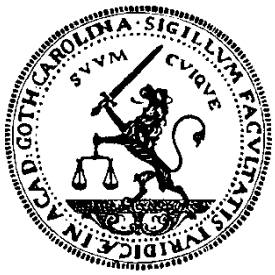


FACULTY OF LAW
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# Non-State Actors Escaping Justice

## Obligations Regarding Child Soldiers Applicable to Non-State Actors

JURM02 Graduate Thesis

Graduate Thesis, Master of Laws program
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# Contents

# Summary

There are mainly three different international legal obligations regarding child soldiers in internal armed conflicts. The prohibition from child recruitment, to provide special protection for children and protection from taking part in hostilities. All are applicable to States but it is less clear which of them apply to non-state actors. In order to determine if these obligations are applicable to non-state actors, different theories of where those obligations could have originated from. There are mainly five possibilities of origin. The possibility of binding a third party to a treaty, legislative jurisdiction, governmental claims, acceptance and customary international law.

If one of those theories applies to the situation at hand, the next step is to analyse if the non-state actor meets the requirements for them to be bound by international law. These requirements are different conditions or characteristics in the form of thresholds the non-state actors have to pass. There are the threshold of organisation, stability and effective control and international legal personality. It is also important to remember the difference in international law between the branches of international humanitarian law and human rights law since the latter is more state-centric and therefore more difficult to apply it to non-state actors.

If there is an applicable theory, the non-state actor meets the requirements and the obligation originates from either international humanitarian law or customary international law, the non-state actor should in theory be bound by it.

# Sammanfattning

Det finns framförallt tre olika internationella skyldigheter angående barnsoldater i interna väpnade konflikter. Förbud från att rekrytera barn till väpnade styrkor, förse barn med särskilt skydd samt att skydde barn från att delta i fientligheter. Alla tre är tillämpliga på stater men det är oklart huruvida icke-statliga aktörer är bundna av de här skyldigheterna och i så fall vilka. Teorier om var förpliktelserna härrör från måste analyseras för att kunna avgöra ifall icke-statliga aktörer är bundna av internationella förpliktelser. Det finns bland annat fem olika teorier. Möjligheten till att binda en tredje part till en traktat, legislativ jurisdiktion, statliga anspråk, godkännande och sedvanlig international rätt.

Om någon av dessa teorier är applicerbara på den givna situationen, nästa steg är att analysera ifall den icke-statliga aktören uppfyller kraven för att de ska kunna vara bundna av internationell rätt. Dessa olika krav är olika villkor eller egenskaper i form av tröskelvärden som de icke-statliga aktörerna måste passera. Tröskelvärdena är organisationsgränsen, stabilitet och effektivitet och internationell juridisk personlighet. Det är även viktigt att observera olikheterna mellan internationell humanitär rätt och mänskliga rättigheter eftersom mänskliga rättigheter är mer stats inriktad och därför svårare att applicera på icke-statliga aktörer.

Den icke-statliga aktören är i teorin bunden av internationell rätt om det finns någon applicerbar teori, den icke-statliga aktören når upp till kraven och förpliktelsen härrör från antingen internationell humanitär rätt eller sedvanlig internationell rätt.

# Preface

This thesis marks the end to my legal studies in Lund, at least for the moment. The education and the time at the university with fellow students have been a special time in my life. Since it is soon time to say goodbye it is almost like an end to an era.

Now that it is time to graduate and thereby hand in this thesis, I would like to take this opportunity to thank the people who have made my graduation and this thesis happen.

Special thanks to Valentin Jeutner, my supervisor during this semester. Thank you for your support and most valued guidance. Your thoughts have been imperative to reach this point.

Also thank you to my friends, family and boyfriend for supporting and believing in me through this journey in both the good and bad times. For all the useful insights, discussions and for just being there for me when I needed it.

Finally, I would like to dedicate this thesis to the children affected by war, forced to live in fear everyday and forgotten by the rest of the society.

Lund, 22 December 17.
Karin Lindahl

# Abbreviations

| | |
|---|---|
| AP | Additional Protocol |
| CRC | Convention on the Rights of the Child |
| FMLN | The Farabundo Martí National Liberation Front |
| GCs | Geneva Conventions |
| HR | Human Rights |
| ICC | International Criminal Court |
| ICJ | International Court of Justice |
| ICRC | International Committee of the Red Cross |
| ICTY | The International Criminal Tribunal for the former Yugoslavia |
| IHL | International Humanitarian Law |
| ILO | International Labour Organisation |
| LTTE | Liberation Tigers of Tamil Eelam |
| NIAC | Non-International Armed Conflict |
| NSA | Non-State Actors |
| OP | Optional Protocol |
| SC | Security Council |
| SCSL | Special Court for Sierra Leone |
| UK | United Kingdom |
| UN | United Nations |
| UNICEF | United Nations Children's Fund |
| UNSC | United Nations Security Council |
| VCLT | Vienna Convention on the Law of Treaties |

# 1 Introduction

## 1.1 Background

As most situations and concepts develop over time, law also develops. In regard to public international law, humanitarian law and other laws regulating situations in armed conflict and war, a lot of changes have happened just in a matter of a few decades. Especially considering how war is constructed and waged. While the war setting has changed with new weapons, different stakes and otherwise developed, this development affects the civilians in different ways. Nowadays, it is common for other parties to get involved in wars except for States. These other parties can for example be armed groups or organisations that are considered as non-state actors. This has had implications on the laws but also on the society as a whole and it can cause civilians to be more exposed to the conflict since warfare often takes place in urban environment.[1] This development has brought on changes to international laws and made the humanitarian laws even more current. Since the development has been fast, there is still a need to clarify the international obligations of these new non-state actors in order for them not being able to escape their legal obligations.[2] This thesis will focus on the

[1] Turns, David. *The Law of Armed Conflict*. In Evans, Malcolm (Ed.), *International Law* (4th edition), Oxford: Oxford University Press, 2014, p. 832; Odello, Marco & Beruto, Jean Luca (Eds.). *Non-State Actors and International Humanitarian Law: Organized armed groups: a challenge for the 21st century*, Milano: FrancoAngeli, 2010, p. 67.

[2] Geneva Academy: "Armed Non-State Actors and the Human Rights Council". Available at: <https://www.geneva-academy.ch/our-projects/our-projects/armed-conflict/detail/4>, accessed 29 November 2017.

protection of children in armed conflict involving non-state actors and particularly the children's right to protection of military exploitation.

Despite the Convention on the Rights of the Child and its mission to protect children, they still become victims of wars in different ways. Even today, more children are killed during wars than ten years ago. Between 1990 and 2000, it is estimated that two million children were killed. The wars in Sudan, Liberia, Cambodia, Sri Lanka and lately Syria are terrible proof of that as can be seen in several case studies made by UNICEF.[3]

By determining the applicable law to non-state actors the hope is to clarify the different obligations and thereby, hopefully, bring forward a change in international law which means that not only States will be accountable for recruiting child soldiers but that non-state actors also have the obligation to refrain from exposing children to armed conflicts since this has been disputable in the international legal community.

## 1.2 Purpose

The purpose of this essay is to clarify the current legal position of the obligations of non-state actors in non-international armed conflict in relation to child soldiers around the world. The thesis will examine the laws, the obligations they impose and how non-state actors are bound by these obligations.

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[3] Ishay, R. Micheline. *The history of human rights: from ancient times to the globalization era: with a new preface*, Berkeley: University of California Press, 2008, p. 303.

## 1.3 Research Questions

Which international legal obligations regarding the recruitment of child soldiers are there?
How can international legal obligations derived from international law created by States bind non-state actors?
Can NSAs be bound by international laws regarding child soldiers?

## 1.4 Delimitations

Since the scope of this thesis is limited, the subject had to be narrowed. This has been done by only focusing on non-state actors as subject and also focusing on non-international armed conflict as a specific situation. The subject has been further narrowed by only discussing the prohibition of child soldiers in international law. Further delimitations such as time or geographic has not been made since the essay is trying to map the legal obligations of non-state actors around the world and not only in a specific region or conflict. Only legal instruments that are relevant and in force today are used in the thesis.

## 1.5 Method

The method used in this essay is legal dogmatic method. By analysing the relevant instruments in international law and the legal implications of them in regard to child soldiers, this essay will search for connections between child soldiers and non-state actors in order to clarify the current legal situation of the subject. It is also analysing the question of how NSAs are bound by international law by presenting and discussing different theories made by legal scholars.

## 1.6 Previous Research

Even though there is some research of non-state actors and child soldiers separately, research on the two subjects constructed in the way as it is in this essay, has not been found. Therefore the subject in this thesis is even more important when clarifying the international law since previous research on the responsibilities of non-state actors concerning child soldiers has been limited. This proves further the importance of a clarification in this field of international law.

## 1.7 Material

The material used in this essay is both primary and secondary sources. When stating the international law and the relevant instruments, primary sources have been used and secondary sources have been used when interpreting them. When interpreting primary sources, commentaries to the legal instruments have been used that have been published by the International Committee of the Red Cross. Because of the origin of these commentaries and the fact that other writers and doctrine refer to them make them seem as reliable sources.

Besides secondary sources, doctrine has been used and various articles from different scholars who have contributed to the debate. Whether or not these articles are reliable is of course important but they are not used as a foundation for facts or to support an argument. Since the field is somewhat unexplored, the secondary sources are primarily used as they are, namely theories and not as stated facts. As long as the theories these scholars present seem logical, they have a function in the second part of this thesis.

## 1.8 Disposition

This thesis is divided into three main chapters. The three chapters are based on the research questions. The first chapter presents an overview of current international legal instruments and their provisions regarding child soldiers. Chapter two presents the issue of where non-state actors' obligations originate from and whether non-state actors might be bound by international obligations. The third chapter discuss conditions and characteristics that non-state actors have to possess in order for the international instruments mentioned in chapter one to be applicable. After the three main chapters follows an overall analysis of which obligations non-state actors might be bound by and a conclusion on what has been presented in the thesis.

## 1.9 Definitions

### 1.9.1 Non-State Actors

There are few definitions mentioned of Non-State Actors (NSAs) in international law.[4] In the United Nations Security Council (UNSC) resolution 1540[5] on weapons of mass destruction and non-state actors offers a definition of non-state actors for the purpose of the resolution, the term was defined as a footnote for the purpose of the resolution without

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[4] Bellal, Annyssa. *Human Rights Obligations of Armed Non-State Actors: An Exploration of the Practice of the UN Human Rights Council*, Academy In-Brief No. 7, p. 7. Available at: <https://www.geneva-academy.ch/joomlatools-files/docman-files/InBrief7_web.pdf>, accessed 10 November 2017.

[5] UN Security Council, Security Council resolution 1540 (2004) [concerning weapons of massive destruction], 28 April 2004, S/RES/1540 (2004).

addressing the non-state actors specifically.[6] The definition in the resolution was that a non-state actor was an 'individual or entity, not acting under the lawful authority of any State in conducting activities which come within the scope of this resolution'.[7]

However, there is no definition of NSAs, which is broadly accepted, in the international community, since it seems as though each definition is criticised by either the United States or some other State. But there are some classifications or examples of armed NSAs that seems to be more generally accepted than others. Some examples of armed NSAs are: Armed opposition groups, Paramilitary groups, Terrorist groups, Vigilante or Self-Defend groups and Territorial Gangs.[8] In this thesis, groups such as armed opposition groups, paramilitary groups and terrorist groups will all be mentioned and included as a type of non-state actor. Therefore, the broad definition presented by the UNSC will be used.

### 1.9.2 Non-International Armed Conflict

Even though some of the first international humanitarian law instruments, such as the 1864 Geneva Convention, the 1868 Saint-Petersburg Declaration and the Hague Conventions of 1899 and 1907, date back to the nineteenth century, they were only applicable to international armed conflicts. Non-International, also called internal, armed conflict was not mentioned in any international law instruments until the Geneva Conventions and the

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[6] Clapham, Andrew. *Human rights obligations of non-state actors in conflict situations*, International Review of the Red Cross, Vol. 88 No. 863 (2006), p. 500.

[7] UN Security Council, Security Council resolution 1540 (2004).

[8] Bellal, Annyssa, p. 8.

Common Article 3 were concluded.[9] Today non-international armed conflicts (NIACs) have gained international recognition and the term is frequently mentioned in international humanitarian law.[10]

#### 1.9.2.1 The Definition of Non-International Armed Conflict in International Law

The definition of NIAC is present in for example the Geneva Conventions and the Hague Convention. In the Geneva Conventions, the definition is presented in the Common Article 3 and the wording is similar to the one found in Article 19.1 in the Hague Convention:

Common Article 3 to the GCs:

> '…armed conflict not of an international character occurring in the territory of one of the High Contracting Parties…'

Article 19.1 of the Hague Convention:

> '… armed conflict not of an international character occurring within the territory of one of the High Contracting Parties…'

Article 8(f) in the Statute of the International Criminal Court (ICC) has a more elaborate definition even though it also refers to NIACs as an armed conflict not of an international character similar to the definitions in the GCs and the Hague Convention:

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[9] David, Eric. *Internal (Non-International) Armed Conflict*. In Clapham, Andrew & Gaeta, Paola (Eds.), Haeck, Tom & Priddy, Alice (Ass. Eds.). *The Oxford Handbook of International Law in Armed Conflict*, Oxford: Oxford University Press, 2014, p. 353.

[10] David, Eric, p. 354.

> ‘Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.’

As can be seen, NIAC is defined in negative terms since it is described as an armed conflict not of international character in the territory of one of the Parties and this is how the term will be used in this thesis. The problem of non-state actors not being able to become party to a treaty is discussed in chapter 3.1 below. Therefore the definition used in this thesis is best explained by the broad and elaborate definition in Article 8(f) of the ICC Statute.

#### 1.9.2.2 Armed Conflict

In the definition of a NIAC, there is an underlying preposition that the meaning of the word is based on the definition of an international armed conflict. Since a NIAC is defined in negative terms as an armed conflict not of international character, the definition of an international armed conflict has to be presented.

When determining if the intensities of the conflict reach the required amount in order to be an international armed conflict, the *Tadić* case is important to mention. In the *Tadić* case from 1997, the International Criminal Tribunal for the Former Yugoslavia stated that the conflict had to reach a certain level of gravity and duration in order to classify as an armed conflict. How to determine if the conflict classifies as an armed conflict the intensity and the organisation of the parties has to be determined. This can be summarised

as two crucial elements; the nature of the conflict and the nature of the parties.[11] These two criteria have to be fulfilled in order for the conflict to fall into the scope of IHL and be classified as an international armed conflict.[12] The *Tadić* case is used in this thesis when establishing if the conflict reaches the criteria required in order to be classified as an armed conflict.

### 1.9.3 Child Soldiers

Article 38 of the Convention on the Rights of the Child, CRC, calls on all States to take action and protect children during war. This entails protection from being recruited and also participating in an armed conflict. Even though the convention defines a child as a person under the age of eighteen, the overall recognized age today is fifteen in regard to both voluntary and compulsory recruitment.[13]

The definition of child soldiers is part of many soft law documents. The Paris Principles is one among them.[14] Article 2.2 of the Paris Principles:

> '"A child associated with an armed force or armed group" refers to any person below 18 years of age who is or who has been recruited or used by an armed force or armed group in any capacity, including but not limited to children, boys and girls, used as fighters, cooks, porters, messengers, spies or

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[11] *Prosecutor v. Dusko Tadić* (Appeal Judgement), IT-94-1-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 15 July 1999, § 562, available at: <http://www.refworld.org/cases,ICTY,40277f504.html>, accessed 7 November 2017.

[12] David, Eric, p. 362.

[13] Ishay, R. Micheline, p. 301.

[14] Waschefort, Gus. *"Situating the Debate." International Law and Child Soldiers*, London: Hart Publishing, 2015, p. 13.

> for sexual purposes. It does not only refer to a child who is taking or has taken a direct part in hostilities.'[15]

The Paris Principles is a result of two international conferences, the first was held in Cape Town in 1997 and the second in Paris in 2007. The conferences were hosted by UNICEF and included participants from 58 States but also others such as different stakeholders. These conferences led to several new non-binding documents.[16]

The term child soldiers in this thesis will thus be used as an abbreviation of "a child associated with an armed force or armed group". Whether or not the age limit is defined as fifteen or eighteen is somewhat beyond the scope of this thesis and irrelevant to its discussion on the obligations of the NSAs.

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[15] UN Children's Fund (UNICEF), The Paris Principles. Principles and Guidelines on Children Associated With Armed Forces or Armed Groups, February 2007, available at: <http://www.refworld.org/docid/465198442.html>, accessed 29 November 2017.

[16] Drumbl. A. Mark, *Reimagining Child Soldiers in International Law and Policy,* Oxford: Oxford University Press, 2012, p. 3.

# 2 Substantive Obligations Regarding Child Soldiers in International Law

Since the purpose of this thesis is to determine the obligations of non-state actors, it is of paramount importance to first present the law in regard to States. Thereafter, based on that information, the analysis continues by proving whether or not non-state actors are bound by these obligations. This part will therefore give an account for the applicable law and obligations in relation to States. The text will be divided into sections of obligations and after each obligation follows in which international legal instruments these obligations can be found. The obligations in customary international law will have its own section in the end of this chapter since it is of a special character from treaty law and thereby avoiding confusion.

## 2.1 Brief History of the Legislation Regarding Child Soldiers

When the Geneva Conventions were drafted, they did not include any provisions about child soldiers. The main inspiration to the conventions was the aftermaths of the Second World War. The only convention that dealt

with children in armed conflicts was the fourth Geneva Convention even though the issue of child soldiers was not mentioned.[17]

Child soldiers by that time were not seen as a problem even though they had existed in the war. They were seen as voluntary, heroic or an unfortunate necessity. Therefore it was not seen as something that needed to be regulated in international law. The main focus was to keep the peace of the world and by preventing war, the concept of child soldiers was not likely to repeat itself in the future.[18] Another aspect was that child soldiers were seen as an internal problem. It was not something for the international community to control. It was up to each State to regulate how they handled recruitment and protection of children in war times. These types of rights owned by individuals against the States were not a common phenomenon directly after the Second World War but it is something that has developed over time. The rights that were supposed to be regulated when the GCs were drafted were protection from actions of other States rather than the domestic State.[19]

There is no definition of the term child in the GCs except from the age limit, which is set to fifteen years. This means that age fifteen marks the end of childhood according to the GCs. and not eighteen as it is in for example the Paris Principles and the CRC.[20]

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[17] Happold, Matthew. *Child Soldiers in International Law*, Manchester: Manchester University Press, 2005, p. 54.

[18] Happold, Matthew, p. 55.

[19] Ibid.

[20] Happold, Matthew, p. 56; See section 2.2 of this thesis.

## 2.2 The Prohibition of Child Recruitment

The prohibition of child recruitment is mentioned in several international instruments such as the Geneva Conventions and their Additional Protocols I and II, The CRC and its Optional Protocol, the ILO Convention, The African Charter on the Rights and Welfare of the Child and customary international law.

In article 51 of the fourth Geneva Convention, the prohibition of recruitment of protected persons is stated. Since children are part of the group of protected persons, the article refers to them as well although it is not aimed at protecting children specifically. Article 51 can also be seen as a prohibition against States to force inhabitants in occupied territory to fight against their own nation. Therefore it must be seen as a general rule, not only applicable to child soldiers.[21]

In 1977 two additional protocols were adopted. They regulated the conditions for children in armed conflict more detailed than in the original GCs. The purposes of the protocols were to fill the gaps in the GCs but also to develop international humanitarian law.[22] In AP I article 77.2 it says that the Parties shall refrain from recruiting children:

> '…they shall refrain from recruiting them into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, the Parties to the conflict shall endeavour to give priority to those who are oldest.'

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[21] Commentary of 1958 to the Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949. Available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=2C777C1F24172394C12563CD0042C5AA>, accessed 9 November 2017.

[22] Happold, Matthew, p. 57.

In contrast to AP I, AP II regulates non-international conflicts of a certain level of intensity (according to article 1(1) AP II). It sets up minimum standards in internal conflicts. The provisions regarding the protection and the participation of children in non-international armed conflicts is regulated in the AP IIs 4th article. It sets up fundamental guarantees for protected groups affected by internal conflicts.[23] The important paragraph relevant to the refrainment of child recruitment is article 4(3)(c):

> 'children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups…'

Since the AP II is regulating non-international conflicts, it does not only bind States which have ratified the protocol but also non-state subjects. This can be seen from the drafting history although it is not clear how these NSAs are bound by it. Even though this is not clear, it is generally accepted to interpret the AP II to be applicable to armed opposition groups.[24]

The AP II is different from the AP I since it does not bind NSAs. There is one exception and that is when the people exercise their right to self-determination in accordance with Articles 1(4) and 96(3) in AP I. This divide between the applications of AP I and II means that there is a gap in regard to the application to NSAs and their involvement in international conflicts which are common in modern warfare. When NSAs fight

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[23] Commentary of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977. Available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=AA0C5BCBAB5C4A85C12563CD002D6D09&action=openDocument>, accessed 9 November 2017.

[24] Happold, Matthew, p. 69.

alongside a State in an international conflict, there is a gap in international humanitarian law where the opposition group is under no obligation to not recruit children into their armed forces.[25] Neither is there an obligation for the State if it lacks 'effective' or 'overall' control over the group's actions as can be seen in the case *Prosecutor v. Kordić and Čerkez* from ICTY.[26]

Both of the protocols gained international acceptance slowly.[27]

The Convention on the Rights of the Child is a human rights convention and it was adopted in 1989. Compared to the two APs, the CRC was popular from the beginning and was ratified by many parties.[28] Today, so many as 196 States have ratified the Convention. This makes it the most ratified human rights treaty in history.[29] The only State to this day, which has not ratified the Convention, is the United States.[30]

At the time of the adoption of the convention, the problems concerning the involvement of children in military conflicts grew even bigger. War was, and still is, devastating for children affected by it. They are more exposed than others and especially in the poor countries. Children are often recruited

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[25] Happold, Matthew, p. 70.

[26] *Prosecutor v. Dario Kordic, Mario Cerkez* (Trial Judgement), IT-95-14/2-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 26 February 2001, paras 66 and 79. Available at: <http://www.refworld.org/cases,ICTY,41483e9be.html>, [accessed 7 November 2017].

[27] Happold, Matthew, p. 74.

[28] Ibid.

[29] FAQs and resources – Convention on the Rights of the Child – UNICEF. Available at: <https://www.unicef.org/crc/index_30225.html>, accessed 8 November 2017.

[30] United Nations Human Rights Office of the High Commissioner – Status of Ratification Interactive Dashboard. Available at: <http://indicators.ohchr.org>, accessed 8 November 2017.

as agents and are unfortunately also among the innocent victims of war.[31] These problems were acknowledged in the CRC from 1989 and it established an obligation for all States to protect the children in war, which also includes an obligation to refrain from recruiting children into their armed forces. It establishes the minimum age for States to recruit children into their armed forces to eighteen.[32]

The CRC has a definition of the term child in its very first article. It says that a child is a 'human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier'. In this case, national law is of subsidiary importance in the way that the CRC has precedence. In fact, Article 4 regulates the measures each State shall undertake including legislative, administrative and such measures for the implementation of the rights mentioned in the Convention.[33]

Article 38(3) entails a prohibition against child recruitment:

> 'States Parties shall refrain from recruiting any person who has not attained **the age of fifteen years** into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest.'

Article 4.1 of the OP to the CRC is particularly relevant to NSAs. It provides the following:

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[31] Ishay R. Micheline, p. 303.

[32] Ibid.

[33] UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, Articles 1 and 4. Available at: <http://www.refworld.org/docid/3ae6b38f0.html>, accessed 8 November 2017.

> 1. Armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years.

Article 4 is absolute in nature and the use of the term "armed groups" is relatively wide, not restrictive to only armed opposition groups but also other NSAs.[34]

The ILO Convention 182 on the Worst Forms of Child Labour deals with the problem of child soldiers even though it is not comprehensively expressed in the Convention itself. Children in the ILO Convention are defined as all persons under eighteen[35] and child soldiers are included in the definition of the frequently used term "worst forms of child labour" as stated in Article 3(a). In contrast to the CRC, the United States has ratified this convention.[36]

The African Charter on the Rights and Welfare of the Child is a regional human rights treaty with focus on children's rights. The Charter prohibits the recruitment of all children and it therefore goes even further than the

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[34] Happold, Matthew, p. 79.

[35] ILO Convention, *Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour*, 1999 (No. 182), Article 2.

[36] Ratifications of C182 - Worst Forms of Child Labour Convention, 1999 (No. 182) – International Labour Organisation. Available at: <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312327:NO>, accessed 8 November 2017.

CRC, APs, OP and the ILO Convention 182.[37] Today, the Charter has been ratified by 41 out of 54 States in the African Region.[38]

## 2.3 Special Protection

In the international instruments there are often a provision stating that children shall enjoy special protection of the Parties.

For example, in AP I the protection of children is regulated in Article 77. The relevant paragraph is 77.1:

> 1. Children shall be the object of special respect and shall be protected against any form of indecent assault. The Parties to the conflict shall provide them with the care and aid they require, whether because of their age or for any other reason.

The CRC has a similar provision in Article 38(4):

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

Article 4.2 of the Optional Protocol to the CRC has a provision where the Parties to the Protocol shall take all feasible measures to make sure that the recruitment of children into armed forces is prevented. This provision is different from the direct recruitment of children by a State, instead it entails

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[37] Happold, Matthew, p. 85.

[38] Ratification Table: The African Charter on the Rights and Welfare of the Child – African Commission on Human and Peoples' Rights. Available at: <http://www.achpr.org/instruments/child/ratification/>, accessed 8 November 2017.

a provision of preventing recruitment of children on the territory of the State and not only into their own armed forces:

> 'States Parties shall take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalize such practices.'

## 2.4 The Protection from Taking Part in Hostilities

Apart from providing provisions against child recruitment and the special protection of children, the legal instruments often include a provision which entails the protection of children from taking direct part in hostilities.

This can be seen in AP I and the meaning of Article 77(2):

> 'The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities…'

Article 77(2) provides an obligation for the Parties to take all feasible measures to make sure that children do not take part in armed conflicts. This obligation is wider than refraining from child recruitment and it also applies to other organisations acting on the territory of the State even though they are not directly under the State´s control. In other words; the State has to take all feasible measures to ensure the protection of children in regard to NSAs acting on the State´s territory.[39]

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[39] Commentary of 1987 Protection of Children to the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977. Available at: <https://ihl-

Article 4(3)(c), apart from providing a provision against child recruitment, states that children are not allowed to take part in hostilities. Article 4(3)(c) is similar to the regulation in article 77(2) of the AP I, but the restrictions in article 4(3)(c) are broader and applicable to internal conflicts. This is because the article imposes a different obligation on the State. The obligation in the AP II is of a more absolute nature since the focus lies more on the result of the measures instead of the means. Another reason why the scope is broader is that the AP II provides a larger scope concerning the participation of children in armed conflicts. In the AP I children are not allowed to take a 'direct part' in hostilities while they in the AP II they can not take part in any warlike acts.[40]

The CRC has a provision in Article 38(2):

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

Even though many States ratified the Convention on the Rights of the Child, there was also some dissatisfaction with the Article 38 of the convention. The dissatisfaction was primarily regarding the age limit in the second paragraph of the Article and the fact that it was set to fifteen instead of eighteen. This led to the proposal to include an additional protocol to the Convention. The Committee on the Rights of the Child initiated the proposal. The purpose of the committee was, and still is, to examine how

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databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=8E174BC1926F72FAC12563CD00436C73>, accessed 9 November 2017.

[40] Happold, Matthew, p. 66.

the Parties to the CRC comply to the convention and the obligation it imposes on the contracting Parties.[41]

The OP sets the same restrictions to the participation in hostilities as the AP I, meaning that children still can participate to some degree although not take a direct part in hostilities.[42] Even though the age limit is raised to eighteen.[43]

## 2.5 Obligations Crystallised in Customary International Law

### 2.5.1 The Two Elements of Customary International Law

As can be seen above in section 2.2 and onwards, there are several treaties that regulate the use of children in armed conflicts. There are different States that have ratified different treaties and this makes it difficult to interpret which obligations the different States are under. Since customary international law derives from practise and it is binding on all States whether or not they have participated in this practice, this is another way to find out which obligations the States are bound by.[44] Customary rules exists

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[41] Happold, Matthew, p. 74.

[42] Happold, Matthew, p. 77.

[43] UN General Assembly, Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 25 May 2000, available at: <http://www.refworld.org/docid/47fdfb180.html>, accessed 8 November 2017.

[44] Thirlway, Hugh. *The Sources of International Law*. In Evans, Malcolm (Ed.), *International Law* (4th edition), Oxford: Oxford University Press, 2014, p. 97.

if two elements are present: practice and *opinio juris*, which means opinion as to law or necessity.[45]

### 2.5.2 Determining Which Rules Exist in Customary International Law

Even if determining a customary international rule may be difficult, it has been concluded that there exists such a rule regarding the recruitment of children under fifteen into the armed forces of the States and also for States to take all feasible measures to prevent them from taking a direct part in hostilities.[46] This has been established through State practice and is applicable in international and non-international armed conflicts.[47] Although the minimum age for recruitment is not yet established through a uniform practice, it is agreed in the international community that the minimum age should not be below the age of fifteen.[48] Even the rule to provide children with special protection during an armed conflict is crystallised in customary international law and is applicable to both international and non-international conflicts.[49]

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[45] Thirlway, Hugh, p. 98.

[46] Happold, Matthew, p. 91.

[47] Henckaerts, Jean-Marie & Doswald-Beck, Louise. *Customary International Humanitarian Law, Volume I: Rules*, New York: Cambridge University Press, 2005, p. 482.

[48] Henckaerts, Jean-Marie & Doswald-Beck, Louise, p. 485.

[49] Henckaerts, Jean-Marie & Doswald-Beck, Louise, p. 479.

### 2.5.3 The Status of International Legal Instruments

Even though there are so many parties to the CRC, this convention does not convey customary international law in its entirety and neither is it an expression of *opinio juris* as stated in the *Nicaragua* Case. In this case the court discussed the principle of non-intervention and why it was part of international law by stating the following: '…statements whereby States avow their recognition of the principles of international law set forth in the United Nations Charter cannot strictly be interpreted as applying to the principle of non-intervention by States in the interna1 and external affairs of other States, since this principle is not, as such, spelt out in the Charter.'[50]

The *Nicaragua* Case in turn refers to the *Continental Shelf Case* where the Court expressed itself in a similar way: 'It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them.'[51]

This means that we have to look elsewhere for the current customary international law by establishing practice and an *opinio juris*. Another problem arises when analysing the different treaties mentioned above. This problem is called 'the Baxter paradox' which means the problem with discerning whether the State's true reason behind acting in a certain way

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[50] Paramilitary Activities in and around Nicaragua (Nicaragua v. USA) (Merits), ICJ Rep. (1968) 14, p. 96.

[51] Continental Shelf (Libyan Arab Jarnahiriyu v. Malta), ICJ. Rep. (1985), para. 27.

was purely because an obligation created by the treaty or if it was because of real State practice.[52]

As mentioned before in section 2.2 of this thesis, there is a gap between the different treaties since AP II only applies to non-international conflicts, the OP binds armed groups and the AP I and CRC only binds States that are Parties to these treaties. when talking about NSAs this proves to be a troublesome matter. Help must be found in the customary international law to cover this gap.

The status of the APs as customary international law in regard to NSAs is important when the NSA operates on a territory of a State which is not a Party or has ratified the Protocol. There is evidence that points towards some of the articles of the AP II enjoy the status of customary international law and one part of this evidence is the discussion held by the ICTY in the *Tadić* appeal case.[53] In this case the Tribunal stated: 'Attention must also be drawn to Additional Protocol II to the Geneva Conventions. Many provisions of this Protocol can now be regarded as declaratory of existing rules or as having crystallised emerging rules of customary law or else as having been strongly instrumental in their evolution as general principles.'[54] When analysing the statement of the Tribunal, it appears that it primarily refers to the norms overlapping with the ones in the common article 3 as customary international law. Which includes articles 4(2), 5, 6, and 13(2)

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[52] *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, Trial Chamber, ICTY, decision of 16 November 1998, para 302.

[53] Zegveld, Liesbeth. *The Accountability of Armed Opposition Groups in International Law*, Cambridge: Cambridge University Press, 2002, p. 20.

[54] *Prosecutor v. Dusko Tadić* aka "Dule" (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), IT-94-1, International Criminal Tribunal for the former Yugoslavia (ICTY), 2 October 1995, para 117.

concerning the fundamental guarantees to persons to take no part in hostilities.[55]

### 2.5.4 Applicability to States and Non-State Actors

Both the Security Council and the General Assembly have, when mentioning child soldiers, avoided expressing themselves in a way where they only mention obligations of States. Instead they have preferred using terms such as "all parties" and not "all States". This points toward an interpretation of the UN wanting to include NSAs as being part of the same obligation as States.[56]

The Secretary-General compiled a list by a request from the SC. This list was supposed to consist of parties to armed conflict that recruit or use children in violation of relevant international obligations.[57] The list was summited as an annex to a report made by the Secretary-General on children and armed conflict. This list included not only States but also NSAs.[58]

Following this list made by the Secretary-General, the Security Council issued another resolution: '…calls on the parties identified in this list to provide information on steps they have taken to halt their recruitment or use

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[55] Zegveld, Liesbeth, p. 21.

[56] Happold, Matthew, p. 95.

[57] UN Security Council, Security Council resolution 1379 (2001) [on the protection of children in armed conflicts], 20 November 2001, S/RES/1379 (2001), para 16. Available at: <http://www.refworld.org/docid/3c4e94561c.html>, accessed 29 November 2017.

[58] Report of the Secretary-General on Children and Armed Conflict, UN Doc. S/2002/1299 (26 November 2002) (third report), annex.

of children in armed conflict in violation of the international obligations…'[59] Since the list included names of NSAs as well as States, the Security Council must have agreed with the Secretary-General's conclusion that all parties to the conflict, including the NSAs, acted in violation of their international obligations. This means, according to this conclusion, that NSAs have obligations under international law even if they are not parties to treaties and these obligations are customary in nature.[60] These customary rules are newly emerged in international law and there is not yet a lot of evidence to indicate the existence of these customary rules.[61]

[59] UN Security Council, Security Council resolution 1460 (2003) [on children in armed conflict], 30 January 2003, S/RES/1460 (2003), para 5. Available at: <http://www.refworld.org/docid/3f45dbdd0.html>, accessed 29 November 2017.

[60] Happold, Matthew, p. 96.

[61] Happold, Matthew, p. 99.

# 3 The Origin of the Obligations of NSAs Derivated from Treaties Ratified by States

Even though it is not settled in the international community how, or even if, non-state actors are bound by international law, there are two aspects to this problem that have appeared during the construction of this essay. The first is the actual applicability problem, meaning how the non-state actors are bound by the law expressively applicable to State actors. In order to discuss this problem, the second aspect to the problem appears. This is the problem of the different criteria that have to be fulfilled by the NSAs in order for them to be considered as a subject governed by international law. These are criteria based on the characteristics of the NSA and they make the NSAs more advanced and make them share characteristics of a State.

In this part of the thesis these criteria will be discussed. Note that this list is not exhaustive in any way but it discusses in a broad way the different aspects represented in most of the doctrine and articles written by legal scholars today. The purpose of presenting the characteristics below is to better analysing if NSAs are bound by the obligations reported in the second part of this thesis.

Several legal documents, such as Common Article 3 in the GCs, have handled the issue and came to the conclusion that armed groups, even NSAs shall comply with international humanitarian law. The Security Council and other institutions have in turn referred to these documents. The Common

Article 3 states that the obligations mentioned refers to not only States, but also all parties to a non-international armed conflict. [62] In the resolution 1564 the SC concluded that all armed groups, including NSAs in a conflict in Darfur were to make sure that their members complied with international humanitarian law.[63]

The problem has been handled by scholars and is not settled in any way. Even though the issue has not been settled, it does not mean that it has not been discussed in advanced settings. On the contrary, the Appeals Chamber of the Sierra Leone Special Court has brought up the topic in 2004 where the Court stated that all parties to an armed conflict are bound by international humanitarian law and in the case of NSAs being part of an armed conflict, they are also bound by international humanitarian law even though only States can be an official Party to a treaty.[64]

Also the Institut de Droit International shared this view in a resolution from 1999. They stated that all parties to an international conflict had an obligation to comply with international humanitarian law. But they also concluded that the obligation included fundamental human rights as well.[65]

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[62] Dinstein, Yoram. *Non-International Armed Conflicts in International Law*, Oxford: Cambridge University Press, 2014, p. 63.

[63] UN Security Council, Security Council resolution 1564 (2004) [on Darfur, Sudan], 18 September 2004, S/RES/1564 (2004), para. 10.

[64] *Prosecutor v. Sam Hinga Norman - Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment),* Case No.SCSL-2004-14-AR72(E), Special Court for Sierra Leone, 31 May 2004. Available at: <http://www.refworld.org/cases,SCSL,49abc0a22.html>, accessed 22 November 2017.

[65] Institut de Droit International, Resolution on " The Application of International Humanitarian Law and Fundamental Human Rights, in Armed Conflicts in which

The different sources and their conclusions have given way to intense discussion among the international community and gained the attention of scholars. The fact that institutions of high esteem commented on a subject in international law without mentioning where the obligation of NSAs originated from amounted to much controversy among scholars.[66]

How the international community came to this conclusion might originate from either one or several different theories. These theories are part of the first aspect of the problem of how NSAs are bound by international law and will be mentioned briefly since this part of the essay will mainly focus on the second aspect.[67]

The first theory is whether or not it is possible to bind a third party through a treaty. The second theory is since international treaties and legal instruments bind States, they affect the national law by binding the States' subject and thereby any armed group including its members acting on its territory by legislative jurisdiction. The third theory applies to NSAs that aspire to become governments or claiming to be self governed. By their aspiration or claim, they regard themselves as being a State even though they might not be internationally recognised as such, it can be said that they are subjecting themselves to being bound by the same treaties as recognised States would be. The next theory is if it is possible for a non-state actor to

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Non-State Entities are Parties", Session of Berlin – 1999, para II. Available at: <http://www.idi-iil.org/app/uploads/2017/06/1999_ber_03_en.pdf>, accessed 1 December 2017.

[66] Dinstein, Yoram, p. 64.

[67] Clapham, Andrew. *Focusing on Armed Non-State* Actors. In Clapham, Andrew & Gaeta, Paola (Eds.), Haeck, Tom & Priddy, Alice (Ass. Eds.). *The Oxford Handbook of International Law in Armed Conflict*, Oxford: Oxford University Press, 2014, p. 772.

agree to be bound by a specific treaty and thereby be bound by the obligations it imposes on the Parties to the treaty. Another theory is the existence of international legal instruments which are directly addressed to non-state actors. Finally but not exclusively there is the possibility of the existence of customary international law which directly binds NSAs.[68] All of these theories will be presented below.

## 3.1 The Issue of Binding a Third Party

The question of the origin of the obligations of NSAs is a difficult one. This is since they are not subjects in international law in the same way as States. They are therefore not able or allowed to ratify or accede to any treaty and cannot be Party to them. When trying to interpret the subjects of the treaties and the overall will of the Parties to them, the States have often intended them to also apply to NSAs.[69]

The main principle to keep in mind here is that you cannot impose obligations on a third party through a treaty. This is not an absolute rule since it is nowadays generally accepted that treaties may have effects on other than the Parties to the treaty. This principle derives from principles in contract law and is associated with a Latin maxim: *pacta tertiis nec nocent nec prosunt*.[70] If this rule is violated by this would be a breach of the rule of sovereign equality in regard to a sovereign State.[71] The problem can be best illustrated in international law by article 11 in the VCLT. The GCs and the

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[68] Clapham, Andrew. *Focusing on Armed Non-State* Actors, p. 772.

[69] Zegveld, Liesbeth, p. 14.

[70] Clapham, Andrew. *Focusing on Armed Non-State* Actors, p. 772.

[71] Clapham, Andrew. *Focusing on Armed Non-State* Actors, p. 773.

APs expressively admit to only allowing States to become "High Contracting Parties".[72] Article 11 of the VCLT prescribes that in order for a State to be bound by a treaty, it has to consent to it by becoming a contracting Party to it.[73] This means that a non-state actor, even though it sometimes may be seen as a State, can nonetheless not become a Party to a treaty and by default not be bound by it according to the Vienna Convention. As an actor in international law, the NSA is unauthorized to participate in the construction of treaties or be a Party to them. The question that follows is if a non-state actor that is not able to be a party to a treaty still can become bound by one.[74]

Article 34 of the VCLT is also addressing the issue of binding a third party in saying that a treaty does not create neither obligations nor rights for a third State without its consent.[75] It is unclear how this provision affects a third party that can not be seen as a State but it seems as though Article 34 provides an exception to the rule if the parties have intended the provision to be binding on third States or international organizations. These third parties must in that case agree to the provision in writing in order to become bound by it.[76] Even if it would be possible for a non-state actor to enter into agreements with States, this would not be seen as an agreement that creates obligations under international law because it is not concluded between States.[77]

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[72] Zegveld, Liesbeth, p. 14.

[73] United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, art. 11.

[74] Dinstein, Yoram, p. 68.

[75] United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, art. 34.

[76] Clapham, Andrew. *Focusing on Armed Non-State* Actors, p. 772.

[77] Dinstein, Yoram, p. 71.

Despite the issue of not being able to bind a third party, it has for some time been generally accepted that treaties between States may have effects on other parties than themselves.[78] Common Article 3 is one example of a treaty that is binding on NSAs for several reasons. Article three is directly addressed to any party to the conflict and it applies to non-international conflicts as well as international. It is also crystallised as a rule in customary international law. Clapham concludes that combining these reasons means that Common Article 3 is binding on NSAs whether or not they have made a written consent to the provisions. The fact that the Sierra Leone Special Court, the UK Ministry of Defence and the ICJ have applied Article 3 as binding towards NSAs supports this theory. Even though this Article can be seen as binding, this can not be said for all norms found in treaties applicable in non-international armed conflicts. It is important to remember the uniqueness of Common Article 3 regarding its standing in international law.[79]

Clapham agrees with the fact that it is misleading to strictly apply the doctrine that treaties only bind those who are Parties to them. He explains that the doctrine has evolved and that it is possible today to say that treaties can create obligations for others except the Parties or even States. It may still be limits to the nature of these obligations due to the State's jurisdiction but this is resolved if the active personality and territorial jurisdiction are combined.[80]

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[78] Clapham, Andrew. *Focusing on Armed Non-State* Actors, p. 773.

[79] Clapham, Andrew. *Focusing on Armed Non-State* Actors, p. 774.

[80] Clapham, Andrew. *Focusing on Armed Non-State* Actors, p. 778.

The ambiguity of intending to bind a third party through a treaty while treaty law dictates that this it is forbidden is apparent although it is possible to see some development lately. This problem leads to scholars and others discussing this problem to solve it through some other way by looking at other sources or theories of where the binding nature might originate from. This focus often shifts to customary international law since this is a problem concerning treaty law.[81]

## 3.2 Legislative Jurisdiction

The first theory presented is the theory of legislative jurisdiction. Since NSAs can not become parties to a treaty themselves, they are indirectly bound by them through the States that have ratified them and become Parties to treaties. In this way, the NSAs are not required to ratify any treaty. If they operate on a States' territory that is Party to a treaty, they are bound by the States' rights and obligations which in turn derive from the treaty to which the State is a Party to. The moment when a State ratifies a treaty, the NSAs operating on its territory are automatically bound by the obligations set forth by the norms stated in the treaty.[82] This alternative is met by several objections, in particular the problem with the NSAs defiance of the domestic legal regime. Non-state actors are often protesting against the State and the established order. This makes it troublesome if the legislative jurisdiction was the one thing binding NSAs to international treaties because it would be hard for them to respect to be bound by obligations on this ground.[83]

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[81] Ibid.

[82] Zegveld, Liesbeth, p. 15.

[83] Dinstein, Yoram, p. 70.

The legislative jurisdiction theory, or doctrine, is based on the ability of the State to legislate for all of its people and this legislation can originate from either international or national law. This principle applies even if some nationals decide to fight the regime. It works the same way when a State legislates in accordance with new international law which affects the rights and obligations. of the nationals. This theory works on the assumption that States can transform its own binding legal obligation as binding legal obligations for its nationals and the same goes for any NSA that works in the State's territory. Although this assumption would be logical, it is problematic to draw such a conclusion based solely on the ratification to a treaty by the State. Moreover, this theory requires a nationality link which sometimes might be hard to establish when it comes to NSAs because they are protesting against the current regime and will often not acknowledge their nationality. This would also mean that in case any foreign fighters participate in the name of the NSA, they are not as bound by national law as some of the other fighters. Since NSAs often are multi- and transnational, such a principle would prove difficult.[84]

The problem of the nationality of the NSAs or its members would seize to exist if it would be possible to bind a third party to the obligations in a treaty as explained in the previous paragraph. When it comes to individual responsibility, this has happened in the field of international criminal law without much objection. It is however more complicated in international humanitarian law and human rights law as will be discussed in more detail in section 4.1 of this thesis.[85]

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[84] Clapham, Andrew. *Focusing on Armed Non-State* Actors, p. 778.

[85] Ibid.

## 3.3 Governmental Claims

Another theory in regard to how NSAs are bound by laws basically created by another party is if the NSA is regarded as its own entity, separate from the State. They are then bound by the obligations in international law irrespective of the State on which territory they operate as an own authoritarian entity. This theory distinguishes itself from the theory of legislative jurisdiction by allowing the NSA to be able to be a bearer of its own obligations directly. They are, through this theory, regarded as independent entities in relation to the State. In order for this theory to be applicable, the NSA has to exercise de facto authority over either persons or territory. Otherwise the NSA is not regarded as an individual entity and the theory is thereby not applicable. The authority and the degree of authority required to meet the conditions is discussed in chapter 4.2 in this thesis. The theory lacks an explanation for the origin of the obligations of NSAs, that do not meet the requirement of authority even though the Common Article 3 still, expressively, binds them.[86]

## 3.4 Acceptance

As has been discussed in Chapter 3.1 about binding a third party, Article 35 of the VCLT opens up the opportunity for a third party to be bound by a treaty if that party has given its consent in writing. The fact that the rules have effect on States however, does not guarantee that they have any effect

[86] Zegveld, Liesbeth, p. 15.

on other parties.[87] Therefore it is likely that these rules do not apply to NSAs and can therefore not explain how NSAs may be bound by rules applicable to non-international armed conflict. However, a treaty can create both rights and obligations for individuals, not only for the States that have ratified it. That combined with that there is, at least, one example of a treaty that effectively binds a third party. Namely the UN Charter. UN bodies such as the Security Council can create binding resolutions on NSAs and other non-members. These facts can support the argument that NSAs can be bound by treaty law as a third party and therefore be affected by the provision in the VCLT.[88] Two criteria have to be met; the contracting Parties of the specific treaty must be willing for it to be applicable to the third party and the third party must accept in writing.[89] By arguing this way, it may be possible for NSAs to consent to being bound by certain rules in international law.

## 3.5 Customary International Law

All of the above mentioned theories have been based on treaty law. There is however another alternative that is based on customary international law instead. When discussing the origin of the obligations of NSAs in regard to customary international law, the issue is similar to the theory of legislative jurisdiction and if the NSA is regarded as its own entity. Some help can be given from Article 38(1)(b) of the Statute of the ICJ which defines international custom 'as evidence of a general practice accepted as law'.

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[87] Pushparajah, Nadarajah. *How are Armed Non-State Actors Bound to Apply the Law of Non-International Armed Conflict*, 12 ISIL Y.B. Int'l Human. & Refugee L. 86-131 (2012-2013), p. 102.

[88] Pushparajah, Nadarajah, p. 103.

[89] Pushparajah, Nadarajah, p. 104.

Compared to international treaties, customary international law is considered as binding on NSAs. This is why it has become so important to determine which rules in treaty law are also conveyed in customary international law. Customary international law can be applied to States, armed opposition groups, non-state actors as well as individuals.[90]

When it is not mentioned where the practice shall originate from, this could be interpreted as if not only State practice is applicable. There is no evidence of the Court applying other than State practice when discussing customary international law but it seems that this is possible.[91] The ICTY on the other hand has used practice of NSAs in its judgements of the *Tadić* appeal case. The Tribunal stated as follows: 'In addition to the behaviour of belligerent States, Governments and insurgents, other factors have been instrumental in bringing about the formation of the customary rules at issue'.[92] The context of the issue discussed by the Tribunal was which customary norms applicable in a non-international conflict in Salvador where the NSA called The Farabundo Martí National Liberation Front (FMLN) was involved. In order to solve the issue, the Tribunal looked at the practice formed by the FMLN which is proof of the possibility that practice from NSAs are relevant in the discussion of their obligations under customary international law.[93] In general, it must be seen as an exception to

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[90] Clapham, Andrew. *Focusing on Armed Non-State* Actors, p. 779.

[91] Zegveld, Liesbeth, p. 26.

[92] *Prosecutor v. Dusko Tadić* aka "Dule" (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), IT-94-1, International Criminal Tribunal for the former Yugoslavia (ICTY), para 108, 2 October 1995. Available at: <http://www.refworld.org/cases,ICTY,47fdfb520.html>, accessed 23 November 2017.

[93] Zegveld, Liesbeth, p. 26.

include the practise of NSAs into the general practice that forms customary international law.[94]

Customary international law may seem to imply the same problem as treaty law in regard to how it is binding upon non-state actors. The difference between treaty law and customary international law in this case is that the latter binds States even without their consent as well as it imposes obligations on all individuals and groups wherever they may be operating in the world. NSAs are not excepted from this rule.[95]

Since NSAs can not be said to contribute to the development of rules of customary international law, the issue is much the same as the problem with the two previous theories of treaty law. Namely how NSAs can be bound by law that they are not participating to creating. One argument to why this theory is accurate despite from the concern of NSAs not participating in the creation of the law, is to see them as no different from individuals bound by international custom even though they have not contributed to the formation of it. The main argument being that all individuals are bound by international law without having been part of its creation, so why should NSAs be differentiated from them?[96]

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[94] Dinstein, Yoram, p. 72.

[95] Ibid.

[96] Dinstein, Yoram, p. 73.

# 4 Threshold Requirements for Non-State Actors

Having established that NSAs can in fact be bound by international law through different theories in the previous section, the next question to be answered will be when NSAs will be bound by international law. Therefore, in this section of the thesis, conditions determining whether obligations previously identified apply to non-state actors will be presented. These conditions are relevant to whether or not the obligations presented in the second section of this thesis are applicable to non-state actors as well as States. The list is in no way exhaustive and it is first and foremost not determined if these conditions are required in order for international law to be binding on NSAs. When reading material discussing this issue, these are the most frequently occurring conditions mentioned by scholars and the conditions in this thesis are simply a compilation of those.

Having acknowledged the different possibilities of how NSAs are bound by obligations in international law, it is time to move on to presenting the different characteristics NSAs need to have in order to be bound by international law. These characteristics together with the different theories above make it possible to analyse the possibility of how NSAs are bound by international law.

There are mainly three characteristics mentioned by for example the Darfur Commission. These characteristics are best seen as a form of threshold in order for a NSA to be bound by customary international law. The Darfur Commission mentions thresholds of organization, stability and effective

control of territory and the possession of international legal personality.[97] When these characteristics are determined, the next step is to determine which rules are applicable and if they mirror customary international law.[98] This means, a part from a violence criterion to the specific non-international conflict, the NSA has to fulfil a set of requirements in order for international humanitarian law to be applicable. While the violence criterion will not be discussed in this thesis, this section will summarize some of the criteria common for both international humanitarian law and human rights law.[99]

## 4.1 The Applicability of IHL Versus HR Law

Some observations on human rights law have to be made in order to understand the specific issues connected to this branch of international law. The distinction between IHL and HR law is important when dealing with the applicability issue because of how these two branches of international law differ in character. It is far more well-established that IHL is applicable to NSAs even though it is still a question to how this is and where the obligations originate from. While HR law is a bigger issue mainly because it is seen as a branch of international law strictly applicable to States and the rights are held by the individuals against it. Therefore NSAs are not as often directly addressed in HR treaties. Since HR law is considered applicable only to States, it would be problematic to acknowledge NSAs as bound by

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[97] Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General, 25 January 2005, para 172. Available at: <http://www.un.org/news/dh/sudan/com_inq_darfur.pdf>, accessed 10 December 2017.

[98] Clapham, Andrew. *Focusing on Armed Non-State* Actors, p. 780.

[99] Clapham, Andrew. *Focusing on Armed Non-State* Actors, p. 786.

HR law since that would recognise them in the legal society as a group similar to States and this is not something the international community is likely to do.[100]

It is well established that Human Rights Law applies in armed conflicts as well as in any other times. This means that the threshold of violence mentioned in the section 4.2.1 below is not needed in order to establish if NSAs are bound by it. This is since IHL and Human Rights Law works complementary, side-by-side.[101]

Clapham sees the notion of Human Rights being addressed only to States as a myth. He is of the belief that nowadays, international human rights law is evolving and it is increasingly considered as being applicable to NSAs. This is partly because the actions of the UN and different human rights report regarding eventual human rights violations by NSAs.[102] The fact that instruments can be directed to States only by using terms such as "States Parties to the convention" does not mean that they do not also apply to NSAs.[103]

While international humanitarian law sets out demanding criteria in order for the NSAs to be bound by the law, human rights law is evolving in this area because the terminology in different treaties in regard to NSAs are getting more loose. In for example, the OP to the CRC and the Africa Union Convention, there is no mention of that the NSA has to be organized in a

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[100] Clapham, Andrew. *Focusing on Armed Non-State* Actors, p. 787.

[101] Bellal, Annyssa & Casey-Maslen, Stuart. *Enhancing Compliance with International Law by Armed Non-State Actors*, 3 Goettingen J. Int'l L, 175-198 (2011), p. 185.

[102] Clapham, Andrew. *Focusing on Armed Non-State* Actors, p. 789.

[103] Clapham, Andrew. *Focusing on Armed Non-State* Actors, p. 790.

specific way or engaged in a certain level of violence. The legitimacy issue of acknowledging NSAs as State-entities is solved by stating that the applicability of the treaty in no way changes the international personality of the NSA.[104]

The UN High Commissioner for Human Rights has in multiple reports, which only focus on NSAs, mentioned child recruitment as a human rights violation.[105] The UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions made a similar observation in regard to the civil war in Sri Lanka. He stated that the NSA called LTTE and the government must both respect the human rights. While the government had binding legal obligations and the NSA did not, it still was a member of the international community and was according to the Special Rapporteur therefore bound by these obligations.[106]

It has also been argued recently by the International Law Association that NSAs, even though they do not reach any of the conditions or characteristics in the next section, are still bound by norms that enjoy jus cogens status.[107]

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[104] Clapham, Andrew. *Focusing on Armed Non-State* Actors, p. 792.

[105] UN Human Rights Council, Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Mali, 7 January 2013, A/HRC/22/33. UN Human Rights Council, Situation of human rights in Mali : resolution / adopted by the Human Rights Council, 17 July 2012, A/HRC/RES/20/17.

[106] Clapham, Andrew. *Focusing on Armed Non-State* Actors, p. 797.

[107] International Law Association (ILA), Non State Actors, First Report of the Committee, Non-State Actors in International Law: Aims, Approach and scope of project and Legal issues, The Hague Conference 2010, para. 3.2.

## 4.2 Different Characteristics of NSAs

### 4.2.1 Threshold of Organisation

The ICTY is one institution that has dealt with the different thresholds necessary for international law to be applicable to NSAs. The ICTY has established that there are some indicative factors that would point towards the organisation reaching the requirement of the threshold of organisation. Even though the factors are by themselves not enough, together they are strong indications of an established organisation.[108]

> 'Such indicative factors include the existence of a command structure and disciplinary rules and mechanisms within the group; the existence of a headquarters; the fact that the group controls a certain territory; the ability of the group to gain access to weapons, other military equipment, recruits and military training; its ability to plan, coordinate and carry out military operations, including troop movements and logistics; its ability to define a unified military strategy and use military tactics; and its ability to speak with one voice and negotiate and conclude agreements such as cease-fire or peace accords.'

This condition is only applicable in regard to IHL and not human rights law since it is applicable at all times and a threshold of violence is therefore not necessary to establish if NSAs are bound by human rights provisions.[109]

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[108] Bellal, Annyssa & Casey-Maslen, Stuart, p. 183.

[109] Bellal, Annyssa & Casey-Maslen, Stuart, p. 185.

#### 4.2.1.1 Sufficiently Developed Structure

The ICC Trial Chamber has mentioned the need of an armed group to have a sufficiently degree of organisation, in the case *Lubanga*[110]. This is in order for them to be able to carry out acts of violation. The requirement should, according to the Trial Chamber, be limited and applied with a degree of flexibility. Factors that should be included when determining if the group has a sufficient degree of organisation are: internal hierarchy, command structure and rules, available military equipment, the ability to plan and execute military operations and the extent, seriousness and intensity of its military involvement in the conflict.[111]

#### 4.2.1.2 Elements of Governmental Functions

It has also been discussed whether elements of governmental functions have to be present. This would include factors as, for example, authority over the population in the territory in which they have control.[112]

NSAs can have governmental functions of different degree. One approach is that if the NSA has *de facto* governmental functions, they are bound by international law. They are bound through the element of statehood this fact provides, recognition of governments and State responsibility. This means that the approach shifts from individuality to the entire organisation behind the NSA. This argument is based on the governmental functions within the NSA, how they are exercised and the

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[110] *Prosecutor v. Thomas Lubanga Dyilo* , ICC-01/04-01/06, International Criminal Court (ICC), 14 March 2012.

[111] Dwyer, Caitlin & McCormack, Tim. Conflict characterisation. In Liivoja, Rain & McCormack, Tim. Routledge Handbook of the Law of Armed Conflict, Oxford: Routledge, 2016, p. 56. Available at: <https://www.routledgehandbooks.com/doi/10.4324/9780203798362.ch3>, accessed 10 December 2017.

[112] Bellal, Annyssa & Casey-Maslen, Stuart, p. 187.

aspiration of the NSA to become an independent State.[113]

Although this theory is not disconnected from the obligations of the State on which territory the NSA operates on. The obligations the NSA is bound by are dependent on which obligations in international law apply to the State. Therefore, this theory has the same problem as the one with legislative jurisdiction in the sense that it focuses on the State on which the NSA does not approve of.[114]

There are however differences from the doctrine of legislative jurisdiction. The first is that the application of the law originates from the NSA itself and its characteristics instead from the State. This would make the question of the legitimacy of the State, from the NSAs point of view irrelevant. Another difference is that while legislative jurisdiction focuses on whether or not the State has ratified any treaties in the past, the argument of governmental functions focuses on the factual circumstances in the present. It also focuses on the future since it is dependent on future aspirations of the NSA to become a State. Overall, it focuses on the NSA as an individual which would make them more inclined to recognise their obligations in international law.[115]

This argument is not without issues. Not all NSAs aspire to become a new State or reach the threshold required of *de facto* governmental functions.[116]

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[113] Kleffner, K. Jann. *The applicability of international humanitarian law to organized armed groups*, International Review of the Red Cross, Vol. 93 No. 882, June 2011, p. 451.

[114] Kleffner, K. Jann, p. 452.

[115] Kleffner, K. Jann, p. 453.

[116] Kleffner, K. Jann, p. 454.

### 4.2.2 Stability and Effective Control

Additional Protocol II lays down even more conditions in order for it to be applicable to NSAs. One of them is that the NSA has to have effective control of a territory within the State where the non-international conflict takes place. This condition is stated in Article 1 paragraph 1 of the Protocol. While the condition of effective control is hard to establish since the provision does not state what kind of degree the control must be. One interpretation would be that the NSA must have similar control as the one a State has of its territory.[117] Another interpretation made by the ICRC is that the control could be partial.[118]

Another argument is that the NSA must have *de facto* territorial control and claim it as their own. When the NSA claims control they both directly and indirectly represent the people in that region and thereby acts as a form of a non-recognised State. The argument against this theory is that even though a NSA has territorial control, this does not automatically mean that it represents the State. Another aspect is how long this territorial control must be in effect. How long do they have to be in control of the territory before they are bound by certain obligations in international law?[119]

It is generally accepted in international law that if a NSA becomes a State, they are

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[117] Bellal, Annyssa & Casey-Maslen, Stuart, p. 184.

[118] Commentary of 1977 Additional Protocol II. Available at: <http://www.icrc.org/ihl.nsf/COM/475-760004?OpenDocument>, accessed 10 December 2017.

[119] Pushparajah, Nadarajah, p. 109.

still responsible for their actions they made as a NSA.[120] However, not all NSAs that have territorial control become new States. As Clapham says:

> Rather than focusing on the theoretical possibility of holding a state accountable for the acts of the insurgent group that went on to become the state-it is time to look at another way in which to say that the group themselves are the bearer of international obligations.[121]

### 4.2.3 International Legal Personality

International Legal Personality is something commonly discussed by scholars in regard to NSAs. If they are considered to have the same personality as States, this could answer to why treaties are binding on both States and NSAs alike. This condition will further be examined and also its correlation with the application of Common Article 3.

Armed groups such as NSAs, no matter how organised they are, are in no capacity to have legal personality. Even though it can be argued that it is possible for NSAs to have legal personality although limited and that this limited personality originates from Common Article 3 and other similar legal instruments which mention NSAs as parties to international conflicts

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[120] International Law Commission (ILC), Draft Article on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), chp. IV.E.1), Article 10.

[121] Clapham, Andrew. *The Rights and Responsibility of Armed Non-State Actors: The Legal Landscape and Issues Surrounding Engagement*, Geneva Academy of International Humanitarian Law and Human Rights (2010), p. 8. Available at: <http://papers.ssrn.com/sol3/papers.cfm?abstractid=1569636>, accessed 1 December 2017.

and therefore have obligations under international law.[122] This thesis however has no support in the overall practice of States.[123]

In order to come to a satisfying conclusion on whether or not NSAs have some kind of legal personality, it is important to look at the legal documents and not only the argument put forth. In this case, Common Article 3 provides good guidance. The very last provision of Article 3 says: "The application of the preceding provisions shall not affect the legal status of the Parties to the conflict." This provision was first added to ease the minds of the States. If it were not for this restriction, it would be hard for governments to supress a revolt or civil war because it would interfere with the Government's authority. In effect, when dealing with NSAs and applying Common Article 3, the State is not granting the NSA any authority. This applies the other way around as well; if a NSA would apply the Article, it would not give it international status. No matter whatever title or claim they have.[124]

The Appeals Chamber of the SCSL said in the *Kallon* case that there is no doubt that Common Article 3 is binding on States and NSAs but this does not by itself mean that NSAs have international personality under international law.[125]

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[122] Zegveld, Liesbeth, p. 151.

[123] Dinstein, Yoram, p. 65.

[124] Commentary of 1960 to the Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949. Available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=466097D7A301F8C4C12563CD00424E2B>, accessed 1 December 2017.

[125] *Prosecutor v. Brima Bazzy Kamara and Morris Kallon*, Decision On Challenge To Jurisdiction, Case No. SCSL-2004-15-AR72(E), 13 March 2004, Special Court for Sierra Leone, para 45.

# 5 Analysis

The main hypothesis to be proven in this thesis is that even though there are some uncertainties among the scholars in the legal international society, non-state actors do have obligations under international law similar to those that States are bound by.

It has proven difficult to find out exactly which obligations regarding child soldiers NSAs are bound by in any given situations. However there are some tools that can prove useful in order to determine which obligations apply in which situations.

Since the field of regulations regarding child soldiers are divided into three sections: international humanitarian law, human rights law and customary international law this complicates the determination of applicable obligations even further. As can be seen from this thesis, human rights law and international humanitarian law are applied differently in regard to NSAs. This is since human rights law is more focused on rights owned by an individual against a State. In other words; human rights law is more State-centric. From the point of view of the NSA, this proves problematic. Hopefully, since child soldiers are often an issue in times of war, where international humanitarian law applies, it does not matter too much that NSAs may not be bound by human rights law in the same way because other obligations derived from IHL are applicable in those situations instead.

The prohibition of the recruitment of child soldiers, the protection of children in armed conflicts in general and the protection of children from taking part in hostilities are mentioned in both human rights and international humanitarian law treaties. Some of those regulations are even seen as customary international law. Especially common article 3 of the

Geneva Conventions, some parts of the AP II and the recruitment of children. Which means that there are provisions that apply to non-international armed conflicts and possibly could apply to NSAs and not only States.

What can be said about the regulation of children is that there are extensive international instruments that regulate their protection in armed conflict in several ways. The CRC and the Geneva Conventions have many ratifications made by many States even though the CRC may not be considered as customary international law.

While a lot of these instrument presented in this essay are directed to and bind States, there is a question of whether they also bind NSAs and how. Since human rights instruments are directed to States in a more prominent way than international human right treaties, it is possible that they do not apply to NSAs at all even though it seems like the development is headed towards a different path lately. Therefore there is no real evidence or certainty that for example the Convention on the Rights of the Child or its Optional Protocol bind non-state actors at this point in time. On the other hand, the development towards it being applicable to non-state actors has been seemingly fast and it may be so in a near future.

For the moment international humanitarian law and customary international law must be the focus when establishing whether NSAs are bound by regulations regarding children and child recruitment. The three different obligations regarding children in armed conflict seem to exist in both treaty law and customary international law. Having established the existence of these obligations, the next task would be to analyse whether or not non-state actors are bound by them.

When looking at the GCs and its APs, it seems as though the AP II is especially relevant because it refers to non-international conflicts. The AP I,

is not as relevant and does not, according to Matthew Happold, bind NSAs except from when the people exercise their right to self-determination.

After having determined that there are obligations that could possibly be applicable to NSAs, the questions that follow are if and how NSAs, as a party to an armed conflict, are bound by international law. If they indeed have obligations where do they originate from and why? There are a few theories to answer those questions; legislative jurisdiction, they themselves aspire to become or claim to be governments and through customary international law.

Even if one or several of the theories give a satisfying answer to the problem, this thesis proves that the NSA itself still has to reach certain requirements in order to be bound by obligations regarding child soldiers.

In order for them to be bound by the obligation to not recruit children into their armed forces, there has to exist an obligation applicable in international law (preferably international humanitarian law or customary international law), the obligation must originate from somewhere and the non-state actor has to live up to a set of requirements.

This is where it becomes really interesting. Each of these theories have flaws and it is in no way obvious when either one of them apply. The first two theories are based on treaty law and the third is based on customary international law. Customary international law seems to be the easiest to determine, if it can be established that there exists an obligation in customary international law, NSAs are probably bound by it since it is generally considered as being binding on NSAs.

In order to reach a satisfying conclusion it is important to examine the specific conflict, the NSA and its characteristics, the obligation and where it

is found and also the children since some instruments refer to child soldiers as persons under fifteen and others as under eighteen.

Either way, the legal position in regard to NSAs and their obligations in international law whether it is regarding child soldiers or any other provision has to be clarified. The international community and the legal setting are unclear and the practice is incoherent when it comes to applicable law to non-state actors.

This thesis has not brought up the issue of compliance except when it comes to where the obligations originate from and whether or not NSAs are bound by them and only in brief by mentioning that some NSAs oppose the regime and are therefore unlikely to accept to be bound by an obligation through the State. This thesis has sought to answer different questions but even though the NSA is bound by an obligation through other means but the State of which they are opposing, it is unlikely that they would comply by it. The most important thing to establish in this essay is the obligations, why and how NSAs are bound by them. The issue of NSAs not complying with their obligations is a matter for another thesis but still worth mentioning.

When analysing the regulations found in the different international legal documents in regard to the protection of children, they seem to be clear, elaborate and definitive. In that sense, they are satisfying. However, the application of them is not clear when it comes to the NSAs. There are several instances in different conflicts around the world where not only States have recruited children in armed conflict. In order to solve the problem of children being affected by war, all aspects of the law have to be more defined. There should be no confusion of the law itself, the application of it or who are bound by it.

By determining that non-state actors are in fact bound by the international legal obligations regarding child soldiers and thereby clarifying the

international law, it is hopefully easier to bring forward a change to how children are treated in armed conflicts around the world. In internal armed conflicts, it seems as though non-state actors should be held to the same standards as States and also be bound by the obligations regarding the protection of children. Since it is not only States but also other actors in wars that use child soldiers, these obligations should apply to them all in order to reach the intended impact. By determining the frames and the applicability of international law, not only States will be accountable for recruiting child soldiers but non-state actors will also have the obligation to refrain from exposing and using children in armed conflicts.

# 6 Conclusion

If the obligations to protect and refrain from recruiting children are mentioned in customary international law this means that NSAs are probably bound by them, at least if the NSAs have the characteristics mentioned. The prohibition against child recruitment is mentioned in lists of customary international law and NSAs are thereby bound by the obligation not to recruit children into their armed forces.

Human rights law is generally not binding on NSAs in non-international conflicts but some international humanitarian law obligations are if the non-state actor reaches one or several of the mentioned requirements. They are either bound by the obligation through legislative jurisdiction, governmental claims or customary international law.

Despite the different legal instruments in force today, they still do not provide enough protection for children in armed conflicts. Some of these problems lies in the issue of binding non-state actors to obligations in international law. While millions of children die every decade, it is of paramount importance to clarify the law and stop the non-state actors from escaping justice.

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