

**SPECIAL COURT FOR SIERRA LEONE**

**IN THE APPEALS CHAMBER**

**Before:** Justice Robertson, Presiding  
Justice Ayoola  
Justice King  
Justice Winter

**Registrar:** Mr. Robin Vincent

**Date:** 21 January 2004

**The Prosecutor against**

**Sam Hinga Norman**  
**Case No.: SCSL-2003-08**

**FOURTH DEFENCE PRELIMINARY MOTION BASED ON LACK  
OF JURISDICTION (CHILD RECRUITMENT)**

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*AMICUS CURIAE* BRIEF  
OF THE UNITED NATIONS CHILDREN'S FUND (UNICEF)

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1. The United Nations Children’s Fund (UNICEF) respectfully submits this *Amicus Curiae* brief pursuant to the 11 December 2003 order of the Appeals Chamber. This brief was prepared by UNICEF, working together with No Peace Without Justice and others.

## **I. ISSUE FOR COURT**

2. In the motion before the Court, the Defence challenges the jurisdiction of the Special Court for Sierra Leone to try the Accused on Count 8 of the indictment, namely for “conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities” (Article 4(c) of the Statute of the Special Court), on the basis that recruiting child soldiers was not a crime under customary international law at any time relevant to the indictment.
3. The issue upon which the Appeals Chamber is being asked to adjudicate is:

“Was the conscription or enlistment of children under the age of 15 into armed forces, or their use in hostilities, a criminal offence under international law during the temporal jurisdiction of the Special Court for Sierra Leone, i.e. as of and after 30 November 1996?”

## **II. SUMMARY OF SUBMISSION OF AMICUS**

4. The *Amicus* submits that by 30 November 1996, customary international law had established the recruitment or use in hostilities of children under 15 as a criminal offence.<sup>1</sup> When establishing the

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<sup>1</sup> Following the terms of the 11 December 2003 Order, and for the purposes of efficiency in language, the term ‘recruitment’ has been used throughout the brief, to refer to conscription, or enlistment of children into armed forces or groups, or their use for participating in hostilities, except where the more detailed use of the terms is necessary. Whereas conscription refers to compulsory or obligatory military

Statute of this Court, the Security Council included Article 4(c) expressly on the understanding that this was “in conformity with the statement of the law existing in 1996 and as currently accepted by the international community.” This same understanding is reflected in Security Council discussions, in 1996, relating to the situation in Liberia.

5. Recruitment of children under 15 is first expressly referred to as a crime in the Rome Statute of the International Criminal Court on 17 July 1998. However, as *Amicus* will demonstrate, there is ample evidence that customary international law recognised this as a crime well before it was set out in the Rome Statute. Such evidence can be drawn from the scope of obligations under the Additional Protocols to the Geneva Conventions; the Convention on the Rights of the Child and its Optional Protocol on the involvement of children in armed conflict; State practice; the judgments of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR); and statements by international and regional organs.
6. The prohibition against the recruitment of children below age 15 is explicitly stated in the Additional Protocols to the Geneva Conventions and in the Convention on the Rights of the Child and has achieved the status of customary international law.
7. The Convention on the Rights of the Child (CRC) in Article 38 obligates States Parties to take “all feasible measures” to prevent the recruitment of children and to ensure that children under 15 do not take direct part in hostilities. This obligation is made explicit in Article 4, which calls for the adoption of “all appropriate legislative, administrative and other measures” to ensure the implementation of

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service, enlistment may refer to either voluntary or compulsory entry into military service, including through forced recruitment. The words “using them to participate actively in hostilities” cover both direct participation in combat and also active participation in military activities linked to combat such as scouting, spying, sabotage and the use of children as decoys, couriers or at military checkpoints.

the treaty. The legal and administrative measures of enforcement include the criminalization of child recruitment, as articulated by the Committee on the Rights of the Child.

8. The Optional Protocol to the CRC on the involvement of children in armed conflict raises the minimum age for direct participation in hostilities to 18 years. The main purpose of the Optional Protocol was to raise the age for recruitment and participation in hostilities beyond the established standards of the Additional Protocols and the CRC. The Optional Protocol also reaffirmed the obligation of all States to criminalize the recruitment and use of child soldiers.
9. State practice shows that the recruitment of children under 15 is subject to a wide variety of prohibitions and criminal sanctions. Most States have enacted legislation for the implementation of their minimum age for recruitment and use of children in hostilities, which can be enforced through general penal sanctions for violations of administrative or military legislation. Several States have explicitly criminalized child recruitment, a trend which has been reinforced since the adoption of the Rome Statute.
10. Moreover, the establishment and judgments of the ICTY and ICTR confirmed that serious violations of the fundamental guarantees of Additional Protocol II lead to individual criminal responsibility. The prohibition of recruitment of children under 15 is one such fundamental guarantee.
11. The broad acceptance of the criminal nature of recruitment of children under 15 is further manifest in declarations and resolutions of States acting within regional and international assemblies and organizations up to 1996, offering clear evidence of the opinion among States that those responsible for recruiting children shall be held accountable. The Machel report on the 'Impact of armed conflict on children' (1994-1996), the negotiations in the Working Group on the Optional Protocol to the CRC on the Involvement of

Children in Armed Conflict (1994-2000), and statements by the UN Security Council and the Council of Ministers of the Organization of African Unity (1996) all demonstrate the consolidation of state practice and *opinio juris* on the crime of underage recruitment by the mid-1990s.

12. It was therefore an expression of existing customary international law when the war crime of child recruitment was included in the Rome Statute, as part of the established framework of international law. The near-universal acceptance of the norm in July 1998 provides good evidence that this was the state of customary international law prior to the Rome Conference. It is submitted that there were no significant changes between 30 November 1996 and 17 July 1998 which would allow the conclusion to be reached that customary international law with respect to this crime had changed during this period.
13. *Amicus* submits that all these considerations are proper sources of customary international law and proper guides for the Court in this area, as set out in Article 38(1)<sup>2</sup> of the Statute of the International Court of Justice, and Article 21 of the Rome Statute.<sup>3</sup>

### **III. THE CUSTOMARY RULE PROHIBITING RECRUITMENT OF CHILD SOLDIERS**

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<sup>2</sup> “The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: i. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; ii. international custom, as evidence of a general practice accepted as law; iii the general principles of law recognized by civilized nations; iv. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.”

<sup>3</sup> “*The Court shall apply: i. in the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence; ii. in the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict; iii. failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.*”

A. **Summary of Argument**

14. In establishing the Statute of this Court the Security Council included recruitment of children under 15 within the Court's jurisdiction on the understanding that this was "in conformity with the statement of the law existing in 1996 and as currently accepted by the international community." This same understanding is reflected in Security Council discussions, in 1996, relating to the situation in Liberia.

Consensus on the recruitment of children under 15 as a war crime was evident during the development of the Rome Statute, and later set out in the Rome Statute itself. This prohibition against the recruitment of children below age 15 was provided for in earlier legal instruments, namely the Additional Protocols to the Geneva Conventions and the Convention on the Rights of the Child.

Additional Protocol II to the Geneva Conventions, which governs the laws of internal conflicts, expresses in absolute terms that children under 15 "shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities." This prohibition is included as one of the "Fundamental Guarantees" of Additional Protocol II.<sup>4</sup>

The Convention on the Rights of the Child (CRC) in Article 38 obligates States Parties to take "all feasible measures" to prevent the recruitment of children under 15 and to ensure that they do not take direct part in hostilities.

This provision is to be interpreted in the framework of Article 4 of the CRC which obligates States Parties to "undertake all appropriate legislative, administrative and other measures" to ensure implementation of the provisions of the CRC.

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<sup>4</sup> Article 4(3) of Additional Protocol II.

This prohibition against recruitment of children under 15 has received universal support in State practice and *opinio juris* and has thus achieved the status of customary international law. This prohibition of recruitment requires States to adopt legal and administrative measures, including the criminalisation of child recruitment.

**B. Security Council Deliberations on the Statute of the Special Court**

15. The deliberations of the United Nations Security Council on the text of the Statute for this Court provide special guidance on the state of customary international law in 1996.
16. The first draft of the statute of the Special Court defined the crime of recruitment as the “abduction and forced recruitment of children under the age of 15 years into armed forces or groups for the purpose of using them to participate actively in hostilities” among the serious violations of international humanitarian law over which the Special Court would have jurisdiction.<sup>5</sup> However, based on the position expressed by the Security Council, the language in the final version as agreed between the United Nations and the Government of Sierra Leone was changed to, “Conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities.” The members of the Security Council considered this change necessary because under relevant international standards, the use and any form of recruitment of children under the age of 15 was a war crime. The Security Council proposed the wording of Article 4(c) as it was ultimately included in the Statute ‘so as to conform it to the statement of the law existing in 1996 and as currently accepted by the international community’.<sup>6</sup>

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<sup>5</sup> Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, S/2000/915 of 4 October 2000, Article 4(c) of the draft Statute.

<sup>6</sup> Letter dated 22 December 2000 from the President of the Security Council addressed to the Secretary-General, S/2000/1234 of 22 December.

17. The provision of the Statute of the Special Court is identical with the wording of the Statute of the International Criminal Court (ICC), which makes the use, the enlistment or the conscription under the age of 15 a crime, regardless of whether enlistment is voluntary and irrespective of whether the child was also used to participate in hostilities. The ICC Statute, adopted on 17 July 1998, was based on the established framework of customary international law at the time.

C. **International Legal Instruments Prior to the Rome Statute:  
Additional Protocol II to the Geneva Conventions**<sup>7</sup>

18. Children under 15 are a protected group under Geneva Convention IV.<sup>8</sup> Both Additional Protocols to the Geneva Convention extend a specific protection to this group and contain explicit references to the recruitment and participation of children in hostilities. The prohibition of recruitment in Additional Protocol I obliges parties to the conflict to refrain from recruiting children and take all feasible measures so that they do not take part in hostilities. In Additional Protocol II, the prohibition is against both recruitment and participation, obliging States Parties in absolute terms that children “shall neither be recruited...nor allowed to take part in hostilities.”<sup>9</sup>

19. In Additional Protocol I, the prohibition is found in ‘Chapter II – Measures in Favour of Women and Children’ and in particular in Article 77:

*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.*

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<sup>7</sup> The consensus position on this topic arrived at during negotiation of the Rome Statute is addressed separately, in section (II.H.) of the brief.

<sup>8</sup> *Geneva Convention IV, relative to the Protection of Civilian Persons in Time of War*, 1948, Articles 14, 23, 24.

<sup>9</sup> Article 4(2) of Additional Protocol II.



20. In Additional Protocol II, which applies to internal conflicts, these provisions are contained in ‘Part II – Humane Treatment’, and in particular Article 4(3)(c) ‘Fundamental Guarantees’:

*4(3)(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;*

21. Furthermore, Article 4 of Additional Protocol II specifically includes the (absolute) prohibition on the recruitment and use of children in hostilities. The prohibition was therefore well established.

22. As at 30 November 1996, 187 countries were State Parties to the Geneva Conventions; 137 of these countries were State Parties to Additional Protocol II.

23. Sierra Leone ratified Additional Protocol II on 21 October 1986.

**D. International Legal Instruments Prior to the Rome Statute:  
Convention on the Rights of the Child**

24. The CRC is the most widely ratified human rights treaty. As at 30 November 1996, all but six countries in existence at that time had ratified the Convention. This clearly demonstrates that the CRC has achieved the status of a universal norm recognized and accepted by all nations. Sierra Leone ratified the convention on 2 September 1990.

25. Article 38 of the Convention strictly prohibits the recruitment and use of children under 15 in hostilities.

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

*(3) States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces.[...] <sup>10</sup>*

26. The reference of Article 38(2) to “all feasible measures” reflects the wording of Additional Protocol I to the Geneva Conventions. This provision is in addition to Article 4 of the CRC, which provides the overall framework for the implementation of the obligations under the CRC. Such measures to be taken by States include appropriate legislative measures for enforcement, which are explicitly mentioned in Article 4 of the CRC:

*State Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. <sup>11</sup>*

27. These two provisions reaffirm the obligation on States Parties to take appropriate steps at national level in order to ensure that children below 15 do not take part in hostilities. According to the Reporting Guidelines of the Committee on the Rights of the Child concerning Article 4, such measures shall include:

*[...] measures adopted to bring national legislation and practice into full conformity with the principles and provisions of the Convention, together with details of:*

*Any comprehensive review of the domestic legislation to ensure compliance with the Convention;*

*Any new laws or codes adopted, as well as amendments introduced into domestic legislation to ensure implementation of the Convention. <sup>12</sup>*

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<sup>10</sup> *Convention on the Rights of the Child* adopted and opened for signature, ratification and accession by General Assembly GA/44/25 (1989) of 20 November 1989; entry into force 2 September 1990, 30 days after the 20<sup>th</sup> ratification, in accordance with article 49. Article 38(2) and (3).

<sup>11</sup> *Supra* Note 10, Article 4.

<sup>12</sup> *Reporting Guidelines to States Parties: General Guidelines regarding the form and contents of periodic reports to be submitted by States Parties under article 44, paragraph 1(b), of the Convention;*

Concerning Article 38, such measures shall include:

*[...] measures adopted pursuant to article 38, including of a legislative, administrative and educational nature, to respect and ensure respect for the rules of international humanitarian law applicable to the State in armed conflicts which are relevant to the child. In this regard, reports should identify the relevant international conventions, instruments and other rules of humanitarian law applicable to the State and the measures adopted to enforce them,*

And, furthermore, concerning Article 38, such measures shall include:

*[...] measures taken pursuant to article 38, paragraph 2, including of a legislative, administrative or other nature, to ensure that persons who have not attained the age of 15 years do not take a direct part in hostilities.<sup>13</sup>*

28. The expectation upon States Parties to take appropriate legislative and other measures in implementing the CRC was specifically stressed and articulated in the drafting process of the Optional Protocol to the CRC on the Involvement of Children in Armed Conflict.<sup>14</sup>
29. In the deliberations of the Working Group on the draft Optional Protocol, some States, notably Nigeria and Sweden (who chaired the

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Adopted by the Committee on the Rights of the Child at its 343<sup>rd</sup> meeting (thirteenth session) on 11 October 1996; paragraph 12.

<sup>13</sup> *Reporting Guidelines to States Parties: General Guidelines regarding the form and contents of periodic reports to be submitted by States Parties under article 44, paragraph 1(b), of the Convention*; Adopted by the Committee on the Rights of the Child at its 343<sup>rd</sup> meeting (thirteenth session) on 11 October 1996; paragraphs 123-124.

<sup>14</sup> *Report to the Commission on Human Rights* E/CN.4/1994/91. The working group for the drafting of the Optional Protocol was established in 1994 by a Resolution of the Commission on Human Rights. The overall purpose of the Optional Protocol was to increase the protection of children under international law by raising the minimum age for recruitment and participation in hostilities. This is also reflected in the Preamble of the Optional Protocol, which states: "Convinced that an Optional Protocol to the Convention that raises the age of possible recruitment of persons into armed forces and

Working Group), indicated that they wanted specific reference to the adoption of “legal sanctions” against those who breached the Protocol. However, other States argued in favor of retaining the wording “all feasible measures”, contained in the Additional Protocols to the Geneva Conventions and reaffirmed in the CRC, because the language “all feasible measures” already obliged States to take legal sanctions. The inclusion of an explicit reference to criminalization was considered to be a codification of existing customary international law.<sup>15</sup>

30. The Working Group’s discussions on “all feasible measures” resulted in Article 4 of the Optional Protocol to the CRC, which reads:

*States Parties shall take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalize such practices.*<sup>16</sup>

31. Article 8 of the Optional Protocol concerning regular reporting on its implementation by States Parties reflects the need for constant monitoring of State Parties’ compliance with the Protocol.<sup>17</sup> It also underlines the obligation of State Parties not only to address

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their participation in hostilities will contribute effectively to the implementation of the principle that the best interests of the child are to be a primary consideration in all actions concerning children”.

<sup>15</sup> *Documents On Working Group On The Elaboration Of A Draft Optional Protocol To The Convention On The Rights Of The Child On Involvement Of Children In Armed Conflicts: Reports* E/CN.4/1995/96, E/CN.4/1996/102, E/CN.4/1997/96, E/CN.4/1998/102, E/CN.4/1999/73, <http://www.unhchr.ch/huridocda/huridoca.nsf/FramePage/WGarmed%20En?OpenDocument&Start=1&Count=1000&ExpandView>. The working group started discussions on the issue of child recruitment, and the steps to be taken to ensure adherence to the Optional Protocol, in its first set of meetings in 1994 and 1995. In its Preamble, it is made clear that the Optional Protocol is built on existing international humanitarian law, to which States have the obligation to abide.

<sup>16</sup> *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict*. Adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000; entered into force on 12 February 2002. Article 4. Sierra Leone ratified on 15 May, 2002.

<sup>17</sup> Article 8 of the Optional Protocol requires State Parties “[...] within two years following the entry into force of the present Protocol for that State Party, submit a report to the Committee on the Rights of the Child providing comprehensive information on the measures it has taken to implement the provisions of the Protocol, including the measures taken to implement the provisions on participation and recruitment.”

recruitment by armed forces, but to take measures to address the recruitment by armed groups within their jurisdiction.

32. The Reporting Guidelines issued by the Committee regarding initial reports of States Parties to the Optional Protocol, confirms that States Parties should report particularly on “*the adoption of legal measures which aim at prohibiting and criminalizing the recruitment and use in hostilities of children under the age of 18 years by such armed groups and the judicial decisions applying to this issue*”.<sup>18</sup>

33. Submissions to and decisions of the Committee on the Rights of the Child (which is the treaty monitoring body to the CRC) show that States Parties and the Committee held an understanding of the Convention consistent with this view. The Committee’s recommendations to States where the recruitment of children has taken place reveal the Committee’s understanding of the criminal nature of the act of child recruitment. The Committee’s concluding observations have urged the authorities of those States to fully respect the provisions of the CRC and the rules of international humanitarian law and to punish those responsible.

34. Following the submission of the initial report by Uganda in 1996,<sup>19</sup> the Committee on the Rights of the Child stated :

*The Committee is deeply concerned that the rules of international humanitarian law applicable to children in armed conflict are being violated in the northern part of the State party, in contradiction to the provisions of article 38 of the Convention. Furthermore, the Committee is concerned about the abduction, killings and torture of*

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<sup>18</sup> Guidelines regarding initial reports to be submitted by States Parties under article 8 (1) of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict CRC/OP/AC/1, 12 October 2001, at Article 4.

<sup>19</sup> Initial report of States Parties due in 1992: Uganda 17 June 1996 CRC/C/3/Add.40, at paragraph 19

*children occurring in this area of armed conflict and the involvement of children as child soldiers.*<sup>20</sup>

35. The Committee recommended that:

*[...] awareness of the duty to fully respect the rules of international humanitarian law, in the spirit of article 38 of the Convention, inter alia with regard to children, should be made known to the parties to the armed conflict in the northern part of the State party's territory, and that violations of the rules of international humanitarian law entail responsibility being attributed to the perpetrators. Furthermore, the Committee recommends that the State party take measures to stop the killing and abduction of children and the use of children as child soldiers in the area of the armed conflict.*<sup>21</sup>

36. In the case of Sierra Leone, the Government in its 1996 initial report to the Committee on the Rights of the Child, acknowledged that there was no minimum age for conscription into armed forces, “except the provision in the Geneva Convention that children below the age of 15 years should not be conscripted into the army”.<sup>22</sup>

37. In 2000, the Committee on the Rights of the Child issued, upon examination of this report, recommendations to Sierra Leone to “establish and strictly enforce legislation prohibiting the future recruitment by any armed force or group, of children under the age of 18...”, confirming the previous trend in its interpretation of the criminal nature of this violation of international law.<sup>23</sup>

## **E. Implementation of Crime of Recruitment at National Level**

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<sup>20</sup> *Concluding observations of the Committee on the Rights of the Child : Uganda*, 21 October 1997 CRC/C/15/Add.80.

<sup>21</sup> *Ibid*, at paragraph 34.

<sup>22</sup> *Initial report of States Parties: Sierra Leone* 1996 CRC/C/3/Add.43, paragraph 28.

<sup>23</sup> CRC/C/15/Add.116. (Paragraph 73).

38. State practice demonstrates full awareness and abhorrence to the practice of recruiting children, and a firm commitment to ensuring that those responsible for such recruitment are held liable under criminal law. The prohibition on recruitment and use of child soldiers below 15 has been universally recognized. Most States have enacted legislation for the implementation of their minimum age for recruitment and use of children in hostilities. Some States have explicitly criminalized child recruitment. The prohibition was therefore well established and its violation considered a criminal act.
39. As one of the principal considerations for establishing customary international law, the conduct of States determines the content of the norm prohibiting and criminalizing the recruitment and use in hostilities of children under 15, and demonstrates *opinio juris* in the acceptance by States that this norm is legally binding.

#### **Minimum Age of Recruitment**

40. Upon signature and ratification of the CRC, several States Parties have lodged declarations and/or reservations concerning Article 38, advocating for a higher standard with regard to child recruitment, making reference also to Article 41 of the CRC, which allows for higher standards of protection. In no instance did any State Party enter a declaration or reservation to lower their legal obligation under Article 38, which reaffirms the recognition of the universal nature of the prohibition on recruitment and use of children under 15 in hostilities.
41. Among those arguing in favour of a higher standard, the Netherlands and Spain voiced their disagreement with the provision of Article 38 setting the minimum age for recruitment of children at 15.<sup>24</sup> Austria and Germany both declared their concern that the standard set at 15 years was too low to be compatible with the

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<sup>24</sup> CRC/C/2/Rev. 8 of 7 December 1999.

principle of the best interests of the child.<sup>25</sup> Andorra deplored the fact that the Convention does not prohibit the use of children [under 18] in armed conflicts. Uruguay declared their commitment to prohibit all recruitment and use of children under 18 in hostilities “under any circumstances”.<sup>26</sup>

42. Colombia, upon signature in 1990, declared that:

*[...] while the minimum age of 15 years for taking part in armed conflicts, set forth in article 38 of the Convention, is the outcome of serious negotiations which reflect various legal, political and cultural systems in the world, it would have been preferable to fix that age at 18 years in accordance with the principles and norms prevailing in various regions and countries, Colombia among them, for which reason the Colombian Government, for the purpose of article 38 of the Convention, shall construe the age in question to be 18 years.*<sup>27</sup>

43. Argentina declared its preference for a categorical prohibition on the use of children [under 18] in armed conflicts, stating that “such a prohibition exists in its domestic law which, by virtue of article 41 of the Convention, it shall continue to apply in this regard.”<sup>28</sup>

44. The minimum age of recruitment of individuals into armed forces, provides a clear illustration of what States consider acceptable. An analysis of the implementation of the minimum age of recruitment at national level has been undertaken, which shows that all States set their minimum age limit for all forms of recruitment or use of persons in hostilities at 16 or above (see Annex I).

### **Domestic Legislation**

45. Most States have enacted legislation for the implementation of their minimum age for recruitment and use of children in hostilities.

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<sup>25</sup> Ibid.

<sup>26</sup> Ibid.

<sup>27</sup> Ibid.



Some States have explicitly criminalized child recruitment. In most cases, the implementation of the minimum age of recruitment has been done as part of military or administrative legislation without specifically criminalizing child recruitment. However, sanctions for violations of administrative and military legislation by State agents are normally contained in the general provisions of criminal law, or sometimes in administrative or military law.

46. In addition to legislation on minimum age of recruitment, States typically have a range of offences which criminalize the forming of armed groups by non-State entities in general. Such offences may be offences concerning the forming and conduct of quasi-military groups, or anti-terrorism laws, crimes of public order, or firearms offences.<sup>29</sup>
47. Several States have explicitly criminalised the recruitment of children under the age of 15 in their national legislation:
- i. Under **Colombia's** national law, a five-year term of imprisonment is imposed on anyone who recruits children under 18.<sup>30</sup>
  - ii. The operative Code of Military Justice of **Argentina** states that breaches of treaty provisions providing for special protection of children are war crimes.<sup>31</sup>
  - iii. **Spain's** Penal Code, states that breaches of international treaty provisions providing for special protection of children are punishable.<sup>32</sup>

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<sup>28</sup> Ibid.

<sup>29</sup> In England and Wales, for example, the forming of an unlawful or non-State armed group would be criminal under the *Unlawful Drilling Act* 1819 ss 1,2,7; the *Public Order Act* 1936 ss2,7,9; or the *Firearms Act* 1968 ss16, 16A, 18, 19.

<sup>30</sup> Colombia, *Law on Judicial Cooperation* (1997), Articles 13–14.

<sup>31</sup> Argentina, *Draft Code of Military Justice* (1998), Article 292, introducing a new Article 876(4) in the *Code of Military Justice as amended* (1951).

<sup>32</sup> Spain, *Penal Code* (1995), Article 612(3).

iv. **Ireland's** Geneva Conventions Act provides that any "minor breach" of the Geneva Conventions, including violations of Article 50 GC IV, and of AP I, including violations of Article 77(2) AP I, as well as any "contravention" of AP II, including violations of Article 4(3)(c) AP II, are punishable offences.<sup>33</sup>

v. **Norway's** Military Penal Code states that:

*[...] anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in ... the Geneva Conventions of 12 August 1949 ... [and in] the two additional protocols to these Conventions ... is liable to imprisonment.*<sup>34</sup>

48. In the wake of the adoption of the Rome Statute of the ICC, many more States have criminalized the recruitment of children under the age of 15 by ratification of the Statute, and in many cases by altering their own legislation accordingly through implementing legislation for the ICC Statute.

#### **Commitments for demobilization of child soldiers**

49. Since the mid-1980s, UNICEF has been regularly involved in the demobilization of child soldiers, through its country programmes in partnership with governments. Within this framework, UNICEF has played a key role in advocating with parties to conflict to receive commitments to stop the recruitment of children and to release children from armed forces and groups, e.g. in Angola, Burundi, Colombia, Democratic Republic of the Congo, El Salvador, Guinea-Bissau, Guinea, Liberia, Mozambique, Rwanda, Sierra Leone, Somalia, Sri Lanka, Sudan and Uganda.

50. In addition to taking a lead role in the demobilization of child soldiers, UNICEF has negotiated with States and armed groups to

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<sup>33</sup>Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

secure commitments to end the recruitment and use of children below age 18. Such a commitment was secured, for example, in 1995, from the Sudan People's Liberation Army (SPLA) and led to the demobilization of thousands of children. A similar commitment was secured from the Liberation Tigers of Tamil Eelam (LTTE) in 1998 and is being closely monitored to help ensure compliance. UNICEF has also signed a Memorandum of Understanding with the Government of Burundi acknowledging the problem of child soldiers in Burundi and giving UNICEF permission to take the lead in developing a programme that engages both the Burundian army and rebels in this effort.

51. These ongoing efforts to negotiate commitments preventing and ending the recruitment and use of children below 18 in hostilities, as well as UNICEF's lead role in the demobilization of children under 18, demonstrate the acceptance by States and non-State actors of their responsibility not to recruit children below the age of 15, and in most cases below 18.

52. In conclusion, state practice shows that the recruitment of children under 15 and their participation in hostilities have been prohibited by most national legislations, which can be enforced through penal sanctions for violations of administrative or military legislation. Some States have explicitly criminalized child recruitment.

**F. Implementation of the Crime of Recruitment at International Level**

53. The prohibition of the recruitment of children under 15 which was included in the two Additional Protocols and in the CRC has developed into a criminal offence. This process has been accompanied and reinforced by the establishment and judgments of the ICTY and ICTR, which clarified that serious violations of the fundamental guarantees of Additional Protocol II can lead to

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<sup>34</sup>Norway, *Military Penal Code as amended* (1902), § 108.

individual criminal responsibility. The recruitment of children under 15 is one such fundamental guarantee. Declarations and resolutions of States acting within regional and international assemblies and organizations up to 1996 offer clear evidence that those responsible for recruiting children shall be held accountable. This is further confirmed in the inclusion of the war crime of recruitment in the Statute of the ICC as part of the established framework of international law.

### **Jurisprudence of the International Criminal Tribunals**

54. In 1993, the ICTY Statute made clear that a person acting in breach of Additional Protocol I to the Geneva Conventions could face criminal sanctions. This was confirmed by the subsequent decision of the Appeals Chamber in *Prosecutor v. Tadic*.<sup>35</sup>
55. By November 1994, States, acting through the Security Council to set up an International Criminal Tribunal for Rwanda (ICTR), had recognised that criminal liability attached also to serious violations of Additional Protocol II.

### The ICTY

56. The Security Council established the ICTY in 1993 under its Chapter VII powers.<sup>36</sup>
57. Article 3 of the Statute for the ICTY lists a series of identified criminal acts.<sup>37</sup> It specifically states that the crimes in question “include, but shall not be limited to” those listed.
58. The Appeals Chamber of the ICTY considered the application of Article 3 of the Statute in *Prosecutor v Tadic*.<sup>38</sup> In particular, it

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<sup>35</sup> *Prosecutor v Dusko Tadic* case No IT-94-1 Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction 2 October 1995.

<sup>36</sup> UN Security Council Resolution S/RES/827 (1993), 25 May 1993.

<sup>37</sup> Statute of the International Criminal Tribunal for the Former Yugoslavia, adopted 25 May 1993, Article 3.

<sup>38</sup> *Prosecutor v Dusko Tadic* Case No IT-94-1 Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction.

considered what was intended to be covered with the words “include, but shall not be limited to”. The Appeals Chamber decided:

*[...] it can be held that Article 3 is a general clause covering all violations of humanitarian law not falling under Article 2 or covered by Articles 4 or 5, more specifically: (i) violations of the Hague law on international conflicts; (ii) infringements of provisions of the Geneva Conventions other than those classified as "grave breaches" by those Conventions; (iii) violations of common Article 3 and other customary rules on internal conflicts; (iv) violations of agreements binding upon the parties to the conflict, considered qua treaty law, i.e., agreements which have not turned into customary international law.<sup>39</sup>*

#### The ICTR

On 8 November 1994 the UN Security Council adopted the Statute for the ICTR.<sup>40</sup>

59. Article 4 of the Statute of the ICTR states:

*The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to: [...]<sup>41</sup>*

60. Article 4 of the Statute of the ICTR uses the same language as Article 3 of the Statute of the ICTY when expressing an intention not to limit the serious violations which fall under the jurisdiction of the court.

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<sup>39</sup>*ibid.*, at Paragraph 89.

<sup>40</sup> UN Security Council Resolution S/RES/955 (1994), 8 November 1994.

<sup>41</sup> Statute of the International Criminal Tribunal for Rwanda, adopted 8 November 1994, Article 4.

61. A list of fundamental guarantees, as provided by Article 4 of Additional Protocol II to the Geneva Conventions, then follows. The Security Council explicitly recognised for the first time that serious violations of fundamental guarantees under Additional Protocol II were capable of bearing criminal liability.

62. The criminal nature of serious violations of fundamental guarantees under Additional Protocol II was considered by the ICTR in the case of *Prosecutor v Akayesu*. The Trial Chamber in that case stated:

*The Chamber understands the phrase "serious violation" to mean "a breach of a rule protecting important values [which] must involve grave consequences for the victim", in line with the above-mentioned Appeals Chamber Decision in Tadic , paragraph 94. The list of serious violations which is provided in Article 4 of the Statute is taken from Common Article 3 - which contains fundamental prohibitions as a humanitarian minimum of protection for war victims - and Article 4 of Additional Protocol II, which equally outlines "Fundamental Guarantees". The list in Article 4 of the Statute thus comprises serious violations of the fundamental humanitarian guarantees which, as has been stated above, are recognized as part of international customary law. In the opinion of the Chamber, it is clear that the authors of such egregious violations must incur individual criminal responsibility for their deeds.*

*The Chamber, therefore, concludes the violation of these norms entails, as a matter of customary international law, individual responsibility for the perpetrator.*<sup>42</sup>

63. The Trial Chamber in the case of *Prosecutor v Akayesu* confirmed the view that in 1994 “serious violations” of the fundamental

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<sup>42</sup> *Prosecutor v Jean-Paul Akayesu* Case No ICTR-96-4-T Judgement 2 September 1998, at paragraphs 616-7.

guarantees contained within Additional Protocol II were subject to criminal liability.<sup>43</sup>

64. The eight violations explicitly listed in Article 4 of the ICTR Statute are drawn from Part II of Additional Protocol II, entitled 'Humane Treatment'. Of those violations, seven are fundamental guarantees set out in Article 4 AP II, while the eighth derives from common Article 3 to the Geneva Conventions.
65. All the fundamental guarantees share a similar character. In recognising them as fundamental, the international community set a benchmark for the minimum standards for the conduct of armed conflict.
66. Child recruitment is one of the fundamental guarantees of Article 4 AP II. It was not explicitly included in the list of the ICTR Statute because of the fact that the recruitment and use of child soldiers was not an element during the genocide in Rwanda.<sup>44</sup>
67. Child recruitment shares the same character as the violations listed. It poses an affront to human dignity and well-being and is inhumane. Save for murder, child recruitment is an act of the same gravity as the violations listed in Article 4 of the Statute of the ICTR.
68. In conclusion, as with the violations listed in the Statute, child recruitment is a positive act, containing both a mental and physical element, for which individuals can be held responsible both for the complete and the inchoate offence.<sup>45</sup> It is therefore subject to criminal sanctions in exactly the same manner as breaches of the other fundamental guarantees listed in the Statute.

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<sup>43</sup> This matter has not been considered by the Appeals Chamber of the ICTR in this or any other case.

<sup>44</sup> It was explicitly recognised by the ICTR in Akayesu that the crimes over which the ICTR had been given jurisdiction were crafted to meet the perceived situation in Rwanda and did not encompass the entirety of customary international law applicable to the conflict: *The Prosecutor v. Jean-Paul Akayesu*, Appeal Judgment, ICTR-96-4, para 464.

**G. State Practice and *Opinio Juris* within Multilateral Fora**

69. In the 1990s, it became evident that the ways in which conflicts are fought had changed.<sup>46</sup> Further, the awareness of impact of armed conflict on children had increased among States, civil society and non-State entities (including parties to armed conflict). A major contribution to this was the groundbreaking study on the ‘Impact of armed conflict on children’ prepared by the independent expert, Ms. Graça Machel, appointed in September 1994, by the Secretary-General. The two-year preparation and presentation of her study in 1996 was a driving force in consolidating strong political will among States to take appropriate action, including for ending impunity for crimes against children, in particular the crime of recruitment.

Report by Graça Machel to the General Assembly on the Impact of Armed Conflict on Children

70. Following the Day of Discussion of the Committee on the Rights of the Child on children in armed conflict, held in 1992, the UN General Assembly in 1993 called upon States to respect the provisions of the Additional Protocols to the Geneva Conventions and the relevant provision of the CRC, and requested the preparation of an expert report on the issue children in armed conflicts.<sup>47</sup> The Secretary-General appointed Graça Machel as an expert in 1994. In 1996, the UN Secretary General presented the Machel Report to the

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<sup>45</sup> Its breach can be identified with similar precision, in that there can be: an identifiable perpetrator; certainty of the breach; obtainable evidence.

<sup>46</sup> The UN Secretary-General stated “While compliance with the rules of international law has been a perennial problem in conflict situations, there is ample evidence which suggests that the situation has dramatically worsened in recent years because of the changing pattern of conflicts.” He gave as an example: “Young children are being recruited and trained to fight in violation of the Convention on the Rights of the Child and the Additional Protocols to the Geneva Conventions.” Report on protection for humanitarian assistance to refugees and others in conflict situations, UN Doc. S/1998/883, 22 September 1998, at paragraph 12.

<sup>47</sup> General Assembly Resolution on the Protection of children affected by armed conflicts A/RES/48/157, 20 December 1993, at paragraph 7.



General Assembly.<sup>48</sup> The subsequent resolution of the GA expressed support for the report and its recommendations.<sup>49</sup>

71. The Machel Report set out a thoroughly researched and well-documented account of the situation of children in armed conflict. With reference to armed non-State groups, it expressed the view that:

*When Governments ratify the international humanitarian conventions that apply to internal conflicts, then international law holds all armed groups within those countries accountable.*

72. It urged States to ensure:

*The early and successful conclusion of the drafting of the optional protocol to the Convention on the Rights of the Child on involvement of children in armed conflicts, raising the age of recruitment and participation in the armed forces to 18 years.*<sup>50</sup>

#### The Organisation for African Unity

73. The presentation of the Machel Study was preceded by six regional consultations on children and armed conflict. Several regional organizations started to address the issue of children and armed conflict, among them the Organization of African Unity, in whose area of responsibility some of the most serious atrocities against children during conflict, including the recruitment of child soldiers, occurred. The Council of Ministers of the Organisation of African Unity addressed the plight of children in situations of armed conflict in a ministerial meeting between 1 and 5 July 1996, and adopted a resolution which affirmed that:

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<sup>48</sup> *Impact of armed conflict on children: Note by the Secretary General* A/51/306, 26 August 1996.

<sup>49</sup> UN General Assembly Resolution A/Res/51/77, *The rights of the child*, 12 December 1996.

<sup>50</sup> *ibid*, at paragraph 62 (d).

*the use of children in armed conflicts constitutes a violation of their rights and should be considered as war crimes.*<sup>51</sup>

#### Security Council debate on Liberia

74. During the debate in the UN Security Council in 1996 on the situation in Liberia, Italy made the following statement:

*Let me once again voice our horror at one of the most despicable actions of the Liberian warlords: their practice of recruiting, training, and deploying children for combat. Training and often drugging children, many of them aged seven to fourteen, who often end up killing relatives and terrorizing their neighbourhoods, is an unconscionable crime. Words alone do not suffice to condemn this heinous behaviour. This behaviour must be stopped immediately, by every means the international community has available, including that of writing some provision, the framework of what will soon become the international criminal court, in order to bring to justice the perpetrators of such intolerable acts.*<sup>52</sup>

75. These sentiments were supported by a number of other delegations at the same debate. The representative for Guinea-Bissau demanded that:

*The Liberian faction leaders respect and protect the children whom they use as cannon fodder, an odious and abhorrent practice that we shall always condemn.*<sup>53</sup>

76. The representative for Poland expressed his appreciation of the condemnation of “making children fight and kill” which he called an “inhuman practice”.<sup>54</sup>

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<sup>51</sup> *Resolution Of The Plight Of African Children In Situation Of Armed Conflicts* CM/RES.1659 (LXIV) REV. 1, at paragraph 7. Available at <http://www.africa-union.org>.

<sup>52</sup> Italy *Statement before the UN Security Council* UN Doc. S/PV.3694, 30 August 1996, p. 6.

<sup>53</sup> Guinea-Bissau, *Statement before the UN Security Council*, UN Doc. S/pv.3694, 30 August 1996, p. 13.

<sup>54</sup> Poland, *Statement before the UN Security Council*, UN Doc. S/pv.3694, 30 August 1996, p. 14.

77. The representative for Chile echoed these words, calling it an “inhuman and barbaric practice”.<sup>55</sup>

78. The United States added that:

*One especially abhorrent practice in this tragic conflict — singled out by the Italian delegation for special consideration and condemnation in the Council’s resolution - has been the recruitment, training and actual deployment of children in combat. Who can forget the photographs of child soldiers brandishing and using assault weapons? Who can imagine the psychological scars that will be left with these children for years to come? The Council is determined that this abhorrent practice shall not continue.*<sup>56</sup>

79. Pursuant to this debate, the Security Council adopted a Resolution in which it:

*Condemns the practice of some factions of recruiting, training, and deploying children for combat, and requests the Secretary-General to include in the report referred to in paragraph 5 above details on this inhumane and abhorrent practice;*<sup>57</sup>

80. Subsequently, the Security Council:

*Condemn[ed] in the strongest possible terms the practice of recruiting, training, and deploying children for combat, and demands that the warring parties immediately cease this inhumane and abhorrent activity and release all child soldiers for demobilization;*<sup>58</sup>

81. Emphasis is made to the fact of the repeated use of the terms “inhumane” and “inhuman” throughout this debate in connection with the recruitment and use of child soldiers.

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<sup>55</sup> Chile, *Statement before the UN Security Council*, UN Doc. S/pv.3694, 30 August 1996, p. 14.

<sup>56</sup> US, *Statement before the UN Security Council*, UN Doc. S/PV.3694, 30 August 1996, p. 15.

<sup>57</sup> UN Security Council, S/RES/1071, 30 August 1996, § 9.

<sup>58</sup> UN Security Council, S/RES/1083, 27 November, § 6.

82. Similarly, the Security Council, acting under Chapter VII of the UN Charter, condemned by a unanimous resolution of 11 March 1999 the recruitment of child soldiers in Sierra Leone and called for the perpetrators to be brought to justice:

*Condemns the atrocities perpetrated by the rebels on the civilian population of Sierra Leone, including in particular those committed against women and children, deplores all violations of human rights and international humanitarian law which have occurred in Sierra Leone during the recent escalation of violence as referred to in paragraphs 21 to 28 of the report of the Secretary-General, including the recruitment of children as soldiers, and urges the appropriate authorities to investigate all allegations of such violations with a view to bringing the perpetrators to justice;*<sup>59</sup>

#### **H. The Rome Statute of the International Criminal Court**

83. The Rome Statute includes the conscription, enlistment or use of children under 15 as a war crime for both international and non-international conflicts.
84. The final version of the Rome Statute which was adopted on 17 July 1998 was the result of discussions by States in the Preparatory Committee, which started its work on 25 March 1996. These discussions were based on drafts prepared by the International Law Commission (ILC).
85. The first comprehensive draft of the Statute was produced by the ILC in 1994.<sup>60</sup> In this draft there was no comprehensive list of the crimes to be included as “war crimes” under the Statute.
86. The first session of the Preparatory Committee<sup>61</sup> produced a proposed exhaustive list. Although there is no mention of child

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<sup>59</sup> UN Security Council Resolution S/RES/1231 (1999) of 11 March 1999, paragraph 3.

<sup>60</sup> *Report of the International Law Commission on the work of its forty-sixth session* UN General Assembly document A/49/355, 1 September 1994.

recruitment in the list, it is significant that one delegation proposed that, following the text of the Statute for the Rwanda Tribunal, the ICC should have power to prosecute serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II.<sup>62</sup>

87. This proposal was effectively adopted with respect to child recruitment in a paper submitted by Germany to the Working Group on Definitions and Elements of Crimes at the December 1997 session of the Preparatory Committee.<sup>63</sup> This paper included a list of “[o]ther serious violations of the laws and customs applicable to armed conflicts not of an international character, within the established framework of international law”. Included on the list is “forcing/recruiting children under the age of fifteen years to take direct part in hostilities.”<sup>64</sup>

88. It is clear from its own wording that the German proposal was intended to list crimes “within the established framework of international law”, rather than to add new classes of acts which it wished to criminalise.

89. This wording “within the established framework of international law” is repeated in the paper of the Working Group at the same session of the Preparatory Committee.<sup>65</sup> This includes four options for discussion of this crime within the context of a non-international armed conflict as follows:

- *Option I: forcing children under the age of fifteen years to take direct part in hostilities*

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<sup>61</sup> Summary Of The Proceedings of the Preparatory Committee During the Period 25 March-12 April 1996, Annex I: Definition Of Crimes

<http://www.iccnw.org/romearchive/documentsreports/1PrepCmt/Annex1DefenitionCrimes.pdf>.

<sup>62</sup> *Ibid*, at page 11.

<sup>63</sup> Working Group on definitions and Elements of Crimes, *Reference Paper on War Crimes submitted by Germany* 12 December 1997.

<http://www.iccnw.org/romearchive/documentsreports/5PrepCmt/GermanStatementonWarCrimes.pdf>

<sup>64</sup> *ibid*, at page 4.

<sup>65</sup> Working Group on Definitions and Elements of Crimes, War Crimes, A/AC.249/1997/WG.1/CRP.9 12 December 1997, <http://www.iccnw.org/romearchive/documentsreports/5PrepCmt/WarCrimes.pdf>, at page 7.

- *Option II: recruiting children under the age of fifteen years into armed forces or groups*
- *Option III: (i) recruiting children under the age of fifteen years into armed forces or groups; or  
(ii) allowing them to take part in hostilities*
- *Option IV: No paragraph*

90. The following year at the Rome Conference, the offence was incorporated in the Rome Statute as a war crime in Article 8 (2):

*(b) Other serious violations of the laws 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.*

and:

*(e) 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;*

91. An authoritative report of the proceedings of the Rome Conference states:

*A few states had serious misgivings about this provision. The United States in particular took the view that it did not reflect customary international law, and was more a human rights provision than a criminal law provision. However, the majority felt*

*strongly that the inclusion was justified by the near-universal acceptance of the norm, the violation of which warranted the most fundamental disapprobation. A few delegations suggested raising the relevant age from 15 to 18, but this was rejected because there was not adequate support for this in customary international law.*<sup>66</sup>

92. Based on discussions that took place during the drafting process, and the fact that underage recruitment and use were included in the Rome Statute, one may conclude that consensus on this issue had already been reached that child recruitment and use under 15 had the status of a war crime under customary international law.

93. The “near-universal acceptance of the norm” in July 1998 provides good evidence that this was the state of customary international law prior to the Rome Conference. The growing acceptance of the norm can be seen in material set out in this brief. That material is chronologically cumulative, and includes:

- October 1992 Committee on Rights of Child, Day of Discussion on Children and Armed Conflict;
- May 1993 Statute of the ICTY and the subsequent decision on jurisdiction in *Prosecutor v Tadic*;
- December 1993 UN General Assembly resolution Requesting the Secretary-General to prepare an expert study on the impact of armed conflict on children;
- November 1994 Statute of the ICTR and the subsequent decision in *Prosecutor v Akayesu*;
- 1994 and 1995 Meetings of the Working Group for the Optional Protocol on the Involvement of

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<sup>66</sup>*Crimes Within the Jurisdiction of the Court*, Herman Von Hebel and Darryl Robinson, in *The International Criminal Court: The Making of the Rome Statute* ed. Roy Lee; Chapter 2, at pp117-8. The authors were members of the delegations of the Netherlands and Canada respectively at the Rome Conference.

- July 1996 Children in Armed Conflict commence;  
Resolution of the Council of Ministers of  
The Organisation of African Unity on  
Children and Armed Conflict;
- August 1996 Publication of Machel Report on the  
Impact of Armed Conflict on Children;
- August 1996 Security Council debate on Liberia;
- October 1996 Presentation of the Machel Report on the  
Impact of Armed Conflict on Children to  
the General Assembly and the Security  
Council, and the endorsement of the  
Report by the General Assembly.

94. The culmination of these significant statements and events precedes the temporal jurisdiction of the Court. By August 1996 there was clear universal acceptance that child recruitment was a criminal offence.

95. This universal acceptance was reiterated in September 1997, when the Committee on the Rights of the Child considered the situation in Uganda. In December of that year, the German delegation of the Preparatory Committee for the ICC submitted its paper to the Working Group on the Definition of Crimes. The substance of that paper was adopted by the Working Group in its text, indicating that the Definition of Crimes was “within the established framework of international law”. Child recruitment was included on the basis that it was already a crime under customary international law.

96. There were no significant changes between 30 November 1996 and 17 July 1998 which would allow the conclusion to be reached that customary international law with respect to this crime had changed during this period. Therefore the crime existed under customary international law at the time of the beginning of the temporal jurisdiction of the Special Court.



I. **Reaffirmation of the Recruitment of Children under 15 as a Crime after the Adoption of the Rome Statute**

97. The inclusion of child recruitment in the Rome Statute prompted States and regional bodies to make yet more emphatic statements to bring the practice of child recruitment to an end and more systematic efforts to criminalize it. The momentum created by the process which led to the inclusion of the crime of recruitment in the Rome Statute continued after July 1998.

98. The widespread acceptance that the Rome Statute had documented existing international criminal law on this issue is made clear by the subsequent declarations and resolutions from international and regional bodies. Significantly, many bodies not only recognised the criminalisation, but pressed for extension of the offence to all person under 18 years of age:

The United Nations General Assembly, in its resolution on the rights of the child of 9 December 1998:

*9. Calls upon all States and other parties to armed conflict to respect international humanitarian law, and, in this regard, calls upon States parties to respect fully the provisions of the Geneva Conventions of 12 August 1949 and the additional protocols thereto of 1977;*

*10. Urges States and all other parties to armed conflict to adopt all necessary measures to end the use of children as soldiers and to ensure their demobilization and effective disarmament; [...]*

*17. Welcomes the ongoing efforts to bring to an end to the use of children as soldiers, and, in this context, recognizes the contribution of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court and recalls the qualification as a war crime in the Rome Statute of the International Criminal Court of the*

*conscription, enlistment or use to participate actively in hostilities of child soldiers, which will contribute towards making it possible to end impunity for the perpetrators of such crimes.*<sup>67</sup>

The Latin American and Caribbean Conference on the Use of Child Soldiers by a Resolution of 8 July 1999:

*Welcoming the adoption of the Statute of the International Criminal Court which confirms "conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities" a war crime, both in international and internal armed conflict, whether by armed forces or armed groups, and hopeful that in future the minimum age will be raised to 18 years; [...]*

*5) Urges all Latin American and Caribbean States:[...]*

*e) to make the recruitment of children under 18 years of age into the armed forces or into armed groups, or their use for direct or indirect participation in international and non-international armed conflict, as well as in situations of internal violence, a crime under domestic law and to bring those responsible for ordering or carrying out these crimes before the appropriate judicial authorities;*<sup>68</sup>

The Nordic Foreign Ministers by a Declaration of 29 August 1999 stated:

*We, the signatories of this Declaration [...]*

*Are determined to have an optional protocol stipulating that States Parties shall ensure that persons below the age of 18 years are not recruited into their armed forces nor allowed to take any part in hostilities that State parties to the protocol shall take all feasible*

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<sup>67</sup> UN General Assembly Resolution A/Res/51/77 of 9 December 1998.

<sup>68</sup> Latin American and Caribbean Conference on the Use of Children as Soldiers: Montevideo Declaration on the Use of Children as Soldiers of 8 July 1999.

*measures to prevent that persons below the age of 18 years shall not be recruited into armed groups distinct from government forces, nor be allowed to take any part in their hostilities that the regulations shall be applicable in both international and internal armed conflicts.*<sup>69</sup>

99. On 16 May 2000, in response to the many calls to finalise the instrument,<sup>70</sup> despite the difficulties in finding an agreement over higher age limits for the prohibition of recruitment, the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict was adopted. The main purpose of the Optional Protocol was to raise the age for the participation in hostilities and the recruitment beyond the established standards of the Additional Protocols and the CRC.<sup>71</sup> The Optional Protocol also reaffirmed the obligation of all States to criminalize the recruitment and use of child soldiers.

#### IV. CONCLUSION

100. The *Amicus* respectfully concludes and submits that a detailed analysis of the sources of customary international law makes it clear that the prohibition on the recruitment and use in hostilities of children under the age of 15, which was contained in the Additional Protocol II to the Geneva Conventions, and in the Convention on the Rights of the Child, had come to bear criminal liability by 30 November 1996.
101. This was also the view of the members of the Security Council when they proposed the language of Article 4(c) of the Statute of the Special Court concerning the war crime of “conscripting or enlisting children under the age of 15 years into armed forces or groups or

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<sup>69</sup> *Declaration by The Nordic Foreign Ministers Against the Use of Child Soldiers* 29 August 1999.

<sup>70</sup> By the Commission on Human Rights, international and regional conferences, NGOs, UNICEF and the Special Representative of the Secretary General on Children and Armed Conflict.

<sup>71</sup> The Optional Protocol on the involvement of children in armed conflict bans the use of children under 18 in hostilities and sets an age limit of 18 for compulsory recruitment by governments, as well

using them to participate actively in hostilities”. According to the Council, Article 4 (c) as contained in the Statute is “in conformity with the statement of the law existing in 1996 and as currently accepted by the international community”.<sup>72</sup>

102. The *Amicus* submits that the foregoing analysis makes it clear that in the case of child recruitment, as of 30 November 1996, the conscription or enlistment of children under the age of 15 or their use in hostilities, was a criminal offence under international law at the beginning of the temporal jurisdiction of the Special Court for Sierra Leone.

Dated: 21 January 2004

Respectfully,

For and on behalf of the United Nations Children’s Fund

PETER D. C. MASON

Senior Adviser, Office of the Executive Director, UNICEF

3 United Nations Plaza

New York, New York 10017

(212) 326-7139

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as raising the standard for voluntary recruitment by government forces above age 15. In addition, it outlaws all recruitment and use below age 18 for non-state groups.

<sup>72</sup> Letter dated 22 December 2000 from the President of the Security Council addressed to the Secretary-General, S/2000/1234 of 22 December.

## ANNEX

### **Minimum age for recruitment and related national legislations**

The Coalition to Stop the Use of Child Soldiers gathered statistics from UNICEF country offices, legislation and government policy documents in preparation for their first global report in 2001<sup>1</sup>. The results can be summarised as follows:

Of 100 States known to have a compulsory recruiting age for their armed forces, 79 set this age at 18 or over. A further 19 set it between 15 and 18 (usually 17 with a few instances of 16). Some of these 19 countries do not deploy under 18 although they will register children under 18 for service or training.

Of 126 countries known to recruit voluntarily (some countries have no army) and about whom there is reliable information, 74 set the recruiting age at 18 or over. A further 50 recruit between the ages of 15 and 18 and again this is usually at 17 with a few instances of recruiting voluntarily at 16. Only 3 countries have the possibility in law of recruiting under 15 years old.

	<b>Minimum age for recruitment</b>	<b>Date/number of the law</b>
Afghanistan		
Algeria	19	Article 1, Edict 74-103 of 15 Dec 1974 Nov. 1998
Andorra	No army	
Angola 20 lowered to 17	20 by law 1/93	17 by decision of the Council of Ministers in 1998
Antigua and Barbuda		
Argentina	No conscription exc exceptional circumstances (18) 18 for voluntary	Law on voluntary military service of 5 January 1995
Armenia	18	Law on Military Duty of 1991

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<sup>1</sup> [www.child-soldiers.org](http://www.child-soldiers.org)

Australia	No conscription exc exceptional circumstances (18) Voluntary: 16	1903 Defence Act
Austria	18 Voluntary: 17	Article 15 of the 1990 Defence Law
Azerbaijan	17	1991 Law on Armed Forces as amended by decrees in 1992 and 1993
Bahamas	No conscription	
Bahrain	No conscription Voluntary: 18	
Bangladesh	No conscription Voluntary: 16	
Barbados	No conscription Voluntary: under 18 with parental consent	Barbados Defence Act, section 19 (2)
Belarus	18	Article 14 of the Universal Military Duty and Military Service Act of October 1992
Belgium	No conscription Voluntary: 18	Conscription abolished in 1995
Belize	18 Voluntary: 16	1977 Defence Ordinance
Benin	21 Voluntary: 21	Law 63-5 of 30 May 1963 as amended by ordinance 75-77 of 28 November 1975
Bhutan	No conscription Voluntary: 18	Since early 1990s
Bolivia	18	Article 1 Decreto Ley 13-907 of 27 August 1976
Bosnia and Herzegovina	BiH: 18 (16 in times of war)  Republika Srpska: 18  Voluntary for all: 18	Article 76 of 1996 Defence Law  Article 28 of 1996 Defence Law

Botswana	No conscription	Chapter 21 (5) of the Defence Force Act of 15 April 1977
Brazil	19 except exceptional circumstances Voluntary: 17	Article 3 of Law 4.375 of 17 Aug 1964
Brunei Darussalam	No conscription exc exceptional circumstances	
Bulgaria	18 Voluntary: 18	1195 Law on Defence and Armed Forces
Burkina Faso	18 Voluntary: 20	
Burundi	16 (practice 18) Voluntary: 16	CRC Committee Compulsory civic service by decree 1/005 of 1 dec 1996)
Cambodia	No conscription Voluntary: 18	Article 42 of the 1997 Law on General Statutes for the Military Personnel of the Royal Cambodian Armed Forces
Cameroon	No conscription Voluntary: 18	Article 11 of Presidential decree 94/185 of September 1994
Canada	No conscription Voluntary: 16	Bill S-18 stipulates that under-18s must not be deployed in hostilities
Cape Verde	Voluntary: 17	Article 31 of the Legislative Decree 6/93 of 24 May 1993 Decree-Law 37/96 of 30 September 1986
Central African Republic	18 Voluntary: 18	CRC Committee
Chad	20 (under with consent) Voluntary: 18 (under with consent)	Article 14 of Ordinance 01/PCE/CEDNACVG/91 of 16 January and Article 52 of the General Statute of the Army (Ordinance 006/PR/92) of 1992 - consent of tutor
Chile	18 Voluntary: 16 under special criteria	Article 13 of the Law on Recruitment and Mobilisation of the Chilean Armed Forces (Decree Law 2.306 of 12 September 1978)

China	18 Voluntary: 15	Section 12 of the 1984 Military Service Law Geneva Conventions
Colombia	Voluntary: 18 18	Law 548 of 23 dec 1999 amending Law 418 of 1997
Republic of the Congo	No conscription Voluntary: 18	No conscription since 1969
Costa Rica	No permanent army Voluntary: 18	Article 12 of the Constitution
Cote d'Ivoire	18 Voluntary: 18	1961 Law: 21 years minimum then Article 82 of the Armed Forces Code of 7 September 1995
Croatia	18 Voluntary: 18	Law of 1991 amended in 1993,1996 and 2001 and Regulations on Military and Civilian Service (1997 and 2000)
Cuba	16/17 (unclear)	Article 67 of the Law 75 on National Defence of 21 dec 94
Cyprus	18 Voluntary: 17	Info from Government
Czech Republic	18 Voluntary: 18	1992 Military Act and paragraph 2 of the law of 14 sept 1999 on military service and military administration
Democratic Republic of the Congo	18	Law Decree of 9 June 2000
Denmark	18 Voluntary: 18	1980 National Service Act, amended by Act 190 of 2 April 1993 and by Act 1088 of 23 dec 1998, Section 13
Djibouti	No conscription	CRC Committee
Dominica	No army Police: 18 years	Police Act Chapter 14:01 Section 5 (a)
Dominican Republic	No Conscription Voluntary: 18	1966 Constitution and CRC Committee
East Timor	No Conscription Voluntary: 18	Regulation of the National Council on the defence Force of January 2001



Ecuador	18	1994 law on military service
Egypt	18	1980 Military and National Service Act 127
El Salvador	18 Voluntary: 16	Article 215 of the 1983 Constitution and Law on military service and reserve armed forces 298 of 30 July 1992
Equatorial Guinea		
Eritrea	18 Voluntary: 18	Article 8 and 9 of the National Service Proclamation 82/95 of 23 Oct 1995
Estonia	18/19 unclear Voluntary: 17	
Ethiopia	No Conscription Voluntary: 18	Article 4 of the Defence Force Proclamation 27/1996 interpreted as minimum 18 years
Fiji	No Conscription Voluntary: 18	CRC Committee
Finland	18 Voluntary: 18	Act of May 2001
France	18 (No conscription after end 2002) Voluntary: 17 with consent	Article 88, Law No. 72-662 13 July 1972. Law No. 97-1019 (28 Oct '97)
Gabon	20(law)/18 (practice) Voluntary: 18	Law Decree No. 4 6 December 1960 Act 004/98 of February 1998
Gambia	No conscription Voluntary: 18	Section 23(2) of the Armed Forces Act, Cap 19 Laws of the Gambia
Germany	18 Voluntary: 17	Article 12(a) of the Basic Law 1956 Law on military service
Ghana	18 Voluntary: 18	Note: There is no conscription in Ghana.
Greece	18; younger during war or mobilisation Voluntary: 18	Law No. 2510 of June 1997

Guatemala	18 Voluntary: 18	Decree No. 78-96 (children and young persons code - article 59)
Guinea	18 Voluntary: Unknown	Article 1 of Order No. 072/PRG/SGG/90 of July 1900
Guinea-Bissau	18 Voluntary: Unknown	Decree 20/83
Guyana	No Conscription Voluntary: unknown	
Haiti	18 Voluntary: 18	Article 268 of Constitution of 1987
Holy See	No conscription Voluntary: 18	
Honduras	No conscription Voluntary : 18	Decree No. 24-94
Hungary	18 Voluntary: 18	1993 National Defense Law
Iceland	No army	
India	No conscription Voluntary: 16	
Indonesia	18 Voluntary: 18	1982 Law on National Defence
Iran	18 (no age limit for paramilitary) Voluntary: 16 (no age limit for paramilitary)	1984 Military Service Act
Iraq	18; younger during war Voluntary: 15 (unclear)	1969 Military Service Act
Ireland	No conscription Voluntary: 17	Article 53 of Defence Act of 1954
Israel	17 Voluntary: 17	1986 National Defence Service Law  (After Nov 2002 - Amendment No. 13 to the law - min. age for compulsory recruitment at 18)
Italy	18 (conscription being phased	

	out) Voluntary: 17	
Jamaica	No Conscription Voluntary: 18	1962 Defence Act
Japan	No conscription Voluntary: 18 (youth cadets from 16)	Article 18 of the constitution
Jordan	No conscription Voluntary: 17	
Kazakhstan	18 Voluntary: 19	1993 Law "On universal military obligations and military service." Military service on contract basis Act 167-II 3PK of 20 March 2001
Kenya	No Conscription Voluntary: apparent age of 18, or younger with consent of guardian	Armed Forces Act, Chapter 199 of the Laws of Kenya
Kuwait	18 Voluntary: 18	1980 Compulsory Service Act
Kyrgyzstan	18 Voluntary: 18	1992 Law on general military duties as amended in 1994
Laos	15, 17 or 18 (unclear) Voluntary: Unknown	1994 Law on Military Service
Latvia	19 Voluntary: 18	Law on Compulsory Military Service
Lebanon	18 Voluntary: 18	Law 110/1983
Lesotho	No conscription Voluntary: 18	Lesotho Defence Force Act of 1996 Section 18
Liberia	No Conscription Voluntary: 18	
Libya	18	Act No. 9 of 1987. Mobilization Act No. 21 (art. 1) allows for 17year olds to

	Voluntary 17	engage in combat. Article 6b of the Military Service Act No. 40 of 1974. Exemption possible under Act No. 6 of 1977
Liechtenstein	No conscription Voluntary: no active forces	
Lithuania	19 Voluntary: 18	Law on Military Duty
Luxembourg	No conscription Voluntary: 17	
Macedonia	18 Voluntary: 17	Macedonian Defence Law (Chapter II article 2)
Madagascar	Unknown Voluntary: Unknown	
Malawi	No conscription Voluntary: 18	
Malaysia	No Conscription Voluntary: 18; certain cadets admitted at 17.5	
Maldives		
Mali	18 Voluntary: 18	Statut general des militaires
Malta	No conscription Voluntary: 17 1/2	Malta Armed Forces Act (Chapter 220 of the Laws of Malta) enacted in 1970
Mauritania	17 (unclear) Voluntary: 18; 16 with consent (unclear)	1962 Law on Recruitment of the Army (no 132/62)
Mauritius	No conscription Voluntary: 18	
Mexico	18 Voluntary: 16 With consent	Military Service Law
Micronesia		

Monaco	No army Police: 21	Sovereign Ordinance 8017 of 1 June 1984
Mongolia	18 Voluntary: unknown	1993 Universal Military Service Law
Morocco	18 Voluntary: 18	Royal Decree of 9 June 1966
Mozambique	18 Voluntary: Unknown	Law 24-97 of 12 December 1997 Article 2
Myanmar	18 Voluntary: Unknown	National Service Law and People's Militia Act of 1959.
Namibia	Unknown Voluntary: 18	Articles 15-2 of 1990
Nauru		
Nepal	No Conscription Voluntary: 18; training from 15	1962 Royal Army New Recruitment Rules
Netherlands	No Conscription Voluntary: 16	Law of 13 March 1997
New Zealand	No Conscription Voluntary: 17	Section 36 of Defence act
Nicaragua	No Conscription Voluntary: 17	Law No. 192 (1995)
Niger	18 Voluntary: Unknown	
Nigeria	No Conscription Voluntary: 18	Decree No. 51 of 1993 National Youth Service Corps Decree
Norway	18; 16 during war Voluntary 17(men); 18(women); 16(home guard) Voluntary: 18 (OP declaration)	Military Service Act of 17 July 1953 No. 29
Oman	No Conscription	

	Voluntary: 18	
Pakistan	No Conscription Voluntary 16; 18 for deployment in hostilities	
Palestinian Authority/ Occupied Territories	Not Applicable Voluntary: 18;17 under Jordanian law applied in special cases	
Panama	No Conscription Voluntary: 18 (For civil security force)	(armed forces dissolved in 1994)
Papua New Guinea	No Conscription Voluntary: Unknown	
Paraguay	18 Voluntary: 16	Law 569 of 24 December 1975
Peru	No Conscription Voluntary: 18	
Philippines	No conscription Voluntary: 18	1991 Republic act No. 7610 (the Special Protection of Children Against Abuse, Exploitation and Discrimination Act, July 1991)
Poland	18 or 17 Voluntary: 17	1967 Law on Universal Obligation of the Republic of Poland
Portugal	No Conscription Voluntary: 18	Military Service Law (Law 174/99) 21 Sept. 1999.
Qatar	No Conscription Voluntary: 18	
Republic of Korea	20 Voluntary: 18 or 17 (unclear)	
Republic of Moldova	18 Voluntary: Unknown	1992 Law on the Military Duty and Military Service of the Citizens of the Republic of Modlova
Romania	20; 18 in times of war	1996 Law on the Preparation of the Population for Defence.

	Voluntary: 18	
Russian Federation	18 Voluntary: 18	1995 Law on Compulsory Military Service
Rwanda	No Conscription Voluntary: 16 (OP declaration: 18)	Legislation adopted in 1977 (though provisions are made for exceptions) Law No. 27/2001 Relating to the Rights and Protection of the Child Against Violence
San Marino	No Conscription Unknown	
Saudi Arabia	No Conscription Unknown	
Senegal	18 Voluntary: 18	
Serbia and Montenegro	18 (17 in case of war) Voluntary: 17	Articles 291 and 301 of the Law on the Yugoslav Republic
Seychelles	No Conscription Unknown	
Sierra Leone	No Conscription Voluntary: Previously any age with consent; unknown if recent government commitments to an age limit of 18 has resulted in legislative change	Section 16(2) of the Royal Sierra Leone Military Forces Act 1961 (- volunteers under apparent age of 17 cannot be conscripted without consent of guardians)
Singapore	18 Voluntary: 16	Enlistment Act of 1 August 1970
Slovakia	18 Voluntary: 17	Conscript Act (Act No. 351/97) & Act on Military Service (Act No. 370/97)
Slovenia	17 Voluntary: 17	1995 Military Service Law
Solomon Islands	No Conscription Unknown	
Somalia	N/A	

	N/A	
South Africa	No Conscription Voluntary: 18	Defence Act adopted in 1999
Spain	Registration at 16, service at 18 (conscription being phased out) Voluntary: 18	Military Service Law (Ley Organica 13/1991) Decreto del Reclutamiento 1107/1993 Decreto 1410/1994
Sri Lanka	No conscription Voluntary: 18	
Sudan	17 Voluntary: Unknown	National Service Law of 1992 Decree of 1997
Suriname	No Conscription Voluntary: Unknown	
Swaziland	No Conscription Voluntary: 18	
Sweden	19 Voluntary: 18	1994 Total Defence Act
Switzerland	19-20 Voluntary: 18	Proposal to abolish the army to be put to referendum in 2002 or 2003
Syrian Arab Republic	18 Voluntary: 18	
Taiwan	18 Voluntary: Unknown	
Tajikistan	18 Voluntary: Unknown	1994 Law on Military Service & 1997 Law on Amendments and additions to the Laws of the Republic of Tajikistan
Tanzania	Upon graduation from secondary school, typicall at 18 or over Voluntary: 15	
Thailand	Register at 18; enlist at 21 Voluntary: 18	1954 Thai Military Service Act
The Former Yugoslav Republic	Registration at 17; service at 18	Articles 279 to 336 of the Law



of Macedonia	Voluntary: 17	on the Yugoslav Army.
Togo	18 Voluntary: 18	
Trinidad and Tobago	No Conscription Voluntary: 18	
Tunisia	20 Voluntary: 18	Law No. 89-51 of 14 March 1989
Turkey	19 Voluntary: 19	Law on Military Service (Law No. 1111)
Turkmenistan	18 Voluntary: 18 (unclear)	
Uganda	No Conscription Voluntary: 18	Article 34(3) & (4) of 1995 Constitution - children (<16) should not be employed or do things that are hazardous (paraphrasing)
Ukraine	18 Voluntary: 18	1992 Universal Liability for Military Service Act  Law on Military Duty and Military Service, June 1999
United Arab Emirates	No Conscription Unknown	
United Kingdom of Great Britain and Northern Ireland	No Conscription Voluntary: 16  (participation in hostilities of under 18 if absolutely necessary)	
United States of America	No Conscription Voluntary: 17	
Uruguay	18 Voluntary: 18	
Uzbekistan	18 Voluntary: Unknown	1992 Law on Defence
Venezuela	18 Voluntary: 18	Article 4 of the Law on Conscription and Military Enlistment (1999 - part of constitution)

Viet Nam	18 Voluntary: 18 (except emergency)	1981 Law on Military Service (revisions in 1990 & 1994)
Yemen	18 Voluntary: Unknown	
Zambia	Unknown Voluntary: "Apparent" age of 18; younger with consent	Defence Act Chapter 106 of the Laws of Zambia
Zimbabwe	No Conscription Voluntary: 18	National Service Act 1980

**Sources:**

- Coalition to Stop the Use of Child Soldiers, Child Soldiers Global Report, May 2001.
- Coalition to Stop the Use of Child Soldiers, 1379 Report, November 2002.
- Declarations made upon ratification of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, as of 26 December 2003.
- States Parties reports to the Committee on the Rights of the Child.