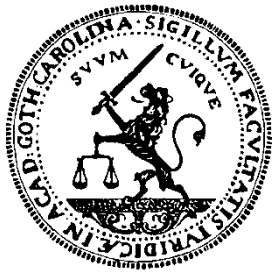

FACULTY OF LAW
Lund University

Kajsa Sturesson

Dismantling the Notion of "Participate Actively in Hostilities"

A Gender Analysis of the Crime of Using Child Soldiers

JAMM07 Master Thesis

International Human Rights Law
30 higher education credits

Supervisor: Letizia Lo Giacco

Term: Spring 2017

Contents

Summary

Children used by military groups in armed conflicts are assigned to different roles and activities depending on their gender identities. In this thesis, therefore, the hypothesis put forward is that application and interpretation of the war crime of "using [children under the age of fifteen years] to participate actively in hostilities" (Articles 8(2)(b)(xxvi) and 8(2)(e)(vii) of the *Rome Statute of the International Criminal Court*, and Article 4(c) of the *Statute of the Special Court for Sierra Leone*) require a gender perspective to make effective the protection of all children in armed conflicts.

During negotiations prior to the conclusion of the Rome Statute, recognition of female child soldiers' particular experiences in armed conflicts (e.g., domestic and sexual exploitation) was stressed; this, in relation to the rationale of the crime of using children to participate in hostilities. The present thesis examines caselaw from the International Criminal Court and the Special Court for Sierra Leone, respectively, concerning the notion of "participate actively in hostilities". Is this legal concept applied and interpreted with due gender sensitiveness?

In this thesis, it is argued that jurisprudence of the International Criminal Court and the Special Court for Sierra Leone reveals that the level of protection stemming from international criminal law is lower for female child soldiers than it is for male child soldiers. Certain "female" activities performed by children used in armed groups are excluded from the notion of "participate actively in hostilities". Thus, they do not fall within the scope of the crime of using child soldiers. While activities connected to combat situations, espionage and guarding of military objects have been covered by the notion, cooking, nursing, and performance of other household chores have not.

Offering a gender analysis of the application and interpretation of the crime of using children to participate actively in hostilities, this thesis suggests a gender-sensitive way of reading international criminal law. With respect to international human rights law, international humanitarian law and Article 21(3) of the Rome Statute, which articulates the importance of internationally recognized human rights as well as the principle of non-discrimination in relation to application and interpretation of the Statute, inclusion of typically "female" activities within the legal notion of "participate actively in hostilities" is advocated for.

Preface

Submitting this master thesis, I would like to take the opportunity to thank my dear family and friends in Lund, Vejbystrand, Midsommarkransen, Malmö, Montreal, and elsewhere, for their overwhelming *love and devotion* throughout the years.

In particular, I want to thank my supervisor, Letizia Lo Giacco, for invaluable guidance and support during the work with this thesis.

Vejbystrand, 21 May 2017
Kajsa Sturesson

Abbreviations

AFRC	Armed Forces Revolutionary Council
CDF	Civil Defense Forces
CEDAW	United Nations Committee on the Elimination of Discrimination against Women
CIL	Customary international law
CIHL	Customary international humanitarian law
CRC	Convention on the Rights of the Child
DRC	Democratic Republic of Congo
FNI	*Front des Nationalistes Intégrationnistes*
FPLC	*Force Patriotique Pour la Libération du Congo*, Patriotic Force for the Liberation of Congo
FRPI	*Force de Résistance Patriotique en Ituri*
ICC	International Criminal Court
ICJ	International Court of Justice
ICJ Statute	Statute of the International Court of Justice
ICL	International criminal law
ICRC	International Committee of the Red Cross
IHL	International humanitarian law
IHRL	International human rights law
OHCHR	United Nations Human Rights Council
Rome Statute	Rome Statute of the International Criminal Court
RUF	Revolutionary United Front
SCSL	Special Court for Sierra Leone

SCSL Statute	Statute of the Special Court for Sierra Leone
UN	United Nations
UNICEF	United Nations Children's Fund
UNTS	United Nations Treaty Series
UPC	*Union des Patriotes Congolais*
VCLT	Vienna Convention on the Law of Treaties

1 Introduction

1.1 Background

Use of children in armed conflicts by national and/or non-state military groups is, according to a United Nations (UN) report published in 2016, taking place in Afghanistan, the Central African Republic, the Democratic Republic of Congo (DRC), Iraq, Mali, Myanmar, Somalia, South Sudan, the Sudan, the Syrian Arab Republic, Yemen, Colombia, Nigeria, and in the Philippines.[1]

The affected children, or the so-called "child soldiers", are used for multiple purposes within their groups, both directly and indirectly related to hostilities. To achieve a comprehensive picture of what use of child soldiers means, each context in which a child soldier is present must be scrutinized; for instance, every conflict is different, and every military group has its own characteristics.[2] To name a few examples, children can be assigned to tasks involving participation in combat at the front line, guarding of military objects, espionage, food-finding, and performance of household chores.[3] Moreover, children – especially female – are used as "wives" of their commanders.[4] For instance, such a situation has been experienced by Hawa, interviewed in the aftermath of the conflict in Sierra Leone (1991-2002):

> "I was first abducted as a small girl and I was in total fear. I thought I would die at any time. During my time with the rebels, I was raped daily. At least one person would demand sex. For my very survival, I gave up myself and I was ready [for coerced sex] at all times. This was until a commander took me as his own and decided to have me as a permanent partner. He protected me against [sexual violence by] others. . . . Towards the end of the war, I became pregnant [with the commander's child]. . . . The child is now three years old".[5]

[1] UN, Children and Armed Conflict, 2016, pp. 37-40.
[2] Fisher, 2013, p. 22.
[3] Ibid, pp. 22-32.
[4] Ibid, p. 169.
[5] Denov, 2006, p. 327.

Several international agreements, originating from the fields of international human rights law (IHRL),[6] international humanitarian law (IHL),[7] and international criminal law (ICL), have sought to protect children in armed conflicts and, accordingly, eliminate their presence in military groups. As to the area of ICL, two institutions have dealt with interesting cases on individual criminal responsibility for war crimes of recruitment and use of child soldiers, namely the International Criminal Court (ICC) and the Special Court for Sierra Leone (SCSL). These courts' jurisprudence regarding the war crime of using children under the age of fifteen years to participate actively in hostilities will be the focus of this thesis.[8] Given the various roles which child soldiers might be exposed to within their groups, it is important to study caselaw on what particular roles or activities that have been included in the legal concept of "participate actively in hostilities" pursuant to Articles 8(2)(b)(xxvi) and 8(2)(e)(vii) of the *Rome Statute of the International Criminal Court* (Rome Statute), and Article 4(c) of the *Statute of the Special Court for Sierra Leone* (SCSL Statute). Only such use of children, i.e., to "participate actively in hostilities", is criminalized under these Articles.

Interestingly, it has been showed that female respectively of male child soldiers are used for partly different purposes within armed forces. For instance, researchers point to the fact that:

> "Female child soldiers face many of the same conditions and occupy many of the same roles [as male child soldiers] within the group. They are targets of violent recruitment, training, fear, hunger, discomfort, and abuse. They act as porters, gatherers, disciplinarians, and fighters. Female child soldiers also face distinctly different treatment and gender-based violence as part of the fighting force: the principle responsibility of cooking usually falls to them and

[6] E.g., UN General Assembly, *Convention on the Rights of the Child*, UNTS, Volume 1577, page 3, 20 November 1989, (CRC).

[7] E.g., *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 75 UNTS 287, 12 August 1949, (Fourth Geneva Convention), and *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 1125 UNTS 609, 8 June 1977, (Additional Protocol II).

[8] See the war crime of use of children to participate actively in hostilities in UN General Assembly, *Rome Statute of the International Criminal Court*, 17 July 1998, (Rome Statute), Articles 8(2)(b)(xxvi) and 8(2)(e)(vii), and in UN Security Council, *Statute of the Special Court for Sierra Leone*, 16 January 2002, (SCSL Statute), Article 4(c).

> they are also expected to be available for sex and to care for any small children who are present".[9]
>
> "The roles played by girls are particularly vital for group survival in terms of logistics (cooking, fetching water and wood, cleaning, caring for the sick and wounded.)".[10]

Thus, recognition of the fact that certain *activities* performed by child soldiers can be tied to certain *gender identities* of these children, may prove helpful when analyzing if a gender perspective is needed in the application and interpretation of the above-mentioned crimes. Accordingly, the interaction between, on the one hand, application and interpretation of the crime of using children to actively participate in hostilities, and, on the other hand, a gender perspective, will be studied in this thesis. Based on the caselaw of international criminal jurisdictions, does the extent of protection of children in armed conflict stemming from international criminal law instruments depend on gender identity?

This thesis will focus on the war crime of using children under the age of fifteen years to participate actively in hostilities pursuant to the Rome Statute as well as the SCSL Statute. The hypothesis put forward by the thesis is that such a crime necessitates a gender perspective to make effective the protection of children in armed conflict against their possible usage in hostilities.

1.2 Purpose

In general terms, the overarching purpose of this thesis is to analyze the interpretation and application of Articles 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Rome Statute, as well as Article 4(c) of the SCSL Statute, from a gender perspective.

Given the rationale of the crime of using children to actively participate in hostilities – i.e., to protect children in armed conflict – the object of this thesis is, first, the relationship between rationale, application and interpretation of the notion of "participate actively in hostilities". Second, and most importantly, the intention is to analyze whether this notion should be informed of gender considerations when applied and interpreted, in order to meet its purpose.

[9] Fisher, 2013, p. 171.
[10] ICRC, Tercier Holst-Roness, 2006, p. 14.

1.2.1 Research Questions

One principal question will form the basis for this thesis, clarifying the purpose of the research. This research question is formulated as follows:

- Shall the application of the notion of "participate actively in hostilities" (Articles 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Rome Statute, and Article 4(c) of the SCSL Statute) be informed of gender considerations to effectively protect children in armed conflict (i.e., to meet the rationale of the rules)?

Moreover, the following sub-questions will be examined in order to answer the principal question:

- Which intentions did the drafters have by codifying the rules criminalizing use of children under the age of fifteen years to "participate actively in hostilities"? How was the underlying rationale of the war crime of use of child soldiers discussed, and was a gender perspective considered?

- Do the application and interpretation of the notion of "participate actively in hostilities" produce different levels of protection, based on gender? Is the notion applied and interpreted effectively or must the ICC and/or the SCSL be better informed of gender considerations in order to effectively secure the rationale of the crime?

1.2.2 Delimitations

Bearing in mind the purpose of this thesis, the present section will describe delimitations made to the research; this, in order to be able to go into depth regarding the above articulated research questions.

First, it can be noted that the intention of this thesis is to focus on a legal concept ("participate actively in hostilities") through the lenses of a gender perspective. Therefore, judicial decisions of international criminal courts will be considered primarily. Empirical studies will be gone through, as seen under section 1.1, "Background", where the reader gains some understanding of what the former child soldier Hawa experienced during her time in an armed group. However, other researchers have studied and will, importantly, further study child soldiers' realities empirically. Based on such research, it is clear that experiences of child soldiers can depend on their gender; *certain activities* performed by child soldiers during armed conflicts are typically

performed by such children with *certain gender* identities.[11] Acknowledging these facts is a premise underlying this thesis, why empirical research will not be further investigated.

Also due to the legal perspective permeating this thesis, *historical* aspects of the addressed conflicts – i.e., the conflicts in the DRC and in Sierra Leone – will not be dealt with in detail. Thus, background information of the cases will only be briefly presented.

Second, it can be underscored that the question of *cumulative convictions* will not be focused on during the research. This procedural criminal law issue has, for instance, been discussed by the SCSL in the *AFRC* judgement,[12] a case examined under section 3.21. In the introduction to chapter 3 of this thesis (see page 33), it is explained that the following case overviews will not only consider legal reasoning with respect to the crime of using children to actively participate in hostilities, but also legal reasoning on other possible applicable qualifications of the same conduct. This is an approach which may lead to concerns with respect to cumulative convictions, an issue arising "when more than one charge stems out of what is essentially the same criminal conduct".[13] However, this subject will not be considered in the present thesis, which is oriented towards substantive criminal law rather than procedural.

Third, it can be mentioned that drafting history of the crime of using children to actively participate in hostilities, codified in the Rome Statute, will be gone through in chapter 2 of this thesis. However, negotiations prior to the entry into force of the SCSL Statute will not be described, since this Statute was merely settled through an agreement between the UN and the Government of Sierra Leone.[14]

1.3 Method and Material

This section describes the steps undertaken for the purpose of writing the present thesis. Insofar as the analysis primarily focuses on legal sources such as international treaty provisions, as well as on judicial decisions within the terms of Article 38 of the Statute of the International Court of Justice (ICJ

[11] Supra, notes 4-5 and 9-10.

[12] *The Prosecutor vs. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu (the AFRC Accused)*, SCSL-04-16-T, Trial Judgement of the SCSL, 20 June 2007, (*AFRC*), paras. 2099- 2111.

[13] Ibid, para. 2099.

[14] Rapp, 2014, p. 25, footnote 9, which refers to UN, Agreement between the UN and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, 2002.

Statute),[15] the method applied is a legal dogmatic one. Importantly, such a method can take various of forms and be combined with perspectives inspired by, for instance, historical, sociological, and philosophical disciplines. Therefore, it is crucial to highlight that this thesis will be conducted with an interdisciplinary approach in the sense that ideas developed within the field of *gender studies* will permeate the analyze. The legal material will, consequently, be read with a gender perspective borne in mind.

Thus, the methodology will be of a classic legal dogmatic type, based on the use of sources within international law recognized under Article 38 of the ICJ Statute, but informed with a clear gender perspective. Most importantly, sources of international criminal law or ICL[16] will be examined throughout the process; yet, sources of, e.g., human rights law or IHRL, as well as international humanitarian law or IHL, are considered.

1.3.1 A Gender Analysis of International Criminal Law

As already pointed to, ideas from the area of gender studies will interact with ideas from the area of international law throughout this thesis. Such a perspective requires a certain methodology, which is presented here. Additionally, section 1.4, "Theory", will provide the reader with an introduction to the theoretical framework underpinning the research.

In the view of Hilary Charlesworth, international law scholar and author of books such as *The Boundaries of International Law: A Feminist Analysis*,[17] gender analysis is a tool by which law is deconstructed:

> "[Feminist methods] will not lead to neat 'legal' answers because they are challenging the very categories of 'law' and 'nonlaw'".[18]

In Charlesworth's text *Feminist Methods in International Law*, two specific methodologies are described; she calls them Searching for Silences and World Traveling. As to the first method, Searching for Silences, Charlesworth highlights gendered dichotomies such as mind/body, action/passivity, and public/private, dichotomies which express stereotypical perceptions of what

[15] UN, *Statute of the International Court of Justice*, 18 April 1946, (ICJ Statute).
[16] See, e.g., Article 21 of the Rome Statute, which lists the hierarchy of sources that are to be applied by the ICC.
[17] Charlesworth & Chinkin, 2000.
[18] Charlesworth, 2004, p. 159.

constitutes "male" respectively of "female" features.[19] In Charlesworth's view, these silent divisions must be addressed rather than ignored within the research on international law. Since the "female" categories are generally seen as subordinate to the "male" ones, they are "both difficult to say and difficult to hear. They seem illegitimate, embarrassing, and irrelevant".[20]

As to Charlesworth's second method, World Traveling, recognition of differences within the group "women" is stressed.[21] The intersectional approach, which Charlesworth touches upon and which will be employed during the work with this research, is described in section 1.4.2, "Speaking for 'All Women'".

Rosemary Grey has, in an article addressing gender considerations within international criminal law institutions such as the ICC, held that a task for scholars encouraging feminist perspectives within the area of ICL "may be to identify and challenge gender bias within the existing legal framework",[22] rather than to replace already codified rules and legal orders. This method or approach will inspire the gender analysis of the present thesis.

1.3.2 Sources and Material

Regarding the material used during the research, legal instruments and agreements as well as judicial decisions will constitute the main body of sources turned to. For instance, reading of judgements originating from the ICC and the SCSL is necessary in order to answer the above articulated research question. Therefore, relevant jurisprudence of these two courts will be extensively studied and discussed.

Furthermore, *travaux préparatoires* or preparatory works of legal instruments will be read and presented. By examining drafting history of the Rome Statute, it will be possible to study what the drafters intended by codifying certain provisions, e.g., the crime of using children to actively participate in hostilities. Moreover, relevant reports and documents issued by international institutions and organizations – crucial within the research area of ICL and use of child soldiers – are gone through, as well as teachings by scholars. In addition to legal sources and literature, empirical research is going to be consulted for the purpose of gaining a more comprehensive picture of

[19] Ibid, p. 163.
[20] Ibid, p. 164.
[21] Ibid, p. 165.
[22] Grey, 2016, p. 331.

experiences of former child soldiers, especially in the DRC and in Sierra Leone.

Some of the judgements, documents and sources will, when appropriate, be quoted. A few of these citations will appear quite extensive; however, they will be presented because of their particular importance to the questions addressed in the thesis. The reader is encouraged to have a glance at, for instance, Judge Elizabeth Odio Benito's dissenting opinion (in the case of *Lubanga*[23]) in its entirety. Among other texts, this separate and dissenting opinion offers an adequate starting point to address the research questions.

Importantly, a wide range of works by scholars with diverse backgrounds will be studied during the research; i.e., representation is taken into account.

1.4 Theory

1.4.1 International Law and the Male Paradigm

Most importantly, this thesis draws on theories developed within the fields of gender studies and international criminal law. The interaction between these two disciplines has been studied by numerous of scholars. Of particular relevance in this context are, however, works of previously mentioned Grey which specifically target the connection between gender and the criminalization of recruitment and use of child soldiers. In her article *Interpreting International Crimes from a 'Female Perspective': Opportunities and Challenges for the International Criminal Court*, it is settled that a premise of ICL – and thus, of Grey's research – is the fact that this area has been historically "developed and interpreted almost exclusively by men".[24] According to Grey, this exclusion of female experiences requires action. In order to achieve a new, "feminist jurisprudence", gender sensitivity is desirable when interpreting both "gender-based"[25] and "gender-neutral crimes".[26]

[23] *Situation in the Democratic Republic of the Congo, in the case of the Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Judgement of the ICC, 14 March 2012, (*Lubanga*).
[24] Grey, 2016, p. 325.
[25] This term is defined in, e.g., ICC, Policy Paper, 2014, p. 3: "'Gender-based crimes' are those committed against persons, whether male or female, because of their sex and/or socially constructed gender roles. Gender-based crimes are not always manifested as a form of sexual violence. They may include non-sexual attacks on women and girls, and men and boys, because of their gender".
[26] Grey, 2016, pp. 325-327.

By addressing the scope of seemingly gender-neutral crimes, Grey touches upon the concepts of *formal and substantive equality*, as well as *direct and indirect discrimination*. These terms are used by legal scholars to describe, e.g., affirmative action, reasonable accommodation,[27] and situations where a legal norm is non-discriminatory as to its wording or "on the surface", but generates discriminatory results when applied (indirect discrimination).[28] As explained by Rachel Fleetwood et al., "prohibitions of indirect discrimination require a state to take account of relevant differences between groups".[29]

Louise Chappell has, in her book *The Politics of Gender Justice at the International Criminal Court: Legacies and Legitimacy*, published in 2016, pointed to difficulties faced by scholars presenting feminist perspectives on the law;

> "Because gender legacies tend to operate as informal rules and practices – working under the surface to shape the attitudes and actions of institutional actors – they are much more difficult to tackle than any limitations in the formal rules. […] Gender legacies slip in to the gaps between the formal rules and their interpretation to distort and displace the intentions of designers. […] When judges do attempt to provide an expansive reading of the law, as Judge Benito did in *Lubanga*, they can easily become targets for attack for 'judicial activism' and 'overreach'".[30]

Also part of the theoretical framework of this thesis, is feminist critique on international law originating from historical, political and social perspectives. For example, such critique is presented by Sandra Fredman in *Women and the Law*. Here, the interplay between gender and legal norms is put in a historical context, and the notion of "law" is analyzed as a "product of social forces".[31] Neither is the law something objective, impossible to change, nor is it unaffected by – but rather built around – society's inevitable power structures. According to Fredman, patriarchy constitutes such a power structure. However, this paradigm can be overthrown.[32]

---

[27] Fleetwood, 2011, pp. 17-18.

[28] Charlesworth, 2004, p. 162.

[29] Fleetwood, 2011, p. 18.

[30] Chappell, 2016, p. 198. For an overview of the case of *Lubanga*, as well as Judge Odio Benito's Separate and Dissenting Opinion in the same case, see section 3.1.1, "The Lubanga Case".

[31] Fredman, 1998, p. 2.

[32] Ibid, pp. 367-368.

> "One of our chief tasks […] is to unmask the male perspective in law, enabling us to give due weight to that of women".[33]

1.4.2 Speaking for "All Women"

Recognizing dangers of the demand to speak for "all women", Fredman raises important questions tied to *intersectionality*. In the author's opinion, multiple factors such as race, class and sexual orientation determine hierarchical systems of domination and subordination. Accordingly, power and capital differs within groups (e.g., within the group called "women"), and not only gender is a decisive factor for a person's life conditions. Nevertheless, Fredman argues that gender constitutes one such factor, which – among others – deserves to be analyzed.[34]

As to the perils of *gender essentialism*, also associated with the claim to speak for "all women", this thesis draws on a "social constructionist perspective on gender",[35] described in Michael Kimmel's *The Gendered Society*. The starting point for his perception of gender is critique of the notion of "sex roles".[36] In Kimmel's opinion, "gender" better describes a reality where social relationships of identities, femininities and masculinities are performed, negotiated and constantly changing.[37] Thus, no inherent features can be attributed to "femininity" and "masculinity"; these concepts vary over time and place, and are closely connected to power.[38] According to Kimmel, power produces gender inequalities, something that he explains as follows:

> "Power creates as well as destroys. It is deeply woven into the fabric of our lives – it is the wrap of our interactions and the weft of our institutions. And it is so deeply woven into our lives that it is most invisible to those who are the most empowered".[39]

Moreover, and also in order to avoid gender essentialism, this research will reflect views described in works of post-colonial feminist scholars, such as Ratna Kapur. In *The Tragedy of Victimization Rhetoric: Resurrecting the Native Subject in International/Post-Colonial Feminist Legal Politics*, she

[33] Ibid, p. 2.
[34] Ibid.
[35] Kimmel, 2000, pp. 87-88.
[36] Ibid, pp. 88-92.
[37] Ibid, pp. 106-107.
[38] Ibid, p. 106.
[39] Ibid, p. 94.

criticizes movements engaged in women's rights for contribution to the idea of women as victims (*victimization*), primarily through their emphasis on violence against women.[40] Kapur defines such gender essentialism as "the fixing of certain attributes to women"[41] and highlights the fact that different women are exposed to different, intersectional systems of subordination and supremacy. Therefore, legal orders cannot only be analyzed as "male"; they must also be seen as products of "social, economic, or historical forces, such as colonialism, enslavement of non-white populations (including both men and women), or the role of the Christian Church".[42] After having addressed *cultural essentialism* as an effect of unsuccessful attempts to avoid gender essentialism, Kapur suggests a new approach to feminist legal politics – an approach which is both "transformative and inclusive".[43] In Kapur's view, this approach must "counter the fictitious homogeneity and sisterhood"[44] in order to create a discourse in which the post-colonial subject is an agent.[45]

The idea suggesting that women shall be viewed and treated as subjects rather than objects is also reflected in, for instance, Lila Abu-Loghod's *The Muslim Woman: The Power of Images and the Danger of Pity*. "The danger of pity"[46] and victimization are, in Abu-Loghod's opinion, affecting the Non-Western woman more than anyone else.[47]

All judicial decisions accounted for in this thesis concern prosecution of crimes which have taken place in the DRC respectively of Sierra Leone. The colonial history of these countries is, naturally, a significant aspect of the context in which the addressed crimes have occurred. Thus, research conducted by post-colonial feminist thinkers will be kept in mind during the work with this thesis. For example, use of language, especially in judicial decisions, must be observed. Trinh T. Minh-ha expresses the importance of words in her article *Difference: A Special Third World Women Issue*, published in 1987 by the Feminist Review:

> "She has been warned of the risk she incurs by letting words run off the rails, time and again tempted by the desire to gear herself to the accepted norms. But where has obedience led her? […] How many, already, have been

[40] Kapur, 2002, p. 2.
[41] Ibid, p. 7.
[42] Ibid, pp. 9-11.
[43] Ibid, p. 37.
[44] Ibid.
[45] Ibid, pp. 36-37.
[46] Abu-Loghod, 2006, http://www.eurozine.com/the-muslim-woman/ (2017-04-09, 21:20).
[47] Ibid.

> condemned to premature deaths for having borrowed the master's tools and thereby played into his hands?"[48]

Similarly, Charlesworth – when describing feminist methods in international law – points to "the gendered and sexed nature of the basic concepts of international law; for example, 'states,' 'security,' 'order,' and 'conflict'".[49]

1.4.3 Terminology and Language

In the field of gender studies, discourses and paradigms are seen as reflecting and reproducing power and, therefore, gender. This view has been emphasized by, for example, above cited Minh-ha and Charlesworth. To define certain terms used in this thesis is, accordingly, imperative to both the writer's and the reader's understanding of the research.

The words "woman", "man", "girl", and "boy" will be used in this thesis only when judicial decisions or other sources refer to these terms. Thus, with the intention to remove focus from biological sex to socially constructed and performed gender identities, the notions of "female", "male", "feminine", and "masculine" will be used when another term is not mentioned in a specific source. In Charlesworth's view – a view adopted here – the term "gender" points toward:

> "The social construction of differences between women and men and ideas of 'femininity' and 'masculinity' – the excess cultural baggage associated with biological sex".[50]

The Rome Statute provides for another, slightly different definition of "gender" in its Article 7(3): "For the purpose of this Statute, it is understood that the term 'gender' refers to the two sexes, male and female, within the context of society".[51] In the ICC's Office of the Prosecutor's *Policy Paper on Sexual and Gender-Based Crimes*, "gender" is defined essentially the same.[52]

---

[48] Minh-ha, 1987, p. 5, referring to Lorde, 2001; "The Master's Tools Will Never Dismantle the Master's House".
[49] Charlesworth, 2004, p. 162.
[50] Ibid, p. 159.
[51] Article 7(3) of the Rome Statute.
[52] ICC, Policy Paper, 2014, p. 3: "Gender: 'Gender', in accordance with Article 7(3) of the Rome Statute […], refers to males and females, within the context of society. This definition acknowledges the social construction of gender, and the accompanying roles, behaviours, activities, and attributes assigned to women and men, and to girls and boys. Sex: 'Sex' refers to the biological and physiological characteristics that define men and women".

It must be emphasized that in the context of this research, use of notions such as "female" and "male" are meant to recognize the existence of various gender identities rather than a binary system based on the idea of two biological sexes. This perception of gender is also argued for by scholars as Kimmel, who holds that "sociology begins with a critique of biological determinism".[53] (See above, on *gender essentialism* in section 1.4.2, "Speaking for 'All Women'").

1.5 Previous Research

The present section is intended to give the reader an idea of the body of research already conducted on the subject for this thesis. Therefore, different views presented in the doctrine, concerning the concept of "participate actively in hostilities", will be briefly examined here. The following text contains an overview of, on the one hand, scholars advocating for an extensive interpretation of "participate actively in hostilities" – informed by gender considerations – and, on the other hand, teachings in favor of a narrower definition of the crime of using children to actively participate in hostilities.

To mention one of the many interdisciplinary works combining the fields of ICL and gender studies, Grey's teachings can be presented. In *Interpreting International Crimes from a 'Female Perspective': Opportunities and Challenges for the International Criminal Court*, Grey offers an analysis of the *Lubanga* case, giving account for various of scholars' views on the judgement. The author's specific focus in this article is how seemingly gender-neutral legal concepts and crimes have different implications for women, men, girls and boys, depending on how the law is applied and interpreted.[54] For example, the legal concept of "participate actively in hostilities" is scrutinized.[55] Grey stresses Article 21(3) of the Rome Statute, which articulates the importance of international human rights law and the principle of non-discrimination in relation to the ICC's application and interpretation of its Statute.[56] Addressing the connection between criminalization of use of child soldiers and gender, a new, "feminist jurisprudence" within international criminal law is encouraged.[57]

Critique of the ICC's and the SCSL's jurisprudence has been put forward regarding a potential expansion of the scope of the "participate actively in

[53] Kimmel, 2000, p. 86.
[54] Grey, 2016, p. 327.
[55] Ibid, pp. 341-349.
[56] Ibid, pp. 331-338.
[57] Ibid, p. 325.

hostilities" notion. This critique is based on multiple arguments. For instance, Kai Ambos has pointed to the conflict between an extensive interpretation of the notion and Article 22(2) of the Rome Statute – the prohibition of analogy.[58] Moreover, Joe Tan, also advocating for a narrower interpretation of the concept of "participate actively in hostilities", has held that an expanded scope means an increased number of child soldiers who become potential targets in armed conflicts. "Active participation" is, in his view, equating with "direct participation", and must therefore be more strictly defined.[59] However, Grey has responded to this critique by arguing that the legal notion of "direct participation" within IHL is distinct from the ICL concept of "active participation".[60]

Furthermore, Chappell has studied the ICC's jurisprudence in relation to gender equality in her above mentioned book *The Politics of Gender Justice at the International Criminal Court: Legacies and Legitimacy*, published in 2016. Here, Chappell puts forward that judgements issued by the ICC lack gender sensitiveness, albeit feminist perspectives were frequently stressed during the negotiations of the Rome Statute.[61] Using Nancy Fraser's explanations of gender injustice as stemming from factors such as "gender misrecognition",[62] Chappell provides the reader with feminist, theoretical tools by which the area of ICL can be dismantled, deconstructed, and evaluated.[63]

In the field of human security studies, Myriam S. Denov et al. have conducted important empirical research in Sierra Leone, based on interviews with war-affected children. The studies, founded by the Canadian International Development Agency, have focused on former child soldiers and their involvement in the conflict between 1991 and 2002.[64] In Denov's article *Wartime Sexual Violence: Assessing a Human Security Response to War-Affected Girls in Sierra Leone*, case studies focusing on three former girl

[58] Ambos, 2012, p. 137, footnote 156.
[59] Tan, 2012, pp. 131-145.
[60] Grey, 2016, p. 349.
[61] Chappell, 2016, pp. 196-197.
[62] Fraser, 2007, p. 26; "Women suffer gender-specific forms of status subordination, including sexual harassment, sexual assault, and domestic violence; trivializing, objectifying, and demeaning stereotypical depictions in the media; disparagement in everyday life; exclusion or marginalization in public spheres and deliberative bodies; and denial of the full rights and equal protections of citizenship. These harms are injustices of misrecognition".
[63] Chappell, 2016, pp. 5-10.
[64] Denov, 2006, pp. 320 and 340.

soldiers in the military group Revolutionary United Front (RUF) are presented.[65]

1.6 Structure

This thesis will be structured with respect to the above expressed research questions. Therefore, the first sub-question on drafting history and intentions behind the concept of "participate actively in hostilities" will first be examined (chapter 2, "Legal Instruments on the Notion of 'Participate Actively in Hostilities'"). In this context, legal instruments originating from the areas of ICL, IHRL, and IHL, related to the same concept, will also be given account for.

Subsequently, the second sub-question on jurisprudence concerning the concept of "participate actively in hostilities" will be investigated (chapter 3, "Judicial Decisions on the Notion of 'Participate Actively in Hostilities'"). Here, caselaw of the ICC and the SCSL, respectively, will be given account for.

Lastly, the concluding chapter, consisting of a summary of as well as a discussion on the findings presented in the thesis, will be offered (chapter 4, "Conclusion").

[65] Ibid. See also section 1.1, "Background", where Hawa, one of the interviewed girls, is quoted.

2 Legal Instruments on the Notion of "Participate Actively in Hostilities"

The fundamental instruments for the ICC and the SCSL, whose jurisprudence is to be analyzed in this thesis, are their respective Statutes; the Rome Statute, and the SCSL Statute.[66] In these legal instruments, there are three certain provisions which all criminalize use of children in armed conflicts, namely: Articles 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Rome Statute, and Article 4(c) of the SCSL Statute. These norms constitute the starting point for this thesis.

Offering an overview of drafting history of these three provisions, the present chapter will provide the reader with an increased understanding of the intentions of the parties regarding the scope of application. More specifically, the notion of "participate actively in hostilities" and its intended rationale will be scrutinized.

2.1 Rules on Applicable Law and Methods of Interpretation

Before examining the crime of using children to participate actively in hostilities more in detail, general rules for the courts to follow when applying, interpreting, and defining legal concepts will here be investigated.

Article 21 of the Rome Statute articulates the hierarchy of legal sources which are to be applied by the ICC. First, the ICC shall apply its Rome Statute and procedural rules; second, treaties and customary international law including principles of international law of armed conflict are to be applied; and third, general principles of law which can be derived from national legal orders and which are in line with the Rome Statute shall be applied (Article 21(1)(a-c)). Moreover, the ICC can consider principles developed in previous cases before the Court (Article 21(2)). Under Article 21(3), it is established that the Court's application and interpretation must not conflict with internationally recognized human rights norms and, additionally, not be discriminatory on grounds such as gender, age and race.[67]

[66] Supra, note 8.

[67] "Gender" is defined in Article 7(3) of the Rome Statute; see section 1.4.3, "Terminology and Language", where this provision is quoted.

No similar provision on applicable law can be found in the SCSL Statute. However, the SCSL has referred to Article 38(1)(a-b) of the ICJ Statute when determining which sources it is to consider (regarding the question of whether the SCSL has jurisdiction over crimes of using children to actively participate in hostilities).[68] Pursuant to these provisions, international conventions and customary international law (CIL) shall be applied by the International Court of Justice (ICJ) when it decides in disputes.[69] Additionally, Article 38(1)(c-d) establishes that the ICJ is to apply general principles of law recognized by civilized nations as well as judicial decisions and teachings.

The Rome Statute is subjected to the Vienna Convention on the Law of Treaties (VCLT)[70] regarding interpretation of the provisions. Under Articles 31 and 32 of the VCLT, norms on interpretation of international treaties are laid down. These norms are generally considered as reflections of CIL,[71] and have been referred to in, for instance, judgements issued by the ICC. In the case of *Katanga* (which will be examined in more detail under section 3.1.2, "The Katanga Case"), the Court referred to the VCLT, holding that its "General Rule" expressed in Article 31(1)[72] took a holistic approach on the

[68] *Prosecutor v. Sam Hinga Norman - Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment),* Case No. SCSL-2004-14-AR72(E), Decision of the SCSL, 31 May 2004, para. 9.

[69] Article 38(1) of the ICJ Statute.

[70] UN, *Vienna Convention on the Law of Treaties*, 23 May 1969, UNTS, Volume 1155, p. 331 (VCLT).

[71] Aust, 2006, paras. 14-18.

[72] Article 31 ("General Rule of Interpretation") of the VCLT reads as follows: "1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty; (b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. 3. There shall be taken into account, together with the context: (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) Any relevant rules of international law applicable in the relations between the parties. 4. A special meaning shall be given to a term if it is established that the parties so intended". Moreover, Article 32 ("Supplementary Means of Interpretation") reads as follows: "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) Leaves the meaning ambiguous or obscure; or (b) Leads to a result which is manifestly absurd or unreasonable".

interpretation of legal norms.[73] In this context, the ICC also recognized that interpretation of norms in order to secure their object and purpose (the principle of effectiveness) constitutes one of the principles pursuant to Article 31(1) of the VCLT.[74]

Moreover, fundamental principles within criminal law, such as the principle of legality, are important to bear in mind when studying the ICC's and the SCSL's decisions. The principles embodied in Articles 22 and 23 of the Rome Statute (*nullum crimen sine lege* respectively of *nulla poena sine lege*) can be said to establish an outer limit for the ICC's application and interpretation of crimes and legal concepts. As to the principle of legality, expressed in Article 22, the ICC is bound to define crimes strictly and without making analogies.[75] The relevance of these rules in relation to the definition of "participate actively in hostilities" will be explored below and is, for example, discussed by scholars such as Ambos.[76]

2.2 Criminalization of Use of Child Soldiers

Articles 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Rome Statute proscribe the war crimes of conscripting and enlisting children under the age of fifteen years into national military forces respectively of other military forces or groups, and of using them to participate actively in hostilities. Thus, the first provision applies to international armed conflicts, whereas the other aims at armed conflicts non-international in their character. The two provisions read as follows:

[73] *Situation in The Democratic Republic of the Congo in the case of the Prosecutor v. Germain Katanga,* ICC-01/04-01/07, Judgement of the ICC, 7 March 2014, (*Katanga*), para. 45.
[74] Ibid, para. 46.
[75] Article 22 ("*Nullum crimen sine lege*") of the Rome Statute reads as follows: "1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court. 2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted. 3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute". Moreover, Article 23 ("*Nulla poena sine lege*") reads: "A person convicted by the Court may be punished only in accordance with this Statute".
[76] See Ambos, 2012, p. 137, footnote 156.

> "Article 8 […]
>
> 2. For the purpose of this Statute, 'war crimes' means: […]
>
> (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts: […]
>
> (xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities. […]
>
> (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".[77]

The provision criminalizing recruitment and use of child soldiers in the SCSL Statute, i.e., Article 4(e), contains the same wording as to the notion of "participate actively in hostilities";

> "Article 4 – Other serious violations of international humanitarian law
>
> The Special Court shall have the power to prosecute persons who committed the following serious violations of international humanitarian law: […]
>
> c. Conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities".[78]

In the ICC's *Elements of Crimes*,[79] the term of "using" children to "participate actively in hostilities" is not further explicated. Regarding the element of use of children in combat, it is merely stated that: "The perpetrator […] used one or more persons to participate actively in hostilities".[80] Thus, and in order to

[77] Articles 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Rome Statute.
[78] Article 4(c) of the SCSL Statute.
[79] Pursuant to Article 9 of the Rome Statute, the Elements of Crimes should guide the ICC's application and interpretation of the crimes.
[80] Elements of Crimes, pp. 31 and 39.

study how this legal concept is intended to be defined, the drafting history of the Rome Statute needs to be turned to.

2.3 Preparatory Works of the Rome Statute

Considering the *travaux préparatoires* of the Rome Statue, a Preparatory Committee – frequently referred to in legal decisions by the ICC and by the SCSL[81] – proposed multiple, optional formulations of the crime of using children in hostilities. The options on how to phrase the criminalized acts followed: "(Option 1) Forcing children under the age of fifteen years to take direct part in hostilities; (Option 2) Recruiting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities; (Option 3) (i) Recruiting children under the age of fifteen years into armed forces or groups, or (ii) Allowing them to take part in hostilities".[82]

With regards to the second option (Option 2; the option most similar to the later codified provision in the Rome Statute), the Preparatory Committee made an interesting remark:

> "This option seeks to incorporate the essential principles contained under accepted international law while using language suitable for individual criminal responsibility as opposed to State responsibility.
>
> The words "using" and "participate" have been adopted in order to cover both direct participation in combat and also active participation in military activities linked to combat such as scouting, spying, sabotage and the use of children as decoys, couriers or at military checkpoints. It would not cover activities clearly unrelated to the hostilities such as food deliveries to an airbase or the use of domestic staff in an officer's married accommodation. However, the use of children in a direct support function such as acting as bearers to take supplies to the front line, or activities at the

[81] See below, chapter 3, "Judicial Decisions on the Notion of 'Participate Actively in Hostilities'".

[82] Preparatory Committee on the Establishment of an International Criminal Court, 1998, p. 18.

> front line itself, would be included within the terminology".[83]

The Preparatory Committee also suggested a codification of certain provisions emphasizing the Prosecutor's sensitiveness regarding "personal circumstances of victims and witnesses, including age, gender and health, and […] the nature of the crime, in particular, but not limited to, where it involves sexual or gender violence or violence against children".[84] Moreover, the elected Judges' expertise on "issues related to sexual and gender violence, violence against children and other similar matters"[85] were pointed to. The later codified provisions, which reflect the Committee's suggestions, can be found in Article 54(1)(b) respectively of Article 36(8)(b) of the Rome Statute.

During plenary meetings on the establishment of the ICC, two issues were frequently discussed: children's particular vulnerability as victims of war crimes, and the importance of gender sensitivity.[86] Reading the statements highlighting protection of children and the importance of gender, made by multiple delegations present at the Conference, it is clear that among other intentions behind the Rome Statute, one was to protect children victimized by armed conflicts. For instance, Eva Boenders, Observer for the Children's Caucus International, held that children must be protected from being used as child soldiers, recalling international agreements originating from both IHL and IHRL.[87] She argued that child soldiers are abused in multiple ways; e.g., through sexually exploitation, and that:

> "The definition of war crimes must consider the full range of children's participation and not be limited by the words 'direct' or 'active'. [Boenders] strongly recommended the inclusion in the Statute of a ban on recruiting and allowing children under the age of 15 to take part in hostilities".[88]

[83] Ibid, p. 18, footnote 19.
[84] Ibid, pp. 42-43.
[85] Ibid, p. 37.
[86] Plenary Meetings of the Conference on the Establishment of an International Criminal Court, 1998, see, e.g., p. 68, para. 65; p. 70, paras. 85 and 91; p.71, para. 115; p. 72, para. 118; p. 98, para. 33; p. 99, para. 36; p. 100, para. 66; p. 101, para. 69; p. 107, para. 23; p. 109, para. 61; p. 118, para. 70; p. 125, para. 60; p. 166, para. 66; p. 235, para. 15; p. 276, para. 34; p. 344, para. 12.
[87] Ibid, p. 72, paras. 118-119.
[88] Ibid, p. 72, para. 119.

Boenders further stated that only a strong court would be capable to ensure the "protection of children in armed conflict".[89]

As to gender sensitiveness, the Minister of Justice in Costa Rica, Mónica Nagel Berger, suggested that the ICC should have competence to prosecute "all crimes in which the dignity of women was violated".[90] Consequently, Nagel Berger advocated for criminalization of "rape, sexual slavery, prostitution and forced sterilization, as well as the recruitment of minors into the armed forces".[91] By stating this, Nagel Berger indeed recognized a connection between gender, sexual abuse and the use of child soldiers.

Tarja Halonen, Minister for Foreign Affairs in Finland, also pointed to "the increasing vulnerability of women and children to exploitation and sexual violence in armed conflicts".[92] Similarly, Stephen Lewis, Observer for the United Nations Children's Fund (UNICEF), expressed a particular concern regarding rights of women and children in conflicts, and held – in line with the Convention on the Rights of the Child (CRC)[93] – that using children under the age of 18 years to participate both directly and indirectly in hostilities should be proscribed as a crime.[94] Codification of norms specifically "safeguarding children"[95] were also recommended by Vincent Kirabokyamaria, Ambassador of Uganda.

[89] Ibid, p. 72, para. 121.
[90] Ibid, p. 77, para. 72.
[91] Ibid.
[92] Ibid, p 98, para. 33.
[93] E.g., Article 38 of the CRC, which reads as follows: "1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.
2. States Parties shall take all feasible measures to ensure that persons who have not attained the age of 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".
[94] Plenary Meetings of the Conference on the Establishment of an International Criminal Court, 1998, p. 112, para. 96.
[95] Ibid, p. 118, para. 70.

2.4 Other Legal Instruments Relating to the Notion of "Participate Actively in Hostilities"

In the ICC *Policy Paper on Sexual and Gender-Based Crimes*, published in 2014, the Office of the Prosecutor articulates a clear intention to adopt a "gender perspective" as well as a "gender analysis"[96] on all crimes within the Court's jurisdiction, i.e., "gender-based crimes",[97] "sexual crimes",[98] and other crimes.[99] Notably, this statement implies that investigations of seemingly gender-neutral crimes, such as the crime of using children to actively participate in hostilities, should also be informed of gender considerations.

In its *Policy Paper*, the Office of the Prosecutor underscored Article 21(3) of the Rome Statute, a provision which obliges the ICC to respect human rights and non-discrimination in its application of the Statute. In this context, the Office of the Prosecutor made reference to a General Recommendation issued by the United Nations Committee on the Elimination of Discrimination

[96] The terms "gender perspective" and "gender analysis" are defined in the ICC, Policy Paper, 2014, pp. 3-4: "Gender perspective: 'Gender perspective' requires an understanding of differences in status, power, roles, and needs between males and females, and the impact of gender on people's opportunities and interactions. This will enable the Office to gain a better understanding of the crimes, as well as the experiences of individuals and communities in a particular society. Gender analysis: 'Gender analysis' examines the underlying differences and inequalities between women and men, and girls and boys, and the power relationships and other dynamics which determine and shape gender roles in a society, and give rise to assumptions and stereotypes. In the context of the work of the Office, this involves a consideration of whether, and in what ways, crimes, including sexual and gender-based crimes, are related to gender norms and inequalities".

[97] The term is defined in ICC, Policy Paper, 2014, p. 3: "Gender-based crimes: 'Gender-based crimes' are those committed against persons, whether male or female, because of their sex and/or socially constructed gender roles. Gender-based crimes are not always manifested as a form of sexual violence. They may include non-sexual attacks on women and girls, and men and boys, because of their gender".

[98] The term is defined in ICC, Policy Paper, 2014, p. 3: "Sexual crimes: 'Sexual crimes' that fall under the subject-matter jurisdiction of the ICC are listed under articles 7(1)(g), 8(2)(b)(xxii), and 8(2)(e)(vi) of the Statute, and described in the Elements of Crimes ('Elements'). In relation to 'rape', 'enforced prostitution', and 'sexual violence', the Elements require the perpetrator to have committed an act of a sexual nature against a person, or to have caused another to engage in such an act, by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression, or abuse of power, or by taking advantage of a coercive environment or a person's incapacity to give genuine consent. An act of a sexual nature is not limited to physical violence, and may not involve any physical contact – for example, forced nudity. Sexual crimes, therefore, cover both physical and non-physical acts with a sexual element".

[99] ICC, Policy Paper, 2014, para. 20.

against Women (CEDAW), on the urge to interpret international criminal law in line with "internationally recognized human rights instruments without adverse distinction as to gender".[100] Moreover, the United Nations Human Rights Council (OHCHR) *Free & Equal Initiative* was referred to in order to stress the importance of elimination of discrimination due to gender identity and sexual orientation.[101] Intersectionality was seen as crucial to the considerations under Article 21(3).[102]

Furthermore, the Office of the Prosecutor discussed the specific crimes within the ICC's jurisdiction, and stated – in relation to Article 8 – that:

> "All […] types of war crimes, including intentionally directing attacks against the civilian population, torture, mutilation, outrages upon personal dignity, or the recruitment of child soldiers, may also contain sexual and/or gender elements".[103]

Moving from the Rome Statute to the area of IHL, use of child soldiers in armed conflicts is addressed in the Additional Protocol II to the Geneva Conventions. For instance, Article 4(3)(c) of Additional Protocol II stipulates that "children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities".[104] In the International Committee of the Red Cross (ICRC) Commentary to the Additional Protocols, it is declared that this provision is intended to protect children in armed conflict, and that it reflects principles codified in the Fourth Geneva Convention.[105] Specifically, the ICRC Commentary affirms that keeping children away from participating in combat "is a fundamental element of their protection".[106] Moreover, and in relation to the concept of "take part in hostilities", the ICRC Commentary states that:

> "Not only can a child not be recruited, or enlist himself, but furthermore he will not be 'allowed to take part in hostilities', i.e., to participate in military operations such as

[100] Ibid, para. 26, footnote 23, referring to CEDAW, General Recommendation No. 30, para. 23.
[101] Ibid, referring to OHCHR, Free & Equal Initiative, https://www.unfe.org/ (2017-05-15, 15:55).
[102] ICC, Policy Paper, 2014, paras. 26-27.
[103] ICC, Policy Paper, 2014, para. 35.
[104] Article 4(3)(c) of Additional Protocol II.
[105] ICRC Commentary, 1987, para. 4517, which refers to Articles 17, 24 and 26 of the Fourth Geneva Convention.
[106] Ibid, para. 4555.

> gathering information, transmitting orders, transporting ammunition and foodstuffs, or acts of sabotage".[107]

It can be observed that the ICRC Commentary, issued in 1987, uses the pronoun "he" vis-à-vis child soldiers. Later, however, the ICRC has published guiding documents recognizing that "children, boys and girls" can be used by military forces in hostilities.[108] Accordingly, the ICRC has pointed to the fact that:

> "Children can be used for purposes other than direct participation in hostilities; they can be used as spies, messengers, domestic servants, sexual slaves, etc. This is why the widely used term 'child soldiers' is often regarded as being too restrictive".[109]

In the ICRC Customary International Humanitarian Law (CIHL) Database – based on the ICRC's CIHL Study – Rule 137 addresses the use of children to participate in conflicts. This Rule, "Children must not be allowed to take part in hostilities",[110] is, for instance, derived from ICL instruments, such as the Rome Statute and the SCSL Statute. Accordingly, the ICRC points to the definition of "using [children] to participate actively in hostilities" proposed by the Preparatory Committee of the Rome Statute.[111]

Initiated by the UNICEF, an international conference on recruitment and use of child soldiers was held in 2007.[112] During this conference, taking place in Paris, the *Principles and Guidelines on Children Associated with Armed Forces or Armed Groups*, or the so-called "Paris Principles", were articulated. In this document, the term "child soldiers" was abandoned; instead, the term "children associated with an armed force or armed group" was used and – interestingly – broadly defined:

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

[107] Ibid, para. 4557.
[108] ICRC, 2012, p. 2.
[109] Ibid, p. 4.
[110] Rule 137, Chapter 39 of the ICRC CIHL Study, available at https://ihl-databases.icrc.org/customary-ihl/eng/docs/home (2017-05-10, 17:07).
[111] Ibid, footnote 17, which refers to the Preparatory Committee on the Establishment of an International Criminal Court, 1998, p. 18, footnote 19, (quoted above in section 2.3, "Preparatory Works of the Rome Statute").
[112] Paris Principles, pp. 4-5.

> boys and girls, used as fighters, cooks, porters, messengers, spies or for sexual purposes. It does not only refer to a child who is taking or has taken a direct part in hostilities".[113]

This understanding of children used in armed conflicts has also been endorsed by the ICRC.[114]

[113] Ibid, p. 7.
[114] ICRC, 2012, p. 2.

3 Judicial Decisions on the Notion of "Participate Actively in Hostilities"

For the purpose of examining the application and interpretation of the legal notion of "participate actively in hostilities", this chapter will contain an overview of relevant caselaw before the ICC and before the SCSL. This caselaw pertains to the notion of "participate actively in hostilities" pursuant to Articles 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Rome Statute or Article 4(c) of the SCSL Statute, respectively.

Accordingly, the focus of this chapter will be the two courts' interpretation of "using children to participate actively in hostilities". To the extent that the conduct may be criminalized both as a war crime and a crime against humanity (e.g., sexual abuse can be discussed in relation to crimes against humanity and war crimes of rape and sexual slavery, as well as in relation to war crimes of using child soldiers), this chapter will consider the parties' submissions in relation to all crimes relevant for acts which potentially fall under the notion of "participate actively in hostilities".

Furthermore, factual circumstances and background information concerning the armed conflict in question will be briefly described. If relevant, dissenting opinions are presented. Judgements issued by the Appeals Chambers will be examined if pertinent. For instance, reversals of convictions connected to crimes under Articles 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Rome Statute and 4(c) of the SCSL Statute are going to be accounted for.

Importantly, a *de lege lata* perspective will permeate the following part of the thesis. Developments of the jurisprudence can be detected throughout the cases, developments which will be discussed under "Conclusion".

3.1 Jurisprudence of the ICC

3.1.1 The Lubanga Case

In the first judgement issued by the ICC since its establishment, Trial Chamber I found Thomas Lubanga Dyilo guilty, as a co-perpetrator, of the war crimes of conscripting and enlisting children under the age of fifteen years into armed groups of the *Force Patriotique Pour la Libération du Congo* (Patriotic Force for the Liberation of Congo) (FPLC), and of using

them to participate actively in hostilities (see Article 8(2)(e)(vii) of the Rome Statute). The judgement was delivered on 14 March 2012.[115]

The Office of the Prosecutor, led by Luis Moreno Ocampo, chose not to charge Lubanga with any "sexual" and/or "gender-based crimes"[116] such as rape and sexual slavery. Despite evidence presented during trial, showing that Lubanga had been involved in such additional crimes, accusations concerning crimes under Article 8(2)(e)(vi) of the Rome Statute were excluded from the charges.[117]

Background of the Case

As to the factual circumstances of the case, Lubanga was the former President of the rebel movement *Union des Patriotes Congolais* (UPC) as well as Commander-in-chief of its military wing, the FPLC.[118] The UPC/FPLC was involved in the so called Hema-Lendu Conflict, a non-international armed conflict in the Court's view,[119] originating from tensions in the Ituri district, part of the DRC.[120] Formally established in 2002, the FPLC allegedly engaged in recruitment of child soldiers through campaigns and abductions, sent the children to military training camps and used them during hostilities.[121]

The crimes which Lubanga was charged with and convicted of occurred between September 2002 and 13 August 2003.[122]

Submissions to and Reasoning by the Court

The Trial Chamber's reasoning was focused on interpreting the requisite "participate actively in hostilities" under Article 8(2)(e)(vii); what activities performed by the recruited and used child soldiers were to be included in this notion?

Due to the Prosecutor's exclusion of charges of the above mentioned sexual and/or gender-based crimes (see, for example, Article 8(2)(e)(vi) of the Rome Statute[123]), polemics arose concerning how to handle the evidence on sexual

[115] *Lubanga*.
[116] Both of these legal terms are defined in ICC, Policy Paper, 2014, p. 3.
[117] *Lubanga*, para. 629.
[118] Ibid, para. 28.
[119] Ibid, para. 567.
[120] For a factual overview of the situation in the DRC, see ibid, paras. 67-91.
[121] Ibid, paras. 29-32.
[122] Ibid, para. 67.
[123] Article 8(2)(e)(vi) of the Rome Statute reads as follows: "2. For the purpose of this Statute, 'war crimes' means: […] (e) Other serious violations of the laws and customs

crimes which emerged from witness statements at trial.[124] The Office of the Prosecutor argued that children used for, e.g., sexual purposes, nursing and domestic chores, should be "viewed as providing essential support"[125] to the conflict. Consequently, these children should be regarded as having possessed "direct support function[s]"[126] during the conflict and as used to "participate actively in hostilities".

Such an extensive interpretation of this requisite, as well as a broad conception of the word "using" in the criminalization, were also advocated for by Radhika Coomaraswamy, the UN Special Representative of the Secretary General on Children and Armed Conflict.[127] In a written submission to the ICC, she held that:

> "When the Special Representative spoke to girl combatants in the eastern DRC, they spoke of being fighters one minute, a 'wife' or 'sex slave' the next, and domestic aides and food providers at another time".[128]

In Coomaraswamy's words, "exclusion of girls from the definition of child soldiers would represent an insupportable break from well-established international consensus".[129] For instance, it would contradict the Paris Principles.[130]

> "The Court should deliberately include any sexual acts perpetrated, in particular against girls, within its understanding of the "using" crime. The Special

applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts: […] (vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in Article 7, paragraph 2(f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of Article 3 common to the four Geneva Conventions".

[124] See for example *Lubanga*, para. 629, where the Office of the Prosecutor was criticized by the Trial Chamber, and Judge Odio Benito's Separate and Dissenting Opinion in *Lubanga*, which will be accounted for below.

[125] Ibid, para. 577.

[126] Ibid, para. 578. The notion of "direct support function" originates from the *travaux préparatoires* of the Rome Statute, see the Preparatory Committee on the Establishment of an International Criminal Court, 1998, p. 18, footnote 19, (quoted above in section 2.3, "Preparatory Works of the Rome Statute").

[127] Special Representative Coomaraswamy, 2008, para. 17.

[128] Ibid, para. 22.

[129] Ibid, para. 24.

[130] Ibid.

> Representative underscores that during war, the use of girl children in particular includes sexual violence".[131]

According to Lubanga's Defense, the correct approach to the notion of "participate actively in hostilities" was another. A broad interpretation of the "using [children under the age of fifteen years] to participate actively in hostilities" notion would, in the Defense's opinion, contradict the principle *nullum crimen sine lege*, codified in Article 22(2) of the Rome Statute.[132]

The Court started its reasoning by recognizing the rationale behind the criminalization of using child soldiers, namely "to protect children from the risks that are associated with armed conflict".[133] Reviewing, e.g., the Pre-Trial Chamber's argumentation and consulting preparatory works of the Rome Statute, the Court discussed whether not only direct, but also indirect forms of participation in hostilities was covered by the notion of "participate actively in hostilities".[134]

In the *travaux préparatoires* of the Rome Statute, the Preparatory Committee distinguished between, on the one hand, activities "clearly unrelated to hostilities" (e.g., delivery of food and housekeeping) and, on the other hand, activities performed for "direct support function" (e.g., carrying of supplies to the front line or participating at the front line) and activities "linked to combat" (e.g., "scouting, spying, sabotage and the use of children as decoys, couriers or at military checkpoints"[135]). According to the Committee, the first category of activities should not be encompassed by the war crime of using child soldiers, while the second category of activities should.[136]

The Trial Chamber made reference to the SCSL's judicial decisions and Radhika Coomaraswamy's written submissions, and stated that the "participate actively" notion was to be interpreted broader than the "direct

---

[131] Ibid, para. 25.
[132] *Lubanga*, para. 583.
[133] Ibid, para. 619.
[134] Ibid, paras. 619-631.
[135] Ibid, para. 621 and the Preparatory Committee on the Establishment of an International Criminal Court, 1998, p. 18, footnote 19, (quoted above in section 2.3, "Preparatory Works of the Rome Statute").
[136] Ibid.

participation"[137] criteria found in Additional Protocol II to the Geneva Conventions.[138]

Furthermore, the Court discussed whether or not the "extent of the potential danger faced by a child soldier"[139] should constitute a factor when deciding if an activity was protected by the criminalization of use of child soldiers. Concluding that the roles assigned to child soldiers in conflicts consist of a wide range of activities, the Court stated that the characterizing aspect of all these activities was the fact that every child soldier "is, at the very least, a potential target".[140] Hence, two aspects of the activities were to be considered when determining if they should be covered by the "participate actively in hostilities" notion. Firstly, the degree of *support* emanating from the activity ought to be taken into account. Secondly, the *risk* or danger linked to the activity should be examined.[141] Subsequently, the Court held that:

> "Given the different types of roles that may be performed by children used by armed groups, the Chamber's determination of whether a particular activity constitutes "active participation" can only be made on a case-by-case basis".[142]

Thus, no general statements were made regarding how to classify "indirect" activities such as sexual slavery and performance of domestic chores.

The evidence on sexual exploitation of the child soldiers was neither considered under the notion of "participate actively in hostilities", nor did the

[137] Following provisions in Additional Protocol II deal with the "direct participation in hostilities" criteria: Article 4(1) ("Fundamental guarantees"), "All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honor and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors"; Article 4(3)(c-d) ("Fundamental guarantees"), "c) children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities; d) the special protection provided by this Article to children who have not attained the age of fifteen years shall remain applicable to them if they take a direct part in hostilities despite the provisions of sub-paragraph c) and are captured"; Article 13(3) ("Protection of the civilian population"), "Civilians shall enjoy the protection afforded by this Part, unless and for such time as they take a direct part in hostilities".

[138] *Lubanga*, paras. 624-627.

[139] Ibid, para. 628.

[140] Ibid.

[141] Ibid.

[142] Ibid.

Office of the Prosecutor charge Lubanga with any sexual and/or gender-based crimes;

> "Regardless of whether sexual violence may properly be included within the scope of "using [children under the age of fifteen years] to participate actively in hostilities" as a matter of law, because facts relating to sexual violence were not included in the Decision on the Confirmation of Charges, it would be impermissible for the Chamber to base its Decision pursuant to Article 74(2) on the evidence".[143]

In other words, the Trial Chamber found itself incapable of taking into account the facts and circumstances connected with sexual exploitation that had been presented at trial, since these circumstances had not been properly adduced earlier during the process. The factual circumstances which could be viewed as facts were, according to the Court, limited to those relating to the actual charges.[144] The Prosecutor was heavily criticized by the Court because of its ignorance of the possibility "to apply to include rape and sexual enslavement [in the charges] at the relevant procedural stages".[145]

Dissenting Opinion by Judge Elizabeth Odio Benito

In Judge Elizabeth Odio Benito's separate and dissenting opinion, the case-by-case based approach regarding how to legally define child soldiers' activities – an approach proposed by the majority of the Court – was criticized. In Odio Benito's view, the object and purpose of the criminalization under Article 8(2)(e)(vii) were protection of children's lives and personal integrity – an interest too important to leave the scope of the provision "open to a case-by-case analysis"[146] rather than to develop a more comprehensive definition of the crime.[147]

Likewise, the Judge challenged the exclusion of evidence on sexual exploitation. Odio Benito held that regardless of whether the charges did or did not contain accusations on sexual exploitation, and regardless of whether the factual circumstances concerning such ill-treatment were or were not properly presented by the Office of the Prosecutor, the Court had competence

[143] Ibid, para. 630.
[144] Ibid.
[145] Ibid, para. 629.
[146] Judge Odio Benito, Separate and Dissenting Opinion in *Lubanga*, para. 7.
[147] Ibid, para. 15.

to define the notion of "participate actively in hostilities" as covering such activities.[148]

Subsequently, Odio Benito addressed one of the Trial Chamber's two requirements for an "indirect", supporting activity to qualify as comprised in the "participate actively in hostilities" notion; namely, that the activity must pose a real danger to the child soldier. Emphasizing the fact that child soldiers are not only exposed to risks originating from "the enemy", but also from within the children's "own" military forces, Odio Benito stated that:

> "Sexual violence is an intrinsic element of the criminal conduct of "use to participate actively in the hostilities". Girls who are used as sex slaves or 'wives' of commanders or other members of the armed group provide essential support to the armed groups. Sexual assault in all its manifestations produces considerable damage and it demonstrates a failure in the protection of the life and integrity of its victim. There is additionally a gender-specific potential consequence of unwanted pregnancies for girls that often lead to maternal or infant's deaths, disease, HIV, psychological traumatisation and social isolation".[149]

> "Sexual violence and enslavement are in the main crimes committed against girls and their illegal recruitment is often intended for that purpose (nevertheless they also often participate in direct combat.) If the war crimes considered in this case are directed at securing their physical and psychological wellbeing, then we must recognize sexual violence as a failure to afford this protection and sexual violence as acts embedded in the enlisting, conscription and use of children under 15 in hostilities. It is discriminatory to exclude sexual violence which shows a clear gender differential impact from being a bodyguard or porter which is mainly a task given to young boys. The use of young girls' and boys' bodies by combatants within or outside the group is a war crime and as such encoded in the charges against the accused".[150]

[148] Ibid, paras. 8 and 15-17.

[149] Ibid, para. 20.

[150] Ibid, para. 21.

3.1.2 The Katanga Case

In March 2014 – two years after Trial Chamber I delivered its *Lubanga* judgement – Trial Chamber II found Germain Katanga, former commander of the rebel group *Force de Résistance Patriotique en Ituri* (FRPI), guilty as an accessory of crimes against humanity (murder, Article 7(1)(a) of the Rome Statute) and of war crimes (murder, Article 8(2)(c)(i); attack against civilian population, Article 8(2)(e)(i); pillaging, Article 8(2)(e)(v) and destruction of enemy property, Article 8(2)(e)(xii)).[151]

In addition to the crimes which Katanga was convicted of, the Office of the Prosecutor had included crimes of rape and sexual slavery as crimes against humanity (Article 7(1)(g)) and as war crimes (Article 8(2)(e)(vi)), as well as war crime of using children under the age of fifteen years to participate actively in hostilities (Article 8(2)(e)(vii)) in the charges – allegations that Katanga was acquitted for.[152]

Background of the Case

While Lubanga belonged the Hema people, Katanga was part of the opposite side of the DRC conflict, namely the Lendu and the political and military group FRPI, which he was in command of.[153]

The crimes which Katanga was charged with occurred during an attack against the village Bogoro in Ituri, DRC, on 24 February 2003.[154] The larger context in which the attack was committed was essentially the same as in the *Lubanga* case. Similar to the Trial Chamber I, Trial Chamber II found that the conflict in question should be defined as non-international.[155] However, Trial Chamber II took a broader approach on the DRC situation, addressing the conflict as the Second Congo War.[156]

During the attacks in Bogoro, methods of warfare such as killings of and attacks against civilians, pillaging, and sexual violence were used by several parties to the conflict.[157] On 24 February 2003, the FRPI and its allied *Front des Nationalistes Intégrationnistes* (FNI) invaded Bogoro. This invasion did not only result in attacks on the UPC camp, but also in killings of approximately 200 civilians, destruction of property and sexual abuse against

[151] *Katanga*.
[152] Ibid, paras. 7-10.
[153] Ibid, para. 521. See also, on the background of the conflict, paras. 427-520.
[154] Ibid, para. 1.
[155] Ibid, para. 1229.
[156] Ibid, paras. 427-520.
[157] Ibid, paras. 516-520.

civilians.[158] Moreover, women and girls were abducted and forced to become "wives"[159] of the FRPI/FNI soldiers, meaning that they were being used for domestic work and sexual purposes.[160]

Submissions to and Reasoning by the Court

As noted above, the Prosecutor charged Katanga with a wide range of crimes. Yet, the focus of this section will be the Court's reasoning on the war crime of using children under the age of fifteen years to participate actively in hostilities.

In relation to the alleged crime under Article 8(2)(e)(vii), the Pre-Trial Chamber had, during previous proceedings, categorized Katanga's mode of liability as falling under Article 25(3)(a) of the Rome Statute. The Trial Chamber II found itself bound to try Katanga as a *committer* of the crime rather than as an *accessory*, which was the mode of liability proven in relation to the charges leading to conviction.[161]

This time led by Fatou Bensouda, the Office of the Prosecutor claimed that usage of child soldiers or *kadogos* was a frequent practice among all military forces operating in the district, including the FRPI forces commanded by Katanga.[162] For instance, children had participated in battles and worked as bodyguards in Katanga's militia.[163]

The Defense, however, argued that it was not clear that the children had been participating actively in the hostilities. In the words of the Court, the Defense held that:

> "Only those activities linked to combat, provided that the threshold of direct participation in hostilities as it understands it is met, are such as to satisfy the requirements of this crime".[164]

This argumentation, intended to equate the "participate actively" criteria with the "direct participation" criteria found in Additional Protocol II of the Geneva Conventions, must be understood as an attempt to narrow the legal definition of "participate actively in hostilities".

---

[158] Ibid, para. 719.
[159] See ibid, para. 1000, on the term "wife" and its connotations in this context.
[160] Ibid, para. 958.
[161] Ibid, paras. 1024 and 1482-1483.
[162] Ibid, para. 1033.
[163] Ibid, paras. 1032-33.
[164] Ibid, para. 1035.

Nevertheless, the Trial Chamber advocated for a different interpretation of the notion, separate from the "direct participation" criteria.[165] In the Court's view, the "participate actively" notion not only encompassed activities directly linked to combat, but also activities with support functions not clearly unrelated to the hostilities.[166] In essence, the Trial Chamber II repeated the reasoning articulated in *Lubanga*, and held – in relation to the scope of the notion of "participate actively in hostilities" – that:

> "The guarding of military objectives or the performance of the duties of a bodyguard or member of an escort also constitute such activities, especially when they have a direct impact on the level of logistical resources and on the organisation of operations required by the other party to the conflict whose aim is to attack such military objectives".[167]

The Trial Chamber concluded that it was proven that children had been participating as soldiers during the attack in Bogoro.[168] However, it was not possible to prove sufficient proximity between Katanga's involvement and the use of child soldiers.[169] Therefore, Katanga could not be found guilty of having committed (see Article 25(3)(a) of the Rome Statute) crimes under Article 8(2)(e)(vii).[170]

In conclusion, it can be said that certain children – assumingly sharing a female gender identity – were not fully recognized as victims in the Trial Chamber's judgement. First, it was established that, for example, crimes against humanity and war crimes of sexual slavery had been perpetrated. Nevertheless, Katanga could not be held criminally responsible due to lack of a "common purpose".[171] Second, the children abducted and used as "wives" of the soldiers were ignored in the reasoning concerning the concept of "participate actively in hostilities", and, thus, invisible in relation to the crimes under Article 8(2)(e)(vii).

[165] Ibid, para. 1043.
[166] Ibid, para. 1044.
[167] Ibid, para. 1045.
[168] Ibid, para. 1065.
[169] Ibid, paras. 1073 and 1085-1087.
[170] Ibid, para. 1088.
[171] Ibid, paras. 1023 and 1663-1664.

3.1.3 The Ntaganda Case

Former Deputy Chief of Staff and commander of operations performed by the FPLC, Bosco Ntaganda, is yet facing trial.[172] The Pre-Trial Chamber II issued the *Decision on Confirmation of the Charges*, confirming the charges brought by the Prosecution against Ntaganda – i.e., charges of five counts of crimes against humanity and 13 counts of war crimes.[173] Indeed, the Pre-Trial Chamber was satisfied that, based on the evidence presented, there existed *substantial grounds to believe* (the evidentiary threshold at this stage of the process[174]) that Ntaganda was guilty of these crimes.[175]

As to the alleged war crimes, charges of rape and sexual slavery of child soldiers (Article 8(2)(e)(vi) of the Rome Statute), as well as use of children under the age of fifteen years to participate actively in hostilities (Article 8(2)(e)(vii)), were included.[176]

Background of the Case

Similar to Lubanga, Ntaganda was part of fractions linked to the Hema people in the DRC, and the conflict in which he participated was seen as non-international in its nature.[177]

The alleged crimes occurred in the Ituri district in 2002-2003, within the context of the conflict between political and military groups operating in the region.[178] During this period of time, Ntaganda served as Deputy Chief of Staff within the FPLC, the military wing of the UPC.[179]

Submissions to and Reasoning by the Court

Regarding the charges of war crimes of rape and sexual enslavement of child soldiers in the UPC/FPLC forces, the Defense argued that war crimes under Article 8(2)(e)(vi) cannot be committed by persons taking direct part in

[172] *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06, decision of the ICC, 9 June 2014, (*Ntaganda*).
[173] Ibid, paras. 36 (crimes against humanity listed and confirmed), and 74 (war crimes listed and confirmed).
[174] Article 61(7) of the Rome Statute, on "Confirmation of the charges before trial", reads as follows: "The Pre-Trial Chamber shall, on the basis of the hearing, determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged".
[175] *Ntaganda*, para. 9.
[176] Ibid, paras. 76 and 83.
[177] Ibid, para. 31.
[178] Ibid, para. 15.
[179] Ibid, para. 108.

hostilities against persons taking direct part in hostilities within the same group, since IHL does not protect this type of situations.[180] Inherent to this statement, must be a definition of children exposed to, for instance, sexual violence in armed groups as *covered* by Article 8(2)(e)(vii), since its "participate actively" criteria is usually considered broader than the "direct participation" criteria found within the field of IHL.[181]

The Pre-Trial Chamber discussed the conception of "direct participation in hostilities" in relation to the children sexually exploited by UPC/FPLC soldiers, and concluded that these could not be seen as taking "direct" or "active" part in hostilities during the time that they were raped and/or sexually enslaved.[182]

> "The sexual character of these crimes, which involve elements of force/coercion or the exercise of rights of ownership, logically preclude active participation in hostilities at the same time".[183]

Moreover, children under the age of fifteen years do not – in the Pre-Trial Chamber's opinion – lose their status as protected by IHL by being part of a military group or by taking direct or active part in hostilities.[184]

Concluding that the children raped and sexually enslaved in the UPC/FPLC camps were covered by the criminalization in Article 8(2)(e)(vi), the Chamber went on to describe how the affected children had been exploited. For example, it was held that one child – a girl under the age of fifteen years who served as a bodyguard – had been raped by the soldier she worked for.[185]

> "Young girls, including under the age of 15 years, were raped in Mandro camp. They were 'domestic servants' and they 'combined cooking and love services'".[186]

Subsequently, the Chamber went on to examine the alleged crimes under Article 8(2)(e)(vii) of the Rome Statute. According to the Court, children had participated actively in hostilities or in "combat-related activities, such as support for combatants"[187] as, for instance, bodyguards, escorts, informants

[180] Ibid, para. 76.
[181] See, e.g., *Lubanga*, paras. 624-627, and *Katanga*, paras. 1043-1045.
[182] *Ntaganda*, paras. 77-80.
[183] Ibid, para. 79.
[184] Ibid.
[185] Ibid, para. 82.
[186] Ibid, para. 82.
[187] Ibid, para. 93.

and military guards.[188] No other activities were mentioned in relation to the notion of "participate actively in hostilities".

3.2 Jurisprudence of the SCSL

3.2.1 The AFRC Case

In June 2007, the SCSL delivered its first judgement since the Court's establishment, finding Alex Tamba Brima, Ibrahim Bazzy Kamara and Santigie Borbor Kanu, former leaders of the political movement Armed Forces Revolutionary Council (AFRC), individually responsible for four counts of crimes against humanity (extermination, rape, murder, and enslavement) and for seven counts of war crimes (terrorism, collective punishment, murder, outrages upon personal dignity, physical violence, recruiting and using children under the age of fifteen years to participate actively in hostilities, and pillaging) pursuant to the SCSL Statute.[189]

In addition to this, the defendants were accused for crimes against humanity of sexual slavery, forced marriage and other inhumane acts, three charges which they were all acquitted of.

Background of the Case

As to the context of the case, the defendants were all, as mentioned above, holding leading positions within the AFRC during its governing period in Sierra Leone.[190] The AFRC was created after a *coup d'état* on 25 May 1997, through which former members of the Sierra Leone Army (SLA) took over the ruling power in the state.[191] Following this coup, the AFRC and its new allies, the military group Revolutionary United Front or RUF, used violence to seize provinces in Sierra Leone controlled by antagonizing forces (e.g., the Civil Defense Forces (CDF)).[192] Attacks were launched by various groups party to the conflict and in 1998, the AFRC was overthrown and the former Government reinstalled.[193]

The situation in Sierra Leone was continually characterized by violence; civilian housings were destroyed,[194] civilian population was targeted and

[188] Ibid, paras. 93-96.
[189] *AFRC*, paras. 14-15.
[190] Ibid, paras. 11-13.
[191] Ibid, para. 164.
[192] Ibid, paras. 166-168.
[193] Ibid, para. 175.
[194] Ibid, paras. 184-186.

abducted,[195] schisms within the AFRC/RUF escalated and resulted in fragmentation,[196] and the capital of Sierra Leone, Freetown, was invaded by the AFRC in 1999.[197] After a peace arrangement settled by the Government and the RUF on how to divide the ruling power in Sierra Leone, the hostilities ceased in 2002.[198]

The Trial Chamber defined the conflict in question as non-international in its character,[199] and stated that the charged crimes were allegedly committed between 25 May 1997 and January 2000.[200]

Submissions to and Reasoning by the Court

Regarding the war crimes incorporated in Article 4(c) of the SCSL Statute, the Prosecutor set forth that children in Sierra Leone had been abducted by the AFRC/RUF and divided into Small Girls Units and Small Boys Units, in order to be trained and used in combat.[201]

Making reference to a dissenting opinion in a decision on child recruitment by the Appeals Chamber from 2004, *Prosecutor v. Sam Hinga Norman – Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment)*, the SCSL stated that "'using' children to 'participate actively in the hostilities' encompasses putting their lives directly at risk in combat",[202] but – in the Trial Chamber's opinion – also covers activities linked to hostilities without amounting to direct participation at the front line.

> "An armed force requires logistical support to maintain its operations. Any labour or support that gives effect to, or helps maintain, operations in a conflict constitutes active participation. Hence carrying loads for the fighting faction, finding and/or acquiring food, ammunition or equipment, acting as decoys, carrying messages, making trails or finding routes, manning checkpoints or acting as human shields are some examples of active participation as much as actual fighting and combat".[203]

---

[195] Ibid, paras. 192-193 and 207-208.
[196] Ibid, paras. 188-191.
[197] Ibid, para. 202.
[198] Ibid, para. 209.
[199] Ibid, para. 251.
[200] Ibid, para. 16.
[201] Ibid, para. 1245.
[202] Ibid, para. 736, with reference to para. 5 of Justice Robertson's Dissenting Opinion in *Decision on Child Recruitment*, 2004.
[203] Ibid, para. 737.

The activities examined by the Court in relation to the use of child soldiers were, e.g., carrying of goods,[204] water-fetching,[205] killings,[206] destruction of civilian property,[207] participation during attacks,[208] sexual slavery (which was, however, categorized as "sexual crimes", distinct from "military element[s] of the [child's] experiences"[209]), working as a bodyguard,[210] forced labor and performance of crimes, such as rape and murder,[211] and guarding of diamond mines.[212]

Use of children to guard diamond mines could, according to the Trial Chamber, constitute an activity covered by the "participate actively in hostilities" notion.[213] The Chamber held that:

> "In the instant conflict, diamonds were mined and sold to raise revenue to finance war efforts. Therefore, use of a child to guard a diamond mine in this context put the child at sufficient risk to constitute illegal use of the child […]; regardless of the specific duties of the children […], the presence of children in locations where crimes were widely committed was illegal".[214]

By stating this, the Court must be said to have endorsed a rather extensive definition of the notion of active participation in hostilities.

The alleged crimes related to sexual abuse were prosecuted as crimes against humanity (rape, Article 2(g) of the SCSL Statute; sexual slavery, Article 2(g); forced marriage as "other inhumane act", Article 2(i)) and as war crimes (outrages upon personal dignity, Article 3(e)).[215] These types of abuse of children, such as "forceful abduction of girls and women from their homes or other places of refuge and their detention with the AFRC troops as they attacked and moved through various districts"[216], were mostly discussed in the context of "gender-based" or "sexual crimes" rather than with respect to the crime of using children to actively participate in hostilities. Nevertheless,

[204] Ibid, para. 1254.
[205] Ibid.
[206] Ibid, para. 1255.
[207] Ibid.
[208] Ibid, para. 1256.
[209] Ibid, para. 1260.
[210] Ibid, para. 1268.
[211] Ibid, para. 1275.
[212] Ibid, para. 1265.
[213] Ibid, paras. 1266-1267.
[214] Ibid, para. 1267.
[215] Ibid, para. 691.
[216] Ibid, para. 711.

the defendants were neither convicted of sexual slavery, nor of forced marriage; instead, the abuse related to sexual slavery was considered under the war crime of outrages upon personal dignity (Article 3(e)), while the count of forced marriage was dismissed.[217]

Similarly, activities linked to crimes against humanity of enslavement (Article 2(c)) – i.e., activities which the enslaved persons were forced to perform – could have been discussed in more detail in connection to the crime of using children to actively participate in hostilities. For instance, activities categorized as forced labor included domestic work, which could also have been regarded as related to the use of child soldiers.[218]

3.2.2 The CDF Case

In August 2007, the Trial Chamber I convicted Moinina Fofana and Allieu Kondewa, former leaders of the CDF in Sierra Leone, of four counts of war crimes (murder, cruel treatment, pillage, and collective punishment). Moreover, Kondewa was found responsible for enlistment of children into the CDF contrary to Article 4(c) of the SCSL Statute.[219]

The following year, however, the Appeals Chamber overruled the Trial Chamber's judgement and found the defendants additionally guilty of two counts of crimes against humanity (murder, and other inhumane acts), while both were acquitted of collective punishment and of recruiting and using child soldiers.[220]

Sam Hinga Norman, also accused, died before the Trial Chamber issued its judgement; consequently, the proceedings against him were terminated.[221]

Background of the Case

As mentioned in relation to the *AFRC* case, the Civil Defense Forces or CDF was one of many political and military entities involved in the conflicts in Sierra Leone between 1991 and 2002.[222] The CDF was created in 1997 by President Ahmad Tejan Kabbah after the *coup d'état* in May, with the intention to organize his support from militias formed by, for instance,

[217] Ibid, paras. 713-714.
[218] Ibid, para. 740.
[219] *The Prosecutor v. Moinina Fofana, Allieu Kondewa (the CDF Accused)*, SCSL-04-14-T, Trial Judgement of the SCSL, 2 August 2007, (*CDF*).
[220] *The Prosecutor v. Moinina Fofana, Allieu Kondewa (the CDF Accused)*, SCSL-04-14-A, Appeals Judgement of the SCSL, 28 May 2008, (*CDF Appeals Judgement*).
[221] *CDF*, para. 5.
[222] Ibid, paras. 60-86.

civilian Kamajor hunters.[223] Fofana, Kondewa and Norman were all appointed to senior positions within the CDF and were referred to as the "Holy Trinity".[224]

The alleged crimes took place in Sierra Leone between September 1997 and March 1998.[225] During this period, the CDF controlled Talia, also called Base Zero, a town which served as the group's headquarters.[226] Here, people were trained and initiated to become soldiers of the CDF; among others, children were trained and initiated.[227] The so-called "Death Squad" patrolled the surrounding areas of Talia, torturing and killing "enemies".[228] Furthermore, various of sites, such as the village of Koribondo and the mining town Tongo, were attacked by the CDF, which resulted in killings of civilians and destruction of property.[229]

Submissions to and Reasoning by the Trial Chamber I

Regarding the legal notions of "conscription", "enlistment", and "use" of children to "participate actively in hostilities" under Article 4(c) of the SCSL Statute, Trial Chamber I quoted the ICRC Commentary to the Additional Protocols to the Geneva Conventions. According to the ICRC, recruitment of children should be illegal if they were used to "take part in hostilities", which encompassed:

> "To participate in military operations such as gathering information, transmitting orders, transporting ammunition and foodstuffs, or acts of sabotage".[230]

In order to define the concept of "participate actively in hostilities", the Court consulted the *travaux préparatoires* of the Rome Statute, referring to a footnote of the Preparatory Committee's work – a footnote also cited by the ICC in the *Lubanga* judgement – which distinguishes "active participation", such as direct support, from activities "clearly unrelated to hostilities".[231]

---

[223] Ibid, paras. 76-86.
[224] Ibid, para. 337.
[225] Ibid, para. 288.
[226] Ibid, para. 303.
[227] Ibid, paras. 313-318.
[228] Ibid, paras. 360-361.
[229] See, e.g., ibid, paras. 383-390 (attacks on Tongo), and 420-431 (attacks on Koribondo).
[230] Ibid, para. 191 which refers to the ICRC Commentary, 1987, para. 4557.
[231] Ibid, para. 193 which refers to the Preparatory Committee on the Establishment of an International Criminal Court, 1998, p. 18, footnote 19, (quoted above in section 2.3, "Preparatory Works of the Rome Statute").

Dissenting Opinion by Justice Benjamin Mutanga Itoe

As to the liability of the accused, Trial Chamber I found Kondewa but not Fofana individually responsible for enlistment of children into the CDF.[232] In a separate and partially dissenting opinion, however, Justice Benjamin Mutanga Itoe advocated for holding both responsible.[233]

Furthermore, Itoe explained his view on the crime under 4(c) of the SCSL Statute, dividing activities covered by the notion of "participate actively in hostilities" into three categories: activities directly associated with combat (e.g., fighting at the front line), activities linked to military duties (e.g., guarding of military objects during hostilities), and activities relating to transportation of materials, such as equipment, to the front line.[234]

According to Itoe's opinion, "domesticated jobs of a purely civilian character like cooking, food finding, laundry or running routine errands"[235] should not be covered.

Submissions to and Reasoning by the Appeals Chamber

On 28 May 2008, the Appeals Chamber delivered its judgement, holding neither Kondewa, nor Fofana responsible for crimes of recruitment or use of child soldiers.[236]

The Chamber discussed Kondewa's role during the alleged enlistment of child soldiers,[237] as well as his role during the alleged use of child soldiers.[238] In Kondewa's ground for appeal, it was argued that initiation of soldiers into the CDF was not equivalent with "enlistment" under Article 4(c) of the Statute, an argument which the Appeals Chamber based its acquittal on.[239]

Thus, the Appeals Chamber reversed the Trial Chamber's conviction regarding the crimes under Article 4(c).[240]

---

[232] Ibid, paras. 967 (regarding Fofana) and 971 (regarding Kondewa).
[233] Justice Mutanga Itoe, Dissenting and Partially Dissenting Opinion in *CDF*. para. 132.
[234] Ibid, para. 10.
[235] Ibid, para. 13.
[236] *CDF Appeals Judgement*, para. 154.
[237] Ibid, paras. 124-132.
[238] Ibid, paras. 133-135.
[239] Ibid, para. 136.
[240] Ibid, para. 146.

3.2.3 The RUF Case

On 2 March 2009, Trial Chamber I convicted Issa Hassan Sesay, Morris Kallon and Augustine Gbao, all former leaders of the military group RUF, of war crimes and crimes against humanity. Sesay and Kallon were found responsible for seven counts of crimes against humanity (extermination, murder, rape, sexual slavery, forced marriage as inhumane acts, physical violence as inhumane acts, and enslavement) and nine counts of war crimes (terrorism, collective punishment, murder, outrages upon personal dignity, mutilation as cruel treatment, recruitment and use of child soldiers, pillage, attacking peacekeeping personnel, and murder of peacekeeping personnel), while Gbao was found not guilty of two of the war crimes (recruitment and use of child soldiers, and murder of peacekeeping personnel) but guilty of the other crimes mentioned.[241]

Additionally, the Prosecutor charged the three defendants with two other crimes directed against peacekeeping personnel, crimes which they were acquitted of.

Background of the Case

Formed in the 1980's, the Revolutionary United Front or RUF was a political and military group participating in the above described conflict, aiming to overthrow the Government and through force establish a democracy in Sierra Leone.[242] However, when elections were organized in 1996, the RUF refused to accept the Government and continued with its military operations.[243]

For instance, the RUF attacked Freetown in 1999, resulting in loss of thousands of civilian lives, sexual abuse, abductions, and destruction of property.[244] Several attacks on other sites, such as villages in the Bo District,[245] were also organized by the RUF. During attacks, women and girls were raped and abducted for the purpose of serving as the combatants' domestic workers and "wives".[246] Moreover, the RUF used civilians for forced labor in diamond mines in the Tongo Fields, where most workers were not even provided with food.[247]

---

[241] *The Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao (the RUF accused)*, Case No. SCSL-04-15-T, Trial Judgement of the SCSL, 2 March 2009, (*RUF*).
[242] Ibid, para. 9.
[243] Ibid, para. 652.
[244] Ibid, para. 960.
[245] Ibid, para. 1015.
[246] Ibid, paras. 1152-1155.
[247] Ibid, para. 1094.

The RUF's recruitment and use of child soldiers were allegedly taking place in Sierra Leone between 30 November 1996 and 15 September 2000.[248]

Submissions to and Reasoning by the Court

As in previous judgements, the SCSL referred to the preparatory works of the Rome Statute when interpreting the concept of "participate actively in hostilities".[249] Trial Chamber I highlighted the fact that recruited children were not only used in combat, but also forced to perform "tasks of logistical importance to the AFRC/RUF forces, such as cooking, conducting food foraging missions and carrying loads including weapons, looted property and food".[250] During food-finding missions, civilians were raped and captured.[251] Children were also expected to work as bodyguards and informants, do the cooking, laundry, and water-fetching.[252] The Trial Chamber specifically recognized that female children were trained in Small Girls Units but often became "wives" of their commanders, which, for example, meant sexual exploitation and forced performance of household chores.[253] Testimonies also showed that child soldiers were used to guard diamond mines.[254] Thus, a wide range of activities were carried out by child soldiers within the RUF.

Determining whether these activities should be covered by the notion of "participate actively in hostilities", the Court held that exposure to risks or dangers associated with hostilities constituted a relevant factor.[255] For instance, and in relation to children participating in armed patrols, it was said that:

> "This situation predisposed [the children] to immediately and spontaneously engage in participating actively in armed combat if and as soon as such an eventuality occurred".[256]

Guarding of military objectives was also seen as an activity within the scope of Article 4(c) of the SCSL Statute. For instance, the diamond mines were, in the opinion of the Court, crucial to the financing of all military forces

[248] Ibid, para. 1691.
[249] Ibid, para. 188, which refers to the Preparatory Committee on the Establishment of an International Criminal Court, 1998, p. 18, footnote 19, (quoted above in section 2.3, "Preparatory Works of the Rome Statute").
[250] Ibid, para. 1618.
[251] Ibid, para. 1675.
[252] Ibid, para. 1620.
[253] Ibid, paras. 1622 and 1667.
[254] Ibid, para. 1664.
[255] Ibid, para. 1718.
[256] Ibid.

operating in Sierra Leone. Hence, they constituted important military targets, exposing their guards – and thereby, child soldiers – to direct danger.[257] For the same reasons, children working as bodyguards of their superiors could be seen as used to "participate actively in hostilities".[258] However, the Court emphasized that:

> "In certain circumstances, rather than acting as bodyguards, some of the children who accompanied Commanders were instead used to perform household chores or to carry out other tasks on behalf of their Commanders".[259]

Under such conditions, the children in question were not to be seen as child soldiers within the meaning of Article 4(c).[260] As to domestic chores in general, these activities were not considered to be encompassed by the "active participation" criteria, as they were "not related to the hostilities and did not directly support the military operations of the armed groups".[261]

According to the Chamber, espionage constituted an activity covered by the notion of "participate actively in hostilities", due to its military nature and direct support function for combatants taking part in hostilities.[262] However, the activity of food-finding did not qualify as "active participation";

> "Although this activity supports the armed group in a general sense, in our view it is not directly related to the conduct of hostilities, especially as the evidence does not establish that the children openly carried arms while on such missions. The Chamber therefore finds that this activity, in and of itself, does not amount to active participation in hostilities".[263]

Acts of rape, sexual slavery and forced marriage were prosecuted as crimes against humanity, but did also constitute the basis for finding the defendants guilty of war crimes of "outrages upon personal dignity".[264] Furthermore, sexual abuse was seen as an aspect of the war crime of terrorism.[265] "Sexual" or "gender based" crimes were also discussed in relation to the crime of

[257] Ibid, paras. 1727-1728.
[258] Ibid, para. 1731.
[259] Ibid, para. 1739.
[260] Ibid.
[261] Ibid, para. 1730.
[262] Ibid, para. 1729.
[263] Ibid, para. 1743.
[264] Ibid, para. 1298.
[265] Ibid, paras. 1351-1352.

collective punishment; the Prosecutor did not, however, prove the existence of specific intent behind the sexual abuse tied to the underlying crime in question.[266]

Forced military training of civilians – including children – was not only discussed in relation to the "child soldier crime", but was also considered under the crime of enslavement. As mentioned above, children underwent training to become bodyguards and/or combatants, something that was viewed as forced labor under Article 2(c) of the SCSL Statute.[267]

3.2.4 The Charles Taylor Case

On 26 April 2012, the SCSL's Trial Chamber II ruled that Charles Ghankay Taylor, former President of Liberia, was criminally responsible for having planned, aided and abetted five counts of crimes against humanity (murder, rape, sexual slavery, other inhumane acts, and enslavement) and six counts of war crimes (terrorism, murder, rape, outrages upon personal dignity, cruel treatment, recruitment and use of child soldiers, and pillage). Hereby, the Trial Chamber convicted Taylor for all crimes included in the indictment.[268]

Background of the Case

Military groups operating in Sierra Leone during the conflict between 1991 and 2002 were supported by actors from neighboring states. For example, Taylor – elected President of Liberia in 1997 – was such an actor.[269] In the words of the Office of the Prosecutor, Taylor offered the above mentioned AFRC/RUF guidance "crucial to the continued survival of the alliance".[270] Moreover, Taylor allegedly reinforced the groups with military equipment and, consequently, enabled their attacks and terror against civilian population in Sierra Leone.[271]

Thus, Taylor was not seen as the direct perpetrator of the crimes, but was found guilty for aiding and abetting, as well as planning, the criminalized acts.[272] These acts had been committed in Sierra Leone between November 1996 and January 2002.[273]

---

[266] Ibid, para. 1378.
[267] Ibid, paras. 1434-1444.
[268] *The Prosecutor v. Charles Ghankay Taylor*, SCSL-03-1-T, Trial Judgement of SCSL, 18 May 2012, (*Taylor*).
[269] Ibid, para. 8.
[270] Ibid, para. 46.
[271] Ibid.
[272] Ibid, para. 6994.
[273] Ibid, para. 13.

Submissions to and Reasoning by the Court

Examining the legal definition of "use" of children to "participate actively in hostilities", Trial Chamber II noted that not only activities which put children's lives at direct risk in hostilities were to be encompassed by the provision in 4(c) of the SCSL Statute. Referring to the *AFRC* Trial Judgement, the Court held that similarly, activities connected to combat (e.g., "carrying loads for the fighting faction, finding and/or acquiring food, ammunition or equipment, acting as decoys, carrying messages, making trails or finding routes, manning checkpoints or acting as human shields"[274]) should be included. However, the exact determination of what constituted active participation should be done on a case-by-case basis.[275]

Again, the SCSL stressed that the activity of guarding military objects such as diamond mines implied active participation in hostilities; when stating this, the Court confirmed its reasoning in the *RUF* Trial Judgement.[276] Similarly, the Trial Chamber repeated the reasoning of the *RUF* case when ruling that performance of domestic chores were not to be included in the concept of "participate actively in hostilities".[277] In relation to household work, the SCSL ruled that:

> "The performance of domestic chores [did not constitute] active participation in hostilities, as these activities were not related to the hostilities and did not directly support the military operations of the armed groups. […] The use of the children to perform "small works" for the commanders' wives does not constitute active participation in hostilities".[278]

Nor should food-finding generally be seen as combat-related.[279] Yet, if such missions were performed by armed children (e.g., carrying knives and sticks[280]) who committed crimes (e.g., violence against and murder of civilians[281]), they might be considered as used to "participate actively".[282]

---

[274] Ibid, para. 444.
[275] Ibid.
[276] Ibid, para. 1459.
[277] Ibid, para. 1477.
[278] Ibid, para. 1522.
[279] Ibid, paras. 1479 and 1493.
[280] Ibid, para. 1481.
[281] Ibid, para. 1480.
[282] Ibid, paras. 1479 and 1509.

> "Where there is a clear link between the [food-finding] mission and the hostilities, the child's active participation in such a mission may constitute "use". In the context of food-finding missions in which children carried arms and committed crimes against civilians, the Trial Chamber finds that such activities constitute active participation in hostilities".[283]

Subsequently, the Court held that use of children as armed bodyguards,[284] and use of children to commit crimes, such as amputations,[285] were activities comprised by the notion of "participate actively in hostilities" pursuant to Article 4(c) of the SCSL Statute.

[283] Ibid, para. 1479.
[284] Ibid, para. 1486.
[285] Ibid, para. 1490.

4 Conclusion

4.1 Summary

Children used by military groups in armed conflicts are generally assigned to different roles within the groups depending on their gender identities. Therefore, it has been argued that application and interpretation of the war crime of "using [children under the age of fifteen years] to participate actively in hostilities"[286] must be done with gender sensitiveness. For instance, Special Representative Coomaraswamy and Judge Odio Benito have both stressed this in the case of *Lubanga*. Recognition of the fact that female and male children are facing different realities and are forced to different activities within armed groups is, in their view, crucial for the effective protection of war-affected children.

During the negotiations prior to the conclusion of the Rome Statute, the interest of protection of children and women in armed conflicts were frequently stressed. Vulnerability of these groups were set forth as one of the intentions behind the establishment of an international criminal court. As to the rationale of the war crime of using children to participate actively in hostilities, recognition of female child soldiers' particular experiences (e.g., sexual abuse) was underscored. With references to IHRL agreements such as the CRC, it was argued that the crime of using children to participate in hostilities should cover use of children for both direct and indirect participation.

However, caselaw originating from the ICC as well as from the SCSL, shows that certain activities performed by children used in armed groups are constantly excluded from the notion of "participate actively in hostilities". Since the excluded activities generally have been tied to female children's roles within military groups, the level of protection stemming from Articles 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Rome Statute and Article 4(c) of the SCSL Statute is lower for female children.

For instance, roles of being used as domestic and sexual slaves, or as so-called "wives" of commanders, are most likely assigned to female children within armed groups. Use of children for such purposes has not, in the above examined cases before the ICC respectively of the SCSL, been categorized as falling within the scope of the war crime of "using [children] to participate actively in hostilities". While activities tied to combat situations, guarding of

[286] Articles 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Rome Statute, and Article 4(c) of the SCSL Statute.

military objects, and armed food-finding missions have been covered by the notion of "participate actively in hostilities", cooking, nursing, and performance of other household chores have not.

In the case of *Lubanga*, issued in 2012, the ICC could not consider sexual enslavement of children in armed groups as active participation in hostilities, even if it was emphasized that the purpose of the crimes of recruiting and using child soldiers was to "protect children from the risks that are associated with armed conflict".[287] In the case of *Taylor*, also from 2012, the SCSL ruled that nor could forced domestic work be seen as such active participation.

Consequently, and despite evidence presented at trials, certain experiences of former child soldiers were not considered relevant under the crime of using children to actively participate in hostilities. Importantly, and as already emphasized, these excluded experiences were "feminine" ones, since they were typically assigned to female child soldiers. An expansion of the scope of the notion of "participate actively in hostilities" could not be made in relation to such "feminine" experiences or activities.

However, guarding of diamond mines was viewed as "active participation" according to, e.g., the SCSL in the *RUF* judgement from 2009. Despite the fact that guarding of military objects was not mentioned in the *travaux préparatoires* of the Rome Statue as an example of "using" child soldiers to "participate actively in hostilities", it was seen as encompassed by the concept. Since diamond mines were important military targets, child soldiers guarding them were – in the SCSL's view – exposed to direct danger. This "direct danger" test was, however, not applied to children working with cooking, nursing, and water-fetching in military camps. Instead, the SCSL held that such activities neither offered the combatants direct support, nor was related to the hostilities. In the *Taylor* case, household tasks were called "small works", and did not amount to active participation in hostilities.

In most of the cases, the defendant or defendants were convicted of "sexual" and/or "gender-based crimes", such as crimes against humanity and war crimes of rape and sexual slavery. Nonetheless, and as pointed to throughout the thesis, the courts could have considered acts of sexual abuse against children used in armed groups under Article 8(2)(e)(vii) of the Rome Statute and Article 4(c) of the SCSL Statute as well.

[287] *Lubanga*, para. 619.

4.2 Discussion

What is advocated for in this thesis might not be an *expansion* of the notion of "participate actively in hostilities". Rather, the inclusion of typically "female" activities in the notion of "participate actively in hostilities" can be viewed as a new, more *gender-sensitive* way of reading (i.e., applying and interpreting) the law.

As pointed to by Charlesworth, concepts fundamental within the field of international law, such as "security", "order", and "conflict", are gendered. Similarly, the notion of "using [children under the age of fifteen years] to participate actively in hostilities" must be analyzed as gendered. Certain practices, often masculine, are regarded as included in this notion, whereas other practices, often feminine, are excluded.

What tasks can be defined as having "support functions" for military operations, and when are you posed to "direct danger" and, therefore, "active" in hostilities? These notions – "support function", "direct danger", and "active" – must also be scrutinized and studied through the lenses of a gender perspective. Such notions can, for instance, be analyzed with Charlesworth's dichotomies borne in mind. The distinction between "public" and "private" – where the private, typically feminine sphere (e.g., the home) is subordinate to the masculine, public sphere (e.g., the front line) – is worth mentioning in this context. "Illegitimate, embarrassing, and irrelevant"[288] as female spheres may seem, it can be argued that the very location of your body – are you at home or at the front line? – is gendered and, thus, invisible respectively of visible to international criminal law.

Existing gender legacies are, as Chappell points to, harder to criticize than existing rules; however, both constitute norms; they are unwritten, social constructions respectively of written, superficially crystal-clear rules. Exclusion of female children's distinctive experiences and typical roles from the definition of "participate actively in hostilities" is therefore difficult to argue against. An understanding of language – gendered language – is needed to dismantle the application and interpretation of such legal concepts, gender-neutral "on the surface" as they are. Lorde has, famously, held that "the master's tools will never dismantle the master's house".[289] The realization of a new "feminist jurisprudence"[290] within ICL, advocated for by Grey, might help to dismantle legal concepts and the neglection of their gendered application and interpretation. A historically male paradigm within

[288] Charlesworth, 2004, p. 164.
[289] Lorde, 2001, p. 1.
[290] Grey, 2016, p. 325.

international law, highlighted by Fredman, has resulted in "masculine" application and interpretation of legal norms. Gender sensitiveness, together with sensitiveness concerning other, intersectional power structures as discussed by Kapur, is crucial in order not to leave female children with female roles within military groups unprotected by ICL.

Article 21(3) of the Rome Statute, examined by Grey and emphasized in the ICC Office of the Prosecutor's *Policy Paper on Sexual and Gender-Based Crimes*, expresses the importance of internationally recognized human rights as well as the principle of non-discrimination in relation to the ICC's application and interpretation of its Statute. For instance, it can be argued that the CRC articulates such human rights norms. In the case of *Lubanga*, Special Representative Coomaraswamy interestingly held that "exclusion of girls from the definition of child soldiers would represent an insupportable break from well-established international consensus",[291] making reference to the Paris Principles. Also touching upon the provision laid down in Article 21(3) of the Rome Statute, Judge Odio Benito put forward, in the case of *Lubanga*, that it was "discriminatory to exclude sexual violence" – clearly affecting female child soldiers on a larger scale than male child soldiers – from the scope of the war crime of using children to participate actively in hostilities.[292]

Judge Odio Benito's separate and dissenting opinion, rejecting a case-by-case based approach to what constitutes use of children to "participate actively in hostilities", must be viewed as embodying Grey's anticipated "feminist jurisprudence". As pointed to by Chappell, such an approach is easily dismissed as "judicial activism". Importantly, though, the seemingly gender-neutral crimes codified in Articles 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Rome Statute and in Article 4(c) of the SCSL Statute, must be applied and interpreted with respect to their rationale; i.e, the protection of children affected by armed conflict. In order to avoid an application and interpretation resulting in indirect discrimination contrary to Article 21(3) of the Rome Statute, it must be recognized that unprotected activities – not covered by the notion of "participate actively in hostilities" in caselaw of the ICC and of the SCSL – are generally tied to female gender identities. Thus, this female group of children are not equally protected from risks associated with armed conflict, compared to male children.

Although it might not be controversial to advocate for gender-sensitive definitions of the crimes codified in the ICC Statute and in the SCSL Statute,

[291] Special Representative Coomaraswamy, 2008, para. 24.
[292] Judge Odio Benito, Separate and Dissenting Opinion in *Lubanga*, para. 21.

such sensitiveness is often ignored. This ignorance prevents the crimes from being effectively applied and interpreted.

References

International Conventions and Agreements

Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), United Nations Treaty Series, 75 UNTS 287, 12 August 1949. Cited: Fourth Geneva Convention.

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), United Nations Treaty Series, 1125 UNTS 609, 8 June 1977. Cited: Additional Protocol II.

United Nations General Assembly, *Rome Statute of the International Criminal Court*, 17 July 1998. Cited: Rome Statute.

United Nations Security Council, *Statute of the Special Court for Sierra Leone*, 16 January 2002. Cited: SCSL Statute.

United Nations, *Statute of the International Court of Justice*, 18 April 1946. Cited: ICJ Statute.

United Nations, *Vienna Convention on the Law of Treaties*, United Nations Treaty Series, Volume 1155, page 331, 23 May 1969. Cited: VCLT.

United Nations General Assembly, *Convention on the Rights of the Child*, United Nations Treaty Series, Volume 1577, page 3, 20 November 1989. Cited: CRC.

Judgements, Judicial Decisions and Dissenting Opinions

Situation in the Democratic Republic of the Congo in the case of the Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06, Trial Judgement of the International Criminal Court, 14 March 2012. Cited: *Lubanga*.

Separate and Dissenting Opinion of Judge Odio Benito, Situation in the Democratic Republic of the Congo in the case of the Prosecutor v. Thomas Lubanga Dyilo, Trial Judgement of the International Criminal Court, ICC-01/04-01/06, 14 March 2012. Cited: Judge Odio Benito, Separate and Dissenting Opinion in *Lubanga*.

Situation in The Democratic Republic of the Congo in the case of the Prosecutor v. Germain Katanga, ICC-01/04-01/07, Trial Judgement of the International Criminal Court, 7 March 2014. Cited: *Katanga*.

Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Bosco Ntaganda, ICC-01/04-02/06, Decision of the International Criminal Court, 9 June 2014. Cited: *Ntaganda*.

The Prosecutor vs. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu (the AFRC Accused), SCSL-04-16-T, Trial Judgement of the Special Court for Sierra Leone, 20 June 2007. Cited: *AFRC*.

Prosecutor v. Sam Hinga Norman – Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), Case No. SCSL-2004-14-AR72(E), Decision of the Special Court for Sierra Leone, 31 May 2004. Cited: SCSL, *Decision on Child Recruitment*.

Dissenting Opinion of Justice Robertson to Appeals Chamber, Prosecutor v. Sam Hinga Norman – Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), Case No. SCSL-2004-14-AR72(E), Decision of the Special Court for Sierra Leone, 31 May 2004. Cited: Justice Robertson, Dissenting Opinion in *Decision on Child Recruitment*, 2004.

The Prosecutor v. Moinina Fofana, Allieu Kondewa (the CDF Accused), SCSL-04-14-T, Trial Judgement of the Special Court for Sierra Leone, 2 August 2007. Cited: *CDF*.

Separate and partially dissenting opinion by Justice Benjamin Mutanga Itoe, The Prosecutor v. Moinina Fofana, Allieu Kondewa (the CDF Accused), Annex A, SCSL-04-14-T, Trial Judgement of the Special Court for Sierra Leone, 2 August 2007. Cited: Justice Mutanga Itoe, Dissenting and Partially Dissenting Opinion in *CDF*.

The Prosecutor v. Moinina Fofana, Allieu Kondewa (the CDF Accused), SCSL-04-14-A, Appeals Judgement of the Special Court for Sierra Leone, 28 May 2008. Cited: *CDF Appeals Judgement*.

The Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao (the RUF Accused), Case No. SCSL-04-15-T, Trial Judgement of the Special Court for Sierra Leone, 2 March 2009. Cited: *RUF*.

The Prosecutor v. Charles Ghankay Taylor, SCSL-03-1-T, Trial Judgement of the Special Court for Sierra Leone, 18 May 2012. Cited: *Taylor*.

Preparatory Works, Commentaries, Guidelines, Reports and Other Material

International Committee of the Red Cross, *Child Soldiers and Other 'Children Associated with Armed Forces and Armed Groups'*, August 2012. Available at https://www.icrc.org/eng/assets/files/other/icrc-002-0824.pdf (2017-05-15, 18:15). Cited: ICRC, 2012.

International Committee of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva 1987. Available at http://www.loc.gov/rr/frd/Military_Law/pdf/Commentary_GC_Protocols.pdf (2017-05-10, 18:35). Cited: ICRC Commentary, 1987.

International Committee of the Red Cross, *Study on customary international humanitarian law conducted by the International Committee of the Red Cross*. Updated version available at https://ihl-databases.icrc.org/customary-ihl/eng/docs/home (2017-05-10, 17:07). Cited: ICRC CIHL Study.

International Committee of the Red Cross, *Violence Against Girls in Africa During Armed Conflicts and Crises*, Tercier Holst-Roness, Florence (Women and War Adviser), Second International Policy Conference on the African Child: Violence Against Girls in Africa, Addis Ababa, 11-12 May 2006. Cited: ICRC, Tercier Holst-Roness, 2006.

International Criminal Court, *Elements of Crimes*, 2011. Available at https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf (2017-05-11, 21:08). Cited: Elements of Crimes.

International Criminal Court, Office of the Prosecutor, *Policy Paper on Sexual and Gender-Based Crimes*, June 2014. Available at https://www.icc-cpi.int/iccdocs/otp/otp-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf (2017-03-17, 14:35). Cited: ICC, Policy Paper, 2014.

United Nations, *Agreement between the UN and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone*, 16 January 2002. Available at http://www.rscsl.org/Documents/scsl-agreement.pdf (2017-05-20, 20:33). Cited: UN, Agreement between the UN and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, 2002.

United Nations, Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome 15 June-17 July

1998, Official Records, Volume II, *Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole*, UN Doc. A/CONR183/13. Available at http://legal.un.org/icc/rome/proceedings/contents.htm (2017-04-19, 16:40). Cited: Plenary Meetings of the Conference on the Establishment of an International Criminal Court, 1998.

United Nations, Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome 15 June-17 July 1998, Official Records, Volume III, *Reports and Other Documents*, "Report of the Preparatory Committee on the Establishment of an International Criminal Court", UN Doc. A/CONF.183/2, 14 April 1998. Available at http://legal.un.org/icc/rome/proceedings/contents.htm (2017-04-19, 16:40). Cited: Preparatory Committee on the Establishment of an International Criminal Court, 1998.

United Nations, *Submission of the Observations of the Special Representative of the Secretary General of the United Nations for Children and Armed Conflict pursuant to Rule 103 of the Rules of Procedure and Evidence*, Radhika Coomaraswamy, ICC-01/04-01/06-1229-AnxA, 18 March 2008. Available at https://www.icc-cpi.int/pages/record.aspx?uri=457038 (2017-04-19, 15:21) Cited: Special Representative Coomaraswamy, 2008.

United Nations Children's Fund, *Principles and Guidelines on Children Associated with Armed Forces or Armed Groups*, "The Paris Principles", Paris, February 2007. Cited: Paris Principles.

United Nations Committee on the Elimination of Discrimination against Women, *General Recommendation No. 30 on Women in Conflict Prevention, Conflict and Post-Conflict Situations*, CEDAW/C/GC/30, 1 November 2013. Cited: CEDAW, General Recommendation No. 30.

United Nations General Assembly, Security Council, *Children and Armed Conflict*, Report of the Secretary-General, A/70/836–S/2016/360, 20 April 2016. Cited: UN, Children and Armed Conflict, 2016.

United Nations Human Rights Council, *Free & Equal Initiative*. Available at https://www.unfe.org/ (2017-05-15, 15:55). Cited: OHCHR, Free & Equal Initiative.

Literature and Articles

Abu-Loghod, Lila, “The Muslim Woman: The Power of Images and the Danger of Pity”, Eurozine, 2006. Available at http://www.eurozine.com/the-muslim-woman/ (2017-04-09, 21:20). Cited: Abu-Loghod, 2006.

Ambos, Kai, “The First Judgment of the International Criminal Court (Prosecutor v. Lubanga): A Comprehensive Analysis of the Legal Issues”, *International Criminal Law Review,* Volume 12, 2012, pages 115–153. Cited: Ambos, 2012.

Aust, Anthony, “Vienna Convention on the Law of Treaties (1969)”, Oxford Public International Law, June 2006. Available at http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1498 (2017-05-13, 18:40). Cited: Aust, 2006.

Chappell, Louise, “The Politics of Gender Justice at the International Criminal Court: Legacies and Legitimacy”, Oxford University Press, New York 2016. Cited: Chappell, 2016.

Charlesworth, Hilary, “Feminist Methods in International Law”, *Studies in Transnational Legal Policy*, Volume 36, 2004, pages 159-184. Cited: Charlesworth, 2004.

Charlesworth, Hilary & Chinkin, Christine, “The Boundaries of International Law: A Feminist Analysis”, Manchester University Press, Manchester 2000. Cited: Charlesworth & Chinkin, 2000.

Denov, Myriam S., “Wartime Sexual Violence: Assessing a Human Security Response to War-Affected Girls in Sierra Leone”, *Security Dialogue,* Volume 37, Number 3, 2006, pages 319-342. Cited: Denov, 2006.

Fisher, Kirsten, J., “Transitional Justice for Child Soldiers: Accountability and Social Reconstruction in Post-Conflict Contexts”, Palgrave Macmillan, New York 2013. Cited: Fisher, 2013.

Fleetwood, Rachel (ed.), “Non-discrimination in International Law: A Handbook for Practitioners”, International Centre For the Legal Protection of Human Rights (INTERIGHTS), London 2011. Available at http://www.interights.org/handbook/index.html (2017-05-08, 20:24). Cited: Fleetwood, 2011.

Fraser, Nancy, “Feminist Politics in the Age of Recognition: A Two-Dimensional Approach to Gender Justice”, *Studies in Social Justice*, Volume 1, Number 1, 2007, pages 23-35. Cited: Fraser, 2007.

Fredman, Sandra, ”Women and the Law”, Oxford University Press, New York 1998. Cited: Fredman, 1998.

Grey, Rosemary, “Interpreting International Crimes from a ‘Female Perspective’: Opportunities and Challenges for the International Criminal Court”, *International Criminal Law Review*, Volume 17, Number 2, 2016, pages 325-350. Cited: Grey, 2016.

Kapur, Ratna, “The Tragedy of Victimization Rhetoric: Resurrecting the Native Subject in International/Post-Colonial Feminist Legal Politics”, *Harvard Human Rights Law Journal*, Volume 15, 2002, pages 1-37. Cited: Kapur, 2002.

Kimmel, Michael, “The Gendered Society”, Oxford University Press, New York 2000. Cited: Kimmel, 2000.

Lorde, Audre, “The Master’s Tools Will Never Dismantle the Master’s House”, published in Bhavnani, Kum-Kun (ed.), *Feminism and Race*, Oxford University Press, New York 2001. Cited: Lorde, 2001.

Minh-ha, Trinh T., “Difference: A Special Third World Women Issue” *Feminist Review*, Volume 25, 1987, pages 5-22. Available at http://www.mitchcogo.com/dwnlds/difference.pdf (2017-05-09, 22:54). Cited: Minh-ha, 1987.

Rapp, Stephen J., “The Challenge of Choice in the Investigation and Prosecution of International Crimes in Post-Conlict Sierra Leone”, published in Chernor Jalloh, Charles (ed.), *The Sierra Leone Special Court and its Legacy: The Impact for Africa and International Criminal Law*, Cambridge University Press, New York 2014. Cited: Rapp, 2014.

Tan, Joe, “Sexual Violence Against Children on the Battlefield as a Crime of Using Child Soldiers: Square Pegs in Round Holes and Missed Opportunities in Lubanga”, *Yearbook of International Humanitarian* Law, Volume 15, 2012, pages 117-151. Cited: Tan, 2012.