised by the time the national elections occurred on 30 July 2006.⁹⁶ Initially the

⁹³ 'Children at War: Creating hope for their future' *Amnesty International AFR* 62/017/2006 (October 2006) 8.

⁹⁴ Knight, M. & Özerdem, A. 'Guns, Camps and Cash: Disarmament, Demobilization and Reinsertion of Former Combatants in Transitions from War to Peace' Volume 41, Number 4 *Journal of Peace Research* (2004) 502.

⁹⁵ Multi-Country Demobilization and Reintegration Program, Quarterly Progress Report: DRC (July-September 2005) 3 & 5.

⁹⁶ Children at War: Creating hope for their future, note 93 above, 8.

total number of soldiers were put at between 300 000 and 330 000;⁹⁷ with 150 000 soldiers in need of demobilisation. 30 000 of this figure represented children.⁹⁸ By the end of June 2006, CONADER's figures suggested that 72 737 adults and 19 054 children had been demobilised.⁹⁹ However, these figures do little to inform whether any real success had been attained. On the one hand it is unclear whether the 150 000 figure was anywhere near accurate. In fact, most suggest it was inflated. There are also doubts about CONADER's accuracy in their figures regarding the numbers that have been taken into the DDR programme. Finally, of the people who passed through the DDR programme it is unclear how many lied about being former combatants and also how many re-joined armed groups after having gone through DDR.

There is a real incentive for people to join the DDR programme who either have no real intention to demobilize or who lie about ever having been combatants to benefit from the programme. The DDR programme provides the participant with an initial \$US110 payment, the *filet de sécurité* (security net); a further \$US 25 per month stipend for a one year period; and vocational training or other assistance in creating a livelihood

⁹⁷ This was the figure put forward by the signatories to the 2002 peace process. It should be kept in mind that at that time parties to the process were still at war with each other as such it is believed that these figures were inflated to create a stronger perception of the armed group's military strength.

⁹⁸ Multi-Country Demobilization and Reintegration Program, Quarterly Progress Report DRC (April-June 2006).

⁹⁹ *Ibid.*

for the person within civilian life.¹⁰⁰ However, after acting as an incentive to even those in no need of DDR, these payments have often not been made and further no vocational training has been provided to many people in the DDR programme;¹⁰¹ adding to the disillusionment of former soldiers, many of whom were opposed to the government in their past military endeavours. On 7 July 2006 CONADER announced the cessation of disarmament and demobilization phases to the programme, due to lack of funds. The remaining funds were allocated to the reintegration phase, leaving thousands of children behind who are in need of demobilization.

It goes without saying that the DDR of children necessarily implies unique approaches and more sensitive methods to ultimately attain the successful reintegration of a given child. To this end, the *Cadre Opérationnel pour les Enfants Associés aux Forces et Groupes Armés* (Operational Framework for the DDR of Children) was drafted by an inter-agency group coordinated by UNICEF.¹⁰² This operational framework provided CONADER with guidelines to the proper DDR of children.

In terms of the Operational Framework, the first phase of both DDR and army integration is for commanders to take their subordinates to military regroupment centres. This initial shared phase is known as *tronc*

¹⁰⁰ 'DRC: DDR and Reform of the Army' *Amnesty International* AFR 62/001/2007 (January 2007) 18.

¹⁰¹ *Ibid.*

¹⁰² This group further consisted of representatives of MONUC, ministries of the Transitional Government and NGO experts.

commun. However, because children are never offered direct cash payments they frequently lie about their age and attempt to be absorbed into the adult DDR programme. At these regroupment centres participants are disarmed, and those undergoing DDR are moved to CONADER/UEPNDDR orientation centres. Upon arrival those under 18 are registered as children, they are housed separately from adults and are supposed to only spend a maximum of 48 hours at these centres.¹⁰³ Thereafter, they are entrusted to an accredited NGO who is charged with their well-being. Children are then taken to transitional care structures run by the given NGO. Generally children will spend 3 months at such structures whereafter they are reunited with their families if possible. In terms of the operational framework, children below the age of 15 are provided with basic education and those older than 15 with vocational training for one year.¹⁰⁴

To a large extent DDR programmes are outcome-based, and CONADER's objectives in this regard are to "remove all children from armed forces and groups; facilitate children's return to civilian life through reinsertion programmes; reinforce sustainable conditions for the protection of children through community ownership of protection mechanisms; develop specific strategies to reintegrate girls associated with armed forces and groups and prevent violations of children's

¹⁰³ Children at War: Creating hope for their future, note 93 above, 21.

¹⁰⁴ For a full assessment of the child DDR process in the DRC see *ibid.*

rights.”¹⁰⁵ In order to succeed in these objectives, the Operational Framework necessitates CONADER to identify children to be demobilized; verify their histories; document, research and ultimately reunite these children with their families; reintegrate them with their families and communities; and finally, monitor the children’s situations.¹⁰⁶ Upon completion of the DDR process, children are issued demobilization certificates, proving their demobilisation and age. This practice has been noted as a success with regard to male children, but not with regard to female children.¹⁰⁷

During 2002, at the outset of the DDR programme, it was estimated that there were 30 000 children in need of DDR¹⁰⁸ but as at September 2008 that estimated figure stood at 3 500.¹⁰⁹ CONADER’s figures suggest that by December 2006 30 000 children had been released by armed forces and groups and furthermore, between October 2006 and August 2007, a further 4,000 children were released.¹¹⁰ Thus, in terms of positive, yield the programme has attained some real success. However, the ‘release’ of children does not include their social reintegration into civilian life. By

¹⁰⁵ ‘Struggling to Survive: Children in Armed Conflict in the Democratic Republic of the Congo’ *Watch List on Children and Armed Conflict* (April 2006) 46.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*, 47.

¹⁰⁸ Children at War: Creating hope for their future, note 93 above 1.

¹⁰⁹ ‘Report of the Secretary General on Children and Armed Conflict in the Democratic Republic of the Congo’ *United Nations Security Council S/2008/693* (10 November 2008) para 19-20; however, the Secretary-General warned that that figure may have increased due to the re-escalation of hostilities in North Kivu from 28 August 2008 onwards.

¹¹⁰ ‘Report of the Secretary-General on Children and Armed Conflict in the DRC’ *S/2006/389* (13 June 2006); ‘Report of the Secretary-General on Children and Armed Conflict’ *A/62/609-S.2007/757* (21 December 2007).

December 2006 CONADER figures showed that of the 30 000 children released 14 000 were still to receive any form of reintegration assistance. This often means that those children are worse off than they were while associated with fighting forces since after demobilization but before reintegration many children had no form of income and nobody to look after them. This increased the number of homeless street children, as well as results in voluntary re-enlistment.

The main point of concern is the apparent inability of the DDR programme to demobilize female child soldiers. Of the 30 000 children estimated to need demobilization, up to forty percent (12 500) were thought to be girls.¹¹¹ Yet, only an estimated twelve percent of children having gone through the DDR process were female.¹¹² With regard to CONADER as an institution, there were great concerns. Amnesty International stated that they “encountered pervasive pessimism among the child protection community about CONADER’s limited capacity to effectively coordinate a comprehensive DDR process given its weak institutional foundations, shortage of technical experience, lack of decentralization and widespread reports of corruption inside CONADER.”¹¹³

¹¹¹ ‘Forgotten Casualties of War: Girls in Armed Conflict’ *Save the Children UK* (2005) 11.

¹¹² 2008 Global Report, note 89 above 110.

¹¹³ ‘Struggling to Survive: Children in Armed Conflict in the Democratic Republic of the Congo’ *Watch List on Children and Armed Conflict* (April 2006) 47.

The UEPNDDR succeeded CONADER immediately after the dissolution of CONADER on 14 July 2007. Ostensibly this substitution of organizations, at least in part, occurred as a result of the loss of faith in CONADER and the associated difficulties in securing further funding. This is evidenced by the fact that the UEPNDDR also functions on the Operational Framework established for CONADER during May 2004. Finally, regardless of successes attained to date, child soldier recruitment bears a proportional relationship to the intensity of hostilities. As a result of the escalation in hostilities during August 2008, the number of children associated with fighting forces in the DRC re-escalated.¹¹⁴ This figure stood at an estimated 3 500 before this escalation in hostilities.¹¹⁵

4. SUMMARY

In the course of this Chapter, I observed various positive developments in relation to the prevention of child soldiering in the DRC. Most significantly among these, are the DDR of thousands of child soldiers on an annual basis, the ongoing prosecutions before the ICC, and the better coordinated sharing of data that has been the result of the work of the country task force for the MRM. However, many of the results achieved to date are mixed. While the DRC was the first state to prosecute an individual for the use and recruitment of child soldiers, that individual has escaped justice and is serving in the National Armed Forces of the very

¹¹⁴ 'Report of the Secretary-General on children and Armed Conflict in the Democratic Republic of the Congo' UN Doc. S/2008/693 (10 November 2008) at para 19-20.

¹¹⁵ *Ibid.*

state that convicted him. Similarly, in the context of the ICC, Bosco Ntaganda, against whom the ICC issued an arrest warrant during 2006, is living a public life as a General in the FARDC without being arrested and surrendered to the ICC. Most distressing, for the thousands of children who are absorbed into DDR programmes on an annual basis, thousands more slip through the cracks, and are not absorbed into these programmes. Moreover, not only are significant numbers of children still recruited on an annual basis, many of those children that have been absorbed into DDR programmes are re-recruited.

The practicalities in the DRC situation support my broad finding that in order to be more effective, all mechanisms engaged with child soldier prevention must be continuously refined. Virtually every mechanism that was included in this Chapter that is operational in addressing child soldiering in the DRC, can be rendered more effective through such continuous reassessment and refinement. The mechanism that is currently under-performing most significantly is the Security Council itself. It is worrying that the most powerful mechanism engaged with child soldier prevention is underperforming the most of all mechanisms engaged with such prevention. Consistent with the conclusions drawn in Chapter 5, the Security Council should take targeted action against those parties that persistently violate child soldier prohibitive norms. The sanctions imposed on *Forces armées de la République démocratique du Congo*, Colonel Innocent Zimurinda is the most significant step in this

regard to date. This notwithstanding, the effective prevention of child soldiering is dependent on contributions being made by every relevant mechanism, and not the refinement of one powerful mechanism.

CHAPTER 7 CONCLUSION

The thesis of this study was defined in Chapter 1: in order for international law to be an agent through which “an era of application” can be entered in the context of child soldier prevention, the focus must be shifted from norm creation, to norm enforcement. In order to address this thesis, I identified two research questions:

- Are the international law norms that prohibit the use and recruitment of child soldiers capable of enforcement in their current form?
- What changes should be effected to the manner of enforcement of these norms in order to achieve a more significant degree of social change? In other words, what is needed for an “era of application”?

Additionally, also in Chapter 1, I indicated that in this study I subscribe to an instrumentalist approach to international law, specifically in relation to the prevention of child soldiering. In approaching the thesis I differentiated early on between “rights protection” and “social change”. The specific conclusions drawn in this thesis regarding the better enforcement and application of international law relates more directly to the narrower concept of rights protection. Extensive rights protection,

however, is an avenue through which broad-based social change can ultimately be achieved.

This Chapter is divided into three parts. Parts one and two address the first and second research questions, respectively. However, disjunctively, the conclusions reached regarding each of the research questions achieve little in plotting the central thesis of the study within the bigger scheme of eradicating the use and recruitment of child soldiers altogether. Therefore, part three not only serves to extrapolate the relevance of the conclusions reached regarding the two research questions, but does so analytically in relation to the nature of the child soldier problem, as detailed in the first two chapters of the study. Indeed, while Chapters 1 and 2 may feature less prominently in this Chapter; they are still indispensable to the success of the study. “An era of application”, by definition, speaks to the reactive role of law, which is consistent with the instrumentalist approach I have adopted. For law to be used effectively as an instrument to achieve a desired outcome, and for law to react effectively to an undesired social reality, a thorough understanding of the nature and extent of that social reality or phenomenon is at the very least greatly beneficial and more likely indispensable.

1. THE ENFORCEABILITY OF INTERNATIONAL LAW NORMS PROHIBITING CHILD SOLDIERING

The various norms prohibiting the use and recruitment of child soldiers belonging to international humanitarian law (IHL), international human rights law (IHRL) and international criminal law (ICL) were individually assessed, in detail, in Chapters 3 and 4. The reason for this assessment is that the nature and content of these norms impact heavily on the potential for their enforcement. The relationship between IHL and IHRL also impacts on the enforcement of these norms. In this context, war crimes in terms of ICL is seen as forming part of IHL, as norms belonging to both these regimes are subject to similar *chapeau* requirements, the existence of armed conflict, and unlike IHRL, both these regimes bind non-state actors in addition to state actors. Thus, for purposes of this section, reference to IHL includes ICL, unless stated otherwise.

i. The Relationship between International Humanitarian Law and International Human Rights Law

In the context of child soldier prevention, I have emphasised the importance of the relationship between IHL and IHRL for a number of reasons, key among these are: first, that no other substantive norms that exist in both IHL and IHRL are defined substantively exactly the same. This is the case with article 77(2) of Protocol I Additional to the Geneva Conventions and article 38 of the Convention on the Rights of the Child (CRC), the two leading child soldier prohibitive norms from IHL and IHRL

respectively.¹ Yet, I argue that there still is potential for irreconcilable norm conflict between IHL and IHRL in relation to child soldier prevention. This serves well to indicate the complex nature of this relationship. Second, IHL applies during times of armed conflict, whereas IHRL applies both during times of peace and armed conflict. Third, IHL binds state and non-state actors, whereas IHRL binds state actors only. Lastly, the regime to which the relevant norm belongs will largely dictate what avenues for enforcement are available.

The potential for norm conflict to which I refer relates to the different obligations the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (CIAC Protocol) creates on parties depending on their status (state or non-state actors) on the one hand, and the principle of equality of belligerents on the other.²

The likelihood of this potential norm conflict occurring is not remote, and the analysis thereof is not purely abstract or academic. Although the CIAC Protocol is a human rights law instrument, it expressly endeavours to regulate the conduct of parties during armed conflict, as it prohibits the use of child soldiers in direct participation in hostilities. This instrument also prohibits the recruitment of child soldiers during peace-time,

¹ Convention on the Rights of the Child (entered into force 2 September 1990) 1577 UNTS 3; and Protocol I Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, adopted 8 June 1977 (entered into force 7 December 1978) 1125 UNTS 17512.

² Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (CIAC Protocol) (entered into force 12 February 2002) 2173 UNTS 222. See Chapter 4.

however, the importance of this instrument is perceived to be its focus on alleviating the suffering of children during armed conflict. Therefore, in any military engagement between a state armed force and a non-state actor, where the relevant state has ratified this Protocol such a conflict of norms is inevitable. The Protocol will impose different obligations on state and non-state actors, and this will be irreconcilable with the equality of belligerents: “the rules of international humanitarian law apply with equal force to both sides to the conflict, irrespective of who is the aggressor”.³

Further, status-dependent obligations add to the asymmetry that generally exists between state and non-state actors. This may prompt non-state actors to dissociate themselves from their IHL obligations, as they are not treated equally to state actors in terms of the law. It is important to keep in mind that one of the major challenges in preventing child soldiering is engagement with non-state actors. This norm conflict does not, however, render the norms contained in the Protocol unenforceable. If it is true that IHL is the *lex specialis vis-à-vis* IHRL, as is suggested by the International Court of Justice, then this norm conflict is to be resolved by applying the lowest common denominator to all parties to the conflict.

Unfortunately both the CRC and the CIAC Protocol failed to achieve their potential in preventing the exploitation of children by armed groups and

³ Greenwood, C. ‘Historical Development and Legal Basis’ in Fleck, D. *The Handbook of International Humanitarian Law* (2008), 11.

forces. This, I conclude, is primarily due to a failure of the drafters of both instruments to appreciate the unique characteristics of IHRL as a legal regime, and specifically how these unique characteristics may contribute to the better protection of children from exploitation by military groups and forces. Much criticism was levelled against the CRC at the time of its adoption for directly adopting the IHL language contained in Additional Protocol I, and for failing to impose stricter obligations in relation to the prevention of the use and recruitment of child soldiers. However, it is not so much the failure of creating stricter standards that resulted in the CRC not achieving its potential, but rather the failure of not creating norms better suited to the IHRL sphere of international law. In particular, unlike IHL, the CRC could have prohibited the use of children during situations falling short of armed conflict, such as internal disturbances and riots. Furthermore, although the CRC does prohibit the recruitment of children during times of peace, the language of the instrument should have reflected this expressly.

The prevailing consideration and motive in drafting the CIAC Protocol was lifting the standards of protection afforded to children, protecting them from military use and recruitment, while at the same time securing mass-state subscription to the instrument. Unfortunately, to achieve this, the drafters of the instrument provided for less proscriptive regulation of child soldier use and recruitment by state actors, than by non-state actors. In addition, neither of the problems I identified above in relation to

the CRC, being the prohibition of the use of children in situations falling short of the IHL definition of armed conflict and the prohibition of child recruitment during times of peace, was rectified in the CIAC Protocol. Nevertheless, the shortcomings of the CRC and its Protocol do not result in a situation where the relevant norms are inherently incapable of being enforced. Instead, these shortcomings have resulted in the net of protection being cast more narrowly.

ii. Shortcomings of the Contemporary Prohibitions of Child Soldiering

There are shortcomings in the existing legal norms, some more worrying than others. In particular, the following elements appear in the most widely ratified instruments prohibiting child soldiering, including the CRC and Additional Protocol I: that “all feasible measures” be taken that “persons who have not attained the age of fifteen years” not be used to “take a direct part in hostilities” and states parties must refrain from “recruiting” such persons. As was the case in the previous section, these shortcomings generally result in protection being offered to fewer children, rather than inhibiting the enforceability of these norms. Moreover, often these shortcomings appear much more devastating than they are. This is certainly true of the “all feasible measures” standard. Child soldier use is a continuous offence (continuous crime in criminal law terms), meaning the offence is committed for as long as a child participates directly in hostilities. The converse effect hereof is that a

child's future status is not determined by whether all feasible measures were taken in the first instance where she/he was used for direct participation in hostilities. Instead, this assessment has to be made *de novo* in each and every instance where the relevant child was used in direct participation in hostilities. It is highly unlikely that a child will be used for direct participation in hostilities on more than one occasion and that all feasible measures to ensure that the child does not so participate were taken in each instance. Moreover, it is highly exceptional that a child will be used in direct participation in hostilities only once. Thus, this standard has very little effect on the enforceability of these norms. This standard does however serve as a barometer for measuring the commitment of states to preventing child soldiering. Unfortunately, it was retained in relation to the regulation of child soldier use by state actors in the CIAC Protocol.⁴

The development of customary international law has already addressed some of these shortcomings, and will continue to do so in the future. The child soldier war crime is the only crime in the Rome Statute of the International Criminal Court (Rome Statute) that was not prohibited in terms of customary law, in the form it exists in the Rome Statute, at the time of the drafting and adoption of the Rome Statute.⁵ Since then, in the *Child Recruitment* decision, the Special Court for Sierra Leone (SCSL)

⁴ Article 1, CIAC Protocol.

⁵ Articles 8(2)(b)(xxvi) and 8(2)(e)(vii), Rome Statute of the International Criminal Court (entered into force 1 July 2002) 2187 UNTS 90.

has held that this formulation of the crime is representative of customary international law.⁶ Paradoxically, while the legal interpretation and analysis offered by the SCSL is often questionable and never more so than in the *Child Recruitment* decision (this is an appropriate example of the adage ‘hard cases make bad law’), this Court’s work has had a tremendously positive effect on the development of child soldier prevention. Such positive developments include the recognition of the prohibition of the use and recruitment of child soldiers as a customary norm. The recognition of the Rome Statute formulation of the child soldier crime as forming part of customary international law extends the scope of protection previously offered to children from military recruitment, to include protection from military enlistment and conscription. This construct is broader than ‘recruitment’, and is broad enough to cover all instances of child soldier acquisition other than children taking up arms truly by their own initiative. Given the fact that there are only a very few states (as opposed to non-state actors) internationally that use children younger than eighteen (instead of fifteen) for direct participation in armed conflict, it is possible that there is an emerging rule of customary international law proscribing the use of children younger than eighteen in direct participation in armed conflict. Of course this is subject to the *opinio juris* element of customary international law also being present.

⁶ *Prosecutor v Sam Hinga Norman, Decision on Preliminary Motion Based on Lack of Jurisdiction*, SCSL-2004-14-AR72E (31 May 2004) (*Child Recruitment* decision).

The only judicial mechanism to have directly enforced a prohibition of the use and recruitment of child soldiers is the SCSL. The Statute of the SCSL proscribes exactly the same conduct as the Rome Statute, i.e. the use, conscription and enlistment of children.⁷ The enforceability of this prohibitive norm is well evidenced by the fact that of the eight people against whom judgements have been rendered by the SCSL, all were charged with child soldiering, and all but one was convicted on this charge. A verdict in *Prosecutor v Lubanga*, the first case to have proceeded to trial before the International Criminal Court (ICC) is due imminently.⁸ Lubanga is charged only with the use, enlistment and conscription of children. Even though the success of the ICC is yet to be determined, there is certainly no lack of commitment on the part of the Office of the Prosecutor to pursue the prosecution of individuals for the use, enlistment or conscription of child soldiers.

Although there are shortcomings in the instruments that currently prohibit child soldiering, elaborating new such instruments is highly unlikely for many years to come. The task of drafting and adopting the CRC and the CIAC Protocol were monumental. Furthermore, there is less incentive for states to ratify any new such convention, as they have already indicated their commitment to the protection of children, and in the context of the CIAC Protocol, in particular, the non-recruitment and use of children during armed conflict. Therefore, hopes for the refinement of these norms

⁷ Article 4(c), Statute of the Special Court for Sierra Leone.

⁸ *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06 (2006).

rest on the development of customary international law. In this regard, mechanisms with the competence to interpret and apply customary child soldier prohibitions should, periodically, reassess the relevant state practice and associated *opinio juris*, so as to ensure that proper account is taken of the potential development of the customary norm.

In summary, the norms proscribing the use and recruitment of child soldiers that are in existence at the moment are capable of enforcement. It is hoped that over time these norms will be refined, with a view to better protecting children. Nevertheless, a concerted effort is now required to address the application of these norms. The scope of application and the available enforcement mechanisms is determined by the legal regime to which the norms in question belong. The implications of the formal nature of the legal regime, be it IHL, IHRL or ICL, to which a particular norm prohibiting child soldiering belongs, does not limit the enforceability of the specific norm. Rather, it dictates the scope of application and available enforcement mechanisms to which the legal regime is confined more broadly.

2. THE REFINEMENT OF INTERNATIONAL LAW ENFORCEMENT MECHANISMS AIMED AT THE PREVENTION OF CHILD SOLDIERING

The likelihood that major changes to a small number of mechanisms will achieve significant results is minimal. Certainly, in this study I did not identify any mechanisms that hold the potential to prevent child soldiering

on a broad-based scale by simply implementing extensive changes to the mechanism itself. Instead, all mechanisms that contribute to the prevention of child soldiering should be refined and reassessed on a continuous basis. Some mechanisms will however require more refinement than others. The mechanisms analysed in this study form part of the United Nations (UN), the African Union (AU) and the ICC. The remainder of this section is divided among these entities and the various mechanisms that form part of them. Each mechanism analysed in this study is catalogued below, with specific emphasis being placed on the changes to the relevant mechanism that I argue will elevate its effectiveness in preventing child soldiering, should the changes be implemented.

i. The Refinement of United Nations Mechanisms Aimed at Child Soldier Prevention

The UN is a massive organization consisting of five principal organs and a host of agencies, funds and other entities. Collectively I refer to the entities that make up the UN System as 'UN entities'. Many of these entities engage with child soldiering. However, the analysis in this thesis focuses on the Special Representative to the Secretary-General on Children and Armed Conflict (SRSG), the Committee on the Rights of the Child (CRC Committee) and the Security Council. The inclusion of these entities in this study was determined by two criteria, the relative strength

of the entity, and the entity's potential for direct engagement with child soldier prevention.

The Special Representative to the Secretary-General on Children and Armed Conflict

The SRSG is the mechanism engaged with child soldier prevention that has arguably yielded the most tangible results to date. As was discussed in Chapter 6 for example, the phasing-out of the use and recruitment of child soldiers by the FARDC, the Armed Forces of the Democratic Republic of the Congo (DRC), was a direct result of negotiations with the DRC Government initiated by former SRSG Otunnu. These negotiations culminated in a five-point action plan to cease the use and recruitment of child soldiers in the ranks of the FARDC, and this plan has seen extensive implementation. The SRSG is one of very few mechanisms engaged with child soldier prevention, the positive results of which can to some extent be measured on a quantitative basis. The deterrent effect of the ICC may be very real, yet it does not yield results that can be measured in a similar fashion. Caution should be heeded not to elevate the role of the SRSG in preventing child soldiering purely on the basis of measurable results, and conversely, mechanisms the results of which are not similarly measurable should not by virtue of this alone be relegated.

The SRSG has invested more time and resources into direct engagement with child soldier prevention, i.e. engagement that may yield measurable

results, than indirect engagement. In the context of indirect engagement, the SRSG is mandated to act as a focal point within the UN system with responsibility for the coordination of initiatives and mechanisms aimed at child soldier prevention emanating from all entities making up the UN system. In this context the SRSG should play a more meaningful role. Even though there is often considerable overlap in their efforts, there is little and often no cross-communication between the various UN entities engaged directly with child soldier prevention. There are various reasons why such communication should exist between these entities, including: they can benefit from each other's data and experience, and such interaction will better enable the different UN entities to make strategic decisions regarding which matters to take up and which not to.

The SRSG does engage with all of these entities, however, these entities may benefit greatly from engagement with each other. Given the level of effectiveness of the SRSG, criticism like this might seem trivial. However, this is wholly consistent with the broader conclusion reached in this section, that all mechanisms, regardless of their current level of effectiveness, should continuously be reassessed and refined.

The Committee on the Rights of the Child

The CRC Committee is a treaty-body forming part of the UN Human Rights Treaty System. In terms of the current mandate of the Committee, its primary function is monitoring state compliance with the CRC. The

Committee does have secondary functions, however, unlike any of its sister treaty-bodies, it does not have any form of complaints procedure or enforcement capacity. A process to elaborate a Protocol to the CRC establishing a complaints procedure is already in an advanced stage, and a second Draft Protocol has been produced providing for an array of different complaints procedures.

The effectiveness of treaty-body complaints procedures is strongly contested. However, I am of the view that it is not the concept of a complaints procedure in the context of treaty-bodies that is inherently incapable of ensuring a degree of compliance with legal norms. This is evidenced by the varying degrees of success of the various treaty-bodies. In this regard the Human Rights Committee serves as an example of an effective complaints procedure. As the Protocol to the CRC that will establish a complaints procedure is still being formulated and negotiated, it is a matter of utmost urgency that this mechanism be formulated so as to ensure effective enforcement of the relevant legal norms. The latest Draft Protocol raises a number of concerns. In particular, while it disallows reservations, it incorporates what I term a 'selective ratification regime'. This regime provides for states to opt-in to various different complaints procedures by making a declaration to that effect. In the most extreme cases, the Draft Protocol absurdly allows states that are ratifying parties to either of the Protocols to the CRC, including the CIAC Protocol but who are not ratifying parties to the CRC itself, such as the United

States, to ratify the Protocol and not be subject to any of the five procedures provided for in the Draft Protocol, except for the enquiry procedure for grave or systematic violations. This is consistent with the trend that has been set by the CRC, and the CIAC Protocol after that, to secure extensive state subscription at the cost of creating better norms, protecting more children and strengthening mechanisms that exist to secure the application of these norms. Those negotiating this instrument should reconsider this approach. Ultimately, the rights of children will be better safeguarded by a mechanism capable of effectively applying relevant norms, even when only a limited number of states are subject to the mechanism, than would be the case where the mechanism enjoys universal subscription, but is inherently flawed to the extent that it cannot effectively apply the relevant norms.

The Security Council

The issue of children affected by armed conflict was formally placed on the agenda of the Security Council of the UN during 1998, and since then, the Security Council has continuously engaged with this issue. Most significantly, the Security Council has established a comprehensive Monitoring and Reporting Mechanism on Children and Armed Conflict (MRM), and Working Group on Children and Armed Conflict (Working Group). However, the MRM and Working Group have no power, in their own right, to enforce or apply international norms prohibiting child soldiering. Instead, they exist to inform the Security Council, which then

has the power to take action by, for example, imposing targeted sanctions against violating parties. The Security Council has adopted one binding Resolution under its Chapter VII powers, which demanded the end of child soldier use and recruitment in the DRC.⁹ This Resolution, however, did not go as far as creating targeted sanctions. There is clear evidence that a number of actors have persistently used and recruited child soldiers for a number of years. The potential of the Security Council to contribute to the prevention of the use and recruitment of child soldiers lies in its considerable power.

The Security Council for the first time threatened persistent violators with targeted sanctions during 2004.¹⁰ This threat has been repeated on numerous occasions since then. By failing to act against such persistent violators, who have been identified by the Secretary-General in his annual report on children in armed conflict, the Security Council is likely reinforcing the view held by some that these are empty threats, and nothing more than political rhetoric. Regardless of debates around the different conceptions of childhood among different cultures, there are no violating parties today that justify their actions on the basis of any such arguments. Such violating parties use and recruit child soldiers as the benefits thereof outweigh the negative consequences; what Singer calls “the decisional calculus behind the use of child soldiers”.¹¹ This will not be

⁹ Security Council Resolution 1332, (14 December 2000).

¹⁰ Security Council Resolution 1539, (22 April 2004) para 5(c).

¹¹ Singer, PW. *Children at War* (2006) 153.

the case should the Security Council impose targeted sanctions, the review of which is conditional on the relevant violating party engaging with the SRSG to implement a plan phasing out the use and recruitment of child soldiers within a fixed time period. Indeed, of all mechanisms engaged with child soldier prevention, I am of the view that the Security Council is best placed to affect this decisional calculus. This, however, is dependent on the Security Council taking the next step and following up its threats with action.

ii. The Refinement of African Union Mechanisms Aimed at Child Soldier Prevention

Within the African Union, both the African Court on Human and Peoples' Rights (African Court), as well as the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) have subject-matter jurisdiction in relation to child soldier prohibitive norms. The African Court is the only regional human rights court that has such subject-matter jurisdiction.

The African Children's Committee has been in existence for ten years, but has produced no real results to date. The relevance of this Committee for present purposes is its status as an African inter-governmental organization, giving it the authority to transmit cases to the African Court. The African Court has as of yet only rendered two decisions, and no final judgements on merits. To enhance the future effectiveness of the Court in

preventing child soldiering, more states should make declarations granting individuals and NGO's with observer status before the African Commission direct access to the Court. Of all the entities that have the authority to transmit cases to the Court, it is most likely that an individual or an NGO will transmit cases dealing with child soldier use and recruitment.

iii. The Refinement of the International Criminal Court in Relation to Child Soldier Prevention

In suggesting changes to enforcement structures, one of the considerations is the feasibility of changing the structure at all. In the context of the ICC the process for amendment is such that small changes are not going to be made to the Rome Statute or the structure of the ICC. In any event, such changes are not required.

The potential of the Rome Statute to achieve far-reaching results rests on state parties incorporating the Rome Statute into their municipal law, and prosecuting violators themselves. States should legislate for the use of universal jurisdiction in relation to the prosecution of war crimes, including the child soldier crime. This will increase the scope for the prosecution of the ICL child soldier crime exponentially. At the same time, the potential of the Rome Statute, in both the municipal and international spheres, is dependent on the extensive subscription to the Statute by states. Efforts

to promote the ratification and municipal incorporation of the Rome Statute must be expanded.

An enforcement gap exists regarding the enforcement of child soldier prohibitive norms on non-state actors. This is so primarily because international law obligations are generally state-focused. IHL and ICL have a more significant role to play in this regard, as unlike IHRL, these regimes create obligations on such non-state actors. Traditionally, however, there was no mechanism to enforce these obligations incumbent upon non-state actors. However, the ICC does have jurisdiction in relation to such actors, and will in all likelihood contribute to narrowing this gap. In terms of IHRL the state in which such a non-state actor operates has a duty to prevent them from using or recruiting child soldiers. In practice this is, however, often impracticable as the state which is the duty-bearer is engaged in armed conflict with the relevant non-state actor and moreover, there are numerous inherent difficulties in enforcing legal norms during on-going armed conflict.

3. CONCLUSION: SHIFTING FOCUS FROM NORM CREATION TO NORM ENFORCEMENT, THE REQUISITES FOR AN “ERA OF APPLICATION”

The two research questions serve different purposes in that the first question relates to the viability of the thesis of the study, whereas the second question analyses how the thesis is to be achieved. Should the

conclusion of the first question have been negative, it would have been fatal to the thesis of the study. The conclusion was, however, positive. The second question calls for further analysis, and a broader range of conclusions. The thesis of the study is “that in order for international law to be an agent through which ‘an era of application’ can be entered in the context of child soldier prevention, the focus must now be shifted from norm creation to norm enforcement”. The conclusion to the first research question confirms that it is viable to shift focus to norm application instead of norm creation. The second question addresses the way in which to achieve “an era of application”. This “era of application” is the next step in combating the use and recruitment of child soldiers. It is, however, not the last.

International law plays a dual role in addressing matters such as child soldiering. First, it plays a reactive role in the sense that violations of the relevant norms are redressed. Second, it plays a less tangible, anticipatory role in preventing violations from occurring altogether. This happens on a micro and macro scale. On the micro scale, the deterrent value of criminal prosecution plays a role in preventing the commission of at least some crimes in some circumstances. On the macro scale, the existence of specific rules of international law prevents the commission of some actions altogether. For example, during 1942 US President Roosevelt authorised the mass internment of people of Japanese

ancestry, including a great number of US citizens.¹² In total in the region of 120 000 people were interned.¹³ On the same authority, people of Japanese ancestry were also excluded from designated areas, including the entire State of California and Oregon.¹⁴ Since the commencement of the “war on terror” there have been many calls from the far-right fringes of society for the internment of Muslim people in the US.¹⁵ Yet, unlike the internment of people of Japanese ancestry during World War Two, these calls have been dismissed as emanating from fringe groups and not representing the views of the majority. Indeed, in a society based on fundamental human rights, such internment is unthinkable.¹⁶

As is clear from the analysis in Chapters 4 and 5, the “era of application”, as envisaged in this thesis, occurs very much in relation to the reactive role of law. This approach still fails to take account of deeper systemic problems that result in children joining armed groups, such as extreme poverty. Circumstances exist where it is sometimes the lesser of two evils

¹² This was done on the authority of Executive Order 9066. See also *Korematsu v United States* 323 US 214 (1944). In this case the US Supreme Court, on a split verdict of six to three, upheld Executive Order 9066 as constitutional. Justice Roberts, Justice Murphy and Justice Jackson gave strong dissenting opinions. Justice Murphy stated in his dissent “I dissent, therefore, from this legalization of racism”.

¹³ Ng, WL. *Japanese American internment during World War II: a history and reference guide* (2002), xi.

¹⁴ *Ibid*, 21.

¹⁵ See for example, Malkin, M. *In Defense of Internment: The Case for Racial Profiling in World War II and the War on Terror* (2004).

¹⁶ In view of the US detention facility at Guantanamo Bay, Cuba, it may be argued that internment is not as unrealistic as I suggest. Although detention at Guantanamo Bay is not based on legal process, it is nevertheless based upon intelligence implicating the specific detainees. The legality of such detention is undoubtedly questionable, but it is not tantamount to the mass internment of people based on ethnicity alone, as was the case with Japanese internees during World War Two. See Olson, LM. ‘Guantanamo Habeas Review: are the D.C. District Court's Decisions consistent with IHL Internment Standards?’ 42 *Case W. Res. J. Int'l L.* 197 (2009-2010) for an analysis of detention at Guantanamo Bay in terms of IHL standards.

for a child to be a child soldier as opposed to a child civilian.¹⁷ Social change should not be limited to ending impunity and preventing the use and recruitment of child soldiers, but should also create an environment where choosing to be a child soldier is not more conducive to self-preservation than choosing to remain a civilian. To achieve this the social milieu should be adjusted to the extent that it is not only commanders who are discouraged from recruiting children, but the children themselves see no benefit in joining armed groups. To again use the language of Andvig and Gates, social change should not only address the “demand” of child soldiers, but also their “supply”.¹⁸ Such social change speaks to the anticipatory role of law.

As I stated earlier, social change is incremental. Achieving broad-based social change cannot be considered until extensive rights protection occurs. This implies that where the social phenomenon that is the subject of concern is a problem on a significant scale, international law’s anticipatory role will only be effective once its reactive role has diminished the scope of the phenomenon. As is evidenced in Chapter 2, the use and recruitment of child soldiers is a problem of global proportions. The “era of application” that is the subject of this thesis is the next step in combating the child soldier phenomenon. Once this “era of application” is achieved, more work will still be required in preventing child soldiering.

¹⁷ See Chapter 2.

¹⁸ Andvig, JC. & Gates, S. ‘Recruiting Children for Armed Conflict’ in Gates, S. & Reich, S. (eds.) *Child Soldiers in the Age of Fractured States* (2009), 77-78.

This work will need to focus more on the deeper systemic problems that cause children to join armed groups and forces, and at the same time, will also need to focus more on the anticipatory role of international law. Norms forming part of international law are applied and enforced in both the municipal and international sphere. The municipal incorporation of international norms is one of the best avenues through which to secure application of these norms, and states should as a matter of course implement the international obligations to which they subscribe into their municipal law. However, the strength of the rule of law in the relevant state will largely determine whether the municipal law can effectively be applied. Children are generally used and recruited during armed conflict in states where the rule of law is very weak. Many of these challenges, as well as successes are evident from the case study of the DRC, contained in Chapter 6.

In the final analysis, as I did in Chapter 1, it is again fitting to refer to former SRSG Otunnu's statement to the General Assembly some twelve years ago:

The Special Representative believes that the time has come for the international community to redirect its attention and energies from the juridical task of the development of norms to the political project of ensuring their application and respect on the ground. An "era of application" must be launched. Words on paper cannot save children and women in peril. Such a project can be accomplished if the international community is prepared to employ its considerable collective influence to that end.¹⁹

¹⁹ 'Promotion and protection of the rights of children: Protection of children affected by armed conflict Note by the Secretary-General' A/54/430 (1 October 1999) para 165.

The two aspects of this short quote with which I agree wholeheartedly are, that the international community must redirect its focus from norm creation, to norm enforcement – indeed, this is the thesis of my study; and, that this goal is achievable if the international community employs its collective influence to that end. I disagree, however, that the task of developing norms is strictly “juridical”, and that the task of ensuring their application and respect, is purely “political”. The purpose of this study is not to restate Otunnu’s views. Rather the value this thesis adds to the knowledge on child soldier prevention is threefold: First, I conclude, after thorough analysis, that the positive law has developed to the extent that there is a body of international law that is capable of application. Second, I identify various entities, functionaries and mechanisms, the refinement of which will render international law more effective in preventing child soldiering. Concomitant to this, I draw specific conclusions in relation to how each of these entities, functionaries and mechanisms are to be refined. Finally, in analysing my findings in relation to each of these research questions, with the aim of addressing the central thesis, I conclude that the findings in this study are the next step in child soldier prevention, and a necessary component in eventually achieving broad-based social change. Nevertheless, such broad-based social change will not be truly achieved during “an era of application”, but rather during an era in which application is not necessary.

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