

## Prohibition of child soldiering – international legislation and prosecution of perpetrators

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As child soldiering is one of the most dramatic and, unfortunately, typical feature of contemporary armed conflicts, it entails a lot of questions and problems in different areas of science – psychology, sociology, economy or law. This article concerns legal aspects of the issue of child soldiers from the standpoint of international law. The aim of it is, on the one hand, to examine existing international legislation that prohibits or restricts using of children in armed conflicts, as well as its impact on state and non-state actors. More importantly, the article considers, on the other hand, instruments that can be employed in relation to prosecution of violators of relevant norms of international law. Furthermore, it presents the current development of main international proceedings involving child soldiering.

### I. Introduction

One of the most alarming and dangerous characteristics of modern armed conflicts is the increasingly widespread employment of children as soldiers. Child soldiers are found on each continent, in nearly every major armed conflict in the world today. The ranks of child soldiers include boys under the age of ten recruited into paramilitaries in Colombia, girls trained as suicide bombers by Tamil Tigers in Sri Lanka, and children kidnapped from their homes by rebels in Northern Uganda<sup>1</sup>. At the present time, it is estimated that 300 000 child soldiers are engaged in over 30 current conflicts around the world. However, one cannot omit that '[...] the cumulative total is much higher – as children are killed or wounded, or manage to grow older - their places are taken by new children. And thus the destruction of young lives is perpetuated from one generation to the next'<sup>2</sup>. According to the 2004 Global Report on Child Soldiering prepared by the Coalition to Stop the Use of Child Soldiers, most of the child soldiers are adolescent, though many are ten years or even younger<sup>3</sup>. Children become soldiers in different ways: some are conscripted or kidnapped; others join armed groups simply because there are convinced or see it is a way to protect their families. In addition to being forcibly recruited, youths also present themselves for service; they may be driven by any of the several forces, including cultural, social, economic or political pressures<sup>4</sup>. They are recruited into both government armed forces or armed opposition

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<sup>1</sup> Becker Jo, 'Child Soldiers Changing a Culture of Violence', *Human Rights Magazine, Section of Individual Rights & Responsibilities*, American Bar Association, 00468185 [Winter2005], Vol. 32, Issue 1; found on: [www.abanet.org/irrr/hr/winter05/childsoldiers.html](http://www.abanet.org/irrr/hr/winter05/childsoldiers.html), assessed on: 14/06/2007.

<sup>2</sup> Machel Graça, *The Impact of War on Children: a review of progress since the 1996. United Nations Report on the Impact of Armed Conflict on Children* (Hurst & Company, London, 2001), 7.

<sup>3</sup> *Child Soldiers. Global Report 2004*, Coalition to Stop the Use of Child Soldiers, 17 November 2004, found on: <http://www.child-soldiers.org>, assessed on: 14/06/2007.

<sup>4</sup> Machel Graça, *Promotion and Protection of the Rights of Children. Impact of Armed Conflict on Children*, Report of the expert of the Secretary-General, submitted pursuant to General Assembly resolution 48/157, 11 ff, found on: [http://www.unicef.org/emerg/files/report\\_machel.pdf](http://www.unicef.org/emerg/files/report_machel.pdf), assessed on: 14/06/2007.

groups, as well as paramilitary groups, militias and civil defense forces. Usually children serve as combatants or as cooks, informants, porters, bodyguards, sentries and spies. Many child soldiers belong to organized military units, wear uniforms and receive explicit training. The problem defies gender boundaries. While the majority of them are boys, girls are recruited as well. Girls are often forced into military activity – in Ethiopia, for instance, girls comprised about 25 percent of opposition forces in the civil war that ended in 1991<sup>5</sup>. What should be seen as even more dramatic, girls are expected not only to fight but are often subjected to rape or sexual exploitation.

It is indisputable that the use of children in war has indeed become a disturbing feature of modern conflicts but it is not a recent phenomenon. According to numerous accounts, child soldiering has a long history. As indicated by its name, many children participated in the Children Crusade of 1212. Furthermore, it has been confirmed that a number of twelve year-old boy combatants created a significant part of Napoleon's army. Also during the First and Second World War young boys often participated in hostilities<sup>6</sup>. Notwithstanding these historical precedents, "the era of the child soldiers" has occurred after 1945<sup>7</sup>.

There are many factors that cause the increase of the active involvement of adolescents in armed conflicts. The first one is connected with prolonging violence and instability, especially in civil wars – the number of casualties in adult men is enormous and therefore the sides of the conflict lack manpower. Another important aspect is the proliferation of lighter weapons, which can be easily carried by children. Virtually all of the child soldiers are armed. In Liberia, for example, most of former child soldiers claim that they used AK-47s, fully automatic Kalashnikov<sup>8</sup>. In addition to the above mentioned facts, many leaders prefer using children to adults, as they tend to be more submissive, less demanding, do not question orders and are easier to manipulate<sup>9</sup>. In addition, psychological and social reasons for children joining a war effort should be taken into account. As Hughes rightly pointed out, an important factor can be 'the child desire to regain a sense of control and power in what has come to be a life full of uncertainty and fear'<sup>10</sup>.

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<sup>5</sup> Wessells Mike, 'Child Soldiers', *Bulletin of the Atomic Scientists*, Chicago [Nov/Dec 97]; found on: [http://pangaea.org/street\\_children/africa/armies.htm](http://pangaea.org/street_children/africa/armies.htm), assessed on: 14/06/2007.

<sup>6</sup> Twum-Danso Afua, 'Africa's Young Soldiers. The Co-option of Childhood', *Institute for Security Studies Monograph* [April 2003], No 8213.

<sup>7</sup> Twum-Danso, 14.

<sup>8</sup> Whitman Lois, Fleischman Janet, 'The child soldiers', Africa Report, 00019836, Jul/Aug94, Vol. 39, Issue 4; found on: <http://www.hrw.org/reports/1994/liberia2>, assessed on: 15/06/2007.

<sup>9</sup> Harvey Rachel, 'Recruitment and deployment of child soldiers – The beginning of the end?', *ChildRIGHT* [March 2000], issue 164; found on:

<http://www.essex.ac.uk/armedcon/News%20Folder/Future/2000News/Comments/DraftOPCS.htm>, assessed on: 15/06/2007.

<sup>10</sup> Hughes Lisa, 'Can International Law Protect Child Soldiers?', *Peace Review* 12:3 [2000], 403.

## II. Legal framework

### 1. Terminology

At the first place, one must consider the legal definition of a child.

Until adoption of the Convention on the Rights of the Child (hereafter referred to as: CRC)<sup>11</sup>, although the term “child” had appeared in some international documents<sup>12</sup>, there was no legal definition of a child. The CRC filled that gap. Pursuant to Article 1 of that Convention, ‘A child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier’. It can be noticed that, generally, CRC adopted eighteen years – the voting age in most countries, as indicator of majority. However, one should pay attention to noticeable flexibility of the Convention in defining a child. Apparently, ‘the moment at which a person ceases to be a child and becomes an adult is not judged in the same way everywhere in the world’<sup>13</sup>; it depends on the individual biological and psychological maturity, on the cultural and social aspects and other criteria.

Another definition that must be explained for a better understanding of the topic is, what seems to be obvious, the term “child soldier”. There is no doubt among scholars, that it covers any child under the age of fifteen that actively takes part in hostilities<sup>14</sup>. However, international organizations which aim is to eliminate the use of children as soldiers have widely adopted a definition proposed in the Cape Town Principles. These define a child soldier in broader terms as:

*‘Any person less than eighteen 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 marriages. It does not, therefore, only refer to a child who is carrying or has carried arms’<sup>15</sup>.*

Another important issue to be discussed is the meaning of “to participate actively (directly or indirectly) in hostilities”, and the meaning of “conscription” and “enlistment” and, in particular, legal consequences, if any, of the distinction between voluntary and forced recruitment.

In the Additional Protocols of 1977, which have been the first instruments of international law that addressed the problem of child soldiers, the prohibition on the use of children in hostilities was formulated differently, depending of the nature of the conflict. Additional

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<sup>11</sup> *Convention on the Rights of the Child*, adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entered into force on 2 September 1990. As there is 192 State Parties to the Convention, it is recognized as the most worldwide adopted act of international human rights law.

<sup>12</sup> The most notable one was the *Declaration on the Rights of the Child*, proclaimed by General Assembly resolution 1386(XIV) of 20 November 1959.

<sup>13</sup> *ICRC Commentary*, Additional Protocol II, <section> 4549.

<sup>14</sup> See: art. 77 (2) of the *Protocol Additional to the Geneva Convention of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, of 8 June 1977; art. 4 (3(c)) of the *Protocol Additional to the Geneva Convention of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts*, of 8 June 1977; art. 38 (2) of the *Convention on the Rights of Child* of 20 November 1989.

<sup>15</sup> *Cape Town Principles and Best Practices, adopted at the Symposium on the Prevention of Recruitment of Children into Armed Forces and on Demobilization and Social Reintegration of Child Soldiers in Africa*, 27-30 April 1997, Cape Town, South Africa.

Protocol I, relating to the international conflicts, in the Article 77 states that the parties to the conflict shall take all reasonable measures in order that ‘Children [...] do not take a direct part in hostilities’. This provision reflects one of the fundamental rules of international humanitarian law, namely the distinction between combatants and civilians based on the assumption that only combatants are allowed to take a direct part in hostilities. To take “direct part in hostilities” means to undertake the acts of war that are likely to cause actual harm to adverse party<sup>16</sup>. A person who is taking direct part in hostilities as a combatant is not entitled to the special protection applied to civilians. The Additional Protocol II prescribes the situation of child soldiers differently. Article 4 (3)(c), that relates to internal armed conflicts, states that ‘Children [...] shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities’. The omission of the word “direct” suggests that the rule established in Additional Protocol II is broader and covers different types of use of children during armed conflicts. But the Commentary to the Additional Protocols concludes that:

*‘Since the intention of the drafters of the article was clearly to keep children under fifteen outside of armed conflicts, therefore they should not be required to perform “indirect acts of participation” such as, in particular “gathering and transmission of military information, transportation of arms and ammunitions, provision of supplies, etc”’<sup>17</sup>.*

Summing up, since 1977 the wording of the “participation of children in armed conflicts” has been standardized, it prohibits the use of children to participate actively in hostilities what, in addition, reflects the purpose of this prohibition – to protect children from the dangers of the war.

A comprehensive explanation of these terms is to be found in the United Nations working papers connected with the establishment of the International Criminal Court (hereafter referred to as: ICC). According to the Report of the Preparatory Committee on the Establishment of an International Criminal Court,

*‘The words “using” and “participate” cover both direct participation in combat and also active participation in military activities linked to combat such as scouting, spying, sabotage and the use of children as decoys, couriers or at military checkpoint [...]. Use of children in a direct support functions such as acting as bearers to take supplies to the front line, or activities at the front line itself, would be included within the terminology’<sup>18</sup>.*

The understanding of the meaning of “recruitment” has also changed since the first appearance in Additional Protocols, which referred solely to the recruitment as such, without the more precise reference to conscription or enlistment. Contemporarily, it is broadly understood as ‘compulsory, forced and voluntary recruitment into any kind of regular or irregular armed force of armed group’<sup>19</sup>. One should pay attention that such an action is recognized as an international crime, irrelevant if the child is coerced, volunteers or intends to participate actively in hostilities.

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<sup>16</sup> Fleck Dieter (ed.), *The Handbook of Humanitarian Law in Armed Conflicts* (Oxford University Press, New York, 1995), 65 ff.

<sup>17</sup> *ICRC Commentary*, Additional Protocol I, <section> 3187.

<sup>18</sup> *Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute and Draft Final Act*; UN Document A/CONF.183/2/Add.1 [1998], 25.

<sup>19</sup> *Cape Town Principles and Best Practices*.

## 2. Contemporary international legislation on child soldiers

It should be considered that in contemporary international law, the protection of children against soldiering is, to some degree, subject of three branches of international law, as provisions on this topic can be found in instruments of international human rights law, international humanitarian law and in international criminal law.

First of all, irrespective of international treaties, it is commonly agreed that the recruitment of children under the age of fifteen into armed forces is prohibited as matter of customary international law. States are under obligation to undertake measures providing barriers for recruitment of children to participate in armed conflicts. According to relevant rules of customary humanitarian international law<sup>20</sup>, recruitment of children into armed forces or armed groups as well as children's participation in hostilities is proscribed. There is enough evidence of state practice, including international conventions, domestic legislation and practice, as well as official statements by state representatives to assert that the prohibition of using children under the age of fifteen in hostilities is a rule of customary law. And as such, this rule must be considered as binding over all states, in both international and non-international armed conflicts.

Furthermore, the prohibition of child soldiering emerges from the universally accepted values of the international community. It is generally recognized that a child, as the most vulnerable member of the society, should be protected by all means, in any situation that infringes its rights. Particularly in times of war the societies are obliged to protect their children.

### i. International Human Rights Law

The most important provisions on the general protection of children can be found in the Convention on the Rights of Child. This treaty, which has been almost universally ratified<sup>21</sup>, covers all fundamental rights of children. The CRC defines a child as a person below the age of eighteen in all respects... with only one exception – Article 38 maintains the low age of fifteen as a criterion for recruitment and participation in armed conflicts as child soldiers. This provision has been established despite of the fact that 'it deals with one of the most dangerous situations that children can be exposed to armed conflicts'<sup>22</sup>. On the other hand, it should be positively assessed that some countries, like Sweden and Switzerland, made separate declarations that guarantee the age of 18 as a minimum for recruitment into armed forces<sup>23</sup>.

Article 38 expressly provides that States should 'take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities'. However, it must be pointed out that this provision is not sufficient to protect children and prevent them from being recruited and taking part in hostilities as "all feasible measures" is an excessively broad term and does not impose any calculable obligations on

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<sup>20</sup> Henckaerts Jean-Marie and Doswald-Beck Louise, *Customary International Humanitarian Law, Volume 1: Rules*, [Rules 136 and 137] (Cambridge University Press, Cambridge, 2005), 482 ff.

<sup>21</sup> Today only two states have failed to ratify the Convention: the United States of America and Somalia.

<sup>22</sup> Helle Daniel, 'Optional Protocol on the Involvement of Children in Armed Conflicts to the Convention on the Rights of the Child', *International Review of the Red Cross* [2000], No. 839, 797.

<sup>23</sup> Druba, Volker, 'The Problem of Child Soldiers', *International Review of Education*, 48 (3-4), [2002], 273.

States. Consequently, a State can easily argue that it took all feasible measures rather than all necessary steps.

Therefore, recognizing that the CRC needed strengthening with respect to participation of children in armed conflicts and because of considerable criticism, the General Assembly of the United Nations undertook another measure by the preparation of the Optional Protocol to the Convention on the Rights of Child on the Involvement of Children in Armed Conflicts<sup>24</sup>.

The Optional Protocol was adopted by the United Nations General Assembly on 25 May 2000 and entered into force on 12 February 2002. The Protocol must be assessed as a document of great importance, as it sets 18 as the minimum age for direct participation in hostilities. The rise of the age limit for participation in hostilities represents a visible improvement of the protection provided by international law and strengthens the trend to shield all children from the dangers of armed conflicts. The treaty also prohibits compulsory recruitment by government forces of anyone younger than eighteen years. It provides for the possibility to accept volunteers from the age of sixteen but only if the State deposits a binding declaration at the time of ratification or accession, setting out their minimum voluntary recruitment age and outlining certain safeguards for such recruitment. However, what can be evaluated as a one of the principal weaknesses of this instrument, it may be difficult to determine in practice whether child soldiers have been voluntarily recruited or not. Furthermore, the safeguards that have been established to ensure that recruitment is voluntary may be hard to implement<sup>25</sup>.

In the case of non-state armed groups, the treaty prohibits, under any circumstances, all recruitment – voluntary and compulsory – under the age of eighteen. But still, ‘Article 4 has been drafted in a way which leaves doubts as to how effective it will be to prevent the recruitment and participation of children in situations of internal armed conflicts, mainly because the wording ‘should not’ seems to impose a moral, as opposed to a legal, obligation under international law’<sup>26</sup>. Another important aspect that may weaken the role of this provision is, ordinarily limited in the situations of internal armed conflicts, the capacity of governments to enforce their domestic legal order.

However, despite of these imperfections of the Optional Protocol, it does represent undeniable progress in the protection of children against recruitment and participation in hostilities. It is also worth noting that the Protocol imposes a duty on States to take measures to ensure the demobilization of child soldiers and their reintegration into society.

The only regional treaty that directly addresses the issue of child soldiers is the African Charter on the Welfare and the Rights of the Child<sup>27</sup>. This document was adopted by the Organization of African States and came into force in November 1999. It defines a child as any person below the age of 18 without exception. Article 22(2) provides that ‘State parties to the present Charter shall take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain in particular, from recruiting any child’. It should be

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<sup>24</sup>*Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children into Armed Conflict*, adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000, entered into force on 12 February 2002. By May 2006 there has been 107 State Parties to this Protocol (and 121 States has signed it).

<sup>25</sup> Helle, 803.

<sup>26</sup> Helle, 805.

<sup>27</sup>*African Charter on the Rights and Welfare of the Child*, adopted in Addis Ababa, Ethiopia, on 11 July 1990, entered into force on 29 November 1999. 39 States has signed the charter and 37 has ratified it; OAU Doc. CAB/LEG/24.9/49 (1990).

read to include both voluntary recruitment and compulsory recruitment. This provision of the African Charter is an essential one as, on the one hand, many of African countries are parties to this treaty and, on the other hand, overwhelming numbers of child soldiers can be found on this continent. Furthermore, as the African Charter is a human rights treaty, its provision applies during times of peace and in times of conflict. But it is not an entirely perfect document. Article 1(3) of the African Charter states that: 'Any custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the present Charter shall to the extent of such inconsistency be discouraged'. Therefore, as Fonseka truly noticed, 'cultural and religious inconsistency [...] greatly increases the likelihood for non-compliance with the Charter'<sup>28</sup>.

The United Nations specialized agencies have also addressed the issue of child soldiers. There are many norms of international labour law aiming at protecting children in different ways. As for this subject matter, one should look at those norms preventing children from taking part in hostilities. The best-known document is the Worst Forms of Children Labour Convention adopted by the International Labour Organization in 1999 that entered into force in 2000<sup>29</sup>. It commits each State, which ratifies it to 'take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency'. According to Article 2, the term "child" means any person under the age of eighteen years and the worst forms of child labour include, *inter alia*, 'All forms of slavery or practices similar to slavery such as the sale and trafficking of children, [...] and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict'<sup>30</sup>. Two valuable notions have been made thanks to this instrument in relation to child soldiering: for the first time it is specifically recognized as a form of child labour, and, what is also significant, it sets an 18-year minimum age limit for participation in hostilities. In addition, Recommendation 190 accompanying the Convention encourages States to make recruitment of child soldiers a criminal offence<sup>31</sup>.

## ii. International Humanitarian Law

In addition to above mentioned human rights documents, the international framework for the protection of children in armed conflicts also consists of the instruments of international humanitarian law.

The basic documents of international humanitarian law on armed conflicts, the Geneva Conventions of 1949<sup>32</sup> do not specifically address participation of children in armed forces. However, children benefit from the general provision provided for civilians not taking part in hostilities – they are guaranteed human treatment and covered by the legal provisions on

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<sup>28</sup> Fonseka Bhavani, 'The Protection of Child Soldiers in International Law', *Asia-Pacific Journal on Human Rights and the Law* [2001], Volume 2, Number 2, 83.

<sup>29</sup> *The Worst Forms of Children Labour Convention [Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Children Labour]*, adopted in Geneva on 17 June 1999, entered into force on 10 November 2000. Currently 132 States are parties to this treaty.

<sup>30</sup> *The Worst Forms of Children Labour Convention*, Article 3(a).

<sup>31</sup> Fonseka, 84.

<sup>32</sup> *The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, the Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, The Geneva Convention relative to the Treatment of Prisoners of War and the Geneva Convention relative to the Protection of Civilian Persons in Time of War* of 12 August 1949.

the means and methods of warfare<sup>33</sup>. The Conventions apply to conflicts of international nature, except for the common Article 3 that ensures the minimal standard of humanitarian protection in non-international armed conflicts. Furthermore, taking into account the particular vulnerability of children, the Geneva Conventions lay down a series of rules granting them particular protection. And even if children are taking part in hostilities, they do not lose those special safeguards. This approach is also emphasized in the Declaration on the Protection of Women and Children in Emergency and Armed Conflict, which states that all efforts should be made to ensure the protection of women and children against ravages of war<sup>34</sup>.

The Additional Protocols to the Geneva Conventions were the first international treaties that covered the situation of active participation of children in hostilities. They set out fifteen as the minimum age for recruitment or participation in armed conflicts. This minimum standard applies to governmental and non-governmental armed forces, in conflicts of both international and non-international character.

More specifically, according to Article 77(2) of Additional Protocol I, applicable in international armed conflicts, 'The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular they shall refrain from recruiting them into their armed forces'. In addition, it provides that in recruiting among those persons who are above fifteen but below eighteen, the Parties to the conflict shall endeavor to give priority to those who are oldest.

The provision that protects children from being recruited and used in non-international armed conflicts is contained in Article 4(3)(c) of Additional Protocol II which states that: 'Children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities'. This provision establishes the principle of non-recruitment and prohibits acceptance of voluntary enlistment as well.

### **III. International criminal law and current proceedings before international tribunals**

According to the most crucial international humanitarian law treaties, the State Parties are obliged to enact criminal legislation to punish the individuals responsible for violation of their provisions. These instruments frequently require States Parties to bring alleged offenders before their own courts or to hand them over for a trial in another country, which, in a given situation, has jurisdiction over them. For example, State Parties to the four Geneva Conventions and Protocol Additional I therefore must enact law to repress the most serious violations of these instruments (those which are defined as grave breaches). Additionally, the State Parties must suppress all violations. This obligation does not require criminal legislation to be adopted but leaves it to States to adopt legislative, administrative or disciplinary measures as necessary<sup>35</sup>. Another example – a State bound by the Optional

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<sup>33</sup> Mainly under the *Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War* of 12 August 1949.

<sup>34</sup> *Declaration on the Protection of Women and Children in Emergency and Armed Conflicts*, proclaimed by General Assembly resolution 3318(XXIX) of 14 December 1974, Article 4.

<sup>35</sup> Segall Anna, *Punishing Violation of International Humanitarian Law at the National Level. A Guide for Common Law States* (International Committee of the Red Cross, Geneva, 2001), 30 ff.

Protocol to the Convention on the Rights of Child should take legislative measures prohibiting and punishing recruitment of children under the age of eighteen<sup>36</sup>.

But in such a case that involves recruitment of child soldiers, the situation is much more complicated. First of all, children are often recruited by non-state actors – which obviously are not bound by international agreements. Furthermore, most countries where children are engaged as child soldiers have internal problems on a wide scale; sometimes the government is too weak to undertake any actions to punish violators of international law or is even unwilling to take steps in this direction. It is rather exceptional that the country's government itself asks for the establishment of an international body and thus provides its respect for international humanitarian law<sup>37</sup>. For that reason, the international community must play an active role in punishing violators of international law.

Following the establishment of the first international court for the former Yugoslavia, the next tribunals have been created for states where armed conflicts have taken place. Finally, the adoption of the Statute of the ICC showed that many countries want to ensure that prosecution is possible for the most serious violations of international law – the crime of genocide, crimes against humanity and war crimes.

### 1. The International Criminal Court

International Criminal Court Statute<sup>38</sup> adopted in Rome on 17 July 1998 constitutes a permanent court to try individuals charged with committing war crimes, crimes against humanity, crime of aggression and genocide. According to the principle of complementarity, the Court has jurisdiction in cases where a State is unable or unwilling to prosecute.

Article 8 of the Statute enumerates acts recognized as war crimes within the Court's jurisdiction. It includes some "child-specific" crimes, which, by definition, can only be committed against children. One of them is conscripting and enlisting them into armed forces or other armed groups, as well as the active involvement of children below the age of fifteen in hostilities<sup>39</sup>. It is also worth noting that the Statute of the ICC is the first international treaty where the recruitment of children is recognized as war crime.

It should be mentioned that the general regulation concerning the definition of a war crime affects by some means the provision on the prohibition of the recruitment of child soldiers. War crimes, to be prosecuted by the ICC, must meet the specific gravity threshold, which indicates that 'The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes'<sup>40</sup>. Despite of this, one cannot agree with the strict opinion of Valentine that 'The limited scope of this crime is unlikely to have any notable deterrent effect on military

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<sup>36</sup> *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children into Armed Conflict*, Article 6(1).

<sup>37</sup> Such a situation had a place in Sierra Leone. In 2000 President of Sierra Leone, Ahmad Tejan Kabbah wrote to Secretary-General of the United Nations Kofi Annan, requesting a court 'to try and bring to credible justice those who committed war crimes during civil conflict'.

<sup>38</sup> *The Statute of the International Criminal Court* adopted in Rome, on 17 July 1998 (U.N. Doc. A/CONF.183/9). As on 1 November 2006, 103 countries are State Parties to the ICC Statute. On 1<sup>st</sup> of November 2006, Chad deposited its instrument of ratification to the Rome Statute. The Statute will enter into force for Chad on 1<sup>st</sup> of January 2007, what will bring the total number of States Parties to 104.

<sup>39</sup> *The Statute of the ICC*, Article 8, para. 2b [xxvi] and Article 8, para. 2e [vii].

<sup>40</sup> *The Statute of the ICC*, Article 8 para. 1.

groups, many of whom will continue to abduct or otherwise forcibly recruit children into their ranks'<sup>41</sup>. On the contrary, there is a visible progress in the protection of children. The outstanding confirmation of it is the first trial before the ICC, with charges based solely on the crimes mentioned in Article 8 para. 2e [vii] of the Rome Statute.

The first person in the history of the ICC that has been formally charged by the Prosecutor of the Court is Thomas Lubanga Dyilo, a former leader of the militia group at war in the Democratic Republic of Congo. As the charges against him have already been confirmed, Lubanga's case will be not only the first trial before the ICC but also the first time that an individual has been brought before an international court on account of war crimes solely on the basis of enlisting and conscripting children under the age of fifteen and using them to participate actively in hostilities<sup>42</sup>. Thomas Lubanga Dyilo is the President of the Union des Patriotes Congolais and was Commander-in-Chief of its military wing, the Forces Patriotiques pour la Liberation du Congo (hereafter referred to as: FPLC). It is established that FPLC commanders systematically abducted boys and girls and forcibly incorporated them into the ranks of the FPLC. Child recruitment was so widespread, that observers described the fighting forces as "armies of children". It is alleged that Lubanga played an overall coordinating role in the FPLC policy to recruit and enlist and conscript child soldiers systematically, in large number, and that he provided the organizational, infrastructural and logical framework for its implementation.

On the current stage of procedure, the Pre-Trial Chamber of the Court has decided that there is sufficient evidence that Mr. Lubanga is criminally responsible as co-perpetrator for the war crimes of enlisting and conscripting children under the age of fifteen years into the FPLC and using them to participate actively in hostilities in Ituri from September 2002 to 13th August 2003. The Chamber noted that there were substantial grounds to believe that after its creation, the FPLC allegedly recruited children in a systematic manner and on a huge scale. It is said that after military training, the children were forced to participate actively in military operations and were used as bodyguards. Furthermore, it has been established that Lubanga Dyilo held an important role as a coordinator of these activities. As the charges have been confirmed, the Presidency of the Court is about to constitute a Trial Chamber responsible for subsequent hearings<sup>43</sup>. In other words, the case is proceeding to trial – the first trial before the ICC. One must agree with the opinion of the Chief Prosecutor of the ICC, Luis Moreno Ocampo who underlined that: 'Regardless of the outcome of the proceedings, this case represents a huge step in the struggle against these serious crimes against children. Child conscription destroys the lives and future of thousands of children around the world'<sup>44</sup>. Certainly, this case will contribute to expose the problem and to prevent such criminal practices.

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<sup>41</sup> Valentine Sandrine, 'Trafficking of Child Soldiers: Expanding the United Nations Convention on the Rights of the Child and its Optional Protocol on the Involvement of Children in Armed Conflicts', 9 *New England International and Comparative Law Annual* [2003] 109, 114.

<sup>42</sup> *Child soldiers charges in the first International Criminal Court case*, the Hague, 28 August 2006; ICC-OTP-20060828-157-En, <http://www.icc-cpi.int/press/pressreleases>, assessed on: 14/04/2007.

<sup>43</sup> *Pre-Trial Chamber I commits Thomas Lubanga Dyilo for trial*, the Hague, 29 January 2007, ICC-CPI-20061109-179-En, <http://www.icc-cpi.int/press/pressreleases>, assessed on: 14/04/2007.

<sup>44</sup> *Child soldiers charges in the first International Criminal Court case*, the Hague, 28 August 2006; ICC-OTP-20070129-196-En, found on: <http://www.icc-cpi.int/press/pressreleases>, assessed on: 14/04/2007.

## 2. The Special Court for Sierra Leone

The Special Court for Sierra Leone (hereafter referred to as: SCSL) was established by the Agreement between the United Nations and the Government of Sierra Leone pursuant to the Security Council Resolution 1315 (2000) of 14th August 2000. The Court has the power to prosecute persons who bear the great responsibility for serious violations of international humanitarian law committed in the territory of Sierra Leone since 1996. According to its Statute, jurisdiction *ratione materiae* of the Court comprises crimes against humanity, violations of Article 3 common to the Geneva Convention and of Additional Protocol II and other serious violations of international humanitarian law as well as some crimes under Sierra Leonean law<sup>45</sup>. Among the last category is placed 'Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities' (art. 4 of the SCSL Statute). Furthermore, the Court can try individuals who were between fifteen and eighteen years old when the alleged acts were committed. However, it should be noticed that such persons surely would not be indicated as it is difficult to believe that they bear the greatest responsibility.

The Appeal Chamber of the Special Court held in the "Hinga Norman Child Recruitment Decision" of May 2004 that the recruitment of child soldiers, namely the conscription, enlistment and use to participate actively in hostilities creates a crime under customary international law attracting individual criminal responsibility since at least November 1996 when jurisdiction *ratione temporae* of the Special Court was started<sup>46</sup>. Decisions undertaken by the SCSR in relation to child soldiering are described by Smith in terms of 'a milestone in the enforcement of the crime of child recruitment'<sup>47</sup>, as for the first time such a criminal act has been charged before an international court or tribunal<sup>48</sup>.

The special characteristic of the civil conflict that existed within Sierra Leone between 1996 and 2002 was the presence of children, especially young boys, under the age of fifteen in the ranks of the armed factions, as the Civil Defense Forces (CDF), the Revolutionary United Front (RUF), the Armed Forces Revolutionary Council (AFRC), the AFRC Junta or alliance and Liberian fighters. Those children were recruited and forced to participate actively in hostilities. As it is estimated, more than 7000 young boys and girls took part in the fighting. In most cases, they had been seized from their families and were unable to escape from their captors. These children were often given military training and were taught to handle and fire weapons, to lay ambushes and evade detection. Furthermore, the involvement of child soldiers during the conflict was so prevailing that some units were specifically designated for young boys (like Small Boys Unit).

The Special Court has indicted thirteen people from all warring factions in Sierra Leone for different crimes under its jurisdiction (and in each of the indictments the use of child soldiers is involved). For example, 11-count indictment against the former president of the

<sup>45</sup> *The Statute of the Special Court for Sierra Leone*, Articles 1-5.

<sup>46</sup> Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), Hinga Norman (SCSL-2004-14-AR72 (E)), 31 May 2004, found on: [http://www.sc-sl.org/SCSL-04-14-AR72\(E\)-131-7430.pdf](http://www.sc-sl.org/SCSL-04-14-AR72(E)-131-7430.pdf), assessed on: 14/04/2007.

<sup>47</sup> Smith Alison, 'Child Recruitment and the Special Court for Sierra Leone', *Journal of International Criminal Justice* [December 2004], Volume 2, No. 4.

<sup>48</sup> Neither the International Criminal Tribunal for the Former Yugoslavia, nor the International Criminal Tribunal for Rwanda does not even mention that crime in their statutes.

Republic of Liberia, Charles Taylor contains, among crimes against humanity, war crimes and other serious violations of international humanitarian law of which he is accused, also: 'Conscripting or enlisting children under the age of fifteen years into armed force or groups, or using them to participate actively in hostilities'. This crime is described as '[an] other serious violation of international humanitarian law', which is punishable under Article 4(c) of the SCSL Statute. Particularly, Charles Taylor is accused that, 'between about 30 November 1996 and 18 January 2002, throughout the Republic of Sierra Leone, members of RUF, AFRC, AFRC/RUF Junta or alliance and/or Liberian fighters, assisted and encouraged by, acting in concert with, under the direction and/or control of, and/or subordinate to the accused, routinely conscripted, enlisted and/or used boys and girls under the age of fifteen to participate in active hostilities. Many of these children were first abducted, then trained in AFRC and/or RUF camps in various locations throughout the country, and thereafter used as fighters'<sup>49</sup>. Although the tentative date for the start of the trial has been set for 2nd April 2007, this proceeding is just as important as trial before the ICC. It shows more active pursuit of child recruitment cases as well as the end for impunity of recruiters.

#### IV. Concluding remarks

Participation of children in hostilities is a particularly inhuman practice that should come to an end. It entails mortal risk not only for the children but also for many people who are exposed to their unpredictability. Furthermore, it raises a great number of human rights issues. Children are generally mistreated; often being forced to take part in torture or killing of their own relatives. Usually they are more vulnerable to the effects of the armed conflicts. Despite of the wide DDR (demobilization, disarmament and reintegration) programmes, post-conflict reconstruction, reintegration and return into everyday civilian life are extremely difficult to these psychologically traumatized, uneducated children and adolescents which were socialized in violence.

To change the situation of children in armed conflict, it is not sufficient to enact new treaties that prohibit their involvement. The history too often has proven that international legislation is not a barrier for States and other actors to break the rules of law. For that reason, attention should be paid to providing effective means of justice to hold perpetrators accountable.

It is also important to take under consideration a crisis of the state as manifested in civil conflicts, the global arms trade and other factors that play a crucial role in enabling the use of children in armed conflicts. First of all, as a matter of principle, governments should stop transfers of weapons to countries known to use child soldiers. Moreover, attention should be paid to '[...] Education and peace initiatives that are used on contextual rather than idealized basis'<sup>50</sup>. Further progress in the fight against child soldiering depends on strong international condemnation, monitoring and advocacy, assurance of financial and other assistance for demobilization and reintegration. Therefore, a key role is played by these governmental and non-governmental organizations that aim at ending the participation of

<sup>49</sup> Case No. SCSL-2003-0-I: *The Prosecutor against Charles Ghankay Taylor, Amended Indictment*, 16 March 2006, The Special Court for Sierra Leone, found on: <http://www.sc-sl.org/Documents/SCSL-03-01-I-75.pdf>, 6 ff, assessed on: 15/06/2007.

<sup>50</sup> de Berry Jo, 'Child Soldiers and the Convention on the Rights of Child', *The Annals of the American Academy of Political and Social Science*, 575 [May 2001], 103.

children in armed conflicts. It should be noted that joint efforts between the Special Representative of the Secretary-General for Children and Armed Conflicts, UNICEF, States, international and regional organizations, non-governmental organizations and other civil society groups have resulted in significant advances and important effects for children; especially through increased awareness of phenomenon of child soldiering and development of international standards which have been accomplished in this area. But still, what has also been underlined in the Report of the Special Representative of the Secretary-General for Children and Armed Conflict, there is a need for much broader and stronger consensus and actions of all key stakeholders<sup>51</sup> for the enforcement of international protection standards.

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<sup>51</sup> Report of the Special Representative of the Secretary-General for Children and Armed Conflict, 61<sup>st</sup> Session of the General Assembly of the United Nations, *Promotion and Protection of the Rights of Children*, 17 August 2006, A/61/275.