

**A CRITICAL ANALYSIS OF THE JURISPRUDENCE OF THE
SPECIAL COURT FOR SIERRA LEONE ON THE USE OF CHILD
SOLDIERS**

**A DISSERTATION SUBMITTED IN PARTIAL FULFILMENT OF
THE REQUIREMENTS OF THE DEGREE LL.M (HUMAN RIGHTS
AND DEMOCRATISATION IN AFRICA)**

BY

DORIS A.M SONSIAMA

**PREPARED UNDER THE SUPERVISION OF
DR RONALD KAKUNGULU-MAYAMBALA**

AT THE FACULTY OF LAW, MAKERERE UNIVERSITY

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Signature:

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Dedication

This work is dedicated to God Almighty for His unfailing love and to my mum Rev
(Mrs) Priscilla Lefevre for always been there for me.

Also to the thousands of child soldiers the world over whose lives have been destroyed
through armed conflicts.

Acknowledgement

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Acronyms

ACRWC	African Charter on the Rights and Welfare of the Child
AFRC	Armed Forces Revolutionary Council
API	Additional Protocol I of the Geneva Conventions Relating to the Protection of Victims of International Armed Conflicts
APII	Additional Protocol II of the Geneva Conventions Relating to the Protection of Victims of Non-International Armed Conflicts
AU	African Union
CDF	Civil Defence Forces
CRC	Convention on the Rights of the Child
ECOMOG	Economic Community of West African States Cease-Fire Monitoring Group
ECOWAS	Economic Community of West African States
ICC	International Criminal Court
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
OP-CRC	Optional Protocol to the Convention on the Rights of the Child
RUF	Revolutionary United Front
SCSL	Special Court for Sierra Leone
TC I	Trial Chamber I of the Special Court for Sierra Leone

TC II	Trial Chamber II of the Special Court for Sierra Leone
TRC Report	Truth and Reconciliation Commission Report of Sierra Leone
UN	United Nations

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‘... children need to play and grow in a nurturing environment so that they will strike terror no more’

D Crane

Chapter One

Introduction

1.1 Background to the study

The use of child soldiers in armed conflicts has been common the world over for a long time now. However, over the last few decades, this practice has become widespread in Africa where armed groups recruit children as part of their war strategy and to help sustain their campaigns. This practice has left thousands of children physically and psychologically bruised with many still suffering from post war effects long after the end of such conflicts.¹ Many negative effects still haunt many of the children who were recruited into the ranks of the government and rebel forces during the decade civil war in Sierra Leone. The civil war in Sierra Leone has been considered to be one of the most gruesome in the history of conflicts in Africa not only because of its high level of brutality but also in the manner in which children were forced into combat and abused both physically and psychologically.² It is estimated that between 7000 - 10 000 children below the age of 15 years, some as young as seven were recruited into armed forces or groups during the war.³

Before the official close of the war in 2002, the former President of Sierra Leone Alhaji Ahmed Tejan-Kabbah made a formal request to the United Nations (UN) Secretary-General (by then Mr Kofi Annan) in June 2000 requesting that a special court be established to prosecute those responsible for serious atrocities during the war.⁴ The Special Court for Sierra Leone (SCSL or the Court) was established in 2002 by UN Security Council Resolution 1315.⁵ Its mandate is:

¹ SK Karanja 'Child soldiers in peace agreements: The peace and justice dilemma' (2008) 8 *Global Jurists* 1.

² Report of the Sierra Leone Truth and Reconciliation Commission (TRC Report) (2004) vol 3B, 315-316: <http://www.sierra-leone.org/TRCDocuments.html> (accessed 5 June 2011).

³ JA Kindberg 'Child solders: The situation': http://www.thesituation.co.uk/features/child_soldiers/child_soldiers.html (accessed 9 June 2011). See also TRC Report (n 2 above) vol 3B, 235.

⁴ A Tejan-Cole 'The complementary and conflicting relationship between the Special Court for Sierra Leone and the Truth and Reconciliation Commission' (2002) 5 *Yearbook of International Humanitarian Law* 316.

⁵ See Security Council Resolution 1315 (2000) of August 2000, S/RES/1315 (2000) para 1: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N00/605/32/PDF/N0060532.pdf?OpenElement> (accessed 7 June 2011).

...to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.⁶

The SCSL was to serve as the citadel of justice for the war torn people of Sierra Leone. One of the mandates of the Court as stated in its Statute is to prosecute persons responsible for ‘conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities.’⁷ Between the period of 2002 to 2006, the SCSL issued on indictments against the leaders of the three warring factions which were the Revolutionary United Front (RUF), Armed Forces Revolutionary Council (AFRC) and Civil Defence Forces (CDF) and the former President of Liberia, Charles Ghankay Taylor.⁸ The indictments include among other charges the recruitment and use of children below the age of 15 years to ‘participate actively in hostilities.’⁹ It was hoped that their indictments would be a first step in changing the legal culture of impunity and in providing justice for victims of the conflict.¹⁰

In 2007, the SCSL convicted three individuals from the AFRC faction for the offence of recruiting and using children below the age of 15 years to ‘participate actively in hostilities.’¹¹ In 2009, another conviction was entered by the SCSL with respect to the same offence against two members of the RUF.¹² These judgments marked the first in which an international criminal tribunal had convicted individuals for recruiting and using children in armed conflict.¹³

1.2 Problem statement and research questions

The SCSL has been lauded as having considered issues ‘which suffered from a dearth of international jurisprudence.’¹⁴ However, its jurisprudence on the use of child soldiers leaves much to be debated about especially with regards its interpretation of

⁶ Art 1 of the Statute of the Special Court for Sierra Leone (SCSL).

⁷ See art 4(c) of the Statute of the SCSL.

⁸ See indictment sheet of the AFRC, RUF, CDF and Charles Taylor: <http://www.scsl.org/HOME/tabid/106/Default.aspx> (accessed 5 September 2011).

⁹ As above.

¹⁰ T Kelsall *Culture under cross examination: International justice and the Special Court for Sierra Leone* (2009) 32.

¹¹ *Prosecutor v Alex Tamba Brima et al*, Case No. SCSL-04-16-T, Trial Chamber Judgment, 20 June 2007.

¹² *Prosecutor v Issa Hassan Sesay et al*, Case No. SCSL-04-15-T, Trial Chamber Judgment, 2 March 2009.

¹³ CC Jalloh ‘Special Court for Sierra Leone: Achieving justice?’ (2011) 32 *Michigan Journal of International Law* 445.

¹⁴ S Sivakumaran ‘War crimes before the Special Court for Sierra Leone’ (2010) 8 *Journal of International Criminal Justice* 1010.

‘active participation in hostilities’ in the context of the conflict in Sierra Leone. While both trial chambers of the SCSL deemed it irrelevant to attach particular significance to the distinction between ‘conscripted and enlistment’ of children into armed forces or groups relying in principle on the fact that a child below the age of 15 years could not give valid consent,¹⁵ it however became an issue with regards distinguishing between active and non-active participation in hostilities. According to Trial Chamber II (TC II) of the SCSL, using children to participate actively in hostilities encompasses only those activities that put ‘their lives directly at risk in combat’ inclusive of any support functions that maintains military operations in a conflict.¹⁶ Those support functions were then listed by TC II as including acting as decoys, human caravans, couriers, guarding mines or military objectives and facilities, manning checkpoints and acting as human shields.¹⁷ However, Trial Chamber I (TC I) adopted a more restrictive interpretation of ‘active participation in hostilities’ stating that since the armed conflict in Sierra Leone was characterised by violence against civilians, it encompasses ‘crimes committed against civilians.’¹⁸ TC I therefore limited ‘active participation in hostilities’ to combat or military activities sufficiently related to combat, thereby significantly narrowing the broader interpretation adopted by TC II.¹⁹ The reasoning TC I adopted was that although support functions such as food finding missions helped to sustain the armed groups, it was not related to the conduct of hostilities.²⁰

This threshold of the degree of ‘participation in hostilities’ required for culpability for the use of child soldiers laid down by the Court is somehow illusive as it failed to take into consideration the nature of the conflict and the changing role of child soldiers in the conflict. Another grave concern is that this interpretation of ‘active participation in hostilities’ adopted by the Court completely disregarded the role of girl child soldiers in the conflict. Girl child soldiers were not redundant within those armed groups. Their abduction, recruitment and use as sex slaves was used to advance one of the military objectives of those armed groups which was ‘primarily to

¹⁵ *Prosecutor v Moinina Fofana & Allieu Kondewa*, Case No. SCSL-04-14-T Trial Chamber Judgment, 2 August 2007, para 192. See *Prosecutor v Issa Hassan Sesay et al* (n 12 above) para 187. See also *Prosecutor v Alex Tamba Brima et al* (n 11 above) para 735.

¹⁶ *Prosecutor v. Alex Tamba Brima et al* (n 11 above) paras 736-737.

¹⁷ *Prosecutor v Alex Tamba Brima et al* (n 11 above) para 737.

¹⁸ *Prosecutor v Issa Hassan Sesay et al* (n 12 above) para 1724.

¹⁹ *Prosecutor v Issa Hassan Sesay et al* (n 12 above) paras 1720 & 1743.

²⁰ As above.

terrorise the civilian population.²¹ The background support functions that girl child soldiers performed such as embarking on food finding missions and as domestic labourers provided the support and resources that armed groups needed to sustain their war campaign.²² Further, certain activities performed by child soldiers such as embarking on food finding missions or acting as human caravans though not related to combat, endangered the lives of child soldiers as a result of circumstances that prevailed at the time which the Court did not take into consideration. This study therefore seeks to critically analyse this aspect of the Court's jurisprudence. The study examines the relevance of the distinction between 'active and non-active participation in hostilities' made by the Court in the context of the conflict in Sierra Leone as well as implications of its future application from a human rights perspective.

In light of this, the study is based on the following questions:

- a. Should the nature of the role performed by child soldiers (whether as active or non-active participant) in the armed conflict have been a crucial basis in determining culpability for the offence of the use of child soldiers?
- b. What are the possible future legal implications of adopting stringent standards in the determination of the threshold of 'active participation in hostilities'?

1.3 Assumptions

While the principle of distinction is relevant in the laws of armed conflict,²³ the case before the SCSL on child soldiers presented a situation wherein the distinction between 'active and non-active participation in hostilities' could not have been of any significance. The nature of the conflict and the multiple, overlapping and diverse functions of child soldiers in the armed conflict could have made any attempt to make an accurate distinction a misnomer. Further, with all these factors in mind, 'active participation in hostilities' should not have been limited to combat or military related

²¹ See indictment sheet of RUF paras 42 - 43: <http://www.sc-sl.org/LinkClick.aspx?fileticket=ppr39WF8TnM%3d&tabid=105>. Indictment sheet of AFRC paras 39 - 40: <http://www.sc-sl.org/LinkClick.aspx?fileticket=0f5nG35Dgf0=&tabid=106>. Indictment sheet of CDF para 24: <http://www.sc-sl.org/LinkClick.aspx?fileticket=3DY274jtZAY=&tabid=104> (accessed on 5 September 2011).

²² A Leibig 'Girl child soldiers in Northern Uganda: Do current legal frameworks offer sufficient protection?' (2005) 3 *Northwestern University Journal of International Human Rights* xxxv.

²³ MD Maxwell & RV Meyer 'The principle of distinction: Probing the limits of its customariness' (2007) *Army Law* 1.

activities as the Court did but should have instead been interpreted broadly to include support, logistical and domestic functions performed by child soldiers.

1.4 Objectives

The objectives of this study are:

- a. To critically analyse the jurisprudence of the SCSL on child soldiers;
- b. To examine whether the role of the child (whether as active or non-active participant) in hostilities should have been a crucial basis in determining culpability for the use of child soldiers and;
- c. To assess possible future legal implications of adopting stringent standards in determining the threshold of ‘active participation in hostilities.’

1.5 Significance of the study

It is of relevance that the jurisprudence of the SCSL on the use of child soldiers be critically analysed especially in light of the divergent opinions that it has triggered. While it is necessary to give credit to the Court as the first to have prosecuted and convicted individuals for the use of child soldiers, it is also equally important to critically analyse the implications of future application of this aspect of its jurisprudence. This is in light of the fact that other international criminal tribunals like the International Criminal Court (ICC) which has started prosecuting individuals for the use of child soldiers might refer to this aspect of the Court’s jurisprudence. This study might therefore be useful in influencing judicial minds. The study may also serve as a useful material for those interested in learning about this aspect of the Court’s jurisprudence and may provide a useful academic groundwork for further research on this subject. It is also hoped that this study will add to scholarly literature on the jurisprudence of the SCSL.

1.6 Research methodology

The study was based on desk research and employed an analytical approach. The jurisprudence of the SCSL on the use of child soldiers was critically analysed in light of the existing rules of international humanitarian law. In undertaking this study,

primary and secondary source materials were used. The primary sources included statutes and case laws of the SCSL and other international criminal tribunals like the International Criminal Tribunal for the former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR) and the ICC. Books, journal articles, reports and information from the internet were also used as secondary source materials.

1.7 Literature review

Many Scholars have written about the SCSL covering different themes ranging from its establishment to its legacy.²⁴ In the same vein, many more scholars have written inspiring pieces on the issue of child soldiers in general. However, there is very limited literature on the SCSL's jurisprudence on child soldiers which this study seeks to address. While few scholars have written on the Court's jurisprudence on the use of child soldiers, none has in actual fact critically analysed this jurisprudence or assessed the implications of its future application which this study seeks to do. Aptel has highlighted the gradual development of international law towards prosecuting child-specific offences in light of the SCSL's judgments on the use of child soldiers.²⁵ She also noted in particular the attempt by the Court to make a distinction between 'active and non-active participation in hostilities,' acknowledging the difficulty of adopting that approach in terms of balancing the interests of victims and defendants.²⁶ Sivakumaran is of the view that a distinction ought to be made between 'active and non-active participation' of a child in combat.²⁷ He differs from TC II's judgment in stating that caution must be exercised before concluding that all support functions which are directly related to combat such as acting as decoy amounts to 'active participation in hostilities.'²⁸ According to him, such a conclusion could give a very broad interpretation to 'active participation in hostilities' which would be problematic.²⁹ Waschefort however agreed on point with regards to making a distinction between acts that amount to 'active participation in hostilities' and those

²⁴ See L Gberie 'Africa and international criminal justice: Lessons from the Special Court for Sierra Leone' (2010) *African Security Review* 31-47 who wrote extensively on the legacy of the Court.

²⁵ C Aptel 'Children and accountability for international crimes: The contributions of international courts' (2010) Innocenti Working Papers, 6 -7: http://www.unicef.irc.org/publications/pdf/iwp_2010_20.pdf (accessed 10 June 2010).

²⁶ Aptel (n 25 above) 11-12.

²⁷ Sivakumaran (n 14 above) 1018.

²⁸ Sivakumaran (n 14 above) 1018-1019.

²⁹ As above.

that does not, noting that the jurisprudence of the Court in this area is sound.³⁰ His reason being that if a broader interpretation is adopted, ‘a greater number of children will be legitimate military targets while conflict is ongoing.’³¹ Smith, in discussing the decision of the Appeals Chamber in Decision on Preliminary Motion Based on Lack of Jurisdiction for Child Recruitment addressed the dissenting opinion of one of the judges who interpreted the term ‘use’ to include only combat functions.³² She stated that to adopt such an interpretation would be manifestly incorrect and that it places a restrictive limit on the interpretation of ‘active participation in hostilities.’³³ According to her, ‘active participation in hostilities’ includes both combat and ‘any active participation in military activities.’³⁴

While these scholarly works are very useful in any discourse of the Court’s jurisprudence on the use of child soldiers, this study differs from these opinions. It employs a different approach by examining whether the nature of the role performed by child soldiers (whether as active or non-active participant) in the armed conflict should have been a crucial basis for the Court to have relied on in establishing culpability for the use of child soldiers. In particular, while the study did not totally disagree with the Court’s findings, it nonetheless seeks to ascertain whether the distinction between ‘active and non active-participation in hostilities’ in this case was meaningful. The study also seeks to assess the future legal implications of adopting the same stringent standards of the SCSL in the determination of what amounts to ‘active participation in hostilities.’ This is a new input to existing literature on the SCSL.

1.8 Chapterisation

The study is divided into five chapters.

Chapter one is the general introductory chapter. It states, defines and sketches the problem statement, research questions, methodology, scope and limitation of study.

³⁰ G Waschefort ‘Justice for child soldiers? The RUF trial of the Special Court for Sierra Leone’ (2010) 1 *International Humanitarian Studies* 196 -200.

³¹ Waschefort (n 30 above) 200.

³² A Smith ‘Child recruitment and the Special Court for Sierra Leone’ (2004) 2 *Journal of International Criminal Justice* 1144.

³³ Smith (n 32 above) 1146.

³⁴ As above.

Chapter two sets out the context to the study by looking at the conflict in Sierra Leone and the role of child soldiers in the conflict. It also examines legal international humanitarian and human rights law as well as domestic legal standards in Sierra Leone for the protection of children from involvement in armed conflict.

Chapter three is the substantive chapter. It critically analyses the Court's jurisprudence on the use of child soldiers.

Chapter four assesses the implications of future application of the Court's jurisprudence from a legal and human rights perspective.

Chapter five is the concluding chapter and also includes recommendations.

1.9 Scope of study

Though there is much to write about in terms of the SCSL's jurisprudence, this study focuses only on the jurisprudence of the trial chambers of the SCSL relating to child soldiers. Also, the study did not take into account the case of the *Prosecutor v Charles Ghankay Taylor*, although the accused has also been charged with the offence of recruitment and use of soldiers, for obvious reasons paramount among which is that the trial chamber has not yet handed down its judgment.

1.10 Limitations

This research was limited by a number of factors. Firstly, the fact that the study was conducted in Uganda while the researcher was writing on the SCSL restricted the researcher's ability in terms of getting the necessary materials and also conducting interviews with individuals especially lawyers that have worked with the Court on their views on this aspect of the Court's jurisprudence. The research was also limited in terms of time and resources. Given the fact that the time frame to complete the research was limited, the researcher faced some constraints in terms of undertaking the research that was needed to do justice to a study of this nature. The unavailability of resources to undertake this research was also a limitation to the study.

Chapter Two

Child soldiers in Sierra Leone and legal instruments for the protection of children in armed conflict situations

2.1 The conflict in Sierra Leone

Sierra Leone is a small country located along the West Coast of Africa with a population of about five million people.³⁵ As a former British Colony, it attained independence from Britain on 27 April 1961.³⁶ Soon after, a series of conflict erupted as a result of power struggle and the country gradually degenerated under a series of corrupt and authoritarian regimes.³⁷ In 1991, the conflict situation took a different turn when a group called the RUF, headed by Corporal Foday Sankoh emerged and began to wage war against the Government of Sierra Leone.³⁸ This war that started in a small town in the Eastern Province was to last for a decade and engulfed almost all areas of the country.³⁹ The conflict in Sierra Leone not only claimed innumerable lives but also wrecked the social fabrics and led to a total collapse of the state's governing apparatus.⁴⁰

While there is no single factor responsible for the conflict, the TRC Report recorded bad governance, endemic corruption and denial of basic human rights as some of the root causes that created conditions which made the eruption of violence inevitable.⁴¹ As the war gradually spread through major parts of the country, different warring factions emerged, all with different regional alliances which resulted into multiple phase of fighting.⁴² The warring factions included the RUF, AFRC and the CDF. In November 1996, the Abidjan Peace Accord was signed between the Government of Sierra Leone and the RUF in order to consolidate peace but two

³⁵ The 2004 population and housing census of Sierra Leone: Statistics Sierra Leone: http://www.statistics.sl/2004_population_and_housing_census_tables.pdf (accessed 19 August 2011).

³⁶ TRC Report (n 2 above) vol 3A, 19.

³⁷ SD Roper & LA Barria *Designing criminal tribunals: Sovereignty and international concerns in the protection of human rights* (2006) 31.

³⁸ Tejan-Cole (n 4 above) 314.

³⁹ TRC Report (n 2 above) vol. 3A, 3.

⁴⁰ Roper & Barria (n 37 above) 32.

⁴¹ TRC Report (n 2 above) vol 1, 10.

⁴² M Humphreys & JM Weinstein 'Handling and manhandling civilians in civil war: Determinants of the strategies of warring factions' (2005) 10-11: <http://www.columbia.edu/mh2245/papers/Civilians.pdf> (accessed 29 September 2011).

months after signing the agreement, the RUF renewed attacks against the government.⁴³ In May 1997, a military coup was staged which ousted the democratic elected government of Ahmed Tejan Kabbah and the army installed Major Johnny Paul Koroma as leader of the AFRC.⁴⁴ After the coup, the new AFRC regime invited the RUF to form a government of national unity with them.⁴⁵ The CDF was created in 1997 by the ousted President who was in exile as a paramilitary government group to fight against the AFRC led government and RUF and to help restore his government back to power.⁴⁶

In 1998, the Economic Community of West African States (ECOWAS) Cease-Fire Monitoring Group (ECOMOG) together with the CDF intervened in another bloody struggle with the AFRC and RUF alliance to restore the government back to power.⁴⁷ Though the intervention was successful, the costs paid were high as thousands of civilians were killed, maimed and the retreating AFRC and RUF forces abducted thousands of children as they took their exit.⁴⁸ The government of Sierra Leone was then pressured by the international community to enter into fresh negotiations with the fighting factions in a bid to bring lasting peace. These negotiations led to the Lomé Peace Accord signed in July 1999 which laid the groundwork for the beginning of a gradual peace process.⁴⁹ The conflict was officially declared over in 2002, after the 'symbolic' burning of arms.⁵⁰

During the entire period of the conflict, all the warring factions allegedly committed serious human rights violations against the civilian population. Children however are thought to have borne the greatest brunt of the conflict as all parties involved systematically targeted and forcibly recruited thousands of children into their ranks.

⁴³ A Tejan-Cole 'A big man in a small cell' in EL Lutz & C Reiger (eds) *Prosecuting heads of state* (2009) 209.

⁴⁴ C Laucci *Digest of the Special Court for Sierra Leone 2003 - 2005* (2007) xvii.

⁴⁵ Roper & Barria (n 37 above) 33.

⁴⁶ *Prosecutor v Moinina Fofana & Allieu Kondewa* (n 15 above) paras 80-81.

⁴⁷ Roper & Barria (n 37 above) 33.

⁴⁸ JA Romero 'The Special Court for Sierra Leone and the juvenile soldier dilemma' (2004) 2 *Northwestern University Journal of International Human Rights* 4-5.

⁴⁹ A Tejan-Cole 'The Special Court for Sierra Leone: Conceptual concerns and alternatives' (2001) 1 *African Human Rights Journal* 107.

⁵⁰ Kelsall (n 10 above) 28.

2.2 The role of child soldiers in the conflict

The conflict in Sierra Leone was particularly gruesome because ‘children were singled out for some of the most brutal violations of human rights recorded in any conflict.’⁵¹ All warring factions employed ‘a policy of deliberately targeting children,’ some as young as seven and who were then used to serve in diverse roles.⁵² They were not only victims of the armed conflict but were also systematically forced to perpetrate crimes against their families and communities and they represented the principal victims of a war they knew nothing about nor understood.⁵³

About 7 000 - 10 000 child combatants participated in the conflict through forcible recruitment although there were cases in which some children volunteered to join the armed groups.⁵⁴ However experts have stated that even in instances where children voluntarily enlist, caution must be had because it would be totally misleading to consider such decision to have been freely exercised taking into consideration the prevailing political, economic and social factors that might have driven them to make such decision.⁵⁵ Voluntary recruitment of a child under the age of 15 years should therefore be considered as illusive. Experts have also noted that armed groups are particularly attracted to children because they are subservient and easy to manipulate.⁵⁶ This was the situation that existed in Sierra Leone where armed groups were more interested in forcibly recruiting children into their ranks than adults. In most cases, children were forced to commit atrocities against civilians especially in their communities in order to deliberately ostracise the child from that community for good.⁵⁷ Child soldiers participated in killing, amputating and mutilating civilians.⁵⁸ Armed groups exploited the vulnerability of child soldiers and they were made to perform some of the most arduous and often dangerous tasks either through the

⁵¹ TRC Report (n 2 above) vol 1, 14.

⁵² TRC Report (n 2 above) vol 2, 96.

⁵³ AB Abbott ‘Child soldiers: The use of children as instruments of war’ (2000) *Suffolk Transitional Law Review* 504.

⁵⁴ TRC Report (n 2 above) vol 3B, 235.

⁵⁵ G Machel ‘Promotion and protection of the rights of children: Impact of armed conflict on children: Note by the Expert of the Secretary-General, 51st session, A/51/150 (1996)’ para 38: http://www.unicef.org/graca/a51-306_en.pdf (accessed on 16 August 2011)

⁵⁶ See Machel (n 55 above) para 34.

⁵⁷ Abbott (n 53 above) 515.

⁵⁸ TRC Report (n 2 above) vol 3B, 263-263.

manipulation of their bravery or under the influence of drugs.⁵⁹ In addition to engaging in combat, child soldiers also looted and burnt properties, manned checkpoints, acted as spies, human shields, decoys, body guards of commanders, guarded camps and mines, homes of commanders and their families and were used to guard military objectives.⁶⁰ They also served as couriers, domestic servants, human caravans to carry looted properties and arms and ammunitions, porters, cooks, sent on food finding missions and used as forced labour to work in mines, work and supervise work on their commanders' farms.⁶¹

Girl child soldiers were sexually exploited and abused through their use as sex slaves and 'bush wives.'⁶² In most cases, armed groups after forcibly recruiting children carved their initials onto their chests, in a deliberate attempt to disfigure them and prevent them from escaping.⁶³ These initials marked the children as members of the faction whose initials they carry which automatically make them enemies to opposition armed factions and constantly exposed those children to danger. Forcible recruitment was the initial step of a long process that used terror, violence and psychological manipulation to bring out high level of obedience and transform children into fierce fighters.⁶⁴ In order to produce the desired combatant in child soldiers, they were regularly intoxicated with hard drugs which transformed them into fierce fighters and ready executioners.⁶⁵

The roles of child soldiers were multiple and often changed depending on the particular needs of the armed group at any time. For instance, a child that was used to do domestic chores would in the face of battle and shortage of manpower, be used in actual combat. This was the reason why almost all the children that were recruited into these armed groups had to undergo forced military training irrespective of their sex. There were no formal standard of assigning tasks to child soldiers after recruitment and they could be assigned to any combat, support or domestic task that

⁵⁹ S Freeland 'Mere children or weapons of war: Child soldiers and international law' (2008) *University of La Verne Law Review* 26.

⁶⁰ TRC Report (n 2 above) vol 3B, 263-264 & 267-268.

⁶¹ As above.

⁶² TRC Report (n 2 above) vol 3B, 262.

⁶³ TRC Report (n 2 above) vol 3B, 275.

⁶⁴ MYM Yoong 'Child soldiers: Problems of definition, role and factors for recruitment (2004) *Journal of the Royal Malaysia Police Senior Officers' College* 6.

⁶⁵ SL Wells 'Crimes against child soldiers in armed conflict situations: Application and limits of international humanitarian law' (2004) 12 *Tulane Journal of International and Comparative Law* 301.

was in need of manpower. The rights of these children were systematically violated and they were forced to commit atrocities or they would be killed.⁶⁶

As the role of child soldiers in the conflict were multiple, so also were the post conflict effects on them multiple. Child soldiers in Sierra Leone have suffered from physical injuries, health complications and psychological disorders.⁶⁷ They also lost out in the fields of education and missed out on the chance to enjoy their childhood.⁶⁸ In addition many still suffer from stigmatisation, ostracisation and community distrust as families and communities often forget that joining the fighting forces was not a choice that many of these children had to make.⁶⁹ A good number of these children have been unable to fully recover from their past as their experiences with the fighting factions have traumatised their childhood development and many have lost their childhood for good.⁷⁰ They represent visible legacies of the effect of war on the development of children and although some of them were made to commit serious atrocities, they should first and foremost be considered as victims of the war.⁷¹ Such atrocities should not be considered as what the child has done but rather the circumstances and conditions which allowed them to commit those crimes.⁷²

2.3 Who is a child soldier?

Although there is as yet no universally accepted definition of a child since a child is defined differently depending on the specific law dealing with the child, the Convention on the Rights of the Child (CRC) defines a child as any person under the age of 18 years.⁷³ In the same vein, there is still no universally accepted definition of the term 'child soldiers.' International Humanitarian Law (IHL) and human rights law that protects children from involvement in armed conflicts identifies them by virtue of their

⁶⁶ TRC (n 2 above) vol 3B, 282.

⁶⁷ TRC Report (n 2 above) vol 3B, 315-318.

⁶⁸ TRC Report (n 2 above) vol 3B, 306.

⁶⁹ TRC Report (n 2 above) vol 3B, 320.

⁷⁰ Abbott (n 53 above) 518.

⁷¹ See Report of the UN Secretary-General on the Establishment of a special court for Sierra Leone (2000), UN Doc S/2000/915, para 7: <http://www.un.org/Docs/sc/reports/2000/915e.pdf> (accessed 16 August 2011).

⁷² D Crane 'Strike terror no more: Prosecuting the use of children in times of conflict - The West African extreme' in K Arts & V Popovski (eds) *International criminal accountability and the rights of children* (2006) 121.

⁷³ Art 1 of the Convention on the Rights of the Child (CRC).

age and offers no standard definition for the concept of child soldiers.⁷⁴ However the Cape Town Principles and Best Practices on the Prevention of Recruitment of Child Soldiers in Africa has defined a child soldier as:

...any person under 18 years of age who is part of any kind of regular or irregular armed force or group in any capacity.... It does not, therefore only refer to a child who is carrying or has carried arms.⁷⁵

This definition according to the Cape Town Principles is not limited to children participating in combat but also includes those engaged in military-related activities, support and domestic functions as well as girl child soldiers used for sexual purposes.⁷⁶ The Principles and Guidelines on Children Associated with Armed Forces or Armed Groups (Paris Principles) equally propounded an all-inclusive definition of the term 'child soldiers' by defining them as 'any person below 18 years who is or who has been recruited or used by an armed force or armed group in any capacity....'⁷⁷ The above definitions of child soldiers are comprehensive as they seek to encompass all categories of child soldiers irrespective of the nature of their role, hence reflecting the realities of the lives and experiences of child soldiers.⁷⁸

2.4 International humanitarian law (IHL) and its protection of children from involvement in armed conflict

There is no single source of law in existence which could be classified as the international law of the child.⁷⁹ Therefore in order to understand the law that governs the protection of children from involvement in armed conflict, recourse must be had to specific and general treaties at regional and global level dealing with human rights,

⁷⁴ MJ Fox 'Child soldiers and international law: Patchwork gains and conceptual debates' (2005) *Human Rights Review* 30.

⁷⁵ See annexure of the Cape Town Principles and Best Practices on the Prevention of Recruitment of Children into the Armed Forces and Demobilisation and Social Integration of Child Soldiers in Africa: [http://www.unicef.org/emerg/files/Cape_Town_Principles\(1\).pdf](http://www.unicef.org/emerg/files/Cape_Town_Principles(1).pdf) (accessed 16 October 2011).

⁷⁶ As above.

⁷⁷ Principle 2(1) of the Principles and Guidelines on Children Associated with Armed Forces or Armed Groups (2007) : http://www.child.soldiers.org/childsoldiers/paris-Principles_March_2007.pdf (accessed 18 August 2011).

⁷⁸ Smith (n 32 above) 1145.

⁷⁹ I Cohn & GS Goodwin-Gill *Child soldiers: The role of children in armed conflict* (1994) 55.

states practice, customary international law and the rules of International Humanitarian Law.⁸⁰

International Humanitarian Law (IHL) offers protection to civilians and persons taking no ‘active part in hostilities’ from the inhumanity of wars.⁸¹ Special protection is afforded to children and by virtue of their vulnerability and inability to make rational decisions, IHL also prohibits their recruitment and use in armed conflict.⁸² The adoption of the four Geneva Conventions of 1949 marked the beginning of the recognition of the special status of children under IHL.⁸³ Though the Fourth Geneva Convention which deals with the protection of civilians during armed conflict did not specifically address the issue of children involved in armed conflict, it nonetheless recognise the special status of children below the age of 15 years.⁸⁴ It further provides for their welfare and guaranteed them preferential treatment during armed conflict situations.⁸⁵ The subsequent adoption of the 1977 Additional Protocols to the Geneva Conventions contained provisions that dealt with the issue of child soldiers.

Article 77(1) of Additional Protocol I (API) provides that children should be the ‘object of special protection.’ With regards to children involved in armed conflict situations, article 77(2) obligates states to take ‘all feasible measures’ to ensure that children who have not attained the age of 15 years do not take ‘direct part in hostilities’ and they should not be recruited into their armed forces. API also makes clear that recruitment of children between the ages of 15 and 18 years to participate in hostilities should only be employed as an exception and even in such cases, priority should be given to those who are oldest.⁸⁶ Though there are a number of issues with these provisions such as their ‘creation of a ‘special category of children’ under the age of 15 within the existing category of those under 18 years and the fact that they only prohibit ‘direct participation in hostilities’ in which states are obligated to take

⁸⁰ As above.

⁸¹ Abbott (n 53 above) 499.

⁸² Abbott (n 53 above) 520-521.

⁸³ Fox (n 74 above) 31.

⁸⁴ See arts 38(5), 50 & 89 of the Fourth Geneva Convention of 1949.

⁸⁵ As above.

⁸⁶ Art 77(3) of Additional Protocol I (API) to the Geneva Conventions.

‘feasible measures,’⁸⁷ API nonetheless comprehensibly states that children under the age of 15 years have no place in armed conflicts.

Additional Protocol II (APII) which deals with the protection of victims in non-international armed conflicts also reiterates that children are entitled to special care and protection.⁸⁸ Article 4(3)(c) in better terms than API provides 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.’

The provision of article 4(3)(c) is unequivocal in terms of protection of children in armed conflict situations by prohibiting all forms of recruitment and participation (whether directly or indirectly) of children below the age of 15 years and this is irrespective of whether the recruitment is into national armed forces or armed groups.⁸⁹ Though the gaps in the Additional Protocols to establish solid standards for the protection of children from involvement in armed conflict are apparent, they however establish a framework of the legal protection that IHL intended to provide for children in armed conflict situations.⁹⁰

2.5 International human rights instruments prohibiting the use of child soldiers

Children are subjects of special interest and protection under international human rights law. The League of Nations in the 1924 Geneva Declaration of the Rights of the Child unanimously declared that ‘mankind owes to the child the best that it has to give...’⁹¹ In 1959, the UN General Assembly adopted a similar Declaration of the Rights of the Child in which it declared that children by virtue of their capacity need special care and protection in order for them to enjoy a ‘happy childhood’ for their good and that of society in general.⁹² Principle 9 of this Declaration prohibits the engagement of children in any activities which gravely affect their health, education, and physical,

⁸⁷ Fox (n 74 above) 33.

⁸⁸ Art 4(3) of Additional Protocol II (APII) to the Geneva Conventions.

⁸⁹ R Brett ‘Child soldiers: Law, politics and practice’ (1996) 4 *International Journal of Children’s Rights* 117.

⁹⁰ V Druba ‘The problem of child soldiers’ (2002) *International Review of Education* 272-273.

⁹¹ Preamble of the 1924 Geneva Declaration of the Rights of the Child, adopted by the League of Nations, supp. 21 (1924).

⁹² Preamble and Principle 2 of the 1959 UN Declaration of the Rights of the Child, proclaimed by the UN General Assembly Resolution 1386 (XIV) of 20 November 1959.

mental and moral development. Though declarations generally have no binding force, they however reflect the stance with regards to specific issues of member states that adopts them. Since the adoption of these declarations, human rights law has developed to provide a framework for the protection of the rights of children.

In 1989, the CRC which is the first international convention that deals extensively with the rights of children was adopted by the UN General Assembly. It not only recognised the special status of children but also considers the child as the holder of rights which are enshrined in international instruments.⁹³ The CRC which defines a child as a person below the age of 18 years imposes an obligation on member states to promote the welfare of the child and ‘to respect and ensure respect’ of the rights enshrined in the Convention to every child.⁹⁴ In addition, the Convention also attempts to address the issue of children and their involvement in armed conflicts. Article 38(1) of the CRC is an undertaking by states ‘to respect’ and ‘ensure respect’ of the rules of IHL relevant to children in armed conflict situations. Article 38(2) obligates states to take ‘all feasible measures’ to ensure that children below the age of 15 years do not take ‘direct part in hostilities.’ Although the protection offered to children involved in armed conflict situations under the CRC is flawed and reflects a number of shortcomings as it is almost a replica of the provision in article 77(2) of API, the Convention nonetheless reiterates that children below the age of 15 years should not ‘take a direct part in hostilities.’

Sierra Leone is a member of the UN and has signed and ratified the Geneva Conventions and their Additional Protocols. It is also a party to the CRC.⁹⁵ It was therefore under an obligation not only to ‘respect’ but also to ‘ensure respect by others’ of its international obligations by protecting its children from involvement in the conflict.⁹⁶ This is consistent with article 2 of the 1969 Vienna Convention on the Law of Treaties which states that ratification of an instrument by a state expresses consent on the part of that state to be bound by that treaty. In General Comment 5, the Committee on the Rights of the Child has stated that on ratification of the CRC, states takes on an obligation under international law to implement the provisions of the

⁹³ C Jesseman ‘The protection and participation rights of the child soldier: An African global perspective’ (2001) *African Human Rights Journal* 141.

⁹⁴ Arts 2 & 36 of the Convention on the Rights of the Child (CRC).

⁹⁵ Sierra Leone ratified the CRC on 18 June 1990.

⁹⁶ Art 2 of the CRC.

CRC.⁹⁷ This also involves an obligation to ensure that children who are below the age of 15 years do not ‘participate in hostilities.’ The responsibility to respect rules of IHL is a burden that rests squarely on all parties to a conflict whether government or opposition armed groups.⁹⁸ In spite of all this, both the Government of Sierra Leone and the rebel factions were blatantly in violation of their obligation in international law by actively recruiting children into the national armed force and rebel groups. They therefore disregarded the principle that even military necessity should not serve as a justification for neglecting international humanitarian law obligations.⁹⁹

Apart from the CRC, the Optional Protocol to the CRC on the Involvement of Children in Armed Conflict (OP-CRC) which was adopted in 2000 and which Sierra Leone has ratified,¹⁰⁰ also obligates states to ‘take all feasible measures’ to ensure that persons below the age of 18 years within their armed force do not participate directly in hostilities.¹⁰¹ Article 2 of the OP-CRC prohibits compulsory recruitment of children below the age of 18 years and article 3(3) specifies some minimum levels of safeguard for voluntary recruitment of children below 18 years. Most importantly, article 4(1) of the OP-CRC prohibits the recruitment or use of children under the age of 18 years ‘under any circumstance’ by non-state armed groups to participate in hostilities and further obligates states to take all necessary measures required to ‘prohibit and criminalise such practice.’

The CRC and the Additional Protocols fall under different regimes of law in that the former is a human rights instrument whereas the latter falls under IHL which applies during armed conflict.¹⁰² However, there is no legal argument to support a position that they cannot be considered together in dealing with children and their involvement in armed conflicts. This is because the prohibition against child recruitment in the CRC is a blanket prohibition and as a human rights instrument, its provisions apply at all times, in times of war as well as peace.¹⁰³ Further, the prohibition under the CRC against the recruitment of persons below the age of 15

⁹⁷ Committee on the Rights of the Child, General Comment No. 5 (2003): General Measures of Implementation of the CRC (arts 4, 42 & 44, para. 6) para 1.

⁹⁸ Cohn & Goodwin-Gill (n 79 above) 64.

⁹⁹ M Happold *Child soldiers in international law* (2005) 77.

¹⁰⁰ Sierra Leone ratified the OP-CRC on 15 May 2002.

¹⁰¹ Art 1 of the OP-CRC.

¹⁰² Fox (n 74 above) 38.

¹⁰³ Happold (n 99 above) 72.

years has been considered as a ‘global agreement’ among state parties since the CRC is to this day the international treaty with the highest number of state ratifications.¹⁰⁴

Apart from the CRC and OP-CRC, the African Charter on the Rights and Welfare of the Child (ACRWC) which is an African regional human rights instrument also prohibits the recruitment and use of children to participate directly in hostilities. Adopted in 1990, the ACRWC defines a child as a person below the age of 18 years.¹⁰⁵ Article 22(1) of the ACRWC obligates state parties to take cognisance of and respect the rules of IHL applicable to children in armed conflicts. Under article 22(2), states parties are to take ‘all necessary measures’ to ensure that children do not take ‘a direct part in hostilities’ and to further refrain from recruiting them. Sierra Leone has ratified the ACRWC and as a member of the African Union (AU), it was under an obligation to respect its commitments under the ACRWC by promoting the rights and welfare of its children and to protect them from involvement in armed conflict as a common standard agreed upon by state parties to the ACRWC.¹⁰⁶ The prohibition against the recruitment of children under the CRC and ACRWC ‘is an obligation of result.’¹⁰⁷

In addition to these human rights instruments, the UN General Assembly through various resolutions it has adopted such as resolutions 49/209, 50/153 and 51/77 has called on states to respect their obligations under the Geneva Conventions, its Additional Protocols and the CRC to ensure that children do not involve in armed conflict.¹⁰⁸ Although some of these provisions are relatively weak in terms of their phraseology, they however reflect a single theme which is the prohibition against the recruitment and use of children below the age of 15 years to participate directly in hostilities.

¹⁰⁴ J de Berry ‘Child soldiers and the Convention on the Rights of the Child’ (2001) *The Annals of the American Academy of Political and Social science* 93.

¹⁰⁵ Art 2 of the African Charter on the Rights and Welfare of the Child (ACRWC).

¹⁰⁶ See art 3(d & h) of the Constitutive Act of the African Union.

¹⁰⁷ Happold (n 99 above) 84.

¹⁰⁸ See General Assembly (GA) Resolution 49/209 of 23 December 1994 (A/RES/49/209), para 2. See also GA Resolution 50/153 of 21 December 1995 ((A/RES/50/153), para 7 and GA Resolution 51/77 of 20 February 1997 ((A/RES/51/77), para 12.

2.6 Domestic legal provisions in Sierra Leone regulating the recruitment of children into the national armed force

The official age of majority in Sierra Leone is 21 years by virtue of the common law which is still in place.¹⁰⁹ Section 4 of the Interpretation Act of 1967 (Act 8 of 1967) also defines a child as a person that has not attained the age of 21 years. Prior to and during the period of the conflict, there was no specific legislation setting out a minimum age for voluntary recruitment into the national armed forces. However, section 16(2) of the Sierra Leone Military Forces Act of 1961 (Act 34 of 1961) prohibits forcible recruitment of children under the age of 17 and half years. Recruitment of such persons under the age of 17 and half years was only permitted with the consent of the parent or guardian of the child.¹¹⁰

2.7 The principle of the ‘best interests of the child’ and its application to child soldiers

The duty to protect and promote the welfare of the child is a positive obligation and states in undertaking that obligation must always have as a primary consideration the ‘best interests of the child.’¹¹¹ The principle of the ‘best interests of the child’ was first mentioned in the 1959 Declaration of the Rights of the Child where the UN General Assembly declared that in the enactment of laws for the protection of children, the ‘best interests of the child’ should always be the ‘paramount consideration.’¹¹² The principle of the ‘best interests of the child’ is one of the guiding principles of the CRC when dealing with matters pertaining to children whether undertaken by the state or other administrative and legislative bodies.¹¹³ Though there is no comprehensive definition of what this best interests principle entails, understanding the ‘best interests of the child’ involves an understanding of the child in context and the fact that his or her ‘best interests’ changes with the circumstance.¹¹⁴ This principle also

¹⁰⁹ See section 74 of the Courts Act 1965 (Act 31 of 1965) of the Laws of Sierra Leone.

¹¹⁰ Country Report of the Republic of Sierra Leone to the Committee on the Rights of the Child on the Implementation of the Optional Protocol to the CRC on the Involvement of Children in Armed Conflict (2007) 2: http://www.essex.ac.uk/armedcon/story_id/Sierra%20Leone-pdf.pdf (accessed 20 August 2011).

¹¹¹ Arts 3(1) of the CRC & 4(1) of the ACRWC.

¹¹² Principle 2 of the 1959 Declaration of the Rights of the Child.

¹¹³ Art 3(1) of the CRC.

¹¹⁴ AS Rotman et al ‘Reconciling parents and children’s interests in relocation: In whose best interest?’ (2000) 38 *Family and Conciliation Courts Review* 342-343.

includes the concept of wellbeing and an opportunity for the child to go through the process of normal development.¹¹⁵ In General Comment 8, the CRC Committee stated that interpretation of the ‘best interests of the child’ must be consistent with the whole Convention’ and therefore it cannot be used ‘to justify practices which conflicts with the child’s human dignity and right to physical integrity.’¹¹⁶ In *Neulinger and Shuruk v Switzerland*¹¹⁷ the European Court of Human Rights stated that one of the essential components of the principle of the ‘best interests of the child’ is the right to ‘development in a sound environment’ that is not harmful to the health and wellbeing of the child. The obligation by states to promote the ‘best interests of the child’ is not optional but rather one that is required in all matters concerning children.¹¹⁸ In General Comment 5, the CRC Committee stated that the principle of the ‘best interests of the child’ requires all concerned to take ‘active measures’ to ensure the protection and promotion of the rights of children.¹¹⁹ It is therefore needless to state that recruiting children for whatever purpose into an armed force or group is not consistent with the CRC and the ‘best interests of the child’ principle. This is because ‘in an ideal world, the child’s best interest lies in never having to join an armed group’ or having to live in conditions which makes this the only option.¹²⁰

Children in armed conflict situations are part of the special class of individuals that international and human rights law protect. However, in spite of the legal protection that is available to them, they continue to suffer from what Abbott has described as the ‘deliberate victimisation’ and ‘blatant disregard for their human rights,’ through their recruitment and use during armed conflicts.¹²¹ Their childhood has become a source of pain to society as they are been used as ‘weapons of war’ by armed groups to perpetrate atrocities against their very own. This reflects the real experiences of the thousands of boys and girls in Sierra Leone who went through a past too painful for history to tell. The SCSL was therefore mandated to prosecute among other crimes persons responsible for the recruitment and use of children below

¹¹⁵ Rotman et al (n 114 above) 350.

¹¹⁶ Committee on the Right of the Child, General Comment No. 8: The rights of the child to protection from corporal punishment and other cruel or degrading forms of punishment (2006) para 26.

¹¹⁷ *Neulinger & Shuruk v Switzerland* (2010) ECHR, para 136.

¹¹⁸ Children’s rights, 3: <http://www.un.org/cyberschoolbus/briefing/children/children.pdf> (accessed 1 October 2011).

¹¹⁹ General Comment No. 5 (n 97 above), para 12.

¹²⁰ Cohn & Goodwin-Gill (n 79 above) 123.

¹²¹ Abbott (n 53 above) 500.

the age of 15 years to participate in hostilities.¹²² This was part of a process to bring justice to the children of Sierra Leone.

¹²² Art 4(c) of the Statute of the SCSL.

Chapter Three

A critical analysis of the SCSL's jurisprudence on the use of child soldiers

3.1 The mandate of the Court and its applicable law

The Security Council through Resolution 1315 of August 2000 called on the UN Secretary-General to negotiate an agreement with the Government of Sierra Leone for the establishment of an independent special court.¹²³ The Court was formally established and became operational in April 2002 after the Sierra Leone Parliament enacted the Special Court Agreement, 2002 (Ratification) Act.¹²⁴ Article 1 of the Court's Statute gives it mandate to prosecute 'persons bearing the greatest responsibility' for serious violations of IHL and Sierra Leonean Law committed in Sierra Leone since 30 November 1996. The 30 of November 1996 was considered as an appropriate starting date for the temporal jurisdiction of the Court because it marked the commencement of a new phase in the conflict as the date in which the Abidjan Peace Accord was signed wherein all warring factions had agreed to end their hostilities.¹²⁵

The conflict in Sierra Leone was of a non-international character between the Government of Sierra Leone and other opposition armed groups.¹²⁶ In *Prosecutor v Fofana*,¹²⁷ the Appeals Chamber of the SCSL in its Decision on Preliminary Motion stated that the question of whether the conflict in Sierra Leone was international or national or whether at some point it became internationalised has no bearing on the application of articles 3 and 4 of the Court's Statute. This is because articles 3 and 4 were drawn from common Article 3 of the Geneva Convention and APII, both of which apply to internal armed conflicts.¹²⁸ Article 3 of the SCSL's Statute therefore gives it

¹²³ Report of the UN Secretary-General (n 71 above) para 1.

¹²⁴ Preamble of the Special Court Agreement, 2002, (Ratification) Act, 2002.

¹²⁵ A Alison 'Sierra Leone: The intersection of law, policy and practice' in CPR Romano et al (eds) *Internationalised criminal courts and tribunals: Sierra Leone, East Timor, Kosovo and Cambodia* (2004) 131.

¹²⁶ C Murungu 'Prosecution and punishment of international crimes by the Special Court for Sierra Leone' in C Murungu & J Biegon (eds) *Prosecuting international crimes in Africa* (2011) 97.

¹²⁷ *Prosecutor v Fofana*, Case No. SCSL-03-14-AR72, Decision on Preliminary Motion on Lack of Jurisdiction Materiae: Nature of the Armed Conflict, 25 May 2004, para 31.

¹²⁸ Murungu 'Prosecution and punishment of international crimes by the Special Court for Sierra Leone' in Murungu & Biegon (n 126 above) 113-114.

jurisdiction to prosecute violations of common Article 3 of the Geneva Conventions and of APII. These prohibitions according to the Appeals Chamber are customary rules of IHL which all parties to a conflict are bound to respect.¹²⁹

With regards to the issue in point, article 4(c) of the Court's Statute gives it jurisdiction to prosecute persons responsible for 'conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities.' This provision was taken directly from article 8(e)(vii) of the Rome Statute of the ICC which in turn has its root from APII.¹³⁰ The leaders of the RUF, AFRC and CDF were jointly and severally charged with the recruitment of children under the age of 15 years or using children to 'participate actively in hostilities' under count 12 of the RUF and AFRC indictments and count 8 of the CDF indictment.¹³¹

3.2 The jurisprudence of the Court on the use of child soldiers

The Trial Chambers dealt with two aspects pertaining to the use of child soldiers. The first issue was the recruitment of 'children below the age of 15 years into armed forces or groups' and the second was their use to 'actively participate in hostilities.' On recruitment, the Trial Chambers stated that there were two forms which were conscription and enlistment. Trial Chamber I (TCI) stated that conscription involves an element of force on the part of the perpetrator either by abduction or forced military training of individuals.¹³² Trial Chamber II (TCII) also defined conscription in similar terms by stating that it involves compulsion which in some instance included the force of law.¹³³ With regards to child soldiers, TCI pointed out that conscription should be interpreted as including acts of coercion such as abduction and forced recruitment which is carried out by armed groups against children for the purpose of using them to 'participate actively in hostilities'.¹³⁴ The Chambers stated that enlistment on the other hand lacked the element of coercion and involves 'accepting or enrolling' persons

¹²⁹ *Prosecutor v Norman*, Case No SCSL-04-14-AR72 Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment) 31 May 2004, para 22.

¹³⁰ Arts 77 of API & 4(3)(c) of APII. See also WA Schabas *The international criminal court: A commentary on the Rome Statute* (2010) 254.

¹³¹ See indictment sheets of RUF, AFRC and CDF (n 21 above) paras 68, 65 & 29 respectively.

¹³² *Prosecutor v Issa Hassan Sesay et al* (n 12 above) para 1695.

¹³³ *Prosecutor v Alex Tamba Brima et al* (n 11 above) para 734.

¹³⁴ As above.

that present themselves voluntarily for recruitment.¹³⁵ However, the Chambers also noted that attributing voluntary consent to enlist into an armed group to a child below the age of 15 years ‘particularly in a conflict setting’ is of ‘questionable merit’ and therefore consent in such instance can never be a valid defence.¹³⁶ By rejecting the defence of consent of the child in this case, the Chambers did not attach much significance to the distinction between these two forms of recruitment where children are concerned. This was a laudable decision by the Trial Chambers because in actual situations of armed conflict, a child’s incentive to join an armed force or group could never be described as voluntary as a result of prevailing social, political and economic factors which might affect the child’s freedom of choice.¹³⁷ In such situations, the distinction between conscription and enlistment often becomes very misty.¹³⁸

On the issue of culpability for using children to ‘actively participate in hostilities,’ the Trial Chambers adopted a list approach in order to determine activities that amounted to ‘active participation in hostilities.’ The Chambers applied the ‘risk standards’ in order to determine activities that would make a child soldier ‘a legitimate target.’ These standards were based on those of conventional warfare which maintains the strict distinction between combatants and civilians.¹³⁹ The activities were therefore limited to combat or military activities directly related to combat. In adopting this list approach, the Chambers excluded certain activities which though not related to combat equally endangered the lives of child soldiers.

There was sufficient evidence adduced before both Trial Chambers that divulged how child soldiers were used in different and overlapping roles. Child soldiers were not only used in combat but they also served as informants, body guards and human caravans.¹⁴⁰ They were used as domestic labourers to cook, do laundry work, clean, prepare food and fetch water for the fighters.¹⁴¹ Girl child soldiers were often sent on ‘food foraging missions’ and were normally armed on such missions.¹⁴² In addition to

¹³⁵ *Prosecutor v Alex Tamba Brima et al* (n 11 above) para 735.

¹³⁶ As above. See *Prosecutor v Moinina Fofana & Allieu Kondewa* (n 15 above) para 192. See also *Prosecutor v Issa Hassan Sesay et al* (n 12 above) para 187.

¹³⁷ See Machel (n 55 above) para 38.

¹³⁸ Cohn & Goodwin-Gill (n 79 above) 23.

¹³⁹ See Maxwell & Meyer (n 23 above) 1 on the ‘principle of distinction’ in IHL.

¹⁴⁰ *Prosecutor v Issa Hassan Sesay et al* (n 12 above) paras 1620, 1660, 1675 & 1731. See also *Prosecutor v Moinina Fofana & Allieu Kondewa* (n 15 above) paras 672 & 675.

¹⁴¹ *Prosecutor v Issa Hassan Sesay et al* (n 12 above) paras 1620 & 1667.

¹⁴² *Prosecutor v Issa Hassan Sesay et al* (n 12 above) para 1660.

their combat and support functions, they were forced into sexual relationships with male fighters and suffered other forms of sexual abuse.¹⁴³ Child soldiers also acted as spies, security guards for training camps, human shields, decoys, messengers, used to man checkpoints, make trails and find routes.¹⁴⁴ Child soldiers guarded mines and civilians working in their commanders' farms and they also supervised work on those farms.¹⁴⁵ Children initiated into the CDF were used to dance for the fighters as the fighters went to battle.¹⁴⁶ Many child soldiers had the insignia of their captors carved into their chests to prevent them from escaping.¹⁴⁷

In defining 'active participation in hostilities,' TCI stated that it involved acts of war such as killing and raping of civilians and burning of houses.¹⁴⁸ This Chamber added that it included not only 'combat operations but also military activities linked to combat' such as acting as spies, decoys or manning military checkpoints.¹⁴⁹ TCII on the other hand defined 'active participation in hostilities' as encompassing activities that puts children's lives 'directly at risk in combat.'¹⁵⁰ The Trial Chambers thereafter proceeded to list activities that amounted to 'active participation in hostilities' for which the Accused persons could be held criminally liable. Those activities included using children in combat, guarding military camps, mines, acting as spies or bodyguards, informants, decoys, manning checkpoints and acting as human shields.¹⁵¹ Although TC II's definition of 'active participation in hostilities' was a bit broader in scope as it included within that definition 'support functions that helped maintain operations in combat,'¹⁵² TC I significantly narrowed down on that interpretation by restricting 'active participation' to combat or 'military activities related to combat,' thereby excluding activities such as food finding mission which the previous Chamber had included within that definition.¹⁵³ According to TC I, though

¹⁴³ *Prosecutor v Issa Hassan Sesay et al* (n 12 above) para 1662.

¹⁴⁴ *Prosecutor v Issa Hassan Sesay et al* (n 12 above) paras 1632 & 1645. See *Prosecutor v Alex Tamba Brima et al* (n 11 above) para 737. Also see *Prosecutor v Moinina Fofana & Allieu Kondewa* (n 15 above) para 688.

¹⁴⁵ *Prosecutor v Issa Hassan Sesay et al* (n 12 above) paras 1656 & 1664.

¹⁴⁶ *Prosecutor v Moinina Fofana & Allieu Kondewa* (n 15 above) para 688.

¹⁴⁷ *Prosecutor v Issa Hassan Sesay et al* (n 12 above) para 1624.

¹⁴⁸ *Prosecutor v Issa Hassan Sesay et al* (n 12 above) paras 1711 & 1712.

¹⁴⁹ *Prosecutor v Issa Hassan Sesay et al* (n 12 above) para 1720.

¹⁵⁰ *Prosecutor v Alex Tamba Brima et al* (n 11 above) para 736.

¹⁵¹ *Prosecutor v Issa Hassan Sesay et al* (n 12 above) paras 1725-1729. See also *Prosecutor v Alex Tamba Brima et al* (n 11 above) para 1267.

¹⁵² *Prosecutor v Alex Tamba Brima et al* (n 11 above) paras 1266-1267.

¹⁵³ *Prosecutor v Issa Hassan Sesay et al* (n 12 above) para 1743.

support functions supported the armed groups, they were in no way ‘related to the conduct of hostilities.’¹⁵⁴ Both Chambers (although TC II applied less stringent standards) therefore concluded that other activities such as domestic and hard labour functions, support and logistical functions would not amount to ‘active participation in hostilities’ because those activities did not ‘directly support the military operations of the armed groups.’¹⁵⁵ The Chambers therefore defined ‘active participation in hostilities’ from a conventional warfare point of view by restricting it to ‘combat or combat related activities.’

This interpretation of ‘active participation in hostilities’ by the Trial Chambers is accurate from a legal point of view. This is because the laws of armed conflict is premised on the principle of distinction between military personnel and objectives on the one hand and civilians on the other, the former been legitimate objects of attack while the latter are protected persons.¹⁵⁶ However, one fatal error of the Trial Chambers in reaching this conclusion was their failure to take into account the overall context of the conflict in which these activities were undertaken by children. The Interpretative Guidance of the International Committee of the Red Cross on the Notion of Direct Participation in Hostilities (ICRC Interpretative Guidance) states that in interpreting the notion of ‘direct participation in hostilities,’ (which established jurisprudence has stated is synonymous with ‘active participation in hostilities’) due consideration must be given to the overall military, cultural, political and geographical context of a conflict.¹⁵⁷ The conflict in Sierra Leone was not a conventional warfare where rules of IHL were respected by the parties. In contrast, it was a bloody unconventional battle, where guerrilla methods were often utilised and armed groups launched attacks without thinking about the Geneva Conventions or its Additional Protocols. As a result of this, there is need to examine whether the Trial Chambers’ interpretation of ‘active participation in hostilities’ was indeed accurate.

¹⁵⁴ As above.

¹⁵⁵ *Prosecutor v Issa Hassan Sesay et al* (n 12 above) paras 1730, 1739 & 1743.

¹⁵⁶ International Review of the Red Cross: Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law (ICRC Interpretative Guidance) (2009) vol 90, 1013: <http://www.ICRC.org/eng/assets/files/other/irrc-872-reports-documents.pdf> (accessed 1 September 2011).

¹⁵⁷ ICRC Interpretative Guidance (n 156 above) 993.

3.3 A critical analysis of the Court's jurisprudence

3.3.1 Persons entitled to protection in internal armed conflicts:

Determining the status of Sierra Leone's child soldiers

APII and common Article 3 of the Geneva Conventions contain IHL rules that govern internal armed conflicts. In internal armed conflicts, IHL protection is only offered to 'civilians and persons taking no active part in hostilities.'¹⁵⁸ Civilians should under no circumstance be targeted 'unless and for such time' as they participate directly in hostilities.¹⁵⁹ However, since the formal status of combatants does not apply in internal armed conflict, it is difficult to conceptualise the principle of distinction which could more easily be done in international armed conflicts.¹⁶⁰ The term 'civilian' is not defined in either common Article 3 or APII. However, the ICRC Interpretative Guidance defines a 'civilian' in the context of an internal armed conflict as a person that is not a member of a state armed force or an organised armed group.¹⁶¹ Further, in *Prosecutor v Blaskic*,¹⁶² the Trial Chamber of the ICTY defined 'civilians' as 'persons who are not, or no longer, members of the armed forces.' In *Prosecutor v Galic*,¹⁶³ 'a civilian' was defined as 'anyone who is not a member of the armed forces or an organised military group belonging to a party to the conflict.' Similarly, in *Prosecutor v Kayishema and Ruzindana*,¹⁶⁴ the ICTR Trial Chamber defined 'civilians' as 'all persons who are not combatants.'

Following from the jurisprudence of the ICTY and ICTR, a civilian is defined as a person that is 'not or no longer' a member of an armed force or group. By analogy, child soldiers who were forcibly recruited by armed forces and groups in Sierra Leone could not have been correctly categorised as civilians. This is because after forcible abduction or even in the case of voluntary enlistment, children were forced to commit atrocities against communities and families for the purpose of bonding them to these

¹⁵⁸ Common Article 3 of the Geneva Conventions & arts 4 & 13 of AP II.

¹⁵⁹ Art 13(3) of APII.

¹⁶⁰ JK Kleffner 'From belligerents to fighters and civilians directly participating in hostilities: On the principle of distinction in non-international armed conflicts one hundred years after the Second Hague Peace Conference' (2007) *Netherlands International Law Review* 322-323.

¹⁶¹ ICRC Interpretative Guidance (n 156 above) 995.

¹⁶² *Prosecutor v Blaskic*, Case No IT-95-14-A, Trial Chamber Judgment, 3 March 2000, para 180.

¹⁶³ *Prosecutor v Galic*, Case No IT-98-29-A, Trial Chamber Judgment, 5 December 2003, para 47.

¹⁶⁴ *Prosecutor v Kayishema & Ruzindana*, Case No ICTR-95-1-T, Trial Chamber Judgment, 21 May 1999, para 179.

armed groups.¹⁶⁵ Later, they would undergo forced military training which was a ‘formal’ way of inducting them as members of these groups.¹⁶⁶ Forced military training was a kind of compulsory requirement which most child soldiers irrespective of the task that would subsequently be assigned to them had to undergo. This training was a form of ‘preparedness tool’ which was reflective of the multiple and changing role of child soldiers. This was the reason why children who were not strong enough to go through the rigors of the trainings were left to perish or even killed.¹⁶⁷

However, even if membership was determined on the basis of performance of ‘continuous combat functions,’¹⁶⁸ child soldiers in Sierra Leone could still not have been properly classified as civilians. This was because apart from the fact that majority of them had to go through forced military training, their roles were multiple, often changed and overlapped. A child that was used in combat and at the same time used as a sex slave could not correctly be classified as a civilian. For as Boothby correctly states, even a member of an armed group that does not engage in continuous combat function cannot be categorised as a civilian in the strict sense of the word.¹⁶⁹ This therefore brings one to the conclusion that child soldiers in Sierra Leone did not enjoy full civilian status.

3.3.2 ‘Active participation in hostilities’ in the context of an internal armed conflict

Though APII uses the words ‘direct participation in hostilities,’ the term ‘active’ is used in place of ‘direct’ in Common Article 3 of the Geneva Conventions.¹⁷⁰ The rules of IHL contained in the Geneva Conventions and its Additional Protocols do not define what ‘direct (or active) participation in hostilities’ entails.¹⁷¹ However in *Prosecutor v Akayesu*,¹⁷² the Trial Chamber of the ICTR stated that these terms are synonyms and should be treated as such. The ICRC Interpretative Guidance has also indicated that

¹⁶⁵ See TRC Report (n 2 above) vol 3B, 263.

¹⁶⁶ See *Prosecutor v Issa Hassan Sesay et al* (n 12 above) para 1619.

¹⁶⁷ As above.

¹⁶⁸ ICRC Interpretative Guidance (n 156 above) 995.

¹⁶⁹ B Boothby ‘And for such time as: The time dimension to direct participation in hostilities’ (2010) *International Law and Politics* 765.

¹⁷⁰ Art 13(3) of APII.

¹⁷¹ HM Even-Khen ‘Can we now tell what direct participation in hostilities is?’ (2007) 40 *Israeli Law Review* 233.

¹⁷² *Prosecutor v Jean-Paul Akayesu*, Case No ICTR-96-4-T, Trial Chamber Judgment, 2 September 1998, para 629.

the terms ‘direct’ and ‘active’ refers to the ‘same quality and degree of individual participation in hostilities.’¹⁷³ Although the term ‘hostilities’ has no precise definition, it is flexible and could vary depending on the type of conflict, circumstance or situation.¹⁷⁴ However, in the context of an armed conflict, it refers to all collective efforts utilised by parties to cause harm or injury to the enemy.¹⁷⁵

Article 4(c) of the SCSL’s Statute mandates the Court to prosecute persons responsible for the recruitment of children under the age of 15 years or their use for ‘active participation in hostilities.’ In determining activities that amounted to ‘active participation in hostilities,’ the Court adopted the conventional warfare standards by stating that it includes ‘combat and military activities directly linked to combat’ which would make a child a ‘legitimate target of attack.’¹⁷⁶ However as emphasised earlier, the conflict in Sierra Leone was not a conventional warfare where the ‘rules of the game’ were respected. As such there were activities that child soldiers performed which though not directly linked to combat exposed them to grave danger and the risk of losing their lives. As presented before one of the trial chambers, children identified as members of rebel groups irrespective of their status within those groups were exposed to the danger of losing their lives because they were considered as ‘collaborators.’¹⁷⁷ Further, as the armed groups frequently changed locations depending on the situation, child soldiers used in combat as well as those who performed domestic and support functions constantly accompanied them which exposed children not involved in combat to extreme dangers in the event of unexpected attacks. Armed groups showed little respect for IHL rules and no attempts were made to distinguish between those ‘taking active part in hostilities’ and those that were not involved in combat. If attacks were directed against the civilian population as all armed groups did, how then could child soldiers who were not involved in combat but nonetheless associated with armed groups have been spared by opposition armed groups? Child soldiers were targeted and killed not because they

¹⁷³ ICRC Interpretative Guidance (n 156 above) 1014.

¹⁷⁴ KM Gallagher ‘Towards a gender-inclusive definition of child soldiers: The Prosecutor v Thomas Lubanga Dyilo’ (2010) 14: http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=kristin_gallagher (accessed 7 September 2011).

¹⁷⁵ DJ van der Toorn ‘Direct participation in hostilities: A legal and practical evaluation of the ICRC guidance’ (2009) 9: http://works.bepress.com/damien_van_der_toorn1 (accessed 7 September 2011).

¹⁷⁶ *Prosecutor v Issa Hassan Sesay et al* (n 12 above) para 1720.

¹⁷⁷ See *Prosecutor v Issa Hassan Sesay et al* (n 12 above) para 1668. Also see *Prosecutor v Moinina Fofana & Allieu Kondewa* (n 15 above) para 602.

were involved in combat at the time but because of their mere association or supposed ‘collaboration’ with armed groups. Many others lost their lives not in the heat of battle but in the safety of private quarters doing the so-called ‘domestic chores’ because they were considered as ‘rebels’ and a rebel irrespective of his or her task within an armed group deserves to die. This was the nature of the armed conflict in Sierra Leone. Child soldiers who were engaged in domestic and support functions within armed groups did not benefit from the ‘revolving door protection’ principle which entitles them to protection unless and ‘for such time as’ they engage in specific acts of hostilities.¹⁷⁸ They perished together with those who were used in combat.

3.3.3 Support functions that equally endangered the lives of child soldiers

Engaging in ‘combat and military activities related to combat’ were not the only activities that endangered the lives of child soldiers as the Trial Chambers (especially TC I) suggested. There were other support functions which though not necessarily related to combat also significantly exposed child soldiers to danger. In the *Prosecutor v Thomas Lubanga Dyilo*,¹⁷⁹ the ICC Pre-Trial Chamber in its Decision on the Confirmation of Charges stated that in relation to child soldiers, the words ‘using’ and ‘participating’ not only covers ‘direct participation in combat and active participation in military activities linked to combat’ but also includes using children in ‘direct support functions.’ Support functions such as food finding missions, human caravans that carried arms and ammunitions for fighters and security guards used to guard farms and homes of commanders should also have been included within the definition of ‘active participation in hostilities.’ There was evidence before TCI that child soldiers who were sent on food finding missions were usually armed.¹⁸⁰ Though this was in no way related to combat, it however placed those children at risk and they would have been ‘legitimate target’ had they crossed paths with opposition armed groups. The 1907 Regulations Respecting the Laws and Customs of War on Land (Hague Regulations) stated that one criterion which makes an individual a legitimate target is ‘the carrying of arms openly.’¹⁸¹ Therefore, arming children whilst they go on food

¹⁷⁸ See ICRC Interpretative Guidance (n 156 above) 1035 on ‘the revolving door protection principle.’

¹⁷⁹ *Prosecutor v Thomas Lubanga Dyilo* Case No ICC-01/04-01/06, Pre-Trial Chamber, Decision on the Confirmation of Charges, 29 January 2007, para 261.

¹⁸⁰ *Prosecutor v Issa Hassan Sesay et al* (n 12 above) para 1660.

¹⁸¹ See art 1(3) of the 1907 Hague Regulations (IV) of the Laws and Customs of War on Land.

finding missions create conditions which showcased them as being ‘militarily prepared’ for combat.

Further child soldiers acting as human caravans that carried arms, ammunitions and other goods for the armed factions were also exposed to grave dangers. Though they were not directly involved in combat, their role was sufficiently linked to a military activity related to combat. This is because they carried and provided the logistics which armed groups used to launch their attacks. Acting as a human caravan should be equated with a military personnel that carries and delivers military supplies at the frontline in conventional armed conflicts. This was because those children accompanied the fighters with their heavy loads of arms and goods which would have made them ‘legitimate target’ in the event of unexpected attacks from enemy forces. Child soldiers acting as human caravans were in no doubt exposed to significant dangers and many of them were killed in the process.

While activities such as guarding commanders’ farms or even their homes might appear to be ‘less life threatening’ than actual participation in combat, they nonetheless place ‘all children under suspicion’ as they were considered as enemies.¹⁸² The RUF for instance relied extensively on the ‘network of government farms’ to sustain its fighters.¹⁸³ In such a case, destruction of those farms would have brought ‘significant military advantage’ to government forces because those farms were of ‘strategic’ importance to the rebels.¹⁸⁴ Therefore child soldiers who were armed to guard those farms would have been legitimately targeted in the event of attacks on those farms, though in actual fact they were not involved in combat or an activity related to combat. In the same way, child soldiers guarding homes of commanders and their families though they were not actually participating in combat, could be considered legitimate targets in the event of attacks as the arms they carried presented them as being ‘militarily prepared’ for combat. The war in Sierra Leone was not fought in battle fields and there was no sense of responsibility on the part of government forces and rebel groups to respect the rules of warfare by distinguishing between persons ‘actively participating in hostilities’ and those that were not. For these reasons, it has been said that the term ‘hostilities’ is flexible and varies

¹⁸² See Machel (n 55 above) para 44.

¹⁸³ See *Prosecutor v Issa Hassan Sesay et al* (n 12 above) para 979.

¹⁸⁴ See Toorn (n 175 above) 27 on the ‘principle of proportionality’ in IHL.

depending on the given situation and that it must be examined in the context of a particular conflict.¹⁸⁵ This provides a compelling reason why the Court should have interpreted ‘active participation in hostilities’ not within the ‘formalistic postulations’ of the rules of IHL but within the context of the conflict that occurred in Sierra Leone.

3.3.4 Where did girl child soldiers fall?

Girl child soldiers in Sierra Leone were not only used to fight in combat but also served as sex slaves and performed support and domestic functions. Support functions that girl child soldiers performed might be reflective of what they do in the normal course of their lives such as food gathering or cooking but the major difference in this case was the extent to which these tasks were militarised not only to serve the fighting forces but also in supporting and fuelling the conflict.¹⁸⁶ Therefore, there was nothing ‘natural or normal’ about girls been forced to perform these tasks for armed groups.¹⁸⁷ This is because these support functions were part of a bigger ‘planning process deliberately’ created by those groups not only to sustain the conflict but also to maintain its overall ‘operational functioning.’¹⁸⁸ The role of girl child soldiers were multiple and ‘fluid’ and their ‘behind the scenes’ support functions provided the resources that was crucial for the armed groups to continue to maintain their campaigns.¹⁸⁹ At least TCI was cognisant of the fact that the RUF depended on these logistical and domestic support functions performed by girl child soldiers in order for them to continue to pursue and maintain their war efforts and enhance the group’s survival.¹⁹⁰ The militarisation of those tasks contributed greatly to blurring much of the distinction between military and civilian life.¹⁹¹ Even though most of these activities were not related to actual combat, they nonetheless endangered the lives of these young girls as they were also targeted by opposition armed groups. However, they were enmeshed in that ‘gray area’ created by the Court’s interpretation of ‘active participation in hostilities.’

¹⁸⁵ Gallagher (n 174 above) 14.

¹⁸⁶ DE Mazurana et al ‘Girls in fighting forces and groups: Their recruitment, participation, demobilisation and reintegration’ (2009) *Peace and Conflict: Journal of Peace and Psychology* 109.

¹⁸⁷ As above.

¹⁸⁸ As above.

¹⁸⁹ M Denov ‘Girl soldiers and human rights: Lessons from Angola, Mozambique, Sierra Leone and Northern Uganda’ (2009) *The International Journal of Human Rights* 819. See also Leibig (n 22 above) xxxv.

¹⁹⁰ *Prosecutor v Issa Hassan Sesay et al* (n 12 above) para 1698.

¹⁹¹ See M Denov & R Maclure ‘Turnings and epiphanies: Militarisation, life histories and the making and unmaking of two child soldiers in Sierra Leone’ (2007) *Journal of Youth Studies* 244.

3.3.5 The line of distinction between acts that amounts to ‘active participation in hostilities’ and those falling below that threshold

It is not always easy to make a clear cut distinction between acts that amounts to ‘active participation in hostilities’ and those falling below that threshold because in actual conflict situations, this distinction is often blurred and does not always ‘hold across the board’.¹⁹² In *Prosecutor v Tadic*,¹⁹³ the ICTY stated that it is superfluous to determine the exact dividing line between acts that amounts to ‘direct participation in hostilities’ (which according to established jurisprudence is synonymous with ‘active participation in hostilities’) and those that does not. Therefore, each situation must be examined on a case by case basis, taking into consideration all relevant factors and examining them within the overall context of an armed conflict.¹⁹⁴ The nature of the armed conflict in Sierra Leone and the context in which child soldiers were used in the conflict would have made it difficult to make any meaningful distinction between acts that amounted to ‘active participation in hostilities’ and those falling below that threshold. Seeking to make such a strict distinction would have been redundant to say the least. This was because child soldiers were targeted not necessarily because of the role they performed within those armed groups but because of their mere association with them. As Francis rightly puts it, the distinction between these two forms of participation (‘direct and indirect participation’) in relation to child soldiers might be relevant for determining the kind of reintegration programme that would be most suitable for them.¹⁹⁵ Such distinction by the Court was therefore arguably of little relevance in establishing culpability for the use of child.

3.4 After the facts: Should the ‘active participation’ of child soldiers in combat have been a crucial basis for determining culpability for the use of child soldiers?

As one of Trial Chambers stated, irrespective of the role of the child, the presence of the child in locations where crimes were widely committed or known to be enemy

¹⁹² DJ Francis ‘Paper protection mechanisms: Child soldiers and the international protection of children in Africa’s conflict zones’ (2007) *Journal of Modern African Studies* 215.

¹⁹³ *Prosecutor v Dusko Tadic*, ICTR IT-94-1 Trial Chamber Judgment, 7 May 1997, para 616.

¹⁹⁴ MN Schmitt ‘Direct participation in hostilities and 21st century armed conflict’ (2009) 508: http://www.uio.no/studier/emner/jus/humanrights/HUM5503/h09/undervisningmateriale/schmitt_direct_participation_in_hostilities.pdf (accessed 7 September 2011).

¹⁹⁵ Francis (n 192 above) 215.

locations amounted to illegal use of the child and was sufficient to put the child's life whether directly or indirectly at risk.¹⁹⁶ Specifying the degree of participation to establish culpability for the use of child soldiers as the Court did without taking into consideration the overall context of the conflict and the multiple and 'fluid' roles of child soldiers was erroneous. This is because 'even low level involvement, such as a messenger or menial camp attendant' endangers the lives of child soldiers.¹⁹⁷ Many child soldiers suffered death at the hands of government forces and opposition armed groups not because they were 'actively participating in hostilities' at the time but because of their mere association with those groups. They were therefore considered as enemies and risked losing their lives. In the face of all this, the role of child soldiers (especially girl child soldiers) within these armed groups should have been viewed not by the nature of the functions they performed but 'within the specific context of the conflict.'¹⁹⁸

There is no doubt that the principle of distinction is very crucial in any discussion of IHL but even the Interpretative Guidance makes for the consideration of other factors in interpreting 'the notion of direct or active participation in hostilities.'¹⁹⁹ This is consistent with article 31(1) of the Vienna Convention on the Law of Treaties which states that:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

'Active participation in hostilities' should therefore have been interpreted in line with the nature and context of the conflict and the purpose of the provision in the SCSL's Statute. If the Court had taken all these factors into consideration, it would have been in a position to understand that in the context of the conflict in Sierra Leone, combat or combat related functions were not the only activities that exposed child soldiers to dangers. Though it is obvious that child soldiers that engaged in combat were exposed to a higher degree of risk but this danger also extended to those who were engaged in other activities not related to combat. In the instance where the line of

¹⁹⁶ *Prosecutor v Alex Tamba Brima et al* (n 11 above) para 1267.

¹⁹⁷ JN Madubuike-Ekwe 'The international legal standards adopted to stop the participation of children in armed conflicts' (2005) *Annual Survey of International and Comparative Law* 37.

¹⁹⁸ See Mazurana et al (n 186 above) 111.

¹⁹⁹ See ICRC Interpretation Guidance (n 156 above) 993.

distinction between these two forms of participation could not clearly be ascertained, the Court should have decided the 'gray areas' in favour of the objective of the prohibition. As Schmitt puts it, 'gray areas' of IHL must always be interpreted in light of the objectives and 'underlying purpose of the law.'²⁰⁰ If a purposive interpretation had been applied by the Court after taking into consideration the overall context of the conflict in which these activities were undertaken by child soldiers, it would have been able to move outside the 'formalistic postulations' of IHL rules when applying them to an actual conflict situation. Most importantly, the Court would have been better able to understand and appreciate that active participation of child soldiers in combat or combat related activities in this case was not the only crucial basis to have relied on in determining culpability for the use of child soldiers.

²⁰⁰ Schmitt (n 194 above) 510.

Chapter Four

Implications of adopting stringent standards in the interpretation of ‘active participation in hostilities’ with reference to child soldiers

4.1 Future legal implications of applying stringent standards in interpreting the rules

Established jurisprudence has been and still is an important source of law that has influenced and helped to shape judicial minds in the interpretation and application of rules of IHL. Since time immemorial, judicial precedent has served as a focal point of reference for interpretation of the law. The SCSL relied on decisions of both the ICTY and ICTR as interpretative guidance in interpreting and applying IHL rules. As the first international tribunal to have dealt with the issue of child soldiers, there is no doubt that other international tribunals will in future look at this aspect of the SCSL’s jurisprudence as a point of reference when dealing with similar issues relating to child soldiers. Though many aspects of the Court’s jurisprudence on the use of child soldiers should be lauded as remarkable in many respects, caution must be had in seeking to apply the same stringent standards adopted by the Court in determining how ‘active participation in hostilities’ should be measured.

Following from the SCSL’s conclusion that ‘active participation in hostilities’ should be limited to ‘combat or military activities related to combat,’ there will also be a tendency for future application of the same inflexible standards by other international tribunals without first understanding the overall context in which child soldiers were used. Most of the conflicts in Africa and other parts of the world in which child soldiers are used are internal armed conflicts and for most part share similar characteristics with the one that occurred in Sierra Leone. This is in terms of the multidimensional and dynamic nature of the conflict and changing roles of child soldiers. Defining ‘active participation in hostilities’ by child soldiers along the standards of a conventional armed conflict without understanding the context of the conflict would take much away from the very essence of the prohibition against the recruitment and use of children. It will also exclude many child soldiers from the law’s

protection especially those engaged in support functions which though not related to actual combat are nonetheless exposed to similar dangers as those engaged in combat. The dynamics and changing nature of internal armed conflicts makes it imperative for a realistic interpretation and application of the rules of IHL especially those dealing with the recruitment and use of child soldiers. Therefore, using a rigid standard to determine what ‘active participation in hostilities’ entails would negatively prejudice girl child soldiers (including some boy soldiers) who are engaged mostly in support functions within armed groups and most importantly, it will also create an incentive for armed groups to use children in other capacities that will evade this definition in an attempt to escape future culpability.

4.1.1 Applying a stringent interpretation of ‘active participation in hostilities’ would negatively prejudice girl child soldiers

A stringent interpretation of ‘active participation in hostilities’ would not only leave little room for protection for girl child soldiers in particular but would also make them legitimate target for exploitation by armed groups. This is because even though girl child soldiers are used in combat, they mostly perform domestic and support functions within armed groups which will not fit into the definition of ‘active participation in hostilities’ already laid down by the SCSL. The SCSL’s interpretation of ‘active participation in hostilities’ will effectively exclude culpability for using child soldiers in domestic, logistics and some support functions, which would most negatively affect girl child soldiers. Given the lack of adequate resources, manpower and organised structure of most armed groups, their survival and success depends to a large extent on the crucial and often arduous support tasks performed mainly by girl child soldiers.²⁰¹ Apart from this, they also have to bear the ‘additional indignity’ of sexual exploitation by male fighters of armed groups which can be more physically and psychologically demoralising than actual participation in combat.²⁰² These support functions are often undertaken at great personal risk by girl child soldiers and

²⁰¹ Denov (n 189 above) 819.

²⁰² T Webster ‘Babes with arms: International law and child soldiers’ (2007) 39 *George Washington International Law Review* 228.

they suffer the same hardship and are equally exposed to dangers of losing their lives as those engaged in combat.²⁰³

As the TRC Report of Sierra Leone clearly stated, ‘there can be no role in warfare for children.’²⁰⁴ Though active participation in combat exposes a child to multiple evils and should be prohibited in all its forms, there is also no argument legal or otherwise to support the view that there is any moral justification in forcibly recruiting children to serve in functions other than ‘combat or combat related activities.’ This is the reason why APII which applies to internal armed conflict prohibits all forms of recruitment and use of children under the age of 15 years whether in direct or indirect capacities.²⁰⁵ Reducing ‘active participation’ to combat or ‘military activities related to combat’ presents girl child soldiers as the ‘invisible unprotected victims’ of the tragedies of armed conflicts.²⁰⁶ The central source of ‘power supply’ for the sustenance of internal armed conflict lies not in the strength of the weapons alone but on the crucial support functions classified as ‘indirect participation’ rendered mostly by girl child soldiers.

The recruitment and use of children in armed conflict irrespective of their sex and the role they perform whether it is directly or indirectly related to hostilities ‘casts suspicion’ on them and make them objects of attack.²⁰⁷ International humanitarian law and human rights law protects children not only against recruitment and use in hostilities but also against any form of cruel, inhumane and degrading treatment.²⁰⁸ Their recruitment and use in armed forces or groups blatantly violates their rights to be treated with dignity and their right to enjoy their childhood development. Using children to participate in hostilities constitutes an affront to the principles of civilised nations irrespective of the nature of the child’s involvement.²⁰⁹ More so, recruitment of children into armed groups whether as combatant or sex slave runs counter to the ‘best interests of the child’ principle. This is because using child soldiers in armed

²⁰³ MJ Fox ‘Girl soldiers: Human security and gendered insecurity’ (2004) 35 *Security Dialogue* 473.

²⁰⁴ TRC Report (n 2 above) vol 2, 97.

²⁰⁵ Art 4(3)(c) of APII.

²⁰⁶ JA Gilbertson ‘Little girls lost: Can the international community protect girl soldiers?’ (2008) 29 *University of La Verne Law Review* 240.

²⁰⁷ A Sheppard ‘Child soldiers: Is the Optional Protocol evidence of an emerging straight-18 consensus?’ (2000) *The International Journal of Children’s Rights* 51.

²⁰⁸ Abbott (n 53 above) 520.

²⁰⁹ AD Renteln ‘The child soldier: The challenge of enforcing international standards’ (1999) 21 *Whittier Law Review* 194.

conflict interferes with their rights to physical survival and development of the child.²¹⁰ In General Comment 5, the Committee on the Right of the Child stated that the term ‘development’ should be interpreted as a ‘holistic concept’ and includes not only the right to physical development but also social, mental, psychological, spiritual and moral development of the child.²¹¹ Involvement in armed conflict irrespective of the form affects all aspect of the wholesome development of a child. Therefore, an interpretation of ‘active participation in hostilities’ that narrows it down to activities related to combat, enmeshed girl child soldiers in a ‘gray area’ where any possibility of receiving protection is reduced to a bare minimum.²¹²

4.1.2 A stringent interpretation of ‘active participation in hostilities’ will create an incentive for armed groups to use child soldiers in other capacities that falls just below that threshold

Recruitment and use of children in armed conflict results in a violation of customary international law and ‘human morality’ irrespective of the mode of recruitment or the role the child is assigned subsequent upon recruitment.²¹³ The experiences of child soldiers in present day conflicts brings out the stark realities of the evolution of warfare and the fact that the application and interpretation of the rules of IHL needs to evolve in order to be relevant and effective for the protection of children who are vulnerable.²¹⁴ The multidimensional and dynamic role of children in fighting forces necessitates for a broader interpretation of ‘active participation in hostilities’ within context that reflects the realities of such conflicts.²¹⁵

If a stringent interpretation of ‘active participation in hostilities’ is adopted without taking into consideration all relevant factors, less protection would be offered to many child soldiers. This would create a loophole which would give perpetrators the ‘green light’ to utilise child soldiers in support functions and other capacities falling outside the standard threshold in an attempt to escape criminal liability in the future. There should be no loophole for armed groups to manipulate such interpretation to

²¹⁰ Art 6 of the CRC.

²¹¹ General Comment No. 5 (n 97 above) para 12.

²¹² Gilbertson (n 206 above) 219.

²¹³ Abbot (n 53 above) 518.

²¹⁴ Wells (n 65 above) 302.

²¹⁵ Gallagher (n 174 above) 16.

their advantage in an attempt to outwit the law in their use of children to support their warfare campaigns.

4.2 Looking forward

If international tribunals are to effectively protect children in armed conflict situations especially child soldiers, rules of IHL must be interpreted outside their formalistic settings and applied to actual conflict situations for as Gilbertson stated:

Until the global community recognises that a child soldier can be any child under eighteen, boy or girl, active or indirect participant, soldier and/or sex slave, the movement towards protection for the world's children will stop at the front lines of armed combat.²¹⁶

Setting a rigid standard in order to determine what amounts to 'active participation in hostilities' as the SCSL did without taking into consideration the entire context of the conflict defeats the whole essence of the prohibition against the recruitment and use of child soldiers. Similarly, adopting these stringent standards would exclude many children especially girl child soldiers engaged in crucial support functions from the protection of the law. This still leaves Zia-Mansoor's question of 'where is the protection of the rights of children who are participating indirectly in hostilities and are confronted with the same risk'²¹⁷ unanswered.

The right against recruitment and use of children in armed conflict is a welfare based right and their participation in any form of military service contravenes the principle of the 'best interests of the child.'²¹⁸ Tolerating any form of use of children in armed conflict would therefore be a contradiction of the existing IHL principles for the protection of children.²¹⁹ As stated by the Appeals Chamber of the SCSL in *Prosecutor v Norman*,²²⁰ the protection of children constitutes 'an important value' and the guarantees under the Geneva Conventions and its Additional Protocols regarding children must be respected at all times. There is no doubt that IHL's protection of

²¹⁶ Gilbertson (n 206 above) 243.

²¹⁷ F Zia-Mansoor 'The dilemma of child soldiers: Who is responsible?' (2005) *The King's College Law Journal* 394.

²¹⁸ M Happold 'Child soldiers: Victims or perpetrators?' (2008) *University of La Verne Law Review* 69.

²¹⁹ CC Maher 'The protection of children in armed conflict: A human rights analysis of the protection afforded to children in warfare' (1989) *Boston College Third World Law Review* 322.

²²⁰ *Prosecutor v Norman* (n 129 above) para 18 & 29.

children involved in armed conflict in very limited and has its shortcomings. However, international tribunals have a duty to apply those rules outside of their settings in order to achieve their purpose and objectives.

In summary, human rights law and customary international law are always violated when children are recruited into armed forces or group irrespective of the form of recruitment or the nature of the child's activities within an armed group.²²¹ Like a stone when thrown onto the surface of a still pond ripples the water and sprays it in all direction, so does the overall effect of armed conflict interferes with and destroys all aspects of the life of children.²²² While it is important that each situation be determined on a case by case basis, it is nonetheless the responsibility of international tribunals to ensure that in interpreting the rules of IHL concerning the recruitment and use of child soldiers, due consideration must be given to all relevant factors, context been the most important. The role of child soldiers must be examined not within the narrow sphere of 'combat or military related activities' but within the broader context of the conflict as a whole.

²²¹ B Fonseka 'The protection of child soldiers in international law' (2001) 2 *Asia Pacific Journal on Human Rights and Law* 85.

²²² S Maslen 'Relevance of the Convention on the Rights of the Child to children in armed conflict' (1996) *Transnational Law and Comparative Problems* 330.

Chapter Five

Conclusion and recommendations

5.1 Conclusion

There is no doubt that the SCSL has made its contribution to the development of IHL by bringing in new jurisprudence in the area of recruitment and use of child soldiers. The number of child soldiers been used in conflict around the world especially in Africa is however increasing on a gradual basis. It appears as if the many international and regional instruments adopted over the years prohibiting the recruitment and use of child soldiers have proved inadequate to address this problem which Freeland has described as a ‘tragic phenomenon of our time.’²²³ The rights of many children have been and are still been violated on a daily basis and little has been done to salvage the world’s lost generation whose lives have and are still been destroyed through their involvement in armed conflicts. Their options to live better lives in future have been limited as they have been robbed of years of education which could have been beneficial to them. Many of those children therefore faced the prospect of a bleak future.

The many evils perpetrated against child soldiers violate not only IHL but also international human rights law which guarantees children the right to special care and protection. Their involvement and use in armed conflict also contravenes the ‘best interests of the child’ principle which provides for their right to normal development and their non-involvement in conditions that is harmful to their health and wellbeing. Their use in armed conflicts also deprives them of the opportunity to benefit from constructive learning processes and they are instead exposed to lives of violence. Besides the fact that using children in armed conflict stands as an affront to the morals of society in general, it also creates conditions of societal insecurity. This is because children are the foundation of societies and a childhood of violence breeds nothing but violence in society. Their use in armed conflict for whatever purpose takes much away from them without giving anything in return because war does not make a child, it breaks a child.

²²³ Freeland (n 59 above) 22.

The SCSL has provided justice to some child soldiers in Sierra Leone by prosecuting and punishing those responsible for recruiting and using children to participate in hostilities. However, many more children are still forcibly recruited and used to serve in armed groups in various parts of Africa and the world over for whom there could never be any possibility of obtaining justice. The promises of the right to care and protection enumerated in many international humanitarian and human rights instruments has been an imaginary tale for many children in situations of armed conflict. The international community therefore needs to acknowledge the enormity of this problem and its future implication if it is left unattended. There is need for collective action to end this tragedy against children and the time to act is now.

5.2 Recommendations

Though this dissertation has mainly focused on the jurisprudence of the SCSL on the use of child soldiers, the recommendations will be broad based. It will include proposals on how other international tribunals can improve on this aspect of the SCSL's jurisprudence and effective measures to be adopted in order to address the problem of child soldiers in general. This is because the SCSL is almost at the closing phase of its mandate and much of its work has gone down into history.

The problem of child soldiers is a pressing concern and dealing with it also requires addressing the multifaceted and complex issues surrounding it which requires the collective effort of all. Even though the SCSL has made its own contribution in this area, there is still need for other international criminal tribunals such as the ICC to improve on this aspect of the Court's jurisprudence. If laws are not properly interpreted and applied, they would not achieve much and their purpose would be rendered redundant. International tribunals in interpreting rules of IHL relating to child soldiers must employ a purposive interpretation in order to achieve the objective and purpose of the law. It is imperative that judges must endeavour to interpret those rules within context after taking into consideration all factors relevant to the conflict including its political, geographical, military and social components. The role played by child soldiers should then be examined against the backdrop of these components. Seeking to apply the rules within their formal settings and in isolation of the context will lead to an erroneous interpretation. Therefore, in order to achieve the

purpose and objective of the law, the rules must be practically applied rather than be read into actual conflict situations. This is by no means suggesting that judges should change the rules but that they should interpret and apply them in context to achieve their overall objective and purpose.

Further, the business of prosecuting perpetrators for recruiting and using children in armed conflicts should not be left to international criminal tribunals alone since in most cases international tribunals only prosecute the leaders of armed forces or groups. National judicial systems should also be equipped and empowered to apply IHL rules to prosecute perpetrators falling just below the 'command responsibility' threshold but who were nonetheless responsible for recruiting and using children to participate in hostilities. This will ensure that all those responsible in one way or the other for recruiting and using child soldiers will not evade accountability.

There is also need for the current rules of IHL relating to children and their involvement in armed conflict to be restructured and revised to reflect the nature of '21st century armed conflicts.' The rules must be amended to prohibit all forms of recruitment and use of children under the age of 15 years whether in direct or indirect capacities in armed conflict. The statutes of international criminal tribunals like the ICC that has mandate to prosecute this offence must also be amended to reflect this total prohibition. Seeking to apply IHL rules in conflict situations that operates under conditions different from those envisaged under the rules will lead to a misinterpretation of those rules. This was clearly the dilemma in which the SCSL found itself in trying to apply the rules within their settings. The nature of internal armed conflict which is prevalent in the world today and the multiple and overlapping combat and support functions that child soldiers perform in those conflicts make any attempt to accurately distinguish between the two forms of participation (direct and indirect participation) redundant and a misnomer. Therefore, rules of IHL must be updated to address current situations in order for the rules to achieve their purpose of protecting children from involvement in armed conflicts situations.

Further, it is also of immense importance that IHL rules be improved upon in order to provide adequate protection for girl child soldiers as they have very little protection under the existing international legal framework. It is very common for girl child soldiers to be engaged in support and domestic functions which automatically

exclude them from 'direct participation in hostilities' and hence from the protection of the law. This is because 'direct or active participation in hostilities' is often limited to actual combat or 'military activities directly linked to combat' as seen from the approach adopted by the SCSL. This means that support and domestic functions performed mostly by girl child soldiers cannot fit into the 'direct or active participation' theory. The rules of IHL must therefore be updated to ensure adequate protection for girl child soldiers. It must also create room for interpreting support functions not in isolation as normal tasks performed by girls but within the context of a broader military campaign. What good would be achieved if armed groups were to stop using children to participate in combat but recruiting them instead to serve in support and domestic functions and as sex slaves? The answer to this question is crystal clear and in actual conflict situation, the distinction between these two levels of participation does not offer more protection to certain categories of child soldiers than others.

The international community must continue in its strong condemnation of armed groups or governments that are involved in the business of recruiting and arming children to participate in armed conflicts. They should move away from the custom of appealing to or encouraging those groups to desist from recruiting children under the age of 15 years but should instead implement firm and sweeping measures to deal with individuals and groups that are involved in such practice. Armed sanctions and embargos should be enforced against governments and groups that are suspected of recruiting or using children to participate in armed conflicts. Effective monitoring mechanisms should also be put in place by the international community to ensure that there is strict compliance with these standards to increase protection for children in situations of armed conflict.

The many international humanitarian and human rights instruments dealing with children and their involvement in armed conflict that have been adopted have demonstrated that laws alone cannot be an effective vehicle to address the problem of child soldiers. There is therefore need for concrete measures to be adopted which would also entail understanding children in context and addressing issues such as factors that creates conditions which serves as incentives for some children to voluntarily enlist into armed groups. This could prove to be a difficult challenge but is one that could nevertheless be achieved.

Children need protection and their welfare must always be respected and protected. A starting point to seriously address the problem of children and their involvement in armed conflict would involve prohibiting every form of recruitment or use of children in armed conflict because there is no level of involvement by children that could be more honourable than others. The international community as a stepping stone to its fight against the use of child soldiers must first understand that a child soldier is a child irrespective of what they do and that there should be no place for children in armed conflicts. The fight against the use of children in armed conflict is a huge fight that will be fraught with many challenges but is nonetheless one that is not worth giving up on. The SCSL to its credit has made its contribution towards this end though other international tribunals have the opportunity to improve on this aspect of its jurisprudence. A lot needs to be done to save the world's children for the 'pills of war' are bitter to swallow especially for children. Our vision for children must therefore be to see them enjoy normal childhood development and to live in '...a society free of conflict where children can grow up as children, not weapons of war.'²²⁴

Word Count: 17 996 (excluding table of contents and bibliography)

²²⁴ Machel (n 55 above) para 253 quoting D Jain's statement in one of the meetings for the UN study on the impact of armed conflict on children.

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