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THESIS

DOES INTERNATIONAL CRIMINAL JUSTICE PROVIDE SUFFICIENT PROTECTION TO GIRLS RECRUITED FOR SEXUAL PURPOSES BY ARMED FORCES AND GROUPS IN THE LIGHT OF INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW?

UNDER THE SUPERVISION OF DR. FABIÁN O. RAIMONDO

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ABSTRACT

Among the children involved in armed conflicts, many of them are girls who have to fulfil multifarious roles. This thesis examines if international criminal justice provides sufficient protection to girls recruited for sexual purposes by armed forces or groups within the framework of international humanitarian law and international human rights law. After comparing the main protections accorded to these girls by the Rome Statute establishing the International Criminal Court, the Additional Protocols to the Geneva Conventions and the Convention on the Right of the Child and its Optional Protocol on the involvement of children in armed conflict, the main advantages and drawbacks of the current legal landscape are analysed. It is concluded that the text of the Rome Statute could be usefully improved by these instruments. The Optional Protocol could provide a basis of reflexion to raise the age-limit mentioned in the Rome Statute from fifteen to eighteen years. As for the Additional Protocol II and the Optional Protocol, by prohibiting indirect participation, they could provide the ground for considering a more gender-inclusive interpretation of the active participation in hostilities. This would address the issue of girls subject to sexual violence more effectively, reduce the existing legal loophole and allow for more adapted measures to be worked out.

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INTRODUCTION

Exposé of subject

Although it is difficult to get accurate figures for children participating in hostilities, Human Rights Watch estimates that hundreds of thousands of children are implicated in armed conflicts in several regions of the world.[1] Different solutions have been put forward to counteract this phenomenon. On the one hand, child-soldiering offences are constitutive of war crimes under the Rome Statute of the International Criminal Court that entered into force in 2002. On the other hand, the international community has implemented programmes of disarmament, demobilisation and reintegration in order to allow these children to return to their former lives as "normal civilians".[2]

Out of hundreds of thousands of children participating in armed conflicts, it is estimated that thirty to forty percents of them are girls.[3] Although some of them are recruited forcibly, some of them join voluntarily, are used as sex slaves or "bush wives" and are therefore subject to sexual violence.[4] As such, these children are in extreme vulnerable positions and their situation requires special attention and treatment. Indeed this traumatic experience leaves physical and psychological sequelae and affects the girls to the same extent as it affects the other groups of child soldiers. Moreover, girl child soldiers also have to deal with other issues, such as HIV, pregnancy or birth of children as a result of rapes, leading to their rejection by their own community. This in turn may render them dependent on their abductors and jeopardize their reintegration.[5]

Since 2002, the Rome Statute has included in its definition of war crimes "conscripting or enlisting children under the age of 15 years into national armed forces or using them

[1] Official website of Human Rights Watch, Facts about child soldiers, 3 December 2008, at: http://www.hrw.org/news/2008/12/03/facts-about-child-soldiers, (consulted on 10 July 2013).
[2] UNITED NATIONS (2010).
[3] BOSCH, EASTHORPE (2012), p. 5.
[4] THE UNITED NATIONS CHILDREN'S FUND (2003), p. 3.
[5] GALLAGHER (2010-2011), p. 133.

to participate actively in hostilities"[6] in cases of international armed conflicts; and "conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities"[7] in the case of an internal armed conflict.

Including girls subject to sexual violence in the context of their recruitment in child-soldiering offences is important not only for the purposes of convicting the perpetrators but also to provide reparation. This would allow these girls to benefit from plans of reintegration and ensures that they will not be bypassed by the programmes of disarmament, demobilisation and reintegration. Indeed, some authors argue that a decision from the International Criminal Court stating that girls recruited for sexual purposes are still child soldiers, would prevent certain armed groups from using their role as an excuse to exclude them from programmes of disarmament, demobilisation and reintegration.[8] Therefore, including these girls in the concept of child soldiers could permit them to benefit from the provisions applicable to child soldiers.

Concerning the International Criminal Court, it is not definitely set whether sexual violence inflicted on girl child soldiers is indeed considered a child-soldiering offence under Article 8 (2)(b)(xxvi) and 8(2)(e)(vii) of the Rome Statute.

In March 2012, the *Prosecutor v. Thomas Lubanga Dyilo* trial judgement of the International Criminal Court gave an extensive interpretation of the concept of active participation in hostilities including not only children participating directly in hostilities as combatants but also children acting as support if this "support provided by the child to the combatants exposed him or her to real danger as a potential target".[9] According to some authors, the jurisprudence of the court indicates that sexual violence on girl child soldiers cannot be regarded as a form of use in hostilities,[10] however, this view is subject to controversy.

[6] Article 8(2)(b)(xxvi) of the Rome Statute.
[7] Article 8(2)(e)(vii) of the Rome Statute.
[8] GALLAGHER (2010-2011), p. 135.
[9] Lubanga Case, Trial Judgment, 14 March 2012, § 628.
[10] JORGENSEN (2012), p. 682 - 683.

The Court also declared that conscripting, enlisting and using children under 15 years to participate actively in hostilities are three different offences, which can be committed separately.[11] This means that the recruitment of children, either forced or voluntary, does not have to be committed for the purpose of making children participate actively in hostilities. Therefore, according to some authors, sexual violence inflicted on girls in the context of recruitment may constitute a war crime on the basis of conscription or enlistment of children.[12]

Therefore, after the first decision of the International Criminal Court in the case of the *Prosecutor v. Thomas Lubanga Dyilo,* two small legal apertures were opened to let girls recruited by armed forces or groups for sexual purposes be incorporated into the concept of "child soldiers" in regard to the Rome Statute. This could lead towards a gender-inclusive definition of the concept of child soldiers. However, since the Prosecutor decided not to charge sexual violence committed on girls under fifteen as separate counts of conscription and of use for participation in hostilities, the chamber considered sexual violence irrelevant,[13] leaving thus the question open.

Consequently, the present thesis intends to analyse both elements of the incrimination of child-soldiering offences, namely the recruitment on the one side and the use to participate actively in hostilities on the other, while mapping their main advantages and drawbacks from a gender-inclusive perspective. It will therefore examine the relevant provisions of the Rome Statute and try to determine whether they provide appropriate protection to female child soldiers subject to sexual violence in the light of international human rights law and international humanitarian law.

As an example, even if hypothetically sexual violence inflicted on girl child soldiers may constitute a war crime on the basis of recruitment of children or a form of use in hostilities, the Rome Statute does not cover the situation of girls older than 15 years. Thus, if a female child soldier aged 15, 16 or 17 suffers the exact same treatment as a young girl of 14-years-old girl, this would not constitute a child-soldiering offence

[11] Lubanga Case, Trial Judgment, 14 March 2012, § 609.
[12] JORGENSEN (2012), p. 682 – 685.
[13] AMANN (2012), p. 812, 815; GROVER (2013), p. 206 – 207.

in the sense of Article 8 (2)(b)(xxvi) and 8(2)(e)(vii) of the Rome Statute.

CONTEXT AND ISSUES AT STAKE

The main area of concern to be addressed is whether international criminal justice provides sufficient protection to girls recruited for sexual purposes by armed forces and groups in the light of international humanitarian law and international human rights law, especially to female child soldiers older than 15 years and younger than 18 years?

READER'S GUIDE

The first chapter describes the concrete situation experienced by girl soldiers recruited for sexual purposes, highlighting the main issues related to their particular conditions.

The second chapter analyses what degree of protection international law may offer these girls. It focuses mainly on two branches of international law, namely international humanitarian law and international human rights law, and analyses two relevant legal instruments, namely the Geneva Conventions and their Protocols, and the Convention on the Rights of the Child and its Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts.

The third chapter examines how sexual violence inflicted on girl child soldiers in the process of recruitment is considered by the International Criminal Court legal instruments and jurisprudence, and focuses on rhz particular situation of 15-to-18-years-olds. For the purpose of the analysis of the jurisprudence of the Court, the emphasis is put on the case of *the Prosecutor v. Thomas Lubanga Dyilo* in the situation of the Democratic Republic of the Congo, which is the first case of sentencing by the Court in general and more particular about child-soldiering offences.

A fourth chapter analyses the current position adopted by the International Criminal Court in the light of the current international humanitarian law and international human rights law. For this purpose, a comparison will be made between the approach adopted by the International Criminal Court concerning sexual violence inflicted on girl child soldiers on the one hand and, on the other hand, the child soldier phenomenon as

considered in the above-mentioned international instruments, namely, the Geneva Conventions and their Additional Protocols, and the Convention on the Rights of the Child and its Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts. On the basis of this comparison, the rationale of the current system will be discussed, as well as its positive and negative aspects. Finally, potential solutions will be considered.

GLOSSARY

For the purpose of this thesis, the term child soldier will be understood as *"*any person below 18 years of age who is, or who has been, recruited or used by an armed force or armed group in any capacity, including but not limited to children, boys and girls, used as fighters, cooks, porters, spies or for sexual purposes. It does not only refer to a child who is taking, or has taken, a direct part in hostilities*".*[14]

[14] Paris Principles and guidelines on children associated with armed forces or armed groups, UNICEF, February 2007.

CHAPTER 1: GIRL SOLDIERS VICTIMS OF SEXUAL VIOLENCE – A WIDESPREAD ACTUAL REALITY

This chapter explores the circumstances and the main issues encountered by the girl soldiers recruited for sexual purposes by armed forces or groups, a picture of their particular situation is described in this chapter. For the purpose of this presentation, it focuses on the context of their recruitment on the many roles that they have to perform within the armed forces and groups and on the unique consequences related to the painful experience they endure as sex slaves. Furthermore, the tools adopted by the international community in order to face this phenomenon are detailed, from the elaboration of international legal instruments and the creation of concrete programmes of reintegration to the establishment of an international criminal justice.

1. SEXUAL VIOLENCE INFLICTED ON GIRLS RECRUITED BY ARMED FORCES OR GROUPS: FACTUAL CONTEXT

According to some reports, thousands of children from seven to eighteen years are recruited and used for many purposes in hostilities in many regions of the world suffering therefore of human rights abuses.[15] This widespread phenomenon has increased over the last decade,[16] drawing thus the international community attention.[17]

[15] THE UNITED NATIONS CHILDREN'S FUND (2003), p. 3.
[16] According to some authors, the use of children as combatants is not a new phenomenon, which already occurred for instance during the period of the Crusades, or during the Second World War. However, it increased due to the proliferation of cheap and light weapons, which may be easily used by children. See PARK (2006), p. 320; MAZURANA, MCKAY (2001), p. 32.
[17] Despite the fact that this phenomenon is not new, according to some authors it became "the rule, rather than the rarity". See SINGER (2005 (a)). The main regions of the world that are currently concerned may be found on the official website of the Special Representative of the Secretary General for children and armed conflict. See http://childrenandarmedconflict.un.org/map/ (consulted on 15 June 2013); HARTJEN, PRIYADARSHINI (2012), p. 108.

Most of the children involved in armed conflicts are recruited or used by non-state armed groups.[18] For instance, regarding the situation in the Democratic Republic of the Congo (DRC), forty percent of the rebel troops commanded by the UPC (*l'Union des Patriotes congolais*) President Thomas Lubanga were children younger than eighteen.[19] However, states-actors may also involve children in armed conflicts. As an example, the United Kingdom may legally enlist young people of sixteen years for a three to five-year period in the military.[20] The main reasons explaining the presence of such young persons among armed forces or groups ranks are their ability to manipulate light and cheap weapons, their resilience and their-easy-to-control condition.[21]

Contrary to what may be expected, child soldiers are not exclusively young boys holding weapons in the middle of the bush. Indeed, it is estimated that approximately thirty to forty percent of the children recruited by armed groups are girls, many of them remaining unaccounted for.[22] Furthermore, reports reveal that sexual exploitation of these girls by armed groups occurs in many different countries, which makes it a widespread phenomenon.[23] In the majority of these states, long-term conflicts have been raging.[24] Thus, there is a clear link between armed conflicts and sexual exploitation of child soldiers.[25]

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[18] HUGHES (2000), p 401; BOSCH, EASTHORPE (2012), p. 5.
[19] HUMAN RIGHTS WATCH (2003), p. 46.
[20] COALITION TO STOP THE USE OF CHILD SOLDIERS, (2008), p. 354 – 357 ; HARTJEN, PRIYADARSHINI (2012), p. 107.
[21] HUGHES (2000), pp. 399 - 405.
[22] BOSCH, EASTHORPE (2012), p. 5; HARTJEN, PRIYADARSHINI (2012), p. 105; PARK (2006), p. 321.
[23] From 1990 to 2001, it has been estimated that sexual exploitation of girl child soldiers occurred in seventeen countries, which are Afghanistan, Angola, Burundi, Canada, Cambodia, Colombia, Democratic Republic of Congo, Honduras, Liberia, Mozambique, Myanmar, Peru, Rwanda, Sierra Leone, Uganda, UK, USA. Out of these seventeen states, fourteen were in a situation of long-term conflict. ALFREDSON (2001), p. , *Lisa Alfredson,* Sexual Exploitation of Child Soldiers: An Exploration and Analysis of Global Dimensions and Trends, 2001, available at: http://reliefweb.int/report/world/sexual-exploitation-child-soldiers-exploration-and-analysis-global-dimensions-and, p. 2. ; MAZURANA, MCKAY (2001), p. 33 ; HARTJEN, PRIYADARSHINI (2012), p. 103 – 104.
[24] ALFREDSON (2001), p. , *Lisa Alfredson,* Sexual Exploitation of Child Soldiers: An Exploration and Analysis of Global Dimensions and Trends, 2001, available at : http://reliefweb.int/report/world/sexual-exploitation-child-soldiers-exploration-and-analysis-global-dimensions-and, p. 3.
[25] ALFREDSON (2001), p. 3.

It must be noted that sexual violence inflicted on child soldiers is not a phenomenon that targets only girls; boys are also concerned.[26] Not only are boys potential victims of sexual violence, but they may also be forced to commit or to witness such acts.[27] However, in the majority of the cases, girls are the main victims of these treatments.[28]

1.1. THE RECRUITMENT OF THE GIRL SOLDIERS

One may wonder how such young persons may be part of armed groups. In many cases, some children join them on a voluntary basis in order to secure themselves food, medical supplies and protection or on the request of their families.[29] On the contrary, many other children are forcibly recruited.[30] Nevertheless, children volunteering may not be less victimized than the conscripted children. Indeed, poverty may be one of the reasons that induced them to join armed groups.[31] Therefore the economic, social, political and cultural conditions play an important role in the decision made by these children.[32] This is the reason why some authors consider that in situations of armed conflicts, voluntary recruitment does not really exist because children do not have many other alternatives.[33]

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[26] MAZURANA, MCKAY (2001), p. 33; PARK (2006), p. 321; Radhika Coomaraswamy, Afghanistan: child soldiers and dancing boys, 2 August 2011, Official website of the Huffington Post, 2 August 2011 at: http://www.huffingtonpost.com/radhika-coomaraswamy/afghanistan-child-soldier_b_820459.html (consulted on 10 July 2013).
ALFREDSON (2001), p. 3.
[27] ALFREDSON (2001), p. 3.
[28] ALFREDSON (2001), p. 3.
[29] THE UNITED NATIONS CHILDREN'S FUND (2003), p. 3. ; Lubanga Case, Trial Judgment, 14 March 2012, § 611; HUMAN RIGHTS WATCH (2003), p. 47; PARK (2006), p. 319.
[30] MAZURANA, MCKAY (2001), p. 32. HUMAN RIGHTS WATCH (2003), p. 47; HARTJEN, PRIYADARSHINI (2012), p. 108 - 109.
[31] THE UNITED NATIONS CHILDREN'S FUND (2003), p. 3.
[32], 2000, p. 9; BOSCH, EASTHORPE (2012), p. 5.
[33] This perspective is shared by the International Criminal Court, which considers that children younger than fifteen are unable to give genuine and informed consent to recruitment in such a context. This is the reason why rather than the children involved in armed conflict, the Court considers that the one responsible are the organisations that support and allow the children to participate directly or indirectly in hostilities. See Lubanga Case, Trial Judgment, 14 March 2012, § 613; *Lubanga* (ICC-01/04-01/06), Written Submission of the United Nations Special representative of the Secretary-General on Children and Armed Conflict Submitted in application of Rule 103 of the Rules of Procedure and Evidence, ICC-04/04-01/06-1229-AnxA, §10, 14; CROOMARASWAMY (2010), p. 536 ; HARTJEN, PRIYADARSHINI (2012), pp. 97, 115 ; BOSCH, EASTHORPE (2012).
However, everyone does not adopt this vision of the problem. Thus some other authors consider on the contrary that in some cases the engagement of children in armed conflict is actually based on a rationale

In some reports, sexual violence is presented as a method of recruitment considering that it is a recurring element in the process of recruitment.[34] The Women's Initiative for Gender Justice advocates the position "that rape and other forms of sexual violence are an integral component of the process of enlistment and conscription for girls, particularly during the initial abduction phase and period of military training by the UPC".[35] This underlies the fact that sexual violence would be intrinsically related to the recruitment in the case of girl soldiers. Indeed, Garca Machel highlighted that "nearly all girls abducted into armed groups are forced into sexual slavery".[36] Moreover, even girls joining armed groups voluntarily are subject to sexual abuses.[37] Consequently, sexual violence against girls being part of the process of recruitment, their recruitment is therefore included in the incrimination of the voluntary or forcible recruitment of children younger than fifteen set in the Rome Statute, as will be developed in the third chapter.

1.2. ROLES OF THE GIRL SOLDIERS

Once children are recruited in armed groups, they perform multiple functions.[38] Some of these boys and girls are combatants and take direct part in hostilities, but many others are used for sexual purposes, or as cooks, porters or spies.[39] As mentioned above, besides the daily tasks that they have to fulfil, girls are subject to sexual violence, they are gang-raped or forced to become the wife of a member of the armed forces and groups, or used as sex slaves, and are supposed to bring them "comfort".[40] Given that

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choice. See PARK (2006), p. 330 about Paul Richards, *Fighting for the Rain Forest: War, Youth & Resources in Sierra Leone,* 1996/2002.
[34] ALFREDSON (2001), p. 4; PARK (2006), pp. 321, 323.
[35] The Women's Initiatives for Gender Justice, ICC Women's Voices, E-letter March 2010 at: http://www.iccwomen.org/Womens-Voices-3-10/WomVoices3-10.html#5 (consulted on 10 July 2013).
[36] MACHEL REVIEW 1996-2000, A/55/749, p. 9.
[37] ALFREDSON (2001), p. 4.
[38] THE UNITED NATIONS CHILDREN'S FUND (2003), p. 3.
[39] THE UNITED NATIONS CHILDREN'S FUND (2003), p. 3.
[40] THE UNITED NATIONS CHILDREN'S FUND (2003), p. 3.

they have to perform different functions and to endure sexual abuses, the damage seems to be even deeper in their case.[41]

There are different categories of girls recruited by armed forces or groups depending on the tasks that are assigned to them. Firstly, many girls victims of sexual violence also participate directly in hostilities by combating on the battlefield.[42] Despite the fact that these girls are primarily combatants and are less likely to be subject to sexual violence, such acts are still perpetrated.[43] Secondly, another category of girls perform the role of sex slaves and provide another type of support such as spying, participating in abductions, cooking or looting, which is generally the main source of food for the armed groups.[44] Therefore, even if they do not take part directly in hostilities, they contribute significantly to the survival of the armed groups as fundamental support,[45] which also entails major risks.[46]

In such a context, the clear division between armed groups on the one hand and civilians on the other is blurred. It is difficult to determine the status of these girls, in particular in the case of the second category of girls who have support functions. Indeed, they provide essential help to the armed groups; but is it enough to define them as child soldiers in the sense of the Rome Statute? On this point, some answers will be found below in the chapter dealing with the legal instruments and the jurisprudence of the International Criminal Court.

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[41] Some studies have revealed that during their period of recovery and reintegration, former girl soldiers are more depressed than boys. See BETANCOURT, BORISOVA, DE LA SOUDIÈRE, Williamson (2011); JORDONS, ET AL. (2000), 691-702; WESSELLS (2006) ; HARTJEN, PRIYADARSHINI (2012), p. 111.
[42] This is for example the case for the girls child soldiers that are part of the Revolutionary Armed Forces of Colombia (FARC). ALFREDSON (2001), p. 5; PARK (2006), p. 321.
[43] ALFREDSON (2001), p. 6.
[44] *Lubanga* (ICC-01/04-01/06), Written Submission of the United Nations Special representative of the Secretary-General on Children and Armed Conflict Submitted in application of Rule 103 of the Rules of Procedure and Evidence, ICC-04/04-01/06-1229-AnxA, §22 ; COSTACHE, p. 2 ; ALFREDSON (2001), p. 5.
[45] PARK (2006), p. 324.
[46] Official website of the United Nations Office of the Special Representative of the Secretary-General for Children and Armed, Child Recruitment, available on http://childrenandarmedconflict.un.org/effects-of-conflict/the-most-grave-violations/child-soldiers/ (consulted on 29 May 2013).

1.3. CONSEQUENCES OF SEXUAL VIOLENCE INFLICTED ON GIRLS RECRUITED BY ARMED FORCES AND GROUPS - UNIQUE SITUATION, UNIQUE NEEDS

Despite the fact that some girls recruited for sexual purposes do not take a direct part in hostilities in the front lines, they are still at risk and have to go through a lot of hardship that boys may be spared from. In that respect, one may say that these girls are in a very unique position due to their gender.[47]

One of the main consequences of sexual abuses inflicted on the girls recruited by armed forces or groups is their rejection by their families because they are regarded as dishonoured.[48] Moreover, their communities may stigmatize them due to their association with rebel groups who may be perceived as murderers.[49] For all these reasons, if they are not married, these girls' marriage prospects are reduced, leaving them completely destitute, which in turn may lead them to prostitution.[50]

Furthermore, their health may be in danger. They are likely to suffer very serious physical and psychological damage but also to develop sexually transmitted diseases such as HIV/AIDS, and face early pregnancies or unsafe or forced abortions.[51] In some cases, they do not receive medical treatment either because none is available or because they fear the consequences of making public the traumatic events they have been through.[52]

Thus, the main consequences of their involvement with armed forces or groups are disastrous not only for them but also for their children born as a result of rape. These girls face a real dilemma: either they return to their community and take the risk of being stigmatized and ostracized, excluded and forced to live in a state of great poverty,

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[47] PARK (2006), p. 322.
[48] HUMAN RIGHTS WATCH (2003), p. 44.
[49] Official website of the Office of the Special Representative of the Secretary-General for children and armed conflict, available at : http://childrenandarmedconflict.un.org/effects-of-conflict/girl-child/, (consulted on 2 May 2013).
[50] HUMAN RIGHTS WATCH (2003), p. 44.
[51] MAZURANA, MCKAY (2001), p. 34 ; PARK (2006), p. 322 ; HUMAN RIGHTS WATCH (2003), p. 46.
[52] HUMAN RIGHTS WATCH (2003), p. 46.

or they stay with the armed forces or groups that recruited them forcibly or voluntarily.[53]

For all these reasons, given that the girls recruited for sexual purposes are in a particular situation, they need to receive particular attention. [54]

2. INTERNATIONAL COMMUNITY RESPONSES TO THE PHENOMENON OF SEXUAL EXPLOITATION OF GIRL SOLDIERS

In order to respond to this widespread phenomenon, the international community has created different instruments. One of them is the development of the international humanitarian law and the human rights law through different treaties aiming at protecting children in the context of armed conflicts.[55] Among the most relevant treaties, one may find the Geneva Conventions and their additional protocols, the Convention on the Rights of the Child and its optional protocol on children involved in armed conflicts.

Another more practical instrument provided by the international community is the programme for demobilization, disarmament and reintegration of children who have been recruited or used in hostilities.[56] However, many of these programmes bypass girl soldiers forced by the armed forces or groups to provide sexual services.[57] One of the reasons is that, in some cases, girls are not recognized as combatants and therefore do not fall within the scope of application of these programmes.[58] For instance, previously, children used to have to turn in a weapon in order to be part of these programmes, which used to exclude all the children recruited by armed forces or groups that did not

[53] MAZURANA, MCKAY (2001), p. 35.
[54] PARK (2006), p. 322.
[55] FOX (2005), p. 29.
[56] UNITED NATIONS (2010).
[57] MAZURANA, MCKAY (2001), p. 31 - 32; THE UNITED NATIONS CHILDREN'S FUND (2003), p. 19; PARK (2006), p. 323.
[58] CANADIAN PEACEBUILDING NETWORK (2008) p. 7.

hold weapons, such as girls recruited for sexual purposes.[59] An additional reason is that these girls are reluctant to present themselves as victims of sexual violence because they fear that, if their situation is exposed they will never be able to marry and will therefore be left destitute.[60]

Another issue is that if these programmes include girl soldiers that have endured sexual violence, they do not adequately meet their needs due to the complex situation in which they are.[61] In some cases, the girls are forcibly married to a member of the armed forces or groups and become "bush wives", if a child is born from that relationship, they may prefer to stay with the father or their "husband", which may prevent them from leaving.[62] Therefore, it is essential to address sexual violence at all stages of the programmes aiming at reintegrating the child into a "normal" life.

Finally, the international community offers a further tool, namely an international criminal justice to pursue the perpetrators of such crimes. One of the main instances competent in this respect is the International Criminal Court, which has currently jurisdiction over cases of crimes of genocide,[63] crimes against humanity[64] and war crimes,[65] as will be examined below.

The International Criminal Court plays a major part, given that it is not only an instrument of enforcement of the legal incrimination of child-soldiering offences by

[59] This is the reason why the United Nations *Integrated Disarmament, Demobilisation and Reintegration Standards* proposed a wider definition of the beneficiaries of these programmes. See BASTICK, GRIMM, KUNZ (2007), p. 182 - 183.
[60] Jane Morse, Reintegration Often Tougher for Girl Child Soldiers, Official website of the American government, 08 May 2008, at: http://www.america.gov/st/hr-english/2008/May/20080508144836ajesrom0.4115412.html?CP.rss=true, (consulted on 10 July 2013).
[61] CANADIAN PEACEBUILDING NETWORK (2008) p. 7; PARK (2006), p. 323.
[62] The Independent, Watch Unicef negotiate the release of a child soldier, 30 December 2012 at: http://www.youtube.com/watch?v=nBbanMr2OaE (consulted on 10 July 2013)
; Official website of the American government, Jane Morse, Reintegration Often Tougher for Girl Child Soldiers, available on : http://www.america.gov/st/hr-english/2008/May/20080508144836ajesrom0.4115412.html?CP.rss=true, (consulted on 2 May 2013).
[63] Article 6 of the Statute of Rome.
[64] Article 7 of the Statute of Rome.
[65] Article 8 of the Statute of Rome.

prosecuting the persons responsible for these acts,[66] but also by leading to a more gender-sensitive approach during programmes of disarmament, demobilisation and reintegration.

Indeed, it may be considered that, by including girls victims of sexual violence in the context of their recruitment into the category of child soldiers, the International Criminal Court would provide them with the visibility that they have been denied until then and would prevent certain armed groups from using their role as a reason to exclude them from the programmes of disarmament, demobilisation and reintegration.[67]. Therefore, one may consider that by deeming these girls to be child soldiers, the Court could permit them to benefit from the programmes applicable to child soldiers.[68]

[66] PARK (2010), p. 335.
[67] GALLAGHER (2010-2011), p. 135.
[68] However, regarding that aspect some authors disagree and consider that child-soldiering offences and their incrimination should not be mixed with the child-soldiering phenomenon and the concrete solutions brought by the international community to respond it given that they do not have the same purpose. See JORGENSEN (2012), p. 681.

CHAPTER 2: GIRL SOLDIERS – THE PROTECTION GRANTED BY INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS LAW

This chapter analyses the degree of protection offered by international humanitarian law and international human rights to the girls recruited by armed forces or groups for sexual purposes. Due to the high rate of ratification conferring them a practically universally binding status, the relevant legal instruments examined are firstly the Geneva Conventions and their Additional Protocols and secondly the Convention on the Rights of the Child and its Optional Protocol on the involvement of children in armed conflicts. Girl soldiers may partly find protection through these two main branches of international law, which complement each other.[69]

Different elements are relevant in order to assess the level of protection granted by these legal instruments to the girls recruited as sex slaves by armed forces or groups. Thus, for each legal instrument, the focus will be put on the treaty language, the nature of the prohibited participation in hostilities - that is to say, either direct or indirect - the character of the recruitment forbidden - which is either forcible or voluntary - the age-limit for participation and recruitment, the existence of specific provisions related to sexual violence committed in that context, and the difficulties related to the enforcement of these rules.[70]

1. INTERNATIONAL HUMANITARIAN LAW: THE GENEVA CONVENTIONS AND THEIR ADDITIONAL PROTOCOLS

The Geneva Conventions adopted in 1949 offer civilians, including children, overall protection during hostilities.[71] This is the case of Article 3, which is common to the four

[69] International humanitarian law may apply to many different actors contrary to international human rights law, which applies only to states. FOX (2005), p. 30.
[70] PARK (2010), p. 331.
[71] Geneva Conventions: Convention (I for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field. Geneva, 12 August 1949; Convention (II) for the Amelioration of the

Geneva Conventions and which provides fundamental guarantees, such as the right to life and the prohibition of cruel treatment and torture. These conventions have a great importance due to their state of ratification, which renders them universally applicable.[72] Yet, the Geneva Conventions do not specifically mention the participation of children in armed conflicts.[73]

Thus, it was necessary to wait until the adoption of the Additional Protocols to the Geneva Conventions in 1977 to find a legal basis aiming explicitely at children participating in hostilities.[74] Though, many gaps remain in the protection granted by these instruments to child soldiers in general and to girls recruited as sex slaves in particular.[75]

The applicable provisions differ depending on the type of armed conflict at stake, the relevant rules concerning international armed conflicts being less strict than rules applicable in situations of non-international armed conflicts. In so doing, the Additional Protocols make an apparent distinction between regular armed forces and irregular armed forces.

1.1. RULES APPLICABLE DURING INTERNATIONAL ARMED CONFLICTS

Article 77 of the Additional Protocol I sets that states parties "shall take *all feasible measures* in order that children who have not attained the age of *fifteen* years do not

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Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Geneva, 12 August 1949 ; Convention (III) relative to the treatment of Prisoners of War. Geneva, 12 August 1949 ; Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, 74 U.N.T.S. 31.

[72] 194 states have ratified the Geneva Conventions making them universal. See the official website of the International Committee of the Red Cross, http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=375&ps=P (consulted on 1 July 2013) for the ratifications to the Geneva Conventions, http://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=470 (consulted on 1 July 2013) for the ratifications to the Additional Protocol I and http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=475&ps=P (consulted on 1 July 2013) for the ratifications to the Additional Protocol II.

[73] HUGHES (2000), p. 400.

[74] FOX (2005), p. 32

[75] See annexes for a summary table showing the main features of the Additional Protocols and the protection that they grant to girl soldiers.

take a *direct part* in hostilities and, in particular, they shall refrain from *recruiting* them into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, the Parties to the conflict shall endeavour to *give priority to those who are oldest*."[76]

1.1.1. PROHIBITION ON DIRECT PARTICIPATION IN HOSTILITIES

Thus, the Additional Protocol I forbids "direct participation" of children younger than fifteen in hostilities in cases of international armed conflicts. Three main remarks should be made about this part of the provision.

Firstly, the wordings "all feasible measures" underlie that States parties do not commit themselves to realising unconditional obligations.[77] The States have to do everything practically possible to prevent children under fifteen from taking part directly in hostilities.[78] Given that they are only subject to an obligation of means rather than an obligation of results, they only have to prove that they tried to do everything in their power to achieve their goal. However, the fact that they failed to reach such an objective is not in itself sufficient to consider that they did not respect the Additional Protocol I.[79] Therefore, one may consider that such wording leaves a lot of discretion to military leaders.[80]

Secondly, given that only "direct participation" in hostilities is prohibited by this instrument, "indirect participation" is not forbidden. However, drawing a definite line

[76] Article 77(2) of the Protocol Additional to the Geneva Convention of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), aug. 15, 1977, 1125 U.N.T.S. 3.
[77] INTERNATIONAL COMMITTEE OF THE RED CROSS (1987), p. 900; ROSEN (2009), p. 91; PARK (2010), pp. 332 - 333.
[78] According to the International Committee of the Red Cross the word "feasible" would correspond in the French version to "*pratiquement possible"* which means that States parties may not be requested to do something impossible. INTERNATIONAL COMMITTEE OF THE RED CROSS (1987), p. 681, note 6.
[79] During the negotiations, the ICRC proposed a different wording, namely "all necessary measures" which would have lead to an absolute obligation. However, this proposition was rejected. FOX (2005), p. 35.
[80] HUGHES (2000), p. 401.

between these two concepts is far from easy.[81] As mentioned above, the roles assumed by the girls recruited by armed forces are multifarious,[82] which makes it difficult to decide whether they should be considered as participating directly or indirectly in hostilities. Yet, concerning the specific circumstances of the girls recruited for the purpose of providing sexual services to armed forces of groups, it is likely that they will not be regarded as directly participating in hostilities and will therefore fall into a lawless zone.[83] Consequently, this specific article does not grant any protection to girl soldiers who have supporting roles such as sex slaves or "bush wives".

Thirdly, the age-limit for direct participation is raised to fifteen years. Consequently, all children participating directly in hostilities, from fifteen to seventeen-year-olds, do not enjoy the protection accorded by the Additional Protocol I.[84] In so doing, the States parties prevent many minors who take important risks in participating directly in hostilities from being legally protected.

1.1.2. PROHIBITION ON FORCIBLE RECRUITMENT

Regarding the prohibition on recruitment, some remarks require to be expressed as well. According to some authors, the Additional Protocol I forbids only forcible recruitment of children below the age of fifteen, voluntary recruitment being left aside by this legal instrument.[85] This is regrettable given that, as explained above, if many children join armed forces on a voluntary basis, they do so because of their environment.[86]

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[81] PILLAY (2008), p. 24.

[82] While many girls victims of sexual violence also participate directly in hostilities by combating on the battlefield, many of them mainly provide support to the armed forces or groups such as participating in abductions, cooking or looting. See MAZURANA, MCKAY (2001), p. 33 ; The Women's Initiatives for Gender Justice, DRC: Trial Chamber I Issues first trial Judgement of the ICC – Analysis of sexual violence in the Judgement, Special issue #1 May 2012, at: http://www.iccwomen.org/news/docs/WI-LegalEye5-12-FULL/LegalEye5-12.html (consulted on 10 July 2013).

[83] Girls used for sexual purposes who do not combat on the battlefield do not fulfil the three conditions necessary to be regarded as participating directly in hostilities, namely the threshold of harm, direct causation between the act and the harm and a belligerent nexus. See MELZER (2009), pp. 41 – 68; PILLAY (2008), p. 24.

[84] HUGHES (2000), p. 401.

[85] Indeed, it has been mentioned in the Commentary on the Additional Protocols that "in fact, according to the Rapporteur, Committee III noted that sometimes, especially in occupied territories and in wars of

Furthermore, it must be noted that the Additional Protocol I requests States Parties to "refrain" from recruiting instead of simply prohibiting them from doing so. Therefore, the very concept of prohibition of recruitment may appear as comparatively weak. This is unfortunate since girls recruited for sexual purposes may find some legal safeguard in the wording "recruitment" given that it covers a wider reality than direct participation in hostilities.[87]

1.1.3. AGE

Finally, Article 77 specifies that the age-limit established for forcible recruitment is fifteen years that, when recruiting children older than fifteen and younger than eighteen, a preference should be given to the oldest.[88] Accordingly, girls from fifteen to seventeen recruited by armed forces for sexual purposes will not be protected anymore by the relative protection granted by this provision notwithstanding the fact that they are still in a particular vulnerable position.[89]

1.2. RULES APPLICABLE DURING NON-INTERNATIONAL ARMED CONFLICTS

In comparison to the set of rules presented above, the rules are stricter in situations of non-international armed conflicts.[90] According to Article 4(3)(c) of the Additional

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national liberation, it would not be realistic to totally prohibit voluntary participation of children under fifteen." See IINTERNATIONAL COMMITTEE OF THE RED CROSS (1987), pp. 900 – 901.

[86] BOSCH, EASTHORPE (2012).

[87] According to the article 38 of the International Court of Justice, judicial decisions are subsidiary means for the determination of rules of law. Thus, for all the provisions analysed in this thesis, "participation", "conscription" and "enlistment" will be treated as separate elements due to the interpretation adopted by the Court in the Lubanga case. Indeed, in that case, the Court observed that conscription, enlistment and use of children are three different offences. See Lubanga Case, Trial Judgment, 14 March 2012, § 609. This opionion follows the approach adopted previously by the judge Justice Robertson in the CDF case who considered that they are "three different crimes". See Norman Case, Decision on preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), Dissenting Opinion of Justice Robertson, 31 May 2004, §5.

[88] ROSEN (2009), p. 91.

[89] MAZURANA, MCKAY (2001), p. 34.

[90] The reason behind this stringent provision is the fact that states do not wish to legitimize non-state actors and therefore impose them tougher rules. See PILLAY (2008), p. 25; ROSEN (2009), p. 92.

Protocol II, "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".[91] This provision brings mainly two improvements in comparison to the rules applicable in situations of international armed conflicts.

1.2.1 PROHIBITION OF DIRECT AND INDIRECT PARTICIPATION IN HOSTILITIES

Firstly, in terms of participation in hostilities, any type of participation of children below the age of fifteen is prohibited regardless of its "direct" or "indirect" character. In so doing, the Additional Protocol II broadens the definition of child soldiers and, depending on the interpretation of the terms "indirect participation" adopted,[92] permits therefore to cover the situation of girl soldiers who may be considered as fundamental support to the armed forces or groups but not as directly participating in combat.

1.2.2. PROHIBITION OF RECRUITMENT

Secondly, besides participation in hostilities, both compulsory and voluntary recruitment are proscribed.[93] This is one of the positive aspects of the Additional

[91] Protocol Additional to the Geneva Convention of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol I), Aug. 15, 1977, 1125 U.N.T.S. 609.

[92] In order to interpret the notion of "participation in hostilities", it is necessary to consider the specific commentary of the article 4 (3) (c) of the Additional Protocol II which states that "not only can a child not be recruited, or enlist himself, but furthermore he will not be "allowed to take part in hostilities", i.e., to participate in military operations such as gathering information, transmitting orders, transporting ammunition and foodstuffs, or acts of sabotage". See INTERNATIONAL COMMITTEE OF THE RED CROSS (1987), § 4557. Pursuant to this commentary, it is unclear if the recruitment of girls by armed forces or groups for sexual purposes could be included in the concept of "participation in hostilities". However, given that girls recruited for sexual purposes have many different roles beside being used as sex slaves such as spying, cooking, looting, or abducting other children which are significant supporting functions allowing the armed forces or groups to survive, it may be considered that they are sufficiently involved in armed conflict to be deemed as "participate indirectly" in hostilities. Indeed, the commentary mentions gathering of information and the transportation of foodstuffs as an example, which may be part of the tasks completed by these girls who do not combat on the battlefield. See MAZURANA, MCKAY (2001), p. 33. Furthermore, according to Nils Melzer, while "the concept of 'hostilities' refers to the (collective) resort by the parties to the conflict to means of injuring enemy, 'participation' in hostilities refers to the (individual) involvement of a person on these hostilities". See MELZER, (2009), p. 41. Therefore, taking into account that they contribute significantly as fundamental support to the survival of the armed groups who intend to injure their enemies, which also entail great risks, they may be considered as being sufficiently involved to be participating in hostilities. For another opinion, see QUÉNIVET (2008), p. 233.

[93] INTERNATIONAL COMMITTEE OF THE RED CROSS (1987), §§ 4555 – 4557.

Protocol II because the concept of recruitment embraces more children involved in armed conflicts than the notion of "participation in hostilities". Once again, the Additional Protocol II expands the concept of child soldiers to children that may not participate in hostilities but have been recruited by armed forces and groups. Therefore, the situation of girls recruited by armed forces or groups for the purpose of being used as sex slaves is definitely contained in this article.

1.2.3. FIFTEEN YEARS AS THE AGE-LIMIT

Nevertheless, the age-limit still remains fifteen years, which means that even if girl soldiers may find some protection in the wording of the Additional Protocol II through "indirect participation in hostilities" and "recruitment", once they turn fifteen, sixteen, or seventeen, such protection vanishes.

1.3. IDENTIFYING THE MAIN ACHIEVEMENTS AND CHALLENGES OF THE GENEVA CONVENTIONS AND THEIR ADDITIONAL PROTOCOLS CONCERNING GIRL SOLDIERS

Although these legal instruments draw the first line leading to the forbiddance of the participation and recruitment of child soldiers, different issues remain concerning the specific role of girl soldiers recruited as sex slaves or "bush wives".

1.3.1. IN SITUATIONS OF INTERNATIONAL ARMED CONFLICTS – NATURE OF THE PARTICIPATION AND RECRUITMENT

First of all, in situations of international armed conflicts, the relevant provisions grant the girls recruited for sexual purposes some relatively weak protection. Indeed, the support provided by these girls is not entailed in this provision given that only direct participation is prohibited.[94] In so doing, the Additional Protocol misses one of the

[94] Article 77 (2) Additional Protocol I.

primary purposes of international humanitarian law, namely providing protection, by denying the fact that these children used as support are also in great danger.[95]

However, the girls recruited for sexual purposes may still find some safeguard in the wording "recruitment".[96] however, as noted above, only forcible recruitment is forbidden by this part of the provision, which is quite an issue given that many children are recruited on a voluntary basis.[97] Hence, in situations of international armed conflicts, the girls recruited for sexual exploitation may only partly rely on this part of Additional Protocol I, the protection granted being rather fragile.

1.3.2. IN SITUATIONS OF NON-INTERNATIONAL ARMED CONFLICTS – NATURE OF THE PARTICIPATION AND RECRUITMENT

Conversely, in situations of non-international armed conflicts, the grounds of protection available for girls used as sex slaves are sounder and more appropriate. Firstly, given that the Additional Protocol II proscribes both direct and indirect participation, girls having supporting roles such as sex slaves may rely on the prohibition of indirect participation to comprise their specific position.[98] Secondly, since both forcible and voluntary recruitment are forbidden, girls may also find a source of safeguard in this part of the article. One major advantage is the fact that even voluntaries will be included. Therefore, girls recruited for sexual purposes in situations of non-international armed conflicts can enjoy a deeper protection.

1.3.3. FIFTEEN YEARS AS THE AGE-LIMIT

Nonetheless, a major drawback appears when using these instruments to deal with both situations of international armed conflicts and non-international armed conflicts; indeed, they still permit young people between the age of fifteen and eighteen to be recruited or

[95] FOX (2005), p. 35.
[96] Article 77 (2) Additional Protocol I.
[97] MAZURANA, MCKAY (2001), p. 32.
[98] Article 4(3)(c) of the Additional Protocol II; See QUÉNIVET (2008), p. 228.

used in hostilities.[99] For the girls recruited as sex slaves, it means that once they reach the age of fifteen they cannot depend on the international humanitarian protection anymore. Yet, given that these girls are still really vulnerable at such a young age and that they have to suffer a singularly dreadful experience,[100] it is crucial that measures should be taken at the international level. This is the reason why many NGOs have been lobbying for the establishment of an age-limit and to set the end of childhood,[101] at eighteen years. [102] Hence, it may be considered that this age-limit of fifteen slows down the effort made by all the stakeholders promoting the "straight 18" approach.[103]

1.3.4. ASYMMETRICAL PROTECTION

In addition, it is regrettable that the protection accorded by the Additional Protocols is asymmetrical, depending on the international or non-international character of the conflict. Indeed, the children in general and the girls recruited for sexual purposes more specifically go through the same sufferings. Consequently, developing an equal degree of protection during both international and non-international armed conflicts would be a positive step.

1.3.5. LACK OF EXISTENCE OF SPECIFIC PROVISIONS RELATED TO GIRLS RECRUITED FOR SEXUAL PURPOSES

Moreover, more generally, one may observe that the Conventions and their Additional Protocols do not contain any specific provisions about girl soldiers and the additional gendered mistreatments that they have to experience. Indeed, the Geneva Conventions deal with the question of children and women during periods of armed conflicts in a general way in relation with the protection of civilians.[104] The Additional Protocols, on the other hand, contain provisions aiming at the protection of the children during armed

[99] HARTJEN, PRIYADARSHINI (2012), p. 100.
[100] MAZURANA, MCKAY (2001), p. 34; FOX (2004), p. 475 – 476.
[101] BREEN (2003), pp. 453 – 481.
[102] Article 1 of the Convention on the Rights of the Child.
[103] FOX (2005), p. 34.
[104] Geneva Convention IV ; PILLAY (2008), p. 24.

conflicts but these articles do not specify any rules especially related to girl soldiers. Thus, although the Additional Protocols consider women and children as a vulnerable category, girl soldiers may not find any specific articles likely to grant them protection.[105]

1.3.6 DIFFICULTIES RELATED TO THE ENFORCEMENT

Finally, even if girl soldiers fall under the scope of applicability of the Additional Protocols, some difficulties remain to be solved. Enforcing these instruments seems to be complicated, partly due to the lack of ratification of the Additional Protocols, and more particularly the Additional Protocol II.[106] Indeed, states tend to avoid the ratification of the Additional Protocol II due to the fact that they do not wish to legitimize non-states actors.[107] However, the state of ratification of those instruments does not explain everything, rather there seems to be a gap between international law and the reality on the ground, some states still showing reluctance to apply the provisions they ratified.[108] Consequently, there is a critical need for the international community to intervene and create enforcement mechanisms.

[105] PILLAY (2008), p. 24.
[106] Indeed, there are still some countries such as United States that did not ratify them, in particular the Additional Protocol II. See HUGHES (2000), p. 401. Currently, there are 167 states parties to the Additional Protocol II, the main exceptions in that regard are the United States, Turkey, Israel, Iran Pakistan and Iraq. See the state of ratification on the Official Website of the ICRI, available on : http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=475&ps=P (consulted on 20 April 2013).
[107] One should also note that the Additional Protocol II only applies to situations reaching a certain intensity of violence. Given that the threshold of intensity that has to be reached is relatively high, there are many circumstances that will not be covered by this Protocol. See Article 1(2) Additional Protocol II. ; HUGHES (2000), p. 401; PILLAY (2008), p. 25.
[108] PILLAY (2008), p. 24.

2. International Human Rights Law: The Convention on the Rights of the Child and its Optional Protocol on the involvement of children in armed conflicts

Several instruments of international human rights law, complementing international humanitarian law, provide rights to children in both periods of peace and armed conflicts.[109] The Conventions on the Rights of the Child and its Optional Protocol on the involvement of children in armed conflicts are part of these legal instruments. They are the most important ones due to the high number of parties that ratified these treaties, in particular the Conventions on the Rights of the Child, conferring them practically a universal status.[110]

Despite such a great status, many reserves could be expressed about these instruments. According to some authors, not only do the Conventions on the Rights of the Child and the Optional Protocol on the involvement of children in armed conflicts fail to make any specific provision as to the situation of girl soldiers, but also these legal instruments disregard their situation.[111]

2.1. The Convention on the Rights of the Child

In 1989, the General Assembly of the United Nations adopted the Convention on the Rights of the Child,[112] which is the first universally legally binding instrument aiming at

[109] Williams (2011), p. 1075 ; Croomaraswamy (2010), p. 538.
[110] For the state of ratification of the Convention on the Rights of the Child, see the official website of the United Nations, available on : http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en (consulted on 1 June 2013). Concerning the state of ratification of the Optional Protocol on the involvement of children in armed conflict, see the official website of the United Nations, available on : http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-b&chapter=4&lang=en (consulted on 1 June 2013).
[111] Pillay (2008), p. 24.
[112] Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990).

the protection of minors.[113] It was created in order to respond to the special needs of children who are more vulnerable than adults.[114] Thus, the most basic human rights have been stated in this convention.

Many issues faced by young girls are addressed in this convention, such as the prohibition of discrimination based on gender contained in Article 2, the protection against economic exploitation, as included in Article 32, the protection against sexual exploitation in Article 34 and the protection of children against abduction and trafficking set out in Article 35.[115] However, concerning armed conflicts, only Article 38 is of any relevance.[116][117]

2.1.1 OBLIGATION OF CONDUCT TO AVOID THE DIRECT PARTICIPATION IN HOSTILITIES OF CHILDREN YOUNGER THAN FIFTEEN

Article 38 of the Conventions on the Rights of the Child provides that the " States Parties shall take *all feasible measures* to ensure that persons who have not attained the age of *fifteen* years do not take a *direct part* in hostilities ".[118]

Although these rules are applicable to both situations of international or non-international armed conflicts irrespectively,[119] the wording of Article 38 of the Convention on the Rights of the Child is really similar to the Additional Protocol I. Consequently, the three main points of criticism that have been formulated above about the Additional Protocol I may also apply here.

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[113] The Convention has been ratified by 193 states, however two states decided not to be part of it, namely the United States and Somalia. For the state of ratification see the Official website of the United Nations, available on : http://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-11&chapter=4&lang=en, (consulted on 26 April 2013)
; Official website of UNICEF, available on : http://www.unicef.org/crc/, (consulted on 26 April 2013)
[114] Official website of UNICEF, available on : http://www.unicef.org/crc/, (consulted on 26 April 2013)
[115] LEIBIG (2005), § 27.
[116] Thus, for instance the article 34 of the Convention prohibiting sexual exploitation does not say anything about sexual exploitation during armed conflict. See PARK (2006), p. 326.
[117] See annexes for a summary table showing the main features of the Convention on the Rights of the child and the protection that it grants to girl soldiers.
[118] Article 38 (2) of the Conventions on the Rights of the Child.
[119] FOX (2005), p. 37.

a) The wording of the provision, obligation of conduct

First of all, this article sets that States Parties should take "all feasible measures" to prevent children from participating in hostilities, which means that the parties to the treaty only commit themselves to an obligation of means rather than an obligation of results.[120] Thus, military officials may enjoy some discretion when taking their decision.

b) Prohibition on direct participation only

Secondly, Article 38 states that children younger than fifteen should not take "direct part in hostilities", whereby the "indirect participation" of children in combat is made legal regardless of their age. It is difficult to draw a clear line between "direct" and "indirect" participation in such a context, but based on the interpretation of the terms given by international humanitarian law, it seems obvious that the girls used as sex slaves will not be deemed as participating directly.[121] As a result, any girls victims of sexual violence in the context of their recruitment, no matter how old they are, will not receive any protection from this convention.

c) Fifteen years as an age-limit

Thirdly, fifteen years is mentioned as the age limit.[122] Therefore, it is perfectly legal that minors of fifteen, sixteen or seventeen take part directly in hostilities in the light of this convention.

Consequently, given that the Article 38 (2) only prohibits the direct participation of children in hostilities, it does not provide any protection to girls victims of sexual mistreatments during their recruitment. As a consequence, since the criterion of "direct

[120] PARK (2010), p. 333.
[121] ANG (2005), pp. 36 – 37.
[122] Despite the fact that some states and NGOs proposed to raise the age limit to eighteen, the United States firmly opposed to it. See PARK (2010), p. 331.

participation" is the main reason for their exclusion from the relative protection provided by the Convention, further analysis of this legal document should help determine whether any other of its legal bases could encompass their specific situation. Indeed, participation in hostilities and recruitment may be differentiated and the prohibition of the recruitment could cover their condition.

2.2.2. OBLIGATION TO REFRAIN FROM RECRUITING CHILDREN YOUNGER THAN FIFTEEN

Regarding the recruitment of children, Article 38 sets that " States Parties shall refrain from *recruiting* any person who has not attained the age of *fifteen* years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give *priority to those who are oldest* ".[123] Two main remarks may be made regarding this part of the article.

a) Prohibition on forcible and voluntary recruitment, controversy

Firstly, once again, the wording of the Convention on the Rights of the Child is really close to Article 77 (2) of the Additional Protocol I.[124] However, the interpretation of the word "recruitment" is subject to controversy. Indeed, given the similarity of the wordings between both the Additional Protocol I and the Convention on the Rights of the Child, Article 38 could be expected to be interpreted in line with international humanitarian law. In that case, it may be deemed that the word "recruitment" only intends to prohibit forced recruitment.[125] Yet, another interpretation could be adopted given that Article 38 is part of human rights law, which is an independent branch of public international law intended to provide the broadest possible protection to the children.[126] In that case, "recruitment" would include both forced and voluntary

[123] Article 38 (3) of the Conventions on the Rights of the Child.
[124] FOX (2005), p. 37.
[125] Thus, during the 1986 Working Group, the United Kingdom suggested to use the term "conscription" instead of "recruitment". See BREEN (2007), p. 84.
[126] ANG (2005), p. 13.

recruitment.[127] Consequently, young girls recruited during armed conflicts as sex slaves may find protection in this provision.

b) Fifteen years as an age-limit

Still, the age-limit of fifteen set by the Convention is exactly the same standard age established in the international humanitarian law instruments. Hence, all children older than fifteen may be recruited legally, girl soldiers included.

2.2.3. IDENTIFYING THE MAIN ACHIEVEMENTS AND CHALLENGES OF THE CONVENTION ON THE RIGHTS OF THE CHILD

The girls recruited for sexual purposes may find a relative safeguard through this Convention on the basis of the prohibition of forced and voluntary recruitment. Yet, relying on the elements just mentioned, it may be considered that the Convention on the Rights of the Child does not particularly take the specific situation experienced by girls recruited for sexual purposes into account.

a) Nature of the prohibited participation and recruitment

A first point of criticism revolves around the fact that the Convention on the Rights of the Child excludes many children that are victims of the war, namely all the children that do not take part directly in hostilities.[128] Such a distinction operated between "direct" and "indirect" participation greatly affects the girl soldiers who undertake a large variety of tasks for the armed force or groups, those very tasks being of major significance and placing the girl soldiers at risk.[129] Therefore, such a restrictive approach disregards the specific issues faced by the girls recruited for sexual purposes and goes against the purpose of the Convention,[130] which intends to protect children.[131]

[127] ANG (2005), pp. 47 – 49.
[128] QUÉNIVET (2008), p. 25.
[129] PILLAY (2008), p. 25.
[130] QUÉNIVET (2008), p. 229.

However, their situation is partly covered by the limits imposed on the recruitment by Article 38 of the Convention. Since prohibiting recruitment encompasses a larger range of circumstances than a "direct participation to hostilities", the states at least commit themselves to not recruiting children younger than fifteen, including girls providing "indirect" participation. Consequently, despite the fact that the specific issues faced by these young girls are disregarded by the Convention, then some protection can still be granted to them.

b) Fifteen years as the age-limit

Secondly, it is unfortunate that Article 38 establishes fifteen as the minimum age for direct participation in hostilities and recruitment. Some even argue that it reveals internal inconsistency between Article 38 and Article 1 defining a child as "a human being below the age of eighteen years, unless, under the law applicable to the child, majority is attained earlier".[132] Indeed why would a child be considered mature once he or she turns eighteen in normal circumstances of peacetime but deemed as an adult when he or she is fifteen in cases of armed conflicts? Situations of armed conflicts are a lot more gruelling, stressful and dangerous for these children, who become more vulnerable.[133] Children require greater protection during these troubled periods. Hence, raising the standard age limit to eighteen would permit to solve this contradiction.

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[131] The Convention has even been considered as undermining the previous improvement existing in the international law such as the Additional Protocol II which contrary to the Convention, prohibits not only "direct" participation, but also "indirect" participation in hostilities in case of internal armed conflict. See CROOMARASWAMY (2010), p. 538; BREEN (2007), p. 87.

[132] The Convention on the Rights of the Child is actually the first international instrument to define childhood and state a precise age-limit. PARK (2006), p. 319; FOX (2005), p. 34; CROOMARASWAMY (2010), p. 538.

[133] HARTJEN, PRIYADARSHINI (2012), p. 97.

c) Lack of existence of specific provisions related to girls recruited for sexual purposes

A third significant issue is the fact that there is no specific provision related to girl soldiers in this Convention.[134] Although Article 34 of the Convention sets protection against sexual exploitation and sexual abuse, which may cover cases of sexual violence inflicted on girl soldiers,[135] this article does not say anything about sexual exploitation during armed conflicts.[136] In that respect, there is a separation in the Convention between the involvement of children in armed conflicts on the one hand and sexual violence inflicted on children more generally; regardless of the circumstances on the other.[137] It is necessary to add both articles together to embrace the particular position of girls recruited for sexual purposes. Consequently, it could be beneficial to establish a specific provision explicitely focusing on the use of rape or sexual violence as a method of intimidation during the recruitment of the girl soldiers in order to grant them more substantial protection.[138]

d) Difficulties related to the enforcement

Finally, another main concern is the ineffectiveness of the Convention due to its lack of enforcement. As mentioned above, different reasons may account for that situation. One of them is related to the very nature of the Convention, which as a human rights document, is only addressed to States parties,[139] while, children are mainly recruited by non-states actors during armed conflicts.[140] Furthermore, no concrete sanctions are laid down in the Convention in case of non-compliance, leading states parties to being only morally condemned. Hence, the international legislation being clearly not sufficient, it is necessary for the international community to develop practical enforcement mechanisms.

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[134] In that respect, the wording of the Convention, which contains the term "child", blurs any difference existing between boys and girls whereas the latter need special care. See PARK (2006), p. 326.
[135] LEIBIG (2005), § 29.
[136] COSTACHE, p. 4.
[137] PARK (2006), p. 326.
[138] LEIBIG (2005), § 29.
[139] QUÉNIVET (2008), p. 230; FOX (2005), p. 38.
[140] LEIBIG (2005), § 30.

2.2. OPTIONAL PROTOCOL ON THE INVOLVEMENT OF CHILDREN IN ARMED CONFLICTS

On 25 May 2000, a more specific instrument was shaped by the United Nations General Assembly in order to meet the particular situation of children involved in armed conflicts, namely the Optional Protocol on the involvement of children in armed conflicts.[141] The Optional protocol entered into force a few months after the Rome Statute on 12 February 2002.

Since the Optional protocol deals particularly with the situation of children involved in armed conflicts, it may be expected to respond properly to the situation of the girls recruited for sexual purposes during these troubled times. However, none of the provisions of the Optional protocol mentions girl soldiers in particular. There is only a minor reference to gender as a source of vulnerability in the preamble.[142] Girls are not distinguished from the other children involved in armed conflicts; therefore, other provisions should be examined to determine whether they grant girl soldiers any specific protection.[143] In that respect, a clear distinction between the rules applicable to regular armed forces and irregular armed forces is made.[144]

2.2.1. RULES APPLICABLE TO REGULAR ARMED FORCES

a) Obligation of means to avoid the direct participation of children younger than eighteen

Concerning the participation in hostilities, Article 1 of the Optional Protocol sets that "States Parties shall take *all feasible measures* to ensure that members of their armed

[141] The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, May 25, 2000, U.N. GAOR, U.N. Doc. A/54/RES/263 (entered into force on February 12, 2002)

[142] The States parties recognize "the special needs of those children who are particularly vulnerable to recruitment or use in hostilities contrary to the present Protocol owing to their economic or social status or gender". See preamble of the Optional Protocol.

[143] See annexes for a summary table showing the main features of the Optional Protocol to the Convention on the Rights of the child and the protection that it accords to girl soldiers.

[144] PILLAY (2008), p. 25.

forces who have not attained the age of *18* years do not take a *direct part* in hostilities". Hence, except for the age-limit, this article is extremely similar to Article 38 of the Convention on the Rights of the Child. Three remarks may be made in that respect.

Firstly, states only have an obligation of means in this regard given that they have to take "all feasible measures " in order to prevent minors from taking part directly in hostilities.

Secondly, just as stated in the Convention on the Rights of the Child, only "direct participation" is mentioned. Consequently, in the light of this article of the Optional protocol, "indirect participation" of children in combat is legal regardless of their age. Given the fact that girls used as sex slaves by armed forces or groups supply such an "indirect participation", the Optional protocol does not offer them any protection in this regard. This made some authors argue that the particular focus on child soldiers who take part directly in hostilities leads to the reinforcement of the male-based definition of child soldiers.[145]

Finally, one important improvement is the raise of the minimum age for direct participation to eighteen years.

b) Prohibition on conscripting children younger than eighteen and prohibition on enlisting children younger than fifteen

About the recruitment operated by state actors, both Article 2 and Article 3 are relevant. The former prohibits the *conscription* of persons younger than *eighteen* in states armed forces.[146] The latter provides that States parties have to deposit a binding *declaration*

[145] LEIBIG (2005), § 34.
[146] The article 2 of the Optional Protocol on the involvement of children in armed conflict states that "States Parties shall ensure that persons who have not attained the age of 18 years are not compulsorily recruited into their armed forces".

that sets forth the minimum age at which a state will permit *voluntary recruitment* into its national armed forces which has to be *higher than fifteen*.[147]

Comparing to the Convention on the Rights of the Child, the Optional protocol finally states explicitely that both types of recruitment are prohibited. Hence, the voluntary character of the recruitment may not be used anymore as an excuse to justify that the children should not be protected by international law.[148]

Moreover, the minimum age of recruitment is raised from fifteen to eighteen years in case of conscription and sixteen years in case of enlistment.[149] Thus, there are less minors that may be legally recruited. Moreover, Article 3 stipulates that, in any case children younger than eighteen should enjoy particular protection regardless of the minimum age set by States parties in their declaration for the voluntary recruitment.[150] In so doing, the Optional protocol reveals a general trend in international human rights law towards forbidding recruitment of children under the age of eighteen regardless of its voluntary or forced nature.

2.2.1. RULES APPLICABLE TO IRREGULAR ARMED FORCES

Article 4 of the Optional Protocol sets that "armed groups that are distinct from the armed forces of a State should not, under *any circumstances*, *recruit* or *use* in hostilities persons under the age of *18* years".[151] This article brings significant improvement compared to the Convention on the Rights of the Child but also to the rules of the Optional protocol applicable to regular armed forces. Indeed, Article 4 of the Optional protocol sets a high threshold of protection applicable to irregular armed forces.[152]

[147] The minimum age for recruitment is thus raised to 16 years. Article 3 (1) and (2) of the Optional Protocol on the involvement of children in armed conflict; FOX (2005), p. 34.
[148] GALLAGHER (2010 – 2011), p. 135.
[149] FOX (2005), p. 39.
[150] Article 3 (1) of the Optional Protocol on the involvement of children in armed conflict.
[151] Article 4 (1) of Optional Protocol on the involvement of children in armed conflict.
[152] PARK (2010), p.332.

a) A strict prohibition on using children younger than eighteen in hostilities

Concerning the participation aspect, three main improvements should be highlighted.

Firstly, contrary to the provisions of the Convention on the Rights of the Child and Article 1 of the Optional protocol aiming at deterring states parties from using directly children in hostilities, Article 4 establishes an absolute prohibition of the use of children in hostilities by using the words "under any circumstances".[153] Thus, instead of an obligation of conduct, the States Parties have to face an obligation of result in that respect.

Secondly, as the word "use" clearly prohibits any type of participation, not only are the children participating directly in hostilities, protected but so are also the children that participate indirectly such as the girls who provide support to the armed groups in many different ways. Consequently, girls used as sex slaves by the armed groups may find real protection in this article of the Optional protocol, which is not the case in the Convention on the Rights of the Child.

Thirdly, the minimum age has been raised to eighteen years, which permits to achieve a some internal consistency between the provisions of the Convention on the Rights of the Child and its Optional Protocol.[154]

b) A strict prohibition on recruiting children younger than eighteen

Concerning the prohibition of recruiting children, two main progresses may be underlined. First, both forced and voluntary recruitment are forbidden, which permits to grant complete protection to girls recruited by armed groups[155].

[153] BREEN (2007), p.79.
[154] Indeed, by raising the minimum age to eighteen, the Optional protocol makes for greater coherence between the article 1 of the Convention on the Rights of the Child which establishes that a child is a human younger than eighteen years and the article 38 of the Convention related to children involved in armed conflict.
[155] MAZURANA, MCKAY (2001), p. 32 – 33.

Furthermore, another major improvement is the raise of the age to eighteen for recruitment regardless of its voluntary or forced nature. Thus, contrary to states actors, irregular armed forces may not enlist people younger than eighteen if they declared another age-limit beforehand. In doing so, the Optional Protocol ultimately grant complete legal protection to all children younger than eighteen against non-state actors under any circumstances in case of armed conflicts.

2.2.3 IDENTIFYING THE MAIN ACHIEVEMENTS AND CHALLENGES OF THE OPTIONAL PROTOCOL ON THE INVOLVEMENT OF CHILDREN IN ARMED CONFLICTS

The Optional Protocol on the involvement of children in armed conflicts has brought several improvements to the condition of children associated with armed forces or groups.

a) The raise of the age-limit to eighteen

Overall, the protection provided by this instrument already existed through the Additional Protocol II, which already prohibited during non-international armed conflicts, not only direct and indirect participation, but also forced and voluntary recruitment.[156] Furthermore, the Convention on the Rights of the Child proscribed already forced and voluntary recruitment during both armed conflicts and peacetime. However, the principal improvement brought by the Optional Protocol compared to the other instruments is the increase of the minimum age of direct participation in hostilities and recruitment to eighteen.[157]

Consequently, the evolution of the norms through all these instruments reveal a general tendency followed by the international community, which considers that children

[156] Article 4 (3) (c) Additional Protocol II.
[157] The only exception is the minimum age for voluntary recruitment by states-actors, which only requires the children to be sixteen years old. See Article 1, 2 and 3 of the Optional Protocol on the involvement of children in armed conflict.

younger than eighteen should not be involved in armed conflicts. Yet, there are some disadvantages are still to be found.

b) Asymmetrical provisions

Following in his predecessor's footsteps**,** a point of criticism that may be voiced about the Optional Protocol is the fact that it offers a patchwork protection to child soldiers in general and to girls recruited for sexual purposes more specifically.[158] Thus, the fact that the rules are asymmetrical depending on the identity of the actors, namely regular or irregular armed forces,[159] may be problematic given that the suffering endured by the children is the same.

In this regard, from the girl soldiers' point of view, the main inconvenient related to the rules applicable to states-actors is the fact that "indirect participation" is not prohibited by the Optional protocol whereas it is, once addressed to non-states actors.[160] One may wonder if it is not unjustified to make a distinction in legal protection based on the identities of the parties concerned. Indeed, why should children living in some regions controlled by irregular armed forces be more protected than children living in states where only the national army could potentially recruit and use them?[161] One justification in so doing is that most of the child soldiers are recruited by non-states actors.[162] Therefore, it could be considered logical that the rules applicable to regular armed forces and non-regular armed forces are different given that they have to meet different issues. Though, several irregular armed groups complain about the fact that they are subject to an unequal treatment,[163] given that in some cases, even regular armed groups may recruit and use children in hostilities.[164] Such circumstances raise questions.

[158] FOX (2005), p. 40.
[159] PILLAY (2008), p. 25.
[160] Article 1 and 4 of the Optional Protocol on the involvement of children in armed conflict.
[161] KOLB, HYDE (2008) p. 68.
[162] CROOMARASWAMY (2010), p. 540.
[163] Ibid., p. 540.
[164] HARTJEN, PRIYADARSHINI (2012), p. 106.

Furthermore, still about the provisions applicable to states-actors, it may be regretted that the Optional Protocol place the minimum age to eighteen only for the cases of compulsory recruitment and not for voluntary recruitment.[165] As mentioned above, distinguishing voluntary and compulsory recruitment is not an easy task given that children may decide to join armed forces because of many reasons such as for instance poverty.[166] As declared by the former Special Representative for Children and Armed Conflict "recruitment, whether enforced or voluntary, is always against the best interests of the child.[167] Creating a general ban of recruitment of children under eighteen regardless of its voluntary or forcible character would be beneficial for girl soldiers providing support as sex slaves to the armed forces because their situation may be covered by the term "recruitment".

Although it is understandable that regular and irregular armed forces are different and therefore should be treated in a different way, in situations of conflict, the rules created do not exclusively aim at the parties, but also at the persons that need to be protected during troubled times. Girls recruited for sexual purposes will not be protected the same way if they fall in the hands of regular armed forces or irregular armed forces despite the fact that they provide the same type of services and end up hurt in the same way. In that respect, it would be advantageous to leave aside the dichotomy existing between state actors and non-state actors and create a similar protection for the persons that may be involved in armed conflicts as it has been done in the Statutes of the International Criminal Tribunals.[168]、

[165] Article 2 and 3 of the Optional Protocol on the involvement of children in armed conflict.
[166] CROOMARASWAMY (2010), p. 540.
[167] Ibid, p. 542.
[168] More and more the distinction between international armed conflict and non-international conflict is left aside by the practitioners and the scholars. See GRAF R (2012), p. 948; See also Statute of the International Criminal Tribunal for the Former Yugoslavia (adopted 25 May 1993) 32 ILM 1192 and Statute of the International Criminal Tribunal for Rwanda (adopted 8 November 1994) 33 ILM 1589.

c) Lack of existence of specific provisions related to girls recruited for sexual purposes

Another major concern is the lack of particular provisions related to girl soldiers. Indeed, the Optional Protocol on the involvement of children in armed conflicts does not establish any specific protection for girls involved in armed conflicts that may suffer from sexual violence within the framework of the recruitment.[169] The Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography that entered into force in 2002 may therefore be considered as a possible tool that could cover the violence that have been inflicted on these young girls.[170]

However, unfortunately the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography does not include girl soldiers recruited for the purpose of being sex slave in its understanding of the offences that may be committed by perpetrators.[171] Article 10 of this Optional protocol sets that "States Parties shall take all necessary steps to strengthen international cooperation by multilateral, regional and bilateral arrangements for the prevention, detection, investigation, prosecution and punishment of those responsible for acts involving the sale of children, child prostitution, child pornography and child sex tourism."[172] Though, none of the categories mentioned in this article may encompass the specific situation of girls that are recruited during armed conflicts for the purpose of being used as sex slaves.[173] In that respect, a clear division exist between the involvement of children in armed conflicts and sexual violence inflicted on children leading to gendered based distinction between boys and girls.[174] Consequently, from a

[169] COSTACHE, p. 6.
[170] LEIBIG (2005), § 33.
[171] COSTACHE, p. 6 ; LEIBIG (2005), § 36.
[172] Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, May. 25, 2000, A/RES/54/263(entered into force Jan. 18, 2002).
[173] They are not sold but recruited, they are not prostituted because they do not receive any material goods in return for sex services and they do not participate to pornographic activities or sex tourism. See LEIBIG (2005), § 36.
[174] LEIBIG (2005), § 33.

legal prospect, the specific issues of the girl soldiers are not addressed. Hence, it could be valuable to create a provision explicitly aiming at the offences of sexual violence as a method of intimidation during the recruitment of the girl soldiers.

d) Difficulties related to the enforcement

Finally, the recurring issue related to the enforcement of the provisions also apply for this instrument.[175] Different reason may explain such problems.

Firstly, the state of ratification of the Optional Protocol may permit to partly answer the question. Indeed, given that 151 States have ratified the Optional Protocol on the involvement of children in armed conflicts, it still has not gain a universally binding status.[176] Thus, campaigns lead by NGOs promoting the universal ratification of this instrument could facilitate partly its enforcement. However, this is not the only explanation given that even universally binding instruments such as the Convention on the Rights of the Child encounter such troubles.

Secondly, another explanation may be found in the nature of the Optional Protocol itself. Indeed, just like the Convention on the Rights of the Child, the Optional Protocol is part of the human rights instruments and is therefore only directed to states.[177] As mentioned above, most of the child soldiers are actually recruited by non-states actors who are not part of this protocol. However, the fact that the Optional Protocol states rules specifically applicable for irregular armed groups shows that there is a norm awaiting codification.[178]

Thirdly, a main problem leading to the lack of the enforcement of the Optional protocol is the fact that there is no sanction contained in that protocol. Hence, it is questionable if

[175] HUGHES (2000), pp. 399 - 405.
[176] Official website of the United Nations, available on : http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-11-b&chapter=4&lang=en, (consulted on 23 May 2013).
[177] FOX (2005), p. 40.
[178] FOX (2005), p. 39.

armed forces or groups will really respect these obligations in practice. Indeed, despite the existence of these international binding provisions, the recruitment and the use of child soldiers not only go on but also increase.[179] Thus, the development of sanctions related to these provisions could permit a better enforcement.

Lastly, the difficulties encountered during enforcement may be explained simply through the general context of the regions at stake. Indeed, it is necessary to tackle the issue in its own context in order to have a practical point of view permitting to find adequate solutions. Therefore, given that the involvement of children in armed conflicts is a structural problem related to the economical, political and cultural situation of one region, creating rules prohibiting the recruitment or the participation of children younger than fifteen or eighteen may be positive from a symbolic point of view, but it does not change the fact that the phenomenon occurs.[180] Therefore there is a need to adopt another range of measures that would answer the phenomenon more effectively by taking into account the political, cultural, social and economic reasons encouraging these children to join armed forces or groups.[181]

Therefore, despite the fact that these international treaties raise awareness and may change the behaviour of the society, the fact that their enforcement is complicated weakens their impact.

[179] HARTJEN, PRIYADARSHINI (2012), p. 103.
[180] Thus for instance, most of the states where child soldiering offences occurred actually prohibit the recruitment of persons younger than eighteen years, such as the Central African Republic, Chad, Democratic Republic of the Congo, Cote d'Ivoire, Rwanda, Sierra Leone or Sudan. Furthermore, most of these states are part of the Optional Protocol on the involvement of children in armed conflict. See COALITION TO STOP THE USE OF CHILD SOLDIERS, (2008) ; PARK (2010), p. 332.
[181] PARK (2010), p. 333.

CHAPTER 3: SEXUAL VIOLENCE COMMITTED ON GIRL CHILD SOLDIERS - THE INTERNATIONAL CRIMINAL COURT'S POSITION

In this chapter, the position adopted by the International Criminal Court towards the phenomenon of sexual violence inflicted on girl soldiers in the process of their recruitment is analysed. In order to do so, it will be focused firstly on the incrimination of child-soldiering offences contained in the Rome Statute. The main issue is to determine if the notions of "recruitment" or "use" of children to participate actively in hostilities may provide any protection to these girls recruited for sexual purposes.

Secondly, given that a simple description of the current legal instrument would insufficient to fully understand the meaning of these concepts, it is necessary to examine the interpretation given to these terms by the International Criminal Court in its jurisprudence. For the purpose of the analysis of the jurisprudence of the Court, it will be focused on the case of the *Prosecutor v. Thomas Lubanga Dyilo* in the situation of the Democratic Republic of the Congo, which is the first case of sentencing by the Court in general and in particular about child-soldiering offences.

Finally, the main advantages and inconvenients of the approach adopted by the Court will be assessed in the light of the situation of the girls subject to sexual violence in the context of their recruitment.

1. THE ROME STATUTE, THE INTERNATIONAL CRIMINAL COURT LEGAL FOUNDATION

On 17th July 1998, at the end of a diplomatic conference in Rome, 120 States adopted the Statute of Rome, which entered into force on 1st July 2002.[182] The Statute of Rome

[182] The Rome Statute of the International Criminal Court, July 1998, U.N. Doc. A/CONF (entered into

was one of the first legal instruments to recognize the recruitment of child soldiers as a crime and is as such a major breakthrough in the international criminal justice scene.[183] Moreover, this legal instrument improves the protection offered to girl child soldiers. Indeed, protection-related issues may be found in different articles, providing thus several bases of incriminations for sexual violence committed on these young girls.

1.1. CHILD SOLDIERING OFFENCES

Since 2002, the Statute of Rome has included in its definition of war crimes "conscripting or enlisting children under the age of fifteen years into national armed forces or using them to participate actively in hostilities"[184] in cases of international armed conflicts; and "conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities"[185] in the case of an internal armed conflict. Both incriminations may be found in Articles 8(2)(b)(xxvi) of the Rome Statute concerning international armed conflicts and in Article 8(2)(e)(vii) of the Rome Statute for non-international armed conflicts.

The definition of a child soldiering offence is composed of two elements, the recruitment on the one hand, which is either forcible ('conscripting'),[186] or voluntary ('enlisting'),[187] and on the other hand, the use of children younger than fifteen to participate actively in hostilities.[188] Thus, the question is to determine if either element of the child soldiering offence could cover sexual abuses inflicted on young girls recruited by armed forces and groups.

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force on July 1, 2002); BOSLY, VANDERMEERSCH (2010), p. 65.
[183] SCHABAS (2010), p. 213.
[184] Article 8(2)(b)(xxvi) of the Rome Statute.
[185] Article 8(2)(e)(vii) of the Rome Statute.
[186] Lubanga Case, Decision on the Confirmation of Charges, 29 January 2007, § 246.
[187] Lubanga Case, Decision on the Confirmation of Charges, 29 January 2007, § 246.
[188] CASSESE, GAETA, JONES, (2009), p. 416.

Concerning the interpretation of Articles 8(2)(b)(xxvi) and 8(2)(e)(vii), the Element of Crimes may be relevant.[189] However, it does not contain an interpretation of the notions of recruitment and use. Therefore, it is necessary to research in a footnote in the Preparatory Committee Draft Statute which explains how in cases of international armed conflicts the concept of recruiting of children under the age of fifteen or of using them to participate actively in hostilities should be understood, as explained below.[190]

1.1.1. THE USE OF CHILDREN YOUNGER THAN FIFTEEN TO PARTICIPATE ACTIVELY IN HOSTILITIES

Indeed, according to the Preparatory Committee, "the words 'using' and participate' have been adopted in order to cover both direct participation in combat and also active participation in military activities linked to combat such as scouting, spying, sabotage and the use of children as decoys, couriers or at military check-points. It would not cover activities clearly unrelated to the hostilities such as food deliveries to an airbase or the use of domestic staff in an officer's married accommodation. However, use of children in a direct support function 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."[191]

Pursuant to this commentary, it is unclear if the recruitment of girls by armed forces or groups for sexual purposes could be included in the concept of "using children younger than fifteen to participate actively in hostilities". However, what is certain is that the words used in the relevant articles of the Rome Statute mentioning "active participation

[189] According to the Elements of Crimes, there is a war crime of using, conscripting or enlisting children when: "1.The perpetrator conscripted or enlisted one or more persons into the national armed forces or used one or more persons to participate actively in hostilities.
2.Such person or persons were under the age of 15 years.
3.The perpetrator knew or should have known that such person or persons were under the age of 15 years.
4.The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict." See International Criminal Court, Elements of Crimes, U.N. Doc. PCNICC/2000/1/Add.2 (2000).
[190] Preparatory Committee Draft Statute, pp. 21-23.
[191] Preparatory Committee Draft Statute, p. 21.

in hostilities" describe a wider reality than the words "direct participation in conflict" that may be found in the Geneva Convention.[192] According to this interpretation, there are two different types of child soldiers, on the one hand the fighters taking part directly in combat, and on the other hand children that do not participate directly in hostilities but provide support.[193] This latter type of participation is being considered more "indirect" than the first one.[194]

The question is therefore to determine if the position of support held by girls recruited for sexual purposes may be part of the acts of "active participation in hostilities". Given that the Rome Statute does not define these acts, the Court has to provide a legal interpretation that may be found in its jurisprudence below.

1.1.2. FORCIBLE AND VOLUNTARY RECRUITMENT OF CHILDREN YOUNGER THAN FIFTEEN

The incrimination of "conscripting or enlisting children under the age of fifteen years" into armed forces or groups does not receive a special definition in the Rome Statute, thus it should be referred to the ordinary national signification of these words.[195] As to whether recruitment of girls for sexual purposes may enter in the scope of this incrimination, it is left ample room for interpretation, which will be analysed below.

2. INTERNATIONAL CRIMINAL COURT'S JURISPRUDENCE

2.1. THE PROSECUTOR V. THOMAS LUBANGA DYILO

On 14 March 2012, the Trial Chamber I judged that Thomas Lubanga was guilty of conscripting and enlisting children under the age of fifteen into the FPLC (Patriotic Force for the Liberation of Congo) and using them to participate actively in hostilities within the meaning of Article 8(2)(b)(vii) and 25(3)(a) of the Statute between

[192] Article 77 (2) of the Additional Protocol I of the Geneva Conventions; JORGENSEN (2012), p. 669.
[193] JORGENSEN (2012), p. 668.
[194] REDRESS (2006) p. 29.
[195] TRIFFTERER, AMBOS (2008), p. 472.

September 2002 and August 2003.[196] On 10 July 2012, the Court sentenced him to an imprisonment of 14 years and issued the directing principles for the reparation of the victims on 7 August 2012.[197] Lubanga decided to appeal against all these three decisions.[198]

Surprisingly, Thomas Lubanga was only convicted for child soldiering offences although the international community was well aware of the massive sexual violence committed in DRC.[199] The reason for this is that the Prosecutor had decided to bring these charges only[200] and failed to add sexual offences later on, which became quite an issue.[201] Therefore, the interpretation given by the Court to the concept of "using children to participate actively in hostilities" and to "conscripting or enlisting children under the age of fifteen years" is of particular significance because if too restrictive an interpretation is adopted, then sexual violence committed against the children recruited by the armed forces or groups is not covered.

Due to the wording of Article 8(2)(b)(vii) of the Rome Statute, the Court first observes that conscription, enlistment and use of children are three different offences.[202] Indeed, the article provides that "conscripting *or* enlisting children under the age of fifteen years into armed forces or groups *or* using them to participate actively in hostilities" are constitutive of war crimes. Thus, these are three varying forms of conduct occurring in

[196] Lubanga Case, Trial Judgment, 14 March 2012; The Women's Initiatives for Gender Justice, DRC: Trial Chamber I Issues first trial Judgement of the ICC – Analysis of sexual violence in the Judgement, Special issue #1 May 2012, at: http://www.iccwomen.org/news/docs/WI-LegalEye5-12-FULL/LegalEye5-12.html (consulted on 10 July 2013).The Court Today, ICC-PIDS-TCT-01-023/13_Eng, 26 April 2013.
[197] Lubanga Case, Decision on Sentence, 10 July 2012 ; Lubanga Case, Decision establishing the principles and procedures to be applied to reparations, 7 August 2012; The Court Today, ICC-PIDS-TCT-01- 023/13_Eng, 26 April 2013.
[198] The Court Today, ICC-PIDS-TCT-01- 023/13_Eng, 26 April 2013.
[199] Margot Wallström, the UN Special Representative for Sexual Violence in Conflict, called the DRC the "rape capital of the world". See WALLSTRÖM (2010), p. 3. ; GRAF (2012), p. 946 – 947.
[200] According to R. GRAF, the selectiveness of the Prosecutor could be explained by the fact that since the court is a complementary institution, only charges that were not already prosecuted at the national level could be brought before the International Criminal Court. Thus, by choosing child soldiering offences, which were not already prosecuted, the Prosecutor bypassed the principle of complementarity. See GRAF (2012), p. 947.
[201] Lubanga Case, Trial Judgment, 14 March 2012, § 629.
[202] Lubanga Case, Trial Judgment, 14 March 2012, § 609.

child-soldiering offences.[203] Consequently, children recruited by armed forces or groups for sexual purposes are allowed to see their specific situation being examined in the light of each of these separate offences, instead of a single offence, which turns out to be really valuable.

2.1.1. THE USE OF CHILDREN UNDER THE AGE OF FIFTEEN TO PARTICIPATE ACTIVELY IN HOSTILITIES

As mentioned above, the interpretation of the concept of "using children to participate actively in hostilities" is not specified in the Rome Statute. However, from the Draft Statute of the Preparatory Committee, it seems clear that "active participation" covers a wider range of activities than "direct participation" in hostilities[204] and therefore concerns not only children having combatant functions, but also children who provide support. However it is unclear to what extent such "indirect participation" is part of the offence.[205]

Consequently, it seems obvious that girls recruited for sexual purposes and fighting on the battlefield as combatants will be regarded as child soldiers in the light of this interpretation of the Rome Statute. Yet, all of them do not take part directly in

[203] In so doing, the International Criminal Court thus follows the interpretation of the judge Justice Robertson in the *CDF* case who considered that they are "three different crimes". See Norman Case, Decision on preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), Dissenting Opinion of Justice Robertson, 31 May 2004, §5 ; GRAF (2012), p. 954.

[204] The criteria of direct participation permits in the context of international humanitarian law to make the difference between, on the one hand combatants who may be lawfully attacked and on the other hand civilians who are protected. See the Official website of the International Committee of the Red Cross, Clarifying the notion of direct participation in hostilities, 2009, available at : http://www.icrc.org/eng/resources/documents/feature/2009/direct-participation-ihl-feature-020609.htm (consulted on 13 May 2013).

[205] According to the Preparatory Committee, "the words 'using' and participate' have been adopted in order to cover both direct participation in combat and also active participation in military activities linked to combat such as scouting, spying, sabotage and the use of children as decoys, couriers or at military check-points. It would not cover activities clearly unrelated to the hostilities such as food deliveries to an airbase or the use of domestic staff in an officer's married accommodation. However, use of children in a direct support function such as acting bearers to take supplies to the front line, or activities at the front line itself, would be included within the terminology." Preparatory Committee Draft Statute, UN General Assembly, Conference 183, Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN Doc. A/Conf.183/2/Add.1 (April, 1998), p. 21.

hostilities. As explained above, girls recruited for sexual purposes have many different roles beside being used as sex slaves or "bush wives", like for instance, cooking, looting, or abducting other children, all of those being significant supporting functions allowing the armed forces or groups to survive.[206] Therefore, based on these facts, can they be considered as participating actively in hostilities?

To determine when "indirect" participation may constitute "active" participation, the Court specifies that two requirements need to be fulfilled.[207] According to the Court, "the decisive factor, therefore, in deciding if an "indirect" role is to be treated as active participation in hostilities is whether the support provided by the child to the combatants exposed him or her to real danger as a potential target".[208] Consequently, a child may be considered as participating actively in hostilities, even if he or she is not fighting on the battlefield, on the condition that this child provide support and is at risk as a potential target.[209] In so doing, the Court adopts a case-by-case approach in order to determine if the tasks assigned to the children by armed forces or groups put them sufficiently at risk and may therefore be considered as child soldiers in the light of the Rome Statute.[210]

Therefore the controversial question is to determine if girls subject to sexual violence in the context of their recruitment by armed forces of groups provide a support that put them in danger as potential targets.

One option is to consider that these girls do indeed provide an important support, though they are not at risk as potential targets and, therefore, fail to meet the two conditions necessary to be considered as actively participating in hostilities.[211] Including

[206] MAZURANA, MCKAY (2001), p. 33.
[207] Lubanga Case, Trial Judgment, 14 March 2012, § 628.
[208] Lubanga Case, Trial Judgment, 14 March 2012, § 628; JORGENSEN (2012), p. 670.
[209] GRAF (2012), p. 962; JORGENSEN (2012), p. 670.
[210] JORGENSEN (2012), p. 671.
[211] JORGENSEN (2012), p. 682.

these girls in the offence of using children to participate actively in hostilities would thus hinder the consistency of the rationale behind the prohibitions.[212]

In this regard, the main issue actually revolves around the fact that the interpretation of the terms "potential targets" is unclear. The Court does not define these terms, thus it is difficult to assess who the children having supporting functions are, whether they are sufficiently in danger to be considered as potential targets and whether they should be deemed as participating actively in hostilities. Therefore the controversy just moved from the interpretation of the wording "active participation" to the terms "potential targets".

Indeed, being a "potential target" could be interpreted in the light of the international humanitarian law, which would probably lead to the exclusion of girls recruited for sexual purposes. However, such an interpretation would be irrelevant in the context of this specific incrimination set by the Rome Statute. In international humanitarian law, legitimate targets may only be combatants contrary to civilians unless the latter directly participate in hostilities.[213] Thus, according to this reasoning, in order to be a legitimate target, one has to take part directly in hostilities. This would lead to the conclusion that only children participating directly in hostilities may be targetable and may therefore be included in the offence of "using children to participate actively in hostilities". This would go against the purpose of the provision incriminating "active participation" which intends to cover not only "direct participation" but also some cases of "indirect participation". For these reasons, it should be considered that the word "target" in the context of the incrimination of "active participation" in hostilities may not be interpreted exclusively in the light of international humanitarian law. This may therefore lead one to deem that both words "target" in the context of the Rome Statute and in the context of international humanitarian law do not cover the same reality.

[212] AMBOS (2012), p. 137 note 156; JORGENSEN (2012), p. 682.
[213] There are only three categories of regular combatants, namely the regular members of the armed forces (Article 4(A)(1) GC III), or civilians participating in *levée en masse* (article 4(A)(6) GC III), or resistance movements and militias not incorporated into the regular army of a belligerent Article 4(A)(2) GC III and article 44 AP I ; See KOLB, HYDE (2008), pp. 197 - 207.

Another argument may lead to the same conclusion. Interpreting of the words "potential targets" to mean "lawful targets" would have huge implications, as it would deprive the children from their protection under international humanitarian law.[214] Yet this protection may only disappear if the persons participate directly in hostilities, which is not the case of the girls recruited for sexual purposes since they participate indirectly. Therefore, the terms "potential target" should not be interpreted exclusively in the light of the international humanitarian law but also in the light of international criminal law so as to integrate the two law areas and their respective scopes. Moreover, although the body of law of the International Criminal Court was elaborated within the framework of the international humanitarian law, the states parties are still free to determine the scope of application of the Rome Statute.[215]

Consequently, the interpretation of "potential target" may be approached in another way. As recalled by the International Criminal Court, the provision incriminating the active participation of children in hostilities is aimed at protecting them from the risks inherent to their association with armed forces or groups, which includes "not only protection from violence and fatal or non-fatal injuries during fighting, but also the potentially serious trauma that can accompany recruitment".[216] Thus, one may consider that the objective of the wording "potential targets" is to protect children from the danger inherent to their association to armed forces or groups, which may be a physical but also a psychological one. In that respect, girls victims of sexual violence in the context of their recruitment have without a doubt to endure serious trauma.[217] Therefore, since they provide a significant support to the armed forces or groups, which places them in a situation of great danger, they should be considered as potential targets.

This approach is defended by the Judge Odio Benito who, in her dissenting opinion, suggests that sexual violence should be included in the offence of use of children to

[214] GRAF (2012), p. 963.
[215] GRAF (2012), p. 964.
[216] Lubanga Case, Trial Judgment, 14 March 2012, §§ 605, 619 ; GRAF (2012), p. 960.
[217] MAZURANA, MCKAY (2001), p. 34.

participate actively in hostilities.[218] She observed that 'sexual violence committed against children in armed groups causes irreparable harm and is a direct and inherent consequence to their involvement with the armed group".[219]

However, such an interpretation is not free from criticism. Two main remarks should be made in that respect. Firstly, there are other legal bases that may cover the offences of sexual violence such as Articles 7(1)(g), 8(2)(b)(xxii) and 8(e)(vi) of the Rome Statute.[220] Though, *in casu* it was impossible to rely on these provisions given that the Prosecutor did not add sexual violence to the charges.[221] Furthermore, it is argued that separating the sexual violence from its context, namely the association with armed forces or groups would lead to an inadequate recognition of the pain endured by girl soldiers.[222] Secondly, including sexual violence in child-soldiering offences may be questionable in the light of the rights of the defence, given that this may be considered contrary to the *nullum crimen* principle.[223]

Concerning the decision of the Court, given that sexual violence was not part of the charges brought by the Prosecutor, the trial chamber did not make any statement on whether sexual violence could be included within the three separate offences, leaving thus the question open.[224] What is clear, though, is that the Court has rejected a general inclusion of sexual violence in the "use-offence" given that the test permitting to

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[218] Some NGOs also advocate that sexual violence is a component of the use of children to participate actively in hostilities and should as such be included in this offence. See The Women's Initiatives for Gender Justice, DRC: Trial Chamber I Issues first trial Judgement of the ICC – Analysis of sexual violence in the Judgement, Special issue #1 May 2012, at: http://www.iccwomen.org/news/docs/WI-LegalEye5-12-FULL/LegalEye5-12.html (consulted on 10 July 2013); This point of view is also shared by some authors and may also be found in the dissenting opinion of the Judge Odio Benito. See GALLAGHER (2010), pp. 127 – 128; Lubanga Case, Dissenting Opinion of Judge Odio Benito, 14 March 2012, §§ 15 – 21.

[219] Lubanga Case, Dissenting Opinion of Judge Odio Benito, 14 March 2012, § 20.

[220] Rape, sexual slavery, and other forms of sexual violence may be constitutive of crimes against humanity as stated in Article 7(1)(g), or of war crime as set in Article 8(2)(b)(xxii) and 8(2)(e)(vi).; AMBOS (2012), p. 137, note 156.

[221] SCHABAS (2012); On that topic, see FERSTMAN (2012), pp. 796 – 813.

[222] GALLAGHER (2010), p. 128.

[223] AMBOS (2012), p. 137, note 156.

[224] Lubanga Case, Trial Judgment, 14 March 2012, § 629. On that topic see also FERSTMAN, 2012, pp. 796 – 813.

determine whether children participating indirectly in hostilities may be considered as actively participating must occur on a case-by-case basis.[225]

Therefore, determining if girls recruited by armed forces or groups for sexual purposes may be considered as participating actively in hostilities is subject to controversy and mainly depends on the interpretation of the words "potential targets". However, it is necessary to recall that such an interpretation should intervene in the respect of the rights of the defence and the principle "*nullum crimen* ".

2.1.2. FORCIBLE AND VOLUNTARY RECRUITMENT OF CHILDREN UNDER THE AGE OF FIFTEEN

The Court first defines the concept of "enlistment" and "conscription" by specifying that they are both forms of recruitment, one referring to the voluntary incorporation of a boy or a girl under the age of fifteen into armed forces or groups whereas the latter refers to a coercively incorporation.[226] The Court goes on to observes that the consent of the child is irrelevant for the purposes of conviction given that both voluntary recruitment and forcible recruitment may be prosecuted.[227]

The Court also observes that "the crime of enlisting and conscripting is an offence of a continuous nature" and that "the crime of enlisting and conscripting children under the age of fifteen years continues to be committed as long as the children remain in the armed groups or forces and consequently ceases to be committed when these children leave the groups or reach the age of fifteen".[228]

Moreover, the Court specifies that in order to enter into the scope of incrimination of "enlistment" or "conscription" of children younger than fifteen, it is not necessary for

[225] Lubanga Case, Trial Judgment, 14 March 2012, § 628.
[226] Lubanga Case, Trial Judgment, 14 March 2012, §§ 607 – 608.
[227] Lubanga Case, Trial Judgment, 14 March 2012,§§ 612, 614 –618 ; AMBOS (2012), p. 134 – 136.
[228] Lubanga Case, Decision on the Confirmation of Charges, 29 January 2007, § 248.

the child to be recruited for the purpose of participating actively in hostilities.[229] Indeed, the Court declares that "although it may often be the case that the purpose behind conscription and enlistment is to use children in hostilities, this is not a requirement of the Rome Statute".[230] As long as the child has been recruited either forcibly or voluntary in armed forces or groups, his or her situation will fall under Articles 8(2)(b)(xxvi) or 8(2)(e)(vii) of the Rome Statute depending on the international or non-international character of the conflict. In that respect, the scope of the crime of recruitment then includes a wider range of tasks that may be assigned to the children than the crime of using them to participate actively in hostilities.[231]

Consequently, girls recruited for sexual purposes may be considered as part of this category since the purpose of their recruitment is irrelevant. However, in the case of Lubanga, given that sexual violence was not part of the charges, the trial chamber refused to make any statement on whether sexual violence could be included in this offence.

3. MAPPING THE MAIN ADVANTAGES AND DRAWBACKS

From a legal perspective, the International Criminal Court offers a wide range of possibilities to girls recruited by armed forces or groups for sexual purposes. Indeed, despite the fact that this is subject to controversy, these girls could be included in the "use-offence" depending on the interpretation of the wording "potential targets". Moreover, in any case even if they are not considered as participating actively, they may always be included in the "recruitment–offence" since it does not require any specific purposes. Finally, it may also be possible to cumulate the charges and use not only the provision related to child-soldiering offences but also Articles 7(1)(g), 8(2)(b)(xxii) and 8(e)(vi) of the Rome Statute related more generally to sexual violence.

[229] Lubanga Case, Trial Judgment, 14 March 2012, § 609; GRAF (2012), p. 958 – 960 ; JORGENSEN (2012), p. 682 - 683.
[230] Lubanga Case, Trial Judgment, 14 March 2012, § 609.
[231] GRAF (2012), p. 959.

However, each of these incriminations has shortcomings. The main point of criticism on the child-soldiering offences and more particularly the "use-offence" in the Lubanga case is based on the principle of *nullum crimen*.[232] Indeed, given that the wording of the child-soldiering offences does not cover explicitly sexual violence, one may argue that other provisions, such as Articles 7(1)(g), 8(2)(b)(xxii) and 8(e)(vi) of the Rome Statute, are more suitable to defend their rights while respecting the rights of the defence. However, these specific provisions do not reflect completely the circumstances in which the sexual violence occurs.[233] Indeed, the articles setting specific incriminations for sexual violence do not specifically take into account that these girls are in a particular vulnerable position due to their young age, or that that the sexual violence occurred in the context of their recruitment by the armed forces or groups.[234]

Therefore, it seems that there is no legal perfect fit to mirror the particular events encountered by the girls recruited for sexual purposes by armed forces of groups. Yet, one may expect that in the future, given the decision taken by the Court in the Lubanga case, the inclusion in child-soldiering offences of girls as victims of sexual violence in the context of their recruitment could be less questionable in the light of the rights of the defence.

Another major drawback in the current legal framework of the International Criminal Court is that child-soldiering offences only cover situations of recruitment or use of children younger than fifteen years. Therefore in the cases of boys or girls who are older than fifteen but still younger than eighteen, whether used or recruited by armed forces or groups and being subject to sexual violence, this legal basis of incrimination is not of any use anymore. In that respect the age-limit of fifteen fixed by the Rome Statute may

[232] Article 22 and 24 of the Rome Statute.
[233] GALLAGHER (2010 - 2011), p. 128.
[234] Moreover, the Judge Odio Benito argued that one specific element regarding that aspect is the fact that the sexual violence was perpetrated *within* the armed forces or groups. Thus, these girls are not only at risk for being targeted by the 'enemy' but also by their 'own' group. As such, being used as sex slaves become parts of their "function" in the armed group, which highlight therefore the link between their role and the combat. See Lubanga Case, Dissenting Opinion of Judge Odio Benito, 14 March 2012, §19; PARK (2006), pp. 322, 327; GALLAGHER K. (2010 - 2011), p. 128.

be really issue not only for children recruited for sexual purposes but also for all the other children recruited or used by the armed forces of groups.

As a last resort, fifteen to seventeen-year-old female victims of sexual violence may in the context of their recruitment, use other legal bases that do not specify any limit regarding the age of the victims, such as Article 7(1)(g) in cases of crimes against humanity or Article 8(2)(b)(xxii) and 8(2)(e)(vi) in cases of war crimes. However, this solution is only applicable to girls recruited for sexual purposes and leaves out all the other child soldiers taking part in hostilities either directly or indirectly.

CHAPTER 4: GIRL SOLDIERS - ASSESSING THE INTERNATIONAL CRIMINAL COURT'S APPROACH WITHIN THE ESTABLISHED FRAMEWORK OF THE CURRENT INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW FRAMEWORK

In this chapter, the current position adopted by the International Criminal Court regarding sexual violence inflicted on girl child soldiers is analysed in the light of the international humanitarian law and international human rights law. In order to do so, different criteria are taken into account, namely the treaty language, the nature of the participation in prohibited hostilities, the character of forbidden recruitment, the age-limit for participation and recruitment, the asymmetry existing between the provisions, the existence of specific provisions related to sexual violence committed in that context, and the issues related to the enforcement of these rules.[235] Resulting from this comparison, the major achievements and challenges of the International Criminal Court approach of the phenomenon will be discussed.

1. ANALYSING THE ROME STATUTE IN THE LIGHT OF THE GENEVA CONVENTIONS AND ITS ADDITIONAL PROTOCOLS

The Rome Statute respects international humanitarian law in most of its aspects, it goes further on certain points but also stays behind regarding some others depending on the international or non-international character of the conflict.[236]

[235] PARK (2010), p. 331.
[236] See annexes for a summary table showing the main features of the Rome Statute and the protection that it grants to girl soldiers.

1.1. RULES APPLICABLE IN SITUATIONS OF INTERNATIONAL ARMED CONFLICTS

In situations of international armed conflicts, the Rome Statute clearly goes beyond the standards of protection established by Article 77 (2) of the Additional Protocol I regarding both prohibition of participation and recruitment.

1.1.1. PARTICIPATION

Indeed, concerning the nature of the forbidden participation, the Rome Statute incriminates the use of children under fifteen in order to participate actively in hostilities as a criminal offence.[237] Thus, the wordings of the Rome Statute are in that respect wider in their embrace than the Additional Protocol I's, which on only provides that States Parties should take "all feasible measures" to prevent children below fifteen years from taking direct part in hostilities.[238]

The formulation "participating directly" is more restrictive than the terminology "participating actively" in hostilities. According to the Preparatory Committee of the Rome Statute, "active participation covers not only direct participation in combat but 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 check-points".[239] Hence, the "active participation" not only encompasses "direct participation" in hostilities but also some cases of "indirect participation". This is confirmed by the Court, which specified in the Lubanga case that in order to determine if "indirect" participation may constitute an act of "active" participation, two requirements need to be fulfilled,[240] namely the child has to provide a support to the combatants, which in turn will expose him to real danger as a potential target.[241]

[237] Article 8(2)(b)(xxvi) of the Rome Statute.
[238] Article 77 (2) of the Additional Protocol I.
[239] Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN Doc. A/Conf.183/2/Add.1 (April, 1998), p. 21.
[240] Lubanga Case, Trial Judgment, 14 March 2012, § 628.
[241] Lubanga Case, Trial Judgment, 14 March 2012, § 628.

Therefore, contrary to the Additional Protocol I, the Rome Statute may potentially offer some protection to girl soldiers recruited for sexual purposes if it is acknowledged that they not only provide support but are also at risk as potential targets.[242]

1.1.2. RECRUITMENT

Additionally, regarding the prohibition of recruitment, the Rome Statute states that forcible or voluntary recruitment of children under fifteen is constitutive of a war crime and may be prosecuted.[243] In that regard, it goes once again further than the Additional Protocol I, which simply requests States Parties to refrain from forcibly recruiting children younger than fifteen.[244]

Hence, contrary to the Additional Protocol I, the Rome Statute not only prohibits forcible recruitment of children but also their voluntary recruitment, which permits to protect them even when they volunteered to join armed forces.[245] Thus, the girl soldiers will with certainty find a safeguard in this provision of the Rome Statute prohibiting forcible and voluntary recruitment whereas the Additional Protocol I provides a really weak protection in that respect.

1.1.3. AGE

Regarding the age-limit for both participation and recruitment, the Rome Statute just follows the Additional Protocol I by fixing the age standard at fifteen years. Thus, the fact that girls of fifteen, sixteen or seventeen years may not rely on the child-soldiering offences prohibited by the Rome Statute may not be criticised in the light the Additional Protocol I which offers the same limited protection.

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[242] Lubanga Case, Trial Judgment, 14 March 2012, § 628.
[243] Article 8(2)(b)(xxvi) of the Rome Statute.
[244] Article 77 (2) of the Additional Protocol I.
[245] MAZURANA, MCKAY (2001), p. 32 – 33.

Consequently, where there is almost no room at all in the Additional Protocol I for the protection of girl soldiers, the Rome Statute on the contrary grants two bases of partial protection to the girls recruited for sexual purposes.

1.2. RULES APPLICABLE IN SITUATIONS OF NON-INTERNATIONAL ARMED CONFLICTS

Concerning situations of non-international armed conflicts, it must be stressed that the Additional Protocol II is actually stricter than the Rome Statute and provides a more adequate protection to girl soldiers.

1.2.1. PARTICIPATION

Indeed, the Additional Protocol II not only prohibits "direct" participation but also "indirect" participation in hostilities.[246] The Rome Statute, on the other hand, forbids the "active" participation in hostilities, which, as commented above, covers direct participation and some cases of indirect participation.[247] Thus, given that the Rome Statute does not encompass all cases of "indirect" participation, the Additional Protocol II offers in comparison wider protection to the children taking part in hostilities in situations of non-international armed conflicts.

Regarding the specific circumstances of the girls recruited by armed groups who are used not only as sex slaves but are also made to participate in abductions, cooking or looting,[248] it is still unsure whether they could be considered as participating actively in hostilities in the light of the Rome Statute. Indeed, as explained above, it would depend on the interpretation of the terms "potential target". The Additional Protocol II on the other side may fully cover their situation by prohibiting all kind of participation in

[246] Article 4 (3) (c) of the Additional Protocol II.
[247] Lubanga Case, Trial Judgment, 14 March 2012, § 628.
[248] *Lubanga* (ICC-01/04-01/06), Written Submission of the United Nations Special representative of the Secretary-General on Children and Armed Conflicts Submitted in application of Rule 103 of the Rules of Procedure and Evidence, ICC-04/04-01/06-1229-AnxA, §22 ; ALFREDSON (2001), p. 5.

hostilities. In this respect the Additional Protocol II goes beyond the Rome Statute in protecting these girls.

One may therefore argue that the wordings "active participation" contained in the Rome Statute should be interpreted in such a manner as to include the girls recruited for sexual purposes given that in situations of non-international armed conflicts the Additional Protocol II offers them protection. However, since the Additional Protocol II is not part of customary law and because the Rome Statute is a separate legal instrument created after long negotiations between the States Parties, the International Criminal Court does not have the obligation to apply the Additional Protocol II as such.[249] Yet, it should be noted that, as part of the branch of international humanitarian law, the Additional Protocol II is still part of the legal framework surrounding the International Criminal Court, and should be kept in mind while interpreting the Rome Statute.

2.1.2. RECRUITMENT

As now regards the offence of recruitment, there is no specific difference between the Additional Protocol II and the incrimination stated by the Rome Statute, both of them prohibiting forcible or voluntary recruitment. Indeed, the International Criminal court specified in Lubanga that it is not necessary for the child to be recruited for the purpose of participating actively in hostilities.[250] Therefore, in that respect the Rome Statute follows the trend initiated by the Additional Protocol II and may include girls recruited for sexual purposes in that incrimination.

1.2.3 AGE

Regarding the age issue, both the Rome Statute and the Additional Protocols grant equal protection to girls recruited as sex slaves. Indeed, fifteen years is the age-limit fixed by all these instruments.

[249] Article 21 and 22 (2) of the Rome Statute.
[250] Lubanga Case, Trial Judgment, 14 March 2012, § 609; GRAF (2012), p. 958 – 960 ; JORGENSEN (2012), p. 682 - 683.

Consequently, one of the best achievements of the Rome Statute is the establishment of a symmetrical protection for child soldiers in both situations of international armed conflicts and non-international armed conflicts, which permits to fill the gaps left by the Additional Protocols. Such an improvement comes with a cost, though, considering the rules applicable during non-international armed conflicts have become less strict.

2. ANALYSING THE ROME STATUTE IN THE LIGHT OF INTERNATIONAL HUMAN RIGHTS LAW

2.1. THE ROME STATUTE IN THE LIGHT OF THE CONVENTION ON THE RIGHTS OF THE CHILD

In the light of the Convention on the Rights of the Child, the Rome Statute is a real success providing a major protection to child soldiers in general, and partly to girl soldiers in particular.[251] Indeed, The Rome Statute not only respects the human rights framework drawn by the Convention on the Rights of the Child but even goes further in some aspects.

2.1.1. PARTICIPATION

Firstly, concerning the participation of children in hostilities, the Rome Statute incriminates their "active participation" instead of the "direct participation" forbidden by the Convention on the Rights of the child.[252] Consequently, the remark was made when comparing the Additional Protocol I and the Rome Statute also applies to this case. Indeed, the Rome Statute has a wider scope of application than the Convention on the Rights of the child,[253] given that "direct participation" does not cover the support

[251] See annexes for a summary table showing the main features of the Rome Statute and the protection that it grants to girl soldiers.
[252] Article 38 (2) of the Convention on the Rights of the Child.
[253] According to the Preparatory Committee on the Establishment of an International Criminal Court, "active participation includes not only direct participation in combat but also active participation in military activities linked to combat such as scouting, spying, sabotage and the use of children as decoys,

brought by girls recruited for sexual purposes, whereas the wording "active participation" may in some circumstances include children having supporting roles if they are at risk as potential targets.[254]

Furthermore, concerning the wordings of the provisions of both instruments, the Rome Statute clearly goes beyond by forbidding "active participation" of children under fifteen. On the other hand, the Convention on the Rights of the child only sets an obligation of conduct for the states parties to take "all feasible measures" to ensure that children will not participate directly in hostilities.[255] Consequently, the nature of the prohibition provided by the Rome Statute is stronger than the one established by the Convention on the Rights of the Child.

Hence, on the aspect of the participation, the Rome Statute provides girls subject to sexual violence in the context of their recruitment with stronger protection than the Convention on the Rights of the child.

2.1.2. RECRUITMENT

Secondly, regarding the recruitment, the Rome Statute and the Convention on the Rights of the child are both on the same page. Indeed, both of them proscribe forced and voluntary recruitment of children below fifteen.[256] Thus, both instruments may grant safeguard to girls recruited for sexual purposes given that their particular experience may be encompassed by the prohibition of recruitment.

2.1.3. AGE

Thirdly, the age standard established by both international instruments is fixed at fifteen years for the participation and the recruitment.[257] The only distinction in that respect is

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couriers or at military check-points". See Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN Doc. A/Conf.183/2/Add.1 (April, 1998), p. 21.
[254] Lubanga Case, Trial Judgment, 14 March 2012, § 628.
[255] Article 38 (2) of the Convention on the Rights of the Child.
[256] Article 38 (3) of the Convention on the Rights of the Child.
[257] Article 38 (2) and (2) of the Convention on the Rights of the Child.

the fact that the Convention on the Rights of the Child sets that during recruitment, priority should be given to the oldest.[258] Thus, the Convention pursues the tendency initiated by the Additional Protocol I toward an age-limit of eighteen years. Consequently, in this regard, the Rome Statute provides almost the same age-limit as the Convention.

2.1.4. ENFORCEMENT

As mentioned above, the Convention on the Rights of the child failing to establish clear sanctions in case of disrespect is quite an issue. In that respect, the Rome Statute may be a tool permitting to achieve partially a better implementation of the international instruments.[259] Thus, concerning the situation of girl soldiers, not only does the Rome Statute goes further in the protection that it may accord to girls victims of sexual violence during recruitment, but it also may be used as a tool of enforcement of other legal instruments.

2.2. ANALYSING THE ROME STATUTE IN THE LIGHT OF THE OPTIONAL PROTOCOL ON THE INVOLVEMENT OF CHILDREN IN ARMED CONFLICTS

The general assessment of the Rome Statute in the light of the Optional Protocol on the involvement of children in armed conflicts leads to relatively lukewarm results.[260] Indeed, each of these instruments presents different advantages for the elaboration of a more gender-inclusive definition of the concept of child soldier. Thus, in some cases the Optional Protocol will be more protective than the Rome Statute, while in some other cases the contrary is true depending on the aspect considered.

[258] Article 38 (3) of the Convention on the Rights of the child.
[259] FOX (2005), p. 39.
[260] See annexes for a summary table showing the main features of the Rome Statute and the protection that it grants to girl soldiers.

2.2.1. RULES APPLICABLE TO REGULAR ARMED FORCES

a) *Participation*

Concerning the participation in hostilities, seen from the perspective of the girls victims of sexual violence, the Rome Statute may be considered as going further than the Optional Protocol on the involvement of children in armed conflicts mainly for two reasons. First, while the Optional Protocol only prohibits "direct participation" in hostilities,[261] the International Criminal Court offers stronger protection under the wording of "active participation". Indeed, as explained above, cases of "indirect participation" may be included in the incrimination of "active participation" on the condition that the child provides support and is at risk as a potential target.[262]

Secondly, the wording of the Optional protocol is weaker than the formulation used in the Rome Statute. In the light of the Optional protocol, States are only subject to an obligation of conduct,[263] whereas the Rome Statute establishes concrete incriminations, which may be judged by the Court. Hence, from a practical point of view, the effectiveness of the Rome Statute should be greater than the Optional Protocol's.

b) Recruitment

Regarding the recruitment, the Rome Statute provides the same level of protection as the Optional Protocol, given that both of them prohibit forced recruitment and voluntary recruitment.[264] Consequently, girls victims of sexual violence in the context of their recruitment may rely on both legal instruments.

[261] Article 1 of the Optional Protocol on the involvement of children in armed conflict.
[262] Lubanga Case, Trial Judgment, 14 March 2012, § 628.
[263] Indeed, the Article 1 of the Optional Protocol on the involvement of children in armed conflict states that States Parties shall take *all feasible* measures to prevent children to participate directly in hostilities.
[264] Article 2 and 3 of the Optional Protocol on the involvement of children in armed conflict.

2.2.2. Rules applicable to irregular armed forces

a) Participation

The Rome Statute is also behind the Optional Protocol in case of use of children by non-States actors. The Optional Protocol prohibits the "use" of children, which encompasses both "direct" and "indirect" participation in hostilities.[265] This is not the case of the Rome Statute, which only forbids active participation and which, in order to include cases of indirect participation in hostilities, require two conditions to be fulfilled, namely that the child brings support and that he or she is in danger as a potential target.[266] Thus, the girls used as sex slaves by armed groups will find protection more easily on the basis of the wording of the Option Protocol rather than the Rome Statute.

b) Recruitment

As mentioned above, the Rome Statute and the Optional Protocol both prohibit forced and voluntary recruitment. Consequently, both legal instruments are of equal reliance for girls victims of sexual violence in the context of their recruitment.

2.2.3. AGE STANDARDS – THE MAIN GAP OBSERVED IN THE ROME STATUTE

More importantly, on the matter of the age standard, one has to note that the Rome Statute is far behind the Optional Protocol. Indeed, while the Optional protocol sets the minimum age at 18 years in case of participation and recruitment,[267] the Rome Statute uses 15 years as a minimum for both offences of use and recruitment. Consequently, the criminal responsibility established by the Rome Statute for recruiting and using children does not correspond with the human rights framework created by the Optional

[265] Article 4 (1) of the Optional Protocol on the involvement of children in armed conflict.
[266] Lubanga Case, Trial Judgment, 14 March 2012, § 628.
[267] The only exception regarding that matter is the age-limit fixed at 16 years in case of voluntary recruitment by states actors. See article 3 of the Optional Protocol on the involvement of children in armed conflicts.

Protocol.[268] That particular aspect of the Rome Statute is really regrettable because, failing to concern all the girls from fifteen to seventeen years, it leaves them without protection.

It must be noted that the role of the International Criminal Court is not to sanction breaches of international treaties such as the Convention on the Rights of the Child or the Optional Protocol on the involvement of children in armed conflicts. The International Criminal Court only has jurisdiction over violations listed in the Rome Statute, which are the result of long negotiations between the States Parties. Comparing these instruments permits to point out the current political and legal trends towards facing the child soldiering phenomenon and helps determine what most appropriate solutions should be adopted. Hence, given that 151 States ratified the Optional Protocol while 122 states ratified the Rome Statute, raising the minimum age-limit to eighteen years in the Rome Statute should be considered an option, so as to have the commitments taken on upon ratifying of the Optional Protocol matched with.[269] Wider protection would thus be provided not only to girl soldiers victims of sexual violence from fifteen to seventeen but also to all the other child soldiers.

Given that an important difference between the Rome Statute and the Optional Protocol is the age-limit for child soldiering offences, one could wonder why the International Criminal Court does not provide protection to all minors and focuses only on children younger than fifteen.

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[268] CROOMARASWAMY (2010), p. 536.

[269] Yet, despite the fact that there are more states parties to the Optional Protocol on the involvement of children in armed conflict than to the Rome Statute, there are still some states that only ratified the Rome Statute but are not part of the Optional Protocol. This is for example the case of the Central African Republic, Dominican Republic, Estonia, Fiji, Gambia, Ghana, Liberia, Nauru and Suriname. See the state of ratification of the Optional Protocol on the involvement of children in armed conflict and the Rome Statute on the Official website of the United Nations, available on http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-11-b&chapter=4&lang=en#EndDec and http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en (consulted on 29 may 2013).

a) Ratio legis

In order to understand this decision, it may be useful to explore the *ratio legis* behind the Rome Statute. Since the legal foundation of the Court is conventional, like any other international treaty, its elaboration took time and emerged through many negotiations between the States Parties. The progress of the proceedings or *travaux préparatoires* could permit to explain some of the choices that were made when the Rome Statute was adopted.

The general opinion about the age-limit for child soldiering offences was actually subject to controversy during the negotiations. Indeed, during the Rome Conference, several states considered that the age standards should have been eighteen rather than fifteen.[270] Different legal instruments were invoked by the states in order to support this argument.[271]

On the other side there were other states that considered that child soldiering offences should not even be included in the Rome Statute.[272] Furthermore, concerning the age standards, it was a technically complex matter for certain states to commit themselves to prohibiting participation and recruitment of children below the age of eighteen while

[270] See the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, UN Doc. A/CONF.183/C.1/SR.4, §§ 73 (Denmark), 74 (Sweden) ; UN Doc. A/CONF.183/C1/SR.5, §§ 8 (Belgium), 23 (Tunisia), 46 (Brazil), 63 (Norway) 83 (Senegal), 85 (Slovenia), 92 (Chile).

[271] Thus, the representatives of Turkey and Chile invoked the Convention on the Rights of the Child to justify eighteen as an age limit. The representatives of Belgium, Brazil and Senegal argued that the age limit should be eighteen in order to ensure consistency with the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict that was at the time in process of negotiation. The representative of Senegal also based his argument on the basis of the International Labour Organization Convention. The representative of Slovenia used the Statute of Rome itself and raised a reason of internal coherence by highlighting that since the minimum age for criminal responsibility was eighteen in the Statute, the same age limit should be adopted for child soldiering offences. However, none of these states decided to make a formal proposal to actually raise the age limit from fifteen to eighteen. See UN Doc. A/CONF.183/C1/SR.5, §§ 8, 23, 46, 83, 85; SCHABAS (2010), p. 253.

[272] For instance, the United States declared that these offences were out of the scope of the Rome Conference because they were not considered as crime in the light of customary international law. See the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, UN Doc. A/CONF.183/C1/SR.4, §54 (US); UN Doc. A/CONF.183/C1/SR.4, § 65 (China) ; UN Doc. A/CONF.183/C1/SR.5, § 62 (Morocco); SCHABAS, (2010), p. 253.

they were applying an inferior age-limit in their own domestic law.[273] Indeed, many states all around the world currently keep on recruiting minors in accordance with their domestic legislation. This is for instance the case in Europe, in countries such as the United Kingdom,[274] or Italy,[275] but also in other continents and in countries such as the United States.[276] Therefore, prohibiting recruitment of children younger than eighteen in the Rome Statute instead of fifteen would have put some States Parties in a difficult position since their national legislation would not have been in conformity with an international treaty that had been ratified by the state itself.

Consequently, it is easy to understand that with different States Parties having deeply divergent views on the inclusion of child soldiering offences in some cases, it was necessary to find a compromise.

b) Contextualism vs. universalism

Concerning the sensitive debate of age standards, there are generally two different points of view that may be adopted, either a contextualist perception of childhood or a universalist vision.[277] The former considers that childhood is a social construction and that the age of majority therefore varies from one place in the world to another, depending on circumstances.[278] Indeed, in some parts of the world, children have to face responsibilities earlier than in other regions.[279] For instance, in Africa the average life expectancy is not higher than fifty-six years.[280] Some children become head of families

[273] Thus for instance, according to Mr. Hamdon representing Lebanon during the negotiations, concerning recruitment of children in armed forces, "many developing countries would have great difficulty in embracing such a provision because of their local culture." See the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, UN Doc. A/CONF.183/C1/SR.5, § 17.
[274] 40% of the forces in the United Kingdom are recruited among people that are between sixteen of seventeen years. See GEE (2010), p. 5.
[275] COALITION TO STOP THE USE OF CHILD SOLDIERS, (2008), p. 188.
[276] COALITION TO STOP THE USE OF CHILD SOLDIERS, (2008), p. 358 ; HARTJEN, PRIYADARSHINI (2012), p. 107.
[277] PARK (2010), p. 332.
[278] GEE (2010), p. 5.
[279] GEE (2010), p. 5.
[280] Official website of the World Health Organization, Life expectancy, WHO 2013, at : http://www.who.int/gho/mortality_burden_disease/life_tables/situation_trends_text/en/, (consulted on 26

before being of legal age. Therefore determining a universal age of majority seems difficult because the context leading a child to become responsible and mature varies from one region to another. It should also be added that some practical issues may prevent some states from monitoring minors when they get involved in armed conflicts, such is the case when states do not keep official birth records of children born on their territory.[281] Consequently, in order to create rules that may be fully enforced, the particular situation of the regions concerned need to be taken into account. Thus, some authors argue that the attitude of the international humanitarian law aiming at imposing a unique universal definition of the childhood, which is lead by western willingness, undermines the local solutions to the problem given that the culture of the states concerned is ignored.[282]

However, from a human rights perspective, the fact that the particular circumstances of some regions of the world lead children to endure harsh living conditions should not be used as an argument to support that they should be less protected in situations of armed conflicts. Such an argument tends to state that because these children were initially in a difficult situation due to poverty, they should get weaker legal protection during armed conflicts than other children living in developed countries. It must be stressed, that the special circumstances of an armed conflict may not be compared to a normal situation; it requires instead an appropriate protection corresponding to the needs of these children who are more vulnerable and therefore need additional protection.[283]

Moreover, imposing an age-limit of eighteen to the recruitment and use of children in hostilities is not only a western-led international humanitarian effort. For instance, the African Charter on the Rights and Welfare of the Child adopted by the Organisation of African Unity in 1999 (which later became the African Union) sets the minimum age

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April 2013); Official website of the Central Intelligence Agency, at : https://www.cia.gov/library/publications/the-world-factbook/rankorder/2102rank.html, (consulted on 26 April 2013).

[281] PARK (2010), p. 333.

[282] ROSEN (2007), pp. 296 – 306.

[283] FOX (2005), p. 36.

for recruitment and direct participation in hostilities at eighteen.[284] Hence, although this instrument did not emerge from the "western community" and that the African Union sometimes critic the approach adopted by the International Criminal Court as being unequal and too focused on the African countries,[285] the African Charter on the Rights and Welfare of the Child declares that children under eighteen should not be involved in armed conflicts. Consequently, for the really specific case of children associated to armed forces or groups, cultural relativism should not be used as an argument to justify that weaker protection for children in some regions of the world.

Therefore, it would be beneficial for the Rome Statute to follow the optional Protocol concerning the minimum age of use and recruitment.

2.2.3. SYMMETRY OF THE PROVISIONS

As mentioned above, the fact that the rules contained in the Optional Protocol are asymmetrical depending on the identity of the actors concerned,[286] is quite problematic given that children have to handle the same suffering. Thus, another significant improvement brought by the Rome Statute is the fact that the provisions incriminating child-soldiering offences do not make a distinction between the international and non-international character of the armed conflicts. Hence, girls recruited for sexual purposes may enjoy the same type of protection, irrespective of the character of the conflict.

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[284] Article 2 and 22(2) of the African Charter on the Rights and Welfare of the Child, 1990, OAU Doc. CAB/LEG/24.9/49 (entered into force Nov. 29, 1999). 41 states out of 52 ratified the Charter. However, several states in which the worst violations of human rights occur did not ratify it, such as the Democratic Republic of the Congo. See the state of ratification on the Official website of African Commission on Human and Peoples' Rights, at: http://www.achpr.org/instruments/child/ratification/ (consulted on 30 May 2013).

[285] Daniel Fontaine, Official website of the Radio Télévision Belge Francophone, 29 May 2013, at: http://www.rtbf.be/info/monde/detail_les-africains-accusent-la-cour-penale-internationale-de-racisme?id=8005503 (consulted on 10 July 2013).

[286] PILLAY (2008), p. 25.

2.2.4. PROVISIONS SPECIFICALLY AIMING AT GIRLS VICTIMS OF SEXUAL VIOLENCE

One of the major concerns expressed about the current international instruments, is the lack of particular provisions related to girl soldiers. In that respect, a major step forward in the protection of girl soldiers by the Rome Statute is the creation of specific articles directly aiming at sexual violence during periods of armed conflicts.[287] As mentioned above, rape, sexual slavery, and other forms of sexual violence may constitute a war crime and be prosecuted in case of international conflicts as established in Article 8(2)(b)(xxii), but also in cases of non-international armed conflicts as stated in Article 8(2)(e)(vi) of the Rome Statute. In so doing, the Rome Statute eventually permits to tie together the offence of sexual violence and the context of armed conflicts instead of making a clear distinction between security, on the one hand, and sexual abuse, on the other.[288]

However, it is still necessary to link both legal bases of sexual violence offences and child-soldiering offences in order to completely encompass the specific situation of girl soldiers. Girl soldiers endure sexual abuses in the context of armed conflicts but do so not as normal civilians, but as children, given that they are recruited forcibly or voluntarily, and then live with armed forces or groups separated from their family, environment, which results in complete social uprooting.

Neither provisions actually offers an incrimination that explicitly fully refers to the situation of girl soldiers recruited by armed forces or groups for sexual purpose during armed conflicts. On the one hand, the current child soldiering offences partly leave aside the particular aspect of the sexual abuse inflicted on these girls during the period of cohabitation between children and armed forces or groups.[289] On the other hand, sexual violence offences do not take into account the particular context of recruitment

[287] COSTACHE, p. 8.
[288] LEIBIG (2005), § 42.
[289] Indeed, as mentioned above, despite that their experience may be included in the "recruitment-offence", their inclusion in the "use-offence" is still unsure depending on the interpretation of the wordings "potential targets".

and manipulation by armed forces or groups of minors framing the sexual abuses caused to these children.[290] Consequently, it may be positive to have one particular provision concerning children under eighteen recruited by armed forces or groups among other for sexual purposes, in order to give girl soldiers more visibility. However, one risk would be to adopt too casuistic an approach, which is difficult to apply in practice.

2.2.5. THE ROME STATUTE AS AN ENFORCEMENT MECHANISM

The significance of legal instruments establishing jurisdictions such as the Rome Statute is indisputable. Indeed, creating tribunals competent for a certain number of offences permits to implement international law and leads to a more concrete enforcement of human rights.[291] So far the practice of recruiting children and using them during armed conflicts has been going on, despite the fact that many international legally binding instruments forbid such an activity.[292] This is due amongst other, to the fact that these legal instruments do not set clear sanctions in case of non-compliance beside moral condemnation.[293] This stop those international provisions from being properly enforced; it also impedes prevention measures and the punishment of the perpetrators. Therefore, making criminal courts such as the International Criminal Court competent for these offences may facilitate the enforcement of these international rules and provide better protection to the children all around the world.

Therefore, one may consider that there are many ways to face the scourge of the recruitment of girls as sex slaves by armed forces or groups. One of them is the criminalization of the actors involved in this type of activity prohibited by international law.[294] This is where the International Criminal Court may play a fundamental role by prosecuting the responsible actors of such acts and by providing compensation to the victims.[295]

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[290] CROOMARASWAMY (2010), p. 536.
[291] PILLAY (2008), p. 25.
[292] HARTJEN, PRIYADARSHINI (2012), p. 99.
[293] PARK (2006), p. 330.
[294] HARTJEN, PRIYADARSHINI (2012), p. 98.
[295] SINGER (2005 (b)), p. 489 – 491.

Yet, jurisdictions are far from being the perfect tool that could answer all implementation issues. Hence, naturally, such measures have to be complemented by political, cultural, and social operations aiming at preventing the involvement of children in armed conflicts, trying to stop it when it takes place and reintegrating the children after they have been the victims of such a terrible experience.[296] In that respect, some consider that given that the child-soldiering phenomenon is a structural issue,[297] practical actions in the cultural, social and economic field need to be taken, not only during periods of armed conflicts but also during peacetime.[298]

[296] HARTJEN, PRIYADARSHINI (2012), pp. 98, 117 - 118.
[297] PARK (2010), p. 330.
[298] There are different ways to achieve such a goal. Thus providing girls the possibility to receive training or attending school may be one of them. See PARK (2006), p. 330 – 333. Moreover, taking measures aiming at involving women in the political life, by setting for instance electoral quotas, may lead to more gender-sensitive policies.

CONCLUSION

These last thirty years, the rights of the children involved in armed conflicts have improved significantly from a legal perspective. Indeed, one after the other, many international instruments such as the Geneva Conventions and their Additional Protocols, the Convention on the Rights of the Child and its Optional Protocol but also many others, have granted child soldiers more inclusive criteria. Among those legal instruments, the Rome Statute establishing the International Criminal Court has included child-soldiering offences in its definition of war crimes.

Among the children involved in armed conflicts, many of them are girls who have to fulfil multifarious roles and undergo gender-related violence. HIV/AIDS, early pregnancies, abortion and social rejection constitute specific damage to girls recruited for sexual purposes by armed forces and groups. As such, they deserve specific considerations in the light of the international criminal justice.

The particular aspect of their experience has motivated the question of this thesis: what type of protection may these girls rely on? More particularly, the question asked was whether the international criminal justice provides sufficient protection to the girls recruited for sexual purposes by armed forces and groups in the light of international humanitarian law and international human rights law.

In order to answer this question, I have examined the protection provided by the main instruments of the international humanitarian law and international human rights law namely the Geneva Conventions and their Additional Protocols, the Convention on the Rights of the Child and its Optional Protocol were analyzed. Generally speaking, the analysis has revealed that the protection accorded is relatively weak considering the narrow scope of application of the provisions, the low age standards, the asymmetrical protection accorded depending on the identity of the actors, and the difficulties related to the enforcement of these measures. Furthermore the lack of existence of specific

provisions related to girls recruited for sexual purposes remains a major barrier to the protection.

By comparison, the Rome Statute establishing the International Criminal Court provides a protection criteria that are generally equivalent to and sometimes even stronger than the safeguards offered by the provisions of international humanitarian law and international human rights law. At least three main advantages of the approach adopted by the International Criminal Court regarding girls recruited for sexual purposes are of a minimal number of three can be observed.

Firstly, the analysis of the documents brings to light that the terms used in the international instruments are different. The terms "active participation" used in the Rome Statute encompass a wider range of cases than the words "direct participation" that are set out in all the other international instruments. The girl's conditions referred to by the words "indirect participation" correspond to conditions closer to "active participation" than "direct participation". Indeed, the Court states that in order to determine when a case "indirect" participation may constitute a case of "active" participation, two requirements need to be fulfilled. The child has to provide support and has to be at risk as a potential target. Consequently the incrimination of using children to participate actively in hostilities could potentially include the situation of girls subject to sexual violence during their recruitments depending on the interpretation of the words "potential target" adopted by the Court.

Furthermore given that the decision of the Court in that respect is founded on a case-to-case basis, a case of the active participation has a more flexible character and therefore allows for the adoption of decisions better fitting with the circumstances. On the contrary, the dichotomy "direct/indirect" leaves no room for any discussion.

Secondly, another positive aspect about the Rome Statute is the fact that both forced and voluntary recruitment are prohibited, contrary to certain international instruments such as the Additional Protocol I, which only prohibits forced recruitment during

international armed conflicts. Thus, in that respect, the Rome Statute is of a particular relevance given that many boys and girls in the world join armed forces or groups on a voluntary basis. Thus, girls recruited for sexual purposes may rely on this incrimination in order to be protected, even if they joined the armed forces or groups voluntarily.

Finally, contrary to some instruments, the Rome Statute does not elaborate different categories of protection for child soldiers depending on the international or non-international character of the conflict. Thus, the Rome Statute draws a line on the asymmetrical protection that was accorded previously by some international instruments such as the Additional Protocols or the Optional Protocol on the involvement of children in armed conflicts. Indeed, during situations of conflicts, the rules created do not exclusively aim at addressing the needs of the parties to the conflict, but also intend to provide protection to the persons that need it during troubled times. Therefore, in that respect, girl soldiers will receive the same protection from the Rome Statute regardless of the nature of the conflict concerned.

Yet, in the light of the situation of the girls recruited for sexual purposes, three main issues remain to be addressed.

Firstly, some international instruments reveal that both direct and indirect participation are prohibited. This is the case of the Additional Protocol II, which forbids any type of participation in situations of non-international armed conflicts. Furthermore the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts also prohibits any type of participation when addressed to non-States actors. Thus, in these circumstances, girls recruited for sexual purposes may be included in the category protected under these instruments. The Rome Statute, on the other hand only incriminates "active participation", which does not automatically include girls used as sex slaves. Therefore, it may be argued that the wording of the Rome Statute should be interpreted in a gender-inclusive way. However, it is necessary to recall that such an interpretation should intervene in the respect of the rights of the defence and the principle "*nullum crimen* ".

Secondly, another important issue is the age standard of fifteen years established by the Rome Statute, which does not match with the minimum age of eighteen set in the Optional Protocol to the Convention on the Rights of the Child. Thus, girls aged from fifteen to seventeen subject to sexual violence are deprived of the protection accorded to child soldiers by the International Criminal Court. Despite the fact that there is no formal obligation for the Court to respect the provisions laid down in the Optional protocol, this age limit points to the international community's general tendency towards considerin that children younger than eighteen should not be involved in armed conflicts and need to be protected. Therefore, improvedthe protection of girls recruited for sexual purposes could be ensured if the age-limit mentioned in the Rome Statute was raised from fifteen to eighteen.

Thirdly, the Rome Statute, just as well as the other international instruments, provides a particular legal tool against sexual violence during periods of armed conflicts. Indeed, it is possible to cumulate the charges and use not only the provision related to child-soldiering offences but also Articles 7(1)(g), 8(2)(b)(xxii) and 8(e)(vi) of the Rome Statute related more generally to sexual violence. The addition of both incriminations allows for the girls' protection, at least in theory. However, separating the sexual violence from its context, namely the association with armed forces or groups would lead to an inadequate recognition of the pain endured by girl soldiers given that it does not reflect the circumstances in which the sexual violence occurred.

Consequently, it may be considered that from a general point of view, and compared to the other international instruments, the Rome Statute in most cases grants the girls victims of sexual violence similar and sometimes even stronger protection, although it offers a weaker protection in a few cases. However, beyond that, some difficulties remain to be solved. The text of the Rome Statute could be usefully improved by including the age-limit of eighteen years set out in the Optional Protocol to the Convention on the Rights of the Child as well as the prohibition of indirect participation established in Article 4 (3) (c) of the Additional Protocol II and Article 4 of the

Optional Protocol. The Optional Protocol could provide a basis of reflexion to raise the age-limit mentioned in the Rome Statute from fifteen to eighteen years. As for the two other provisions, they could provide the ground for considering a more gender-inclusive interpretation of the active participation in hostilities. This would address the issue of girls subject to sexual violence more effectively, reduce the existing legal loophole and allow for more adapted measures to be worked out.

BIBLIOGRAPHY

Articles

Lisa Alfredson, Report from Coalition to Stop the Use of Child Soldiers, "Sexual Exploitation of Child Soldiers: an exploration and analysis of global dimensions and trends", January 2001, available at : http://reliefweb.int/report/world/sexual-exploitation-child-soldiers-exploration-and-analysis-global-dimensions-and (consulted on 9 July 2013).

Diane Marie Amann, Prosecutor v. Lubanga in: *The American Journal of International Law*, Vol. 106, no 4, The American Society of International Law, Lancaster, October 2012, pp. 809 – 817.

Kai Ambos, The First Judgement of the International Criminal Court (Prosecutor v. Lubanga): A Comprehensive Analysis of the Legal Issues in: International Criminal Law Review, 12, Martinus Nijhoff Publishers, 2012, pp. 115-153.

T.S. Betancourt, I. Borisova,, M. de la Soudière, J. Williamson, Sierra Leone's Child Soldiers: war exposures and mental health problems by gender in: *Journal of adolescent Health*, 49, n°1, Elsevier Inc., July 2011, pp. 21-28.

Mark Drumbl, The effect of the Lubanga Case on understanding and Preventing child Soldiering in forthcoming : *Yearbook of International Humanitarian Law*, 2013, (consulted on 1 July 2013), pp. 1 - 30

Shannon Bosch & Juanita Easthorpe, Africa's toy soldiers, non-state armed groups, and 'voluntary' recruitment" in: *African Security Review*, volume 21, n° 2, Paul-Simon Handy (Guest editor), June 2012, pp. 4 – 19.

Claire Breen, The Role of NGOs in the Formulation of and Compliance with the Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflict in: *Human Rights Quarterly*, Vol. 25, No. 2,The Johns Hopkins University Press, May 2003, pp. 453 – 481.

Claire Breen, When Is a Child Not a Child? Child Soldiers in International Law, in: *Human Rights Review*, Vol. 8, n° 2, Springer Netherlands, January-March 2007, pp. 71 – 103.

Canadian Peacebuilding Network, Emerging Issues : Youth, Gender and the Changing Nature of Armed Conflict, 2008, available at: http://www.peacebuild.ca/documents/Report-Youth-and-Gender-Conflict-FINAL-draft-EN-Feb-29_FINAL.pdf (consulted on 1 July 2013).

Ruxandra I. Costache, Girl children soldiers: potential need for an increased protection under the international law of human rights and the international humanitarian law, available at: http://www.drept.unibuc.ro/dyn_doc/cercetare/cdo-Costache.pdf (consulted on 15 June 2013)

Radhika Coomaraswamy, The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict – Towards Universal Ratification in: *International Journal of Children's Rights*, Vol.18, n°4, Martinus Nijhoff Publishers, November 2010, pp. 535-549

Carla Ferstman, Limited charges and limited judgments by the International Criminal Court – who bears the greatest responsibility? in: *The International Journal of Human Rights*, Vol. 16, No. 5, Routledge, part of the Taylor & Francis Group, June 2012, pp. 796 – 813.

Mary-Jane Fox, Girls Soldiers: Human Security and Gendered Insecurity, in: *Security Dialogue*, Vol. 35, No. 4, J. Peter Burgess, Norway, December 2004, pp. 465 – 479

Mary-Jane Fox, Child soldiers and international law: patchwork gains and conceptual debates in: *Human Rights Review*, Vol.7, n°1, Springer, Netherlands, January 2005, pp. 27 – 48.

Kristin M. Gallagher, Towards a gender – inclusive definition of child soldiers: The Prosecutor v. Thomas Lubanga Dyilo in: *Eyes on the ICC*, Vol. 7, n°1, CASIN, NY, 2010-2011, pp. 115 – 136.

Mark Gee, Why is the international justice system ineffective at protecting the rights of child soldiers ? in: *Internet Journal of Criminology*, October 2010, pp. 1-79.

Roman Graf, International Criminal Court and Child Soldiers: an appraisal of the Lubanga judgement in: *Journal of International Criminal Justice* 10, n°4, 2012, p. 945 - 969.

Lisa Hughes, Can international law protect child soldiers? in: *Peace Review: A Journal of Social Justice*, Vol. 12, No. 3, Taylor & Francis Ltd, 2000, pp. 399 - 405.

Human Rights Watch, Ituri: "Covered in Blood" - Ethnically Targeted Violence In Northeastern DR Congo, vol. 15. No. 11 (A), New York, July 2003.

Jordons, M.J.D., Kohrt, B.A., Wiestse, A.T., Speckman, R.A., Suejen, M.M;, Worthman, C.M., and Komproe, I.H., Comparison of Mental Health between Former Child Soldiers and Children Never Conscripted by Armed Groups in Nepal", Journal of the American Medical Association, 2000 (300/6), pp. 691-702.

Nina H. B. Jorgensen, Child Soldiers and the Parameters of International Criminal Law in: *Chinese Journal of International Law*, Vol. 11, n° 4, 2012, pp. 657 – 688.

Abigail Leibig, Girl Child Soldiers in Northern Uganda: Do Current Legal Frameworks Offer Sufficient Protection? in: *Northwestern Journal of International Human Rights*, Vol. 3, n°1, Spring, 2005.

Graça Machel, The Impact of Armed Conflict on Children - A critical review of progress made and obstacles encountered in increasing protection for war-affected children, International Conference on war affected children, Canada, September 2000, pp. 1-60, available at: http://rsx23.justhost.com/~victimas/recursos_user/documentos/kb5736.pdf (consulted on 9 July 2013).

Dyan Mazurana, Susan McKay, Child Soldiers; What about the Girls? in: *Bulletin of the Atomic Scientists*, Sage, 2001, pp. 31 – 35.

Augustine S. J. Park, Other Inhumane Acts: Forced Marriage, Girl Soldiers and the Special Court for Sierra Leon, in: *Social & Legal Studies*, Vol. 15, n°3, September 2006, pp. 315 – 337.

Augustine S. J. Park, Child soldiers and distributive justice: addressing the limits of law? in: *Crime, Law and Social Change*, Vol. 53, n°4, May 2010, pp. 329 – 348.

Priya Pillay P., A 'Call to Arms :' A Gender Sensitive Approach to the Plight of Female Child Soldiers in: International Law, Human Rights Brief, Washington , DC: Center for human Rights and humanitarian Law,Vol. 15, no. 2, 2008, pp. 1-27.

Noëlle Quénivet, Girl Soldiers and Participation in Hostilities, in: *The African Journal of International and Comparative Law*, Vol. 16, n°2, September 2008, pp. 219 – 235.

David M. Rosen, Child Soldiers, International Humanitarian Law, and the Globalization of Childhood in: *American Anthropologist*, Vol. 109, no 2, June 2007, pp. 296-306.

David M. Rosen, Who is a child ? The legal conundrum of child soldiers in : *Connecticut Journal of International Law*, Vol 25, 2009, pp. 81 – 118.

WILLIAM A. SCHABAS, Lubanga Sentenced to Fourteen Years, July 2012, available on http://humanrightsdoctorate.blogspot.be/2012/07/lubanga-sentence-to-fourteen-years.html (consulted on 7 July 2013)

Peter W. Singer, Too Young to Kill, Newhouse News Service, January 2005 (a), available at: http://www.pwsinger.com/articles.html (consulted on 7 July 2013).

Peter W. Singer, Child Soldiers: The New Faces of War, American Educator, 2005 (b), available at : http://www.pwsinger.com/articles.html (consulted on 7 July 2013).

K'Shaani O. Smith, Prosecutor v. Lubanga.: How the International Criminal Court failed the Women and Girls of the Congo in: *Howard Law J*ournal, Vol. 54, n° 2, 2011, pp. 467-500.

The United Nations Children's Fund, Guide to the optional protocol on the involvement of children in armed conflict, New York, December 2003, pp. 1-74.

Margot Wallström, the UN Special Representative for Sexual Violence in Conflict at the United Nations Security Council Open Meeting on 'Women, Peace and Security: Sexual Violence in Situations of Armed Conflict', New York, 27 April 2010, pp. 1-6, available at : http://www.stoprapenow.org/uploads/features/StatementofSRSGWallstromSecurityCouncilOpenMeeting27April2010.pdf?v=h1wnEb3xrBE (consulted on 7 July 2013)

Jay Williams, The international campaign to prohibit child soldiers: a critical evaluation in: *The International Journal of Human Rights*, Vol. 15, n° 7, 2011, pp. 1072 – 1090.

Books

Fiona Ang, *A commentary on the United Nations Convention on the Rights of the Child, Article 38 : Children in Armed Conflicts*, Martinus Nijhoff, 2005, pp. 1-68.

M. Bastick Grimm, R. K. Kunz., *Sexual Violence in Armed Conflict, Global Overview and Implications for the Security Sector*, Geneva Centre for the Democratic Control of Armed Forces, SRO Kunding, Geneva, Switzerland, 2007.

H.D. Bosly, D. Vandermeersch, *Génocide, crimes contre l'humanité et crimes de guerre face à la justice: les juridictions internationales et les tribunaux nationaux*, Bruylant et L-G-D-J, Bruxelles-Paris, 2010.

A. Cassese, P. Gaeta, J.R.W.D. Jones, *The Rome Statute of the International Criminal Court : a commentary,* Oxford University Press, 2009.

S. C. Grover, *Humanity's Children: ICC Jurisprudence and the Failure to Address the Genocidal Forcible Transfer of Children*, Springer, 2013.

Clayton.A. Hartjen and S. Priyadarshini, *The Global Victimization of Children : Problems and Solutions*, Springer, January 2012, pp. 1- 415.

International Committee of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Martinus Nijhoff Publishers, Dordrecht, 1987, pp. 1- 900

International Committee of the Red Cross, *Child soldiers and other children associated with armed forces and armed groups*, International Committee of the Red Cross, 2nd edition, 2012, pp.1-14.

Robert Kolb, Richard Hyde, *An Introduction to the International Law of Armed Conflicts*, Hart Publishing, 2008, p. 68.

NILS Melzer, *Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law*, ICRC, Geneva, 2009, pp.1-85.

REDRESS Mariana Goetz, Clémentine Olivier, Bukeni Beck Wazuri, *Victims, Perpetrators or Heroes: Child Soldiers before the International Criminal Court*, The Redress Trust, London, September 2006, pp.1-79.

William A. Schabas, *The International Criminal Court: a Commentary on the Rome Statute*, Oxford University Press, 2010, pp. 1-1336.

Otto Triffterer, Kai Ambos, *Commentary on the Rome Statute of the International Criminal Court : Observers' Notes, Article by Article*, C.H.Beck, 2008, p. 472

United Nations, Department of Peacekeeping Operations, *Second generation disarmament, demobilization and reintegration (DDR) practices in peace operations*, United Nations Publication, New-York, January 2010, pp.1- 74

Michael G. Wessells*, Child Soldiers: From Violence to Protection*, Harvard University Press, 2006, pp.1-284.

Case

I.C.C., Pre-Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Confirmation of Charges, 29 January 2007, ICC-01/04-01/06-803-tEN.

I.C.C., *The Prosecutor v. Thomas Lubanga Dyilo,* Written Submissions of the United Nations Special Representative of the Secretary-General on Children and Armed

Conflict Submitted in application of Rule 103 of the Rules of Procedure and Evidence, 18-03-2008, ICC-01/04-01/06-1229-AnxA

I.C.C., Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute, 14 March 2012, ICC-01/04-01/06-2842.

I.C.C., *The Prosecutor v. Thomas Lubanga Dyilo*, Dissenting Opinion of Judge Odio Benito, 14 March 2012, ICC-01/04-01/06-2842

I.C.C., Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on Sentence pursuant to Article 76 of the Statute, 10 July 2012, ICC-01/04-01/06-2901

I.C.C., Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision establishing the principles and procedures to be applied to reparations, 7 August 2012, ICC-01/04-01/06-2904

SCSL, Appels Chamber, *The Prosecutor v Sam Hinga Norman*, Decision on preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), Dissenting Opinion of Justice Robertson, 31 May 2004, SCSL-2004-14-AR72(E)

Court's documents

The Court Today, *ICC-PIDS-TCT-01- 023/13_Eng*, 26 April 2013

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

United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 4th meeting**,** *UN Doc. A/CONF.183/C.1/SR.*4, 15 June - 17 July 1998

United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 4th meeting, *UN Doc. A/CONF.183/C1/SR.5*, 15 June - 17 July 1998

Legal Instruments

Geneva Conventions: Convention (I) for the amelioration of the conditions of the wounded and the sick in armed forces in the field, Geneva, 12 August 1949; Convention (II) for the amelioration of the onditions of wounded, sick and shipwrecked members of armed forces at sea, Geneva, 12 August 1949; Convention (III) relative to the treatment of prisoners of war, Geneva, 12 August 1949 and Convention (IV) relative to the protection of civilian persons in time of war, Geneva, 12 August 1949, 75 U.N.T.S. 31.

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), adopted on 8 June 1977 by the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, UN Doc.a/32/144 Annex I, 1125 UNTS no.17512 (entered into force on 7 December 1978).

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II), adopted on 8 June 1977 by the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, UN Doc.a/32/144 Annex II, 1125 UNTS no.17512 (entered into force on 7 December 1978).

Convention on the Rights of the Child, U.N.G.A Res. 44/25, 44 UN GAOR, Supp. (no.49), UN Doc. A/44/49, November 20, 1989, 1577 UNTS 3 (entered into force on September 2, 1990).

The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, May 25, 2000, U.N. GAOR, U.N. Doc. A/54/RES/263 (entered into force on February 12, 2002).

The Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, May 25, 2000, G.A. Res. 263, U.N. GAOR, 54th session, Annex II, U.N. Doc. A/RES/54/263 (entered into force on January 18, 2002).

International Labor Organization Convention no.182 on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor, 1999.

The Rome Statute of the International Criminal Court, July 1998, U.N. Doc. A/CONF (entered into force on July 1, 2002).

International Criminal Court, Elements of Crimes, U.N. Doc. PCNICC/2000/1/Add.2 (2000).

Statute of the International Criminal Tribunal for the Former Yugoslavia (adopted 25 May 1993) 32 ILM 1192.

Statute of the International Criminal Tribunal for Rwanda (adopted 8 November 1994) 33 ILM 1589.

African Charter on the Rights and Welfare of the Child, 1990, OAU Doc. CAB/LEG/24.9/49 (entered into force on November 29, 1999).

Principes du Cap et meilleures pratiques, 30 avril 1997.

The Paris Principles, Principles and Guidelines on Children Associated with Armed Forces or Armed Groups, February 2007.

Reports

Coalition to stop the use of child soldiers, *Child Soldiers*, Global Report 2008, 2008, ISBN 978095416245-0

Graça Machel, *The Impact of Armed Conflict on Children*, 1996, A/51/306.Add.1.

Graça Machel, The Machel, *Review 1996-2000: a Critical Analysis of Progress Made and Obstacles Encountered in Increasing Protection for War-Affected Children*, 2000, A/55/749.

Websites

Radhika Coomaraswamy, Afghanistan: child soldiers and dancing boys, 2 August 2011, Official website of the Huffington Post, at: http://www.huffingtonpost.com/radhika-coomaraswamy/afghanistan-child-soldier_b_820459.html (consulted on 10 July 2013)

Daniel Fontaine, Official website of the Radio Télévision Belge Francophone, 29 May 2013, at: http://www.rtbf.be/info/monde/detail_les-africains-accusent-la-cour-penale-internationale-de-racisme?id=8005503 (consulted on 10 July 2013).

The Independent, Watch Unicef negotiate the release of a child soldier, 30 December 2012 at: http://www.youtube.com/watch?v=nBbanMr2OaE (consulted on 10 July 2013)

Jane Morse, Reintegration Often Tougher for Girl Child Soldiers, Official website of the American government, 08 May 2008, at: http://www.america.gov/st/hr-english/2008/May/20080508144836ajesrom0.4115412.html?CP.rss=true, (consulted on 10 July 2013).

Official website of African Commission on Human and Peoples' Rights, at: http://www.achpr.org/instruments/child/ratification/ (consulted on 30 May 2013).

Official website of the Central Intelligence Agency, at : https://www.cia.gov/library/publications/the-world-factbook/rankorder/2102rank.html, (consulted on 26 April 2013).

Official website of the channel of the International Criminal Court, at: http://www.youtube.com/user/IntlCriminalCourt, (consulted on 2 May 2013).

Official website of Human Rights Watch, at: http://www.hrw.org/home, (consulted on 2 May 2013).

Official website of Human Rights Watch, Facts about child soldiers, 3 December 2008, at: http://www.hrw.org/news/2008/12/03/facts-about-child-soldiers, (consulted on 10 July 2013).

Official website of the International Committee of the Red Cross, at: http://www.icrc.org/eng/, (consulted on 2 May 2013).

Official website of the International Criminal Court, at: http://www.icc-cpi.int/FR_Menus/icc/Pages/default.aspx, (consulted on 2 May 2013).

Official website of the office of the Special representative of the Secretary General for Children and armed conflict, at: http://childrenandarmedconflict.un.org/, (consulted on 2 May 2013).

Official website of UNICEF, at: http://www.unicef.org/index.php, (consulted on 2 May 2013).

Official website of the United Nations, at : http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en (consulted on 10 June).

Official website of the World Health Organization, Life expectancy, WHO 2013, at : http://www.who.int/gho/mortality_burden_disease/life_tables/situation_trends_text/en/, (consulted on 26 April 2013).

Video - United Nations Webcast, Children and Youth at the ICC: Participation, Protection and Reparations, Speakers: Silvana Arbia, Registrar of the International Criminal Court; Elisabeth Rehn, Director of the Board of the Trust Fund for Victims; Brigid Inder, Executive Director of Women's Initiatives for Gender Justice; Grace Akallo, former child soldier from Uganda and co-founder of the Network of Young People affected by War, 15 December 2011, at: http://www.unmultimedia.org/tv/webcast/2011/12/children-and-youth-at-the-icc-participation-protection-and-reparations.html, (consulted on 10 July 2013).

Video - United Nations Webcast, Panel discussion on the Paris Commitments and Principles on Children Associated with Armed Forces or Armed Groups, 26 September 2011, at: http://www.unmultimedia.org/tv/webcast/2011/09/panel-discussion-on-the-paris-commitments-and-principles-on-children-associated-with-armed-forces-or-armed-groups.html, (consulted on 10 July 2013).

Video - United Nations Webcast, Panel discussion on the Paris Commitments and Principles on Children Associated with Armed Forces or Armed Groups, 26 September 2011, at: http://www.unmultimedia.org/tv/webcast/2011/09/panel-discussion-on-the-paris-commitments-and-principles-on-children-associated-with-armed-forces-or-armed-groups.html, (consulted on 10 July 2013).

The Women's Initiatives for Gender Justice, DRC: Trial Chamber I Issues first trial Judgement of the ICC – Analysis of sexual violence in the Judgement, Special issue #1 May 2012, at: http://www.iccwomen.org/news/docs/WI-LegalEye5-12-FULL/LegalEye5-12.html (consulted on 10 July 2013).

The Women's Initiatives for Gender Justice, ICC Women's Voices, E-letter March 2010 at: http://www.iccwomen.org/Womens-Voices-3-10/WomVoices3-10.html#5 (consulted on 10 July 2013).

ANNEXES

1. Summary table of the legal protection accorded to child soldiers by the Geneva Conventions and their Additional Protocols

	Participation			**Recruitment**		
	wording	character	age-limit	wording	character	age-limit
IAC - Article 77 (2) AP I	"all feasible measures" = obligation of conduct	Direct participation only	15 years	"refrain" = prohibition	Forced recruitment only	15 years and priority to the oldest
NIAC - Article 4 (3) (c) AP II	Absolute prohibition	Direct and indirect participation	15 years	Absolute prohibition	Forced and voluntary recruitment	15 years

2. SUMMARY TABLE OF THE LEGAL PROTECTION ACCORDED TO CHILD SOLDIERS THE CONVENTION ON THE RIGHTS OF THE CHILD

	Participation			**Recruitment**		
	wording	character	age-limit	wording	character	age-limit
During armed conflict of an international or non-international character - Article 38 CRC	"all feasible measures" = obligation of conduct	Direct participation only	15 years	"refrain" = prohibition	Forced and voluntary (subject to controversy) recruitment	15 years and priority to the oldest

3. SUMMARY TABLE OF THE LEGAL PROTECTION ACCORDED TO CHILD SOLDIERS BY THE OPTIONAL PROTOCOL TO THE CONVENTION ON THE RIGHTS OF THE CHILD ON THE INVOLVEMENT OF CHILDREN IN ARMED CONFLICTS

	Participation			**Recruitment**		
	wording	character	age-limit	wording	character	age-limit
Regular armed forces - Article 1, 2 and 3 OPCRC	"all feasible measures" = obligation of conduct	Direct participation only	18 years	"refrain" = prohibition	Forced and voluntary recruitment	18 years in case of forced recruitment and 16 years in case of voluntary recruitment
Irregular armed forces - Article 4 OPCRC	Under any circumstances = absolute prohibition	Direct and indirect participation	18 years	Under any circumstances = absolute prohibition	Forced and voluntary recruitment	18 years

4. Summary table of the legal protection accorded to child soldiers by the Rome Statute

	Participation			Recruitment		
	wording	character	age-limit	wording	character	age-limit
IAC – Article 8 (2)(b)(xxvi) of the Rome Statute	Absolute prohibition	active participation which covers indirect participation only if the child provides support AND is at risk as a potential target (Lubanga)	15 years	Absolute prohibition	Forced and voluntary recruitment	15 years
NIAC – Article 8(2)(e)(vii) of the Rome Statute	Absolute prohibition	active participation which covers indirect participation only if the child provides	15 years	Absolute prohibition	Forced and voluntary recruitment	15 years

		support AND is at risk as a potential target (Lubanga)				

CAPTION

- The green colour highlights the specific part of the different provisions that may provide a legal protection to girls recruited for sexual purposes.
- The orange colour underlies the provisions that may grant a limited protection to girls subject to sexual violence.