

## The International Legal Framework to Protect Children in Armed Conflict

### Abstract :

The core elements of the international legal framework are strong tools for the protection of children affected by armed conflict. However, there are other tools which have not been discussed in this introduction, such as the Ottawa Convention and the European Union Guidelines on Children and Armed Conflict, which can contribute to protection.

Implementation of this framework needs continued investment in terms of national legislation and allocation of sufficient resources with the involvement of the many agencies such as NGOs, the Special Representative, the Security Council and other UN agencies. This investment should not be limited to children associated with armed forces or armed groups, but instead should include the protection, recovery and reintegration of all children affected by armed conflict, as required under the ACRWC and the CRC.

Special attention is given to remedies for children's rights violations—for example, through truth and reconciliation commissions at the national and international level, and the prosecution of perpetrators of crimes against children via special courts and tribunals, and the ICC. The Third Optional Protocol to the CRC providing communications procedure can become an extra tool for remedies.

**Key Words:** International Legal Framework ; Protect Children ; Armed Conflict

### ملخص:

في القانون الدولي الطفل موضوع حماية عامة كشخص لا يشارك في الأعمال العدائية، وحماية خاصة نظرا لطبيعته كونه ضعيف بشكل خاص. وعلاوة على ذلك، الطفل المشارك في الأعمال العدائية محمي أيضا سواء في حالات النزاع المسلح الدولي أو النزاع المسلح غير الدولي، يستفيد الطفل كونه شخص مدني، بالحق في المعاملة الإنسانية، بما في ذلك احترام الحياة والسلامة الجسدية والمعنوية.

منذ أواخر التسعينات، ترسانة من المعاهدات و القرارات و البروتوكولات الدولية تمت إضافتها لتأطير حماية الطفل الجندي. التصديق على هذه الصكوك الدولية لحماية حقوق الطفل أنشأت تغييرا في السلوك؛ فالآن القوات والجماعات المسلحة تستخدم وتجنّد الأطفال في الظل. وهناك متابعة أمام المحكمة الجنائية الدولية، و الحكم على لوبانغا هو انتصار للأطفال الذين يجبرون على القتال في الحروب الوحشية.

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### Introduction:

**Child** soldiers has been an issue of global concern in recent decades, the development of international law had a great impact on the protection of children's rights in armed conflicts situation. There are now some 300,000 children serving as soldiers in over 30 conflicts around the world<sup>1</sup>, Africa has the highest numbers of child soldiers.

However, the impact of armed conflict on children can be substantial and havelong lasting repercussions on their physical,

emotional and mental well-being. Although the term “child” had appeared in some international documents, there was no legal definition of a child until the adoption of the Convention on the Rights of the Child 1989; according to Article 1 of that Convention, ‘A child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier’.

The internationally agreed definition for a child associated with an armed force or armed group (child soldier) is 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, messengers, spies or for sexual purposes. It does not only refer to a child who is taking or has taken a direct part in hostilities.<sup>2</sup>

The international community has taken significant steps to address the situation of children in armed conflict, and has made a number of legal commitments to protecting children affected by armed conflict. It is impossible to mention all of the relevant documents in this introduction to the international legal framework to protect children in armed conflict, we only mention some of the international instruments in international human rights law and international humanitarian law and international criminal law because they share the goal of preserving the dignity and humanity of all.

A first type of questions regarding the recruitment and participation of children in hostilities is: Are children prohibited in international law from participating in hostilities?

And has 18 years been established in international law as the minimum age for compulsory and voluntary recruitment ? Is unlawful child recruitment and use criminalized in national law?

A second type of questions concerns the responsibility of child soldiers for international crimes (genocide, crimes against humanity, war crimes). Does the criminal justice system have the capacity to effectively investigate and prosecute allegations of unlawful recruitment and use?

In this presentation of the international legal framework for the protection of children in armed conflict, we will discuss the legal framework within which both international human rights law and international humanitarian law apply in situations of armed conflict, identifying the type of legal obligations imposed on the different parties to armed conflicts and discuss the prohibition of child soldiering under international tribunals, we discuss also children as authors of grave serious crimes and atrocities.

Part One - The International Legal Protection of Children

Section 1: International Legal background of the international protection of Children

The protection of children starts to be put in place at the beginning of the 20th century, since 1919, the international community following the creation of the League of Nations starts to give some kind of importance to the concept of child protection. In this section we will discuss international legal background of the international protection of children before the birth of the convention of 1989 and under The Convention on the rights of the Child.

§1- Before the birth of the Convention of 1989

A- Customary international law: humanitarian principles applicable to children  
Customary international law consists of rules that come from "a general practice accepted as law" and exist independent of treaty law. Customary IHL is of crucial importance in today's armed conflicts because it fills gaps left by treaty law and so strengthens the protection offered to victims<sup>3</sup>.

despite The significant progress in codifying international humanitarian law we should not ignore customary humanitarian law. It remains extremely important because it can help in the interpretation of treaty law, and also the Geneva Conventions apply only between or within States that have ratified them, while Rules of customary international humanitarian law, sometimes bind all States and all parties to the conflict, without the need for formal adherence. There is no agreed list of customary rules, but the most authoritative interpretation is the ICRC study. The study lists 161 rules of customary IHL which fill the gaps left by treaty law in both international and non-international armed conflicts<sup>4</sup>.

customary international law contains a wide range of protections for the civilian population and children in particular. Some IHL rules deal exclusively with the protection of children, treating them as a distinct group, where they enjoy "special protection". Some of these protections are extended to them through their mothers, other protections concern children under 15. The prohibition of the recruitment of children into armed conflict was well-established in customary international law. This latter provides for specific rules concerning children:

Rule 135: Children affected by armed conflict are entitled to special respect and protection.

State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts.<sup>5</sup>

Practice indicates that the special respect and protection due to children affected by armed conflict includes, in particular:

- protection against all forms of sexual violence<sup>6</sup>;
- separation from adults while deprived of liberty, unless they are members of the same family<sup>7</sup>;
- access to education, food and health care<sup>8</sup>;
- evacuation from areas of combat for safety reasons<sup>9</sup>;
- reunification of unaccompanied children with their families<sup>10</sup>.

Rule 136. Children must not be recruited into armed forces or armed groups.<sup>11</sup>

Rule 137. Children must not be allowed to take part in hostilities.<sup>12</sup>

Furthermore, customary rules regulate children's internment conditions with regards to their separation from adults except their families. In case of displacement, all possible measures must be taken to ensure satisfactory conditions of children's shelter, hygiene, health, safety and nutrition and non-separation of family members<sup>13</sup>.

#### B- The Hague Conferences

The Hague Conventions of 1899 and 1907 are a series of international treaties and declarations negotiated at two international peace conferences at The Hague in the Netherlands. Along with the Geneva Conventions, The Hague Conventions were among the first formal statements of the laws of war and war crimes in international law.

The Hague Regulations are generally considered as corresponding to customary international law, binding on all States independently of their acceptance of them. The First Hague Peace Conference signed on 1899 was to create conditions preventing further wars and brought up issues of international disputes, laws of war and other clauses that deals with conflicts and peace. The Hague Regulations provide rules concerning all aspects of land warfare, such as: the categories of persons that were to be regarded as combatants; the treatment of prisoners of war; restrictions on the adoption of means and methods of waging war, including some basic rules on the protection of civilian populations etc. The Second Hague Peace Conference in 1907, went deeper into the problems that were presented at the conference of 1899. The main goal was ensuring international peace, the convention of 1907, strongly focused on naval warfare.

The 1907 Convention (IV) respecting the Laws and Customs of War on Land is the most important annex of the 1907 Hague Conventions, where provisions concerning the protection of nationals (including children) in the occupied territories against the consequences of war were provided<sup>14</sup>. Although the use of children as soldiers was not specifically prohibited in the texts of The Hague Regulations, its Article 23 (h) prohibited in general all forced participation of nationals of a hostile party in operations of war directed against their own countries<sup>15</sup>. This implies a change of views on children such that children ceased to be viewed simply as property subservient to their states. With the enactment of The Hague Conventions (1899-1907), laws governing war on land were better defined with respect to both civilians and soldiers.

#### C-The Universal Declaration of Human Rights 1948 (UDHR)

The UDHR is a milestone document in the history of human rights, the Declaration was proclaimed by the United Nations General Assembly in Paris on 10 December 1948 as a common standard of achievements for all people and all nations. It sets out, for the first time, fundamental human rights to be universally protected. It is not a treaty but is generally agreed to have become

part of customary international law. The first sentence of the preamble introduces the concept of the 'inherent dignity' of human beings as a fundamental basis for human rights, and the first Article states that: 'All human beings are born free and equal in dignity and rights.' The Universal Declaration did not claim to have the status of a legally binding instrument.

Although most of the human rights proclaimed by the Universal Declaration apply equally to adults and children, two of its provisions explicitly refer to "children". Article 25(2) states: "Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection". And article 26 is a general provision concerning the right to education.

D-International Covenant on Civil and Political Rights 1966 (ICCPR)

The International Covenant on Civil and Political Rights 1966 contains general provisions from which children are entitled to benefit as well as certain specific provisions on safeguards for children in the administration of justice and as members of a family unit. Various provisions of the Covenant refer to the terms "juvenile", "children" or "child".

The ICCPR contains important articles which appear to protect the child from involuntary circumcision; Article 10(2)(b) states that: "accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication". Article 14(4) specifies that: "in the case of juvenile persons, the procedure before the courts and tribunals shall be such as will take account of their age and the desirability of promoting their rehabilitation". Article 24 is the most comprehensive Covenant provision pertaining to children:

(1) Every child shall have...the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

(2) Every child shall be registered immediately after birth and shall have a name.

(3) Every child has the right to acquire a nationality.

Some Covenant articles which do not explicitly mention children clearly apply to them, such as "the inherent right to life" guaranteed to "every human being" by Article 6(1) and the stipulation in Article 8(1) that: "no one shall be held in slavery"; Article 14(1) incorporates a more specific reference to rights of the young: "any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children"; Article 9 provides a right of security of person; Article 7 provides a right to freedom from torture, and cruel or degrading treatment. Article 26 provides a right to the equal protection of the law for all persons; Article 18 provides that everyone has a right to adopt a religion and the ICCPR recognizes the family as

entitled to societal and state protection (article 23(1)); In Article 6(5) the ICCPR precludes the imposition of the death penalty on persons under the age of eighteen at the time of committing a crime, it states that: " Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women".

§2- The Convention on the rights of the Child (CRC)

The protection of children's rights under international treaty law can be traced back to the first Declaration of the Rights of the Child adopted by the League of Nations in 1924. However, the 1924 Declaration, never intended to create binding obligations on states and corresponding legal rights for children. The 1959 Declaration represents 'the first serious attempt to describe in a reasonably detailed manner' a catalogue of the rights of the child. Although the 1959 Declaration was a non-binding resolution of the General Assembly, its statement on the rights and welfare of the child set the foundation for subsequent development of the corpus of child law at the international level.<sup>16</sup> The Convention on the rights of child was adopted and opened for signature, ratification and accession by the United Nations General Assembly through resolution 44/25 on November 20, 1989 and it came into force on September 2, 1990.

The Convention on the Rights of the Child (CRC) is almost universally ratified<sup>17</sup>, it is the cornerstone of international protection framework for all children affected by armed conflict; article 38 of this Convention, which deals with the recruitment and use of children in armed conflict, is directly linked to this protection.

A- Article 38 of the Convention on the rights of the Child

The Convention on the Rights of the Child urges in Article 38, governments to take all feasible measures to ensure that children under 15 have no direct part in hostilities. It sets 15 years as the minimum age at which an individual can be voluntarily recruited into or enlist in the armed force. Article 38 states that:

1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.
2. States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.
3. States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavor to give priority to those who are oldest.
4. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all

feasible measures to ensure protection and care of children who are affected by an armed conflict.

The standards of this provision have been improved in the optional protocol on the involvement of children in armed conflict, under Article 2, "States Parties undertake to respect the rights set forth in the present Convention and to ensure that each child within their jurisdiction without discrimination of any kind."

In August 1996 the report<sup>18</sup> of Graça Machel, brought a huge attention to the problems affecting children living in war zones. The Machel Report analyzed the effectiveness of international protection standards using the UN CRC as a framework for analysis.

**B-Optional Protocol to the UNCRC on the Involvement of Children in Armed Conflict (2000)**

The Optional Protocol represents a clear improvement of existing international law, although the text also contains evident weaknesses. Of particular importance may be highlighted:

-The protocol prohibits compulsory recruitment by government forces of anyone younger than eighteen years, according to article 2 : "States Parties shall ensure that persons who have not attained the age of 18 years are not compulsorily recruited into their armed forces"; The protocol sets 18 as the minimum age for direct participation in hostilities, this provision provides the possibility to accept volunteers from the age of sixteen but only if the State deposits a binding declaration at the time of ratification or accession, setting out their minimum voluntary recruitment age and outlining certain safeguards for such recruitment.

-According to Article 1:"States Parties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities." In our opinion the obligation imposed on States to prevent participation in hostilities should have been made more absolute, and should also have covered indirect participation, which may often be also dangerous for the children involved.

-According to Article 4, paragraph 1:"Armed groups, 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." As we see here, the issue of non-state actors has been included in the Optional Protocol, and they are forbidden from recruiting anyone under the age of 18 for any purpose, but we regret that the provision imposes a moral not legal obligation.

**Section 2: Regional legal protection of Children**

Besides the global level, children's rights are also laid down on the regional level, in this context, we will discuss the African Charter on the Rights and Welfare of the Child 1990, European legal protection of children and other laws like Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor (Convention 182).

§1: The African Charter on the Rights and Welfare of the Child 1990 (ACRWC)

The ACRWC was adopted by the Organization of African States in 1990 and came into force in November 1999. It is the only regional treaty that directly addresses the issue of child soldiers. The Charter's provisions regarding children in armed conflicts (Article 22) attempt to advance the provisions contained in Article 38 of the Convention. This provision of the African Charter is an essential one as, on the one hand, many of African countries are parties to this treaty and, on the other hand, overwhelming numbers of child soldiers can be found on this continent. Article 22(2) provides that:

'State parties to the present Charter shall take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain in particular, from recruiting any child'. This article replaces the expression "persons who have not attained the age of fifteen years" that is used by the Convention in Article 38(2) by the words "no child".

Given the strict definition in Article 3 of the Charter this means that the age of protection under the Charter is 18 years without exception. Furthermore, the Charter prohibits the recruitment of any child, and therefore of any person under the age of 18 years. A similar provision can be found in Article 38(3) of the Convention. However, the Convention fixes the age of persons who are not allowed to be recruited at 15 years. The Charter, therefore, increases the level of protection by including persons between the ages of 15 and 18 years.

§2: European Legal protection of Children

A- European Convention on Human Rights 1950

The Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) uses throughout the term "everyone" (or, where appropriate, "no one"); Specific references to the young are found in two articles of the ECHR and concern legal proceedings. Article 5(1)(d), on the lawful procedures for depriving a minor of his or her liberty, permits the lawful detention of a minor for the purpose of educational supervision or for bringing him before the competent legal authority. Article 6(1) stipulates that everyone is entitled to a fair and public hearing and that judgment will be pronounced publicly, but the hearing may be held in private when required by the interests of juveniles or the protection of the parties' private life. Protocol No. 7 to the ECHR provides that while spouses enjoy equality of rights and responsibilities in their relations with their children, this does not prevent States "from taking such measures as are necessary in the interests of the children" (article 5).

B-European Convention on the exercise of children's rights 1996

The European Convention on the Exercise of Children's Rights (ECECR) stresses in the Preamble on the aim of promoting the rights and "best interests" of children. It contains a number of procedural measures designed to ensure that children's rights are respected and sets up a Standing Committee to deal



with matters arising from the Convention, it states that children should have the opportunity to exercise their rights, particularly in family proceedings affecting them; they should be provided with relevant information.

The ECECR applies to children who have not reached the age of eighteen (article 1(1)).

§3: Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor (ILO Convention 182)

Another instrument which offers protection for children from participation in armed conflicts is the ILO Convention 182. In 1990, the General Conference of the International Labor Organization (ILO) adopted the ILO Convention 182, which for the first time expressly recognized forcible recruitment of children as one of the worst form of child labor, as is clear from Article 3 and Article 7 (1), which read:

Article 3: "All forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labor, including forced or compulsory recruitment of children for use in armed conflict."

Article 7 (1): "Each Member shall take all necessary measures to ensure the effective implementation and enforcement of the provisions giving effect to this Convention including the provision and application of penal sanctions or, as appropriate, other sanctions."

For the purposes of this convention, the term "child" applies to all persons under the age of eighteen (article 2).

ILO Convention 182 strengthen the safeguards to protect children from participation in armed conflicts in several aspects. It is listed as a form of child labor, child soldiering in conflict zones is not limited to those who fight in the frontlines or who take a direct part in hostilities, but also those who take an indirect participation in a variety of tasks, such as cooking, doing laundry, or providing sexual services to adult combatants. In this respect, all the other conventions focus only on those who take direct part in hostilities but ILO Convention 182 protects children who take indirect part in hostilities. However, the provision does not extend protection to those who are voluntarily recruited, it only seeks to protect those children who are forcibly recruited.

ILO Convention 182 is the first human rights instrument expressly providing for criminal sanctions against the use of child soldiers. When we read Articles 1, 2 and 7 (1) side by side ILO convention 182 urges States to take the most effective sanctions, i.e. criminal sanctions to prevent this brutal atrocity and states should consider compulsory recruitment of children under 18 years as a crime in the domestic laws.

The wide acceptance of the Convention could be considered as a strong indication that prohibition of forcible recruitment of children under the age of 18 has become customary international law.<sup>20</sup>

Part two: Protection of Children in armed conflict

Section 1: The Geneva Conventions 1949 and its additional Protocols 1977

The most significant humanitarian law treaties that apply to warfare today are the Geneva Conventions, which were drafted after the World War II in 1949 and its two additional protocols that were adopted in 1977. These instruments provide protection to civilians and those who can no longer take part in hostilities.

§1- Common article 3 to the Geneva conventions 1949

Common Article 3 to the Four 1949 Geneva Conventions provides that:

« In case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the Conflict shall be bound to apply, as a minimum, the following provisions:

1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any similar criteria. To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment; and

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

2) The wounded and sick shall be collected and cared for».

According to Article 3, the parties to the internal armed conflict are bound to respect fundamental human rights. According to the International Court of Justice, the provisions of Article 3 common to the Geneva Conventions “constitute a minimum yard stick” applicable to any armed conflict “and reflect what the Court in 1949 [in the Corfu Channel case] called ‘elementary considerations of humanity’<sup>21</sup>.

We would say that the Geneva Conventions have served their goals better service for the past sixty years, and they remain very important, and this certainly applies to cases of international disputes, including cases of occupation. For example, to the situation in the Darfur region of Sudan, Colombia, eastern Democratic Republic of Congo, as well as the current

situation in Palestine, Syria, Iraq. The Geneva Conventions cover all of these situations; and given back to the global acceptance, the Common Article 3 is applicable in any armed conflict anywhere in the world, and children must of course be protected in any armed conflict.

§2-Geneva Convention IV 1949

The Geneva Convention relative to the Protection of Civilian Persons in Time of War, commonly referred to as the Fourth Geneva Convention, defines humanitarian protections for civilians in a war zone, including hostages, diplomats, spies, bystanders and civilians in territory under military occupation. The convention outlaws torture, collective punishment and the resettlement by an occupying power of its own civilians on territory under its military control. The Convention incorporated a limited number of obligations on parties to a conflict to provide special protection to children<sup>22</sup>. These include allowing free passage of food, clothing and medicine intended for children and assisting children who are separated or orphaned<sup>23</sup>. State parties are also permitted to establish hospital and safety zones to protect children, as well as other vulnerable groups.

§3- Additional Protocols I and II to the Geneva Conventions

In 1977, the international community adopted two additional protocols to the Geneva conventions, they set out fifteen as the minimum age for recruitment or participation in armed conflicts. This minimum standard applies to governmental and non-governmental armed forces, in conflicts of both international and non-international character. Additional Protocol I broadened the protection afforded to children in international conflicts, according to Article 77(2) of Additional Protocol I: 'The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular they shall refrain from recruiting them into their armed forces'. The Protocol set 15, not 18 years as the minimum age for participation and recruitment. Article 78 of Additional Protocol I addresses the evacuation of children from war-torn countries, providing that children are not to be evacuated, unless there are compelling reasons.

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

Section2: Protection of children in armed conflict in case law

The criminal liability of children is a difficult concept to think about at the international level because international criminal law is not clear on the issue of the minimum age for criminal liability.

§1- Protection by the international criminal courts

International judicial bodies, in charge of the application of international humanitarian law and international human rights law, have paid increased attention to the violations of children's rights in armed conflicts. The main international jurisdictions that addressed children's rights violations are the International Criminal Court (ICC), the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), the Special Court for Sierra Leone (SCSL).

A- Rome Statute of the International Criminal court 1998

In the past two decades, the international community has taken a number of crucial initiatives to end impunity for grave violations against children. The ICC 1998, which came into force in 2002, established the first permanent, treaty-based, international criminal court to help end impunity for the perpetrators of the most serious crimes of concern to the international community. It gives the court jurisdiction over the most serious crimes of concern under international law: Article 8 of the Statute enumerates acts recognized as war crimes within the Court's jurisdiction. It includes some "child-specific" crimes, which, by definition, can only be committed against children. One of them is conscripting and enlisting them into armed forces or other armed groups, as well as the active involvement of children below the age of fifteen in hostilities<sup>24</sup>. Under Article 8(2)(b)(xxvi) and (e)(vii) of the 1998 ICC Statute, "conscripting or enlisting children under the age of fifteen years" into armed forces or groups constitutes a war crime in both international and non-international armed conflicts. It applies individual responsibility to those who commit violations and also defines sexual slavery as a war crime (Article 8(2)(b)(xxii) and Article 8(2)(e)(vii)) and a crime against humanity (Article 7(1)(g)). The ICC issued its first-ever verdict on March 14th, 2012 in the case of THOMAS LUBANGA DYILO, leader of the rebel group Congolese Patriotic Union. The ICC sentences Thomas Lubanga to 14 years in prison who was found guilty of abducting boys and girls under the age of 15 and forcing them to fight in the Democratic Republic of the Congo's eastern Ituri region in 2002-2003.

B- Statute of the Special Court for Sierra Leone (2002)

The Special Court for Sierra Leone, is a judicial body set up by the government of Sierra Leone and the United Nations to "prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law" committed in Sierra Leone after 30 November 1996 and during the Sierra Leone Civil War.

The special characteristic of the civil conflict that existed within Sierra Leone between 1996 and 2002 was the presence of children, especially young boys, under the age of 15 in the ranks of the armed factions. Those children were recruited and forced to participate actively in hostilities.

The Statute gives the Court jurisdiction over specific crimes against children, such as the conscription or enlistment of children under the age of 15 years into armed forces or groups and the active use of children in hostilities. Article 4 of the Statute of the SCSL provides: “The Special Court shall have the power to prosecute persons who committed the following serious violations of international humanitarian law: ... conscripting or enlisting children under the age of 15 years into armed forces or groups”.

former Liberian President Charles Taylor became the first African president to be convicted for his part in war crimes, 11-count indictment contains, among crimes against humanity, war crimes and other serious violations of international humanitarian law of which he is accused, also ‘Conscripting or enlisting children under the age of fifteen years into armed forces or groups, or using them to participate actively in hostilities’.

C- Statute of the International Criminal Tribunal for the former Yugoslavia 1993

the International Criminal Tribunal for the former Yugoslavia was established in May 1993 by the UN Security Council, it was the first war crimes court created by the UN, following the armed conflict, to try those responsible for violations of international humanitarian law in the territory of the former Yugoslavia. In this Tribunal, children are afforded the same protections provided to adult victims and witnesses<sup>25</sup>. The Statute and Rules of Procedure and evidence of the International Criminal Tribunal for the former Yugoslavia do not explicitly limit its jurisdiction to over 18 years old. In theory, the ad hoc tribunal could seek prosecutions of those who were under 18 at the time of their crime; however, the International Criminal Tribunal for Yugoslavia has not sought to prosecute children, largely because children did not play a major role in the conflict in the former Yugoslavia.

D- Statute of the International Criminal Tribunal for Rwanda 1994

the Security Council created the International Criminal Tribunal for Rwanda following the serious violations of international humanitarian law that were committed during the 1994 genocide in Rwanda. As many children had taken part in the genocide, the issue of prosecuting them was much more pertinent than it had been in Yugoslavia and since 14 years is the national age of criminal responsibility in Rwanda, children under this age would not be prosecuted. However, prosecution was for children aged 14 to 18 in national courts, rather than in the International Tribunal<sup>26</sup>.

The only specific reference to children in the Statute of the International Criminal Tribunal for Rwanda appears in the list of crimes that constitute

genocide, which includes “forcibly transferring children of the group to another group committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group”<sup>27</sup>. These include a Victims and Witnesses Unit and safeguards for security and privacy during testimony, provided for in Rule 34. The Rules of Procedure and Evidence of the Tribunal do not limit jurisdiction to over 18 year olds. In theory, the Tribunal could seek prosecution of those who were under 18 at the time of their crime; however, they have not sought to do so.

#### §2- Children as authors of grave serious crimes and atrocities

since the condemnation of Thomas Lubanga for recruiting and using child soldiers in 2012, the issue of child soldiers has gained increased attention. However, not much has been said about the crimes perpetrated by those children.

The act of recruiting child soldiers is a war crime; however, as soldiers, they may be perpetrators of many crimes<sup>28</sup>. Therefore, the question arises as to whether they should be held liable for these crimes. Even so, the criminal liability of children is a difficult concept to think about at the international level for many reasons such as, no minimum age for criminal liability exists under international law because countries conflict on what this age should be.

International law does, however, provide minimal guidance on how to determine what the minimum age should be; Rule 4/1 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice “Beijing rules” provide that: “In those legal systems recognizing the concept of the age of criminal responsibility for juveniles, the beginning of that age shall not be fixed at too low an age limit, bearing in mind the facts of emotional, mental and intellectual maturity”.

international criminal law is not clear in determining the minimum age of criminal liability, the statutes of various international judicial bodies are conflicting on this point. While the (ICTY) and (ICTR) statutes are silent on the issue, the Serious Crimes Panels in East Timor have jurisdiction over minors over 12 years of age<sup>29</sup> and the (SCSL) has jurisdiction to prosecute children over fifteen years of age. However, the statute of the SCSL strictly regulates prosecution of children under eighteen years of age and privileges rehabilitation as opposed to other traditional aims of punishment. The ICC has jurisdiction to prosecute individuals over eighteen years of age.

Most national systems allow prosecutions of child soldiers and, in fact, some have done so<sup>30</sup>. Currently, we are witnessing a case within international criminal law, that of DOMINIC ONGWEN, indicating that the prosecution of individuals for crimes committed as children may be possible.

International human rights law does not argue against child prosecution, the CRC contains provisions on the criminal liability of children, stating that if a child is to be prosecuted, certain conditions must be respected. This is a strong

indicator that the international community, through states' ratifications of the CRC and also through ratification of regional treaties like the African Charter on the Rights and Welfare of the Child, agrees that child prosecution is authorized.

Based on the above considerations, child soldiers should never be prosecuted under the age of fifteen. However, prosecution of children between fifteen and eighteen is not necessarily the best way to implement the right to reintegration promoted by the CRC. This is the reason why children between fifteen and eighteen could be held accountable in ways other than criminal prosecutions, for instance by using mechanisms of transitional justice other than criminal.

International law provides no explicit guidelines for whether or at what age child soldiers should be prosecuted for grave violations of international humanitarian and human rights law, perhaps the best way to solve the dilemma of what to do with child soldiers who violate international humanitarian law, however, is by eliminating the use of children as soldiers altogether.

**Conclusion:**

The main elements of the international legal framework are strong instruments to protect children affected by armed conflict. However, there are other instruments that we have not mentioned in this article, as Paris principals, the Ottawa Convention and the EU Guidelines on Children and Armed Conflict, which also help to protect children. Also The efforts between the Special Representative of the Secretary-General for Children and Armed Conflicts, international and regional organizations, non-governmental organizations and other civil society groups have resulted significant advances and important effects for children.

The implementation of this framework needs to be regularly at the law, to allocate sufficient resources and mobilize many organizations such as NGOs, the Special Representative of the Secretary General of the UN, the Security Council and other UN agencies. This commitment should not only be limited to children associated with armed forces or armed groups, but also addresses the protection, rehabilitation and reintegration of all children affected by armed conflict, as envisaged in the African Charter on the Rights and welfare of the Child and the Convention on the Rights of the Child.

Particular attention is paid to the question of remedies for violation of the rights of the child for example, through the prosecution of perpetrators of crimes against children before special tribunals and the International Criminal Court. The third optional protocol to the Convention on the Rights of the Child on a communications procedure may become an additional instrument to lodge appeals.

Footnotes& selected bibliography

1) child soldiers, global report 2004, Coalition to Stop the Use of Child Soldiers, 17 November 2004,found on: <http://www.child-soldiers.org>.

- 2) Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups, 2007.
- 3) [www.icrc.org/eng/resources/documents/misc/customary-law-translations.htm](http://www.icrc.org/eng/resources/documents/misc/customary-law-translations.htm)
- 4) Customary International Humanitarian Law (CIHL) Study, ICRC, Henckaerts, J-M and Doswald-Beck, L, Cambridge University Press, Cambridge & New York, 2005.  
[www.icrc.org/ihl.nsf/INTRO/612?OpenDocument](http://www.icrc.org/ihl.nsf/INTRO/612?OpenDocument)
- 5) Rule 135, ICRC study, Henckaerts, J-M and Doswald-Beck, L, Cambridge University Press, Cambridge & New York, 2005.
- 6) Ibid Rule 93.
- 7) Ibid, Rule 120.
- 8) Ibid, Rules 55, 118 and 131.
- 9) Ibid, Rule 129.
- 10) Ibid, Rules 105 and 131.
- 11) Ibid, Rule 136.
- 12) Ibid, Rule 137.
- 13) Ibid, Rule 120.
- 14) Regulations concerning Laws and Customs of War on Land, The Hague, 18 October 1907, Section III, Military Authority Over the Territory of the Hostile State, Articles 42-56.
- 15) Ibid, Article 23(h): “A belligerent is likewise forbidden to compel the national of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent’s service before the commencement of the war”.
- 16) professor Kamel FILALI, Regional child instrument on the African continent: The African charter on the rights and welfare of the child in AUCIL Journal of International Law, Issue N°1, 2013.
- 17) Today only two states have failed to ratify the Convention: The United States of America and South Soudan.
- 18) Graça Machel, “Impact of Armed Conflict on Children: Report of the Expert of the Secretary-General”, submitted pursuant to General Assembly Resolution 48/157, UN Doc A/51/306, 26 August 1996.
- 19) The Worst Forms of Child Labor Convention, Article 1: “Each Member which ratifies this Convention shall take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labor as a matter of urgency.” Article 2: “For the purposes of this Convention, the term "child" shall apply to all persons under the age of 18”. Article 7(1): “Each member shall take all necessary measures to ensure the effective implementation and enforcement of the provisions, including the provision of penal sanctions, or appropriate other sanctions”.



- 20) BhavaniFonseka, The Protection of Child Soldiers in International Law, 2 Asia-Pacific Journal on Human Rights and the Law (2001):2, p. 84.
- 21) Nicaragua (merits), (1986) at § 218.
- 22) There are also a number of provisions that provide specific protection for pregnant women, for example, "...expectant mothers shall be the object of particular protection and respect" (Article 16).
- 23) Articles 13-26, Geneva Convention IV. These articles are primarily concerned with the provision of medical facilities and supplies.
- 24) The Statute of the ICC, Article 8, para.2b[xxvi] and Article 8, para.2 e[vii].
- 25) Statute of the International Criminal Tribunal for Yugoslavia, 25/05/1993, S/R/827, Article 4(2)(e), available on-line at <http://www1.umn.edu/humanrts/icty/statute.html>.
- 26) Children who are detained and prosecuted are entitled to the protection of the international juvenile justice guarantees, which govern detention, trial, sentencing and rehabilitation: Convention on the Rights of the Child, 20November 1989, United Nations Treaty Series, vol. 1577, pg 3, Article 37, 39, 40, available on-line at <http://www.unhcr.org/refworld/docid/3ae6b38f0.html> and United Nations, "Standard Minimum Rules for the Administration of Juvenile Justice", UN Res 40/33-Beijing Rules, 1985; United Nations, "Rules for the Protection of Juveniles Deprived of their Liberty", UN Res 45/113-JDLs, 1990; United Nations, "Guidelines for the Prevention of Juvenile Delinquency", UN Res 45/112-Riyadh Guidelines, 1990.
- 27) Statute of the International Criminal Tribunal for Rwanda,8/11/1994, S/R/955, Article 2(2)(e), available on-line at <http://www2.ohchr.org/english/law/itr.htm>.
- 28) MatthewHappold, "ChildSoldiers,VictimsorPerpetrators?"(2008)29ULaVerneL Rev56at79.
- 29) UnitedNations TransitionalAdministration inEastTimor,Regulation2000/30 Section45OnTransitional Rules of Criminal Procedures, online: EastTimor LawJournal<<http://www.eastimorlawjournal.org/UNTAETLaw/Regulations/>>
- 30)See Human Rights Watch, „The Omar Khadr Case: A Teenager Imprisoned at Guantanamo“, June 2007, available at [www.hrw.com](http://www.hrw.com) (pointing out the US failure to implement both international and US juvenile justice standards).
- 31) Mark Drumbl, "Reimagining ChildSoldiersin InternationalLawandPolicy" (WorkingPaperNo2011-17, WashingtonandLeeUniversitySchoolof Law, September2011)online: <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1921527](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1921527)>.