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TABLE OF CONTENTS

TABLE OF CONTENTS	I
ACRONYMS AND ABBREVIATIONS	IX
INTRODUCTION	1
PART I – HISTORY OF THE CRIME OF CHILD RECRUITMENT	7
CHAPTER 1: OVERVIEW OF THE INTERNATIONAL INSTRUMENTS CONCERNING THE ISSUE OF RECRUITMENT OF CHILDREN	7
A. Background	7
B. Overview of the International Instruments Concerning the Recruitment of Children under International Humanitarian Law.....	13
I. Geneva Convention relative to the Protection of Civilians Persons in the Time of War of 1949	13
II. Protocol Additional to the Geneva Convention relating to the Protection of Victims of International Armed Conflicts	17
III. Protocol Additional to the Geneva Convention relating to the Protection of Victims of Non-international Armed Conflict	19
C. Overview of the International Instruments Concerning the Recruitment of Children under International Human Rights	21
I. UN Convention on the Rights of the Child	21
II. Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor	27
III. African Charter on the Rights and Welfare of the Child	29
IV. Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict	31
1. “Straight-18” Age Standard under the OPCRC.....	31
2. Recruitment of Children into Military Schools.....	34
a. Relevant Provisions concerning Recruitment of Children into Military Schools.....	34

b. Violation on Children in Military Schools.....	35
c. Prohibition of Enrollment of Children in Military Schools under International Law.....	37
3. Conclusion.....	38
V. Convention to Suppress the Slave Trade and Slavery and its Supplementary Convention Of 1956.....	39
1. Slavery Convention of 1926.....	39
2. Supplementary Convention of 1956.....	40
VI. Soft Law on the Issue of Child Soldering.....	41
1. UN Security Council Resolutions on Children and Armed Conflicts.....	41
2. UN General Assembly on the Rights of the Child.....	43
3. Cape Town Principles and Best Practices	44
4. Regional Declarations on the Use of Child Soldiers.....	45
D. Overview of the International Instruments Concerning the Crime of Child Recruitment under International Criminal Law	48
I. Rome Statute of the International Criminal Court	49
1. The Establishment of the ICC.....	50
2. The Provisions of Crime of Child Recruitment under the Rome Statute.....	52
II. Statute of Special Court of Sierra Leone	56
E. CONCLUSION.....	57
CHAPTER 2: OVERVIEW OF THE CASE LAW CONCERNING THE CRIME OF CHILD RECRUITMENT	59
A. International Judicial Practice of the Crime of Child Recruitment before the Special Court of Sierra Leone	60
I. The Case concerning the Civil Defense Forces	61
II. The Case concerning the Armed Forces Revolutionary Council	65

III. The Cases concerning the Revolutionary United Front	68
1. Prosecutor v. Issa Sesay, Morris Kallon and Augustine Gbao	69
2. Prosecutor v. Foday Saybana Sankoh	72
3. Prosecutor v. Sam Bockarie	73
4. Prosecutor v. Johnny Paul Koroma	74
IV. Prosecutor v. Charles Ghankay Taylor	74
B. Situations and Cases before the International Criminal Court	77
I. The Situation in Uganda: Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen	78
II. The Situation in the Democratic Republic of the Congo	79
1. Prosecutor v. Thomas Lubanga Dyilo	79
2. Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui.....	82
3. Prosecutor v. Bosco Ntaganda	83
C. CONCLUSION.....	84
PART II – ANALYSIS OF THE CRIME OF CHILD RECRUITMENT IN THE INTERNATIONAL CRIMINAL LAW REGIME	86
CHAPTER 3: THE CRIME OF CHILD RECRUITMENT UNDER CUSTOMARY INTERNATIONAL LAW	87
A. Legal Significance of the Status of the Crime of Child Recruitment under Customary International Law.....	87
I. The Binding Force of Customary International Law.....	88
1. The Limitation of Treaty Laws.....	88
2. The Rome Statute in Particular.....	90
3. The Need of Customary International Law	92
II. The Inter-relationship between Customary International Law and the Principle of <i>Nullum Crimen Sine Lege</i>	92

1. The IMT and the IMTFE	93
2. ICTY.....	95
3. ICTR	97
4. SCSL	99
B. Assessment of Customary International Law	99
I. State Practice.....	100
1. Virtually Uniform.....	101
2. Extensive and Representative.....	103
3. Continuity and Repetition.....	105
II. <i>Opinio Juris</i>	106
C. Status of the Crime of Child Recruitment before 1996	108
I. Finding by the Majority in <i>Norman</i> Jurisdiction Decision.....	109
1. The Reasoning of the Majority Decision	110
2. Flaws Contained in the Majority Decision	113
a. Flaws in the Analysis of the Child Recruitment as a Crime before 1996.....	113
a) The Interpretation of Obligations to Criminalize Child Recruitment under the Treaties.....	114
b) The Rome Statute in Particular.....	115
b. Lack of sufficient National Legislation in the Analysis of Customary International Law.....	117
a) State Practice of the Crime of Child Recruitment.....	117
b) <i>Opinio Juris</i> of the Crime of Child Recruitment.....	118
c. Conclusion	120
II. Dissenting Opinion Delivered by Justice Robertson	120

1. Major Arguments in the Dissenting Opinion of Justice Robertson	120
2. Critics of the Dissenting Opinion of Justice Robertson	123
a. Forcible Recruitment of Children as a Violation of the CA3.....	123
b. The Necessity of Distinguishing Child Enlistment and Forcible Recruitm...	124
D. Status of the Crime of Child Recruitment as Customary International Law as of Today.....	125
I. The State Practice of States Parties to the Rome Statute	126
II. The State Practice of Non-Party States to the Rome Statute	129
III. The State practice of “Specially Affected” States	131
IV. The Widespread and Systematic Use of Child Soldiers as Grounds for an Argument of IncosistentState Parties and Weak <i>Opinio Juris</i>	135
E. CONCLUSION	136
CHAPTER 4: THE CONSTITUENT ELEMENTS OF THE CRIME OF CHILD RECRUITMENT ACCORDING TO THE ROME STATUTE AND THE ELEMENTS OF CRIMES	138
A. General Requirements for War Crimes	139
I. Armed Conflicts and the Crime of Child Recruitment	139
1. The Existence of an Armed Conflict	140
a. The Existence of an International Armed Conflict.....	140
a) Foreign Military Intervention.....	142
i. The ICTY’s Jurisprudence on “Foreign Military Intervention”... ..	142
ii. The ICC’s Jurisprudence on “Foreign Military Intervention” in the <i>Lubanga</i> case	143
b) Agents of a Foreign State.....	145
i. The “Effective Control” Test.....	146
ii. The “Overall Control” Test.....	147

iii.	The “Effective Control” Test vs. The “Overall Control” Test..	147
2.	The Existence of an Internal Armed Conflict.....	148
a.	The Substantive Rules Regarding an Internal Armed Conflict.....	149
b.	The Judicial Practice of Determining an Existence of an Internal Armed Conflict.....	151
a)	The Intensity of the Conflict.....	152
b)	The Organization of the Parties.....	152
3.	The Phrase “National Armed Forces” vs. “Armed Forces or Groups”.....	154
II.	The Nexus between the Armed Conflict and the alleged Offense	155
B.	Specific Elements of the Crime of Child Recruitment	157
I.	The <i>Actus Reus</i> of the Crime of Child Recruitment.....	157
1.	Two Categories of the <i>Actus Reus</i> : Recruitment and Use.....	157
2.	The Forms of Recruitment: “Conscription” and “Enlistment” of Children.....	158
a.	The Definition of “Conscription” in the Context of Child Recruitment.....	158
b.	The Definition of “Enlistment” in the Context of Child Recruitment.....	160
c.	<i>De Jure</i> and <i>De Facto</i> Recruitment.....	162
a)	<i>De Jure</i> Recruitment of Children in Armed Forces or Groups.....	162
b)	<i>De Jure</i> Recruitment of Children in Armed Forces or Groups.....	163
3.	The Use of Children to Participate Actively in Hostilities	163
a.	The Term of “Active” vs. “Direct”.....	164
b.	The Definition of “Active” Participation vs. “Inactive” Participation	166
4.	The “Recruitment of Children into Armed Forces or Groups” vs. the “Use of Children to Participate Actively in Hostilities”.....	169
a.	“Indirectly Participate in Hostilities” as a <i>De Facto</i> “Recruitment of Children in Armed Forces or Groups”.....	171

b.	The Arguments against the Inclusion of the “Use of Children to Participate Indirectly in Hostilities” into the Realm of “Recruitment of Children in Armed Forces of Groups”	172
c.	The Rational of Separating the “Use of Children to Participate Actively in Hostilities” from the “Recruitment of Children in Armed Forces or Groups”	172
d.	The Efforts of Adding the “Use of Children to Participate Indirectly in Hostilities” into Framework of the “Use of Children to Participate Actively in Hostilities”	173
5.	The Minimum Recruitment Age for Children	175
a.	Children Must be under the Age of 15 Years.....	175
b.	Efforts to Raise the Recruitment Age to 18 Years	175
a)	A Child’s Free Will as an Argument	176
b)	Current Development of Raising the Age Limit to 15 Years.....	177
II.	<i>Mens Rea</i> of the Crime of Child Recruitment under the Rome Statute.....	178
1.	The Meaning of “Unless Otherwise Provided” in Article 30 of the Rome Statute...179	
a.	“Unless Otherwise Provided” in the Respect of the Rome Statute.....	179
b.	“ Unless Otherwise Provided” in the Respect of Article 21.....	181
c.	“Unless Otherwise Provided” in the Respect of the EoC.....	182
a)	Arguments against the EoC as “Other Provided” the Rome Statute...183	
b)	Arguments for the EoC as “Other Provided” the Rome Statute.....	184
c)	EoC can be regarded as “Other Provided” the Rome Statute.....	185
2.	Article 30 and the EoC: Mental Element of the Crime of Child Recruitment.....	187
a.	Intent as a <i>Mens Rea</i> of the Crime of Child Recruitment under Article 30...187	
a)	Intent in relation to Conducts.....	188
b)	Intent in relation to Consequences.....	188
i.	Arguments for the Inclusion of Recklessness into Article 30	189

ii.	Arguments against the Inclusion of Recklessness into Article 30.....	191
iii.	Arguments of the Inclusion of <i>Dolus Eventualis</i> into Article 30 (2) (b).....	191
iv.	<i>Dolus Eventualis</i> can be included into the Realm of Article 30 (2) (b).....	194
c)	Proof of Intent	195
d)	Intent <i>vs.</i> Motive	197
b.	Knowledge as a <i>Mens Rea</i> of the Crime of Child Recruitment under Article 30.....	198
c.	The <i>Mens Rea</i> Regarding the Age of a Child	199
a)	The Approaches of Interpretating “Should Have Known” Standard....	200
i.	The “Failure to Obtain the Information” Approach	200
ii.	The “Failure to Acknowledge the Information” Approach	201
b)	The Interpretation of the “Should Have Known” Standard in the <i>Lubanga</i> case.....	203
c)	Rationalizing the “Had Reason to Know” Standard Regarding the Age of a Child.....	205
C.	CONCLUSION.....	208
PART III	–FINAL CONCLUSION	211
ABSTRACT	(GERMAN, ENGLISH).....	211
ANNEX I	(ZUSAMMENFASSUNG DEUTSCH).....	213
ANNEX II	ABSTRACT (ENGLISH).....	215
BIBLIOGRAPHY.....		248
CV.....		225

ACRONYMS AND ABBREVIATIONS

ACRWC	African Charter on the Rights and Welfare of a Child
ACHR	American Convention on Human Rights
AI	Amnesty International
AJCL	American Journal of Comparative Law
AJIL	American Journal of International Law
AP I	Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts
AP II	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts
Art.	Article
AU	African Union
AUILR	American University International Law Review
BERKJIL	Berkeley Journal of International Law
Cambr. LJ	Cambridge Law Journal
CLR	Criminal Law Review
CRC	UN Convention on the Rights of the Child
DCI	Defence for Children International
DDR	Disarmament, Demobilization and Reintegration
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
ed.	Editor
EJIL	European Journal of International Law
EU	European Union
FDM ILJ	Fordham International Law Journal
GA	General Assembly
GA Res.	General Assembly Resolution
GCI	Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field
GCII	Geneva Convention for the Amelioration of the Condition of Wounded and Sick and Shipwrecked Members of Armed Forces at Sea
GCIII	Geneva Convention Relative to the Treatment of

	Geneva Convention Relative to the Protection of Prisoners of War
GCIV	Geneve Convention Relative to the Protection of Civilian Persons in Time of War
HRC	Human Rights Committee
HRW	Human Rights Watch
ICC	International Criminal Court
ICCPR	UN International Covenant on Civil and Political Rights
ICESCR	UN International Covenant of Economics, Social and Cultural Rights
ICJ	International Criminal Justice
ICLQ	International and Comparative Law Quarterly
ICrimLR	International Criminal Law Review
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IJHR	International Journal of Human Rights
ILC	International Law Commission
ILO	International Labor Organization
ILO Convention 182	International Labor Organization Worst Forms of Child Labor Convention ¹⁸²
ILSA JICL	ILSA Journal of International and Comparative Law
INTLLAW	International Lawyer
INTLRRC	International Review of the Red Cross
JICJ	Journal of Criminal Law
Max Planck YBUNL	Max Planck Yearbook of United Nations Law
NGO	Non-Governmental Organization
OPCRC	Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict
para.	Paragrap
RICJ	Review of the International Commission of Jurists
Rome Statute	Rome Statute of the International Criminal Court
SCSL	Special Court for the Sierra Leone
TRC	Truth and Reconciliation Commission
UN	United Nations
UN GAOR	General Assembly Official Record

UNICEF

United Nations Children's Fund

UNTS

United Nations Treaty Series

VCLT

Vienna Convention on the Law of Treaties

YBILC

Yearbook of International Law Commission

Introduction

“The horrors lived by child soldiers are overwhelming: abducted, subjected to sexual slavery, beaten, deprived, forced to kill and often murdered. [...] Tens of thousands of under-18s were estimated to have been recruited by armed forces in at least 60 countries. While thousands were legally recruited, others were forcibly conscripted in military round ups to replenish numbers in unpopular armies. Still others were enlisted in countries where the lack of a functioning birth registration system made it impossible to verify the age of recruits and ensure protection of under-18s from active military service. [...] Some [i.e. of the young recruits] were reportedly beaten during training, receiving little medical care for their injuries. Girl soldiers are frequently subjected to rape and other forms of sexual violence as well as being involved in combat and other roles.”¹

This quotation from the *Child Soldiers Global Report 2004* (hereinafter “Global Report 2004”), published by the *Coalition to Stop the Use of Child Soldiers*, aims to call for international attention to protect children against military exploitation. This Report outlines the scope of child soldiery, the methods of recruitment, and most importantly stresses the detrimental effects and the prevalent phenomena of child soldiering: not only young soldiers have suffered from widespread violence and brutalities of armed conflicts, but the number of child soldiers has been seen an increase at an alarming rate. Obviously the cited report is not the only voice calling for attention to the miserable situation of child soldiers used in armed conflicts.

As early as 1993, Ms. Graça Machel was commissioned by the General Assembly of the United Nations to study the impact of armed conflict on children.² A report, summing up the extent of using child soldiers and its consequences was presented to the 51st Session of the

¹ Coalition to Stop the Use of Child Soldiers, *Child Soldiers Global Report 2004*, Coalition to Stop the Use of the Child Soldiers, 2004, pp. 9, 14, 16, 42.

² General Assembly, Protection of children affected by armed conflicts, A/RES/48/157, 85th Plenary Meeting, 20 December 1993, para. 7.

General Assembly.³ In this report, it is estimated that hundreds of thousands of children, many of whom are only ten years old or even younger, were serving either in government armies or in opposition groups.⁴ The use of young soldiers in wars, therefore, was labeled as “one of the most alarming trends in armed conflicts”.⁵

Due to a large number of child soldiers serving in armed forces— primarily in non-state armed groups, but also in national armed forces,⁶ the task to end the child recruitment has become an issue of high public attention over the last few years. The condemnation of under-age military service is near-universal, coming not only from international bodies, but also from the States who pledge to implement their obligation to prohibit using of children soldiers in the midst of armed conflicts. The Office of the Special Representative of the Secretary-General for Children and Armed Conflict (“hereinafter “the Office”) set a good example of fighting against child soldering.

Since 1997, the Office has devoted itself to the mission of protection children from war.⁷ The use of children as soldiers is considered as a part of a broad issue of “war-affected children offenses”, and it has become central within the work of the Office. Especially in 2009, the Office identifies “recruiting and using children under 18 years” as one of the six grave violations against children during armed conflict and urges the states to end the impunity of

³ General Assembly, Provisional Agenda of the Fifty-first Regular Session of the General Assembly, A/51/150, 51st Session, 19 July 1996.

⁴ United Nation General Assembly, Graça Machel, *Report concerning the Impact of Armed conflict on Children* (hereinafter “Machel Report”), U.N. Doc. A/51/306, 26 August 1996, para. 35.

⁵ *Ibid*, para. 34.

⁶ Save the Children, *Child Soldiers – and Other Children Used by Armed Forces and Groups*, 2010, p.1, available at http://www.savethechildren.org.uk/en/docs/Child_soldiers_policy_brief.pdf (last accessed on May 2011).

⁷ In its mission statement, the Office states, “an extraordinary impetus now exists for the application of international standards and norms that demonstrates the remarkable commitment of the international community to child protection in armed conflict. It is imperative to maintain that momentum in order to further advance the agenda and to better protect our children from war. See website of the Office of the Special Representative of the Secretary-General for Children and Armed conflict, <http://www.un.org/children/conflict/english/index.html> (last accessed on 9 Sept 2010).

perpetrators who recruit or use children in hostilities.⁸ Various efforts are being made by the Office to draw international attention to the horrendous plight of children soldiers serving in armed forces or groups and ultimately to stop the use of child soldiers by both governments and non-state actors.

On 5 October 2010, the Office issued a unique documentary picturing the miserable life of a group of former child soldier, who was abducted and was forced to become fighters of the Lord's Resistance Army (hereinafter "LRA") in northern Uganda. Through the documentary, the Office expresses a clear stance that no child should be used to take part in hostilities and the governments should assist the former child soldiers in finding a new existence after a life of violence, distress and alienation.⁹

The Office also calls on all of the governments for actions to develop and strengthen the existing international norms and standards for the protection of children from soldering. On 25 May 2010, the Office, along with the Special Representative of the Secretary-General on Violence against children, the United Nations Children's Fund (hereinafter "UNICEF"), and the Office of the High Commissioner on Human Rights launched a "zero under eighteen" two-year campaign, with the aim to achieve universal ratification of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (hereinafter "OPCRC")¹⁰ by 2012, and to "promote the adoption and effective implementation of relevant national legislation".¹¹ The Office especially emphasizes the

⁸ Office of the Special Representative of the Secretary-General for Children and Armed Conflict, *The Six Grave Violations Against Children During Armed Conflict: The Legal Foundation*, Working Paper No. 1, October 2009, pp. 3, 7-8.

⁹ Office of the SRSF for Children and Armed Conflict, *Delegates and Mission Staff Invited to World Premiere of Documentary "Children of War"*, 5 October 2010, available at http://iseek.un.org/webpgdept1913_11.asp (last accessed on 8 October 2010).

¹⁰ The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (hereinafter "OPCRC"), Doc. A/54/L. 84, 16 May 2000, entry into force 12 February 2002.

¹¹ The Office of the Special Representative of the Secretary-General for Children and Armed Conflict, *Concept note "Zero under 18"*,

[http://zerounder18.org/Portals/ZeroUnder18/documents/Concept%20Note%20-](http://zerounder18.org/Portals/ZeroUnder18/documents/Concept%20Note%20-%20ZeroUnder18%20Campaign.pdf)

[%20ZeroUnder18%20Campaign.pdf](http://zerounder18.org/Portals/ZeroUnder18/documents/Concept%20Note%20-%20ZeroUnder18%20Campaign.pdf) (last accessed on 7 October 2010). See more about the Zero under Eighteen Campaign, available at <http://zerounder18.org/Default.aspx?tabid=829> (last accessed on 7 October 2010).

obligation of governments and non-State actors to strengthen “the essence of the OPCRC” to raise the minimum age of recruitment to 18 years, even including for voluntary recruitment.

In the implementation of its mission of fighting to end impunity, the Office welcomes the achievement made by international tribunals on the trials regarding the crime of child recruitment, and further encourages national tribunals to achieve accountability for child soldiering violations at the national level.¹²

It should also be pointed out that efforts to end the use of child soldiers involve a wide spectrum of international organizations with their own fields of action, which collaborate with each other. Besides the Office, the Special Rapporteur on contemporary Forms of Slavery, including its causes and its consequences (hereinafter “Special Rapporteur”) is another organization among all the others that provided recommendations on measures that should be taken on all variant forms of slavery practices, including child soldiering. Over the years, Special Rapporteur has collected evidence of “a wide range of slavery practices”,¹³ which are stated in the report of Office of the United Nations High Commissioner for Human Rights,

“the word ‘slavery’ covers not only traditional slavery, but also “the slave trade, these abuses include the sale of children, child prostitution, child pornography, the exploitation of child labor, the sexual mutilation of female children, the use of children in armed conflicts, debt bondage, the traffic in persons and in the sale of human organs, the exploitation of prostitution, and certain practices under apartheid and colonial regimes.”¹⁴

Use of child soldiers in hostilities therefore has been specifically incorporated into the scope of contemporary forms of slavery. The following will describe the main international instruments regarding slavery.

¹² See the Office’s homepage, available at <http://www.un.org/children/conflict/english/actions.html> (last accessed on 7 October 2010).

¹³ Suzanne Miers, *Slavery in the Twentieth Century: The Evaluation of a Global Problem*, Rowman Altamira, 2003, p. 15.

¹⁴ Fact Sheet 14: Contemporary Forms of Slavery, Office of the Commissioner for Human Rights, June 1991, available at <http://www.ohchr.org/Documents/Publications/FactSheet14en.pdf> (last accessed on 1 November 2010).

It should not be underestimated that through the process of fighting against child soldiering, an important contribution to the advancement of international legal norms relating to child soldiering has been made by modern international criminal law. At the early stage, the international instruments only prohibit child soldiering, but not expressly obligations to criminalize the practice of child soldiering as an international crime attracting individual responsibility. The approach of only obliging states to prohibit the practice of child recruitment seems not to work satisfactorily to stop the use of child soldiers. Apparently it failed to bring about lots of progress in the campaign of entailing criminal responsibility to perpetrators – an issue attracts important concern in the field of international criminal law. It is well-known that the principle of individual criminal responsibility for serious violations of international humanitarian law has been a motor for the interpretation and implementation of respective standards and norms. And thus, the Rome Statute of the International Criminal Court (hereinafter “Rome Statute”), as an example, marked a milestone in the road towards the criminalization of violations of children by defining child recruitment as a war crime in its Article 8 (2) (b) (xxvi) and (e) (vii).

This dissertation, therefore, will focus on two main aspects of the crime of child recruitment: the norms and standards relating to child soldiering on the international level, and some issues relating to the implementation of these norms and standards at the national level. To this end, the dissertation firstly will summarize the international instruments on the prohibition of child recruitment under a classical human rights aspect, and then it will deal with the developments of the crime under international criminal law, in terms of criminalization level. Following outlining and analyzing the relevant international instruments, an overview of case law relating to the prosecution of perpetrators who use child soldiers in hostilities will be addressed in Chapter 2. Based on the judicial practice at the international tribunals, along with a detailed research on the criminalization of child soldiering in the national legislation, the following Chapter 3 is to investigate the question whether the crime of child recruitment formed part of the customary international law. Last but not least, Chapter 4 is to engage in an analysis of the constituent elements of the crime of child recruitment under the Rome Statute. As the first case regarding the crime of child

recruitment before the ICC, the jurisprudence which was established in the *Lubanga* case¹⁵ not only has sent a clear message that no individual is beyond the reach of justice for child soldiering, but also has sent an important precedent for both international tribunals and national courts in child recruitment trials.

¹⁵ At the time when the dissertation was finished writing, the trial of *Lubanga* had not been completed, and therefore no judgment had yet been delivered. This dissertation will produce an analysis of the Decision on the Confirmation of Charges of the Pre-trial Chamber in the *Lubanga* trial at the International Criminal Court.

PART I – HISTORY OF THE CRIME OF CHILD RECRUITMENT

Chapter 1: The International Instruments Concerning the Issue of Child Soldiering

A. Background

Children's involvement in wars and armed conflicts is not something unknown until recently. Throughout the history of *homo sapien*, child soldiers have been found on frontlines engaged in fighting or other staffing chores. In fact, the history of child soldiers can be dated back to ancient times, when children were generally considered not only as property under the lawful ownership of man, whether a father, slave master, or guardian, but also as property of the State.¹⁶ Spartan children, for instance, were taken from their mothers at the tender age of 7 to be kept in dormitories with other boys and trained as soldiers,¹⁷ simply because they were believed to be loyal to the state.¹⁸ The same situation was found in ancient Rome where seven-year-olds were obliged to join the army.¹⁹ Minor service in military units was not only a phenomenon common within the territory of a state, but underage involvement in hostilities also extended to occupied territories far away from the home country. In those times, no voice was ever raised challenging the legality of one nation going to war with another.²⁰ The conquerors took from the vanquished not only his life, but also all of his belongings,

¹⁶ This view has been upheld by some of the States until modern times. Jacob G. Hornberger, *Children Are Property of the State*, paras.1-2, available at <http://www.fff.org/comment/ed0400d.asp> (last accessed on 15 September 2010).

¹⁷ *Ibid.*

¹⁸ Social Studies School Service, *Ancient Greece*, Social Studies Publisher, 2003, p. 91.

¹⁹ See Xueyou Databases, *The Flourishing Age of Ancient Greece and Rome*, pp. 17-18, available at <http://zhjyx.hfjy.net.cn/Basic/EBookLib/KWDW/TS004056> (latest visit on 8 August 2008).

²⁰ During that period no systematic law was formed, though some principles concerning the laws of war were delineated. For example, Cicero (106-43 B.C.) urged soldiers to conduct with as little cruelty or inhumanity as possible to reduce the implicit horrors. See Kelly Dawn Askin, *War Crimes Against Women: Prosecution in International War Crimes Tribunals*, Martinus Nijhoff, 1997, p. 19.

including women, children, domestic animals and personal properties.²¹ It was a widespread practice for children to be seized as property and then recruited to take part in armed conflicts against their own countries.

Slowly, a sense began to emerge that some distinction should be made between combatants and non-combatants in war.²² Despite the fact that the term “civilian” remained undefined, a feeling had grown that the population of an enemy state should be spared the wrath of war. Take ancient China, for instance, a beginning was made in regard to the treatment of the non-combatant. Sun Tsu, the author of “The Art of War” in the sixth century B.C. forbade the slaying of prisoners of war, giving as alternatives: absorption into one’s own army, enslavement or ransom.²³ Still, there was no clearly formed view that children should be protected from military service, either as vulnerable persons or as civilians.

In the Middle Ages, the situation continued more or less the same. Child soldiers were still viewed as heroes not victims.²⁴ In 1212 Children crusades, for example, composed entirely of young children holding the faith of homeric heroism set out to take the Holy Land from the Muslims.²⁵ But only a few of them returned home and most were starved, drowned or frozen to death during the journey and others were caught by the Arabs and sold into slavery.²⁶

²¹ Howard S. Levie, *History of the Law of War On Land*, International Review of the Red Cross, No. 838, p. 339.

²² Richard Shelley Hartigan, *the Forgotten Victim: A History of the Civilian*, Precedent Publisher, 1982, pp. 7, 124.

²³ Howard S. Levie, *History of the Law of War on Land*, *supra* note 21, p. 339.

²⁴ Dominique Marshall, *The Construction of Children As An Object of International Relations: The Declaration of Children’s Rights and the Child Welfare Committee of League of Nations, 1900-1924*, 7 International Journal of Children’s Rights (1999):2, pp. 133-134.

²⁵ It is estimated that 20,000 children were recruited into the German Children’s Crusade lead by a boy and 30,000 thousands of children for the France Crusade. See Zhao Daming, *The War of Crusades*, available at <http://www.mslfw.com/Soft/ShowSoft.asp?SoftID=44> (latest visit on 8 August 2008). See also IlonaTopa, *Prohibition of Child Soldiering, International Legislations and Prosecution of Perpetrators*, International Law Journal (2007) 105, p. 106, available at <http://www.hanselawreview.org/pdf5/Vol3No1Art06.pdf> (last accessed on 10 November 2010).

²⁶ Robert Lee Wolff and Harry W. Hazard, *A History of the Crusades: the Later Crusades, 1189-1311*, Vol. II, University of Pennsylvania Press, 1962, p. 336.

Since such “heroic” deeds were much applauded and conferred on the person’s everlasting glory, it was an unrealistic legal issue at that time to prohibit the act of child recruitment.

In addition, social values on children had remained much the same: children were still viewed as little more than property to be used by the conquering victors. Throughout the military circles, the notion went unchallenged that all persons, including unarmed women and children, were still the enemy.²⁷ It was not until the Enlightenment Period when the first humanitarian principles were expostulated and social values regarding the treatment of soldiers, prisoners of war, and civilians started to change. Take Jean Jacques Rousseau for example, he stated that

*“One has the right to kill its defenders as long as they are armed, but as soon as they lay down their arms and surrender [...] they become simply men again, and one no longer has any right to their lives[...].”*²⁸

The same view was upheld by Emmerich van Vattel who pleaded the immunity of persons who offer no resistance against the war and stated:

*“Women, children, feeble old men, and the sick are to be counted among the enemy [...] But these are enemies who offer no resistance, and consequently the belligerent has no right to maltreat or otherwise offer violence to them.”*²⁹

In 1863 the Lieber Code in its Articles 31-47 laid down specific humanitarian rules in time of war, which was an relatively early attempt to punish crimes against the inhabitants of hostile countries.³⁰ However, it failed to lay down explicitly a ban on recruitment of children as property of the state or occupied state. Child soldiers were still found fighting in the Napoleonic wars. Familiar figures in Nelson’s navy were the “powder monkeys” – officially,

²⁷ Richard Shelly Hartigan, the Forgotten Victim: A History of the Civilian, *supra* note 22, p. 155.

²⁸ Jean-Jacques Rousseau, On the Social Contract, Penguin, 1968, p. 51.

²⁹ Emmerich von Vattel, the Law of Nations or the Principles of Natural Law, 2nd (ed.), Lonang Institute, 1758, pp. 282-283.

³⁰ Instructions for the Government of the United States in the Field by Order of the Secretary of War, 24 April 1863 (hereinafter “The Lieber Code”). See also D. Schindler & J. Toman, The Laws of Armed Conflicts, 3rd (ed.), Martinus Nijhoff, 1988, p. 3.

Ship's Boys 3rd Class – many of whom were the sons of serving seamen as young as 12 years old.³¹

Another attempt in codifying the laws of land warfare was made one year after the Lieber Code. The year 1864 saw the promulgation of the Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field,³² which gave birth to a considerable codification of humanitarian laws, despite the fact that this short and sketchy instrument was considered inadequate during the Nuremberg Trial.³³ The Hague Conventions codified international humanitarian law and rules on arms control and disarmament, with an aim to reduce the horrors of warfare, concentrating mostly on unnecessary suffering in war.³⁴ A slightly redrafted set of the Regulations attached to the 1907 Convention (IV) respecting the Laws and Customs of War on Land (hereinafter “Hague Regulations”) is the most important annex of the 1907 Hague Conventions, where provisions concerning the protection of nationals (including children) in the occupied territories against the consequences of war were provided.³⁵ Although the use of children as soldiers was not specifically prohibited in the texts of the Hague Regulations, its Article 23 (h) prohibited in general all forced participation of nationals of a hostile party in operations of war directed

³¹ Robin Cross, *Children and War*, available at <http://www.channel4.com/history/microsites/H/history/c-d/childwar02.html> (latest visit on 8 August 2008). IlonaTopa, *Prohibition of Child Soldiering, International Legislations and Prosecution of Perpetrators*, *supra* note 25, p. 106.

³² Geneva Convention for the Amelioration of the Condition of the Wounded and Sick of Armed Forces in the Field (hereinafter “GC I”), 75 U.N.T.S. 31, adopted on 12 August 1949 by the Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War, entered into force on 31 October 1950.

³³ Kelly Dawn Askin, *War Crimes against Women: Prosecution in International War Crimes Tribunals*, *supra* note 20, p. 39.

³⁴ See *Laws of Wars: Pacific Settlement of International Disputes* (hereinafter “Hague I”), 29 July 1899; *Laws and Customs of War on Land* (hereinafter “Hague II”), 29 July 1899; *Laws of War: Adaptation to Maritime Warfare of Principles of Geneva Convention of 1864* (hereinafter “Hague III”), 29 July 1899; *Laws of Wars, Prohibiting Launching of Projectiles and Explosives from Balloons* (hereinafter “Hague IV”), 29 July 1899, with *Declaration on the Launching of Projectiles and Explosives from Balloons*, 29 July 1899; *Declaration on the Use of Projectiles the Object of Which is the Diffusion of Asphyxiating or Deleterious Gases*, 29 July 1899; *Declaration on the Use of Bullets Which Expand or Flatten Easily in the Human Body*, 29 July 1899.

³⁵ The Convention (IV) respecting the Law and Customs of War on Land the its Annex: Regulations concerning Laws and Customs of War on Land (hereinafter “Hague Regulations”), The Hague, 18 October 1907, Section III, Military Authority Over the Territory of the Hostile State, Articles 42-56.

against their own countries.³⁶ This implies a change of views on children such that children ceased to be viewed simply as property subservient to their states.³⁷

During the World War I (hereinafter “WW I”), the innumerable violations of the Hague Conventions indicated the insufficiency of the Hague Conventions in view of the protection of civilians in occupied territories. In the case of child recruitment, it is roughly estimated that in WW I some 250,000 underage boys were recruited in the British Army, of whom perhaps 50% were killed or wounded.³⁸ Since the enormity of the offenses committed during WW I, concerned voices were raised calling for punishment of the criminals, preferably before an international tribunal.³⁹ In 1919, the War Crimes Commission was established and thirty-two offenses were specified as violations of the customs of wars. However, regrettably child recruitment was not enumerated as one of the violations of the laws of customs of wars in the report.⁴⁰ Although the trial failed, due to various reasons,⁴¹ it proved to pave a way for the development of judicial institution of International Humanitarian Law (hereinafter “IHL”).⁴²

Blatant deficit of specific obligations in the international instruments not to recruit children continued right up to the Second World War (hereinafter “WWII”) when recruitment of child soldiers became more rampant, more widespread and sometimes in forms quite complex. The

³⁶ *Ibid.*, Article 23(h): “A belligerent is likewise forbidden to compel the national of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent’s service before the commencement of the war”.

³⁷ A. Clean Mower Jr., *The UN Convention on the Rights of the Child: International Law Support for Children*, Greenwood, p. 11.

³⁸ Richard van Emden, *Britain’s Boy Soldiers*, Channel 4 History, 2004, available at <http://222.channel4.com/history/microsites/H/history/a-b/boysoldiers.html> (last accessed on 10 November 2010).

³⁹ Susan Brownmiller, *Against Our Will, Women and Rape*, Ballantine, 1975, p. 31.

⁴⁰ UN War Crimes Commission, *XIII Law Report of Trials of War Criminals* 122, 1919.

⁴¹ The reasons for this are mainly twofold. It is partly because the Netherlands refused to surrender ex-Kaiser Wilhelm II, and partly because the disagreement to the creation of a tribunal. See William B. Simons, *The Jurisdictional Basis of the International Military Tribunal at Nuremberg*, in the book edited by Ginsberg’s & Kudriavtsev (eds.), *The Nuremberg Trial and International Law*, Kluwer, 1990, pp. 39-45.

⁴² Ivan Jovanović, *Immunity of Heads of State for International Crimes: Deflating Dictator’s Lifebelt?*, 3 *Belgrade Law Review* (2009):206, p. 207.

most notable example of systematically using child soldiers during WWII was the Hitler Youth,⁴³ which at the last stage of the War trained thousands of child soldiers for the German Army.⁴⁴ In order to avoid a repeat of the failure in the aftermath of WW I, the International Military Tribunal (hereinafter “IMT”) and the International Military Tribunal for the Far East (hereinafter “IMTFE”) were established for the punishment of persons who committed serious offences during WW II.⁴⁵ Regrettably, neither Article 6 of the International Military Tribunal Charter (hereinafter “IMT Charter”) or the Control Council Law No. 10 (hereinafter “CCL10”) specifically listed the use of child soldiers in war as a crime,⁴⁶ nor did the IMTFE Charter enumerate the act of child recruitment as a violation of the laws or customs of war.⁴⁷ One possible reason for the failure to criminalize the act of child recruitment as a crime under both the Charters of the IMT and of the IMTFE might be the uncertainty of whether recruitment of nationals of occupied territories had been covered by customary international law at the time of the WW II.

However, the lack of jurisdiction of the two military tribunals over persons who recruited child soldiers to take part in hostilities would not mean that the world community would tolerate such atrocities any longer. Immediately after WW II, the consciousness of the international community was shocked by the revelation of large numbers of child soldiers used in the war and by the consequent suffering of severe physical and psychological

⁴³ The Hitler Youth created in the 1920's. By the outbreak of the WWII, children from 10 to 18 year olds were compulsory to join the Hitler Youth. The task of the boys section was to prepare the boys for military service. For girls, the organization prepared them for motherhood. See Alan Dearn & Elizabeth Sharp, *The Hitler Youth 1933-45*, Osprey, 2006, p. 5.

⁴⁴ From late 1944 children of Hitler Youth were directly used in combat. See Alan Dearn & Elizabeth Sharp, *The Hitler Youth 1933-45*, *ibid.*, p. 6. See also Peter Warren Singer, *Caution: Children at War*, 31 Parameters (2001), para. 8, available at http://www.questia.com/googleScholar.qst;jsessionid=9973C12A0A290D75C49035755D011A91.inst1_1b?docId=5002432475 (last accessed on 10 November 2010).

⁴⁵ M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal law*, 2nd (ed.), Kluwer Law International, 1999, p. 607.

⁴⁶ Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, London, 8 August 1945, 8 UNTS 279, Article 6. Allied Control Council Law No. 10, Punishment of Persons Guilty of war Crimes, Crimes Against Peace and Humanity, 20 December 1945, Official Gazette of the Control Council for Germany, No. 3, Berlin, 31 January 1946.

⁴⁷ R. Pritchard & S. Zaide (eds.), *The Tokyo Major War Crimes Trial: The Complete Transcripts of the Proceedings of the International Military Tribunals for the Far East*, Vol. I, Garland Publishing, 1981, p. 21.

distortion they experienced.⁴⁸ The welfare of the young soldiers consequently gained more attention and concerns from the public, and relevant legislation prohibiting the use of child soldiers was put on the agenda. A variety of international instruments came into existence prohibiting this vicious atrocity. Some, as part of IHL, have proscribed norms to protect civilians (including children) in time of war from the involvement in hostilities; some, as part of international human rights laws (hereinafter “IHRL”), emphasized the rights of children both in peace and in war; others, known as “soft law”, expressed great concern about the situation of child soldiers in the armed conflicts.

B. Overview of the International Instruments Concerning the Prevention of Child Recruitment under International Humanitarian Law

I. Geneva Convention relative to the Protection of Civilians Persons in the Time of War of 1949 (hereinafter “GC IV”)

The first international instrument relating to child recruitment ⁴⁹ is the GC IV, which was adopted in 1949 at the Diplomatic Conference of Geneva.⁵⁰ The GC IV provides standards for the treatment of persons who are members of civilian population in an armed conflict. Some of its provisions provided for general protection of children from wars. The prohibition of under-age military service is provided in Article 51 (1) of the Convention, which stipulates:

⁴⁸ Long term effects of the violence in armed conflicts are likely to cause the psychosocial result of loss, fear, confusion, aggression. See Laura Arntson & Christine Knudsen, *Psychosocial Care for Children in Armed Conflict: Supplement Training Manual*, Save the Children Norway, 2005, pp. 4-6.

⁴⁹ Although the Hague Regulations can be regarded as the first instrument to prohibit to compel the national of the hostile party (including children) to take part in the operations of war, it is a general provision not specifically concerned of children, or of a specific protected group including children.

⁵⁰ Convention Relative to the Protection of Civilian Persons in Time of War (hereinafter “GC IV”), adopted on 12 August 1949 by the Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War, 75 U.N.T.S. 31, entered into force on 31 October 1950.

*“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.”*⁵¹

The term of “protected persons” within the meaning of Article 51 GC IV is defined in Article 14:

*“the wounded, sick and aged persons, children under fifteen, expectant mothers of children under seven.”*⁵²

It can clearly be seen from the text that Article 51 (1) not only bans forcible recruitment of children under the age of 15 into armed forces of the Occupying Power, but also strictly prohibits all forms of pressure or propaganda aimed at securing voluntary enlistment. At the Diplomatic Conference, the suggestion of prohibiting propaganda to secure voluntary enlistment encountered opposition from some delegates, with regard to the difficulty to distinguish propaganda from disguised forms of coercion,⁵³ yet in the end this prohibition was successfully carried through. And finally the term “enlistment” was defined as covering “all enlistment in the armed forces of the Occupying Power, whatever the theatre of operations and whoever the opposing forces might be.”⁵⁴

However, Article 51 (1) can hardly be regarded as a comprehensive provision for the protection of children from recruitment. Firstly, the enrollment of young volunteers by the Occupying Power is not prohibited under Article 51(1). The large use of child soldiers during WWII was, in the eyes of most delegations, as “voluntary and heroic or an unfortunate necessity”.⁵⁵ And therefore, though the propaganda of voluntary enlistment is prohibited, the GC IV’s primary attention was devoted to the prohibition of forcible recruitment rather than voluntary enlistment. The absence of legislation banning any voluntary enlistment thus has left a gap which gives the contracting States the choices to decide whether to recruit an

⁵¹ *Ibid.*, Article 51 (1).

⁵² *Ibid.*, Article 14.

⁵³ Jean S. Pictet (ed.), *Commentary of the Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949*, (hereinafter “ICRC Commentary on the GC IV”), ICRC Geneva, 1951, p. 292 and fn. 6.

⁵⁴ *Ibid.*, p. 291.

⁵⁵ Matthew Happold, *Child Soldiers in International Law*, Juris Publishing, Manchester University Press, 2005, p. 55.

under-aged volunteer to fight in an armed conflict, even if they know fully well that it is inhumane to expose vulnerable minors to the ravages of war.

Furthermore, forcible recruitment of a child by his or her own country does not fall within the realm of Article 51(1). The sole objective of Article 51 (1) is to protect certain persons who happen to fall into the hands of an adverse power in times of armed conflict.⁵⁶ Just as ICRC Commentary points out,

“the definition [of protected persons] has been put in a negative form; as it is intended to cover anyone who is not a national of the party to the conflict or occupying Power in whose hands he is”.⁵⁷

Since IHL deals with relations between warring parties and hostile individuals, the beneficiaries of the GC IV was limited merely to certain protected persons who are in the power of an occupying party. Because the recruitment of children of an Occupying Power was perceived as “being primarily an internal matter” at the time when the Geneva Conventions were drafted,⁵⁸ the nationals of the Occupying Power, including those under the age of 15, however, cannot be protected under the GC IV as those of an occupied territory.

In fact, children are more likely to fall in the hands of their own governments than of those of Occupying Powers.⁵⁹ Nowadays, a majority of cases indicate that a large percentage of children are serving in military units or taking active part in hostilities on behalf of their own country. One good example is that in the Democratic Republic of the Congo (hereinafter “DRC”) not only the Government forces and, but also a dozen local militia groups have been actively engaged in the abduction of children of their own nationals since the onset of the

⁵⁶ See GC IV, *supra* note 50, Article 4: “Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals”. See also Robert Kolb, *The Relationship between International Humanitarian Law and Human Rights Law: A Brief History of the 1948 Universal Declaration of Human Rights and the 1949 Geneva Conventions*, International Review of the Red Cross, No. 324, 30 September 1998, p. 419.

⁵⁷ Jean S. Pictet (ed.), ICRC Commentary on the GC IV, *supra* note 53, p. 45.

⁵⁸ Matthew Happold, *Child Soldiers in International Law*, *supra* note 55, p. 55.

⁵⁹ Martha Albertson Fineman & Karen Worthington, *What is Right for Children?: the Competing Paradigms of Religion and Human Rights*, Ashgate, 2009, pp. 94-95.

Second Congolese War in 1998.⁶⁰ In this respect, the prohibition of recruiting children by their own countries is also provided in International Human Rights Conventions, such as the CRC, which will be discussed in the following part.

Finally, most of child soldiering occurs in internal armed conflicts, whereas the Article 51 (1) does not regulate the conducts occurred in an internal armed conflict. Since the safeguards outlined in the GC IV do not apply to non-international armed conflicts, the only protection in the event of a civil war is given through the Common Article 3 of the Geneva Conventions (hereinafter “CA3”). CA3 prohibits certain flagrant violations of customs of wars, including prohibition on “violence to life and person”, “outrages upon personal dignity”, [...] and “taking of hostages”⁶¹ However, the prohibition of child recruitment is not specially provided in CA3.⁶² Therefore, the application of CA3 seems to be too weak to effectively protect children from military service in a non-international armed conflict.⁶³

Nevertheless, it must be noted that up to now 194 States have ratified the GC IV,⁶⁴ which demonstrates a wide acceptance “by virtually the entire international community through formal and solemn acts”.⁶⁵ All the 194 contracting parties are, therefore, under the obligation to observe the rules under GC IV, including the obligation to prohibit forcible recruitment of children under the age of 15 in an occupied territory.

⁶⁰ Christopher W. Mullins & Dawn L. Rothe, *Blood, Power and Bedlam: Violations of International Criminal Law in Post-Colonial Africa*, Peter Lang, 2008, p. 131.

⁶¹ See GC IV, *supra* note 50, Article 3. Or see GC I, *supra* note 32, Article 3; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (hereinafter “GC II”), 75 U.N.T.S. 31, adopted on 12 August 1949 by the Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War, entered into force on 31 October 1950, Article 3; Convention relative to the Treatment of Prisoners of War (hereinafter “GC III”), 75 U.N.T.S. 31, adopted on 12 August 1949 by the Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War, entered into force on 31 October 1950, Article 3.

⁶² ICRC, *Commentary of the Convention (III) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, ICRC Geneva, 12 August 1949, p. 41.

⁶³ The application of the CA3 in the case of forcible recruitment of children will be addressed in Chapter 3.

⁶⁴ ICRC, *Treaties & Documents by Country*, <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=375&ps=P> (last accessed on 8 November 2010).

⁶⁵ Theodor Meron, *Human Rights in International Strife: Their International Protection*, Cambridge: Grotius Publications, 1987, p. 349.

II. Protocol Additional to the Geneva Convention relating to the Protection of Victims of International Armed Conflicts (hereinafter “AP I”)

The AP I, as supplement to the Geneva Conventions, have provided protection for the victims in international armed conflicts. Part IV of the Protocol contains an extensive set of protections for the civilian population, especially Section III of Chapter II where the issue of child soldiers is specifically provided.⁶⁶ The key provision on this issue is contained in Article 77(2) and (3), which reads:

“[...]

(2) 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 15 years but who have not attained the age of 18 years, the Parties to the conflict shall endeavor to give priority to those who are oldest.

(3) If, in exceptional cases, despite the provisions of paragraph 2, children who have not attained the age of 15 years take a direct part in hostilities and fall into the power of an adverse Party, they shall continue to benefit from the special protection accorded by this Article, whether or not they are prisoners of war.”

Compared with Article 51 (1) GC IV, AP I made decisive progress in protection of children from recruitment. Firstly, it has signified an important step forward by requiring States to refrain from recruiting children who were their own nationals.⁶⁷ Just as Mr. Surbeck stated, when introducing the draft of Article 68 (the basis of Article 77 AP I) to Committee III of the Diplomatic Conference,

“[t]he article was intended to operate for the benefit of all children who were in the territories of the parties to the conflict, whether the

⁶⁶ Protocol Additional to the Geneva Convention of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (hereinafter “API”), 8 June 1977, Adopted on 8 June 1977 by the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, and entry into force on 7 December 1978.

⁶⁷ *Ibid.*, article 77 (2) and (3).

territory was occupied or not, and whether or not children fall within the definition of protected persons in Article 4 of the GC IV.”⁶⁸

Furthermore, Article 77 AP I requires the contracting States to give priority to the oldest children, when recruiting persons between the age of 15 and 18 years. The insertion of this language indeed is an indication of a strong effort of some representatives at the Diplomatic Conference to raise the minimum age for recruitment to 18 years. Therefore, this Article does not intent to bear any direct relevance to raise the age beyond 15 years.⁶⁹ However, adopting this language, in fact, played a role in protecting certain children between the age of 15 and 18 from military service.

Despite the considerable legislative achievements made by the Article 77, advocates of prohibition of child recruitment may find article 77 disappointing. One ambiguity contained in the text of Paragraph 2 is the word “recruitment”. The term “recruitment” is ambiguous as to whether it refers to “both the forcible conscription and voluntary enrolment” or only the former. The literal meaning of the term “recruitment” denotes “to get or seek for fresh supplies of men for the army”,⁷⁰ which can be subject to different interpretations and might be construed as if the AP I was to prohibit both “the forcible recruitment and voluntary enlistment”.⁷¹ In fact, children under the age of 15 who voluntarily join armed forces are not protected by the Article 77. As is clearly seen from the ICRC Commentary in the interpretation of Article 77 (2),

“It would not be realistic to totally prohibit voluntary participation of children under fifteen.”⁷²

And thus, similar to the GC IV, Article 77 (1) mainly focuses on forcible recruitment of children under the age of 15 in international armed conflicts.

⁶⁸ Official Record (hereinafter “OR”) XV, CDDH/III/SR.45, p. 68.

⁶⁹ Y. Sandoz, C. Swinarski & B. Zimmermann (eds.), Commentary to the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (hereinafter “Commentary to the API”), 1984, ICRC Geneva, para. 3188.

⁷⁰ J. A. Simpson & E. S. C. Weiner, Oxford English Dictionary, Volume XIII, Clarendon, 1989, p. 375.

⁷¹ Y. Sandoz, C. Swinarski & B. Zimmermann (eds.), Commentary to the AP I, *supra* note 69, para. 3179.

⁷² *Ibid.* para.3184.

Furthermore, the phrase “take all feasible measures” was a political and diplomatic compromise that “allowed states party considerable freedom to evade the general prohibition”.⁷³ This phrase requires relatively low level of obligation and commitment and does not go far enough to protect children from recruitment. Children who are under armed conflicts are protected only if it is feasible for the governments to prohibit them from being recruited or used in hostilities.⁷⁴

III. Protocol Additional to the Geneva Convention relating to the Protection of Victims of Non-international Armed Conflict (hereinafter “AP II”)

As a complement to the CA3, AP II⁷⁵ marks a significant progress on the protection of children from serving in military units in non-international armed conflicts. Before the adoption of AP II, CA3 was the only source of law that applies explicitly to non-international armed conflicts. CA3, referred to as a “mini Convention on the treatment of persons in civil wars”,⁷⁶ sets forth the minimum protections and standards of conduct, with which States and armed opponents are all obliged to comply. However, protections specified in CA3 only cover the core of humanitarian laws, and recruitment of children was not specifically mentioned.⁷⁷

AP II extends the essential rules of the laws of war by applying all fundamental principles stipulated in CA3 and additionally, supplements them with detailed provisions on the protection of civilian population, including children. Article 4 AP II lists “fundamental

⁷³ Bennett, T. W., *Using Children in Armed Conflict: A Legitimate African Tradition? Criminalizing the Recruitment of Child Soldiers*, 32 Monograph, December 1998, Institute of Security Studies Monograph Series, available at <http://www.iss.co.za/pubs/monographs/no32/contents.html> (last accessed on 16 October 2010).

⁷⁴ Jordan A. Gilbertson, *Little Girls Lost: Can the International Community Protect Girl Soldiers?*, 29 University of La Verne Law Review (2008): 219, p. 230.

⁷⁵ Protocol Additional to the Geneva Convention of 12 August 1949, and relating to the Protection of Victims of Non-international Armed Conflicts (hereinafter “APII”), 8 June 1977, Adopted on 8 June 1977 by the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, and entry into force on 7 December 1978.

⁷⁶ Jean S. Pictet (ed.), *Commentary to the Geneva Convention VI*, *supra* note 53, p. 292. Roy Gutman & David Rieff, *Crimes of War: What the Public Should Know*, W.W. Norton & Company, 1999, p. 207.

⁷⁷ Forcible recruitment of children as soldiers may be part of violations of the CA3, however, enlistment of volunteers under the age of 15 might be another story. For more details, see *infra* Chapter 3.

guarantees” to provide protection to civilian populations and guarantee their minimum standards of humane treatment under all circumstances.⁷⁸ Among a number of “fundamental guarantees” for persons affected by non-international armed conflicts, the prohibition of recruitment of children is provided in Article 4 (3) (c), which reads:

“Article 4: All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honor and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction.

[...]

1. 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.”*⁷⁹

Another remarkable development of Article 4(3) (c) is that it confers a higher protection than all the earlier conventions. Under the Article 4 (3) (c) the word “feasible”, which may be used as an excuse for the governments to keep on recruiting children into armed forces, does not appear in the text.⁸⁰

Some scholars⁸¹ may consider Article 4 (3) (c) as a significantly initial step, because this article leaves governments not much discretion in “use children to take *indirect* part in hostilities”, as Article 4 (3) (c) adopts the phrase of “take part in hostilities” quietly different from the formulation of “take direct part in hostilities” used in Article 77. However, this view can hardly find any grounds to support its stance. Rare resources are useful to prove this

⁷⁸ SCSL, Prosecutor v. *Sam Hinga Norman, Moinina Fofana, Allieu Kondewa*, SCSL-04-14-T, Trial Chamber, Judgment (hereinafter “Norman Trial Judgment”), 2 August 2007, para. 28.

⁷⁹ AP II, *supra* note 75, Article 4 (3) (c).

⁸⁰ Jean Pictet (eds.), *Commentary to the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-international Armed Conflicts* (hereinafter “Commentary to the AP II”), 1984, ICRC Geneva, para. 4557.

⁸¹ See Bennett, T.W., *Using Children in Armed Conflict: A Legitimate African Tradition? Criminalizing the Recruitment of Child Soldiers*, *supra* note 73. See also Jordan A. Gilbertson, *Little Girls Lost: Can the International Community Protect Girl Soldiers?*, *supra* note 74, p. 230.

different phrase provided in Article 4 (3) (c) covers both direct and indirect participation. Looking through the ICRC Commentary on the AP II, one can see the ICRC does not give a clear explanation of what is “indirect” participation, but repeats the definition of “direct” participation made in the ICRC Commentary on the AP I in Article 77.⁸² Furthermore, an examination of the records of the Diplomatic Conference reveals that the difference between the languages in Article 77 and Article 4 (3) (c) should be deemed as “a result of inadvertence”, but not a result of “the arguments of principle”.⁸³ As Mr. Humphrey said, the coverage of Article 4 (3) (c) was deemed to be “an anomalous shift from the general standard of ‘direct’ involvement in hostilities”.⁸⁴ From this perspective, it cannot reach the conclusion that Article 4 (3) (c) imposes a much stricter obligation on contracting states or it provides a comprehensive protection for children than Article 77 AP I.

C. Overview of the International Instruments Concerning the Prevention of Child Recruitment under International Human Rights

I. UN Convention on the Rights of the Child (hereinafter “CRC”)

Legislative endeavor to protect the rights of the child from the perspective of human rights law never had ceased.⁸⁵ This endeavor can be seen from the legislation of the American

⁸² The Commentary on the Article 4 (3) (c) AP II states that “Not only can a child not be recruited, or enlist himself, but furthermore he will not be “allowed to take part in hostilities, *i.e.*, to participate in military operations such as gathering information, transmitting orders, transporting ammunition and foodstuffs, or acts of sabotage.” The definition of “direct” made in Commentary on the Article 77 API refers to “Examples would include, in particular, gathering and transmission of military information, transportation of arms and munitions, provision of supplies *etc.* The intention of the drafters of the article was clearly to keep children under fifteen outside armed conflict, and consequently they should not be required to perform such services; if it does happen that children under fifteen spontaneously or on request perform such acts, precautions should at least be taken; for example, in the case of capture by the enemy, they should not be considered as spies, saboteurs or illegal combatants and treated as such. In addition, appropriate instruction is again essential.” See Commentary to the AP II, *supra* note 80, para. 4557 and Commentary to the API, *supra* note 69, para. 3178.

⁸³ For more details, see Matthew Happold, *Child Soldiers in International Law*, *supra* note 55, pp. 67-68.

⁸⁴ Thomas Humphrey, *Child Soldiers: Rescuing the Lost Children*, 13 *Australian Journal of Human Rights* (2007):1, p. 123.

⁸⁵ For an extensive overview of international documents relating to the rights of children, see Philip E. Veerman, *The Rights of the Child and the Changing Image of Childhood*, Martinus Nijhoff Publisher, 1992, pp. 153-369.

Convention on Human Rights,⁸⁶ the European Convention on the Protection of Human Rights and Fundamental Freedoms,⁸⁷ International Covenant on Civil and Political Rights (hereinafter “ICCPR”),⁸⁸ and the International Covenant on Economic, Social and Cultural Rights (hereinafter “ICESCR”).⁸⁹ All of these conventions are applicable to everyone within contracting parties’ territories,⁹⁰ without discrimination on any ground⁹¹ and some specific

See also Geraldine van Bueren, *The International Law on the Rights of the Child*, Martinus Nijhoff, 1995, pp. 6-32.

⁸⁶ The American Convention on Human Rights, adopted at the American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969. Article 17 (4): “The States Parties shall take appropriate steps to ensure the equality of rights and the adequate balancing of responsibilities of the spouses as to marriage, during marriage, and in the event of its dissolution.”

⁸⁷ The European Convention on Human Rights was signed by the Council of Europe at Rome on 4 November 1950. Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 262, entered into force May 18, 1954, Article 2: “No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religions and philosophical convictions.” Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, E.T.S. 117, entered into force 1 November 1988, Article 5: “Spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution. This Article shall not prevent States from taking such measures as are necessary in the interests of the children.”

⁸⁸ International Covenant on Civil and Political Rights (hereinafter “ICCPR”), adopted and opened for signature, ratification and accession by General Assembly Resolution 2200 A (XXI), 16 December 1966, and entry into force on 23 March 1976. See Article 17 (4): “In case of dissolution, provision shall be made for the necessary protection of any children solely on the basis of their own best interests.”

⁸⁹ International Covenant on Economic, Social and Cultural Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200 A (XXI) of 16 December 1966, entry into force 3 January 1976, in accordance with article 27. Article 10 (3): “Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labor should be prohibited and punishable by law.”

⁹⁰ Theodor Schilling, *Is the United States bound by the ICCPR in relation to occupied territories?*, available at <http://centers.law.nyu.edu/jeanmonnet/archive/fellowsforum/Schilling%20Forum%20Paper%20100504.pdf> (last accessed on 26 February 2012).

⁹¹ See the American Convention on Human Rights, Article 1: “1. The States Parties to this Covenant undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons for race, colour, sex,

provisions in respect to children are stipulated. All of these efforts finally gave birth to the CRC, as the most important convention on the protection of children's rights.⁹²

CRC doubtless is a significant development in providing a relatively effective mechanism for the protection of children. Firstly, under CRC, a child is not considered as the "object of concern" from the perspective of public or private philanthropy, but as the "subject of rights".⁹³ Secondly, it establishes four fundamental principles: nondiscrimination; the best interests of the child; participation, survival and development,⁹⁴ which provide an approach for the States to protect children's rights and interests in their national program.⁹⁵ From this perspective, it would no question that children's interests should not be subordinated to a

language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition. 2. For the purposes of this Convention, "person" means every human being." See also The European Convention on Human Rights, Article 1: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention." Article 14: "The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." See also ICCPR, Article 2: "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." See also International Covenant on Economic, Social and Cultural Rights, Article 2 (2): "The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

⁹² See generally UN Convention on the Rights of the Child (hereinafter "CRC"), G.A. Res. 44/25, 44th U.N. GAOR Supp. No. 49, November 20, 1989 (hereinafter "CRC"), Provisional Agenda Item 108, November 20, 1989.

⁹³ Mark Ensaraco & Linda C. Majka, *Children's Human Rights: Progress and Challenges for Children Worldwide*, Rowman & Littlefield Publisher, 2005, p. 14.

⁹⁴ CRC, *supra* note 92, Articles 2, 3, 6 and 12. Article 2 requires non-discrimination on any discriminative factors, including sex, age, colour, race, religion and disability. Article 3 provides that the child's interests are to be given primary consideration. Article 6 obliges further States and Parties to ensure to the maximum extent possible "the survival and development of the child". Article 12 places an obligation on governments to ensure that children's views are sought and considered in all matters that affect their lives.

⁹⁵ UNICEF, *Convention on the Rights of the Child*, 26 August 2008, available at <http://www.unicef.org/crc> (last accessed on 5 April 2010).

greater war effort, military necessity or state security.⁹⁶ Finally, another advancement made by the CRC is the definition of “child”. Article 1 of the Convention reads that,

“For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.”⁹⁷

As appeared from this language, the CRC makes a great contribution to the protection of children between the age of 15 and 18 years, while the Conventions of 1949 as well as their two Additional Protocols had evaded the sensitive question of who were “children”. Due to an absence of a definition on the term of “children”, the relevant age of the children in each specific case must “be determined in the light of the [specific] provision” under the Geneva Conventions.⁹⁸ However, as will be addressed subsequently, the inclusion of a definition of “children” into CRC does not result in satisfactory progress in the protection of children, between the age of 15 and 18 years, from recruitment.

Based on these principles, the CRC contains a number of innovative provisions that have never previously been codified.⁹⁹ However, CRC can hardly be considered as a satisfactory convention to deal with the problem of child soldiering, and offers little more protection than AP I. The protection of children from participation in armed conflicts, as provided in Article 38(2) and (3) CRC, similarly mirrors the formulation of Article 77 (2) AP I.

“2. State Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen 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

⁹⁶ T. W. Bennett, *Using Children in Armed Conflict: A Legitimate African Tradition? Criminalising Recruitment of Child Soldiers*, *supra* note 73.

⁹⁷ CRC, *supra* note 92, Art. 1.

⁹⁸ *Ibid.*

⁹⁹ Sharon Detrick, *A commentary on the United Nations Convention on the Rights of the Child*, Martinus Nijhoff, 1999, p. 4.

*years but who have not attained the age of eighteen years, States Parties shall endeavor to give priority to those who are oldest.”*¹⁰⁰

Even though Article 1 defines a child as “a person below the age of 18”, surprisingly, the age of 15 appears elsewhere in the Article 38 as the minimum age for recruitment. It must be pointed out that despite of the efforts made by some delegations during the Diplomatic Conference to raise the minimum age to 18 years, no definitive resolution was reached. The proposal of setting 18 years as the minimum age failed to win enough support, due to the strong opposition from countries, such as U.S., Canada, United Kingdom, and Bangladesh,¹⁰¹ which either were affected by non-international armed conflicts at the time or committed to recruit children under 18 into their armed forces.¹⁰²

As being relevant only those under 15 years, Article 38 (3) seems to render an inconsistency with the previous provision of Article 1, which defined the children as the persons under the age of 18 years. Its failure to protect children under the age of 18 from military service in armed conflicts leads to a grey area of protection for children between the age of 15 and 18.¹⁰³ This contradictory also damage the fundamental human rights principle of equal treatment,¹⁰⁴ according to which, “all children, regardless of differences in circumstance or social status, deserve equal protection”.¹⁰⁵

Since children between the age of 15 and 18 years are not completely protected from being recruited under Article 38 (3), setting a higher minimum age of recruitment to include the children between the age of 15 and 18 years would be one of the main issues for the subsequent legislation, such as OPCRC.¹⁰⁶

¹⁰⁰ CRC, *supra* note 92, Article 38 (2) and (3).

¹⁰¹ Timothy Webster, *Babes with Arms: International Law and Child Soldiers*, 39 Geo. Wash. Int’L. Rev. (2007): 227, p. 239 and Fn 66.

¹⁰² Roy Gutman & David Rieff, *Crimes of War: What the Public Should Know*, *supra* note 76, p. 78.

¹⁰³ Jordan A. Gilbertson, *Little Girls Lost: Can the International Community Protect Girl Soldiers*, *supra* note 74, p. 232.

¹⁰⁴ For example Article 24 (1) ICCPR: “[e]very child shall have, without any discrimination as to race, color, sex, language, religion, national or social origin, poverty or birth, the right to such measures of protection as are required by his status as a minor, on part of his family, society and the State”.

¹⁰⁵ T. W. Bennett, *Using Children in Armed Conflict: A Legitimate African Tradition? Criminalising Recruitment of Child Soldiers*, *supra* note 73.

¹⁰⁶ This will be discussed in *infra* Part IV, Chapter 1.

Furthermore, Article 38 (2) follows the languages of Article 77 (2) AP I, which require contracting states to take “all feasible measures” to ensure that children will not take a direct part in hostilities.

Although Article 38 is considered to fail to offer children sufficient protection for children from participation in armed conflicts, some of its development should not be overlooked. Article 38 functioned as “one of the most important bridges linking humanitarian law and human rights law whose complementarities are increasingly recognized”.¹⁰⁷ In its paragraphs (1) and (4), Article 38 provides:

“1. State Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts, which are relevant to the child.

[...]

*4. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.”*¹⁰⁸

Article 38, as a “dual-protection”, was a remarkable development in extending its binding force to a non-governmental party by directly obliging State Parties to respect the rules of international humanitarian law. And meanwhile, by giving priority to children’s interests in all circumstance, Article 38 requires contracting states to maintain a prohibition on child recruitment during peace.¹⁰⁹ In sum, it provides a relatively comprehensive set of guarantees that children’s interests are always applicable and always be protected, whether the children are under the control of armed forces or in the custody of dissident parties, or whether in times of war or in the peacetime.

¹⁰⁷ ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Reports 1996, para. 79. The ICJ states that fundamental rules of international humanitarian laws “constitute intransgressible principles of customary international law”.

¹⁰⁸ CRC, *supra* note 92, Articles 1 and 4.

¹⁰⁹ T. W. Bennett, *Using Children in Armed Conflict: A Legitimate African Tradition? Criminalising Recruitment of Child Soldiers*, *supra* note 73.

So far, the CRC has been ratified by every single UN member state in the world except United States and Somalia. It's extremely high rate of ratification has brought CRC nearly universal acceptance. This universal acceptance demonstrate the consensus and willingness of a grand array of nations to put the children's interests in the first consideration, and guarantee that they are truly acting in the best interests of children.

II. Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor (hereinafter "Convention 182")

The CRC is not the only convention in human rights regime that specifically provides protection for children. Another instrument which offers protection for children from participation in armed conflicts is the Convention 182.¹¹⁰ In 1990, the General Conference of the International Labor Organization (hereinafter "ILO") adopted the ILO Convention 182, which for the first time expressly recognized forcible recruitment of children as one of the worst form of child labor, as is clear from Article 3 and Article 7 (1), which read:

"Article 3: All forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict.

[...]

*Article 7 (1): Each Member shall take all necessary measures to ensure the effective implementation and enforcement of the provisions giving effect to this Convention including the provision and application of penal sanctions or, as appropriate, other sanctions."*¹¹¹

ILO Convention 182 enhances the safeguards to protect children from participation in armed conflicts in several aspects. Firstly, listed as a form of child labor, child soldiering in conflict zones is not limited merely to those who fight in the frontlines or who take a direct part in

¹¹⁰ Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst forms of Child Labours (hereinafter "ILO Convention 182"), Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst forms of Child Labours (hereinafter 'ILO 182'), 2133 U.N.T.S.161, 17 June 1999, adopted by International Labour Organization.

¹¹¹ *Ibid.*, Articles 3 and 7.

hostilities, but also those who take an indirect participation in a variety of tasks, such as cooking, doing laundry, or providing sexual services to adult combatants. In this respect, ILO Convention 182 is an initial step in protecting children who take indirect part in hostilities, as all other conventions earlier only focus on those who take direct part in hostilities. However, regrettably, the provision only seeks to protect those children who are forcibly recruited and does not extend protection to those who are voluntarily recruited.

Furthermore, when Articles 1, 2 and 7 (1) are examined side by side,¹¹² ILO 182 appears to express its willingness to regard compulsory recruitment of children under 18 years as a crime in the domestic laws by urging States to take the most effective sanctions, *i.e.* criminal sanctions to deter this brutal atrocity. This is the first human rights instrument expressly providing for criminal sanctions against the use of child soldiers.

Another valuable contribution made by ILO Convention 182 is the adoption of the phrase “all necessary measures” in Article 7 (1). As mentioned above, Article 77 (2) AP I requires the Contracting States to take “feasible” measures to prohibit the act of child recruitment,¹¹³ which incidentally is the wording used in Article 38 (2) CRC.¹¹⁴ Pursuant to Article 31 of Vienna Convention on the Law of Treaties regarding the general rules of interpretation¹¹⁵, a treaty shall be interpreted in accordance with the ordinary meaning to be given to the terms of the treaty (literal interpretation), in their context, that is to say, according to a systematic view of the whole treaty (systematic interpretation). The word of “feasible” generally referring to

¹¹² *Ibid.*, Article 1: “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.” Article 2: “For the purposes of this Convention, the term “child” shall apply to all persons under the age of 18”. Article 7(1): “Each member shall take all necessary measures to ensure the effective implementation and enforcement of the provisions, including the provision of penal sanctions, or appropriate other sanctions”.

¹¹³ The wording is used not only in Article 77 of API, but also in Articles 57 and 58 of API. See AP I, *supra* note 66.

¹¹⁴ The CRC, *supra* note 92, Article 38(4).

¹¹⁵ Vienna Convention on the Law of Treaties, signed at Vienna on 23 May 1969, entered into force on 27 January 1980. Article 31 (1): “1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” In general, this Article is considered to be a customary international law regarding principles of treaty interpretation. See *e.g.* ICJ, Territorial Dispute Case, Libyan Arab Jamahiriya v. Chad, Judgment, 3 February 1994, ICJ Report 1994, para. 41. See also World Trade Organization Appellate Body, *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, 29 April 1996, p. 17.

“capable of being done, possible or practicable”,¹¹⁶ allowed States “considerable freedom to evade the general prohibition”.¹¹⁷ Such freedom may include the consideration of a nation’s overall policy goals for “the success of military operations”.¹¹⁸ As Paul Tavernier points out, the term feasible “imposed on contracting states only an obligation of means and not an obligation of result.”¹¹⁹ On the contrary, the term of “necessary” referring to “indispensable, vital, essential and requisite”,¹²⁰ confers a more stringent standard, as it does not give contracting States much leeway to evade their obligations under the Convention.

By March 2009, 169 countries had ratified this Convention.¹²¹ The wide acceptance of the Convention could be considered as a strong indication that *prohibition* of forcible recruitment of children under the age of 18 has become customary international law.¹²²

III. African Charter on the Rights and Welfare of the Child (hereinafter “ACRWC”)

Besides international instruments adopted by international organizations, there has been a proliferation of regional documents that specifically address the issue of child recruitment. ACRWC¹²³ is one of the regional instruments identifying a child as “a possessor of certain rights” and prohibiting the practice of child soldiering.¹²⁴ No doubt, the wide and systematic use of child soldiers in Africa is one of the main reasons that attracts the concerns of

¹¹⁶ The Oxford English Dictionary, Oxford, 1st (ed.), 1933, Vol. IV, p. 182.

¹¹⁷ T. W. Bennett, *Using Children in Armed Conflict: A Legitimate African Tradition? Criminalising Recruitment of Child Soldiers*, *supra* note 73.

¹¹⁸ F. Jenny Kuper, *International Law Concerning Child Civilians in Armed Conflict*, Oxford University Press, 1997, p. 102.

¹¹⁹ Matthew Happold, *Child Soldiers in International Law*, *supra* note 55, p. 60.

¹²⁰ The Oxford English Dictionary, *supra* note 116, Vol. XI, p. 166.

¹²¹ Source: ILOLEX, Convention No. C 182, 5 October 2010, available at <http://www.ilo.org/ilolex/cgi-lex/ratific.pl?C182> (last accessed on 4 March 2009).

¹²² Bhavani Fonseka, *The Protection of Child Soldiers in International Law*, 2 Asia-Pacific Journal on Human Rights and the Law (2001):2, p. 84. As to whether forcible recruitment is yet a crime under customary international law will be addressed in Chapter 3.

¹²³ African Charter on the Rights and Welfare of the Child (hereinafter “ACRWC”), OAU Doc. CAB/LEG/24.9/49 (1990), entered into force 29 November 1999.

¹²⁴ Danwood Chirwa, *The Merits and Demerits of the African Charter on the Rights and Welfare of the Child*, 10 The International Journal of Children’s Rights (2002):157, p. 157.

Organization of African Unity (hereinafter “OAU”) on the issue of child soldiering.¹²⁵ OAU began to enact ACRWC in 1990 and this Charter eventually came into force in 1999.

Article 2 of ACRWC establishes the definition of “children” as “person below 18 years of age” and Article 22 (2) prohibits the use of child soldiers in armed conflicts:

“Article 2: For the purposes of this Charter, a child means every human being below the age of 18 years.”

[...]

Article 22(2): 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.”¹²⁶

With fewer limitations than can be found in all other instruments earlier, ACRWC adopts the highest standard on the protection of child from participation in armed conflicts. Firstly, the ACRWC adopts a higher age standard: the “straight 18” position. It sends a clear message that the participation of children under the age of 18 in armed conflict is not to be tolerated on the African continent. Finally, like the Convention 182, ACRWC requires the States Parties to “take all necessary measures” to prohibit the use of child soldiers. These “necessary measures” include stricter measures, such as criminal sanctions.

Although the strong language of Article 22 (2) offers considerable protection for children, one may still argue that ACRWC fails to include the use of children to take indirect part in hostilities into the realm of Article 22(2).¹²⁷

So far 37 of the 53 member States of the OAU have ratified ACRWC.¹²⁸ The binding force of ACRWC extends only to the contracting states, and the members that have not ratified

¹²⁵ Julia Sloth-Nielsen, *Children’s Rights in Africa: A Legal Perspective*, Ashgate, 2008, p. 166.

¹²⁶ ACRWC, *supra* note 123, Article 22.

¹²⁷ Jordan A. Gilbertson, *Little Girls Lost: Can the International Community Protect Girl Soldiers?*, *supra* note 74, pp. 238-239.

¹²⁸ See Amnesty International, *African Children’s Charter: A Welcome Step to Securing the Rights of Africa’s Children*, News Service 223/99, 29 November 1999, available at <http://www.hartford-hwp.com/archives/30/161.html> (last accessed on 16 January 2009). Some scholars took the view that the political nature of this Charter spotted the enforcement of the provisions, since some of the states are politically

ACRWC are not subject to the general prohibition. Among the non-contracting States, six of them were affected by armed conflicts between the year 1990 to 2005,¹²⁹ including Sierra Leone, which has signed the ACRWC in 1992 yet failed to ratify.¹³⁰ But the ACRWC is still a great achievement in the international legislation on the issue of child soldiering, especially as a regional instrument for Africa where using children as soldiers is known as the gravest.

IV. OPCRC

Dissatisfaction with Article 38 of the CRC resulted in the attempt in 1992 to draft an Optional Protocol aiming to “strengthen the implementation of rights recognized in the CRC and to increase the protection of children from involvement in armed conflict”.¹³¹ In 1994, the UN Commission on Human Rights established a working group to elaborate a draft of Optional Protocol. On 25 May 2000, the OPCRC was adopted by the UN General Assembly in the Annex I in the Resolution 263 and later came into force on 12 February 2002.¹³²

1. The “Straight-18” Age Standard under the OPCRC

By providing more details and expanding obligations beyond those under the CRC, OPCRC is widely recognized as a major advance, especially by raising the minimum age of recruitment to 18 years,¹³³ as Articles 1 and 2 reads:

compelled to ratify the Charter based on their international credentials. See Nima Elmi, *Child Soldiers, Where is the Law?*, Verdict (Oxford University Law Society) Hilary Term (2006), available at SSRN: <http://ssrn.com/abstract=1646645> (last accessed on 8 June 2010), p. 2.

¹²⁹ Jordan A. Gilbertson, *Little Girls Lost: Can the International Community Protect Girl Soldiers?*, *supra* note 74, p. 238.

¹³⁰ Ratification of the ACWRC, available at <http://www1.umn.edu/humanrts/instree/afchildratifications.html> (last accessed on 15 September 2010).

¹³¹ OPCRC, *supra* note 10, the Preamble.

¹³² General Assembly, Optional protocols to the Convention on the Rights of the Child on the involvement of children in armed conflict and on the sale of children, child prostitution and child pornography, A/RES/54/263, 25 May 2000. See UNICEF, *Optional Protocol on the Involvement of Children in Armed Conflict*, 10 February 2006, available at http://www.unicef.org/crc/index_30203.html (last accessed on 24 September 2010).

¹³³ Elizabeth Aguiling-Pangalangan & H. Harry L. Roque Jr. (eds.), *Children in Armed Conflict: Roundtable Discussion*, UP Law Centre, Institute of International Legal Studies, 2006. p. 26.

“Article 1: 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.

Article 2: States Parties shall ensure that persons who have not attained the age of 18 years are not compulsorily recruited into their armed forces.”¹³⁴

In spite of stiff opposition at the beginning, the minimum age of recruitment was brought up to 18 years and it was declared that no one under the age of 18 shall be directly involved in combat. The “straight 18 position” approach has earned the OPCRC warm acclaim and wide support from international communities, especially from the NGOs.¹³⁵

However, OPCRC does not raise the age limits for all forms of recruitment by governments, but is merely limited to forcible recruitment. The pressure from several States, such as USA along with the UK, to lower the age for voluntary enlistment to 16 finally forced the Committee to make a compromise to allow children older than 15 but younger than 18 to be recruited voluntarily by governmental armed forces. The freedom is retained to the States Parties to set their own minimum age, so long as precautions are taken to ensure that such voluntary recruitment is genuine.¹³⁶ However, no guidance on how the young volunteers should be enlisted to ensure their true consent. This is demonstrated in Article 3 (1) and (3), which state:

“Article 3

1. States Parties shall raise 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

¹³⁴ OPCRC, *supra* note 10, Articles 1 and 2.

¹³⁵ In December 2005, the 26th International Conference of the Red Cross and Red Crescent had the topic on agenda to support the idea of an optional protocol to the Convention on the Rights of the Child rising the age of recruitment in armed conflict to eighteen years. See ICRC, *Optional Protocol to the Convention on the Rights of the Child concerning Involvement of Children in Armed Conflicts: Position of the International Committee of the Red Cross Geneva*, International Review of the Red Cross, No. 322, 27 October 1997, para. 11.

¹³⁶ Elizabeth Aguilin-Pangalangan, Rights of Children in Armed Conflict under the Convention on the Rights of the Child and Domestic Laws, *supra* note 133, p. 26.

recognizing that under the Convention persons under the age of 18 years are entitled to special protection.

[...]

3. States Parties that permit voluntary recruitment into their national armed forces under the age of 18 years shall maintain safeguards to ensure, as a minimum, that:

(a) Such recruitment is genuinely voluntary;

(b) Such recruitment is carried out with the informed consent of the person's parents or legal guardians;

(c) Such persons are fully informed of the duties involved in such military service;

(d) Such persons provide reliable proof of age prior to acceptance into national military service.

[...]”¹³⁷

Problematically, the OPCRC directly obliges the dissident parties to the armed conflict to refrain from recruitment of children under the age of 18 in both forcible recruitment and voluntary enlistment, which is stated in Article 4(1) and (2):

“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.”¹³⁸

A question is arising immediately from the distinct regulations governing armed forces and armed groups. Such distinguish are likely to result in “the uncomfortable situation” where a government is allowed to recruit a volunteer at 17 year old, while the same action conducted by a member of armed group will lead to individual criminal responsibility for child soldiering.¹³⁹

Another question is to be raised as to how far the implementation of Article 4 (1) can go. Since rebel groups “are not amenable to the ordinary methods of enforcing human rights

¹³⁷ OPCRC, *supra* note 10, Art. 3.

¹³⁸ *Ibid.*, Art. 4.

¹³⁹ Timothy Webster, *Babes with Arms: International Law and Child Soldiers*, *supra* note 101, p. 243.

law”,¹⁴⁰ any attempt to make them respect children’s rights will depend entirely on their willingness to cooperate.¹⁴¹ Therefore, the language of Article 4 (1) and Article 4 (2) is different. The term “should” was adopted to keep armed groups from recruiting and using children in conflicts. As the word “should” is commonly used to express a recommendation but not binding a mandate, the prohibition of using children as soldiers in hostilities under the provision of Article 4 does not necessarily obligate the armed groups to observe. Different from Article 4(1), Article 4 (2) has set a higher obligation on State parties by using the word “shall” to convey an obligation¹⁴² to the states to adopt “legal measures necessary to prohibit and criminalize such practices”. In this respect, the task of prevent and deter the practice of child soldiering by armed groups will finally rely on the aid and capacity of the governments, in the form of passing domestic laws to prosecute and punish members of the rebel groups who committed the act of child recruitment.¹⁴³

2. Recruitment of Children into Military Schools

a. Relevant Provisions concerning Recruitment of Children into Military Schools

As stated above, in Article 3 (1), the OPCRC requires states to raise the age standard to 18 years for voluntary recruitment by government forces.¹⁴⁴ However, under the OPCRC this requirement is not compulsory in the case of admission of children into military schools, as can be seen from Paragraph 5:

“The requirement to raise the age in paragraph 1 of the present article does not apply to schools operated by or under the control of the armed

¹⁴⁰ T. W. Bennett, *Using Children in Armed Conflict: A Legitimate Africa Traditions?*, *supra* note 73, p. 42.

¹⁴¹ *Ibid.*

¹⁴² Kenneth A. Adams, *A Manual of Style for Contract Drafting*, American Bar Association, 2004, p. 23.

¹⁴³ Ilona Topa, *Prohibition of Child Soldiering, International Legislations and Prosecution of Perpetrators*, *supra* note 25, p. 110.

¹⁴⁴ OPCRC, *supra* note 10, Article 3 (1): “States Parties shall raise 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”.

*forces of the States Parties, in keeping with articles 28 and 29 of the Convention on the Rights of the Child.”*¹⁴⁵

Such exemption to the “straight-18” age standard in relation to military schools comes mainly as a consequence of the objections raised by certain states, who argued that besides the defense function, military schooling also prepares children with knowledge and skills for use in peacetime as well as in war in the future.¹⁴⁶

Recognizing the rights of children to education, the OPCRC refrains from prohibiting states admitting children between age of 15 and 18 into military schools. Nevertheless, it emphasizes in Paragraph 5 that military schools must operate in accordance with Article 28 and 29 of the CRC and particularly, education given in military school should conform to some minimum standards, such as respecting the human dignity and the right to physical integrity of the enrolled children. Furthermore, prohibition of forcible enrollment of children younger than 18 years still applies to the military school.¹⁴⁷

b. Violations against Children in Military School

It should be pointed that although the OPCRC is not opposed to admission of children in military school, violence of any kind against children in military school is categorically prohibited. It also remains a concern with the OPCRC whether “children in military schools are members of the armed forces or could be used or targeted in hostilities”.¹⁴⁸

¹⁴⁵ *Ibid.*, Article 3 (5).

¹⁴⁶ Coalition to Stop the Use of Child Soldiers and UNICEF, *Guide to the Optional Protocol on the Involvement of Children in Armed Conflict*, p. 16, available at www.unicef.org/publications/index_19025.html (last accessed on 15 March 2012).

¹⁴⁷ Article 2 of the OPCRC prohibits forcible recruitment under the age of 18 for both government and non-state groups, and therefore, the forcible recruitment of children under the age of 18 into military school is also prohibited.

¹⁴⁸ Coalition to Stop the Use of Child Soldiers, *Submission to the UN Study on Violence against Children, with specific Reference to Children in Military Schools and to Children in Peace Time Government Forces*, March 2005, p. 2.

Human rights reports and studies dealing with violence against children have collected a great deal of evidence of ill-treatment and institutionalized violence against, and abuses of children in military schools, some even resulting in death.¹⁴⁹

Street children are known to be often subjected to physical violence and obliged to enroll in military school.¹⁵⁰ The military environment and the nature of the education, *i.e.*, whether compatible with the OPCRC, is another concern of the NGOs.

According to the survey of many NGOs, it is a common phenomenon that children enrolled in military schools are required to wear military uniform when in school; and there are schools that require children to wear uniform on their way to and from school.¹⁵¹ In addition, many countries are found to incorporate military training into the school curriculum, where children are trained in the use of fire arms and combat fighting.¹⁵²

Even graduation from military school is found not to automatically grant the children the free choice of their future, as they are regularly required to “give commitments to serve in military base or units as conscripts”.¹⁵³ All this leads some researchers to conclude that what

¹⁴⁹ See NGO Group for the Convention on the Rights of the Child, *Violence against Children: What do NGOs know? What do NGOs Say?*, February 2006. See also Coalition to Stop the Use of Child Soldiers, *Submission to the UN Study on Violence against Children, with specific Reference to Children in Military Schools and to Children in Peace Time Government Forces*, *ibid.*, p.2. See also Mail Online, *Military college “sorry” that “sickening” child sex abuse case was not reported to police*, 21 November 2011, available at <http://www.dailymail.co.uk/news/article-2062037/Citadel-president-John-Rosa-apologises-handling-sex-abuse-claim-military-college.html#ixzz1rolOQciX> (last visit on 18 February 2012). See also Amir Givol, Neta Rotem & Sergey Sandler, *Children Recruitment in Israel*, New Profile, 2004, p. 31.

¹⁵⁰ Coalition to Stop the Use of Child Soldiers, *Submission to the UN Study on Violence against Children, with specific Reference to Children in Military Schools and to Children in Peace Time Government Forces*, *supra* note 148, p. 3.

¹⁵¹ Amir Givol, Neta Rotem & Sergey Sandler, *Children Recruitment in Israel*, *supra* note 149, p. 31. See also Coalition to Stop the Use of Child Soldiers, *Submission to the UN Study on Violence against Children, with specific Reference to Children in Military Schools and to Children in Peace Time Government Forces*, *supra* note 148, p.3.

¹⁵² Coalition to Stop the Use of Child Soldiers, *Submission to the UN Study on Violence against Children, with specific Reference to Children in Military Schools and to Children in Peace Time Government Forces*, *ibid.*, p. 11.

¹⁵³ Amir Givol, Neta Rotem & Sergey Sandler, *Children Recruitment in Israel*, *supra* note 149, p. 31.

happened in the military schools made children attending military schools *de facto* military recruits.¹⁵⁴

Recent studies also find that many countries allow children to attend military cadet school after their 8th or 9th grade, as a consequence, children as early as 13 may already be receiving training at military schools learning the use of fire arms.¹⁵⁵ Some countries, for example, Argentina are found to require that children who enroll in military school must be no older than 15 years.¹⁵⁶

c. Prohibition of Enrollment of Children in Military Schools under International Law

Many NGOs, for example, the Coalition to Stop the Use of Child Soldiers, take the opinion that the best way to protect children from violations in military school is to prohibit “the recruitment of any under-18s into the armed forces or to any other military institutions”,¹⁵⁷ to which, however, the author takes exception, for the following reasons:

Firstly, it must be admitted that there exist many military schools, though run by the armed forces of a State, whose aims are not to teach children to fight in combat or prepare them to become soldiers in armed, on the contrary, these military schools focus on how to help children, especially impressionable teenagers, to learn to be a better citizen,¹⁵⁸ as it has been

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid.* See also Coalition to Stop the Use of Child Soldiers, *Submission to the UN Study on Violence against Children, with specific Reference to Children in Military Schools and to Children in Peace Time Government Forces*, *supra* note 148, p. 9.

¹⁵⁶ Coalition to Stop the Use of Child Soldiers, *Submission to the UN Study on Violence against Children, with specific Reference to Children in Military Schools and to Children in Peace Time Government Forces*, *supra* note 148, p. 11.

¹⁵⁷ Coalition to Stop the Use of Child Soldiers, *Submission to the UN Study on Violence against Children, with specific Reference to Children in Military Schools and to Children in Peace Time Government Forces*, *supra* note 148, p. 3.

¹⁵⁸ Some examples of such military schools are Military Child Education Coalition, available at <http://www.militarychild.org/about-us/mission>; Education Seek, available at http://educationseek.com/military_schools.html; Summer Military Schools, available at

shown by research that military schools can play important roles in shaping children's personal characters, by training them in disciplines and instilling in them moral values. In addition, allowing children to attend military school is comparable to respecting their rights to education, which is widely recognized in the CRC.

Secondly, it is impractical to prohibit admission of children in military schools. According to the data collected by the Coalition to Stop the Use of Child Soldiers, only 15 countries out of the 96 countries surveyed state expressly not to admit under-18s into military schools, while 27 countries provide clear evidence in legislation or in practice that children under-18s in military schools are members of the armed forces.¹⁵⁹ State parties to the OPCRC for example Azerbaijan, made declaration upon ratification that "persons, who are meeting the defined requirements of the military service, may voluntarily enter and be admitted in age of 17 the active military service of the cadets' military school".¹⁶⁰

The status quo and the views held by the majority of States dictate that the only effective means of prevention and prohibition of abuses in military schools lies in efforts to enhance cooperation between the OHCHR and the State Parties, such as implementing or reinforcing effective human rights mechanism to monitor and review human rights situations in military schools, respond to abuses, follow up progress and measures taken by States, and promote human rights assistance and education.

3. CONCLUSION

<http://www.militaryschools411.com/articles/teen-military-schools-private-youth-academy/summer-military-schools.html>.

¹⁵⁹ The 15 countries are Albania, Bosnia Herzegovina, Cameroon, Croatia, Denmark, Estonia, Jordan, Lebanon, Moldova, Mongolia, Slovenia, Spain, Switzerland, Saudi Arabia, Syria and Tunisia. The 27 countries who regard the under-18s in military schools as members of the armed forces are Australia, Azerbaijan, Bangladesh, Belgium, Brunei Darussalam, Canada, China, Eritrea, Cuba, Georgia, India, Israel, Italy, Japan, Kazakhstan, Kyrgyzstan, Mexico, Myanmar, Netherlands, North Korea, The Philippines, Portugal, Romania, Russia, Singapore, United Kingdom, and Viet Nam. See Coalition to Stop the Use of Child Soldiers, *Submission to the UN Study on Violence against Children, with specific Reference to Children in Military Schools and to Children in Peace Time Government Forces*, *supra* note 148, p. 3.

¹⁶⁰ Consideration of Reports Submitted by State Parties under Article 8, paragraph 1, of the optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, CRC/C/OPAC/AZE/CO/1, 8 March 2012, para. 13.

Although some of its key provisions have been weakened by diplomatic compromise, OPCRC is still an important step along the way to protect children from participation in armed conflicts. So far, 143 States have ratified the OPCRC¹⁶¹ and it is believed that the OPCRC will prove to be a powerful tool for advocacy and persuasion of a full protection of children from participation in armed conflicts.

V. Convention to Suppress the Slave Trade and Slavery and its Supplementary Convention of 1956

As stated in the introduction, the word “slavery” today has been broadened to cover various slavery-like practices, including child soldiering. In this respect, Conventions directly related to the issue of slavery should also be mentioned. The Convention to Suppress the Slave Trade and Slavery (hereinafter “Slavery Convention of 1926”)¹⁶² and the Supplement Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery (hereinafter “Supplementary Convention of 1956”)¹⁶³ are the two main international instruments relating to slavery, both of which provided for the suppression of the slave trade as well as the abolition of slavery in all its forms.

1. The Slavery Convention of 1926

The Slavery Convention is the first legal instrument, which defines slavery and slave trade in Article 1 as follows:

“(1) Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.

¹⁶¹ UNICEF, *Optional Protocol on the Involvement of Children in Armed Conflict*, *supra* note 132.

¹⁶² Slavery Convention of 1926, the Convention was amended by the Protocol done at the Headquarters of the United Nations, New York, on 7 December 1953; the amended Convention entered into force on 7 July 1955, Signed at Geneva on 25 September 1926.

¹⁶³ The Supplement Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, adopted by a Conference of Plenipotentiaries convened by Economic and Social Council resolution 608(XXI) of 30 April 1956 and done at Geneva on 7 September 1956.

(2) The slave trade includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves.”¹⁶⁴

As the first instrument regulating the issue of slavery, the Slavery Convention of 1926 only provided a basic definition of slavery, which “stood as a model for states to measure slavery within their borders”.¹⁶⁵ The basic definition given by the Slavery Convention of 1926, however, provided only an outline, no international bodies or reviewing procedures were established to evaluate and track violations in respect to slavery.

2. The Supplementary Convention of 1956

An *ad hoc* Committee of Experts on Slavery was established in 1949, and it was believed that the definition of slavery provided in the Slavery Convention 1926 did not go far enough to cover the full range of practices related to slavery.¹⁶⁶ The Supplementary Convention of 1956 was therefore drafted where the definition of slavery was refined and broadened. Under the Supplementary Convention of 1956, State parties were not only obliged to abolish slavery, but also obliged to prohibit various slavery institutions and practices, including debt bondage, serfdom, the selling of women by their families for marriage, certain forms of abuse of women, and the buying and selling of children for labor or prostitution.¹⁶⁷

Abduction and forcible use of children as soldiers is arguably within this definition of slavery, as well as girl soldiers exposed to threat or forced to sexual slavery, victims of forced marriage, and girls transferred by a person to another for purpose “closely linked with the

¹⁶⁴ Slavery Convention of 1926, Art. 1.

¹⁶⁵ Jessica Bell, *Contemporary Slavery and International Law*, Human Rights & Human Welfare: Topical Research Digest: Human Rights and Contemporary Slavery, p. 36.

¹⁶⁶ United Nations High Commissioner for Human Rights, *Abolishing Slavery and its Contemporary Forms*, HR/PUB/02/4, June 1999, para. 15, available at <http://www.ohchr.org/Documents/Publications/slaveryen.pdf> (last visit on 1 November 2011).

¹⁶⁷ Supplement Convention of 1956, *supra* note 163, Article 1.

three forms of servile states provided under the definition of Supplementary Convention of 1956”.¹⁶⁸

VI. Soft Law on the Issue of Child Soldiering

Recent years have seen the international community’s efforts to issue various new declarations, resolutions, action plans, guidance, rules of principles, reports and recommendations on the issue of child soldiering. These documents are referred to as “soft law”, in that they do not directly bind States but are considered to have persuasive power.¹⁶⁹ Although soft law should not be considered as a formal source of international law, it has a legal effect on the creation and application of general law.¹⁷⁰

1. UN Security Council Resolutions on Children and Armed Conflict

By demonstrating and emphasizing the destructive impact of armed conflict on children, UN Security Council issued a series of resolutions to encourage States to take all necessary measures to ameliorate the serious situation of child soldiering.¹⁷¹

In August 1999, the Security Council adopted an unprecedented resolution - Resolution 1261, to express its grave concern on the harmful impact of armed conflict on children.¹⁷² The Security Council issued a series of further resolutions calling for concerted international actions and creating a number of monitoring mechanisms to observe and detect the use of child soldiers by the States affected by conflicts.¹⁷³ For example, in Resolution 1314 (2000),

¹⁶⁸ United Nations High Commissioner for Human Rights, Abolishing Slavery and its Contemporary Forms, *supra* note 164, para. 36, available at <http://www.ohchr.org/Documents/Publications/slaveryen.pdf> (last visit on 1 November 2011).

¹⁶⁹ Conor Foley, *The Thin Blue Line: How Humanitarianism Went to War*, Verso, 2008, p. 42. See also Peter Malanczuk, *Akehurst’s Modern Introduction to International Law*, 7th Ed., Routledge, 1997, p. 54.

¹⁷⁰ Alina Kaczorowska, *Public International Law*, Taylor & Francis, 2010, p. 65.

¹⁷¹ F. Jenny Kuper, *Military Training and Children in Armed Conflict: Law, Policy and Practice*, Martinus Nijhoff Publisher, 2005, p. 85.

¹⁷² Security Council, S/RES/1261, on the Protection of Children in Armed Conflicts, 25 August 1999.

¹⁷³ Security Council, S/RES/1314, on the Protection of Children in Armed Conflicts, 11 August 2000; S/RES/1460, on Children in Armed Conflict, 30 January 2003; S/RES/1539, on Children in Armed Conflict, 22 April 2004; S/RES/1612, on children in Armed Conflict, 25 July 2005; S/RES/1379, on Children in Armed

called for full implementation of the prohibition of child soldiering.¹⁷⁴ Resolution 1379 (2001) called for actions to halt the use of children in hostilities, and asked the Secretary-General to draw up a list of parties that recruited or used children at the time.¹⁷⁵ In 2002, on the request of the Security Council, an annex in the Resolution 1299 provided a list of “parties to armed conflict that recruit or use child soldiers”.¹⁷⁶ One year later, Security Council issued Resolution 1460 (2003), where parties to armed conflict that were using child soldiers were called on to provide information on steps to halt such recruitment of children.¹⁷⁷ The resolution 1612 (2005) approved a monitoring and reporting mechanism to collect information on the use of child soldiers from both non-State and State sides.¹⁷⁸

The Resolution 1882 (2009) went further on to call upon the States who violates the applicable international law involving child recruitment to stop the use of child soldiers, and also encouraged states to take criminal sanctions to prosecute and punish perpetrators who use child soldiers in armed conflicts.¹⁷⁹ Recently, the Security Council unanimously adopted Resolution 1998 (2011), which called again upon the parties to armed conflicts listed in the annexes of the report on children and armed conflict to prepare and implement the action plan to halt recruitment of children, and urged the government authorities to bring to justice those responsible for child soldering.¹⁸⁰

Conflict, 20 November 2001. They called for regional groupings to stop the use of children as child soldiers. See also Conor Foley, *The Thin Blue Line: How Humanitarianism Went to War*, *supra* note 169, p. 42.

¹⁷⁴ Security Council, S/RES/1314, on the Protection of Children in Armed Conflicts, *Ibid.*, para. 16.

¹⁷⁵ Security Council, S/RES/1379, on Children in Armed Conflict, *supra* note 173.

¹⁷⁶ Security Council, S/RES/1299, on Children in Armed Conflict, 26 November 2002, Part V, paras. 27-31 and Annex, p. 14.

¹⁷⁷ Security Council, S/RES/1460, on Children in Armed Conflict, *supra* note 173, para. 5.

¹⁷⁸ Security Council, S/RES/1612, on Children in Armed Conflict, *supra* note 173, para. 2.

¹⁷⁹ Security Council, S/RES/1882, on Children in Armed Conflict, 4 August 2009, para. 16: “Calls upon concerned Member States to take decisive and immediate action against persistent perpetrators of violations and abuses committed against children in situations of armed conflict, and further calls upon them to bring to justice those responsible for such violations that are prohibited under applicable international law, including with regard to recruitment and use of children, [...] through national justice systems, and where applicable, international justice mechanisms and mixed criminal courts and tribunals, with a view to ending impunity for those committing crimes against children.”

¹⁸⁰ Security Council, S/RES/1998, on Children in Armed Conflict, 12 July 2011, para. 6, 11.

In 2010, the Security Council's efforts directly focused on the persistent violators. On the basis of an official list of violators who infringe the obligation not to use child soldiers, on 16 June 2010 the Security Council held an Open Debate on "Children and Armed Conflict" and expressed its readiness to impose targeted measures against persistent violators.¹⁸¹

2. UN General Assembly Resolution on the Rights of the Child

Great efforts aimed at enhancing the protection of children affected in armed conflicts, including child soldiers, have been undertaken by the UN General Assembly in the past decade. As early as 1997, the UN General Assembly adopted the Resolution A/51/77 calling for vigorous efforts to combat the practice of recruiting children as soldiers and recommended to establish a Special Representative of the Secretary-General for Children and Armed Conflict.¹⁸² On 16 March 2001, the General Assembly issued the Resolution A/54/263 that adopts and opens for the signature and ratification of the OPCRC.¹⁸³ In the Resolution A/57/190 (2003), the General Assembly urged States and armed groups to take effective measures to demobilize children who have been recruited or used in hostilities, and to provide assistance for their physical and psychological recovery and social reintegration.¹⁸⁴ The Resolution A/59/261 (2005) called upon the States to sign or ratify the OPCRC and urged the State parties to fully implement the OPCRC, especially their obligation to adopt safeguards to ensure the recruitment of volunteers under the age of 18 years is not forced or coerced.¹⁸⁵ In Resolution A/62/141, legal measures necessary to criminalize the acts of children recruitment were suggested by the General Assembly to be used as a means to end the brutal practice of child soldiering.¹⁸⁶ The issue of child soldiering was condemned again as one of the serious violations of international law in the Resolution A/64/146, where not

¹⁸¹ United Nation General Assembly, A/64/742—S/2010/181, 21 May 2010. See also Security Council, Open Debate on Children and Armed Conflict, Statement by SRSG Radhika Coomaraswamy, 16 June 2010, available at <http://www.un.org/children/conflict/spanish/16-jun-2010-open-debate-security-council-statement.html> (last accessed on 9 November 2010).

¹⁸² General Assembly, A/51/77, 20 February 1997, para. 35.

¹⁸³ General Assembly, A/54/263, 16 March 2001, para. 1.

¹⁸⁴ General Assembly, A/57/190, 19 February 2003, para. 13.

¹⁸⁵ General Assembly, A/59/261, 24 February 2005, paras. 4, 48.

¹⁸⁶ General Assembly, A/62/141, 22 February 2008, para. 41 (f).

only the parties to the armed conflicts but also civil societies were urged to pay serious attention to protect child victims.¹⁸⁷

3. Cape Town Principles and Best Practices

In April 1997, UNICEF and Working Groups on the CRC held a symposium in Cape Town, South Africa, which is dedicated to develop strategies for preventing child recruitment. The attention is particularly focused on two aspects: to raise the minimum age of recruitment to 18 years old, and to establish the demilitarization, demobilization and reintegration program for former child soldiers.

A big success during the symposium is the creation of the definition of 'Child soldier', which includes

*“Any person under 18 years of age who is part of any kind of regular or irregular armed force or armed group in any capacity, including but not limited to cooks, porters, messengers and anyone accompanying such groups, other than family members. The definition includes girls recruited for sexual purposes and for forced marriage. It does not, therefore, only refer to a child who is carrying or has carried arms.”*¹⁸⁸

This revolutionary definition provides a rather broad scope to include all children engaging in all kinds of participation in armed conflicts, no matter fight on the frontline or performing supporting tasks. Under this definition, children who take an indirect part in hostilities, such as girls used as sexual commodity or recruited for forced marriage, fall within the realm of child soldiers.

¹⁸⁷ General Assembly, A/64/146, 3 March 2010, para. 19.

¹⁸⁸ UNICEF, the Cape Town Principles and Best Practices, available at [http://www.unicef.org/emerg/files/Cape_Town_Principles\(1\).pdf](http://www.unicef.org/emerg/files/Cape_Town_Principles(1).pdf) (last accessed on 16 January 2009).

Although the Cape Town definition is considered by some scholars as the most commonly agreed definition of child soldiers,¹⁸⁹ this definition has not been widely adopted on both international level and national level. This definition reflects the intent of the drafters to advance the best interests of the child, but not a convenient formulation for States to implement. Furthermore, the non-binding force of the Cape Town Principles may also lead to the failure to adopt this encompassing definition.

4. Regional Declarations on the Use of Children as Soldiers

On the regional level attention has also been paid to the destructive impact of armed conflict on children. In 1999, both *the Maputo Declaration on the Use of Children as Soldiers* (hereinafter “Maputo Declaration”) and *the Montevideo Declaration on the Use of Children as Soldiers* addressed the plight of child soldiers in Africa and Latin America and further called on to stop the use of child soldiers.¹⁹⁰ Realizing that most of children soldiering occurred among rebel groups, the Maputo Declaration urged the African States not to provide sanctuary to any armed forces or armed groups for recruiting or using child soldiers.¹⁹¹ In the Montevideo Declaration, all Latin American and Caribbean States are urged to fully respect and actively support the adoption of the OPCRC.¹⁹² In 2000, two major conferences were organized by *the Coalition to Stop the Use of Child Soldiers* respectively in Asia and the Middle East. Declarations against recruitment of children for military use were issued during each conference.¹⁹³ According to the Kathmandu Declaration, a regional network on Stop

¹⁸⁹ See also Dana Landau, *Child Soldier*, available at <http://www.isn.ethz.ch/isn/Current-Affairs/ISN-Insights/Detail?lng=en&ots627=fce62fe0-528d-4884-9cdf-283c282cf0b2&id=122984&contextid734=122984&contextid735=123960&tabid=123960> (last accessed on 7 November 2009).

¹⁹⁰ Human Rights Watch, *Maputo Declaration on the Use of Children as Soldiers*, 22 April 1999, available at <http://www.chora.virtualave.net/maputo-declaration.htm> (last accessed on 8 June 2010). Latin American and Caribbean on the Use of Children as Soldiers, Montevideo, Uruguay, 8 July 1999, available at <http://www.unesco.org/cpp/uk/declarations/montevideo.htm> (last accessed on 8 June 2010).

¹⁹¹ Human Rights Watch, *Maputo Declaration on the Use of Children as Soldiers*, *ibid*, p. 3.

¹⁹² Latin American and Caribbean on the Use of Children as Soldiers, *Montevideo Declaration on the Use of Child Soldiers*, Montevideo, Uruguay, 8 July 1999, p. 3.

¹⁹³ On May 2000, the Coalition to Stop the Use of Child Soldiers launched the Conference to condemn the use of child soldiers in Asia. In 2001 the Amman Conference was initiated by the UNICEF and the Coalition to Stop the Use of Child Soldiers.

Use of Child Soldiers was established, which was considered as one of the biggest achievement of the Asia-Pacific Conference.¹⁹⁴ The Amman Declaration issued in April 2000 called on States of the region to “criminalize” the practice of child recruitment and to stop “supply[ing] small arms or light weapons to any government or armed group which recruits or uses child soldiers”.¹⁹⁵

In short, in the past decade, actions from the international community against the use of child soldiers have been taken more than ever before. This, on the one hand, shows the growing concerns of international community on the issue of child soldiering; on the other hand, it also reflects the increasingly continuing use of child soldiers by a variety of armed forces and groups all around the world, as the growing international concerns actually arises from the urgent demand for ending the use of child soldiers.

D. Overview of the International Instruments Concerning the Crime of Child Recruitment under International Criminal Law

As can be seen from the above discussion, in the past two decades, significant advance in the field of IHL and IHRL have been made to promote and protect children from recruitment or use as soldiers in hostilities. However, the lack of effective enforcement mechanisms and the State’s ignorance of their responsibility under international law to protect the children in their territories have undermined the effectiveness of these provisions. As far as the Geneva Conventions are concerned, one of the main weaknesses of the Geneva Conventions is the lack of “viable enforcement mechanisms”.¹⁹⁶ In term of the enforcement of the IHRL, on the one hand, the most human rights instruments focus more on the standards of human rights but not on the enforcement mechanism, and assume that governments will adequately enforce

¹⁹⁴ Coalition to Stop the Use of Child Soldiers, *Asia-Pacific Conference: Don’t Arm Those Who Use Children as War Weapons*, available at <http://www.essex.ac.uk/armedcon/issues/texts/Soldiers007.htm> (last accessed on 8 June 2010).

¹⁹⁵ Child Soldiers and the Law, *Amman Declaration on the Use of Children as Soldiers*, April 2000, p. 2, available at http://www.tamilnation.org/humanrights/child/instruemnts_resolution.htm (last accessed on 8 June 2010).

¹⁹⁶ ICRC, A Milestone for International Humanitarian Law, 22 September 2006, available at <http://www.icrc.org/eng/resources/documents/statement/geneva-conventions-statement-220906.htm> (last accessed on 5 October 2011).

international human rights into domestic law.¹⁹⁷ Furthermore, many national governments lack political will to implement international human rights standard and to restrain their own human rights violations.¹⁹⁸

According to the record on the use of child soldiers, since WW II, particularly in the last two decades, the situation of child soldiers has not seen much improvement.¹⁹⁹ The widespread use of children as soldiers is reported one of the most painful and traumatic legacies of the twentieth century.²⁰⁰ There seems to be a fierce expansion of the use of children in armed conflicts both in numbers and in the variety of roles children are called upon to serve.²⁰¹

It was estimated that in 2005 over 300,000 children, most of them ranging in ages from 11 to 15 years old, were serving as child soldiers in more than fifty countries around the world.²⁰² Africa is estimated to have amassed the largest number of child soldiers, with up to 120,000, nearly the half of the total number, believed to be involved in hostilities.²⁰³ As happened

¹⁹⁷ Terry Collingsworth, *The Key Human Rights Challenge: Developing Enforcement Mechanisms*, 15 Harvard Human Rights Journal (Spring 2002):184.

¹⁹⁸ The primary responsibility for the enforcement of international human rights standards lies with national governments. See also Innocent Anaba, *Political Will, Bane of Human Rights Enforcement*, 16 November 2010, available at <http://www.vanguardngr.com/2010/11/political-will-bane-of-human-rights-enforcement/> (last accessed on 5 October 2011).

¹⁹⁹ This has already pointed out in the Introduction.

²⁰⁰ Olara Otunnu, *Additional Report of the Special Representative of the Secretary General for Children and Armed Conflict*, E/CN.4/2000/71, 9 February 2000. Annex I: Mission report on the visits to Sierra Leone and Guinea, para.12.

²⁰¹ Among more than 36 armed conflicts from 1997 to 1998, children under the age of 15 took part in 28 combats, and some children were only seven years. It was estimated that there may be a quarter of a million children under the age of 18 serving in government armed forces or armed opposition groups. The Coalition to Stop the Use of Child Soldiers said that “children, including about 120,000 in African armies, were used as front-line fighters, minesweepers, spies, porters and sex slaves”. See Coalition to Stop the Use of Child Soldiers, *Child Soldiers Global Report 2001*, 22 April 1999. See Rachel Brett & Margaret Mccallin, *Children: The Invisible Soldiers*, 2nd (ed.), Radda Barnen, 1996, p. 19.

²⁰² Abigail Leibig, *Girl Child Soldiers in Northern Uganda: Do Current Legal Frameworks Offer Sufficient Protection?*, 3 North western University Journal of International Human Rights (2005), available at <http://www.law.northwestern.edu/journals/jihr/v3/6/> (last accessed on 22 April 2010). See also Peter Singer, *Child Soldiers: Cause and Symptom of Human insecurity*, Human Rights Watch, available at http://www.humansecurityreport.info/background/Singer_Child_Soldiers.pdf (last accessed on 12 April 2009).

²⁰³ See Coalition to Stop the Use of Child Soldiers, *Child Soldiers Global Report 2004*, *supra* note 1, p. 31.

during the protracted conflicts in Burundi in 1993, children as young as ten years played a major part in the war efforts, serving in many different roles in the conflict, such as combatants, labors, spies, and sex slaves, for Burundi armed forces as well as for armed groups.²⁰⁴ Only in the year of 2004, hundreds of child soldiers served in the Forces Nationales pour la Libération (hereinafter “FNL”).²⁰⁵ The same situation has been found going on in Uganda since 1986, where as many as 25,000 children, including 7,500 girl soldiers, have reportedly been abducted by the LRA and forced to be soldiers, sex slaves, porters, and so on.²⁰⁶ Babies born to children fighting with the LRA in Uganda are now almost old enough to fight as second-generation child soldiers. The DRC is reportedly one of the countries with the largest number of child soldiers in the world, and it was estimated that as many as 30,000 children were associated with armed groups at the height of the war.²⁰⁷ Children’s involvement in armed conflicts is not a problem that affects only boys. In fact as many as a third of those abducted or coerced into military conflict are girls. Some of them are as young as eight when they were taught to kill or used as “sexual slaveries”.²⁰⁸ During the conflict in Sierra Leone from 1996 to 1999, more than 10,000 children under the age of 18 were believed to have been enlisted as rebel fighters.²⁰⁹ According to the Global Report 2004,

²⁰⁴ See Eben Kaplan, *Child Soldiers around the World*, Council on Foreign Relations, 2 December 2005, p. 2, available at <http://www.cfr.org/publication/9331> (last accessed on 8 August 2008).

²⁰⁵ Coalition to Stop the Use of Child Soldiers, *Child Soldiers Global Report 2004: African Regional Overview*, Coalition to Stop the Use of Child Soldiers, 2004, *supra* note 1, p. 1.

²⁰⁶ See Amnesty International, *Uganda: Child ‘Night Commuters’ Fear Abduction*, 18 November 2005, p. 4.

²⁰⁷ ICC, *Prosecution v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Statement of Fatou Bensouda, Deputy Prosecutor of the International Criminal Court, at the OTP monthly media briefing, 28 August 2006, Introduction, para. 5.

²⁰⁸ See Olara Otunnu, *Additional Report of the Special Representative of the Secretary General for Children and Armed Conflict*, *supra* note 200, para.11. See also Olara Otunnu, *Mission Statement: Sierra Leone*, available at <http://www.un.org/special-rep/children-armed-conflict/countryVistis/Sierra-Leone.htm> (last accessed on 8 August 2008). Amnesty International, *Sierra Leone: Childhood-a casualty of conflict*, AFR 51/609/3000, 31 August 2000. See also Coalition to Stop the Use of Child Soldiers, *Africa Report: Sierra Leone*, 1999, available at <http://222.child-soldiers.Org/reports-africa/sierra-leone.html> (last accessed on 8 August 2008).

²⁰⁹ U.S. Agency for International Development Bureau for Humanitarian Response (BHR) Office of U.S. Foreign Disaster Assistance (OFDA), *Sierra Leone-Complex Emergency*, Fact Sheet # 1, FY 2000, October 7, 1999, para. 11.

there were an estimated 17,000 children were serving in governments forces, and Between 2,500 and 5,000 children serving in armed opposition group.²¹⁰

Asia comes second, with millions of children involved in fighting forces in active conflicts or ceasefire situations.²¹¹ Widespread forcible recruitment of children, even as young as eleven, was reported in Myanmar in 2007 to serve in the National Army.²¹² Situations in Latin America and the Middle East are also grave. Disturbing reports from Colombia reveal that the number of children used by armed groups had increased to around 11,000 by 2004, with children as young as 12 being trained and deployed to use explosives and weapons.²¹³ During the Iraq war in 2003, it was reported that children were used as combatants by Iraqi governments.²¹⁴

Considering the widespread use of children soldiers in armed conflicts which occurred in the last two decades, the following subchapter will address the legislative efforts to establish the individual criminal responsibility of the persons who recruit or use child soldiers in hostilities.

I. Rome Statute of the International Criminal Court (hereinafter “Rome Statute”)

The “toothless nature of the provisions” provided in the above mentioned international instruments is often blamed for being one of the major reasons for the increasing spread of child soldiers in armed conflicts.²¹⁵

²¹⁰ Coalition to Stop the Use of Child Soldiers, *Child Soldiers Global Report 2004: African Regional Overview*, *supra* note 1, p. 1.

²¹¹ Of the 33 armed conflicts in which children were involved up to November 1998, 15 were in Asia, 11 in Africa and four in Europe. This is a salutary reminder that child soldiering is not only “an African problem”. See Save the Children, *Children’s Rights: Reality or Rhetoric?*, Save the Children, 2000, p. 45.

²¹² Human Rights Watch, *Child Soldier Use 2009*, available at http://www.rightwords.org.uk/files/Child_Soldier_Use.pdf (last accessed on 22 September 2010).

²¹³ Coalition to Stop the Use of child Soldiers, *Extract from Child Soldier Use 2003: A Briefing for the 4th Security Council Open Debate on Children and Armed Conflict*, 16 January 2004, para. 2.

²¹⁴ CNN, U.N. Reports Children Used as Combatants in Iraq, 29 January 2006, available at http://articles.cnn.com/2006-01-18/world/iraq.rights_1_human-rights-reports-children-iraq-war?s=PM:WORLD, (last accessed on 16 January 2008).

²¹⁵ Nima Elmi, *Child Soldiers, Where is the Law?*, *supra* note 128, p. 1.

The individual criminal law, as a new dimension to international law, is in this respect of special importance for international criminal justice. The establishment of the International Criminal Court (hereinafter “ICC”) is for that matter believed to be a milestone in the international community’s effort to stop the use of child soldiers and to enforce legal provisions regarding child soldiers by underlining individual criminal responsibility of perpetrators.

1. The Establishment of the ICC

Since the end of WWII, it has been a dream of international humanitarian law advocates to see a permanent world court established that would have the jurisdiction to try individuals for genocide, crimes against humanity and war crimes.²¹⁶

As early as 1946, the General Assembly adopted a resolution affirming the “Nuremberg Principles”, and one year later Resolution 177 (II) was adopted in 1947 establishing a Commission for the drafting of a code of offences against the peace and security of mankind,²¹⁷ which would include four major international crimes, namely, crimes against peace, war crimes, crimes against humanity and genocide.²¹⁸

During the discussion on the crime of genocide, the question of the possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes was raised and the International Law Commission was invited to study this question.²¹⁹ Consequent to the conclusion reached by the International Law Commission that the

²¹⁶ Howard Ball, *War Crimes and Justice*, Contemporary World Issues, ABC Clio, 2002, p. 48.

²¹⁷ General Assembly, resolution 177 (II): Formulation of the Principles Recognized in the Charter of the Tribunal and in the Judgment of the Tribunal, 21 November 1947.

²¹⁸ The Crime of genocide was later embodied in a separate convention: Convention on the Prevention and Punishment of the Crime of Genocide, which was adopted by the General Assembly in 1948. General Assembly, resolution 260 (III): Prevention and Punishment of the Crime of Genocide, 9 December 1948, Part A.

²¹⁹ General Assembly, resolution 260 (III): Prevention and Punishment of the Crime of Genocide, 9 December 1948, Part B.

establishment of a court was not only desirable but feasible; a Committee on International Criminal Jurisdiction was created to prepare reports regarding the establishment of a court.²²⁰ The committee prepared a draft Statute in 1951 and revised it in 1953; however, the drafting was postponed thereafter, due to the pending of “the adoption of a definition of aggression”.²²¹ Until December 1989 when Trinidad and Tobago called for international courts to deal with drug trafficking and other international crimes, the General Assembly again requested the International Law Commission to address the question of establishing an international criminal court”.²²² After nearly five years’ work, the International Law Commission submitted the General Assembly the draft statute for an international criminal court²²³ in 1994 and recommended the General Assembly “convene an international conference of plenipotentiaries to study the draft statute”.²²⁴

By resolution 49/5²²⁵ an *ad hoc* Committee on the Establishment of an International Criminal Court was set up, which met twice from 3 to 13 April and from 14 to 25 August 1995 “reviewing the major issues arising out of the draft statute and considering arrangements for the convening of an international conference”.²²⁶

The General Assembly, in resolution 50/46, decided that a Preparatory Committee on the Establishment of an International Criminal Court (hereinafter “PrepCom”) be set up to discuss major substantive issues arising from that draft statute prepared by the Commission

²²⁰ ICC, *Rome Statute of the International Criminal Court: Overview*, available at <http://untreaty.un.org/cod/icc/general/overview.htm> (last accessed on 8 February 2009).

²²¹ *Ibid.*

²²² Yearbook of the International Law Commission 1994, Volume II, Part Two: Report of the Commission to the General Assembly on the Work of its forty-sixth Session, A/CN.4/SER.A/1994/Add.1 (part 2), para. 17. See also General Assembly, resolution 44/39, A/44/PV.72, 4 December 1989.

²²³ The final version of the Working Group's report was examined by the Commission at the 2374th to 2376th meetings, held on 21 and 22 July 1994, and the text of the draft can be found in A/CN.4/L.491/Rev.2. and Corr. 1 and Add.1-3.

²²⁴ Yearbook of the International Law Commission 1994, Volume II, Part Two: Report of the Commission to the General Assembly on the Work of its Forty-sixth Session, *supra* note 222, para. 17.

²²⁵ General Assembly, A/RES/49/53, 17 February 1995, para. 2. See also Howard Ball, *War Crimes and Justice*, Contemporary World Issues, *supra* note 216, p. 50.

²²⁶ General Assembly, Report of the *Ad Hoc* Committee on the Establishment of an International Criminal Court, Fiftieth Session, No. 22, A/50/22, 6 September 1995.

and to prepare a widely acceptable consolidated draft text.²²⁷ At the fifty-second session, the General Assembly decided to hold a diplomatic conference of plenipotentiaries in 1998 “with a view to finalizing and adopting a convention on the establishment of an international criminal court”.²²⁸

In April 1998, the PrepCom completed the preparation of the draft Statute of an International Criminal Court and the consolidated text was delivered to the Rome Conference. From 15 June to 17 July 1998, the text of consolidated draft went under discussion participated by more than 160 States, and Rome Statute was finally adopted on 17 July 1998.²²⁹

On 1 July 2002, the Rome Statute entered into force, that is, 60 days subsequent to its receiving the 60th ratification needed for it to come into effect.²³⁰ Kofi Annan hailed the adoption of the Rome Statute and described it as “a giant step forward in the march toward universal human rights and the rule of law.”²³¹

2. The Provision of Crime of Child Recruitment under the Rome Statute

Under the Rome Statute, genocide, crimes against humanity, war crimes are enumerated in Articles 6, 7, 8 of the Rome Statute.²³² Certain crimes committed against children fall under

²²⁷ General Assembly, A/RES/50/46, 11 December 1995, para. 2.

²²⁸ General Assembly, A/RES/51/207, 16 January 1997, para. 5.

²²⁹ Coalition for the International Criminal Court, Rome Conference, available at <http://www.iccnw.org/?mod=rome> (last accessed on 5 October 2011).

²³⁰ The provisions of the Rome Statute determine the date upon which the treaty enters into force. See Rome Statute, Article 126: “1. This Statute shall enter into force on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations. 2. For each State ratifying, accepting, approving or acceding to this Statute after the deposit of the 60th instrument of ratification, acceptance, approval or accession, the Statute shall enter into force on the first day of the month after the 60th day following the deposit by such State of its instrument of ratification, acceptance, approval or accession.”

²³¹ Kofi Annan, Statement at the Ceremony Held at Campidoglio Celebrating the Adoption of the Statute of the International Criminal Court, 18 July 1998, available at <http://www.un.org/icc/speeches/718sg.htm> (last accessed on 16 June 2010).

²³² Rome Statute, Articles. 5, 6, 7, 8. Rome Statute of International Criminal Court, Doc. A/CONF.183/9 (1998), revised 2010 at the Review Conference in Kampala. On 11 June 2010, the Review Conference of Rome Statute held in Kampala adopted the amendments to the Rome Statute which include Article 8 *bis* on the crime of

the jurisdiction of the Court.²³³ The inclusion of the crime of child recruitment in the Rome Statute was a turning point in the history of international criminal justice, as it enables the prosecution and punishment of perpetrators who recruit or use children in hostilities. This advance had been preceded by an intense debate during the PrepCom on whether the recruitment of child soldiers warranted the most fundamental disapprobation, including entailing individual criminal responsibility. Although some delegations took the view that “it was inappropriate to include in the Statute an issue (child recruitment) that had more of human rights than an international humanitarian law character”,²³⁴ the crime of child recruitment was finally approved to be provided in the final draft of the Rome Statute. Article 8 (2) (b) (xxvi) sets forth this crime in relation to international armed conflicts as follows:

*“Conscripting or enlisting children under the age of fifteen years into national armed forces or using them to participate actively in hostilities.”*²³⁵

In Article 8 (2) (e) (vii), a similar provision is laid down to be applied in non-international armed conflicts:

*“Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities.”*²³⁶

To give a clear picture of what kinds of child recruitment the ICC is supposed to prosecute and punish, the Rome Statute adopts the phrase: “conscripting or enlisting” to suggest that both forcible recruitment and recruitment of volunteers are both prohibited.²³⁷

aggression. The ICC will not exercise its jurisdiction over the crime of aggression until after 1 January 2017 when the jurisdiction will be activated by the State Parties. See Coalition for the International Criminal Court, the Crime of Aggression, available at <http://www.iccnw.org/?mod=aggression>, (last accessed on 5 October 2011).

²³³ Ilona Topa, *Prohibition of Child Soldiering-International Legislation and Prosecution of Perpetrators*, *supra* note 25, p. 113.

²³⁴ Roy S. Lee, *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational, 2001, p. 205.

²³⁵ Rome Statute of International Criminal Court (hereinafter “Rome Statute”), U.N.Doc.A/CONF.183/9 (1998), Article 8 (2) (b) (xxvi).

²³⁶ Rome Statute, *ibid.*, Article 8 (2) (e)(vii).

Furthermore, it is worth noting that the call for criminal liability is not only limited to the international level, but also implemented at the national level as well.²³⁸ Although there is nothing explicitly provided in the Rome Statute imposing any obligation on the states to implement the crimes provided in the Statute into their domestic laws, the ICC actually leaves the primary responsibility to investigate and punish the alleged criminals to individual states under the complementarity jurisdiction.²³⁹ As is stressed by NGOs as a political demand, the complementarity system “can only work if states undertake the following: ratify

²³⁷ For more details, please see *infra* A. *Actus Reus*, Chapter 4.

²³⁸ Countries that have signed the Rome Statute should not neglect to implement the provisions into their domestic laws. See Justin Coleman, *Showing its Teeth: The International Criminal Court Takes on Child Conscription in the Congo, But Is Its Bark Worse Than Its Bite?*, 26 Penn St. Int'l L. Rev (2008): 765, pp. 784-785.

²³⁹ Article 17 of the Rome Statute: “Issues of Admission. 1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute; (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3; (d) The case is not of sufficient gravity to justify further action by the Court. 2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable: (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5; (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice; (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice. 3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.” See also Article 1 of the Rome Statute: “An International Criminal Court (“the Court”) is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.” See also the Preamble of the Rome Statute: “Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions.”

or accede to the Rome Statute, fully cooperate with the Court by providing all the necessary judicial assistance in its proceedings, and implement all of the crimes under the Rome Statute into domestic legislation”.²⁴⁰ In this respect, many organizations, not only Coalition of the International Criminal Court, but also the NGOs, such as the ICRC Advisory Service on International Humanitarian Law, are working on advocating and assisting the development of implementing national legislation.²⁴¹

However, critics have voiced their disappointment on some key issues provided by Article 8 (2) (b) (xxvi) and Article 8 (2) (e) (vii). Firstly, dissatisfaction comes with the failure of the Rome Statute to protect children who may be used in “indirect but violent ways” to take part

²⁴⁰ Coalition of International Criminal Court, *Implementation of the Rome Statute*, available at <http://www.coalitionfortheicc.org/?mod=romeimplementation> (last accessed on 9 October 2011). The Preamble of the Rome Statute emphasizes the significance of the enforcement of the Rome Statute at the national level: “Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.”

ICRC, *Official Statement, Rome Statute of the International Criminal Court: Implementation at the National Level: Opening Remarks by M. Jacques Forster, Vice-President of the ICRC*, Moscow, Russian Federation, 4-5 February 2004, available at http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5VSHQH?OpenDocument&style=custo_print (last accessed on 22 April 2010).

²⁴¹ ICRC, *Official Statement, Rome Statute of the International Criminal Court: Implementation at the National Level: Opening Remarks by M. Jacques Forster, Vice-President of the ICRC*, Moscow, Russian Federation, available at http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5VSHQH?OpenDocument&style=custo_print (last accessed on 22 April 2010): “[T]he ICRC Advisory Service on International Humanitarian Law, which was set up in 1996 to provide States with more effective assistance, has been giving States technical advice on the ratification and implementation of humanitarian law instruments and facilitating the exchange of information on measures, legislative and other, already adopted.” See also Coalition of International Criminal Court, *Implementation of the Rome Statute*, available at <http://www.coalitionfortheicc.org/?mod=romeimplementation> (last accessed on 9 October 2011): “The CICC is one of a few organizations in the world actively monitoring and working on promoting the development of implementation legislation globally. As with ratification, the overwhelming focus of CICC’s work is educational, providing basic information, documentation and examples of how different nations have addressed similar legal issues. To assist our membership, and also those governments working on their legislation, the Coalition is committed to providing comprehensive information on the state of legislative drafting and implementation campaigns throughout the world.”

in hostilities.²⁴² The limited protection provided only to children who “participate actively in hostilities” leaves children who take indirect participation beyond the realm of Article 8(2) (b) (xxvi) and Article 8 (2) (e) (vii). Finally, like most of the instruments earliest, the Rome Statute consistently set the minimum age for recruitment at 15 years. Apparently, such formulation came from the need for consensus. Nevertheless, one can not underestimate the continuing efforts of the International organizations and NGOs, such as Human Rights Watch, UNICEF and ICRC, to raise this minimum age to 18 years. From this perspective, the question of raising the minimum age to 18 years seemed to be knocking at the door, demanding attention to a future agenda, though one cannot expect a smooth journey on the road ahead.²⁴³

II. Statute of the Special Court of Sierra Leone (hereinafter “SCSL Statute”)

During the civil war of Sierra Leone thousands of children under the age of 15 were recruited as child soldiers by direct or indirect coercive means.²⁴⁴ Considering the cruel reality of the massive use of children in hostilities and of the severe situation of the extensive sexual abuse of girl soldiers in Sierra Leone, a Special Court in Sierra Leone (hereinafter “SCSL”) was established on the request of the Security Council.²⁴⁵ A similar provision mirroring Article 8 (2) (e) (vii) of the Rome Statute was set forth in the SCSL Statute, which states in Article 4:

*“Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities.”*²⁴⁶

²⁴² Timothy Webster, *Babes with Arms: International Law and Child Soldiers*, *supra* note 101, p. 241. See also Jordan A. Gilbertson, *Little Girls Lost: Can the International Community Protect Girl Soldiers?*, *supra* note 74, p. 235.

²⁴³ The difficulties to achieve the “straight 18” standard will be addressed in Chapter 4.

²⁴⁴ These means may include but not limited to, abduction, threats, killing of family members by the adductors.

²⁴⁵ UN Security Council, Secretary-General’s Report on the Establishment of the Special Court for the Sierra Leone, Doc. S/2000/915, 4 October 2000, para. 12.

²⁴⁶ SCSL Statute, Article 8 (2) (e) (vii).

SCSL Statute specifically provides for criminality of child recruitment committed in the context of a non-international armed conflict, under the title of “other serious violations of international humanitarian law”.

E. CONCLUSION

As shown above, the use of child soldiers, especially those who are under the age of 15 years, is incontrovertibly prohibited under a substantial body of legislations in international law. Numerous developments have taken place in this regard since Geneva Conventions of 1949. Two aspects are of paramount importance. Firstly, the legislative development regarding prohibition of child soldiering in the field of international human rights law has greatly contributed to the protection of children from being recruitment and has operated in the circumstances where humanitarian law fails. International human rights law regards child soldiers as victims, as children’s rights and interests are largely violated by their participation in the armed conflicts. The prohibition of children to be recruited in armed forces or groups is therefore a welfare right. Based on this premise, children’s participation in armed conflicts, whether compulsorily or voluntarily, and whether occurs in the war times or peacetime, is never in their best interests.

Additionally, the Rome Statute and the SCSL Statute further strengthen the prohibition of child soldiering by introducing individual criminal responsibility. It is admitted that the violations of the obligations under the norms of international human rights instruments are largely considered as a wrongful act resulting in state responsibility, but not a crime attracting individual criminal responsibility. By listing the practice of child soldiering as a war crime, the Rome Statute transformed this prohibition into a criminalization. Judicial affirmation of this crime began in 2003, when the accused Norman was charged with the crime of child recruitment before the SCSL. Following the judicial practice of the SCSL, the ICC has in its very first case specifically called for Lubanga to be held accountability for his participation in planning the recruitment or use of child soldiers in hostilities.²⁴⁷

Nevertheless, as addressed above, current international and regional instruments regulating the use of child soldiers have been criticized as age-biased. It seems that impunity gaps are

²⁴⁷ For more details, see *infra* Chapter 2.

appearing in the regard of the failure to prosecute individuals who recruit or use children under the age of 18 in the context of the Rome Statute the SCSL Statute. Further demand is also growing in respect to raise the age threshold of recruiting volunteers into government forces to 18 years. Furthermore, current international and regional instruments regulating the use of child soldiers is also regarded as disappointing, as they fail to offer protection for children who take indirect part but play supporting role in hostilities, such as cook and sexual slaves.²⁴⁸ Although the road ahead is not smooth, the current laws, such as Convention 182 and ACWRC are successful attempts to reconcile the interests between governments and children. It is believed in the near future the international community may be willing to take the Cape Town definition of “child soldier”, which reflects all aspects of a child soldier’s right and interests.

²⁴⁸ For more details, see *infra* Chapter 4.

Chapter 2: Overview of the Case Law Concerning the Crime of Child Recruitment

As addressed in the previous chapter, the establishment of the ICC is of significance to the development of international laws of protecting children from recruitment or use as soldiers in hostilities, as it set an international platform to enforce international provisions regarding child soldiering and also sent a message that the violations of international laws would no longer be tolerated without punishment.

So far, 21 former leaders have been accused of the crime of child recruitment before the SCSL and the ICC. The examination of the respective judicial decisions is of crucial importance not only for the purpose of assuring the evolution of the jurisprudence, but also as a means of establishing the most appropriate interpretation to the applicable rules.²⁴⁹ In this respect, the judicial practice regarding using child soldiers before the ICC and other international criminal tribunals will be reviewed in the following chapter.

As to the question of the retroactive effect, this question will be covered by the discussion of the customary nature of the crime of child recruitment before 1996 when the SCSL started its jurisdiction over the crimes occurred during the Sierra Leone civil war.

The prosecution of perpetrators, who committed the crime of child recruitment, before international criminal courts is a relatively recent phenomenon. Little attention was given to children when the IMT and IMTFE were established in the aftermath of the WW II. The legal framework of these two tribunals only included a very few provisions pertaining to the rights and the needs of children, which did not cover the protection of children from participation in armed conflicts.²⁵⁰ The crime of child recruitment also neither appears in the Statute of the

²⁴⁹ Antonio Cassese, *International Criminal Law*, Oxford University, 2003, p. 37. See also Christopher W. Mullins & Dawn L. Rothe, *Blood, Power and Bedlam: Violations of International Criminal Law in Post-Colonial Africa*, *supra* note 60, p.25.

²⁵⁰ Cecile Aptel, *Children and Accountability for International Crimes: The Contribution of International Criminal Courts*, available at http://www.unicef-irc.org/publications/pdf/iwp_2010_20.pdf (last accessed on 8 October 2010), UNICEF Innocenti Research Centre, August 2010, p. 3.

International Criminal Tribunal for the Former Yugoslavia (hereinafter “ICTY”), nor of the International Criminal Tribunal for Rwanda (hereinafter “ICTR”), and therefore trials before these two *ad hoc* tribunals have not yet referred to any charge concerning the crime of child recruitment.²⁵¹

The crime of child recruitment is explicitly provided both in the SCSL Statutes and the Rome Statute. These documents, as shown above in Chapter 1, have brought about a major development in respect to the prosecution and punishment of perpetrators who use child soldiers in armed conflicts. Although both of the two courts have established their jurisdiction on the crime of child recruitment, the SCSL seems to be far more experienced in its judicial practice on this crime than the ICC.

So far, the SCSL has been the most active in pursuing child recruiters, having exercised its judicial practice in respect of 13 indictments. While until now only three accused have been brought to the ICC under the charge of this crime of child recruitment, and no judgment has yet been reached. Nevertheless, as will be discussed below, both of the courts have devoted considerable energy to fighting to end impunity for child soldiering violations, and further set important precedents through application and clarification of rules in respect of the crime of child recruitment. On the basis of the described development, the case-law of the SCSL will be addressed in detail first.

A. Judicial Practice of the Crime of Child Recruitment Before the SCSL

Based on the agreement between the government of Sierra Leone and the UN, the SCSL was established in 2002, with the mission to try those “who bear the greatest responsibility” for war crimes, crimes against humanity and other serious violations of international humanitarian law, committed in the territory of Sierra Leone since 30 November 1996.²⁵² As noted above in Chapter 1, the crime of child recruitment is defined in Article 4 (3) (c) SCSL Statute, namely “conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to take active part in hostilities”. The Sierra Leone civil war

²⁵¹ One may argue that at the time of prosecuting the accused, prosecution may play a role to charge the accused who recruit child soldiers within the scope of other crimes.

²⁵² Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, *supra* note 245, para. 1. See also SCSL Statute, Article 1.

between 1991 and 2002 was known for its widespread use of child soldiers in various tasks in armed factions, such as the Civil Defense Forces (hereinafter “CDF”), the Revolutionary United Front (hereinafter “RUF”), the Armed Forces Revolutionary Council (hereinafter “AFRC”), as well as among the Liberian fighters. The SCSL is the first international criminal tribunal to have tried perpetrators for violations of international humanitarian law as related to the recruitment of children under the age of 15 as child soldiers or use them in hostilities. So far 13 people from all warring factions in Sierra Leone were charged with the crime of child recruitment.²⁵³ Among the 13 accused, six of them were found guilty of this crime.

I. The Case Concerning the CDF

The first trial concerning the crime of child recruitment is the case against Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa before the SCSL. On 7 March 2003, Norman, along with Fofana and Kondewa, was indicted on eight counts of crimes against humanity and war crimes, including the crime of child recruitment.²⁵⁴ At the time relevant to the indictment, Norman was the “National Coordinator” of the CDF,²⁵⁵ and the leader of the paramilitary force “Kamajors”.²⁵⁶ Fofana was the “National Director of War” of the CDF and was regarded as the second in command.²⁵⁷ In addition to this function, Fofana was also in charge of commanding some of the battalions of the CDF.²⁵⁸ As a leading member and “High

²⁵³ The International Herald Tribune News, *Death by Child*, 15 November 2008.

²⁵⁴ SCSL, Norman Trial Judgment, *supra* note 78, para. 1.

²⁵⁵ *Ibid*, para. 13.

²⁵⁶ Africa News, *Law Bulletin Analyses Legal Ramifications of Child Soldier Recruitment*, 8 December 2008. See also Thomas Humphrey, *Child Soldiers: Rescuing the Lost Children*, *supra* note 84, p. 121.

²⁵⁷ SCSL, Norman Trial Judgment, *supra* note 78, para. 1.

²⁵⁸ Trial Watch, *Moinina Fofana*, available at http://www.trial-ch.org/en/trial-watch/profile/db/facts/moinina_fofana_400.html (last accessed on 1 December 2009).

Priest”²⁵⁹ of the CDF, Kondewa was in control of the supervision of all initiations to the CDF.²⁶⁰

The joint trial of the three accused commenced on 3 June 2004. On 22 February 2007 Norman’s trial was put to an end due to his death at a military hospital in Dakar while detained.²⁶¹ Although the Trial Chamber terminated the proceedings against Norman,²⁶² the death of Norman did not influence the trial against the other two accused: Fofana and Kondewa. The trial continued until October 2006 and a judgment was issued in August 2007. According to the judgment, Fofana was convicted on four counts²⁶³ but was acquitted from the charge of the crime of child recruitment, while Kondewa was found guilty on five

²⁵⁹ When Kamajors go to war they must go to Kondewa to be advised. Kondewa chooses who goes to warfront, blesses them as high priest. See SCSL, Prosecutor v. *Sam Hinga Norman, Moinina Fofana, Allieu Kondewa*, SCSL-04-14-T, Decision Regarding Prosecution and Kondewa Final Trial Briefs, Trial Chamber, 15 December 2006, para. 13.

²⁶⁰ SCSL, Norman Trial Judgment, *supra* note 78, para. 1. See also Trial Watch, *Allieu Kondewa*, available at http://www.trial-ch.org/en/trial-watch/profile/db/facts/allieu_kondewa_400.html (last accessed on 1 December 2009).

²⁶¹ An independent investigation by medical experts to ascertain the cause of the death of Norman has been ordered. SCSL, Press Release, *Special Court President Orders Inquiry into Death of Hinga Norman*, Office of Press and Public Affairs, Freetown, Sierra Leone, 23 February 2007, para. 4. See also SCSL Press Release, *Special Court Inductee Sam Hinga Norman Dies in Dakar*, 22 February 2007.

²⁶² Although the proceedings against Norman was terminated, Judge Benjamin Nutanga Itoe claimed his disagreement with the majority on the decision to delete the name of Norman from the cover sheets of chamber rulings, decisions, court process and records. SCSL, Prosecutor v. *Sam Hinga Norman, Moinina Fofana, Allieu Kondewa*, SCSL-04-14-T, Dissenting Opinion of Hon. Justice Benjamin Mutanga Itoe on the Majority Decision to Delete the Name of the First Accused, Samuel Hinga Norman (Now Deceased) from the Cover Sheets of Chamber Rulings, Decisions, Court Process and Records, 22 June 2007, paras. 27-31.

²⁶³ The Trial Chamber found with respect to the Accused Fofana to be responsible for Court 2 - Violence to life, health and physical or mental well-being of persons, in particular murder, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II; Court 4 - Violence to life, health and physical or mental well-being of persons, in particular cruel treatment, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II; Court 5- a Violation of Article 3 common to the Geneva Conventions and of Additional Protocol II; as well as Count 7 – Collective Punishments, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II. SCSL, Norman Trial Judgment, *supra* note 78, Disposition.

counts,²⁶⁴ including the crime of child recruitment. According to the Sentencing Judgment issued on 9 October 2007, Fofana was sentenced for six years of imprisonment, and Kondewa for eight years.²⁶⁵

The prosecution appealed against the sentencing judgment and called for higher sentences based on nine grounds. Kondewa also appealed his conviction based on six grounds. In regard to sentencing, the Appeals Chamber held, Justice Gelaga King dissenting, that the Trial Chamber erred in law in finding that “just cause” can be a mitigating factor. The Appeals Chamber stated that consideration of motive for the purpose of sentence is not to regard motive as a defense.²⁶⁶ Furthermore, the Appeals Chamber, by a majority, Justice Gelaga King dissenting, reversed the Trial Chamber’s decision on acquittals of Fofana and Kondewa on counts 1 and 3 of the indictment, *i.e.*, for murder and inhumane acts as crimes against humanity. The Appeals Chamber, again by majority with Justice Gelaga King and Jon Kamanda dissenting, sustained the convictions of Fofana on counts 2 and 4 for murder and cruel treatment as war crimes, and increased the sentences substantially. The Appeals Chamber not only unanimously overturned Kondewa’s conviction for murder in Talia, but also reversed Kondewa’s conviction on Count 8 for “the enlistment of children under the age of 15 as combatants”. On 28 May 2008, the Appeals Chamber resentedenced Fofana to 15 years as opposed to the original six years, and Kondewa to 20 years as opposed to the original eight

²⁶⁴ The Trial Chamber found with respect to the Accused Kondewa to be responsible for Court 2 - Violence to life, health and physical or mental well-being of persons, in particular murder, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II; Court 4 - Violence to life, health and physical or mental well-being of persons, in particular cruel treatment, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II; Court 5 - a Violation of Article 3 common to the Geneva Conventions and of Additional Protocol II; Court 7 – Collective Punishments, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II; as well as Count 8 – enlisting children under the age of 15 years into an armed groups and/or using them to participate actively in hostilities, another serious violation of international humanitarian law. See SCSL, *Norman* Trial Judgment, *supra* note 78, Disposition.

²⁶⁵ SCSL, *Prosecutor v. Sam Hinga Norman, Moinina Fofana, Allieu Kondewa*, SCSL-04-14-T, Judgment on the Sentencing of Moinina Fofana and Allieu Kondewa (hereinafter “*Norman* Sentencing Judgment”), Trial Chamber, 9 October 2007, Disposition.

²⁶⁶ SCSL, 5th Annual Report of the President of the Special Court for the Sierra Leone, June 2007 to May 2008, p. 23.

years.²⁶⁷ Dissenting opinions were read out by Justice Winter regarding enlistment of child soldiers, which will be elaborated on in Chapter 4.²⁶⁸

The trial is a remarkable milestone, for it not only delivered justice to the victims,²⁶⁹ but also warned future perpetrators that such atrocity would not be tolerated.²⁷⁰ Some ingenious ideas are left by the Norman trial. One of the most important legacies is *the Decision on Preliminary Motion concerning Lack of Jurisdiction (Child Recruitment)* (hereinafter “Norman Jurisdiction Decision”) by the Appeals Chamber on 31 May 2004.²⁷¹ In this decision, the Appeals Chamber found that the prohibition of the recruitment of children under the age of 15 years had crystallized as a norm of customary international law by November 1996 and as such entailed individual criminal responsibility to perpetrators who had recruited the child soldiers at least from that date. This finding was of particular significance, as it was deemed by many scholars as a landmark milestone resulting in the first ever decision reinforcing the legitimacy of the jurisdiction over the crime of child recruitment by an international judicial authority.²⁷² However, the finding that the crime of child recruitment had been customary international law before 1996 is still controversial to some scholars.²⁷³

²⁶⁷ SCSL, *Prosecutor v. Sam Hinga Norman, Moinina Fofana, Allieu Kondewa*, SCSL-04-14-A, Judgment (hereinafter “*Norman Appeals Judgment*”), Appeals Chamber, 28 May 2008, paras. 115-154.

²⁶⁸ For more details, see *infra* Chapter 4.

²⁶⁹ Tucker Reals, *Former Liberian Leader Boycotts Trial*, 4 June 2007, available at <http://www.cbsnews.com/stories/2007/06/04/world/main2880672.shtml?tag=currentVideoInfo;videoMetaInfo> (last accessed on 16 October 2010).

²⁷⁰ Stephen Kabera Karanja, *Child Soldiers in Peace Agreements: The Peace and Justice Dilemma*, *Global Jurist Advances*, Volume 8, Issue 3, Article 9, 2008, pp. 2-3.

²⁷¹ SCSL, *Prosecutor v. Sam Hinga Norman*, SCSL-2004-14-AR72(E), Appeals Chamber, Decision on Preliminary Motion Based on lack of Jurisdiction (Child Recruitment) (hereinafter “*Norman Jurisdiction Decision*”), 31 May 2004.

²⁷² See SCSL, *Norman Appeals Judgment*, *supra* note 267, paras. 115-154. See SCSL, *Norman Trial Judgment*, *supra* note 78, para. 184. See also SCSL, *Prosecutor v. Alex Tamba Brima, Brima Bazzy Karama and Santigie Borbor Kanu*, SCSL-2004-16-T, Trial Chamber, Judgment (hereinafter “*Brima Trial Judgment*”), 20 June 2007. See also Renate Winter, *Der Spezialgerichtshof von Sierra Leone*, Landesgruppe Österreich der Internationalen Strafrechtsgesellschaft und Österreichischer Juristenverband (Eds), *Internationale Strafgerichtshöfe und Menschenrechte*, Symposium am 6 Oktober 2006 in Wien, 2007, pp. 34-36.

²⁷³ The issue concerning the status of the crime of child recruitment under customary international law will be discussed in Chapter 3, *infra*.

Furthermore, the Norman trial has provided valuable precedents on the clarification of some of the key elements of the crime of child recruitment.

However, there is still some ambiguity contained in the judgment, especially the explanation of the term “enlistment” by the Trial Chamber, which has raised some questions regarding the *actus reus* of this crime.²⁷⁴

II. The Case Concerning the AFRC

On 25 May 1997, the government of the newly elected president Ahmed Tejan Kabbah was overthrown by a group of soldiers from Sierra Leone Army (hereinafter “SLA”), who had formed the AFRC and Johnny Paul Koroma was elected as the head of AFRC.²⁷⁵ Shortly thereafter, the AFRC and the RUF joined their forces to become a new army called “the People’s Army”.²⁷⁶ In order to regain the power of President Kabbah, the Economic Community of West African States (hereinafter “ECOMOG”) stormed Freetown in February 1998.²⁷⁷ Due to a series of attacks launched on the AFRC by the forces of ECOMOG, the AFRC was driven out of Freetown.²⁷⁸ During the retreat, the AFRC and RUF troops committed widespread looting, attacks on civilians, and heavy damages to infrastructure and housing of civilians.²⁷⁹ After the attack on Freetown in January 1999, the AFRC subsequently divided into two groups, one of which was supporting a faction of the RUF, and the other formed the “West Side Boys”, many members of which were abducted children.²⁸⁰

²⁷⁴ The issue will be addressed in A. *actus reus*, Chapter 4, *infra*.

²⁷⁵ International Centre for Transitional Justice, *Special Court for Sierra Leone Issues First Judgment, Long-Awaited Milestone in Road to Justice*, 22 June 2007, available at <http://www.ictj.org/en/news/press/release/1238.html> (last accessed on 16 October 2010).

²⁷⁶ Paul Richards, War and Peace in Sierra Leone, 25 Fletcher F. World AFF. (2001) 41, p. 45. Babafemi Akinrinade, International Humanitarian Law and the Conflict in Sierra Leone, 15 Notre Dame J. L. Ethics & Pub. Pol.’Y (2001):391, p. 431.

²⁷⁷ UNHCR, *Sierra Leone: Information on the 1997 Coup D’etat, ECOMOG harassment of civilians, and the current situation in Sierra Leone*, United States Bureau of Citizenship and Immigration Services, 5 January 2000, p.1.

²⁷⁸ SCSL, *Brima Trial Judgment*, *supra* note 272, paras. 168, 173, 175.

²⁷⁹ *Ibid.*, paras. 178-195, 206-207.

²⁸⁰ *Ibid.*, para. 208.

Three accused - Alex Tamba Brima, Brima Bazzy Kamara, and Santigie Borbor Kanu - from the AFRC faction were arrested in 2003. Brima was in direct command of AFRC/RUF forces in the Kono District.²⁸¹ Kamara was a senior member of the AFRC, and served as Brima's second in command based in Kono District.²⁸² Kanu was a senior commander of AFRC/RUF forces in Kono District as well, and "commanded in charge of civilian abductees" during the attack on Freetown on 6 January 1999.²⁸³ The Prosecution charged them with 14 counts of crimes against humanity as well as with war crimes, including the crime of child recruitment.²⁸⁴ On 7 March 2005 the trial began and testimony was heard from more than 140 witnesses.²⁸⁵

Based on the established evidence, the Trial Chamber found that the only form of recruitment conducted by the AFRC was abduction, and the Chamber further found that these abductions "were linked to these Accused in this case in the districts of Bombali, Freetown and the Western Area".²⁸⁶ The trial Judgment was delivered on 19 July 2007. Based on the consideration of the gravity of the offences and individual circumstances of the convicted persons, including aggravating and mitigating factors, the Chamber found Brima guilty on ten counts,²⁸⁷ including the crime of child recruitment, with sentences of 50 years; Kamara

²⁸¹ *Ibid.*, para. 342.

²⁸² *Ibid.*, paras. 380, 461-467.

²⁸³ SCSL, *Brima* Trial Judgment, *supra* note 272, para. 535.

²⁸⁴ SCSL, *Prosecutor v. Alex Tamba Brima, Brima Bazzy Karama and Santigie Borbor Kanu*, SCSL-2004-16-PT, Indictment, 18 February 2005, para. 65.

²⁸⁵ International Centre for Transitional Justice, Press Releases, *Special Court for Sierra Leone Issues First Judgment, Long-Awaited Milestone in Road to Justice*, *supra* note 275.

²⁸⁶ SCSL, *Brima* Trial Judgment, *supra* note 272, paras. 1275-1277.

²⁸⁷ The Trial Chamber found with respect to the Accused Brima to be responsible for Court 1 - Acts of Terrorism, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II; Count 2 - Collective punishments, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II; Count 3 - Extermination, a Crime against Humanity; Count 4 - Murder, a Crime against Humanity; Court 5 - Violence to life, health and physical or mental well-being of persons, in particular murder, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II; Court 9 - Outrages upon personal dignity, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II; Court 10 - Violence to life, health and physical or mental well-being of persons, as mutilation, a Violation of Article 3 common to the Geneva Conventions and of Additional Protocol II; Count 12- Conscripting children under the age of 15 years into an armed group and/or using them to participate actively in hostilities, another serious violation of

guilty on eleven counts,²⁸⁸ including the crime of child recruitment, with sentences of 45 years; and Kanu guilty on eleven counts,²⁸⁹ including the crime of child recruitment, with sentences of 50 years.

Both the Prosecution and the defendants appealed. Among the three accused, only Kanu filed Grounds of Appeal on the issue of the crime of child recruitment.²⁹⁰ Kanu claimed that the

international humanitarian law; Count 13 - Enslavement, a Crime against Humanity; as well as Count 14 – Pillage, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II. See SCSL, *Brima* Trial Judgment, *supra* note 272, paras. 2113-2116.

²⁸⁸ The Trial Chamber found with respect to the Accused Kamara to be responsible for Court 1- Acts of Terrorism, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II; Count 2- Collective punishments, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II; Count 3- Extermination, a Crime against Humanity; Count 4- Murder, a Crime against Humanity; Court 5- Violence to life, health and physical or mental well-being of persons, in particular murder, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II; Count 6- Rape, a Crime against Humanity; Court 9- Outrages upon personal dignity, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II; Court 10- Violence to life, health and physical or mental well-being of persons, as mutilation, a Violation of Article 3 common to the Geneva Conventions and of Additional Protocol II; Count 12- Conscription of children under the age of 15 years into an armed group and/or using them to participate actively in hostilities, another serious violation of international humanitarian law; Count 13- Enslavement, a Crime against Humanity; as well as Count 14 – Pillage, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II. See SCSL, *Brima* Trial Judgment, *supra* note 272, paras. 2117-2120.

²⁸⁹ The Trial Chamber found with respect to the Accused Kamara to be responsible for Court 1 - Acts of Terrorism, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II; Count 2- Collective punishments, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II; Count 3- Extermination, a Crime against Humanity; Count 4 - Murder, a Crime against Humanity; Court 5 - Violence to life, health and physical or mental well-being of persons, in particular murder, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II; Count 6- Rape, a Crime against Humanity; Court 9 - Outrages upon personal dignity, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II; Court 10 - Violence to life, health and physical or mental well-being of persons, as mutilation, a Violation of Article 3 common to the Geneva Conventions and of Additional Protocol II; Count 12 - Conscription of children under the age of 15 years into an armed group and/or using them to participate actively in hostilities, another serious violation of international humanitarian law; Count 13 - Enslavement, a Crime against Humanity; as well as Count 14 – Pillage, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II. See SCSL, *Brima* Trial Judgment, *supra* note 272, paras. 2121-2123.

²⁹⁰ SCSL, *Prosecutor v. Alex Tamba Brima, Brima Bazzy Karama and Santigie Borbor Kanu*, Judgment (hereinafter “Brima Appeals Judgment”), Appeals Chamber, 22 February 2008, paras. 28-33.

Appeals Chamber should overturn his conviction for conscripting, enlisting, and using children under 15 years in hostilities because he lacked the requisite *mens rea*. Alternatively, Kanu argued that child recruitment was not a war crime by 30 November 1996, the starting date of the SCSL's temporal jurisdiction.²⁹¹ On appeal the conviction imposed by the Trial Chamber against Kanu for recruiting child soldiers were upheld. Based on the finding of the Norman Jurisdiction Decision that the crime of child recruitment had been part of customary international law before 1996, the Appeals Chamber found it “vexatious” that Kanu lacked the requisite *mens rea* of conscripting or enlisting children under the age of 15 years or using them to participate actively in hostilities.²⁹²

On 22 February 2008, the Appeals Chamber delivered its Judgment on the *Brima* case. The Appeals Chamber dismissed the appeals against conviction brought by Brima, Kamara and Kanu. The Appeals Chamber upheld the Prosecution’s grounds of appeal, by stating that the Trial Chamber “erroneously failed to consider acts of forced marriage as constituting a crime against humanity”, but regarding the substantial sentences imposed by the Trial Chamber, the Appeals Chamber declined to “consider arguments that Brima, Kamara and Kanu bore responsibility for additional crimes”.²⁹³ The Appeals Judgment remained the sentences found by the Trial Chamber for all of the three accused.

Regarding the issue of the status of the crime of child recruitment, the *Brima* case generally followed the finding of the Norman Jurisdiction Decision that the crime of child recruitment had been part of customary law before 1996. The *Brima* case has reinforced the legitimacy of the jurisdiction over this crime, and sent a clear message that no individual is beyond the reach of justice for the violations of recruiting child as soldiers or using them to actively participate in hostilities.

III. The Cases Concerning the RUF

²⁹¹ *Ibid*, para. 293.

²⁹² *Ibid*. para. 296.

²⁹³ UNHCR, Sierra Leone: Information on the 1997 Coup D'etat, ECOMOG harassment of civilians, and the current situation in Sierra Leone, *supra* note 277, p. 9.

In respect of the RUF trail, the SCSL has dealt with four different cases: *Prosecutor v. Issa Sesay, Morris Kallon and Augustine Gbao*, *Prosecutor v. Foday Saybana Sankoh*, *Prosecutor v. Sam Bockarie*, and *Prosecutor v. Johnny Paul Koroma*.

1. Prosecutor v. Issa Sesay, Morris Kallon and Augustine Gbao

As senior commanders of the RUF, Issa Hassan Sesay, Morris Kallon, and Augustine Gbao were indicted on 7 March 2003 on 17 counts of crimes against humanity, violations of CA3, and other serious violations of international humanitarian law, including the crime of child recruitment.²⁹⁴ Sesay and Kallon were arrested on 10 March 2003 and had their initial appearance on 15 March 2003, where they pleaded not guilty to all charges.²⁹⁵ After Gbao's arrest on March 2003, he had his first initial appearance on 25 April 2003, and also pleaded not guilty to all charges.²⁹⁶

On 5 July 2004 commenced the trial of these three former rebel leaders. Considering the systematic use of child soldiers by the RUF, the Chamber found that a substantial degree of planning of child recruitment from RUF Commanders at the highest levels existed.²⁹⁷ Based on the factual finding that Sesay and Kallon were the senior RUF Commanders in February 1998 when children were abducted in large numbers, and that Sesay and Kallon gave orders for children to be trained at RUF camps, the Chamber found that Sesay and Kallon were liable for planning the use of persons under the age of 15 years to actively participate in

²⁹⁴ SCSL, *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, SCSL-04-15, RUF Summary of the Charges, available at <http://www.scsl.org/CASES/ProsecutorvsSesayKallonadnGbaoRUFSummaryoftheCharges/tabid/185/Default.aspx> (last accessed on 11 January 2010).

²⁹⁵ SCSL, Press Release, *Sesay Plead Not Guilty: Three Other Hearing Adjourned*, 15 March 2003, available at <http://www.sc-sl.org/LinkClick.aspx?fileticket=dovl%2bKxChyg%3d&tabid=114> (last accessed on 11 January 2010). SCSL, Press Release, *Birma and Kallon Pleaded Not Guilty*, 15 March 2003, available at <http://www.sc-sl.org/LinkClick.aspx?fileticket=%2fFKRltuMyjM%3d&tabid=114> (last accessed on 11 January 2010).

²⁹⁶ SCSL, Press Release, *Gbao Plead Not Guilty to Charges in Front of the Special Court*, 15 March 2003, available at <http://www.sc-sl.org/LinkClick.aspx?fileticket=cylbZaqpFUY%3d&tabid=114> (last accessed on 11 January 2010).

²⁹⁷ SCSL, *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, SCSL-04-15-T, Trial Chamber, Judgment (hereinafter "Sesay Trial Judgment"), 2 March 2009, para. 1744.

hostilities.²⁹⁸ Due to the lack of corroborated evidence to establish a substantial contribution of Gbao to the widespread use of children soldiers, the Trial Chamber was not satisfied beyond reasonable doubt that the Accused Gbao was individual criminal responsibility under Article 6 (1) of the SCSL Statute for the crime of child recruitment.²⁹⁹ Since the Prosecution has failed to establish that Gbao was in a superior-subordinate relationship with the perpetrators of the alleged crime, he was found not liable as a superior under Article 6 (3) of the SCSL Statute for the use of children under the age of 15 to actively participate in hostilities.³⁰⁰

On 8 April 2009, the Trial Chamber sentenced Sesay a term of imprisonment of 52 years, Kallon to 40 years, and Gbao to 25 years,³⁰¹ for war crimes and crimes against humanity committed during the 1996-2001 period of the civil war in Sierra Leone. According to the judgment, Sesay was convicted on 16 counts,³⁰² including the crime of child recruitment;

²⁹⁸ *Ibid.*, paras. 2223-2237.

²⁹⁹ *Ibid.*, paras. 2235-2236.

³⁰⁰ *Ibid.*, para. 2237.

³⁰¹ *Ibid.*, Disposition.

³⁰² The Trial Chamber found with respect to the Accused Sesay to be responsible for Court 1- Acts of Terrorism, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II; Count 2- Collective Punishments, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II; Count 3- Extermination, a Crime against Humanity; Count 4 - Murder, a Crime against Humanity; Court 5 - Violence to life, health and physical or mental well-being of persons, in particular murder, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, pursuant to Article 6 (1) of the Statute by participating in a joint criminal enterprise, in relation to events in Tikonko, Sembehun and Gerihun in Bo District, in Kenema District, in Kono District, and in Kailahun District; Count 6 - Rape, a Crime against Humanity; Count 7 – Sexual Slavery, a Crime against Humanity; Count 8 – Other inhumane acts (forced marriage), a Crime against Humanity; Count 9 - Outrages upon personal dignity, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II; Count 10 - Violence to life, health and physical or mental well-being of persons, as mutilation, a Violation of Article 3 common to the Geneva Conventions and of Additional Protocol II; Count 11- Other inhumane acts (physical violence), a Crime against Humanity; Count 12 - Conscription of children under the age of 15 years into armed groups, or using them to participate actively in hostilities, another serious violation of international humanitarian law; Count 13 - Enslavement, a Crime against Humanity; Count 14 – Pillage, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, Count 15 - Intentionally directing attacks against personnel involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as well as Count 17 - Violence to life, health and physical or mental well-being of persons, in particular murder, a

Kallon was convicted on 16 counts,³⁰³ including the crime of child recruitment; and Gbao was convicted on 14 counts,³⁰⁴ but was acquitted from the charge of the crime of child recruitment.

violation of Article 3 common to the Geneva Conventions and of Additional Protocol II. Pursuant to Article 6 (3) of the Statute as a superior in relation to events in Bombali and Tonkolili District. See SCSL, *Sesay* Trial Judgment, *supra* note 297, Disposition.

³⁰³ The Trial Chamber found with respect to the Accused Kallon to be responsible for Court 1- Acts of Terrorism, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II; Count 2 - Collective Punishments, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II; Count 3- Extermination, a Crime against Humanity; Count 4 - Murder, a Crime against Humanity; Count 5 - Violence to life, health and physical or mental well-being of persons, in particular murder, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, pursuant to Article 6 (1) of the Statute by participating in a joint criminal enterprise, in relation to events in Tikonko, Sembahun and Gerihun in Bo District, in Kenema District, in Kono District, and in Kailahun District, as well as instigating Murder in relation to an event in Wenedu in Kono District; Count 6 - Rape, a Crime against Humanity; Count 7 – Sexual Slavery, a Crime against Humanity; Count 8 – Other inhumane acts (forced marriage), a Crime against Humanity; Court 9 - Outrages upon personal dignity, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II; Count 10 - Violence to life, health and physical or mental well-being of persons, as mutilation, a Violation of Article 3 common to the Geneva Conventions and of Additional Protocol II; Count 11- Other inhumane acts (physical violence), a Crime against Humanity; Count 12- Conscripting children under the age of 15 years into armed groups, or using them to participate actively in hostilities, another serious violation of international humanitarian law; Count 13 - Enslavement, a Crime against Humanity; Count 14 – Pillage, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, Count 15 - Intentionally directing attacks against personnel involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as well as Count 17 - Violence to life, health and physical or mental well-being of persons, in particular murder, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, pursuant to Article 6 (3) of the Statute as a superior in relation to events in Bombali and Tonkolili District. See SCSL, *Sesay* Trial Judgment, *supra* note 297, Disposition.

³⁰⁴ The Trial Chamber found with respect to the Accused Kallon to be responsible for Court 1- Acts of Terrorism, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II; Count 2- Collective Punishments, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II; Count 3- Extermination, a Crime against Humanity; Count 4 - Murder, a Crime against Humanity; Count 5 - Violence to life, health and physical or mental well-being of persons, in particular murder, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, pursuant to Article 6 (1) of the Statute by participating in a joint criminal enterprise, in relation to events in Tikonko, Sembahun and Gerihun in Bo District, in Kenema District, in Kono District, and in Kailahun District; Count 6- Rape, a Crime against Humanity; Count 7 – Sexual Slavery, a Crime against Humanity; Count 8 – Other inhumane acts (forced marriage), a Crime against Humanity; Count 9- Outrages upon personal dignity, a violation of Article 3 common

All the three accused and the Prosecution appealed the Trial Judgment to the Appeals Chamber, with 46 Grounds filed by Sesay, 31 by Kallon, 19 by Gbao and 3 by Prosecution.³⁰⁵ Sesay appealed his conviction for his role in the use of child soldiers and Kallon appealed his conviction for planning the use of child soldiers.³⁰⁶ The Prosecution in Ground 2 appealed the acquittal of Gbao for the crime of child recruitment.³⁰⁷ As to the Sasay's and Kallon's appeals, the Appeals Chamber unanimously upheld their convictions on the 16 counts, including the crime of child recruitment.³⁰⁸ But the Appeals Chamber unanimously dismissed the Prosecution's appeal on the acquittal of Gbao for the crime of child recruitment, because the Prosecution failed to prove beyond reasonable doubt that Gbao had significant contribution to the commission of the crime of child recruitment.³⁰⁹ In April 2009, the Appeals Chamber sentenced Sesay to 52 years of imprisonment, while resented Kallon for 39 years, and Gbao for 20 years.³¹⁰

The case against Sesay has been one of the most anticipated trials before the SCSL, and its analysis of the crime of child recruitment has indeed contributed to the furtherance of international criminal justice and has also enhanced the accountability for the use of child soldiers in armed conflicts.

2. Prosecutor v. Foday Saybana Sankoh

to the Geneva Conventions and of Additional Protocol II; Count 10 - Violence to life, health and physical or mental well-being of persons, as mutilation, a Violation of Article 3 common to the Geneva Conventions and of Additional Protocol II; Count 11 - Other inhumane acts (physical violence), a Crime against Humanity; Count 13 - Enslavement, a Crime against Humanity; Count 14 - Pillage, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, Count 15 - Intentionally directing attacks against personnel involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations. See SCSL, *Sesay Trial Judgment*, *supra* note 297, Disposition.

³⁰⁵ SCSL, *Sesay Trial Judgment*, *supra* note 297, para. 12.

³⁰⁶ SCSL, *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, SCSL-04-15-A, Appeals Chamber, Judgment (hereinafter "*Sesay Appeals Judgment*"), 26 October 2009, paras. 26-27.

³⁰⁷ *Ibid.*, para. 29.

³⁰⁸ *Ibid.*, paras. 9-11. See also SCSL, *Sesay Trial Judgment*, *supra* note 297, Disposition.

³⁰⁹ SCSL, *Sesay Appeal Judgment*, *supra* note 304, paras. 1169-1180.

³¹⁰ *Ibid.*, Disposition.

Foday Saybana Sankoh, one of the leaders of the RUF, was indicted on 7 March 2003 on 17 counts of crimes against humanity, and war crimes, including the crime of child recruitment.³¹¹ Sankoh was accused of personally having ordered many operations, including one called “Operation Pay Yourself” that encouraged troops to loot anything belonging to the civilians.³¹² Sankoh was arrested after his soldiers gunned down a number of protesters outside his home in Freetown in 2000.³¹³ Sankoh died in custody of natural causes on 29 July 2003, while awaiting trial.³¹⁴ On 8 December 2003 the Prosecutor formally withdrew the indictment against Sankoh.³¹⁵

3. *Prosecutor v. Sam Bockarie*

Sam Bockarie, former Battlefield Commander of the RUF,³¹⁶ was indicted on 7 March 2003 on 17 counts of crimes against humanity, and war crimes, including the crime of child recruitment.³¹⁷ Bockarie was infamous for his brutal tactics, and earned the nickname “Mosquito” for his ability to attack when his enemies were off-guard.³¹⁸ Bockarie was killed in Liberia, which was officially reported to be a shootout with Liberian forces in May

³¹¹SCSL, *Prosecutor v. Foday Sankoh*, SCSL-03-02-I-001, Indictment, 7 March 2003, para. 50.

³¹² Foday Sankoh, available at <http://www.spiritus-temporis.com/foday-sankoh/> (last accessed on 3 June 2010).

³¹³Mark Tran, Charles Taylor and Conflict in West Africa, Global Policy Forum, 4 June 2007, available at <http://www.globalpolicy.org/component/content/article/165/29621.html> (last accessed on 3 June 2010).

³¹⁴ Home Office, *Sierra Leone Country Report, Country Information & Policy Unit*, Immigration and Nationality Directorate, Home Office, United Kingdom, April 2004, available at http://www.ecoi.net/file_upload/panja1_02787sie.pdf (last accessed on 3 June 2010).

³¹⁵ SCSL, *Prosecutor v. Foday Sankoh*, SCSL-03-02-PT, Withdrawal of Indictment, 8 December 2003, p. 2.

³¹⁶ Alpha Sesay, *Tylaor Says RUF Commander Sam Bockarie Did Not Take Orders from Him*, available at <http://www.charlestaylortrial.org/2009/08/05/taylor-says-ruf-commander-sam-bockarie-did-not-take-orders-from-charles-taylor/> (last accessed on 6 January 2010).

³¹⁷SCSL, *Prosecutor v. Sam Bockarie*, SCSL-03-04-I, Indictment, 7 March 2003, para. 49.

³¹⁸ Agaro, *Sierra Leone*, available at <http://www.arago.si.edu/index.asp?cmd=1&con=1&tid=2041528> (last accessed on 6 January 2010).

2003.³¹⁹ The proceedings against Bockarie by the SCSL were terminated on 8 December 2003.³²⁰

4. Prosecutor v. *Johnny Paul Koroma*

Johnny Paul Koroma, former Head of State and Chairman of the AFRC, was indicted on 7 March 2003 on 17 counts of crimes against humanity and war crimes, including the crime of child recruitment.³²¹ During the period covered by the indictment, the AFRC and RUF alliance were allegedly led armed attacks throughout the territory of Sierra Leone under the orders of Koroma.³²² The alliance is reported to have forcibly recruited children into armed groups.³²³ Koroma fled Freetown in January 2003, and is still at large.³²⁴

IV. Prosecutor v. *Charles Ghankay Taylor*

Another case before the SCSL is the trial of Charles Ghankay Taylor (hereinafter “Taylor case”), the former President of Liberia, who was indicted on 7 March 2003 on 17 charges. Taylor has been charged with the crime of child recruitment as a commander responsible for crimes committed by “the members of the RUF, the AFRC, the AFRC/RUF Junta, who allegedly conscripted, enlisted and/or used boys and girls under the age of fifteen to participate in active hostilities”.³²⁵ Many of the children allegedly were abducted, and then trained in the AFRC and/or the RUF camps in various locations throughout the country, and thereafter used as fighters.³²⁶

³¹⁹ The Sierra Leone Web, Sierra Leone News May 2003, available at <http://www.sierra-leone.org/Archives/slnews0503.html> (last accessed on 6 January 2010).

³²⁰ SCSL, Prosecutor v. *Sam Bockarie*, SCSL-03-04-PT, Withdrawal of Indictment, 8 December 2003.

³²¹ SCSL, Prosecutor v. *Johnny Paul Koroma*, SCSL-03-03-I, Indictment, 7 March 2003, para. 47.

³²² Trial Watch, *Johnny Paul Koroma*, available at http://www.trial-ch.org/en/trial-watch/profile/db/facts/johnny-paul_koroma_161.html (last accessed on 6 January 2010).

³²³ *Ibid.*,

³²⁴ SCSL, Prosecutor v. *Johnny Paul Koroma*, SCSL-03-03-I, Indictment, 7 March 2003.

³²⁵ SCSL, Prosecutor v. *Charles Ghankay Taylor*, SCSL-03-01-PT, Prosecution’s Second Amended Indictment, 29 May 2007, p. 6.

³²⁶ *Ibid.*,

On 31 May 2004, the Appeals Chamber dismissed a motion by Taylor, which challenged the indictment against him on the grounds of sovereign immunity and extraterritoriality.³²⁷ On the same day, Taylor was apprehended by the Nigerian authorities and flown to Monrovia where he was arrested by the United Nations Mission in Liberia (hereinafter “UNMIL”).³²⁸ On 29 March 2006, Taylor was arrested by the Nigerian police,³²⁹ and then was taken into the custody of the SCSL.³³⁰ He is charged with crimes against humanity and war crimes over his alleged role in the brutal civil war in Sierra Leone where he was accused of backing rebels.³³¹ The Prosecution has contended that Taylor is liable for each of these counts pursuant to joint criminal enterprise liability, because he intended each of the charged crimes as means to gain political and physical control of Sierra Leone and its diamonds.³³²

³²⁷ SCSL, *Prosecutor v. Charles Ghankay Taylor*, Decision on Immunity from Jurisdiction, Appeals Chamber, 31 May 2004.

³²⁸ Nicolas Cook, *Liberia's Post-War Development: Key Issues and U.S. Assistance*, CRS Report for Congress, Prepared for Members and Committees of Congress, 25 May 2010, p. 52, available at <http://allafrica.com/download/resource/main/main/يداتس/00020134:647db2db06d5d692bfc52e365debb773.pdf> (last accessed on 3 November 2010). See also SCSL Office of the Prosecutor Press Release, *Prosecutor Welcomes UN Security Council Resolution Granting the United Nations Mission in Liberia (UNMIL) Chapter VII Powers to Arrest Charles Taylor*, 14 November 2005, available at <http://www.sc-sl.org/LinkClick.aspx?fileticket=bOPxFQrJBdo%3d&tabid=196> (last accessed on 6 January 2010). SCSL, *Prosecutor v. Charles Ghankay Taylor*, available at <http://www.sc-sl.org/CASES/ProsecutorvsCharlesTaylor/tabid/107/Default.aspx> (last accessed on 6 January 2010).

³²⁹ The New York Times, *Liberian Warlord Charles Taylor caught in the Nigeria*, 29 March 2006, available at <http://www.nytimes.com/2006/03/29/world/africa/29iht-web.0329taylor.html> (last accessed on 5 November 2010).

³³⁰ SCSL Press Release, *Prosecutor v. Charles Ghankay Taylor*, available at <http://www.sc-sl.org/CASES/ProsecutorvsCharlesTaylor/tabid/107/Default.aspx> (last accessed on 5 November 2010).

³³¹ SCSL, *Prosecutor v. Charles Ghankay Taylor*, SCSL-03-01-PT, Prosecution's Second Amended Indictment, *supra* note 325. See also BBC News, *Charles Taylor Caught in Nigeria*, 29 March 2006, available at <http://news.bbc.co.uk/2/hi/africa/4856120.stm> (last accessed on 5 November 2010).

³³² Jennifer Easterday, *The Trial of Charles Part I: Prosecuting "Persons who bear the Greatest Responsibility"*, UC Berkeley War Crimes Studies Centre, June 2010, p. 26. See also SCSL, *Prosecutor v. Charles Ghankay Taylor*, SCSL-03-01-327, Prosecution notification of filing of amended case summary, 3 August 2007, paras. 43.1-43.2.

On his first appearance at the SCSL, Taylor pleaded not guilty.³³³ On 30 June 2006, Taylor was transferred to the ICTY under the security concern.³³⁴ At the time of writing this dissertation (end of 2011), Taylor is under trial in The Hague before the Trial Chamber of the SCSL, which has heard testimony from over 35 Prosecution witnesses. A trial verdict is expected in 2011.

Based on the established evidence, the Pre-trial Chamber confirmed that Taylor was one of the principal organizers and sponsors of the RUF and was “actively involved in fueling the violence in Sierra Leone”.³³⁵ However, Taylor denied that children were deployed as fighters during the civil war.

*“So when you hear of reports that there were some young men seen carrying rifles, these reports are true. But what the reports don’t say is this: that the men that they see carrying these rifles are young men walking with their families, but do not enter combat. Never enter combat.”*³³⁶

³³³ SCSL, Press Release, 29 March 2006, available at <http://www.sc-sl.org/LinkClick.aspx?fileticket=hWEjA9QZgI0%3d&tabid=196> (last accessed on 6 January 2010).

³³⁴ SCSL, *Prosecutor v. Charles Ghankay Taylor*, SCSL-03-01-1-PT, Decision on Defence Oral Application for Orders Pertaining to the Transfer of the Accused to The Hague, 23 June 2006. SCSL Office of the Prosecutor Press Release, Prosecutor David M. Crane Calls Taylor a Continuing Threat to Regional Peace, 20 September 2004, available at <http://www.sc-sl.org/LinkClick.aspx?fileticket=cYUJ9%2fFigg0%3d&tabid=196> (last accessed on 6 January 2010). See also SCSL, Fifth Annual Report of the President of the Special Court for Sierra Leone, June 2007 to May 2008, p. 5.

³³⁵ Jacqueline Geis & Alex Mundt, *When to Indict? The Impact of Timing of International Criminal Indictments on Peace Processes and Humanitarian Action*, Brookings, p. 3, available at [http://www.reliefweb.int/rw/RWFiles2009.nsf/FilesByRWDocUnidFilename/RWST-7RAQ9A-full_report.pdf/\\$File/full_report.pdf](http://www.reliefweb.int/rw/RWFiles2009.nsf/FilesByRWDocUnidFilename/RWST-7RAQ9A-full_report.pdf/$File/full_report.pdf) (last accessed on 18 October 2010). See also Gabriel I.H. Williams, *The Special Court and Charles Taylor’s Possible Indictment, The Perspective*, Atlanta Georgia, 11 November 2002, p. 3, available at <http://www.theperspective.org/slspecialcourt.html> (last accessed on 16 October 2010).

³³⁶ Africa News, Legal and Judicial Affairs: *Taylor Used Children to Help War, But not to Fight*, 16 July 2009.

Although the surprise move of the Prosecutor to indict Taylor raised some criticisms,³³⁷ the trial against Taylor is definitely one of the most high profile cases before the SCSL, and serves as one of milestones in the process of prosecuting political leaders for accountability for the use of child soldiers in armed conflicts.

B. Situations and Cases before the International Criminal Court

The ICC has been devoting considerable energy to investigating the crime of child recruitment through its first set of cases. It's very first trial, the case of Lubanga (hereinafter "*Lubanga case*"), was launched exclusively on the charge of the crime of child recruitment. Besides the *Lubanga case*, the ICC showed its sustained attention to the crime of child recruitment by indicting seven other leaders.³³⁸

Currently, four situations³³⁹ have been referred to the Court.³⁴⁰ Among them, the situations in Uganda and in the DRC are involving charges concerning the crime of child recruitment. In the situation of Uganda, four former members of the LRA, who have been charged with the crime of child recruitment, are still under arrest. In the situation of the DRC, the Accused Bosco Ntaganda (hereinafter "*Ntaganda case*") is still at large, while the trial of Germain

³³⁷ The SCSL battled a lack of political will in the international community to hand Taylor over to the tribunal. The indictment of Taylor by the SCSL was viewed by most of the African delegates and regional heads of state "as an affront to their sovereignty and regional pride" and challenged the jurisdiction of the SCSL on Taylor case by holding that the SCSL was a court of international character. For example, the Foreign Minister of Ghanaian criticized the request of the SCSL to arrest Taylor as "embarrassing". For more details, see Jacqueline Geis & Alex Mundt, *When to Indict? The Impact of Timing of International Criminal Indictments on Peace Processes and Humanitarian Action*, *supra* note 335, pp. 3-5. Jennifer Easterday, *The Trial of Charles Part I: Prosecuting "Persons who bear the Greatest Responsibility"*, *supra* note 332, p. 49.

³³⁸ The seven other leaders are Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen, Thomas LubangaDyilo, Germain Katanga, Mathieu Ngudjolo Chui, and BoscoNtaganda.

³³⁹ Three States Parties to the Rome Statute – Uganda, the DRC and the Central African Republic (hereinafter "CAR") – have referred situations occurring on their territories to the Court. In addition, the Security Council referred the situation in Darfur, Sudan, a non-State Party to the Court. See <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/> (last accessed on 6 January 2010).

³⁴⁰ Although the situations were solely from Africa, where some of the most serious violations of human rights were happening, it is hoped that other jurisdictions outside Africa known for grave human rights violations will also be referred to the Court.

Katanga and Mathieu Ngudjolo Chui (hereinafter “*Katanga case*”) is at the pre-trial stage, and the case against Lubanga is under trial at the time when the dissertation is drafted.³⁴¹ As to the situations in the CAR and in Darfur, Sudan, so far there are no child-related cases.

I. The Situation in Uganda: Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen

In January 2004, Ugandan President Yoweri Museveni referred the situation of abuse of human rights in Uganda to the ICC. The Situation concerned the crimes committed by the LRA, who waged an intensive war against the government forces in Northern Uganda.³⁴² On 6 October 2005, the ICC issued arrest warrants for five senior military leaders of the LRA: Joseph Kony, Vincent Otti, Okot Odhiambo, Raska Lukwiya³⁴³ and Dominic Ongwen. There are 33 charges in total, of which 12 counts concerns crimes against humanity and another 21 counts regarding war crimes, including the crime of child recruitment.³⁴⁴ Although Kony denied all the charges, especially the recruitment of child soldiers,³⁴⁵ the LRA is infamous for its notorious atrocities, including abduction of children who were used as fighters, porters or sex slaves.³⁴⁶

³⁴¹ *Ibid.*

³⁴² Global Policy Forum, *International Criminal Court Investigations Uganda*, available at <http://www.globalpolicy.org/component/content/article/164/28660.html> (last visit 18 October 2010).

³⁴³ BBC News, *Ugandan Army “Kills Senior Rebel”*, 13 August 2006. According to spokesmen for the military, the Ugandan army killed Lukwiya on August 12, 2006. According to the decision of Pre-Trial Chamber II, ICC-02/04-02/05-248, 11 July 2007, to terminate the proceedings against Raska Lukwiya, the warrant of arrest is rendered without effect therefore the name of Raska Lukwiya has been removed from the case.

³⁴⁴ ICC Press Release, *Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Raska Lukwiya and Dominic Ongwen*, ICC-02/04-01/05, available at <http://www.iccpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200204/related%20cases/icc%200204%200105/uganda?lan=en-GB> (last visit 5 January 2010).

³⁴⁵ Reuters AlertNet, *No Deal After U.N. Official meets Uganda Rebel Kony*, 12 November 2006, available at <http://www.alertnet.org/thenews/newsdesk/L12604312.htm> (last visited on 18 October 2010).

³⁴⁶ ICC, Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005, ICC-02/04-01/05, Pre-trial Chamber, 27 September 2005, para. 5, available at <http://www.icc-cpi.int/iccdocs/doc/doc97185.PDF> (last accessed on 5 November 2010). See also Henry Mukasa & Barbara Among, *If Kony says he is ready to sign, that arrangement can be made but only if he is going to assemble at*

Although the warrants were issued already for more than five years, the four accused remain at large in the territories of the State parties to the ICC.³⁴⁷ Since the ICC has no police force to arrest any accused, the cooperation of State Parties to arrest and transfer the suspect seems to be of great significance for the success of the ICC.³⁴⁸

II. The Situation in the Democratic Republic of the Congo

1. Prosecutor v. Thomas Lubanga Dyilo

The first charge issued by the ICC was against Lubanga, the founder of the Union of Patriotic Congolese (hereinafter “UPC”) and the commander-in-chief of the Patriotic Force of Liberation of the Congo (hereinafter “FPLC”), for his role in the recruitment of child soldiers.³⁴⁹ During the period of his control over the UPC, a large number of atrocities, such as mass killings, destruction of property, rape and torture of civilians, were committed by the UPC in the Ituri Region of north-east Congo.³⁵⁰ The Court established in its Decision on the Confirmation of Charges (hereinafter “Decision on Confirmation”) that children were recruited into the ranks of the FPLC on a huge scale.³⁵¹ It further has been established that

Ri-kwangba, Congo Watch, 31 December 2008, available at

http://congowatch.blogspot.com/2008_12_01_archive.html (last visit 5 January 2010).

³⁴⁷ The Enough Project, *Wanted by the ICC: The LRA's leaders: Who They Are and What They've Done*, available at

<http://www.iccpi.int/menus/icc/situations%20icc%200204/related%20cases/icc%200204%200105/ugada?lan=en-GB> (last accessed on 5 January 2010).

³⁴⁸ Stephen Kabera Karanja, *Child Soldiers in Peace Agreements: The Peace and Justice Dilemma*, *supra* note 270. “Article 86 calls upon the State Parties to cooperate fully with the Court in its investigation of crimes and prosecution of culprits within the jurisdiction of the Court. Any failure in cooperation will reduce the Court to a mere “paper tiger” and as a result bringing culprits to justice will be severely hampered”.

³⁴⁹ Christopher W. Mullins & Dawn L. Rothe, *Blood, Power and Bedlam: Violations of International Criminal Law in Post-Colonial Africa*, *supra* note 60, p. 19.

³⁵⁰ Chris McGreal, *Hague's Credibility in Dock as Trial over Child Soldiers Opens*, *The Guardian*, 26 January 2009, available at <http://www.guardian.co.uk/world/2009/jan/26/hague-trial-child-soldiers-congo> (last accessed on 18 October 2010).

³⁵¹ ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06, Pre-Trial Chamber I, Public Redacted Version with Annex I, Decision on the Confirmation of Charges, 29 January 2007, para. 251. “Children were made up over fifty

Lubanga played an overall role as a coordinator in the FPLC policy to systematically enlist and conscript child soldiers and also provided the organizational, infrastructural and logical support for its implementation.³⁵²

Lubanga was arrested in Kinshasa on 17 March 2006, and was transferred to the ICC by the Congolese government.³⁵³ On 22 February 2008, due to the failure of the Prosecution to supply potentially exculpatory evidence, Lubanga was put to wait for a determination of whether he should remain in the custody of the Court or whether he should be released, with or without condition.³⁵⁴ The case now is returned to the bench.

The Pre-Trial Chamber confirmed that substantial evidence is sufficient enough to believe that Lubanga was responsible, as co-perpetrator, for the conscription and enlistment of children under the age of 15 years into the FPLC from the beginning of September 2002 to 2 June 2003 in an international armed conflict; and from 2 June 2003 to 13 August 2003 in a non-international armed conflict.³⁵⁵ The trial against Lubanga began on 26 January 2009 and is expected to be finish in 2011.

The Lubanga case is not only the first trial before the ICC, but also the first case that “an individual has been brought before an international court solely on account of the crime of

percent of their ranks in armies.” See The Redress Trust, *Victims, Perpetrators or Heroes?: Child Soldiers before the International Criminal Court, Report*, September 2006, pp. 17-18, available at <http://www.redress.org/downloads/publications/childsoldiers.pdf> (last accessed on 5 January 2010).

³⁵² ICC, Prosecutor v. *Lubanga*, Decision on the Confirmation of Charges, *ibid*, paras.252, 253.

³⁵³ Stephanie Hanson, *Council on Foreign Relations, Africa and International Criminal Court*, available at http://www.cfr.org/publication/12048/africa_and_the_international_criminal_court.Html (last visited 16 June 2009).

³⁵⁴ ICC, Prosecutor v. *Lubanga*, ICC-01/04-01/06, Public, Urgent, Order for Submissions on the Detention of Thomas Lubanga Dyilo, 22 October 2008, p. 3.

³⁵⁵ ICC, *Lubanga* case, Decision on the Confirmation of Charges, *supra* note 351. See also Jason Morgan-Foster, *ICC Confirms Charges Against DRC Militia Leader*, ASIL Insights, 9 March 2007, p. 11, available at <http://mail.tjisl.edu/exchange/SusanT/Inbox/ASIL%20Insight:%20ICC%20Confirms%Ch> (last accessed on 6 January 2010).

child recruitment.³⁵⁶ As the first case concerning the crime of child recruitment before the ICC, Lubanga trial was described as “an important stage” in the efforts to establish individual criminal responsibility for the use of child soldiers in military operation.³⁵⁷ As the Chief Prosecutor of the ICC, Luis Moreno Ocampo, stated:

*“Regardless of the outcome of the proceedings, this case represents a huge step in the struggle against these serious crimes against children”.*³⁵⁸

Additionally, the *Lubanga* case definitely will be of crucial importance to the work of the ICC in the clarification of the substantive provision on the crime of child recruitment.³⁵⁹ This case is also representing a valuable precedence on the explanation of the definition of the crime of child recruitment, especially regarding the terms of “national armed forces” used in Article 8 (2) (b) (xxvi).³⁶⁰ Therefore, this jurisprudential development will not only have an impact on the following trial afterwards, but it could also have repercussions beyond the ICC in the development of the jurisprudence of the crime of child recruitment.

³⁵⁶ ICC Press Release, *Child Soldiers charges in the First International Criminal Court Case*, ICC-OTP-20070129-196-En, The Hague, 28 August 2006, available at <http://www.icc-cpi.int/press/pressreleases>, (last accessed on 6 January 2010).

³⁵⁷ However, the political controversy and international dispute over the very first trial were leveled at the trial from human rights groups and organizations, such as lack of communication, and the issue of sovereignty was one of these major questions concerning the court. See Justin Coleman, *Showing its Teeth: The International Criminal Court Takes On Child Conscription in the Congo, But Is Its Bark Worse Than Its Bite?*, 26 Penn St. Int’l L. Rev. (2008) 765, p. 768. Among all the dispute, some criticized that charges against Lubanga was only limited to the recruitment of child soldiers. The failure of charging other crimes, such as rape and torture, would lead to damage the credibility of the ICC. See, for example, Chris McGreal, *International: Hague’s Credibility in Dock as Trial over Child Soldiers Opens*, *supra* note 350, p. 24. On the contrary, others supported the prosecution of merely the crime of child recruitment, and claimed that such prosecution increased the awareness about this crime. See Human Rights Watch, *D.R. Congo: ICC Charges Raise Concern, Joint Letter to the Chief Prosecutor of the International Criminal Court*, 31 July 2006, available at <http://hrw.org/english/docs/2006/08/01/congo13891.htm> (last visited 27 June 2009).

³⁵⁸ ICC, *Child Soldiers Charges in the First International Criminal Court Case*, *supra* note 256.

³⁵⁹ Stephen Kabera Karanja, *Child Soldiers in Peace Agreements: The Peace and Justice Dilemma*, *supra* note 270, p. 28.

³⁶⁰ Article 8 (2) (b) (xxvii) is applicable to international armed conflicts. For more details about this Article, see above chapter 1. For more details of the terms of “national armed forces”, see *infra* Chapter 4.

2. Prosecutor v. *Germain Katanga and Mathieu Ngudjolo Chui*

On 2 July 2007, the second warrant of arrest was issued against Germain Katanga, the chief commander of the Force de Résistance Patriotique en Ituri (hereinafter “FRPI”).³⁶¹ Katanga was surrendered to the ICC by the DRC on 17 October 2007, and was transferred to the Detention Centre in The Hague.³⁶² One of the former leaders of the Front des nationalistes et intégrationnistes (hereinafter “FNI”), Mathieu Ngudjolo Chui, was arrested on 6 February 2008, and soon was transferred to the Detention Centre of the ICC.³⁶³ Considering the identical crimes committed by the FRPI and the FNI, the two cases were joined into one trial.³⁶⁴ The two Accused allegedly jointly committed, through their subordinates, “the use of child under the age of 15 years to take active part in hostilities in the territory of Ituri District before, during and aftermath of the attack on the village of Bogoro on 24 February 2003”.³⁶⁵ On 27 June 2008 commenced a confirmation of charges hearing. Based on the established evidence, the Pre-trial Chamber found that

“There is sufficient evidence to establish substantial grounds to believe that Katanga and Ngudjolo consistently used children for multiple purposes, including direct participation in hostilities within

³⁶¹ ICC, Prosecutor v. *Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07, Warrant of Arrest for Germain Katanga, 2 July 2007.

³⁶² *Ibid.*

³⁶³ ICC, Prosecutor v. *Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-02/07, Warrant of Arrest for Mathieu Ngudjolo Chui, 6 July 2007.

³⁶⁴ The Chamber stated that joining the cases would not prejudice the subjects or would not be contrary to the interest of justice, see Coalition for the International Criminal Court, *ICC to Open Second Trial Against two Congolese Warlords Katanga and Ngudjolo, Alleged Crimes include Rape, Sexual Slavery and Recruitment of Child Soldier*, 20 November 2009, p. 1, available at http://www.iccnw.org/documents/Katanga-Ngudjolo_trial_CICC_PR_Nov09_EN.pdf (last accessed on 5 January 2010). See also Coalition for the International Criminal Court, *Katanga - Ngudjolo Chui Case*, available at <http://www.iccnw.org/?mod=drctimelinekatanga> (last accessed on 5 January 2010).

³⁶⁵ ICC, Prosecutor v. *Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07, Public Redacted Version, Decision on the Confirmation of Charges, 30 September 2008, paras. 243, 253-263.

*the FNI/FRPI militias prior to, during, and following the attack of Bogoro on 24 February 2003”.*³⁶⁶

As the charges have been confirmed, Trial Chamber II was constituted for the subsequent hearings which started on 24 November 2009.³⁶⁷ This case was highlighted by the large number of participating victims. A total of 345 applicants have been granted victim status for the *Katanga* case, compared to 93 for the Lubanga trial.³⁶⁸ A group of child soldiers as child witnesses is represented by a separate counsel.³⁶⁹

3. Prosecutor v. *Bosco Ntaganda*

The Fourth warrant of arrest was issued against Bosco Ntaganda, the former associate of Lubanga and the Commander-in-Chief of the FPLC.³⁷⁰ It is alleged that Ntaganda had *de jure* and *de facto* authority over the FPLC training camp and used his authority to actively

³⁶⁶ *Ibid.*, paras. 253-256, 258, 263. It is said that some of the children under the age of fifteen years were also used by Mathieu Ngudjolo Chui, Germain Katanga and other FNI/FRPI commanders as personal escorts and bodyguards.

³⁶⁷ ICC Press Release, *Opening of the Trial in the Case of Germain Katanga and Mathieu Ngudjolo Chui on 24 November, 2009*, ICC-CPI-20091120-PR477, 20 November 2009, available at <http://www.iccpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200107/press%20releases/pr477> (last accessed on 6 January 2010).

³⁶⁸ Coalition for the International Criminal Court, *ICC to Open Second Trial Against two Congolese Warlords Katanga and Ngudjolo, Alleged Crimes include Rape, Sexual Slavery and Recruitment of Child Soldier*, *supra* note 364, p. 1.

³⁶⁹ *Ibid.* The Pre-Trial Chamber recognized 345 persons, including 10 child soldiers as victims for the purpose of participating in present case. See also ICC Press Release, *Press Conference on the Opening Tomorrow of the Second Trial Before the International Criminal Court*, ICC-CPI-20091123-PR478, 23 November 2009, available at <http://www.iccpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200107/press%20releases/pr478> (last accessed on 6 January 2010).

³⁷⁰ ICC, *The Prosecutor v. Bosco Ntaganda*, ICC-CPI-20080429-PR310, available at http://iccnw.org/documents/CAD_press_release_Ntaganda_04292008_EN.pdf (last accessed on 5 January 2010). Also see, Trial Watch, *Bosco Ntaganda*, available at http://www.trial-ch.org/en/trial-watch/profile/db/facts/bosco_ntaganda_761.html (last accessed on 5 January 2010).

implement the policy of child recruitment.³⁷¹ He was accused of war crimes with regard to “conscripting, enlisting and use of children under the age of 15 to participate actively in hostilities in Ituri, the DRC, between July 2002 and December 2003”.³⁷² At the time of writing the dissertation, Ntaganda is remaining at large in the DRC.³⁷³ The ICC is calling on the relevant authorities in the DRC and in neighboring countries to arrest and transfer him to the Court.³⁷⁴ In this respect, the lack of cooperation from the State parties in arresting indicted persons may seriously undermine the authority of the Court.³⁷⁵

C. CONCLUSION

Since the Rome Statute and the SCSL Statute have expressly criminalized the child recruitment as a war crime, several former leaders were charged with this crime before both of the two courts. This judicial work is significant and precedent-setting, because, through the judicial practices, the courts not only express their commitment to end the impunity of criminals who recruited children as soldiers, but also further discourage potential warlords from this egregious violation of children’s rights. In addition, it may be hoped that these judicial practice will educate the public and create a strong awareness for the protection of children from being recruited. Since the SCSL has already reached three judgments regarding the crime of child recruitment, these trials and convictions have set the stage for trials before

³⁷¹ ICC Press Release, *Warrant Arrest Against Bosco Ntaganda Unsealed*, ICC-CPI-20080429-PR310, available at

[http://www.iccpi.int/menus/icc/press%20and%20media/press%20releases/press%20releases%20\(2008\)/warrant%20of%20arrest%20against%20bosco%20ntaganda%20unsealed](http://www.iccpi.int/menus/icc/press%20and%20media/press%20releases/press%20releases%20(2008)/warrant%20of%20arrest%20against%20bosco%20ntaganda%20unsealed) (last accessed on 5 January 2010).

³⁷² ICC, Prosecutor v. *Bosco Ntaganda*, ICC-01/04-02/06, year, available at http://www.iccnw.org/documents/International_Warrant_of_Arrest_against_Bosco_Ntaganda.pdf (last accessed on 5 January 2010).

³⁷³ ICC, Prosecutor v. *Bosco Ntaganda*, ICC-01/04-02/06, available at <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0104/Related+Cases/ICC+0104+0206> (last accessed on 5 January 2010).

³⁷⁴ AMICC, *the Case of Prosecutor v. Bosco Ntaganda at the International Criminal Court*, available at <http://www.amicc.org/docs/Ntaganda.pdf> (last accessed on 5 January 2010).

³⁷⁵ Stephen Kabera Karanja, *Child Soldiers in Peace Agreements: The Peace and Justice Dilemma*, *supra* note 270.

the ICC. However, as stated above, parts of these judgments concerning the elements of the crime of child recruitment contained some ambiguity and still need to be correctly framed from a conceptual viewpoint. The ICC therefore has an opportunity to strengthen and improve the jurisprudence emerging from the SCSL, especially the terms of “recruitment” and the definition of the phrase of “take active part in hostilities”.³⁷⁶

It should be admitted that the judicial practice relating to the crime of child recruitment is still at a low number. From this perspective, it is not realistic to expect a consensus on every legal issue concerning this crime. For this reason, the rest of the paper is devoted to a discussion of several significant and much-debated issues relevant to the crime of child recruitment.

³⁷⁶ For more details, see *infra* Chapter 4.

Part II – THE CRIME OF CHILD RECRUITMENT IN THE INTERNATIONAL CRIMINAL REGIME

Chapter 3: The Crime of Child Recruitment under Customary

International Law

The years since 1949 have witnessed some remarkable development in judicial practice regarding the use of child soldiers in hostilities, in terms of both contents and enforcement mechanism. Of particular importance is the Norman Jurisdiction Decision which was issued in May 2004. In the decision, the Appeals Chamber of the SCSL found that the crime of child recruitment, that is, “conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities”, had attained the status of customary international law by 1996.

The importance of the decision derives from the fact that establishment of the customary status of the crime of child recruitment is the surest means of providing universal cover for children from involvement in armed conflict. Since a customary international norm has the legal effect of binding all states,³⁷⁷ its application as a legal resource by courts will

³⁷⁷ The consistent objections may absolve a state from the binding of a customary international law only when the objection has been “consistently” maintained “from the early stages of the rule”. See Mark E. Villiger, *Customary International Law and Treaties*, Martinus Nijhoff Publishers, 1985, p. 16. See also Ted Stein, *The Approach of a Different Drummer: The Principle of the Persistent Objector in International Law*, 26 Harv. Int’l L.J. (1985): 457, p. 457. The International Court of Justice has endorsed the persistent objector rule. See ICJ, *Fisheries case, United States v. Norway*, 18 December 1951, ICJ Report 1951, pp. 116, 131; See also ICJ, *Asylum case, Colombia v. Peru*, Judgment, 20 November 1950, ICJ Report 1950, pp. 266, 277–78. However, a state cannot be a persistent objector to *jus cogens* rules and theorists have generally concluded that the practical application of the rule is limited. See also Michael Byers, *Custom, Power, and the Power of Rules*, Cambridge University Press, 1999, p. 181. See also Jonathan I. Charney, *The Persistent Objector Rule and the Development of Customary International Law*, 1 Brit. Y.B. Int’l. L. (1986), p. 11. See also Linda A. Malone, *International Law*, Aspen Publishers, 2008, p. 25.

consequently deter potential perpetrators from recruitment or use children in armed conflicts anywhere in the world.³⁷⁸

This legal opinion is of particular significance, as it has set a valuable precedent concerning the prosecution and conviction of persons who committed child recruitment. Trial Chambers of both the *Brima* case and the *Sesay* case confirmed the finding of the Norman Jurisdiction Decision that the crime of child recruitment had been part of customary law before 1996.³⁷⁹ Nevertheless, this has remained a controversial issue to date, as to whether or not the crime of child recruitment had crystallized as a norm of customary international law by November 1996.

This chapter is thus firstly devoted to an analysis of the verifiability of the finding that child recruitment had acquired the customary status as a war crime by 1996.³⁸⁰ The analysis is aimed at showing some flaws contained in the reasoning of the Majority Opinion of the Norman Jurisdiction Decision, which requires questions be raised of the principle of legality. Furthermore, a further analysis will be made to find out about the status of child recruitment under customary international law as of today,³⁸¹ to which the second part of the present chapter is intended to give an answer.

A. Legal Significance of the Status of the Crime of Child Recruitment Under Customary International Law

The analysis of the status of customary international law regarding child recruitment is based on two considerations: a) the binding force of customary international law, and b) the principle of *nullum crimen sine lege*.

³⁷⁸ Pilar Villanueva Sainz-Pardo, *Is Child Recruitment as a War Crime Part of Customary International Law?*, 12 International Journal of Human Rights (2008):555, p. 555.

³⁷⁹ For more details, see the case concerning the AFRC and II. 1. *Prosecutor v. Issa Sesay, Morris Kallon and Augustine Gbao*, Chapter 2.

³⁸⁰ See *infra* C. Status of the Crime of Child Recruitment as Customary International Law before 1996, Chapter 3.

³⁸¹ This will be discussed in following part D. Status of the Crime of Child Recruitment as Customary International Law as of Today, Chapter 3.

I. The Binding Force of Customary International Law

Customary international law confers a norm with an obligatory power, by which all states³⁸² are bound to observe, no matter whether a state happens to be party to an international treaty containing the rule in question or not.³⁸³ Such obligatory power inherent to customary international law is binding on all states of the international community except for the consistent objectors, and cannot, according to the ICJ in the *North Sea Continental Shelf* case, be “the subject of any right of unilateral exclusion exercisable at will by any one of them [*i.e.* States] in its own favor.”³⁸⁴

1. The Limitation of Treaty Laws

Compared with the customary international law, treaties are usually limited in application and in themselves cannot provide universal cover for all cases without exceptions. As far as treaties are concerned, signing and accession are required for a treaty to become binding.

³⁸² The consistent objections may absolve a state from the binding of a customary international law only when the objection has been “consistently” maintained “from the early stages of the rule”. See Mark E. Villiger, Customary International Law and Treaties, *supra* note 377, p. 16. See also Ted Stein, *The Approach of a Different Drummer: The Principle of the Persistent Objector in International Law*, *supra* note 377, p. 457. The International Court of Justice has endorsed the persistent objector rule. See ICJ, Fisheries case, *supra* note 377, pp. 116, 131; See also ICJ, Asylum case, *supra* note 377, pp. 266, 277–78. However, a state cannot be a persistent objector to *jus cogens* rules and theorists have generally concluded that the practical application of the rule is limited. Michael Byers, Custom, Power, and the Power of Rules, *supra* note 377, p. 181. See also Jonathan I. Charney, *The Persistent Objector Rule and the Development of Customary International Law*, *supra* note 377, p. 11. See also Linda A. Malone, International Law, *supra* note 377, p. 25.

³⁸³ ICJ, Legality of the Threat or Use of Nuclear Weapons, *supra* note 107, para. 79. “It is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and ‘elementary considerations of humanity’ as the Court put it in its Judgment of 9 April 1949 in the *Corfu Channel* case [ICJ Reports 1949, p. 22], that the Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of customary international law.”

³⁸⁴ ICJ, North Sea Continental Shelf Case, Federal Republic of Germany v. Denmark/Netherlands, Judgment, 20 February 1969, ICJ Reports 1969, para. 63.

From this perspective, an international convention only has the binding force over the contracting parties, but not over those which choose to remain uncommitted. Yet it is often with the latter that the problem is most serious.

The case of Somalia presents a good example. Somalia is one of the only two countries in the world which have so far ignored all the international instruments providing the prohibition of child recruitment, having neither ratified the CRC,³⁸⁵ nor the AP I and the AP II,³⁸⁶ nor the ACRWC,³⁸⁷ nor the Convention 182,³⁸⁸ nor the OPCRC,³⁸⁹ nor signed up as a state party to the Rome Statute.³⁹⁰ Such being the case, the absence of ratifications of international treaties with the provision regarding child recruitment would leave a leeway for the Somalia government to freely recruit as many children as they like into armed forces and use them to take active part in hostilities. In fact, Somalia illustrated more than any other country the widespread use of child soldiers. According to the Global Report 2004, it is estimated that since 1991, 200, 000 children carried arms or had been recruited in Somalia's forces and groups.³⁹¹ It is necessary in this respect to examine the status of provisions regarding child recruitment as customary rules to ensure that both the government and armed groups are "bound by these rules and can be held accountable in case of non-compliance".³⁹²

³⁸⁵ See Up to now 192 States-the holdouts are United States and Somalia. ACEI, Summit for the Convention on the Rights of the Child: Mobilizing Communities for Ratification, para. 1. Available at <http://www.acei.org/summitcrc.htm>, (last accessed on 12 April, 2009).

³⁸⁶ ICRC, Treaties & Documents by Country, <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=375&ps=P>, (last accessed on 12 April, 2009).

³⁸⁷ International Secretariat of Amnesty International, *African Children's Charter: A Welcome Step to Securing the Rights of Africa's Children*, News Service 223/99, 29 November 1999, available at <http://www.hartford-hwp.com/archives/30/161.html> (last accessed on 16 January 2009).

³⁸⁸ This source is based on the ILOLEX, see <http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C182> (last accessed on 4 March 2009).

³⁸⁹ Database, Normal Commitment to Human Rights: A Global Survey, available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-b&chapter=4&lang=en (last accessed on 12 April, 2009).

³⁹⁰ The 114th ratification by Moldova in October 2010 represents an important milestone in advancing towards universal ratification of the Rome Statute.

³⁹¹ Stop the Use of Child Soldiers, *Global Report 2004: Africa Region Overview*, p. 2.

³⁹² The magazine of International Red Cross and Red Crescent Movement, *Customary International Humanitarian Law*, available at http://www.redcross.int/EN/mag/magazine2005_2/24-25.htm (last accessed on

2. The Rome Statute in Particular

As stated above, Rome Statute made decisive progress, as it criminalizes the act of child recruitment in Article 8 (2) (b) (xxvi) and Article 8 (2) (e) (vii) as an international crime attracting individual criminal responsibility to those committing the crimes as well as others who may be liable for the crimes, for example by aiding, abetting or otherwise assisting in the commission of a crime.³⁹³ However, as a treaty law, the Rome Statute has limited applicable scope.³⁹⁴ The Court may only exercise jurisdiction over state party, or on the territory of a non-state party where that non-state party has entered into an agreement with the court providing for it to have such jurisdiction in a particular case, or the Security Council has referred the situation of a non-state party to the Prosecutor.³⁹⁵ Generally speaking, the Rome Statute is legally binding mainly on the States that have pledged their support to it.³⁹⁶ And thus, even though the Rome Statute elevated child recruitment to a crime, its jurisdiction to prosecute such act, in principle, only extended as far as the States parties and has no binding power on non-party states that have withheld their support.³⁹⁷ So it is possible to

1 October 2011). Jean-Marie Henckaerts and Louise Doswald-Beck, Customary International Humanitarian Law, Cambridge University Press, Vol.3, 2005.

³⁹³ ICC, Jurisdiction and Admissibility, available at

<http://www.icc-cpi.int/Menus/ICC/About+the+Court/ICC+at+a+glance/Jurisdiction+and+Admissibility.htm>

(last accessed on 16 August 2010).

³⁹⁴ *Ibid.*

³⁹⁵ Rome Statute, *supra* note 235, Article 12.

³⁹⁶ According to Article 12 of the Rome Statute, the Court may exercise jurisdiction only under three situations: “(a) a covered crime is committed by a national of a member state; (b) a crime has been committed on the territory of a member state; or (c) a specific case is referred by the Security Council”. The exercise of the jurisdiction under the first two conditions needs the support of the state. Even though the Security Council can refer a specific case to the ICC, yet it is not always the case. So far, two situations before the ICC were referred by the Security Council that is, Sudan and Libya. Furthermore, although the Security Council can make decisions binding on Member States if necessary in order to maintain peace and security, it is not practical for the Security Council to refer all the violations involving child recruitment, especially those occurred in the non-parties, to the ICC.

³⁹⁷ Although Article 15 of the Rome Statute provided three ways to trigger the Court to exercise its jurisdiction on investigation of a situation: “(i) a State party to the Statute referred the situation to the Court; (ii) the Security Council referred a situation to the court under Chapter VII of the UN Charter; and (iii) the Prosecutor initiate

conclude that as a result of this limitation, unless a non-party state agree to allow the ICC to exercise the jurisdiction in a particular case or the Security Council refers a situation of a non-state party to the Prosecutor, non-party state's nationals who recruit or use children in the territories of the non-party States would have a very high probability of getting away with their atrocities free from any punishment.

A cursory examination of the relevant literature on this matter demonstrates that among the current 114 States Parties, the States "specially affected"³⁹⁸ by the use of child soldiers only account for a very small number.³⁹⁹ Around half of the countries that are alleged to be in serious breach of the obligation not to recruit children under the age of 15 years as soldiers are among the non-party States,⁴⁰⁰ some of whom are unwilling to consent the jurisdiction of the ICC.

The limitation of the Rome Statute restrains the court from exercising its jurisdiction in all-known cases of child recruitment.⁴⁰¹ So it is possible to conclude that as a result of this

investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court received from individuals or organizations ("communications"). So far there is the case of Darfur in Sudan, which was referred to the ICC by the Security Council and the rest are referred by the States Parties of the ICC. See also Elizabeth Aguilin-Pangalangan & H. Harry L. Roque Jr. (eds.). *The Criminal Nature of Recruitment of Child Soldiers under International Humanitarian Law*, *supra* note 133, p. 9.

³⁹⁸ ICJ, Case concerning North Sea Continental Shelf, *supra* note 384, p.29.

³⁹⁹ Lists of parties that recruit or use children in situations of armed conflict, see GASC, A/63/785-s/2009/158, 26 March 2009, Annex I and II. The highlighted states with situations of concern on child recruitment on the agenda of the Security Council, such as, Iraq, Myanmar, Nepal, Somalia, Philippines, Sri Lanka, are not yet a state party to the ICC. See Coalition to Stop the Use of Child Soldiers: Children should not Be Used in Adult Wars, 12 February Anniversary of the UN "Child Soldiers" Treaty, 11 February 2003.

⁴⁰⁰ According to the Annual Report issued by the General Assembly on 21 May 2010, 13 countries were reported in violation of their obligation not to recruit or use child soldiers in armed conflicts. They are Myanmar, Somalia, Philippines, Sri Lanka, the DRC, Uganda, Sudan, Columbia, Afghanistan, the CRA, Chad, Iraq and Nepal. Among the 13 countries up to seven of them are non-party States of the Rome Statute. They are Myanmar, Somali, Philippines, Sri Lanka, Sudan, Iraq and Nepal. See General Assembly, A/64/742-S/2010/181, 21 May 2010, Annex I and Annex II.

⁴⁰¹ Jonathan I. Charney, *Progress in International Law?*, 93 AM.J.INT'L L. (1999):452, p. 453. See also Kyle R. Jacobson, *Doing Business with the Devil: The Challenges of Prosecuting Corporate Officials Whose Business Transactions Facilitate War Crimes and Crimes Against Humanity*, 56 A.F.L.REV. (2005):167, pp. 170-171.

limitation, unless a non-party state agree to allow the ICC to exercise the jurisdiction in a particular case or the Security Council refers a situation of a non-state party to the Prosecutor, non-party state's nationals who recruit or use children in the territories of the non-party States would have a very high probability of getting away with their atrocities free from any punishment.

As to a State party, even though the ICC can exercise its jurisdiction over a national of a State Party, or over a crime occurred on the territory of a State Party, or a situation referred by the Security Council, the Court's jurisdiction is further limited to crimes taking place after 1 July 2002. If a State joins the Court after 1 July 2002, the Court only has jurisdiction after the Rome Statute entered into force for that State.⁴⁰²

3. The Need of Customary International Law

Considering treaty laws have so far failed to provide universal protection to all children from recruitment into armed conflict, the next open avenue to be explored is customary international law.

Due to its strong obligatory power, customary international law also erects a judicial authority, by which all states are bound to observe, whether or not a state happens to be party to an international treaty containing the rule in question.

II. The Inter-relationship Between Customary International Law and the Principle of *Nullum Crimen Sine Lege*

The issue of customary status of the crime of child recruitment is closely related to the principle of legality, or *nullum crimen sine lege*, which stands today as a fundamental criminal principle. The principle is intended to protect individuals from being prosecuted or punished for their act which were not violations of penal law or international law at the time

⁴⁰² Rome Statute, Article 126.

when the act was committed.⁴⁰³ As Bassiouni points out, the principle of legality plays a significant role in fighting “against unbridled abuse of power”.⁴⁰⁴

When an international tribunal is established, whether a crime exists under a customary international law is one of the major issues that a Statute drafter must take into consideration. The tribunal jurisdiction should be limited to the extent of the existing law, and should be prevented from becoming a source of, to use *bariums*, “unbridled abuse of power”.

Under this principle, it is a fundamental jurisdictional obligation upon tribunals to ascertain whether an alleged crime is part of customary international law, at the time the crime was committed. And the status of a crime as part of customary international law will probably be the final guarantee that the principle is not violated and the proceedings are legal. To better understand the importance of the customary international law in the safeguarding the rights of the defendant against unlawful prosecution, the following part will give a close examination of how customary international law plays a role in the observance of principle of legality in the establishment of jurisdiction of the international criminal tribunals.

1. The IMT and the IMTFE

Almost 70 years ago, the question of legality in criminal proceedings became the cause of a heated debate. It happened in the Nuremberg Trial, where the defendants challenged the legality of the International Military Tribunal Charter (hereinafter “IMT Charter”) and the International Military Tribunal for the Far East Charter (hereinafter “IMTFE Charter”)⁴⁰⁵,

⁴⁰³ Beth Van Schaack, *Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals*, The Georgetown Law Journal, Vol. 97, p.174. M. Cherif Bassiouni, *International Criminal Law*, Vol. 3, Transnational Publisher, 1987, p.122: “The principle of legality first and foremost means that an act must be criminalized under the applicable law when the act is committed. And then there can be no punishment of crime without a pre-existing law”.

⁴⁰⁴ M. Cherif Bassiouni, *The Law of the International Criminal Tribunal for the Former Yugoslavia*, Transnational Publishers, 1996, p. 282: the principle of legality is “not only a fairness right but also a fundamental right against unbridled abuse of power.”

⁴⁰⁵ United Nations, Charter of the International Military Tribunal-Annex to the London Agreement (Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis), 8 August 1945, 82 U.N.T.S. 280; also see the Charter and Judgment of the Nuremberg Tribunal: History and Analysis Appendix II,

with the question whether both of the two Charters were truly restating laws that had preceded the commission of the act, or the Charters prescribed new laws.⁴⁰⁶

According to the defendant, the definition of crime against humanity was unknown at the time when the alleged acts were conducted, which would have meant that the IMT Charter was a retroactive law in violation of the principle of *ex post facto* laws.⁴⁰⁷

But the Tribunals rejected the challenge raised by the decedent by asserting that crimes against humanity did not engage a newly established rule, and this crime came under the preexisting “common law crimes”, which were punishable under the criminal codes of “all civilized States”, to which Germany certainly could not claim exception.⁴⁰⁸ It was admittedly a convoluted argument. Although afterwards the tribunals managed to establish the legal grounds for their jurisdiction against persons who committed serious atrocities in WWII, numerous debate and critics were put forward on the explanation of the legality of their jurisdiction.⁴⁰⁹

United Nations General Assembly - International Law Commission, New York, 1949 (A/CN.4/5, 3 March 1949). Tokyo Charter: Special Proclamation by the Supreme Commander for the Allied Powers, 19 January 1946, T.I.A.S. No. 1589, 4 Bevans 20.

⁴⁰⁶ Almost all the defendants raised the same question on the legality of the charter. Although the tribunals took great pains to justify their jurisdiction by trying to prove the existence of crimes before WWII, especially crimes against peace, the legality of the charter still remains questionable. Even the legality of the establishment of the two war crimes tribunals was called into question. See George Ginsburgs & Vladimir Nikolaevich Kudriavtsev, *The Nuremberg Trial and International Law*, Martinus Nijhoff, 1990, pp.54, 149.

⁴⁰⁷ George Finch and Professor Hans Kelsen held the view that the conviction of the defendants of crimes against humanity and peace was undoubtedly *ex post facto*. See George Ginsburgs & Vladimir Nikolaevich Kudriavtsev, *The Nuremberg Trial and International Law*, *ibid.*, p.54. Also see M. Cherif Bassiouni, *Crimes against Humanity in International Criminal Law*, *supra* note 45, pp.165-166.

⁴⁰⁸ M. de Menthon, Opening Argument at Nuremberg, see Kenneth S. Gallant, *Principle of Legality in International and Comparative Criminal Law*, Cambridge University press, 2008, p.23-24, and Fn 118,126. Although no claim was explicitly made in the opening argument that the crimes against humanity was also a war crime, some scholars inferred from the statement that M. de Menthon implied that the crime against humanity “were also on their facts war crimes”.

⁴⁰⁹ This dissertation will not go into details of the debate and critics. For more details, see George Ginsburgs & Vladimir Nikolaevich Kudriavtsev, *The Nuremberg Trial and International Law*, *supra* note 406.

In fact, the trials conducted by the IMT and the IMTFE proved a test case.⁴¹⁰ Ever since then, the principle of legality has stood eminent in the consideration of the jurisdiction of any international tribunal afterwards. The question of non-retroactivity raised in the IMT and IMTFE has remained one of the most issues that occupy the attention of the drafters constantly, as evident from the following observation shows:

*“The principle of non-retroactivity of criminal rules is now solidly embedded in international law. It follows that courts may only apply substantive criminal rules that existed at the time of commission of the alleged crime.”*⁴¹¹

Since 1945, the principle of legality with an enhanced image has imposed a stricter standard in legal proceedings on both the national and international levels. Already, it can be seen from the establishment of the international criminal tribunals after the WWII.

2. ICTY

At the time of its establishment, the questions asked not only involved whether its jurisdiction over an offence that had already become a crime under national law or international law, but also whether a crime had already attained customary status under international law when the alleged acts were committed.⁴¹² This requirement arises mainly from the concern that the principle of legality should be fully complied with. As can be clearly seen from the Secretary-General’s Report to the Security Council regarding the establishment of the ICTY:

“The application of the principle nullum crimen sine lege requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary

⁴¹⁰ The drafters of the ICTY were determined to distance themselves from the perceived problems of the post-war tribunals. See Richard Vogler, *A World View of Criminal Justice, International and Comparative Criminal Justice*, Ashgate, 2005, p.279.

⁴¹¹ Antonio Cassese, *International Criminal Law*, *supra* note 249, p. 149.

⁴¹² “Because the Tribunal’s functions are punitive against individuals, it is bound by the principles of legality”. See M. Cherif Bassiouni, *The Law of the International Criminal Tribunal for the Former Yugoslavia*, *supra* note 404, p. 270.

*law so that the problem of adherence of some but not all States to specific conventions does not arise”.*⁴¹³

The same concern was expressed in the Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction in the *Tadic* case (hereinafter “*Tadic* Jurisdiction Decision”). In this decision, the Appeals Chamber found that,

*“The only reason behind the stated purpose of the drafters that the international Tribunal should apply customary international law was to avoid violating the principle of nullum crimen sine lege in the event that a party to the conflict did not adhere to a specific treaty”.*⁴¹⁴

However, it should be pointed out that the ICTY does not absolutely exclude the application of treaty laws. In fact, the jurisdiction of the ICTY is composed by two parts of crimes: a) treaty-based crimes, as long as the treaty is binding on the party to the conflicts; and b) crimes under customary international law.⁴¹⁵ This can be seen from the Appeal Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction in the *Tadic* case,

“[i]t should be emphasized again that the only reason behind the stated purpose of the drafters that the International Tribunal should apply customary international law was to avoid violating the principle of nullum crimen sine lege in the event that a party to the conflict did not adhere to a specific treaty. (Report of the Secretary-General, at para. 34.) It follows that the International Tribunal is authorized to apply, in addition to customary international law, any treaty which: (i) was unquestionably binding on the parties at the time of the alleged offence; and (ii) was not in conflict with or

⁴¹³ Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808 (1993), para.34, which stated that “rules of international humanitarian law which is beyond any doubt part of customary law”.

⁴¹⁴ ICTY, Prosecutor v. *Dusko Tadic*, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (hereinafter “*Tadic* Jurisdiction Decision”), 2 October 1995, Appeals Chamber, para. 143. Daniela Kravetz, *The protection of Civilian In War, The ICTY’s Galic Case*, 17 Leiden Journal of International Law (2004): 524, p.527.

⁴¹⁵ ICTY, *Tadic* Jurisdiction Decision, *ibid.*, para. 143.

*derogating from peremptory norms of international law, as are most customary rules of international humanitarian law.”*⁴¹⁶

3. ICTR

Similar with the practice of the ICTY, the ICTR Statute not only requires the Tribunal to apply customary international law, but also allows the prosecution of violations provided in treaty that Rwanda ratified, especially the AP II.⁴¹⁷ As obvious from the Secretary General’s Report of the Establishment of the ICTR:

*“Article 4 of the Statute, accordingly, includes violations of Additional Protocol II, which, as a whole, has not yet been universally recognized as part of customary international law [...]”*⁴¹⁸

However, according to Gallant,

*“The ICTR Statute included treaty-based crimes which might or might not have been customary, but applied to Rwanda through its ratification of the instruments involved and the adoption of the substance of the instruments into national law of Rwanda”.*⁴¹⁹

In other words, Rwanda was treaty-bound to implement its obligations under AP II.⁴²⁰ Therefore the leaders of Rwanda should be “reasonable awareness” of their obligation provided under the AP II. This practice, similar to that of the ICTY, does not deny the importance of the customary international law in the observance of the principle of legality.

⁴¹⁶ ICTY, *Tadic* Jurisdiction Decision, *ibid.*, para. 143. Daniela Kravetz, *The protection of Civilian in War, The ICTY’s Galic Case*, *supra* note 414, p. 527.

⁴¹⁷ Guénaél Mettraux, *International Crimes and the ad hoc Tribunals*, Oxford University Press, 2005, p. 11.

⁴¹⁸ Security Council, Report of the Secretary-General pursuant to Paragraph 5 of Security Council Resolution 955 (1994), UN Doc. S/1995/134, 13 February 1995, para.12. Also see ICTR Statute, Article 4, where its Statute requires the ICTR to apply APII.

⁴¹⁹ Kenneth S. Gallant, *Principle of Legality in International and Comparative Criminal Law*, *supra* note 408.

⁴²⁰ ICTR, *Prosecutor v. Akayesu*, ICTR-96-4-T, Trial Chamber, Judgment, 2 September 1998, para. 617.

4. SCSL

The concern of non-retroactivity was also a point of emphasis in the establishment of the SCSL, a “mixed” tribunal of domestic and international components. The Secretary-General’s Report on the Establishment of the SCSL claimed its opinion regarding the subject-matter jurisdiction:

“In recognition of the principle of legality, in particular nullum crimen sine lege, and the prohibition on retroactive criminal legislation, the international crimes enumerated, are crimes considered to have had the character of customary international law at the time of the alleged commission of the crime.”⁴²¹

However, the legality of the jurisdiction of the SCSL over the crime of child recruitment had repeatedly been challenged by the defenses, whether the child recruitment had been crystallized as a crime by 1996, when the temporal jurisdiction of the SCSL states. By 1996, Sierra Leone had been a contracting party to the GC IV, the AP I, the AP II, the CRC. However, none of the above mentioned treaties criminalize the recruitment of children as a crime in their provisions. In this respect, the inclusion of the child recruitment into the SCSL Statute largely violates the principle of legality, unless it can be proved that child recruitment had been a customary international law by 1996. This leads to the birth of the Norman Jurisdiction Decision, which will be elaborately analyzed in the following part of this Chapter.

In sum, if the principle of legality is for the protection the defendant’s rights against unlawful prosecution,⁴²² the legal ground for prosecution falls, to a large extent, on the proof of the existence of customary international law. Furthermore, due to the universal obligatory force

⁴²¹ Secretary-General’s Report on the Establishment of the Special Court for the Sierra Leone, Doc. S/2000/915, 4 October 2000, para. 12. See also SCSL, Norman Jurisdiction Decision, *supra* note 271, where the Appeals Chamber focused on the international customary nature of the child recruitment instead of simply stating that the tribunal is bound by its statute.

⁴²² Héctor Olásolo, *A Note on the Evolution of the Principle of Legality in International Criminal Law*, Criminal Law Forum, Volume 18, Numbers 3-4, December 2007. Kenneth S. Gallant, Principle of Legality in International and Comparative Criminal Law, *supra* note 408, Chapter 6.

of the customary international law, the customary international law can establish an extraordinary jurisdiction over all persons and all states, especially when there was no written rule covering the crime at the time it was committed, or when treaties or international conventions are found to have had no power regarding a non-party state.

All the reasons cited above should give us ample justification to devote the following section to the issue of whether the crime of child recruitment has the characteristics of customary international law. To begin with, the next part will give a brief overview of the prerequisites of a customary international law and the ways they are usually expressed.

B. Assessment of Customary International Law

Customary international law, in Article 38 of the Statute of the International Criminal Court (hereinafter “ICJ Statute”), refers to “international custom, as evidence of a general practice accepted as law”. This formulation, though vague and descriptive, has been universally accepted. In 2000, the 69th Conference of the International Law Association held in London considered the Report of the International Committee on the Formation of Customary International Law (hereinafter “ILA Conference London Report 2000”)⁴²³ where definition of customary international law was again codified as follows:

“[A] rule of customary international law is one which is created and sustained by the constant and uniform practice of States and other subjects of international law in or impinging upon their international legal relations, in circumstances which given rise to a legitimate expectation of similar conduct in the future.”⁴²⁴

As can be seen from the above cited definitions, the establishment of a customary rule requires two main elements: state practice and *opinio juris*.

⁴²³ International Law Association, Conference Resolution London 2000, Resolution No. 16/2000, Formation of General Customary International Law.

⁴²⁴ ILA, Final Report of the Committee on the Formation of Customary (General) International Law, Statement of Principles Applicable to the Formation of General Customary International Law, Report of the Sixty-Ninth Conference, London, 2000, Principle 4 and commentary (a) thereto, pp. 725–726 (hereinafter “ILA London Conference Report 2000”), p. 8.

I. State Practice

As for what practice contributes to the creation of the customary international law, the International Law Commission considers both physical and verbal acts of a State as State practice.

Physical acts frequently cited as examples of State practice include battlefield behavior, reports on military operations and arresting people or seizing property.⁴²⁵ Verbal acts include “diplomatic Statements (including protests), policy statements, press releases, official manuals (e.g. on military law), instructions to armed forces, comments by governments on draft treaties, legislation, decisions of national courts and executive authorities, pleadings before international tribunals, statements in international organizations, and the resolution these bodies adopt”.⁴²⁶

For a verbal act to count as State practice, it must be a public act; consequently, acts, such as internal memoranda, confidential opinions of Government legal advisers, and secret “bugging” of diplomatic premises would hardly fall under the term ‘State practice’.⁴²⁷ Similarly, acts of individuals, corporations, non-governmental entities have apparently little to do with State practice, unless “carried out on behalf of the State or adopted by the state”.⁴²⁸

The second consideration, whether a practice creates a rule of customary international law, must take account of the density of such a practice.⁴²⁹ The density requirement is a measure involving three separate but closed related issues, namely, virtual uniformity,

⁴²⁵ *Ibid.*, p. 14. See also Mark E. Villiger, Customary International Law and Treaties, *supra* note 377, p. 13.

⁴²⁶ ILA London Conference Report, *ibid.*, p. 14. See also Mark E. Villiger, Customary International Law and Treaties, *ibid.*

⁴²⁷ ILA Report, *ibid.*, p. 15.

⁴²⁸ *Ibid.* pp. 16-18.

⁴²⁹ *Ibid.*, p. 20.

representativeness and continuity.⁴³⁰ This is to say that a customary rule must involve certain behavior virtually universal among all states and not some isolated incidence of practice of small number of states. Only when all three criteria are met, can a certain state practice be said to be a contributing factor to the formation of a customary international law.⁴³¹

1. Virtually Uniform

Firstly, for State practice to create a customary international norm, it must meet the standard of “virtually uniform”, both internally and collectively. The term “internal uniformity” was defined by the ILA as “each State whose behaviour is being considered should have acted in the same way on virtually all of the occasions on which it engaged in the practice in question”.

As to what constitutes an “internal uniformity”, the ICJ jurisprudence has given some explanations. In the *Nicaragua case*, the Court went over the question of what has been termed “internal uniformity”, emphasizing that inconsistency or uncertainty in a State’s practice is not fatal, as long as “it does not try to excuse its non-conforming conduct by asserting that it is legally justified”.⁴³² In the judgment, the Court stated:

“The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct

⁴³⁰ Jean-Marie Henckaerts, *Customary International Humanitarian Law: a response to US Comments*, International Review of the Red Cross, Volume 89, Number 866, June 2007, pp. 3-5.

⁴³¹ ICJ, North Sea Continental Shelf cases, *supra* note 384, para.74: “Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.”

⁴³² ILA London Conference Report, *supra* note 424, p. 22.

inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justification contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule."⁴³³

A virtually uniform State practice must also be "collective uniformity", that is, "different States must not have engaged in substantially different conduct, some doing one thing and some another".⁴³⁴ And therefore a "constant and uniform usage" or a general consistency across States in their practice is required to meet the standard of "collective uniformity". In the Asylum case, the ICJ emphasized the need of "constant and uniform usage" with respect to the exercise of diplomatic asylum:

"The party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party, [...] that it is in accordance with a constant and uniform usage practiced by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State.

[...]

The facts brought to the knowledge of the Court disclose so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum and in official views expressed on various occasions, there has been so much inconsistency in the rapid succession of conventions on asylum, ratified by some states and rejected by others, and the practice has been so much influenced by considerations of political expediency in the various cases, that it is not possible to discern in all this any constant and uniform usage, accepted as law, with regard to the alleged rule of unilateral and definitive qualification of the offence."⁴³⁵

⁴³³ ICJ, Case Concerning Military and Paramilitary Activities in and against Nicaragua, *Nicaragua v. United States of America*(Merits), Judgment, 27 June 1986, para. 186.

⁴³⁴ ILA London Conference Report, *supra* note 424, p. 21.

⁴³⁵ ICJ, Asylum case, Judgment, *supra* note 377, p. 277.

However, it should be not be read as if a few uncertainties or contradictions in a State practice necessarily constitute a bar to the formation of a rule of customary international law. The issue came up in the Nicaragua case, when the court examined the customary nature of the non-intervention principle:

*“The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolute rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.”*⁴³⁶

In other words, contrary practice is not deemed sufficient to undermine the formation of a rule of customary international law, unless it is the official practice of the states affected, or it is condemned by other States.⁴³⁷

2. Extensive and Representative

For the determination of the existence of a customary international law, it is not necessary to prove the consent of each individual State, but the State practice must be both extensive and representative. There is nevertheless no mathematical formula or a precise percentage for calculating how widespread a practice must be, it will be mainly based on the “degree of repetitiveness of the practice”.⁴³⁸ As can be seen in the North Sea Continental Shelf Cases, the Court emphasized that State practice does not need to be universal among all the states.

⁴³⁶ ICJ, Case concerning Military and Paramilitary Activities in and against Nicaragua, *supra* note 433, para. 186.

⁴³⁷ Jean-Marie Henckaerts, Study on customary international humanitarian law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict, 857 International Review of the Red Cross (2005):175, p. 180.

⁴³⁸ ILA London Conference Report 2000, *supra* note 424, p. 25.

Instead, the Court stipulated that State practice must be “extensive and representative”,⁴³⁹ as is given in the following description:

*“With respect to the other elements usually regarded as necessary before a conventional rule can be considered to have become a general rule of international law, it might be that, even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected.”*⁴⁴⁰

Similarly, the ILA in its London Conference Report 2000 pointed out that the question concerned of the evaluation of “extensive and representative” criterion is not how many States in the same practice, but which States, especially the States whose interests are specially affected.⁴⁴¹

A following question is who are “specially affected” States. Given to the scope and the nature of the interests, the answer may vary according to circumstances.⁴⁴² As Henckaerts pointed out, in the case of the legality use of blinding laser weapons, those “identified as having been in the process of developing such weapons” are considered as “specially affected States”.⁴⁴³ Concerning the rules of international humanitarian law, “specially affected States” generally include those “participated in an armed conflict” and those whose “practice examined for a certain rule was relevant to that armed conflict”.⁴⁴⁴

⁴³⁹ Jean-Marie Henckaerts, *Study on customary international humanitarian law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, *supra* note 437, p. 180. See also ICJ, North Sea Continental Shelf cases, *supra* note 384, pp. 13-14. ICJ in the North Sea Continental Shelf Cases explicitly stated that “within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked.”

⁴⁴⁰ ICJ, North Sea Continental Shelf cases, *ibid.*, para. 73.

⁴⁴¹ ILA London Conference Report 2000, *supra* note 424, p. 26 (e).

⁴⁴² *Ibid.*

⁴⁴³ Jean-Marie Henckaerts, *Study on customary international humanitarian law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, *supra* note 437, p. 181.

⁴⁴⁴ *Ibid.*, p. 181.

If all specially affected States are represented, it does not necessarily require major powers must participate in a practice in order for it to become a customary international rule.⁴⁴⁵ It may not be left out of sight that a practice that is not displayed by those States “whose interests are specially affected” will in most cases not contribute to the formation of a norm of customary international law.⁴⁴⁶

Although the fact that the participation of specially affected States is important to the formation of a customary international rule, it will not necessarily be only the “specially affected” to be represented as a very widespread participation. In the most cases, the practice of other States should also be considered for the establishment of a customary international law, whether or not they are “specially affected”.⁴⁴⁷

3. Continuity and Repetition

The third requirement concerning the evaluation of state practice is related to the period of time in the formation a rule of customary international law. It is generally agreed that “some time will normally elapse” before a practice to become sufficiently dense.⁴⁴⁸ There is, however, no specific time requirement for the establishment of a customary rule. In the North Sea Continental Shelf cases, the Court emphasized that the continuity of the practice should be not interpreted literally as a requirement on temporal duration.⁴⁴⁹ On the contrary, all that

⁴⁴⁵ ILA London Conference Report, *supra* note 424, p. 26.

⁴⁴⁶ General Report to the XVIIIth Congress of the ISMILLW on the Practice and Customary Law in Military Operations, including Peace Support Operations, in: W. Heintschel v. Heinegg/C. Hellestveit/S. Horvat (eds.), *Practice and Customary Law in Military Operations*, International Society for Military Law and the Law of War, /May 2009, Brussels 2011, 61-264. See also Jean-Marie Henckaerts, *Study on customary international humanitarian law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, *supra* note 437, p. 180.

⁴⁴⁷ Jean-Marie Henckaerts, *Study on customary international humanitarian law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, *supra* note 437, p. 181.

⁴⁴⁸ *Ibid.*, p. 181 .

⁴⁴⁹ ICJ, North Sea Continental Shelf case, *supra* note 384, para. 74. “Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially

is required is “accumulating a practice of sufficient density”, in terms of uniformity, extensive and representativeness.⁴⁵⁰

II. Opinio juris

In general, *opinio juris* refers to a “belief in the legal permissibility or obligatoriness of the practice”,⁴⁵¹ or denotes a consensus that there is a rule of customary law.⁴⁵² In the assessment of *opinio juris*, the essential problem, as pointed out by Brownlie, is surely the proof of an *opinio juris*.⁴⁵³ In practice, International courts are often willing to take the approach of assuming the existence of an *opinio juris* from “the evidence of a general practice, a consensus in the literature, or the previous determinations of the Court or other international tribunals.”⁴⁵⁴ And when there is a constant and uniform State practice, there is no absolute need to prove the presence of an *opinio juris* is.⁴⁵⁵ This is mainly because verbal acts are often regarded as “indications of both practice and a corresponding *opinio juris*”.⁴⁵⁶

However, particular importance should be reserved for the evaluation of *opinio juris* in assessing the probative value of a state practice, when the state practice is not sufficiently dense.

affected, should have been both extensive and virtually uniform in the sense of the provision invoked; and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.”

⁴⁵⁰ ILA London Conference Report, *supra* note 424, p. 20 (d).

⁴⁵¹ *Ibid.*, p. 33 (b).

⁴⁵² ICJ, North Sea Continental Shelf Cases, *supra* note 384, p. 73: “it is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States”. See also M. Shaw, *International Law*, 5th (ed.), Cambridge University Press, 2003, p. 80. Jean-Marie Henckaerts, *Study on customary international humanitarian law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, *supra* note 437, p. 178.

⁴⁵³ Ian Brownlie, *Principles of Public International Law*, 6th (ed.), Oxford University Press, 2003, p. 8

⁴⁵⁴ *Ibid.*

⁴⁵⁵ ILA London Conference Report, *supra* note 242, p. 33 (16).

⁴⁵⁶ Gerhard Werle, *Principles of International Criminal Law*, T.M.C. Asser Press, 2005, p. 46. See also Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, *supra* note 437, p. 182.

An examination of the jurisprudence of the ICJ indicates that the ICJ does not specifically prove the presence of *opinio juris* except when there is a belief that the practice is ambiguous to count towards the formation of customary law.⁴⁵⁷ When analyzing a situation involving ambiguous omissions in the Lotus case, the Court disagreed with the argument of France that the absence of prosecutions for collisions on the high seas acted as evidence proving the existence of an obligation not to institute such prosecution. On the contrary, the Court found that there were other possible reasons when States omitted to prosecute in such a case. For this reason, the Court could not reach the conclusion that there were “a conscious[ness] of having a duty to abstain” among States.⁴⁵⁸

The ICJ in the *North Sea Continental Shelf* cases examined another kind of ambiguous conduct that may be taken to count towards the establishment of customary international law by mistake. In the North Sea Continental Shelf cases, Denmark and the Netherlands referred to a number of bilateral treaties in support of the existence of a general legal obligation to delimit overlapping continental shelf on the basis of equidistance. However, the Court disagreed with this argument with an examination of the presence of an *opinio juris* in order to determine whether the ambiguous practice actually contribute to the formation of customary international law.⁴⁵⁹ In the process, the Court ran up against various possible reasons why a State may apply the equidistance principle in solving the overlapping continental shelf issue, and concluded that the conduct of states in applying the equidistance principle was based on a range of different reasons, which “can only be problematical and must remain entirely speculative”.⁴⁶⁰ The final conclusion reached was that “no inference could justifiably be drawn that they believed themselves to be applying a mandatory rule of customary international law”.⁴⁶¹

⁴⁵⁷ ILA London Conference Report, *supra* note 424, p. 34.

⁴⁵⁸ Permanent Court of International Justice, Lotus case, France v. Turkey, Judgment, Serial A, No. 10, p. 28.

⁴⁵⁹ Jean-Marie Henckaerts, Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict, *supra* note 437, p. 182.

⁴⁶⁰ ICJ, North Sea Continental Shelf cases, *supra* note 384, paras. 76–77; See also ILA London Conference Report, *supra* note 424, p. 37, Principle 17(iv) and commentary.

⁴⁶¹ *Ibid.*

As stated above, if a particular practice is sufficiently dense, the Court often finds the existence of a rule of customary law without going to the length of trying to prove the existence of *opinio juris*. But in cases where the conduct is ambiguous, evidence of the *opinio juris* is critical, in that the practice must be shown to be repeated in a way which demonstrates that “a legal obligation is involved”.⁴⁶²

C. Status of the Crime of Child Recruitment as Customary International Law before 1996

The discussion above shows that as required by the non-retroactivity principle, it is necessary to ascertain the exact time when child recruitment has been crystallized as a crime under international law, and, if one goes further, it is also necessary to ask when such crime acquired the status of a customary international law in international law.

The question was answered by the Appeals Chamber in its jurisdiction decision the *Norman* case on 31 March 2004. The Chamber decided that child recruitment, namely “conscripting, enlisting children under the age of 15 in armed forces or groups or using them to participate actively in hostilities”, was a crime under customary international law before 1996. This was the first time that a particular time frame was referred to for the formation of a customary rule with regard to child recruitment. However, the decision remains controversial to date, in spite of the years that have passed since the decision was taken.

This section is therefore devoted to an examination as to whether child recruitment was indeed a crime under customary international law *prior to 1996* or it was merely regarded as a wrongdoing.⁴⁶³

From the very beginning, Justice Robertson raised a strong voice against the Majority opinion. In his dissenting opinion he asserted that child recruitment lacked the nature of

⁴⁶² ICJ, the North Sea Continental Shelf Cases, *supra* note 384, pp. 13-14. See also Nicaragua Case, *supra* note 433, para. 77.

⁴⁶³ 1996 was when the temporal jurisdiction of the SCSL started.

crime before 1996, and further stressed that this offense only be a crime in 1998 when the Rome Statute was adopted.⁴⁶⁴

The same opinion can be found in the *Brima* case⁴⁶⁵, where the defense challenged the jurisdiction of the SCSL, insisting that conscripting or enlisting children under the age of 15 was not a war crime at the time of the act alleged, and further claimed that the accused was lacking “the criminal knowledge of committing the crime of child recruitment”.⁴⁶⁶

In the following is a discussion based on the Majority opinion in the Norman Jurisdiction Decision and the dissenting opinion of Justice Robertson, in order to determine a time frame for the formation of child recruitment as a crime under customary international law.

I. Finding by the Majority in the *Norman Jurisdiction Decision*

At the beginning of the Norman trial, the defense challenged the jurisdiction of the SCSL over the crime of child recruitment on the basis of the principle of legality, that is, there was no evidence that child recruitment as defined in Article 4(c) of the Statute was recognized as a crime entailing individual criminal responsibility under customary international law at the time the alleged acts were committed back in November 1996.

Pursuant to Article 72 (E) of the Rules of Procedure and Evidence, the preliminary motion was referred to the Appeals Chamber,⁴⁶⁷ for an opinion on the question of whether and when

⁴⁶⁴ SCSL, Norman Jurisdiction Decision, Dissenting Opinion of Justice Robertson, *supra* note 271.

⁴⁶⁵ See the discussion in Chapter 2 for more detail.

⁴⁶⁶ The Appeals Chamber rejected the submission, based on the confirmation of the jurisdiction decision ruled in the *Norman* case that conscripting or enlisting children under the age of 15 years into armed force or groups or using them to participate actively in hostilities was a crime entailing individual criminal responsibility at the time of the acts alleged in the Indictment. The Appeals Chamber further claimed that it is frivolous and vexatious for Kanu to contend that the absence of criminal knowledge on his part vitiated the requisite *mens rea* in respect of the crimes relating to child soldiers. SCSL, *Brima Appeals Judgment*, *supra* note 280, paras. 732.

⁴⁶⁷ See Statute of the SCSL, article 72 (E), “When making an order under Sub-Rule (A) above, a Judge or Chamber shall wherever appropriate state in the order whether the transcript of those proceedings relating to the evidence of the witness to whom the measures relate shall be made available for use in other proceedings before the Special Court”.

the norm of child recruitment had acquired the status of a crime under customary international law.⁴⁶⁸

The defense held that even though certain international treaties, such as the AP II and CRC, might have imposed an obligation on States to refrain from recruiting child soldiers, these instruments however did not go as far as criminalizing the act prior to 1996.⁴⁶⁹ Clearly if this argument were proven true, the trial would have violated the principle of *nullum crimen sine lege*.

On the Prosecution side, it was argued that the crime of child recruitment was already part of customary international law at the time the offences were committed, and that evidence could be derived from the relevant provisions of treaty laws, especially the Rome Statute.⁴⁷⁰ Furthermore, “the sheer number of states” that illegalized the practice of child recruitment under their national law gave further evidence of the existence of the crime under customary international law.⁴⁷¹

On 31 May 2004, the Appeals Chamber by a 3:1 majority delivered a 27-page decision which stated that recruitment of children, namely “conscripting or enlisting children under the age of 15 or using them to participate actively in hostilities”, had become a crime under customary international law by November 1996.

1. The Reasoning of the Majority Decision

For its finding, the Appeals Chamber first examined relevant international instruments, particularly the GC IV, the AP I, AP II, the ACRWC and the CRC. The wide ratification of

⁴⁶⁸ Norman Jurisdiction Decision, *supra* note 271, para. 3.

⁴⁶⁹ *Ibid.*, para. 1.

⁴⁷⁰ SCSL, Prosecutor vs. Sam Hinga Norman, Preliminary Motion Based on Lack of Jurisdiction: Child Recruitment, 26 June 2003, para. 3-9; See also SCSL, Norman Jurisdiction Decision, *supra* note 271, para. 5.

⁴⁷¹ SCSL, Norman Jurisdiction Decision, *supra* note 271, para. 5, cited as “[t]he prosecution submits further that the sheer number of states that made the practice of child recruitment illegal under their domestic law demonstrated that the practice is widely viewed as unacceptable and a violation of international obligations.”

these conventions gave the Appeals Chamber reasons to believe that the *prohibition* of child recruitment had become a customary international law before November 1996.⁴⁷²

The mere prohibition, however, cannot be interpreted as criminalization. Criminalization carries criminal responsibility for the perpetrators of the offence, while the prohibition of a conduct can at the most be taken as a condemnation of a wrongdoing or a declaration of a moral stance.

Therefore, the next question, requiring clarification by the Appeals Chamber, was whether such prohibition also entailed individual criminal responsibility of the person recruiting children before 1996. In other words, the central question was whether such a prohibited act was “criminalized and punishable under international or national law”⁴⁷³, or remained a simple prohibition on States attracting no individual criminal liability.

In support of its conclusion that child recruitment had already entailed individual criminal responsibility under customary international law before 1996, the Appeals Chamber adopted a two-pronged argument: a) the act of child recruitment was a violation of fundamental humanitarian values leading to individual criminal liability before 1996, and b) such a crime had become a customary international law.⁴⁷⁴ The two aspects can be seen as follows:

*“As has been shown in the previous sections, child recruitment was a violation of conventional and customary international humanitarian law by 1996. But can it also be stated that the prohibited act was criminalised and punishable under international or national law to an extent which would show customary practice?”*⁴⁷⁵

⁴⁷² *Ibid.*, paras. 10-23.

⁴⁷³ *Ibid.*, para 25.

⁴⁷⁴ The emphasis given to the customary nature of the crime of child recruitment arises mainly from the definition of the principle of *nullum crimen sine lege*, which was defined in the Secretary-General’s Report on the establishment of the SCSL as, “in recognition of the principle of legality, in particular *nullum crimen sine lege*, and the prohibition on retroactive criminal legislation, the international crimes enumerated, are crimes considered to have had the character of customary international law at the time of the alleged commission of the crime.”.

⁴⁷⁵ See Norman Jurisdiction Decision, *supra* note 271, para. 25.

It should be noted that these two aspects are not completely independent of each other. Rather they are both required to support the compliance of the principle of *nullum crimen sine lege* in the discussed case.

To prove its point, the Appeals Chamber cited the provisions of Article 38 of the CRC⁴⁷⁶ and Article 4 of the OPCRC⁴⁷⁷, as both of which require to take “all feasible measures” to prevent recruiting and using child soldiers in hostilities. The phrase “feasible measures”, according to the Appeals Chamber, includes criminal sanction as measure of enforcement.⁴⁷⁸ This further implies that the states parties have an obligation to criminalize the act of recruitment or use of child soldiers.

Furthermore, the Rome Statute was claimed to be applicable as evidence of the existence of the crime of child recruitment under customary international law before 1996. With regard to this point, the Appeals Chamber went as far as recounting the proposal of the Germany Delegation to include child recruitment as a crime into the Rome Statute as well as the objection of US Delegation that the prohibition on child recruitment was a human rights provision rather than a criminal law one.⁴⁷⁹ The Appeals Chamber argued that the Rome Statute “focused on the codification and effective implementation of the existing customary norm rather than on the formation of a new one” and concluded that the agreement of the majority to incorporate child recruitment into the Rome Statute was sufficient enough to prove that child recruitment had already become a crime under customary international law before 1996.⁴⁸⁰

In addition, the Majority examined national legislations in regard to the crime of child recruitment. State practice of 108 states, whose national legislations included criminal sanction as a measure of enforcement, was regarded sufficient to support the finding that

⁴⁷⁶ Article 38(2) of the CRC: “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.”

⁴⁷⁷ Article 4 of the OPCRC: “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”.

⁴⁷⁸ See Norman Jurisdiction Decision, *supra* note 271, paras. 35, 41.

⁴⁷⁹ *Ibid.*, para. 33.

⁴⁸⁰ *Ibid.*, para. 33.

“[t]he recruitment of child soldiers⁴⁸¹ was criminalized before it was explicitly set out as a criminal prohibition in treaty laws by November 1996, the starting point of the frame relevant to the indictment.”⁴⁸²

2. Flaws Contained in the Majority Decision

There can be little doubt that the *prohibition* of child recruitment had become part of customary international law before 1996, and this conclusion, being uncontroversial, encountered no objection from either the prosecution or the defense counsel.

There are however some notable ambiguities in the Majority’s finding as to whether there indeed existed a crime under customary law prior to 1996. As mentioned above, the Majority’s reasoning is based on two aspects: a) the existence of the criminalization of the child recruitment in national or international law before 1996, and b) such practice had become a custom before 1996. In this respect, an examination of these two aspects will give us some bearing on the soundness of the reasoning of the Majority’s finding.

a. Flaws in the Analysis of the Child Recruitment as a Crime before 1996

As stated above, the core issue is whether the international conventions are sufficient proof of criminalization of child recruitment as a customary law before 1996. In the following a detailed examination is undertaken in an effort to reveal the flaws in the reasoning of the Norman Jurisdiction Decision.

⁴⁸¹ Although the Appeals Chamber in the *Norman* case ruled that the offence of recruitment of child soldiers had crystallized under customary international law prior to the events alleged in the Indictment, the Trial Chamber in the *Norman* case stated that the “‘use of child soldiers’, in ordinary language, could not be said to be a form of recruitment. Having considered the dismissal by the Appeals Chamber of the whole Motion relating to Article 4(c) in its totality, and having considered the available authorities, the Chamber found that ‘using child soldiers to participate actively in hostilities’ was also proscribed under customary international law prior to the events charged in the Indictment.”, see SCSL, Norman Trial Judgment, *supra* note 78, para. 197.

⁴⁸² Norman Jurisdiction Decision, *supra* note 271, para. 53.

a) The Interpretation of Obligations to Criminalize Child Recruitment under International Conventions

One of the arguments of the Appeals Chamber is that the treaties prohibiting the act of child recruitment, such as the CRC and the OPCRC, set up an obligation for State parties to criminalize this act.

Admittedly these treaties indeed imposed an obligation on the states to protect children from recruitment into armed forces or groups. Yet it is also true that none went as far as placing an obligation to criminalize the act in terms of the individual criminal responsibility. Thus, although “all feasible measures” was required by both the CRC and the OPCRC, the expression “feasible”, being open to interpretation, left the states to interpret to their own liking what was feasible. There was thus little hope for real criminal sanctions on individuals who recruit and use child soldiers.⁴⁸³ As Humphrey notes:

“No international body was created to supervise Additional Protocol II and determine which conflicts met its criteria. Similarly, the CRC did not found criminal sanctions, but an inadequate system of periodic reporting to a special committee with no faculty to force compliance, to punish non-compliance or to even hear complaints. [...] the obligation to report has been consistently breached by many states with no consequence. [...] The CRC’s simple requirement that states use ‘feasible measures’ to protect children is also weak.”⁴⁸⁴

The above passage suggests, contrary to what the Majority was claiming, these conventions, though generally accepted, demonstrated not a proof but rather a lack of commitment by the states parties to penalize child recruitment in their national laws.⁴⁸⁵

Furthermore, it should be noted that all the international conventions concerning child recruitment earlier than the Rome Statute only impose the obligation on the states not to use children in hostilities, but had not unequivocally contained any obligation on individuals not

⁴⁸³ SCSL, Norman Jurisdiction Decision, Dissenting Opinion of Justice Robertson, *supra* note 271, para.28.

⁴⁸⁴ Thomas Humphrey, *Child Soldiers: Rescuing the Lost Children*, *supra* note 84, p.123.

⁴⁸⁵ *Ibid.*

to do so. In this respect, the interpretation by the Appeals Chamber confuses the issue of the “obligations upon states parties to make the particular conduct criminal in their national laws” with that of “the creation of an international crime”.⁴⁸⁶

b) The Rome Statute in Particular

The claim that the Rome Statute codified an existing customary norm regarding child recruitment was also hard to be substantiated. The Appeals Chamber was known to have supplied three reasons with respect to the conclusion that Rome Statute codified an existing customary norm regarding child recruitment. Firstly, “the first draft of the Rome Statute was produced as early as 1994 referring generally to war crimes”; secondly, “in the first session of the Preparatory Committee it was proposed that the ICC should have the power to prosecute serious violations of Common Article 3 and Additional Protocol II”; and lastly, the inclusion of child recruitment into the Rome Statute “was justified by the near universal acceptance” and the act of child recruitment “warranted the most fundamental disapprobation”.⁴⁸⁷

The fact that war crimes were drafted into the Rome Statute in 1994 does not however imply that the act of child recruitment was necessarily included as one of those criminalized at the time. The fact is that the proposal for the inclusion of child recruitment as a crime was raised for the first time in 1997, as revealed by a trace of the PrepCom.⁴⁸⁸ According to Humphrey, “the issue of criminalization [of child recruitment] was mostly a reaction to the Machel Report, received in 1996 and discussed in 1997.”⁴⁸⁹ This is to say that the relevant timeframe for formulization of child recruitment as a crime should center around the period between the receipt of the Machel Report in 1996 and the adoption of the Rome Statute.

⁴⁸⁶ Matthew Happold, *Child Soldiers in International Law*, *supra* note 55, pp. 131-132.

⁴⁸⁷ Norman Jurisdiction Decision, *supra* note 271, para. 33.

⁴⁸⁸ Preparatory Committee on the Establishment of an International Criminal Court, *Decisions Taken by the Preparatory Committee its Session Held from 11 to 21 February 1997*, A/AC.249/1997/L.5, March 1997. See also Matthew Happold, *Child Recruitment as a Crime under the Rome Statute of the International Criminal Court*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=979916 (last visit on 15 March 2012), p.20.

⁴⁸⁹ Thomas Humphrey, *Child Soldiers: Rescuing the Lost Children*, *supra* note 84, pp. 120-121.

Nor was the second reason provided in support of the claim any more convincing. The Appeals Chamber referred to the power of the ICC to prosecute serious violations of Common Article 3 and the AP II, in an attempt to demonstrate that the Rome Statute did not create a new legislation on the crime of child recruitment. But no adequate ground was given by the Appeals Chamber for the claim that child recruitment constituted a serious violation or a grave breach of the AP II. Due to the lack of further analysis, child recruitment appears to have been included in the Rome Statute as a crime simply because child recruitment was prohibited under the AP II. As it stands, a mere mention of the power of the ICC to prosecute serious violations of Common Article 3 and AP II does not constitute sufficient proof that child recruitment had been incorporated as a crime before 1996. Besides, Common Article 3 and AP II only cover situations in non-international armed conflicts but not those involving international armed conflicts.⁴⁹⁰

The third reason was more of an attempt at patchwork to stop any loophole left by the first two reasons supplied. However, the vague and ambiguous statement does not sufficiently warrant the conclusion that child recruitment was a crime before 1996. The near universal acceptance of the norm of child recruitment only related to the prohibition but not the criminalization of the act of child recruitment, considering, “individual breaches of human rights norms are not *per se* criminal unless specifically criminalized”.⁴⁹¹

Actually even by October 2000, or two years after the adoption of the Rome Statute, the question remained unresolved whether child recruitment was a crime under customary international law. This can be seen from the Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, where the issue of the customary nature of the crime of child recruitment resurfaced. The report raised the doubt again: “it is far less clear whether it is customarily recognized as a war crime entailing the individual criminal responsibility of the accused”,⁴⁹² when referring to the formulation of the Rome Statute with regard to child recruitment.

⁴⁹⁰ Matthew Happold, *Child Recruitment as a Crime under the Rome Statute of the International Criminal Court*, *supra* note 488, p. 20.

⁴⁹¹ *Ibid.*

⁴⁹² Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, *supra* note 245, para. 17.

The Appeals Chamber is therefore argued to have neither addressed the issue of when child recruitment became a crime, nor supplied evidence enough for a conclusion that such a crime had crystallized as customary international law before the Rome Statute.

b. Lack of Sufficient National Legislation in the Analysis of Customary International Law

Since state practice and *opinio juris* are the two major elements required for proving the existence of a customary international law, in the following these two aspects will be examined in verification of the Majority's finding.

a) State Practice of the Crime of Child Recruitment

As discussed in Chapter 1, no international instruments have been found criminalizing the act of child recruitment up to 1996. Now it must be examined if there was any evidence at the national level of imposing criminal responsibility on perpetrators before 1996.

According to the Majority, "by 2001, and in most cases prior to the Rome Statute, 108 states explicitly *prohibited* child recruitment. [...] The list of states in the 2001 Child Soldiers Global Report clearly shows that states with quite different legal systems - civil law, common law, Islamic Law - share the same view on the topic."⁴⁹³

However as argued early, the principle of *nullum crimen sine lege* requires a well-established crime, which cannot be easily substituted with something like a vaguely expressed moral stance or a mere declaration of abhorrence or prohibition. Yet the legislations referred to in the Majority's finding were unfortunately prohibition of child recruitment only.

If the distinction between prohibition and criminalization is made, then one fact that stood out was that among these 108 States, only five had actually *criminalized* the offence in their

⁴⁹³ Norman Jurisdiction Decision, *supra* note 271, para. 44.

criminal laws prior to 1996.⁴⁹⁴ The question then is how the five countries be construed as evidence of an “extensive and virtually uniform” state practice of criminalizing child recruitment offenses.

The Majority also attempted to draw support by stating that:” sanctions can be found [...] in administrative legislation, or in the laws by civil servants.”⁴⁹⁵ Here the Majority seems to claim the same value of an administrative or civil measure to criminal sanctions. It is questionable if these administrative laws indeed play the same extent of function as the criminal provisions⁴⁹⁶ *i.e.* punishing the perpetrator or deterring the potential criminals. Rather, it must be concluded that the state practice as presented by the majority did not qualify for the “virtually uniform” standard for the formation of a customary international law, but for “a particular serious wrongdoing”.⁴⁹⁷

b) *Opinio Juris* of the Crime of Child Recruitment

As stated above, in situations where practice is ambiguous, the examination of the evidence of the *opinio juris* become particularly crucial in determining whether or not a practice counts towards the formation of a custom. In the current case, there is neither dense practice on the criminalization of child recruitment before 1996, nor the possibility of the formation of an *opinio juris*.

⁴⁹⁴ SCSL, Norman Jurisdiction Decision, Dissenting Opinion of Justice Robertson, *supra* note 271, paras. 42-43. See also Thomas Humphrey, *Child Soldiers: Rescuing the Lost Children*, *supra* note 84, p. 124: Among the five countries, “two of the states had military controls on the prohibition of child recruitment, and the other three had administrative controls that effectively prevented children from being enlisted.”

⁴⁹⁵ Norman Jurisdiction Decision, *supra* note 271, para. 47.

⁴⁹⁶ There is a difference between administrative measures and criminal sanctions, as the former aim at recovering benefits unduly received, whereas the latter seek to punish and deter rather than to confiscate proceeds. However, administrative sanctions, seems not being so much different in nature from criminal sanctions, requires stricter rules than administrative measures. In practice it is not always easy to decide whether a sanction is a truly penal sanction or rather than an administrative sanction. From this perspective, analysis should always be based on a case-to-case basis.

⁴⁹⁷ Happold Matthew, *Children in International Law*, *supra* note 55, p. 132.

As already pointed out, no international conventions before the Rome Statute attached individual criminal responsibility to the issue of child recruitment.⁴⁹⁸ The fact that, of the 108 states mentioned by Majority, only five countries expressly criminalized child recruitment in their criminal law seems to be a scant ground to establish a general consensus by the international community on the criminalization of child recruitment.⁴⁹⁹ Among those countries that placed child recruitment on a criminal basis, a brief in legal obligation to criminalize the conduct of child recruitment is not the only reason for using the criminal sanctions.

The lack of judicial practice concerning the crime of child recruitment, both in the World War II Tribunals, and in the post-war international criminal tribunals, is another indication of its non-customary status.⁵⁰⁰

After all being shown, if the proposition that State practice and *opinio juris* in this case sufficiently entailed individual criminal responsibility were to be allowed, it should constitute, according to Mettraux,⁵⁰¹ a case of “a rule generates a custom” rather than “a custom generates a rule”. In the words of the ICJ, the existence of a customary norm should be established

*“[b]y induction based on the analysis of a sufficiently extensive and convincing State practice, and not by deduction based on preconceived ideas as to what the law should be”.*⁵⁰²

⁴⁹⁸ Norman Jurisdiction Decision, *supra* note 271, para. 38.

⁴⁹⁹ *Ibid.*, para. 44.

⁵⁰⁰ Elizabeth Aguiling-Pangalangan & H. Harry L. Roque Jr. (eds.), *Children in Armed Conflict: Roundtable Discussion*, *supra* note 133, p. 9.

⁵⁰¹ “Many a Chamber of the *ad hoc* Tribunals has been too ready to brand norms as customary, without giving any reason or citing any authority for that conclusion. What judges find to be customary may be what they are willing or able to find in the practice of states and their *opinio juris* so that customary law has to a large extent been a matter of opinion, rather than one of existing state practice, to a point where it sometimes seems that “rule laid down by judges have generated custom, rather than custom generated the rules.” See Guénaél Mettraux, *International Crimes and the ad hoc Tribunals*, *supra* note 417, p.15, fn.8-9.

⁵⁰² ICJ, *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, Judgment, ICJ Reports 1984, para.111.

3. Conclusion

In sum, based on the above discussion, it must be contended that the Majority decision was inherently flawed.⁵⁰³ Evidence from the available international instruments and national domestic legislations before only 1996 showed that the view shared among the international community by 1996 was that recruitment of child soldiers was an abhorrent wrongdoing. However there was no indication of a consensus that it amounted to a crime. A most regrettable fact this is. Surely “we might wish the law were otherwise,” as stated in the IMT Trial, “but we must administer it as we find it”.⁵⁰⁴

II. Dissenting Opinion Delivered by Justice Robertson

1. Major Arguments in the Dissenting Opinion of Justice Robertson

Justice Robertson in his Dissenting Opinion in the Norman Jurisdiction Decision questioned the accuracy of the Majority finding, arguing that the Decision based on the finding was inconsistent with the principle of legality in criminal law.

The main argument of Justice Robertson was that up to 1996 no provision of child enlistment (*i.e.* recruitment of volunteers) as a crime could be found in the treaty laws. This conclusion was reached on the basis of separating forcible child recruitment from child enlistment. It was his belief that the two should belong to two different categories of recruitment, in spite of they lead to the same consequence that children are enrolled in the armed forces or groups.

As far as forcible recruitment was concerned, there was no question to Justice Robertson that “the use of physical force or threats in order to recruit children” had already acquired the status of a crime under customary international law by November 1996. However, if the question was mainly concerned with the means of how a child became involved in armed conflict rather than the end, child *enlistment* plays a crucial role on the discussed issue. It was

⁵⁰³ Guénaél Mettraux, *International Crimes and the ad hoc Tribunals*, *supra* note417, p.15. See also Thomas Humphrey, *Child Soldiers: Rescuing the Lost Children*, *supra* note84, p.125.

⁵⁰⁴ *United States v. Von Leeb and Others*, US Military Tribunal sitting at Nuremberg, Judgment of 28 October 1948, in *Law Reports of Trials of War Criminals*, XI (“*High Command case*”), p. 563.

highly unlikely that the child *enlistment* had been developed as a crime before November 1996.

To support his argument, Justice Robertson carefully went through the preparatory work leading up to the adoption of the SCSL Statute. A close scrutiny revealed a major difference between the proposal of the Secretary-General on child recruitment and that of the President of the Security Council.

In the proposal of the Secretary-General, child enlistment was not included into the crime of child recruitment. This is made abundantly clear in the Secretary-General's Report on the Establishment of the SCSL:

*“Owing to the doubtful customary nature of the ICC’s statutory crime which criminalizes the conscription or enlistment of children under the age of fifteen, 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. [...] The elements of the crime under the proposed Statute of the Special Court are: Abduction and forced recruitment in the most general sense, and transformation of the child into, and its use as, among other degrading uses, a ‘child combatant’.”*⁵⁰⁵

Clearly, here “voluntary” enlistment was pronounced as having a ‘doubtful’ customary status and thus excluded from the proposed crime. But in the letter of the President of the Security Council, one finds that the crime of child recruitment expanded to include child enlistment.⁵⁰⁶ The difference in their treatment of child enlistment was the question Justice Robertson raised, which challenged the certainty that the Majority felt about the criminal status of child enlistment:

“[i]t might strike some as odd that the state of international law in 1996 in respect to criminalization of child enlistment was doubtful to

⁵⁰⁵ Norman Jurisdiction Decision, Dissenting Opinion of Justice Robertson, *supra* note 271, para. 4.

⁵⁰⁶ *Ibid.*, para. 5. See also Security Council, Letter dated 22 December 2000 from the President of the Secretary Council addressed to the Secretary-General, S/2000/1234, 22 December 2000, Annex, p. 5.

*the UN Secretary-General in October 2000 but was very clear to the President of the Security Council only two months later.”*⁵⁰⁷

There was little doubt to Justice Robertson that the status of *child enlistment* as a crime remained ambiguous.

Furthermore, an examination of the PrepCom showed that even though the draft statute for the ICC was submitted by International Law Commission in 1994, the proposal to include child enlistment as a crime was not raised until December 1997,⁵⁰⁸ which did not get its final approval until as late as July 1998.

It was thus groundless to conclude that there existed a widely accepted obligation on states to criminalize child enlistment as early as 1996. If the status of child enlistment remained dubious to the UN Secretary-General in 2000, was there really legal ground for the child enlistment became a crime by 1996? Or what knowledge could one attribute to the defendant on the ground?

Finally, the relevant state practice up to 1996 regarding child enlistment was examined, which showed few provisions by the national authorities to criminalize voluntary enlistment before 1996.⁵⁰⁹

All this led Justice Robertson to conclude that prosecution and punishment of *child enlistment* before 1996 was fallible, for lack of sufficient legal ground. In fact, July 1998, when the ICC was established,

“was the beginning of crystallization point of child enlistment? [...] The state practice immediately after July 1998 demonstrates that the

⁵⁰⁷ Norman Jurisdiction Decision, Dissenting Opinion of Justice Robertson, *supra* note 271, para. 6.

⁵⁰⁸ Preparatory Committee on the Establishment of an International Criminal Court, Decisions Taken by the Preparatory Committee its Session Held from 11 to 21 February 1997, *supra* note 488. See also Matthew Haggold, *Child Recruitment as a Crime under the Rome Statute of the International Criminal Court*, *supra* note 488, p.20.

⁵⁰⁹ Norman Jurisdiction Decision, Dissenting Opinion of Justice Robertson, *supra* note 271, para. 20. As Judge Robertson emphasized in the Dissenting Opinion, “the Geneva Convention IV, the 1977 Protocols, the Convention on the Rights of the Child and African Charter are, even when taken together, insufficient”.

*Rome Treaty was accepted by states as a turning point in the criminalization of child recruitment.”*⁵¹⁰

2. Critics of the Dissenting Opinion of Justice Robertson

However, this is not to say that the distinction between child enlistment and forcible recruitment did not attract its own controversy. Critic on this matter was raised by some scholars.

a. Forcible Recruitment of Children as a Violation of the CA 3

Justice Robertson made a distinction in his dissenting opinion between forcible recruitment and child enlistment, to the effect that forcible recruitment had already acquired the status of a crime by November 1996, however, no evidence was found that “the law in 1996 criminalized individuals who enlisted child volunteers”.⁵¹¹ As to the reason why forcible recruitment had been a crime by 1996, Justice Robertson simply stating that forcible recruitment amounted to the violation of CA3:

*“[t]his [abduction and forcible recruitment] was in my view a war crime by November 1996; indeed, it would have amounted to a most serious breach of Common Article 3 of the Geneva Convention.”*⁵¹²

To Happold, the argument by Justice Robertson was well supported that child enlistment was not a crime before 1996. What Happold objected to was that it was questionable that forcible recruitment of children could be regarded as an offence under the CA3 by interpretation:

⁵¹⁰ *Ibid.*, para. 40.

⁵¹¹ SCSL, Norman Jurisdiction Decision, Dissenting Opinion of Justice Robertson, *supra* note 271, paras. 4-5. Since it is well recognized that CA3 is part of customary international law and its violation imposes individual criminal responsibility, the person who committed the atrocities listed in CA3 should take individual criminal responsibility for their perpetrations. ICTY Jurisprudence confirmed the opinion that CA3 is part of customary international law.

⁵¹² *Ibid.*, para. 4.

*“The problem is, however, that Common Article 3 does not specifically prohibit such conduct, nor is there any evidence additional to that adduced in the majority opinion to suggest that states had criminalized it prior to 1996”.*⁵¹³

Since CA3 does not specifically prohibit forcible recruitment, such an interpretation of the CA3 may be in breach of the principle of specificity. It must be noted that it is insufficient for criminalization to be inferred from the seriousness of the offence but must be established independently.⁵¹⁴

b. The Necessity of Distinguishing Child Enlistment and Forcible Recruitment

From a totally different perspective, Smith, objected to the distinction drawn by Justice Robertson between non-forcible recruitment and forcible recruitment.⁵¹⁵ To her, the distinction between forcible and voluntary nature of child recruitment is simply a distraction.⁵¹⁶ The purpose of this crime is to “impose liability for merely enrolling a child under the age of 15 into an armed force or group”.⁵¹⁷ To Smith, the law should focus on protecting children from recruitment into armed conflicts and not dwell on a distinction of forms of recruitment.⁵¹⁸ She maintains “the conscription or enlistment of a child under the age of 15 is a crime, whether the child is coerced or volunteers”.⁵¹⁹

However it must be remembered that the point at issue is the principle of legality, or whether there is legal precedence involving the persecution of a person for a certain act. The nature of the question thus places a stringent requirement on the principle of legality. This is abundantly demonstrated in the quote given above regarding the General-Secretary. In point

⁵¹³ Happold Matthew, *Child Soldiers in International Law*, *supra* note 55, p. 132.

⁵¹⁴ ICTY, *Prosecutor v. Dragomir Milosevic*, IT-98-29-1/A, Judgment, Partly Dissenting Opinion of Judge Liu Daqun, Appeals Chamber, 12 November 2009, para. 5.

⁵¹⁵ Alison Smith, *Child Recruitment and the Special Court for Sierra Leone*, 2 *International Criminal Justice* 1141, p. 1147.

⁵¹⁶ *Ibid.*, p. 1148.

⁵¹⁷ *Ibid.*, pp. 1148, 1152.

⁵¹⁸ *Ibid.*, p. 1147: “Whether the enlistment is voluntary or forced appears to be one of the major considerations on which the dissenting opinion is based.”

⁵¹⁹ *Ibid.*, p. 1152.

of the legality, it was felt necessary that voluntary enlistment be given a separate category of its own.

The opinion presented, on the other hand, was intended to show that although child enlistment “was abhorrent to all reasonable persons in 1996, but abhorrence alone does not make that conduct a crime in international law.”⁵²⁰

D. Status of the Crime of Child Recruitment as Customary International Law as of Today

On the analysis of the Norman jurisdiction Decision, the above discussion reveals that before 1996 child recruitment under the age of 15 years were generally deemed as a wrongdoing, at most, a prohibition under customary international law, but not a crime entailing individual criminal responsibility. As the development of the substantive laws regarding child recruitment, especially the criminalization of such act under the Rome Statute, there is little doubt that child recruitment is a war crime today. What remains to be found out now is whether this crime, as of today, has become a crime under customary international law.

As stated above, due to the intrinsic legal effect of a customary international law to bind all states, a customary status of the crime of child recruitment will have an effect of binding non-party states to prosecute and punish their nationals who committing this heinous international crime. From this perspective, the newly born international jurisprudence on child recruitment, the implementation of provision of child recruitment under the Rome Statute, and the legislation of child recruitment as a crime in domestic laws will be examined as evidence in the evaluation the customary nature of the crime of child recruitment.

As pointed out earlier, formation of customary international law requires consistent and extensive state practice and *opinio juris*.⁵²¹ The two aspects will be examined in the

⁵²⁰ Norman Jurisdiction Decision, Dissenting Opinion of Justice Robertson, para. 9.

⁵²¹ Jean-Marie Henckaerts, *Study on Customary Rules of International Humanitarian Law: Purpose, coverage, mythology*, *supra* note 437, p.178. As the International Court of Justice stated in the Continental Shelf case: “It

following, in an effort to demonstrate that child recruitment has indeed become a crime under customary international law today.

First of all, it is known that the Rome Statute has received recognition from 114 states by 2010.⁵²² So more than half of the international community, “an overwhelming majority of States”, have given their consent to apply the Rome Statute in their domestic practice and have agreed to criminalize the use of child soldiers in an explicit and precise manner.⁵²³ This is arguably a significant factor in the proof of formation of state practice.

Secondly, a number of legislative practices on criminalization of child recruitment had been carried out in domestic laws, especially since the Rome Statute came into effect. Since 2003 trials of persons charged with the crime of child recruitment have become a reality as can be seen in the court of both the SCSL and the ICC.

However, the question still remains whether such practices have reached to the extent of sufficient, or they are just practices of certain States, and should not be taken as general acceptance by the whole international community.

I. The State Practice of State Parties to the Rome Statute

The state practice of the state parties to the Rome Statute will firstly be discussed. The adoption of the Rome Statute prompted a large number of states to implement the Rome Statute’s provisions into their own laws. Since then, there has been an increasing trend to legislate the norms of the child recruitment as a crime at the national level.

is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States”, ICJ, North Sea Continental Shelf case, Judgment, *supra* note 384, p.73.

⁵²² The 114th ratification by Moldova in October 2010 represents an important milestone in advancing towards universal ratification of the Rome Statute. See ICC, the *States Parties to the Rome Statute*. See <http://www.icc-cpi.int/Menus/ASP/states+parties> (last accessed on 30 December 2010).

⁵²³ The 1996 Rome Statute was regarded as a reflection of the legal views of an overwhelming majority states in *Furundzija* case. ICTY, *Prosecutor v. Auto Furundzija*, IT-95-17/1-T, Judgment, Trial Chamber, 10 December 1998, para. 227. Kenneth S. Gallant, *The Principle of Legality in International and Comparative Criminal Law*, *supra* note 408, p.229.

For the Monism States, such as Germany, The Netherlands, Poland, Russian, South Africa, and Austria, the act of ratifying the Rome Statute means an immediate incorporation of the provisions of the Rome Statute into their national laws. Therefore, judges in the national courts can apply the Rome Statute directly, just as if it were part of the national law.

As for the Monism States, the incorporation is often either redundant or very little is required, Austria and Germany still incorporate the provisions regarding the crime of child recruitment into their national system. **Australia** adopted the *International Criminal Court (Consequential Amendments) Act in 2002* to criminalize the offence of “using, conscripting and enlisting children in the course of an international armed conflict.”⁵²⁴ The **German** legislator, in the *Völkerstrafgesetzbuch (VStGB)* of 26 June 2002, adopted the definition provided in the Rome Statute word by word, such that the crime is defined as “[W]er im Zusammenhang mit einem internationalen oder nicht internationalen bewaffneten Konflikt [...] Kinder unter 15 Jahren für Streitkräfte zwangsverpflichtet oder in Streitkräfte oder bewaffnete Gruppen eingliedert oder sie zur aktiven Teilnahme an Feindseligkeiten verwendet, [...]”⁵²⁵ According to § 8 (1) (5), child recruitment attracts a punishment of imprisonment of at least three years.

As far as the Dualism States are concerned, many have passed legislations through the treaty-making process to criminalize the recruitment of children, either occurs in their territories or committed by their nationals.

A revised criminal code of **Burundi** adopted in 22 April 2009 defined the crime of child recruitment exactly in the wording of the Rome Statute, that is, “conscripting or enlisting of children under the age of 15 years in national armed forces or using them to participate actively in hostilities” applicable in the context of international armed conflict, and

⁵²⁴ Section 268.68(1) of the International Criminal Court (Consequential Amendments) Act, An Act to amend the Criminal Code Act 1995 and certain other Acts in consequence of the enactment of the International Criminal Court Act 2002, and for other purposes, No. 42, 2002.268.68 War crime-using, conscripting or enlisting children:(1) A person (the *perpetrator*) commits an offence if:(a) the perpetrator uses one or more persons to participate actively in hostilities; and (b) the person or persons are under the age of 15 years; and (c) the perpetrator’s conduct takes place in the context of, and is associated with, an international armed conflict.”

⁵²⁵ See § 8 (1) (5) VStGB.

“conscripting or enlisting children under the age of 15 years or using them to participate actively in hostilities”, applicable in the context of a non-international armed conflict.⁵²⁶

In **Kazakhstan**, “recruitment, training, financing or other material support for mercenaries” was prohibited under Article 162 of the Criminal Code, and the violation would cause imprisonment from 7 to 15 years.⁵²⁷

In **Lithuania**, a new Article 105 was introduced into the Criminal Code in May 2003, according to which, “the recruitment of under-18s into armed groups and their use in hostilities” is punishable by imprisonment of up to 12 years.⁵²⁸

Mongolia legislated in its domestic law against “the use of minors as foreign mercenaries in armed conflicts”, which would be punishable by a 10–15 years’ imprisonment”.⁵²⁹

⁵²⁶Article 198 (2) (z)) and Article 198 (5) (g) of Revised Penal Code 22 April 2009, No. 1/05. Article 198 (2). “Les autres violations graves des lois et coutumes applicables aux conflits armés internationaux dans le cadre établi du droit international, à savoir, l’un quelconque des actes ci-après: (z) aa. Le fait de procéder à la conscription ou à l’enrôlement d’enfants de moins de 15 ans dans les forces armées nationales ou de les faire participer activement à des hostilités.” [...] “5° “Les autres violations graves des lois et coutumes applicables aux conflits armés ne présentant pas un caractère international, dans le cadre établi du droit international, à savoir l’un quelconque des actes ci-après: (g) Le fait de procéder à la conscription ou à l’enrôlement d’enfants de moins de 15 ans dans les forces armées ou dans des groupes armés ou de les faire participer activement à des hostilités.”

⁵²⁷ The Criminal Code of the Republic of Kazakhstan, Law No. 167, 16 July 1997. Article 162: Employment of Mercenaries: “1. Enlistment, training, financing, or other material support of a mercenary, as well as the use of him in a military conflict or military actions, shall be punished by imprisonment for a period from four to eight years. 2. The same acts committed by a person with the use of his official position or with regard to an underage person, shall be punished by imprisonment for a period from seven to fifteen years with forfeiture of property, or without it. 3. Participation of a mercenary in a military conflict or military actions shall be punished by imprisonment for a period from three to seven years. 4. The act stipulated by the third part of this Article which entailed the death of people or other grave consequences, shall be punished by imprisonment for a period from ten to twenty years with forfeiture of property, or life-time imprisonment with forfeiture of property”.

⁵²⁸ Criminal Code of the Republic of Lithuania, adopted on 26 September 2000, by the Law No.III-1968.

⁵²⁹ The Criminal Code of Mongolia, 10 January 2002, MN016. Article 303(1) of the Criminal Code of Mongolia, “use of foreign mercenaries in armed conflicts or warfare, training, financing or support of them in other forms shall be punishable by imprisonment for a term of more than 5 to 8 years.”

In **Sierra Leone**, there have been reported several trials of persons who recruited children. The SCSL was created by the government of Sierra Leone in conjunction with UN in January 2002, for purpose of conducting trials of those “bearing the greatest responsibility” for crimes against humanity, war crimes and other serious violations of international law, including the crime of child recruitment.⁵³⁰ To date, 13 leaders from all sides of the armed conflict in Sierra Leone, *i.e.* AFRC, CDF, and RUF have been indicted for the crime of child recruitment.⁵³¹

II. The State Practice of non-party States to the Rome Statute

The campaign for domestic legislation was no longer limited to the State parties to the Rome Statute, but extended to States who had not yet ratified the Rome Statute. As far as non-party States to the Rome Statute are concerned, there is no lack of evidence showing that domestic legislations in these countries are catching up with the growing trend to criminalize child recruitment.

The **Azerbaijan** government legislated in Article 116 (5) of its *Criminal Code* that “any person who attracts minors in armed forces shall be punished by imprisonment for the term from seven up to fifteen years or life imprisonment”.⁵³²

In April 2000, the president of the **Cote D’Ivoire** signed a decree granting amnesty for crimes committed during the armed conflict. However, the crime of child recruitment was specifically excluded from the amnesty, as it was regarded as “crimes constituting serious violations of human rights”.⁵³³

⁵³⁰ Statute of the SCSL, Article 1.

⁵³¹ The International Herald Tribune, Death by Child, 15 November 2008. They were three former AFRC leaders, two former CDF leaders, and three former RUF leaders. Two others had been indicted by the Court: the leader of the RUF, Foday Sankoh, who had died in custody in 2003, and the leader of the CDF, Norman, who died in February 2007. In March 2006, the Nigerian authorities apprehended Charles Taylor, former president of Liberia, who was transferred to the authority of the Court where he was charged with war crimes, crimes against humanity and other serious violations of international humanitarian law, including the use of child soldiers during his alleged involvement in the Sierra Leone conflict supporting the RUF.

⁵³² Criminal Code of the Azerbaijan Republic, 1 September 2000. Article 116: Infringement of norms of the international humanitarian right during confrontations, 116.0.5: “attraction of minors in armed forces.”

⁵³³ Ouagadougou Peace Agreement, signed between President Laurent Gbagbo and New Forces rebel leader Guillaume Soro, 4 March 2007, VI. Provisions aimed at consolidating the national reconciliation, Peace, The

Article 87 of the **Republic of Indonesia** *Law on Child Protection* provided for imprisonment of no less than five years for “recruiting and equipping children for military purpose, or misusing children” by “involving them in political activities, or in an armed conflict, social disturbance [...] or in a violent event”.⁵³⁴

Compared with the other national legislations, the **Singaporean** legislation framework for the protection of children engages a much wider scope. *The Children and Young Persons Act* provides that “any act which endangers or is likely to endanger the safety of the child or young person” is a criminal offence.⁵³⁵ There is no doubt that recruitment of children into armed conflict is among the acts circumscribed as likely to endanger the safety of the child.

Child Soldier Accountability Act of **United States** passed into law after being signed by the president on 3 October 2008,⁵³⁶ which makes it a federal crime to “recruit children knowingly or to use those as soldiers under the age of 15”. The Act also empowers the US courts to “prosecute any individual on US soil for the offense, even if the children were

Security and free Movement of People and Goods, 6.3: ‘[...] a new law of amnesty covering the crimes and offences related to national security, in connection, with the military, political and social troubles that broke out in the country[...], except for economic offences, war crimes and crimes against humanity.’

⁵³⁴ Chapter XII, Article 87 of Law No. 23/2002 on National Child Protection Act, Republic of Indonesia. According to Article 1 (1), children are defined as someone under 18 years old.

⁵³⁵ Children and Young Persons Act of Singapore, 21 March 1993. Article 5 (b) willfully or unreasonably does, or causes the child or young person to do, any act which endangers or is likely to endanger the safety of the child or young person or which causes or is likely to cause the child or young person: (i) any unnecessary physical pain, suffering or injury; (ii) any emotional injury; or (iii) any injury to his health or development; or (c) willfully or unreasonably neglects, abandons or exposes the child or young person with full intention of abandoning the child or young person or in circumstances that are likely to endanger the safety of the child or young person or to cause the child or young person: (i) any unnecessary physical pain, suffering or injury; (ii) any emotional injury; or (iii) any injury to his health or development.

⁵³⁶ S.2135 [110th]: Child Soldiers Accountability Act of 2008. Sec. 2442: Recruitment or use of child soldiers: “(a) Offense- Whoever knowingly--(1) recruits, enlists, or conscripts a person to serve while such person is under 15 years of age in an armed force or group; or (2) uses a person under 15 years of age to participate actively in hostilities; knowing such person is under 15 years of age, shall be punished as provided in subsection (b).”

recruited or served as soldiers outside the US”.⁵³⁷ The law imposes penalties of up to 20 years or life imprisonment, if the recruitment or use of children in hostilities results in the children’s death.

Research have also shown that at least two other states, **Tanzania** and **Papua New Guinea**, are in the legislation process to criminalize the acts of child recruitment under their national laws.⁵³⁸

Among the rest of the non-party States, which have neither made any attempt in their national legislations to criminalize child recruitment nor dissented from this rule, up to 25 have no record or shown any indication of using child soldiers in armed conflict.⁵³⁹

III. The State Practice of “Specially Affected” States

Furthermore, customs require a broader test on those “specially affected” States. In the *North Sea Continental Shelf* Case, the ICJ stressed the importance of the practice of “specifically affected” states, by stating that “a very widespread and representative participation in the convention might suffice of itself, provided it included that of States, whose interests were “specially affected””.⁵⁴⁰

In this respect, the practice of those “specially affected” States is the final test of State practice concerning the crime of child recruitment as to whether it is “virtually uniform” to be recognized as customary international law. For that matter, the state practice of these countries is separately examined.

⁵³⁷ Africa News, *Uganda: UPDF Has No Reason to Recruit Children*, 21 October 2008.

⁵³⁸ A “children’s law” to address the child recruitment has been proposed since 2005. Coalition to Stop the Use of Child Soldiers, *Child Soldiers Global Report 2008*, 2005, p.332. See also BBC Monitoring Africa, *Tanzanian Government to Amend Laws to Block Recruitment of Child Soldiers*, 4 October 2008: “we consider these so that extraterritorial jurisdiction could be introduced for such crimes”. A submission of new child protection legislation was being drafted by the Minister. See Coalition to Stop the Use of Child Soldiers, *Child Soldiers Global Report 2008*, p.270.

⁵³⁹ Coalition to Stop the Use of Child Soldiers, *Child Soldier Global Report 2008*, *ibid.*, Data Summary, pp.389-407.

⁵⁴⁰ ICJ, *North Sea Continental cases*, Judgment, *supra* note 384, para. 73.

The mostly affected states with regard to the use of child soldier are unquestionably those which have been or still are burdened under protracted armed conflicts and using child soldiers in hostilities. According to the Annual Report issued by the General Assembly on 21 May 2010, there are 13 countries reported in violation of their obligation not to recruit or use child soldiers in armed conflict. These countries are Myanmar,⁵⁴¹ Somalia, Philippines, Sri Lanka, the DRC, Uganda,⁵⁴² Sudan, Columbia, Afghanistan, the CRA, Chad, Iraq and Nepal.⁵⁴³ However of these 13 countries, nearly half are known to have already provided for the crime of child recruitment in their penal codes.

For example, **Myanmar** in its *1993 Child Law* sets penalties for offences of “*employing or permitting a child to perform work which is hazardous to the life of the child or which may cause disease to the child or which is harmful to the child’s moral character*”.⁵⁴⁴ The word “work” provided in the text should unarguably cover tasks performed by child soldiers, such as decoys, couriers or at military checkpoints, even sexual slavery. The violation of this provision may lead to an imprisonment of up to six months.

The **Columbia** government in Article 14 of its *Law no. 418*, prohibits “the recruitment of children by armed forces or armed groups, with a penalty of up to five years’ imprisonment.”⁵⁴⁵

⁵⁴¹ GA, A/Res/61/232 (2006). In this regard expressing deep concern at large-scale human rights violations in Myanmar, as cited in the report of the Special Rapporteur of 21 September 2006, including violence against unarmed civilians by the Myanmar military, unlawful killings, torture, rape, forced labour, the militarization of refugee camps, and the recruitment of child soldiers.

⁵⁴² See Africa News, *Uganda: UPDF Has No Reason to Recruit Children*, 21 October 2008: “According to Human Rights News published on the Human Rights Watch Website, Uganda is listed among the countries that have reportedly used child soldiers between 2004 and 2007.”

⁵⁴³ General Assembly, A/64/742—S/2010/181, 21 May 2010, Annex I and II.

⁵⁴⁴ The Child Law, The State Law and Order Restoration Council Law No. 9/); The 11th Waing Day of Loo Waso, 1355 M.E., 14th July 1993, Chapter XVII: Offences and Penalties, Article 65. ‘Whoever commits any of the following acts shall, on conviction be punished with imprisonment for a term which may extend to 6 months or with fine which may extend to kyats 1000 or with both: (a) employing a permitting a child to perform work which is hazardous to the life of the child or which may cause disease to the child or which is harmful to the child’s moral character’.

⁵⁴⁵ Coalition to Stop the Use of Child Soldiers, *Child Soldiers Global Report 2008*, *supra* note 538, p.101.

A draft of a bill for the protection and promotion of children's rights has been initiated by the government of **Nepal**. Among other provisions, the crime of recruitment of child soldiers appears high on the draft list.⁵⁴⁶

Penalties of up to 20 years' imprisonment are provided in **Philippines** for "the recruitment of children for use in armed conflicts" in Section 12 (D) of *the Republic Act 9231*.⁵⁴⁷

On 9 April 2009, *the Child Act* for **Southern Sudan** was inaugurated by the president of the government of South Sudan, which criminalizes the recruitment and use of child soldiers under the age of 18 by armed forces or groups.⁵⁴⁸

The government of **Sri Lanka** set 18 as the minimum age for recruitment, and in 2006 the *Penal Code* of Sri Lanka was amended, to include a criminal offence of "engaging/recruiting children for use in armed conflict" with a punishment up to 20 years of imprisonment.⁵⁴⁹

⁵⁴⁶ General Assembly, A/64/742—S/2010/181, 21 May 2010, p.11.

⁵⁴⁷ Republic Act No. 9231: An Act Providing For The Elimination Of The Worst Forms Of Child Labor And Affording Stronger Protection For The Working Child, Amending For This Purpose Republic Act No. 7610, As Amended, Otherwise Known as the "Special Protection Of Children Against Child Abuse, Exploitation And Discrimination Act", Sec. 12-D. Prohibition Against Worst Forms of Child Labor. - No child shall be engaged in the worst forms of child labor. The phrase "worst forms of child labor" shall refer to any of the following: "(1) All forms of slavery, as defined under the "Anti-trafficking in Persons Act of 2003", or practices similar to slavery such as sale and trafficking of children, debt bondage and serfdom and forced or compulsory labor, including recruitment of children for use in armed conflict. "

⁵⁴⁸ The Southern Sudan Gazette No.1 Volume I, Acts Supplement No. 1, 10th February 2009, Act 10 Child Act 2008. Article 31. The Child and Armed Conflict: "(1) The minimum age for conscription or voluntary recruitment into armed forces or groups shall be eighteen years; (2) The Government shall ensure that no child shall be used or recruited to engage in any military or paramilitary activities, whether armed or un-armed, including, but not limited to work as sentries, informants, agents or spies, cooks, in transport, as laborers, for sexual purposes, or any other forms of work that do not serve the interests of the child.[...]" Article 32. Penalties for Recruitment of a Child into an Armed Force: "Any person involved in the recruitment of a child into an armed force or use of a child in any activity set forth above, commits an offence and shall upon conviction, be sentenced to imprisonment for a term not exceeding ten years or with a fine or with both"

⁵⁴⁹ Article 7 (358A) (1) (d) of the Parliament of the Democratic Socialist Republic of Sri Lanka, Penal Code (Amendment) Act, No. 16 of 2006, 'Any person who engages or recruits a child for use in armed conflict shall be guilty of an offence.'

According to the *Child Protection Code* adopted on 29 January 2009, the government of **the DRC** criminalizes and prescribes penalties of 10 to 20 years' imprisonment for the recruitment and use of children by armed forces, the police and armed groups.⁵⁵⁰

In **Uganda**, trials have been conducted for prosecution of persons who used child soldiers in armed conflicts. Particularly in January 2004, President Museveni of Uganda referred the situation of Uganda to the ICC. The referral was an attempt by the Uganda government to stop the inhumane violations of the Rome Statute, including the practice of using children as soldiers in armed conflict, and to prosecute perpetrators of war crimes, including the crime of child recruitment, and crimes against humanity with a severe sentence.⁵⁵¹

In the CAR, Afghanistan, and Chad, neither the constitutions nor the criminal codes specifically criminalize recruitment or use of children in armed conflict. All the three countries are, however, parties to the Rome Statute. As such they should take steps to reform their criminal codes to bring them in line with the provisions of the Rome Statute, which specifically and unequivocally hold individuals criminally liable for the recruitment of child soldiers.

In general, there seems to be good practices among the “specially affected” States of implementing the Rome Statutes into their national laws, and there is a representative participation among “specially affected” States in the legislation campaign to criminalize the act of child recruitment.

In sum, the 114 ratifications of the Rome Statute, the active participation of non-state parties in criminalizing the act of child recruitment, the criminal sanctions legislated by the “especially affected” States in their domestic laws, as well as judicial practice concerned with

⁵⁵⁰ The DRC, *Child Protection Code*, Law 09/001. General Assembly, A/64/742—S/2010/181, 21 May 2010, Article 53(c): “Les pires formes de travail des enfants sont interdites. Sont considérées comme pires formes de travail des enfants. [...] (c) le recrutement forcé ou obligatoire des enfants en vue de leur utilisation dans les conflits armés.”

⁵⁵¹ Susan Tieferbrun, *Child Soldiers, Slavery and the Trafficking of Children*, 31 *Fordham Int’L. J.* (2008):415, p. 511.

the crime of child recruitment,⁵⁵² all point to one conclusion that a legal conviction has formed that the use of child soldiers in armed conflict should incur individual criminal liability.

IV. The Widespread and Systematic Use of Child Soldiers as Ground for an Argument of Inconsistent State Practice and Weak *Opinio Juris*

The widespread and systematic use of child soldiers around the world today⁵⁵³ may still constitute grounds for counter-argument to the effect that there is still no of customary law with regard to the crime of child recruitment today. However, these violations cannot seriously challenge the existence of the crime of child recruitment under customary international law.

It is true that the violations, at first sight, appear to undermine the evidence gathered above. However, it should be borne in mind that this contrary practice “does not prevent the formation of a rule of customary international law, as long as this contrary practice is condemned by other States or denied by the government itself”, according to the jurisprudence of the ICJ.⁵⁵⁴

In fact, so far no governments or armed groups involved in using child soldiers have publicly declared that they have the rights to do so, or have absolved themselves from the obligation of not to recruit or use child soldiers. On the contrary, all of them have found it necessary to

⁵⁵² A number of scholars take the view that a solid approach to determine states practice is to examine state practice of as many states as possible. See Ruth A. Kok, *Statutory Limitations in International Criminal Law*, T.M.C. Asser Press, 2007, p. 181.

⁵⁵³ Though there is a decrease in the number of conflicts from 27 in 2004 to 17 by the end of 2007, the number of governments that deployed children in combat or other frontline duties in their armed forces has not significantly decreased since 2004. See Coalition to Stop the Use of Child Soldiers, *Child Soldiers Global Report 2008*, *supra* note 538, Introduction, pp.15-16.

⁵⁵⁴ Jean-Marie Henckaerts & Louise Doswald-Beck, *Customary International Humanitarian Law*, Volume I: Rules, *supra* note 392, p. xxxvii.

urgently deny or at least make a gesture of denying that child recruitment had occurred.⁵⁵⁵ The fact that no country has made a stand openly to oppose the criminalization or punishment of persons who recruit child soldiers, indeed, provides strong evidence of *opinio juris*.⁵⁵⁶

E. CONCLUSION

In this chapter, the question whether the use of child soldiers has attained the status of customary international law has been examined. The primary interest in this question is regarding its status before the year 1996. Although the *Norman Jurisdiction Decision* found the recruitment of children under the age of 15 before 1996 was a crime under customary international law, this decision has been challenged by many scholars as lacking legal certainty on its verification.⁵⁵⁷

Justice Robertson's dissenting opinion, as one of these different voices, argues that this offence only became a crime at the time of the adoption of the Rome Statute in 1998, since child enlistment can hardly be said to be crystallized as a crime in the very early stage when the Rome Statute was drafted.

Despite of some debate over Justice Robertson's dissenting opinion, his scathing criticism still manages to show the limits and errors inherent in the majority's decision. Particularly, this dissenting opinion is a strong reminder that the fundamental principle of *nullum crimen sine lege* should be served at all times of the criminal process.

After almost 15 years' development since 1996, the criminalization of child recruitment, *i.e.* conscripting or enlisting of children under the age of 15 years or use them to participate actively in hostilities, has developed into a rule in customary international law today. Sufficient state practice of the State Parties, the non-party States to the Rome Statute, and

⁵⁵⁵ Sometimes the countries denied the child recruitment by asserting that these children were not military recruits. Stephen Kabera Karanja, *Child Soldiers in Peace Agreements: The Peace and Justice Dilemma*, *Global Jurist Advances*, *supra* note 270, p.2.

⁵⁵⁶ Security Council, S/RES/1379, *supra* note 173, para. 8 (d).

⁵⁵⁷ Guénaél Mettraux, *International Crimes and the ad hoc Tribunals*, *supra* note 417, p.15. See also Thomas Humphrey, *Child Soldiers: Rescuing the Lost Children*, *supra* note 84, p.125.

particularly the “specially effected” States, bears a strong indication of the existence of a customary international law on the criminalization of the child recruitment.

Besides, domestic legislations and judicial practice regarding to criminalization of individuals who recruit and use child soldiers in hostilities additionally demonstrate a willingness of the international community to condemn the use of child soldiers and to take criminal sanctions to stop this atrocity.

Chapter 4: The Constituent Elements of the Crime of Child

Recruitment under the Rome Statute

As is well known, the elements of a crime play an important role in determining what must be proved by the prosecutor to constitute a crime. They are therefore essential in building the ground rules of a trial. In the case of the crime of child recruitment, only when all the elements of this crime are established beyond a reasonable doubt, the accused can be found guilty of the crime of child recruitment; otherwise he or she is entitled to acquittal.

The first attempt to define the characteristics of the crime of child recruitment came with the adoption of the Elements of the Crimes (hereinafter “EoC”), which was adopted by Assembly of States Parties (hereinafter “ASP”) at its first session in 2002. Article 9 of the Rome Statute defines the role of the EoC for the ICC as it “shall assist the Court in the interpretation and application of articles 6, 7 and 8”.⁵⁵⁸ This article clearly indicates that the EoC itself has no binding status upon the judges and must be consistent with the Rome Statute.⁵⁵⁹

Since no other international instruments or documents has provided the constituent elements of the crime of child recruitment as clearly and comprehensively as the EoC does, the EoC were also taken by other international criminal tribunals, such as the SCSL, as a basic applicable reference for the culpability of an accused in their judicial practice. Five elements, according to the EoC, are essential with respect to the crime of child recruitment:

“(i) The perpetrator conscripted or enlisted one or more persons into the national armed forces [or group] or used one or more persons to participate actively in hostilities;

⁵⁵⁸ Rome Statute, Article 9 (1).

⁵⁵⁹ Knut Dörmann, *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 Yearbook of United Nations Law (2003):341, p. 350. On the contrary, the EoC is given priority in the application of law under Article 21, which states that “the Court shall apply [...] in the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence; [...]”. The discussion of the controverting languages between Article 9 and Article 21 will be discussed in subsequent sections.

- (ii) Such person or persons were under the age of 15 years;*
- (iii) The perpetrator knew or should have known that such person or persons were under the age of 15 years;*
- (iv) The conduct took place in the context of and was associated with an international armed conflict; and*
- (v) The perpetrator was aware of the factual circumstances that established the existence of an armed conflict.”⁵⁶⁰*

Although there is no question about its grave nature, child recruitment is a relatively new crime, compared with most of the other international crimes provided in the Rome Statute. Consequently, a close examination of the elements of this crime will be helpful in clarifying this comparatively new legal definition.

Essentially, a number of questions concerning the elements of this crime will be looked into, including the definition of “conscript” and “enlistment”; to what extent an “active” participation is to be regarded sufficient to constitute the crime of child recruitment; and whether the person must know with certainty that the child recruited was under the age of 15 years at the exact time when the recruitment was conducted. In the following a detailed examination will be given to the definition of each of these elements.

A. General Requirements for War Crimes

I. Armed Conflicts and the Crime of Child Recruitment

Since the crime of child recruitment is provided under war crimes, it shares the basic characteristics of war crimes, *i.e.*, the conduct “took place in the context of and was associated with an international or internal armed conflict”. That is to say two contextual elements are specified for this crime: a) there must have been an armed conflict, whether internal or international; b) there must have been a nexus between the armed conflict and the alleged offense.

⁵⁶⁰ Elements of the Crime of the International Criminal Court, ICC-ASP/1/3 (part II-B), adoption on 9 September 2002, entry into force 9 September 2002, pp. 33, 53.

1. The Existence of an Armed Conflict

According to the EoC, an armed conflict must be known to exist with respect to the alleged act of child recruitment. As far as armed conflicts are concerned, the general practice of international humanitarian law distinguishes between an international and non-international armed conflict, which though does not seem at first glance to hold any importance with regard to the crime of child recruitment, as the Rome Statute criminalizes the act both in the contexts of international and non-international armed conflicts. Yet this well-seasoned distinction cannot be neglected in our discussion, for by international practice, it is the first requirement in establishing the existence of an armed conflict. This section therefore contains a discussion about the conditions under which an armed conflict is internationalized and the characteristics marking an internal armed conflict as opposed to internal disturbances.

a. The Existence of an International Armed Conflict

Article 2 of the Geneva Conventions (hereinafter “CA2”) and Article 1 (4) of the AP I are generally recognized as two main international instruments regulating the conducts in international armed conflicts. Traditionally, these laws have sought to regulate the conducts between States. It is from this respect that the existence of an international armed conflict is said to be based on the ground, *i.e.*, the factual use of force by one State against another.

It must be pointed out however that Article 1 (4) of the AP I gives a much broader application scope than that provided by CA2, as the definition of an international armed conflict provided in AP I is not limited its ambit to the traditional inter-state confrontations, but expands the scope of the term “national” to include cases of “fighting against colonial domination, alien occupation or racist regimes in the exercise of their right to self-determination”.⁵⁶¹

⁵⁶¹ Additional Protocol I, Article 1 (4): “Armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law

The inclusion of these parties within the scope of AP I suggests that the dichotomy between international and non-internal armed conflicts is neither absolute nor is principled. As the current tendency goes, a pure case of either an international or internal armed conflict is becoming more and more a rare occurrence.⁵⁶² Usually what happens is one or more State intervenes into an internal conflict in support of the non-state actor by joining military operations or providing arms and funds.⁵⁶³ The term “internationalized armed conflict” was therefore introduced to describe those conflicts whereby the non-state actor in an internal armed conflict is acting on behalf of another state. The definition of internationalized armed conflict has been further refined by the ICTY Appeals Chamber in its landmark judgment of the *Tadic* case, which gave rise to the following consideration:

“It is indisputable that an armed conflict is international if it takes place between two or more States. In addition, in case of an internal

concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations”.

⁵⁶² The most transparent internationalized armed conflicts in recent history are: NATO’s intervention in the armed conflict between the Federal Republic of Yugoslavia (FRY) and the Kosovo Liberation Army (KLA) in 1999, for more details, see S. Alexeyevich Egorov, *The Kosovo Crisis and the Law of Armed Conflicts*, International Review of the Red Cross, No. 837, 2000, p. 183. For more details on the situation in Bosnia and Herzegovina between the Bosnian, Serbs and the central authorities of Bosnia and Herzegovina after 19 May 1992. See also ICTY, *Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic & Esad Landzo, (Celebici)*, IT-96-21-A, Appeals Judgment, *Judgment*, 20 February 2001, paras. 33,48,50; See also ICTY, *Prosecutor v. Tadic*, IT-94-1-A, 15 July 1999, Judgment, Appeals Chamber, paras. 156,162. The intervention of Rwanda, Angola, Zimbabwe, Uganda and others, in support of opposing sides in the DRC civil war since August 1998, for more details, see Human Rights Watch, *Eastern Congo Ravaged: Killing Civilians and Silencing Protest*, Vol. 12, No. 3 (A), http://www.hrw.org/reports/2000/drc/Drcoo5-01.htm#P68_1748, (last accessed on 8 June 2010). See also ICC, *Prosecutor v. Lubanga*, Confirmation of Charges, *supra* note 351. ICJ, *Military and Paramilitary Activities in and against Nicaragua* case, Judgment, *supra* note 433, p. 14.

⁵⁶³ The factual circumstances of internationalization are numerous and may often be very complex. As Schindler has put it, he term “internationalized armed conflict” may include, but not be limited to, “a) two States militarily intervene in an internal armed conflict through its troops in support of opposing sides; b) war between two internal factions both of which are backed by different States, and c) war involving a foreign intervention in support of an insurgent group fighting against an established government.” See D. Schindler, *International Humanitarian Law and Internationalized Internal Armed Conflicts*, 22 International Review of the Red Cross (1982): 255, p. 255.

*armed conflict breaking out on the territory of a State, it may become international (or, depending upon the circumstances, be international in character alongside an internal armed conflict), if (i) another State intervenes in that conflict through its troops, or alternatively if (ii) some of the participants in the internal armed conflict act on behalf of that other State.”*⁵⁶⁴

It can be seen from the above addressed, where armed groups are acting as the proxies of a foreign state will essentially be considered to be international armed conflicts, and thus the body of law governing conducts of parties to an international armed conflict will apply.⁵⁶⁵ The following paragraphs therefore will address the two ‘ifs’ stated in the *Tadic* judgment, which set out the two criteria in determining the existence of an international armed conflict.

a) Foreign Military Intervention

i. The ICTY’s Jurisprudence on “Foreign Military Intervention”

The first criterion the Appeals Chamber established in the *Tadic* case for the determination of an international armed conflict is whether another State intervenes in an internal armed conflict through its troops.⁵⁶⁶ Yet regrettably, the Appeals Chamber in the *Tadic* case failed to use the opportunity to quantify the requisite extent of a military intervention which would be sufficient to internationalize a *prima facie* internal armed conflict. The same issue resurfaced in the *Rajic* case. The Trial Chamber eventually supplied a criterion by requiring that the intervention must be “significant and continuous” to internationalize an internal armed conflict.⁵⁶⁷ However, it is still unclear to what extent a foreign military intervention, which indirectly affects an internal conflict, is sufficient to render that conflict international. The

⁵⁶⁴ ICTY, Prosecutor v. *Tadic*, Appeal Judgment, *supra* note 562, para. 84.

⁵⁶⁵ Mark Freeman, *International Law and Internal Armed Conflicts: Clarifying the Interplay between Human Rights and Humanitarian Protections*, Journal of Humanitarian Assistance, available at <http://sites.tufts.edu/jha/archives/152> (last accessed on 15 March 2012).

⁵⁶⁶ ICTY, *Tadic* Appeal Judgment, *supra* note 562, para. 84.

⁵⁶⁷ ICTY, Prosecutor v. *Ivica Rajic*, IT-95-12-R61, Review of the Indictment Pursuant to Rule 61, 13 September 1996, para.12 in James G. Stewart, *Towards A Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict*, 85 IRRC (2003): 313,p. 329.

following ICTY Jurisprudence seems to offer some help in clarifying this issue, as is apparent from the Naletilic Judgment:

*“There is no requirement to prove that [Army of the Republic of Croatia] troops were present in every single area where crimes were allegedly committed. On the contrary, the conflict must be looked upon as a whole, [...]”*⁵⁶⁸

The same principle was apparently assumed in the *Blaskic* case, where “the presence of an estimated 3,000 to 5,000 regular Croatian Army personnel who were mostly stationed outside the area of conflict between the Croatian Defense Council and the Bosnia Herzegovina Army” was considered to be sufficient to render an internal armed conflict international.

However, it is highly questionable whether the presence of a “minor foreign military army”, as seen in the *Blaskic* Judgment, is sufficient to prove the existence of a foreign military intervention, as required to renders an internal armed conflict international.

ii. The ICJ’s Jurisprudence on “Foreign Military Intervention” in the Democratic Republic of the Congo v. Uganda case and the ICC’s Jurisprudence in the Lubanga Case

It is a well-known fact that Uganda and Rwanda supported the insurgent group in the DRC’s civil war during the period of 2002 and 2003. The issue at stake, however, is whether the degree of these involvements reached the extent to be regarded as sufficient to internationalize a *prima facie* internal armed conflict.

As far as Uganda was concerned, the ICJ’ judgment of the *Democratic Republic of the Congo v. Uganda* case (hereinafter “armed activities case”) dealt with the issue whether Uganda had intervened in the internal armed conflict of the DRC through Uganda Peoples’ Defense Forces (hereinafter “UPDF”), the finding of which was subsequently adopted by the Pre-trial Chamber in the *Lubanga* case to determine the nature of the armed conflict in the DRC.

⁵⁶⁸ ICTY, Prosecutor v. Mladen Naletilic & Vinko Martinovic, IT-98-34-T, Trial Chamber, Judgment, 31 March 2003, para. 194.

According to the ICJ, to reach a conclusion as to whether a State whose army are present on the territory of another State can be regarded as an occupying Power, it must

*“Satisfy itself that the foreign armed forces in the occupied territory were not only stationed in particular locations, but they had substituted their own authority for that of the Congolese government.”*⁵⁶⁹

Unlike the findings of *Blaskic* and the *Naletilic* case, the ICJ emphasized that the presence of armed forces in the territory of a state is not to be regarded as sufficient to constitute military intervention of a foreign State, unless there is an added condition that the armed forces had established and exercised their own authority in the occupied territory.

In the ruling, the ICJ further found that Uganda actually established its authority in the Ituri area, based on a range of clear evidence:

*“General Kazini, commander of the Ugandan forces in the DRC, created the new “province of Kibali-Ituri” in June 1999 and appointed MsAdèle Lotsove as its Governor”*⁵⁷⁰

[...]

*“Uganda also established and exercised authority in Ituri by actively extending military, logistic, economic and financial support to irregular forces having operated on the territory of the DRC”*⁵⁷¹

Based on the criteria applied by the ICJ in the armed activities case and the evidence submitted before the confirmation hearing,⁵⁷² the Pre-trial Chamber in the *Lubanga* case found that the intervention of Uganda in the Ituri region through the UPDF army had turned the armed conflict into a conflict with an international character, starting from the date of July 2002 to the date of 2 June 2003 when the Ugandan army was the effective withdrawal of from Congolese territory”.⁵⁷³

⁵⁶⁹ ICC, Prosecutor v. *Lubanga*, Decision on the Confirmation of Charges, *supra* note 351, para. 213.

⁵⁷⁰ ICJ, *Democratic Republic of the Congo v. Uganda*, Armed Activities on the Territory of the Congo, Judgment, 19 December 2005, ICJ Report 2005, para. 175.

⁵⁷¹ *Ibid.*, para. 345.

⁵⁷² ICC, Prosecutor v. *Lubanga*, Decision on the Confirmation of Charges, *supra* note 351, paras. 218-219.

⁵⁷³ *Ibid.*, paras. 220, 406.

As far as Rwanda's involvement was concerned, the evidence submitted to the Pre-trial Chamber showed that Rwanda had provided arms, advice, support and soldiers to UPC, however it was insufficient to enable the Pre-trial Chamber to establish substantial grounds for a finding that Rwanda had directly intervening in the armed conflict through its army or had exercised its own authority in Ituri. Therefore, from 3 June 2003 to 13 August 2003, the conflict in the Ituri region was pronounced to be a conflict of non-international character.

Thus, insofar as the indictment against *Lubanga* was concerned, the charges were listed in two parts divided chronologically as a matter of the nature of the conflict, that is, conscription, enlistment and use of children under the age of 15 in an international armed conflict from July 2002 to 2 June 2003, and conscription, enlistment, and use of children under the age of 15 in a non-international armed conflict from 2 June 2003 to December 2003.

b) Agents of a Foreign State

The second criterion the Appeals Chamber set forth in the *Tadic* case for determining the existence of an international armed conflict concerns whether “some of the participants in the internal armed conflict act on behalf of another State.”⁵⁷⁴ In accordance with the spirit of international humanitarian law, accountability should be imposed not only on those having formal positions of authority, but also on those who wield *de facto* power.⁵⁷⁵ For the armed units fighting within a State however “belonging to another State”, it is necessary for the respondent state to wield some “degree of authority or control” over those armed units.⁵⁷⁶ The core issue for this criterion is therefore to what extent the degree of control is sufficient enough to regard an armed group or an individual, who does not possess the formal status as agent or organ of the foreign Power, as acting on behalf of a foreign Power.⁵⁷⁷

There are two necessary standards for use in the determination of “the degree of control” of a foreign State. One belongs to the body of law on state responsibility, while the other, adopted

⁵⁷⁴ ICTY, *Tadic* Appeals Judgment, *supra* note 562, para. 84.

⁵⁷⁵ *Ibid.*, paras. 92-96.

⁵⁷⁶ *Ibid.*, paras. 97.

⁵⁷⁷ ICTY, *Tadic* Trial Judgment, *supra* note 577, paras. 90, 103.

in the *Tadic* case, is derived from international humanitarian law. It seems that the judicial inconsistency regarding the two standards makes it a quite intricate issue in the determination of the degree of control.⁵⁷⁸

i. The “Effective Control” Test adopted by the ICJ

The “effective control” standard specifying the circumstances under which a group or individual can be regarded as acting as a *de facto* state official was adopted by the ICJ in the Nicaragua case, when answering the question whether the United States should bear the responsibility for the actions of the contras who wreaked havoc within Nicaragua.⁵⁷⁹

The evidence submitted failed to satisfy the Court that the control of the United States over the contras was sufficient to be “an effective control”, therefore, United States was not considered responsible for violations of humanitarian law perpetrated by the contras,⁵⁸⁰ as started follows,

*“All the forms of United States participation [...], and even the general control by the respondent state over a force with a high degree of dependency on it, would not in themselves mean [...] that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State.”*⁵⁸¹

A corollary of the statement would follow that a control over a group or individual not characterized as agent of a foreign Power would not be deemed as sufficient, unless the said Power was found either directly involved in giving specific instructions,⁵⁸² or having

⁵⁷⁸ James G. Stewart, *Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict*, *supra* note 567, pp. 325, 326-328 and footnote 65.

⁵⁷⁹ ICJ, *Military and Paramilitary Activities in and against Nicaragua*, *supra* note 433, paras. 109-116.

⁵⁸⁰ *Ibid.*, para. 5.

⁵⁸¹ *Ibid.*, para. 115. All the forms of United States participation includes the financing, organizing, training, supplying and equipping of the *contras*, the selection of its military or paramilitary targets, and the planning of the whole of its operation.

⁵⁸² *Ibid.*, paras. 75-80.

participated in the planning, direction, support and execution of specific operations.⁵⁸³

ii. The “Overall Control” Test adopted by the ICTY

There is however obvious discrepancy between the standard in the determination of the “degree of control” established in the *Tadic* case and the one set down in the Nicaragua case. When determining the nature of the armed conflict between the Bosnian Serbs and the central authorities of Bosnia and Herzegovina, the ICTY Appeals Chamber established a less rigorous⁵⁸⁴ but equally cogent⁵⁸⁵ “overall control” test, which is stated as follows:

*“This requirement, however, does not go so far as to include the issuing of specific orders by the State, or its direction of each individual operation. [...] The control required by international law may be deemed to exist when a State (or, in the context of an armed conflict, the Party to the conflict) has a role in organizing, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group.”*⁵⁸⁶

Based on the “overall control” standard, the Appeals Chamber found that after 19 May 1992 the armed forces of the Republika Srpska were acting on behalf of Former Republic of Yugoslavia, thereby rendering the internal armed conflict international.”⁵⁸⁷

iii. The “Effective Control” Test vs. the “Overall Control” Test

⁵⁸³ *Ibid.*, paras. 86.

⁵⁸⁴ ICTY, *Prosecutor v. Zlatko Aleksovski*, IT-95-14/1-A, Appeals Chamber, Judgment, 24 March 2000, para. 145. The Appeals Chamber stated that “the Appeals Chamber in the *Tadic* Judgment arrived at this test against the background of the ‘effective control’ test ..., the Appeals Chamber considers it appropriate to say that the standard established by the ‘overall control’ test is not as rigorous as those tests. ”

⁵⁸⁵ *Ibid.*, para. 137. The Appeals Chamber stated that “the Appeals Chamber will follow its decision in the *Tadic* Judgment, since, after careful analysis, it is unable to find any cogent reason to depart from it.”

⁵⁸⁶ *Ibid.*, para. 137.

⁵⁸⁷ ICTY, *Tadic* Appeal Judgment, *supra* note 562 para. 162.

It is obvious that the “overall control” test sets a lower standard than the “effective control”, since the “overall control”, unlike the “effective control”, does not require issuing of specific instructions or undertaking direct involvement in specific operations. The reason for adopting a lower degree of control within the ICTY Jurisdiction lies in the fact that the “overall control” standard was used in the context of answering the question of the nature of an armed conflict, which is different from the question of state responsibility. Only when the nature of an armed conflict is established, can the question of individual criminal responsibility be raised.

The ICJ was, in contrast, dealing with the question of state responsibility, which required higher standard to prove the effective participation of a state. The rationale behind of the “effective control” can also be seen as follows:

“[...]to prevent States from escaping international responsibility by having private individuals carry out tasks that may not or should not be performed by State officials, or by claiming that individuals actually participating in governmental authority are not classified as State organs under national legislation and therefore do not engage State responsibility. In other words, States are not allowed on the one hand to act de facto through individuals and on the other to disassociate themselves from such conduct when these individuals breach international law.”⁵⁸⁸

At this point, the Appeals Chamber in the Tadic case contested that “no reliance could however be placed on the *Nicaragua* test, because the issue of state responsibility raised was different from the issue of whether an individual was criminally liable depending on the nature of the armed conflict in which he [or she] had been involved”.⁵⁸⁹ From this perspective, the degree of control required to internationalize an armed conflict is a question of “overall control”, which is a test applicable in determining whether an individual or an armed group, be it highly organized or unorganized, is acting as a *de facto* State organ.

2. The Existence of an Internal Armed Conflict

⁵⁸⁸ ICJ, Military and Paramilitary Activities in and against Nicaragua, Judgment, *supra* note 433, para.117.

⁵⁸⁹ Antonio Cassese, 4 *The Nicaragua and Tadic Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia*, Eur J Int Law (2007):649, p.656.

There are far fewer international rules governing internal armed conflicts than those governing international armed conflicts.⁵⁹⁰ The relevant international rules relating to internal armed conflicts can be found in provisions contained in CA3, the AP II, and the Rome Statute. The three instruments however laid down quite distinct definitions of an internal armed conflict.⁵⁹¹

a. The Substantive Rules regarding an Internal Armed Conflict

The CA3 and AP II were the first rules containing principles applicable to an internal armed conflict.⁵⁹² According to CA3, internal armed conflict is referred to as an “armed conflict not of an international character”.⁵⁹³ This definition however was met with strong objections from the delegations that feared that acts of banditry or unorganized and short-lived insurrections would all be brought under the cover of this general and vague expression.⁵⁹⁴ Although such doubt of the delegates brought a number of restrictions to be discussed during the Diplomatic Conference, which however were left out in the final version.⁵⁹⁵ One of the main reasons for doing so was based on the consideration to apply the CA3 “as widely as possible”. From this perspective, those discussed conditions seemed to be “not indispensable”.⁵⁹⁶

⁵⁹⁰ Eva La Haye, *War Crimes in Internal Armed Conflict*, Cambridge University Press, 2008, Introduction.

⁵⁹¹ See AP II, *supra* note 75, Article 1; Rome Statute, *supra* note 47, Article 8 (2) (f). Also see James G. Stewart, *Towards a Single definition of armed conflict in international humanitarian law: A critique of internationalized armed conflict*, *supra* note 567, pp. 10-11.

⁵⁹² ICRC, *Commentary to Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, (hereinafter “ICRC Commentary on the GC I”), ICRC Geneva, 1951, p. 39.

⁵⁹³ See CA3.

⁵⁹⁴ *Commentary to GC I*, *supra* note 592, pp. 47-48. *Commentary to AP II*, *supra* note 80, paras. 4448, 4459.

⁵⁹⁵ First Working Party, First and Second Draft, Annexes A and B to the 7th Report of the Joint Committee, Final Record of the Diplomatic Conference of Geneva, 1949, Vol. II-B, p. 121.

⁵⁹⁶ ICRC *Commentary to Geneva Convention I*, *supra* note 592, pp. 49, 50.

AP II, on the other hand, endeavored to give a more precise definition of an internal armed conflict.⁵⁹⁷ Contrary to CA3's cover-all definition, AP II sets a significantly higher threshold for its own application, limiting its scope to:

*“all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949 (...) (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.”*⁵⁹⁸

Apparently, the violence is required to be sustained at certain intensity to qualify as an internal armed conflict.⁵⁹⁹ As to the criteria of the degree of violence, some restrictions on the insurgent parties were laid down: an armed group must be organized under a responsible command, must have control over part of the territory to enable them to carry out sustained and concerted military operations, and must have the ability of implementing the Protocol.⁶⁰⁰

In Paragraph 2, the AP II expressly excludes “situations of internal disturbances and tensions from its application.”⁶⁰¹ The term “internal tensions and disturbances” is referred to situations that involve the use of force and other repressive measures by a government to maintain or

⁵⁹⁷ AP II, *supra* note 75, Article 1, which states that “This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.”

⁵⁹⁸ AP II, *supra* note 75, Article 1. See also James G. Stewart, *Towards a Single definition of armed conflict in international humanitarian law: A critique of internationalized armed conflict*, *supra* note 567, p. 319.

⁵⁹⁹ Commentary to AP II, *supra* note 80, paras.4449-4450, 4453.4457; O.R. VIII, p. 203, CDDH/I/SR. 22, para. 11.

⁶⁰⁰ ICRC Commentary to the AP II, *supra* note 80, paras. 4453- 4470.

⁶⁰¹ AP II, *supra* note 75, Article 1 (2).

restore public order or public safety. Its constitution is of no relevance “whether State repression is involved or not, whether the disturbances are lasting, or whether only a part or all of the national territory is affected”.⁶⁰² Accordingly, these situations are fall short of an armed conflict. The AP II also illustrated in its paragraph 2 a list of examples of internal tensions and disturbances, which include “riots, such as demonstrations without a concerted plan from the outset; isolated and sporadic acts of violence, as opposed to military operations carried out by armed forces or armed groups; and other acts of a similar nature, including, in particular, large scale arrests of people for their activities or opinions”.⁶⁰³

The Rome Statute subsequently adopted a definition to include all conflicts that

“take place in the territory of a State when there is protracted armed conflict between governmental authorities and organised armed groups or between such groups”.⁶⁰⁴

Similar to Article 1 of the AP II, the Rome Statute in its Article 8 (2) (d) and (f) emphasize that the Statute does not apply to “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature”.⁶⁰⁵ Two essential characteristics of an internal armed conflict are identified: “the intensity of the armed conflict” and “the organisation of the parties”,⁶⁰⁶ which are similar to but more general than the criteria provided in Article 1 of the AP II. The following section will discuss the two essential standards provided in the Rome Statue.

b. The Judicial Practice of Determining an Existence of an Internal Armed Conflict

⁶⁰² ICRC, ICRC action in connection with internal disturbances, International Review of the Red Cross, No 294, 1993, para. 2.

⁶⁰³ ICRC Commentary on APII, *supra* note 80, para. 4474.

⁶⁰⁴ Rome Statute, Article 2 (b) (f).

⁶⁰⁵ Rome Statute, Article 8 (2) (f) which states that “Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.”

⁶⁰⁶ ICTY, *Tadic* Jurisdiction Decision, *supra* note 414, para. 70.

The efforts by international tribunals to find appropriate criteria for the determination of the existence of an internal armed conflict have helped to establish the distinction between an internal armed conflict and internal disturbances.⁶⁰⁷ The two criteria provided in the Rome Statute, *i.e.*, (a) the intensity of the conflict, and (b) the organization of the parties have become the criteria generally relied upon in determining an internal armed conflict.⁶⁰⁸

a) The Intensity of the Conflict

The Lubanga case started with the Pre-trial Chamber's analysis on whether the situation in the DRC constituted a non-international armed conflict within the definition set forth in Article 8 (2) (d) of the Rome Statute. To answer this question, the Pre-Trial Chamber first examined whether a conflict of a certain degree of intensity existed. "The large number of armed attacks carried out during the period",⁶⁰⁹ "the large numbers of victims involved",⁶¹⁰ as well as "the involvement of the Security Council",⁶¹¹ were all taken as factors indicative of a high degree of intensity.

Other factors taken into account in the determination of the intensity of a conflict include "the increase in the number of the government forces", "the distribution of weapons among both parties to the conflict",⁶¹² and "the extent of the displacement of people caused by the conflict".⁶¹³

b) The Organization of the Parties

⁶⁰⁷ The Appeals Chamber in the *Tadic* case has found that "an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State". See *ibid.*, para. 70.

⁶⁰⁸ ICTY, *Tadic* Trial Judgment, *supra* note 577, para. 562.

⁶⁰⁹ ICC, Prosecutor v. *Lubanga*, Decision on the Confirmation of Charges, *supra* note 351, para. 235 and fn. 303.

⁶¹⁰ *Ibid.*, para. 235 and fn. 304.

⁶¹¹ *Ibid.*, para. 235 and fn. 305.

⁶¹² ICTY, Prosecutor v. *Zejnir Delalic, Zdravko Mucic, Hazim Delic & Esad Landzo*, (Celebici), IT-96-21-T, Trial Chamber, Judgment, 16 November 1998, para. 188.

⁶¹³ ICTY, Prosecutor v. *Fatmir Limaj, Haradin Bala, Isak Musliu*, IT-03-66-T, Trial Chamber, Judgment, 30 November 2005, para. 90.

As far as the organizational degree is concerned, factors taken into account include the existence of headquarters, designated zones of operation, and the ability to procure, transport and distribute arms,⁶¹⁴ which are all considered to be helpful in distinguishing an organized party from disorganized and short-lived ones. The evidence of the installation of own administrative officials, the establishment of an organized military structure, and the ability to carry out large-scale military operations for a prolonged period of time,⁶¹⁵ gave the Pre-trial Chamber in the *Lubanga* case enough ground to believe that the UPC/FPLC, PUSIC and FNI were organized to such a degree as to satisfy the criteria of being organized armed groups.⁶¹⁶

Another aspect of the organizational degree concerns the question of whether the parties have the ability to carry out sustained and concerted military operations. As stipulated in the AP II, this criterion should normally be taken into consideration when determining the existence of an internal armed conflict. The ICC in the *Lubanga* case however no longer required this criterion in determining whether a party to the conflict had control over part of the territory. A commentary on the Rome Statute supported the view reflected in the *Lubanga* case that,

*“Additional factors, such as the involvement of government forces on one side or the exercise of territorial control by the rebel forces, are not indispensable for the determination of an armed conflict”.*⁶¹⁷

The analysis of the degree of organization obtained, gave sufficient evidence for the three armed groups, i.e., the National Integrationist Front (hereinafter “FNI”), Party for the Safeguarding of the Congo (hereinafter “PUSIC”) and the Union of Congolese Patriots/the Forces Patriotiques pour la liberation du Congo (hereinafter “UPC/FPLC”) to qualify as organized armed groups within the meaning of article 8(2) (f) of the Rome Statute.⁶¹⁸

⁶¹⁴ *Ibid.*, paras.80, 89.

⁶¹⁵ ICC, Prosecutor v. *Lubanga*, Decision on the Confirmation of Charges, *supra* note 351, paras. 236-237. See also Koen Vlassenroot, *Armed Group and Military in Eastern People’s Republic of Congo*, Lectures Series on African Security, 2008, p.5.

⁶¹⁶ ICC, Prosecutor v. *Lubanga*, Decision on the Confirmation of Charges, *supra* note 351, paras. 236-237.

⁶¹⁷ Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge University Press, 2003, pp, 386-387.

⁶¹⁸ ICC, Prosecutor v. *Lubanga*, Decision on the Confirmation of Charges, *supra* note 351, para. 237.

3. The Phrase “National Armed Force” vs. “Armed Force or Group”

With regard to the crime of child recruitment, there is still another issue to be discussed. Comparing the language employed in Article 8 (2) (b) (xxvi) of the Rome Statute with that in Article 8 (2) (e) (vii), the wording “armed groups” can be seen clearly missing in Article 8(2) (b) (xxvi). Article 8 (2) (b) (xxvi), governing the crime of child recruitment committed in the context of international armed conflict, is phrased thus:

“conscripting or enlisting children under the age of fifteen years into national armed forces”

Whereas Article 8(2) (e) (vii), dealing with the crime of child recruitment in the context of non-international armed conflict, reads as follows:

“conscripting or enlisting children under the age of fifteen years into armed forces or groups”.

The question therefore is whether the omission of the phrase “armed group” in Article 8 (2) (b) (xxvi) would leave a gap in the prosecution of persons, who are members of “armed groups”, and who have recruited children or used them to participate actively in an international armed conflict.

This issue received careful examination in the *Lubanga* case. As stated above, the original internal armed conflict between the DRC government and dissident armed groups had changed into an international armed conflict between July 2002 and 2 June 2003, soon after direct involvement of the governmental armed forces of Uganda. The whole armed conflict from July 2002 to 2 June 2003 falls within the scope of Article 8(2) (b) (xxvi), which however only criminalizes the recruitment of children into **national armed forces**.

The Chamber subsequently found that the adjective “national” does not necessarily limit the scope of the application of this provision merely to governmental armed forces, but should be extended to cover armed groups substantially linked to a foreign State.⁶¹⁹ In reaching this

⁶¹⁹ *Ibid.*, paras.275, 282.

conclusion, the Pre-trial Chamber first referred to Article 43 of the AP I⁶²⁰ and the jurisprudence of the ICTY in the Tadic case, both of which apply the term “national” to cases beyond the traditional term of “governmental”.⁶²¹

The Chamber also produced an argument that interpreting the term “national” as meaning “governmental” would contravene the very purpose of the Rome Statute, which is to make sure that “the most serious crimes of concern to the international community as a whole must not go unpunished”.⁶²²

In consequence, the charge of *Lubanga* for conscripting, enlisting children into the FPLC, which was an armed group, between July 2002 and June 2003 in an international armed conflict was found to fall within the jurisdiction of ICC.

II. The Nexus between the Armed Conflict and the Alleged Offense

A link with an armed conflict is required by the EoC as a contextual element to the crime of child recruitment, as reflected in the provision that “the conduct took place in the context of and was associated with an armed conflict”.⁶²³

The expressions “in the context of” and “was associated with” are normally used alternatively, not cumulatively.⁶²⁴ However in the provision the drafters used the phrase “in the context of”

⁶²⁰ The Commentary on Article 43 of API defines what constitutes the “armed forces of a Party” in an international armed conflict. According to the Commentary, armed forces under the API is not limited to governmental forces, however, liberation movements fighting against colonial domination, resistance movements, those fighting of “self-determination” or “national liberation” constitute armed forces, as long as they represents certain characteristics of a government. See ICC, *Prosecutor v. Lubanga*, Decision on the Confirmation of Charges, *supra* note 351, paras.272-273.

⁶²¹ When determining the scope of “protected person” under the Geneva Convention, the term “national” refers not only to nationality, but also to the nationals belonging to the opposing party in an armed conflict. ICC, *Prosecutor v. Lubanga*, Decision on the Confirmation of Charges, *supra* note 351, paras. 277-280.

⁶²² ICC, *Prosecutor v. Lubanga*, Decision on the Confirmation of Charges, *supra* note 351, paras. 281, 284.

⁶²³ EOC, *supra* note 560, pp. 33, 53.

⁶²⁴ Roy S. Lee, *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, *supra* note 234, p. 120.

to refer to “the existence of an armed conflict in the country or area, where the conduct was committed”, while the expression “was associated with” was used to stress “the necessary nexus between the armed conflict and the conduct of the perpetrator”.⁶²⁵

In other words, this is to say that the said offence is not required to occur at the exact time and place where fighting was actually taking place, in case the alleged offence was either temporally or geographically removed from the actual fighting. According to the Jurisprudence of the ICTY, the “nexus” would be established if “the offences were closely related to the armed conflict as a whole”.⁶²⁶ It is sufficient to establish the nexus if the perpetrator acted in furtherance of or under the guise of the armed conflict.⁶²⁷ That is to say, it is possible for the armed conflict not to be causally linked to the alleged crimes. It would be sufficient, as long as it had played a substantial role in the perpetrator’s ability to commit the crimes, in his decision to commit them, in the manner in which they were committed or for the purpose for which they were committed.⁶²⁸

In the *Lubanga* case for example, the Pre-trial Chamber found that there was a sufficiently clear nexus between *Lubanga*’s alleged criminal conduct of recruiting and using child soldiers and the armed conflict in Ituri, such that he was unquestionably implicated in the crime of child recruitment.⁶²⁹ According to the Pre-trial Chamber, there was substantial evidence showing that children under the age of 15 were enlisted and conscripted to undergo a short term of military training where they were made to learn the use of weapons.⁶³⁰ The corroborating evidence was contained in the video of *Lubanga*’s visit to the training camp for combat preparation.⁶³¹ The existence of the armed conflict in the DRC formed the background,

⁶²⁵ Eva La Haye, War Crimes in Internal Armed Conflict, *supra* note 590, pp. 112-113. See also Roy S. Lee, The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence, *supra* note 234, p. 121.

⁶²⁶ ICTY, *Tadic* Trial Judgment, *supra* note 517, para. 573.

⁶²⁷ *Ibid.* ICTY, Prosecutor v. *Milomir Stakic*, Trial Judgment, July 31, 2003, para. 569.

⁶²⁸ ICTR, Prosecutor v. *Jean de Dieu Kamuhanda*, ICTR-95-54A-T, Trial Chamber, Judgment, 22 January 2004, para. 735. ICTY, Prosecutor v. *Dragoljub Kunarac, Radomir Kovac & Zoran Vukovic*, IT-96-23/1-A, Appeal Chamber, Judgment, 12 June 2002, para. 58. ICTY, Prosecutor v. *Mitar Vasiljevic*, IT-98-32-T, Trial Judgment, 29 November 2002, para. 25. ICTY, *Stakic* Trial Judgment, *supra* note 627, para. 569.

⁶²⁹ ICC, Prosecutor v. *Lubanga*, Decision on the Confirmation of Charges, *supra* note 351, paras. 286-293.

⁶³⁰ *Ibid.*, para. 289.

⁶³¹ *Ibid.*, para. 291.

or the requisite precondition, of *Lubanga*'s plan and commission of recruiting children into the armed group or using them to take active part in hostilities.

B. Specific Elements for the Crime of Child Recruitment

As a general rule, there are two ingredients that must be established for a criminal charge to stand: the *actus reus* and *mens rea*. It is a well-known rule of criminal law not to seek to punish persons for their evil thoughts or intentions, if the accused has not caused or committed the *actus reus*.⁶³² Hence, as one of the most significant elements to distinguish a crime from others, what constitutes the *actus reus* will be the first focus of our discussion in this chapter.

I. The *Actus Reus* of the Crime of Child Recruitment

The *actus reus* of the crime of child recruitment is provided in the EoC as “the perpetrator conscripted or enlisted one or more persons into the national armed forces [or group] or used one or more persons to participate actively in hostilities”.

1. Two Categories of *Actus Reus*: Recruitment and Use

Rather than using the single term “recruitment” with respect to the prohibition against child soldiering,⁶³³ two new concepts “conscript” and “enlisting” came into being with the Rome Statute. By presenting the terms “conscript” and “enlist” as alternatives, the Rome Statute

⁶³² R. v. *Deller*, 36 Crim. App. R. 184, 1952. Leo Tolstoy, *War and Peace*, Volume III, New York, McClure, Phillips and Co., 1904, p.398. See also Peter W. Low, John Calvin Jeffries & Richard J. Bonnie, *Criminal Law: Cases and Materials*, Foundation Press, 1986, p. 363.

⁶³³ ICC, Prosecutor v. *Lubanga*, Decision on the Confirmation of Charges, *supra* note 351, para. 244: “The term used in this article [article 8] – recruitment – differs from those used in the Rome Statute – enlisting and conscripting.” See also SCSL, *Norman* Trial Judgment, *supra* note 78, para. 191: “The Chamber notes that ‘recruitment’ is the subject of the proscription under the Geneva Conventions of 1949 and the Additional Protocols of 1977 rather than ‘enlistment’, ‘conscripting’, or ‘use’ of child soldiers, the terms used in the Statute.”

clearly subscribes to two different forms of recruitment.⁶³⁴ Additionally, by adopting the disjunctive “or” to link the “conscript”, “enlist” and “use”, the Rome Statute endows “conscription”, “enlistment” and “use” with equal status in the constitution of the *actus reus* of this crime.⁶³⁵

All three acts, that is, “conscription”, “enlistment” and “the use of children to participate actively in hostilities” have been criminalized,⁶³⁶ no matter whether they are committed in the context of an international or a non-international armed conflict. Hence, if a person recruited children, regardless of whether by force or with consent, or used them to take active part in hostilities, the *actus reus* would be satisfied. The three facets stand independent but correlative. This has been confirmed in the jurisprudence of SCSL and ICC,⁶³⁷ where a three-tiered list of charges, for example, in the Lubanga arrest warrant, was brought up by the prosecution: “a) conscripting children into armed groups; b) enlisting children into armed groups; and c) using children to participate actively in hostilities”.⁶³⁸

2. Two Forms of Recruitment: “Conscription” and “Enlistment”

a. The Definition of “Conscription” in the Context of Child Recruitment

As discussed above, the act of “recruitment” can take either of the two forms defined in the Rome Statute and the SCSL Statute: “conscription” or “enlistment”. According to its literal definition, the term “conscription” refers to “the compulsory enrolment into military

⁶³⁴ ICC, Prosecutor v. *Lubanga*, Decision on the Confirmation of Charges, *supra* note 351, para. 244: “The Rome Statute prefers the terms ‘conscripting’ and ‘enlisting’ to ‘recruitment’.”

⁶³⁵ Oxford English Dictionary, 2nd Edition, Vol. VI.

⁶³⁶ The three forms of act correspond roughly to the headings of forcible recruitment, voluntary enlistment and use children to take active part in hostilities.

⁶³⁷ SCSL, *Norman* Trial Judgment, *supra* note 78, para.140. See also SCSL, *Brima*, Trial Judgment, *supra* note 272, para. 738.

⁶³⁸ ICC, Prosecution v. *Lubanga*, ICC-01/04-01/06, Pre-Trial Chamber I, Warrant of Arrest for Thomas Lubanga. See also ICC, Prosecution v. *Lubanga*, Statement of Deputy Prosecutor Fatou Bensouda Press Briefing 8 November 2006, The Charges, Office of the Prosecutor, (hereinafter ‘Statement of Press Briefing’), p. 4.

service”.⁶³⁹ So, in the context of child recruitment, it is safe to conclude that the notion of “conscription” is defined in terms of forcible recruitment or an exertion of force upon children in order to gain control over them for specific use within an armed force or group. The term “conscription” in the judgment in the *Brima* case by the Trial Chamber II of the SCSL is defined to imply “compulsion” and encompassing acts “through the force of law”,⁶⁴⁰ which is “not necessarily restricted to direct acts of physical force and also include threats or intimidation”.⁶⁴¹ This view was confirmed in both the *Sesay* case⁶⁴² before the SCSL and the *Lubanga* case before the ICC.⁶⁴³

Abduction is one of the means of conscription most often employed by both government armed forces and armed opposition groups.⁶⁴⁴ An act termed “press-ganging” was frequently undertaken by armed groups, which would abduct all the children in sight throughout a village.⁶⁴⁵ The entire conflict context in Sierra Leone was as a whole coercive.⁶⁴⁶ Children are abducted at gunpoint from buses, cars, refugee camps, churches, schools, streets, or even from their homes.⁶⁴⁷ Afterwards, boys are usually used in hostilities to commit atrocities, while girls are frequently forced to perform sexual tasks.⁶⁴⁸

Abduction of children by an armed force or group for the purpose of using them to participate actively in hostilities is only one facet of conscription, forced military training may also

⁶³⁹ The Oxford English Dictionary, *supra* note 116, vol. II, p.848. .

⁶⁴⁰ SCSL, *Brima* Trial Judgment, *supra* note 272, para. 734.

⁶⁴¹ Discussion Paper Proposed by the Co-coordinator, Suggested Comments Relating to the Crime of Genocide, UN Doc. PCNICC/1999/WGEC/RT.3.

⁶⁴² SCSL, *Sesay* Trial Judgment, *supra* note 297, para. 186.

⁶⁴³ ICC, Prosecutor v. *Lubanga*, Decision on the Confirmation of Charges, *supra* note 351, para. 247.

⁶⁴⁴ SCSL, *Brima* Trial Judgment, *supra* note 272, para. 734. See also SCSL, *Sesay* Trial Judgment, *supra* note 297, paras. 1697, 1700.

⁶⁴⁵ Raymond J. Toney & Shazia N. Anwar, International Human Rights Law and Military Personnel: A Look behind the Barrack Walls, 14 AM.U.int’l.L REV.(1998):519, p. 522.

⁶⁴⁶ Sonja C. Grover, Prosecuting International Crimes and Human Rights Abuses Committed Against Children: Leading International Court Cases, Springer, 2009, p. 74.

⁶⁴⁷ Amy B. Abbott, *Child Soldiers-The Use of Children as Instruments of War*, 23 Suffolk Transnat’l L. Rev. (2000):499, p. 516.

⁶⁴⁸ Stephanie H. Bald, *Searching for a Lost Childhood: Will the Special Court of Sierra Leone find Justice for Its Children?*, 18 AM.U.INT’L.L.REV (2002) :506, p. 540.

suffice for constitution of conscription of children in armed forces or groups, in case such forcible military training amounts to a conduct with the purpose of compelling a person to join an armed force or group.⁶⁴⁹

b. The Definition of “Enlistment” in the Context of Child Recruitment

If it is relatively uncontroversial that conscription is a concept of forcible recruitment, the definition of “enlistment” has in contrast remained open to different interpretations. The literary definition of the term “enlistment” refers to an “act of recording or registering”⁶⁵⁰ and “accepting and enrolling volunteers”.⁶⁵¹ This is what leads some to conclude that enlistment should be categorized as “a voluntary act”.⁶⁵² However, this is not a conclusion that comes unchallenged. There are others who take the view that the notion comprises both the act of voluntary enrolment and the act of conscription.⁶⁵³

This controversy regarding the definitions of “enlistment” is very much in evidence in the judicial practices before the international criminal courts. For example, Trial Chamber I of the SCLS in the *Brima* case upheld the distinction between “conscription” and “enlistment” with the observation that “as the forms of recruitment, conscription is forcible recruitment, whereas enlistment is voluntary recruitment”.⁶⁵⁴ The same view was expressed by Trial Chamber III in the *Sesay* trial of the SCSL and by the Pre-trial Chamber of the ICC in the *Lubanga* case.⁶⁵⁵ However, Trial Chamber I of the SCSL in the *Norman* case seemed to be in favor of a broader interpretation.

⁶⁴⁹ SCSL, *Sesay* Trial Judgment, *supra* note 297, para. 1695.

⁶⁵⁰ The Oxford English Dictionary, *supra* note 116, Vol. III, p. 191.

⁶⁵¹ SCSL, *Brima* Trial Judgment, *supra* note 272, para. 735. SCSL, *Sesay* Trial Judgment, *supra* note 297, para. 185. ICC, *Prosecutor v. Lubanga*, Decision on the Confirmation of Charges, *supra* note 351, para. 247.

⁶⁵² SCSL, *Brima* Trial Judgment, *supra* note 272, para. 735.

⁶⁵³ Knut Dörman, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, *supra* note 508, p. 377.

⁶⁵⁴ SCSL, *Brima* Trial Judgment, *supra* note 272.

⁶⁵⁵ ICC, *Prosecutor v. Lubanga*, Decision on Confirmation of the Charges, *supra* note 351, para. 246-247. See also SCSL, *Sesay* Trial Judgment, *supra* note 297, paras. 185. The Pre-trial Chamber in *Lubanga* case made the same interpretation as that in *Brima* case, that enlistment was explained as the act of “accepting and enrolling individuals when they volunteer to join an armed force or group.”

What happened in the *Norman* case was that “conscription of child soldiers” was not among the charges brought up by the Prosecution, who mentioned only “initiation or enlistment [of] children under the age of 15 years into armed forces or group, and in addition, or in the alternative, use them to participate actively in hostilities”.⁶⁵⁶ Trial Chamber I in its judgment, however, maintained that the term “enlistment” was consistent with both the sense of voluntary enrollment and that of forcible recruitment such that:

*“the term “enlistment” could encompass both voluntary enlistment and forced enlistment into armed forces or group [...]. For the purpose of the Indictment, where “enlistment” alone is alleged, the Accused is put on notice that both voluntary and forced enlistment are charged.”*⁶⁵⁷

With such a broad interpretation given to the term “enlistment”, a discussion is understandably required here. The partial judgment cited above probably raise more questions than answers. Apart from others, should the terms of “enlistment” be regarded as including both “voluntary and forcible recruitment”, particularly after the accused was informed of the charges brought against him or her?

It should be pointed out that in the *Norman* case the failure of the Prosecutor to bring the charge of “conscription” in the first place was the reason why the Trial Chamber adopted the broad interpretation in the judgment. This, however, raises a concern as to whether such an interpretation broadened the meaning of the original charge and whether the accused should be judicially assumed to possess the understanding of the term “enlistment” in the way as the Chamber defined it.

If the common understanding of the term “enlistment” takes it to be “voluntary act”, the explanation of the term “enlistment” by the Chamber would then amount to an amendment of the charge,⁶⁵⁸ thus giving rise to a doubt as to whether the accused had been given sufficient

⁶⁵⁶ SCSL, *Norman* Trial Judgment, *supra* note 78, para. 29.

⁶⁵⁷ SCSL, *Norman* Trial Judgment, *supra* note 78, para. 192.

⁶⁵⁸ In the *Lubanga* trial, the trial judges Elizabeth Odio Benito and Rene Blattman though agreed that new charges could be added but emphasized that “they could only be based on fresh evidence, not only on existing

notice and understanding of the alleged charge. There is, therefore, no legal ground to adhere to the definition given by Trial Chamber I in the *Norman* case to the term “enlistment” and disregard the interest of the defenses for a fair trial in the criminal trial procedure.

As far as the provision of child recruitment under the Rome Statute is concerned, “enlistment” is never given an all-embracing reading. The Rome Statute employs the disjunctive “or” to link the two concepts: “conscription”, an uncontroversial concept of forcible recruitment, and the seemingly controversy-riddled “enlistment”. In this way, it signals its endorsement of a narrow definition for the term “enlistment”, or “voluntary recruitment” in the context of the crime of child recruitment.

So it is proposed here that the term “enlistment” should be taken to mean “voluntary recruitment” in contrast corresponding to “forceful recruitment” as defined of its counterpart “conscription”, in the context of child recruitment.

c. *De Jure* and *De Facto* Recruitment

Next comes the issue to what extent an act of “recruitment of children into armed forces or groups” is deemed sufficient to constitute the crime of child recruitment.

a) *De Jure* Recruitment of Children into Armed Forces or Groups

A *de Jure* recruitment is easily recognizable by its formality, which as a rule involves the military administrative process for registration and enrolling children into an armed force or group, wherein such act in itself is sufficient to constitute the crime, no matter whether the child is eventually used to take part in hostilities after the recruitment or not. The rationale lies in the fact that once children are formally recruited into armies, no matter what their performances are, they lose their civilian status.⁶⁵⁹

facts”. The presiding judge Adrian Fulford stated that “Regulation 55 could not be used to add, substitute, or amend the charges, since the prosecutor must request those changes before the trial begins.”

⁶⁵⁹ “Armed groups that are not part of the armed forces need to follow four conditions: Commanded by a person responsible for his subordinates; having a fixed distinctive emblem recognizable at a distance. Article 44(3) of the AP I sets an exception to this rule when the nature of the hostilities prevents the combatant from

b) *De Facto* Recruitment of Children into Armed Forces or Groups

However, in most of the times, the recruitment does not show a formal process of military registration, but consists of a single informal act, such as putting on uniforms, being under military discipline, bearing arms or wearing any of the traditional means of marking as a soldier.⁶⁶⁰ The recruitment may also take the form of a process involving several acts, such as, abducting a child and giving him or her a gun, or a protracted process spanning a long period consisting of providing children with religious initiation and afterwards sending them to military camps. These acts, lacking the formality of military registration, may not constitute the *de jure* recruitment, but can satisfy the requirement of a *de facto* recruitment.⁶⁶¹

What usually happens is that after the child was abducted, captured, or initiated, the child will be assigned to military training camps, or used to take part in hostilities without appropriate military registration. To all purpose and intent, children in these situations are actually serving members of armed forces or groups.⁶⁶² As noted by the Majority of the Appeals Chamber in the Norman case, recruitment “cannot narrowly be defined as a formal process”, and in a broad sense it includes “any conduct accepting the child as a part of the militia”.⁶⁶³

3. The Use of Children to Participate Actively in Hostilities

distinguishing himself or herself. There is an ongoing legal debate about the scope of a distinctive sign which combatants of non-regular armed forces need to wear; carrying arms openly; and conducting their operations in accordance with the laws and customs of war”. See ICRC, *Distinction between Combatants and Civilians*, available at <http://www.diakonia.se/sa/node.asp?node=3920> (last accessed on 27 April 2010).

⁶⁶⁰ Roy S. Lee, *The International Criminal Court: The Making of the Rome Statute, Issues, Negotiations, Results*, Springer, 1999, p.118.

⁶⁶¹ SCSL, *Norman Appeal Judgment*, Partially Dissenting Opinion of Honourable Justice Renate Winter, *supra* note 267, para.12.

⁶⁶² *Ibid.*

⁶⁶³ Since the Appeals Chamber in the Norman stated that “enlistment” in the Norman case denotes to both conscription and enlistment, therefore, the term “enlistment” used by the CDF actually means recruitment, including both forcible recruitment and voluntary enrolment. SCSL, *Norman Appeal Judgment*, *supra* note 267, para. 144.

Besides the above mentioned conscription and enlistment, a discussion of the crime cannot go without mentioning another offence: the use of children to participate actively in hostilities.

International instruments, however, seem to have gone different ways for the definition of the “use” of children in hostilities. Article 77 of the AP I and Article 38 of the CRC favor a narrow interpretation, explicitly restricting the use of children to take part in hostilities as “taking direct part in hostilities”.⁶⁶⁴ The Commentary on the AP I on the other hand, cited examples (of such direct participation) includes “in particular, gathering and transmission of military information, transportation of arms and munitions, provision of supplies *etc*”.⁶⁶⁵ The Statute of the SCSL and the Rome Statute, adopted a closely related wording “active participation” in their provisions regarding child recruitment, in contrast to the term “direct participation” favored by the AP I and CRC.

In the following, the difference between the words “active”, “direct” and “inactive” will be examined, with the aim of opening up a discussion: to what extent a “use” can be said to satisfy an “active” requirement as provided by the SCSL Statute and the Rome Statute for protection of children from being used in hostilities.

a. The Term of “Active” vs. “Direct”

It has sometimes been suggested that the adoption of the term “active” was the result of careful deliberation.⁶⁶⁶ Indeed, a decision was made during the drafting of the Rome Statute

⁶⁶⁴AP I, *supra* note 66, Article 77. CRC, *supra* note 92, Article 38.

⁶⁶⁵ICRC Commentary to the Additional Protocol I, *supra* note 69, para. 3187: “Examples would include, in particular, gathering and transmission of military information, transportation of arms and munitions, provision of supplies etc. The intention of the drafters of the article was clearly to keep children under fifteen outside armed conflict, and consequently they should not be required to perform such services; if it does happen that children under fifteen spontaneously or on request perform such acts, precautions should at least be taken; for example, in the case of capture by the enemy, they should not be considered as spies, saboteurs or illegal combatants and treated as such. In addition, appropriate instruction is again essential.”

⁶⁶⁶ John T. Holmes, *The Protection of Children’s Rights in the Statute of the International Criminal Court*, in the book: Mauro Politi & GivsepeNesi, *The Rome Statute of the ICC: A challenge to Impunity*, Ashgate, 1998, p. 121.

to move away from the term “direct”, for the reason of the increased use of civilians in supporting roles in the military.⁶⁶⁷ The adoption of “active” was an attempt to avoid an interpretation in a very narrow sense, whereas the new term was believed possible to encompass a broader range of activities. “Active” thus came into circulation and was frequently adopted in the frame of the crime of child recruitment.

Unfortunately this change in language failed to bring the desired effect. The two words are frequently assumed to be interchangeable in common usage, as obvious from the conclusion of the ICTR in the *Akayesu* case, that “the definition of the term ‘take active part in hostilities’ and the term ‘take direct part in hostilities’ are similar”.⁶⁶⁸ In the English texts of the Geneva Conventions and of the Additional Protocols, the two words “active” and “direct” were used interchangeably for the notion of direct participation in hostilities. The consistent use of the phrase “*participant directement*” in the equally authentic French texts demonstrates that the terms “direct” and “active” refer to the same quality and degree of individual participation in hostilities.⁶⁶⁹

Furthermore, though, it appears at first sight that the PrepCom had drawn a distinction between the terms “active” and “direct” in the context of the child recruitment, what actually transpired was that a distinction was drawn between “combat” and “military activities linked to combat”, not between “active” and “direct” participation.⁶⁷⁰ This can be seen in the explanatory footnote of the PrepCom Draft Statute providing guidance for the interpretation the scope of “the use of children in hostilities”,⁶⁷¹ which reads:

“The words “using” and “participation” 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 the use of children as decoys, couriers or at

⁶⁶⁷ Roy S. Lee, *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, *supra* note 234, p. 206.

⁶⁶⁸ ICTR, *Akayesu* Trial Judgment, *supra* note 420, para. 629.

⁶⁶⁹ ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, *International Review of the Red Cross*, No. 872, 31 December 2008, p. 1035.

⁶⁷⁰ *Ibid*, footnote 84.

⁶⁷¹ Roy S. Lee (ed), *The International Criminal Court: The Making of the Rome Statute, Issues, Negotiations, Results*, *supra* note 660, p. 118.

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 married 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."⁶⁷²

In this footnote, the phrase "participate actively in hostilities" follows closely in spirit what is offered in the AP I Commentary on the term of "take direct part in hostilities", containing both direct participation in combat and also certain military activities linked to combat.

b. The Definition of "Active" Participation vs. "Inactive" Participation

As stated above, "active participation" is, according to the Rome Statute, not limited to fighting in the frontline, but also covers military activities linked to the combat, including activities such as conveying arms and equipment to regular troops, armed patrol, spying and sabotage. The Zutphen draft in its footnote took pains to illustrate with examples of what kinds of acts are satisfied as an "active" use.⁶⁷³ However the wide range of tasks and roles performed by children in armed conflicts means that exhaustive enumeration is out of the question. There thus remain many areas riddled with ambiguity and open to interpretations. Fortunately, there are two mutually complementary and supportive criteria which can be used to determine whether the participation is "active" or not. The first standard is found in the *Tadic* case with a clear definition of "take active part (active participation)", as referring to

⁶⁷² PrepCom Draft Statute, p. 21.

⁶⁷³ "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 the 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 married accommodation. However, use of children in a direct support function such as acting as porters to take supplies to the front line, or activities at the front line itself would be included within the terminology." See Report of the Inter-sessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands, Preparatory Committee on the Establishment of an International Criminal Court, article 20[E], at 23 n.12, U.N. Doc. A/AC.249/1998/L.13 (1998).

“acts of war that by their nature or purpose are likely to cause actual harm to the personnel or equipment of the enemy armed forces”.⁶⁷⁴

According to the ICRC, “active participation” means a causal connection between the act of participation and its consequence on the enemy.⁶⁷⁵ Some factors in determining the “causal connection” are taken into consideration by the Trial Chamber in the *Sesay* case, which included, but are not limited to: i) conducting a direct support to the war efforts and to the military operation of the armed force or group, such as using children as spies;⁶⁷⁶ ii) performing tasks that are military in nature or by the purpose are intended to cause damage or actual harm to the adversary party, such as using children to perpetrate crimes against civilians;⁶⁷⁷ iii) undertaking tasks that are related to or close to military objectives, such as armed patrol.⁶⁷⁸

The second standard stated in the *Lubanga* case requires that the “military activities” should by nature involve high likelihood of exposing children to military danger and realistic fear. For example, children who play a role in guarding military objects or transporting arms and munitions to the frontline should be regarded as “taking active part in hostilities”, since they

⁶⁷⁴ ICTR, *Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, ICTR-96-3, Trial Chamber, Judgments and Sentence, 6 December 1999, para.100. ICTY, *Tadic Appeals Judgment*, *supra* note 562, para. 616. ICTR, *Prosecutor v. Laurent Semanza*, ICTR-97-20-T, Trial Chamber, Judgment and Sentence, 15 May 2003, paras. 363-366. The Trial Chamber further takes note of the Commentaries, where it is stated that “to restrict the concept of participating directly in hostilities to combat and to active military operations would be too narrow, while extending it to the entire war effort would be too broad”. See also *Prosecutor v. Alferd Musema*, ICTR-96-13-A, Judgment and Sentence, Appeals Chamber, para. 279; ICRC Commentary on Additional Protocol I, *supra* note 69, paras.1944, 1679, 4788. The quoted sentence continues: “as in modern warfare the whole population participates in the war effort to some extent, albeit indirectly,” and that “active participation in hostilities implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and the place where the activity takes place”.

⁶⁷⁵ T. W. Beneet, *Criminalising the Recruitment of Child Soldiers, Using Children in Armed Conflict: A Legitimate Africa Traditions?*, *supra* note 73.

⁶⁷⁶ SCSL, *Sesay Trial Judgment*, *supra* note 297, para, 1729.

⁶⁷⁷ *Ibid.*, para. 1720.

⁶⁷⁸ *Ibid.*, para. 1718.

are exposed to bullets and shells or to capture by the enemy.⁶⁷⁹ An even lower level of involvement in hostilities, such as being bodyguard of a high-ranking military commander, will arguably expose children equally to potential attacks by the enemy. Factors related to this criteria should presumably include, but are not limited to, i) high risk of possible enemy attacks, such as guarding military objectives;⁶⁸⁰ ii) the proximity to a key military target of the warring factions, such as bodyguards to Commanders.⁶⁸¹

The Pre-trial Chamber in the *Lubanga* case, however, found it necessary to place a limit on the “combat-related activities” holding that any activity that is “clearly unrelated to hostilities” would not fall within the prohibition.⁶⁸²

Doubtless, “combat-related activities” in the context of child recruitment denotes solely activities “manifestly with connection to the hostilities”.⁶⁸³ This interpretation would actually exclude a large number of children who were deemed unfit for combat but were used to provide logistical support to the armed forces or groups. These logistic tasks, therefore, would only be wrapped in the category of “inactive” participation, because they are by nature and purpose only contribution to a military operation, but not necessarily cause actual harm to the enemy, or provide directly support to the military operations”.⁶⁸⁴

⁶⁷⁹ ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Confirmation of Charges, *supra* note 351, para. 267.

⁶⁸⁰ SCSL, *Sesay* Trial Judgment, *supra* note 297, para. 1727.

⁶⁸¹ *Ibid.*, para. 1731. See ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Confirmation of Charges, *supra* note 351, para. 263.

⁶⁸² ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Confirmation of Charges, *ibid.*, para. 262.

⁶⁸³ So far, the Trial Chamber in the *Brima* case gave a broader scope of “participation actively in hostilities”. In the *Brima* case, the Trial Chamber took the view 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 labor or support that gives effect to, or helps maintain, operations in a conflict constitutes active participation.” See SCSL, *Brima* Trial Judgment, *supra* note 272, para. 737.

⁶⁸⁴ ICTY, *Tadic* Appeal Judgment, *supra* note 562, para. 199. [T]o be concerned in the commission of a criminal offence [...] does not only mean that you are the person who in fact inflicted the fatal injury and directly caused death, be it by shooting or by any other violent means; it also means an indirect degree of participation [...]. [I]n other words, he must be the cog in the wheel of events leading up to the result which in fact occurred. This position has been widely accepted by States. See Jean-Marie Henckaerts and Louise Doswald-Beck, *customary*

Similarly, the use of children as domestic labor or sexual slavery,⁶⁸⁵ are “manifestly without connection to the hostilities”, and therefore would not come within the scope of “use of children to take active part in hostilities” in the context of the crime of child recruitment either under the SCSL Statute or the Rome Statute.⁶⁸⁶

4. The “Recruitment of Children into Armed Forces of Groups” vs. the “Use of Children to Participate Actively in Hostilities”

To tackle this issue, the judgments in the *Norman* case on the issue relating to Kondewa’s guilty of the crime of child recruitment should first be examined. According to the Indictment, Kondewa was convicted by the SCSL of the initiation of Witness TF2-021 who was under the age of 15 years into the CDF.

In the circumstances of the enlistment of TF2-021, the Trial Chamber was of the opinion that Kondewa’s initiation of Witness TF2-021 was “an act analogous to enlisting children for active military service”⁶⁸⁷, or was an essential condition for Witness TF2-021’s enrollment into the CDF. Based on this, the Trial Chamber ruled that Kondewa was guilty of enlisting Witness TF2-021 into the CDF⁶⁸⁸ and Kondewa therefore was sentenced to seven years of imprisonment for his enlistment of Witness TF2-021.

Kondewa appealed against his conviction regarding the enlistment of Witness TF2-021. According to the Appeal Judgment, the Majority acquitted Kondewa of liability under Article 6(1) of the Statute for “committing” the crime of enlisting Witness TF2-021, based on the basis that there was connection between Kondewa’s act of initiation of Witness TF2-021 to

international humanitarian law, Vol. 1: Rules, supra note 392, p. 22 or footnote 129-134. See also SCSL, *Sesay Trial Judgment, supra* note 297, paras. 1630, 1743.

⁶⁸⁵ SCSL, *Sesay Trial Judgment, supra* note 297, paras. 1620, 1730. See Coalition to stop the use of child soldiers, *Child soldier’s global report 2004, supra* note 1, p. 16. See Graça Machel, *The Impact of War on Children: A Review of Progress since the 1996 United Nations’ Report on the Impact of Armed Conflict on Children*, London: Hurst and Company, 2001, p. 7.

⁶⁸⁶ SCSL, *Brima Trial Judgment, supra* note 272, para. 263.

⁶⁸⁷ SCSL, *Norman Trial Judgment, supra* note 78, para. 970.

⁶⁸⁸ *Ibid.*, para. 970. See also SCSL, *Norman Appeal Judgment, Partially dissenting opinion, Justice Winter, supra* note 267, paras. 14-18.

join the CDF and the actual enrollment of TF2-021 into the CDF.⁶⁸⁹ The Appeals Chamber found that before Kondewa initiated Witness TF2-021, Witness TF2-021 had already enlisted in the CDF as a child soldier to “carry looted property”,⁶⁹⁰ and therefore his initiation by Kondewa into the CDF cannot be counted as enlistment.⁶⁹¹ As Appeals Chamber rules,

*“It is apparent to the Appeals Chamber that there is a paucity of jurisprudence on the question of how direct an act must be to constitute “enlistment” under Article 4.c., as well as the possible modes of enlistment. The Appeals Chamber holds that for enlistment there must be a nexus between the act of the accused and the child joining the armed force or group.”*⁶⁹²

There was one dissenting voice though. Justice Winter pointed out that “the key test to determine whether an act in question constitutes enrolment is acceptance into an armed force or group”.⁶⁹³ The main thrust of her argument was that “carrying looted property” did not constitute “participating actively in hostilities”, because the act of “carrying looted property” was “done for private purposes”, and thus it is insufficient to establish that the Witness TF2-021 had already been “enlisted into armed forces or groups”.⁶⁹⁴

Basically, the case focuses on one specific act, the act of “carrying looted property” and its definition in relation to the current legislation. Thus two questions seem appropriate here: a) whether the act of “carrying looted property” is equivalent to an act of “active participation in hostilities,” of which the Appeals Chamber in the *Norman* case seemed to be convinced; and b) whether the act of “carrying looted property” is sufficient to constitute “recruitment of children into armed forces or groups”.

⁶⁸⁹ *Ibid.*, para.146.

⁶⁹⁰ *Ibid.*, paras. 141-145.

⁶⁹¹ *Ibid.*, para. 8: “It is clear that the enlistment of Witness TF2-021 had taken place before he was initiated by Knodewa. The evidence shows that the Witness had first been captured by the rebels in 1995 and was later captured by the CDF in 1997. Upon his capture by the CDF, Witness TF2-21 was forced to carry looted property by the CDF.”

⁶⁹² SCSL, *Norman* Appeal Judgment, *supra* note 267, para. 141.

⁶⁹³ SCSL, *Norman* Appeal Judgment, Partially Dissenting Opinion of Honorable Justice Renate Winter, *ibid.*, paras. 11-12.

⁶⁹⁴ *Ibid.*, para. 12.

As discussed above, carrying looted property can only be fallen into the scope of “indirect participation” in hostilities, as it does not by its nature is likely to cause any damage or actual harm to the adversary party. Since the first question was already discussed in the previous section relating to the definition of “active participation in hostilities”, the following section will focus on the second question.

a. The “Indirectly Participate in Hostilities” as a *de facto* “Recruitment of Children in Armed Forces or Groups”

The main issue here is whether the “use” of children in hostilities, no matter whether the participation is active or inactive, should all be deemed as a *de facto* recruitment into armed forces or groups. As far as “active participation” is concerned, there is general consensus that the use of children to participate “actively” in hostilities is actually a kind of *de facto* recruitment of children in armed forces or groups. Thus, the only question left is whether “indirect participation” of children in hostilities should also be regarded as *de facto* recruitment.

A possible argument in this regard is that indirect participation in hostilities is essential in providing the basic support for the operation of an armed force or group. On this basis, it can be argued that children who serve for an armed force or group in an indirect role are *de facto* members of the armies, even though they do not take active part in hostilities.

Furthermore, it should be pointed out there is no sharply marked distinction between children used as laborers in the armed forces or groups and those serving in military operations, particularly, because a) children taking indirect participation are also commanded by a person in the army; and b) children used as laborers also have a fixed distinctive emblem or carrying arms, while performing tasks, such as carrying looted properties or on food-finding missions. As the evidence in the Norman case showed us, the Witness TF2-021 was fully armed while carrying looted properties. And it must be again emphasized that military uniform and carrying arms have always been used as a means to distinguish combats from civilians.⁶⁹⁵

⁶⁹⁵ Amir Givol, NetaRotem & Sergey Sandler, Children Recruitment in Israel, *supra* note 149, p. 31.

Thus, with respect to comprehensive protection for children involved in military service, the inclusion of “indirect participation” into the frame of “recruitment of children in armed forces of groups” is believed by the author to be consistent with the purpose of Geneva Conventions, which holds that the vulnerable groups in the armed conflicts should be protected to the maximum extent possible.⁶⁹⁶

b. The Arguments against the Inclusion of the “Use of Children to Participate Indirectly in Hostilities” into the Realm of the *de facto* “Recruitment of Children in Armed Forces of Groups”

A possible argument against inclusion of “indirect use of child in hostilities” as *de facto* “recruitment”, could take the form that once these children are regarded as *de facto* members of an army, they would lose the protection of the Geneva Convention as civilians. This certainly creates a dilemma. On the one hand, Geneva Convention offers protection for children performing logistic tasks, as long as they are kept out of the category of *de facto* members of armed forces or groups and still keep their civilian status in armed conflicts. On the other hand, being included in the category of *de facto* members of armed forces, they would gain the protection from being recruited as child soldiers. The question thus boils down to alternative protect children maximally and ensure their best interests in armed conflicts.

One possible argument in favor of taking ‘indirect participation’ as *de facto* recruitment is that children should be first and foremost protected from involvement in armed conflict, no matter directly or indirectly. No doubt, if there is no use of children to take indirect participation in hostilities, there is no need to discuss whether those children should be protected under civilian status or not. From this perspective, it is better to include children taking indirect participation in armed conflicts into the scope of *de facto* recruitment of children into armed forces or groups.

c. The Rationale of Separating the “Use of Children to Participate Actively in Hostilities” from the “Recruitment of Children into Armed Forces or Groups”

⁶⁹⁶ ICTY, *Tadic* Appeal Judgment, *supra* note 562, paras. 167-168.

The discussion above seems to suggest that the distinction between “use” and “recruitment” is negligible, especially if the recruitment is in the *de facto* sense. But this is not to say that the current framework of legislation as laid down by both SCSL Statute and the Rome Statute should be disregarded. The importance of the current framework, *i.e.*, listing recruitment (conscription and enlistment) and use as separate acts, has a more practical manipulation at the stage of sentencing. That is, the distinction of “active participation in hostilities” signals an aggravated form of the crime, for being an actual employment of children to serve in military operations in hostilities. The conviction of an accused on the use of children to “participate *actively* in hostilities” invites a heavier sentence than merely “recruitment (*de jure* and *de facto*) of children in armed force or groups”.

And thus, if a use constituted both a *de facto* recruitment (including both the active and inactive use of children in hostilities) and the use of children to take active part in hostilities, the person can be sentenced on account of the latter charge for the active “use of children”, instead of the former - the *de facto* recruitment. That could be the reason, though active participation constitutes *de facto* recruitment, it should be still listed apart from the form of “recruitment of children into armed forces or groups”.

d. The Arguments for Adding the “Use of Children to Participate Indirectly in Hostilities” into the Realm of the “Use of Children to Participate Actively in Hostilities”

The current legislation on the crime of child recruitment has also sometimes been criticized for being formulated in such a way as to exclude “inactive participation” from the “use of children in armed conflicts”.⁶⁹⁷ For example, Henckaerts and Doswald-Beck maintain that, permitting only a certain degree of participation undermines the principle at stake: for their own safety, children who are especially vulnerable should be excluded from hostilities,

⁶⁹⁷ T. W. Bennet, *Criminalising the Recruitment of Child Soldiers: Using Children in Armed Conflict: A Legitimate Africa Traditions?*, *supra* note 77.

whether participating directly or indirectly, children are placed in danger.⁶⁹⁸ The lack of prohibition of indirect participation was the reason of a concern of the UNICEF, too, which believes that it will actually encourage the parties to an armed conflict to increasingly use children in taking indirect part in hostilities.⁶⁹⁹

Among the proposed amendments is one that suggests that a new phrase of “taking part in hostilities” (including both active participation and inactive participation) be adopted in the future legislation such as to provide a more comprehensive safeguard to protect children from the involvement in armed conflicts.⁷⁰⁰

The question is whether sweeping them all under one category offers a feasible option. It should be noted that though it is indisputable that indirect participation in hostilities may in some circumstances place children under similar risks as active participation, the omission of “inactive participation” in the frame of “use of children in hostilities” does not however necessarily lead to a vague or incomplete protection for children, if, as argued in the previous section, the use of children to perform logistic tasks, such as cooking or doing laundry, is taken to be a form of *de facto* recruitment.⁷⁰¹

Furthermore, as mentioned above, the inclusion of inactive participation into the form of “use” would contravene the very purpose of the legislation, which aims to impose heavier sentences in cases where children are used to take *active* part in hostilities, as opposed to mere “*de facto* recruitment of children in armed conflicts” to perform *indirect* role. From this perspective,

⁶⁹⁸ Jean-Marie Henckaerts & Louise Doswald-Beck, Customary International Humanitarian Law, *supra* note 392, p. 23. They also run the risk of being captured by the adversary party. If they fall into enemy hands, they are always faced with the certainty of being regarded as spies rather than combatants which confer a status on the persons affected such that they can enjoy the treatment of prisoners of war.

⁶⁹⁹ A closer examination of the definition of “child soldier” proposed by the Cape Town Principles, which defines child soldier as “any person less than eighteen years of age who is part of any kind of regular or irregular armed force or armed group *in any capacity*, including but not limited to cooks, porter, messengers, and anyone accompanying such groups, other than family members”. UNICEF, The Symposium on the Prevention of Recruitment of Children into the Armed Forces and on Demobilisation and Social Reintegration of Child Soldiers in Africa, *supra* note 579, p. 8.

⁷⁰⁰ Roy S. Lee, The International Criminal Court: The Making of the Rome Statute, Issues, Negotiations, Results, *supra* note 660, p.118.

⁷⁰¹ See *De Jury* und *De facto* Recruitment, *supra* Chapter 4.

“inactive” participation should not be combined into the form of “use of children to take active part in hostilities”.

5. The Minimum Recruitment Age of Children

a. The Person must be under the Age of 15 years

It should be noted that the substantive provisions for the crime of child recruitment as laid down in the Rome Statute and the SCSL Statute are restricted to the protection for children under the age of 15 years. For the constitution of the crime of child recruitment, the Prosecution must prove that the victim was a person under the age of 15 at the time the recruitment or the use was committed.⁷⁰² If the children had attained the age of 15, the person who recruited or used them to take active part in hostilities will remain outside the scope of law. The reason for choosing 15 as the minimum recruitment age for the crime of child recruitment is that, at the time when the Rome Statute was drafted, there was no sufficient State practice criminalizing persons who recruited or used children between the age of 15 and 18 in hostilities.⁷⁰³

b. Efforts to Raise the Recruitment Age to 18 Years

Once recruited into armed forces or groups or used to take active part in hostilities, children will lose civilian status and become legitimate military targets to the enemy fires. From this perspective, children between the age of 15 and 18 years should be given the same protection from recruitment.

These days international sentiment is increasingly turning in favor of raising the age limit to 18 for recruitment. This is clearly visible from the efforts of many international organizations and the NGOs. During the 26th and the 27th International Conferences of the Red Cross and Red Crescent, the ICRC expressed its support of the idea of setting 18 as the minimum

⁷⁰² For the *mens rea*, see *infra Mens Rea*, Chapter 4.

⁷⁰³ See Chapter 3. See also Mauro Politi & Giuseppe Nesi, *The Rome Statute of the International Criminal Court*, Ashgate, 2001, p. 120. The fact that this standard-setting [raising the age of recruitment to 18] exercise is still underway led many delegations in Rome to accept that the age of recruitment should be retained at fifteen years.

recruitment age.⁷⁰⁴ Human Rights Watch takes the same position that no children under the age of 18 should be recruited, either voluntarily or forcibly, or made to participate in hostilities.⁷⁰⁵ The UNICEF has also taken the position supporting 18 as the minimum age for participation in armed conflicts. In a statement to the UN Security Council on 12 February 1999, the Executive Director of the UNICEF made a strong plea on account of the “straight-18” standard.

a) A Child’s Free Will as an Argument

Despite the efforts by these humanitarian agencies for setting the minimum age of recruitment at 18 years, States are reluctant to accept this standard, especially setting 18 as the minimum age of voluntary recruitment. A major argument against raising the enlistment age to 18 is the allegedly the free will of the young person.

The author thinks this argument can hardly to be said as an aspirational excuse. The dire circumstances as well as the environmental influences of an armed conflict⁷⁰⁶ leave children no option other than voluntary enlistment into military service.⁷⁰⁷ Many factors can drive a

⁷⁰⁴ ICRC, Protection of the Civilian Population in Period of Armed Conflict, Resolutions of the 26th International Conference of the Red Cross and Red Crescent, Resolution 2, 1 January 1996, C. with Regard to Children, available at <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/57JMRV#a3>. See also ICRC, *Protection of Victims of Armed Conflict through respect for International Humanitarian law, Report of the Plenary Commission, Theme I of the Plan of Action*, 27th the International Conference of the Red Cross and Red Crescent, Geneva, 31 October to 6 November 1999, Specific Humanitarian Problem, 4 November 1999, para. 2, available at <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/57JQ6D> (last accessed on 26 June 2010).

⁷⁰⁵ Human Rights Watch, *My Gun was as Tall as Me: Child Soldiers in Burma*, 2002, p.176.

⁷⁰⁶ ICRC, *Optional Protocol to the Convention on the Rights of the Child concerning Involvement of Children in Armed Conflict, Position of the International Committee of the Red Cross*, *supra* note 103, para.45. Fernando Jiovani Arias Morales, *the Psycho-social care of demobilized child soldiers in Colombia: Conceptual and Methodological aspects*, Coalition to Stop the Use of Child Soldiers, 2005, available at http://www.childsoldiers.org/psychosocial/Psychosocial_Care_of_Demobilized_Child_Soldiers_in_Colombia_Conceptual_and_Methodological_Aspects_2005_by_Dr_Fernando_Jiovani_Arias_Morales.pdf, (last accessed on 8 June 2010), p.2.

⁷⁰⁷ ICC, *Prosecutor v. Lubanga*, Confirmation of Charges, *supra* note 351, p. 5. See Vision, *Reclaiming Their Youth*, Fall 2008 Issue, available at <http://www.vision.org/visionmedia/article.aspx?id=6686>, (last accessed on 10 June 2010).

child to join the military: to gain food and/or shelter for their offered services;⁷⁰⁸ to search for role models, as the image of strong armed men in their eyes were heroes;⁷⁰⁹ or to revenge for the violence done to their family.⁷¹⁰ The paucity of alternative options on top of the immaturity to fully understand the consequences of their choices are hardly factors that would boost the claim their decisions to join the army were made under their full autonomy.⁷¹¹

In fact, the main reason that States are reluctant to set a higher age standard for recruitment, is exactly their youth and the attendant immaturity. The things such as manipulability, malleability, obedience, incomprehension of danger or death are all the qualities that make ideal soldier material.

b) Current Development of Raising the Age Limit to 18 Years

Nevertheless, there are some encouraging signs in the current state practice that things are moving ahead. 109 states, or more than two thirds of the nations of the world, have adopted

⁷⁰⁸ This can be seen from the Hutu-Tutsi conflict in Rwanda. See Isobel McConnand & Sarah Uppard, *Children - Not Soldiers: Guidelines for Working with Child Soldiers and Children Associated with Fighting Forces*, Save the Children, December 2001, p.17, available at <http://www.reliefweb.int/rw/lib.nsf/db900SID/LGEL-5D8D6Q?Open> (Latest visiting is on 8 August 2008). Coalition to stop the use of child soldiers & UNICEF, *Guide to the Optional Protocol on the involvement of children in armed conflict*, December 2003. p.7; see also Boothby & Knudsen, *Waging a New kind of war: Children of the Gun*, 282 Sci Am. (2000): 60-, p. 61; See also Daya Somasundaram, *Child soldiers: Understanding the Context*, 324 British Medical Journal (2002): 1268, p. 1268.

⁷⁰⁹ This is one of the main reasons that children decided to join the army during the protracted conflict in Sierra Leone. See ICRC, Commentary on Additional Protocol I, para. 3185. Ilene Cohn & Guys Goodwin-Gill, *Child Soldiers: The Role of Children in Armed Conflict*, Oxford University Press, 1994, p.11.

⁷¹⁰ In the Liberia conflict, lots of children joined the armed based on this reason. See J. Louise Despert, Preliminary Report on Children's Reactions to the War, Unspecified Vendor, 1942, pp.417-418. Human Rights Watch, *Easy Prey: Child Soldiers in Liberia*, Human Rights Watch, 1994.

⁷¹¹ ICRC Commentary on Additional Protocol I, *supra* note 69, para. 3185. See also Matthew Happold, *Child Recruitment as a Crime under the Rome Statute of the International Criminal Court*, in: *The Legal Regime of the International Criminal Court: Essays in Memory of Igor Blischenko* (José Doria, Hans-Peter Gasser & M. Cherif Bassiouni Eds.), Martinus Nijhoff, 2009, p. 580.

the “straight 18” standard by stipulating 18 as the minimum age for conscription,⁷¹² which is a most welcome development. Furthermore, some states, such as Columbia,⁷¹³ Macedonia,⁷¹⁴ Thailand,⁷¹⁵ though only a small fraction of the international community, have incorporated in their domestic laws the punishment of both conscription and enlistment of children under 18 into armed forces or groups. As the issue of the minimum age for recruitment is continually brought up in debates and 18 constantly turns up in proposals as the appropriate age, it is hoped that in the foreseeable future a new provision will be drafted to prosecute the recruitment, either conscription or enlistment, or the use of child soldiers under the age of 18 instead of 15 in hostilities.

II. The *Mens Rea* of the Crime of Child Recruitment under the Rome Statute

The concepts of *actus reus* and *mens rea* is one long established in criminal law. Basically it requires only when the prosecution succeeds in establishing the two basic elements at the same time, a conviction is possible,⁷¹⁶ as reflected in the legal maxim “*actus non facit reum nisi mens sit rea*”.⁷¹⁷ However, neither the Charters of Nuremberg or Tokyo, nor the Statutes of the ICTY or the ICTR has laid down any general provision specific on the mental element.⁷¹⁸ The only exception is the Rome Statute, “confirming the *mens rea* as a general requirement of culpability”.⁷¹⁹

⁷¹²Ilene Cohn & Guys. Goodwin-Gill, *Child Soldiers: The Role of Children in Armed Conflict*, *supra*note709, Chapter 3, p.7-8, 53-75, Annex, Voting Age and Military Age by Country.

⁷¹³Colombia, *Law 418 of 1997 for compulsory recruitment and Law 548 of 1999 for voluntary recruitment*.

⁷¹⁴ Macedonia, *Defence Law, at Ministry of Defence*, Article 62.

⁷¹⁵Thailand, *Constitution, at International Constitutional Law*, Section 69and 49.

⁷¹⁶ William A. Schabas, *Genocide in International Law: The Crimes of Crime*, Cambridge University Press, 2000, p. 151.

⁷¹⁷ It could be translated as “an act does not make a person guilty of a crime, unless the person’s mind is also guilty”. See *Reynolds v. G. H. Austin & Sons Ltd* [1951] 2 KB 135.

⁷¹⁸ Mohamed Elewa Badar, *The Mental Element in the Rome Statute of the International Criminal Court: A Commentary from a Comparative Criminal Law Perspective*, 19 *Criminal Law Forum* (2008): 473, p. 473.

⁷¹⁹ Gerhard Werle & Florian Jessberger, “*Unless Otherwise Provided*”: *Article 30 of the ICC Statute and the Mental Elements of Crimes under International Criminal Law*, 3 *JICJ* (2005): 35, p. 36.

During the sessions of the PrepCom, there were proposals to insert the general principle concerning *mens rea*⁷²⁰ to include not only intent and knowledge but also special intent, recklessness and negligence in the Rome Statute.⁷²¹ However, in the end only intent and knowledge made it into the final version of the Rome Statute.⁷²² This is thought as a result of the differences in national practices and theories as to the interpretation of recklessness and negligence.⁷²³ It is possible why Article 30 of the Rome Statute, on one hand, stipulates that “a person shall be criminally responsible and liable for a crime within the jurisdiction of the Court, only if the material elements are committed with intent and knowledge”, while, on the side, it drops down a clause: “unless otherwise provided”.⁷²⁴ This raises a question concerning whether the clause “unless otherwise provided” signifies that the EoC or other laws can add, reduce or even default the “intent and knowledge” coverage provided by Article 30.

1. The Meaning of “Unless Otherwise Provided” in Article 30 of the Rome Statute

a. “Unless Otherwise Provided” in respect of the Rome Statute

To answer the question, one must first examine the reason why the Rome Statute only specified “intent and knowledge” in Article 30. According to Werle and Jessberge,

⁷²⁰ Donald K. Piragoff & Darryl Robinson, Article 30: Mental Element, in: Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article (Otto Triffterer ed.), Beck/Hart, 2008, para. 1, p. 850.

⁷²¹ Report of the Preparatory Committee on the Establishment of an International Criminal Court, U.N. GAOR, 52st Sess. Supp. No. 22, U.N. Doc. A/51/22 (1996), Vol. II, pp. 92-93.

⁷²² Donald K. Piragoff & Darryl Robinson, Article 30: *Mental Element*, *supra* note 720, para. 1, p. 850. See also John Tessitore & Susan Woolfs, A Global Agenda: Issues Before the 5th Assembly of the UN, UN Association of the United States of America and the Business Council for the UN, 2000, p.257.

⁷²³ Roy S. Lee, The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence, *supra* note 234, pp.24-25.

⁷²⁴ Rome Statute, Article 30.

*“article 30 does not only codify but seeks to standardize the mens rea requirement for [...] all crimes within the jurisdiction of the ICC, which are in fact all crimes under international law.”*⁷²⁵

Piragoff and Robinson are more specific about the purpose of Article 30:

*“[w]ith respect to other mental elements, such as certain forms of ‘recklessness’ and ‘dolus eventualis’, [...] various forms of negligence or objective states of mental culpability should not be contained as a general rule in article 30.”*⁷²⁶

Badar stated his view in a more theoretical vein:

*“[t]he significance of this provision (i.e. Article 30) is that it assigns different levels of mental element to each of the material elements of the crime in question. This is a remarkable shift from an ‘offence analysis’ approach to an ‘element analysis’ approach.”*⁷²⁷

By applying an “element analysis” approach, the Rome Statute assigns a culpable state of mind to each objective element of a crime.⁷²⁸

It was these considerations that allowed other mental elements to be incorporated in each individual article regarding specific crimes or modes of responsibility provided in the Rome Statute.⁷²⁹ The “multiplicity of special rules”, as Werle and Jessberger states, necessarily requires examining “the definitions on a case-by-case basis to determine whether the different wordings involve a departure from the standard laid down in Article 30 ICCSt.”⁷³⁰ In short, the accepted view is that Article 30 does not seek to absolutely exclude all the other

⁷²⁵ Gerhard Werle & Florian Jessberger, “Unless Otherwise Provided”: Article 30 of the ICC Statute and the Mental Elements of Crimes under International Criminal Law, *supra* note 719, p. 37.

⁷²⁶ Donald K. Piragoff & Darryl Robinson, Article 30: *Mental Element*, in: Commentary on the Rome Statute of the International Criminal Court, *supra* note 720, p. 850.

⁷²⁷ Mohamed Elewa Badar, *The Mental Element in the Rome Statute of the International Criminal Court: A Commentary from a Comparative Criminal Law Perspective*, *supra* note 718, p. 475-476.

⁷²⁸ *Ibid.*, p. 476, 516.

⁷²⁹ *Ibid.*

⁷³⁰ Gerhard Werle & Florian Jessberger, “Unless Otherwise Provided”: Article 30 of the ICC Statute and the Mental Elements of Crimes under International Criminal Law, *supra* note 719, p. 44.

mental states, but allows for deviation from the “intent and knowledge” coverage in the Article 30, as is evident from the phrase “unless otherwise provided”.

b. “Unless Otherwise Provided” in Respect of Article 21

According to Article 21 (1) of the Rome Statute, the Court not only “shall apply in the first place, this Statute, Element of Crimes and its Rules of Procedure and Evidence”, but also should consider applicable treaties, principles and rules of international law and customary international law in terms of legal resources.⁷³¹ Accordingly, the Rome Statute cannot be the only legal sources meeting the standard of “otherwise provided”.

However, some scholars, for example, Weigend, take a different stand, arguing that pursuant to the principle of legality, any modification of definitions or rules, including the *mens rea* set out in Article 30, would have to be found in the Statute itself and not from other sources.⁷³²

This argument may have some plausibility, but is not convincing enough, especially when it comes to the case of customary international law. Actually, customary international law often plays an indispensable role in the interpretation of the Rome Statute, as pointed out by Werle and Jessberger, that there exists a strong argument that the interpretation and application of the Rome Statute should be as far as possible in conformity with customary international law.⁷³³

In this regard, case laws, in particular, judgments by the international criminal tribunals should also be included in accessing the existence of a customary international law. Besides, case laws may also provide valuable interpretative insights on the clarification and

⁷³¹ Rome Statute, Article 21 (1).

⁷³² T. Weigend, 'The Harmonization of General Principles of Criminal Law: The Statutes and Jurisprudence of the ICTY, ICTR and ICC: An Overview', 19 *Nouvelles études pénales* (2004): 319, p. 327.

⁷³³ There is a consistent opinion that customary international law could also be applied as an exception to the mental state coverage of Article 30. For more details, see Gerhard Werle & Florian Jessberger, “*Unless Otherwise Provided*”: *Article 30 of the ICC Statute and the Mental Elements of Crimes under International Criminal Law*, *supra* note 719, p. 46. As Werle and Jessberger stated, applying the customary international law is based on the need of “a uniform interpretation and application of the Rome Statute and customary international law”.

supplementation of the provisions of Rome Statute.⁷³⁴ As far as applicable treaties are concerned, Article 21 provides two types: “a particular treaty having direct bearing on a case”, and “a widely ratified treaty viewed as evidence of the ‘rules and principles of international law’”.⁷³⁵ Given this definition, there is hardly any reason why applicable treaties cannot be regarded as a derivation from the Rome Statute.

In consequence, principles and rules of international law are arguably eligible as “other provisions” that provide supplement to the Rome Statute or standards different from the Rome Statute, in the sense that they are derived from the conscience of humanity or are applied by “a representative majority of states, including the world’s principal legal systems”.⁷³⁶

c. “Unless Otherwise Provided” in Respect of the EoC

However, can legal provisions embodied in other sources, such as the EoC,⁷³⁷ offer a basis for an expansion or narrowing of the Article 30’s general standard? It will be shown below, there is still some question as to whether the EoC can also be applied as an exception to the mental state coverage of Article 30. There are some scholars,⁷³⁸ who take the view that Article 21 of the Rome Statute entitles the ICC to apply the EoC as the first legal sources of international

⁷³⁴ Knut Dörmann, *War Crimes under the Rome Statute of the International Criminal Court, with a Special Focus on the Negotiations on the Elements of Crimes*, *supra* note 559, p. 353.

⁷³⁵ Otto Triffterer(ed.), *Commentary of the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, Beck/Hart, 1999, Article 21, para. 10.

⁷³⁶ *Ibid.*, Article 21, paras. 15, 18.

⁷³⁷ Different standards of *men srea* specific to certain crimes within the jurisdiction of the ICC are provided in the EOC or found in customary international law. Roy S. Lee, *The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence*, *supra* note 234, pp. 28-30. Antonio Cassese, *International Criminal Law*, *supra* note 249, p. 176.

⁷³⁸ Werle directly pointed out that “[T]aking Article 21 (1) ICCSt. into account, one thus would correctly come to the conclusion that the ‘unless-otherwise-provided’ clause allows modification of the subjective requirements laid out in Article 30 ICCSt. through both the Elements of Crimes and customary international law.” This can be found in Gerhard Werle & Florian Jessberger, “*Unless Otherwise Provided*”: *Article 30 of the ICC Statute and the Mental Elements of Crimes under International Criminal Law*, *supra* note 719, p. 45.

criminal law among all the sources which might be applicable.⁷³⁹ On the other hand, it is arguable whether Article 9 with its phrase “shall assist” implies a subsidiary status of the EoC to the Rome Statute. An accompanying question inevitably raised in view of the contradiction between the wording of Article 9 and that of Article 21 is in that case what the status of the EoC is. Unfortunately, neither the Rome Statute nor the EoC has deemed it necessary to suggest any effective solution or clear interpretation to the conflict between these two documents.

Before analyzing the answers to the questions, the author would like to point out the reasons why these issues should be discussed and how they are related to the issue of the *mens rea* of the crime of child recruitment. There is good reason why this issue should be discussed, because the question whether the elements in the EoC should belong to the “otherwise provided” is closely related to the issue of crime of child recruitment. The EoC allows for two dimensions regarding to the age of child: “knew” and “should have known”, as can be seen from the paragraph 3 of the EoC relating to Article 8(2) (b)(xxvi) and Article 8(2)(e)(vii):

“[t]he perpetrator knew or should have known that such person or persons were under the age of 15 years.”⁷⁴⁰

This provision constitutes a deviation from the Rome Statute. “Should have known” as a constructive knowledge is insufficient to establish the *mens rea* threshold provided in Article 30, which requires the crimes be committed in a mental state of either intent or knowledge.

a) Arguments against the EoC as “Otherwise Provided” in the Rome Statute

Those who are against the deviation of the EoC⁷⁴¹ from Article 30 maintain that in Article 9, the EoC are provided as “a subsidiary to the Statute”.⁷⁴² The word “shall assist” implies a

⁷³⁹ Rome Statute, Article 21 (1): “The Court shall apply in the first place (i) its Statute, Elements of Crimes, and its Rules of Procedure and Evidence.”

⁷⁴⁰ EoC, Article 8(2) (b) (xxvi) and Article 8(2) (e) (vii), pp. 33,53.

⁷⁴¹ These arguments were raised during the negotiation of the EOC. For more details, see Donald K. Piragoff & Darryl Robinson, Article 30: *Mental Element*, *supra* note 720, p. 850-856.

subsidiary or secondary status of the EoC to the Rome Statute. Accordingly, the EoC should be regarded as “unable to expand a defendant’s liability beyond what is foreseen by the Statute itself.”⁷⁴³

b) Arguments for the EoC as “Otherwise Provided” in the Rome Statute

However, there is very strong objection to the subsidiary status of Article 9. Werle and Jessberger, for example, brush it aside, arguing that Article 9 requires the EoC “to be compatible with the Statute”, and therefore “differing provisions in the Elements of Crimes are to be treated just like differing provisions in the Statute itself”.⁷⁴⁴ This “compatible” relationship between the EoC and the Rome Statute is, to a large extent, concluded on the established agreement of the significant role of the EoC in the interpretation and the application of the Rome Statute.

This view was finally approved and reaffirmed in the General Introduction to the EoC, which can also be read to render the EoC legally applicable as a source of law “otherwise provided”,

*“As Stated in article 30, 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. 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. Exceptions to the article 30 standard, based on the Statute, including applicable law under its relevant provisions, are indicated below.”*⁷⁴⁵

⁷⁴² Rome Statute, Article 9: The Elements of Crimes “shall assist the Court in the interpretation and application of article 6, 7 and 9”.

⁷⁴³ Mohamed Elewa Badar, *The Mental Element in the Rome Statute of the International Criminal Court: A Commentary from a Comparative Criminal Law Perspective*, *supra* note 718, p. 503.

⁷⁴⁴ Gerhard Werle & Florian Jessberger, “*Unless Otherwise Provided*”: Article 30 of the ICC Statute and the Mental Elements of Crimes under International Criminal Law, *supra* note 719, p. 46.

⁷⁴⁵ EoC, General Introduction, para. 2.

In the *Lubanga* case, the Pre-trial Chamber is of the same opinion, affirming that the EoC can by themselves “provide otherwise”.⁷⁴⁶ Pursuant to this wording “unless otherwise provided”, the Pre-trial Chamber considered the “should have known” standard, though outside the “intent and knowledge” coverage, as one mental element of the crime of child recruitment regarding the age of the child.

Bassiouni takes the view that the EoC are not merely explanatory to the Rome Statute, but are the mini-code which define, supplement and quasi-legislatively codify issues relating to crimes, principles and evidentiary questions. In other words, the EoC have a “more outcome-determinative role in interpretation of the statutory provisions”.⁷⁴⁷

c) The EoC Can be regarded as “Otherwise Provided” in the Rome Statute

Attention has here been brought to the conflicting wordings of Article 21 and Article 9. In Article 21, the EoC stands at the top of the list of all relevant provisions, being listed as first among all the applicable sources of international criminal law. In Article 9, the word “shall assist” seems to suggest a subsidiary status to the EoC. However, an examination of the negotiation leading to the Rome Statute shows that the EoC should be understood to have only persuasive value rather than binding force.

During the Rome Diplomatic Conference, some delegation proposed that the EoC should be endowed with binding force on the judges of the ICC.⁷⁴⁸ However, the proposal of binding character was rejected by the majority of the delegations at the Rome Conference, in view of the concern that such binding force may undermine the judicial discretion of the judges.⁷⁴⁹

⁷⁴⁶ ICC, Prosecutor v. *Lubanga*, ICC-01/04-01/06-803, Decision on the Confirmation of Charges, Pre-trial Chamber I, 29 January 2007, para. 356.

⁷⁴⁷ M. Cherif Bassiouni, *The Legislative History of the International Criminal Court: Introduction, Analysis, and Integrated Text* (3 vols), Martinus Nijhoff, 2005, pp. 153-154.

⁷⁴⁸ Otto Triffterer, (ed.), *Commentary of the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, *supra* note 735, Article 9, para. 30.

⁷⁴⁹ Knut Dörmann, *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 Yearbook of United Nations Law (2003): 341, p. 350. See also Otto Triffterer (ed.), *Commentary of the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, *supra* note 735, Article 9, para. 30.

Nevertheless, the author believes that the subsidiary status of the EoC does not necessarily deny its derivation from the Rome Statute even when there are obvious contradictions between the EoC and the Rome Statute. Indeed, there are reasonable grounds to believe that the EoC should be given priority in application.

Firstly, the drafting of the EoC was undertaken subsequent to the Rome Statute for purpose of giving guidance on the application of the Rome Statute. As such, the EoC seek to provide details on issues relating to the statutory crimes, the principles of criminal law, and even some evidentiary questions, which the Statute failed to address. All the details covered by the EoC, including all the supplements, contradictions, or conflicts, were established by agreement of the participants regarding the interpretation of Article 30 (1), “so as to permit the *mens rea* of a crime within the jurisdiction of the ICC to be “otherwise provided” in the EoC”.⁷⁵⁰ Similarly, Paragraph 2 of the General Introduction to the EoC can also be read to endow the EoC with legality, to be applied as a source of law “otherwise provided”.

Secondly, a close look at the negotiations leading to the EoC indicates that the draft of the EoC took on a wide range of comprehensive research, including proposals from delegations, detailed study of the ICRC, analyses of international law instruments and relevant case laws. From this perspective, the EoC to a very large extent is “drafted in accordance with existing international humanitarian law”.⁷⁵¹ Accordingly, it can be concluded that any modification, supplementation and even contradiction showed in the EoC would have been given due examination.

In spite of the contribution of the EoC in the clarification of the Rome Statute, the provisions of the EoC are far from perfect. On the contrary, there are still areas that clearly need improvement, areas which are ill-accorded with existing international humanitarian law. These problematic and contentious issues would need further judicial probing and reflection. The author argues in this regard, that it will be up to the judges to determine what is meant by “unless otherwise provided” and whether to apply the EoC when contradictions show up.

⁷⁵⁰ Matthew Happold, *Child Recruitment as a Crime under the Rome Statute of the International Criminal Court*, *supra* note 711, p. 19.

⁷⁵¹ Knut Dörmann, *War Crimes under the Rome Statute of the International Criminal Court, with a Special Focus on the Negotiations on the Elements of Crimes*, *supra* note 559, p. 402.

Before reaching a solution, the Court must make impartial assessment of the relevant international instruments, established principles of international law and customary international law to make sure that the application of law, whether the EoC or the Rome Statute, is in line with the established framework of the international humanitarian law.

2. Article 30 and the EoC: Mental Elements of the Crime of Child Recruitment

As far as the crime of child recruitment is concerned, no provision in international instrument so far has figured out what will constitute the *mens rea* of this crime, except for Article 30 of the Rome Statute and the EoC.

Article 30 of the Rome Statute, on the one hand, sets out a general definition of the subjective elements for all crimes within the ICC's jurisdiction: intent and knowledge. The EoC, for reasons stated above, can be taken as an additional specific provision to supplement the *mens rea* regarding the age of children.

As discussed above, the "should have known" standard provided in the EoC is arguably a viable mental element applicable in the case of child recruitment. And thus, the EoC going beyond what is provided in the Rome Statute, allowed a constructive knowledge, "should have known", to be a possible constituent of the *mens rea* of this crime,

"the perpetrator knew or should have known that such person or persons were under the age of 15 years".⁷⁵²

The following sections are devoted to a discussion of these three mental elements as provided in Article 30 and the EoC.

a. Intent as *Mens Rea* of the Crime of Child Recruitment Under Article 30

Article 30 (2) captures two forms of intention, distinguishable by i) intention "in relation to conduct", where the person "means to engage in the conduct",⁷⁵³ whereas ii) "in relation to a

⁷⁵² EoC, pp. 33&53.

⁷⁵³ Rome Statute, Article 30 (2) (a): "In relation to conduct, that person means to engage in the conduct."

consequence”, where the person “means to cause a consequence or is aware that it will occur in the ordinary course of events”.⁷⁵⁴

a) Intent in relation to Conducts

Essentially, a conduct must be “a voluntary action” of a defendant, accompanied by “the basic consciousness or volition” attributable to this action. This was basically the accepted view, as is evident in the *Lubanga* case, where the Pre-trial Chamber I stated that, “[t]he cumulative reference to ‘intent’ and ‘knowledge’ requires the existence of a volitional element on the part of the suspect.”⁷⁵⁵

b) Intent in relation to Consequences

Article 30 (2) (b) of the Rome Statute further specifies two aspects of intention: i) “the person means to cause that consequence”, or, ii) the person “is aware that it will occur in the ordinary course of events”,⁷⁵⁶ which suggests two degrees of intent relating to consequences was provided, *dolus directus* of the first degree and *dolus directus* of the second degree. The Pre-trial Chamber in the *Lubanga* case followed this principle and stated that the intent first and foremost requires *dolus directus* of the first degree:

*“the suspect (i) knows that his or her actions or omissions will bring about the objective elements of the crime, and (ii) undertakes such actions or omissions with the concrete intent to bring about the objective elements of the crime (also known as dolus directus of the first degree).”*⁷⁵⁷

⁷⁵⁴ Rome Statute, Article 30 (2) (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.”

⁷⁵⁵ ICC, Prosecut. *Thomas Lubanga Dyilo*, No. ICC-01/04-01/06-803, Decision on the Confirmation of Charges, Pre-trial Chamber I, 29 January 2007, para. 351.

⁷⁵⁶ Rome Statute, Article 30 (2) (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.”

⁷⁵⁷ ICC, Prosecut. *Thomas Lubanga Dyilo*, No. ICC-01/04-01/06-803, Decision on the Confirmation of Charges, Pre-trial Chamber I, 29 January 2007, para. 351.

It is further stated that the intent provided in the Article 30 (2) (b) also encompasses *dolus directus* of the second degree,

*“in which the suspect, without having the concrete intent to bring about the objective elements of the crime, is aware that such elements will be the necessary outcome of his or her actions or omissions.”*⁷⁵⁸

In short, the fact is indisputable that a first and second degree intents are provided in Article 30 (2) (b), however, the question whether recklessness is included as a part of “*dolus directus* of the second degree” in the Article 30 (2) (b) is not such a straightforward one. As shall be shown below, there is some dispute over this question.

Two opinions on this issue have been offered. The minority view is that the language of Article 30 implies the inclusion of recklessness [*dolus eventualis*] in the concept of the indirect intent. The more accepted view is that recklessness cannot be included in the frame of Article 30.⁷⁵⁹

i. Arguments for the Inclusion of Recklessness into Article 30

The advocates, who regard the recklessness as part of Article 30, focus on the problems that would be created by excluding recklessness from the scope of Article 30. It is argued that exclusion of the concept of “recklessness” from the coverage of Article 30 may lead to acquittals of defendants who, though without the intent, take a high and unjustifiable risk of a

⁷⁵⁸ *Ibid.*, para. 352.

⁷⁵⁹ David J. Bederman, International Decisions: international Criminal Law- Mens Rea - Intent and Guilty Knowledge, 104 The American Journal of International Law (2010):241, pp. 242-243. Albin Eser, Mental Elements—Mistake of Fact and Mistake of Law, in: The Rome Statute of the International Criminal Court: A Commentary (Antonio Cassese eds.), 2002, pp. 889, 915. In the book the author notes that liability based on mere awareness of the risk that one’s conduct may result in the prohibited consequence – *dolus eventualis*—“seems not to be the position of the Rome Statute”.

consequence.⁷⁶⁰ In his criticism of the Rome Statute for excluding recklessness as a basic capable mental state for war crimes, Cassese points out:

*“[O]n this score [excluding recklessness as a mental element of the ICC] the Rome Statute marks a step backwards with respect to *lex lata* [...] and possibly creates a loophole: persons responsible for war crimes, when they acted recklessly, may be brought to trial and convicted before national courts, while they would be acquitted by the ICC.”*⁷⁶¹

In other word, if an acquittal has been granted on this basis, it might be seen to be inconsistent with the national domestic application of crimes under international law, but it would not be considered to contravene the general judicial practice before the ICTY and the ICTR.⁷⁶²

There are times when the ultimate object of the international law, *i.e.*, “international crimes must be punished” is used as ground for clarification of the “imprecise” language of Article 30. It is exactly this argument that is offered in an attempt to include recklessness (*dolus eventualis*) in the *mens rea* of child recruitment.⁷⁶³ The problem with this argument is that one should not “substitute the concept of *de lege lata* [the law as it is] with the concept of *de lege ferenda* [the law as it ought to be] only for the sake of widening the scope of Article 30 of the Statute and capturing a broader range of perpetrators.”⁷⁶⁴

⁷⁶⁰ Johan D. Van der Vyver, *The International Criminal Court and the Concept of Mens Rea in International Criminal Law*, 12 U. MIAMI INT’L & COMP. L. REV. (2004): 57, pp. 64-65: “It is reasonable to accept that crimes committed without the highest degree of *dolus* ought as a general rule not to be prosecuted in the ICC.”

⁷⁶¹ Antonio Cassese, *The Statute of the International Criminal Court: Some Preliminary Reflections*, 154EJIL 10 (1999):144, p. 154.

⁷⁶² Gerhard Werle & Florian Jessberger, “*Unless Otherwise Provided*”: Article 30 of the ICC Statute and the Mental Elements of Crimes under International Criminal Law, *supra* note 719, p. 42.

⁷⁶³ Ferrando Mantovani, *The General Principles of International Criminal Law: The Viewpoint of a National Criminal Lawyer*, 1 Journal of International Criminal Justice (2003): 26, p. 32.

⁷⁶⁴ ICC, Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08, Decision Pursuant to Article 67(1)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, Pre-trial Chamber II, 15 June 2009, para. 369.

ii. Arguments against the Inclusion of Recklessness into Article 30

Those against inclusion of recklessness into the mental elements of Article 30 build their argument around the phrase “will occur” in Article 30, insisting that it implies a strict standard, which, according to Werle and Jessberger, requires a possibility with a high probability of happening in the ordinary course of events, for “after all, it [article 30] does not say ‘may occur’”.⁷⁶⁵ That the phrase “will occur” excludes recklessness is shared by Triffterer, who also holds the position that the defendant’s awareness of the possibility of a particular consequence under the mental state of recklessness is insufficient to prove a high probability of the consequence, as required by “will occur”.⁷⁶⁶ Similarly, Roger, in his examination of the PrepCom sessions, finds nothing to support including recklessness in the frame of Article 30.⁷⁶⁷

iii. Arguments of the Inclusion of *Dolus Eventualis* into Article 30 (2) (b)

A third view is taken up by Triffterer, who in his Commentary on the Rome Statute, draws a distinction between the concept of “*dolus eventualis*” and the “recklessness”. It is argued that *dolus eventualis* meets the volition requirement provided in Article 30 (2) (b).⁷⁶⁸ The likely meaning of the phrase “will occur in the ordinary course of events” embodied in most legal systems, as Piragoff and Robinson contend, is understood in such a way that “the occurrence of a consequence flowing from a particular conduct is highly probable”.⁷⁶⁹ *Dolus eventualis* is such a mental state that requires “the knowledge or foresight of a substantial probability that the consequence will occur”.⁷⁷⁰

⁷⁶⁵ Gerhard Werle & Florian Jessberger, “Unless Otherwise Provided”: Article 30 of the ICC Statute and the Mental Elements of Crimes under International Criminal Law, *supra* note 719, p. 37.

⁷⁶⁶ Otto Triffterer, The New International Criminal Law: It’s General Principles Establishing Individual Criminal Responsibility, in: The New International Criminal Law (Kalliopi Koufa ed.), 2003, p. 706.

⁷⁶⁷ Roger S. Clark, *The Mental Element in ICC: The Rome Statute of the International Criminal Court and the Elements of Offences*, 12 Criminal Law Forum (2001): 291, pp. 301-303.

⁷⁶⁸ Donald K. Piragoff & Darryl Robinson, Article 30: *Mental Element*, *supra* note 720, p. 860.

⁷⁶⁹ Donald K. Piragoff & Darryl Robinson, Article 30: *Mental Element*, *supra* note 720, p. 860.

⁷⁷⁰ *Ibid.*

Boot in his book supports this interpretation, stating that though “it [Article 30] does not include a concept of recklessness,⁷⁷¹ it appears however that Article 30 includes *dolus eventualis* in view of the phrase ‘will occur in the ordinary course of events’ in paragraph(2)(b).”⁷⁷²

Although the law does not provide for general principles of *dolus eventualis*, a decision by the Egyptian Court of Cassation however gives the following interpretation:

*“dolus eventualis substitutes intent, in the strict sense of the word, in establishing the element of intentionality. It can only be defined as a secondary uncertain intention on the part of the perpetrator who expects that his act may go beyond the purpose intended to realize another purpose that was not intended initially but nevertheless performs the act and thus appreciates the unintended purpose.”*⁷⁷³

However, this is not a view generally accepted. Most insist on a strict interpretation of the phrase “will occur”. For instance, Ambos argues that,

*“However, the perpetrator [in the mental state of dolus eventualis] is not, as required by Article 30 (2) (b), aware that a certain result or consequence will occur in the ordinary course of events. He or she only thinks that the result is possible”.*⁷⁷⁴

⁷⁷¹ Under this circumstance and the following circumstances, recklessness denotes a narrower concept, which excludes advertent recklessness, because advertent recklessness is roughly equivalent to the term *dolus eventualis*.

⁷⁷² Machteld Boot, *Nullum Crimen Sine Lege* and the Subject Matter Jurisdiction of the International Criminal Court: Genocide, Crimes against Humanity, War Crimes, Intersentia, 2002, p. 583.

⁷⁷³ Judgment, Egyptian Court of Cassation, Case No. 1853/Judicial Year 47, Dec. 25, 1930 in Mohamed ElewaBadar, *Dolus Eventualis and the Rome Statute without it?*, 12 New Crim. L. R. (2009): 433, p. 444 with fn.82.

⁷⁷⁴ Kai Ambos, *General Principles of Criminal Law in the Rome Statute*, 10 Criminal Law Forum (1999):1, pp. 21-22.

In respect of the crime of child recruitment,⁷⁷⁵ the Defense in the Katanga case submitted their concern for including the concept of *dolus eventualis* in Article 30 (2) (b),⁷⁷⁶ however, the Pre-trial Chamber in the Katanga case seemed reluctant to give a definitive answer on the question. Only in the footnote of the Decision, the Chamber mentions that the majority's opinion is that Article 30 encompasses *dolus eventualis*,⁷⁷⁷ however, in the same footnote it also cites the partly dissenting opinion of Judge Usacka that there is no need for the present Decision to discuss whether the concept of *dolus eventualis* has a place within the framework of Article 30 of the Statute, because the Chamber will not rely on this concept for the mental element in relation to the crimes charged.⁷⁷⁸

The Pre-trial Chamber in the *Lubanga* case, on the other hand, was apparently in support of the view of Piragoff and Robinson that the concept of *dolus eventualis* is included in Article 30, though not the notion of recklessness, as *dolus eventualis* requires a higher volition than recklessness, and such volition is based on the knowledge of the overwhelming probability of the occurrence of a result.⁷⁷⁹

However, it went further by taking a rather expansive definition of *dolus eventualis* to include the circumstances where the probability of the occurrence of a consequence is low. According to the Pre-trial Chamber, *dolus eventualis* can be inferred from two different degrees of probability of the occurrence of a consequence:

⁷⁷⁵ The recruitment of children mentioned in this section is not related to mental element in respect of the age of the child itself. As to the mental state regarding the age of a child, it will be discussed in the following section.

⁷⁷⁶ ICC, Prosecutor v. *Katanga & Ngudjolo Chui*, ICC-01/04-1/07, Defence Written Observations Addressing Matters That Were Discussed at the Confirmation Hearing, 28 July, 2008, paras. 31-32.

⁷⁷⁷ ICC, Prosecutor v. *Germain Katanga & Mathieu Ngudjolo Chui*, ICC-01/04-1/07, Decision on the Confirmation of Charges, Pre-trial Chamber, 30 September 2008, fn. 329. The author takes the view that this finding was made in such a reckless manner that the Chamber treated this opinion as valid without even engaging in an examination of their basis, or giving any explanation or approaches how this opinion is made.

⁷⁷⁸ ICC, Prosecutor v. *Germain Katanga & Mathieu Ngudjolo Chui*, Defence Written Observations Addressing Matters That Were Discussed at the Confirmation Hearing, *supra* note 776, para. 531. For more details about whether there is sufficient evidence to establish substantial grounds to believe that in respect of counts 6, 7, 8, and 9, the suspects acted with *dolus directus* in the first or second degree, see ICC, *Prosecutor v. Katanga & Ngudjolo Chui*, ICC-01/04-1/07, Decision on the Confirmation of Charges, Partly Dissenting Opinion of Judge Anita Usacka, in: Decision on the Confirmation of Charges, *supra* note 777, paras. 13-35.

⁷⁷⁹ ICC, Prosecutor v. *Lubanga*, Decision on the Confirmation of Charges, *supra* note 351, paras. 352 – 355.

“a) the risk of bringing about the objective element of the crime is substantial (that is, there is a likelihood that it ‘will occur in the ordinary course of events’); and
“b) the risk of bringing about the objective element of the crime is low”.⁷⁸⁰

In both cases the accused must have a certain degree of subjective attitudes toward the consequences, or a “clear acceptance of the consequences”.⁷⁸¹ To the Chamber, this volition element is essential in the second case, where the probability of a consequence is low.⁷⁸²

iv. *Dolus Eventualis* Can be Included into the Realm of Article 30 (2) (b)

Based on the above discussion, the author agrees with Piragoff and Robinson, *i.e.*, to interpret Article 30 (2) (b) in such a broad sense as to include circumstances where the accused has the knowledge of a substantial probability that the consequence will occur. And therefore the conclusion is that the notion of *dolus eventualis* can be explained as having a place within the framework of Article 30 (2) (b).

Firstly, there are some good theoretical ground for taking *dolus eventualis* as a form of intent. According to the Romano-Germanic concept of intent, intent is constituted in two conjunctive components: the awareness (knowledge of a pertinent consequence) and the will (acceptance of the result).⁷⁸³ From this perspective, *dolus eventualis* shares the same nature and essence with criminal intent. This idea is supported by some national criminal laws, which warrant treating intent and *dolus eventualis* in the same way. For example, the Italian

⁷⁸⁰ *Ibid.*, paras.353–354.

⁷⁸¹ *Ibid.*, para. 438.

⁷⁸² Mohamed Elewa Badar, *Dolus Eventualis and the Rome Statute without it?*, *supra* note 773, p. 437.

⁷⁸³ Both the French and Italian criminal laws require “the foreseen and desire” elements. See Mohamed Elewa Badar, *The Mental Element in the Rome Statute of the International Criminal Court: A Commentary from a Comparative Criminal Law Perspective*, *supra* note 718, p. 492. See also ICC, Prosecutor v. Lubanga, Decision on the Confirmation of Charges, *supra* note 351, paras. 351: “The cumulative reference to ‘intent’ and ‘knowledge’ requires the existence of a volitional element on the part of the suspect.” See also Mohamed Elewa Badar, *The Mental Element in the Rome Statute of the International Criminal Court: A Commentary from a Comparative Criminal Law Perspective*, *supra* note 718, p. 492.

criminal law recognizes *dolus eventualis* as a form of constructive intention.⁷⁸⁴ *Dolus eventualis* is, in South African criminal law, “a sufficient form of *mens rea* for all crimes based on intention”.⁷⁸⁵ In other countries, such as Germany, the “consent and approval theory” (*i.e.* “Wissen and Wollen”) is widely applied by the courts and accepted by the majority of German scholars.⁷⁸⁶ Likewise, the Austrian Criminal Code in Section 5 (1) defines ‘intent’ in exactly the same way, and therefore follows the German doctrine.⁷⁸⁷

However, it must be contended that the opinion of the Pre-trial Chamber in the *Lubanga* case is unsatisfactory, where the analysis of *dolus eventualis* in the second situation appears to be subjective, hence, flawed.

According to the Pre-trial Chamber decision, *dolus eventualis* in the second situation is the circumstances where the risk of bringing about an objective element is low. In this case, knowing that the predictability of the event is near to improbable to be foreseeable, and thus it is highly questionable to impute the accused with the knowledge or foresight that the consequence “will occur”. In other words, if the consequence is not one predictable with a high probability, thus foreseeable to the accused, the prosecution would be hard put to prove a charge of “intentionally causing the consequence”.

In fact, *dolus eventualis* should not be seen as specifying a low threshold element. The perpetrator is required actually to be able to perceive the occurrence of the consequence as probably but not remote.⁷⁸⁸ Therefore, the Chamber should have given an explanation concerning the degree of “low” probability, in order not to confuse the borderlines between *dolus eventualis* and recklessness, or even criminal negligence in some cases.

⁷⁸⁴ Article 43 of the Italian Penal Code. See also Mohamed Elewa Badar, *Dolus Eventualis and the Rome Statute without it?*, *supra* note 773, pp. 443-444.

⁷⁸⁵ Mohamed Elewa Badar, *Dolus Eventualis and the Rome Statute without it?*, *supra* note 773, p. 444.

⁷⁸⁶ The “consent and approval theory” requires the offender must not only foresee the consequences as possible (Wissen), but also accept the consequences (Wollen). See Mohamed Elewa Badar, *Dolus Eventualis and the Rome Statute without it?*, *supra* note 773, p. 445.

⁷⁸⁷ Kienapfel Diethelm & Höpfel Frank, *Grundriss des Strafrechts, Allgemeiner Teil*, 13th Edition, Manz, 2009, pp. 94-95.

⁷⁸⁸ Mohamed Elewa Badar, *Dolus Eventualis and the Rome Statute without it?*, *supra* note 773, p. 446.

c) Proof of Intent

It is a general practice that determination of the subjective elements is based on inference more or less entirely from the overt act.⁷⁸⁹ Paragraph 3 of the general introduction to the EoC gives a general guidance on proof of intent, affirming that “[e]xistence of intent and knowledge can be inferred from relevant facts and circumstances”.⁷⁹⁰

In the case of conscription of children, the *mens rea* of using force may be derived from physical violence or overt expression of threats of abduction.⁷⁹¹ Apart from the question of the age itself, which will be discussed later,⁷⁹² there was no possibility that a defendant can accidentally or innocently abduct children, or forcibly send children to military camps. All of these acts necessarily underlay an intention of making the child a soldier. In the case of enlistment or use of children to take active part in hostilities, things are not much different. The fact that an individual gave a gun or uniform to a child, or put a child’s name on the recruitment list is in itself good enough evidence, for there could hardly be a plausible argument that he had no intention of recruiting the child for military purposes, even if the act was simply putting a uniform on a child. In this case, there is no question of the actor unknowingly and unintentionally causing the result.⁷⁹³

The Pre-trial Chamber in the Lubanga case gave special considerations to the overt acts of Lubanga in the determination of his awareness of the implementation of child recruitment, his willingness to accept the result by reconciling himself with it or by condoning it.⁷⁹⁴ The evidence given for the crime of child recruitment included, apart from others, Lubanga’s visit

⁷⁸⁹ Theodor Meron, *War Crimes Law Comes of Age: Essays*, Oxford University Press, 1999, p.176. See also William A. Schabas, *Genocide in International Law*, *supra* note 716, p. 222, “The intent is a logical deduction that flows from evidence of the material acts”. See also the *Akayesu* case, where the intent is inferred from the physical acts, and specifically their massive and/or systematic nature or their atrocity. ICTR, *Akayesu* Trial Judgment, *supra* note 420, para. 477.

⁷⁹⁰ EoC, general introduction, para. 3.

⁷⁹¹ Edward Eldefonso & Alan R. Coffey, *Criminal Law: History, Philosophy, Enforcement*, Harper and Row Publishers, 1817.

⁷⁹² See *infra* Part: *Should have known*, Chapter 4.

⁷⁹³ One may argue here self-defense is a good defense. But what it is discussed here is not ground for excluding criminal responsibility, but the proving of the *mens rea*.

⁷⁹⁴ ICC, *Prosecutor v. Lubanga*, Decision on the Confirmation of Charges, *supra* note 351, para. 404.

to FPLC training camps when the recruitment of underage children were in progress, the transcript of the speech of Lubanga in front of the young FPLC recruits, his instructions encouraging the supply of young recruits to the FPLC, as well as the use of children as bodyguards for his home.⁷⁹⁵ All this was delivered to the court to establish the intent of Lubanga to commit the crime of child recruitment as a co-perpetrator.

d) Intent vs. Motive

It should be pointed out that *mens rea* should not be confused with “motive”, though many a prosecutor have often enough cited motive as circumstantial evidence to prove that a defendant acted intentionally or knowingly.

Essentially, motive refers to the underlying cause of a person’s actions. However, by nature, *mens rea* is different from motive. *Mens rea*, being a will to a conduct or a consequence, with stress on knowledge of the consequence, is therefore an essential element for the constitution of a crime, while motive does not necessarily involve knowledge of the consequence of the act.⁷⁹⁶ For, a bad motive will not necessarily make an act a crime, nor will a good motive prevent an act from being a crime.⁷⁹⁷

For example, a child may be recruited to serve in a war, which could be fought for a motive “to defend the homeland, to safeguard the safety of the public, or to fight against aggressors”, for a “public” or “lofty” purpose in a so-called “just war”.⁷⁹⁸ In other words, the existence of such motives does not necessarily involve, thus would not prove, an intention to recruit children for military purposes. In short, motives do not necessarily contribute to the commission of a crime.⁷⁹⁹

⁷⁹⁵ *Ibid.*, paras. 405.

⁷⁹⁶ Edward Eldefonso & Alan R. Coffey, *Criminal Law History, Philosophy, Enforcement*, *supra* note 791, p.47.

⁷⁹⁷ *Ibid.*

⁷⁹⁸ SCSL, *Norman Appeal Judgment*, *supra* note 267.

⁷⁹⁹ This view has been affirmed by the ICTY in trials concerning the crime of genocide. ICTY, *Prosecutor v. Tihomir Blaskic*, IT-95-14-A, Appeals Chamber, Judgment, 29 July 2004, para. 694. ICTY, *Prosecutor v. Milorad Krnojelac*, IT-97-25-A, Appeals Chamber, Judgment, 17 September 2003, para. 102. ICTY, *Prosecutor v. Goran Jelusic*, IT-95-10-A, Appeals Chamber, Judgment, 5 July 2001, para. 49. ICTY, *Prosecutor v. Radoslav Brdjanin*, IT-99-36-T, Trial Chamber, Judgment, 1 September 2004, para. 696.

b. Knowledge as *Mens Rea* of the Crime of Child Recruitment under Article 30

The notion of “knowledge”, as stipulated in Article 30 (3), refers to the “awareness that a circumstance exists or a consequence will occur in the ordinary course of events.”⁸⁰⁰ There are therefore implicitly two forms of knowledge: a) knowledge of a circumstance, and b) knowledge of a consequence.⁸⁰¹ Since the latter is an element shared by both the concept of intent and that of knowledge,⁸⁰² the following section will focus on the first form: knowledge of a circumstance, as the second form has already undergone close examination early on.

Firstly, it is clear that “knowledge of a circumstance” contains the notion of “actual knowledge”. Take for example, evidence may show that the defendant received certain records or had them in his or her possession. The law may in consequence assume that he or she read and understood them. But this is not the notion of actual “knowledge” under Article 30 (3). The apparently logical assumption constitutes a form of “constructive knowledge”.

In fact, no form of constructive knowledge, either in “should have known”, or in “has reason to know” would be compatible with the notion of “knowledge” under Article 30 (3). However, as mentioned earlier, with the clause of “unless otherwise provided”, the Roman Statute makes it clear that its provisions should be taken into consideration. As discussed in the previous section, the author takes the view that Article 30 should be interpreted as the default rule to be applied only if there are no specific rules on the mental element in either the other provisions of the Rome Statute, the EoC or other legal sources under Article 21. Considering that except for the Rome Statute and the EoC, there is neither case law nor relevant international instrument that had provided the *mens rea* for the crime of child recruitment before the *Lubanga* case, the “should have known” standard adopted as a subsequent complementation in the interpretation of the Rome Statute should be applied. This is what will be discussed in the following section, that is, what “should have known” standard regarding the age of a child must consist of.⁸⁰³

⁸⁰⁰ Rome Statute, Article 30.

⁸⁰¹ Antonio Cassese, International Criminal Law, *supra* note 249, p. 164.

⁸⁰² Donald K. Piragoff & Darryl Robinson, Article 30, *supra* note 720, p. 860, para. 25.

⁸⁰³ See *infra* C. *Mens rea* regarding the Age of a Child.

In general, “knowledge” of a circumstance can be inferred from relevant facts and circumstances,⁸⁰⁴ and in most cases the prosecution only needs to offer circumstantial evidence, such as a defendant's statements or other behaviors, to prove a defendant's knowledge.⁸⁰⁵

As far as the crime of child recruitment is concerned, the circumstantial evidence of the knowledge of the accused can be deduced from the context of the crime, which may include the following factors: i) the number of children being recruited; ii) the geographical scale of child recruitment committed; iii) the time during which the illegal acts occurred; iv) the fact of deliberately and systematically targeting young children as manpower for the armed force; v) the *modus operandi* of similar illegal acts; vi) the ranks of officers involved, and vii) particular circumstances of the specific area, *etc.* These factors will offer a basis for the Court to assess the knowledge of the accused with regard to the circumstance of children being recruited into the armies, or used to take active part in hostilities.

c. The *Mens Rea* Regarding the Age of a Child

In order to gain a comprehensive picture of the mental elements required by a specific crime,⁸⁰⁶ the default rule “unless otherwise provided” requires the reading of Article 30 in conjunction with the EoC. In connection with the crime of child recruitment, the EoC specifies two levels of knowledge regarding the age of a child: “knew” and “should have known”. As stated in Paragraph 3 of the EoC relating to Article 8(2)(b)(xxvi) and Article 8(2)(e)(vii), “[t]he perpetrator knew or should have known that such person or persons were under the age of 15 years.”⁸⁰⁷

As a constructive knowledge, “should have known” is a lesser mental state than “actual knowledge”. Nonetheless it is however sufficient, in accordance with the EoC, to constitute the mental state regarding the age of the victim. That is to say if the prosecutor is able to

⁸⁰⁴ John Tessitore & Susan Woolfs, A Global Agenda: Issues Before the 5th Assembly of the UN, *supra* note722, p.257. ICTY, *Tadic* Trial Judgment, *supra* note 577, paras.657, 659.

⁸⁰⁵ William A. Schabas, Genocide in International Law, *supra* note716, p. 211.

⁸⁰⁶ *Ibid.*, p.30.

⁸⁰⁷ EoC, paras.33, 53.

prove that the perpetrator was *negligent* to the existence of the circumstance that the child recruited was under the age of 15, the charge should be allowed to stand. In the following, the second mental state, i.e., the standard of “should have known” will be discussed.

a) The Approaches of Interpreting “Should Have Known” Standard

The “should have known” standard, as an additional mental element requirement in “determining the age of a child”⁸⁰⁸ is, in the first place, a lower mental state than “actual knowledge”, thus not necessarily requiring the person knew for certain that the victim was under the age of 15.⁸⁰⁹ Secondly, the “should have known” standard is not a form of strict liability, holding a defendant responsible solely because of his position of authority,⁸¹⁰ but is a form of culpable failure, failure to be apprised of a particular circumstance, such as, the real age of the child being recruited. Nevertheless, what remains unclear is to what extent is the liability attached to a culpable failure.⁸¹¹ There are two approaches regarding this issue: the failure to obtain information, or the failure to acknowledge the information.

i. The “Failure to Obtain the Information” Approach

The “failure to obtain the information” approach holds that a person should be held responsible for his or her failure to comply with his or her duty to act with due diligence to obtain information of a certain fact or circumstance. What is meant by this approach is that it is not necessary for the recruiter to have intent to ignore the age of a child at the time when

⁸⁰⁸ ICC, Prosecutor v. *Lubanga*, Decision on the Confirmation of Charges, *supra* note 351, para. 359.

⁸⁰⁹ Roy S. Lee, *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, *supra* note 234, pp. 32, 207.

⁸¹⁰ The jurisprudence of the international tribunals, include the IMT, suggests that command responsibility is not a strict liability. See *United States v. Wilhelm List and others (Hostages Trial)*, VIII Law Reports of Trials of War Criminals, 1949, p. 34. See also *German High Command Trial*, XII Law Reports of Trial of WAR Criminals, 1951, p. 76. See also ICTR, *Akayesu Trial Judgment*, *supra* note 420, para. 489. See also ICTY, *Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic & Esad Landzo, (Celebici)*, Appeal Judgment, *supra* note 562, para. 239.

⁸¹¹ Jenny S. Martinez, *Understanding Mens Rea in Command Responsibility: From Yamashita to Blaskic and Beyond*, 5 JICJ (2007): 638, pp. 652-653.

the recruitment is committed. But he or she should be held responsible for his or her negligence in not exhibiting a degree of due care for the safeguard of the age of the child.

This is the idea first raised in the Hostages Trial before the IMT in a similar context of command responsibility, where the Tribunal stated that, a commander

*“is charged with notice of occurrences taking place within that territory. He may require adequate reports of all occurrences that come within the scope of his power and, if such reports are incomplete or otherwise inadequate, he is obliged to require supplementary reports to apprise him of all the pertinent facts. If he fails to require and obtain complete information, the dereliction of duty rests upon him and he is in no position to plead his own dereliction as a defence.”*⁸¹²

This approach was taken up by a majority of case law of the IMT and IMTFE, and later was confirmed in the *Blaskic* case of the ICTY. The Chamber in the *Blaskic* trial took the view that the existence of

“a specific information giving rise to a suspicion is not required as a prerequisite to attract a criminal responsibility to a commander, as it is the commander’s duty to collect and investigate the conducts of the subordinates”.⁸¹³

In essence, this approach requires that it be a duty of the commander to obtain the information regarding the crimes of the subordinates.⁸¹⁴ The imputation of liability is linked to the defendant’s omission to use all the available sources to be informed of a certain fact or circumstance.

ii. The “Failure to Acknowledge the Information” Approach

⁸¹² See *United States v. Wilhelm List and others*, VIII Law Reports of Trials of War Criminals, at, 71. See also Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, *supra* note 508, p.375.

⁸¹³ ICTY, *Prosecutor v. Tihomir Blaskic*, IT-95-14-T, Trial Chamber, Judgment, 3 March 2000, para. 322.

⁸¹⁴ *Ibid.*, para. 332. As can be seen from the judgment, the Chamber held that “General Blaskic did not perform his duties with the necessary reasonable diligence.”

It is sometimes suggested that, at least, serious negligence or recklessness is part of the requirement with regard to “should have known” standard, where the accused is criminally responsible if he or she did not care to know.⁸¹⁵ Under this interpretation, it is sufficient for the prosecutor to demonstrate that an accused was aware of the risk that the child recruited was under the age of 15, but failed to take reasonable care to avoid the risk.⁸¹⁶ Thus, this approach is comparable to the “had reason to know” standard. That is, if one takes a good look at the jurisprudence of the ICTY and the ICTR, it is not difficult to find⁸¹⁷ that both tribunals have consistently rejected a “duty to obtain the information” formula in the context of command responsibility,⁸¹⁸ which would hold a commander criminally responsible for the actions of his subordinates, that is, negligence to obtain information presumably within his reach.⁸¹⁹

On the contrary, the “had reason to know” standard sets out a “volitional element”, requiring a mental state of negligence serious enough to amount to acquiescence.⁸²⁰ If the “had reason to know” standard is to apply to cases of child recruitment, the prosecution would have to show that general information regarding the age of the child was available to the defendant, or at least put him or her on notice of the very high likelihood that the child had been recruited or is about to be recruited is under the age of 15 years.

⁸¹⁵ Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, *supra* note 617, p.375. ICC, *Prosecutor v. Lubanga*, Decision on the Confirmation of Charges, *supra* note 351, para. 358.

⁸¹⁶ Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, *ibid.*, p. 381.

⁸¹⁷ ICTY, *Prosecutor v. Tihomir Blaskic* Trial Judgment, *supra* note 813, para. 332.

⁸¹⁸ Although command responsibility is an omission mode of responsibility, and therefore might require a special and different *mens rea* from the individual responsibility, the interpretation and application of “should have known” standard and “has reason to know” standards can be a valuable reference to the present issue.

⁸¹⁹ To name a few of the cases: see ICTY, *Prosecutor v. Delalic et al*, *supra* note 612, paras. 386-389. See also ICTY, *Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic & Esad Landzo, (Celebici)*, Appeal Judgment, *supra* note 562, para. 241. See also ICTY, *Blaskic* Appeal Judgment, *supra* note 799, paras. 257- 258. See also ICTR, *Prosecutor v. Ignace Bagilishema*, ICTR-95-1A-A, Appeals Chamber, Judgment, 3 July 2002, paras. 34-35. See also ICTY, *Prosecutor v. Sefer Halilovic*, IT-01-48-T, Trial Chamber, Judgment, 16 November 2005, para. 71.

⁸²⁰ ICTR, *Akayesu* Trial Judgment, *supra* note 420, para. 489.

The *Celebici* case,⁸²¹ in a note of clarification, found that the “had reason to know” is consistent with Article 86 of the AP I,⁸²² which requires that

*“a superior can be held criminally responsible only if some specific information was in fact available to him which would provide notice of offences committed by his subordinates. Such information need not provide conclusive proof of the crimes, but must be enough so that it ‘indicated the need for additional investigation’ ”.*⁸²³

This finding actually overturned the interpretation of “should have known” standard made in the *Blaskic* case. The introduction of a “had reason to know” standard substituted the formula of “dereliction of duty to obtain information” for the requirement of “failure to acknowledge available information”. This is pointed out by Arnold, under the “had reason to know” standard,

*“a supervisor is only liable for having failed to take notice of information that may have indicated the occurrence of crimes, but not for the failure of obtaining that information.”*⁸²⁴

b) The Interpretation of the “Should Have Known” Standard in the *Lubanga* Case

⁸²¹ ICTY, *Delalic et al*, Trial Judgment, *supra* note 612.

⁸²² Article 86(2), API states that “[t]he fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.”

⁸²³ ICTY, *Delalic et al*, Trial Judgment, *supra* note 612, para. 393.

⁸²⁴ Roberta Arnold, Article 28: *Responsibility of Commanders and other Superiors*, in: Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article (Otto Triffterer), *supra* note 720, p. 829.

Despite the wide and nearly consistent practice in the application of the “had reason to know” standard by the two ad hoc tribunals, the interpretation of the “should have known” standard is placed at the discretion of the ICC on a case to case basis.

This is obviously the case with the Pre-trial Chamber in the *Lubanga* case. Though it acknowledged the jurisprudence of the ICTY in the application of the “had reason to know” standard, the Chamber of the *Lubanga* case, nevertheless, adopted the “failure to obtain the information” formula in its interpretation of the “should have known” requirement. Take the conditions stipulated by the Pre-trial Chamber for the application of the “should have known” standard that when the suspect,

*“i. did not know that the victims were under the age of fifteen years at the time they were enlisted, conscripted, or used to participate actively in hostilities; and
ii. lacked such knowledge because he or she did not act with due diligence in the relevant circumstances (one can only say that the suspect ‘should have known’ if his or her lack of knowledge results from his or her failure to comply with his or her duty to act with due diligence).”*⁸²⁵

An example of such diligence is the care that should be exercised even if the physical appearance of a child suggests that he or she is over 15 years, as emphasized in the following by Dörman:

*“The mens rea requirement [should have known] would [...] be met if the accused does not provide for safeguards and inquire the age of the child even though the child’s age appears close to the protected minimum age.”*⁸²⁶

⁸²⁵ICC, Prosecutor v. *Lubanga*, Decision on the Confirmation of Charges, *supra* note 351, para. 358.

⁸²⁶Knut Dörmann, Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary, *supra* note 617, p.375. See also Otto Triffterer (ed.), Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article, *supra* note 735, p. 262. See generally Johan D. Van der Vyver, *The International Criminal Court and the Concept of Mens Rea in International Criminal Law*, 12 U. MIAMI INT’L & COMP. L. REV. (2004): 57, p.65.

What would count as “due diligence”, according to Happold, include “asking the age of recruits, seeking to verify their answers from parents, or looking at birth certificates or other identity documents”.⁸²⁷

c) Rationalizing the “Had Reason to Know” Standard Regarding the Age of a Child

The *Lubanga* trial followed the IMT’s practice in the interpretation of the standard of “should have known” as a culpable liability of failure to obtain relevant information relating to a circumstance. However, in regard to the crime of child recruitment, it is the belief of the author that the “has reason to know” standard is more appropriate for the “should have known” standard, as a higher threshold of the *mens rea* is believed to be fairer.

This belief stems essentially from the fact that it is not often the case that recruiters have all the resources available to access information as to whether a child is under the age of 15, or has attained the generally accepted legal age for military service. In countries, such as the DRC, or in the areas such as southern Sudan, there is no efficient system or mechanism for documenting births. Even in countries with developed administrative systems, children are unlikely to be carrying such documentations in times of war or civil upheaval.⁸²⁸ While the appearance and the maturity could be a strong indication that a child is over 15 years, it is however not an indicator which is, in and of itself, sufficient to establish the real age of the child.⁸²⁹

From this perspective, applying the “failure to obtain the information” approach to the crime of child recruitment would arguably be unfair. Basically, the accused should not take responsibility for something unlikely to be foreseeable, due to shortage of information. Accordingly, the “had reason to know” standard applied by the ICTY and the ICTR is

⁸²⁷ Matthew Happold, Child Recruitment as a Crime under the Rome Statute of the International Criminal Court, *supra* note 711, p. 99.

⁸²⁸ Eva La Haye, War Crimes in Internal Armed Conflict, *supra* note 590, pp.113-114.

⁸²⁹ In certain area, children matured earlier. A child of 15 years old may look like a grow-up. An individual in charge of recruitment might conscript him among a great number of grown-ups by negligence.

believed to offer a better guidance for the definition of the mental state required in regard to a child's age.

C. CONCLUSION

Although the Rome Statute marked a new era in which child recruitment is criminalized as a war crime under international law, Article 8 (2) (b) (xxvi) and Article 8 (2) (e) (vii) of the Rome Statute have raised a number of questions about the contours of the crime of child recruitment. This chapter focused on some of the ambiguities contained in the languages of Article 8 (2) (b) (xxvi), Article 8 (2) (e) (vii) and Article 30, in an attempt to clarify such ambiguities by making a balance between the best interests of the child and the protection of the rights of the accused.

Firstly, it was pointed out that the *actus reus* of the crime of child recruitment consists of two forms: the “recruitment of children in armed forces or groups” and the “use of children to participate actively in hostilities”. It is argued that the “use of children to participate actively in hostilities” should only refer to activities related to military operations, and not be extended to indirect participation of children as laborers for logistic tasks. However, it must be noted that such interpretation of the form of “use”, does not necessarily exclude the “indirect participation” from the crime of child recruitment. For those children, as *de facto* members of the armed forces or groups, would naturally fall under the category of victims of *de facto* “recruitment”. The separation of the “use of children to participate actively in hostilities” from *de facto* recruitment, is thought to provide more flexibility for the Judges in criminal sentencing.

As to the *mens rea* of the crime of child recruitment, Article 30 of the Rome Statute, through the phrase “unless otherwise provided”, leaves the door open for application of rules not stipulated in the Roman Statute, which were however provided in the EoC and other international instruments. The ambiguous and imprecise wording of Article 30 (2) has raised a number of questions about whether *dolus eventualis* can be explained as part of intent under the framework of Article 30 (2). What is argued in this chapter is that the practice, at national level of treating intent and *dolus eventualis* in exactly the same way, suggests that there are theoretical grounds to include *dolus eventualis* as a form of intent. However, the more

expansive approach adopted by the Pre-trial Chamber in the *Lubanga* case seemed to have muddied the water more and brought more questions on this issue.

As to the *mens rea* of the age of a child, the argument raised in the chapter is that the “should have known” Standard should be given a narrow explanation to set the liability to “failure to acknowledge the information” but not to “failure to obtain the information” of the age of a child. Such explanation is in conformity with the reality in the warring zones where the availability of information is rather difficult and sometimes impossible.

The decision of the Pre-trial Chamber in the *Lubanga* case on the nature of the armed conflict regarding the alleged crimes committed by Lubanga is put under close scrutiny in this chapter. Discussion is made to understand the approach adopted by the Pre-trial Chamber in its analysis of the issue of the extent to which a foreign military intervention would be deemed sufficient to internationalize an internal armed conflict. The analysis of the different approaches of the ICTY and the ICJ in the determination of the issue of whether an agent is acting on behalf of a foreign state, has demonstrated different levels of requirements in the establishment of state responsibility in international law and the individual criminal responsibility in criminal law.

Finally, although the Rome Statute only criminalized the act of recruitment or use of children under the age of 15 in hostilities, there are certain signs that sentiment is turning in favor of raising the age limit to 18 years. It is to be hoped that the age issue will be given full consideration in the future draft on the issue of child recruitment.

PART III – FINAL CONCLUSION

Children, as the most vulnerable group in armed conflicts, deserve special attention and full protection by the international community. It is the duty of every State to prohibit the use of child soldiers and to establish relevant judicial systems, including municipal legislations, to make possible prosecution and punishment of perpetrators who commit the crime of child recruitment.

The achievement of the international judicial community is undeniable in the development of international standards concerning the prohibition and punishment of child recruitment. Progress is clearly visible from GC IV to OPCRC, where the former only prohibited forcible recruitment of children under the age 15 and the latter not only bans both the forcible recruitment and recruitment of volunteers, but also raises the recruitment age to 18 years. The adoption of the Rome Statute, which for the first time expressly criminalized the act of child recruitment as a crime, is generally regarded as a big step forward.

However, these developments in legislation have so far failed to produce a drastic reduction in the use of child soldiers. The inhumane and widespread practice of child recruitment in various war areas and the miserable life of child soldiers during protracted conflicts continue calling for vigilance and commitment from the international community.

To achieve the real progress of eliminating child soldiering, it is not simply a comprehensive legal standard-setting. Besides that, norms must be fully enforced, and prosecution must always be brought to perpetrators who committed the crime of child recruitment. The widespread and prevalent use of child soldiers may result from three main reasons. Firstly, as discussed in Chapter 1, every international instrument relating to child recruitment has their own flaws, resulting either from compromises in some of the key issues, or from vague and broad language.

Secondly, the applicability of international humanitarian law depends largely upon the adoption of appropriate national legislation, and the end of child soldiering cannot be achieved without the respect of each state. Accordingly governments of States Parties should

fulfill entirely their obligation to adopt or supplement the relevant national legislation. What seems truly delightful is that the rapid development in the regulatory mechanism to stop the use of child soldiers on the international level has witnessed sufficient rise in state practice and *opinio juris* of the criminalization of child recruitment. As discussed in Chapter 3, since the adoption of the Rome Statute, child recruitment has crystallized as a crime under customary international law.

The last reason, which also will be the next step in the process of eliminating child soldiering, is the effective prosecution of perpetrators. The analysis of case law regarding the crime of child recruitment in Chapter 2 showed that so far there are only nine trials involving 13 accused before both the SCSL and the ICC. The number of perpetrators punished or being prosecuted is rather limited. Clearly more judicial practice is urgently needed to enrich the authority of the law on the crime of child recruitment.

Additionally, trials of the crime of child recruitment can not only bring deterrence, rehabilitation, and healing effects, but also provide a good opportunity to clarify some misconceptions and vague language used in the provisions. In Chapter 4, the provisions regarding the crime of child recruitment in the Rome Statute and the EoC have been analyzed with the aim of identifying the key factors in the constituency of the crime of child recruitment before the international criminal tribunals. The reasoning and findings in the relevant cases, especially in the *Lubanga* case before the ICC, have been subjected to close examination, which at the same time has helped with the development of the theories proposed here.

Firstly, the *actus reus* of the crime of child recruitment contains two offences: recruiting (conscripting or enlisting) children under the age of 15 into armed forces or groups; and the use of them to take active part in hostilities. As far as “recruitment” is concerned, it refers to both *de jure* and *de facto* recruitment. The term “use of children to participate actively in hostilities” only refers to military activities linked to combat. Any indirect participation, to a large extent, can be regarded as part of *de facto* recruitment. The separation of the “use of children” taking active part in hostilities from “recruitment of children” is thought to provide more flexibility for the Judges in criminal sentencing.

Secondly, even though Article 30 of the Rome Statute sets down a narrow definition, it has not blocked the possibility to extend the definition to include mental elements elsewhere provided, such as in the EoC. It is evident from the language of “unless otherwise provided”. Accordingly, besides intent and knowledge, the criteria of “should have known” should also be applied as *mens rea* in the case of child recruitment. A narrow explanation of the “should have known” standard has been argued to be applied to set the liability of the accused for his “failure to acknowledge the information” concerning the age of a child.

Recent trends in the development of the norms of child recruitment should also not be underestimated. Although it is widely recognized that the minimum age of recruitment of children is 15 years for this crime, it has been argued that on the basis of the principle of maximal protection of civilians (including children) in armed conflicts and the principle of the best interest of children in international human rights law, it is however necessary to raise the minimum recruitment age from 15 years to 18 years. As more states accept to raise the age of recruitment to 18 years, it is also hoped that recruitment or the use of children under the age of 18 may become a crime under customary international law one day.

ANNEX I: ZUSAMMENFASSUNG(DUETSCH)

Trotz der Dynamik, die sich in der letzten Dekade in der Entwicklung des internationalen Rechts zur Verhinderung und Bestrafung des Kindersoldatentums gezeigt hat, ist das Phänomen der Kindersoldaten bis heute ein weit verbreitetes Problem. Die vorliegende Dissertation versucht, mit einer Analyse der Verbrechen der Rekrutierung von Kindern effektive Mittel zum Schutz der Kinder vor Rekrutierung in bewaffneten Konflikten zu finden. Das Ausmaß der Probleme wird dabei derart dargestellt, dass die unterschiedlichen Rahmenbedingungen der Normen der Rekrutierung von Kindern verglichen, die praktischen und rechtlichen Ansätzen, die ergriffen wurden, um auf das Kindersoldatentum zu reagieren, diskutiert und die Trends für die zukünftige Entwicklung hervorgehoben werden.

Teil I untersucht den Rahmen des Völkerrechts in Bezug auf das Verbot von Kindersoldatentum. Zu diesem Zweck bewertet und vergleicht Kapitel 1 historische Entwicklungen innerhalb des humanitären Völkerrechts, der internationalen Menschenrechte und des internationalen Strafrechts in Bezug auf Bestimmungen über die Rekrutierung von Kindern. Kapitel 2 untersucht die gerichtliche Praxis der internationalen Gerichtshöfe für die Verfolgung der Täter, die das Verbrechen der Rekrutierung von Kindern begangen haben, im Detail.

Teil II, der dem Hauptteil dieser Studie entspricht, konzentriert sich auf die Analyse des Verbrechens der Rekrutierung von Kindern im Regime des Völker-Strafrechts. Kapitel 3 führt eine detaillierte Diskussion über die völkergewohnheitsrechtliche Natur des Verbrechens der Rekrutierung von Kindern, dabei wird die Rechtmäßigkeit der gerichtlichen SCSL-Entscheidung der Berufungskammer im *Norman Case*, Personen, die Kinder vor 1996 rekrutiert oder in Feindseligkeiten verwendet haben, hinterfragt. Im Anschluss daran werden die staatliche Praxis und die *opinio juris* der Kriminalisierung des Kindersoldatentums unter die Lupe genommen. Verschiedene Äußerungen, die von der Berufungskammer in der genannten Entscheidung vorgebracht wurden, werden in diesem Kapitel dargelegt und kritisiert. In Kapitel 4 werden einige grundsätzliche Schwierigkeiten in Bezug auf die Tatbestandsmerkmale dieser Verbrechen, die das Römische Statut und der EOC zur

Verfügung stellen, erörtert. Zu diesem Zweck bezieht sich die Autorin auf Rechtsprechung internationaler Strafgerichte sowie auf theoretische Perspektiven, die in einschlägigen Studien diskutiert worden sind.

In Summe lässt sich feststellen, dass ein unabdingbares und absolutes Verbot des Kindersoldatentums auf internationaler Ebene etabliert wurde. Darüber hinaus wird angenommen, dass die Kriminalisierung des Kindersoldatentums seit der Verabschiedung des Römischen Statuts in der Staatenpraxis eine ausreichende Dichte erlangt hat. Obwohl eine juristische Praxis auf nationaler Ebene in Bezug auf das Verbrechen der Rekrutierung von Kindern noch aussteht, haben sich die Strafverfolgung und Bestrafung der Täter auf der internationalen Ebene gut entwickelt. Die gerichtliche Praxis auf internationaler Ebene wird als fähig erachtet, für Staaten einen wertvollen Rahmen zur Anwendung und Auslegung der Normen bezüglich des Kindersoldatentums in deren nationalen Rechtssystemen zu bieten.

Stichwörter: Kindersoldaten, bewaffneter Konflikt, Einsatz, Zwangsverpflichtung, Wehrpflicht, Mindestalter der Rekrutierung, Völkergewohnheitsrecht

ANNEX II: ABSTRACT (ENGLISH)

The phenomenon of child soldiering remains today a widespread problem, despite the dynamism shown in the development in international law in the past decade in prohibition and punishment of child soldiering. This dissertation attempts to find effective ways of protecting children from recruitment in armed conflicts with an analysis of the crime of child recruitment by outlining the scale of the problems such that the different frameworks of norms of child recruitment are compared, the practical and legal approaches that have been taken to respond to child soldiering are discussed, and the trends for future development are highlighted.

Part I examines the frame of international law relating to the prohibition of child soldiering. For this purpose, chapter 1 reviews and compares historical developments within international humanitarian law, international human rights law and international criminal law in regard to provisions relating to child recruitment. Chapter 2 further examines in detail the judicial practice of the international criminal tribunals on the prosecution of the perpetrators who committed the crime of child recruitment.

Part II, being the main part of this study, focuses on the analysis of the crime of child recruitment in the regime of international criminal law. Chapter 3 carries out a detailed discussion of the customary nature of the crime of child recruitment, in which the judicial decision of the SCSL Appeals Chamber in the *Norman* Case is questioned for its legality in terms of prosecuting persons who recruited or used children in hostilities before 1996. Following that, the state practice and *opinio juris* of criminalizing child soldiering are closely examined. Various pronouncements the SCSL Appeals Chamber raised in its decision are set out, and criticized, in this chapter. In Chapter 4, some conceptual problems relating to the constituent elements of this crime provided in the Rome Statute and the EoC are discussed. For this purpose, the author refers to case law of international criminal tribunals as well as to theoretical perspectives of scholars employed in relevant studies.

In sum, the absolute and non-derogable prohibition of child soldiering is found to have been undeniably established on the international level. In addition, criminalization of child

soldiering is believed to have received sufficient density of State practice since the adoption of the Rome Statute of the ICC. It is understood that though judicial practice at the national level concerning the crime of child recruitment is still to be hoped for, prosecution and punishment on the international level of perpetrators are however well in progress. The judicial practice on the international level is believed capable of providing valuable framework for states to apply and interpret the norms of child soldiering in their national judicial systems.

Key Words: child soldiers, armed conflicts, recruitment, use, conscription, enlistment, minimum age of recruitment, customary international law

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151. The European Convention on Human Rights was signed by the Council of Europe at Rome on 4 November 1950. Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 262, entered into force May 18, 1954
152. Vienna Convention on the Law of Treaties, signed at Vienna on 23 May 1969, entered into force on 27 January 1980

ANNEX IV: CURRICULUM VITAE OF THE AUTHOR

EDUCATION

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- 03.2008-06.2012: Vienna University, Doctoral Degree of Law, Vienna, Austria
 - 03.2007-02.2008: VWU, German Language Certificate for Preliminary University Study, Vienna, Austria
 - 09.2004-06.2006: Renmin University of China, Master of Law, Beijing, China
 - 09.1999-06.2003: Zhongnan University of Economics and Law, Bachelor of Law, Wuhan, China
 - 09.2001-06.2003: Zhongnan University of Economics and Law, Bachelor of Administration (Minor), Wuhan, China

WORKING EXPERIENCE

-
- 01.02.2011-31.12.2011: **Project Assistant**, UC Berkeley War Crimes Studies Centre, University of California, Berkeley, USA
 - 01.10.2010-30.01.2011: **Intern**, Corruption and Economic Crime Branch, UNODC, Vienna, Austria
 - 01.03.2009-02.04.2010: **Visiting Scholar**, UC Berkeley War Crimes Studies Centre, University of California, Berkeley, USA
 - 01.07.2006-28.02.2007: **Consultant**, Shandong Yangguang Engineering Design Institute, Jinan, Shandong Province, China
 - 01.09.2005-28.02.2006: **Intern**, International Criminal Tribunal for the Former Yugoslavia (ICTY), The Hague, Netherlands
 - 10.09.2004-31.08.2005: **Research Assistant**, College for Criminal Law Science of Beijing Normal University, Beijing, China
 - 04.09.2003-03.09.2004: **Paralegal**, Shandong Excellent Law Firm, Jinan, Shandong Province, China

PUBLICATIONS

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- The Application of Customary International Law before International Criminal Courts, accepted by the Journal: China International Criminal Law Review, to be published in July 2012
 - The Crime of Child Recruitment under International Law, 8 International Law Review of Wuhan University (2008), pp. 92-121

- The Property Law: Estate Law, (co-author), China Legal Publishing House, 2007, 350p.
- The Property Law: Property Law in Rural Area, (co-author), China Legal Publishing House, 2007, 210p.
- Translation of the article: Contemporary Challenges in the Civil-military Relationship: Complementarities or Incompatibility into Chinese, in the book: Zhu wenqi (ed.), International Review of the Red Cross - International Humanitarian Law Literary Collection, Law Press China, 2006, pp. 161-186
- Translation of the article: International Criminal Court: Impartial and Efficient International Criminal Justice for Asia and the World into Chinese, 1 China Review of International Criminal Law (2006), pp. 269-278
- Views on the Rule of Law, 5 Shandong Judicial Review (2001), pp. 64-65
- The Impact of Entering WTO on China's Accounting System, 5 Journal of Plan and Market (2001), pp. 34-36

ACTIVITIES

- Participant, Summer Institute in International Humanitarian Law and Human Rights "The Rights of Women and Children", Singapore and Cambodia (4-16.07. 2011)
- Conference Team, Global Standards-Local Action, 15 Years Vienna World Conference on Human Rights, Vienna, Austria (08.2008)
- Conference Team, the Ethics Regional Workshop for Asia on International Criminal Law, Beijing, China (09.2006)
- Conference Team, the Seminar on ICC and its Development in International Criminal Law, Shanghai, China (06.2005)
- Member of Delegation of Renmin University of China, 3rd Red Cross International Humanitarian Law Moot Court, Hong Kong, China (03.2005)

COMPUTER SKILLS

- Operating System: Microsoft Windows, Windows NT, Windows Vista
- General: MS Words, MS Excel, PowerPoint, Databases, Internet
- Programming Language: C

LANGUAGE

- Chinese: Native Fluency
- English: Good Fluency
- German: Intermediate