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Girls Used in Armed Conflict

- An analysis of the protection of girls, associated with armed groups or forces, through prohibitions on using children in armed conflict

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Summary

Since the 1970s, the practice of conscripting, enlisting or recruiting children into armed groups or forces has become increasingly common, and many children are used for various tasks in conflicts around the globe. Children are easily persuaded or forced into such armed groups or forces, and they suffer great harm from exposure to violence. Girls are generally recruited in the same manner as boys, and they experience, at large, the same consequences as boys. Girls do, however, also suffer gender specific consequences, related to sexual violence and/or pregnancies as well as related to disrupted social ties to their original societies. These consequences correspond to the gender specific use of girls, meaning that girls are typically held further away from the battlefield, as they are used as wives, sex slaves and/or perform domestic chores.

Several international legal instruments prohibit children's partaking in armed conflict. The Geneva Conventions of 1949 are silent on the matter, but other relevant legislation directly addresses the use of children in armed conflict. However, almost all of the relevant provisions prohibit only the use of children to "actively/directly participate in hostilities". Said phrase has traditionally been a concern relating to the principle of distinction and in extension to the question of which (civilian) persons lose their protection against attack, because of their acts. It has been argued that an act, in order to qualify as direct participation, must a) likely affect the military of a party to an armed conflict or death, injury or destruction on protected persons or objects, and b) directly cause harm. The act must also, c), be intended to cause such qualified harm, as prescribed by a), in support of one fighting party and to the disadvantage of another. Protection which is afforded civilians, for as long as they do not actively participate in hostilities, is *not* afforded to members of organized armed groups. Such membership is determined by whether or not a person has assumed a continuous combat function. Further, a distinction has been made between accompanying or supporting persons, who do not take direct part in hostilities, and persons having a continuous combat function.

Documents providing for principles and guidelines, academics, non-governmental organizations and the International Committee of the Red Cross advocates for a wide interpretation of "active/direct participation in hostilities", in relation to children used in hostilities. Some of these interpretations specifically include all children who participate in armed conflict in any

capacity, meaning that children used for domestic services, sexual purposes and/or used as “wives”, are to be considered as active/direct participants in hostilities.

International jurisprudence on the matter offers a rather incoherent practice, both when interpreting “active/direct participation in hostilities” and when acknowledging girls used in armed conflict. There is no consistent guidance to be found, in delivered judgments, on how to determine which children are to be considered to be covered by the “active/direct participation in hostilities”-requisite. A hesitation towards expanding said term to cover children used further away from the battlefield can be noticed, but a positive development can also be observed. A reoccurring problem of *how* to address the use of girls in armed conflict can be identified in relevant jurisprudence. The prosecution in respective cases seems to repeatedly struggle with their charges on matters of sexual slavery, forced marriages and/or the use of girls as domestic servants. The courts have chosen different ways to acknowledge, or ignore, such use of girls.

My conclusions are that by incorporating the term “active/direct participation” into almost every legal provision prohibiting the use of children in armed conflict, legislators have failed to acknowledge the use of girls by armed groups or forces. The term creates, in itself, a great uncertainty as to whether or not gender specific use of girls is to be considered prohibited or not. “Active/direct participation” should, in my opinion, be interpreted differently when used for the traditional purpose of applying the principle of distinction, and when used for the purpose of assessing liability for the use of children in armed conflict. Further, the hesitance found in international jurisprudence to expand said wording to cover tasks assigned to girls, has led to an even more weakened protection for girls used in armed conflict. The overall acknowledgment of girls’ experiences is poor, and the analyzed judgments show major flaws in bringing forward or allowing for charges on the matter. When charges of sexual violence have been brought before the court, the reasonings of the judges are unnecessarily complicated and next to offensive.

In my opinion, a wider interpretation of “active/direct participation in hostilities” is favorable to girls used in armed conflict. A counterargument may be that a wider interpretation would put more children at risk for being considered combatant and thus lawful targets of attack. I, however, argue that the international humanitarian law narrative, needs adjustment when applied to children as they cannot be equated to adult civilians taking part in hostilities.

Preface / Förord

In favorem vitae, libertatis, et innocentiae omnia praesumuntur.

Höstterminen 2012 började jag på juristprogrammet i Lund av två anledningar. Den första anledningen var att mamma och pappa tyckte att det var en bra idé. Den andra anledningen var att jag läst att juristprogrammet var bättre i Lund än i Uppsala. Jag ville egentligen plugga människorätt, men tänkte att en juristexamen skulle ge en god grund att stå på.

Under åren vid Lunds universitet har jag varit nationsaktiv och karnevalsaktiv, jag har ätit hundratals pizzor på Challes pizzeria och jag har lyckats bli både hund- och hästägare. Dessa år skulle jag inte byta mot något annat. Framförallt har jag mitt magiska tjejgäng att tacka. Att tjejer är bäst är inget nytt, men ni har verkligen varit exceptionella. Mamma och pappa, tack för att ni outtröttligt passat hund, lämnat matlådor och lyssnat på mitt juristsnack, jag hade inte varit här idag utan er. Tack till alla vänner jag fått genom FEMJUR, fortsatt att ifrågasätta! Jag vill också tacka min handledare Göran Melander, som stått ut med min velighet, mina tusentals frågor och som varit en ovärderlig kunskapskälla. Utan våra möten hade det inte blivit någon examensuppsats. Slutligen tack till Tinkerbelle, fast du inte kan läsa.

Sex år senare vet jag fortfarande inte riktigt om jag är en jurist eller bara en förklädd människorättsaktivist. Jag har i alla fall min juristexamen och jag hoppas att den ska bli en god grund att stå på när jag ger mig ut i världen för att skipa lite himla rättvisa.

Lund den 23 maj 2017

Sara Hansson

Abbreviations

APs	Protocols Additional to the Geneva Conventions of 1948
CRC	Convention on the Rights of the Child
CIAC Protocol	Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict
CIHL	Customary International Humanitarian Law
DRC	Democratic Republic of the Congo
FPLC	the Force Patriotique pour la Libération du Congo
GCs	Geneva Conventions of 1948
IAC	International Armed Conflict
ICC	International Criminal Court
ICL	International Criminal Law
ICRC	International Committee of the Red Cross
IHL	International Humanitarian Law
IHRL	International Human Rights Law
MONUSCO	United Nations Organization Stabilization Mission in the Democratic Republic of the Congo
NGO	Non-Governmental Organization
NIAC	Non-International Armed Conflict
POWs	Prisoners of War
RUF	Revolutionary United Front
SCSL	the Special Court for Sierra Leone
UN	United Nations
UNICEF	United Nations International Children's Emergency Fund
UPC	the Union des Patriotes Congolais
VCLT	Vienna Convention on the Law of Treaties

1 Introduction to the Research

Exact numbers are not available, but several non-governmental organisations (NGOs) as well as the United Nations (UN) regularly report of children participating in armed conflicts around the globe.¹ Child Soldiers International's online database *Child Soldiers World Index*, covering all UN Member States, shows that children have been used in hostilities, by state armed forces and by non-state armed groups, in at least 18 conflicts since 2016.² Not many would argue that children benefit from partaking in hostilities, and several international legal instruments prohibit the enlistment, conscription, recruitment and use of children to actively participate in hostilities. Children are given different functions when associated with armed groups/forces. Some are positioned close to the battlefield and some, especially girls, are assigned supportive roles, far away from the frontlines. This master thesis is centralized around the protection, or the lack thereof, offered by the international judicial system to girls who are associated with armed groups/forces, and are given non-warrior functions. I will explain and discuss the legal framework, the reoccurring requisite "active/direct participation in hostilities", and how international judicial bodies have acknowledged the use of girls in armed conflict.

1.1 Purpose & Research Questions

To recruit, enlist, conscript and to use children to actively participate in hostilities is prohibited by several international treaties as well as by customary international humanitarian law. These acts are further criminalized within the area of international criminal law. The phrasing of the crime of "using children to actively participate in hostilities", with additional knowledge of the fact that girls and boys are given separate functions within armed conflicts, raises a question. *To what extent are girls, associated with armed groups/forces, protected, by prohibitions on the use of children in armed conflict?* The primary aim of this thesis is thus to identify possible shortcomings of the international judicial prohibition on using children in warfare, when it comes to protecting girls used in armed conflict. My research begins with creating a context for my analysis by investigating the reality faced by girls associated with armed groups/forces.

¹ Human Rights Watch, *Facts About Child Soldiers*, 3 December 2008; Human Rights Watch, *Child Soldiers Worldwide*, 12 March 2012; United Nations Office of the Special Representative of the Secretary-General for Children and Armed Conflict (UN Special Representative), *Child Recruitment and Use*; Coalition to Stop the Use of Child Soldiers, *Global Report 2008*, Bell and Bain 2008, p. 12.

² Child Soldiers International, *Child Soldiers World Index*.

This initial study aims at conceptualising a setting, based in the “real world”, and highlighting the importance of acknowledging the use of girls as a real and consequential practice by armed groups/forces. I then attempt to pinpoint applicable international law, with the purpose of studying how such law prohibits the use of children in armed conflict. My research then turns to the particular requisite of “active/direct participation in hostilities” and how it has been interpreted, both traditionally and in specific relation to the use of children in armed conflict. The scrutiny of the “active/direct participation in hostilities”-term overlaps with a study of how the phenomenon of using girls in armed conflict has been undertaken by international courts.

In order to fulfil the purpose of identifying and analysing possible shortcomings of the international legal protection of girls used in armed conflict, I pose 3 research questions:

1. How does international law prohibit the use of children in armed conflict?
2. How is the requisite “active/direct participation in hostilities” to be interpreted, traditionally respectively in relation to children used in armed conflict?
3. How is the phenomenon of using girls in armed conflict acknowledged by international courts when handling cases of children used in armed conflict?

1.2 Delimitations

I have chosen to limit this essay to situations of children being used in armed conflict, and have thus excluded situations of child exploitation during peace time. My research is focused only on how girls are protected as associates to armed groups/forces from atrocities committed by the same. The legal provisions which I have scrutinized are of a specific nature, aimed at prohibiting the use of children in armed conflict and relating only to children associated with armed groups/forces. Legal provisions which generally prohibit some of the crimes committed against girls associated with armed groups/forces, such as sexual slavery, rape, forced labour etc. are not directly part of my research on applicable law. These provisions are nevertheless touched upon within my study of relevant case law. Further, my research is dedicated to children who are used by armed groups/forces in a way which creates a distinction between boys and girls, being aware that many children are assigned functions irrespective of their gender. Neither non-binary children nor transgender children have been subjects of this thesis. Adult womens’ experiences, and their legal protection, have been excluded from the chapters describing the reality of girls used in armed conflict and relevant law. This distinction has not

been possible when describing relevant jurisprudence, due to how prosecutors have brought forward charges before international courts.

Many provisions which are relevant to children used in armed conflict encompass prohibitions on recruiting, enlisting and/or conscripting children into armed groups/forces. I have deliberately excluded these practices from the scope of this thesis for several reasons. Firstly, this practice, and reasons behind children joining armed forces or groups, does not to any larger extent differentiate between boys and girls. The subject is only briefly discussed in chapter two. Secondly, the discourse by scholars and courts regarding the prohibitions on recruiting/conscripting/enlisting, is to a large extent centralized around a possible element of voluntariness. The factor of voluntary enlistment has already been made a subject of debate, and is further an issue settled by international jurisprudence.³ Thirdly, as many girls are used for sexual purposes through violence, and taken as “wives” through forced marriages, voluntariness is logically precluded.

Non-international law and jurisprudence regarding children used in armed conflict has been eliminated from my research due to the international character of said practice. Law governing armed conflicts is first and foremost a matter of international interest and therefore also the practice of using children within that context. The relevant provisions are found in international law and I found it reasonable to examine how said law has been interpreted by international bodies. Although children have been used in armed conflicts around the globe, the crime of using children in armed conflict is not codified neither in the statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY) nor in the statute of the International Tribunal for Rwanda (ICTR).⁴ I have therefore chosen to examine case law produced by the International Criminal Court (ICC) and the Special Court for Sierra Leone (SCSL). Because of the case law which I have found to be relevant, I have limited some of my fact finding in chapter two to the Democratic Republic of the Congo (DRC) and Sierra Leone. This is, however, not of any

³ See for example: Special Court for Sierra Leone, Trial Chamber I, *The Prosecutor Against Moinina Fofana & Allieu Kondewa, Judgement*, 2 August 2007, SCSL-04-14-T, para. 192; McBride, Julie, *The War Crime of Child Soldier Recruitment*, T.M.C. Asser Press, 2014, pp. 57–58; Waschefort, Gus, *International Law and Child Soldiers*, Volume 53 in the series Studies in International Law, Hart Publishing, 2015, pp. 116, 123–124; Werle, Gerhard & Jessberger, Florian, *Principles of International Criminal Law*, Oxford University Press, 3rd edition, 2014, pp. 464–465.

⁴ See: United Nations (UN) Security Council, *Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 7 July 2009)*, 25 May 1993; UN Security Council, *Statute of the International Criminal Tribunal for Rwanda (as amended on 13 October 2006)*, 8 November 1994.

greater importance as the phenomenon of using girls in armed conflict, generally, seems to be of a similar nature wherever it occurs.⁵

1.3 Perspective

A prevailing concept throughout this thesis is that children have no place in armed conflict, and that the use of them in any capacity is to be regarded as non-desirable. Further, girls, and women, are particularly vulnerable during times of war because of their gender and its unequal status. Often being treated as inferior, girls become discriminated against, deprived and excluded from the social mainstream.⁶ Statistics on sexual violence committed against women during armed conflict are increasingly available, statistics showing other ways of suffering experienced by women during armed conflict is not. Typically, such data is submitted by men and women are consequently assigned categories used for male civilians and no distinction is made regarding gender specific suffering. It has been argued that women, and girls, are subject of a double disability compared to combatants as they are civilians *and* women.⁷

This thesis is written from a perspective of presupposing said inferior position in society held by women and girls, and, in extension, the lack of acknowledgment of their suffering during armed conflict. Relevant law, jurisprudence and other material has been critically assessed from a perspective with particular focus on functions, experiences and suffering specific to girls. I wish to again stress the importance of differentiating between legislation which generally prohibits certain acts, which may well protect the group of girls relevant to my research. Such provisions are aimed at protecting civilians and/or persons who are victims of crimes committed by their adversary. Children used in hostilities are protected by their child-status as such, and I have written this thesis from a perspective of the concept of children who become associated with armed groups/forces and used within that context.

⁵ See: chapter two.

⁶ UN, *Beijing Declaration and Platform for Action*, 15 September 1995, paras.135 & 260–269.

⁷ Gardam, Judith, *Women and the Law of Armed Conflict: Why the Silence?* The International and Comparative Law Quarterly, Volume 46, Issue 1, 1997, p. 58; McKay, Susan, *The Effect of Armed Conflict on Girls and Women*, Peace and Conflict: Journal of Peace Psychology, Volume 4, Issue 4, 1998, p. 384.

1.4 Research Method & Materials

The thesis initially provides for a description of the situation of children used in hostilities, alongside a somewhat comparative method regarding differences and similarities between the tasks assigned to boys respectively to girls. Secondly, I describe relevant legal provisions, followed by an explanation of different narratives concerning the interpretation of the term “active/direct participation in hostilities”. Lastly, two cases from the ICC and two cases from the SCSL are presented, focusing on the interpretation of “active/direct participation in hostilities”. Additional attention is directed towards the overall handling of testimonies and evidence relating to girls who have been associated with armed groups/forces

The first part is construed by information gathered on the factual situation of girls used in armed conflict. In order to find this data, I turned predominantly to sources provided by NGOs and bodies of the UN. Given the nature of NGOs, i.e. not acting in the interest of states, they provide for information which I have estimated as credible. NGO-reports often have a purpose of displaying present issues as well as obtained achievements resulting from their work, offering faceted material. Expert of the Secretary-General Graça Machel’s *Report on the Impact of Armed Conflict on Children*⁸ (the Machel Study) is internationally renowned, frequently cited and provided my research with substantial information on the situation of girls associated with armed groups/forces. Academic papers, published in well-known publications or on the webpages of recognised international organizations, are also referred to.

The latter parts of my research have been conducted mainly through the use of legal doctrinal method, i.e. through critical examination of legislation and jurisprudence in order to identify existing law and what it prescribes. This method encompasses a hierarchy of sources as information is gathered from codified law, general principles of law, customary law, case law, practice and academic articles or doctrinal work.⁹ In accordance with the legal doctrinal method, I have used sources of international treaty law, precedential jurisprudence, and to some extent general principles of law in order to pinpoint applicable provisions. The reasoning behind my selection of jurisprudence has been explained above, under subchapter 1.2. The International

⁸ UN General Assembly, *Impact of Armed Conflict on Children: Note by the Secretary-General*, A/51/306, 26 August 1996 (the Machel Study).

⁹ Hitchinson, Terry, *Researching the jury*. In *Research Methods in Law*, ed. Watkins, Dawn & Burton, Mandy, Routledge, 2013, pp. 9–10; Van Hoecke, Mark, *Legal Doctrine: Which Method(s) for What Kind of Discipline?* In *What Kind of Method for What Kind of Discipline?* ed. Van Hoecke, Mark, Hart Publishing, 2011, pp. 11–12.

Committee of the Red Cross' (ICRC) *Study on Customary International Humanitarian Law*¹⁰ has been used to identify customary rules regarding the issue at hand. Said study has received criticism, but since I lack the resources to conduct research of my own in order to find relevant customary law, I decided to rely on the ICRC's findings. Although perhaps with some caution, the Study is often referred to by scholars and provides for the only comprehensive catalogue on customary international humanitarian law.

Apart from case law produced by international courts, secondary sources have been used to interpret international legislation. These range from commentaries by scholars through the ICRC, international documents, agreed upon by states but without implementation mechanisms, official UN documents, reports by NGO's and academic scholarly work. The ICRC's *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*¹¹, has been used in order to describe the traditional understanding or perception of the term "active/direct participation in hostilities. The document was met with disagreement of different nature and degree.¹² However, based on treaty law, rules and principles of international humanitarian law and numerous other sources, plus involving several experts,¹³ the guide does not, in my opinion, entirely lack neither credibility nor importance. Nonetheless, possible errors of their report cannot be precluded and it must be kept in mind that the document as such is not binding. In all relevant parts, the same reasoning can be applied to the *Public Report*¹⁴ presented by the Swedish International Humanitarian Law Committee.

In particular the works of Waschefort, McBride and McKay have offered helpful analyses of the applicable law as well as interpretations of it. I have chosen authors based on their acknowledgments and on their contributions of specific assessments relevant to my research. I have found their works to be informative and, in my opinion, well substantiated. As always, it should be noted that scholars can be biased and as well as influenced and I have hence endeavored to find independent sources in support of statements throughout my research.

¹⁰ International Committee of the Red Cross (ICRC), Henckaerts, Jean-Marie & Doswald-Beck, Louise, with contributions by Alverman, Carolin, Dörmann, Knut & Rolle, Baptiste, *Customary International Humanitarian Law, Volume I: Rules*, Cambridge University Press, 2009.

¹¹ ICRC, Melzer, Nils, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian law*, 2009.

¹² See for example: Schmitt, Michael N. *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, Harvard National Security Journal, Volume 1, 2010.

¹³ ICRC, Melzer 2009, op. cit., p. 9.

¹⁴ SOU 1984:56, *Betänkande av folkrättskommittén*.

My analysis is based on a critical legal perspective and to some extent expressing my opinion of what the law should be, *de lege ferenda*, as opposed to what the law is, *de lege lata*.¹⁵ Said critical standpoint is connected to the perspective explained above regarding girls' particular vulnerability.

1.5 Terminology

Throughout the thesis I use the words "child", "girl" and "child soldier". A definition of the term "child" is not included in the relevant provisions of international humanitarian law, and the ICRC has concluded that no generally accepted definition exists.¹⁶ The Convention on the Rights of the Child¹⁷ provides, in its first article, for a definition of "child" as all persons under the age of 18 years, unless a lower age is provided by applicable law. For the purpose of this thesis, and bearing in mind that the use of children in armed conflict is not desirable, "child" refers to persons under the age of 18 years. The term "girl" is used when referring to children of female sex, whereas "women" is used for adults of female sex.

"Child soldier" is a term which does not occur in any of the relevant provisions. It is, however, frequently used by prosecutors before international courts and seem to refer to children used in hostilities with certain functions. I have tried to avoid this term, as it is not a legal one, but I have not altered it when referring to relevant material. In chapter six, I use the phrase "child-soldier"-provisions/prohibitions as an umbrella term, covering relevant provisions of law. It can be noted that *the Cape Town Principles and Best Practices*¹⁸ (the Cape Town Principles), defines "child soldiers" while the updated version of said document, i.e. *the Paris Principles, Principles and Guidelines on Children Associated with Armed Forces or Armed Groups*¹⁹ (the Paris Principles), instead uses the term "a child associated with an armed force or armed

¹⁵ See for example: Hellner, Jan, *Argumentation de lege ferenda*, Svensk Juristtidning, 1975, p. 401.

¹⁶ ICRC, Pilloud, Claude, de Preux Jean, Sandoz, Yves, Zimmermann, Bruno, Eberlein Philippe, Gasser, Hans-Peter & Wenger F., Claude, with the collaboration of Pictet, Jean, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ed. Sandoz Yves, Swinarski Christophe, Zimmermann, Bruno, Martinus Nijhoff Publishers, 1987, pp. 899–900, para. 3179.

¹⁷ UN General Assembly, *Convention on the Rights of the Child*, A/RES/44/25, 20 November 1989, UN Treaty Series, Volume 1577, p. 3 (CRC).

¹⁸ UN International Children's Emergency Fund (UNICEF), *Cape Town Principles and Best Practices on the Recruitment of Children into the Armed Forces and on Demobilization and Social Reintegration of Child Soldiers in Africa*, April 1997 (the Cape Town Principles).

¹⁹ UNICEF, *The Paris Principles. Principles and Guidelines on Children Associated with Armed Forces or Armed Groups*, February 2007 (the Paris Principles).

group”, though the definitions are similar. The definition provided by the Cape Town Principles seems to be in conformity with my own perception:

*Child soldier [...] is any person under 18 years of age who is part of any kind of regular or irregular armed force or armed group in any capacity, including but not limited to cooks, porters, messengers and anyone accompanying such groups, other than family members. The definition includes girls recruited for sexual purposes and for forced marriage. It does not, therefore, only refer to a child who is carrying or has carried arms.*²⁰

1.6 Outline and Disposition

Chapter two of this thesis creates a context for my research question by describing in what ways children are generally used in armed conflict and by identifying the gender specific use of girls and the gender specific consequences suffered by them. The following chapter introduces and explains relevant international provisions governing the prohibitions on using children to (actively) participate in hostilities. Chapter three also explains the applicability of said provisions. The fourth chapter is centralized around the term “active/direct participation in hostilities”, explaining the traditional concept and interpretation of the term is, followed by interpretations made in specific relation to children used in armed conflict. Jurisprudence of the ICC and the SCSL is presented in chapter five. Two cases from each court are studied, they all encompass charges on using children to actively participate in hostilities and sometimes also allegations and/or testimonies, of sexual crimes and/or forced labour. This chapter covers the reasoning of the respective courts on the relevant law, but also describes how testimonies and evidence of girls’ experiences are perceived and treated by the judicial system. Lastly, the sixth chapter provides for an analysis of how the relevant law protects girls used in armed conflict, and concludes on deficiencies discovered relating to the law as well as to the judicial system.

²⁰ The Cape Town Principles, p. 12.

2 The Reality of Girls Used in Armed Conflict

The phenomenon of using children in hostilities is relatively new in modern warfare. The previous practices of using children for military purposes, such as during WWII, were considered to be exceptions and the real shift in perception began alongside the development of lighter and more “user friendly” weaponry. The period of the Cold War changed the nature of hostilities into domestic conflicts based on ethnic and religious agendas, characterised by guerrilla warfare. In these types of war the use of children increased. Modern use of children as war-participants, as we know it today, can be tracked back to the 1970s in Cambodia and the Khmer Rouge, leading to a clear change in attitude towards this custom.²¹ In 1993 The Committee on the Rights of the Child decided to submit a request to the Secretary-General of the UN, asking for an investigation on the matter of child protection during armed conflict.²² Appointed by the General Assembly, Graça Machel investigated and later reported on the requested matter, a report which drew international attention to the issue of children used as soldiers during armed conflict, referred to as the Machel Study. In her study, Machel firmly stated that “The flagrant abuse and exploitation of children during armed conflict can and must be eliminated”²³. Following the Machel Study, the UN Special Representative to the Secretary-General on Children and Armed Conflict (the UN Special Representative) was appointed, working alongside NGOs focusing on children’s rights and child soldier prevention.²⁴

This chapter aims at elaborating the context in which my research has taken place. By reference to several independent sources, I firstly attempt to describe how children are used in armed conflict and what consequences they may suffer. Secondly, chapter two emphasizes the gender related similarities and differences between boys and girls associated with armed groups/forces.

²¹ McBride 2014, op. cit., pp. 5–6.

²² Committee on the Rights of the Child, *Report on the Third Session*, CRC/C/16, 5 March 1993, para. 176 & Annex VI.

²³ The Machel Study 1996, para. 316.

²⁴ Ibid, paras. 266–269 & 316; UN General Assembly, *The Rights of the Child: Resolution adopted by the General Assembly*, 20 February, A/RES/51/77; Waschefort 2015, op. cit., p. 3.

2.1 Children Used in Armed Conflict

In wartimes, children are frequently subjected to cruel treatment. Children are often abducted by conflicting parties to be sexually abused or to be recruited into the armed groups or armies. The effects on children who are abducted are long-term and the consequences to their mental and physical health are grave.²⁵

Children can become part of armed groups or forces in different ways, and children do sometimes join armed groups “voluntarily”. Such “voluntary” association can be triggered by a number of factors such as poverty, or a wish to support the family. The armed groups/forces may sometimes be the child’s best option, especially if his or her parents are dead, missing or present but abusive. Additionally, children might join armed groups/forces in order to get shelter, food, employment and sometimes even education or protection – necessities not provided by a state torn by armed conflict. Lastly, factors such as societal pressure or pressure from family members can persuade a child to voluntarily join armed groups/forces, some children are driven by seeking revenge. In the adolescent years, a child’s desire to find his/her identity and a sense of social meaning can lead them to become involved in military activities. Often, these factors are cumulative or interlinked with each other.²⁶ The association can, of course, instead be involuntary and induced through abduction, abuse, conscription or press-ganging.²⁷ The practice of abducting children has increased in the past years and the method is used to terrorize different communities, especially ethnic or religious groups.²⁸

The functions of children vary and they are not always forced into direct combat. Common to all children associated with armed groups/forces, irrespective of their individual functions, is the exposure to violence whether as bystanders, as victims or as participants. The obvious consequences of children joining armed forces are disrupted childhood and education, plus hindered psychological development. Children participating in armed violence are subjected to the risk of being killed or maimed, and many suffer from psychological and social issues during

²⁵ UN Special Representative, *Abduction*; Human Rights Watch 2008, op. cit.

²⁶ The Machel Study 1996, paras. 38–43; Bastard, Kristin, *Preventing the Recruitment of Child Soldiers: The ICRC Approach*, Oxford Journals, Refugee Survey Quarterly, Volume 27, Issue 4, 4 December 2008, pp.143–144; Brett, Rachel, *Adolescents Volunteering for Armed Forces or Armed Groups*, International Review of the Red Cross, No. 852, 31 December 2003, pp. 859–862.

²⁷ The Machel Study 1996, para. 36; UN Special Representative, *Child Recruitment and Use*.

²⁸ UN Special Representative, *Abduction*.

and after the war. Both witnessing and participating in killing have severe implications for children who are still mentally and emotionally developing. NGOs have reported on military training deliberately breaking children down in order to make them obedient, and sexual abuse is an additional risk faced by children who are present in a military context.²⁹

2.2 Girls Used in Armed Conflict

Gender specific abuse, related to women's and girls' unequal societal positions and their sex, is not a new concept within the realms of armed conflict.³⁰ The Machel Study acknowledges sexual exploitation and gender based-violence as a specific phenomenon. Rape, prostitution, sexual humiliation and mutilation, trafficking and domestic violence are listed as threats to women and girls during armed conflict.³¹ Not only is sexual or gender specific violence against women used as a mean of war, but girls being used by armed groups is another, widespread, problem. The United Nations International Children's Emergency Fund (UNICEF) suggests that "girls are primary targets for abduction in armed conflict with the objective of forcing them to become warriors or sexual and domestic partners"^{32,33} This is partially confirmed by the Machel Study, which states that girls too are recruited into armed forces/groups. According to several sources, many girls are, by armed groups/forces, used in the same way as boys but girls do also have functions specific to their gender. They may serve as camp cooks, clothe washers and caretakers for the wounded. Girls associated with armed groups/forces may further be forced into prostitution in order to obtain money, food, housing, protection or other means, i.e. are used as sex slaves, and are sometimes forced to marry their aggressors.³⁴ The UN Special Representative summarizes the current situation of girls in armed conflict by stating that girls are subjected to the risk of forced marriage as well as pregnancy at a young age when connected to armed groups/forces.³⁵

In the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo's (MONUSCO) report it is stated that exact numbers of girls recruited and/or used by

²⁹ Child Soldiers International, *How is Recruiting Children Harmful?*

³⁰ McKay 1998, op. cit., p. 383.

³¹ The Machel Study 1996, paras. 45, 91.

³² UNICEF, Bellamy, Carol, *The State of the World's Children 2005 – Childhood Under Threat*, 2005, p. 42.

³³ Ibid.

³⁴ The Machel Study 1996, paras. 45, 91; McKay 1998, op. cit. pp. 386–387; Brett 2003, op. cit., p. 865; Park, S.J. Augustine 'Other Inhumane Acts': *Forced Marriage, Girl Soldiers and the Special Court for Sierra Leone*, *Social & Legal Studies*, Volume 15, Issue 3, 1 September 2005, p. 322.

³⁵ UN Special Representative, *Impact of Conflict on Girls*; Human Rights Watch 2008, op. cit.

armed groups/forces in the DRC are difficult to account for. An estimate, however, of 30-40% of children recruited in the DRC are girls. Statements from witnesses speak of girls used as wives/concubines, cooks or combatants. A number of girls stated to MONUSCO and partners that they were wives of combatants, accounts which were supported by other witnesses. More specifically relating to the functions of girls used in the armed conflicts in the DRC, considerably fewer girls than boys were used as warriors. More than a third of the girls who participated in MONUSCO's investigation had the main role of cooking and performing domestic tasks, often while also being "wives" or sex slaves. Although underlining that some girls associated with armed groups/forces in the DRC were legitimate spouses of combatants, the organization emphasizes the large number of victims of sexual exploitation. The crimes committed against girls are, among others, rape, forced marriage and sexual slavery, and witness statements account for pregnancies and systematic abuse.³⁶

When interviewing 733 women, of whom 143 under the age of 18, in Sierra Leone, the UN found that 41 % of these women had been abducted and that 3 % had involuntarily married their abductor.³⁷ The UN Secretary-General reported, in 2001, that 60 % of the over 4000 children abducted in January in Sierra Leone, were girls and that a majority of them had been sexually abused. According to the same report, abducted girls were often forced into providing sexual services or used as spouses for the members of armed groups/forces. Some women and girls held captive by the armed groups were yet to be released.³⁸ Scholars Denov and Maclure, when writing about female child soldiers, refer to statistics showing that 30 % of fighting forces in Sierra Leone were made up by girls. Additionally, Denov's and Maclure's article features testimonies of sexual violence, sexual slavery and forced marriages to male commanders, which is further supported by additional studies.³⁹

³⁶ UN Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO), *Invisible survivors: Girls in Armed Groups in the Democratic Republic of Congo from 2009-2015*, 2015, pp. 8–9 & 20–22.

³⁷ UNICEF, *The Impact of Conflict on Women and Girls in West and Central Africa and the UNICEF Response*, February 2005, pp. 7–9.

³⁸ UN General Assembly, *Situation of Human Rights in Sierra Leone: Note by the Secretary-General*, 9 August 2001, A/56/281, paras. 14 & 16.

³⁹ Denov, Myriam & Maclure, Richard, *Engaging the Voices of Girls in the Aftermath of Sierra Leone's Conflict: Experiences and Perspectives in a Culture of Violence*, *Anthropologica*, Volume 48, No. 1, War and Peace, 2006, p. 77; Park 2005, op. cit., pp. 322–323, 327.

2.3 Gender Specific Consequences

Scholar McKay thoroughly explains the multiple physical health effects of sexual violence, alongside the psychological effects triggered by the humiliation and anguish caused by said violence. Girls who have been subjected to rape often experience flashbacks, long term fear, issues with intimate relationships and they may avoid medical care for fear of being condemned. McKay further identifies high suicide rates among girls exposed to sexual violence. Forced pregnancies may lead to dangerous abortion methods and young girls usually suffer from complications, sometimes permanent, related to giving birth, beside suffering from psychological trauma. Other listed health effects are sexual transmitted diseases and gynaecological, oral and/or anal injuries. It has further been observed that reproduction plays a key role in existence of identity of a group.⁴⁰

Issues following sexual violence are not only concentrated to the experience itself, but continues as girls who become mothers of their enemies' children may be considered to be unmarriageable by their own societies.⁴¹ This continued trauma experienced by girls when being rejected by their own society is identified also by the UN Special Representative. It acknowledges that girls avoid reaching out for help as they fear being labelled as “bush wives” or their children being marked as “rebel babies”. The UN Special Representative additionally recognises that girls, after years of association with armed groups/forces, stay because their family ties and dependency have changed during this time.⁴²

According to the UN Special Representative, armed groups/forces sometimes keep girls captive as “wives” even after promises have been made to liberate associated children.⁴³ MONUSCO recognizes the difficulties to demobilize girls associated with armed groups/forces, stating that these girls are, by the armed groups/forces, not categorized as child soldiers. Girls are instead considered to be dependants and therefore not qualified for formal reintegration processes. Consequently, girls are not separated from armed groups/forces nor documented to the same extent as boys. The possibilities to flee from armed groups/forces are

⁴⁰ McKay 1998, op. cit., p. 322.

⁴¹ Ibid, p. 385; Park 2005, op. cit., p. 322.

⁴² UN Special Representative, *Impact of Conflict on Girls*.

⁴³ Ibid.

also more limited for girls, as they are less willing and able to take the risks such a flight encompasses. Being pregnant or having children further reduces the incentive to escape.⁴⁴ UNICEF has found multiple reasons for the fact that girls are marginalized within the field of demobilization and reintegration programmes. They list that the number of girls associated with armed groups/forces is underestimated, that girls fall outside the scope of what is considered to be a “real soldier” and that current programs focus on boys. Further, it is noted that a lack of distinction between girls and women contributes to the issue of demobilizing and reintegrating girls associated with armed groups/forces.⁴⁵

⁴⁴ MONUSCO 2015, op. cit., pp. 8–9.

⁴⁵ UNICEF, Bellamy 2005, op. cit., pp. 42–43; Park 2005, op. cit., p. 323; Brett 2003, op. cit., p. 865; Denov & Maclure 2006, op. cit., pp. 74–75; See also: UN, *Operational Guide to the Integrated Disarmament, Demobilization and Reintegration Standards*, 2014, p. 206 ff.

3 Children Used in Armed Conflict – International Law

Having seen in the previous chapter that boys and girls are used in different ways when associated with armed groups/forces, relevant legislation needs to be examined in order to determine to what extent it is prohibited to use children in armed conflict. International humanitarian law (IHL) constitutes one of the oldest branches of international law and aims at controlling states' and individuals' actions during war times, and at protecting persons and objects. Two objectives are to be balanced against each other: military needs of State forces or armed groups and protection of those who do not partake in the hostilities.⁴⁶ Apart from treaty law, customary international humanitarian law (CIHL) is an important source of law regulating military actions of parties to an armed conflict.

International Human Rights Law (IHRL) is a somewhat “newer” notion within the sphere of international law. The objective of IHRL is to protect individuals from power abuse by states and it generally covers a State-individual-relationship, i.e. a vertical relationship. Thus, states must adjust their national legislation so that it is in conformity with their IHRL commitments. Although being a subject of debate, it is widely accepted that IHRL applies not only in peace time but also in times of war.⁴⁷

IHL and IHRL address States' (and/or non-governmental armed groups') responsibilities and obligations. Compliance with IHL is, however, also implemented through holding individuals accountable for violations they have committed during times of war. During the Nuremberg Tribunals, the international community recognised that “crimes against International Law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of International Law be enforced”^{48, 49} International criminal law (ICL) covers rules establishing, excluding or in any other way regulates, the responsibility for crimes under international law, i.e. crimes involving direct individual responsibility under

⁴⁶ Crawford, Emily & Pert, Alison, *International Humanitarian Law*, Cambridge University Press, 2015, p. 29.

⁴⁷ UN Human Rights, Office of the High Commissioner, *International Legal Protection of Human Rights in Armed Conflict*, UN Publication, HR/PUB/11/01, 2011, pp. 5–6; Waschefort 2015, op. cit., pp. 79–80, 89.

⁴⁸ Crawford & Pert 2015, op. cit., p. 245.

⁴⁹ Ibid.

international law. International criminal law aims at protecting “peace, security and [the] well-being of the world”⁵⁰, and the relevant crimes all connect to an international element by presuming a setting of systematic or large-scale use of force. Consequently, ICL prevents and punishes violations of IHL. The notion of retribution is inevitably related, and individualization of a perpetrator is an important factor to victims and their families when pursuing justice.⁵¹

In the following subchapters, international law relating to the protection of children during armed conflicts will be presented. Initially introduced are instruments categorized as IHL, then relevant legislation of IHRL and lastly ICL which covers children used in hostilities. As will be clear throughout this chapter, many of the provisions are similar in their wording. Common to the majority of international law governing children who are used in armed conflict is the reference to “direct/active participation in hostilities”. After an introduction to relevant instruments and articles, with brief elaboration on other requisites, a more in-depth discussion on this specific term will follow.

3.1 International Humanitarian Law

The four Geneva Conventions of 1949⁵² (GCs I-IV) and the two Protocols Additional to the GCs⁵³ (APs I-II) form part of the core of IHL. The former apply to all cases of declared war and to any other armed conflict which may develop between two or more State Parties. Further, the provisions of the GCs apply to any case of partial or total occupation of the land of a State Party.⁵⁴ An international armed conflict (IAC) is at hand when two or more states resort to armed force. The duration and intensity of the conflict is irrelevant. IACs include liberation

⁵⁰ Preamble, UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, UN Treaty Series, Volume 2187, p. 3.

⁵¹ Werle & Jessberger 2014, op. cit., pp. 27, 31–39, 402.

⁵² ICRC *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949, UN Treaty Series, Volume 75, p. 31 (Geneva Convention I); ICRC, *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 12 August 1949, UN Treaty Series, Volume 75, p. 85 (Geneva Convention II); ICRC *Geneva Convention Relative to the Treatment of Prisoners of War*, 12 August 1949, UN Treaty Series, Volume 75 p. 135 (Geneva Convention III); ICRC, *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, UN Treaty Series, Volume 75 p. 287 (Geneva Convention IV).

⁵³ ICRC, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, 8 June 1977, UN Treaty Series, Volume 1125, p. 3 (Additional Protocol I); ICRC, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts*, 8 June 1977, UN Treaty Series, Volume 1125, p. 609 (Additional Protocol II).

⁵⁴ Article 2, Common to the Geneva Conventions I-IV; See also: Crawford & Pert 2015, op. cit., pp. 51–58.

wars, where colonial domination, alien occupation and apartheid is fought against.⁵⁵ Consequently, the Conventions apply to IACs.

Children used in armed conflict are, because of the phenomenon's brief history, not directly featured in these main legislative instruments of international humanitarian law and it could be claimed that these instruments lack significance in relation to protecting such children.⁵⁶ The GC III, for example, regulates the treatment of prisoners of war (POWs). Article 4 of the GC III provides that POWs are those who have fallen into the power of the enemy who are: members of the armed forces of a party to the conflict and militias or volunteer corps, part of such armed forces. Included are also, among others, members of other militias, e.g. organized resistance movements, if they fulfil certain conditions regarding their distinction. Also, persons who accompany armed forces, without being members thereof are encompassed. This latter category can be, according to article 4 of the GC III, "members of labour units or of services responsible for the welfare of the armed forces"⁵⁷. Children associated with armed groups/forces, or "child soldiers", are not mentioned in any of the provisions of the GC III.

Turning to the GC IV, which relates to the protection of civilian persons during war, the at least somewhat relevant provisions are not formulated as direct prohibitions on using children in armed conflicts and all norms fairly relating to such use are limited to occupied territories.⁵⁸ An occupying power⁵⁹ cannot, in any situation, enlist children from the occupied community, according to article 50 of GC IV. Consequently, children are protected from being enlisted by the occupying power, but not from being enlisted by their own forces or forces not hostile to them. In its commentaries to article 50 the ICRC speaks of the atrocities committed against children during the Second World War and of the importance of protecting humanity's future. According to the commentaries, the purpose of article 50 is to prevent young persons from being forced to join organizations and services "*en masse*"⁶⁰, in order to avoid practices used

⁵⁵ Article 2, Geneva Convention IV; Article 1, Additional Protocol I; See also: ICRC, Opinion Paper, *How is the Term "Armed Conflict" Defined in International Humanitarian Law?*, March 2008; Crawford & Pert 2015, op. cit., p. 52.

⁵⁶ Waschefort 2015, op. cit., p. 56.

⁵⁷ Article 4(A)(4), Geneva Convention III.

⁵⁸ Waschefort 2015, op. cit., p. 56.

⁵⁹ N.B. "Occupying power" also includes organisations related to/subordinate to the occupying power.

⁶⁰ French, meaning: "in one group or body; all together".

during WWII.⁶¹ The following article, article 51, prohibits conscription of protected persons⁶² by the occupying power. According to the ICRC commentary, it is strictly prohibited to force enemy subjects to partake in violence against their own State. Not only is enlisting prohibited, but any form of pressure or propaganda seeking to assure voluntary enlistment.⁶³ However, the same limitation as that of article 50, i.e. protection from recruitment only by the *occupying power*, still applies.⁶⁴ Article 51 GC IV further prohibits compelling persons under 18 years of age to work, in any capacity. This exception from forced labour is unrestricted, and according to the ICRC young persons must be protected from compulsory work which is frequently too physically challenging and may lead to separation from their parents.⁶⁵

According to scholar Waschefort, the three major shortcomings of GC IV in regards of protecting child soldiers are, firstly, that it only protects occupied people from the occupying power. Secondly, the protection is limited to international armed conflicts. Thirdly, the relevant provisions lack specificity.⁶⁶

A non-international armed conflict (NIAC) can exist between a State's armed forces and dissident armed forces or other organized armed groups, if the conflict reaches a certain level of intensity and a certain level of organization of the parties.⁶⁷ Article 3 common to the GCs applies in cases of such armed conflicts which occurs in the territory of one of the State Parties. This provision provides for minimum-obligations prescribed all parties to the given conflict. The article's first paragraph prohibits inhumane treatment of persons who *do not take active part in hostilities*. Said paragraph specifically forbids violence to life and person, hostage taking, outrages upon personal dignity, in particular humiliating and degrading treatment as well as sentences or executions without previous judgments. Common article 3 has become relevant in cases of children used in armed conflict brought before international courts.⁶⁸

⁶¹ ICRC, Uhler, Oscar, Coursier Henri, Siordet, Frédéric, Pilloud, Claude, Boppe, Roger, Wilhelm, René-Jean & Schoenholzer, Jean-Pierre, *The Geneva Conventions of 12 August 1949, Commentary, IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, ed. Pictet, Jean, 1958, pp. 284–285; Waschefort 2015, op. cit., pp. 56–57.

⁶² Defined in article 4, Geneva Convention IV.

⁶³ ICRC, Uhler et. al. 1958, op. cit., pp. 292–294.

⁶⁴ Waschefort 2015, op. cit., pp. 56–57.

⁶⁵ ICRC, Uhler et. al. 1958, op. cit., pp. 293–294.

⁶⁶ Waschefort 2015, op. cit., pp. 57–58.

⁶⁷ Article 1, Additional Protocol II; See also ICRC, Opinion Paper 2008, op. cit.

⁶⁸ See: subchapter 5.2.2.

Explicit prohibitions on recruiting and using children do, however, appear in APs I-II, i.e. at the time when the need of special provisions regarding the matter became apparent.⁶⁹ In regards of applicability, article 1(3) of AP I refers to common article 2 of the GCs, meaning that the Protocol also applies in IACs between two or more High Contracting Parties. The Protocol further applies to wars of national liberation.⁷⁰ Article 77(2) of AP I provides that State Parties to the relevant conflict must take all feasible measures to prevent that children under the age of 15 years take direct part in hostilities. Further, Parties are particularly obliged to refrain from recruiting children into their armed forces. When recruiting persons between the ages of 15 and 18 years, the Parties must attempt to prioritize the oldest. Thus, the article's second paragraph covers three different issues: children taking direct part in hostilities, children being recruited into armed forces and how to prioritize when recruiting children between the ages of 15 and 18 years.

As said by the ICRC commentaries on article 77, the article's applicability is unrestricted and applies to all children within the territory of a State engaged in armed conflict. The phenomenon of children and adolescents participating in combat should, in the view of ICRC, come to an end and is considered an inhumane practice as it is morally dangerous to children themselves as well as to people exposed to their unreliability. The negotiations of article 77 entailed opposition from the Parties, and some of the proposed phrasings of the ICRC were mitigated. Notably, the original suggestion did not include the wording "direct" participation in hostilities, when prohibiting the use of children. In the concluding commentary on paragraph two, the ICRC highlights that the article in question first and foremost concerns nationals of the recruitment State, i.e. primarily applies to said State's nationals. Nationals of other states are, however, not excluded.⁷¹

According to article 1(1) of AP II, the Protocol applies to armed conflicts not covered by AP I, taking place in the territory of a State Party between its armed forces and dissident armed forces or other organized armed groups, given that the conflict fulfil certain criteria.⁷² Hence, AP II applies to NIACs. The second protocol provides for a more extensive protection through its article 4.3(c) than offered by the "mirror provision" in AP I, and according to the ICRC

⁶⁹ McBride 2014, op. cit., pp. 19–20.

⁷⁰ Article 1(4) Protocol I; Waschefort 2015, op. cit., p. 59.

⁷¹ ICRC, Pilloud et. al. 1987, op. cit., pp. 899–902, paras. 3177, 3183–3187 & 3191.

⁷² Article 1, Protocol II.

commentary of said article, the prohibition is central to the protection of children. Article 4.3(c) states that children younger than 15 years shall neither be recruited in the armed forces or groups nor should they be allowed to take part in hostilities. Similar to the AP I-prohibition, the article is divided between “recruitment” and “use”/partaking, the relevant age-limit being 15 years. Negotiations of the age limit were extensive, as some State Parties advocated for an age limit of 18 years instead – making it impossible to reach a unanimous decision. Regardless, with reference to considerations in the draft to article 4, and to the age limit used by GC IV, the 15-year age limit was adopted.⁷³

The wording of this AP II provision, i.e. “shall neither be recruited [...] nor allowed”, and the applicability to “armed forces or groups” shows a broader scope of offered protection compared to AP I. This can be further confirmed by the absence of the “all feasible measures” standard.⁷⁴ It should be noted, that article 4.3(c) does not entail the wording “‘direct’ part in hostilities”. Instead, the provision prohibits children to take part in hostilities – which, according to the ICRC, includes participation in military operations by gathering information, transporting ammunition and foodstuffs, transmitting orders or acts of sabotage. In its commentaries, the ICRC categorizes the content of subparagraph (c) as an absolute obligation while comparing it to article 77 of AP I, claiming that the latter is less constraining.⁷⁵

Codified regulation on the use of children in armed conflict can be found in the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict⁷⁶ (the CIAC Protocol). This protocol borders between IHL and IHRL, since the Convention on the Rights of the Child is categorized as IHRL.⁷⁷ Because the CIAC Protocol’s provisions are specifically designed to regulate acts during armed conflict, I choose to address it in conjunction with IHL instruments. The Protocol was adopted in 2000, came into force in 2002 and 167 states are currently parties.⁷⁸

⁷³ ICRC, Junod, Sylvie-Stoyanka, with the collaboration of Pictet, Jean, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ed. Sandoz Yves, Swinarski Christophe, Zimmermann, Bruno, Martinus Nijhoff Publishers, 1987, pp. 1379–1380, paras. 4555–4556; Goodwin-Gill, Guy & Cohn, Ilene, *Child Soldiers: The Role of Children in Armed Conflict*, Clarendon Press, 1994, p. 64; Waschefort 2015, op. cit., p. 72.

⁷⁴ Waschefort 2015, op. cit., p. 72.

⁷⁵ ICRC, Junod 1987, op. cit., pp. 1380–1381, paras. 4557–4558.

⁷⁶ UN General Assembly, *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, A/RES/54/263, 25 May 2000, UN Treaty Series, Volume 2173, p. 222 (CIAC Protocol).

⁷⁷ See: chapter 3.2.

⁷⁸ UN Treaty Collection, *Depositary: Status of Treaties*, Chapter IV, 11.b.

The first article of the CIAC Protocol provides that the parties shall take all feasible measures to ensure that persons under the age of 18 years who are members of the parties' armed forces do not take a direct part in hostilities. This provision concerns only the use of children in armed conflict, and not the recruitment of them. Additionally, no obligation of preventing non-state actors from using children in hostilities is encompassed within the relevant article. The only substantial development, in regards of protecting children used in hostilities, is the heightened age threshold of 18 years compared to the otherwise common limit of fifteen years. Both "all feasible measures" and "direct part in hostilities" are terms which have been subjected to different interpretations by State parties.⁷⁹ Further, the CIAC Protocol's article 4 declares that armed groups distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under 18 years. State Parties to the Protocol shall also take all feasible measures to prevent such recruitment. Armed groups do not have to be actively engaged in an armed conflict in order to be covered by article 4. Recruitment of children under 18 years is prohibited prior to conflict as well. By using the less stringent wording of "should not", paragraph 1 of article 4 reflects the IHRL system, in which only states that are parties to the relevant legal document can have obligations.⁸⁰

The ICRC's *Study on Customary International Humanitarian Law* (the ICRC CIHL Study) was created with the help of well-known experts and with the aim of identifying CIHL. In said study, 161 rules of CIHL are recognised. The ICRC describes CIHL as a "gap filler" of treaty law on armed conflict, strengthening the protection for victims.⁸¹ In the Statute of the International Court of Justice, CIHL is defined as "a general practice accepted as law"⁸². For a rule to become customary, state practice must reflect such custom and it must be proven that the international community believes that the given practice is mandatory as a legal matter.⁸³ Customary international law applies universally. It binds states that are not party to treaties and the applicability of customary norms is generally not affected by the IAC/NIAC distinction. Within the ICRC CIHL Study all rules apply to IACs, and the rules which do *not* apply to NIACs particularly specify such limited application. If IAC-limited application is not specified, the

⁷⁹ Waschefort 2015, op. cit., pp. 92–93.

⁸⁰ UNICEF & Coalition to Stop the Use of Child Soldiers, *Guide to the Optional Protocol on the Involvement of Children in Armed Conflict*, December 2003, p. 17.

⁸¹ ICRC, Henckaerts & Doswald-Beck et. al. 2009, op. cit., pp. xxv–xxxviii.

⁸² Article 38(1)(b), UN, *Statute of the International Court of Justice*, 18 April 1946.

⁸³ ICRC, Henckaerts, & Doswald-Beck et. al. 2009, op. cit., p. xxxviii.

rule is thus binding also for non-state armed groups engaged in the hostilities.⁸⁴ Given the limited treaty law governing NIACs, CIHL becomes especially important in these conflicts.

Rule 136 of the ICRC CIHL Study prohibits the recruitment of children into armed forces and armed groups in both IACs and NIACs. The ICRC writes that this practice is prohibited in multiple international legal instruments, as well as in numerous military manuals and in many countries' national legislation. Official contrary practice could not be found during the ICRC's investigation. Instead, the practice of child recruitment was found to be condemned by several states and international organizations.⁸⁵ Also notably, the SCSL's Appeals Chamber stated in 2004 that recruiting child soldiers had become a crime under customary international law even before it had been codified as an international crime in treaty law. This statement was not contested by the parties to the relevant proceedings.⁸⁶

Further, rule 137 of the ICRC CIHL study states that children must not be allowed to take part in hostilities. The rule applies in both IACs and NIACs. References are made to international humanitarian treaty law as well as to human rights instruments and international criminal law. Again, the practice is largely prohibited in military manuals and within national legislation, while also condemned by states and international organizations. The ICRC mentions rehabilitation and reintegration programmes as further support of the customary nature of the rule in question.⁸⁷ Defining the term "participation in hostilities", the ICRC refers to the *travaux préparatoires* of the Rome Statute⁸⁸, in which one of the footnotes reads that "using" and "participate" were adopted to cover direct participation in combat as well as "active participation in military activities linked to combat"⁸⁹. Examples of such active participation are spying and using children as decoys or couriers. Activities clearly unrelated to the hostilities, e.g. the use of domestic staff in an officer's married accommodation, would *not* be covered by the relevant wording. However, the *travaux préparatoires* continue by clarifying that using children in a

⁸⁴ Crawford & Pert 2015, op. cit., p. 38; Waschefort 2015, op. cit., p. 99; See also: ICRC, *Customary international humanitarian law: questions & answers*, 6. *Who is bound by customary international law?*, 15 August 2005.

⁸⁵ ICRC, Henckaerts & Doswald-Beck et. al. 2009, op. cit., p. 482–484.

⁸⁶ SCSL, Appeals Chamber, *The Prosecutor Against Sam Hinga Norman, Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment)*, 31 May 2004, SCSL-2004-14-AR72(E), para. 53; Waschefort 2015, op. cit., p. 99.

⁸⁷ ICRC, Henckaerts & Doswald-Beck et. al. 2009, op. cit., pp. 485–487.

⁸⁸ UN, *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, A/CONF.183/2/Add. 1, 14 April 1998.

⁸⁹ *Ibid.*, p. 21, footnote 12.

direct support function would indeed be included, examples being supply bearers to the front line. Reference by the ICRC is, however, also made to the Netherlands' statement when ratifying the CRC which declared that states should not be permitted to engage children in hostilities, neither directly nor indirectly.⁹⁰

3.2 International Human Rights Law

The UN Convention on the Rights of the Child⁹¹ (CRC) was adopted in the late 1980s, containing a prohibition on military use of children and authorizing the establishment of the Committee on the Rights of the Child.⁹² The implementation of the CRC by its State Parties is monitored by the Committee on the Rights of the Child and the Parties must submit regular reports, every five years, to said committee. The reports are then examined by the Committee on the Rights of the Child and “concluding observations”, addressing concerns and recommendations, are communicated back to the states.⁹³

The CIAC Protocol, optional to the CRC, which specifically relates to children in armed conflict has been presented in the previous subchapter. One article of the CRC, however, also covers this subject. Article 38 of the CRC leads with placing an obligation upon State parties to respect and ensure applicable IHL rules that are relevant to children. In addition, the article obliges State parties to take all feasible measures to ensure that persons under the age of 15 years do not take a direct part in hostilities. The third paragraph provides that State parties must refrain from recruiting persons under the age of 15 years. Additionally, when recruiting persons between the ages of 15 and under 18 years, State parties shall prioritize the oldest. The last paragraph of article 38 provides for a general obligation, in accordance with the obligatory protection of civilian population during armed conflict, to ensure protection and care of children caught up in war.

During the drafting of the CRC, above article became subject to substantial debate revolving around the relevant age limit, a potential distinction between “voluntary recruitment” and “con-

⁹⁰ Ibid; ICRC, Henckaerts & Doswald-Beck et. al. 2009, op. cit., p. 487.

⁹¹ For full reference see footnote 17.

⁹² Articles 38 & 43 CRC.

⁹³ Articles 43–45 CRC; UN Human Rights Office of the High Commissioner, Committee on the Rights of the Child, *Monitoring children's rights*.

scription” and lastly whether the provisions were to explicitly provide for recruitment for training and education. A somewhat reflective text of article 77 of the AP I was finally agreed upon in order to content the delegates. The prohibition to use children to directly participate in hostilities in article 38 paragraph two also encompasses an obligation of State parties to prevent non-state entities from this practice. The obligation to not recruit, however, applies only to the party itself. Paragraph three, regarding the prioritization of persons between fifteen and under eighteen years, extends to potential application in NIACs as well.⁹⁴

By using the word “hostilities” as defining the relevant prohibition, CRC does not extend the scope of said prohibition to situations which do not amount to armed conflict. It is argued, given the fact the IHRL applies not only in armed conflict, that the CRC has the potential to prohibit the use of children by armed groups/forces also in internal disturbances or other situations not covered by humanitarian treaty law.⁹⁵

3.3 International Criminal Law

On the 17th of July 1998, the Rome Statute of the International Criminal Court⁹⁶ (the ICC statute or the Rome statute) was adopted by 120 states and 124 states are currently parties. The Statute entered into force the 1st of July 2002 with 60 states having ratified it.⁹⁷ The core crimes of international criminal law are genocide, crimes against humanity and war crimes. War crimes relate directly to IHL and a largely accepted definition of these crimes are acts which constitute *serious* violations of the law of armed conflict.⁹⁸ In the Rome Statute, article 8 on war crimes is divided into the subcategories of grave breaches of the GCs and other serious violations of the laws and customs applicable in IACs. Other categories are serious violations of common article 3 of the GCs in NIACs and, lastly, other serious violations of the laws and customs applicable in NIACs. According to article 7 of the Rome Statute, crimes against hu-

⁹⁴ Waschefort 2015, op. cit., pp. 90–91.

⁹⁵ Ibid, p. 90.

⁹⁶ UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, UN Treaty Series, Volume 2187, p. 3 (Rome Statute).

⁹⁷ International Criminal Court, *About – History*.

⁹⁸ Crawford & Pert 2015, op. cit., pp. 245–246; See also: ICRC, Henckaerts & Doswald-Beck et. al. 2009, op. cit., pp. 568–603.

manity consists of specified acts, among which sexual crimes and causing great suffering, committed as part of a widespread or systematic attack directed against civilian population. These crimes are within the jurisdiction of the ICC.⁹⁹

The statutes of the ICTY and the ICTR do not encompass provisions regarding the use of children in armed conflict.¹⁰⁰ The Rome Statute, however, criminalizes conscripting or enlisting children under the age of 15 years, or using them to actively participate in hostilities. These crimes are found in articles 8(2)(b)(xxvi), IACs, and 8(2)(e)(vii), NIACs, of the Rome Statute. Including these crimes into the Rome Statute was part of the intention to develop international law, in order to meet the current needs, and went beyond plain codification of existing law at the time of the drafting in 1998.¹⁰¹ Other reasons were because of the severe trauma experienced by children participating in violence, the increased willingness by children to use violence that follows from such participation and the interruption in their education. Further, they were considered to pose a great danger to others due to being unpredictable.¹⁰² The fact that child soldier recruitment had not been specifically criminalized before, including said practice into the Rome Statute became subject to debate during the negotiations on the treaty text, before an agreement on inclusion was reached.¹⁰³ The introductions to subparagraphs (b) and (e) of article 8 reads “[...] violations of the laws and customs applicable [...], within the established framework of international law”, indicating that the drafters tried to avoid a breach of the principle of *nullum crimen sine lege*¹⁰⁴ by clarifying that the child soldier prohibition was already existing and only codified by the Rome Statute.¹⁰⁵

The articles and relevant subparagraphs follows the now familiar pattern by being divided into one part regarding recruitment/conscription/enlistment and one part concerning the use of children to actively participate/partake in hostilities. Regarding this division, scholar McBride presents two alternative interpretations. Firstly, conscription/enlistment can be regarded as continuing crimes. It starts when the child associates with the armed group and ends when the child leaves or is demobilized, or when s/he turns 15 years. The time in-between additionally constitutes the crime of “use”. The crime of conscripting/enlisting is committed from said starting

⁹⁹ Article 5, Rome Statute.

¹⁰⁰ See: subchapter 1.2.

¹⁰¹ McBride 2014, op. cit., p. 47.

¹⁰² Werle & Jessberger 2014, op. cit., p. 463.

¹⁰³ McBride 2014, op. cit., pp. 47–50.

¹⁰⁴ Latin, meaning: “no crime without law”, also known as principle of legality.

¹⁰⁵ McBride 2014, op. cit., p. 121.

point, and continues throughout the association, triggering criminal responsibility for the person who recruited the child, irrespective of his or her involvement in the use of the child in armed conflict. The recruitment/enlistment activates accountability for all following use, even if by commanders other than the recruiter. Secondly, the crime can be interpreted as non-composite. It can then be committed by either conscripting/enlisting a child, *or* through the following “use” of said child, without any connection between the two acts. The liability would then expand to encompassing not only the recruiter, but also anyone who uses the child for military purposes.¹⁰⁶

According to article 9 of the Statute, the Elements of Crimes document¹⁰⁷ (EOC) “shall assist the court in the interpretation and application of articles 6, 7 and 8”. The document is, however, non-binding and functions only as an interpretative aid.¹⁰⁸ According to the EOC, article 8(2)(b)(xxvi) encompasses five elements. Firstly, the perpetrator must have committed the criminalized acts, i.e. conscripted or enlisted one or more persons into the national armed forces or used one or more persons to participate actively in hostilities. Secondly and thirdly, these person/s must have been under the age of 15 years at the time and the perpetrator must have known, or should have known, this. The recruitment, enlistment or use must have taken place in the context of and been associated with an IAC, and the perpetrator must have been aware of factual circumstances establishing the existence of an armed conflict.¹⁰⁹ Generally the same elements are required for child soldier recruitment in NIACs. However, the first element mentions “armed force *or* group”, and the fourth element speaks of the context of and association with a NIAC instead of an IAC.¹¹⁰ The elements for war crimes under article 8(2) shall be interpreted within the context of IHL.¹¹¹

The Statute of the Special Court for Sierra Leone¹¹² (the SCSL Statute) is the result of negotiations, and a following agreement, between the UN and the Government of Sierra Leone. The negotiations were pursued after the adoption of resolution 1315 by the Security Council¹¹³ in 2000, a response to the Sierra Leonean civil war which began in 1997.¹¹⁴ The SCSL Statute

¹⁰⁶ McBride 2014, op. cit., pp. 58–59; Werle & Jessberger 2014, op. cit., p. 467.

¹⁰⁷ International Criminal Court (ICC), *Elements of Crimes*, 2011 (EOC).

¹⁰⁸ McBride 2014, op. cit., p. 50.

¹⁰⁹ Article 8(2)(b)(xxvi), EOC, p. 31.

¹¹⁰ Article 8(2)(e)(vii), EOC, p. 39.

¹¹¹ Article 8, Introduction, para. 2, EOC, p. 13.

¹¹² UN Security Council, *Statute of the Special Court for Sierra Leone*, 16 January 2002 (SCSL Statute).

¹¹³ UN Security Council, S/RES/1315 (2000), 14 August 2000.

¹¹⁴ McBride 2014, op. cit., pp. 85–87.

encompasses the same definition of crimes against humanity as the Rome Statute. It further criminalizes violations of common article 3 of the GC and of AP II as well as “other serious violations of IHL”. The competence of the SCSL covers, alongside specified breaches of Sierra Leonean law, said crimes if committed in the territory of Sierra Leone since 30 November 1996.¹¹⁵

Article 4 of the SCSL Statute covers “other serious violations of international humanitarian law”. The act of conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities is criminalized under subparagraph (c) of said article – identical to the relevant articles of the Rome Statute.

¹¹⁵ Articles 1–5, SCSL Statute.

4 Active/Direct Participation in Hostilities

The term “active/direct participation in hostilities” seem to be reoccurring in international legal provisions prohibiting the use of children in armed conflict. Bearing in mind the gender specific use of girls, highlighted in chapter two, it becomes relevant to assess how this term can be interpreted and whether or not it includes acts typically carried out by girls associated with armed groups/forces.

The notion of direct or active participation in hostilities has traditionally been used for determining legitimate, and illegitimate, targets. Thus, direct or active participation in hostilities has been thoroughly assessed, although not always explicitly in relation to child soldiers. Chapter four is therefore divided into two subchapters: one in which the traditional concept of direct or active participation in hostilities is presented, in order to provide for principles and distinctions which can be used as analogies in regards of child soldiers. The second subchapter will provide for interpretations of direct or active participation in hostilities specifically related to children used in hostilities.

4.1 The Traditional Concept of Active/Direct Participation in Hostilities

A cardinal principle of IHL is the principle of distinction, applying in IACs as well as in NIACs. In rule 1 of the ICRC CIHL Study it is established that parties to a conflict must, at all times, distinguish between civilians and combatants. Civilians may not be subjects of attacks, and attacks can only be directed against combatants. The rule is, directly or indirectly codified in different regulations.¹¹⁶ Another customary norm, connected to rule 1, is rule 7 of the ICRC CIHL Study, which provides for the principle of distinction between civilian objects and military objectives. Attacks may only be directed against the latter. Combatants are, in rule 3, defined as “all members of the armed forces of a party to the conflict [...], except medical and

¹¹⁶ ICRC, Henckaerts & Doswald-Beck et. al. 2009, op. cit., pp. 3–8; See for example: articles 48, 51(2) & 52(2), Additional Protocol I & article 13(2), Additional Protocol II.

religious personnel”¹¹⁷. Members of State armed forces may be combatants in both IACs and NIACs, however the combatant status exists only in IACs.¹¹⁸ Military objectives are defined in rule 8 as only those objects which by nature, location, purpose or use contribute effectively to military action and which destructions, captures or neutralizations would offer definite military advantage.¹¹⁹ Civilians are persons who are not members of the armed forces and civilian objects are all objects which are not military objectives, according to rules 5 and 9. Although, rule 5 does highlight the uncertainty as to whether members of armed opposition groups are to be considered members of armed forces or civilians.¹²⁰ The principle of proportionality, however, offers some wiggle room for the conflicting parties. According to rule 14 of the Study, an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would not be in proportion to the concrete and direct military advantage expected, is prohibited. Thus, some civilian casualties are allowed, as long as they are proportionate in relation to the gained military advantage. However, as prescribed by rule 15, all feasible precautions must be taken to avoid, or at least, minimize incidental civilian injuries.¹²¹

Civilians lose protection against attack, when and for such time as they directly participate in hostilities, according to article 51(3) of AP I and article 13(3) of AP II. The customary rule is embodied in rule 6 of ICRCs Study on Customary IHL.¹²² An attempt to resolve the issue of civilians intermingling with armed actors and performing duties closely related to military operations was made by the ICRC in 2009 through its *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* (the DPH Study). The study aims at providing recommendations on how to interpret IHL relating to the notion of direct participation in hostilities. The term itself is defined as “conduct which, if carried out by civilians, suspends their protection against the dangers [as civilians] arising from military operations”¹²³, and the DPH Study crystallizes three key legal questions:

- Who is considered a civilian for the purposes of the principle of distinction?
- What conduct amounts to direct participation in hostilities?

¹¹⁷ ICRC, Henckaerts & Doswald-Beck et. al. 2009, op. cit., p. 11.

¹¹⁸ Ibid, pp. 11–14 & 25–29; See also: Article 43(2), Additional Protocol I.

¹¹⁹ ICRC, Henckaerts & Doswald-Beck et. al. 2009, op. cit., pp. 29–32; See also: article 52(2), Additional Protocol I.

¹²⁰ ICRC, Henckaerts & Doswald-Beck et. al. 2009, op. cit., pp. 17–19 & 32–34; See also: article 50, Additional Protocol I.

¹²¹ ICRC, Henckaerts & Doswald-Beck et. al. 2009, op. cit., pp. 46–55.

¹²² Ibid, pp. 19–24.

¹²³ ICRC, Melzer 2009, op. cit., p. 12.

- What modalities govern the loss of protection against direct attack?¹²⁴

For the purpose of this thesis, the second question is undoubtedly the most relevant in order to make an analogy to the prohibition on using children to actively/directly take part in hostilities. It must, however, be kept in mind that the ICRC guide has a different purpose than the thesis at hand. The guide aims at clarifying persons status in relation to the principle of distinction and who can be a legitimate target, who can enjoy civilian protection and who can enjoy combatant status.¹²⁵

The ICRC begins its scrutiny of the concept of direct participation in hostilities by establishing that treaties of IHL do not provide for a definition. Neither State practice nor international jurisprudence offers any clear interpretations. The concept must thus be interpreted in accordance with the Vienna Convention on the Law of Treaties¹²⁶ (VCLT), i.e. “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose”¹²⁷. The ICRC then proceeds by stating that direct participation in hostilities refers only to conducts within armed conflict, excluding conducts occurring in situations classified as internal disturbances. A disclaimer is made in relation to particular conducts, and the ICRC points out that consideration must be given to the specific circumstances in the given situation.¹²⁸

Direct participation in hostilities is, by the ICRC, divided into two elements: “hostilities” and “direct participation” within such hostilities. The degree and quality of a person’s individual involvement in hostilities determines whether such involvement is to be described as “direct” or “indirect. By referring to the French texts of the GCs and APs, which consistently uses the term “*participent directement*”, the ICRC concludes that “direct”¹²⁹ and “active”¹³⁰ participation, used in the English texts of the GCs and APs respectively, is to be considered as referring to the same quality and degree of individual participation in hostilities. The ICRC, additionally, settles that “direct participation in hostilities” is synonymously used in the respective APs, and should therefore be interpreted equally in IACs and NIACs.¹³¹

¹²⁴ Ibid, pp. 9–13.

¹²⁵ Ibid, p. 11.

¹²⁶ UN, *Vienna Convention on the Law of Treaties*, 23 May 1969, UN Treaty Series, vol. 1155, p. 331 (VCLT).

¹²⁷ Article 31, VCLT.

¹²⁸ ICRC, Melzer 2009, op. cit., pp. 41–42.

¹²⁹ See for example: articles 51(3), 43(2) & (67)(1)(e) Additional Protocol I & article 13(3) Additional Protocol II.

¹³⁰ See for example: common article 3 of the Geneva Conventions I-IV.

¹³¹ ICRC, Melzer 2009, op. cit., pp. 43–44.

By reference to articles in the APs, the ICRC states that treaty IHL regards individual conduct, by civilians or members of the armed forces, which constitutes part of the hostilities as direct participation in hostilities. The scope of conduct constituting direct participation in hostilities is unaffected by whether the participation is spontaneous, sporadic, unorganized or as part of an organized army or armed group. These factors may, however, be key when determining an individual's status as a civilian or a combatant. Consequently, direct participation in hostilities relates to a person's involvement in certain hostile acts, and not to his/her function, status or association. The ICRC emphasises that direct participation in hostilities should not be extended beyond specific acts, as it would affect the distinction between "temporary, activity-based loss of protection (due to direct participation in hostilities), and continuous, status or function-based loss of protection (due to combatant status or continuous combat function"¹³². It is further stressed that the distinction between rules governing civilian protection and protection of members of armed forces or armed groups must be upheld.¹³³

The DPH Study lists three cumulative criteria which must be met for an act to qualify as direct participation in hostilities. The first requirement, called the threshold of harm, does not necessitate a specific act leading to actual harm reaching the threshold but only the objective likelihood of such harmful result. For an act to be qualified as direct participation in hostilities, it must either likely affect the military of a party to an armed conflict, e.g. military operations or military capacity, or likely inflict death, injury or destruction on persons or objects protected against direct attack.¹³⁴

The criteria of direct causation, the second requirement, means that a direct link must exist between the specific act and the harm likely to result from that act. The standard is further met if an act constitutes an integral part of a military operation which has direct link to such harm. According to the ICRC, the terminology of direct participation in hostilities, leading to loss of protection against attack for civilians, implies that there is also a notion of indirect participation in hostilities *not* leading to such loss of protection. In general terms, it could be argued that all activities objectively leading to the military defeat of the enemy (including e.g. design, pro-

¹³² Ibid, pp. 44–45.

¹³³ Ibid, pp. 44–45.

¹³⁴ Ibid, pp. 46–50.

duction and shipment of equipment and construction or maintenance of infrastructure) are included in the general war effort. Political, economic or media activities supporting such effort would be included in the category of war-sustaining activities. Both classifications may well contribute, or even be indispensable, to damage reaching the threshold of harm. But unlike conduct of hostilities, intended to cause said damage, general war effort and war sustaining activities includes also acts which only maintains or build up capacity to cause such damage. Consequently, direct and indirect causation must be separated and depends on the closeness of the causality relation between the act and subsequent harm. In turn, this distinction of causation of harm corresponds to the distinction between direct and indirect participation in hostilities. The ICRC argues that an individual's conduct which indirectly causes harm, or only builds up or maintains a party's capacity to harm the opponent does not qualify as direct participation in hostilities. It is neither necessary nor sufficient that an act is indispensable to the harmful consequence. Neither is it sufficient in order to qualify an act as DPH that said act is linked to its consequences through an uninterrupted causal chain of events. An example selected by the ICRC to illustrate the criteria of direct causation is a civilian truck driver delivering ammunition to an active fire position at the front line. This act would be considered an integral part of an ongoing military operation, and thus direct participation in hostilities. Transporting ammunition from a factory to a place for further shipping however, is too distant from the use of said ammunition in an operation and does therefore not ensue direct harm, i.e. the truck driver is not directly participating in hostilities.¹³⁵

The third and last criteria is called the belligerent nexus. It requires that an act must be intended ("specifically designed"¹³⁶) to directly cause qualified harm "in support of a party to the hostilities and to the disadvantage of another"¹³⁷, in order to be considered direct participation in hostilities. Generally, harm caused in individual self-defense or defense of others against violence not allowed under IHL, in exercising power or authority over persons or territory, as part of civil unrest against such authority, or during inter-civilian violence, lacks the belligerent nexus.¹³⁸

¹³⁵ Ibid, pp. 51–54, 56, 58.

¹³⁶ Ibid, p. 58.

¹³⁷ Ibid.

¹³⁸ Ibid, pp. 58–64.

In chapter II and subchapter VII.2 of the DPH Study, the ICRC addresses members of organized armed groups. Regarding the determination of membership in organized armed groups, the ICRC concludes that the concept is difficult to clarify partially due to lack of formalized integration and specific uniforms or signs. Additionally, various affiliations with organized armed groups exist and many do not amount to relevant membership. Because of this, membership depends on the individual's continuous function and its correspondence to the conduct of hostilities by a non-State party to the conflict. According to the ICRC, the criterion which is decisive for a person's membership in an organized armed group, is whether s/he "assumes a continuous function of the group involving his or her direct participation in hostilities"¹³⁹, i.e. assumes a continuous combat function. The notion of continuous combat function primarily distinguishes between members of organized armed groups and civilians who directly participate in hostilities by spontaneous, sporadic or unorganized acts, or civilians with functions of political, administrative or non-combatant nature. Lasting integration into an organized armed group is required in order for an individual to assume continuous combat function. An individual recruited, trained and equipped can therefore be considered having a continuous combat function even before s/he commits aggressive acts. According to the Study, such members of organized armed groups lose their status as civilians, for as long as their membership lasts, by virtue of their continuous combat function. The protection offered to civilians, for as long as they do not directly participate in hostilities, cannot apply to members of organized armed groups as this would grant them considerable advantage over members of State armed forces, i.e. legitimate, military targets. Thus, when persons do more than spontaneous, sporadic or unorganized direct participation in hostilities, and associates with an organized armed group which belongs to a conflict party, they are not protected against direct attack while continuing their association. A membership of an organized armed group starts when a civilian *de facto* assumes a continuous combat function. This criterion must be assessed in good faith, taking into account prevailing circumstances and with a presumption in favor of civilian protection in cases of uncertainty.¹⁴⁰

However, persons who merely accompany or support an organized armed group, without directly participating in hostilities are not to be considered having a continuous combat function,

¹³⁹ Ibid, p. 33.

¹⁴⁰ Ibid, pp. 31–34 & 71–73.

and thus not members of said group either. They are, instead, civilians assuming support functions even when they provide substantial support and benefit from protection against attack. If they commit acts amounting to direct participation in hostilities, they temporarily lose that civilian status.¹⁴¹ Civilians who accompany armed forces, without being actual members thereof, are mentioned in article 4(4) of the GC III, as stated above in subchapter 3.1. In a public report by the IHL Committee appointed by the Swedish Government, these persons are called “civilians with accompanying status” and they are, under said article of GC III, granted status as prisoners of war if captured by their adversaries. Article 4(4) does, however, require that such civilians have been authorized to serve the military force and that they can prove their status with identification cards. Examples of civilians with accompanying status are, among others, supply contractors, members of labor units and personnel responsible for the welfare of the armed forces which they accompany. In order for a person to acquire accompanying status, s/he must not be a direct part of the armed forces, i.e. s/he cannot be registered in mobilization charts or any similar documents. Neither can accompanying persons be used for combat. The Swedish IHL Committee writes that the GC III implies that the accompanying status is appropriate for service assignments of a temporary nature. Additionally, said status ought to be suitable for those persons who normally enjoy status as civilians and actualizes a temporary shift from civilian status to accompanying status and then back to civilian status again. As suggested by the Swedish IHL Committee, the classification of civilians accompanying armed forces should be used for persons who work closely or adjacent to armed forces, but do not partake in combat and are not registered in the militaries’ mobilization charts. The temporary nature of said status is further emphasized.¹⁴²

4.2 Active/Direct Participation in Hostilities Relating to Children Used in Armed Conflict

The Cape Town Principles were adopted in 1997 at a symposium on the prevention of recruitment of children into the armed forces and on demobilization and social reintegration of child soldiers in Africa. The Cape Town Principles encompass multiple recommendations, directed towards governments and communities, on how to help child soldiers. The term “child soldier” is defined in a wide manner, covering any person under the age of 18 years who is part of armed

¹⁴¹ Ibid, pp. 34–35.

¹⁴² SOU 1984:56, *Betänkande av folkrättskommittén*, pp. 78–80.

forces or groups of any kind in any capacity. The definition includes cooks and anyone accompanying such groups, other than family members. Further, it is specifically pointed out that girls recruited for sexual purposes and for forced marriage are included in the definition as well. Hence, not only children carrying arms are the persons referred to as child soldiers by the Cape Town Principles.¹⁴³

The Paris Principles, adopted in 2007, is a document of principles and guidelines on children associated with armed forces or armed groups. Almost ten years after the Cape Town Principles were agreed upon, UNICEF started an international review of said principles which led to the Paris Principles. This document of 2007 provides for guidance on the unconditional release of children from armed forces or armed groups from a child rights-based perspective. The definition of a “child associated with an armed force or armed group” resembles the child soldier-definition of the Cape Town Principles, including persons under the age of 18 years recruited into an armed force or group in any capacity. Said capacities include fighters, cooks and children used for sexual purposes. It is emphasized that the definition is not limited to children taking direct part in hostilities. The Paris Principles also stress, that dialogues should be held with armed forces or groups, while emphasizing that using girls as “wives”, for sexual purposes or for domestic labor, are indeed acts which may constitute violations of human rights and IHL.¹⁴⁴ In 2017, the Paris Principles’ more elaborate guidelines, the Paris Commitments¹⁴⁵, had been endorsed by 108 states.¹⁴⁶

Despite the fact that such a large number of states have adhered to the Paris Commitments, a substantial discussion can be found regarding the term “direct/active participation in hostilities”. Commenting on the CIAC Protocol, UNICEF and the NGO Coalition to Stop the Use of Child Soldiers write that the wording of article 1, “direct participation in hostilities”, can be interpreted as covering active participation in hostilities as well as military activities and direct support functions. Notably, the use of girls as sex slaves or wives is explicitly mentioned as examples of what could be encompassed within the term. The organizations conclude that it is

¹⁴³ The Cape Town Principles, pp. 1, 12.

¹⁴⁴ The Paris Principles, pp. 4–7, 23.

¹⁴⁵ UNICEF, *The Paris Commitments to Protect Children from Unlawful Recruitment and Use by Armed Forces or Armed Groups*, February 2007.

¹⁴⁶ Watchlist on Children and Armed Conflict, ‘*Protect Children From War*’ 10th Anniversary of the Paris Commitments and the Paris Principles on Children Associated With Armed Forces and Armed Groups, 15 March 2017.

essential, in all cases, to provide children with the broadest possible protection that can be afforded under IHL and IHRL.¹⁴⁷

Further, the UN has declared, in a document of guidelines for disarmament, demobilization and reintegration programs (DDR programs), that distinctions should not be made between combatants and non-combatants in regards of children associated with armed forces or groups when it comes to their eligibility for said programs. Girls who have carried out tasks of a logistic nature and/or have worked as cooks and/or have been exploited for sexual purposes should, in relation to DDR programs, be considered part of the given armed group/force. The reason for this is that children, particularly girls, associated with armed groups or forces perform duties of supportive and non-combatant character while still crucial to the functioning of said groups or forces. The line between combatants and non-combatants among children used in armed conflict is thus, according to the UN, blurred. Said document of guidelines introduces a category called “female supporters/females associated with armed forces and groups”. This category covers girls economically and socially dependent on an armed group/force, functioning as cooks, nurses or used for sexual exploitation.¹⁴⁸

In its commentary to article 77(2) of AP I, the ICRC poses the question of whether the phrase “*direct* part in hostilities” can lead to the assumption that indirect acts of participation are not to be covered by article 77(2). The drafters’ intention has, according to the ICRC, clearly been to keep children from armed conflict and they should therefore not perform such supporting services either.¹⁴⁹ The draft article which was proposed, did indeed cover a prohibition also on indirect participation in hostilities, but was rejected by states due to perceived as unrealistic with regards to the nature of wars of national liberation. Other commentators have expressed views on the flexibility of the restrictions provided by article 77(2), arguing that voluntary indirect participation by children in hostilities is not prohibited by said article.¹⁵⁰

¹⁴⁷ UNICEF & Coalition to Stop the Use of Child Soldiers 2003, op. cit., p. 14; See also: Doek, Jaap, *The International Legal Framework for the Protection of Children in Armed Conflict*, UN Institute for Disarmament Research, Disarmament Forum, Issue 3, 2011, p. 14.

¹⁴⁸ UN, *Operational Guide to the Integrated Disarmament, Demobilization and Reintegration Standards*, 2014, pp. 47, 206 & 230.

¹⁴⁹ ICRC, Pilloud et. al. 1987, op. cit., p. 901, para. 3187.

¹⁵⁰ Goodwin-Gill & Cohn 1994, op. cit., p. 61.

It should be noted, that the war crime of using children in armed conflict embodied in the Statutes of the SCSL respectively of the ICC reads “*active part in hostilities*”.¹⁵¹ The use of active participation versus direct participation has led to discussions as to whether or not there is an actual difference between the two standards. International tribunals have approached the issue in an inconsistent manner, some proclaiming that the standards are the same (ICTR) and some determining that they are different (ICC).¹⁵² Scholar McBride addresses the threshold of active participation in the Rome Statute, starting by declaring that combatant and non-combatant children are equally covered by the threshold of active participation in hostilities, embodied in the relevant articles. Again, the differences between terminologies is highlighted: “direct part in hostilities” from CRC, the CIAC Protocol and AP I, “any part in hostilities” from AP II and, “active participation in hostilities” from the Rome and SCSL Statutes.¹⁵³ McBride refers to the *travaux préparatoires* of the Rome Statute, mentioned in subchapter 3.1, which differentiates between “activities linked to combat”¹⁵⁴ and “activities clearly unrelated to the hostilities”¹⁵⁵, e.g. the use of domestic staff in an officer’s married accommodation.¹⁵⁶ According to McBride, the definition in said footnote includes use of children not only at the front lines of an armed conflict. She argues that *active* participation in hostilities covers more functions than the terminology of direct participation in hostilities. In the opinion of McBride, the threshold of *direct* participation in hostilities can be met only by a child with a combatant role. This reasoning leads the scholar to make the conclusion that the criminalization of child soldiering in the Rome Statute aims at expanding the definition of said crime. This expansion is made by including a more varied set of roles, that can be held by children in armed conflict, that meets the threshold of active participation in hostilities.¹⁵⁷

That the linguistic perspective provides for an argument of differentiating the standards of direct and active participation is initially agreed upon by scholar Waschefort. Direct would relate to one’s contribution to the conduct, while active would instead relate to the intensity of one’s participation in the conduct. Waschefort does, however, further acknowledge the ICRC’s reasoning presented above regarding the French GC and AP texts, which consistently uses the

¹⁵¹ Articles 8(2)(b)(xxvi) & 8(2)(e)(vii) Rome Statute; Article 4 SCSL Statute; Waschefort 2015, op. cit., p. 63.

¹⁵² Waschefort 2015, op. cit., p. 63.

¹⁵³ McBride 2014, op. cit., p. 60.

¹⁵⁴ UN, *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, A/CONF.183/2/Add. 1, 14 April 1998, p. 21, footnote 12

¹⁵⁵ Ibid.

¹⁵⁶ Ibid.

¹⁵⁷ McBride 2014, op. cit., pp. 60–61.

phrase “*participent directement*” despite the English texts’ differentiation between “active” and “direct”. Conclusively, in Waschefort’s opinion, the terms direct and active should be deemed the same – bearing in mind that authority supporting the opposite position, among which the ICC jurisprudence, does exist.¹⁵⁸

Waschefort elaborates, more generally, that the qualification of direct participation in hostilities embodies the principle of distinction. He argues that provided the aim of preventing children to get involved in armed conflict, it would be desirable to use a broad interpretation in favour of direct participation. The wider the interpretation, the further a child could be removed from the hostilities and still acquire protection, as s/he would still be deemed to directly participate. Waschefort uses as an example in his book, a child acting as a cook to the armed forces who would likely *not* be considered as participating directly if a stricter interpretation were to be used. In that case, his/her use in a conflict would be lawful, while a broad interpretation would, likely, lead to the conclusion that s/he was directly participating and therefore used in an unlawful manner. As understood in subchapter 4.1, the standard of direct participation is not only used in relation to protect child soldiers, but also when determining the scope of protection for civilians. A generous interpretation of said standard would, while increasing the protection for child soldiers, lessen the protection of civilians then being perceived as directly participating in hostilities, according to Waschefort. This leads back to the balancing act of on the one hand protecting civilians, and on the other allowing the targeting of combatants. Said balance is the core of the discussion of whether a strict or a generous interpretation of direct participation should be used in cases of hostilities. This parallel, children used in armed conflict vis-à-vis civilians, opens up for the question of whether the direct participation-standard should be interpreted as the same standard when the purpose is to protect civilians and child soldiers respectively.¹⁵⁹

Proceeding to the reliance on interpretive devices instead, Waschefort suggests the use of the “most favourable” principle, which is found in human rights law. According to the Inter-American Court of Human Rights, the principle can be read as requiring choosing “the alternative that is most favourable to protection of the rights enshrined in [the Convention], based on the

¹⁵⁸ Waschefort 2015, op. cit., p. 63.

¹⁵⁹ Ibid, pp. 64–65.

principle of the rule most favourable to the human being”¹⁶⁰. This reasoning can favour a narrow interpretation of direct/active participation in hostilities when applied within the principle of distinction. At the same time, above reasoning can support a liberal interpretation of that same standard when applied to a situation of child soldier prevention. A maxim which can be used as a general principle, when applying substantive norms of law is “all things are to be presumed to be in favour of life, liberty, and innocence”¹⁶¹. This interpretive device would, most likely, lead to a conclusion similar to the one reached with the “most favourable” principle. The maxim provides for interpretations in favour of the lives and welfare of civilians, and the wellbeing of children used in hostilities respectively. Convenient as these devices for interpretation may seem, they cannot be regarded as exclusively in agreement with IHL, in the views of Waschefort. Within the framework of distinction, it is clear that civilian life is a central factor, but so is the notion of combatants being allowed to target their adversary. Looking to human rights, the protection of civilian lives will probably be considered the decisive element. In the realm of IHL, where fatality is expected, other conclusions are possible. It can thus be argued that direct/active participation in hostilities should be interpreted the same way in the context of distinction as in the context of preventing the use of children in armed conflict.¹⁶²

In relation to the ICRC’s DPH Study, the continuous combatant function-category may increase the protection of children used in armed conflict, as it would apply beyond the time of actual direct participation of the child. However, according to Waschefort, persons outside of the limits specified by IHL could be targeted as a result and the category should therefore not be maintained. Perhaps also beneficial to child soldier prevention, recommendation IX of the DPH Study reads:

*In addition to the restraints imposed by international humanitarian law on specific means and methods of warfare, and without prejudice to further restrictions that may arise under other applicable branches of international law, the kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances.*¹⁶³

¹⁶⁰ Inter-American Court of Human Rights, *Case of Mapiripán Massacre v. Colombia*, 15 September 2005, Series C No. 122, para. 106; Waschefort 2015, op. cit., p. 65.

¹⁶¹ Latin: “*In favorem vitae, libertatis, et innocentiae omnia praesumuntur*”.

¹⁶² Waschefort 2015, op. cit., p. 65–66.

¹⁶³ ICRC, Melzer 2009, op. cit., p. 17.

This relates to the issue of children being considered to be a legitimate target once they participate directly in hostilities, i.e. having combatant status, despite being unlawfully recruited and used. From a child protection perspective, it can be claimed that this recommendation limits the amount of force used against children who participate in hostilities. Having examined the DPH Study, Waschefort reaches the conclusion that children must, in order to qualify as directly/actively participating in hostilities perform acts meeting the requirements of harm, direct causation and the belligerent nexus.¹⁶⁴

¹⁶⁴ Waschefort 2015, op. cit., pp. 67–68.

5 Children Used in Armed Conflict – International Jurisprudence

“Active/direct participation” appears to be a term which can be interpreted in numerous ways, although a wide interpretation seems to be argued most favourable in order to eliminate the use of children in armed conflict. To put the term in a more concrete context, the jurisprudence of international courts becomes relevant. In this chapter, the ICC’s and the SCSL’s interpretations of said term will be examined. Additionally, the approach taken by the courts and its actors regarding the phenomenon of girls used in armed conflict will be scrutinized.

The provisions prohibiting the use of children in armed conflict in the Rome Statute and the SCSL Statute respectively were presented in chapter three. Articles 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Rome Statute outlaws the acts, committed in the context of armed conflict, of conscripting or enlisting children under the age of 15 years into national armed forces or armed groups, and using them to actively participate in hostilities. Said acts are categorized as war crimes: other serious violations of the laws and customs applicable in IACs and NIACs. Article 4 of the SCSL Statute, other serious violations of international humanitarian law, encompasses a similar criminalization in paragraph (c).

In order to bring more clarity of the rulings presented below, it should further be declared that the Rome Statute criminalizes acts of (c)enslavement and (e)severe deprivation of physical liberty. Further, (k)other inhumane acts causing great suffering or serious injury to body or to mental or physical health is outlawed. Lastly, (g)rape, sexual slavery, enforced prostitution, forced pregnancy or any other form of sexual violence of comparable gravity under article 7 as crimes against humanity is proscribed. The same sexual crimes are also prohibited under articles 8(2)(b)(xxii) and 8(2)(e)(vi), as war crimes, other serious violations of laws and customs applicable in IACs and NIACs. Lastly, the acts of wilfully causing great suffering or serious injury to body or health, and committing outrages upon personal dignity are illegal under articles 8(2)(a)(iv) and 8(2)(c)(ii) as serious violations of the GCs and common article 3. Correspondingly, the SCSL Statute prohibits crimes against humanity such as (c)enslavement, (g)sexual crimes as in the Rome Statute and (i)other inhumane acts through article 2. Violence

to life, health and physical or mental well-being of persons, outrages upon personal dignity falls within the scope of violations of common article 3 and AP II as prescribed by article 3 in the SCSL Statute. This applies particularly to rape, enforced prostitution and any form of indecent assault.

5.1 Jurisprudence of the SCSL

The founding of the SCSL followed the civil war which took place in Sierra Leone between 1991 and 2002, and the two cases presented below concerns acts committed during said civil war. The Revolutionary United Front (RUF) took control over Sierra Leonean diamond mines in 1991, and the organization further gained control over the eastern parts of Sierra Leone. In 1992 the National Provisional Ruling Council overthrew the government of Sierra Leone, only to be overthrown themselves in 1996. A new president was elected, Ahmed Tejam Kabbah, but he was overthrown in 1997 by parts of the Sierra Leone Army which established the Armed Forces Revolutionary Council (AFRC). Together with the RUF, the AFRC formed an alliance.¹⁶⁵ Kamajors¹⁶⁶ were enlisted by the military at the beginning of the Sierra Leonean civil conflict, acted as protectors of different communities and received some training by the soldiers. After the overthrow of the Kabbah-government, the Kamajors assembled to fight the AFRC. While president Kabbah was in exile, he established the Civil Defense Forces (CDF), which was comprised mainly by Kamajors. Thus, the CDF, supported the Kabbah-government and fought against the RUF and the AFRC.¹⁶⁷

¹⁶⁵ C. Grover, Sonja, *Prosecuting International Crimes and Human Rights Abuses Committed Against Children, Leading International Court Cases*, Springer, 2010, pp. 69–70.

¹⁶⁶ Originally referring to men protecting communities while having knowledge of the forest and of areas of medicine.

¹⁶⁷ SCSL, Trial Chamber I, *The Prosecutor Against Moinina Fofana & Allieu Kondewa* (The Prosecutor Against Fofana & Kondewa), *Judgement*, 2 August 2007, SCSL-04-14-T (SCSL, Trial Chamber I, *The Prosecutor Against Fofana & Kondewa, Judgment*), paras. 2, 50–81.

5.1.1 The CDF Case

Moinina Fofana and Allieu Kondewa were arrested in 2003 and further ordered to be transferred and detained, based on allegations of them committing serious crimes during the Sierra Leonean civil war.¹⁶⁸ The two alleged perpetrators, “top leaders” of the CDF, were then brought before Trial Chamber I (TC I or the Chamber) of the SCSL charged with, amongst other charges, enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities, prohibited under article 4(c) of the SCSL Statute, categorized as other serious violations of international humanitarian law.¹⁶⁹

In 2004, the prosecution requested to amend the original Indictment against the alleged perpetrators, adding charges of gender based crimes. The new counts, i.e. counts 9–12, contained acts of (g) rape, sexual slavery and any other forms of sexual violence and (i) other inhumane acts, prohibited under article 2 of the SCSL Statute, regulating crimes against humanity. Moreover, the prosecution wanted to add charges of violations of common article 3 of the GC and of AP II, as criminalized through article 3 of the SCSL Statute, (e) outrages upon personal dignity.¹⁷⁰ The basis for these new allegations were new evidence showing that various acts of sexual violence had been committed during the civil war. Multiple crimes had been committed by the CDF against civilian women, but there was also particular evidence of women being abducted and used as sex slaves and/or being forced to marry Kamajors. The “wives” had further been forced to perform marital duties.¹⁷¹

The TC I decided that if it had granted said amendment, it would prejudice the defendants and violate their right to be tried without undue delay and further be an abuse of process, and therefore decided to dismiss the prosecutions motion. This decision was made in spite of the fact that TC I claimed itself to be aware of the importance of gender crimes within international

¹⁶⁸ SCSL, *The Prosecutor Against Moinina Fofana, Order for Transfer and Provisional Detention Pursuant to Rule 40bis*, May 2003, SCSL-2003-11-PD; SCSL, *The Prosecutor Against Allieu Kondewa, Order for Transfer and Provisional Detention Pursuant to Rule 40bis*, May 2003, SCSL-2003-12-PD.

¹⁶⁹ SCSL, *The Prosecutor Against Moinina Fofana, Indictment*, 24 June 2003, SCSL-2003-11-I, para. 24; SCSL, *The Prosecutor Against Allieu Kondewa, Indictment*, 24 June 2003, SCSL-2003-12-I, para. 24; SCSL, Trial Chamber I, *The Prosecutor Against Fofana & Kondewa, Judgment*, paras. 1, 3 & 337–347.

¹⁷⁰ SCSL, *The Prosecutor Against Samuel Hinga Norman, Moinina Fofana & Allieu Kondewa (The Prosecutor Against Norman, Fofana & Kondewa), Request for Leave to Amend the Indictment Against Norman, Fofana and Kondewa*, 9 February 2004, SCSL-2004-14-PT, Annex I, *Amended Indictment*, para. 31.

¹⁷¹ *Ibid*; SCSL, *The Prosecutor Against Norman, Fofana & Kondewa, Request for Leave to Amend the Indictment Against Norman, Fofana and Kondewa*, 9 February 2004, SCSL-2004-14-PT, para 11.

criminal justice.¹⁷² The Chamber further rejected the prosecution’s suggestion of sexual offences, including forced marriages, to fall within the scope of “other inhumane acts”, claiming it to cover only acts of a non-sexual nature.¹⁷³

After the motion on amending the indictment had been denied by TC I, the prosecution filed a motion for a ruling on the admissibility of evidence. The prosecution sought clarification regarding whether or not witnesses’ testimonies which related to the dismissed charges, i.e. on sexual violence, were admissible under the original counts. In other words, the prosecution asked TC I if evidence relating to gender crimes could be ascribed to the charges of other inhumane acts and violence to life, health and physical or mental well-being of persons, in particular cruel treatment. The prosecution argued that this was indeed the case.¹⁷⁴ The TC I, however, ruled that evidence of commission of sexual crimes were not admissible under the original counts.¹⁷⁵ According to TC I, the allegations of sexual violence were not explicitly pleaded in the indictment. Admitting evidence concerning such allegations would contravene the defendants’ rights as they would not have been accurately informed of the nature of the case, or it would lead to prolonged proceedings and violate the right to a fair and expeditious trial.¹⁷⁶

The Trial Chamber did neither approve the adding of charges of gender based crimes nor the admissibility of evidence of such crimes. The judgment therefore came to cover only the charges of enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities. In the Trial Chamber I’s conclusions on the relevant law, much emphasis was put on proving that offences related to child soldiers were a crime under customary international law, and further that it was not in violation of the principle of *nullum crimen sine lege*. On the definition of “using children to participate actively in hostilities”, the Chamber, like the ICC, considered the *travaux préparatoires* to the Rome Statute and

¹⁷² SCSL, Trial Chamber, SCSL, *The Prosecutor Against Norman, Fofana & Kondewa, Decision on Prosecution Request for Leave to Amend the Indictment*, 20 May 2004, SCSL-04-14-PT, paras. 82 & 86–87.

¹⁷³ SCSL, Trial Chamber I, *The Prosecutor Against Sam Hinga Norman, Moinina Fofana & Allieu Kondewa (The Prosecutor Against Norman, Fofana & Kondewa), Reasoned Majority Decision Prosecution Motion for a Ruling on the Admissibility of Evidence*, 24 May 2005, SCSL-04-14-T, para. 19.

¹⁷⁴ SCSL, Trial Chamber, *The Prosecutor Against Norman, Fofana & Kondewa, Urgent Prosecution Motion for a Ruling on the Admissibility of Evidence*, 15 February 2005, SCSL-04-14-T, paras. 29 & 40–41.

¹⁷⁵ SCSL, Trial Chamber, *The Prosecutor Against Norman, Fofana & Kondewa, Decision on the Urgent Prosecution Motion Filed on the 15th of February 2005 for a Ruling on the Admissibility of Evidence*, 23 May 2005, SCSL-04-14-T, paras. 1–3.

¹⁷⁶ SCSL, Trial Chamber I, *The Prosecutor Against Norman, Fofana & Kondewa, Reasoned Majority Decision Prosecution Motion for a Ruling on the Admissibility of Evidence*, 24 May 2005, SCSL-04-14-T, para. 19.

the relevant footnote on the terms “use” and “active participation”. Said footnote differentiates between activities linked to combat/direct support functions and activities clearly unrelated to hostilities. The Chamber further commented that the “use” of child soldiers could not be considered to be a form of recruitment, but settled that the use of children to participate actively in hostilities was also considered a crime under customary international law. The TC I argued that it would not be logical to prohibit only the recruitment of children but not the use of them to fight.¹⁷⁷

Several children had testified during the CDF trial, speaking of abductions, threats and of their partaking in hostilities by carrying arms, fighting and committing atrocities. From said testimonies the TC I concluded that children under the age of 15 years had been conscripted, enlisted or used to participate actively in hostilities during the time relevant to the charges. This was further supported by evidence which showed that children had acted as body guards and had been present at camp sites. The Chamber did not, however, find that it was proven beyond reasonable doubt that Fofana had planned, ordered or committed the crime of enlisting child soldiers into an armed group, or using them to participate actively in hostilities. Kondewa, on the other hand, was found to have been initiating young boys into the CDF, which was considered analogous to enlisting them. It was established that Kondewa had committed the crime of enlisting a child, witness TF2-021, and he was found guilty. Because of finding at least one proven case of enlistment for which Kondewa was responsible, the Chamber stated that it needed not consider evidence regarding the use of children to participate actively in hostilities. This conclusion was supported by the fact that the latter charge was alternative to the charge of enlisting child soldiers.¹⁷⁸

5.1.1.1 The Appeals Chamber

The CDF case was brought before the Appeals Chamber (the AC or the Chamber) in 2008 with several appeals against the judgment of TC I. The AC briefly discussed the fact that TC I did not find it necessary to consider evidence relating to the use of children, as it had found evidence proving enlistment of a child. The Appeals Chamber merely stated that it could not consider evidence on this alternative charge. It further declared that even if it was to consider said evidence, it would reach the conclusion that evidence was lacking in regards of the children’s

¹⁷⁷ SCSL, Trial Chamber I, *The Prosecutor Against Fofana & Kondewa, Judgment*, paras. 182–197.

¹⁷⁸ *Ibid*, paras. 667–689, 959 & 970–972.

ages. Nevertheless, the AC finally concluded that it was of the opinion that the TC I should have considered evidence on the alternative charge.¹⁷⁹

The TC I's decision not to grant the prosecution's amendment was appealed against to the AC. The AC, however, deemed itself not to have jurisdiction to entertain the appeal without leave of the TC I and thus did not consider the merits of said amendment. In the appeal of the TC I judgment, the prosecution argued that TC I had committed an error of law, of fact and/or a procedural error by not approving the amendment. The prosecution did not, however, require remittal of the case to TC I if the AC was to find an error. The AC pointed out that since the prosecution did not seek remedy other than a plain conclusion of an error of law and that such an error would not relate to counts which were part of the TC I's judgment, the prosecution had failed to show that the relevant error of law would "invalidate the decision or that an error of fact would lead to a miscarriage of justice"¹⁸⁰. It was further highlighted that the prosecution had had an opportunity to bring a separate indictment containing the new allegations before the TC I. Finding that a consideration of the prosecution's appeal, the AC concluded that it would be a purely academic practice and that the appeal failed in its entirety.¹⁸¹

The prosecution had appealed against the TC I's decision to deny the request to lead and adduce evidence of sexual violence under the existing counts of the original indictment. The prosecution argued that the TC I had erred in law, procedure and fact when denying admission of evidence of sexual nature in relation to the relevant counts. The AC stated that acts of sexual violence may, as proposed by the prosecutor, amount to other inhumane acts and/or cruel treatment. It did, however, agree with TC I in regards of the fact that the indictment did not specifically refer to sexual violence relating to the charges of the relevant crimes. These conclusions were followed by a discussion on the possibility to "cure" a defect in the indictment. The AC noted that the prosecution had brought up acts of rape, sexual slavery, sexual assaults, harassment, non-consensual sex and forced marriages throughout the trial. The Chamber considered the timeliness and consistency of the prosecution's notice, the motions submitted by said party and the evidence's possible effects on the lengthiness of the trial. These considerations led the AC to find that TC I had erred by not hearing evidence of acts of sexual violence on the basis

¹⁷⁹ SCSL, Appeals Chamber, *The Prosecutor Against Fofana & Kondewa, Judgment*, 28 May 2008, SCSL-04-14-A, paras. 133–135.

¹⁸⁰ *Ibid*, para. 426.

¹⁸¹ *Ibid*, paras 410–427.

of it not being specified in the indictment. However, this appeal did not invalidate the TC I's conviction of Kondewa and/or Fofana.¹⁸²

5.1.1.2 Partially Dissenting Opinion of Honorable Justice Renate Winter

In her partially dissenting opinion to the judgment of the Appeals Chamber, Justice Renate Winter firstly addressed Kondewa's liability for enlisting and using children. In the Justice's view, Kondewa was wrongfully acquitted liability for enlisting witness TF2-021. Referring to paragraph 142 of the Trial Chamber's judgment, in which the Chamber finds that TF2-021 was captured by the CDF and forced to carry looted property and thus enlisted, Winter stated that she did not agree with the analysis. In her opinion, the Chamber "[misapplied] the concept of enlistment as it related to the circumstances surrounding the CDF's recruitment of children [...]"¹⁸³. Although she agreed upon the fact that enlistment can be constituted by "use" of child soldiers in some cases, Winter did not agree that carrying looted property can be categorized as such "use".¹⁸⁴

In one segment of her comments on TC I's reasoning regarding the term "enlistment", Winters argued that within some armed forces or groups, the case can be that no clear records exist of enlistment, but instead several examples of "use" of children. In such cases, where no process of child enlistment is in place, the "use" of children to participate actively in hostilities may amount to enlistment. In the opposite case, i.e. where enlistment processes do exist – as in the CDF case, it would be illogical, according to Winter, to conclude that the "use" of a child equals enlistment. In the view of Winter, the fact that TF2-021 was forced to carry looted property did not mean that he was "participating in active hostilities or in any activity that [involved] the CDF as a military organization"¹⁸⁵. Because looting had been interpreted as taking property for private, not military, purposes, this act could not be interpreted as the child being enlisted or used to participate actively in hostilities.¹⁸⁶

¹⁸² Ibis, paras. 428–451.

¹⁸³ SCSL, Appeals Chamber, *The Prosecutor Against Fofana & Kondewa, Judgment, Partially Dissenting Opinion of Honorable Justice Renate Winter*, 28 May 2008, SCSL-04-14-A, para. 9.

¹⁸⁴ Ibid, paras. 8–9.

¹⁸⁵ Ibid, para. 19.

¹⁸⁶ Ibid, paras. 12–14 & 19–20.

The Justice agreed with the Appeals Chamber regarding the Trial Chamber I's decision not to consider any evidence or pronounce a verdict in relation to Kondewa's liability for "using" child soldiers. Winter considered the fact that Kondewa had initiated several children into the CDF, the purposes for said initiations and Kondewa's knowledge of their future tasks as warriors. She then concluded that initiations constituted "practical assistance to the CDF's 'use' of children under the age of 15 to participate active in hostilities"¹⁸⁷ ¹⁸⁸.

Winter also made extensive arguments, mostly of a procedural nature, regarding the denial of leave to amend the indictment with additions of sexual crimes. When addressing the TC I's balancing of the rights of the accused with other factors, the Justice highlighted the fact that considerations had to be given to the importance of prosecuting the facts which were brought up in the amended indictment. Winter wrote that by denying the amendments, TC I precluded all possibilities of prosecuting the gender based violence allegedly committed by the CDF. Referring to specific obligations of the prosecution to deal with gender based crimes and the Chamber's own statement on the high-profile nature of such crimes, Winter concluded that her opinion was that the decision had hindered the Court's fulfilment of its mandate. The decision had also, according to Winter, prevented the victims of the alleged sexual crimes to seek justice, another duty appointed the SCSL as "an international [...] forum established to adjudicate gross violations of human rights"¹⁸⁹ ¹⁹⁰.

5.1.2 The AFRC Case

Warrants of arrests for Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu were issued in 2003.¹⁹¹ According to the prosecution, Brima, Kamara and Kanu were guilty of 17 counts of crimes against humanity, war crimes and other serious violations of IHL. In the original indictments, among multiple allegations, all three defendants were accused of being

¹⁸⁷ Ibid, para. 30.

¹⁸⁸ Ibid, paras. 29–31.

¹⁸⁹ Ibid, para. 86.

¹⁹⁰ Ibid, paras. 85–86.

¹⁹¹ SCSL, *The Prosecutor Against Alex Tamba Brima, also known as Tamba Alex Brima, also known as Gullit (Brima), Warrant of Arrest and Order for Transfer and Detention*, 7 March 2003, SCSL-2003-06-I; SCSL, *The Prosecutor Against Brima Bazzy Kamara, also known as Ibrahim Bazzy Kamara also known as Alhaji Ibrahim Kamara (Kamara), Warrant of Arrest and Order for Transfer and Detention*, 28 May 2003, SCSL-2003-10-I; SCSL, *The Prosecutor Against Santigie Borbor Kanu, also known as 55, also known as Give-Five, also known as Antigie Khanu, also known as S.B. Khanu, also known as S.B. Kanu, also known as Antigie Bobson Kanu, also known as Borbor Santigie Kanu (Kanu), Warrant of Arrest and Order for Transfer and Detention*, 16 September 2003, SCSL-2003-13-I.

criminally responsible for crimes against humanity, under article 2 of the SCSL Statute, through acts of (g) rape and sexual slavery. As an additional, or alternative ground, to said sexual crimes, the prosecution charged the defendants with a count of (e) outrages upon personal dignity, a violation of common article 3 of the GCs and of AP II under article 3 of the SCSL Statute. The indictments further contained charges of conscripting or enlisting children under the age of 15 years into armed forces or groups, or using them to participate actively in hostilities. Acts punishable under article 4(c) of the SCSL Statute and considered as other serious violations of international humanitarian law. The three men were also charged with counts of abductions and forced labor, labelled as enslavement, a crime against humanity under article 2(c) of the SCSL Statute.¹⁹² The indictments were joined and the prosecution requested to amend said joint indictment. The request entailed keeping the original counts regarding sexual violence, the use of child soldiers and abductions and forced labor, among others, but adding a new count of forced marriage. Forced marriage was argued to be an act falling under (i) other inhumane acts, a crime against humanity prohibited under article 2 of the SCSL Statute.¹⁹³

The charges of sexual crimes became subjects of a lengthy discussion on procedural and legal matters by the TC II. Count 7, sexual slavery and any other form of sexual violence, was dismissed due to being bad for duplicity as it was deemed difficult for the accused to fully understand if they were defending themselves against allegations of sexual slavery or of sexual violence.¹⁹⁴

As to the crime of forced marriage, count 8 in the amended joint indictment, the prosecution had argued that it fell within the ambit of other inhumane acts, violating article 2(i) of the SCSL statute. This count was included under the count on sexual crimes, rape and sexual slavery, and the prosecution presented as a factual basis that forced marriage was to be considered an inhumane act “of similar gravity to existing crimes within the Court’s jurisdiction”¹⁹⁵. This crime

¹⁹² SCSL, *The Prosecutor Against Brima, Indictment*, 3 March 2003, SCSL-03-06-1, paras. 30, 39–42, 46 & 47–52; SCSL, *The Prosecutor Against Kamara, Indictment*, 26 May 2003, SCSL-03-10-I, paras. 29, 30, 40–45, 50–57; SCSL, *The Prosecutor Against Kanu, Indictment*, 15 September 2003, SCSL-2003-13-I, paras. 30, 40–45, 50 & 51–57.

¹⁹³ SCSL, *The Prosecutor Against Brima, Kamara & Kanu, Amended Consolidated Indictment*, SCSL-2004-16-PT, paras. 51–57; SCSL, *The Prosecutor Against Brima, Kamara & Kanu, Request for Leave to Amend the Indictment*, 9 February, SCSL-2004-16-PT, Annex I, *Amended Indictment*, paras. 51–57, 65 & 66–73.

¹⁹⁴ SCSL, Trial Chamber II, *The Prosecutor Against Brima, Kamara & Kanu, Judgment*, 20 June 2007, SCSL-04-16-T, paras. 93–95.

¹⁹⁵ *Ibid*, para. 701.

was, according to the prosecutor, to be distinct from sexual acts as it would qualify as an inhumane act without a sexual element, even though the existence of such an element is common. Further submitted by the prosecution, sexual slavery may not amount to forced marriage, as a sex slave would not necessarily be obligated to pretend to be the wife of her perpetrator. Likewise, a victim of sexual violence would not necessarily be coerced to perform all tasks connected to a marriage. Therefore, in the view of the prosecutor, forced marriage, an inhumane act, can indeed involve sexual violence or slavery, but encompasses separate elements too. The defense of Kanu, on the other hand, argued that forced marriage was not to be considered an international crime as it was not of sufficient gravity. The conduct of forced marriage could not, according to the defense, be considered sexual slavery and did not amount to a crime against humanity. Forcing a woman into a marriage-like relationship was not as grave as the other acts referred to in the relevant articles of the SCSL Statute, stated the defense, while referring to an expert report on the complex relation between the “husband” and the “wife”.¹⁹⁶

The Chamber was not satisfied with the categorization of forced marriage as a crime independent of the crime of sexual slavery, prohibited under article 2(g) of the Statute. Relying on jurisprudence of the ICTY and the ICTR, the TC II concluded that gender crimes are separated into an isolated paragraph, codifying sexual slavery as a crime against humanity. The elements of the crime of sexual slavery were listed by TC II as encompassing elements of ownership, forced sexual engagement and the mental element of the perpetrator. Considering these elements, the TC II noted that the prosecution had failed to present circumstances of any woman or girl being forcefully married without the marriage amounting to sexual slavery. Further, no evidence supported that the mere declaration by rebels, claiming victims to be their wives, had caused any trauma to said victims. Even if such evidence had been presented, the TC II was of the opinion that it would not amount to a crime against humanity because of the lacking gravity of such acts of labelling/declarations. The prosecution’s evidence of forced marriages proved, according to TC II, elements subsumed by the crime of sexual slavery as said evidence covered the abduction of girls and the rebels taking them as “wives” without consent. The relationships further entailed elements of ownership and control, including control over the girl’s sexuality, movements and labor. The “wives” were expected to carry their “husbands” packings, to cook and to wash. In conclusion, the TC II established that there was no need to separate the crime of forced marriage from sexual slavery as the former was subsumed by the latter. Count 8, i.e.

¹⁹⁶ Ibid, paras. 701–702.

forced marriage as a crime of “other inhumane acts”, was thus dismissed. Count 9, outrages upon personal dignity as a violation of common article 3 of the GCs and of AP II, was charged additionally or alternatively by the prosecution. The TC II concluded that it was satisfied that sexual slavery was to be considered an outrage upon personal dignity, as it was an act of serious humiliation and degradation. The crime of sexual slavery was thus dealt with under count 9.¹⁹⁷

Regarding the relevant law on conscripting, enlisting or using children to participate actively in hostilities, the TC II adopted the elements of the relevant crime from the Rome Statute as guidance. The Chamber further concluded that the Appeals Chamber had found the child soldier crime to be criminalized also under customary international law. Addressing the term of “using children to participate actively in hostilities”, the TC II firmly stated that this encompassed putting children’s lives directly at risk in combat. The now well-known footnote of the *travaux préparatoires* to the Rome Statute was additionally considered, and the Chamber expressed that active participation in hostilities is not limited to participation in combat. Highlighting the fact that armed forces need logistical support to maintain operations, the TC II settled that any labor or support giving effect to, or help maintaining, operations in a conflict is to be categorized as active participation. Finding and/or acquiring food was one of the examples mentioned by the Chamber.¹⁹⁸

Addressing the case at hand, sexual slavery was considered under count 9, “outrages on personal dignity”. Young girls, and women, had testified of heinous sexual crimes and further stated that they had been captured, forced to do domestic chores and being taken as “wives”. Based upon said testimonies and other evidence presented, the TC II found that sexual slavery, as a crime of outrages on personal dignity, had occurred at multiple occasions during the time relevant to the charges. Former child soldiers and other witnesses had testified of abductions, exploitation sexual crimes and abuse. Children had been used for multiple tasks other than for fighting, among these were carrying food and luggage, fetching water and guarding diamond mines. In relation to the task of guarding mines, because the diamonds were used to finance war efforts, the TC II said that this task had put the child at sufficient risk to amount to illegal use of said child. Additionally, the Chamber stated that the mere presence of children at the AFRC Secretariat, a place where multiple crimes were committed, regardless of their specific

¹⁹⁷ Ibid, paras. 697–714 & 719.

¹⁹⁸ Ibid, paras. 727–737.

duties, was illegal. The TC II concluded that it was satisfied that children under the age of 15 years had been used for military purposes during several years at multiple locations in Sierra Leone.¹⁹⁹

5.1.2.1 Separate Concurring Opinion of Honourable Justice Julia Sebutinde

With the aim of scrutinizing the phenomenon of forced marriages in the Sierra Leonean civil war more closely, Justice Sebutinde wrote a separate concurring opinion to the judgment delivered by Trial Chamber II in the AFRC case. Starting off by summarizing the procedural history of forced marriage within the relevant case, Sebutinde explained the view of Trial Chamber I, which decided on the amendment of the indictment: forced marriage was to be classified as a sexual or gender crime parallel to rape, sexual slavery or sexual violence. She proceeded by recapping the Trial Chamber's decision in the CDF-case not to admit evidence of forced marriages, and the categorization of such crimes as sexual crimes.²⁰⁰

Expert witnesses had been called during the AFRC-trial and in their statements Sebutinde highlighted the relationship between the abductor and his "wife". In this description, it was clarified that the term "wife" was used to express control over a woman, manipulating her into obeying her captivator's wishes and staying faithful. The role of a "wife" in these circumstances, encompasses carrying possessions, gratifying sexual wishes, cooking, doing laundry, showing affection and love and so forth. Sexual abuse had been testified of by all victims interviewed by said expert. Justice Sebutinde wrote in her conclusions, that it was clear that the phenomenon of forced marriage as occurred in Sierra Leone fulfilled the requirements of the crime of sexual slavery. She thus agreed with the categorization decided by the Trial Chamber, opposing the prosecution's suggestion that the crime of forced marriage constituted an "other inhumane act".²⁰¹

5.1.2.2 Partially Dissenting Opinion of Honourable Justice Doherty

Justice Doherty wrote a partially dissenting opinion to the judgment delivered by Trial Chamber II, addressing count 7 on sexual slavery and count 9 on forced marriages. The opinion stated

¹⁹⁹ Ibid, paras. 1078–1188, 1109, 1133, 1145, 1170, 1187–1188, 1252–1267 & 1278.

²⁰⁰ SCSL, Trial Chamber II, *The Prosecutor Against Brima, Kamara & Kanu, Judgment, Separate Concurring Opinion of the Hon. Justice Julia Sebutinde Appended to Judgment Pursuant to Rule 88(C)*, 20 June 2007, SCSL-04-16-T, paras. 1–2 & 3–5.

²⁰¹ Ibid, paras.13–18.

in regards of count 7 was, however, merely procedural, arguing that the issue of duplicity had been raised too late and that it had not been necessary to dismiss the count in its entirety.²⁰²

As to the crime of forced marriage, Doherty did not agree with the majority's opinion that evidence of said crime was subsumed by the crime of sexual slavery. Considering the victim's testimonies, the Justice firstly concluded that a decision to stay in a forced marital union, or the transformation of such a union into a situation of consent, does not retroactively remove the crime originally committed. She reached this conclusion by arguing that the mere protection offered by such "marriages" was "a relative benefit or a means of survival"²⁰³, and not to be understood as consent or independence, hence not lessening the severity of the criminal acts. Doherty emphasized the facts that victims of forced marriages were often young and consequently vulnerable, especially considering the contexts of abduction and violence, alongside highlighting the psychological and moral injuries following such "marriages". Doherty concluded that the phenomenon of forced marriage was indeed distinguished from sexual slavery as victims of the latter did not receive protection from rape by other rebels, but were neither stigmatized to the same extent as the "wives". Additionally, she found the label of "rebel wife" to have long-lasting and severe effect on the victims, consequently fulfilling the mental elements required by the crime of an "other inhumane act". The crime of forced marriage is, in the opinion of Doherty, mainly concerned with the "mental and moral suffering of the victim"²⁰⁴, centralized around "the forced conjugal association by the perpetrator over the victim"²⁰⁵, and may not always involve physical violence. In conclusion, the Justice wrote that she was satisfied that forced marriages inflicted such serious mental and physical harm to the victim that it amounts to a crime of an "other inhumane act".²⁰⁶

5.1.2.3 The Appeals Chamber

The issue of the categorization of forced marriage was brought before the Appeals Chamber (the AC or the Chamber). The prosecution argued that the TC II had made three errors of law and fact when finding that "other inhumane acts" ought to cover only acts of a non-sexual nature, that the prosecution had not been able to prove elements of a non-sexual crime of forced

²⁰² SCSL, Trial Chamber II, *The Prosecutor Against Brima, Kamara & Kanu, Judgment, Partly Dissenting Opinion of Justice Doherty on Count 7 (Sexual Slavery) ad Count 8 ('Forced Marriages')*, 20 June 2007, SCSL-04-16-T, paras. 2–11.

²⁰³ Ibid, para. 46.

²⁰⁴ Ibid, para. 52.

²⁰⁵ Ibid, para. 53.

²⁰⁶ Ibid, paras. 14–54.

marriage independent of sexual slavery and for dismissing the count of forced marriage as an “other inhumane act” based on it being subsumed by the crime of sexual slavery.²⁰⁷

The AC firstly stated that “other inhumane acts” is a category of an inclusive nature and part of customary international law. Secondly, the AC noted that jurisprudence of international tribunals includes a broad spectrum of criminal acts, among others sexual crimes, under “other inhumane acts”. The context of said criminal acts had been central to the jurisprudence, showing that the qualification of an act as an “other inhumane act” is made on a case-by-case basis. Factors to be taken into account were listed by the AC as the nature of the act/omission, the context in which the act took place, personal circumstances of the victim such as age, sex, health and the physical, mental and moral effects caused by the conduct upon the victims. Therefore, the TC II had, in the AC’s opinion, erred in law when stating that “other inhumane acts” were to be interpreted restrictively. The AC could neither see any reason why the sexual crimes listed under article 2(g) of the Statute would exclude the possibility to charge crimes with sexual or gender components as “other inhumane acts” – concluding that TC II was wrong in concluding that article 2(i) of the Statute does not cover also sexual crimes.²⁰⁸

Assessing the circumstances of the case brought before it, the Chamber noted that evidence showed a will among the perpetrators to impose such forced conjugal association, as mentioned by the prosecution, rather than ownership. It further stated that forced marriage is not primarily a sexual crime. The AC found that during the trial proceedings it had been presented that girls were violently abducted, forced to move along with the troops, compelled to take on duties of a conjugal nature such as sexual intercourse and domestic labor. The girls were further subjects of forced pregnancies and expected to take care of their children. In return, they were provided with food, clothing and protection by their “husbands”, different from girls who were used for sexual purposes only. The AC found that it was unreasonable to argue that forced marriage was a crime subsumed by the crime against humanity of sexual slavery. While sharing the elements of non-consensual sex and denial of liberty, the two crimes are distinct by factors such as the forced marriage’s characteristics of force, by words or threats, into conjugal association and the exclusive relationship. According to the AC, these differences imply that forced marriage

²⁰⁷ SCSL, Appeals Chamber, *The Prosecutor Against Brima, Kamara & Kanu, Judgment*, 22 February 2008, SCSL-2004-16-A, paras. 177–180.

²⁰⁸ *Ibid*, paras. 182–186.

is not first and foremost a sexual crime and TC II thus erred when concluding that said crime was incorporated in the crime of sexual slavery.²⁰⁹

The Chamber listed that the victims of forced marriage had suffered physical injury related to “acts of rape and sexual violence, forced [labor], corporal punishment, and deprivation of liberty”²¹⁰, had experienced trauma from witnessing murder and mutilations of their family, having to marry the perpetrators, being branded “rebel wives” and excluded from their communities, alone or together with their children, and thus had suffered social stigmatization. The AC took into account the special vulnerability of women and girls, alongside the fact that many victims of forced marriage were children, and the severe consequences suffered by the victims. It then stated that the acts of forced marriage was of similar gravity to many other crimes incorporated in crimes against humanity.²¹¹

5.2 Jurisprudence of the International Criminal Court

The ICC case law presented below, concentrates on events in Ituri, DRC, between September 2002 and August 2003. Bordering Uganda, Ituri is a district on the north east of the DRC that has been characterized by ethnic tensions and competition for resources since 1999. According to experts, violence occurring in Ituri was, from the outset, economically motivated, but the DRC’s colonial past has influenced the situation further due to ethnic divisions and related, violent, acts. Approximately 18 different ethnic groups can be found in Ituri, among which the Lendu and the Hema, the latter favoured by the Belgian colonial rule. Tensions between the Hemas and the Lendus led to the establishing of self-defence forces and armed confrontation between the groups. The Union des Patriotes Congolais (UPC), mainly composed by Hemas, was created on 15 September 2000. Together with its military wing, the Force Patriotique pour la Libération du Congo (FPLC), UPC took power in Ituri, Congo, September 2002. Between September 2002 and August 2003, the organized armed group of UPC/FPLC was partaking in an NIAC against other militias.²¹²

²⁰⁹ Ibid, paras. 190–196.

²¹⁰ Ibid, para. 199.

²¹¹ Ibid, paras. 199–203.

²¹² ICC, Trial Chamber I, *Case of The Prosecutor v. Thomas Lubanga Dyilo* (The Prosecutor v. Lubanga), *Judgment pursuant to Article 74 of the Statute*, 14 March 2012, ICC-01/04-01/06-2842 (ICC, Trial Chamber I, *The Prosecutor v. Lubanga, Judgment*), paras. 67, 72–81 & 543–567.

5.2.1 The Lubanga Case

In the beginning of 2006 a warrant of arrest was issued for Thomas Lubanga Dyilo, one of the founding members of, as well as the President of, the UPC.²¹³ He was brought before Trial Chamber I (TC I or the Chamber) of the ICC in 2012, charged under articles 8(2)(e)(vii) and 25(3)(a) of the Rome Statute with the war crimes of conscripting and enlisting children under the age of 15 years into an armed group and using them to participate actively in hostilities.²¹⁴ It should be duly noted, however, that the Prosecution did not submit any charges of sexual violence.

The Pre-Trial Chamber I of the ICC analyzed the notion of active participation in hostilities before the case was brought up before the Trial Chamber. Two categories of participation were distinguished by the Pre-Trial Chamber: active participation in hostilities, meaning not only direct participation in hostilities, but also covering active participation in combat-related activities. The Pre-Trial Chamber further formulated that activities related to hostilities were activities having “a direct impact on the level of logistic resources and on the organization of operations required by the other party to the conflict”²¹⁵. The second category formulated by the Pre-Trial Chamber were activities clearly unrelated to hostilities, such as “food deliveries to an airbase or the use of domestic staff in married officer’s quarters”²¹⁶, these activities did not, according to the Pre-Trial Chamber, qualify as active participation in hostilities.²¹⁷

Before the TC I, in regards of use of children to participate actively in hostilities, the prosecution argued that the term “child soldiers” covers any child under the age of 18 years who participate in any circumstances in an armed group. Thus, the protection of such child soldiers is not to be limited to actively fighting children but extends also to children with other functions such as cooks or when used for sexual purposes or forced marriage. The prosecution did, however, accept the Pre-Trial Chamber’s conclusion that some activities were excluded, such as

²¹³ Ibid, para. 81; ICC, Pre-Trial Chamber I, *The Prosecutor v. Lubanga, Warrant of Arrest*, 10 February 2006, ICC-01/04-01/06-2-tEN.

²¹⁴ ICC, Trial Chamber I, *The Prosecutor v. Lubanga, Judgment*; ICC, Pre-Trial Chamber I, *The Prosecutor v. Lubanga, Document Containing the Charges, Article 61(3)(a)*, 28 August 2006, ICC-01/04-01/06-356-Anx2, paras. 25–40 & p. 24.

²¹⁵ ICC Pre-Trial Chamber I, *The Prosecutor v. Lubanga, Decision on the Confirmation of Charges*, 29 January 2007, ICC-01/04-01/06-903-tEN, para. 263.

²¹⁶ Ibid, para. 262.

²¹⁷ ICC, Trial Chamber I, *The Prosecutor v. Lubanga, Judgment*, paras. 261–262.

domestic staff in the officers' quarters, for being clearly unrelated to the hostilities. The prosecution's wide interpretation of active participation in hostilities was further supported by reference to the opinion of Special Representative of the Secretary General on Children and Armed Conflict. In her view, children functioning as cooks, nurses and children who were sexually exploited were to be considered as providing essential support. To summarize, the prosecution advocated a wide interpretation of the term "direct support function" to grant child soldiers a more extensive protection and to hinder all use of children in activities which are closely related to armed conflict.²¹⁸

The defense, on the other hand, criticized the Pre-Trial Chamber's interpretation for excluding only activities clearly unrelated to hostilities from the notion of active participation in hostilities. In the view of the defense, such a wide interpretation would violate article 22(2) of the Rome Statute, i.e. the principle of *nullum crimen sine lege*. The defense submitted that active participation in hostilities should instead be interpreted synonymously with direct participation in hostilities. Relying in the above-mentioned criteria identified by the ICRC, the defense argued that active participation in hostilities covered only "acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces"²¹⁹. A wide interpretation, according to the defense's submission, would diminish the meaning of "active" as a tool for distinction.²²⁰

Starting with a general assessment of the law, the Chamber noted that the scope of using children to participate actively in hostilities were not defined, neither in the Statute nor in the Elements of Crimes. Thus, TC I needed to interpret article 8(2)(e)(vii) in accordance with articles 21 and 22(2) of the Statute, alongside article 31(1) of the VCLT. Jurisprudence of the SCSL was, by TC I, considered not to be part of directly applicable law as referred to by article 21 of the Rome Statute, but still of potential assistance in the interpretation of article 8(2)(e)(vii). In regards of other international treaty law, the Chamber mentioned the relevant provisions in AP II and the CRC. In light of these instruments of international law, the Chamber stated that "children associated with armed conflict" was a broad concept. It was, according to the Chamber, clearly intended to give children extensive protection, and did not form part of the wording of the charges against Lubanga. Even though emphasizing that provisions of the Rome Statute

²¹⁸ Ibid, paras. 574–578.

²¹⁹ Ibid, para. 584.

²²⁰ Ibid, paras. 583–587.

had been applied as opposed to this general notion, TC I recognized that children in armed conflict were normally assigned many tasks not always within the established definition of warfare. Consequently, the Chamber concluded, children associated with armed conflict risked facing, for example, rape, sexual enslavement and other forms of sexual violence.²²¹

Being considered a separate crime under article 8(2)(e)(vii) of the Rome Statute, the Chamber individually assessed the use of children to actively participate in hostilities. Firstly, TC I stated, that the general intention of the prohibition on using children to participate actively in hostilities was to protect children from risks associated with armed conflict. Referring to the Elements of the Crimes, TC I found that it is required that the conduct has taken place “in the context of and was associated with an armed conflict”. According to the Chamber, it is suggested by the *travaux préparatoires* of the Rome Statute that direct participation may not be necessary, although a link with combat is. Additionally, the previously mentioned footnote²²², explaining the intention to cover military activities linked to combat and direct support functions but not activities clearly unrelated to the hostilities, was part of TC I’s assessment.²²³ TC I then proceeded to the interpretations of the SCSL, holding a wider concept of “using” children. Proposed to the Chamber, by the Special Representative, was to focus on whether the child’s supportive function was essential to the armed force.²²⁴

Differentiating between active and direct participation in hostilities, the Chamber interpreted the former as intended to offer a wide interpretation of activities and roles covered by the criminalization of using children in hostilities. The TC I stated that level of potential danger a child soldier is exposed to will often not be related to the kind of role which s/he is appointed. Active participants in hostilities are individuals on the front line, but also children involved as supporters to the combatants. According to the Chamber, both direct or indirect participation makes the concerned child a potential target, at the very least. Deciding if an “indirect” role should be considered as active participation in hostilities, in the TC I’s view, was the key factor of whether or not “the support provided by the child to the combatants exposed him or her to real danger as a potential target”²²⁵. Concluded by the Chamber, a child soldier’s support and level of risk associated with such support meant that a person could be actively involved in

²²¹ Ibid, paras. 600–605.

²²² See: subchapter 3.1.

²²³ ICC, Trial Chamber I, *The Prosecutor v. Lubanga, Judgment*, paras. 619–621.

²²⁴ Ibid, paras. 624–626.

²²⁵ Ibid, para. 628.

hostilities even if not present at the direct scene of them. This assessment has to, according to TC I, be made on a case-by-case basis.²²⁶

Lastly, the Chamber assessed how the submissions regarding sexual violence were to be regarded under article 8(2)(e)(vii) of the Rome Statute. It was noted that the prosecution had indeed referred to sexual violence throughout the trial, but had not requested any correction of the charges, mentioned above. The prosecution had not only failed to ask to include rape and sexual enslavement during the appropriate procedural stages, but had also argued that it would be unfair if Lubanga was tried and convicted based on these actions. The Chamber stated that according to the jurisprudence of the Appeals Chamber the factual allegations were not to be exceeded. As allegations supporting sexual slavery had not been referred to it would be impermissible for the TC I to incorporate such acts into its decision. This was the case irrespective of whether or not sexual violence was included as a matter of law within the scope of using children to actively participate in hostilities.²²⁷

TC I concluded, when addressing the case at hand, that it was clear that children under the age of 15 years were conscripted and enlisted into the UPC/FPLC during the relevant time. Highlighting the use of “or” in article 8(2)(e)(vii), the Chamber settled that a child who has been enlisted or conscripted acquires a status which does not depend on whether or not s/he is later used to participate actively in hostilities. The Chamber emphasized the fact that a child may be required to undertake a variety of tasks. The argument brought forward by Lubanga’s defense, that enlistment of a person must have a purpose of him/her actively participating in hostilities, was thus not approved. It was further concluded by the Chamber, that children were used by the UPC/FPLC, during the period of the charges, in order to participate in combat, used as military guards and used as escorts and body guards for the main staff, the commanders and for Lubanga himself. Witnesses had stated that girls who were associated with UPC/FPLC were often appointed domestic chores such as cooking, alongside other assignments, and others claimed that they had suffered harm resulting from sexual violence. The Chamber took evidence of domestic tasks assigned to girls into account when establishing that said supportive functions exposed the girls to danger by becoming a potential target. TC I did, however, emphasize that these domestic tasks were carried out *in addition* to the other assignments they

²²⁶ Ibid, paras. 627–628.

²²⁷ Ibid, paras. 629–631.

were given as UPC/FPLC soldiers which involved them in combat. The Trial Chamber found that evidence established, beyond reasonable doubt, that children under the age of 15 years had been conscripted and enlisted into said group and used by the same to participate actively in hostilities during the relevant time.²²⁸

5.2.2 The Ntaganda Case

Bosco Ntaganda is another man purportedly involved in the Congolese conflict described above. A first warrant of arrest for him was issued in 2006, and a second in 2012.²²⁹ Ntaganda was Deputy Chief of General Staff for Military Operation of the FPLC and is currently charged with 13 counts of war crimes. Among these crimes are enlistment and conscription of children under the age of 15 years and using them to participate actively in hostilities. The charges are made under articles 8(2)(e)(vii) and 8(2)(e)(vi) of the Rome Statute.²³⁰ The case was brought before Pre-Trial Chamber II (PTC II or The Chamber) in 2014 which delivered a decision confirming the charges. A trial was opened before Trial Chamber VI in 2015, but no judgment has been delivered.²³¹

Counts of rape and sexual slavery of child soldiers were demonstrated through several testimonies, and children further stated that they had been domestic servants, cooks and providing “love services”²³².²³³ Ntaganda’s defense argued that the crimes of rape and sexual slavery against the UPC/FPL child soldiers were not predicted by the Rome Statute as IHL fails to protect persons taking part in hostilities as victims of crimes committed by their fellow soldiers. The PTC II firstly made reference to common article 3 of the Geneva Conventions and its requirement on humane treatment of those not actively participating in hostilities. Article 4(1) and (2) of AP II was further noted by the Chamber as providing for a similar requirement, with the addition of prohibiting outrages upon personal dignity, especially rape, enforced prostitution and any form of indecent assault. PTC II therefore reached the conclusion that it had to

²²⁸ Ibid, paras. 16, 819, 834, 838, 857, 867, 880–882, 910, 914 & 916.

²²⁹ ICC, Pre-Trial Chamber I, *Case of the Prosecutor v. Bosco Ntaganda* (The Prosecutor v. Ntaganda), *Warrant of Arrest*, 22 August 2006, ICC-01/04-02/06-2-Anx-tENG; ICC, Pre-Trial Chamber II, *Situation on the Democratic Republic of the Congo, Second Corrigendum of the Public Redacted Version of Prosecutor’s Application under Article 58 filed on 14 May 2012*, ICC-01/04-611-Red-Corr2.

²³⁰ ICC, Pre-Trial Chamber II, *The Prosecutor v. Ntaganda, Updated Document Containing the Charges, Annex A*, 16 February 2015, ICC-01/04-02/06-458-AnxA, pp. 61–62 & 64–65.

²³¹ ICC, Press Release, *Ntaganda trial opens at International Criminal Court*, 2 September 2015.

²³² ICC, Pre-Trial Chamber II, *The Prosecutor v. Ntaganda, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda*, para. 82.

²³³ Ibid, paras. 81–82.

determine whether or not the children who had been victims of rape and/or sexual slavery were taking direct/active part in hostilities at the relevant time of the crimes. Guided by the prohibition to recruit and use children under the age of 15 years to take part in hostilities, covered both by article 4(3)(c) AP II and by article 8(2)(e)(vii) Rome Statute, PTC II stated that only the membership of children in an armed group was not to be considered as determinative proof of active/direct participation in hostilities. It further considered it contradictory to the very rationale of the protection of such children to argue that a child under the age of 15 years would lose protection offered to them by IHL merely by joining an armed group. However, the Chamber continued by stating that it was of the view that not yet 15-year-old children did lose said IHL protection only while actively/directly participating in hostilities. But those who are subject to rape and/or sexual enslavement cannot, according to PTC II, be characterized as taking active part in hostilities “during the specific time when they were subject to acts of sexual nature”²³⁴. In the view of the Chamber, the sexual character of such crimes logically precludes simultaneous active participation in hostilities, as they involve force or coercion or the exercise of rights of ownership. Thus, the PTC II found that child soldiers of the UPC/FPLC under the age of 15 years were indeed protected by IHL from acts of rape and sexual slavery.²³⁵

Additionally, the PTC II found that children had been given weapons and uniforms, had been assigned battalions or brigades. The Chamber did not address any testimonies regarding domestic or sexual functions of girls under the count of using children to actively participate in hostilities. It simply concluded that children under the age of 15 years had been used as combatants or for combat-related activities such as support for combatants, military guards, informants, bodyguards and escorts.²³⁶

The defense challenged ICC’s jurisdiction over the acts of rape and sexual slavery of child soldiers, by reference to the mentioning of common article 3 of the GCs in article 8 of the Rome Statute under which the crimes were charged. The defense pointed out that common article 3 of the GCs did not mention rape and sexual slavery of child soldiers and contended that said article applied only to protected person, a category which did not encompass child soldiers. Further, the defense argued that IHL does not protect members of armed groups from acts committed by their own forces, and that the crime of using child soldiers was an exception to

²³⁴ Ibid, para. 79.

²³⁵ Ibid, paras. 76–82.

²³⁶ Ibid, paras. 91, 93 & 96.

this standard. Claiming that AP II was not at all applicable, the defense concluded that even if so was the case, the instrument did not prohibit rape and sexual violence against child soldiers by their own forces.²³⁷ Trial Chamber IV decided on the matter, and reasoned that article 8(2)(e)(vi) of the Rome Statute did not specify the potential victims of the crimes listed. The Chamber further observed that “child soldier” was not a term of legal nature, and that it was not encompassed within the judicial framework of the ICC. The term was instead to be considered a descriptive term, referring to the alleged victims of rape and sexual slavery. It was concluded, that evidence relating to crimes of rape and sexual slavery needed not be limited to certain types of victims.²³⁸

Ntaganda appealed the Trial Chamber’s decision to the Appeals Chamber, which agreed with the Trial Chamber and denied the appeal. The Appeals Chamber further specifically agreed with the statement made by the TC IV: “there is never a justification to engage in sexual violence against any person; irrespective of whether or not this person may be liable to be targeted and killed under international humanitarian law”^{239 240}.

²³⁷ ICC, Trial Chamber VI, *The Prosecutor v. Ntaganda, Application on Behalf of Mr. Ntaganda Challenging the Jurisdiction of the Court in Respect of Counts 6 and 9 of the Document Containing the Charges*, 1 September 2015, ICC-01/04-02/06-804, paras. 21–30 & 36–40.

²³⁸ ICC, Trial Chamber IV, *The Prosecutor v. Ntaganda, Decision on the Defence’s Challenge to the Jurisdiction of the Court in Respect of Counts 6 and 9*, 9 October 2015, ICC-01/04-02/06-892, paras. 22–26 & 29.

²³⁹ *Ibid.*, para. 46.

²⁴⁰ ICC, Appeals Chamber, *The Prosecutor v. Ntaganda, Judgment on the Appeal of Mr. Ntaganda Against the “Second Decision on the Defence’s Challenge to the Jurisdiction of the Court in Respect of Counts 6 and 9*, 15 June 2017, ICC-01/04-02/06 OA5, paras. 65 & 70.

6 Analysis & Conclusions

In chapter two I explained the setting for this thesis. Said chapter showed that children are used to participate in armed conflict, that they are easily persuaded or forced into armed groups/forces and that they suffer great harm from being used in warfare. Further, girls are generally recruited in the same manner as boys, and they experience, at large, the same consequences as boys. But it was also noted that girls suffer gender specific consequences, related to sexual violence and/or pregnancies as well as related to disrupted social ties to their original societies. Hence, these gender specific consequences relate to the gender specific use of girls. This gender specific use means that girls are typically held further away from the battlefield, used as “wives”, sex slaves and/or perform domestic chores. Having settled these initial facts, I can conclude that the patriarchy is alive and well. Reasons behind why girls are used differently because of their gender is however not part of this thesis. However, given the supposed international concerns regarding gender specific violence as well as regarding the use of children in armed conflict, one could assume that the specific use of girls in armed conflict would be acknowledged within the international judicial system.

6.1 International Law

As to the international legislation, my findings were that, within the sphere of IHL, the GCs applicable in IACs are silent on the matter of children participating in hostilities. Other instruments do prohibit the use of children in armed conflict, but are formulated through different wording. The terms range from “children’s participation in hostilities” to “children’s active/direct participation in hostilities”. The former wording is found in rule 137 of the CIHL Study, but when defining such participation in hostilities, reference is made to the preparatory work of the Rome Statute which differentiates between activities linked to combat and to activities clearly unrelated to hostilities respectively. Reference is also made to a wider interpretation through a statement by the Netherlands, but the prior may indicate that rule 137 does not cover any participation of children in hostilities, and only such participation which is linked to combat. Other than rule 137, only article 4 of AP II lacks a requirement of “*active/direct* participation in hostilities”. My conclusive finding on international legislation prohibiting the use of child soldiers is therefore that almost all of them, with the clear exception of AP II and the

ambiguous exception of rule 136 of the CIHL Study, prohibits children's *active or direct participation in hostilities*.

Given some of the commentaries to the provisions and considering the prevailing purposes of keeping children from taking part in armed conflict, I find myself wondering *why* the international community did not assume a stronger position in this matter, considering children's distinctive vulnerability and the acknowledgement of them as particularly worth protecting. The explanation relating to the GCs is rather simple, as children participating in hostilities was not a widely common phenomenon at the time of their drafting. This is, however, not the case with other relevant provisions. Despite the fact that the ICRC recognized the dangers of involving children in armed conflict, negotiations of article 77 of AP I led to a less stringent wording of said provision than recommended in its draft. Its mirror provision, article 4 of AP II, provides for the only absolute prohibition on using children in hostilities. One may question why the negotiating states were more inclined to accept a more stringent in cases of non-international armed conflicts rather than in international armed conflicts.

I find it even more perplexing that the CIAC Protocol, which stems from an IHRL instrument with the sole purpose of protecting children's rights, obliges state parties only to ensure that children do not take a *direct* part in hostilities. Further, it merely encourages non-state armed groups not to use children in hostilities. It must, of course, be kept in mind that the Protocol can only impose obligations upon parties to it, but I struggle to see why this fact stands in the way of a more absolute wording, especially in relation to such parties. The same confusion, and reasoning, can be applied to the CRC. Additionally, the fact that the wording of rule 137 of the ICRC CIHL Study *can* be read as prohibiting any partaking of children in hostilities, is somewhat encouraging. The fact that CIHL applies universally, and the broad basis upon which such norms are founded, does however generate even more question marks surrounding the wording found in codified law. If a satisfactory custom has been recognised by the ICRC, leading to the phrasing of rule 137, would not the matter, i.e. that any kind of participation is covered by the "child soldier"-prohibitions, be settled?

Moving over to analysing ICL, not much else can be said than what I have already considered. I do, however, find it interesting that even through the drafters of the Rome Statute went beyond simply codifying already existing law, especially considering the reasons behind this bold move, they did not have the courage to criminalize all use of children in hostilities. Instead,

they stuck to a wording similar to the AP I, not the wording of the AP II, and outlawed the use of children to “actively participate in hostilities”. This spilled over to the SCSL Statute, which provides for the same, weak, protection of children.

One could, theoretically, argue that if states do not wish to prohibit the use of children in hostilities unless they are actively participating, then it should not be prohibited by international law. States are, most certainly, part of negotiations and form the international bodies governing matters of international interest. The issue with such argumentation is that no states actually seem to advocate, or at least not in a very widespread manner, the use of children in hostilities. The age limit can be debated, as well as the question of enrolling children who voluntarily wish to associate with armed groups/forces. However, there seems to be very little conflicting debate regarding the fact that (at least young) children suffer from being exposed to violence and that they should be protected during times of war. This must not necessarily mean that anyone wants to be held accountable for such use, but it would be interesting to look deeper into the reasoning behind the existing law and why it is largely limited to the use of children who “actively/directly participate in hostilities”.

Analysing implications of the prohibitions on using children for active/direct participation in hostilities from the perspective of protection offered to girls, it becomes apparent that drafters did not have this particular group in mind. The practice of assigning girls with tasks not clearly related to violence and/or obvious military operations, makes the interpretation of “active/direct participation in hostilities” essential to whether or not they are to be covered by relevant provisions. This wording puts girls at risk of not being considered to be “real child soldiers” even though they are associated with an armed group/force, exposed to dangers and suffer great consequences.

6.2 Interpretations of Active/Direct Participation in Hostilities

Looking into possible interpretations of “active/direct participation in hostilities”, it can be concluded that the traditional understanding of said term is difficult to apply to children given a children’s rights-perspective. Active/direct participation in hostilities has traditionally been

an issue relating to the principle of distinction and in extension which persons lose their protection against attack because of their acts. The ICRC has firstly settled that “direct” and “active” are to be interpreted synonymously. For an act to qualify as direct participation, it must a) likely affect the military of a party to an armed conflict or death, injury or destruction on protected persons or objects. Additionally, b) a direct causation must exist between the specific act and the harm likely to result from it. In the ICRC’s view, “*direct* participation in hostilities” indicates that *indirect* participation in hostilities does not lead to loss of civilian protection. The act must also, c), be intended to cause such qualified harm, as prescribed by a), in support of one fighting party and to the disadvantage of another. If this interpretation of “active/direct participation in hostilities” was to be applied to children used in armed conflict, it would be rather far-fetched to consider girls used as “wives”, sex slaves or cooks as actively/directly participating in hostilities. Notably, within this realm of the traditional notion on “active/direct participation in hostilities”, it is more favourable to be considered a civilian, i.e. not actively participating in hostilities, than the opposite. This turns the tables of my research perspective, and suddenly girls who are used further away from the battlefield become more protected, as civilians, than boys. In my opinion, however, the very basic concept of the principle of distinction is problematic in relation to children used in armed conflict. Again, considering children’s distinctive vulnerability and them being acknowledged as particularly worth protecting, one may question if children should be equated to other civilians. The reasoning of the ICRC is largely based on the main balancing act of IHL: protecting civilians while allowing for some civilian casualties motivated by military necessity. Thus, civilians cannot act more or less as combatant and still be protected as civilians as it would be unfair. But I doubt that such reasoning can be applied to children without alteration. Are children as responsible for their acts as adults? In many cases they are not. Are children who bear arms equally allowed to target as adult combatants? Opinions may vary. The answers to these questions can of course depend on other factors such as the child’s age, possible voluntariness surrounding his or her partaking in hostilities etc. One may rely on recommendation IX of the DPH Study, which can be interpreted as limiting the amount of force used against children who participate in hostilities. My personal view is that children does not automatically lose their protection as protected persons, or civilians, when directly participating in hostilities. I do, however, understand the complexity of this issue as it seems unreasonable, from an IHL perspective, to prohibit the targeting of combatants merely because of their age. It develops into a difficult discussion which, according to me, circles back to the fact that children should not act as combatants in the first place.

As to the determination of memberships in organized armed groups, the ICRC settles the criterion to be that a person must assume a continuous combat function. A key factor of such function is the lasting integration into an organized armed group. Protection which is afforded civilians, for as long as they do not actively participate in hostilities, is *not* afforded to members of organized armed groups. The ICRC does, however, make a distinction between accompanying or supporting persons, who do not take direct part in hostilities, and persons having a continuous combat function. Persons within the former category are protected against attack. Further, the Swedish IHL Committee of 1984 argues for a new category: civilians with accompanying status, which would be afforded only to persons who are not a direct part of the armed forces and who are not used for combat. These persons would be temporarily granted POW status. These categories again raise the question of children's special position compared to other civilians. The "unfairness" considered by the ICRC cannot, in my opinion, be applied to children without careful consideration regarding reasons behind their association with organized armed groups. It can further be discussed whether or not children would benefit from acquiring temporary status as POWs through accompanying status. My conclusion regarding traditional interpretations of "active/direct participation in hostilities" is that the concept itself is flawed when applied to children used in armed conflict, as it does not consider children separately from adults. On the one hand, girls who are assigned supportive tasks may well benefit from this type of interpretation as they are more likely to be considered civilians than boys who are assigned tasks of a more clear-cut military nature. On the other hand, the above presented interpretation clearly excludes girls who are assigned supportive tasks from the explicit "child soldier"-prohibitions of international law.

On the matter of "active/direct participation in hostilities" specifically relating to children used in hostilities, guiding principles, academics, NGOs and the ICRC seem to be in favour of a wide interpretation. The Cape Town Principles and the Paris Principles specifically include children used for domestic services, sexual purposes and/or used as "wives" in their respective definitions of the term "child soldiers"/ "child associated with an armed force or armed group". NGOs have advocated for the widest possible protection to be offered to children used in armed conflict when commenting on the CIAC Protocol. Further, the ICRC has commented that the intention of article 77(2) of the AP I was to keep children from armed conflict, preventing that children perform even supporting services. Notably, however, the draft version of the article was rejected and thus also the coverage of "indirect participation in hostilities". The *travaux préparatoires* of the Rome Statute, on the other hand, does differentiate between activities

linked to combat and activities clearly unrelated to hostilities. Unlike the ICRC, scholar McBride argues that “active” and “direct” are *not* to be interpreted synonymously. In her opinion, direct participation can be conducted only through combatant roles whereas active participation covers also functions further away from the frontlines. Scholar Waschefort, however, agrees with the ICRC. Waschefort provides for extensive arguments on the interpretation of active/direct participation in hostilities, stating that a wide interpretation would be favourable to the aim of preventing children’s partaking in hostilities. A generous interpretation would however possibly also mean that civilians’ protection would be diminished, as more acts would be perceived as direct participation in hostilities leading to loss of civilian protection. Interpreting active/direct participation in hostilities one can further rely on the “most favourable” principle, or principles of geographical importance. Waschefort also highlights the possible positive effects of using the continuous combatant function as means to increase the protection of children used in hostilities.

Firstly, I agree with the ICRC and Waschefort on their conclusions regarding the synonymous reading of “active” and “direct” participation based on the French translation of the relevant provisions. Secondly, viewing the implications of a wide interpretation of “active/direct participation in hostilities” from a gender perspective, it is clear that it is more favourable to girls used by armed forces/groups than a narrower understanding of the term. Referring to my analysis of the relevant law, a narrow interpretation of “active/direct participation in hostilities” effectively excludes girls who are used for other purposes than those of obvious military nature. Provided that the international community aims at protecting *all* children, by prohibiting the use of them in a way which disrupts their childhood and exposes them to violence and further leads to long lasting distress, I cannot find any arguments that would justify a narrow interpretation of said term when assessing possible violations of “child soldier”-prohibitions. Waschefort mentions the correlation between a possible weakened protection of civilians, which is indeed relevant. I do, however, return to, and stand by, my previous reasoning regarding the fact that children are not “regular” civilians, as they require special considerations on account of their particular vulnerability. In my opinion, the term ought to be interpreted differently depending on the context. One interpretation if it is a tool to distinguish protected civilians from civilians who can be legitimate targets because of their actions, and another if it is a tool to prohibit the use of children in armed conflict. For the former purpose, a narrow interpretation protects more civilians, and for the latter purpose a wider interpretation is more favourable.

6.3 International Jurisprudence

Turning to possibilities of actual redress and reparation offered to children used in armed conflict, it can be concluded that the phenomenon of using girls in armed conflict has been brought before the ICC and the SCSL, and acknowledged to different extents. In my opinion, jurisprudence on children used in hostilities shows a rather grim reality. I do, however, find it important to on the one hand keep in mind the Courts' limited possibilities to provide for too "radical" interpretations of the law. The principle of legality is, undoubtedly, a fundamental principle of criminal law. On the other hand, one must also remember the Courts' mandate of upholding international law, and their authorities as producers of precedential case law. Further, the Courts are allowed to, and do, consult multiple sources when analysing the meaning of codified law.

Starting with the SCSL's interpretation of "active participation in hostilities", the Court's decision in the CDF case was, to say the least, unsatisfactory. The Trial Chamber only briefly touched upon the use of children as body guards and being present at camp sites, and did not elaborate in any substantial manner. This was criticised by the Appeals Chamber. Justice Renate Winter argued to some extent on the "use of children"-requisite, stating that carrying looted property could not be categorized as criminalized use. She further argued that in situations where enlistment processes of children do exist, within an armed group, the use of children cannot be equalized to enlistment as such. She did, however, agree that initiating children, with the knowledge of future use as warriors, did amount to practical assistance of use of children to actively participate in hostilities. The reasoning of Winter is not in line with the interpretation advocated in favour of hindering the use of child soldiers, and neither does it indicate that girls used for other tasks than of a strictly military nature should be covered by the term "active participation in hostilities. Her reasoning further presupposed that all children associated with armed groups are either, more or less, officially enlisted, or they are not. She did not consider the possibility that enlistment processes may be applied to some children but not all.

In the AFRC case, the Trial Chamber stated, when generally assessing the law prohibiting the use of children to actively participate in hostilities, that putting children's lives directly at risk in combat was embedded in such use. Further, any labour or support giving effect to or help maintaining operations in a conflict was to be considered as active participation, according to

the Trial Chamber. In the given case, the mere presence of children at the AFRC Secretariat was deemed to be illegal regardless of the children's specific duties. This is a fairly radical improvement compared to the restrictive reasoning expressed in the CDF decision and the opinion of Justice Winter.

The ICC's interpretation of "active participation in hostilities" in the Lubanga case is, unfortunately, not easy to analyse. The Trial Chamber recognised that the concept of "children associated with armed conflict" was of a broad nature, intended to give children extensive protection, but that it was not part of the wording of the charges against Lubanga. The Chamber proceeded by concluding that a child is often exposed to potential danger, irrespective of his/her function. Indirect participation was to be considered as active participation depending on whether or not the participation exposed the child to real danger as a potential target. This general reasoning seems to indicate the possibility of a wide interpretation of "active participation in hostilities", but does require exposure to real danger as a potential target. The Court did not elaborate on what was to be considered such real danger, but it may well be the mere presence at a military base. Evidence of children who had been assigned domestic tasks, in the Lubanga case, was however only considered when such tasks had been assigned in addition to other, more "combat involving", assignments.

Hence, it is somewhat unclear whether or not activities of a non-military nature are considered active participation in hostilities by the SCSL and the ICC. On the one hand, the AFRC case indicates that all children present at a military base are used in an unlawful manner. The ICC, on the other hand, lays down a requirement of exposure to real danger and further seems to value "combat involving" assignments as more dangerous than domestic tasks.

Conclusions on the courts' interpretations of active/direct participation in hostilities cannot be read separately from my conclusions on the overall handling by the judicial system of girls used in armed conflict, which I find next to unacceptable. In CDF case, the SCSL denied amendments to the indictment when the prosecutor tried to add charges of sexual violence. The evidence of such violence was, additionally, deemed inadmissible in relation to the original charges. The decision to not allow added charges of sexual violence was not considered by the Appeals Chamber. However, by not permitting the admission of evidence, the Trial Chamber was found to have committed an error. Justice Renate Winter took a strong stance in favour of victims of sexual crimes, stating that the Trial Chamber had hindered the SCSL fulfilling its

mandate when deciding not to allow for charges and/or evidence relating to such crimes. In the AFRC case charges of sexual violence again became a matter of procedural difficulties. Forced marriage was deemed to be subsumed by the crime of sexual slavery, thus not an “other inhumane act”. Count 7 on sexual slavery and any other form of sexual violence was however dismissed, and sexual slavery was instead dealt with as a crime of “outrages upon personal dignity”. Assessing evidence in the case at hand, the Trial Chamber found that girls had been subjected to abductions, sexual crimes, been taken as “wives” and been forced to do domestic chores. Justice Sebutinde wrote a clarifying concurring opinion, elaborating on the relationship between abductors and their “wives” and why the phenomenon was to be considered a form of sexual slavery. Justice Doherty argued, in her partially dissenting opinion, that there had been no need to dismiss the count on sexual slavery in its entirety. Further, she was of the opinion that forced marriage was not a crime subsumed by the crime of sexual slavery, but rather amounted to a crime of “other inhumane acts”. The Appeals Chamber did not agree with the Trial Chamber’s conclusion regarding that “other inhumane acts” covered only acts of a non-sexual nature. Neither did the Appeals Chamber agree with the conclusion that forced marriage was a crime subsumed by sexual slavery, as the former was not a mainly sexual crime. The Chamber granted the prosecution’s appeal, and found that forced marriage was to be categorized as an “other inhumane act”.

Before the ICC, the prosecution in the Lubanga case failed to submit charges of sexual violence. The Trial Chamber did therefore not incorporate evidence of such acts into its decision, and took no position on the question of whether or not such acts were a matter of law within the scope of using children to actively participate in hostilities. The most recent case of Ntaganda is yet to be decided on by the ICC. This is the first case in which specific charges of sexual violence committed against child soldiers have been brought before a court. The defence argued that child soldiers were not protected, by any relevant provisions, from rape and/or sexual slavery committed by their fellow soldiers. The Pre-Trial Chamber settled that the children concerned were not taking active part in hostilities during the precise time when they were victims of sexual crimes. The Trial Chamber instead reasoned that the alleged crimes did not require a specific type of victims, and that sexual violence was unjustified regardless of the victim’s potential combatant status. The Appeals Chamber agreed with the Trial Chamber.

Firstly, I find it remarkable that the prosecutions have failed in three out of four cases to present proper charges of sexual violence and forced marriages. This may well be because of issues of

evidence or other factors not covered by my research. It may also be simply because of the courts unwillingness to address the issue, especially in the CDF case considering Justice Winter's dissenting opinion. I too consider the SCSL's decision not to allow the changes of the indictment alongside the denial of submission of evidence of sexual violence to be contradictory to the purpose and mandate of the SCSL. It may also be because prosecutors find it easier to submit fewer charges. Such reasons are however a subject for another thesis.

Secondly, girls appear to be put between a rock and a hard place. On the one hand, the prosecution tries to argue for a wide interpretation of the "use to actively participate in hostilities"-requirement, such as in the Lubanga case. These arguments have varied in their success, as the courts appear to be hesitant to expand criminal responsibility also to the use of children for other purposes than those clearly related to hostilities. In the Lubanga case, the court did not approve of such arguments and deemed it necessary with separate charges of sexual violence, or at least the specifying of such charges within the indictment and was not satisfied with the prosecution's arguments. On the other hand, the prosecution charges the use of children as sex slaves and/or "wives" under other provisions than "child soldier"-prohibitions. Firstly, I regard this an issue as it does not differentiate between children and adults, despite children's recognized need for special protection. Secondly, it has not proven to be very successful. In some cases, the courts have simply denied the charges or have not considered evidence admissible. When charges and evidence of sexual violence actually *have* become subjects of the court's reasoning, they appear to be entangled in reasoning on matters of categorizing the crimes, such as forced marriages. In the Ntaganda case, where proper charges were brought forward albeit not under the "child soldier"-provision, the matter became a discussion of whether or not children are "legitimate" victims of sexual crimes when they are associated with an armed group. I find this discussion almost of an offensive nature in respect of the victims. Problems as arisen in the Ntaganda case, or similar issues, e.g. problems relating to evidence or intent, can be avoided if charges of sexual violence were replaced with the "simpler" charge of use of children in armed conflict and a wide interpretation of "active/direct participation in hostilities". Then the court would only have to assess whether or not children had been used, notwithstanding how, in the armed conflict and retribution could be offered to the victims. However, the outcome of these, approved, charges have at least been somewhat successful as the courts have recognized acts of sexual violence and/or forced marriages although criminalized through provisions not relating to children.

In my opinion, it seems as if girls used by armed forces/groups are not always “enough” directly/actively participating in hostilities to be covered by “child soldier”-prohibitions. When they are assessed as victims of sexual slavery and/or rape and/or forced marriages, they are however enough associated with said armed force/group for it to become an issue regarding their victim status. Fortunately, the ICC seems to have settled that children can be victims of sexual crimes even by their fellow soldiers, indicating a positive evolution of the acknowledgement of girls used in armed conflict in international jurisprudence.

6.4 Concluding Remarks

Girls associated with armed groups/forces are protected by prohibitions on the use of children in armed conflict only when they are considered actively participating in hostilities. Despite my rather harsh criticism of the case law on children used in armed conflict, some development found within the reasoning of the courts indicate an evolution towards a more inclusive child protection perspective. This development involves a more generous interpretation, for the purpose of protecting children, of the notion of direct participation in hostilities. Notwithstanding the reasons why, current relevant legislation, except from the AP II, requires the direct participation of children. The protection of girls used in armed conflict thus lies within the interpretation of this term. A wide interpretation of “direct/active participation in hostilities” is supported by plenty of sources and would be in line with child protection purposes. Such interpretations are not unreasonable when presupposing that children should not be associated with armed groups/forces and that children suffer severe consequences from being exposed to violence, sexually abused and from being forcefully married to adults. If a wider interpretation of the existing law was undertaken by international courts, the prosecutors would only have to charge alleged perpetrators with the use of children in hostilities. Former “child soldiers” experiences could then actually be addressed in a dignified way without discussions of whether or not a girl is actively participating in hostilities while she is being raped. By extension, the gender specific consequences of girls not being released from armed groups/forces, being rejected from their communities for being “rebel wives” and/or not being considered eligible for DDR programs may be lessened. It would create an incentive to recognize the traumas suffered by girls associated with armed groups as well as raise awareness of the phenomenon as such. The specific crimes of sexual violence are not superfluous, and I am not arguing that they should be replaced or altered. On the contrary, in the few cases where charges under such provisions have been made successfully, they have offered girls some sort of justice. I am,

however, arguing that prohibitions on the use of children in armed conflict seem to cover only a fraction of the reality faced by children, and that children should be separated from adults, because of their particular vulnerability associated with their child status.

The wording “active/direct participation in hostilities”, and a narrow interpretation of it, becomes an obstacle for girls who have been used in armed conflict to obtain redress. Labelling more children as actively participating in hostilities is not a practice without possible negative effects. Firstly, if such labelling is brought by a generous interpretation made by courts, the principle of legality must be considered. Secondly, it may well be argued that labelling children as actively participating in hostilities heightens the risk of children being perceived as combatants to a larger extent also in other areas of IHL, depriving them of protection as civilians and making them legitimate targets of attack. A more elaborate discussion on this matter, other than what has been touched upon already in this thesis, would indeed be of great importance. Such a discussion is, however, linked to my final thoughts on the matter. By using IHL-founded terms and by using an IHL narrative when interpreting such terms, we face the risk of drafters and judges not recognizing children’s particular vulnerability. Such acknowledgment is perhaps more of a IHRL nature. This is of course an issue to any children used in armed conflict, but, in line with history, girls take the hardest fall.

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