Child Soldiers participating as victims in proceedings before the Special Court for Sierra Leone and the International Criminal Court.

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Introduction

The international community has to deal with many different problems that have to be solved in order to create a peaceful, healthy and flourishing world. Difficulties exist with regard to the Third World countries that struggle to establish a strong social and economic infrastructure. Many conflicts occur because these countries are not able to provide the most basic needs to their citizens. Africa is a continent that has to deal with many conflicts, because Africa belongs to the poorest and least developed continents. Although there are some countries that are developing and innovating, many countries still struggle to fight economical, social and political problems.

The UN is not always able to get a real insight in all the factors that play a role in the origins of conflicts. However, they are able to monitor the conflict and also which tactics and means are used. As a result of these monitoring activities, they became aware of the fact that many children were used actively in the hostilities. The use of children as combatants was and is very alarming, because of the fact that children are a particularly vulnerable group. In 1994 there was a growing awareness of the forced participation of children in armed conflict. Therefore the United Nations General Assembly decided that an expert study on the problem must be started. In 1996 the report was finished and it gave guidance on how the use of child soldiers could be prevented and how the recovery and social reintegration of these children should be given form.¹ This report by expert Graça Machel has been very influential in the development of international and regional standards.

Although international human rights and humanitarian law instruments were created after the Second World War, it was not until the 1990s that the first international law instruments started paying attention to the situation of children. The Convention on the Rights of the Child, created in 1989, deals with children’s rights in general, but it also pays attention to the protection of children in armed conflict. Former child soldiers have to deal with their traumas and need recognition for what they have been through. According to several NGOs, victim participation in cases against the people that recruited them as child soldiers could contribute to their reintegration.²

In this thesis I am going to explore how victim participation has been given form in the case of child soldiers in Africa. The central research question will read as follows:

How is victim participation given form before the SCSL and the ICC when former child soldiers participate as victims in the proceedings?

The first chapter will be dedicated to existing law and standards concerning child soldiers. I will take a look at international documents concerning child rights, but also at general humanitarian and human rights instruments to find out which protection mechanisms are codified in international law. I will also take a look at African law on this subject to see if this region provides additional protection to the children. The focus will be on codified law, because it is not feasible to describe existing customary law that deals with this topic too. This first chapter is important because it provides an overview of the international law documents that have contributed to the prohibition of the recruitment of child soldiers.

The second chapter will focus on the Special Court for Sierra Leone and the International Criminal Court and their victim participation schemes. The ICC is the first international court which includes victim participation rights in its Statute, but maybe there were already some provisions in the Statute of the SCSL that contributed to the development of the mechanism in the Rome Statute. I want to find out if they also considered the fact that children need extra protection when they participate in the proceedings. In my opinion this is important, especially when former child soldiers participate in a case against their recruiter. My hypothesis is that child soldiers are not protected enough by these courts. Even if there are special rules for children, there should be some additional rules that only apply to former child soldiers that participate because of the specific crime of recruiting child soldiers. This is a very severe crime and therefore it should receive special attention, especially with regard to the victims. A short inspection of the Rome Statute proves that there are no special provisions on the protection of former child soldiers that participate.

One of the first cases that provided guidelines for the prosecution of the crime of recruiting child soldiers was the case of Sam Hinga Norman before the Special Court for Sierra Leone. He was the first person to be prosecuted for the crime of enlisting and conscripting child soldiers. The Rome Statute of the International Criminal Court includes a provision that states that the recruitment of child soldiers constitutes a crime. This provision is used in the case against Thomas Lubanga Dyilo. These cases have been influential in the fight against the recruitment of child soldiers and therefore chapter 3 will be devoted to these two cases. I will give an overview of the facts of the case and the considerations of the Court. After that I will focus on how the victims of Norman and Lubanga participated in these cases. I want to find out if former child soldiers participated in the proceedings and if they contributed to the prosecution. I also want to see if the protection mechanisms that are mentioned in chapter 2 were used for the protection of these child witnesses and victims.

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3 Prosecutor vs. Norman, Case No. SCSL-2004-14-AR72(E)
4 Prosecutor vs. Thomas Lubanga Dyilo ICC-01/04-01/06
The goal of this thesis is to find out if former child soldiers get enough protection when they participate as victims in the proceedings before the SCSL and ICC. If the answer is no, as I expect it to be, than I want to find out where the protection of these children can be improved and what kind of special provisions could be added to the victim participation schemes of international courts. If I find out that they do get enough protection than I will explain why the existing provisions are enough to provide former child soldiers with the protection that they need. I will also check if there are issues left that need closer study.

By describing the differences between the SCSL and ICC it will be more clear which developments have been made for the improvement of the situation of (child) victims with the creation of the Rome Statute. My thesis will be based on a literature study combined with an exploration of case law in chapter 3. I hope this will lead to more knowledge with regard to the possibilities of child soldiers to participate in international courts in cases against child recruiters.
Chapter 1  Law and Standards

The use of child soldiers is not a recent phenomenon. In reality children have been used in hostilities since the Ancient Greece. The history of the Spartans is one of a very militaristic society. In this time of battles for power between the big city states the Spartans decided to introduce a state policy in order to make their population strong enough to resist attacks from the enemy. To ensure the future of the Spartans, military training and education started at a very young age. There were many hostilities and the struggle for power was the foundation on which societies were built. Many people were needed to uphold these kinds of societies and the consequence was that children started participating in these conflicts.

The centuries between the Ancient Greece and the 19th century knew huge leaps forward in the development of mankind. Despite this progression, the phenomenon of child soldiers seemed to be present at all times. The Civil War in the United States was no exception. Both sides recognized the fact that children should not be used as warriors, and ordered a ban on enlisting children under the age of 18. Unfortunately this did not prevent children from joining the forces as drummers, drivers and sometimes even combatants. The attitude of the fighting parties changed even more after the heavy casualties of the first years. Officers decided that they could circumvent the existing ban and started recruiting children from the age of 10.

Children are not always forcibly conscripted. The realities of war may cause children to develop patriotic feelings and support the actions of an armed party, or enlist themselves because it might be the only way to survive. The consequences of conscripting children are the same, whether or not they joined the army voluntarily. Many former child soldiers find it hard to reintegrate into their communities. Participation in armed conflicts is detrimental to their development and therefore efforts have been made to prohibit the recruitment of child soldiers.

This first chapter will be devoted to the description of International and African Law and other standards that have been introduced over the years to combat the practice of recruiting children into armed forces or groups. The documents that will be put forward in this part of the chapter form the foundation of the protection of child soldiers.

5 V. Mobley, The History of child soldiers; When children were used as warriors, Military History 7 July 2008
6 Ibid
7 G. C. Wisler, When Johnny went marching; young Americans fighting the Civil War, Harper Collins 2001 page 21
1.1 International Law concerning child soldiers

Although the recruitment of child soldiers is not a recent phenomenon, it was not until the 1990s that the first internationally recognized ban on the recruitment was established. Since the first provisions on this issue have been implemented it has become a central topic in international law. The developments made in this area are known for their universality and fast implementation. The focus on the rights and protection of children grew. Unfortunately, children are still fighting in wars in every part of the world. But those who recruited the children will no longer go unpunished.

In this paragraph the most important documents in the protection of children and the prevention of child recruitment are mentioned and their most important holdings and provisions. We can make a distinction between several categories; international humanitarian law, international human rights law, Security Council Resolutions, soft law and other important sources. International criminal law has also paid important contributions to the development of the crime, but the provisions in the Statutes of Courts and International Tribunals will not be discussed in this chapter as we will focus on the SCSL and the ICC and their Statutes in Chapter 2.

International Humanitarian Law

1.1.1 Geneva Conventions and Additional Protocols

Although the Geneva Conventions and its Protocols cannot be seen as instruments made for the protection of child soldiers, it is important to mention the Conventions in this paragraph because they form the foundation of humanitarian law and they contain certain provisions concerning the treatment of children during armed conflict. The conventions apply to international armed conflicts, but Common article 3 of the Conventions ensures minimum humanitarian protection in non-international armed conflicts too.

For a long time, there was a clear distinction between human rights law and humanitarian law; human rights law deals with the relationship between the state and its nationals while humanitarian law deals with the treatment of civilians and other persons during an armed conflict. These differences have become smaller in the past decades. However, children’s rights started to be incorporated in human rights documents, for example in the Declaration on the Rights of the Child

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adopted by the League of Nations in 1924, but humanitarian law did not include these rights until 1977. The most important reason for this is the fact that the drafters of the Geneva Conventions of 1949 did not see why children needed special protection during armed conflicts. Every civilian should be protected when he or she does not take part in the hostilities. Unfortunately, they did not foresee that many children would become the intended victims of the conflict.

The Conventions all failed to include a clear definition of who could be considered to be a child. But there are some provisions, mainly in the Fourth Geneva Convention of 1949 which deal with special rights for children. Article 24 obliges States to take care of the maintenance and education of children that have become orphans during the armed conflict. This article speaks of children under the age of 15. Other articles also use this age limit, and explicitly mention pregnant women, mothers of children under seven years and children under fifteen years as vulnerable groups that should receive ‘preferential treatment’. On the contrary, there are articles that speak of persons under eighteen years. For example article 68 that prohibits the pronouncement of the death penalty on persons who were under 18 at the time of the offence. Article 51 makes clear that the Occupying Power may not force protected persons to work unless they are over eighteen. This was the first time that a distinction in age categories was made. The drafters could not predict the problems that would rise with regard to this discrepancy.

The Geneva Conventions of 1949 did not create a special category for children who participated as combatants, because they could not foresee the widespread use of child soldiers. In 1977, it became clear that the existing Conventions were no longer up to date. They could not deal with the new types of wars that emerged, including internal wars with many atrocities. Two Additional Protocols, adopted in 1977, extended the protection of civilians in times of conflict. These Protocols were also the first international treaties that included the issue of active participation of children in armed conflict. Additional Protocol I implemented article 77 while article 4 was included in Additional Protocol II.

Article 77 reads:

1. Children shall be the object of special respect and shall be protected against any form of indecent assault. The Parties to the conflict shall provide them with the care and aid they require, whether because of their age or for any other reason.

12 See for example article 38 of the Fourth Geneva Convention of 1949
13 I. Topa (n 9) page 112
2. The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years the Parties to the conflict shall endeavor to give priority to those who are oldest.

3. If, in exceptional cases, despite the provisions of paragraph 2, children who have not attained the age of fifteen years take a direct part in hostilities and fall into the power of an adverse Party, they shall continue to benefit from the special protection accorded by this Article, whether or not they are prisoners of war.

4. If arrested, detained or interned for reasons related to the armed conflict, children shall be held in quarters separate from the quarters of adults, except where families are accommodated as family units as provided in Article 75, paragraph 5.

5. The death penalty for an offence related to the armed conflict shall not be executed on persons who had not attained the age of eighteen years at the time the offence was committed.

Article 4 is an important provision of Additional Protocol II, which is also visible in the name of the article; fundamental guarantees. Paragraph 3 is the section that deals with children:

Children shall be provided with the care and aid they require, and in particular:

a) they shall receive an education, including religious and moral education, in keeping with the wishes of their parents, or in the absence of parents, of those responsible for their care;

b) all appropriate steps shall be taken to facilitate the reunion of families temporarily separated;

c) 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;

d) the special protection provided by this Article to children who have not attained the age of fifteen years shall remain applicable to them if they take a direct part in hostilities despite the provisions of subparagraph (c) and are captured;

e) measures shall be taken, if necessary, and whenever possible with the consent of their parents or persons who by the law or custom are primarily responsible for their care, to remove children temporarily from the area in which hostilities are taking place to a safer area within the country and ensure that they are accompanied by persons responsible for their safety and well-being.

Paragraph 2 of article 77 and sub c of paragraph 3 of article 4 deal with the prohibition against the use of child soldiers. Protocol II supplements Protocol I and applies to non-international armed conflicts too. It has a broader scope than Protocol I in another respect, namely that it prohibits all forms of participation, so not only ‘direct’ participation. But it may be clear that these Protocols do not provide clarity with regard to the age limit question. Besides that, they give States a large margin of appreciation because vague terms are used such as ‘all feasible measures’ and ‘endeavor’.
Although these humanitarian law instruments have made some contributions to the protection of children during armed conflict, it is clear that the few provisions that they contain are not enough to ensure their protection. Especially because Protocol II is not ratified by many countries. Children should be protected from enlistment during other small internal riots too, and even in times of peace. The 1980s can be seen as the decade in which important steps in international law were made regarding child protection.

**International Human Rights Law**

**1.1.2 The UN Convention on the Rights of the Child**

The UN Convention on the Rights of the Child came into force in 1989 and is ratified by almost every state in the world. It is also one of the most quickly ratified treaties in history. This Convention is a human rights instrument, which means that it applies in times of conflict and in times of peace. It contains certain provisions that deal with children in armed conflicts. This can be seen as an innovation in human rights law, because in previous human rights instruments there were only references to the Geneva Conventions and as we have seen in the previous paragraph, they contain certain deficiencies. The Convention was the first international law document to include a clear definition of childhood. Article 1 of the CRC reads:

*For the purposes of the present Convention a child means every human being below the age of eighteen unless, under the law applicable to the child, majority is attained earlier.*

This might seem to be a very strong article which clearly wants to introduce a universal age limit with regard to the definition of childhood. But the convention includes a provision prohibiting the recruitment of child soldiers, in which the drafters used a more flexible approach to age. Article 38 reads:

2) States Parties shall take all feasible measures to ensure that persons who have not attained the age of 15 years do not take direct part in hostilities

3) States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavor to give priority to those who are oldest.

As we can see, the wording is very similar to the wording of Geneva Protocol I. This means that vague terms are still used and it is clear that this leaves much discretion to the states. Moreover, the age of 15 is used again which is also a reason for discussion. The age of 18 is used in all other provisions,

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14 P. W. Singer, *Children at war*, University of California Press 2006 page 141
15 T. Webster (n 8) page 238
but 15 was in line with the existing humanitarian law instruments. Therefore it might be the case that a child that is 16 years old is considered to be a child, but can still be legally recruited according to the Convention on the Rights of the Child.

Article 41 proves to be important with regard to the age limit of article 38. Rules that give children the greatest protection prevail, according to this article. This means that states can chose to use the age of 18 when dealing with article 38, if this age limit is used under domestic law. Unfortunately the drafters of the Convention were not able to change these inconsistencies.

1.1.3 The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict

The Parties to the Convention on the Rights of the Child wanted to develop the protection mechanism with regard to children in armed conflicts. The Optional Protocol to the Convention on the Rights Of The Child on the Involvement of Children in Armed Conflict was ratified in May 2000 and entered into force in 2002.

Article 1 provides that:
States Parties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities.

Article 2 provides that:
States Parties shall ensure that persons who have not attained the age of 18 years are not compulsorily recruited into their armed forces.

Finally, article 3 paragraph 1 provides that:
States Parties shall raise the minimum age for the voluntary recruitment of persons into their national armed forces from that set out in article 38, paragraph 3, of the Convention on the Rights of the Child, taking account of the principles contained in that article and recognizing that under the Convention persons under the age of 18 years are entitled to special protection.

Although article 3 seems to be very progressive, paragraph 2 states that governments are still able to permit voluntary recruitment under the age of 18. The only requirement for the permission is a binding declaration of the State, deposited at the time of ratification or accession, that sets forth the minimum age at which it will permit voluntary recruitment into its national armed forces. Paragraph 3 continues by stating that Parties should maintain safeguards to monitor the voluntary recruitment. Paragraph 3 will not be enough to avoid discussions on whether or not children joined the armed forces of the State voluntarily.

16 Article 41 of the Convention on the Rights of the Child
The Optional Protocol makes a distinction between the armed forces of the state and armed groups that are distinct from these forces. Article 4 provides that:

*Armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18.*

Article 1 states that governments should take all feasible measures to avoid children below the age of 18 years from taking direct part in hostilities. We can see that the definition used in article 1 is broader than the definition in article 4. Governments should take ‘all feasible measures’, whereas armed groups distinct from the armed forces of the State are faced with a more clear prohibition, they ‘should not’ recruit children either voluntarily or compulsory. But the formulation ‘should not’ is not that strong either, because it does not express the fact that it is a legal obligation. It is difficult for the Government to enforce this provision in internal armed conflicts.  

The wording of article 1 provides children the opportunity to volunteer in the armed forces of the State as long as the child is not participating directly in the hostilities, because the article only prohibits the forced recruitment into the armed forces. Other armed groups cannot recruit or use children under the age of 18. This leads to a strange situation; children between 15 and 18 may join the armed forces of the state voluntarily, but they may not join armed groups that are not governed by the State. The state system could therefore recruit children between 15 and 18 into its armed forces and simultaneously prosecute armed groups for recruiting children between 15 and 18.

The provisions of the Optional Protocol are clearly focused on the minimum age mentioned in the Convention on the Rights of the Child. The Optional Protocol was created in order to establish the age of 18 years for the definition of childhood for once and for all. From the amount of ratifications the conclusion can be drawn that many states agree with the age of 18 as the age limit. Even the United States, who did not ratify the Convention on the Rights of the Child, ratified this Protocol.

The difficulties in determining the age limit for childhood has caused many problems with regard to the formulation of international standards against child recruitment. Although the international community seems to have reached consensus over the fact that every person under the age of 18 years is considered to be a child, this is not reflected in the provisions concerning child soldiers.

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17 I. Topa (n 9) page 110  
18 T. Webster (n 8) page 242  
Security Council Resolutions

1.1.4 Resolution 1261 of the Security Council

The fact that the Security Council of the United Nations paid attention to the issue of child soldiers means a lot. The task of the Security Council is to maintain peace and security, which normally applies to national or regional problems. This thematic issue, which is not connected to a specific territory, is addressed by the Security Council because the protection and rights of children that get involved in armed conflict are important in the maintenance of peace and security. The resolutions are binding on all Member States of the United Nations.

Graça Machel conducted a study on the impact of armed conflict on children at the request of the Secretary-General of the United Nations and the Committee on the Rights of the Child. This report was the foundation for addressing the worldwide problem of children participating in armed conflicts. It recommended action of governments and communities, but also of the affected children themselves. It also took the existing law enforcement mechanisms into account and made recommendations for improvement. The resolution was passed on 25 August 1999 and urges all Member States to prevent the recruitment of children into armed forces and makes recommendations on their rehabilitation and reintegration. They strongly recommend that the protection and rehabilitation of children get priority during peace negotiations. It is clear that much emphasis is on the reintegration of children after they have become part of the hostilities.

1.1.5 Resolution 1314 of the Security Council

Resolution 1261 mandated Kofi Annan, the UN Secretary-General, to write a report with recommendations with regard to the implementation of the Resolution. This report was published on 19 July 2000 and contained 55 recommendations for the effective protection of children in armed conflict. On 26 July there was an Open Debate in the Security Council which led to the creation of Resolution 1314.

The system is clear: Resolution 1261 can be seen as the foundation of the issue of child soldiers as a security and peace problem. It is the primary source of reference, while Resolution 1314 was established to specify measures that could be taken for the protection of children in armed conflict. It contains targets that should be reached in the future. Resolution 1314 passed on 11 August 2000.

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22 W. Seneviratne, International Legal Standards Applicable to Child Soldiers, Sri Lanka Journal of International Law no.15 2003, page 46
Resolution 1314 is important because it contains a plan of action for fighting certain grave crimes against children. Sexual violence, abduction and recruitment are explicitly mentioned as crimes that deserve priority and the Security Council strongly condemns these crimes. Another very specific point in the Resolution is the fact that it calls for measures against the trade in diamonds, because the trade in diamonds leads to massive victimization of children. Another interesting point is the fact that much emphasis is on regional cooperation. The Resolution calls for greater cross-border cooperation which could serve the purposes of the Resolution even better. Regional initiatives could entail child protection programmes and other practical policies which could directly influence the issue. Finally, the Resolution urges states to ratify the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts in order to make the minimum age of 18 a global standard in dealing with child soldiers.

1.1.6 Resolution 1612 of the Security Council

The United Nations did not stop addressing the problem of child soldiers. In 2005, Resolution 1612 was passed by the Security Council. This Resolution focuses on monitoring and reporting when one of the six grave violations against children, which are included in the Resolution, are perpetrated. One of these grave crimes is the recruitment of child soldiers. A Monitoring and Reporting mechanism was created which tries to address the issue and make sure that the perpetrators will be held accountable for the violations. The three Resolutions also led to the establishment of a Working Group to address violations of children’s rights during armed conflicts.

Soft Law: The Cape Town and Paris Principles

1.1.7 The Cape Town Principles

The Cape Town Principles were developed at the symposium on the Prevention of Recruitment of Children into the Armed Forces and on Demobilization and Social Reintegration of Child Soldiers in Africa in 1997. Although the focus with regard to the reintegration and demobilization is on child soldiers in Africa, the Principles formulate several objectives that are important in the fight against the recruitment of child soldiers in every part of the world.

The symposium was conducted by UNICEF and the NGO Working Group on the Convention on the Rights of the Child. The goal of the symposium was the establishment of the minimum age of 18 years for the recruitment for the armed forces. The Cape Town Principles provide a list of definitions, including a definition of a child soldier. It states:

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

The parties to the symposium gave a broad interpretation of what the term ‘child soldier’ entails. This definition also includes children that are recruited for other purposes than fighting at the front lines. This can be important for the participation of former child soldiers in the proceedings before international courts and tribunals, as we will see later on in chapter 2. Unfortunately this broad definition is not implemented in international law documents created after the Cape Town Principles. But the creation of the Principles did help in the discussions on the age limit.

The Cape Town Principles are not binding but can be seen as recommendations in order to prevent the abuse of children in armed conflicts. They have proved to be effective in the sense that it enhanced the developments in creating the Optional Protocol to the Convention on the Rights of the Child. It became a key instrument to enhance the development of international norms and was able to influence policy strategies on the national, regional and international level because it addressed the complexity of the problem and the root causes of the issue.

1.1.8 The Paris Commitments and Principles

The Paris Commitments and Principles were the follow up of the Cape Town Principles and were created in February 2007. The Principles developed in Cape Town needed an update as a consequence of the inclusion of the war crime of recruiting child soldiers in the Rome Statute of the International Criminal Court. Once again, the ministers and representatives of several countries gathered at a Convention to reaffirm their collective concern about children in armed conflicts and the physical, emotional, mental and social harm they have to suffer as a result of the violations of their rights during armed conflicts. They express their commitment to finding and implementing lasting solutions for the problem. They call upon states to ratify the international instruments that prohibit the use of child soldiers but stress the importance of ratifying the Convention on the Rights of the Child and the Optional Protocols to the Convention.

The Commitments state that the Cape Town Principles have been helpful in the fight against the unlawful recruitment of children under 18 into armed forces or groups and the reintegration of

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former child soldiers. The Cape Town Principles helped guide decisions and actions taken. The Paris Commitments include 20 topics to which the international community will commit. This will contribute to the central commitment; to make every effort to uphold and apply the Paris Principles, consistent with international obligations.

The Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups provide detailed guidance for the institutions that implement policy programmes. A child rights-based approach is used, which means that the foundation of the principles can be found in international law and standards. Experience and knowledge from previous intervention programs are also taken into account. The goal of the Principles is to create greater coherence and promote good practice.

**Other sources**

1.9 ILO Convention 182

Convention 182 of the ILO on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour entered into force in November 2000. The convention was the first document that expanded the issue to labor law. It defines a child as a person under the age of 18 and it prohibits the worst forms of child-slavery, including the forced recruitment of children under the age of 18 for use in armed conflict. The prohibition on the forced or compulsory recruitment of child soldiers can be found in article 3 of the Convention. The Convention does not take voluntary participation into account. States are obliged to take immediate and effective measures to secure the prohibition and elimination of these grave forms of child labor. The Convention was accompanied by Recommendations. Recommendation 190 encourages States to make recruitment of child soldiers a criminal offence. This has contributed to the inclusion of the prohibition on the recruitment of child soldiers in international criminal law, as we will see in Chapter 2.

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27 The Paris Commitments to protect children from unlawful recruitment or use by armed forces or armed groups, UNICEF 5 and 6 February 2007
28 UNICEF, Paris Principles, February 2007 Background and Purpose of the Principles
29 Article 2 of ILO Convention 182
30 M. Happold, *Child Soldiers: Victims or Perpetrators*, University of La Verne Law Review no. 29 2008, page 66
31 I. Topa (n 9) page 111
1.2 African Law concerning child soldiers

Cooperation is needed in order to address the specific needs of certain regions. Child soldiers are often used in conflicts on the African continent. Therefore the African nations started to work together and they established some instruments to protect children in armed conflict. These instruments tend to be very similar to the international instruments, but sometimes they use these international documents as the foundation or source of inspiration for their own instruments, and are able to develop the existing standards even further.

The most important and influential African Law instruments will be discussed here. The focus will be on the African region because my focus with regard to victim participation will be on the Special Court for Sierra Leone, in particular the Norman case, and the International Criminal Court and the case against Lubanga. Regional (African) instruments which include prohibitions on the use of child soldiers might be important in these cases.

1.2.1 African Charter on the Rights and Welfare of the Child

The African Charter on the Rights and Welfare of the Child is established by the Organization of African Unity in 1991. It came into force on 29 November 1999. The Charter is a human rights instrument so it applies in times of peace and in times of conflict. It is unfortunate that 8 years had to go by before the Charter could come into force, because The African Charter can be seen as a progressive instrument. It fills in gaps that were left by the Convention on the Rights of the Child and its Optional Protocol. It starts by giving the definition of a child. Article 2 reads:

_for the purposes of this Charter, a child means every human being below the age of 18 years._

While the negotiations about the text of the Convention on the Rights of the Child took very long and finally a provision was made which is not really satisfying, the African Charter was able to use other, more far-reaching terms in the provision that prohibits the use of child soldiers. This makes the Charter unique, because it is the only regional instrument that addresses the issue of child soldiering. Article 22 paragraph 2 reads:

_states parties to the present Charter shall take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain in particular, from recruiting any child._

The fact that ‘all necessary measures’ is used instead of ‘all feasible measures’ means that there is a smaller margin of appreciation for states. The monitoring body of the Charter is able to say that the state can do more because not all necessary measures are taken, while in the monitoring of the Convention it will turn out to be a discussion on whether or not the measures were feasible.

32 T.W. Bennett (n 1) December 1998
Another interesting point is the fact that the article does not make a distinction between voluntary and compulsory recruitment; they are both prohibited.

What did not change is the fact that the child may not play a ‘direct’ part in the hostilities. The same objections rise as in discussions on the Convention, because this leaves room for the fighting parties to use children indirectly in the hostilities, which is of course a reason for concern.

Although the African Charter on the Rights and Welfare of the Child can be seen as a progressive instrument in the fight against the recruitment of child soldiers, the compliance with the document is reduced by article 1 paragraph 3 of the same Charter. It reads:

*Any custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the present Charter shall to the extent of such inconsistency be discouraged.*

This leaves room for non-compliance on cultural and religious grounds. The fact that they should be discouraged does not lead to a legal obligation to let the Charter prevail.

### 1.2.2 Maputo Declaration on the Use of Child Soldiers

In 1999 the African Conference on Child Soldiers took place. Regional Conferences were organized for sharing information about the use of child soldiers in the region. After the Maputo Conference, other conferences were held in Montevideo and in Berlin. The declarations that are the result of these conferences are not binding but can be seen as instruments to reach consensus on the minimum age of 18, so this could be laid down in the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict. Therefore many parties were invited to these types of conferences, so not only governments were involved but NGOs and UN agencies too. This would lead to more political support when the parties would be able to set the minimum age to 18 for once and for all.

All parties condemned the use of child soldiers and were willing to create norms to prohibit the use of children under the age of 18 in armed forces. Many countries also made clear that they would ratify the African Charter on the Rights and Welfare of the Child. This was important for the Charter, because these efforts resulted in the entry into force of the Charter only a few months later.

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33 I. Topa (n 9) page 111  
35 Ibid page 4
1.3 Concluding observations on law and standards

The Convention on the Right of the Child and the Optional Protocol to the Convention concerning Children in Armed Conflict have been very influential with regard to the protection of children. They have established an internationally recognized definition of a ‘child’, there was no definition in international law before these documents were established. Every human being under the age of 18 is considered to be a child. This norm is almost universally; the United States and Somalia are the only countries which have not ratified the Convention on the Rights of the Child. Children are provided with special protection because they are considered to be more vulnerable than adults.

Although the definition of a child is almost universally recognized, this cannot be said about the definition of a child soldier. The international and regional laws and standards that we have seen in the previous paragraphs all use different definitions of a child soldier. Most discussions focus on the age limit, the meaning of the phrase ‘direct participation in hostilities’, and the distinction between voluntary and forced recruitment.

As we have seen, there are different opinions on the question which age should serve as the minimum age with regard to the recruitment and participation of children in armed conflicts. It would be desirable to prohibit the recruitment of children under the age of 18, but for now the minimum age is still 15. The instruments that were established from 1990 onwards have focused on new standard setting. The African Charter applied the minimum age of 18 and the Cape Town Principles also used 18 as the age limit for recruiting soldiers. Unfortunately they can be seen as exceptions to the general rule.

The discussion about the ‘direct participation in hostilities’ is less controversial as a standard seems to be created to use the wording ‘participation of children in armed conflicts’. This prohibits children to participate actively in conflicts, directly or indirectly. The question about the meaning of ‘recruitment’ is also answered by the Cape Town Principles. Conscripting and enlisting children also falls under the description of recruitment. The Principles made clear that the definition of recruitment includes voluntary and compulsory recruitment into any kind of regular or irregular armed force or armed group. This is important because it avoids discussions on the distinction between armed forces that are part of the State and other armed groups.

36 M. Happold (n 30) page 63
37 I. Topa (n 9) page 108. Also in the Statute of the ICC.
38 Ibid page 108
NGOs and scholars have widely adopted the definition of a child soldier used in the Cape Town Principles. This definition addresses the issues discussed above, but it also includes children that are not carrying arms. It explicitly mentions several functions that children can have within an armed force or group, including sexual slavery, a crime that is within the scope of child soldiery but is often neglected. It is now up to the international community to adopt this definition too.

Although this chapter might seem very positive on the standards that have evolved since the use of child soldiers became really problematic, in reality they did not prevent children from being forced to fight in some of the most cruel wars such as the ones in Liberia and Rwanda. The next chapter will focus on how international tribunals and courts deal with child soldiers when they participate as witnesses or victims in the proceedings.

39 I. Topa (n 9) page 107
Chapter 2  The SCSL and ICC; Child Witness and Victim Participation

Chapter 1 showed us the most important documents concerning child soldiers. It is clear that the international community has paid attention to the problem and recognizes the severity of it. Many binding and non-binding documents have been put into place in order to make the act of recruiting children into armed forces illegal. Unfortunately, armed conflicts are still present all over the world and children are still used as combatants in these conflicts. The conflicts in Rwanda, Sierra Leone, Liberia and Congo can be seen as the most severe ones which have caused many casualties amongst civilians. Therefore courts and tribunals have been established to deal with the perpetrators of these grave crimes. This led to the establishment of the Special Court for Sierra Leone in 2000 and the establishment of the International Criminal Court in 2002. The inclusion of the prohibition on the use of child soldiers in the Statutes of these Courts made this crime fall under international criminal law and therefore it is possible to hold the persons that recruit children into armed groups liable.

The first paragraph of this chapter will deal with the phenomenon of creating special courts. After that we will take a look at how the SCSL and ICC deal with children as victims and witnesses. The focus is on victim participation, but because the two areas are very intertwined it is important to look at both ‘roles’ that the former child soldiers can play in the proceedings. We will only look at a selection of protective measures for child witnesses. These measures are selected by looking at several important cases before the SCSL and the ICC; I found out that the special measures for child witnesses mentioned in this chapter are often used. The question that rises is: which rules about victim participation exist before the SCSL and ICC and to which extent do former child soldiers that participate as witnesses get more protection?

Besides being victims as well as witnesses, the former child soldiers can also be seen as perpetrators. However, none of them have been tried before an international court of tribunal. This is due to the coercive circumstances which forced them to commit the crimes. Children do not bear the greatest responsibility for the grave crimes that are committed.

2.1  The creation of special courts and tribunals

Throughout history, conflicts have been taking place which shocked the conscience of mankind. Genocides, war crimes, and crimes against humanity were committed at all continents and in every century. The technical advances made in the 19th century contributed to the art of warfare, which made it easier to harm the opponent. The technical developments also made it possible to

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40 See Chapter 3. But the measures are also used in other big cases, such as the process against Charles Taylor.
41 C. Aplet, Children and accountability for international crimes: the contribution of international criminal courts, UNICEF Innocenti Working Paper, August 2010 page 20
communicate with other parts of the world very quickly, and this globalization made it possible that in the 20th century two World Wars took place which included many parts of the world even though the battlefield was on European ground.  

At the end of the Second World War, the Allied forces promised to punish the perpetrators of the worst war crimes and the Nuremberg International Military Tribunal was put into place. On the 8th of August 1945 the London agreement was signed and the Tribunal came into being. This development was followed by the establishment of the Tokyo International Military Tribunal in January 1946. These two courts contributed to the development of international criminal law, but also showed many deficiencies in their way of working. The most important point of criticism was the fact that the Tribunals were seen as examples of ‘victor’s justice’.  

Many years went by before the idea of installing an ad hoc International Criminal Tribunal was revived. The atrocities of the war in Yugoslavia which started in 1991 were reason for the international community to come into action again. The Secretary-General of the UN recommended in a report the creation of a tribunal by a resolution of the Security Council. The foundation for this type of action was chapter 7 of the UN Charter. A draft Statute was included which was based on the Nuremberg Tribunal, but it was different because it was more focused on cooperation. The draft Statute was adopted by the Security Council in Resolution 827 which formally established the ICTY. The International Criminal Tribunal for Rwanda was established in the same way as the ICTY. The Tribunal was created through Security Council Resolution 935 and 955 in 1994. The Statute of the ICTR is very similar to the Statute of the ICTY and their way of working is more or less the same too. What is important for the purpose of this thesis, is that both the Statute of the ICTY and the ICTR do not contain any special provisions concerning child soldiers. This is very striking because the armed forces in both conflicts were known for recruiting children. Concerning the fact that these Tribunals were established in the 1990s, when the attention for child soldiers grew, it is a pity that the drafters were not able to reach consensus on including a provision which prohibits the recruitment of child soldiers. It was not until the establishment of the Special Court for Sierra Leone when international criminal responsibility for these acts was formally accepted.

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43 Ibid page 111
44 Ibid page 115
45 Ibid page 113. The court was said to be biased and only focused on conviction.
47 Cryer a.o. (n 41) page 123
2.2 The Special Court for Sierra Leone

A civil war broke out in Sierra Leone in 1991. The Revolutionary United Front entered Sierra Leone from Liberia and tried to overthrow the government.\(^{48}\) During this conflict there were many human rights violations, but what really characterized the conflict was the massive use of child soldiers. The social structure of the country was totally ruined because of the events and it was difficult to end the situation. In the end, peace was enforced by British troops and a UN peace-keeping mission.\(^{49}\) The government of Sierra Leone asked the Security Council to establish a Special Court in order to deal with the very grave crimes that were committed during the hostilities. The Secretary-General of the UN entered negotiations with the government of Sierra Leone and they created the Statute of the Court. The Court was formally established by a treaty between Sierra Leone and the UN. The Special Court of Sierra Leone started to work in practice in July 2002.\(^{50}\)

The Special Court for Sierra Leone can legitimately be said to be ‘special’, in the sense that it is not an organ of the UN, but it is not part of the domestic legal system of Sierra Leone either.\(^{51}\) This is also reflected in the composition of the Court, which consists of a majority of international judges and a minority of judges form Sierra Leone. In its Statute the Court refers to international instruments but also to national laws.\(^{52}\) So there is a mixed system that applies.

The Court has jurisdiction over crimes that have been committed from 30 November 1996 onwards.\(^{53}\) The Court is able to prosecute the persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean Law, which is also contained in article 1 paragraph 1 of the Statute of the Court.\(^{54}\) This focus on the ‘big fishes’ of the armed conflict is based on practical considerations and it has a deterrent effect on other perpetrators of crimes.

The topic on child soldiers remained controversial. The Court clearly wanted to criminalize the use of children during the armed conflict and set a precedent for future events. In the end the Special Court was successful in its efforts to put attention to the crime of recruiting child soldiers. The Statute of the Court contains several international humanitarian law provisions, including the recruitment of child soldiers in article 4(c) of its Statute. Article 4 paragraph c reads:

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\(^{48}\) Cryer a.o. (n 41) page 182  
\(^{49}\) Ibid page 182  
\(^{50}\) Ibid page 182  
\(^{51}\) Ibid page 183  
\(^{52}\) Ibid page 183  
\(^{53}\) At this date a peace agreement was signed between the Sierra Leonean Government and the R.U.F.  
\(^{54}\) Article 1 (1) of the Statute of the Special Court for Sierra Leone
The Special Court shall have the power to prosecute persons who committed the following serious violations of international humanitarian law:

\(c\) Conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities.

This makes the SCSL the first international criminal court that can prosecute persons for recruiting child soldiers. The establishment of individual criminal responsibility for committing this crime was discussed in the case against Norman, as we will see in Chapter 3.

Article 7 paragraph 1 of the Statute excludes jurisdiction over children that were under the age of 15 when they committed the crimes. Paragraph 2 continues by explicitly mentioning measures for the treatment of offenders between 15 and 18 years of age before and after their conviction. The paragraph makes clear that children between the age of 15 and 18 should be treated with dignity and in conformity with other human rights standards. They cannot be sentenced to imprisonment but will be included in alternative programs and services.\(^{55}\) We can see that the SCSL could not avoid the continuation of the discrepancy between the age limit of 15 and of 18 years old. Despite that the Statute can be seen as progressive in the protection of children, because other tribunals such as the International Criminal Tribunal for Rwanda only included general humanitarian law provisions.

### 2.3 Child Witness Protection before the SCSL

Children that become victims of the crime of included in article 4(c) of the Statute can participate in the proceedings against the recruiters before the SCSL. If they want to participate, they will fall in the category of child witnesses. There is no possibility for them to participate in the status of ‘victim’.

#### 2.3.1 Who is considered to be a child witness?

Article 7 makes clear that individuals under the age of 18 deserve special protection, but the Statue of the SCSL does not give a definition of a ‘child’ or ‘child witness’. The same can be said about the Rules of Procedure and Evidence. Therefore the Prosecution has developed its own criteria for determining who is a ‘child witness’. The Special Court for Sierra Leone uses the age limit of 18 years, contained in the Convention on the Rights of the Child, to determine who can be considered to be a child. Every witness that has not reached the age of 18 years can make use of the protection measures that we will see in the next paragraphs. This is an established practice before the SCSL. The question that rises is whether or not witnesses that are older than 18 can still ask for the protective measures that apply to child witnesses because they are former child soldiers.

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\(^{55}\) Cryer a.o. (n 41) page 184. Articles 7, 15(5) and 19(1) of the SCSL Statute
The actual age of a witness is one of the factors for determining if a witness should receive support and protection. But this is not the most important factor. The general way to deal with the issue is to classify the witness as a child witness when there is an allegation that the witness participated as a child in the hostilities. The Special Court has considered all witnesses that were just over 18 and had been child combatants when they were children to be child witnesses.

This can be seen as a deliberate policy decision of the Court. The Court decided to take this approach because it became clear that in many cases it was not clear what the age of the witness was. This is a consequence of the fact that few people in Sierra Leone have birth certificates. Another factor that influenced the policy decision of the Court is the fact that even if the actual age of a witness can be determined, their psychological and social development may have stagnated as a result of their recruitment. The history and vulnerability of the witness may require special protective measures. Until now there have been no defence teams that have made objections against the determination that someone is a child witness and should therefore receive protective measures.

2.3.2 Protection mechanism

Before I start exploring the child witness protection mechanism that is established in the Special Court, I will give a sketch of the organisational structure of the Court.

Special Court for Sierra Leone:

1) Office of the Prosecutor
   5 sections:
   • Prosecutions
   • Appeals
   • Investigations
     - Witnesses Management Unit
     • Section for Evidence, Archiving and Post-Operational Access
     • Legal Operations
2) Registry
   • Court Management
   • Witness and Victim Support Unit
   • Outreach and Public Affairs
   • Detention Facility

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56 K. Sanin and A. Stirnemann, *Child Witnesses at the Special Court for Sierra Leone*, University of California, Berkeley War Crimes Studies Center March 2006 page 4
57 A. Michels, *Protecting and supporting children as witnesses: lessons learned from the Special Court for Sierra Leone*, UNICEF Innocenti Research Centre Expert Discussion on Transitional Justice and Children Background documents, 10-12 November 2005 page 32
58 K. Sanin and A. Stirnemann (n 55) page 13
59 Also referred to as the Witness and Victim Service Unit or Witness and Victim Section
3) Chambers
   - Trial Chamber I
   - Trial Chamber II
   - Appeals Chamber

4) Defence Office

Most international courts have established a Victims and Witnesses Unit, which falls under the Registry, but the investigators fall under the Office of the Prosecutor. For the protection and support of victims and witnesses during the investigation phase, a Witness Management Unit was established. The task of the Management Unit is important because of the fact that different persons will be included in the witness program. The Unit should take the roles of witnesses within the conflict into account and make sure that the ‘victim witnesses’ are kept separate from ‘insider witnesses’ that might have been perpetrators in the conflict.

Article 16(4) of the Statute of the Special Courts states that the Registrar ‘shall set up’ a Victims and Witnesses Unit within the Registry. The Witness and Victims Support Unit (WVS) of the Registry takes over the protection of the witnesses once they are added on the list to appear at trial. Their task includes the provision of protective measures and security arrangements, counseling and other appropriate assistance. The Witness Management Unit and the WVS should work together and coordinate their activities.

The difference between the Witness Management Unit and the Witness and Victim Support Unit is not limited to the stage of proceedings in which they operate. Another difference is the fact that the Witness Management Unit only provides pre-trial care to witnesses of the prosecution, as a result of the fact that the Unit falls under the Office of the Prosecutor. The witnesses for the defence do not have access to the services provided by the Unit and shall have to rely on the care provided by the Witness and Victim Support Unit. The WVS has installed several safeguards to avoid direct confrontation between witnesses of the prosecution and witnesses of the defence.

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60 Ibid page 31
62 Ibid page 21
63 U.C. Berkeley War Crimes Study Centre (n 61) page 22
2.3.2.1 Protection during investigations

Children can have a big influence in proceedings before international courts, because they can be essential for providing evidence for crimes committed during the conflict. They can also testify for crimes committed against themselves, which simultaneously helps them in the acceptance of what happened. Although their importance cannot be underestimated, not many children have appeared as witnesses before international courts. One of the reasons for this is the fact that it was not until the establishment of the SCSL that special attention was paid to the recruitment of child soldiers and other crimes against children. Another factor is the fact that prosecutors do not know if they can rely on the testimonies of young children, even if these children are already adults when the proceedings start. Sometimes these problems are overcome and children are able to give their testimony. In that case special rules apply because of their vulnerability. The intimidating setting of the courtroom and the fact that traumatic events have to be recalled make this process very delicate. We will take a look at how the SCSL has treated these child witnesses.

The investigation phase is very crucial in every case brought before a court, but when former child soldiers are involved extra caution should be exercised for their security and psychological well-being. Investigators and prosecutors tend to make use of so called intermediaries to find potential witnesses. These intermediaries are usually individuals or organizations which face security risks themselves. It is sometimes hard to find out if a certain organization is reliable. Therefore investigators have to try to get an insight in how the social bonds are constructed in a certain area, which has proven to be difficult to understand for investigators from countries which have a completely different social structure. However, it is a task that has to be fulfilled in order to be able to protect the privacy and mental well-being of the child witnesses and victims. The Witness Management Unit helps the investigators to provide witnesses, and child witnesses in particular, with the best care and protection possible.

The WVS takes over the task of the Management Unit once it becomes clear that the witness will be able to participate in trial. The WVS must make sure that the witness will not be exposed to harmful activities as a consequence of testifying. Their task is especially important in case of child witnesses, because the safety of the family of the children is under pressure when the child gives an incriminating testimony against an important figure. In case of crimes against children the WVS must ensure appropriate assistance, including physical and psychological rehabilitation. Paragraph 4 of article 16 of the Statute therefore requires that:

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64 C. Aptel, *Children and Accountability for International Crimes* (n 40) page 28
65 C. Aptel (n 40) page 30
66 Ibid page 31
‘The Unit personnel shall include experts in trauma, including trauma related to crimes of sexual violence and violence against children.’

The Special Court Rules of Procedure and Evidence include provisions which make clear what the exact role of the Witnesses and Victims Services Unit is within the pre-trial stage. Rule 34 for example, states that the Unit can make recommendations on protective and security measures for witnesses. Moreover, they can make long-term and short term plans for witness protection. In the most severe cases the Trial Chamber can recommend the non-disclosure of the identity of the witness, according to Rule 69.

Article 15 paragraph 4 of the SCSL Statute reads:

*Given the nature of the crimes committed and the particular sensitivities of girls, young women and children victims of rape, sexual assault, abduction and slavery of all kinds, due consideration should be given in the appointment of staff to the employment of prosecutors and investigators experienced in gender-related crimes and juvenile justice.*

Therefore the Court hired an investigator that is specialized in juvenile justice. She is part of the Investigations Division of the Office of the Prosecutor. This investigator and the Witnesses and Victims Support Unit created more specific guidelines for the protection of child witnesses, with help from UNICEF. In 2003 The Government of Sierra Leone, the SCSL and UNICEF published the ‘Principles and Procedures for the Protection of Children in the Special Court for Sierra Leone’. Two clear objectives were formulated: secure the collaboration of child protection agencies in the provision of psycho-social support to children in all stages of the Court and ensuring support of those agencies in their identifying and supporting activities towards child witnesses during the investigation phase.

The guidelines try to take the best interest of the child into account and consist of best practices for the identification of child witnesses, which includes a vulnerability test. The assessment of the ability of children to give evidence is an important practice established by the SCSL. Specialists will check if the child is able to give a testimony and if this is in the best interest of the child. After that a decision can be made about the participation of the child. In case there is a risk of re-traumatization the specialist can decide to leave the child out of the courtroom or ask for special protective measures.

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67 Rule 34 of the Special Court Rules of Procedure and Evidence
69 K. Sanin and A. Stirnemann (n 55) page 17
measures. Furthermore, child-friendly interviewing techniques should be used in every stage of the proceedings. A child-rights expert, who knows the situation of the children in Sierra Leone, is recruited by the SCSL to give guidance to the chief prosecutor.

The Principles and Procedures for the Protection of Children in the Special Court for Sierra Leone make clear that there must be close cooperation between the attorneys and investigators and the Witnesses and Victims Support Unit at all stages of the proceedings. UNICEF and the Witnesses and Victims Service Unit provide training on the guidelines in order to make employees in every section of the Special Court aware of the special care that should be taken when dealing with children. Furthermore, a Monitoring Committee was installed to check the implementation of the principles. The Committee consists of representatives of the Special Court for Sierra Leone and Child Protection Agencies of Sierra Leone. We can conclude that lots of efforts have been made to guide the protection of children in the investigation phase.

2.3.2.2 Protection during trial

Because children are particularly vulnerable, it is not surprising that they get special treatment before the Court. The courtroom can be intimidating, and they do not know what they have to face when they enter the proceedings. Therefore the SCSL knows a practice of preparing children before they enter the courtroom and give their testimony. An attorney and a psychologist are present during this ‘prepping’ to see if the child is able to give the testimony. Although some critics tend to think that the children will be drilled to give specific answers, practice shows that it does help children to feel less intimidated when their testimony is examined. They are better prepared to give answers before the Court.

There are several rules adopted in order to protect the identity and safety of the children. There are measures which apply to all witnesses, such as using pseudonyms and voice distortion. Other measures are the exclusion of identifying data in the public Court records or giving testimony in a closed room. In addition, the SCSL has some special measures for children. One important option for children is that they can testify through a video link, which is possible according to rules 75 and 85 of the Rules of Procedure and Evidence. This reduces stress, especially because the child will only see

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70 C. Aptel (n 40) page 32
71 C. Aptel (n 40) page 33
72 K. Sanin and A. Stirnemann (n 55) page 18
73 Ibid page 18
74 A. Michels (n 56) page 35
75 C. Aptel (n 40) page 34
76 Rule 75 paragraph b sub b and c of the Rules of Procedure and Evidence
77 K. Sanin and A. Stirnemann (n 55) page 27
the person that asks the questions, not the entire courtroom. Children under the age of 18 always have the opportunity to testify via a video link. In general the Court has never exposed children fully in Court, but always made use of pseudonyms and a protective witness screen. The Court decides at the beginning of the trial if a witness is entitled to special protective measures. When the witnesses are identified as child witnesses, they will be seen as belonging to a particularly vulnerable group. The Prosecutor only has to notify the Court and the defence that a child witness will be giving testimony. The Court will grant permission for protective measures for all witnesses in this category. This will avoid delays in the procedure, because the Prosecutor will not have to discuss the status of all witnesses one by one.

There are no special rules on the way of questioning before the Court. Attorneys and lawyers do not receive any special training. Usually they understand that former child soldiers who participate as witnesses are victims as well, and therefore they will try not to ask questions which could harm or re-traumatize the children. The ‘prepping’ work done before children enter the Court’s proceedings also helps children prepare for the more thorough questioning.

2.4 The Sierra Leone Truth and Reconciliation Commission

Besides the ‘conventional’ way of participating as a witness, there are also other institutions created in order to give victims the opportunity to express their views. In the case of Sierra Leone, it was important that such a body would be established in order to reveal the truth. This would help gain more insight into the realities of the war, but it also contributes to the design of reparation programs for victims. Therefore the Lomé Peace Agreement of 1999 requested the establishment of a Truth and Reconciliation Commission which would pay particular attention to children. This commission has a different function than the Court but it can provide supporting information during trial.

The SCSL did not provide for a victims participation scheme but in the case of Sierra Leone a Truth and Rehabilitation Commission (TRC) was established which effectively addressed issues concerning reparations for former child soldiers. The SCSL and the TRC have a relationship of complementarity. The Court has jurisdiction over acts committed since 1996, while the TRC can investigate crimes that were committed before 1996 too. Moreover, the Court has jurisdiction over all crimes committed in

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78 A. Michels (n 56) page 36
79 K. Sanin and A. Stirnemann (n 55) page 28
80 L. Côté (n 67) page 28
82 Ibid page 341
83 The Redress Trust, *Victims, perpetrators or heroes? Child Soldiers before the International Criminal Court*, September 2006 page 58
the sphere of the civil war while the TRC has jurisdiction over acts committed until 7 July 1999. So both institutions overlap in their jurisdiction but are not totally equal. The Truth and Reconciliation Commission operated from July 2002 until October 2004.

Because many children became victims during the war in Sierra Leone, it was essential that they were able to talk about their experiences before the TRC. The TRC referred to article 3 of the Convention on the Rights of the Child, which states that in every conduct the best interests of the child should be taken into account. The best interests of the child should be taken into account when they are making their statements, which means that special measures should be taken to ensure confidentiality. The commission was able to respond to the needs of the victims and promote their reconciliation by giving former child soldiers the opportunity to talk about what they have been through and ensuring them that they will not incriminate themselves. The TRC is able to listen to the testimonies of more victims and witnesses than the Court, thereby recognizing their suffering. The final report of the Commission consisted of historical facts which illustrated what the former child soldiers had experienced during the armed conflict.

UNICEF developed rules for the treatment of children in the process before the Commission. They state that the TRC should take the provisions of the Convention on the Rights of the Child and the African Charter into account when dealing with children. They recommend to use the definition developed by the CRC, defining children as every individual under the age of 18. The report makes clear that their identities should be protected and the participation in public hearings will only take place in camera. The child should be prepared to give a statement, which also applies to the witness participation of children before the SCSL. Besides that, it is emphasized that the child should receive psycho-social help from experts in this field.

The participation of children in truth commissions has been promoted by several NGOs and other global institutions. It approaches accountability in a different way than the courts and tribunals. They provide children with the opportunity to express their views and this gives them the opportunity to reintegrate into their communities. They will tell the truth, including the crimes that they have committed themselves. Children will be more reluctant to talk about the crimes they have committed before courts, because they are afraid that they will be prosecuted. Truth commissions

87 Ibid page 27
have a different approach and they will be far more linked with reconciliation activities. It is important that TRC’s are human rights based in order to avoid the risk of children becoming victims again. This was the first TRC that gave children the opportunity to express their views. Therefore we can conclude that the TRC of Sierra Leone has been influential with regard to the development of procedures to protect the rights of child victims that participate in truth commissions.  

2.5 The International Criminal Court

After the Second World War and the Nuremberg and Tokyo Tribunals there was a call for a permanent international criminal court that could deal with the most severe crimes. The Genocide Convention of 1948 already discussed a proposal on the subject but in the end it only mentioned such a court as a possibility in the future. The discussions during the negotiations of the Genocide Convention made the General Assembly of the UN ask for a study on the possibility to establish a permanent international court. The International Law Commission started to work on this, but it was clear that there was not enough support for the establishment of the Court because of the Cold War.

The creation of a permanent court was put back on the agenda of the UN in 1989, and the General Assembly asked the International Law Commission to make a Draft Statute for such a court again. The Draft Statute was ready in 1994. A Preparatory Committee started to look at the draft in order to find out which issues where cause for less support of states, and find solutions for these problems. The Rome Conference was held in 1998 and the draft statute made by the Preparatory Committee served as the foundation of the negotiations. In the end the Rome Statute was created, and it came into force on 1 July 2002. This Statute established the ICC.

The Statute of the international Criminal Court also contains provisions on child soldiers. It actively participates in the discussions on what the minimum age should be. The negotiations during the Rome Conference led to the establishment of article 8. Paragraph 2 sub b sub xxvi and sub e sub vii provide that:

2) For the purpose of this Statue, ‘war crimes’ means:

b) Other serious violations of war and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

(xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

88 P. Cook and C. Heykoop, Children participating in the Sierra Leonean Truth and Reconciliation Commission, Harvard University Press March 2010 page 161
89 Cryer a.o. (n 41) page 145
90 Ibid page 146
Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

(vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities.

The inclusion in the Rome Statute makes these crimes war crimes, which also leads to individual criminal responsibility. It incriminates two elements, which avoid the discussions that were the consequence of the wording used in the Additional Protocols to the Geneva Conventions and the Convention on the Rights of the Child. The term ‘recruitment’ is covered by the description ‘conscripting and enlisting’. This includes the administrative act, putting names of children on a list.  

The article also covers the use of children in hostilities by including the phrase ‘using them to participate actively in hostilities’. This covers direct participation in combat at the front lines, but the use of children in direct support functions in the armed group or force is covered too. The wording used in the Convention on the Rights of the Child and its Optional Protocol, ‘taking direct part in hostilities’, might exclude the more passive forms of participation.

The Statute criminalises the recruitment into national armed forces in case of international armed conflict, and the recruitment into national armed forces and other armed groups in case of internal armed conflict. This is a consequence of the drafting process, where the Arab States made very strong statements in order to exclude children that join armed groups distinct of the State to fight in international conflicts from falling within the provision. They used the example of Palestinian children that join the Intifada and claimed they should be able to participate without falling within the scope of the article. The international community met their concerns and therefore this distinction was made.

The articles in the Rome Statute still use the minimum age of fifteen, but there appears to be a consensus with regard to raising the minimum age of article 8 to 18. This would also be in compliance with the fact that the ICC explicitly excludes children below the age of 18 from its mandate in article 26 of the Rome Statute, thereby following the international practice of international and mixed tribunals and courts. We have to wait and see if the age limit will be raised in the future.

91 The Redress Trust (n 81) page 29
93 The Redress Trust (n 81) page 30
95 C. Aptel (n 40) page 24
2.6 Child Witness Protection before the ICC

The ICTY, ICTR and SCSL were very important in the development of international criminal law. Grave crimes were committed and these courts were able to prosecute the persons that were responsible for these acts. However, a permanent body would lead to more coherency and therefore the ICC was established. Although the Rome Statute could implement many provisions that were similar to those included in the Statutes of the before mentioned courts, a lacuna could be found in the area of victim participation. Therefore the ICC provides an elaborate framework concerning this area, in particular for children. \(^{96}\)

Before we start looking at the protection mechanism for child witnesses and victims, I will give an overview of the organizational structure of the ICC, focusing on the special units for victims:

International Criminal Court:

1) Presidency
2) Judicial Divisions
3) Office of the Prosecutor
   - Investigations Division
     - Gender and Children Unit
4) Registry
   - Victims and Witnesses Unit
   - Victims Participation and Reparations Section
5) Other Offices
   - Office of the Public Counsel for Victims
   - Office of the Public Counsel for Defence
   - Trust Fund for Victims

The ICC has a Victims and Witnesses Unit which is part of the Registry, just like all other international courts and tribunals. This unit has the same functions as the victims unit of the SCSL, which means that they provide protective and security measures to victims and witnesses. They are responsible for the assistance of victims and witnesses that appear before the Court. \(^{97}\)

I will shortly address the protective measures that are established for child witnesses. After that I will focus on (child) victims that participate, because this is the most innovative part of the ICC.

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\(^{96}\) C. Aptel (n 40) page 30  
\(^{97}\) Ibid page 30
2.6.1 Protection during investigations

Rule 86 of the Rules of Procedure and Evidence and article 54(1)(a) of the Statute deal with the duties of the prosecutor in the investigation phase. All appropriate measures should be taken for the effective investigation and prosecution of the alleged crimes. But what makes the provision different from the provision of the SCSL, is the fact that the emphasis is on the interests and circumstances of the victims and witnesses. Article 54 explicitly states that the prosecutor should take the nature of the crime into account, ‘in particular when it involves sexual violence, gender violence, or violence against children’. The prosecutor of the ICC is required to appoint legal advisors which have legal expertise on specific issues such as violence against children according to article 42(9) of the Rome Statute. Therefore the Prosecutor established a Gender and Children Unit which is part of the Investigations Division. This Unit has developed child-friendly guidelines for dealing with children during the investigation phase. They also give training in child-friendly interviewing techniques. The guidelines of the Unit can be compared to the Guidelines that the SCSL adopted to govern the treatment of child witnesses in the investigation phase. These developments will definitely lead to a more structured approach towards children in this early stage in the proceedings.

2.6.2 Protection during trial

The ICC also includes protective measures for children during trial in its Statute and in its Rules of Procedure and Evidence. Article 68 of the Statute provides which measures can be taken. According to paragraph 2 of this article, hearing may be held in camera in order to protect vulnerable witnesses and this measure shall be taken in several cases, including the case of a child who is a victim or a witness unless the Court thinks that the child is able to testify directly. It is important to note that this provision applies to victims too. The Court can also appoint support persons to assist children during trial. This practice can be compared to the ‘prepping’ work of the SCSL, but in this case persons with expertise are appointed. Other protective measures are comparable to the measures of the SCSL. The identity of the witness can be excluded from the public court records and pseudonyms and voice and image distortion technologies can be used. The judges should also be aware of the manner of questioning before the Court in order to avoid intimidation.

There are still deficiencies in the witness protection system. The ICC is still very young, established at the beginning of the 21st century, and therefore there is still much room left for improvement of the rules concerning child protection. The Court must take into account that it is reliable on states when

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98 The Redress Trust (n 81) page 35
99 Article 68 of the Rome Statute.
it comes down to identifying and protecting witnesses, a consequence of the lack of an police force of the ICC.  

Protective measures are even more important when the case concerns powerful leaders and much media attention is involved. When the Court is aware of these factors that make the protection of witnesses a particularly important and difficult case, efforts can be made to create guidelines. The protection of children cannot stop after a case has been closed and is necessary until the child is able to fully reintegrate in society.

2.7 Participation of child victims

The Special Court for Sierra Leone has been a pioneer in the criminalization of conscripting child soldiers and using them to participate actively in the hostilities. This progressive development has been very important in the recognition of the suffering of child soldiers. The SCSL also provides an opportunity for the victims of these crimes to participate as witnesses in the proceedings. But because of the adversarial nature of the process, this is also the only option for the former child soldiers to participate in the process against their abductors. This means that they are not really seen as parties to the proceedings. The same system applied in before the ICTY and the ICTR. It became clear that victims, especially former child soldiers, should be able to express their views and talk about their experiences before Court. The participation as victims in the proceedings is more compatible to the aim of bringing justice to the victims, instead of just using their testimonies for the prosecution. The Rome Statute of the ICC contains provisions on victim participation and therefore we will focus on victim participation before the ICC.

2.7.1 Witness or victim?

The SCSL did not give child soldiers the opportunity to participate as victims. Although the ‘new system’ of the ICC does include victim participation, it is not that strange that other international criminal courts and tribunals did not. This has everything to do with the ‘double role’ that child soldiers play. They are witnesses as well as victims and it has proved to be difficult to find a balance between these two roles.

When children participate as victims they will be included in the Trust Fund for Victims which gives them the right to reparations. Therefore the goal of victim participation is to receive reparations for the harm suffered, which could influence the testimony given as a witness. The United Nations Economic and Social Council adopted the UN Guidelines on Justice for Child Victims and Witnesses of Crimes in order to deal with the difficulties in defining the role of these children. The principles

101 C. Aptel (n 40) page 38
102 Cryer a.o. (n 41) page 479
103 C. Aptel (n 40) page 40. See also paragraph 2.7.4.
included in the guidelines are based on the provisions of the Convention on the Rights of the Child and they are focused on the way the Court approaches children whether they participate as victims or witnesses.

Problems might exist when children incriminate themselves or other victims when they testify as witnesses. The Court focuses on the main perpetrators of the crimes and therefore children will not be prosecuted. But it is difficult when a witness mentions the name of a child that participates as a victim in a context of criminal activities. This might have an influence on the position of the child victim. Different views and interests of victims and witnesses could lead to conflicting stories which do not contribute to truth finding and prosecution. Nevertheless, it is important that victims get the opportunity to express their own views and concerns.

Trial Chamber I of the ICC addressed the dual status of victims and witnesses on 18 January 2008. They stated that witnesses will not be banned as victims, because this would be contrary to the aim and purpose of article 68(3) of the Rome Statute. However, the ICC can decide to exclude a victim from testifying as a witness when it infringes fair trial guarantees.  

### 2.7.2 Definition of a victim

Rule 85 of the Rules of Procedure and Evidence of the ICC reads: “Victims’ means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court.” As a result of this formulation, child soldiers can also join the procedure as victims. The Court tried to give further guidance to this general definition in the Lubanga case. They stated that there must be a sufficient link between the harm and the charges. The Court stated that article 68 provides former child soldiers with special safeguards since recruiting child soldiers is now a serious crime, and the children who were recruited are always seen as direct victims and therefore they can participate in every case in which an accused is charged with this crime.  

We will take a more detailed look at the Decision of the Court in Chapter 3.

### 2.7.3 Victim participation before the ICC

The ICC has a more developed victim participation system than any other international or mixed court. It provides for protection, participation and reparation. Article 68 of the Statute is the most important provision in this respect:

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104 Prosecutor vs. Lubanga, Trial Chamber I Decision on Victims’ Participation ICC-01/04-01/06-1119, §132
105 Trial Chamber I Redacted version of “Decision on ‘indirect victims’” ICC-01/04-01/06-1813, 9 April 2009, p. 20
Article 68
Protection of the victims and witnesses and their participation in the proceedings

1. The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

2. As an exception to the principle of public hearings provided for in article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness.

3. Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

4. The Victims and Witnesses Unit may advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counselling and assistance as referred to in article 43, paragraph 6.

5. Where the disclosure of evidence or information pursuant to this Statute may lead to the grave endangerment of the security of a witness or his or her family, the Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of the trial, withhold such evidence or information and instead submit a summary thereof. Such measures shall be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

6. A State may make an application for necessary measures to be taken in respect of the protection of its servants or agents and the protection of confidential or sensitive information.

Paragraph 1 and 2 of article 68 provide for special protective measures and the possibility to conduct a part of the proceedings in camera. These measures are also applicable to the child witness. This emphasizes the connection between participating as a victim or as witness.

Paragraph 3 of article 68 gives victims, including children, the opportunity to take part in the proceedings, individually or through their legal representatives. Rules 89 until 95 of the Rules of Procedure and Evidence further elaborate upon the legal representation of victims. In most cases the victim will participate through a legal representative, who is included in a list of counsel so the victims can choose who they want. The Office of the Public Counsel for Victims provides support and assistance to the legal representatives, and to the victims that participate in the proceedings too. Members of this Office can be appointed as legal representatives. When victims make use of legal representation, they do not have to travel to the Court. Therefore former child soldiers tend to make use of it, especially when they have to travel long distances. There are many formalities that have to be fulfilled, or people do not have the means to travel to the Court. The children are in the middle of the reintegration progress and when they leave their homes again for a few weeks this might have a detrimental effect on the process.

106 [http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Victims/Legal+Representation/](http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Victims/Legal+Representation/)
Paragraph 3 of article 68 is the most progressive provision of the Statute, because for the first time victims get the opportunity to express their views and concerns at all stages of the proceedings. Before the inclusion of this provision, children were only able to express their views in Truth and Reconciliation Commissions, as we have seen in the case of Sierra Leone. The phrase ‘in all stages of the proceedings’ should be emphasized, because it enables victims to start expressing their views from the investigation phase onwards. The Pre-Trial Chamber of the ICC granted six victims the right to participate in the investigation phase in the case concerning the situation in the DRC. This was the first case to confirm the possibility to participate in this early phase of the proceedings.  

Part VII of the Guidelines on Justice in Matters involving Child Victims and Witnesses of crime deal with the right to be heard and express their views and concerns. Child victims and witnesses should be able to express their views and concerns freely and in their own matter. Child victims and their families might have special concerns about the proceedings that they wish to address. The Gender and Children Unit use their child-friendly approach in order to find out what concerns these children the most.

The right to participate in the proceedings can be very beneficial to child victims, but there is still much work left before this right can be properly invoked. Many children do not understand why they should participate and what they could gain from participating. They have to fulfill difficult formalities before they can enter the procedure. Moreover, the International Criminal Court is a very big and incomprehensible institution for people in Africa. Especially in the context of Africa, where poverty rules and many people struggle to meet their primary needs, it is difficult for many victims to see why they should bother to express their views. Therefore the Victims Participation and Reparation Section is created within the ICC. This Unit provides victims with the necessary information about what they can expect from their participation and reparations procedure.

2.7.4 Reparations

Article 79 of the Rome Statue can be seen as the foundation of the Trust Fund for Victims:

1) A Trust Fund shall be established by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims.

2) The Court may order money and other property collected through fines or forfeiture to be transferred, by order of the Court, to the Trust Fund.

3) The Trust Fund shall be managed according to the criteria to be determined by the Assembly of States Parties.

107 Pre-Trial Chamber I, Situation in the Democratic Republic of Congo, Decision on the Applications for Participation in the Proceedings of VPRS1, VPRS2, VPRS3, VPRS4, VPRS5 and VPRS6, ICC-01/04-01/06.
108 The Redress Trust (n 81) page 45
The victim participation mechanism of the ICC is not restricted to participation in the proceedings in the courtroom. Victims should also receive compensation for the harm that they have suffered by being victim of the grave crimes that are contained in the Rome Statute. The Trust Fund for Victims was established to ‘involve these victims in defining and implementing the most appropriate means of reparation and rehabilitation’. Rules 94 to 97 of the Rules of Procedure and Evidence give further guidance on reparations proceedings. In my opinion it is enough, for the purpose of this thesis, to know that former child soldiers and their families are able to claim these reparations. This fits within the restorative justice perspective of the International Criminal Court which focuses on the needs of victims.

2.8 Other sources that deal with child victims

Throughout the years, several international law documents have been focusing on the protection of children when they participate as victims or witnesses in international criminal proceedings. One of the most important documents in this respect is the Convention on the Rights of the Child, especially because the provisions of this Convention apply to all national and international courts. The CRC has no derogation clause, so the rights of children should be safeguarded at all times, even during emergencies and armed conflicts. It even applies to truth commissions. In chapter 1 we have already seen that this document has proved to be very influential in the debate on the minimum age that should be used for the crime of recruiting child soldiers. But it also deals with the rights children have when they become part of international criminal proceedings. One of the most important articles of the Convention is article 12, which states that children have the right to be heard in any judicial or administrative procedure affecting their lives. This applies to international criminal procedures too, and the Rome Statute clearly implemented this rule in article 68 and rule 88 of the Rules of Procedure and Evidence where they provide children the opportunity to express their views.

Another important article that is included in the Convention on the Rights of the Child is article 39. This article makes clear that States are obliged to take measures to promote the recovery and reintegration of child victims. It states that this shall take place in an environment that fosters the health, self-respect and dignity of the child. The CRC and the Optional Protocol on the Involvement of Children in Armed Conflict are the legal foundation for the focus on recovery of former child soldiers. Article 39 also applies to the crimes that are codified in the Rome Statute, including the recruitment of child soldiers. It is important that the article is taken into account in the transitional justice

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109 www.trustfundforvictims.org/legal-basis
110 S. Siegrist (n 20) page 5
111 UNICEF Innocenti Research Centre (n 98) page 49
112 UNICEF (n 98) page 51
systems of the ICC and the SCSL. When former child soldiers participate in processes against their recruiters, steps should be taken to guarantee that these children will not be affected in any way by the way they are treated. The big challenge for the international courts is to give them all the rights to participate in the process while keeping the circumstances they live in into account.

2.9 Concluding remarks

This chapter has shown us that children need special protection when they participate in proceedings before the ICC and the SCSL. The Courts have recognized this and adopted several measures to provide children with the opportunity to talk about what they had to go through, during investigations as well as during the actual trial. One of the important developments established by the SCSL and the ICC is the fact that the identity of the children will not be revealed to the accused. Allowing children to testify via video-links makes them able to speak freely in a safe environment without having the eyes of their recruiters focused on them. This is not only beneficial to the children, but also to the trustworthiness of their testimonies.

It is important that experts on working with children are employed in both Courts, because questioning children needs a very different approach than questioning adults. Especially when there is some form of cross-examination, a practice that can have a big impact on the persons testifying. The prosecutor should always balance the best interests of the child against the best interests of the case in any case involving child victims.

We can also conclude that there are no special provisions that apply only to child soldiers. Witness and victim protection mechanisms are created for all witnesses and victims. Sometimes there are provisions that provide extra protection to children, but not to the former child soldier as such. The UN Guidelines on Justice in Matters involving Child Victims and Witnesses of Crimes include a provision which gives children the right to be protected against discrimination based on race, gender or any other particular status.\footnote{113} This also means that child soldiers may not be distinguished from other children that have become victims of the war by giving them a special victim status. This distinction might lead to discrimination when the former child soldier receives reparations and a child that has become an orphan because of the war is not entitled to these fees. Therefore all children should get the same opportunities for participating as victims in the proceedings, and child soldiers should be treated in the same way as other child victims. Experts have proved that this approach is beneficial to their rehabilitation and reintegration process.\footnote{114}

\footnote{113} Guidelines, paragraph 15
\footnote{114} The Redress Trust (n 81) page 33
Children belong to a very vulnerable group that are frequently targeted, especially in conflict situation. Because they form a large part of the victims of conflict, it is important that they can participate in the proceedings in order to find out the truth and bring justice. It is also important for their own recovery and reintegration into the communities that they come from. During their involvement it is important that there is attention for the best interests of the child. After all, the best interests of the child should be taken into account in all actions involving children according to article 3 of the Convention on the Rights of the Child. Children are able to contribute to the work if the SCSL and the ICC, but only when they get the protection that they need.
Chapter 3 The landmark cases of Norman and Lubanga

Chapter 2 made clear that the SCSL and the ICC have played a major role in the protection of children against recruitment into armed forces. The case against Sam Hinga Norman before the SCSL was the first case that made the recruitment of child soldiers a separate and grave crime. The case against Thomas Lubanga Dyilo was the first case before the ICC and it also contributed in the fight against the use of children in armed conflicts. These two landmark cases will be discussed in this chapter and we will see how child soldiers were able to participate in the proceedings before the two Courts.

3.1 The Norman Case

The case of the Prosecutor vs. Sam Hinga Norman has been very influential. Norman can rightfully be considered to be a ‘big fish’ in the Sierra Leonean civil war. He was the leader and national coordinator of the Civil Defence Force, a militia group which supported the President of Sierra Leone in the fight against the Revolutionary United Front. Norman was in charge of the CDF, he made all the strategic and operational decisions between 1991 and 2002. This also included very violent attacks on civilians, and many people were killed by the CDF. In 2002 he became the Minister of the Interior of Sierra Leone. However, he could not fulfil his job for a long time because he was indicted in 2003 and brought before the Special Court for Sierra Leone in 2004.

Two other leaders of the CDF, Fofana and Kondewa were indicted later on in 2003. Fofana was the National Director of War of the CDF and Kondewa was the High Priest of the force. The indictments of Norman, Fofana and Kondewa were consolidated in 2004. These three persons were charged with 8 counts of crimes against humanity and war crimes under article 15 of the Statute, violation of article 3 of the Geneva Conventions and Additional Protocol II and other serious violations of international humanitarian law. This would lead to violations of articles 2, 3 and 4 of the Statute of the Court for which these three persons can be held individually responsible according to article 6 paragraphs 1 and 3 of the Statute. Count 8 is most important in this respect; it contains the violation of international humanitarian law in combination with article 4 of the Statute namely the enlistment of child soldiers under the age of 15 years into armed forces and using them to participate actively in the hostilities.

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115 Prosecutor vs. Norman, Case No. SCSL-2004-14-AR72(E)
116 http://www.haguejusticeportal.net/eCache/DEF/8/328.html
117 Appeals Chamber Decision, Case no. SCSL-04-14-A, page 8
118 Appeals Chamber Decision, Case no. SCSL-04-14-A, page 5
Norman, Fofana and Kondewa knew about and approved the use of children in the hostilities. After the children were recruited, initiation and training were the next steps in their transformation to real soldiers. The three men were in control of these initiatives and ‘education’. The Norman case is the first case brought before an international body with an indictment which includes the crime of recruiting child soldiers.\(^{119}\) But also in domestic law no one had been prosecuted for the crime of recruiting child soldiers until then. Therefore this case has been very influential in determining the scope of application of the rules regarding the use of child soldiers.

### 3.1.1 Consideration of the Court

The Defence of Norman claimed in a preliminary motion that the Special Court did not have subject matter jurisdiction. They requested the Court to dismiss the charges on child recruitment (article 4(c) of the Statute of the Court) by stating that this did not constitute a crime at the time when the act was committed, which would be between 1996 and 2001. They stated that this prohibition on child recruitment was not yet part of customary law back then.\(^{120}\) Additional Protocol II to the Geneva Conventions and the Convention on the Rights of the Child might have been in place to prohibit the recruitment of child soldiers, but according to Norman this was not a sufficient ground to reach the conclusion that he was criminally responsible. The lawyers of Norman stated that it was not until the establishment of the Rome Statute in 1998 that this alleged crime became part of international customary law. Before that there was not enough state practice, and although it was clear that it was morally wrong there was no criminal liability for the act of recruiting child soldiers.\(^{121}\) This argument is based on the ‘nullem crimen sine lege’ principle which prohibits prosecution for crimes which were not criminal at the time they were committed.

The Court rejected the Norman’s arguments in the ‘Decision on the Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment)’. The conclusion of the Appeals Chamber made clear that the recruitment and use of children under the age of 15 in hostilities is a matter of customary international law, which was already the case at the time the crimes were committed. The Court refers to Additional Protocol II to the Geneva Conventions (see paragraph 1.1.1) which already includes child recruitment, and therefore the Court states that it was already part of international humanitarian law before 1996. The Convention on the Rights of the Child made clear that there was global recognition and acceptance of the prohibition of recruiting child soldiers.\(^{122}\) The Rome Statute

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\(^{119}\) N. B. Novogrodsky, *Litigating child recruitment before the Special Court for Sierra Leone*, San Diego International Law Journal 7, page 421  
\(^{120}\) Ibid page 422  
\(^{122}\) K. Sanin and A. Stirnemann (n 55) page 5
was a further codification in order to be able to enforce this prohibition properly and effectively.\textsuperscript{123} So this case makes clear that the norm which was already part of customary law now belongs to international criminal law, and Norman could be held responsible. It provided the Prosecution (and the Defence) with the opportunity to call former child soldiers for testimonies with regard to their victimization.\textsuperscript{124}

### 3.1.2 Importance of the Tadic Decision of the ICTY

The Defence team of Norman claimed that the fundamental principles of nullum crimen sine lege and nullum crimen sine poena were breached. These principles make clear that a person cannot be prosecuted for an act that was not criminal at the time that the act was committed. The emphasis should be on the conduct, not on the description of the crime in criminal law. This means that it must be foreseeable and accessible to the perpetrator that his conduct was punishable. The question that rises is if someone can be individually responsible for the act if it was not clear whether or not the existing law shows customary practice.

The ICTY developed a test in the case against Tadic\textsuperscript{125}, which is helpful in determining if an offence can be subject to prosecution before the Tribunal. The requirements are:

1. the violation must constitute an infringement of a rule of international humanitarian law;
2. the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met;
3. the violation must be "serious", that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim [...];
4. the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.\textsuperscript{126}

The Special Court uses these requirements for the establishment of the individual responsibility of Norman. We have already seen in the previous paragraph that the Court stated that the prohibition against the recruitment of child soldiers was already part of customary humanitarian law at the time that Norman would have committed this crime. The documents mentioned in chapter one show us that the international community thinks that the prohibition represents important values. The Appeals Chamber emphasizes this by focusing on three documents and their most important provisions.

\textsuperscript{123} Max du Plessis (n 119) page 109
\textsuperscript{124} K. Sanin and A. Stirnemann (n 55) page 6
\textsuperscript{125} Prosecutor vs. Dusko Tadic, Case no. IT-94-1-A
\textsuperscript{126} Prosecutor vs. Dusko Tadic, \textit{Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, (“Tadic Jurisdiction Decision”), Case No. IT-94-1-AR72, paragraph 94}
The first international law document mentioned by the Appeals Chamber is Additional Protocol II of the Geneva Conventions. The Special Court relies on Part II of this Protocol in conjunction with its fundamental guarantees to specify which crimes fall within the Jurisdiction of the Court. The fundamental guarantees in the document are very important, because they make clear what the minimum standards for the conduct of armed conflict are.\(^{127}\)

The Court also mentions Common Article 3 of the Geneva Conventions as an important source for determining which crimes fall within the jurisdiction of the Court. This article deals with the prohibition of inhumane and degrading treatment. This article also includes the treatment of child soldiers, according to the Court.\(^{128}\) The third and last influential document for determining that the prohibition of recruiting child soldiers represents important values is a Security Council Resolution of 30 August 1996. The Security Council declared in this Resolution that the recruitment and training of children for combat was and is an ‘inhumane and abhorrent practice’.\(^{129}\)

International human and humanitarian law pay attention to the issue as well as the UN peace and security organ, and therefore we can conclude that the recruitment of child soldiers is a serious violation of international (customary) law. Many reports have been submitted by human rights organizations which make clear that the recruitment of children into armed forced bears many grave consequences for children, especially for their development.

The Defence team decided not to challenge the conclusion that the prohibition of child recruitment had gained the status of customary at the time that the acts were committed. But they did claim that the documents mentioned did not criminalize the activity and therefore it did not constitute a war crime that leads to individual responsibility of the accused.\(^{130}\) In the Tadic case the ICTY already decided that violations of the laws and customs of war, including violations of article 3 of the Geneva Conventions, could lead to prosecution of the alleged offender. The ICTR developed this rule by including article 4 in its Statute, which makes clear that serious violations of the fundamental guarantees in Additional Protocol II could also lead to individual criminal liability.\(^{131}\)

The Appeals Chamber in the Tadic case also decided that there must be a ‘clear and unequivocal recognition of the rules of warfare in international law and state practice’.\(^{132}\) If this is the case, than

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127 UNICEF Amicus Brief, para. 65
128 Appeals Chamber Prosecutor vs. Sam Hinga Norman, Decision on Preliminary Motion based on Lack of Jurisdiction (Child Recruitment) 31 May 2004, SCSL-2004-14-Ar72(e) para. 28
130 Prosecutor vs. Fofana, Reply to the Prosecution Response to the Motion referring to the Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, 4 October 2000, S/2000/915, §17
132 Tadic Jurisdiction Decision (n 124), para. 128
there is an indication of a willingness to criminalize the act. Punishment of the act by national courts and statements by governments and international organizations could also contribute to the conclusion that there is an intention to make individuals responsible for their deeds in international criminal law. Usually the international courts deal with grave crimes and the only way to enforce international law is by punishing the individuals that commit these crimes. A provision that explicitly states that there is individual criminal responsibility is not necessary for determining that the accused can be held responsible.\textsuperscript{133} That is the whole point of international customary law; it is customary, and therefore it does not have to be codified.

The conclusion of the Appeals Chamber in the Norman case is that child recruitment was part of customary law by November 1996, the period mentioned in the indictment. This act was criminalized even if this was not explicitly mentioned in international law documents yet. Therefore the principles of nullum crimen sine lege and nullum crimen sine poena are not violated and Norman can be held individually responsible.

\textbf{3.1.3 Dissenting Opinion of Judge Robertson}

Judge Robertson also deals with the question whether or not the nullem crimen sine lege principle is violated when Norman is prosecuted for recruiting child soldiers. He states that the Nuremberg Tribunal decided to interpret this principle more broadly, and prosecute acts that are universally regarded as abhorrent and shock the conscience of humanity.\textsuperscript{134} Judge Robertson argues that especially when the acts are deeply shocking and abhorrent, the principle should be applied rigidly. This will contribute to the legitimacy of the system, because the accused will not be prosecuted of a non-existent crime. The question that has to be answered in every case is if the defendant could have known (through competent legal advice) at the time of conduct that the act was violating international criminal law, even if it was not clearly prohibited by national law in the country where the alleged crime was committed. This principle is the basis of the rule of law according to Robertson, because it requires governments and the international community to take positive action to make sure that crimes will not go unpunished.\textsuperscript{135}

Judge Robertson confirms that by the end of 1996 a rule had emerged in customary international law that obliged states and armed forces in these states to avoid conscripting and enlisting children under the age of 15 or using them in hostilities in international or internal conflict. However, he claims that there was no ground for prosecuting and punishing individuals accused of enlisting

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\textsuperscript{133} Appeals Chamber Decision, Case No. SCSL-03-08-PT-122, paragraph 38
\textsuperscript{134} Prosecution Response, para. 17
\textsuperscript{135} Appeals Chamber Decision, Case No. SCSL-03-08-PT-122 Dissenting Opinion paragraph 14
\end{flushright}
children under the age of 15. Judge Robertson emphasizes the special jurisdiction of international criminal law, which makes the accused lose the protection of his home state. This is the reason why only the worst crimes will be prosecuted: only breaches of Common Article 3 of the Geneva Conventions will be considered to be offences under international criminal law and other specified conduct that has been identified as an international law crime. Treaties or other methods can demonstrate that there is consensus within the international community that an act must be qualified as an international law crime and the accused should be punished for his deed.\(^{136}\)

In addition, Judge Robertson claims that the rule against child recruitment was a human rights principle rather than a rule which entailed individual criminal liability in international law before the conclusion and approvement of the Rome Treaty in 1998. The Rome Treaty turned a rule of international humanitarian law into a war crime punishable by international criminal courts.\(^{137}\) It was not just a codification of customary law. He states that state practice after the Conclusion of the Rome Treaty in 1998 showed that the Treaty was a turning point in the criminalization of child recruitment. This means that there was no state practice of criminalizing the act prior to the Rome Treaty, which means that persons could not be held liable for the act before 1998.

The dissenting opinion ends with the conclusion that it was not until the 122 states signed the Rome Treaty in 1998 that the enlistment of children could be considered to be an international law crime. Although a norm of customary law does not have to be included in a Treaty to gain the status of international criminal law, state practice and the overall attitude towards the crime before 1998 lead judge Robertson to the conclusion that the prosecution of Norman for his acts committed in 1996 would breach the nullum crimen sine lege principle.\(^{138}\)

### 3.1.4 Participation of the Victims

The rules concerning victim participation in the statutes of the ICTY, ICTR and SCSL are very marginal. The Court focuses on the prosecution of the alleged perpetrators, and therefore not much attention is paid to the role of the victims. The victims are mentioned in the Statutes and Rules of Evidence, but their role is very limited and passive. All three ad-hoc courts allow victims to give testimony if they are called by the Prosecution, Defence or the Court itself.\(^{139}\) But that is about it.

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136 Case No. SCSL-04-14-A  Dissenting Opinion of Judge Robertson, paragraph 33  
137 *Ibid* paragraph 39  
138 *Ibid* paragraph 45  
The former child soldiers that participated in the proceedings against Norman were therefore called to testify as witnesses, not as victims. The SCSL did develop specific rules for dealing with child witnesses in the proceedings, as we have seen in the previous chapter. The case against Norman, Kondewa and Fofana included 5 former child soldiers that participated as witnesses. There were 3 witnesses that were already older than 18 when they gave their testimony. We have seen in paragraph 2.3.1 that adults that have been child soldiers are also able to receive protective measures. The identity of these witnesses were protected and they testified behind a screen so the public and the accused could not see them. The 2 witnesses that were still under the age of 18 testified via video links. The testimonies of these witnesses were important. Although the purpose of testifying as a witness is to contribute to the decision between guilt and innocence, by telling their stories and expressing their views on what happened it can also be seen as a form of victim participation. But the fact that they are formally seen as witnesses denies their status as victims.

As we have already seen before, a Truth and Reconciliation Commission was established in order to find out the truth about the conflict and the crimes committed. The Truth and Reconciliation Commission of the Special Court of Sierra Leone is the first truth commission which pays particular attention to the experiences of children. This Commission also played a role in the case of Sam Hinga Norman. In the case of Norman, the TRC requested to interview Norman before the end of the mandate of the TRC which was ending in 2003. However, the Court decided that the TRC could not have access to Norman because he was indicted and not yet tried and public testimonies before the TRC could infringe the integrity of the proceedings before the SCSL. Judge Robertson decided in appeal that there must be a compromise; the TRC should be able to receive testimonies from Norman, but not in a public hearing, only in written records. Norman was more interested in a public hearing and declined to cooperate with the TRC in the way proposed by judge Robertson. The SCSL developed a Practice Direction in order to govern the practices of both institutions after the decision in the Norman case. Rule 5 of this Practice Direction made clear that the accused can give consent to questioning by the TRC. The Presiding Judge can decide to refuse this right of the TRC by stating that this is necessary in the interests of justice or for the maintenance of the integrity of the proceedings of the Special Court.

The indifference towards victims before the SCSL but also the ICTR and ICTY has raised many questions and has received much criticism. Carla del Ponte, Prosecutor before the ICTY and ICTR already made clear that the voices of the victims are not sufficiently heard. She stated:

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140 A. Michels (n 56) page 18
141 Prosecutor v. Samuel Hinga Norman Appeals Chamber Case No. SCSL-03-08-PT-122 Note 80
142 Ibid Note 82
‘Victims have almost no rights to participate in the trial process, despite the widespread acceptance nowadays that victims should be allowed to do so. (...) It is regrettable that the Tribunal’s statute makes no provision for victim participation during the trial, and makes only a minimum of provision for compensation and restitution to people whose lives have been destroyed.’

This dissatisfaction with the lack of opportunities for victims to participate in the proceedings is the reason why the Rome Statue of the ICC includes rules on victim participation.

3.2 The Lubanga case

The case of Thomas Lubanga Dyilo can be seen as a landmark case in several respects. Lubanga was the first detainee of the International Criminal Court. He was the first person to be tried before a court for the atrocities that took place in the Democratic Republic of Congo from 1998 until 2003. This case can also be seen as a landmark case with regard to formal victim participation.

Thomas Lubanga was the leader of the Union of Congolese Patriots, an armed group which fought in the northeastern part of Congo. The conflict was a part of the Second Congolese War which involved many African Countries and armed groups. The UPC supports the Hema, an ethnic group in the northeast region of Ituri. It consists of a military wing and a political wing, and Lubanga was commander-in-chief of the military wing called the Forces Patriotiques pour la Libération du Congo. The Prosecutor of the ICC charged Lubanga with the crime of enlisting and conscripting children under the age of fifteen and using children under the age of fifteen to participate actively in hostilities, which are war crimes according to articles 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Rome Statute of the International Criminal Court.

This case stresses the importance of protecting children from being recruited as soldiers because the initial list of charges only concerns the act of conscripting child soldiers. This case also shows us that people in Congo did not know that the recruitment of child soldiers is illegal according to international law. Therefore surprised reactions were expressed when the indictment against Lubanga was made public. The case is still pending, and witnesses are still being heard today.

3.2.1 Consideration of the Court

Thomas Lubanga Dyilo was arrested on 19 March 2005 in Congo. An arrest warrant of the ICC was made public on 10 February 2006 and he was transferred to The Hague, were he made his initial appearance before the ICC on 20 March 2006.

143 Address to the Security Council by Carla del Ponte, Prosecutor of the international criminal tribunals for the former Yugoslavia and Rwanda to the UN Security Council The Hague, 24 November 2000 (JL/P.1.S./542-e)
144 http://www.iccnow.org/?mod=drctimelinelubanga
Unfortunately, there were many delays and stays of proceedings so the trial before Trial Chamber I of the ICC did not begin until 26 January 2009. There were several grounds on which these delays were based. Decisions had to be made on the non-disclosure of evidence, an order for release of Lubanga because of procedural imperfections, and on the participation of victims overall and in the appeal. The order for release of Lubanga was based on the right to a fair trial of the accused (See paragraph 3.3.2). The Trial Chamber found that this right could no longer be guaranteed, especially because the Prosecution did not implement the orders of the Chamber. Of course these decisions of the Trial Chamber were challenged in appeal. The Appeals Chamber reversed the decision and stated that the Trial Chamber should impose sanctions on the Prosecution before turning to drastic means such as unconditional release.\textsuperscript{145} So the proceedings could be resumed on 25 October 2010.

Ten former child soldiers have testified since the start of the Lubanga trial, and several experts expressed their views on the phenomenon at the invitation of the judges.\textsuperscript{146} Their testimonies describe the horrific events that have taken place, including military training, sexual slavery and the many cruel killings. The Lubanga trial helped formulating the essential elements of the crime of conscripting and enlisting child soldiers or using them in armed conflicts. The reasons for using these children were highlighted in order to define the source of the problem.

One problem that the Prosecution faces is the individual responsibility of Lubanga. The Defence does not deny the fact that there were child soldiers. But because of the fact that Lubanga was the leader of the UPC and did not participate actively at the front line, the Defence stated that he did not play a role in the recruitment of child soldiers. According to the Defence, there was not even a policy to recruit children. Instead, Lubanga would have made efforts to demobilize these children.\textsuperscript{147} The task of the Prosecution is to have enough witnesses to testify against the claims of the Defence. The participation of child soldiers would help fulfilling this task.

\textbf{3.2.2 Participation of the Victims}

The International Criminal Court is the first international criminal court which contains rules on victim participation in its Statute. Because the Lubanga case is the first case brought before the ICC, it is also the first case in which the rules on victim participation could be brought into practice. This also meant that the provisions concerning victim participation were ‘put under the microscope’ and

\textsuperscript{145} Appeals Chamber, \textit{Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled "Decision on the Prosecution’s Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU"}, ICC-01/04-01/06-2582 para. 55-61

\textsuperscript{146} W. Wakabi, \textit{Lubanga Trial Highlights Plight of Child Soldiers}, Commentary on Trial Report 5 October 2010

\textsuperscript{147} \url{http://www.aegistrust.org/Lubanga-Chronicles/lubanga-chronicle-107-defence-witness-19-qlubanga-issued-orders-to-demobilized-child-soldiers-within-the-upcq.html}
several components of the provisions had to be reviewed in order to find out what the exact meaning of the words is. Decisions made by Pre-Trial Chambers in other cases had already established when persons were able to participate as victims in the proceedings. They had established that victims could already participate during the investigation phase, because this was in conformity with the object and purpose of the idea behind victims’ participation. The main rule on the recognition as a victim in the procedure is that there must be a close link between the physical or material suffering of the victim and the crimes for which the accused is charged. When you can participate as a victim, you have the right to representation and to reparation.

On 18 January 2008, the decision on victim participation was taken in the Lubanga case. Trial Chamber I decided to take a different approach towards victim participation. They started by looking at the definition of a victim. The definition is given in rule 85 of the Rules of Procedure and Evidence, which is already discussed in chapter 2. This definition states that a victim is a natural person who has suffered harm as a result of the commission of a crime within the jurisdiction of the Court. Organizations and institutions can be victims too, but only when have suffered direct harm. For natural persons there is no such requirement. This means that indirect victims can participate in the proceedings too. The Trial Chamber also found that ‘harm’ included psychical and emotional suffering and economic loss. The harm can be suffered individually or collectively. This means that the Trial Chamber gives a broad interpretation of the required harm.

Both the Prosecution and the Defence appealed against the decision of the Trial Chamber. The broad notion of a victim was not in accordance with the original meaning of the text of the Statute according to these parties. The Appeals Chamber delivered its judgment on these appeals on 11 July 2008. The Appeals Chamber agreed with the broad approach taken by the Trial Chamber. A natural person may personally suffer material, physical or psychological harm, directly or indirectly. This implicated that former child soldiers are able to participate, but their parents too as the indirect victims of the crime of conscripting child soldiers. This decision is very important, especially in the case of Lubanga where many child soldiers were involved.

Furthermore, the Appeals Chamber made clear that it did not agree with the Trial Chamber when they stated that the harm could be suffered individually or collectively. The harm should be suffered by an individual who can claim to be the victim of a crime, not just by any group that is linked

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148 S. Vélez, Victims raise their voice in the Lubanga case, 23 October 2009
149 Rule 85(a) of the Rules of Procedure and Evidence
150 Trial Chamber I, Redacted version of “Decision on ‘indirect victims’”, ICC-01/04-01/06-1813, para. 90-91
151 M. Gillett, Victim Participation at the International Criminal Court, Australian International Law Journal Volume 16 2009, page 6
152 Ibid page 8
indirectly to the crime committed. This explanation of the Appeals Chamber is important for the interpretation of the term ‘harm’, and sets clear limits as to who can claim to be a victim. The question that has to be answered in future cases is whether or not the applicant personally suffered material, physical or psychological harm.

3.2.2.1 Scope of participation

The Representatives of the Victims requested clearness about the scope of victims’ participation. They wanted to introduce evidence themselves and comment on evidence of the Prosecution and the Defence. The Trial Chamber decided that under article 69 paragraph 3 of the Rome Statute the Court had the possibility to request the presentation of all evidence to discover the truth. This also includes evidence provided by the representatives of the victims when it helps determining if the accused is guilty or innocent. It also fits within the idea of the drafters of the Rome Statute, who wanted to include the right of victims to present additional evidence. There was no consensus on this, but the Court still has the opportunity to let victims participate at all stages of the proceedings, when the Court thinks this is appropriate.

The Trial Chamber decided that victims are able to express their views and concerns in any phase of the trial. The testimonies given by the victims can be used by the Court. These testimonies can contribute to the truth finding and the possible prosecution of the accused. Therefore this is a new and progressive approach to the submissions of the victims, but it could infringe article 67 paragraph 1 of the Rome Statute, and therefore the Trial Chamber decided to grant Lubanga leave to appeal.

The Defence team of Lubanga argued that the Court should not provide the victims with the same rights as the traditional parties. Because the evidence brought by the victims will be incriminating the accused, the principle of equality of arms will be infringed. This will lead to an unfair trial. The Prosecution agreed with the Defence and stated that the acceptance of incriminating evidence brought by victims infringes the basic principles of the adversarial process of criminal proceedings as it may prejudice the Defence. There are provisions in the Rome Statute that explicitly mention the ‘parties’ with regard to certain rights such as the collection of evidence and the obligation of disclosure. The victims are formally not seen as ‘parties’.

153 M. Gillett (n 148) page 9
154 Trial Chamber I, Decision on the Prosecution’s application for admission of four documents from the bar table pursuant to Article 64(9), ICC-01/04-01/06-2662 paragraph 108
155 Article 68(3) of the Rome Statute.
156 Trial Chamber I, Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims’ Participation of 18 January 2008, ICC 01 /04-01/06-1191 para. 19
157 M. Gillett (n 148) page 10
The representatives of the victims did not agree with both parties. Because the victims are affected by the decision of the Court with regard to the guilt of the accused, they should have the opportunity to participate and help the Court make its decision. Therefore they stated that they should get the opportunity to question witnesses and introduce evidence.\textsuperscript{158}

The Appeals Chamber agreed with the Prosecution and stated that the victims cannot be seen as real parties in the proceedings before the ICC. According to the Rome Statute and the Rules of Procedure and Evidence, it is the task of the Prosecutor to prove that the accused is guilty. This does not mean that the Court cannot take other evidence into consideration. The Appeals Chamber takes into account that the ICC is the first international Court which includes victim participation in its Statute, and therefore it is important that the victims are able to invoke this right in practice. Therefore the majority of the Appeals Chamber accepted the contribution of the victims to the evidence, even if this touches upon the question whether or not the accused is guilty of the crimes in the charges.\textsuperscript{159}

The Appeals Chamber continued by specifying the requirements that the victim has to fulfill in order to participate in this active manner. When these requirements are fulfilled, the victim can participate and this would not infringe the rights of the accused.\textsuperscript{160}

After the Appeals Chamber reviewed the decision of the Trial Chamber and decided what the scope of the right to victim participation is, they decided to grant 4 victims the right to appeal against the decision to release Lubanga. These persons were already participating in the process as recognized victims, and the Appeals Chamber decided that they were affected by the order of release. The 4 victims could express their views on the decision and provide written submissions.\textsuperscript{161} This means that the victims have a complementary role; it is the Prosecution that has to prove the guilt of the accused, the victims offer extra input. They only get a bigger role when the Prosecution has trouble proving certain facts or when the victims feel that their best interests are not represented. This makes clear that the victims will not be taking the role of a second Prosecutor, a scenario that dissenting Judge Pikis was afraid of.\textsuperscript{162}

\textsuperscript{158} Victims’ Observations on Appeal against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008 (Case No ICC-01/04-01/06-1345-tENG, 21 May 2008) paragraph 41.

\textsuperscript{159} Appeals Chamber, Decision on the participation of victims in the Appeals, ICC-01/04-01/06-2168 para. 96

\textsuperscript{160} Ibid paragraph 4

\textsuperscript{161} M. Gillett (n 148) page 10

\textsuperscript{162} Appeals Chamber, Dissenting Opinion of Judge Pikis, ICC-01/04-01/06-766, para. 14
3.2.2.2 Link between the harm and the charges

The Trial Chamber also dealt with previous ICC decisions that established the need of a causal link between the harm suffered and the specific charges against the accused. If there was no sufficient link, the victims would not be able to participate.\footnote{Pre-Trial Chamber I, \textit{Decision on the Applications for Participation in the Proceedings}, ICC-01/04-01/06-172, page 3} The Majority of the Trial Chamber did not agree with this requirement and decided that it would be enough if the victim shows that there is an evidential link between the harm of the victim and the evidence to be led on in a specific issue.\footnote{Trial Chamber I, \textit{Decision on Victims Participation}, ICC-01/04-01/06-1119, para. 96} Judge Blattmann dissented and stated that neglecting the link between the victim and the charges against the accused violated fundamental principles of criminal law. It would infringe the rights of the accused to a fair trial and therefore he stated that the stricter test should be used which obliges victims that want to participate in the proceedings to demonstrate the link between their harm and the charges in the indictment.\footnote{Trial Chamber I, \textit{Separate and Dissenting Opinion of Judge Blattmann}, ICC-01/04-01/06-1119 para. 6-7} The Appeals Chamber agreed with Judge Blattmann. They referred to article 68 paragraph 3 of the Rome Statute in conjunction with rule 89 paragraph 1 of the Rules of Procedure and Evidence. These provisions deal with the right of victims to participate. A trial starts in order to convince the judge that the suspect committed the crimes that he is accused of, and therefore the Appeals Chamber states that it is a logical consequence that only victims that suffered harm from the alleged acts of the accused can participate.

I already mentioned that indirect victims also fall within the scope of the definition of a victim. In the Lubanga case several persons applied as indirect victims, because they suffered harm due to crimes committed by the child soldiers. Trial Chamber I had to deal with the question whether or not these applicants could be seen as indirect victims. The ‘Decision on Indirect Victims’ in the Lubanga case was taken on 8 April 2009.

The Trial Chamber took a close look at rule 85 of the Rules of Procedure and Evidence and the Appeals Chamber Decision of 11 July 2008, which deals with the scope of the victim participation scheme (see paragraph 3.2.2.1). The Court concluded that indirect victims can participate too, as long as they can prove that there is a causal link between the harm and the crimes charged. This means that the harm that the indirect victims suffered must be the result of the conscription and enlistment of the child soldier. This is the case when the indirect victim has a certain relationship with the child, especially when it concerns family members.\footnote{Trial Chamber I, \textit{Decision on ‘indirect victims}, ICC-01/04-01/06-1813 8 April 2009 paragraph 52} This makes clear that the applicants were not seen as
victims only because they suffered harm as a result of crimes committed by the direct victims. Their harm is not linked to the crimes that Lubanga is accused of, but to the subsequent events.\textsuperscript{167}

The approach of the Appeals Chamber is logical in the sense that the Trial Chamber can focus on the crime in the indictment. The Court will have to find out if the accused is guilty or innocent for committing these crimes. By requiring a link between the harm and the alleged crimes, the Court is able to use the indictment to see if a person can be seen as a victim and if they are able to participate. This test is more strict than the proposed test of an evidential link, which is beneficial for the Court which already has to deal with very many victim applications.\textsuperscript{168}

The fact that only victims of the crimes in the indictment are able to participate in the proceedings can lead to difficult situations. A very small group of victims of Lubanga can participate because he is only accused of the war crime of conscripting and enlisting children under the age of fifteen and using them to participate actively in hostilities. This means that the victims will mainly be former child soldiers, which is of course a very good development with regard to fighting the this practice. Although it is important that child soldiers have the opportunity to participate, according to several NGOs the focus of the Appeals Chamber is too narrow and neglects sexual violence crimes. Victims of these crimes could not participate because the required link is not present. This limits victims’ participation as to their representation and reparation before the ICC.\textsuperscript{169}

The main point of critique on the Lubanga case is therefore focused on the crimes that were charged by the Prosecutor. The Legal Representatives of the Victims asked the Court to use Regulation 55 of the Regulations of the Court which means that they requested a re-characterization of the facts. The representatives stated that the testimonies of the witnesses led to the conclusion that there were violations of other provisions of the Rome Statute besides child recruitment. They want recognition of the Court that the facts also constitute sexual slavery and inhumane treatment.\textsuperscript{170}

The Trial Chamber had to make a decision on the request of the Legal Representatives. The decision eventually taken was not unanimous. Regulation 55, combined with Regulation 74 allows the Court to change the legal characterization of the facts. However, this may not exceed the facts described in the charges. The Prosecution argued that the use of both Regulations in this context is unlawful because there is not just a re-characterization but five additional charges would be added when the facts would be changed. This is in the same line of reasoning as the dissenting opinion of Presiding

\textsuperscript{167} V. Spiga, \textit{Indirect Victims' Participation in the Lubanga Trial}, \textit{Journal of International Criminal Justice} 8 (2010), page 188
\textsuperscript{168} M. Gillett (n 148) page 11
\textsuperscript{169} Letter of Human Rights Watch to the Prosecutor Luis Moreno Ocampo
\textsuperscript{170} S. Vélez (n 145) 23 October 2009
Judge Fulford. The two other judges, Odio Benito and Blattman, did not agree with this argument and the final decision made clear that the legal characterization of the facts could be changed. ¹⁷¹

3.3 Deficiencies with regard to the treatment of witnesses in the Lubanga case

3.3.1 Witnesses in Court

Although the Statute of the Court provides a clear framework for the protection of witnesses and victims, in practice it became clear that it was hard to find out how these provisions would apply. Because the Lubanga case was the first case brought before the Court, it was also the first case that had to deal with witnesses and witness protection. The first witness before the ICC was a former child soldier testifying against Mr. Lubanga, who was his commanding officer.

An earlier ruling of the Pre-Trial Chamber made clear that the Prosecution was not allowed to review the witness’ testimony before the witness gave evidence in the courtroom. Although this measure was taken for the protection of the witness, it became clear that it had a detrimental effect on this former child soldier. The witness testified against mr. Lubanga in the morning, but decided to repeal his testimony in the afternoon. It became clear that he was not really prepared for the process. Moreover he had to face mr. Lubanga directly because there were no measures taken to shield the witness from the accused, he was only shielded from the public. ¹⁷² Presiding Judge Fulford requested that the Victims and Witnesses Unit of the Court would discern if it was in the best interests of the witness to continue. ¹⁷³ It was not until the measures provided for in the Statute were taken that the child could complete its testimony against Lubanga. This makes clear that the protection mechanisms for child victims and witnesses are really necessary in transitional justice. The Court reviewed its procedures for vulnerable witnesses after the trial and the Victims and Witnesses Unit appointed a psychologist who was able to work with children who were victim of international crimes.

3.3.2 Intermediaries

Many questions of the Defence team were focused on the financial support that the witnesses that appeared before the Court received. The Prosecution claimed that these payments should be seen as compensation for witness expenses, whereas the Defence said it should be regarded as payment for witness testimony because the amounts of money that the witnesses received were way too high.

¹⁷¹ S. Vélez (n 145) 23 October 2009
¹⁷² A. Smith, Basic Assumptions of Transitional Justice and Children, Harvard University Press March 2010 page 41
¹⁷³ K. Davey, Lubanga Trial: First week in review, Child Soldier Relief 1 February 2009
Therefore the Court requested that the Victims and Witness Unit provided information on the amounts paid to witnesses.\textsuperscript{174} The Defence team focused on the payment to the intermediaries in Congo. Several witnesses of the Defence team stated that there was a practice of bribing and coaching witnesses. They claimed that the intermediaries forced the witnesses to say that they were former child soldiers, but in reality they were never recruited by the troops of Lubanga. Therefore they requested that the Prosecution should reveal the identities of the intermediaries that will give testimony on the alleged corruption.\textsuperscript{175} Judges Fulford, Odio Benito and Blattmann issued an order to the Prosecution for the reveal of an intermediary to the Defence. Unfortunately, the Prosecution did not comply with this order, even after several requests of the Court. The Prosecutor stated that the reveal of the identity of the intermediary would put the life of this intermediary in danger. The Court did not agree with the Prosecutor and they stayed the proceedings, stating that the Prosecution abused the Court process by not implementing the orders of the Court. Therefore they decided that the right to a fair trial could no longer be guaranteed and ordered the release of Thomas Lubanga Dyilo.

The Prosecution appealed against the decision of the Court and received help from the Principal Counsel of the Office of the Public Counsel for Victims. The Court must take the gravity of the charges into account, because these charges still stand against the accused. His unconditional release could also threaten the lives of the victims and witnesses, especially former child soldiers. After the participation of the lawyers of the victims in the formulation of the ground of appeal, the judges accepted the request of the representatives of the victims which stated that victims that participated in the Lubanga Trial should be able to participate in the Appeals Trial too.

\textsuperscript{174} M. Staggs and S. Kendall, \textit{Sierra Leone Trial Monitoring Program Weekly Report}, U.C. Berkeley War Crimes Studies Centre report No. 4 page 4
\textsuperscript{175} K. Davey, \textit{Lubanga Trial: June and July in Review}, Child Soldier Relief 12 Augustus 2010
3.4 Concluding remarks

The testimonies of former child soldiers form a big part of the case against Thomas Lubanga. Several child soldiers participated as victims in the proceedings. In most of the cases the victims testify through their legal representatives. Joseph Keta, one of these legal representatives requested that the victims would be given the opportunity to share their experiences. Although they do not testify for one of the disputing parties in particular, the ICC states that it is important that the victims are able to give evidence and express their views on the circumstances of the case.\footnote{T. Gurd, \textit{Why are victims testifying now?}, January 16, 2010, Legal Analysis of the Lubanga Trial}

There were many victims that participated in the proceedings, including child soldiers and their parents. The focus on the prosecution of the crime of recruiting child soldiers in these big and influential cases made sure that the crime will not go unpunished in future situations. The requirement of a link between the harm and the charges makes sure that child soldiers and their family members will always be able to participate as victims (or as witnesses) when the accused is charged with the crime of child soldier recruitment.

Although the protection mechanisms were in place, we have seen that in practice there is still a lot to be done before there is a clear and simple route that should be followed when a child enters the proceedings. The decisions of the Trial Chamber and Appeals Chamber in the Lubanga case have already been very important for the development of the victim participation scheme of the ICC. The decisions make clear that ‘participation’ is not just a term, it is a way of getting recognition for your suffering. Before the establishment of this participation scheme victims were only passive objects of the procedure, as we can see at the SCSL. The possibility to participate also implies that the victims will be able to claim reparations. This will contribute to the acceptance of the ICC as a fair Court that really listens to victims.
Chapter 4 Conclusion

We have seen that since the 1990s children have received more attention on the international level. Before the codification of several international human and humanitarian rights instruments they were seen as passive subjects belonging to a particularly vulnerable group. However, they did not receive any special protection and crimes committed against children were seen in the larger context of a crime. International law documents have paid large contributions to the protection of children, especially when the first provisions on the prohibition of recruiting child soldiers evolved. But it was not until the establishment of special courts and tribunals that these new rights could be invoked properly. The Special Court for Sierra Leone and the International Criminal Court, the two institutions that are central in this thesis, were extremely important in the development of the legal framework that established individual criminal responsibility for child soldier recruitment.

The international documents and courts have established a shift in thought; children are seen as the holders of rights and can actively participate in transitional justice processes. Therefore it is important that judges listen to children when they express their views and concerns because they can provide a unique insight into the crime and the conflict as a whole. Allowing children to talk about their experiences can have a big influence on the process and its outcomes.

After the case of Norman was finished it became clear that children have gained a central place in international investigations and prosecutions. Children are still being used in armed conflicts and because of the development of prosecuting the recruiters this crime can be properly addressed. Truth and reconciliation commissions have be put into place as another measure of transitional justice. These institutions can have a deterrent effect on militia groups and leaders, but they can also help children and local communities in accepting what has happened before they can come to terms with the past.

The process does not stop after a former child soldier has given its testimony before a court or a commission. After these formalities, efforts should be made to reintegrate the child into their communities. The Special Representative for Children in Armed Conflict, UNICEF, NGOs and experts have joined their forces to see if truth commissions and war crimes tribunals can really contribute to the reintegration of former child soldiers. Truth commissions can play a big role in reconciliation and healing. However, there should be more practical solutions on the ground. Therefore UNICEF has made efforts for the reintegration of former child soldiers.

177 P. Cook and C. Heykoop (n 86) page 160
178 M. A. Corriero (n 79) page 343
179 G. Wigglesworth (n 82) page 826
It is also important to pay attention to the way children are treated when they participate in these transitional justice systems. There must be proper protection for children participating as witnesses or victims in trial, but their protection should start as soon as they are identified as possible participators in the process. Intermediaries should approach these children very carefully. They already have a difficult history and if they are mistreated again this will have damaging consequences. After these children are informed of their rights and possibilities, they should receive as much help as possible when they decide to come to the Court to testify. It is extremely important that their identities are shielded to protect these children and their families. Direct confrontation with the accused should be avoided, because it could have a detrimental effect on the trustworthiness of the testimonies which will be adjusted out of fear and intimidation. This was also visible when the first former child soldier testified in the Lubanga case.

Although many efforts have been made, there are still some issues that are cause for concern.

**The Age Limit**

Since the attention for protection children against recruitment in armed forces grew, there has been no consensus on what age limit should be used to define a child soldier. As we have seen in Chapter 1, there are many different definitions used and although many efforts have been made to set the age limit at 18 for once and for all, there are still documents that use the age of 15. This leads to a gap in the protection of children between 15 and 18 years old; children under the age of 15 are always protected, but it is unclear how children between 15 and 18 should be treated. Can they still be considered to be ‘children’ and ‘child soldiers’? Cultural conceptions of maturity play a role in this debate and these conceptions differ in every tribe.

This is also reflected in the Statute of the SCSL which states that the age of 15 marks the boundary between child soldiers and normal soldiers, because the Statute only prohibits conscription and enlistment of children under the age of 15. The Statute does not exclude jurisdiction over children under the age of 18 as the Rome Statute of the ICC does. While the SCSL is theoretically able to prosecute children between 15 and 18, no cases have been started against them. The SCSL decided not to join the debates concerning age limits, because they wanted to focus on the material elements of the crime.

This emphasizes the difficulties in determining the standard again. The Rome Statute is more clear and children below the age of 18 will not be prosecuted. This will hopefully expand the protection so it will be illegal to recruit children between 15 and 18 too. In my opinion, this is the right way forward; the international community should start making efforts to close the gap in international law with regard to the age limit that was created by the Geneva Conventions and its Protocols.
Outreach

Despite all the criticism on the SCSL and ICC, these Courts have had a big impact on the development of international law and the procedures for invoking the internationally recognized rights. This also has a positive impact on social and political circumstances in countries such as Congo and Sierra Leone. It became clear in the past couple of years that victims appreciate the new opportunities under the Rome Statute. Victims are still very relieved when they find out that the Prosecutor of an international court is starting an inquiry, because this means that the perpetrators of the crimes will be held accountable for their deeds. It is also a recognition for their suffering. The threat of being prosecuted by the international criminal courts will have deterrent effect on the warlords.

It is also important that the Prosecutor educates the regions in which the armed conflict has taken place, because on several occasions it became clear that the local communities were not aware of the fact that recruiting child soldiers is a war crime. A special outreach strategy should be developed to explain to the community what the legal status of this crime is and why the Prosecutor focuses on prosecuting this crime only. This will also contribute to the elimination of the crime in the future. It is also important that the prosecutor and the judges take the impact of their decisions into account. Each decision will set a precedent, and they have to keep in mind that setting the wrong example will immediately affect the legitimacy of the Court.

It is difficult for the judges to engage in outreach activities because of the case load of the courts and they do not have expertise in this field. But outreach is an essential element when the ICC truly wants to focus on victims. The Special Court for Sierra Leone already paid more attention to outreach mechanisms. This is of course the consequence of the existence of the TRC which has held conversations with local communities and victims, and the complementary relationship between the SCSL and TRC. This makes it necessary for the Court to explain what they are doing and why. Therefore the Court created a section in the system that deals with outreach activities such as informed dialogues with victims and communities.180

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180 M. Glasius, What is Global Justice and Who decides? Civil Society and Victim Responses to the International Criminal Court’s First Investigations, Paper presented at the annual meeting of the ISA’s 49th Annual Convention Bridging Multiple Divides 26 March 2008 page 17
Concluding remarks

The ICC will be the most important enforcement mechanism to protect child soldiers in the future. By making the perpetrators individually responsible they are able to make a clear statement, which is especially needed for the African countries because the practice is still very common there. The efforts that are made will contribute to awareness with regard to child soldiers. Of course these transitional justice processes are not enough; they are essential for addressing the issue and the recognition of the suffering of the children, but reintegration programs should be established in order to make these children able to get on with their lives. We have to keep in mind that reconciliation is not possible just by participation; families, communities and the children themselves should work together to overcome the events of the past. The root causes of the conflicts and the inclusion of children in these conflicts should also be addressed.

When I started my research into the topic of child soldiers and their protection before international criminal courts, my hypothesis was that they might not receive enough protection. My first chapter already showed that the international community did pay a lot of attention to the issue, although there is still no clearness on what the age limit should be. After that I found out in chapter 2 that the SCSL and ICC do have special measures for dealing with child witnesses and victims. These provisions apply to all children, not only to child soldiers. The UN Guidelines on Justice in Matters Involving Child Victims and Witnesses have proved to be important with regard to the protection of child soldiers and other child victims. Paragraph 15 contains the right not to be discriminated on the basis of race, gender or any other particular status, as we have already seen in chapter 2. This right touches upon other rights of children and the way they should be treated, such as the fact that their best interests should be taken into account according to article 3 of the Convention on the rights of the Child. The Redress Trust, a human rights organization that helps securing remedies for victims of torture, states that several NGOs have argued that forms of positive discrimination towards former child soldiers can lead to stigmatization which makes it harder for them to reintegrate into their communities.\textsuperscript{181} Therefore it is important that a non-discriminatory approach is used. I started to question my hypothesis; maybe it is not such a big problem that there are no specific provisions dealing with the protection of former child soldiers when they participate in the proceedings.

The SCSL made important steps in the protection of children against recruitment in the Norman case, but the participation of former child soldiers was restricted to giving testimony as witnesses. They were able to participate in the Truth and Reconciliation Commission as victims but this does not directly affect the procedure against the accused.

\textsuperscript{181} The Redress Trust (n 81) page 33
The ICC developed a victim participation mechanism which made children able to express their views and concerns before the Court and receive reparations for the harm that they suffered. This is a very positive development and it made clear that the ICC has made a lot of efforts to protect children when they participate in the proceedings, whether they participate as witnesses or as victims. The Lubanga case made me doubt my hypothesis again. In first instance I welcomed the approach of the ICC, which focuses on child soldiers. Lubanga was only charged with the crime of conscripting or enlisting child soldiers. But then it became clear to me that this focus might be too narrow; it neglected the rights of other child victims. NGOs made clear that this narrow focus is not compatible to human rights principles.

We have seen in chapter 2 that special protective measures have been installed to help children when they participate in transitional justice processes. Former child soldiers, even when they have already reached the age of 18, can make use of these measures. The efforts made to criminalize the conduct resulted in a policy of focusing on the prosecution of the crime. Although this is a very important development, the international community should not forget that there are children that become victims of other crimes that are equally grave and also deserve attention. If these crimes are not in the charges there is no possibility for these victims to get protection, participate in the proceedings, and receive reparations for the harm they suffered. The discrepancy between former child soldiers and other victim categories should be addressed in order to give all victims of armed conflicts the same opportunities for recovery.

The hypothesis that child soldiers do not receive enough protection can be confirmed nor rejected. There is a clear focus on the crime of child soldier recruitment and the victims of this crime shall be able to join the proceedings of the transitional justice institutions. Protection mechanisms have been installed to provide protection for these vulnerable child witnesses and victims. But we need to keep an eye on how the protective measures established in these institutions work out in practice to know if they are really able to protect the former child soldiers when they enter the proceedings.
Appendix

Issues that need closer study

Failure to include gender based crimes
There might be too much attention for certain specific crimes. The SCSL as well as the ICC want to raise awareness for the issue of child soldiers, which is important and should be supported. Nevertheless, we have already seen that a too narrow focus can neglect or marginalize the suffering of others. Especially in the case of girl child soldiers.

The system does not provide effective protection for these girl soldiers. Girls are recruited too and may be used at the front line as soldiers, but most of the time they are recruited to become sexual slaves of the officers. Although international law is in place to protect children from becoming soldiers and to protect them against sexual abuse, these girl soldiers do not seem to fit in the definitions used in these protection provision. The only document that really prohibits the recruitment of girls for sexual purposes are the Cape Town Principles. However, this document is not legally binding so it cannot be enforced properly and it will be harder to influence other international law documents.

The Special Court dealt with the question of what is meant with ‘taking an active part in hostilities’. It has decided to use a broad definition in order to include girl child soldiers too. This is a very progressive approach and it makes these girls able to apply for reintegration programs too. It will also enhance the legitimacy and credibility of the Court. The SCSL has been very influential in raising awareness for the general issue of child soldiers. Maybe they are able to expand their influence by going more into detail and specifying the crime of recruiting girls for sexual purposes.

If the prosecutors only includes the crime of conscripting and enlisting child soldiers in the indictment, as was the case in the indictment against Lubanga, the harm of other victims, in particular other children, will be set aside. This is detrimental in two ways; the other children do not get the chance to participate in the proceedings as witnesses or victims. And the former child soldiers, who are able to participate, will be separated from their communities even more because they get this ‘special treatment’ in the form of child sensitive investigations and trials. They will be involved in procedures for reconciliation and reintegration too. This differential treatment will lead to difficulties when the former child soldiers try to reintegrate, because the community will have the feeling that the harm that they suffered is marginalized. They will not be able to claim reparations.

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182 E. Hedkvist, Girls and Boys at War: Prohibition in International Law against the Use of Child Soldiers, University of Örebro School of Law, Psychology and Social Work Fall 2009 page 9
through the Victims Trust Fund of the ICC whereas the child soldiers receive the reparations that are most beneficial for them.

Human Rights Watch and other NGOs have already expressed their concern with the narrow scope of the charges, especially in the case of Lubanga where mass murder, rape and torture were prominent features of the conflict. These NGOs have conducted very thorough investigations and had conversations with the local communities which provided them with a list of very severe crimes that were committed during the hostilities. The narrow scope of the charges has been universally condemned. While the recruitment of child soldiers was one of the primary activities of Lubanga and his colleagues, it remains unclear why Lubanga is only charged with this crime. The Prosecutor never officially explained why he decided to prosecute Lubanga for this crime only. Many critics have been focusing on the decision of the Court, and many concluded that the Prosecutor acted out of pragmatic considerations. Because this was the first trial before the ICC, the it was important that Lubanga could be convicted and maybe that is the reason why this was the only crime in the indictment. It would speed up the process and the ICC would show the world that it was able to convict persons very fast and efficient. We have reviewed the case of Lubanga in chapter 3 and we can conclude that if this was the main argument of the ICC and the Prosecutor, they clearly failed.

The positive side of the choice of the Prosecutor is that it is clear for once and for all that the recruitment of child soldiers is a criminal act. But even when this is accepted by the local communities, the other side of the medal is harder to accept; that this crime is put above murder, torture and rape which are the most severe crimes that can be committed. This choice seems to take these other crimes less serious. It may even lead to impunity with regard to the other crimes. The arrest warrants that the ICC has issued after Lubanga contain more crimes in order to avoid these types of situations in the future. But this has caused ethnical tensions again, because the crimes of one ethnic groups seem to be less severe now than the crimes committed by another ethnical group that perpetrated the same crimes but were not convicted for them.

Possible solutions
Victims can only participate when there is a sufficient link between their harm and the crimes in the indictment. This means that victims are dependent on the Prosecutor since he is the one who decides which crimes to charge. Of course it is important that the Prosecutor keeps paying attention to the recruitment of child soldiers. But as I already stated before, there must be more attention for other crimes committed, against children as well as against adults. One of the most neglected crimes

183 M. Glasius (n 177) page 6
184 Ibid page 7
185 Ibid page 7
is the crime of using girls as sexual slaves. One option for the inclusion of these girl victims is the broadening of the definition of child soldiers. This definition will have to include a special category concerning girl child soldiers. The Cape Town Principles can serve as an example in this respect. This will be an important addition to the Rome Statue and it will address the most serious concerns of the NGOs and human rights organizations.

Another solution is also aimed at the amendment of the Rome Statute. Victims are able to change the legal characterization of the facts under the current provisions of the Rome Statute, as we have seen in the Lubanga case, but this is a difficult route to walk for the Legal Representation of the victims. The ICC wants to be a pioneer with regard to victim participation, and therefore it has to look at the best practices of states in this respect. As Matthew Gillett already stated in his article\(^\text{186}\), there are many European countries which give victims the right to review decision of the Prosecutor. They can start a procedure when the Prosecutor decides not to prosecute a certain act or when he decides to discontinue the proceedings. Right now the ICC only provides States with the possibility to review the decisions of the Prosecutor.

Article 53 paragraph 1 and 2 already make clear that the Prosecutor has to keep the victims’ interests into account when he assesses if an investigation serves the interests of justice. The inclusion of a right for victims to review decisions of the Prosecutor, as proposed by Matthew Gillett, could be helpful in this sense. The Prosecutor must take the effects of his or her decision into account, especially the rights of the victims and their possibility to get reparations for the harm that they suffered. This amendment would not infringe the right to a fair trial but it would only enhance the approach that the Court already has; placing the victim in the centre of the proceedings.

\(^{186}\) M. Gillett, *Victim Participation at the International Criminal Court*, Australian International Law Journal Volume 16 2009 page 8
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