Girls and Boys at War

*Prohibition in International Law against the Use of Child Soldiers*

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Abstract

The recruitment, enlistment and use of children younger than fifteen to participate actively in hostilities is prohibited in customary international law as well as in several international legal instruments. The use of child soldiers is, despite of the prohibition, a widespread phenomenon with 300,000 as the estimated number of child soldiers in national armies as well as in various rebel and insurgent groups in the world today. Although the problem is world-wide; most recent focus have been on Africa where children have served and still serve in ongoing conflicts in various functions including but not limited to front line soldiers, messengers, guards and sex-slaves. Many of the world’s child soldiers are girls that are facing the risks of sexual abuse and discrimination. In this thesis the 1996-2002 civil war in Sierra Leone will serve as an example of a conflict were children were used as soldiers.

Prohibition against the use of child soldiers can be found in international legal instruments in both human rights law and international humanitarian law. It can also be found in instruments in the fields of international labor law and prohibition against slavery. The provisions differ in their definition of a child soldier; concerning age limit as well as the child’s function during the conflict. There are also differences in the responsibility of states to protect children against being used as soldiers. This particularly affects girl soldiers since they often have their primary tasks behind the front line and thus are not usually included in the more narrow definitions of child soldiers.

Two courts; the International Criminal Court (ICC) and the Special Court for Sierra Leone (SCSL) are used as examples of enforcement mechanisms. The SCSL as being the first court to deliver convictions for the use of child soldiers as well as thoroughly discussing the illegality of the use of child soldiers has been of importance in the fight against the use of child soldiers. The ICC will be the enforcement mechanism of the future and it has already prosecuted for the use of child soldiers. The SCSL has raised the awareness and started the struggle against impunity for those responsible for using child soldiers but it is the ICC that will have to continue the fight, although with some obstacles to overcome.
**Abbreviations**

AFRC  Armed Forces Revolutionary Council  
AU  African Union  
CDF  Civil Defense Forces  
CRC  Convention on the Rights of the Child  
DDR  Demobilization, Disarmament and Reintegration  
DRC  Democratic Republic of Congo  
ECOMOG  Economic Community of West African States  
ESDP  European Security and Defense Policy  
EU  European Union  
FPLC  Forces Patriotiques pour la Libération du Congo  
HRW  Human Rights Watch  
ICC  International Criminal Court  
ICTR  International Criminal Tribunal for Rwanda  
ICTY  International Criminal Tribunal for Yugoslavia  
IDP  Internally Displaced Persons  
ILO  International Labor Organization  
LRA  Lord’s Resistance Army  
MONUC  United Nations Mission in the Democratic Republic of Congo  
NGO  Non-governmental Organization  
RUF  Revolutionary United Front  
SBU  Small Boy Unit  
SCSL  Special Court for Sierra Leone  
SGU  Small Girl Unit  
UN  United Nations  
UNICEF  United Nations Children’s Fund  
UNLA  Uganda National Liberation Army  
UPC  Union de Patriots Congolais  
UPDA  Ugandan Peoples’ Democratic Army
1. Objectives

1.1 Objectives

War is horrific for a state and its people, and despite numerous efforts from the United Nations, inter-governmental organizations, non-governmental organizations, states and individuals world-peace is still a utopia. While world-peace is yet not an option, one might hope that we at least should be able to protect those who are the most vulnerable, namely children, from taking an active part in armed conflicts. Sadly, this is also far from reality and in this very moment hundreds of thousand children serve in state and non-state armed forces of the world.

The reason why I have chosen to concentrate on this horrendous yet important subject is not merely due to its importance to those affected, but also because of recent development in international law and jurisprudence; although the usage of children as combatants in armed conflicts is not a new phenomenon, it is only in the last few decades that the issue has been brought to attention and condemned.

The primary purpose of this essay is to analyze the recent development in the prohibition against the enlistment, conscription and use of child soldiers. In order to accomplish this I will use cases from the Special Court for Sierra Leone (SCSL) and from the International Criminal Court (ICC). The 1996-2002 conflict in Sierra Leone will also serve as an example of a conflict with children involved as combatants.

The children around the world who participate in armed conflicts do not belong to a heterogenic group; they have different backgrounds and experiences. Naturally, not all aspects will be addressed, however, where appropriate I have chosen to have a gender perspective. Girls and boys often have different roles in society at a whole which also applies in armed conflicts which is to some extent reflected in legislation and decisions. My aim is therefore to include a gender perspective in the answers to the questions below.

The main question to be answered is whether the cases by the Special Court for Sierra Leone and those by the International Criminal Court have brought any changes to the prohibition of enlistment, conscription and use of child soldiers, and if so, in what sense?

Sub-questions to be answered are whether the current legal framework offer sufficient protection to children involved in armed conflict and if the enforcement mechanisms are functioning in a satisfactory manner. These sub-questions will lead to a lege ferenda discussion on future developments.

1.2 Method

I have chosen to mainly use a dogmatic method with some influence by the social science field. This means that I have gone beyond the legal method and highlighted some of the practical aspects.
As this essay has an international focus, legal sources of public international law such as customary law, treaties and general principles of law have been used. The starting point of my thesis is mainly treaties and thus I have used customary law and general legal principles to a lesser extent.

One of the problems I encountered is the lack of new and available material. One example is the website of the Special Court for Sierra Leone, which does not always contain recent information and updates.

Due to the fact that several legal processes are still ongoing and this field of international law is developing at this very moment it has been difficult to find updated literature and I have therefore relied mainly on electronic material such as scientific articles and reports. Printed material in the form of books have mainly been used in the sections concerning background and history while I have relied on articles and electronically sources for those parts of the paper that require recent information.

### 1.3 Structure

I have chosen a thematic disposition where the paper is divided into sections covering a general overview of child soldiers, legal instruments that can be applied to the use of child soldiers, the International Criminal Court and a case study of the Sierra Leone conflict and the following trials for indictment.

Chapter two concerns child soldiers in general and also covers the history of the phenomena, the present day occurrence and underlying causes of child soldiery. This chapter also includes a section on girl soldiers, highlighting their situation and difficulties.

In the following chapter I will present the international legal instruments on the subject of child soldiery. The section starts with a presentation of definitions of a child soldier, based on international legal documents. Conventions on international humanitarian law and human rights law and their sections on child soldiery will then be listed; customary law will also be touched upon. The last part of this chapter will include soft law including European Union and African Union recommendations. The role of the United Nations, in particular the Security Council, will also be raised here.

Chapter four to six will concern more practical issues and include examples of international court cases and a case study of the conflict in Sierra Leone and the use of child soldiers in that conflict.

Chapter number four will be a presentation of the International Criminal Court and its efforts to prosecute those recruiting and using child soldiers. The relevant legal provisions for the court are to be found in the Rome Statute, which will also be presented in this chapter. Two practical examples of the work of the ICC are to be given towards the end of the chapter. One being the indictment of Thomas Lubanga Dyilo, the commander in chief of a military group in the Democratic Republic of Congo (DRC), charged with the war crimes of conscripting and enlisting children under the age of fifteen years into an armed group and using them to participate actively in hostilities. The other example is of the arrest order of Joseph Kony, the Ugandan leader of the Lord’s Resistance Army.
The fifth chapter will be about the conflict in Sierra Leone and child soldiers taking part in that conflict. Here an introduction to the country of Sierra Leone and the war it was affected by will be given. This chapter will also include a section on girl soldiers in Sierra Leone.

Chapter six will continue on the subject of Sierra Leone and include the background on the Special Court for Sierra Leone and its purpose. The main part of this section will be a presentation of a few of the findings Special Court cases.

In the last two chapters, analysis and conclusions, I will present my own thoughts and findings and answer the questions asked in the very beginning of the paper. The factual findings presented in chapter two to six will be discussed here. The future and lege ferenda will also be touched upon.

1.4 Delimitation

The use of children in conflicts is not limited to any continent or to a specific time period; focus in this essay will however be on child soldiers in Africa from the 1990s till the present day, save for a shorter introduction and background which will have a more global approach. While numerous examples of child soldiery can be found in Africa I have chosen to examine the 1996-2002 conflict in Sierra Leone, including decisions delivered by the Special Court for Sierra Leone. Indictments of the permanent International Criminal Court will also be included as they concern more recent and still ongoing conflicts.

This whole paper is based upon the assumption that taking part in armed conflicts and military operations, including peace time operations is detrimental for a child and should be avoided. I have therefore chosen not to discuss the question of advantages and disadvantages for children involved with military or armed groups any more than what is needed to introduce the various reasons for the fact that child soldiers exist.

Concerning international legislation; treaties and other binding documents of global character as well as regional legislation relevant only for African states and actors will be used while other regional documents will be omitted.

When appropriate I will include a gender perspective. This does not mean that it is the main focus of the paper or that it will be part of all sections; neither does it mean that a full gender analysis is to be expected in any part of the essay.

The term “child” in international law often refers to humans below the age of eighteen; however, in the context of child soldiers in international law the definition of a “child” is slightly more complicated. Different treaties use different ages (fifteen and eighteen being the most common). For the purpose of this essay; when the term “child” is used in the context of children as soldiers and nothing else stated, it will refer to children under the age of fifteen.

The term “soldier” may also cause confusion. As will be seen in the essay, several terms such as “enlistment”, “conscription” “use to take active part in hostilities” etc will be used and they all have slightly different meanings. In introductions, backgrounds etc the term “child soldier” will be used as a broad term for all children (under the age of fifteen) engaged in military activities.
2. Child soldiers – an overview

2.1 Introduction

It is estimated that 250,000-500,000 children are engaged in armed conflict around the world, around 300,000 of these are thought to be actively engaged in combat, furthermore, out of these 300,000 some 120,000 are estimated to be in Africa.¹ The use of child soldiers has caused the deaths of more than two million children, left six millions disabled and one million orphaned. In addition to physical injuries more than ten million children have been afflicted by psychological trauma and twelve millions have been made refugees.² Another side of the problem is that between a third³ and 40% of the world’s child soldiers are girls.⁴ All these numbers are however very uncertain and vague, no statistics is kept and no one knows exactly how many child soldiers there are to be found in the world’s national and non-national armies.⁵

The Coalition to stop the use of child soldier concluded in its 2008 global report that at least 63 countries allowed for children (under eighteen) to voluntarily enlist in their armed forces, 26 of those had children in their ranks. There are other countries that though not permitting the recruitment of children introduce children to a military culture through military-connected schools and other youth initiatives.⁶

The number of conflicts in which children were directly used decreased from 27 in 2004 to 17 in late 2007. This downturn is however not so much the outcome of state effort to end this horrible practice as the result of a general decrease in the number of armed conflicts around the world. Sadly, where armed conflicts do occur, it is almost certain that children are involved. Most of these children are in non-state armed groups, but some governments still have children within their ranks.⁷ Examples of this are the conflicts in the Central African Republic, Chad, Iraq, Somalia and Darfur all in which child soldiers are involved.⁸

As of November 2007 military recruitment in different forms of children under the age of eighteen took place in at least 86 countries and territories. This includes recruitment by armed groups and government forces during conflicts as well as recruitment into peace time armies.⁹

⁶ Coalition To Stop Child Soldiers “Child Soldiers Global Report 2008” 2008 United Kingdom, Bell and Bain p. 16
⁷ Coalition To Stop Child Soldiers “Child Soldiers Global Report 2008” 2008 United Kingdom, Bell and Bain p. 12
⁸ Coalition To Stop Child Soldiers “Child Soldiers Global Report 2008” 2008 United Kingdom, Bell and Bain p. 15
⁹ Coalition To Stop Child Soldiers “Child Soldiers Global Report 2008” 2008 United Kingdom, Bell and Bain p. 12
2.1.1 Girl soldiers

It became evident to the world that girl soldiers existed after the armed conflicts in Angola and Mozambique in the 1990. Since then girl soldiers have been present in nearly all non-international conflicts. In 2004 about 3000 girl soldiers were demobilized and received reintegration support in the process that formally ended the Liberian conflict. The same numbers of girls were included in demobilization, disarmament and reintegration (DDR) programs in the Democratic Republic of Congo. In both countries the estimated sum of girls in armed forces far exceeded the 3000 included in DDR programs.

Girls that fight at the front lines exist, but many girls and young women perform domestic tasks and sexual services to armed groups. These girls, being neither strictly civilians nor combatants, are often caught in a grey zone in international law. Being used for sexual reasons may include sex slavery and the practice of selling or giving away girls as a reward. Consequences of the use of girls for sexual purposes are sufferings including infections of sexual transmitted diseases, such as HIV and pregnancies. In Sierra Leone it has been estimated that between seventy and ninety percent of rape victims suffered from a sexually transmitted disease. A study of underage girl soldiers in Sierra Leone, Mozambique and Northern Uganda showed that about thirty percent became pregnant.

Although many girl soldiers are subjected to sexual violence and abuse, sexual slavery is seldom the sole purpose of the use of girls and young women in African rebel groups. In most African countries are women expected to perform daily chores and agricultural work. These are tasks that need to be carried out even in times of war and are especially important to rebel and insurgent groups that cannot rely solely on looting and the cooperation of civil population for their survival.

While the needs of girls for a successful DDR process often are different from those of boys, it is a fact that has mainly been ignored in post-demobilization programs. The availability of medical assistance for physical injury from rape and sexually transmitted diseases is often low.

10 Coalition To Stop Child Soldiers “Child Soldiers Global Report 2008” 2008 United Kingdom, Bell and Bain p. 28-29
11 The DDR-programs for disarmament, demobilization and reintegration are UN led processes that are part of the building of security and stability in post-conflict societies. The aim of the DDR programs is to help the transition of ex-combatants from conflict to peace and the peaceful reintegration to the post-conflict society. DDR-processes are part of all of the last seven peacekeeping operations established by the UN Security Council, including the missions in Sierra Leone, Democratic Republic of Congo and Liberia. There are also DDR-programs in countries where there are no current UN peacekeeping operations such as Somalia and Uganda. The DDR programs are mainly for adult ex-combatants but there are also programs designed for former child soldiers. http://www.unddr.org/whatisddr.php
12 Coalition To Stop Child Soldiers “Child Soldiers Global Report 2008” 2008 United Kingdom, Bell and Bain p. 28-29
and girl mothers and their children are a vulnerable group; risking stigmatization and rejection, in most of the post-conflict societies.\textsuperscript{17}

\subsection*{2.2 Historical background}

The problem of child soldiers is far from recent; it is a part of the history of all civilizations. In the European Middle Ages young boys from the upper class were expected to serve as “squires” and become knights. From the age of around thirteen these boys were taught the duties and responsibilities of a knight as well as fighting skills. The history of child soldiers can also be seen in terms such as “infantry”; the Italians called the young soldiers following the knights on foot \textit{infante}, meaning child.\textsuperscript{18} Other historical examples include the “children’s crusade” of 1212, divisions of young boys in the army of Napoleon, and child fighters employed by the Nazis during the Second World War.\textsuperscript{19} Children as parts of fighting forces was not seen as something unnatural and it was not until the industrial revolution and the spread of formal and institutionalized schooling that the view of children and childhood as something separate from adults became the common opinion in the industrialized world. Along with this view came the concept of a child soldier as an abused and exploited victim. Ties between childhood and military culture continue to exist in the West in the form of military schools and academies.\textsuperscript{20} After the World Wars “small boy units” were established by the British in some of its colonies, including Sierra Leone. By the 1980s several national and non-national armies of the world undisturbedly used and recruited child soldiers. In 1996 Graca Michel’s report “Impact of Armed Conflict on Children”\textsuperscript{21} was published and the international community, including the UN was made aware of the enormous problem. The UN General adopted resolution 48/157 as an attempt to protect children from armed conflict and Graca Machel was appointed to survey the issue.\textsuperscript{22}

\subsection*{2.3 Why are there child soldiers? Root causes and modern inventions}

To understand and end issue of child soldiers the root causes must be addressed. Several factors contribute to the present problem of child soldiery; including poverty, inequality, discrimination and human rights abuses. Where one or more of these conditions exist, children will go on being vulnerable to involvement in armed groups.\textsuperscript{23} The involvement of

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\textsuperscript{17} Coalition To Stop Child Soldiers “Child Soldiers Global Report 2008” 2008 United Kingdom, Bell and Bain pp. 16
\textsuperscript{20} Rosen, David M “Armies of the Young – Child Soldiers in War and Terrorism” New Brunswick, NJ USA, Rutgers University Press, 2005 pp. 6-8
\textsuperscript{23} Coalition To Stop Child Soldiers “Child Soldiers Global Report 2008” 2008 United Kingdom, Bell and Bain” p. 15
\end{flushleft}
children in armed conflict can be forced or voluntary, though the difference between the two may be uncertain.  

2.3.1 Modern Conflicts

A part of the problem of child soldiers has by scholars been suggested to be connected with the characteristics of so called “new wars”. While wars traditionally have been fought by centralized states for political and territorial motives, new wars arise in a context that is characterized by “the fragmentation of armies and police forces; the growth of organized crime and paramilitary groups [and] the ready availability of weapons and mercenaries”. In new wars, the fighting is carried out among civilians, which is the group that stands for over 90% of the causalities. In these modern conflicts the distinction between combatants and civilians has become uncertain and civilians, especially children, are forced into military activities and to perform military tasks. The wars of today are often internal rather than fought between states and they involve a wider range of political and military actors than traditional wars did; it is not uncommon that warlords controlling a specific area, organized criminal groups, units of regular forces or security service and mercenaries and private military companies all are involved in the same conflict. The forces mobilized in modern wars have usually had less formal training than conventional combatants, opening up for conflicts where the humanitarian laws are less respected.

Modern conflicts of this type have been present in Western Africa for many years and it may help turning children into child soldiers in the respect that in a pro-longed low-intensity conflict children are at a high risk of being separated from their parents, either permanently by death or temporarily since children are often left to fend for themselves. These children often have to make the choice between begging on the street or join an armed force or militia, the latter alternative often correctly viewed as safer by the child. Children growing up in war torn areas are seldom given any other options than to continue the fighting they have witnessed during childhood.

2.3.2 Small personal weapons

In the unstable world of today there is an increase of the sale and use of small personal weapons. Today an estimated amount of five hundred million small arms have been sold globally. The availability and usage of small personal weapons does not only reflect the instability and insecurity of the world today but also enables the use of children in armed

conflicts. The UN Special Representative for Children and Armed Conflict concluded in her 2008 report that the widely spread availability of small arms and light weapons aggravate conflicts and harden peace building processes as well as help sustaining a culture of violence in fragile post-conflict societies. Also explosive weapons such as hand grenades and land mines can easily be thrown or planted by children. Modern technology and the development towards weapons demanding less physical strength and training from its user makes even very young children useful in combat.

2.3.3 Social and economic reasons

In many countries children are viewed as less valuable and less human, than adults. Without appreciation and protection children are more likely to become involved in armed conflicts. Children may also be alone for other reasons; in modern days of globalization many adults in developing countries look for work far away from home, leaving their children behind. Other children are orphaned because of AIDS. To abandoned and orphaned children an army may seem as a substitute for a family, providing security and stability. In an article related to the trafficking of children Virginia Garrard stress poverty as an important factor for the vulnerability of children; in families struggling for survival children are the “most vulnerable segment in the social pyramid”. Children in these families must contribute to the survival of the family, sometimes through illegal and dangerous means, such as working for an army or armed organization.

Children of both sexes join military group on what at least on the surface may seem to be out of free will. While some of the reasons for volunteering are the same for girls and boys, girls may have reasons not shared with male children. Girls may choose to join an armed group for reasons of domestic problems, protection and equality. Joining a military group for the sake of equality may seem like a drastic action to take for a young girl, but many girls want to prove their equality with boys and some armed groups even try to recruit girls by arguing that they will be treated equal and have equal opportunities. This is however usually not the case and the girls within fighting forces are often used as domestic laborers and for sexual purposes. While male children do not need to struggle for equality the same way as girls, the status of being a warrior may be seen as a positive attribute to strive for.

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30 Report of the Special Representative of the Secretary-General for Children and Armed Conflict A/63/227, 6 aug 2008, p. 10
31 Honwana, Alcinda ”Child soldiers in Africa” 2006 University of Pennsylvania Press, Philadelphia, Pennsylvania p. 31
38 Freeland, Steven “Child soldiers and international crimes – how should international law be applied?” 3 NZJPIL 2005 p. 308
2.3.4 Military and strategically reasons

Children are physically vulnerable and trained to obey and follow orders without questioning and are easily intimidated and tricked into performing dangerous tasks. Their difficulties to understand the consequences of their actions and how they affect other people make children unlikely to follow the rules of war and therefore particularly dangerous in battle.\(^{39}\) A child being physically smaller than adults is another factor; its size allows him or her to be forced into mine fields or frontlines by senior commanders while the rest of the troops stay behind.\(^{40}\) Findings from case studies\(^ {41}\) show that reasons why military leaders choose to have children within their ranks include that children have fewer opportunities outside the barracks and therefore will adapt more easily than adults taken from his work, studies or family. Also the fact that children usually are healthy and without any family obligations was seen as positive.\(^ {42}\) Some armed groups, the Lord’s Resistance Army in Uganda being an example, use forced recruitments and abductions to gain new troops and fill their ranks. Due to the limited physical strength of children and their vulnerable status in many societies children are more easily abducted or forced to join these groups.\(^ {43}\)

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\(^{39}\) Silva, Jennifer R, “Child Soldiers: A Call to the International Community to Protect Children from War” 31 Suffolk Transnat’l L. Rev. 681 2007-2008 p. 688


\(^{41}\) Quotations from military leaders from case studies from Paraguay and Liberia

\(^{42}\) Brett, Rachel and McCallin, Margaret “Children the invisible soldiers” Rädda Barnen, Grafiska Punkten, Växjö 1996, p. 184

\(^{43}\) Freeland, Steven “Child soldiers and international crimes – how should international law be applied?” 3 NZJPIL 2005 p. 305
3. Prohibition against Child soldiers in international law

International prohibitions against the use of child soldiers are to be found in several treaties under international humanitarian law, human rights law and international labor law.\(^44\) The prohibition on the use of child soldiers stands out among other provisions in international law because of its universality and for implementation. Thirty years ago it was hardly seen as a crime to recruit children; this changed however in the 1990s and has turned into over a dozen indictments in international criminal courts.\(^45\)

3.1 Definition of a child soldier in international law

In order to be able to identify who is a child soldier the two words “child” and ”soldier” must be defined. Perhaps one of the most widespread definitions of who is a child can be found in the 1989 Convention on the Rights of the Child which in its first article states that:

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

In determining which child is a soldier and thus is protected by various treaties three different terms are used; enlistment, recruitment and using to take active part in hostilities. The term “child soldier” will thus include all three terms mentioned above.

In all international law provisions concerning child soldiers the definition of a child soldier depends on the criterion of the age of a specific individual. While an objective criterion like this makes the defining easier, it can cause trouble in societies where the distinction between a child and an adult traditionally has got less to do with age and more to do with ceremonies or acts performed by the individual. The situation might even occur where the act of participating in armed conflict may itself contribute to a person being considered as an adult.\(^46\)

As will be seen further on in this chapter, when referring to child soldiers most universally or nearly universally accepted treaties and those parts that have crystallized into customary law set the age limit at fifteen.\(^47\) More recent efforts to raise the age limit to eighteen to agree with the definition of “child” in most documents have however been made.\(^48\)

The perhaps most extensive definition a child soldier can be found in the Cape Town Principles from 1997. The Cape Town Principles and Best Practices are the result from cooperation between UNICEF and a NGO working group on the Convention on the Rights of

\(^{44}\) The Rome Statute, the Convention on Childrens Rights and the International Labour Organisation Convention 182 to mention a few examples.


\(^{46}\) Freeland, Steven “Child soldiers and international crimes – how should international law be applied?” 3 NZJPL 2005 pp. 307-308

\(^{47}\) The Convention on the Rights of the Child, the Rome Statute, the Geneva Conventions and the Statute for the Special Court for Sierra Leone all set the age limit at fifteen.

\(^{48}\) The higher age limit is to be found in article 2 in the African Charter on the Rights and Welfare of the Child, and in article 2 of the International Labour Organisation Convention No 182, on the Worst Forms of Child Labour Convention.
the Child to create a symposium. The definition of a child soldier according to the Cape Town Principles is as follows:

“...any person under 18 years of age who is part of any kind of regular or irregular armed force or armed group in any capacity, including but not limited to cooks, porters, messengers and anyone accompanying such groups, other than family members. The definition includes girls recruited for sexual purposes and for forced marriage.”

3.2 International humanitarian law

International humanitarian law is the international legal framework that seeks to limit the effects of armed conflict for humanitarian reasons. International humanitarian law applies once an armed conflict has started; it does not regulate when a state can start to use military force. Once the conflict has started it applies equally to all parts in it, regardless of who started the conflict. A substantial part of international humanitarian law is codified in the Geneva conventions which protect people who are not or who are no longer taking part of the conflict. Other treaties within international humanitarian law concern the prohibition of using certain weapons and the protection of certain people and goods. Many parts of the international humanitarian law are now accepted as customary law.

3.2.1 The Geneva conventions

The Geneva Conventions consists of four conventions and three additional protocols concerning the treatment of people who are not or who are no longer taking part in hostilities such as civilians, prisoners of wars and medical or religious personnel. Children under the age of fifteen are mentioned as a group in need of special protection in the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War. Relevant to the issue of child soldiers are mainly the 1977 Additional Protocol I concerning the protection of the Protection of Victims of International Armed Conflicts and the 1977 Additional Protocol II concerning the Protection of Victims of Non-International Armed Conflicts. Article 76 of Protocol I provides that:

“women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault”.

According to this provision women are to be treated in a manner that protects them from sexual violence during international conflicts.

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50 International Committee of the Red Cross “What is humanitarian law” http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/humanitarian-law-factsheet/SFile/What_is_IHL..pdf
51 Fifteen is set as an age limit in for example article 23 and 38.
52 Gilbertson, Jordan A “Little girls lost: Can the International Community Protect Girl Soldiers?” 29 U. La Verne L. Rev. 2008 p. 228
States are obliged by article 77 Protocol I to prevent children under the age of fifteen from taking a direct part in international armed conflicts. In recruitment states have to give priority to the eldest children when they are choosing between children between the ages of fifteen and eighteen.53

Article 76 and 77 of Additional protocol I both aim for the protection of women and children, it can however be questioned whether they offer sufficient protection. First of all, the minimum age for recruitment is fifteen and not eighteen even though it is said that priority is to be given to the eldest children when choosing. Another disappointment is that children are only protected when “feasible”. Furthermore, the protection of women and children only apply when they are civilians and not parts of the conflict. In conclusion, the additional protocol I to the Geneva Conventions fails to consider the possibility of female children under the age of fifteen being parts of conflict without being used as direct participants; a practice common in several countries.54

Protocol II, article 4 includes “‘fundamental guarantees” for those not directly involved in the conflict. According to this provision they are to be treated humane under all circumstances. Concerning women not directly involved in hostilities article 4(2) (e) prohibits “outrage upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault.” Article 4(3) (c) provides protection for children by stating that

“children who have not attained the age of fifteen years shall neither be recruited in the forces or groups nor allowed to take part in the hostilities”.

Again there is a failure in raising the age limit to eighteen, however, in one respect the formulation in Protocol II is to prefer above that in article 77 in Protocol I; the “feasibility” provision is missing. All participation, directly or indirectly, by children under the age of fifteen in non international conflicts is prohibited by this section.55

The Geneva Convention does not succeed in providing a precise definition of a child, but it does manage to establish 15 as the age of which children below enjoy special protections.56

3.3 International human rights law

Human rights are the fundamental rights humans should enjoy in relation to state authorities.57 The sources of human rights include general legal principles, inter-state agreements in the form of conventions, treaties or covenants, UN resolutions and customary law. UN resolutions could be considered recommendations to the states.58 however UN Security Council

57 Fisher, David I “Mänskliga rättigheter - en introduktion” Fjärde upplagan Elanders, Vällingby, p. 13
58 Fisher, David I “Mänskliga rättigheter - en introduktion” Fjärde upplagan Elanders, Vällingby, pp. 17-21
resolutions may be considered as binding. As will be seen in this part, the prohibition on child soldiers is present in all of these forms of international human rights law and both in regional inter-state agreements and in universal agreements.

3.3.1 The Convention on the Rights of the Child

The 1989 Convention on the Rights of the Child (CRC) offers protection to children in a number of situations, including children in armed conflicts. It also prohibits “all forms of sexual exploitation and sexual abuses” (article 34) and sale and trafficking of children (article 35).

Under article 38(2) of the Convention on the Rights of the Child all ratifying nations must take “all feasible measures” to make sure that children under the age of fifteen do not take direct part in armed conflicts. The language is very close to that of Protocol I to the Geneva Convention but it goes a step further by making all ratifying states doing everything feasible to keep children away from participating in armed conflicts. Protocol I only requires the parties to the conflict to take all feasible measures.

In subsection 3 of article 38 ratifying countries are prohibited from recruiting children younger than fifteen and as in Protocol I requires countries to choose older children when choosing between fifteen to eighteen year olds. Other rule in the CRC could also be applicable to situations when children in one way or another participate in military forces; art 3, best interests of the child, art 19, protection of children in care of others and art 24, right of child to enjoyment of health to mention a few examples.

Protection against sexual violence is to be found in the CRC; article 34 prohibits “all forms of sexual exploitation and abuses” and article 35 prohibits participating states from being involved in the sale and trafficking of children. There is no derogation article in the CRC and therefore it applies both in times of peace and during conflict.

59 Article 25 of the United Nations Charter states that “The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”

60 The 1989 Convention on the Rights of the Child Article 38, see also; Gilbertson, Jordan A “Little girls lost: Can the International Community Protect Girl Soldiers?” 29 U. La Verne L. Rev. 2008 p. 230

61 Article 3.1. “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration”

62 Article 19. 1. “States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.”

63 Article 24. 1. “States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.”


3.3.2 The Optional Protocols to the Convention on the Rights of the Child

In the drafting of art 38 of the 1989 CRC, many of those involved in the working group wanted to raise the standards and prohibit anyone under the age of eighteen from participating in armed conflict. However, the parties could not agree on this, and it was not until the 2000 Optional Protocol on Child Soldiers that the standards were raised within ratifying states. The optional protocol established eighteen as the minimum age for both compulsory recruitment by states and direct participation in government forces (articles 1 and 2). The participating states are also required to raise the current minimum age of fifteen for voluntary recruitment of those under eighteen (article 1). The states themselves can decide how much they want to raise the minimum age, but once they do, they must make a binding declaration stating the minimum age that will be respected (art 3 (1) (2)). The countries must ensure that the voluntary recruitment is regulated and that the minimum age is respected (3(3)). Regarding non-governmental forces, the optional protocol goes even further and prohibits all recruitment or use in hostilities of children younger than eighteen. States must criminalize such practices (art 4).

The Optional Protocol I succeed in its main purpose; to raise the minimum age of recruitment and participation in armed conflicts. It is also notable that one of the world’s most influential countries, the United States, which has not ratified the CRC, has ratified Optional Protocol I. The protocol fails however in addressing issues such as sexual exploitation and violence that are specific to girls indirectly involved in armed conflicts. It also fails girl soldiers in a broader perspective in that in its first article explicitly excludes indirect participation in hostilities.

The language of this Optional Protocol is somewhat unfortunate compared to that in the African Charter on the Rights and Welfare of the Child and the International Labor (ILO) Convention 182. The term “all feasible measures” is used, which allows for factors other than the protection and the rights of the child to be taken into consideration. There is no definition of the word “feasible” in the optional protocol, but the term has been defined in another international humanitarian law instrument:

“...practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations”. 

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70 Greenhill, Malin and Ulfsparre, Christina ”Mänskliga rättigheter för alla och envar” 2007, Norstedts Juridik, Vällingby, p. 123
72 Freeland, Steven ”Child soldiers and international crimes – how should international law be applied?” 3 NZJPIL 2005 pp. 315-316
73 Both the African Charter on the Rights and Welfare of the Child and the International Labor Convention 182 will be discussed later on.
Some countries, the United States being one example, have also included similar definitions in its interpretive declarations to the Optional Protocol. Concerns have been expressed about the possibility of this definition becoming widely accepted and part of customary international law, a development which could mean that the obligation on states to protect children would be secondary and open up a possibility for children under eighteen to be used, if justified by military circumstances.75

The preamble of the Optional Protocol I include another sentence that gives rise to some concern. It stresses that the protocol is to be

“…without prejudice to the purposes and principles contained in the Charter of the United Nations, including Article 51, and relevant norms of humanitarian law”.

Article 51 of the UN Charter concerns the “inherent” right to self-defense in the case of an armed attack.76

The number of states ratified “The Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict” has increased from 77 up to 120 in the years between 2004 and 2007.77

Issues concerning sexual exploit and trafficking of children are dealt with in Optional Protocol II to the Convention on the Rights of the Child, which prohibits the selling of children and using them for prostitution and/or pornography. In article 2(a) sale of children is defined as

“any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration”.

Girls sexually exploited and traded as goods between fighting forces or groups are by definition covered by these articles. The key for protection by Additional Protocol II is payment; only when girls are being sold or other valuable consideration change hands is the protocol of any use. In situations where girls are brutally abducted and used for sexual purposes by their abductors, without any money transactions, the protocol is of little or no use.78

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75 Freeland, Steven “Child soldiers and international crimes – how should international law be applied?” 3 NZJPIL 2005 p. 315
76 Freeland, Steven “Child soldiers and international crimes – how should international law be applied?” 3 NZJPIL 2005 p. 316
77 Coalition To Stop Child Soldiers “Child Soldiers Global Report 2008” 2008 United Kingdom, Bell and Bain p. 13
3.3.3 The International Labor Organization Convention 182

The ILO convention no 182\textsuperscript{79} from 1999 concerns the prohibition and elimination of the worst forms of child labor. Art 3(a) in this convention prohibits:

\begin{quote}
“all forms of slavery or practices similar to slavery, such as (...) forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict”.
\end{quote}

In this convention, children are defined as those under eighteen years old (article 2). It is important to bear in mind that this convention only includes a ban on forced recruitment of children under eighteen; neither the participation in combat nor voluntary recruitment is prohibited.\textsuperscript{80} The convention also include a gender perspective in that it requests the ratifying states to take into account the special situation of girls.\textsuperscript{81} The obligation of the member states to protect children from the worst forms of child labor is expressed in quite strong words in the convention’s first article which states that all member states:

\begin{quote}
“…shall take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency”.
\end{quote}

3.3.4 The African Charter on the Rights and Welfare of the Child

The 1990 African Charter on the Rights and Welfare of the Child is the only regional instrument that at the present time addresses the issue of child soldiers.\textsuperscript{82} The African Charter on the Rights and Welfare of the Child include articles relevant to the issue of child soldiery and sexual exploitation; a problem for many girl soldiers. Article 2 defines a child as “every human being below the age of 18 years”. Article 22 is about child soldiers and requires ratifying states to:

\begin{quote}
“…take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain ... from recruiting any child”.
\end{quote}

The language of the African Charter is stronger than that in the CRC in that it requires participating states to take all “necessary measures” and it also sets a higher age limit for recruitment and participation, eighteen. However, as many other human rights instruments the African Charter fails in protecting the children who are parts of armed groups but do not actively take part in hostilities, as is the case with many girl soldiers. According to the charter; member states are to prevent “the inducement, coercion or encouragement of a child to engage in any sexual activity”, including the use of children in pornography or prostitution (article 27). Even though the African Charter acknowledges the need for protection of children against participation in armed conflicts and against sexual exploitation, it does not

\textsuperscript{79} The convention is ratified by 171 states, Sierra Leone is however not one of those. http://www.ilo.org/ilolex/english/docs/declworld.htm International Labour Organization’s homepage

\textsuperscript{80} Kuper, Jenny, “Military training and children in armed conflict law policy and practice” 2005 Koninklijke Brill NV, Leiden, The Netherlands, p. 48

\textsuperscript{81} International Labour Organization Convention 182 article 7 (2)(e)

\textsuperscript{82} Freeland, Steven “Child soldiers and international crimes – how should international law be applied?” 3 NZJPIL 2005 p. 311
connect the two issues. The African Charter has another flaw in that it is not binding on internal rebel and insurgent groups which are groups that often are responsible for much of the use of child soldiers.

3.3.5 Prohibition of slavery

The prohibition of slave trade and slavery are well established rules of customary law that are now part of jus cogens in international law. Still, the forced use of children as soldiers is a modern form of slavery. International rules prohibiting slavery are to be found in documents as the Slavery Convention of 1926 and the UN Slavery Convention of 1956. The 1926 Slavery Convention, which is the first international legal document to define slavery, defines slavery as:

“(1)…the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised... (2) The slave trade includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery: all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged; and, in general, every act of trade or transport in slaves.”

The 1956 UN Convention on Slavery included the practices of debt bondage, servitude and any other institutions whereby a woman or a child can be transferred from one person to another. The ban on slavery is not among those international rules that are the first mentioned when discussing the prohibition against the use of child soldiers. Authors such as Susan Tiefenbrun do however argue that “The abduction, transport and forcible use of children as soldiers…” is within the definition of the 1926 and 1956 Slave Conventions.

3.4 Soft law and UN resolutions

Several resolutions and reports by international organizations have been issued in recent years. Some of these documents fall into the category of “soft law”, which means that even though they are not per se legally binding, they may still have legal effects. Particularly UN

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89 Soft law include a large variety of documents from treaties with soft obligations to resolutions that are non-binding or voluntary and codes of conduct from international and regional organizations. Even statements prepared by individuals in non-governmental capacity, with the purpose of laying down international principles can be part of soft law. Chinkin explains the legal effect of soft law by claiming that “soft law may not be
Security Council Resolutions and possibly UN Assembly Resolutions that are unanimously adopted can be regarded as soft law.\textsuperscript{90} Support for the claim of counting UN Security Council resolutions as soft law can be found in article 25 of the UN Charter which imposes a duty on UN member states to “accept and carry out the decisions of the Security Council…”\textsuperscript{91}

The problem of child soldiers has been observed by the UN and frequently addressed in numerous General Assembly reports, Secretary General Recommendations and Security Council Resolutions. The UN contribution is mainly in the form of reports, recommendations and resolutions. Important to remember that the UN special Representative does not have the mandate to perform any operational activity or rescue missions. Rather, the aim of the UN and its special Representative is to raise awareness, inform and try to ensure that proper respect is shown to children in all international cooperation and UN operations\textsuperscript{92}

The United Nations Committee on the Rights of the Child started an examination on state party reports in the implementation of the Optional Protocol on the involvement of children in armed conflict in 2005. The general conclusions drawn from the examinations were that an increased desire among states to develop methods for the protection of children from armed conflict was beginning to emerge but also that many governments must take further measures.\textsuperscript{93}

In 2004 and in 2005 the UN Security Council adopted resolution 1539 and 1612, demanding a monitoring and reporting mechanism on children and armed conflict to be founded.\textsuperscript{94} To answer to the calls of the Security Council a working group on children and armed conflict was established in 2005. The purpose of the group was to review reports submitted under the mission and to observe and examine the development and implementation of time bound action plans to end recruitment and use of child soldiers. The working group has since its establishment taken a variety of actions against abuses of children; the actions including the issuing of conclusions based on reports and the transmission of letters and appeals to parties participating in violations. The Security Council specifically targeted individuals in 2006 when it imposed a travel ban on a leader of an armed group in Côte d’Ivoire and froze the assets of leaders in the Democratic Republic of Congo who recruited child soldiers.\textsuperscript{95}

The UN Security Council is however not the only international body that has taken concern in the issue of child soldiers; various regional bodies such as the European Union (EU) and the African Union (AU) have also taken interest in the question. EU guidelines on children and armed conflict were issued in 2003 and made more practical by an implementation strategy


\textsuperscript{91}Kuper, Jenny, “Military training and children in armed conflict law policy and practice” 2005 Koninklijke Brill NV, Lrifrn, The Netherlands, p. 93


\textsuperscript{93}Coalition To Stop Child Soldiers “Child Soldiers Global Report 2008” 2008 United Kingdom, Bell and Bain pp. 13-14

\textsuperscript{94}Coalition To Stop Child Soldiers “Child Soldiers Global Report 2008” 2008 United Kingdom, Bell and Bain p. 14

\textsuperscript{95}Coalition To Stop Child Soldiers “Child Soldiers Global Report 2008” 2008 United Kingdom, Bell and Bain p. 14
from 2006. A checklist on integration and protection of children was also adopted in order to ensure that the European Security and Defense Policy (ESDP) operations and missions systematically addressed the rights and protection of children.\textsuperscript{96} The AU asked its member states to ratify the African Charter on the Rights and Welfare of the Child before the end of 2008 and to have it implemented by 2010.\textsuperscript{97}

\textsuperscript{96} Coalition To Stop Child Soldiers “\textit{Child Soldiers Global Report 2008}” 2008 United Kingdom, Bell and Bain, p. 14
\textsuperscript{97} Coalition To Stop Child Soldiers “\textit{Child Soldiers Global Report 2008}” 2008 United Kingdom, Bell and Bain, p. 14
4. The International Criminal Court

The International Criminal Court (ICC) is a treaty based court governed by the Rome Statute with the purpose of helping to end impunity for those who have committed the worst crimes of concern to the international community. The ICC, as first of its kind, is a permanent independent international organization with its seat at The Hague.

4.1 Background

Courts established to deal with war crimes and crimes against humanity are not a recent phenomena; courts and tribunals such as the Nuremberg and Tokyo Trials after the Second World War and the International Criminal Tribunals for the former Yugoslavia (ICTY) and for Rwanda (ICTR) after the end of the Cold War have been set up before. These tribunals were the result of the international consensus that impunity could not be accepted. However, these trials were all limited to try crimes only from a specific period of time and a specific conflict and the international community agreed that an independent, permanent criminal court was needed to be established.

On 17 July 1998 the ICC could finally become established after 120 states had adopted the Rome Statute. The Statute later entered into force on 1 July 2002 when it had been ratified by 60 countries.  

The ICC is meant to be a court of last resort, that is, it will only try a case if it is not investigated or prosecuted by a national court. The national proceedings must however be genuine and not undertaken with the purpose of protecting a person from genuine criminal proceedings. The ICC is also limited in that it will only try those accused of the gravest crimes of concern to the international community.

4.2 The Rome Statute

The Rome Statute of the International Criminal Court (Rome Statute) has jurisdiction over “the most serious crimes of concern to the international community as a whole”. Crimes against humanity (5(1) (b)) and war crimes (5(1) (c)) are crimes that belong to the most serious crimes.

The Rome Statute states its jurisdiction over crimes related to the use of children under the age of fifteen in international armed conflicts under its section on war crimes and article 8:

\[ b) \quad \text{Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts: } \]

\[ (\ldots) \]

98 International Criminal Court homepage  http://www2.icc-cpi.int/Menus/ICC/About+the+Court/

99 International Criminal Court homepage http://www2.icc-cpi.int/Menus/ICC/About+the+Court/ ICC+at+a+glance/
Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

The same wording applies in non-international conflicts:

(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

(...)

(vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;\(^{100}\)

Sexual violence is listed as a crime in article 7, subsection 1(g)

“rape, sexual slavery, enforced prostitution, forced pregnancies, enforced sterilization or any other form of sexual violence of comparable gravity”

Girls who are being sexually abused or exploited while being part of an armed group are however not covered by this article; only when committed as part of a systematic attack against a civilian population is sexual exploitation considered a crime against humanity.\(^{101}\)

In conclusion, children under the age of fifteen are protected under the Rome Statute from direct participation in armed conflict while indirect participation, which is often the case of girl soldiers, is not addressed. None of the provisions in the statute criminalize the use of girls for domestic and sexual purposes. Nevertheless, the Rome Statute is of importance for women and girls in armed conflicts by stating that rape and other forms of sexual abuse and violence can be crimes against humanity or war crimes and thus, criminalized.\(^{102}\)

The choice of the drafters of the Rome Statute to only criminalize the recruitment and use of children younger than fifteen may seem incoherent with article 26 under the Statute which states that the Court has no jurisdiction over any person that was younger than eighteen at the time of the alleged crime. This incoherence results in a Court that leaves young people aged fifteen to seventeen in a gap. They are not protected from being recruited or used in hostilities and when they take part in hostilities, the Court is unable to investigate and take criminal proceedings against them.\(^{103}\)

The International Criminal Court, ICC has indicted a few leaders in internal armed conflicts. The first arrest warrants were issued in October 2005 when three commanders of the Lord’s

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\(^{100}\) Text bolded by the author.

\(^{101}\) Gilbertson, Jordan A “Little girls lost: Can the International Community Protect Girl Soldiers?” 29 U. La Verne L. Rev. 2008, p. 233


\(^{103}\) Freeland, Steven “Child soldiers and international crimes – how should international law be applied?” 3 NZJPIL 2005, p. 324
Resistance Amy, LRA, a Ugandan rebel force, were charged for several crimes, including enlistment, conscription and the use of child soldiers. The three men named Joseph Kony, Vincent Otti and Okot Odhiambo have still not been brought to any court and therefore it can be questioned how important the indictments are for their future use of child soldiers. ICC issued another arrest warrant of interest in February 2006, against Thomas Lubanga Dyilo in the Democratic Republic of Congo (DRC). This Case is of extra interest since the only charges brought against him concerned the recruitment and use of child soldiers. 104

4.3 International Criminal Court indictments

An important step towards individual criminal responsibility for those who recruit and use children in armed conflicts have been taken through partly the convictions in the Special Court for Sierra Leone (SCSL) and partly through the adoption of the Rome Statute and resent indictments in the International Criminal Court (ICC), which unlike the SCSL, is a permanent court. 105

4.3.1 Thomas Lubanga Dyilo

Thomas Lubanga Dyilo has his origin in the district of Ituri in the Democratic Republic of Congo (DRC). The district is rich in natural resources such as gold, oil and diamonds, and is populated by some 20 different ethnic groups in the country. Lubanga belongs to the ethnic group of the Hemas, which is one of the largest groups. In the summer of 1999 disputes over natural resources caused tensions between the different ethinical groups and in the second half of 2002 violence occurred again in parts of the district. Lubanga entered politics between 1999 and 2000 and was soon elected to the Ituri District Assembly. He was the first to sign the statutes of the Union de Patriots Congolais (UPC). The UPC received control over Bunia, the district capital, in August 2002. A military wing of the UPC, the Forces Patriotiques pour la Libération du Congo (FPLC) was officially established and Lubanga became Commander-in-Chief. 106

Lubanga was charged by the ICC Prosecution under article 8(2)(e)(vii) and 25(3)(a) of the statute with the war crimes of conscripting and enlisting children under the age of fifteen years into an armed group and using them to participate actively in hostilities. The Prosecution alleged that even before the official founding of the FPLC, children were recruited and trained in UPC military training camps. 107

The interest the ICC in recent years has taken in prosecuting for the use of child soldiers is welcomed by many in the international community but not by all. There are humanitarian rights activists arguing that the court is failing to address larger issues such as civilian mass murder, rape and torture. While activists claim that child soldiers have been used for decades in Congo without being seen as a large issue by the population, the ICC answers that it

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105 Coalition To Stop Child Soldiers “Child Soldiers Global Report 2008” 2008 United Kingdom, Bell and Bain, p. 13
106 ICC-01/04-01/06 The prosecutor v Thomas Lubanga Dyilo section 1-8 (pp. 5-6)
107 ICC-01/04-01/06 The prosecutor v Thomas Lubanga Dyilo section 9-10 (pp. 6-7)
“will demonstrate that there will be no impunity for those that are responsible for these types of crimes (...). The conscription, enlistment and active use of children in armed conflict represents one of the most brutal and troubling legacies of war.” \(^{108}\)

Human Rights Watch (HRW) has in its report “Courting History The Landmark International Criminal Court’s First Years” pointed at some concerning consequences of the ICC:s decision to charge Thomas Lubanga only with the war crimes of enlisting and conscripting children under the age of fifteen years as soldiers and of using them to actively participate in hostilities in 2002-2003. Lubanga and the Union des Patriots Congolais (UPC) militia committed numerous horrible crimes including murder, torture and rape but despite the fact that he was investigated for nearly two years he was not charged with any other crimes than that of enlisting and conscripting child soldiers. This has caused some concern from organizations such as the HRW since it does not reflect the gravity of the crimes committed. Research by the HRW indicates that many Ituri do not consider the use of children in armed conflicts as “serious” \(^{109}\) since all Ituri militias had used children and it is also commonly known that the 1996 overthrow of the dictator Mobutu Sese Seko had mainly been carried out by child soldiers. \(^{110}\) However, the research also shows that the ICC charges against Lubanga have raised awareness of the topic. The increased awareness of the fact that using child soldiers is an actual crime is, according to the HRW, especially important to the families who voluntarily let their children join and fight for the militia to express their support. \(^{111}\)

Increased awareness has however also had less positive effects; the HRW has in its field missions learned that the militia leaders in Ituri seem to have changed their approach to child soldiers. Subsequent to the charges against Lubanga the militia leaders not openly admit the number of child soldiers within their forces and are less willing to hand over children to the United Nations Mission in the Democratic Republic of Congo (MONUC) and the United Nations Children’s Fund (UNICEF). Instead they deny having children under their command and children are hidden or even abandoned rather than handed over. In the case of Lubanga, the limited charges against him compared to more comprehensive charges against perpetrators from other ethnical groups have caused further tensions between ethnical groups as it is seen as to indicate that the atrocities committed by the Hemas were less serious than those committed by other groups. \(^{112}\) Another rumor caused by the sole charge of child recruitment was that the “real reason” for the charges was that Lubanga had killed “white people”, in this case, UN peace keepers. \(^{113}\)

\(^{109}\) Human Rights Watch “Courting History The Landmark International Criminal Court’s First Years ” 2008
\(^{110}\) Human Rights Watch New York, USA, pp. 62-64
\(^{111}\) Human Rights Watch “Courting History The Landmark International Criminal Court’s First Years ” 2008
\(^{112}\) Human Rights Watch New York, USA, pp. 127-128
\(^{113}\) Human Rights Watch “Courting History The Landmark International Criminal Court’s First Years ” 2008
Human Rights Watch New York, USA, pp. 64-68
Human Rights Watch “Courting History The Landmark International Criminal Court’s First Years ” 2008
Human Rights Watch New York, USA, pp. 65-69
Human Rights Watch “Courting History The Landmark International Criminal Court’s First Years ” 2008
Human Rights Watch New York, USA, p. 128
4.3.2 Uganda and the Lord’s Resistance Army

In December 2003 the Ugandan Government referred the situation of the Lord’s Resistance Army (LRA) to the International Criminal Court and at the beginning of 2004 the ICC decided to investigate the situation.\(^{114}\)

The LRA emerged from the politically unstable Northern Uganda following the overthrow of a regime led by Tito Okello who was supported by the Uganda National Liberation Army (UNLA). After the overthrow members of the UNLA fled to Northern Uganda and Southern Sudan where they founded armed resistance groups; the most significant being Ugandan Peoples’ Democratic Army (UPDA). The political unrest in the area became a breeding ground for local spiritual mediums. Some of these individuals claiming to be able to communicate with spirits became political and military leaders; the most successful being Alice Auma Lakwena who initiated and led the Holy Spirit Movement. She and her followers intended to take Kampala, but failed.\(^{115}\)

Two new groups then formed out of the remnants of the various spiritual and military movements. One of the groups is called the Lord’s Army and lead by Alice Lakwena’s father was defeated in 1989. The other group is the Lord’s Resistance Army lead by Joseph Kony who claims to be a spirit medium and a relative of Alice. The LRA has persisted in its campaigns against the Ugandan Government and others considered as their enemies. Since 1994 the LRA has received support from the Sudanese Government and has thus been able to keep its forces within Sudanese territories. Significant for the LRA is the abduction and force recruitment of children and young people.\(^{116}\) It is estimated that a total amount over 66 000 youths have been abducted, the majority after 1996. Those abducted are most commonly between 10 and 24 years old and remained with the LRA for a period of everything between ten days and ten years.\(^{117}\) Even though the LRA’s main target is the Ugandan Government forces; it is mainly known for terrorizing civilian populations. This has caused mass flight among civilians and in 2005 it was estimated that over 1.5 million people were living in camps for Internally Displaced Persons (IDP Camps) in northern Uganda.\(^{118}\)

In 2005 the International Criminal Court issued an arrest order for Joseph Kony, the founder and leader of the Lord’s resistance Army (LRA). The LRA has for years been engaged in attacks and violence against the Ugandan Army and civilians in the form of murder, abduction, sexual enslavement, mutilation, mass burnings of homes and looting. The abducted civilians, including the children have been forced to join the LRA as fighters, porters and sex slaves.\(^{119}\) Joseph Kony is being charged with 33 counts, count 13 being enlisting of children through abduction.\(^{120}\)

\(^{114}\) Happold, Matthew “The International Criminal Court and the Lord’s Resistance Army” Melbourne Journal of International Law vol. 8 (1), pp 160-161
\(^{119}\) ICC-02/04-01/05 Arrest order for Joseph Kony, p. 3
\(^{120}\) ICC-02/04-01/05 Arrest order for Joseph Kony, p. 15
Despite the efforts of the ICC abduction and forced recruitment of children by the LRA is continuing in Congo. The 2009 annual report on children and armed conflict by the Secretary General finds that only in the fall of 2008 154 attacks by the LRA were reported and large numbers of children were abducted. Between September and December the same year 104 children managed to escape from the LRA and received support and help to reintegrate.\textsuperscript{121}

\textsuperscript{121} A/63/785–S/2009/158, Annual Report of the Secretary-General, 26 Mar 2009, section 45
5. The Conflict in Sierra Leone and the Special Court for Sierra Leone

5.1 Background to the conflict

Sierra Leone is a republic in West Africa. It is about the same size as Czech Republic (72,000 square kilometers) and has some five and a half million inhabitants. Sierra Leone has been independent since 1961 and became a republic in 1971. Seven years later the president Siaka Stevens turned the republic into a one party state. In the 1990s the country was struck by military coups and civil war.\(^\text{122}\)

The trials in the Special Court for Sierra Leone (SCSL) against defendants from the Armed Forces Revolutionary Council (AFRC) and the Civil Defense Forces (CDF) cases have resulted in landmark decisions for the international prohibition against child soldiers. The AFRC defendants were soldiers in the Sierra Leone Army that seized power from the elected government of president Kabbah in a coup and formed a new government, the Armed Forcers Revolutionary Council. The RUF was invited to join the new government and at first they cooperated to gain control over districts held by CDF to secure weapons and diamonds. Reports of human rights violations conducted by the AFRC started to reach the rest of the world and the forces of the Economic Community of West African States (ECOMOG) launched attacks in February 1998 the AFRC and RUF then fought together and separately to win back the control of Sierra Leone. During this period civilians were frequently attacked and the AFRC experienced divisions both within the own group and the cooperation with RUF. The disagreements lead to divisions of AFRC that turned it into two groups; one supporting the RUF and the other becoming the “West Side Boys”, a group responsible for several attacks on civilians.\(^\text{123}\)

5.2 Child soldiers in Sierra Leone

In the decade-long civil war\(^\text{124}\) that affected Sierra Leone more than 10,000 children were used as soldiers in the three major forces; the Revolutionary United Front (RUF), the Armed Forces Revolutionary Council (AFRC) and the Civil Defence Forces (CDF).\(^\text{125}\) About a fourth were thought to be girls.\(^\text{126}\) The children involved in warfare in the Sierra Leone civil war most likely suffered from similar experiences as child soldiers all over the world, there are however a few things that are worth to be mentioned about the children involved in this conflict. All major forces in the civil war, including the RUF, AFRC, CDF and even the

\(^{122}\) http://www.ne.se/sierra-leone?i_whole_article=true#.Nationalencyklopedin online (page visited 2009-05-17)


\(^{124}\) The war was declared over in 2002 when all insurgent groups had been disarmed. The country is still politically unstable but is now, with the help of a truth- and reconciliation commission and an UN-supported court, trying to deal with it’s violent past. (http://www.ne.se/sierra-leone?i_whole_article=true#).Nationalencyklopedin online (page visited 2009-05-17)

\(^{125}\) Novogrodsky, Noah B.”Litigating Child Recruitment Before the Special Court for Sierra Leone” 7 San Diego Int’l J. L. 421 2005-2006, p. 423

\(^{126}\) McKay, Susan and Dyan, Mazurana “Where are the Girls Girls in Fighting Forces in Uganda, Sierra Leone and Mozambique: Their Lives During and After War” International Centre for Human Rights and Democratic Development, Montreal 2004, p. 92
government forces forcibly recruited children into their ranks. The RUF used several thousands of children within their forces. The children, some of them as young as eight or nine, were used to fight at the front lines but also to perform various tasks such as cooking or carrying food and loot. Both boys and girls were within the RUF forces; the boys would be arranged in “Small Boy Units” (SBU:s, although many of the girls primarily functioned as “wives” to the fighters, some were arranged in “Small Girl Units” (SGU:s) and trained in combat. The RUF repeatedly drugged children using a whole range of drugs such as alcohol, marijuana, cocaine and heroine, before sending them to battle, along with a child’s natural recklessness and lack of experience this made them especially vulnerable.

5.2.1 Girl soldiers in Sierra Leone

During the 1996-2002 war in Sierra Leone girls were commonly used in most forces involved and there were even special “small girl units” (SGUs). Though there were many girls among the child soldiers the most widespread picture of a child soldier is still that of a boy. One reason why girls are not commonly seen and recognized as combatants may be that because of community stigma, they are ashamed to admit that they were parts of fighting forces.

The most common roles of girls in the forces were cooks, fighters and domestic laborers, followed by porters, “wives” and food producers. About half of the girls studied by McKay and Mazurana reported that they received training in using weapons. Although most of the girl soldiers in Sierra Leone were abducted and forced to join the various forces a substantial number of girls and young women joined voluntarily.

Most of the girls abducted were exposed to sexual violence, such as rape, including gang rape, and sexual torture. Sometimes very young girls and those who were in captivity for only a short time were spared. Being a “wife” of a rebel captor could also grant protection from broader sexual violence. There are also reports on boys being sexually abused in groups with more girls than boys, because of stigma, there is however small recognition that boys and men have also been subjected to sexual violence.

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128 SCPL-04-15-T section 1618-1623
130 McKay, Susan and Dyan, Mazurana “Where are the Girls Girls in Fighting Forces in Uganda, Sierra Leone and Mozambique: Their Lives During and After War” International Centre for Human Rights and Democratic Development, Montreal 2004, p. 15
131 McKay, Susan and Dyan, Mazurana “Where are the Girls Girls in Fighting Forces in Uganda, Sierra Leone and Mozambique: Their Lives During and After War” International Centre for Human Rights and Democratic Development, Montreal 2004, p. 45
132 McKay, Susan and Dyan, Mazurana “Where are the Girls Girls in Fighting Forces in Uganda, Sierra Leone and Mozambique: Their Lives During and After War” International Centre for Human Rights and Democratic Development, Montreal 2004, p. 92
134 McKay, Susan and Dyan, Mazurana “Where are the Girls Girls in Fighting Forces in Uganda, Sierra Leone and Mozambique: Their Lives During and After War” International Centre for Human Rights and Democratic Development, Montreal 2004, p. 58
Girls and young women that had served as combatants during the conflict also found difficulties when returning home after the war. Girls fighting for the RUF were in many cases labeled as “rebels” when returning to their home communities, thus excluded from reintegration programs and also denied counseling and support.\textsuperscript{135}

While “wives” often are seen as separate from the fighters, McKay and Mazurana claims the contrary and argue that many of the “wives” of RUF commanders held considerable power and influence within the compounds. The “wives” were in control of the compound while the commander was in field or on a mission, this included being in charge of determining how food and loot would be distributed, deciding who to send on a mission and enforce discipline in the camp. The “wives” of commanders also had bodyguards and would sometimes advise their “husbands” in military strategy. It was not uncommon that the “wives” carried weapons and received training on how to use them. The “wives” could also be in charge of SBUs and SGUs. While being a “wife” often meant some protection and influence, a “wife” could be replaced by a more favored girl, the rejected “wife” would then usually be sent to the front line and forbidden to return to the civilian camps.\textsuperscript{136} According to some interviews with former abductees it was not uncommon that the captured girls and young women were given weapons before the boys.\textsuperscript{137} This indicates that there was no clear line drawn between “civilian functions” and military functions, a person could easily cross that line,\textsuperscript{138} but at least half of the girls and young women within the RUF forces received military training.\textsuperscript{139}

Girls were present in the CDF forces, which mainly consisted of Kamajors and Gbethis, as well. The Kamajors were originally a traditional male-only hunting society. However, as the pressure increased from the RUF, they became a self-defense force and started enlisting girls. The Gbethis were never a traditional male society and initiated women and girls as fighters. Females also served the Gbethis in other capacities. Women and girls served in both the Kamajors and the Gbethis as initiators, commandiers, spiritual leaders, frontline fighters, medics, herbalists, spies and cooks. Girls working and/or fighting for the CDFs had joined both because of their CDF husbands and for reasons of mere survival, girls were also abducted and forced to join the CDF. One girl interviewed by McKay and Mazurana said that since the boys in a village would often be abducted by the RUF, the Kamajors would instead target the remaining girls.\textsuperscript{140}

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\textsuperscript{135} McKay, Susan and Dyan, Mazurana “Where are the Girls Girls in Fighting Forces in Uganda, Sierra Leone and Mozambique: Their Lives During and After War” International Centre for Human Rights and Democratic Development, Montreal 2004, pp. 36-37
\textsuperscript{136} McKay, Susan and Dyan, Mazurana “Where are the Girls Girls in Fighting Forces in Uganda, Sierra Leone and Mozambique: Their Lives During and After War” International Centre for Human Rights and Democratic Development, Montreal 2004, pp. 93-94
\textsuperscript{137} Coulter, Chris “Being a Bush Wife Womens’s Lives Through War and Peace in Northern Sierra Leone” Gdansk, Poland, 2006, p. 231
\textsuperscript{138} McKay, Susan and Dyan, Mazurana “Where are the Girls Girls in Fighting Forces in Uganda, Sierra Leone and Mozambique: Their Lives During and After War” International Centre for Human Rights and Democratic Development, Montreal 2004, pp. 93-94
\textsuperscript{139} Coulter, Chris, Persson, Mariam and Utas, Mats ”Young female fighters in African Wars” Nordiska Afrikainstitutet, 2008, p. 12
\textsuperscript{140} McKay, Susan and Dyan, Mazurana “Where are the Girls Girls in Fighting Forces in Uganda, Sierra Leone and Mozambique: Their Lives During and After War” International Centre for Human Rights and Democratic Development, Montreal 2004, pp. 96-97
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According to a study made of McKay and Mazurana in 2004 girls’ experiences within fighting forces are made more severe than those of the boys’, because of sexism and misogyny.141

5. 3 Special Court for Sierra Leone

In resolution 1315, adopted by the UN Security Council in August 2000, the Security Council expressed its concern for the serious crimes committed in Sierra Leone and requested the Secretary General to negotiate with the government of Sierra Leone to set up an independent Special Court.142 The agreement negotiated between the UN and the government of Sierra Leone resulted in the Statute for the Special Court for Sierra Leone, from which the court derives its mandate. The Special Court for Sierra Leone (SCSL) was established jointly by the UN and the government of Sierra Leone. It was given the mandate to try those who have the greatest responsibility for serious crimes in international law and domestic law of Sierra Leone committed in Sierra Leone after 30 November 1996.143

In 2003 the prosecutor of the SCSL issued thirteen indictments out of which two have been withdrawn because of the deaths of the accused. Trials of three former Armed Revolutionary Forces (AFRC) leaders and two former leaders of Civil Defense Forces (CDF) have been completed (including appeals) 144 and a judgment on the trial of former leaders of Revolutionary United Front (RUF) was delivered in 25 February 2009 while the appeal process is not yet completed.145

5.3.1 Statute for the Special Court for Sierra Leone

Many of the provisions of the statute have the same meaning as most of the international instruments regulating child soldiers; the age limit is still fifteen to mention one example. It does offer some extra protection though in that it prohibits recruitment into armed forces and groups or using children as active participants in armed groups.146 Girls are mentioned in the statute; article 5(a) gives the court mandate to prosecute anyone who abuses girls in violation of the Sierra Leone Prevention of Cruelty to Children Act of 1926. Acts punishable include abusing girls under the age of thirteen (in some cases fourteen) and abduction of girls (of any age) for “immoral purposes”.147

The SCSL stands out in the respect that it does not have any predefined elements of crimes; instead each chamber must create the elements of crimes during the trials. This has lead to the situation that the chambers have adopted different elements of crime concerning the recruiting and using of child soldiers. In the AFRC case a slightly modified version of the ICC’s

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141 McKay, Susan and Dyan, Mazurana “Where are the Girls Girls in Fighting Forces in Uganda, Sierra Leone and Mozambique: Their Lives During and After War” International Centre for Human Rights and Democratic Development, Montreal 2004, p. 14
142 UN Security Council Resolution 1315, 2000
143 http://www.sc-sl.org/ABOUT/tabid/70/Default.aspx Homepage of SCSL
144 http://www.sc-sl.org/ABOUT/tabid/70/Default.aspx Homepage of SCSL
147 Statute for the Special Court of Sierra Leone article 5(a)(i-iii)
elements were used. The chamber in the CDF case adopted two sets of elements, one that included enlistment and conscription of children under the age of fifteen into armed forces or groups and one related to the use of children under fifteen to participate actively in hostilities.\textsuperscript{148}

5.4 Special Court for Sierra Leone cases of importance

In the summer of 2007 the SCSL released its first two judgments in the so called Armed Forces Revolutionary Council (AFRC)\textsuperscript{149} and the Civil Defense Forces (CDF)\textsuperscript{150} cases. In the AFRC judgment the Court unanimously found Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu, all in leading positions within the AFRC guilty of eleven counts of crimes against humanity and war crimes, including that of enlistment of children under the age of fifteen into armed forces or groups or using them to participate actively in hostilities. In the CDF case the two accused; Moinina Fofana and Allieu Kondewa were found not guilty of the crime of enlisting children into armed forces or groups.\textsuperscript{151}

The defendants in the CDF case all belonged to the CDF which was a security force that fought in the support of Sierra Leone’s elected government. The force consisted mainly of Kajamaras, traditional hunters, and after the 1997 coup the Kamajaras became an independent group that fought both the AFRC and the RUF in support of the government. Three individuals; Sam Hinga Norman, Moinina Fofana and Allieu Kondewa together formed the central command of the CDF. They were all arrested in 2003.\textsuperscript{152}

The Special Court for Sierra Leone issued a landmark decision already in May 2004 when it in the CDF case found that an individual may be held responsible for the crime of recruiting children as soldiers in an armed conflict. In deciding this, SCSL came to be the first international criminal body to indict a person for the criminal offence of recruiting children as soldiers in armed conflicts. The crime of recruitment of child soldiers is regulated in art 4 of the statute of the Special Court of Sierra Leone, for the purpose of this instrument a child is a person under the age of fifteen. The intent of the article is that it is not possible for a child under the age of fifteen to meaningfully consent to enlist or participate in armed conflict. The ruling was not without controversy however. The former leader of the Civil Defense Forces Sam Hinga Norman was one of the first defendants before the SCSL. Among the accusations to Norman were enlistment of children under the age of fifteen into armed groups and using them in hostilities. Norman’s defense argued that the charges concerning child recruitment were to be dismissed on the grounds that recruitment of children was not a crime under the international law during the time of the civil war, 1996-2001. According to Norman, even though international instruments, such as Additional Protocol II to the Geneva Protocol and the Convention of the Rights of the Child may prohibit the recruitment of children under the age of fifteen as soldiers, they would not necessarily criminalize such activities. Norman also denied that the criminalization of child recruitment in the Rome Statute would amount to a

\textsuperscript{149} SCSL-04-16-T
\textsuperscript{150} SCSL-04-14-T
\textsuperscript{151} Oosterveld, Valerie and Marlowe, Andrea “International Decisions Special Court for Sierra Leone” 101 Am. J. Int’l L. 848-857 (2007), pp. 849-850
codification in customary international law. Because of this, the indictment of Norman concerning child recruitment related crimes would, according to Norman and his defense, violate the international prohibition on retroactive criminal liability. Norman’s motion was rejected by the Court that ruled that the provision in article 4 of the statute had crystallized into a crime under customary international law before November 1996. Accordingly, it was possible to prosecute individuals for this offence.

Later on, in the AFRC case the court defined “conscription”, “enlistment” and “using” in the context of child soldiery. The trial chamber II found that “‘conscription’ implies compulsion, including through abduction and forced recruitment, that ‘enlistment’ entails accepting and enrolling individuals when they volunteer to join an armed force or group, and that ‘using’ children to participate actively in hostilities encompasses putting their lives directly at risk in combat.”

5.4.1 Civil Defense Forces Trial Judgment (SCSL-04-14-J)

In its case SCSL-04-14-J the Chamber comments on the ruling SCSL-2004-14AR72 (E) by the Appeals Chamber. While the Appeals decision discussed the prohibition of child recruitment as a part of customary international law, it overlooked “using child soldiers to participate actively in hostilities” and enlistment. The Chamber quickly stated that enlistment is “clearly a form of recruitment” and should be treated as such. The chamber then moved on to interpret the Appeal Chambers view on the situations where the use of child soldiers instead of enlistment or recruitment can be said to have occurred. First, it noted that “using” is clearly no a form of recruiting. However, the fact that the Appeals Chamber dismissed the Norman defense Motion in full, which in addition to the views of “available authorities” must lead to the conclusion that using children armed conflicts also is a part of customary international law “For it would make no sense to say that recruiting children under 15 years of age for the armed forces was prohibited, but using them to fight was not.”

Initiation of child soldiers was also part of the charges of the accused although it is not listed as an offence in the Statute. On this the Chamber merely concluded that the findings on initiation of child soldiers may be relevant when establishing liability under article 4(c) of the Statute.

5.4.2 Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao (SCSL-04-15-T)

In this case about the RUF and AFRC/RUF forces the chamber concluded that the RUF and the AFRC/RUF forces both used and were depending on child soldiers. In fact, children were so common as fighters that reports sent to the president during this time did not distinguish between child and adult soldiers. Several thousands of children were separated from their families and forced to join the RUF movement. The chamber did however note that not all of the children were used in direct hostilities. The abducted children would be screened

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154 SCSL-04-14-J section 197
155 SCSL-04-14-J section 197
156 SCSL-04-14-J section 198
157 SCSL-04-15-T section 1615-1616
158 SCSL-04-15-T section 1661
and those deemed fit for combat would be sent to training while the rest would be given other tasks within the RUF, such as cooking, carrying out food-finding missions and carrying food, weapons and loot. Some of the children who went through combat training would be sent to the front lines while others became body guards or spies. The boys were arranged into “SBUs” (Small boys units). Individual boys would also often be referred to as a SBU. Girls were also abducted; often to be forced into sexual relationships with fighters. If they resisted they risked physical or sexual abuse or being executed. Girls deemed suitable as combats were sent to training along with the boys. However, after completed training the girls would usually go back to the commanders and their wives to take up domestic chores. Though girls typically performed duties such as cooking and cleaning some were also organized into “SGU:s” (Small girls units), similar to the SBU:s of the boys. To make the children fearless in battle the RUF would frequently give alcohol or drugs such as marijuana, amphetamine and cocaine to the children.

The chamber argued that the common use of the word “SBU” referring to a group as well as to an individual supports the claim that the RUF and AFRC/RUF forces were well aware that they used children under the age of fifteen in their fighting forces.

Following the description of the functions and training of children within the RUF the Chamber concluded that children under the age of fifteen were abducted and forcibly trained. It also acknowledged that not all children were subjected to military training but were used for other purposes within the RUF. Furthermore the Chamber stated that notwithstanding the fact that some abducted children never took part in direct hostilities the abductees were compulsorily enlisted and therefore conscripted.

The Chamber moved on to examine the question of whether the accused knew if they had children under the age of fifteen in their military forces. In a war-torn country where a person not always knows his or her own exact age it might not be obvious if a person is above or below the age set by the SCSL statute. Witnesses, often children themselves, commonly described the ages of other by how tall he or she was. As mentioned above; the term SBU was commonly used and in the training camps of Bunumbu and Yengema records that included the age of the captured girls and boys were kept. Children were also especially prized as fighters “…due to their agility and obedience…” The Chamber also noted that in attacks on civilians, children were often kept alive to be captured and used in the fighting forces. The chamber recognized evidence that children as young as eight or nine were abducted. Even in cases where eye-witnesses have relied solely on a child’s size to determine it’s age it is clear that the children in question have been young, as seen in this example where a witness spoke about children guarding mining sites for the RUF and the AFRC; “Some of the young boys were so small they did not have the strength to carry their guns but had to drag them along.” Apart from the issue of conscription the Chamber also

159 SCSL-04-15-T section 1618-1620
160 SCSL-04-15-T section 1621
161 SCSL-04-15-T section 1622
162 SCSL-04-15-T section 1623
163 SCSL-04-15-T section 1621
164 SCSL-04-15-T section 1700
165 SCSL-04-15-T section 1669
166 SCSL-04-15-T section 1702
167 SCSL-04-15-T section 1703
168 SCSL-04-15-T section 1697
169 SCSL-04-15-T section 1664
examines in which situations the children within the armed forces can be said to have actively participated in hostilities. The Chamber stressed that it holds in mind that an expansive definition of active participation would cause children only associated to armed groups to lose their protection and status as persons hors de combat under humanitarian law. Apart from fighting in the front lines the Chamber recognizes taking part in violence against civilians, guarding of military objects; including mining sites and gathering of information and spying on the enemy as taking active part in hostilities. Children working as domestic laborers are according to the Chamber, not included in the group of those considered actively participating in hostilities, neither are those who participate in food finding missions, unless circumstances occur that indicate different. Concerning the use of children as bodyguards the Chamber came to the conclusion that it is clearly related to hostilities but that it depends on the circumstances whether it amounts to taking active part in hostilities or not.

5.4.3 Prosecutor v Sam Hinga Norman (SCSL-2004-14-AR72(E))

Sam Hinga Norman filed a claim arguing that child recruitment was not part of international criminal law at the times relevant to his indictment and that article 4(c) is therefore a violation of the principle of nullum crimen sin lege. Norman further objected that the Protocol II Additional to the Geneva Conventions of 1977 and the Convention on the Rights of the Child would criminalize recruitment of child soldiers. While admitting that the 1998 Rome Statute criminalized child recruitment he denied that it codifies customary international law and demands that the Prosecution point out the moment when it became part of customary international law.

In case SCSL-2004-14-AR72 (E) the Chamber of Appeal responded to the claims of Norman and discussed his objections. Concerning customary international law the Appeals Chamber established that the prohibition on child recruitment had become customary international law before November 1996 and that both the element of state practice and opinion juris were fulfilled. The reasoning based on the fact that recruitment of children under the age of fifteen has been prohibited by almost all states and has done so for a long time. The number of states (all but six in 1996) that had ratified the Convention on the Rights of the Child and the fact that there were no reservations to article 38 gives further evidence to view that article 38 is universally accepted. When asked to determine a certain moment in time when child recruitment became part of customary international law the Chamber argues that it is “…impossible and even contrary to the concept of customary law to determine a given event, day or date upon which (...) a norm has crystallised”. Nevertheless, the Chamber concluded that states started to consider child recruitment as a problem in the mid.1980s and that the customary international law began to develop along with acceptance of important legal instruments between 1990 and 1994. The Chamber then decided to set the time of crystallizing to the years between 1994 and 1996. One of the judges, Judge Robertson, disagreed with the majority and argued that conscription should be distinguished from

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170 SCSL-04-15-T section 1724-1729  
171 SCSL-04-15-T section 1730  
172 SCSL-04-15-T section 1743  
173 SCSL-04-15-T section 1732  
174 SCSL-2004-14-AR72(E) section 1  
175 SCSL-2004-14-AR72(E) section 3  
176 SCSL-2004-14-AR72(E) section 17-19  
177 SCSL-2004-14-AR72(E) section 50  
178 SCSL-2004-14-AR72(E) section 50
enlistment. Furthermore he claimed that prior to the adoption of the Rome Treaty in 1998 criminal responsibility did not attach to the offence of enlistment. However, Norman died in February 2007 and the trial chamber terminated the proceedings against him.

6. Analysis

In order to ensure that all children involved in warfare are equally protected international legal instruments must have similar rules and definitions. Today it seems as if all treaties and statutes have their own definitions of child soldiers; both concerning age limits and which tasks a child must perform to be protected under the rules about child soldiery in a specific document. The definition of a child soldier is important in order to offer equal protection to boys and girls within fighting forces, since they often have different roles; though they may often overlap.

A long-time infected issue is the age limit. According to the Convention on the rights of the Child children are humans under the age of eighteen, unless they are part of a conflict where the universally accepted age limit still is fifteen. The age of fifteen is also what the international community has recognized as a part of customary international law.

All international human rights and humanitarian legislation on the subject are more or less similar concerning the age limit; they all offer a protection to children under the age of fifteen, while the protection for children aged fifteen to eighteen is not yet complete. There are some differences however in both the question of age and in some other aspects. The Additional Protocol I to the Convention on the Rights of the Child is a document that indicates an aim of parts of the international community to have children older than fifteen protected. It is however a fairly recent document, not globally accepted, and since the states themselves decides how much they will raise the age limit concerning voluntary recruitment, it does not yet offer grounds to form customary law. Though the Optional Protocol I has managed to bring attention to the issue of the age limit it has other flaws. Concerning the reference to Article 51 of the UN Charter, I do not see it as a great surprise that the Optional Protocol is not to be interpreted in any ways contrary to the UN Charter. I do however think it is unfortunate that article 51 is explicitly mentioned and that this might add further arguments to the view that military considerations in some situation are to be superior to the protection of children and their rights.

The International Labor Organization Convention 182 which includes child soldiery as one of the worst forms of child labor is based upon the presumption that a child is every human being under the age of eighteen. It only prohibits its ratifying states to compulsory recruit children into its forces and thus does not cover voluntary enlistment. The impact of this convention is probably that it connects child soldiery to slavery and explicitly mentions forced or compulsory recruitment of children for use in armed conflict as slavery or a practice similar to slavery.

The African Charter on the Rights and Welfare of the Child contributes in a positive way; the age limit is set at eighteen, with no exceptions and the obligation on its member states is somewhat stronger than in the CRC. Unfortunately, the African Child Charter has not had much of an impact in practice as child soldiers continue to occur in several African states.

Though not yet universally accepted, I believe that recent efforts to raise the age limit are indications of a willingness to expand the protection to cover those between the age of fifteen and eighteen. Unfortunately, I have not seen any discussions of this in the International Criminal Court indictments. Important as the human rights documents may be, it is still the ICC and temporary courts such as the Special Court for Sierra Leone that have the possibility to enforce international legislation.
Unsatisfactory is also the fact that most human rights and humanitarian documents fail to consider the special situation of girl soldiers. In theory, girls enjoy protection against being used as front-line soldiers in certain documents and protections against sexual abuse in other documents; the optional protocol I and II to the Convention on the Rights of the Child are examples. In reality, it seems as if girl soldiers fall in between protections because of the lack of connection between the two types of protection. The best definition in the sense of being the most including can probably be found in the Cape Town Principles which also includes girls recruited for sexual purposes in the definition of child soldiers. Unfortunately, this definition is not widely accepted and is not legally binding. I do, however, believe that the existence of the Cape Town Principles reflects an increasing awareness and will to broaden the definition. The Special Court for Sierra Leone has also discussed the use of girls as soldiers and for sexual purposes; a fact that I believe is important as it acknowledges their existence and brings attention to the problem.

Apart from the prohibition of the use of child soldiers as a part of international customary law numerous documents in both human rights law and humanitarian law exist. These treaties may have their flaws in not once and for all raising the age limit to eighteen, not taking in a gender perspective and not covering all the roles children may have in an armed group, but they are there and the prohibition is globally. All these provisions contribute of course to raise awareness, but they are mainly based on report mechanisms, as in the case of the Convention on the Rights of the Child and its additional protocols. The enforcement is therefore difficult, and as with other human rights issues, relying on principles of “shame on you”. To make it extra complicated in the case of child soldiery; children are often used by various military or paramilitary groups, loosely or not at all connected to a recognized government. These non-governmental groups may be committing a range of atrocities and may already have been condemned by the international community. It is therefore crucial that an efficient system of enforcement exists. One form of enforcement, a Special Court, set up to prosecute perpetrators of a certain conflict has been examined in this paper. As effective as a court in this form may prove to be, it has its limitations and is temporarily by its nature. Temporary courts such as the SCSL are also depending on the approval of the current state and would most likely not have been possible to carry out had the conflict still been ongoing. What then remain are national judiciary systems and the International Criminal Court. National systems, I believe, would in many situations most likely not be able to efficiently and unbiased prosecute those accused of recruiting or using children in armed conflicts. Those countries where children are taking active part in armed hostilities are usually countries long-time ravished by internal conflicts, lacking a strong and efficient judicial system. Furthermore, governmental forces may themselves have had children within their ranks. That leaves us with the International Criminal Court. Even though the ICC has only started its mission; it has already proved to be interested in prosecuting those who have violated the rights of children.

The Special Court for Sierra Leone decision SCSL-2004-14-AR72 (E) has established that the prohibition on child recruitment is unquestionably a part of customary international law. In being the first international criminal body to prosecute individuals for the crime of child recruitment it established that individuals may be held criminally responsible for violations of the prohibition against child recruitment. In doing this, the SCSL Appeals Chamber also presented a timeline of how the prohibition of child recruitment has crystallized into customary law.
Despite its contributions to clarify the existing international legal status of the conscription, enlistment and use of child soldiers to take active part in hostilities the Special Court for Sierra Leone failed to discuss the age limit. Fifteen years is the maximum age to be called “child soldier” for the purpose of the Statute and for criminal indictments. This is however understandable considering that the Special Court is occupied with a certain geographical area during a specific period of time that has ended and thus do not have the opportunity to get into discussions on lege ferenda. The SCSL did however notice that the current debate has shifted into being about age limits instead of the criminalization of child soldiery.

In the SCSL case no. SCSL-04-15-T the chamber defined the terms of “conscription” “enlistment” and “using” to participate actively in hostilities”. Interesting for further development in the legislation is perhaps especially the Chambers view on “using to participate actively in hostilities” since the Chamber broadened the definition to also include children working with the guarding of military objects; including mining sites, gathering of information and spying on the enemy.

Even though gender is not specifically mentioned by the Special Court I do believe that in broadening the scope of who is taking an active part in hostilities and who is not, the SCSL has contributed to more girls receiving status as child soldiers and thus access to demobilization and reintegration programs.

The International Criminal Court is perhaps the most important enforcement mechanism when it comes to enforcing the rights of child soldiers today. In prosecuting for the use of child soldiers the ICC has succeeded in raising the awareness on the question of child soldiers as an issue for the international community and stating that perpetrators will be individually responsible.

It is interesting that the ICC has in the case of Thomas Dyilo Lubanga charged him only for the crime of child recruitment. This is naturally a sign that the protection of children from involvement in armed conflicts has started to be considered a serious issue suitable for courts such as the ICC. This has contributed to bring the issue to the top of the agenda and has raised awareness around the world.

Organizations such as Human Rights Watch have pointed at consequences of less positive art of the ICC’s focus on the prohibition on child soldiery. One is that after it became known that Thomas Dyilo Lubanga was being charged for having child soldiers in his troops, other militia leaders in the area became less willing to admit there were child soldiers within their forces which in turn caused children to be hidden or abandoned rather than handed over to help organizations. This is of course a regrettable development; it does however appear to be more a question of enforcement and lack of funds to investigate the violations of the prohibition against child soldiery than criticism of the measures actually taken against the use of children in armed conflicts. Generally speaking; the practice of criminals to perform their criminal activities in secret is not a surprise, rather an expected development. Nevertheless, warnings of children being caused more harm should not be ignored but taken into account in the planning and funding of the ICC. The weakness of the ICC enforcement mechanism is however to be taken serious and monetary resources as well as aid from national enforcement will be needed.

An issue that has been raised is whether the International Criminal Court is loosing credibility when it chooses to focus to charge for crimes related to child soldiery when other crimes such
as genocide and mass mutilations are seen as more grave. Serious crimes against humanity are repeatedly being committed all around the world and the resources for international investigation are limited, meaning that some cases will receive priority over others. Recently crimes of child conscription and the use of children in hostilities have received the attention of the international community, taking resources and focus from other serious crimes. I believe that it is right of the ICC to focus on crimes against children at the present time. The area of international protection of children and their rights has developed substantially in the last twenty years and I think it is time for the protection of children from involvement in armed conflict to have practical meaning; in the sense of individual criminal responsibility as well as the forming of international customary law on the subject. In the future other issues may need more focus, but considering the need for development in this area and the vast number of child soldiers at the moment, I believe that the current processes concerning child soldiers are necessary.

Just as there is not one single reason for the fact that child soldiers exist; there is not one single solution to end this conduct. Modern conflicts where attacks aimed at civilians are integral parts of the warfare and create situations where children are abandoned and left with no other choice than to join armed forces or groups. Adding on to that is an idea that children make good soldiers and the widespread availability of light weapons, possible for even a small child to handle. I therefore believe that information and education on the subject are crucial. In some conflicts parents have their children join military groups as a sign of support; they as well as military commanders need to learn that using a child in armed conflict is a serious criminal offense and punishable.

I believe that raising the value of children, both girls and boys, in the society and in the family would be one crucial factor in the strife for ending the use of child soldiers. Here I think that the existance and information about human rights documents promoting children’s rights such as the Convention on the Rights of the Child are important. It could be argued that this is mainly a social and cultural question and not a legal one. I am however of the opinion that the legal rights of children during conflicts are extensions of their legal rights in peace time. If extensive rights are enforced and respected in other aspects, they will be less likely to be violated in defense issues and in times of conflict.
7. Conclusions

The main subject of this paper has been the conflict in Sierra Leone and the rulings issued by the Special Court for Sierra Leone. That particular conflict is now behind us and the criminal proceedings in the Special Court for Sierra Leone will soon be over. Unfortunately the same does not apply to those some 300 000 children around the world involved in armed conflict and the road to that goal will be both long and demanding. Nevertheless, small steps on the way have been taken and there is now both a variety of legal documents prohibiting this horrible practice and an International Criminal Court with jurisdiction over individual perpetrators.

The answer to the main question of whether or not the Special Court for Sierra Leone and the International Criminal Court have had an impact on the international legal framework of the protection of children against being used in armed conflicts is yes, I do believe that the arguing and the finding of both courts have contributed.

The Special Court for Sierra Leone may be restricted to a geographical space and a certain period of time, but it has succeeded in adding further gravity to the prohibition against using children under the age of fifteen to participate in armed conflicts as a part of international customary law, to clarify certain terms and broaden the concept of “using to participate actively in hostilities” to not only include those fighting in the front lines. I believe that the importance of the SCSL cases mainly is in the form of clarifying and cementing the proscription on child soldiery. They may also have had an impact on which functions that constitute taking active part in hostilities; recognizing and discussing additional functions within armed groups or forces.

The International Criminal Court is in some aspects meant to be the opposite of the SCSL; it is open for all the countries wishing to join and it is not restricted in time. Being the closest thing international law has to a regular court with an agenda of its own and not depending on single regimes, it’s work these early years will no doubt have an impact and set the standards for several years to come. It is therefore of great importance that the ICC has chosen to address the issue of child soldiery. Although the ICC has not yet added something new to the prohibition, it has however established the use of child soldiers as a criminal offense that individuals can be tried and punished for. The mere fact that the issue has received attention from the ICC is important since it establishes the use of children in armed conflict as a serious crime worthy of international attention. The struggle against child soldiery have more features than that of enforcement by criminal indictments, nevertheless it is an essential part.

The protection of children from armed conflicts is the purpose of numerous provisions in all kinds of international legal provisions; including but not limited to the almost globally ratified convention on the rights of the child. It is now beyond doubt that it is unlawful to conscript, enlist and recruit children or use them to take active part in hostilities. The question is now rather about the details. One of the details is the age limit which is internationally accepted as being fifteen. Voices calling for a raise of the limit to also protect those aged fifteen to seventeen have emerged and will hopefully lead to a shift in the definition. Another detail is the question of who is to be included in the definition of a child soldier. The Special Court for Sierra Leone has made significant contributions in including children involved in armed forces but performing other tasks than fighting in the front line in the definition on child soldiers. I am of the opinion that a use of the Cape Town principles in defining who is a child soldier and who is not would be more consistent with the view of a child as a person under the
age of eighteen than the definition most documents offers. Furthermore, the principles also reflect the reality better in having a broader scope for the functions of children in armed conflicts.

 Concerning the situation of girls in armed forces and groups I believe that it is crucial that the definition of a child soldier is broadened to include more children than only those fighting in the front line; as mentioned before, the definition found in the Cape Town Principles is an excellent example of a more inclusive definition. Unfortunately, I do not think that the adoption of that definition would be enough; a strengthening of girls’ position in the society is necessary for change. It will not be possible to protect girl children from harm in the form of discrimination and sexual abuse during times of conflict before they are considered equal to boys during times of peace and stability.

While legislation and individual criminal responsibility for perpetrators are necessary, legislators and prosecutors will always be one step behind, lacking necessary resources. Addressing root causes is therefore just as essential. The most desirable would naturally be the end of all armed conflicts, but there are also smaller steps that can be taken in order to protect children’s rights in military conflicts. Questioning of the ready availability on small personal arms and prevention of the falling apart of families as a result of AIDS; to mention a few measures that can be taken to address the root causes. Strengthening of the child’s value in the family and the society as a whole is another part of the solution.
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Appendix 1

Convention on the Rights of the Child

Article 3
1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

Article 19
1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

Article 24
1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.

2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures:
   (a) To diminish infant and child mortality;
   (b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;
   (c) To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution;
   (d) To ensure appropriate pre-natal and post-natal health care for mothers;
   (e) To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and
nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents;
(f) To develop preventive health care, guidance for parents and family planning education and services.

3. States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.

4. States Parties undertake to promote and encourage international co-operation with a view to achieving progressively the full realization of the right recognized in the present article. In this regard, particular account shall be taken of the needs of developing countries.

**Article 34**
States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:
(a) The inducement or coercion of a child to engage in any unlawful sexual activity;
(b) The exploitative use of children in prostitution or other unlawful sexual practices;
(c) The exploitative use of children in pornographic performances and materials.

Article 35
States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.

**Article 38**
1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.

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

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

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 39**
States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.
Appendix 2

Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict

Article 1
States Parties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities.

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

Article 3
1. States Parties shall raise the minimum age for the voluntary recruitment of persons into their national armed forces from that set out in article 38, paragraph 3, of the Convention on the Rights of the Child, taking account of the principles contained in that article and recognizing that under the Convention persons under the age of 18 years are entitled to special protection.
2. Each State Party shall deposit a binding declaration upon ratification or accession to the present Protocol that sets forth the minimum age at which it will permit voluntary recruitment into its national armed forces and a description of the safeguards it has adopted to ensure that such recruitment is not forced or coerced.
3. States Parties that permit voluntary recruitment into their national armed forces under the age of 18 years shall maintain safeguards to ensure, as a minimum, that:
   (a) Such recruitment is genuinely voluntary;
   (b) Such recruitment is carried out with the informed consent of the person’s parents or legal guardians;
   (c) Such persons are fully informed of the duties involved in such military service;
   (d) Such persons provide reliable proof of age prior to acceptance into national military service.
4. Each State Party may strengthen its declaration at any time by notification to that effect addressed to the Secretary-General of the United Nations, who shall inform all States Parties. Such notification shall take effect on the date on which it is received by the Secretary-General.
5. The requirement to raise the age in paragraph 1 of the present article does not apply to schools operated by or under the control of the armed forces of the States Parties, in keeping with articles 28 and 29 of the Convention on the Rights of the Child.

Article 4
1. Armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years.
2. States Parties shall take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalize such practices.
3. The application of the present article shall not affect the legal status of any party to an armed conflict.