

The extra-territorial obligation of member states of the Optional Protocol on the Involvement of Children in Armed Conflict to prevent the use of child soldiers

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Mini-dissertation submitted in *partial* fulfillment of the requirements for the degree *Magister Legum* in Comparative Child Law at the Potchefstroom Campus of the North-West University

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2015

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LIST OF ABBREVIATIONS

ACRWC	African Charter on the Rights and Welfare of the Child
CESCR	Committee on Economic, Social and Cultural Rights
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
CWFCL	Convention on the Worst Forms of Child Labour
DDR	Disarmament, Demobilisation and Reintegration programmes
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICRC	International Committee of the Red Cross
IHL	International Humanitarian Law
NGO	Non-Governmental Organisation
SCSL	Special Court for Sierra Leone
SRSR	Special Representative of the Secretary-General
UK	United Kingdom
UN	United Nations
UNICEF	United Nations Children's Fund
US	United States

1 Introduction

The United Nations Secretary-General's 2015 report on children in armed conflict lists 57 parties that recruited or used children in armed conflict during 2014.¹ The United Nations Children's Funds official statistics indicate that since 2005 more than 300 000 child soldiers have been documented fighting in armed conflicts in 41 countries around the world.² The term 'child soldier' refers to any person below the age of 18 who is or has been recruited or used by a state or non-state actor as fighters, cooks, porters or messengers in armed conflict.³

Children are recognised as a vulnerable group in society because, among other attributes, they are young, physically smaller than adults, immature and impressionable. They consequently need special safeguards and care, including appropriate legal protection.⁴ There is a variety of international instruments that provide legal protection to children and more specifically prohibit the recruitment of children into armed conflict. The relevant instruments prohibiting the recruitment of children into armed conflict will be investigated. These instruments are *inter alia*, The Geneva Convention IV relative to the Protection of Civilian Persons in Time of War, 12 August 1949 and its Additional Protocols, The United Nations Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, and vol. 1577 it's Optional Protocol and the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour Convention No 182, 1999. The Geneva Convention and its Additional Protocols provide protection to children during times of armed conflict. The Convention on the Rights of the Child, 20 November

1 Africa-check 2014 <https://africacheck.org>.

2 United Nations Children's Fund 2010 www.unicef.org, Peace Direct 2013 www.peacedirect.org UNICEF is an agency of the United Nations responsible for programmes to aid education and the health of children and mothers in developing countries.

3 Definition obtained from Child Soldier's International www.child-soldiers.org The definition is consistent with the overall prohibition of the *Optional Protocol on the Involvement of Children in Armed Conflict* that children under the age of 18 may not take part in armed conflicts. This definition is also consistent with the definition of a "child associated with an armed force or armed group" in the *Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups*.

4 See *The United Nations Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, and vol. 1577* preamble.

1989, United Nations, Treaty Series, and vol. 1577 and its Optional Protocol on the Involvement of Children in Armed Conflict prohibit the recruitment of children into armed conflict. The Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour Convention No 182, 1999 states the recruitment of children into armed conflict is one of the worst forms of child labour. The purpose of analysing these instruments is to establish if the prohibition on the recruitment of children into armed conflict has become a part of customary international law and in such an event, whether the provisions of the Optional Protocol on the Involvement of Children in Armed Conflict may have extra-territorial obligations for member states. Customary international law rules are created once the two main requirements are met namely, the rule must be settled practice (*usus*) and there must be an acceptance of an obligation to be bound (*opinio juris*).⁵ It will therefore be necessary to investigate if the prohibition on the recruitment of children into armed conflict has met the two main requirements of *usus* and *opinio juris*.

International human rights instruments such as the Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, (Convention on the rights of the Child) and its Optional Protocols are negotiated among United Nations member states and are aimed at protecting the rights of children. These international human rights instruments are legally binding on the individual states that become party to them. It must be mentioned that each of these international human rights instruments usually have a Committee established for the relevant instrument.⁶ The Committees consist of independent experts that monitor the implementation of the international human rights instruments. The committees' also produces General Comments.⁷ The General Comments provide interpretations on these international human rights instruments and the legal nature of the obligations contained therein. General Comments provide for the practical implementation of human rights and assist states in their implementation of relevant international human rights instruments. General Comments are not treaties and do not need

5 Dugard *International Law A South African perspective* 29.

6 United Nations Human Rights Office of the High Commission 2014 www.ohchr.org

7 United Nations Human Rights Office of the High Commission 2014 www.ohchr.org

ratification by treaty parties. General Comments are not legally binding, however they provide an authoritative character with a legal basis. There are various ways for a state to become a party to these instruments. Once a state becomes a party to the Optional Protocol, a state accepts an obligation to protect, promote, respect, and fulfil the enumerated rights. Governments that ratify the Convention or one of its Optional Protocols must report to the Committee on the Rights of the Child, which is the body of experts charged with monitoring States' implementation of the Convention and Optional Protocols.

The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 25 May 2000 (Optional Protocol) is the most specific instrument that deals with the recruitment of children into armed conflict. The Optional Protocol specifically aims at limiting the involvement of children in armed conflict by, *inter alia*, increasing the age of recruitment of children into armed conflict. There are 159 countries that have ratified the Optional Protocol, 22 countries that have neither signed nor ratified it, and 15 countries that have signed but not yet ratified it.⁸ Member states to the Optional Protocol have an obligation to uphold the rights of all children which includes the right not to be conscripted by armed forces. This obligation includes a state not taking any action that would lead to the recruitment of child soldiers by another state or non-state actor.

The question that will therefore be researched is whether the Optional Protocol creates an extra-territorial obligation for a member state to prevent the use of child soldiers and if such an obligation exists, to what extent a member state should comply with the extra-territorial obligations without abrogating state sovereignty and territorial integrity. The primary objective will therefore be to establish the existence of an extra-territorial obligation. An extra-territorial obligation entails obligations of states that extend their responsibilities beyond their national borders.⁹ The secondary objectives will be to discern if the principle that children should not be

8 Office of the Special Representative of the Secretary-General for Children and Armed Conflict 2014 <https://childrenandarmedconflict.un.org>

9 Skogly Beyond national borders 340.

recruited into armed conflict has obtained customary international law status. In order to ascertain whether aforementioned principle has obtained customary international law status it is necessary to identify and analyse applicable legal instruments and establish if an extra-territorial obligation can be distilled from the text of these instruments. It will further be investigated whether state practice and jurisprudence supports the extra-territorial obligation. The significance of establishing such an obligation would broaden the extent to which states parties owe their human rights obligations. The effect would further place an obligation on states to ensure the prohibition on the recruitment of children in armed conflict in other states. This will further have the effect that the prohibition on the recruitment of children in armed conflict is enforced not only the state they currently reside in but all states.

Chapter 2 will first provide a background on the use of child soldiers in armed conflict. This background will include the definition of what is considered a child soldier and the different roles children have during armed conflict. Chapter 3 will provide the legal framework underlying the Optional Protocol. The legal framework will indicate whether the principle that children should not be recruited into armed conflict has gained customary international law status. Chapter 4 will investigate the existence of extra-territorial obligations for member states of the Optional Protocol to prevent the use of child soldiers beyond their own borders. This will be done by establishing what an extra-territorial obligation entails and creating a legal foundation for extra-territorial obligations. Chapter 5 of this dissertation examines if such an obligation exists, to what extent a member state should comply with the extra-territorial obligations without abrogating state sovereignty and territorial integrity.

2 Use of child soldiers in armed conflict: Conceptual clarification

2.1 Introduction

There are thousands of children serving as soldiers in armed conflicts around the world. Children as young as 8 years are participating in armed conflicts around the world. These children fight on the front lines and participate in armed conflict by going on missions and acting as spies, messengers or lookouts. Girls are also forced into sexual slavery. It is estimated that 40% of all child soldiers are girls.¹⁰ They are often used as sex slaves for the male combatants. The international community recognised that armed conflict had a large impact on children and that certain steps had to be taken to protect children in armed conflict. In order to address this problem Graça Machel was given the mandate in 1996 to present a report to the General Assembly on this specific issue. The report was titled, 'The Impact of Armed Conflict on Children'. The report highlighted the impact of armed conflict on children and identified them as the primary victims of armed conflict. The report led to the adoption of a Resolution by the UN General Assembly on the rights of the child which recommended that the Secretary-General appoint a Special Representative on the impact of armed conflict on children.¹¹ During 1999 the Security Council adopted the Security Council resolution 1261 (1999)¹². This was the first resolution adopted by the UN Security Council on children and armed conflict. This Resolution placed the issue of children affected by war on the agenda of the Security Council. The Council identified and condemned grave violations committed against children in times of armed conflict. In 2001 the Security Council passed the Security Council Resolution on the protection of children in armed conflict¹³ which requested the Secretary-General to list parties to armed conflict that recruit or use children in violation of the international obligations applicable to them. The Optional Protocol

10 Anon 2014 <https://www.warchild.org.uk/issues/child-soldiers>

11 Resolution by the UN General Assembly on the rights of the child resolution / adopted by the General Assembly, 20 February 1997, A/RES/51/77.

12 Security Council Resolution 1261 (1999)[on children in armed conflicts], 25 August 1999, S/RES/1261 (1999).

13 The Security Council Resolution 1379 (2001) [on the protection of children in armed conflicts], 20 November 2001, S/RES/1379 (2001).

entered into force on the 12 of February 2002. This date is also known as the International Day against the Use of Child Soldiers. During 2014 the Security Council passed the Resolution on children in armed conflict¹⁴ which encourages member states to take measures to avoid the military use of schools and further endorsed the 'Children, Not Soldiers' campaign. The purpose of the campaign is to end child recruitment and use by government armed forces in conflict by the end of 2016.¹⁵ The Optional Protocol makes a distinction between armed groups of non-state actors and armed forces under state control.¹⁶ A non-state actor is considered as an individual or organisation that is not allied to any particular country or state.¹⁷ Armed forces under state control refer to any armed force that is under government control.

The purpose of this section is to provide a background on armed conflict where child soldiers are being recruited by both states as well as non-state actors.¹⁸ Paragraph 2 of this section will define child soldiers and what is considered as armed conflict.

2.2 Background

It remains a common cause that where states are involved in armed conflicts children are often recruited into military forces which are under government control.¹⁹ Governments usually promulgate legislation that enables them to lower the age of recruitment in times of armed conflict in order to defend their sovereignty and national interests.²⁰ In these instances children can be found serving in the national armed forces of states. An example would be the United Kingdom (UK) as

14 Security Council Resolution 2143 (2014) [on children and armed conflict] , 7 March 2014, S/RES/2143 (2014).

15 Office of the Special Representative of the Secretary General for Children and Armed Conflict 2015 <https://childrenandarmedconflict.un.org/mandate/timeline>.

16 Article 4 of the *Optional Protocol on the Involvement of Children in Armed Conflict*.

17 Anon date unknown www.oxforddictionaries.com

18 For the sake of convenience the terms 'state' and 'non-state actors' will be referred to, as this is the terminology used to distinguish between government and non-governmental forces in the *Optional Protocol on the Involvement of Children in Armed Conflict*.

19 Anon 2015 www.hrw.org/news/2015/02/16/south-sudan-government-forces-recruiting-child-soldiers; Human Security Centre Human security report 2005: War and Peace in the 21st Century 35.

20 Barrow 2001 <http://news.bbc.co.uk/2/hi/europe/1383998.stm>

its armed forces recruit children as young as sixteen. It must be noted however, that the UK made the following declaration upon ratification of the Optional Protocol that children under the age of 18 would only be deployed in regions where they are genuinely needed.²¹

Instances where children are recruited by states are usually due to a shortage of manpower. These recruitments are usually regulated by law and states avoid sending children into armed conflict zones.²² Systematic forced recruitment is also employed by states where there are shortages of manpower, although the age of recruitment is usually 18 years of age.²³ Systematic forced recruitment is when a state enacts legislation that forces all children above 18 to serve a year or more in the armed forces of a state.

The concept of recruiting child soldiers into state armed forces is well known.²⁴ An example would be the Second World War as child soldiers were recruited by German military forces as a last desperate resort to stop the Allied forces advance into German occupied territory. The Germans equipped child soldiers with weapons to form Hitler Youth brigades. As Germany suffered more casualties during the course of the war more teenagers volunteered and were accepted, initially as reserve troops and later on as regulars.

The Optional Protocol specifically refers to armed groups which are distinct from the armed forces of states.²⁵ Armed groups constitute the armed forces of a non- state party to the conflict and consist only of individuals who serve to take a direct part in hostilities.²⁶ The Optional Protocol specifically makes provision for the inclusion of armed groups as they are among the perpetrators when it comes to recruiting child

21 Human Rights Watch World Report 2004; Anon 2005 <http://news.bbc.co.Uk/2/hi/6328771.stm>

22 UNICEF Facts Sheet 2009 www.unicef.org.

23 Cohn and Goodwin-Gill *Child Soldiers* 24; Greenbaum, Veerman and Bacon-Shnoor *Protection of children during armed political conflict* 125.

24 Child Soldiers International 2014 www.chlld-soldiers.org

25 Article 4(1) of the *Optional Protocol on the Involvement of Children in Armed Conflict* reads as follows: 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.

26 Crawford *Identifying the enemy* 15.

soldiers.²⁷ Armed groups favour recruiting children as they are, among other attributes young, immature and impressionable and are considered to be an expendable resource.

2.3 Child soldiers

The advantage of using child soldiers is that their adult counterparts are often reluctant to kill children and usually do not suspect them as infiltrators or spies. The availability of light weight weapons has made it possible for children as young as 12 to be recruited by armed groups. For child soldiers to survive in their new environment they are forced to turn against their own communities by committing brutal atrocities. This ensures that they are unable to return to their former lives. Child soldiers in armed groups are formed into fierce fighters by brutal indoctrination practices. An example of these indoctrination practices would be where a child is forced to kill a family member and is thereafter effectively barred from returning to his family.²⁸

A child soldier refers to any person below 18 years of age who is or who has been recruited or used by a state or non-state actor in any capacity including but not limited to children (both boys and girls) used as fighters, cooks, porters, messengers, spies or for sexual purposes.²⁹ A child soldier does not only refer to a child who is taking, or has taken a direct part in armed conflict.³⁰ These children that take part in armed conflict are often abducted or forcibly recruited by both state and

27 Child Soldiers International 2014 www.child-soldiers.org

28 Robinson *The Right of Child Victims of Armed Conflict to Reintegration and Recovery* 51.

29 UNICEF Facts Sheet 2009 www.unicef.org

30 Definition was obtained from Child Soldier's International www.child-soldiers.org. The definition is consistent with the overall prohibition of the Optional Protocol on the Involvement of Children in Armed Conflict that children under the age of 18 may not take part in armed conflicts. This definition is also consistent with the definition of a "child associated with an armed force or armed group" in the Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups.

non-state actors.³¹ Other children are driven to join due to poverty, abuse, and discrimination or to seek revenge for violence enacted against them or their families.

Children are more likely to become child soldiers if they are displaced from their homes, living in combat zones, have been separated from their families, or have limited access to education.³² Children may join armed groups as the only way to guarantee daily food and survival.³³ Children often '*voluntarily*' take part in armed conflicts, not realising the dangers and abuses to which they will be subjected. Most of the children who are participating in armed conflicts are responding to economic, cultural, social, and political pressures.

2.4 Armed conflict

The Optional Protocol specifically refers to the term armed conflict. In the international legal framework there is no universal consensus of an explicit definition of armed conflict.³⁴ There are various definitions of what is considered to be armed conflict.³⁵ The reference to an armed conflict already presupposes it is an internal armed conflict.³⁶ A non-international armed conflict usually takes place within the territory of a State and in which the armed forces of no other State participate and a non-international armed conflict is governed by specific provisions of the law. When a reference is made to armed conflict, its non-international character is usually presumed.³⁷ It is only when explicit reference is made to international armed conflict that the presumption is removed. The legal norms applicable in a non-international

31 Bailliet *Non-state actors, soft law and protective regimes* 36C; Child Soldiers International 2014 www.child-soldiers.org

32 UNICEF Facts Sheet 2009 www.unicef.org

33 UNICEF Facts Sheet 2009 www.unicef.org

34 Barquero *Thresholds of non-international armed conflict* 1-2.

35 Oppenheim *International law: a treatise* 209: "A civil war exists when two opposing parties within a state have recourse to arms for the purpose of obtaining power in the state, or when a large portion of the population of a state rises in arms against the legitimate government"; Green *The contemporary law of armed conflict* 303: "A non-international armed conflict is one in which the governmental authorities of a state are opposed by groups within that state seeking to overthrow those authorities by force of arms"; La Haye *War crimes in internal armed conflicts* 5: "Internal armed conflict can be defined as the use of armed force within the boundary of one state between one or more armed groups and the acting government, or between such groups".

36 Barquero *Thresholds of non-international armed conflict* 2.

37 Barquero *Thresholds of non-international armed conflict* 2.

armed conflict are just as applicable in an international armed conflict.³⁸ For the purpose of this dissertation, the following definition from Child Soldiers International will be used: "*Armed conflict refers to both international and non-international conflicts of high and low intensity that involves states and/or non-state actors.*"

As has been stated above, children are being recruited into armed conflict. In order to address this issue certain instruments have been adopted by the international community that condemn the use of child soldiers. The relevant instruments prohibiting the recruitment of children into armed conflict will be investigated hereunder. These instruments range from international humanitarian law, international treaties, regional instruments and national laws that create obligations for states to prohibit the use of child soldiers as will be elaborated on below.

38 Perna *The formation of the treaty law of non-international armed conflicts* 102.

3 Legal framework on the prohibition and the prevention of the use of child soldiers

3.1 Introduction

The legal prohibition that children may not be recruited into armed forces can be found in the rules of international humanitarian law, the law and practice of states, treaties (both at international and regional level), customary international law.³⁹

Each of the most relevant instruments pertaining to the prevention of the use of child soldiers will be discussed in this section. These instruments will each be identified, analysed and discussed in the context of the legal framework for the prevention of the use of child soldiers.

3.2 International Humanitarian Law

International law distinguishes between *jus ad bellum* and *jus in bello*. *Jus ad bellum* deals with a state's right to go to war and *jus in bello* is the law governing the waging of war and the treatment of combatants and civilians in time of war.⁴⁰ *Jus in bello* is also known as International Humanitarian Law (IHL).⁴¹ The protective principle established by IHL extends to all combatants and civilians in an international armed conflict. The scope, application and principle sources of IHL will firstly be examined to provide context to the legal prohibition that children should not be recruited into armed forces. IHL does not distinguish between the armed forces, civilian population of an aggressor or the victims of armed conflict.⁴² Modern humanitarian law began in 1859 after the battle of Solferino in 1859 between Austrian and Franco-Italian forces where thousands of wounded soldiers were left to die without any medical

39 *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict* a 1 May 25, 2000, 2173 U.N.T.S.222; *Rome Statute of the CCart* 8(2)(b) July 17 1998 2187 UNTS 90; *Protocol Additional to the Geneva Conventions* of 12 August 1949 and *Relating to the Protection of Victims of International Armed Conflicts* a 77 June 8 1977; there are various provisions in the international humanitarian law and human rights law that state that children under the age of 18 should not be recruited.

40 Dugard *International Law* 519.

41 ICRC What are jus ad bellum and jus in bello? 2015 www.icrc.org

42 Dugard *International Law* 526.

treatment.⁴³ A young Swiss banker named Henry Dunant began a movement which led to the creation of the Geneva-based International Committee of the Red Cross (ICRC).⁴⁴

The ICRC is a non-governmental organisation committed to providing relief to victims of armed conflict. The first multilateral humanitarian treaty (the Geneva Convention) on the amelioration of the conditions of the wounded in armies in the field of 1864, was also a product of this movement.⁴⁵ Thereafter a host of multilateral treaties were adopted. These treaties together with customary rules, constitute modern humanitarian law.⁴⁶ During 1899 and 1907 treaties were adopted at The Hague that dealt with the laws and customs of war.⁴⁷ In 1949 and 1977 more modern treaties were adopted in Geneva which concerned the protection of persons from the effects of armed conflict. IHL can therefore be described as being comprised of the law of The Hague and the law of Geneva.⁴⁸ The International Court of Justice states that the two systems are so closely interrelated that they have gradually formed one single system known as IHL.⁴⁹

The law of Geneva protects combatants no longer engaged in armed conflict and civilians who are not involved in the hostilities. The law of Geneva has its roots in the Hague regulations of 1907 and in the Geneva Convention of 1929 which provided for the protection of the wounded and sick as well as prisoners of war. These conventions were replaced by the four Geneva Conventions of 1949:⁵⁰ (i) To ameliorate the

43 Dugard *International Law* 526.

44 Dugard *International Law* 526.

45 Dugard *International Law* 526.

46 Customary law is specifically included in the preamble to the *Hague Convention*. See *Hague Convention* (IV) respecting the laws and customs of war on land 1907, also known as the Martens Clause. Further on this topic see Henckaerts, Doswald-Beck and Alvermann *Customary international humanitarian law* and *S v Basson* 2005 1 SA 177 (CC) 174 177 216.

47 Dugard *International Law* 526.

48 Dugard *International Law* 527.

49 *Legality of the Treat or Use of Nuclear Weapons* Advisory Opinion of 8 July 1996 International Court of Justice Report 226 256.

50 International Committee of the Red Cross (ICRC), Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), 12 August 1949, 75 UNTS 31; International Committee of the Red Cross (ICRC), Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), 12 August 1949, 75 UNTS 85; International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Treatment of Prisoners of

conditions of the wounded and sick in armed forces in the field; (ii) to better ameliorate the conditions of the wounded, sick and shipwrecked members of armed forces at sea; (iii) to regulate the treatment of prisoners of war and (iv) to protect civilians in time of war. The Geneva Convention IV relative to the Protection of Civilian Persons in Time of War, 12 August 1949, provides in article 50 that the occupying power may not enlist children in formations or organisations subordinate to it. The initial standard for the prevention of the use of child soldiers is found in the Geneva Convention IV of 1949 and therefore, forms part of international IHL. The Geneva Convention IV of 1949 and its additional Protocols, including the provisions relating to the recruitment of children in armed conflict, will be discussed hereunder.

3.3 Geneva Convention and its Additional Protocols

The Second World War brought tragedy into the lives of millions of children and was one of the worst chapters of armed conflict. Children are innocent victims of armed conflict and must be protected as they represent humanity's future.⁵¹ The international community realised after the Second World War that specific protective measures had to be included in the Geneva Convention IV relative to the Protection of Civilian Persons in Time of War 12 August 1949 ("Geneva Convention") to protect children in armed conflict. Therefore, article 50 of the Geneva Convention took the step to specifically include protective measures for children. Article 50 prohibits the occupying power from recruiting children in formations or organisations subordinate to the occupying power.⁵² The article was intended to prevent any repetition of the recruitment practices that took place during the Second World War.⁵³ During the Second World War large numbers of children were recruited and enlisted into occupying state's armed forces in order to advance the political aims of these forces.⁵⁴

War (Third Geneva Convention), 12 August 1949, 75 UNTS 135; International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287.

51 ICRC "General Commentary on the Geneva Convention" 288.

52 ICRC "General Commentary on the Geneva Convention" 288.

53 ICRC "General Commentary on the Geneva Convention" 288.

54 ICRC "General Commentary on the Geneva Convention" 288.

Further in article 51 the Geneva Convention addresses the issue of compulsory recruitment of children into the armed forces of states. Article 51(1), reads as follows:

The Occupying state's armed forces may not compel protected persons to serve in its armed or auxiliary forces",

and article 51(2) states,

...the Occupying Power may not compel protected persons to work unless they are over 18 years of age.

It is clear from the wording of article 51 that the Geneva Convention places an obligation on the occupying power not to recruit persons under the age of 18 in the territory that is occupied. It is equally clear that the Geneva Convention does not specifically place an obligation on the sovereign state not to recruit persons under the age of 18 into its armed forces in its own territory.⁵⁵ Due to the narrow application of sections 51 and 52 of the Geneva Convention which only places an obligation on the occupying power the international community adopted the First and Second Additional Protocol to the Geneva Convention in order to address the shortfalls of the Geneva Convention.⁵⁶

A direct example hereof would be article 77 of the Protocol Additional to the Geneva Conventions of 12 August 1949, The Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 ("First Additional Protocol to the Geneva Convention"), which states that:

Parties to armed conflict shall take all feasible measures to ensure that children who have not attained the age of 15 years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces.

The purpose of article 77 of the First Additional Protocol to the Geneva Convention was to extend the provisions in the Geneva Convention to all children in territories of states that are involved in armed conflict, not just to occupied territories, and further

55 ICRC "General Commentary on the Geneva Convention" 294.

56 Dugard *International Law* 531.

to prohibit the direct participation of children in armed conflict.⁵⁷ This article is therefore, not subject to any restrictions in regard to its scope of application. The article, therefore, applies to all children who are in the territory of states at war, whether or not they are affected by the armed conflict.⁵⁸

In light of the above, it is clear that the First Additional Protocol to the Geneva Convention places an obligation on member states not to recruit children under the age of 15. The First Additional Protocol to the Geneva Convention does not address voluntary enlistment of children under the age of 15. The wording rather indicates that children who have not attained the age of 15 shall not take a direct part in armed conflict and therefore does not address indirect participation of children in armed conflict, such as using children to gather military information, to act as porters or cooks.⁵⁹ The ICRC draft proposal of the First Additional Protocol to the Geneva Convention does not include the word direct.⁶⁰ The intention of the drafters of article 77 was clearly to prohibit children under the age of 15 from participating directly in armed conflict. However, if children under 15 spontaneously perform some of the abovementioned acts and are captured by the enemy, they should not be considered as spies, saboteurs or porters.⁶¹

The First Additional Protocol further states that the parties to armed conflict shall refrain from recruiting children under the age of 15 into their armed forces. The First Additional Protocol therefore, does not specifically prohibit children from voluntarily enlisting themselves into the state armed forces, but rather places the obligation on member states not to recruit children under the age of 15.

Protocol Additional to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977 (hereinafter referred to as the "Second Additional Protocol to the Geneva

57 ICRC "Commentary to the Protocol Additional to the Geneva Conventions" 3174.

58 ICRC "Commentary to the Protocol Additional to the Geneva Conventions" 3177.

59 ICRC "Commentary to the Protocol Additional to the Geneva Conventions" 3187.

60 ICRC "Commentary to the Protocol Additional to the Geneva Conventions" 3187.

61 ICRC "Commentary to the Protocol Additional to the Geneva Conventions" 3187 where it is stated that precautions should at least be taken by states and that, in addition, appropriate instruction is essential.

Convention") filled in the lacuna left by the First Additional Protocol to the Geneva Conventions by providing in Article 4(3)(c) that:

Children who have not attained the age of 15 years shall neither be recruited into armed forces or groups, nor be allowed to take part in hostilities.

This article clearly prohibits voluntary enlistment and recruitment of children under the age of 15. The Second Additional Protocol to the Geneva Convention's restricting age limit gave rise to lengthy discussion as the great divergence of domestic legislation of states on this question did not make it possible to arrive at a unanimous decision on the age of recruitment.⁶² A large number of states opted for the age limit of 18 for children to be allowed to participate in armed conflict.⁶³ However, the age limit of 15 was adopted to increase the chances of the proposal of the Second Additional Protocol to the Geneva Convention being accepted. The ICRC therefore, followed the age limit laid down in the Geneva Convention to ensure that children enjoy privileged treatment.⁶⁴

The Second Additional Protocol to the Geneva Convention's wording further suggests a broader interpretation on the use of children in armed conflict as the wording excludes direct participation as was used in the First Additional Protocol to the Geneva Convention. The Second Additional Protocol to the Geneva Convention uses the words 'nor be allowed to take part in hostilities'. The Second Additional Protocol can therefore, be interpreted to include direct as well as indirect participation of children in armed conflict.⁶⁵ In essence the Second Additional Protocol prohibits using children as spies, porters and cooks during armed conflict.

The Geneva Convention and its Additional Protocols address the issue on the use of children in armed conflict but do not specifically address the particular needs of children, and neither do they set minimum standards for the protection of their rights. The first international treaty to address this issue was the Convention on the Rights of

62 ICRC "Commentary to the Protocol Additional to the Geneva Conventions" 4556.

63 ICRC "Commentary to the Protocol Additional to the Geneva Conventions" 4556.

64 ICRC "Commentary to the Protocol Additional to the Geneva Conventions" 4556.

65 ICRC "Commentary to the Protocol Additional to the Geneva Conventions" 4557.

the Child, 20 November 1989, United Nations, Treaty Series, and vol. 1577 ("CRC") which also guarantees civil and political rights as well as economic, social and cultural rights for children. The CRC is one of the most specific instruments regarding the protection of children's rights and also addresses the use of children in armed conflict.

3.4 United Nations Convention on the Rights of the Child

The **CRC** is one of the most ratified treaties in the world and serves its purpose in both war and peace.⁶⁶ The significance of the CRC being one of the most ratified treaties in the world prompts the examination on whether the content thereof has customary international law status. The CRC defines a child as:

...a human being below the age of 18 years, unless, under the law applicable to the child, majority is attained earlier.⁶⁷

The CRC further in Article 38 establishes the age of 15 as the minimum age of recruitment. Article 38 of the CRC reads as follows:

1. States 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.
2. States Parties shall take all feasible measures to ensure that persons who have not attained the age of 15 years do not take a direct part in hostilities.
3. States Parties shall refrain from recruiting any person who has not attained the age of 15 years 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, States Parties shall endeavour to give priority to those who are oldest.

Article 38(1) places an obligation on states to respect and protect the rights of children under International Humanitarian Law. This paragraph therefore incorporates the previous protection afforded to children during armed conflict under the Hague Conventions as well as under the Geneva Conventions and their Additional Protocols. Article 38(2) places the age restriction of 15 as the minimum age for children to participate directly in armed conflict. The Second Additional Protocol to the Geneva Convention prohibits both the direct and indirect participation of children under the

66 Coomaraswamy 2010 *International Journal of Children's Rights* 535-549.

46 Article 1 *Convention on the Rights of the Child* 3.

age of 15 in armed conflict. It can be argued that the CRC undermines the standards set by the Second Additional Protocol to the Geneva Convention as it does not prohibit indirect participation of children in armed conflict.⁶⁸ The reason for the CRC not including indirect participation is due to the reluctance of certain states to change recruitment practices for their armed forces; they maintain that children under the age of 15 may be recruited into their armed forces even though these children would never be used directly in armed conflict.⁶⁹ Paragraph 3 of article 38(3) prohibits member states from recruiting children under the age of 15 into their armed forces and further places an obligation on member states to give preference to the oldest children when recruiting children between the age of 15 and 18. It is interesting to note that the majority of the provisions of the CRC protect children up to the age of 18 but the CRC still did not raise the age of recruitment to 18.⁷⁰ This can be explained by the resistance of certain states to change their practice of recruitment as their domestic legislation still provides for the recruitment of children who have attained the age of 15.⁷¹

The CRC fails to implement a complete prohibition on the military recruitment of children under the age of 18. This resulted in the Optional Protocol on the Involvement of Children in Armed Conflict being created specifically to address the shortfalls of the CRC.⁷² The proposition for the Optional Protocol was strongly supported by the Committee on the Rights of the Child.⁷³ However, due to the slow

68 Coomaraswamy 2010 *International Journal of Children's Rights* 535-549.

69 UNICEF Facts Sheet 2009 www.unicef.org where it was noted that the UK and Vietnam had reservations to the CRC. It must also be noted that the USA has still not adopted the CRC.

70 Coomaraswamy 2010 *International Journal of Children's Rights* 535-549.

71 Harvey *Children and armed conflict* 30 where the objections of the United States of America was noted as well as the compromise regarding the age limit for children. Examples of state domestic legislation that punishes the recruitment under the age of 15: *Australia's Criminal Code Act* (1995), as amended in 2007, the person or persons are under the age of 15 years; *Belgium's Penal Code* (1867), as amended in 2003, provides: War crimes envisaged in the 1949 [Geneva] Conventions ... and in the [1977 Additional Protocols I and II] ... , as well as in a 8(2)(f) of the [1999 ICC Statute], and listed below, ... constitute crimes under international law and shall be punished in accordance with the provisions of the present title 7. conscripting or enlisting children under the age of 15 into armed forces or armed groups; Germany's Law Introducing the International Crimes Code (2002) a 1, § 8(1)(5): punishes anyone who, in connection with an international or non-international armed conflict, "conscripts children under the age of 15 years into the armed forces, or enlists them in the armed forces or in armed groups".

72 Harvey *Children and armed conflict* 6.

73 Harvey *Children and armed conflict* 7.

drafting process of the Optional Protocol on the Involvement of Children in Armed Conflict, the International Labour Organization included a provision in the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour Convention⁷⁴ ("WFCL") that specifically addresses the recruitment of children in armed conflict.⁷⁵

3.5 International Labour Organization: Convention for the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour

Before the Optional Protocol on the Involvement of children in armed conflict came into operation the International Labour Organization adopted the WFCL. The WFCL was adopted in June 1999 and entered into force in November 2000.⁷⁶ The drafting of the WFCL presented an opportunity to address the issue on the prohibition on the recruitment of children under the age of 18 as a form of child labour.

During the drafting of the WFCL the Trade Unions, Non-profit Organisations (NGOs) and certain governments supported the inclusion of a provision that would specifically address the recruitment of children during armed conflict.⁷⁷ As a result of the adoption of the WFCL the recruitment of children under the age of 18 was accepted as one of the worst forms of child labour. The adoption of the WFCL holds practical implications for the International Labour Organization as it places an obligation on states to continually review the law and practice in their territories in relation to WFCL as well as work on practical alternatives to child recruitment.⁷⁸

The WFCL declared that forced or compulsory recruitment of children under the age of 18 for the use in armed conflict is among the worst forms of child labour and calls

74 Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour Convention⁷⁴ No 182, 1999.

75 Coomaraswamy 2010 *International Journal of Children's Rights* 535-549.

76 UN Ref World 2014 <http://www.refworld.org>.

77 Harvey *Children and armed conflict* 1, 6.

78 Harvey *Children and armed conflict* 1, 6.

upon member states to take all necessary measures, including sanctions, to eliminate the practice of child soldiering.⁷⁹

Article 3, of the WFCL reads as follows:

For the purposes of this Convention, the term "the worst forms of child labour" comprises the following:

- (a) 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;

The WFCL does not specifically address all participants in armed conflict but rather addresses the forcible recruitment of children under the age of 18. The WFCL does not specifically prohibit the voluntary enlistment of children in armed conflict and does not specifically address the participation of children in armed conflict as previous instruments did. However, the purpose of the inclusion of the provision to prohibit the forcible recruitment of children in armed conflict was to ensure that member states would change their domestic legislation in order to conform to the strict 18 years ban on the recruitment of children in armed conflict.⁸⁰

It is clear that states negotiate conventions on an international level to prohibit the recruitment of children in armed conflict. Member states to these conventions further show their commitment to prohibiting the use of child soldiers by developing and adopting regional instruments among themselves. The effect of adopting regional instruments strengthens existing legal measures that a state may have to prevent the recruitment of children in armed conflict. Hereunder the regional instruments that prohibit the recruitment of children in armed conflict will be discussed.

3.6 Regional instruments prohibiting the use of child soldiers

The first treaty to establish 18 as the minimum age for recruitment was the African Charter on the Rights and Welfare of the Child⁸¹ ("African Charter"). The African

79 Article 7(1) *International Labour Organization (ILO), Worst Forms of Child Labour Convention*, C182 17 June 1999.

80 Harvey *Children and armed conflict* 7.

81 was the African Charter on the Rights and Welfare of the Child, 11 July 1990.

Charter was entered into force in November 2000 and obligated member states to refrain from recruiting any child under the age of 18.⁸² The Charter further prohibits the voluntary enlistment and compulsory recruitment of children in armed conflict, and also prohibits the direct participation of children in armed conflict.

After the adoption of the African Charter the participants to the African Conference on the Use of Children as Soldiers adopted the Maputo Declaration on the Use of Children as Soldiers, 22 April 1999 ("Maputo Declaration"). The conference was held on the 22nd of April 1999 and led to the creation of the Maputo Declaration which called for the end of the recruitment and use of child soldiers under the age of 18. Article 1 of the declaration states that:

We solemnly declare that the use of any child under 18 years of age by any armed force or armed group is wholly unacceptable.

Article 2 of the declaration further prohibits the direct and indirect participation of children in armed conflict.

The Organisation of American States as well as the Council of Europe adopted regional instruments among themselves to prevent the recruitment of child soldiers. The Organisation of the American States' Resolution on Children and Armed Conflict was adopted on the 5th of June 2000. The resolution encourages its member states to respect International Humanitarian Law regarding child soldiers and especially to sign and ratify the Optional Protocol and the WFCL. The Council of Europe also expressed its concerns about the recruitment of children in armed forces and the treatment of child soldiers by national forces.⁸³ These regional instruments show the international communities' commitment to the prevention of the use of child soldiers.⁸⁴

82 Article 22(2) of the *African Charter on the Rights and Welfare of the Child* states: "State parties to the present charter shall take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain in particular, from recruiting any child".

83 *Council Conclusions* of 10 December 2002 (doc 15138/02, page 9). *Council Conclusions on the Biennial Review of the EU Guidelines on Children and Armed Conflict* of 12 December 2005 (doc 14960/05 p 15); *Implementation Strategy for Guidelines on Children and Armed Conflict* adopted on 25 April 2006 (doc 8285/1/06 REV 1); *Resolution on Children and Armed Conflict* adopted by the EU-ACP Joint Parliamentary Assembly June 2003.

84 Harvey *Children and armed conflict* 30.

3.7 Optional Protocol on the Involvement of Children in Armed Conflict

States show their commitment to prevent the use of child soldiers by ratifying or acceding to the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 25 May 2000 (Optional Protocol). To date almost two-thirds of UN member states have ratified or acceded to the Optional Protocol.⁸⁵

The purpose of the Optional Protocol is to strengthen existing international human rights law aimed at preventing the recruitment of child soldiers. During the past decade states and NGOs have strived for a more focused legislative measure to prevent the recruitment of children by armed forces. In 1994 the United Nations' Commission on Human Rights formed a committee to draft an Optional Protocol to give effect to this prohibition. The committee consisted of international NGOs, the Committee on the Rights of the Child, state representatives and independent experts. Graça Machel, a former Minister of Education for Mozambique, was appointed as the United Nations secretary-general's independent expert to submit a study on the impact of armed conflict on children which was submitted to the General Assembly in 1996 and played an important role in the establishment of the Optional Protocol.⁸⁶ It took nearly six years to finalise the content of the Optional Protocol. In 1998 several NGOs created the Coalition to Stop the Use of Child Soldiers in order to start a campaign to generate political support against the slow drafting process of the Optional Protocol.⁸⁷

During January 2000 the members of the committee tasked with drafting the Optional Protocol agreed that the Optional Protocol would focus on compulsory recruitment and ban direct participation of children in hostilities.⁸⁸ The Optional Protocol entered into force and became legally binding on the 12th of February 2002 after receiving the

85 Coalition to stop the use of child soldiers Child Soldiers Global Report" 12.

86 Coomaraswamy 2010 *International Journal of Children's Rights* 535–549.

87 Coalition to stop the use of child soldiers Child Soldiers Global Report" 15.

88 The report resulted in the appointment by the secretary-general of a special representative for children in armed conflict with a mandate to promote the rights, protection and wellbeing of children during armed conflict. The special representative advocates for the application of international standards to protect children from recruitment and participation in armed conflict.

first ten ratifications.⁸⁹ This legal instrument established 18 as the minimum age for compulsory recruitment and participation in hostilities.

The Optional Protocol creates legally binding obligations regarding the prohibition of the use of child soldiers and state parties to the Optional Protocol are obligated to abide by all the provisions of the Optional Protocol in order to conform to international law.⁹⁰ The Optional Protocol completely prohibits the use of children in hostilities and defines a child as someone who is under the age of 18.⁹¹ This provision requires member states to raise the minimum age of recruitment from 15 to 18. This obligation does not encompass indirect participation which is often just as dangerous to children involved in armed conflict. The Optional Protocol does not provide guidance on the interpretation of direct participation in hostilities, nor is direct or indirect participation defined. In addition, the interpretation cannot be found in the *travaux préparatoires* of the Optional Protocol.⁹²

The Optional Protocol ultimately fails to cover the indirect participation of children under the age of 18 in armed conflict. The effect hereof is that children may be used to indirectly participate in armed conflict. The fact that only direct participation was addressed in the Optional Protocol was the result of a compromise.⁹³

The language of the Optional Protocol is drawn from article 38(2) of the CRC and article 77(2) of the First Additional Protocol to the Geneva Convention. Article 1 of the Optional Protocol refers to the participation of children in hostilities and not in armed conflict.⁹⁴ During the Diplomatic conference of Geneva during 1974 and 1977 'hostilities' were defined as acts of war that strike at the personnel or material of (an)

89 Coomaraswamy 2010 *International Journal of Children's Rights* 535-549.

90 *Vienna Convention on the Law of Treaties* 23 May 1969 United Nations Treaty Series 1155 331 set forth the principle of *pacta sunt servanda* that requires states to uphold their treaties in good faith.

91 *Optional Protocol on Children in Armed Conflict* a 1.

92 Vandewiele *Optional protocol* 20.

93 During negotiations of the Optional Protocol the UN Working Group finally concluded the draft of the text for the Optional Protocol (the compromise position taken by States which previously had opposed consensus may have been motivated by concerns that the NGO campaign might eventually succeed) see Vandewiele *Optional protocol* 21.

94 See *Additional Protocol and CRC* - The United Kingdom as well as Vietnam made a declaration on 1 stating that it did not exclude the deployment of under 18s in certain circumstances.

enemy's armed forces.⁹⁵ Further during this conference the term persons taking part in hostilities was discussed and it was stated that the term hostilities not only covers the time a civilian actually makes use of a weapon, but also includes the time he is carrying the weapon as well as the times he undertakes hostile acts without using the weapon. The term hostility is considered a broader notion than armed conflict.⁹⁶ This can also be substantiated due to the fact that the term is broadly used in IHL.⁹⁷

The Optional Protocol specifically provides that neither states nor armed groups may recruit children under the age of 18 into armed conflict.⁹⁸ As states sign treaties they are normally the ones that are legally bound by the treaties' obligations under international law.⁹⁹ As the use of child soldiers has been condemned throughout the international community and armed groups often use child soldiers in their armies, the Optional Protocol took the step to specifically include armed groups. The Human Rights Watch has reported the use of child soldiers by armed groups in various countries.¹⁰⁰ Article 4 specifically provides that:

...armed groups that are distinct from the armed forces of the state should not under any circumstances recruit or use in hostilities any person under the age of 18.

This provision of the Optional Protocol rather serves to impose a moral obligation upon armed groups and puts the legal obligation on member states in respect of armed groups.¹⁰¹ This legal obligation includes criminalising these recruitment practices and enforcing the Optional Protocol within the member states' jurisdiction. In terms of IHL each party in a conflict has an equal obligation to uphold in terms of the rules of International Humanitarian Law.¹⁰² There is a lack of equality of obligations in the Optional Protocol which can be seen in the rules that govern states

95 Vandewiele *Optional protocol* 21.

96 Vandewiele *Optional protocol* 21.

97 Vandewiele *Optional protocol* 20.

98 See *Optional Protocol* specifically aa 1, 2 and 4.

99 *Vienna Convention on the Law of Treaties* 331 aa 6 and 26, *Kuobel v Royal Dutch Petroleum Company* 621 F. 3D 11, 127, it was held in this case that corporations cannot be held liable for the violation of international law because corporations do not sign treaties.

100 Child Soldiers International "State responsibility to prohibit the recruitment and use of children by state-allied armed groups" 2.

101 Helle 2000 *IRRC* 797, 806; Sivakumaran *The law of non-international armed conflict* 324.

102 Vandewiele *Optional protocol* 22.

and those that govern armed groups.¹⁰³ The lack of equality can be found in the fact that voluntary recruitment of children over the age of sixteen is permitted into a state's armed forces but not into armed groups.¹⁰⁴ This creates a double standard which has been questioned by some armed groups.¹⁰⁵ An example of an armed group that has considered itself bound by the Optional Protocol is the New People's Army of the Philippines.¹⁰⁶

The Optional Protocol places obligations on member states to take certain actions within their jurisdiction and places obligations on member states to provide assistance outside their jurisdiction. This can be seen in article 7 which provides that all state parties to the Optional Protocol must cooperate to ensure the complete implementation of the Optional Protocol. Article 7 of the Optional Protocol reads as follows:

States Parties shall cooperate in the implementation of the present Protocol, including in the prevention of any activity contrary to the Protocol and in the rehabilitation and social reintegration of persons who are victims of acts contrary to this Protocol, including through technical cooperation and financial assistance. Such assistance and cooperation will be undertaken in consultation with concerned States Parties and relevant international organizations.

States Parties in a position to do so shall provide such assistance through existing multilateral, bilateral or other programmes, or, inter alia, through a voluntary fund established in accordance with the rules of the General Assembly.

It is clear that article 7 places an obligation on a member state to provide technical and financial assistance outside its jurisdiction to other member states to the Optional Protocol. Article 7 further provides that a member state must take measures to prevent any action that might be contrary to the Optional Protocol. Article 7 therefore, embodies the idea of international cooperation as member states to the Optional

103 Sivakumaran *The law of non-international armed conflict* 324.

104 See *Optional Protocol* article 3 which states: States Parties shall raise the minimum age for the voluntary recruitment of persons into their national armed forces from that set out in a 38 para 3 of the *Convention on the Rights of the Child* 1 taking account of the principles contained in that article and recognizing that under the Convention persons under 18 are entitled to special protection.

105 Machel *The impact of war on children* 20; Helle 2000 *IRRC* 797, 808; Sivakumaran *The law of non-international armed conflict* 324. Modern warfare: armed groups private militia, humanitarian organisations and the law (University of British Columbia Press 2012) 73, 81.

106 The NPA of the Philippines and see Report of the Secretary-General on the *Children in Armed Conflict in the Philippines* para 21.

Protocol must help each other uphold their obligations. Article 7 specifically states that member states must do so by cooperating in the implementation of the Optional Protocol through *inter alia*, existing multilateral, bilateral or other programmes or a voluntary fund established in accordance with the rules of the General Assembly.

There are numerous additional instruments that were adopted by states to strengthen the principle of the Optional Protocol. These additional instruments are *inter alia*, resolutions, commitments and principles. The purpose of these additional instruments is to raise awareness and to strengthen cooperation between states to prohibit the recruitment of children in armed conflict. These additional instruments will be dealt with hereunder.

3.8 Additional instruments

The UN Security Council has passed numerous resolutions that prohibit states from using children in armed conflict.¹⁰⁷ Before 1999 there were no Security Council resolutions that dealt with children in armed conflict. The first Security Council resolution was the result of the first debate on this subject.¹⁰⁸ This resolution affirmed the protection and security afforded to children in armed conflict. Specific reference was also made to the harmful impact of conflict on children, including the consequences that this has for peace and security. The resolution also called on states to take action to monitor the small arms trade and to address the issue of child soldiers within their jurisdiction. A second Security Council resolution reiterates the concerns mentioned in the first resolution and expands on the issue where IHL on children in armed conflict is being violated.¹⁰⁹ The Security Council confirmed its readiness to consider these situations and adopt appropriate steps to deal with these international humanitarian and human rights law violations. A third Security Council Resolution again raises the concern of the impact of armed conflict on children and

107 S.C. RES. 1612; U.N. doc.s/res/1612 (July 26, 2005); S.C. RES. 1539; 1539, U.N. DOC. S/res/1539 (April 22, 2004) S.C. res. 1460, U.N.DOC.s/res/1460 (January 30, 2003) S.C.res. 1379, U.N.DOC. s/res/1379 (November 20, 2001) S.C.RES.1261; U.N.DOC.s/res/1261 (August 25, 1999).

108 Harvey *Children and armed conflict* 16 and see Security Council resolution 1261 of 1999 S/RES/1261 (1999).

109 Security Council resolution 1314 of 2000 S/RES/1314 (2000).

calls on corporate actors to refrain from doing business with parties to a conflict that do not protect children.¹¹⁰ The resolution also reaffirms that states must prohibit the recruitment of children in armed conflict further to which the Security Council instructed the Secretary-General to gather information on parties that recruit or use children in armed conflict. The fourth Security Council resolution includes the content of the previous three resolutions as well as calling for the application of international norms and standards for the protection of children in armed conflict.¹¹¹

These resolutions are not binding on states themselves but do provide a framework for the protection of children in armed conflict. This framework can also be used to compare state-specific situations to one another.¹¹² The resolutions reflect the growing awareness of the impact of armed conflict on children and specifically that children should not be recruited into armed conflict.

Further to the resolutions passed by the Security Council, the United Nations Children's Fund (UNICEF) and the French Foreign Ministry held a meeting in March in 2007 called *Free children from war*. There were 59 United Nations member states that participated in the meeting and two outcome documents were created which obliged states to uphold political commitments towards the prohibition of the use of children in armed conflict.¹¹³ The Paris Principles is a series of commitments based on legislative instruments regarding child soldiers and the protection of children from participation in armed conflict. The Paris Principles and resolutions demonstrate the UN's and states' commitment to the prevention of the use of child soldiers in armed conflict. In 2007 a conference was held in Cape Town by Child Protection partners where the Cape Town Principles were adopted. The Cape Town Principles is not a

110 Harvey *Children and armed conflict* 16 and see Security Council Resolution 1379 of 2001 S/RES/1379(2001).

111 Harvey *Children and armed conflict* 16 and see Security Council resolution 1460 of 2003 S/RES/1460(2003).

112 Security Council Resolutions made under chapter VII of the Charter of the UN in response to specific acts of aggression or threats to intentional peace and security by a state are binding on all members of the UN; Harvey *Children and armed conflict* 16.

113 The Paris Principals, February 5th 2007 the Paris commitments to protect children from recruitment or use by armed forces or armed groups; the Paris principles February 5th 2007, the principles and guidelines on children associated with armed forces or armed groups.

binding legal instrument but it provides a broader definition of child soldiers which included the following:

...any person under 18 years of age who is part of any regular or irregular armed force or armed group in any capacity, including but not limited to, cooks, porters and messengers, including girls recruited for sexual purposes and forced marriages...

The Cape Town Principles' definition of child soldiers included direct and indirect participation of children in armed conflict.¹¹⁴ It is clear that these additional instruments strengthen the existing international instruments and that states recognise that children should not be recruited into armed conflict. It is further also recognised by international prosecutors that the recruitment of children into armed conflict is considered a war crime.

3.9 Customary international law

Customary international law requires the existence of two elements namely, *usus* (*state practice*) and *opinio juris* (the belief that such a practice is prohibited or allowed as a matter of law).¹¹⁵ Article 38(1)(b) of the statute for the International Court of Justice describes customary international law as a general practice accepted as law. The test whether a rule of general customary international law exists can be found in the following case law *Continental Shelf (Libya v. Malta)*¹¹⁶ (*Continental Shelf case*), *Colombia v. Peru*¹¹⁷ (*Asylum case*), and Fisheries Jurisdiction Cases¹¹⁸ (*Fisheries Jurisdiction cases*). Hereunder *usus* and *opinio* will be described in relation to prohibition of the recruitment of children in armed conflict and it will be argued that this principle forms part of customary international law.

3.9.1 Usus

Usus (state practice) can be found in a variety of materials including treaties, national legislation, decisions of national and international courts, diplomatic correspondence,

114 *Cape Town Principles* 27-30 April 2007 1.

115 Dugard *International Law A South African perspective* 29

116 *Continental Shelf (Libya v. Malta)*¹¹⁶ 1985 I.C.J. 13 (June 3) 20 November 1950.

117 *Colombia v. Peru*, International Court of Justice (ICJ).

118 Fisheries Jurisdiction Cases [1973] ICJ Rep 3; [1974] ICJ Rep 3.

opinions of law advisors and policy statements by government officials.¹¹⁹ State practice is considered to be the acts of states which constitute their practice in international legal spheres.¹²⁰ According to the International Court of Justice, in the *Asylum* case a state practice comes into existence if such a practice is constant and uniform.¹²¹

It was further established in the Fisheries Jurisdiction Case that for a state practice to form part of customary international law such a practice must receive general or widespread acceptance.¹²² The reference to state practice that must be uniform means that different states must not have engaged in different conduct. An example hereof is that the rules of IHL enjoy overwhelming support and therefore states respect and protect the rules of IHL. Thus states may not engage in conduct that is considered contrary to IHL. It must be mentioned that where a state acts contrary to IHL such conduct is condemned by other states and this only confirms the rule of IHL. Secondly for a practice to become customary international law the state practice must enjoy general or widespread acceptance. General or widespread acceptance does not mean that the rule must be universal practice, but general practice would be considered sufficient.¹²³

The reason that general practice is considered to be sufficient is that it is impossible to establish the exact number of states required to form a customary international rule. In the *Continental Shelf case*, the International court of Justice stated that the practice must include that of states whose interests are especially affected.¹²⁴ The International Court of Justice raised two implications in respect of state practice of states whose interests are especially affected, the first being that states which have been especially affected are represented, which means that the majority of states do

119 Dugard *International Law* 29.

120 Henckaerts *Study on customary international humanitarian law* 179.

121 Henckaerts *Study on customary international humanitarian law* 179 and see International Law Association, 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 14, p. 734.

122 Henckaerts *Study on customary international humanitarian law* 180.

123 Henckaerts *Study on customary international humanitarian law* 180.

124 International Court of Justice, North Sea Continental Shelf cases, op cit (note 7) p 43, § 74. Volume 87 Number 857 March 2005.

not need to actively participate in the practice, but rather must have at least accommodated it.¹²⁵ The second implication is that if specifically affected states do not accept the practice, it cannot become a rule of customary international law.¹²⁶ It was, however, further held in the *Continental Shelf case* that universal acceptance is not necessary.¹²⁷ Therefore, it is not necessary for all specifically affected states to accept the practice.

State practice in relation to the prohibition on the recruitment of children in armed conflict can be seen by the acts of states and the latter can be seen by the domestic and international instruments they adopt.

For a state practice on the prohibition of the recruitment of children in armed conflict to form part of customary international law such a practice has to enjoy general or widespread acceptance. IHL which includes the Geneva Convention and its Additional Protocols¹²⁸ is respected and protected by states and enjoys overwhelming support¹²⁹. The Geneva Convention and its Additional Protocols afford specific protection to children in armed conflict and have been adopted by a large number of states.¹³⁰ Therefore, IHL can be said to enjoy general or widespread acceptance. In relation to children in armed conflict especially affected states would be those participating in armed conflict and states that condemn the recruitment of children into armed conflict.¹³¹ Therefore, any state that participates in armed conflict is subject to any rule of IHL and this includes the prohibition on the recruitment of children in armed conflict.

125 Henckaerts *Study on customary international humanitarian law* 181.

126 Henckaerts *Study on customary international humanitarian law* 182.

127 International Court of Justice, *North Sea Continental Shelf cases*, op cit (note 7) p 43, § 74. Volume 87 Number 857 March 2005.

128 See para 3.2.

129 Henckaerts *Study on customary international humanitarian law* 182.

130 See para 3.2.

131 Henckaerts *Study on customary international humanitarian law* 182

3.9.2 *Opinio juris*

The requirement of *opinio juris* in respect of establishing a rule of customary international law refers to a general practice being carried out as a right.¹³² Article 38(1)(b) of the statute for the International Court of Justice describes this as accepted as law by states. In the *Continental Shelf case* the International Court of Justice elaborated on this requirement by stating that:¹³³

The act concerned amounts to settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of customary international law requiring it. The need for such a belief is the existence of a subjective element, is implicit in the very notion of *opinio juris sive necessitates*. The states must, therefore, feel that they are conforming to a legal obligation. The frequency or even habitual character of the acts is not in itself enough.

The requirement of *opinio juris* is therefore, a belief of a state to be legally bound by a certain settled practice. When considering *opinio juris* and the recruitment of children in armed conflict it must be established that states believe they are legally bound by a certain settled practice, in this case the prohibition of the recruitment of child soldiers. States have adopted and supported the creation of various international instruments to prohibit the recruitment of child soldiers.¹³⁴ Certain rights are only entered into treaties when states feel an obligation to uphold and support such rights. It can therefore be stated that the creation of the legal framework for the prevention of the use of child soldiers by the international community supports a settled practice by state.

In light of the legal framework for the prevention of the use of child soldiers, it is clear there is a vast number of international instruments, varying from treaties to resolutions, which prohibit the recruitment and use of child soldiers. States show their

132 Dugard *International Law* 33.

133 *Continental Shelf (Libya v. Malta)* 1985 ICJ 13 (June 3) 45.

134 *Additional Protocol to the Geneva Convention 1949; Convention on the Rights of the Child; Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflicts; Security Council Resolutions: 1261 (1999), 1314 (2000), 1379 (2001), 1460 (2003) 1539 (2004), 1612 (2005), 1882 (2009), 1999 (2011); Paris Principles and Guidelines associated with Armed Forces or Armed Groups, 2007.*

commitment to the general practice of prohibiting the use of child soldiers by ratifying and adopting these instruments. The international courts have also upheld that the prohibition on the use of child soldiers is considered to form part of customary international law. To support this argument further, the ICRC has compiled a list of rules that is considered to have been formed into customary international law.¹³⁵ The mandate to compile this list was given to the ICRC by the Red Cross and Red Crescent during 1995 at the 26th international conference.¹³⁶ The purpose of the list was to create greater certainty regarding the rules of customary international law.¹³⁷ Rule 136 of the list states that, "children must not be recruited into armed forces or armed groups". This rule was included in the list as it is considered part of customary international law due to the vast number of international legal instruments that prohibit the recruitment of children. In light of the above it can be stated that the principle of the prohibition on the recruitment of children in armed conflict has formed part of customary international law as it has qualified in terms of *usus* and *opinio juris*.

3.10 Enforcement by courts and tribunals

3.10.1 Special Court of Sierra Leone

The Special Court of Sierra Leone was established to try individuals who were accused of war crimes during Sierra Leone's civil conflict, and also tried individuals for the recruitment of child soldiers in armed conflict.¹³⁸ Articles 1 and 4 of the statute for the Special Court of Sierra Leone criminalise the use of children under the age of 15 in armed conflict. The statute does however not define the use of child soldiers as a war crime but rather as a serious violation of IHL. The Special Court of Sierra Leone convicted numerous individuals for war crimes, including the use of child soldiers

135 Henckaerts, Doswald-Beck and Alvermann *Customary international humanitarian law* 456 Rule 136.

136 Henckaerts, Doswald-Beck and Alvermann *Customary international humanitarian law* 456 Rule 136.

137 Henckaerts, Doswald-Beck and Alvermann *Customary international humanitarian law* 16; Crawford *Identifying the enemy* 50.

138 *Statute of the Special Court of Sierra Leone* aa 1 and 4. January 16, 2002. *Prosecutor v Kondewa* SCSL-03-12-I. *Prosecutor v Taylor* SCSL-03-01-PT.

during the conflict in Sierra Leone.¹³⁹ It must also be mentioned that in *Prosecutor v Sam Hinga Norman*¹⁴⁰ (*Prosecutor v Norman*) the Appeal chambers for the Special Court of Sierra Leone held that the principle of *nullem crimen* must be applied by reference to customary international law. In the *Prosecutor v Norman* the Appeal Chambers further found that the prohibition on the recruitment of child soldiers in internal and international armed conflict had formed into customary international law prior to November 1996 which was before the Special Court of Sierra Leone was established.¹⁴¹

3.10.2 International Criminal Court

The Rome Statute¹⁴² established the International Criminal Court (ICC) which reflected a historical development in the prohibition against the use of children in armed conflict. The ICC established the following as war crimes:¹⁴³

...conscripting or enlisting children under the age of 15 years into the national armed forces of states or using them to participate actively in hostilities in an international armed conflict and recruiting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities in a non-international armed conflict...

The Rome Statute¹⁴⁴ established the ICC to try individuals charged with war crimes, genocide, and crimes against humanity. The ICC has tried individuals for the recruitment of children under the age of 15. The first case the ICC heard on the recruitment of child soldiers was in *Prosecutor v Thomas Lubanga Dyilo*¹⁴⁵ (*Prosecutor v Lubanga*). Thomas Lubanga was charged with war crimes of recruiting and enlisting

139 *Prosecutor v Brima, Kamara and Kanu* SCSL-04-16-T; Taylor Case No. SCSL-03-01-PT, H22; *Sesay* Case SCSL – 203-05-I,H 46; *Sesay Kallon and Gbao* SCSL-04-15-T,U 6; *Kondewa* Case SCSL-03-12-I,I 24.

140 *Prosecutor v Thomas Lubanga Dyilo*, case No. ICC 01/04-01/06.

141 *Prosecutor v Sam Hinga Norman* SCSL 2204 12 AR72 E 31 May 2004 and see Clapham and Gaeta *The Oxford handbook of international law* 46 49.

142 Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, ISBN No. 92-9227-227-6.

143 Article 8(2)(b)(xxv1) and (2) (e)(vii) of the *Rome Statutes of the International Criminal Court* UN DOC A/CONF/183/9, entered into force 1 July 2002.

144 UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, ISBN No. 92-9227-227-6.

145 *Prosecutor v Thomas Lubanga Dyilo* case No. ICC 01/04-01/06.

children under the age of 15 years into an armed group and using them to participate in hostilities. During the *Prosecutor v Lubanga* the ICC cited the Special Court of Sierra Leone in *Prosecutor v Sam Hinga Norman*¹⁴⁶ ("*Prosecutor v Sam Hinga Norman*") where the Special Court of Sierra Leone recognised that the prohibition of the recruitment of child soldiers had formed a part of customary international law.¹⁴⁷ Further in the *Prosecutor v Lubanga* the pre-trial chambers of the ICC rejected the accused's argument that the charge of recruiting child soldiers violated the principle of legality because the charge of child recruitment had not formed part of customary international law. The ICC agreed with the Special Court of Sierra Leone's conclusion in *Prosecutor v Sam Hinga Norman* that the prohibition on the recruitment of child soldiers had formed part of customary law.¹⁴⁸ This trial is an example of the international community's commitment to punishing the use of child soldiers.

146 *Prosecutor v Sam Hinga Norman* SCSL 2004 14 AR72 E 31 May 2004

147 Clapham and Gaeta *The Oxford handbook of international law* 46 49.

148 *Prosecutor v Thomas Lubanga Dyilo* ICC 01/04-01/06; Clapham and Gaeta *The Oxford handbook of international law* 46 49.

4 Extra-territorial obligations of member states to the Optional Protocol

4.1 Introduction

In terms of international law states are legally bound by the treaties and conventions they have signed. Once a state has signed a treaty it is held responsible for upholding the obligations contained therein. This principle is also applicable to the Optional Protocol on the Involvement of Children in Armed Conflict. The term extra-territorial obligation refers to a state responsibility that extends beyond their national borders obligations which go beyond its own borders. An example hereof would be where one state trades small arms with a state that is using those arms to commit human rights violations. There would thus be an obligation on that state, if it is aware of the human rights violations, not to enter into trade with that state. A further example of extra-territorial obligation of a state would be to keep its pollution to a minimum as this could affect neighbouring states. In order to understand how states obtain extra-territorial obligations one must first understand general state obligations obtained from treaties. In this section the Optional Protocol will be used as an example of a treaty to which a state may become a party. Thereafter extra-territorial obligations will be investigated and these obligations will be applied to member states of the Optional Protocol.

4.2 How a state becomes party to a treaty

There are two ways for a state to become party to the Optional Protocol; either by ratification or accession. Both of these acts signify an agreement by a state to be legally bound by the Optional Protocol. The Optional Protocol is considered independent to the Convention on the Rights of the Child and must be ratified or acceded to in a separate process. The Optional Protocol is not only open for signature and ratification by any state that is a party to the Convention on the Rights of the

Child or has signed it, but it also allows for accession by any state.¹⁴⁹ Most Optional Protocols are opened to ratification only by state parties who ratified the underlying treaty.

4.2.1 Signature

Signature of the Optional Protocol constitutes a state's preliminary endorsement of the Protocol. Therefore, signing the treaty does not create a binding legal obligation on states but rather demonstrates the state's intention to examine the treaty in good faith. Signing the Optional Protocol does not commit a state to proceed to ratify the Optional Protocol, however, the state is obliged to refrain from acts that would defeat the treaty's purpose and objectives. An example hereof would be that a state which has signed the Optional Protocol should not pass legislation that lowers the age of voluntary recruitment of children into state armed forces.

4.2.2 Ratification and accession

Ratification signifies a state's agreement to be legally bound by the Optional Protocol. Accession has the same legal effect as ratification although it must be stated that the procedures differ, for instance, when a state ratifies the treaty it must first sign and then ratify the treaty. In the case of accession there is no signature necessary. In general, human rights treaties have no fixed term during which the human rights treaty is open for signature, rather it falls within states' discretion whether to accede, ratify, or sign a treaty. States usually sign treaties to reflect public endorsement after its adoption, whereas accession may take much longer as states have to conform to their domestic procedural requirements. The formal procedures for ratification or accession vary according to the requirements of the national legislation of each state. In certain states the government is constitutionally empowered to accede or ratify a treaty without involving legislative authorities. In other states the consent of the legislative branch of that state is required in order to ratify or accede to a treaty.¹⁵⁰ A combination of these two systems is also often used by states. An example hereof

149 Article 9 of the *Optional Protocol*.

150 Dugard *International Law* 40.

would be that prior to accession or ratification, a state usually reviews the treaty to determine whether its national laws are consistent with the provision of the treaty and to consider an appropriate means of promoting compliance thereof. States sometimes consult with NGOs working for children's rights in order to establish the most appropriate way in which to ensure compliance of the treaty.

States are not obliged to adopt all legislative measures outlined by the Optional Protocol prior to ratification or accession.¹⁵¹ However, they are expected to comply with the obligations of the treaty within a reasonable time. Ratification and accession consists of a two-step process: firstly the organ of the state, being either Parliament, Head of State, Government, the Crown or the Senate, makes a formal decision to be a member of the treaty through their domestic or national procedures, secondly, the national instrument of accession or ratification is prepared. Therefore the state who wishes to accede or ratify the optional protocol must set forth a binding declaration stating that:¹⁵²

The minimum age at which it will permit voluntary recruitment into its national armed forces and the description of the safeguards it has adopted to ensure that such recruitment is not forced or coerced.

The national instrument of accession or ratification, together with the binding declaration is lodged with the United Nations secretary-general. After the national instrument is lodged, the treaty usually specifies the time period which must lapse before the treaty takes effect. The Optional Protocol stipulates that it will become binding on the state one month after the national instrument was lodged for accession or ratification. Before the national instrument is accepted, it must specify compliance with article 3(2) of the Optional Protocol and must contain the mandatory declaration. The Optional Protocol provides for denunciation and amendment procedures for states.¹⁵³

151 UNICEF "Guide to the Optional Protocol on the involvement of children in armed conflict" 26.

152 Article 3(2) of the *Optional Protocol*.

153 See Article 11 and 12 of the *Optional Protocol*.

4.2.3 *Reservation and interpretative declaration*

When a state signs, cedes or ratifies a treaty, the state may file a reservation on specific provisions of a treaty unless the treaty prohibits reservations.¹⁵⁴ Any reservation by a state to a treaty must still be compatible with the object and purpose of that treaty.¹⁵⁵ A state's reservation will only be accepted if no other state raises an objection. Reservations may also be withdrawn at a later date by the state who made that reservation. States may also make a declaration at the time of accession, ratification or signature that reflects the state's interpretation of the treaty or a provision thereof. The declaration may not diminish the obligation of the state under the treaty and may not limit its legal effects. Declarations that intend to exclude or diminish the legal effect of the treaty are in fact reservations. An example hereof would be the previously mentioned United Kingdom's declarations that it would not exclude the deployment of members of its armed forces under the age of 18 under certain conditions but would deploy only children where there is a genuine military need.¹⁵⁶ Child rights advocates, including the Coalition to Stop the Use of Child Soldiers, consider the declaration made by the UK to be contrary to the object and purpose of the Optional Protocol. These groups argue that the United Kingdom's declaration constitute a reservation.

4.2.4 *Binding declaration*

Part of the accession or ratification process includes that a state deposits a binding declaration of which the purpose is to establish the minimum age of voluntary recruitment into the national armed forces of a state.¹⁵⁷ This declaration may be strengthened at any time by a state by simply notifying the Secretary-General of its intention to do so. The Optional Protocol prohibits the compulsory recruitment of

154 Article 2(1)(d) of the *Vienna Convention on the Law of Treaties* of 1969 which defines reservation as "a unilateral statement, however, phrased or named made by a State when signing, ratifying, accepting, approving or acceding to a treaty; whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that state".

155 Article 2(1)(d) of the *Vienna Convention*.

156 Article 2(1)(d) of the *Vienna Convention*.

157 Article 3(2) of the *Optional Protocol*.

children under the age of eighteen it does permit those children who are between sixteen and seventeen years of age to be voluntarily recruited by states.¹⁵⁸ The United States of America, The United Kingdom and Australia were responsible for weakening the provisions of the Optional Protocol by insisting that the Optional Protocol allows for the voluntary recruitment of non-combatant children between sixteen and seventeen years of age.¹⁵⁹ It must be mentioned, however, that many child protection organisations such as UNICEF and the Coalition to Stop the Use of Child Soldiers advocate for a ban on children under the age of 18 to be voluntarily recruited by state armed forces or for them to participate in armed conflict. States are encouraged to accede or ratify the Optional Protocol to implement the binding declaration that establishes 18 as the minimum age of compulsory recruitment. If a state fails to submit its binding declaration the national instrument for accession or ratification will not be accepted, but will instead be held pending until its binding declaration is submitted.¹⁶⁰ Therefore, it can be said that if a state wishes to accede or ratify a treaty it must deposit a binding declaration.

4.2.5 Effect of Ratification or Accession for a State

Once a state has become a party to the Optional Protocol, a legal obligation is placed on that state to ensure the implementation of the treaty. The state further has an obligation to ensure that its domestic legislation conforms to the Optional Protocol. The implementation of the Optional Protocol will depend on the state's legal system. In a monist system the treaty is automatically incorporated into a state's domestic law once it has been ratified.¹⁶¹ Monist states usually have constitutional provisions that give precedence to ratified international treaties over domestic laws. In the case where there is a difference between the domestic laws and the treaty the latter prevails. Monist systems are a common trait of civil law systems.¹⁶²

158 Honwana Child Soldiers in Africa 36.

159 Honwana Child Soldiers in Africa 36.

160 UNICEF "Guide to the Optional Protocol on the involvement of children in armed conflict" 24.

161 Dugard *International Law* 47.

162 Dugard *International Law* 47.

States that have a dualist system must firstly incorporate the treaty into its domestic laws through legislation before the treaty can be enforced. A dualist system is a common trait of a common law system.¹⁶³

Certain provisions of the Optional Protocol require specific implementation through domestic legislation regardless whether a state follows a monist or dualist system. These provisions are known as non-self-executing provisions and they are implemented through domestic legislation in order to respect and fulfil their obligations under the Optional Protocol. The majority of the provisions of the Optional Protocol require states to take action to ensure that they comply with their obligations under the treaty. An example hereof would be that the Optional Protocol places an obligation on states to criminalise the compulsory recruitment of children under the age of 18. The Optional Protocol further requires states to take steps in order to fulfil their obligations by creating institutional bodies to foster a national dialogue on the Optional Protocol and the nature of state responsibility.

As the manner in which states can become a party to the Optional protocol has been discussed in detail above it is now necessary to examine the principles of extra-territorial obligations. This will be accomplished by firstly looking at the human rights obligations of states, secondly examining these obligations in an extra-territorial perspective and thirdly inspecting the legal foundation for extra-territorial human rights obligations and specifically looking how these principles apply to the Optional Protocol.

4.3 Human rights obligations of states

As has been established above, the principle that children should not be recruited into armed conflict forms part of International Human Rights law.¹⁶⁴ It is therefore, necessary to examine what general human rights obligations entail before the notion of extra-territorial obligations can be examined.

163 Dugard *International Law* 40.

164 See para 3.2 above.

The human rights stem from the notion that there are certain limits on freedom of manoeuvre for autocratic rulers that were represented by royal rulers in the 18th and 19th centuries.¹⁶⁵ This principle was developed into a notion that there were certain limits to what a state may do to its subjects and the focus was on the negative approach, which entails that a state is to refrain from interference in certain rights. This obligation to refrain from interference was regarded as the human right obligation with which states should comply and was based on a liberal political philosophy of the "night watchman state".¹⁶⁶ The approach was built on the notion that if a state refrains from interference then it has complied with its obligations. It must be mentioned that this negative approach to human rights obligations has not been incorporated in the modern day drafting of treaties nor in the practice of the bodies established to monitor compliance with the treaties. State responsibility and obligations in terms of human rights has already been expressed in a more modern format in the United Nations, Charter of the United Nations, 24 October 1945 (Charter of the United Nations). Article 13 of the Charter of the United Nations states that the purpose of the United Nations is *inter alia*, to achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian nature and in promoting and encouraging respect for fundamental freedoms for all without distinction between race, sex, language or religion. The Charter of the United Nations states in articles 55 and 56 that the United Nations shall promote universal respect and observance of human rights and fundamental freedoms for all, and all members pledge themselves to take joint and separate actions in cooperation with the organisation for the achievement of the rights enshrined therein. Therefore, Articles 13, 55, and 56 of the Charter of the United Nations confirm that positive action must be taken in order to ensure that state obligations in the charter are fulfilled. These articles also indicate that this action may be joint. The United Nations Committee on economic, social and cultural rights stated in their general comments on state

165 Skogly *Beyond national borders* 57.

166 Sawyer *The ethical state?* 87.

obligations in respect of the international covenant on economic, social, and cultural rights that:¹⁶⁷

The committee wishes to emphasise that in accordance with Articles 55 and 56 of the Charter of the United Nations with well-established principles of international law and with the provisions of the covenant itself international cooperation for the development and thus for the realisation of economic, social and cultural rights is an obligation of all states.

The modern approach to human rights obligations that positive action needs to be taken is evident in modern treaties. Furthermore, according to the International Covenant on Civil and Political Rights (ICCPR), member states have an obligation to respect and to ensure to all individuals within their territory that their rights are recognised. The ICCPR confirms this point by providing that member states take steps to realise the rights contained in the covenant. The Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols Number 11 and 14, 4 November 1950, also contain this obligation in article 1 where it states that:

The high contracting parties shall secure to everyone within their jurisdiction the rights and freedom defined in section one of this convention.

The African Charter of Human and People Rights also contains these principles in that the member states shall recognise the rights, duties and freedoms enshrined in this chapter and shall undertake to adopt legislative or other measures to give effect to them. The Optional Protocol also incorporates this approach as is evident from Article 6(1) which reads as follows:

Each State Party shall take all necessary legal, administrative and other measures to ensure the effective implementation and enforcement of the provisions of the present Protocol within its jurisdiction.

Thus it can be stated that obligations that go beyond the negative obligation to refrain from interference are recognised in all the major universal and regional human rights

167 UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 3: *The Nature of States Parties' Obligations* from 1990 para 14.

treaties.¹⁶⁸ Therefore, there is an obligation on states to take positive action in order to ensure that human rights are being enjoyed. This positive obligation has been recognised by the UN Committee on Economic Social and Cultural Rights, the Human Rights Committee, and the European Court of Human Rights.¹⁶⁹ International human rights obligations as expressed in human rights treaties include the negative obligation to refrain from interference in rights and the positive obligation to ensure that rights enjoyment is obtained.

The negative and positive obligations were later developed into the notion of the different types of duties that states have which distinguished between the duty to: 1) avoid depriving; 2) protect from deprivation; and 3) aid the deprived.¹⁷⁰

The above-mentioned obligations were further developed into the three categories of obligations of states under international human rights law, which are to respect, protect and fulfil.¹⁷¹ According to the UN Committee on Economic, Social, and Cultural Rights, these three obligations apply as extra-territorial obligations. The next sections will assess the tripartite classification of state obligation in light of an extra-territorial perspective.

4.4 State obligation in an extra-territorial perspective

In this section the state obligations to respect, protect, and fulfil will be assessed in light of an extra-territorial perspective. Firstly the obligation of states to respect will be discussed. The obligation to respect implies that a state has to respect the human rights of individuals in another country when entering into cooperation with or carrying out foreign policy that has an impact on these individuals.¹⁷² Secondly, the

168 Skogly *Beyond national borders* 59.

169 Human Rights Committee General Comment no 6 on a 6 the right to life 1982; also see *A v United Kingdom* (application 25599.99) judgment 23 September 1998. See further General Comment no 3 on the nature of state party obligations 1990 no 7 on the right to adequate housing, no 12 On the right to food no 13 the right to education 1999.

170 Skogly *Beyond national borders* 59; Shue *Basic rights* 52.

171 Eide Right to Adequate Food as a Human Right Un-Sub division on the prevention of discrimination and protection of minorities; Maastricht Guidelines on Violations of Economic Social and Cultural rights; Shue *Basic rights* 52.

172 Skogly *Extraterritoriality* 1-4.

obligation to protect will be discussed. The obligation to protect implies that states have an obligation to ensure that private parties over which they assert jurisdictional control do not violate the rights of individuals in other states.¹⁷³ Thirdly, the obligation to fulfil requires states to take such measures that are necessary for the full realisation of human rights in other states.¹⁷⁴ The right to fulfilment is considered a controversial element of extra-territorial obligations as it raises problems concerning the sovereignty of a state that is facing human rights violations.¹⁷⁵

4.4.1 Respect

The obligation of states to respect human rights represents the obligation not to interfere in the individual's enjoyment of the human rights. This obligation is reflected in the Charter of the United Nations and all other international treaties concerned with human rights.¹⁷⁶ This obligation is often referred to as a classic obligation and stems from the liberal tradition of limiting the activities of states so as not to infringe on the freedom and liberties of its subjects. The obligation implies that a state is duty-bound to respect individual human rights and not to deprive or interfere with rights that individuals are already enjoying. It applies to both civil and political rights, as well as economic, social, and cultural rights.¹⁷⁷ The obligation to respect is of paramount importance as a state's violation of this obligation would interfere directly in the individual's enjoyment of these rights. This issue has been raised by the UN committee on Economic Social and Cultural rights in several of its General Comments.¹⁷⁸ The obligation to respect is applicable to all human rights and there is a basic obligation not to interfere or deprive to the extent that it will undermine human rights enjoyment of any individual. The important question is how this obligation is extra-territorially extended. In the context of treaties and human rights instruments

173 Joseph and McBeth *Research handbook on international human rights law* 75.

174 Joseph and McBeth *Research handbook on international human rights law* 75.

175 Joseph and McBeth *Research handbook on international human rights law* 75.

176 Articles 55 and 56 provides that all members pledges themselves to promote universal respect for, observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.

177 Maastricht Guidelines on *Violations of Economic Social and Cultural rights* a 6.

178 UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment no 14 Right to health adopted by the committee in May 2000 para 34.

this obligation is extended by foreign affairs of states or international assistance and cooperation. This would imply that a state's action should not impair the human rights already enjoyed by individuals and other states.¹⁷⁹ An example hereof would be that a state should not for instance dump waste in a river that leads to another state whose population relies on the water for drinking. This would lead to the state downstream's population being deprived of the right to health and life. Therefore, any state activity that interferes or deprives people in other states of their human rights will represent a violation of the obligation to respect. Expanding on the obligation of states to respect and to refrain from interfering, the obligation would provide a duty to guarantee the right to life for children during armed conflict which would include the right not to be recruited. Children who are recruited into armed conflict are placed directly into harm's way and have a high likelihood of being killed in the conflict.

4.4.2 Protect

The second obligation is a state's duty to protect. This obligation implies that states have to regulate the activities of third parties to protect against violations of human rights. The obligation was defined as follows by Asbjorn Eide:¹⁸⁰

The obligation to protect requires from the state to implement measures necessary to prevent other individuals or groups from violating the integrity, freedom of action and other human rights of the individual.

States implement this obligation in their domestic legislation by, for example, raising the minimum age of recruitment of children into their national armed forces. Extra-territorial obligations in this sense would imply an obligation upon states to regulate the activities of third parties within their jurisdiction to ensure that they do not infringe upon the rights of individuals. If this obligation is extended to children in armed conflict, states have an obligation to criminalise the recruitment of children in

179 Skogly *Beyond national borders* 68.

180 Eide and Rosas "Economic, social and cultural rights: a universal challenge" 16.

armed conflict.¹⁸¹ This could also entail that if states deploy their armed forces internationally there is an obligation on them not to deploy children.

4.4.3 Fulfil

The obligation to fulfil requires the state to take the measures necessary to ensure that each person within its jurisdiction has opportunities to obtain satisfaction of those needs recognised in human rights instruments which cannot be secured by personal effort.¹⁸² This obligation has further been expanded by the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, 26 January 1997 which in article 6 provides that the obligation to fulfil requires states to take appropriate legislative, administrative, budgetary, judicial, and other measures towards realisation of such rights. If this right is expanded in an extra-territorial sense, it would imply that states are required to positively improve human rights situations of individuals in other states. If the obligation to fulfil places the aforementioned duty on states to promote human rights in other states it gives rise to several questions in respect thereof. Firstly, does this obligation contravene the principles of sovereignty and the prohibition of intervention of one state in another's affairs? Secondly, does this obligation imply a legal obligation to provide developmental assistance? Thirdly, does this imply a legal obligation to assist victims of massive human rights violations in other states through humanitarian intervention? Fourthly, what would the implications of such obligations be for multi and bilateral relations between states and the international community?

The provisions that deal directly with the nature of obligations upon member states of the UN are articles 55 and 56 of the Charter of the United Nations. In terms of article 56:

...all members pledge themselves to take joint and separate action in cooperation with organisations for the achievement of the purpose set forth in Article 55. These purposes are *inter alia* to promote 'universal respect for, and observance of human

181 Nilsson *Children and youth in armed conflict* 13

182 Skogly *Beyond national borders* 68.

rights and fundamental freedoms for all without distinction as to race, sex, language or religion'.

The specific obligations stemming from these articles have been the topic of continuing debate among scholars. Some argue that the obligations refer to the United Nations as such, instead of addressing member states individually.¹⁸³ Others have pointed out that the passage of joint and separate action implies that states individually and collectively will promote universal respect for, and observance of human rights and fundamental freedoms.¹⁸⁴

This discussion touches directly on the issue of sovereignty. If the approach followed would be that states must act individually and collectively, it would imply that international human rights law would prescribe what obligations states have towards individuals that reside within their jurisdiction as well as individuals that reside in other states.

In this respect it will firstly be necessary to understand what is meant by *jus cogens* and *erga omnes*. *Jus cogens* is a set of fundamental, overriding principles of international law from which no derogation is permitted.¹⁸⁵ The concept of *jus cogens* can be found in case law of international courts and tribunals, the work of the United Nations International Law Commission (ILC) and more specifically in article 53 of the Vienna Convention on the Law of Treaties of 1969 (VCLT). This article reads as follows:

...a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character...

183 Skogly *Beyond national borders* 69.

184 Skogly *Beyond national borders* 69.

185 De Wet *Jus cogens and obligations erga omnes* 8.

The concept of *erga omnes* was further defined in the International Court of Justice's decision in the Barcelona Traction case¹⁸⁶ (Belgium v Spain):

...an essential distinction should be drawn between the obligations of a state towards the international community as a whole, and those arising vis-à-vis another state in the field of diplomatic protection. By their very nature, the former are the concern of all states. In view of the importance of the rights involved, all states can be held to have a legal interest in their protection; they are obligations *erga omnes*. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person...

It can therefore, be said that *erga omnes* is defined as, obligations of a state towards the international community as a whole, by their very nature these are the concern of all states.¹⁸⁷ In view of the importance of the right involved all states can be held responsible to uphold the legal interest if it is considered *erga omnes*.¹⁸⁸ Some commentators have suggested that all human rights that belong to the principle of *jus cogens*, which includes all human rights guaranteed under customary international law, will carry these obligations of *erga omnes*.¹⁸⁹ While others consider obligations *erga omnes* to be a wider concept than *jus cogens*, in other words, obligations *erga omnes* cover the area of *jus cogens* in international law as well as going further.¹⁹⁰ The obligation *erga omnes* only deals with the interest to act, not any duty to act regarding the matter. This is still governed by sovereignty and it is up to the individual state to decide whether to take action or not. It has previously been stated that the prohibition on the recruitment of children in armed conflict has formed part of customary international law. Therefore, if the prohibition on the recruitment of children in armed conflict has formed part of customary international law, it is considered an obligation *erga omnes* for states to uphold.

186 Barcelona Traction case (Belgium v Spain) (Second Phase) ICJ Rep 1970 3 at paragraph 33.

187 Skogly *Beyond national borders* 81.

188 The notion of *erga omnes* is generally accepted, however, scholars are still debating as to which rights carry these status see De Wet *Jus cogens and obligations erga omnes* 9.

189 Skogly *Beyond national borders* 81.

190 Skogly *Beyond national borders* 82.

4.5 Legal foundation for extra-territorial human rights obligations

Extra-territorial human rights obligations have their founding in international human rights law. There is an abundance of treaties that address economic, social, and cultural rights in relation to extra-territorial obligations. Therefore, it may be concluded that any extra-territorial human rights obligations are confined to economic, social, and cultural rights sphere of international human rights law. However, such an interpretation does not reflect the current understanding of extra-territorial human rights obligations.¹⁹¹ A number of international bodies such as the International Court of Justice, the UN Human Rights Committee the European Court of Human Rights and the Inter-American Commission on Human Rights, have all confirmed that international human rights treaties protecting civil and political rights contain obligations for the state parties that go beyond the national territory.¹⁹² An example hereof would be the Namibian Opinion where the International Court of Justice found that South Africa, having established apartheid in the neighbouring state, was in breach of its international obligations under the UN Charter.¹⁹³

A further example would be the advisory opinion of the International Court of Justice in consideration of the construction of a wall in occupied Palestinian territory by Israel.¹⁹⁴ The International Court of Justice considered the relevance of obligations stemming from human rights treaties that Israel had ratified in respect of the acts done by a state in the exercising of its jurisdiction outside its own territory.¹⁹⁵ The International Court of Justice held that:¹⁹⁶

191 Joseph and McBeth *Research handbook on international human rights law* 50.

192 Joseph and McBeth *Research handbook on international human rights law* 50.

193 Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia, International Court of Justice (ICJ) 21 June 1971. It was found that South Africa's acting extra-territorially was of no consequence, however, South Africa was in breach of its obligations under the UN Charter See Joseph and McBeth *Research handbook on international human rights law* 83.

194 Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (ICJ) 9 July 2004.

195 Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (ICJ) 9 July 2004.

196 Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (ICJ) 9 July 2004.

The territories occupied by Israel have for over 37 years been subject to its territorial jurisdiction as the Occupying Power. In the exercise of the powers available to it on this basis, Israel is bound to the provisions of the ICESCR.

Extra-territorial obligations can be found by examining the language of certain treaties as will be elaborated herein below. In this section a discussion will follow in regard to international human rights treaties that are specifically important based on their own provisions for the discussion on extra-territorial obligations. These treaties are The International Convention on Economic Social and Cultural Rights, The Convention on the Rights of the Child, The Optional Protocol on the Involvement of Children in Armed Conflict and a short discussion on other human rights treaties which include extra-territorial obligations.

4.5.1 Charter of the United Nations

The Charter of the United Nations establishes the purpose of the organisation and the purpose of being a member of the UN in article 1 of the Charter. Each individual state is bound by the Charter of the United Nations and has obligations to assist in fulfilling these purposes. The fundamental principles of universal and international protection of human rights are provided in article 1(3) which reads as follows:

The purpose of the United Nations is to achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian character and in promoting and encouraging respect for human rights and for fundamental freedoms for all.

The purpose of the statement that the organisation's purpose is to achieve international cooperation in relation to the substantive content of the rest of the paragraph is relevant to the question of extra-territorial obligations. If international cooperation is to be achieved the members of the UN will have an obligation to contribute to this cooperation which is aimed at addressing problems of an economic, social, humanitarian and human rights character. If member states of the United Nations claim that human rights obligations are uniquely territorial, it would disregard the principle of international cooperation in article 1.¹⁹⁷ Further, articles 55 and 56

197 Joseph and McBeth *Research handbook on international human rights law* 76.

provide that the United Nations shall promote universal respect for and observance of human rights and fundamental freedoms for all. This will be done through joint and separate action in cooperation with the United Nations.¹⁹⁸ The texts of these articles are due to a compromise between the wording suggested by Australia and the United States in the drafting process of the Charter of the United Nations.¹⁹⁹ Australia proposed that all members of the United Nations should pledge to take action on both national and international levels for the purpose of securing for all people, including their own, such goals as improved labour standards.²⁰⁰ The result was a formulation in which the pledge would mean that the members would both cooperate internationally and act within their own countries to pursue the economic and social objectives of the United Nations.²⁰¹ This was opposed by the US as it claimed that all that could be included in the charter was to provide for collective action and thus it could not obligate a state to take separate action because that would constitute an infringement upon the internal affairs of the member states.²⁰² Thus, the interpretation of article 56 has formed to accept a compromise, as the rather limited obligatory function of article 56 is the result of the wording of article 55 to which it refers.²⁰³ The latter only describes purpose and not substantive obligations to be achieved by means of cooperation.

It can further be stated that article 55(c)²⁰⁴ contains substantive obligations in regard to human rights²⁰⁵ and when considering articles 55 and 56 together, it establishes obligations to take actions to promote respect for human rights. According to this interpretation there is a firm obligation on states to act individually as well as collectively to promote respect for human rights. As domestic human rights obligations have now gained virtually universal acceptance, it is rather paradoxical

198 See The Charter of the *United Nations* at a 55(c).

199 Joseph and McBeth *Research handbook on international human rights law* 77.

200 Simma *et al The Charter of the United Nations* 793.

201 Joseph and McBeth *Research handbook on international human rights law* 78.

202 Joseph and McBeth *Research handbook on international human rights law* 78.

203 Joseph and McBeth *Research handbook on international human rights law* 79.

204 See The of the *Charter of the United Nations* a 55(c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion

205 Simma *et al The Charter of the United Nations* 793.

that the extra-territorial obligations have become the controversial ones.²⁰⁶ The meaning of jointly as used in article 56 may be interpreted to mean action through the United Nations as a way to practically carry out the United Nation's mandate. Therefore, the United Nations may not be able to fulfil its purpose without joint commitment from the membership. This interpretation of jointly is considered to be narrow as it does not include any reference to the United Nations. The article provides that this joint action shall take place in cooperation with the organisation. If it was intended to imply a narrow obligation to promote respect for human rights through the work of the United Nations, one would have expected the wording to be joint and separate action through the member states. However, a wider formulation is used and the understanding of jointly therefore implies an obligation to act jointly to promote respect for human rights, and also an obligation to cooperate with the United Nations in this regard.²⁰⁷ This joint action has a clear extra-territorial element to it, namely only one of the states acting jointly may at any given time address the promotion of respect for human rights domestically, all the other states involved in the joint action will logically be addressing human rights respected in another state.²⁰⁸

It must also be mentioned that article 56 does not only call for joint action, but indeed also separate action in cooperation with the United Nations. These words, seen in conjunction with the provisions in article 55(c), which call for universal respect for human rights, further strengthens arguments for human rights obligations beyond national borders for individual states. The article further uses the term universal rather than domestic, it is submitted that this wording has extra-territorial implications, and that it adds to the charter's non-discrimination principle, in that states shall promote respect for human rights not only of their own populations, but indeed universally as well.

In addition to the Charter of the United Nations, various specific human rights treaties are the main sources of human rights obligations. Some of these treaties have

206 Simma *et al* *The Charter of the United Nations* 793.

207 Joseph and McBeth *Research handbook on international human rights law* 78; Simma *et al* *The Charter of the United Nations* 948.

208 Joseph and McBeth *Research handbook on international human rights law* 78; Simma *et al* *The Charter of the United Nations* 948.

provisions which give specific content to extra-territorial obligations, while others have been interpreted to contain such obligations without specific mention thereto in the treaty text.²⁰⁹

Hereunder a discussion will follow in regard to international human rights treaties that are specifically important based on their own provisions for the discussion on extra-territorial obligations. These treaties are the International Convention on Economic Social and Cultural Rights, the Convention on the Rights of the Child, the Convention on the Rights of Persons with Disabilities, the Optional Protocol on the Involvement of Children in Armed Conflict, and a short discussion on other human rights treaties which include extra-territorial obligations.

4.5.2 International Covenant on Economic, Social and Cultural Rights

The International Covenant on Economic, Social, and Cultural Rights (ICESCR) is a debated topic on extra-territorial human rights obligations.²¹⁰ article 2(1) of the ICESCR specifically sets out the extra-territorial obligations of states as:

Individually and through international assistance and cooperation for the realisation of the right guaranteed.²¹¹

It must be noted that the covenant also omits the reference to territory or jurisdiction which is common in other human rights instruments.²¹² The understanding of the content of the extra-territorial obligations stemming from this provision in article 2(1) of the ICESCR has not been significantly developed.²¹³ The Committee on Economic Social and Cultural Rights has begun to include implicit references to this provision in

209 Skogly *Extraterritoriality* 1-4; Coomans and Kamminga *Extraterritorial application of human rights treaties* 35.

210 Joseph and McBeth *Research handbook on international human rights law* 78.

211 Joseph and McBeth *Research handbook on international human rights law* 78; a 2(1) of the *International Covenant on Civil and Political Rights*.

212 Joseph and McBeth *Research handbook on international human rights law* 79.

213 Joseph and McBeth *Research handbook on international human rights law* 79; UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 3: *The Nature of States Parties' Obligations* from 1990 a 2(1) the committee referred to this passage indicating that available resources include these available through international assistance (at 13) and read in conjunction with aa 55 and 56 of the UN charter that international cooperation for development and thus for the realisation of economic social and cultural rights is an obligation of all states. It is particularly incumbent upon those states which are in a position to assist others in this regard.

general comments and in the questioning of and concluding observations to state reports.²¹⁴ In order to shed some light on article 2(1) and the obligations contained therein a closer look at the drafting history is necessary. During the drafting of the covenant in the 1950s and 1960s there was some discussion over the inclusion of the passage international assistance and cooperation in this article. The discussion by the Commission on Human Rights and in the General Assembly's third committee were, however, not conclusive as to the drafting parties' intention on assistance. What was however, clear was that international cooperation and assistance were seen as necessary if the covenant's rights were to be realised.²¹⁵ It was further discussed that the nature of this cooperation was included as one of the means of realisation of the rights. However, it has proven to be one of the more controversial aspects of this instrument as international cooperation and assistance are necessary for the realisation of the rights in the covenant.

This extra-territorial obligation can further be extended to the prohibition on the use of child soldiers if article 10(3) of the ICESCR is read together with article 2(1). article 10(3) reads as follows:

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 labour should be prohibited and punishable by law.

Therefore, states have an extra-territorial obligation under the ICESCR to ensure that children are not employed in work that is considered harmful to their morals or health or dangerous to life and this should be accomplished both individually and through international assistance and cooperation. This would therefore, include an obligation not to be recruited into armed conflict as such work would be considered harmful to health, morals and dangerous to life.²¹⁶

214 Joseph and McBeth *Research handbook on international human rights law* 80.

215 Joseph and McBeth *Research handbook on international human rights law* 80.

216 Nilsson *Children and youth in armed conflict* 13.

4.5.3 *Convention on the Rights of the Child*

The CRC incorporated the obligation of international assistance and cooperation in regard to the rights incorporated in the convention. article 4 of the CRC reads as follows:

States Parties shall undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake measures to the maximum extent of their available resources and where needed, within the framework of international cooperation.

The debates that ensued during the drafting process of article 4 included the issue of the reference to available resources.²¹⁷ It must be mentioned that the first draft text present by Poland in January 1980 already included international cooperation, and this was readily accepted and not considered controversial as is evident by the lack of debate surrounding its inclusion.²¹⁸ The Committee on the Rights of the Child has not dealt with the concept of international cooperation as part of the treaty obligations in much detail. The Committee on the Rights of the Child's comments on international cooperation relate to the seeking of international assistance and specifically address the recognition of extra-territorial obligations.²¹⁹

As has been established above article 38 of the CRC prohibits the recruitment of children into armed conflict.²²⁰ If this obligation under Article 38 is read together with Article 4 of the CRC it creates an extra-territorial obligation for states to prohibit the recruitment of children into armed conflict and that this must be accomplished by utilising the maximum extent of their available resources within the framework of international cooperation.

217 Skogly *Beyond national borders* 103.

218 Skogly *Beyond national borders* 104.

219 Committee on the Rights of the Child, General Comment No 5: General Measure of Implementation of the Convention on the Rights of the Child, UN Doc CRC/GC/2003/5 (3 October 2003).

220 See para 3.4 above.

4.5.4 *Optional Protocol on the Involvement of Children in Armed Conflict*

In order to determine whether the Optional Protocol contains an extra-territorial obligation it is necessary to examine the text of the Optional Protocol. Article 7 of the Optional Protocol addresses international cooperation and assistance and reads as follows:

1. States Parties shall cooperate in the implementation of the present Protocol, including in the prevention of any activity contrary thereto and in the rehabilitation and social reintegration of persons who are victims of acts contrary thereto, including through technical cooperation and financial assistance. Such assistance and cooperation will be undertaken in consultation with the States Parties concerned and the relevant international organizations.
2. States Parties in a position to do so shall provide such assistance through existing multilateral, bilateral or other programmes or, *inter alia*, through a voluntary fund established in accordance with the rules of the General Assembly.

The main provision is that neither states nor armed groups may recruit children under the age of 18 into armed conflict. The Optional Protocol also obligates states to take legal, administrative and other measures to ensure the implementation of the Optional Protocol within their jurisdiction. If article 7 is read with the overall provision of the Optional Protocol it implies that State Parties must commit to prevent the use of child soldiers in any country as they must cooperate in the prevention of any activity that is considered contrary to the provisions of the Optional protocol.²²¹

The purpose of the statement that State Parties shall cooperate in the implementation of the Optional Protocol and to prevent any activity contrary thereto is aimed at achieving the obligations as set forth in the Optional Protocol. It is further not insignificant in relation to the question of extra-territorial obligations. If international cooperation is to be achieved the States Parties of the Optional Protocol will have an obligation to contribute to this cooperation which is aimed at addressing the problem of the recruitment of children into armed conflict. If a State Party claims that the

221 Begley 2011 *Am U Int'l L Rev* 631.

obligations as set forth in the Optional Protocol are uniquely territorial, it would disregard the principle of international cooperation.²²²

In amplification to the aforesaid, the Optional Protocol places an obligation on States Parties to take positive steps to prevent any activity that is considered contrary to the Optional Protocol. When this is considered within international cooperation, the Optional Protocol creates an extra-territorial obligation. However, this extra-territorial obligation has to be applied without abrogating state sovereignty or territorial integrity. In order for a state to exercise this extra-territorial obligation it will require influence over the contravening state. When considering how a state may influence another state or elicit compliance from another state to a treaty, it is necessary to consider the practice of international politics. The practice of international politics is considered one of the processes in international influence and ultimately compliance. The practice of international politics consists of a spectrum of refined practices, mechanisms or means.²²³ A practice is considered as bargaining, arguing or socialisation. A mechanism is considered to be strategic calculation or identity resonance. Means is considered as force, sanctions, conditions or persuasion. These practices address the question of how states and international entities exercise influence and obtain compliance from certain actors. When a state's influence over another is considered in an extra-territorial perspective, a state that has influence over another state has a responsibility to promote abidance of a treaty.²²⁴ The abiding member state will abide by the provisions of the Optional Protocol and the contravening member state will recruit child soldiers. An example hereof would be where an abiding member state has influence over a contravening member state that recruits child soldiers; the abiding member state then has a responsibility to influence the activities of the contravening member state to ensure compliance with the Optional Protocol. Further, if an abiding member state is aware that the contravening member state recruits child soldiers then the abiding member state has an obligation not to provide technical or military assistance to the contravening member state. If

222 Begley 2011 *Am U Int'l L Rev* 631.

223 Rajkovic *The politics of international law and compliance* 13.

224 Begley 2011 *Am U Int'l L Rev* 632.

the abiding member state provided technical or military assistance to the contravening member state then the abiding member state would be promoting the use of child soldiers thus violating the provisions of the Optional Protocol in so doing. Similarly, an abiding member state should not take action that would lead to another state's or non-state actor's use or recruitment of child soldiers.

This extra-territorial obligation under the Optional Protocol can further be extended to arms transfers.²²⁵ The UN General Assembly passed a resolution in 2006 which called for an arms treaty to ensure that states that exported arms do not export arms to states that commit human rights violations with the arms.²²⁶ The resolution further stated that control over arms transfers is necessary to ensure international peace and security.²²⁷ The resolutions ultimately lead to the creation of the Arms Trade Treaty. The treaty was adopted on the 24th of December 2014. It regulates the international trade in conventional weapons and obligates member states to monitor arms exports to ensure that weapons don't cross existing arms embargoes or end up being used for human rights abuse, including terrorism. The former UN Special Rapporteur for Small Arms and Human Rights argued that an extra-territorial obligation exists for the transfer of light arms and small weapons.²²⁸ The argument for this extra-territorial obligation was based on the right to life, being an international norm which must be upheld by all states. In *Belguim v Spain*²²⁹ the International Court of Justice declared that the right to life is *erga omnes*. The interpretation thereof was that the international community as a whole had a legal obligation to uphold the right to life. The UN Special Rapporteur's argument in this regard was that the trade of light weapons and small arms can lead to the violation of the right to life which was considered a breach of international law.²³⁰ The right to life is considered a

225 Begley 2011 *Am U Int'l L Rev* 631.

226 See UN Resolution 61/89 Trade Treaty G.A.

227 See UN Resolution 61/89 Trade Treaty G.A.

228 Gibney and Skogly *Universal human rights and extraterritorial obligations* 35.

229 *Barcelona Traction, Light and Power Company Limited (Belgium v. Spain)* (New Application: 1962) See *Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain)* 1970 ICJ 50 | 33 (Feb 5 1970).

230 Begley 2011 *Am U Int'l L Rev* 633.

peremptory norm.²³¹ It can therefore, further be argued that the right to life extends to the recruitment of child soldiers as a state taking actions that would support the use of child soldiers in another state is violating the peremptory norm of the right to life, due to the child's life being placed in jeopardy by being recruited.²³²

231 Smith *Human rights and biomedicine* 65; Ramcharan *The right to life in international law* 40; Wicks *The right to life and conflicting interests* 46.

232 Begley 2011 *Am U Int'l L Rev* 633.

5 Conclusion

It has been alluded to herein above that children are a vulnerable group in society, even more so during times of armed conflict.²³³ In this regard the roles of children during armed conflict have been established and a clear definition of child soldiers has been provided.²³⁴ The international community has recognised that children must be afforded appropriate legal protection especially during times of armed conflict, and have therefore adopted specific legal instruments to prohibit the recruitment of children during armed conflict.²³⁵ The most important of these instruments being *inter alia* the Geneva Convention and its Additional Protocols, the CRC, the WFCL and the Optional Protocol.²³⁶ Each of these instruments has been examined and their specific articles relating to the prohibition on the recruitment of children during armed conflict has been outlined. It has been argued that IHL contains the principle of the prohibition on the recruitment of children during armed conflict. It has been established that the principle that children may not be recruited into armed forces or armed groups has formed part of customary international law.²³⁷ This principle has gained customary international law status as it meets the two main principles being the rule must be settled practise (*usus*) and there must be an acceptance of an obligation to be bound (*opinio juris*).²³⁸ International courts and tribunals have confirmed that the principle has gained customary international law status.²³⁹ The aforementioned conclusion has further established that the principle that children should not be recruited into armed conflict has obtained customary international law status. IHL has further developed into three categories of obligations of states, which are to respect, protect, and fulfil. These obligations have been discussed in an extra-territorial perspective on the recruitment of children during armed conflict and it has

233 See Chapter 1 page 1.

234 See Chapter 2 page 5 - 10

235 See Chapter 3 page 11 - 31

236 See Chapter 3 page 8 - 38

237 See Chapter 3 page 29 - 31

238 See Chapter 3 page 25 - 29

239 See Chapter 3 page 25 - 29

been established that:²⁴⁰ Firstly, states must respect the rights of children and refrain from interfering in their rights and there is also a duty to guarantee the right to life for children during armed conflict which would include the right not to be recruited. Secondly, states must protect the rights of children by criminalising the recruitment of children in armed conflict. Finally, states must fulfil the rights of children which would imply that states are required to positively improve human right situations of children in other states. The concept *Jus cogens* has been discussed and it has been established that the prohibition on the recruitment of children during armed conflict forms a part hereof.²⁴¹ It has further been established that the obligation *erga omnes* deals with the interest to act, therefore it is up to the individual state to decide whether to take action or not. As the prohibition on the recruitment of children in armed conflict forms part of customary international law, it is considered an obligation *erga omnes* for states to uphold.

The existence of extra-territorial obligations has been generally established and more specifically in the Optional Protocol. It has been found that extra-territorial obligations can be distilled from the text of treaties. The conclusion in this chapter has established our primary objective namely, confirming the existence of extra-territorial obligations.²⁴² Moreover, it has further been established that Article 7 read together with the overall provision of the Optional Protocol implies that State Parties must commit to prevent the use of child soldiers in any state, as they must cooperate in the prevention of any activity that is considered contrary to the provisions of the Optional Protocol. It has, therefore, been established that the Optional Protocol creates extra-territorial obligation for member states as they have to cooperate and prevent any activity that is contrary to the provisions of the Optional Protocol. The question therefore arises whether, the Optional Protocol establishes this extra-territorial obligation, does customary international law create this obligation or is the Optional Protocol therefore only a codification of this obligation.

240 See Chapter 4 page 40 - 45

241 See Chapter 4 page 44

242 See Chapter 4 page 45 - 56

Member states to the Optional Protocol, therefore, have an extra-territorial obligation to prevent the use of children in armed conflict and this obligation must be exercised by states within the realm of international politics to influence states to abide by the treaty. This extra-territorial obligation goes further and places a positive obligation on states to, for instance, prohibit the use of child soldiers by not doing arms trades with contravening member states as has been alluded to herein above.

There are numerous countries that have ratified the Optional Protocol as states recognise that children should not be recruited into armed conflict. There is further an extensive framework that prohibits the recruitment of children into armed conflict and member states to the Optional Protocol have an obligation to prevent the use of child soldiers during armed conflict. It is, therefore, illogical for member states not to exercise their extra-territorial obligations to the fullest extent of their means without abrogating state sovereignty or territorial integrity to prevent the use of child soldiers by other states.

SUMMARY

Title: The extra-territorial obligation of member states of the Optional Protocol on the Involvement of Children in Armed Conflict to prevent the use of child soldiers

Key words: extra-territorial, obligation, Optional Protocol, children, armed conflict, child soldiers

Children have been documented fighting in armed conflicts around the world. The United Nations Secretary-General's 2015 report on children in armed conflict listed 57 parties that recruited or used children in armed conflict during 2014. The United Nations Children's Funds official statistics indicated that since 2005 more than 300 000 child soldiers have been documented fighting in armed conflicts in 41 countries around the world. The International community has recognised that children are a vulnerable group in society even more so during times of armed conflict. The International community has adopted a legal framework to ensure the prohibition on the recruitment of children during times of armed conflict, the most specific instrument in this regard being the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 25 May 2000. The objectives of this study were to establish whether the Optional Protocol creates an extra-territorial obligation for a member state to prevent the use of child soldiers and if such an obligation exists, to what extent a member state should comply with the extra-territorial obligations without abrogating state sovereignty and territorial integrity.

The objective was accomplished by firstly establishing the existence of an extra-territorial obligation and secondly by discerning whether the principle that children should not be recruited into armed conflict has obtained customary international law status. The study has concluded that extra-territorial obligations can be distilled from the text of treaties. The study has further concluded the principle that children should not be recruited into armed conflict has obtained customary international law status as it has met the requirements of *usus* and *opinio juris*. It has been established that the Optional Protocol creates extra-territorial obligation for member states as they have to

cooperate and prevent any activity that is contrary to the provisions of the Optional Protocol. Member states to the Optional Protocol, therefore, have an extra-territorial obligation to prevent the use of children in armed conflict and this obligation must be exercised by states within the realm of international politics to influence states to abide by the treaty.

OPSOMMING

Title: Die ekstra-territoriale verpligtinge van lidlande tot die Opsionele Protokol rakende die betrokkenheid van kinders in gewapende stryd om die gebruik van kindersoldate te voorkom

Sleutelwoorde: ekstra-territoriale, verpligting, Opsionele Protokol, kinders, gewapende konflik, kindersoldate

Die Sekretaris-Generaal se verslag aan die Verenigde Nasies in 2015 rakende kinders in gewapende konflik het aanduiding gegee dat 57 lande kinders gebruik het in gewapende konflikte gedurende 2014. Die Kinderfonds vir die Verenigde Nasies het statistieke vrygestel gedurende 2005 wat aanduiding gegee het dat 300 000 kindersoldate in 41 lande deelgeneem het aan gewapende konflik.

Die internasionale gemeenskap het erken dat kinders 'n kwesbare groep in die samelewing is, selfs meer so in tye van gewapende konflik. Die internasionale gemeenskap het hierdie aangespreuk deur 'n wetlike raamwerk te ontwikkel om 'n verbod te plaas op die indiensneming van kinders tydens gewapende konflik. Die mees bekendste instrument in hierdie verband is die Opsionele Protokol tot die Konvensie rakende die Regte van die Kind oor die betrokkenheid van kinders in gewapende konflik, 25 Mei 2000. Die doelwitte van hierdie studie was om vas te stel of die Opsionele Protokol 'n ekstra-territoriale verpligting skep vir 'n lidstaat tot die verbod op die gebruik van kindersoldate en indien so 'n verpligting bestaan, tot watter mate 'n lid staat moet voldoen aan die ekstra-territoriale verpligtinge sonder om staat soewereiniteit en territoriale integriteit te beïnvloed.

Die doel van die studie is bereik deur eerstens die bestaan van 'n ekstra-territoriale verpligting vas te stel en tweedens deur oordeelkundig vas te stel of die beginsel van die verbod op die gebruik van kinders soldate gedurende gewapende konflik die status van internasionale gewoontereg gewerf het. Die studie het tot die gevolgtrekking gekom dat die ekstra-territoriale verpligtinge vasgestel kan word uit die tekste van verdrae. Die studie het verder tot die gevolgtrekking gekom dat die beginsel van die verbod op die gebruik van kinders soldate gedurende gewapende konflik die status van

internasionale gewoontereg verwerf het deurdad dit voldoen aan die vereistes van *usus* en *opinio juris*. Daar is vasgestel dat die Opsionele Protokol 'n ekstra-territoriale verpligting skep vir lidlande om saam te werk en enige aktiwiteite wat strydig is met die bepalinge van die Opsionele Protokol te verhoed. Lidlande van die Opsionele Protokol het dus 'n ekstra-territoriale verpligting om die gebruik van kinders in gewapende konflik te voorkom en hierdie verpligting moet uitgeoefen word deur state binne die raamwerk van internasionale politiek.

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