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CHILD SOLDIERS

when a child is no longer a child

A legal-doctrinal analysis of the international legislation on child soldiers

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Abstract

The child soldier problem is an escalating and growing phenomenon around the world. It is a complex issue as it involves a wide range of areas such as human rights, politics and cultures. A comprehensive legal framework is in place to protect children in armed conflicts, yet they are still being targeted, recruited and deployed in armed groups and organizations. The purpose of this study is to conduct an exhaustive examination of current international law, *de lege lata*, regarding child soldiers aged 15-18. The legal-dogmatic method will be used to identify the merits, but above all the shortcomings and problems of the legislation. The result shows that international law treats children differently in terms of age and when they are no longer considered child soldiers. The findings demonstrate the difficulties between the two frameworks of international humanitarian law and international human rights law in relation to child rights and protection issues. Furthermore, it has been discovered that the international law regarding child soldiers is outdated, contradictory and inconsistent, as society and warfare have changed since the adoption of the documents. The lack of legal sanctions against recruiters and enablers complicates the situation even further.

Keywords: child soldiers, children's rights, international law, international humanitarian law, international human rights law

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Table of abbreviations

AP	Additional Protocol
CRC	Convention on the Rights of the Child
GC	Geneva Conventions
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICTY	International Criminal Tribunal for the former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
ICRC	International Committee on the Red Cross
IHL	International Humanitarian Law
IHRL	International Human Rights Law
ILO	International Labor Organization
IS	Islamic State
LRA	Lord's Resistance Army
NGO	Non-Governmental Organization
OPAC	Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in armed conflict
UN	United Nations
UNGA	United Nations General Assembly
UDHR	Universal Declaration of Human Rights
UNSC	United Nations Security Council

1 Introduction

The consequences and damages to children in armed conflicts are enormous. Hunger, diseases, mental- and physical health problems, death, torture, sexual abuse, becoming a refugee, enslavement, abduction, separation from parents, forced marriage, detention, deprivation of education, robbed of their childhood, displacement, trafficked, recruited as child soldiers. The list goes on, but children and armed conflicts do not belong together. Even less do children and soldiers belong together in the same sentence.

Children are one of the most targeted groups in armed conflicts and suffer in many inapprehensible ways. Child soldiers have witnessed and experienced things no child ever should and had many of their fundamental human rights violated. It is estimated that 300.000 children under the age of 18 around the globe are participating in direct hostilities as child soldiers.¹ The recruitment and use of children soldiers is not a new phenomenon, but in recent decades, the issue has escalated and thus become a global concern and issue.² Despite the fact that the use of child soldiers has been condemned by states, the United Nations (UN) and Non-Governmental Organizations (NGO's), children of all ages continue to be recruited into armed forces.³ The desire to eliminate the use of child soldiers is therefore both a humanitarian issue as well as a human rights question.⁴ Efforts by the international community have succeeded in a large number of legal developments and treaties in the matter, divided into the frameworks of international humanitarian law (IHL) and international human rights law (IHRL).⁵

Current international legislation and customary law consist of a total prohibition on the recruitment, conscription, and enlistment of children under the age of 15 in all armed conflicts, for all armed groups and organizations. Breaching the rules is stated as a war crime of universal jurisdiction. The 15-year limit has been criticized as being insufficiently low, often ignored and unable to protect all children, as it allows children aged 15-18 to become soldiers.⁶

¹ Save the Children, *Stop the War on Children: Protection children in the 21st-century conflict*, p.7.

² Singer, *Children at war*, authors note.

³ The Paris Principles, p.4.

⁴ Bring, Klamberg, Mahmoudi och Wrangle, *Sverige och folkrätten*, p.282.

⁵ Happold, *Child soldiers in international law*, p.5.

⁶ Sandoz, "Land Warfare", p.115.

The fact that the law distinguishes between children below and above the age of 15 entails that children older than 15 are not protected in the same way as younger children in legislation. The complexity of the discussion on the age limit of child soldiers seems to be rooted in the issue of States' different views of the term childhood and when it ends, factors that include ideological, cultural, religious and geographical beliefs. In the discourse of children's rights, the different age limits cannot be interpreted as anything else than contradictory and inconsistent when different standards apply to different ages, when the state community has determined to identify children as a particularly vulnerable group in need of special care and protection. Most states and NGO's advocate for a "straight-18" ban on all recruitment and use of child soldiers despite forced, compulsory, or voluntary participation in all hostilities, for all groups and organizations, in order to protect, respect and fulfill children's rights.⁷ In recent years, various principles have been adopted to further enhance this view, but the prosecution of recruiters and enablers of child soldiers is conspicuous by its absence.

1.1 Choice of research

The idea for this thesis started to grow one year ago. In January 2022 a Swedish woman was put on trial on the grounds that her son was a child soldier. Between 2012 and 2013, the mother and her family traveled to Syria to join the terrorist organization the Islamic State (IS). Shortly after arrival, the two eldest sons, 14 and 12 years old, became child soldiers for the group.⁸ The trial attracted attention for several reasons, partly because the crime had never before been tried in Sweden but also because many people find it difficult to understand why anyone would want to choose a life in a conflict zone with daily hostilities instead of living in a country where several human rights are fulfilled and children have the right to education, health, freedom of religion, expression and liberty. From a children's rights perspective, it is unfortunate that parents are able to expose their children to such risks.

During their time in Syria, both sons died as soldiers on the battlefield at the age of 16 and 17 years old. Interestingly, the trial did not deal with the fact that both sons were soldiers - only one of them, due to the fact that the older brother turned 15 upon arrival in Syria -

⁷ Happold, *Child soldiers in international law*, p.8-9.

⁸ Stockholm District court, Case B 20218-20, p.4.

and thus is no longer a child soldier in the legal sense.⁹ Although the two brothers shared the same fate, as they were both taken to Syria by their parents, only the younger one received some form of legal justice, if that exists, when his mother was convicted of grave violation of international law and grave war crime for not preventing him from becoming a child soldier. With that said, I have been thinking about this trial for over a year and the fact that the law does not protect all children from becoming child soldiers. Therefore, I have decided to devote my master's thesis in Human Rights and Democracy to the issue of international law and the framework of child soldiers.

1.2 Research problem

In numerous human rights documents and treaties, as well in IHL, the global community has agreed that children are in special need of care and protection.¹⁰ As a result, in most countries, people under the age of 18 are not allowed to take a driver's license, decide over their funds, vote in the parliament elections, go out to night clubs, buy alcohol, drop out of school without their guardian's permission, or be sentenced to imprisonment, all for the purpose of protecting young individuals.¹¹ Yet, children between 15-18 can legally participate in battles as soldiers.

The Convention on the Rights of the Child (CRC) states that all human beings under the age of 18 are *children*.¹² At the same time, the same convention prescribes that State Parties are not allowed to recruit any *person* below the age of 15 into their armed forces.¹³ The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (OPAC) further strengthened the protection of children aged 15-18 by stipulating that State 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 hostilities¹⁴ or are forcibly recruited into national armed forces.¹⁵ For non-state armed forces, OPAC prescribes a total ban on recruitment and use of persons under

⁹ Ibid., p.15.

¹⁰ Breen, *When is a Child Not a Child? Child Soldiers in International Law*, p.73.

¹¹ Singer, *Children at war*, p.17.

¹² Article 1, Convention on the Rights of the Child. General Assembly resolution 44/25. 20 November 1989.

¹³ Article 38 3p, CRC.

¹⁴ Article 1, Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict. International Committee of the Red Cross, General Assembly resolution A/RES/54/263. 25 May 2000.

¹⁵ Article 2, OPAC.

18, despite voluntary or forced recruitment.¹⁶ However, OPAC does not provide any sanctions against breaches, which means that individuals who violate the rules cannot be legally punished. Further, warfare has changed since World War II, from being between states to being within states which has left its mark on how armed conflicts actually take place today.¹⁷ Having said that, it is of interest to study the adequacy of the legal framework in today's armed conflicts together with the above-mentioned Court Case. Since the case is only one year old, no previous research on it has been found, which could lead to new discoveries.

1.3 Aim and research questions

Legislation can be considered inconsistent with regard to the protection of children, but also at what age children can be used as soldiers in armed conflicts, even though they are still children, i.e., under 18 years of age according to the Convention on the Rights of the Child. The purpose of this study is therefore to examine the international legal response to the issue of recruitment and use of child soldiers between the ages of 15 and 18. In addition, a Case Study of a legal case will be investigated to see if the current legislation is compatible with today's armed conflicts.

In order to achieve the study's purpose, the following questions will be investigated:

- What is the existing legal framework, *de lege lata*, on the recruitment and use of child soldiers between 15-18 years?
- What are the legal possibilities to hold child soldier recruiters and enablers responsible?

1.4 Disposition

The study is divided into nine chapters. The introduction chapter provides a broad overview of the situation of child soldiers in the world, followed by the choice of research and research problems. This is followed by the purpose and questions. Chapter two contains a literature review followed by chapter three which presents the methodology, material and methodology discussion. Chapters four-six will investigate the international

¹⁶ Article 4, OPAC.

¹⁷ Bring, Klamberg, Mahmoudi och Wrange, *Sverige och folkrätten*, p.280.

framework on child soldiers through the legal-doctrinal method and chapter 7 will review the unique Court Case explained in Part 1.1. Chapter 8 will contain an analysis of the results derived from the investigation together with earlier research. In the last chapter, nine, conclusions and discussion will be held where further research is recommended.

2 Literature review

In the field of child soldiers, a substantial amount of research can be found as the issue rapidly has increased in the last decades. Most of the studies concern the role of child soldiers and their tasks, the underlying reasons for recruitment, rehabilitation programs and why the occurrence of child soldiers have escalated since the second half of the 20th century. The following presented material will be essential for this study when pursuing a deeper understanding of the legislation and approach to the matter of child soldiers.

Armed conflicts are one of the most catastrophic events of humankind and the number of child soldiers increases each year in both government forces and opposition groups.¹⁸ Although children are recognized as vulnerable and in special need of protection and support, children's rights are violated daily in armed conflicts. Haer argues, in order to create a world where children can freely have their rights and privileges fulfilled that come with being a child, the international community must work together to alleviate the many cases of abuse that children currently face.¹⁹ Singer defines a child soldier as “any person under 18 years of age who is engaged in deadly combat or combat support as part of an armed force or group”.²⁰ A definition that should be considered self-evident, but is not.

The use of children in armed conflicts breaches international laws and has severe effects on each individual child as well as the entire society. Children who grow up in violent and armed environments, especially those who act as soldiers, develop values and identities based on these foundations which can turn children into perpetrators of violence instead of citizens capable of establishing stable peace.²¹ Therefore, Haer argues that the issue of recruiting and using child soldiers must be a high priority for the international community to combat and defeat, in order to create a better future for coming generations. Haer acknowledges the importance for academics to further research the issue while she presents three undiscovered areas – girl soldiers, forced vs. voluntary recruitment and the effective international response.²² The third area, effective international response, is

¹⁸ Haer, *Children and armed conflict: looking at the future and learning from the past*, p.74.

¹⁹ Ryu, *Children in Armed Conflicts: Inconsistency of the laws, culpability, and criminal responsibility of child soldiers*.

²⁰ Singer, *Children at war*, p.16.

²¹ Haer, *Children and armed conflict: looking at the future and learning from the past*, p.74.

²² *Ibid.*, p.75.

of great interest to this study and will thus be further explored by discovering the legal framework in order to understand what the global community has achieved. According to Haer, the international response mainly consists of three measures; naming and shaming perpetrators, sanctions for violators and juridical instruments to punish offenders. Unfortunately, sanctions are often absent.²³

Ryu further puts pressure on the international community to refuse support to armed groups and establish economic sanctions.²⁴ Ryu maintains that the international framework on child soldiers consists of too many gaps, weaknesses and inconsistencies that will endanger children's health, rights, and lives in armed conflicts. The terms in the provisions are too vague as the majority of them obligate states to take "all feasible measures" which can be interpreted as "if possible". Instead, Ryu proposes a change to "all necessary measures". Ryu highlights the importance to create permanent international monitoring mechanisms with the purpose to ensure, observe, and oversee state practices, national legislation and policies on child soldiers. Ryu's findings are important pieces that this study will look more deeply into, especially the inconsistencies and gaps in the provisions and terms. Despite international efforts to legislate against the use of child soldiers, more children than ever are joining armed groups. This makes Haer question how much impact deterrent punishment has on recruiters and enablers.²⁵ Happold's approach to the child soldier's problem is skeptical, as many efforts to combat the issue still not have decreased the number of children affected and used in battles. However, Happold does see a pattern that the prohibition on forced recruitment of children under the age of 18 may become a new rule of customary law.²⁶

Breen criticizes international law regarding the protection of children in armed conflict and spot outs its gaps and paradoxes. She believes that the international attempt to protect children is too weak when it comes to the severe consequences of armed conflicts. She goes on to argue that the reason for this is the inability of states to agree on the age limit for child soldiers and that some states always will allow them. Further, she examines the implementation of Article 38 of the CRC and finds it weaker than the protection in AP

²³ Ibid., p.82.

²⁴ Ryu, *Children in Armed Conflicts: Inconsistency of the laws, culpability, and criminal responsibility of child soldiers*.

²⁵ Haer, *Children and armed conflict: looking at the future and learning from the past*, p.83.

²⁶ Happold, *Child soldiers in international law*, p.170.

II, as CRC only covers State Parties, while the majority of the conflicts around the world today are intrastate. She further argues that the drafting process of the legislation on child soldiers reflects the “lowest common denominator” approach.²⁷ Ang has studied Article 38 in its entirety, reviewing the terms and wording. Her conclusion is that the main achievement of the article is its success in connecting the two bodies of public international law, by implementing a provision of IHL in a human rights treaty. As a result, it can contribute to enabling the application of human rights provisions to non-state actors.²⁸

Singer depicts how warfare has changed from children being spared on the battlefield to becoming elaborate targets for recruitment, indoctrination, training and dispatch to hostilities. Singers' answers to why the use of children in hostilities has become such an escalating phenomenon, are the world economy, the technological development in small arms and last, the balance of power in the world after the Cold War.²⁹ Happold finds the escalating problem of child soldiers is partly due to the fact that children are easy to manipulate, given tasks that no adult wants, are cheap to operate and have few demands.³⁰ Singer stresses the importance of the international community agreeing that children should not participate as soldiers in armed conflicts, referring to the old natural law that children have no place in war.³¹ Singer, Breen and Ryu emphasize how voluntary recruitment is rarely a voluntary act, but often a forced one as the child often has no other choice. Therefore, they claim that it is a failure of the states to have made that distinction.

Another escalating problem in the 21st century is terrorism, a dark domain of modern warfare. Children's participation in such groups has increased ever since the terror attacks in the US on September 11th, 2001, when the war on terror began.³² Singer explains that a driving factor for terrorism can be religious beliefs, explaining for example Islam and Jihad, where children are often used as soldiers and suicide bombers.³³ Sometimes even parents enable their children to become involved in terrorist organizations, which

²⁷ Breen, *When is a Child Not a Child? Child Soldiers in International Law*, p.87.

²⁸ Ang, *Article 38: children in armed conflicts*, p.63.

²⁹ Singer, *Children at war*, p.46.

³⁰ Happold, *Child soldiers in international law*, p.8-9.

³¹ *Ibid.*, p.156.

³² *Ibid.*, p.131.

³³ *Ibid.*, p.135.

Singer describes as the saddest aspect of child participation in such groups, that there are parents who wish their children to become soldiers instead of teachers or doctors.³⁴

As the Court Case the thesis will investigate is about terrorism, Singer's writings on this will be an essential aspect for the study. Since the last binding protocol on child soldiers was adopted in 2000 in the OPAC, roughly the same period as the escalation of terrorism, this aspect is probably closely related to the obsolescence of current legislation. Therefore, this study aims to contribute to the research field of child soldiers and how the law does not protect all children. Thanks to the unique legal Court Case, where the law was tested to its limits, concrete conclusions can be drawn by comparing current international legislation of IHL and IHRL.

³⁴ Ibid., p.145.

3 Method and material

3.1 Legal-doctrinal method

To answer the purpose and research questions, the legal-doctrinal method will be used. The method aims to analyze the law in force, *de lege lata*, by interpreting the content of the authoritative sources of law.³⁵ When determining the law in force, the hierarchy of legal sources is used, with the legal text being the most important, followed by preparatory works, precedent and doctrine.³⁶ Therefore, the methodology relates to a concrete research question where the analyses are based on the sources.³⁷ According to Kleinman, the method is to examine the different elements of the doctrine of legal sources, the final result may then be presumed to reflect the content of the law in force, or, in other words, how the rules of the law are to be interpreted in a given concrete context.³⁸ The collected data and material, which demonstrates the current legal system, can thereafter be criticized if needed, and contradictions, differences and ambiguities in the different sources of law can be found.³⁹

The method is used by many legal scholars where attempts are made to interpret and systematize valid legal norms, and to find and shed light on gaps and potential improvements.⁴⁰ One explanation for the widespread use and recognition of the method is that it aims to influence the development of the legal system and legal thinking.⁴¹ The method will hence be used primarily to identify the law in force, and secondarily to carry out an analysis of the law and its merits, but above all problems.⁴² Finally, the study aims to determine, based on the conclusions drawn, whether the legal situation is satisfactory or not with regard to children's rights.

³⁵ Hjertstedt, "Beskrivningar av rättsdogmatisk metod: om innehållet i metodavsnitt vid användning av ett rättsdogmatiskt tillvägagångssätt", p.167.

³⁶ Kleinman, "Rättsdogmatiskt metod", p.36

³⁷ Ibid., p.21-24.

³⁸ Ibid., p.26.

³⁹ Ibid., p.35.

⁴⁰ Hjertstedt, "Beskrivningar av rättsdogmatisk metod: om innehållet i metodavsnitt vid användning av ett rättsdogmatiskt tillvägagångssätt", p.167.

⁴¹ Kleinman, "Rättsdogmatiskt metod", p.44.

⁴² Hjertstedt, "Beskrivningar av rättsdogmatisk metod: om innehållet i metodavsnittet vid användning av ett rättsdogmatiskt tillvägagångssätt", p.167.

The 1969 Vienna Convention on the Law of Treaties provides guidelines on how states should interpret treaties. This study will interpret relevant conventions based on the general rule of interpretation, meaning that “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose, including preamble and annexes”.⁴³ The justification of this choice is that no matter how states wish the law to be applied through the supplementary interpretation method⁴⁴, the fact that legislation stipulates a 15-year age limit leaves no room for such interpretation.

3.2 Material

As the study will examine current international law on child soldiers through the legal-doctrinal method, the empirical data will be gathered through accepted legal sources, which are published material of treaties, preparatory work and preambles.⁴⁵ Relevant articles of international conventions and additional protocols will be investigated and presented in original texts, from both IHL and IHRL. In addition, a legal case will be investigated and an interview with the prosecutor from that case. These sources will be used as primary material. Further, secondary sources of judicial doctrine, choice of method and earlier research will be extensively studied in order to understand the origin of various provisions. As it is secondary material, this means that it has already been interpreted once by different authors.

The treaties selected for the study are based on those related to the participation of children in armed conflict. It will be the most recognized international treaties in both IHL and IHRL – The Additional Protocols to the Geneva Conventions, Convention 182, the CRC, the Rome Statute and the OPAC. These conventions were written between 1977 and 2000, which is an important aspect to remember as much has evolved since then from a societal perspective.

The justification for including the Court Case is that it is the first case in Sweden in which a parent has been tried for using their child as a child soldier. The lack of similar cases will

⁴³ Article 31, Vienna Convention on the Law of Treaties, Vienna on 23 May 1969.

⁴⁴ Article 32, Vienna Convention.

⁴⁵ Kleineman, "Rättsdogmatiskt metod", p. 21.

exclude a comparative approach, but on the other hand, its achievements will be highlighted. The provisions used by the Court are based on international law, meaning that Swedish law will only be explained in how it relates to international law.

When previous research has been searched, the databases EbsocHost, HeinOnline, OpenAthens, Oxford University Press, and Libris have been used. Further searches have been made on the basis of the reference list in the articles found relevant. Keywords that have been searched are “child soldier legislation”, “children at war”, “child soldering” and “child recruitment”. The material has been collected in both English and Swedish.

3.3 Method discussion

The legal-dogmatic method will exclude the use of a theory. This is justified by the fact that the view of the findings presented may lead to limited conclusions, as the purpose is to determine the law in force. This is a generally accepted principle in jurisprudence. An optional choice of research method would be the legal-analytical method where an applicable theory would have been able to apply. Yet, the study does not aim to give proposals on how the law should be, but instead to find gaps and inconsistencies regarding legislation. Therefore, the choice of the legal-doctrinal method is justified by the fact that the aim of the thesis is to gain a deeper understanding of the legal rules applicable to child soldiers. In order to analyze the Court Case in the best possible way, it is crucial to know the underlying factors of the law in force to be able to point out shortcomings. The method has been criticized for only analyzing the design of the legal rules and thus not how they are applied in practice. Nevertheless, the method can detect shortcomings in the law, which in turn can contribute to changes in practice.⁴⁶ Therefore, its advantages seem to outweigh its shortcomings.

3.4 Delimitations

The child soldier issue can be studied through many disciplines in order to draw different conclusions, however, this study will be limited to exploring the legal discipline in order to achieve answers to the stated purpose and research questions. When the term child is used, the definition of Article 1 in CRC is referred to. As the prohibition against recruiting

⁴⁶ Kleineman, "Rättsdogmatisk metod", p. 39-49.

children into armed forces under the age of 15 is explicit and clear in legislation, this study will mainly focus on children between 15-18 years old. The study will not examine different origins or causes of armed conflicts nor how armed groups or conflicts are defined. Neither will the study investigate child soldiers' tasks or how they are reintegrated into society again. It is primarily the efforts of states to protect child soldiers that will be targeted and not NGOs. The study will not be limited to a particular conflict or geographical area, as the central theme is that no child under 18 should be involved in armed conflict regardless of their location. Irrespective of where the child is recruited and used, the suffering, violence and tragedy is the same.

The term armed conflict will be used rather than war, as the former is a purely factual description of a situation, without associations of right and wrong in terms of *jus ad bellum*.⁴⁷ Armed groups and armed organizations will be used as synonyms.

3.5 Ethical considerations

Ethical considerations in a research process are very important, both to achieve the best possible quality in a responsible way and because of the important role of research in today's society with high expectations.⁴⁸ Therefore, the study will apply the principles of the Swedish Research Council in the conduct of the research. Good research ethics together with truth, reliability, anti-plagiarism, honesty, respect and responsibility are dominant principles that will be accepted throughout the work.⁴⁹ The study will not handle any sensitive data. However, the legal case, which in itself is public information, concerns children and therefore ethical considerations have led to the names being kept confidential and pseudonyms such as big brother, little brother, and mother will be used instead. The prosecutor will therefore also be referred to as the prosecutor.

⁴⁷ D. Evans, Malcolm, *International law*, p.844.

⁴⁸ *God forskningssed*, Svenska Vetenskapsrådet, preface.

⁴⁹ *Ibid.*, p.8.

4 International Humanitarian Law

In this chapter, international humanitarian law will be investigated in its entirety by examining the origins of the articles concerning child soldiers through the legal-doctrinal method.

4.1 Background

The bloody battle of Solferino in 1859 raised the idea that there must be rules in war, to minimize human suffering. In 1863, the International Committee on the Red Cross (ICRC) was created and a year later entered the first Geneva Convention into force.⁵⁰ International Humanitarian Law (IHL), also called the laws of war, founded in customary law regulates what is permitted and not in armed conflict and is only applicable when an armed conflict is ongoing.⁵¹ IHL makes a distinction between international armed conflicts and non-international armed conflicts, where the former regulates conflicts between two or more states and the latter between a state military and a non-governmental force, or where the parties are non-governmental. Today, many of the armed conflicts are between non-international groups, which makes customary law inherently important for humanitarian protection as those rules apply to all warring parties despite being part of legally binding treaties.⁵² It is important to remember that IHL shall be respected, regardless of which party is “right” or “wrong” in the conflict and who started it.⁵³

4.2 Geneva Conventions

At the end of World War II, the Nuremberg Tribunal was established to prosecute those responsible for the terrible crimes that had been committed. The Nuremberg Tribunal launched the idea of individual responsibility under international law, as previously only the state could be held responsible for breaches of international law. Developments continued and in 1949 the four Geneva Conventions (GC)⁵⁴ were adopted by the ICRC,

⁵⁰ D. Evans, Malcolm, *International law*, p.844. p.276.

⁵¹ Proposition 2013/14:146, p.34-35. Common Article 2 of the Geneva Conventions of 1949.

⁵² Proposition 2013/14:146, p.32.

⁵³ Linderfalk “Folkrättens källor”, p.31.

⁵⁴ Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea.

stipulating that grave breaches of these conventions would be punishable as war crimes and that states have a responsibility to hold perpetrators of these crimes accountable.⁵⁵ The GC consists of numerous provisions dealing with children in need of special protection. A civilian is defined in a negative form, meaning that all people who do not take part in combat are civilians and enjoy the general protection that all non-combatants should be spared, as long as they do not take direct part in hostilities.⁵⁶ Children are protected by GC IV in international armed conflicts and Common Article 3 of the four conventions in non-international armed conflicts.⁵⁷ Neither of the conventions contains prohibitions on child soldiers due to the fact that they were written shortly after the end of World War II. The drafters had other important issues to deal with and hence child soldiers were not a priority, but neither as big issue as it would later become.⁵⁸ However, the GC IV prohibits all coercive labor for people under the age of 18⁵⁹ which one could interpret as a ban on the recruitment and enlistment of child soldiers.

When the four GCs were written and enacted, war between states was essentially the norm. In the 1960s, a new form of warfare began to emerge: civil wars within states caused by social, political and ideological disagreements. Armed conflicts started to get tenser and instigated serious damage and consequences for the civil population. Civil wars made the application of various IHL principles more difficult, such as the distinction between civilians and soldiers.⁶⁰ This led to the adoption of two Additional Protocols (AP) to the GC in 1977 by the ICRC.⁶¹

4.3 Additional Protocol I

The adoption of the APs was the starting point of the legal framework for children's participation in armed conflicts. AP I regulates international armed conflicts and states:

Geneva Convention (III) relative to the Treatment of Prisoners of War, and Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War.

⁵⁵ Bring, Klamberg, Mahmoudi och Wrange, *Sverige och folkrätten*, p.296.

⁵⁶ Melzer, "The Principle of Distinction Between Civilians and Combatants", p. 307.

⁵⁷ Breen, *When is a Child Not a Child? Child Soldiers in International Law*, p.77.

⁵⁸ Happold, *Child soldiers in international law*, p.55.

⁵⁹ Article 51, Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War. International Committee of the Red Cross, Geneva, 12 August 1949.

⁶⁰ Bring, Klamberg, Mahmoudi och Wrange, *Sverige och folkrätten*, p.280.

⁶¹ *Ibid.*, p.281.

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 endeavour to give priority to those who are oldest.⁶²

The attentive can observe that the article neither uses the term child nor defines what a child is, but it was a deliberate intention by the ICRC. In the commentary on the protocol, the ICRC noted that the term “child” does not have a generally accepted definition and that many dictionaries have diverse explanations. Furthermore, the drafters noted that the age of puberty varies depending on the individual, climate and race. The moment a person ceases to be a child is not assessed in the same way everywhere and that, depending on the culture, the age can vary between approximately 15 and 18.⁶³ However, the repeated use of the term *persons under 15* in the GC can be interpreted as a reasonable basis for a definition.

When AP I was in draft, the drafting Committee noted that it would not be realistic to completely prohibit voluntary participation of children under the age of 15, specifically in occupied territories and armed conflicts of national liberation. The result in the second sentence of Article 77(2) was thus a compromise between the drafters where the majority were opposed to extending the ban on recruitment beyond the age of 15. However, to accommodate this suggestion, it was stipulated that when recruiting persons between the ages of 15 and 18, priority should be given to the oldest.⁶⁴ Furthermore, despite Article 77 really only defines persons under 15 years as children, the ICRC expressed “up to now there have been no rules in this field, and this article will certainly be very useful, even if it is not mandatory in some circumstances.”⁶⁵ According to Breen, the efforts to protect children from becoming soldiers are weak in AP I, and in her analysis of the article it appears to as it was drawn in response to international pressure to keep the lower age limit of 15 years.⁶⁶

⁶² Article 77.2, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I). International Committee of the Red Cross, 8 June 1977.

⁶³ Commentaries, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), para. 3178.

⁶⁴ Ibid., para. 3179.

⁶⁵ Ibid., para. 3179.

⁶⁶ Breen, *When is a Child Not a Child? Child Soldiers in International Law*, p.78.

4.4 Additional Protocol II

AP II regulates non-international armed conflicts stating in Article 4(3)(C) and (D):

(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.⁶⁷

Again, no definition of the term child is provided for the same reasons as the first protocol.⁶⁸ In the Commentary, the principle of non-recruitment does also include accepting voluntary enlistment into armed groups. “Not be allowed to take part in hostilities” means for instance participating in military operations, gathering information, transporting ammunition or acts of sabotage.⁶⁹ AP II is not only binding to the State Parties but also to non-state actors that are fighting on the territory of such states.⁷⁰ Comparing the ICRC Commentaries of the articles on child soldiers, one can observe that Article 4(3)(C) of AP II consists of an absolute obligation with no escape as it statutes “shall” while Article 77(2) of AP I is less constraining as it statutes “all feasible measures”, which allows exceptions for children’s participation under the age of 15.⁷¹ Already during the draft of the AP’s, many State Delignates were unsatisfied with the low age limit of 15 years for children’s participation in battles.⁷²

Due to the historical perception that the provisions on war crimes only are applicable to international armed conflicts, the Geneva Conventions and the AP I only criminalize and sanction grave breaches in international armed conflicts.⁷³ Hence, Common Article 3 and AP II do not provide any penal suppression of grave breaches, thus crimes committed in non-international armed conflicts.⁷⁴ However, customary law has developed in this

⁶⁷ Article 4(3)(C), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II). International Committee of the Red Cross, 8 June 1977.

⁶⁸ Commentaries, Protocol Additional to the Geneva Conventions of 12 August 1949, and relation to the Protection of Victims of Non-International Armed Conflicts (Protocol II), para. 4549.

⁶⁹ Ibid., para.4557.

⁷⁰ Happold, *Child Soldiers in international law*, p.69.

⁷¹ Commentaries, Protocol Additional to the Geneva Conventions of 12 August 1949, and relation to the Protection of Victims of Non-International Armed Conflicts (Protocol II), para. 4558.

⁷² Ibid., para. 4556.

⁷³ Bring, Klamberg, Mahmoudi och Wrangle, *Sverige och folkrätten*, p.300.

⁷⁴ Ang, *Article 38: children in armed conflicts*, p.44.

regard, not least with the creation of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) and their practice. This eventually led to the creation of the International Criminal Court.⁷⁵

4.5 International Criminal Court

The International Criminal Court (ICC) is a permanent court with jurisdiction to prosecute individuals who allegedly have gravely violated international law. ICC is governed by the Rome Statute, adopted in 1998.⁷⁶ The crimes within the jurisdiction are war crimes, crimes against humanity, genocide and crime of aggression.⁷⁷ These crimes are subject to universal jurisdiction, which means that states themselves can prosecute individuals who have violated the provisions in domestic courts. Universal jurisdiction refers to the idea that certain crimes are so grave that they affect the entire international community and therefore, no one should be exempt from responsibility. Therefore, the states have jurisdiction to prosecute an individual regardless of nationality, territory the crime was committed on and when in time.⁷⁸ While drafting the Statute, consideration was given to the customs, developed by the ICTY and ICTR, that individuals who commit war crimes in non-international armed conflicts should also be held accountable. Hence, the Rome Statute contains sanctions against perpetrators in both international armed conflicts and non-international.⁷⁹ The Rome Statute prescribes a war crime as:

Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.⁸⁰

Conscripting or enlisting children under the age of fifteen years into armed forces or groups using them to participate actively in hostilities.⁸¹

Individuals violating these regulations can thus be prosecuted in ICC and in the State Parties' domestic courts, as it is their obligation as parties.⁸² Further, for an individual to

⁷⁵ Bring, Klamberg, Mahmoudi och Wrangle, *Sverige och folkrätten*, p.300.

⁷⁶ The Rome Statute has 123 State Parties.

⁷⁷ Article 5, Rome Statute of the International Criminal Court, Rome 17 July 1998.

⁷⁸ Proposition 2013/14:146, p.51.

⁷⁹ Bring, Klamberg, Mahmoudi och Wrangle, *Sverige och folkrätten*, p.300.

⁸⁰ Article 8(2)(b)(xxvi), Rome Statute.

⁸¹ Article 8(2)(e)(vii), Rome Statute

⁸² Happold, *Child Soldiers in international law*, p.132.

be sentenced in ICC, the prosecutor must show that the alleged perpetrator committed the crime with intent and knowledge.⁸³ There is thus a high degree of evidence required.

ICC has no jurisdiction to prosecute persons under the age of 18 at the time of the alleged crime⁸⁴, as children who are accused of international crimes at the time when they were associated with armed forces should primarily be considered as victims and not only as perpetrators.⁸⁵ Further, the UN Special Representative for Children and Armed Conflict, the UN Security Council (UNSC) and the UN Secretary-General have condemned the use of child soldiers and expressed that child soldiers need to be recognized as victims and not perpetrators.⁸⁶ Breen argues that this reasoning is contradictory and paradoxical as IHL permits children between the ages of 15-18 to become child soldiers, an approach that is later sanctioned by international criminal law.⁸⁷ The paradox is called the child soldier dilemma, where the line between victim and perpetrator operates in a grey zone.

The international legal framework attempt to combat the issue of child soldiers is weak according to many experts and researchers.⁸⁸ Yet, the use of child soldiers violates acceptable practices of war and the majority of states campaign for the straight 18-approach.⁸⁹ Singers advocates the systems of punishment and deterrence, where child soldier leaders, enablers of recruitment and child soldier supporters must be brought to justice for war crimes.⁹⁰ Further, Singer proposes that the doctrine of using children in armed conflicts should be criminalized in the same way as the states have agreed that it is unacceptable to use chemical and biological weapons under any circumstances.⁹¹

4.5.1 Verdicts in ICC

The recruitment and use of child soldiers have been investigated by the ICC. ICC's first verdict was issued in 2012 against Thomas Lubanga Dyilo. Lubanga Dyilo, the warlord of a Congolese armed group, was found guilty of war crimes by recruiting and using child

⁸³ Article 30, Rome Statute.

⁸⁴ Article 26, Rome Statute.

⁸⁵ The Paris Principles, 3.6.

⁸⁶ Monique Ramgoolie, *Prosecution of Sierra Leone's Child Soldiers*, p.154.

⁸⁷ Breen, *When is a Child Not a Child? Child Soldiers in International Law*, p.80.

⁸⁸ See Breen, Singer, Happold and Ryu.

⁸⁹ Breen, *When is a Child Not a Child? Child Soldiers in International Law*, p.92.

⁹⁰ Singer, *Children at war*, p.230.

⁹¹ *Ibid.*, p.170.

soldiers under the age of 15 and sentenced to 14 years imprisonment.⁹² The ruling was praised by many UN officials as a victory for the protection of children in armed conflict and a crucial milestone in the fight against impunity.⁹³ The judgment established that conscripting is defined as forced recruitment and enlistment as voluntary recruitment.⁹⁴ In 2019, the Congolese Chief, Bosco Ntaganda, was convicted of war crimes of using child soldiers and sentenced to 30 years.⁹⁵ In 2021, Dominic Ongwen was found guilty of conscription and use of child soldiers, among other things, in Uganda for the Lord's Resistance Army (LRA) and sentenced to 25 years imprisonment.⁹⁶ Ongwen was himself abducted and recruited as a child soldier at age 9 by the LRA,⁹⁷ a circumstance the court considered in the verdict by stating that he had experienced much suffering in his childhood. However, they still found him a fully responsible adult as he was a commander of the LRA.⁹⁸ He was thus considered a perpetrator and a victim, as the child soldier dilemma mentioned above. However, these judgments do not address the question of whether these men recruited and used children over the age of 15, but the lack of sanctions against it makes it impossible to even examine the question.

⁹² International Criminal Court, *The Prosecutor vs. Thomas Lubanga Dyilo*

⁹³ United Nations, *In landmark ruling, ICC finds Congolese warlord guilty of recruiting child soldiers.*

⁹⁴ International Criminal Court, *The Prosecutor vs. Thomas Lubanga Dyilo*

⁹⁵ International Criminal Court, *The Prosecutor vs. Bosco Ntaganda.*

⁹⁶ Open Society Justice Initiative. The trial of Dominic Ongwen at the International Criminal Court.

⁹⁷ Platform for peace and humanity, *Children's Protection During Armed Conflict and the Criminal Responsibility of Child Soldiers.*

⁹⁸ International Criminal Court, *Ongwen case: ICC Appeals Chamber confirms the conviction and sentencing decisions.*

5 International Human Rights Law

In this chapter, international human rights law will be investigated by examining the origins of the articles concerning child soldiers through the legal-doctrinal method.

5.1 Background

The other part of international law is International Human Rights Law (IHRL), a relatively new area of law with the creation of the UN in 1949. During the Cold War, there were tensions between the two blocs and their ideology about what human rights are and which rights should be prioritized, but despite this, a number of conventions, declarations and instruments could be adopted in the field of human rights during this time.⁹⁹ The human rights and freedoms are universal and belong “to each of us regardless of ethnicity, race, gender, sexuality, age, religion, political conviction, or type of government”.¹⁰⁰ Children, like all other human beings, are entitled to the human rights and freedoms stated in the Universal Declaration of Human Rights (UDHR), as well as the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR). The UN Charter preamble from 1949 statutes that “we the peoples of the United Nations determined to save succeeding generations from the scourge of war”.¹⁰¹

During the last three decades the issue of child soldiers has gone from almost none, to a high priority on the annual agendas of both the UN General Assembly (UNGA) and the UNSC.¹⁰² The UN has tended to handle the issue of child soldiers as part of the broader issue of war-affected children.¹⁰³ Human rights are primarily about the relationship between the individual and the state, and the obligations and responsibilities arising from human rights are reserved for states, which can create difficulties when individuals do not comply.¹⁰⁴ The UNGA and the UNSC have condemned the act of using child soldiers and have called on all parties to an armed conflict to comply with their obligation under international humanitarian law and customary law.¹⁰⁵

⁹⁹ Bring, Klamberg, Mahmoudi och Wrangle, *Sverige och folkrätten*, p.230.

¹⁰⁰ Article 2, UDHR.

¹⁰¹ Preamble, Charter of the United Nations, 1945.

¹⁰² Happold, *Child soldiers in international law*, p.53.

¹⁰³ *Ibid.*, p.35.

¹⁰⁴ Bring, Klamberg, Mahmoudi och Wrangle, *Sverige och folkrätten*, p.232.

¹⁰⁵ Happold, *Child soldiers in international law*, p.95.

5.2 Convention on the Rights of the Child

In the contemporary era, there is no doubt that there is a difference between childhood and adulthood, but this was not always the case.¹⁰⁶ The idea that children have their own rights is relatively new. Until the Renaissance, children were not viewed as weaker or inferior compared to adults, instead, children had to learn at an early stage how to live, survive and support the family. When the Renaissance and the Reformation movement emerged, the view of children changed and quickly they were seen as weak and in need of discipline. From here on, the notion of childhood was developed in the practice of a social construction. Until the 1970s parents and guardians were recognized as sole agents of the child and from a legal perspective, meaning that children had no rights as such.¹⁰⁷ Therefore, the CRC made a historical entrance in 1989 and became the most widely ratified human rights treaty in the shortest period of time. All the world's states have signed the convention, except the United States.¹⁰⁸ The CRC is an international legally binding agreement that promises the world's children that states will fulfill their rights. For the first time, children were not seen as objects to their parents – rather as human beings and individuals with their own rights¹⁰⁹, in other words, real subjects of the law.¹¹⁰ The CRC provides specific needs for the child and for the care and protection of society where civil and political rights and economic, social and cultural rights are met.¹¹¹ Four pervasive principles prevail throughout the convention¹¹² - (1) the best interest of the child,¹¹³ (2) respect for the views of the child,¹¹⁴ (3) the right to life, survival and development¹¹⁵ and (4) non-discrimination.¹¹⁶

Article 1 statutes that “a child is every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier”.¹¹⁷ Although the result of the article, the states have still not agreed on a universally accepted view of when

¹⁰⁶ Ibid., p.27.

¹⁰⁷ International Human Rights Law and Practice, p.546.

¹⁰⁸ Rädna barnen, Barnkonventionen.

¹⁰⁹ UNICEF, *Convention on the Rights of the Child*.

¹¹⁰ International Human Rights Law and Practice, p.545.

¹¹¹ Fisher, *Mänskliga rättigheter*, p.38.

¹¹² Proposition 1997/98:182, p.9.

¹¹³ Article 3, CRC.

¹¹⁴ Article 12, CRC.

¹¹⁵ Article 6, CRC.

¹¹⁶ Article 2, CRC.

¹¹⁷ Article 1, CRC.

childhood ends and adulthood starts.¹¹⁸ During the draft, numerous discussions were held to satisfy the State Parties in regard to the matter. The outcome of Article 1 was thus a compromise between those who sought a universal definition of childhood based only on age, and those who advocated for local and cultural conceptions.¹¹⁹

In all actions concerning children, the best interest of the child shall be the primary consideration, regardless of whether it is by administrative authorities, welfare institutions, courts of law, legislative bodies or private institutions.¹²⁰ In the General Comment to the CRC, the Committee on the Rights of the Child held that non-state actors have “indirect obligations” under the article. Further, the Committee proposed that State Parties should implement a permanent monitoring body with the purpose to ensure States and non-state actors comply with the convention.¹²¹

5.2.1 Article 38 of the CRC

Article 38 (2p) and (3p) of the CRC are of interest to this study and regulates:

2. States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.
3. States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavor to give priority to those who are oldest.¹²²

The outcome of this article was a result of demanding discussions on the right of children to not be recruited into armed forces. Three questions were recurring among the State Parties; what age the standards for child soldiers should be set at, if/how a distinction between “voluntary recruitment” and “conscription” should be drawn and if it should be a distinction between recruitment into armed forces for the purposes of training and education as opposed to fighting.¹²³

¹¹⁸ Happold, *Child soldiers in international law*, p.27.

¹¹⁹ *Ibid.*, p.5.

¹²⁰ Article 3, CRC.

¹²¹ United Nations, General Comment no.5.

¹²² Article 38, CRC.

¹²³ Breen, *When is a Child Not a Child? Child Soldiers in International Law*, p.83.

The United States and the Soviet Union argued that the Working Group was not mandated to review already existing standards in international law, referencing the AP's where the age limit was set to 15 while other delegations maintained that they should not be constrained by existing standards. As there were several difficulties in agreeing on the wording of the article, one suggestion was to exclude it. In the end, it was agreed that setting a lower limit that states could agree on was better than nothing at all. The Colombian representative asked why the Working Group was willing to recognize other rights for children up to the age of 18, but not willing to protect children in armed conflict up to the same age range. Sweden, Venezuela and Algeria were leading states in calling for an 18-year ban on child soldiers where Sweden made several suggestions for the text of the article, which was met with opposition, in particular from the United Kingdom, Canada, Soviet and the US.¹²⁴

The protection of children under 15 from being recruited into armed forces means that States Parties have an obligation to respect this and to demobilize the use of child soldiers. States that breach this obligation are responsible for putting an end to the infringement and granting of reparation.¹²⁵ According to Ang, it is unfortunate that the Working Group could not agree to set the age limit at 18 as it would have been a significant achievement in the field of children's rights.¹²⁶ Furthermore, Article 38 (2p) emphasizes that children taking an indirect part are not included and thus not a rights-bearer in the provision. Article 38 is also unique as it is the only article in the CRC that refer to *people* under 15 years.¹²⁷ Numerous states and NGOs participating in the conference were disappointed with the outcome when it further provides lesser protection for children than Article 4(3)(C) of AP II, since the provisions do not reach non-state actors in the CRC.

¹²⁴ Ibid., p.14-16.

¹²⁵ Ang, *Article 38: children in armed conflicts*, p.28.

¹²⁶ Ibid., p.42.

¹²⁷ Happold, *Child soldiers in international law*, p.72.

5.3 Optional Protocol on the Involvement of Children in armed conflict

The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in armed conflict (OPAC) entered into force in 2000. The OPAC has 172 ratifications, demonstrating the common will of states to improve the protection of children in armed conflict.¹²⁸ It reaffirms that children's rights require special protection for their peace, security, and development of the long-term consequences of armed conflicts, and the Preamble refers to both the Rome Statute and the CRC.¹²⁹ Unlike the CRC, some articles in the OPAC also apply to non-state actors, which was considered a great achievement.¹³⁰

The State 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.¹³¹ One can observe that the obligation is not absolute which means that exceptions are possible. Further, the protocol states that people under 18 are not to be *compulsorily recruited*, an absolute rule that applies to both State Parties and non-state groups. Article 3 raises the minimum age of voluntary recruitment of persons into national armed forces from what is set out in Article 38 (3p) of the CRC, taking account of the principle contained in that article and recognizing that under the convention persons under the age of 18 years are entitled to special protection.¹³²

Article 4 goes even further, strengthening the protection of children from becoming soldiers in non-state armed forces and introducing a total ban on the recruitment and use of persons under the age of 18.¹³³ In other words, it means that children are not allowed to join non-state armed groups voluntarily either.¹³⁴ Both the AP II and the OPAC do regulate non-states groups, but the rules are only applicable to them if they are operating on a territory that is a State Party to the documents. If a state has not ratified them, non-state actors still must comply with the rules of customary law. The OPAC permits

¹²⁸ United Nations Treaty Collection, *OPAC*.

¹²⁹ Preamble, *OPAC*.

¹³⁰ ICRC, *Engaging Non-State Armed Groups on the Protection of Children*.

¹³¹ Article 1, *OPAC*.

¹³² Article 3, *OPAC*.

¹³³ Article 4, *OPAC*.

¹³⁴ Ramgoolie, *Prosecution of Sierra Leone's Child Soldiers*, p.153.

voluntary enlistment for children aged 16 and above into governmental armed forces if the requirements are met that the enlistment is truly voluntary, with the approval of the parents, and that the recruit is fully informed about the employment.¹³⁵ The OPAC hence improved children's rights in armed conflict in various ways and it can therefore be seen as the greatest protection for child soldiers in international law, since the minimum age was raised from 15 to 18 years old for forced and voluntary recruitment into non-state armed conflicts and states responsibility to take all feasible measures to not recruit children under the age of 18 into their forces and that those under 18 are not compulsorily recruited.¹³⁶

Once again, delegations ended up discussing, similar to those in drafting the CRC, where to set the limit on child soldiers. Some stressed that an adjustment to 18 years was absolutely necessary while others argued that raising the age limit was not the solution to ending the issue of child soldiers. A number of delegations also pointed to their national legislation which allowed, under certain conditions and circumstances, the recruitment of persons under the age of 18 into their armed forces, which would bring national and international law into conflict with each other by raising the age to 18 in the protocol. However, it was pointed out that states could not have their national legislation influence the outcome of emerging international law as it aims to establish the strongest protection for individuals. At the time of drafting the OPAC, reference was made to statistics showing that 70 out of 99 states already had a minimum age of 18 for recruitment into national armed forces. It was considered that the establishment of a straight 18-year limit for child soldiers in international law would therefore reflect the national legislation of most states. By this reasoning, a large part of the majority continued to support raising the age limit, while opponents made it clear that efforts should be made by states not to recruit children under the age of 18 but that it cannot be legislated if exceptions must be made.¹³⁷ The argument against raising the age limit was also that it should be legal for children to join armies voluntarily, which was countered by the fact that voluntary recruitment is hardly voluntary but compulsory in the sense that children have no other choice. States advocating the straight 18 ban therefore expressed their dissatisfaction after the adoption of OPAC, which retained the distinction between voluntary and forced recruitment,

¹³⁵ Happold, *Child soldiers in international law*, p.32.

¹³⁶ Ramgoolie, *Prosecution of Sierra Leone's Child Soldiers*, p.153.

¹³⁷ Breen, *When is a Child Not a Child? Child Soldiers in International Law*, p.18.

arguing that it set double standards.¹³⁸ Ang sees the rise with one year highly regrettable that the states could not agree on the "straight 18" approach in a legally binding instrument.¹³⁹

5.4 Convention 182

In 1999, the International Labor Organization (ILO) adopted Convention 182 where the use of child soldiers is stated as one of the worst forms of child labor that can be tantamount to slavery.¹⁴⁰ Convention 182 defines a child as a person under the age of 18 years old and encourages the State Parties to do the same.¹⁴¹ It also sets the minimum age for forced and compulsory recruitment at 18 and calls for "immediate and effective measures to secure the prohibition and elimination of the worst forms of child labor as a matter of urgency".¹⁴² With this convention, it was hoped that the forced recruitment of child soldiers would be reduced.¹⁴³

5.5 Comparison between IHL and IHRL

The point to be made about these sets of rules is that the IHRL concerns the relationship between the individual and the state, while the IHL is a set of rules in armed conflicts. IHRL is applicable in both peacetime and armed conflict, while IHL is only applicable in armed conflicts.¹⁴⁴ The age limit for child soldiers in IHL is 15 years, while IHRL, through OPAC, raised it to 16 years. IHL and IHRL are two separate systems of international law that both safeguard human life, dignity and rights, albeit in different ways.¹⁴⁵ Historically, these regulatory frameworks have been created separately and distinct from each other which has made the interpretations, monitoring and enforcement different between them. For example, the Geneva Conventions make no mention of human rights and the UDHR makes no mention of armed conflict. Yet they are two overlapping systems because ultimately it is about the human being.¹⁴⁶

¹³⁸ Ibid., p.19.

¹³⁹ Ang, *Article 38: children in armed conflicts*, p.55.

¹⁴⁰ Article 3(a), Worst Forms of Child Labour Convention, (Convention 182), 1990.

¹⁴¹ Article 2, Convention 182.

¹⁴² Article 1, Convention 182.

¹⁴³ Motion till riksdagen, *Barnsoldater*.

¹⁴⁴ Bring, Klamberg, Mahmoudi och Wrangle, *Sverige och folkrätten*, p.281.

¹⁴⁵ ICRC, *what is the difference between IHL and human rights law?*

¹⁴⁶ Ang, *Article 38: children in armed conflicts*, p.9.

However, the adoption of Article 38 of the CRC was unique, as the provision belongs to the field of international humanitarian law but has now been included in a human rights instrument. In that sense, Article 38 can be viewed as a hybrid between the two legal frameworks. Thus, states have recognized that it is possible to combine the two sets of rules in the same treaty.¹⁴⁷

¹⁴⁷ Ibid., p.13.

6 Customary law and principles

This chapter presents customary law and important principles on child soldiers.

6.1 Customary law

Customary law plays an inherently important role in the international arena.¹⁴⁸ Customary law regarding child soldiers constitutes a minimum standard to which states and non-state actors must obey.¹⁴⁹ In the Special Court for Sierra Leone, the UN Secretary-General emphasized that the provisions of Article 4 of AP II have been considered customary law for a long period of time, meaning that the recruitment and use of children under the age of 15 is customarily prohibited.¹⁵⁰

In 2005, the ICRC published a study that examined customary international humanitarian law and how it protects victims of war.¹⁵¹ Three established rules were found concerning children in armed conflicts, with both international and non-international character. Rule 135 stresses that *children affected by armed conflict are entitled to special respect and protection*.¹⁵² Rule 136 that *children must not be recruited into armed forces or armed groups*¹⁵³ and rule 137 that *children must not be allowed to take part in hostilities*.¹⁵⁴

According to rule 135, children always have the right to the special protection drafted in the four GC's and AP I and II which e.g., regulate protection against all forms of sexual violence, access to education, health care and food, and evacuation from areas of combat for safety reasons.¹⁵⁵ In this context, children are defined as anyone under the age of 18. Neither is it allowed to execute the death penalty on persons who were under the age of 18 at the time of the offense.¹⁵⁶ Rule 136 expresses the prohibition to recruit children under the age of 15 into armed forces, referencing AP I and II, CRC, ILO Convention 182, the Rome Statute and domestic military manuals and legislation.¹⁵⁷ Rule 136 concludes

¹⁴⁸ Clapham, *Human rights obligations of non-state actors* p. 85.

¹⁴⁹ Happold, *Child soldiers in international law*, p.86.

¹⁵⁰ Henckaerts & Doswald-Beck, *Customary international humanitarian law*, p.486.

¹⁵¹ *Ibid.*, xviii.

¹⁵² *Ibid.*, p.479.

¹⁵³ *Ibid.*, p.482.

¹⁵⁴ *Ibid.*, p.485.

¹⁵⁵ *Ibid.*, p.481.

¹⁵⁶ *Ibid.*, p.482.

¹⁵⁷ *Ibid.*, p.483.

by stating that despite the different ages of what states consider to be the minimum age (between 15-18) of recruitment, there is a broad consensus that it should not be lower than 15 years and hence that age constitutes customary law.¹⁵⁸ In a survey conducted by the Coalition to Stop the Use of Child Soldiers in 2005, showed that most states are practicing an 18 years old limit when recruiting into their national armed forces, at least what is stressed in domestic legislation.¹⁵⁹ Rule 137 is about customary law against children's participation in hostilities in Article 77(2) in AP I, Article 4(3)(C) in AP II, CRC, Article 8(2)(xxvi) and (e)(vii) of the Rome Statute, as the last one is referring to war crimes if the provisions are breached.

6.2 International principles

The "straight 18" approach campaign started in the late 1990s. Voices were raised to adopt a new treaty on child soldiers to raise the minimum age of recruitment to 18. The coalition consisted of researchers, human rights advocates, welfare workers and national groups who were involved to change the policymaker's mind. The work led to the adoption of the OPAC, which failed to set an 18-year age limit.¹⁶⁰ Nevertheless, more than two-thirds of all UN members have committed to the "straight-18" policy that stresses no recruitment of children for any military purpose.¹⁶¹ The Paris Principles¹⁶², with a child rights-based approach to the problem of children associated with armed forces or armed groups,¹⁶³ were developed in 2007 in cooperation between the UN, states and NGOs.¹⁶⁴ The purpose is to combine global humanitarian knowledge and experience, to advocate good custom. The principles include guides on the prevention of unlawful recruitment and use of child soldiers, how to facilitate the release of children associated with armed forces, how to facilitate the reintegration of child soldiers and how to ensure the most protective environment for all children.¹⁶⁵ In 2017, the Vancouver Principles¹⁶⁶ were adopted, consisting of a set of 17 political commitments by the Member States on child protection in peacekeeping and principles focusing on how to prevent the recruitment

¹⁵⁸ Ibid., p.485.

¹⁵⁹ Happold, *Child soldiers in international law*, p.88.

¹⁶⁰ Robin Kirk. *The story behind "Straight 18" on child soldiers*.

¹⁶¹ David Gee. *Why 18 Matters: A Rights-Based Analysis of Child Recruitment*.

¹⁶² Principles and Guidelines on Children associated with Armed Forces or Armed Groups.

¹⁶³ Save the Children, *Time to end grave violations against children in conflict*, p.11.

¹⁶⁴ The Paris Principles, p.5.

¹⁶⁵ Ibid., p.6.

¹⁶⁶ The Vancouver Principles on Peacekeeping and the Prevention of the Recruitment and Use of Child Soldiers.

and use of children as soldiers. The Vancouver Principles are built upon the Paris Principles seeking to further straighten the protection for children at war emphasizing the Member States to enhance training, planning and conduct of their forces. The Vancouver Principles are taking a practical approach to end the recruitment and use of child soldiers.¹⁶⁷

¹⁶⁷ Preamble, Vancouver Principles.

7 Case study

With presented material from the previous chapters, this part of the study will put the legislation into context by focusing on a legal case from Sweden where the laws were applied. The case is based on the provisions in the Rome Statute. To better understand the judgment, a brief introduction to how Swedish law complies with international law will be presented.

7.1 Swedish legislation

The Swedish legal system's relationship to international law is dualistic, which means that domestic legislation and international legislation are two separate systems. In order for a treaty to become Swedish legislation, Sweden has to incorporate and ratify the agreement for courts to be able to apply the provisions. Sweden is a party to the CRC¹⁶⁸, OPAC¹⁶⁹ the Rome Statute¹⁷⁰, and the GC with both AP. Moreover, Sweden advocates that no children under the age of 18 shall be recruited and participate in hostilities,¹⁷¹ and made concrete textual proposals for both Article 38 of the CRC and OPAC that the age limit for soldiers should be set at 18.

In the proposition to the Swedish Law (2014:406) on penalties on certain international crimes, the law who refers to the Rome Statute, child soldiers participation in hostilities includes, in addition to participation in combat, activities such as lookout, spying, sabotage, working in an arms or ammunition factory, and transporting weapons to places where hostilities are taking place. Furthermore, criminal liability includes the use of children as decoys, couriers or guards in, for example, military barracks or arms and ammunition depots.¹⁷²

7.2 Case B 20218-20

The case was held in Stockholm District Court in January 2022, where a Swedish woman (hereafter referred to as the mother) was tried for war crimes related to child soldiers. As

¹⁶⁸ Lag (2018:1197) om Förenta nationernas konvention om barnets rättigheter.

¹⁶⁹ SOU 2016:19. Barnkonventionen blir svensk lag, p.116.

¹⁷⁰ Lag (2014:406) om straff för vissa internationella brott.

¹⁷¹ Bring, Klamberg, Mahmoudi och Wrangle, *Sverige och folkrätten*, p.282.

¹⁷² Proposition 2013/14:146, p.273.

set out in Part 1.2, the family consisted of her, her husband and their six children. They belonged to the Islamist Salafi movement and glorified armed conflict for Islam and Sharia and wanted to live in a fundamentalist society. In the fall/winter of 2012, the father and the oldest son (big brother) traveled to Syria to join the terror organization the Islamic State (IS), and in the spring of 2013 the mother and the other five siblings connected.¹⁷³

Terrorism has become a growing societal problem since the attacks on the World Trade Center in 2001.¹⁷⁴ As a consequence, the terror organization the IS emerged. It is estimated that 300 people from Sweden traveled to Syria at the same time as the family become members of the same organization, all sharing the same ideology, to join and fight for the IS.¹⁷⁵

Upon arrival, the two eldest sons, aged 14 and 12, started training with the IS. Initially, the brothers lived with their father and other men in one part of the IS-controlled area and the mother and other siblings in another part. In August 2013, the father was killed in a battle in which the brothers participated, leading them to move in with their mother.¹⁷⁶ The trial was therefore limited to the period of the offense starting with the move to the mother.¹⁷⁷

As both brothers trained and fought for IS, it is conceivable that the trial was about the mother being guilty of war crimes related to child soldiers against both sons. Nevertheless, as the reader has been introduced to in this study, it is only sanctioned to recruit and use children under the age of 15, meaning that the prosecution could only extend to the children's 15th birthday. Although the big brother was 14 years old when he arrived in Syria, his role as a child soldier and jihadi fighter could not be covered by his mother's prosecution,¹⁷⁸ as he reached the age of 15 shortly after his arrival and is therefore no longer a child soldier within the meaning of the law.¹⁷⁹ In an interview with the prosecutor, she confirmed that it was decided not to prosecute the mother for the months the older brother was still 14 years old due to the lack of evidence on the

¹⁷³ Stockholm District Court, Case B 20218-20, p.7.

¹⁷⁴ Singer, *Children at war*, p.131.

¹⁷⁵ Swedish Defence University, *Swedish Foreign Fighters in Syria and Iraq*, p.75.

¹⁷⁶ Stockholm District Court, Case B 20218-20, p.7.

¹⁷⁷ *Ibid.*, p.10

¹⁷⁸ *Ibid.*, p.28.

¹⁷⁹ *Ibid.*, p.15.

circumstances of his entry into Syria, his recruitment and the fact that the internal armed conflict was different in the fall/winter 2012 when he allegedly traveled and spring 2013 when the mother joined.¹⁸⁰

The trial therefore focused solely on the younger brother being subjected to the crime of recruitment and use as a child soldier. The prosecution argued firstly that the mother should be convicted of an intentional crime by making him a soldier and secondly that she did so by omission.¹⁸¹ The court held that it had jurisdiction as of Sweden's implementation of the provisions in the Rome Statute in national law and since war crimes are subject to universal jurisdiction.¹⁸²

The Court found she could not be convicted of actively making her son a soldier as she did not recruit, train or equip him.¹⁸³ The Court then examined her parental negligence as she exposed him to the offense of recruitment and use in combat when he was younger than 15 years old. As told, Sweden has never before prosecuted an individual for war crimes related to child soldiers, which meant that the Court had no national cases to rely on; but it did refer to a German case from 2020, where a mother was sentenced to prison for failing to prevent, and thus allowing, her 7-year-old son to be recruited into the IS.¹⁸⁴

The Court argued in the question of liability for failure to act that the offender must be in a position of guarantor and thus have a duty to act and protect, as a parent has for its child. Although war crimes do not explicitly refer to omissions but active acts, the Court held that omissions are nevertheless covered by the crime, referring to previous doctrinal sources, court cases on murder and the proposition of the Swedish law on war crimes. Furthermore, it is generally accepted that the national legal traditions of states can be used in trials for crimes covered by the Rome Statute, which means that the rules and principles of Swedish courts can be applied in cases of international law.¹⁸⁵ It was further found that the concepts of using and recruiting can be breached by omission.¹⁸⁶

¹⁸⁰ Interview with the prosecutor conducted 24/3 2023.

¹⁸¹ Stockholm District Court, Case B 20218-20, p.9-10.

¹⁸² *Ibid.*, p.11.

¹⁸³ *Ibid.*, 17.

¹⁸⁴ *Ibid.*, 20.

¹⁸⁵ *Ibid.*, 18-19.

¹⁸⁶ *Ibid.*, 21

The Court argued that the mother knew a civil war was ongoing in Syria with violent extremist Islamist groups, and that she, at that time when traveling to Syria, was aware of the circumstances that her children could be used as soldiers. Further, the Court declared that anyone taking children to a war zone is clearly prepared to expose them to suffering and hardship, as well as high risks of injury and death.¹⁸⁷ The Court referred to previous court cases in Sweden where parents' failure to act in situations where their child was under threat or violence has led to convictions due to lack of adequate action by the parent.¹⁸⁸

The District Court determined that the mother had chosen to put herself and her children in a very dangerous situation by moving to Syria during the years when the armed conflict was at its worst. The fact that she was the guardian of the son means that she cannot avoid punishment for failing to prevent him from becoming a child soldier by omission. It was therefore considered that she, together with other men, carried out the act jointly and in tacit agreement and should therefore be convicted of war crimes.¹⁸⁹ The Court also found that she intentionally allowed her son to be recruited and used on behalf of IS, as the trip to Syria was in accordance with her beliefs and wishes and nothing that she wanted to prevent.¹⁹⁰

Noting that the son was exposed to a high risk of injury and death, which contributed to his death in combat in 2017, at 16 years old, the Court found, on an overall assessment, that the mother was guilty of a serious breach of international law and The mother was sentenced to six years imprisonment for grave violation of international law and grave war crime. The court argued that she had failed in her role as a guarantor of protection to prevent her son from being recruited and used as a child soldier for the terrorist organization.¹⁹¹ The mother was sentenced to six years imprisonment for grave violation of international law and grave war crime. The court argued that she had failed in her role as a guarantor of protection to prevent her son from being recruited and used as a child soldier for the terrorist organization.¹⁹²

¹⁸⁷ Ibid., 26-27

¹⁸⁸ Ibid., 36-37.

¹⁸⁹ Ibid., 38.

¹⁹⁰ Ibid., 31-33.

¹⁹¹ Ibid., 39.

¹⁹² Ibid., p.4.

In the verdict, it can be read that anyone who brings children into a brutal war zone is clearly prepared to expose them to suffering and hardship, as well as extraordinarily high risks of injury and death.¹⁹³ In Swedish legislation, it is not prohibited for parents to take their children into armed conflict. Therefore, during the interview with the prosecutor, she explained that Sweden should adopt a new law prohibiting parents from taking their children into war zones. Such laws already exist in Germany, the Netherlands and France. However, she stressed that it is important that the law is carefully drafted so that innocent people are not affected, such as guardians of different origins traveling to their home countries. One criterion would therefore be to take a child to an area that exposes them to significant danger, which an armed conflict would be. Further, she believes that such legislation could have a deterrent effect.¹⁹⁴

¹⁹³ Stockholm District Court, Case B 20218-20, s.26-27.

¹⁹⁴ Interview with the prosecutor conducted 24/3 2023.

8 Analysis

In this chapter, results from the investigation will be analyzed together with earlier research and light will be shed on contradictions, differences and ambiguities in current legislation. Much effort will be put into analyzing the outcome of the Court Case.

There is no doubt that armed conflict is one of the worst things a person can experience, especially a child. Armed conflicts violate fundamental human rights and rob children of their childhood. It has been discovered that the escalating phenomena of child soldiers is a complex issue as it involves a wide range of areas such as human rights, politics and cultures. By examining various preparatory works and commentaries on the conventions on children's participation in combat, the study has highlighted the issues surrounding the concept of childhood and the lack of a global consensus on when childhood ends and adulthood begins. Arguments from states vary, but the most common are cultural, religious, social and geographical differences. The state sovereignty and the political inability of states to agree on an age limit for the use of child soldiers has contributed to the diversity of legislation in this area. Breen maintains that the fact that some states claim their right to use child soldiers means that a global consensus on the legislation is almost impossible to achieve.¹⁹⁵ On a positive note, the majority of states apply an 18-year age limit for their national armed forces and 18 is the generally accepted transition to adulthood around the globe.¹⁹⁶

In Hear's study, she concluded that children growing up in a violent environment acting as soldiers, develop values and identities based on these foundations, making them perpetrators of violence rather than a citizen capable of creating a stable peace.¹⁹⁷ The case of Ongwen, mentioned in Part 4.5.1, is a clear example of this, as Ongwen was recruited at a young age into the LRA, where he later became a high commander who himself recruited young children to become soldiers. Therefore, preventing and combating the use of child soldiers must therefore become a priority for the entire international community, as violence begets violence. Further, Singer's proposal to ban

¹⁹⁵ Breen, *When is a Child Not a Child? Child Soldiers in International Law*, p.73.

¹⁹⁶ Singer, *Children at war*, p.17.

¹⁹⁷ Haer, *Children and armed conflict: looking at the future and learning from the past*, p.74.

the use of child soldiers, under the age of 18, in the same way as biological weapons is a way forward.¹⁹⁸

8.1 De lege lata

The first time the use of children in armed conflicts was legislated was in AP I and II to the GC in 1977, followed by the CRC in 1989, the ILO Convention 182 in 1997, the Rome Statue in 1998 and OPAC in 2000. At the time of writing this thesis, it is over 23 years since the last binding international treaty on child soldiers was introduced, which is important to remember as society is constantly changing, and legislation does not always keep up. To reinforce the notion that children need to be protected in hostilities, the straight-18 approach has been a driving force along with the Paris- and Vancouver principles as well as customary law.

As found, different terms are used in the different provisions about children's participation in armed conflicts. The term *all feasible measures* in AD I¹⁹⁹ and CRC²⁰⁰ has been criticized to be vague and give the states a wide range of interpretations. Additionally, articles that only cover *direct* participation in hostilities leave room for indirect participation, which in turn provides weak protection for the child. Further, it can be highly criticized that the legislation distinguishes between forced and voluntary enlistment into armed forces. If a child voluntarily joins an armed group, it usually is because of other underlying reasons such as poverty, religion or ideologies. Children voluntarily participating in armed conflicts often have no other real choice. Therefore, Ryu emphasizes that voluntary recruitment must be viewed with critical eyes and suggest that the distinction should be eliminated.²⁰¹ Breen raises critique for international law to be vague and porous when it comes to different standards and provisions regarding the child's age. Looking at the consequences of children's participation in conflicts, the greatest level of protection for the longest period of time should be called for. Since the laws are not adopted like this, Breen argues that this aspect only shows a lack of commitment to securing children's rights.²⁰² There is no doubt that the diversity of

¹⁹⁸ Singer, *Children at war*, p.190.

¹⁹⁹ Article 77.2, AD I.

²⁰⁰ Article 38, CRC.

²⁰¹ Ryu, *Children in Armed Conflicts: Inconsistency of the laws, culpability, and criminal responsibility of child soldiers*.

²⁰² Breen, *When is a Child Not a Child? Child Soldiers in International Law.*, p.72.

provisions leaves much room for interpretation for both states and non-state actors. Breen highlights how this interpretive game-playing can mean the difference between life and death for a child in combat.²⁰³ A dead 16-year-old on the battlefield is still a dead child, regardless of a soldier or not.

The CRC strengthened children's rights in countless ways, giving children the right to life, survival and development, non-discrimination, respect and a peaceful world.²⁰⁴ Despite that, CRC has been widely criticized for its weak attempt to protect children from becoming soldiers, especially as it is an exhaustive treaty whose primary purpose is to protect children. As CRC applies to all persons under the age of 18, but the protection from being recruited into armed groups only applies to children under the age of 15, creating a gap in legislation to protect children aged 15-18. According to Ryu, this disharmony makes it further difficult to put an end to the recruitment of child soldiers.²⁰⁵ Breen argues that the outcome of Article 38 in the CRC reflects a "lowest common denominator" approach by the states which also leaves room for the interpretation and application of children's rights by setting the low age limit at 15 years.²⁰⁶ With that said, Article 38 of the CRC goes against all the other rights stated in the CRC, UDHR, ICCPR and ICESCR.

It has been discovered that the provisions for non-state actors are stricter than for state armed forces. A distinction again made that in practice means that not all children are equally protected, as it depends on the group they join or are recruited into. In OPAC, the provision prescribes that state militaries are not allowed to recruit children under the age of 18 into their forces, yet it is allowed for children to voluntarily join if they are between 16 and 18. For non-state actors, the age limit is 18 years, regardless form of recruitment. A limit that has been found frequently ignored by both governmental- and non-state armed forces.²⁰⁷ The fact that protection was also reduced for children with the adoption of Article 38 of the CRC as it only applies to states must be seen as a failure as AP II also includes non-state actors.

²⁰³ Ibid., p.87.

²⁰⁴ Articles 2, 3, 6, 12, CRC.

²⁰⁵ Ryu, *Children in Armed Conflicts: Inconsistency of the laws, culpability, and criminal responsibility of child soldiers*.

²⁰⁶ Breen, *When is a Child Not a Child? Child Soldiers in International Law*, p.87.

²⁰⁷ Sandoz, "Land Warfare", p.115.

In addition, ICC does not have jurisdiction to investigate and prosecute individuals under the age of 18 at the time of the alleged crime²⁰⁸, which hypothetically means that children older than 15 can voluntarily participate in hostilities as combatants, commit war crimes, crimes against humanity and genocide - but they cannot be prosecuted in the ICC for this. A child soldier should primarily be seen as a victim in accordance with the Paris Principles,²⁰⁹ making it even more contradictory to establish a framework allowing voluntary recruitment.

8.2 Convicting perpetrators

The adoption of the ICC was not only an achievement in the sense that the world received a permanent court for the gravest offenses internationally but also because the boundaries between IHRL and IHL were blurred, as the Court has jurisdiction to prosecute individuals who allegedly have violated international law. The Rome Statute provides the prohibition of conscription and enlistment of children under the age of 15 in armed forces. Criminal liability for recruitment includes any action that results in a child under the age of 15 being formally or de facto considered a member of a national armed force or armed group. As presented in the study, perpetrators have been convicted of the recruitment and use of child soldiers over the years in ICC. Unfortunately, the number of convictions is a fraction of all recruiters out there in the world.

As it has been discovered, international law is written by states, primarily for states. The conventions' ratification shows the State Parties' consent and willingness to follow the provisions, which has resulted in lack of sanctions for misuse, especially in human rights treaties. Since OPAC is the newest treaty on children in armed conflicts, which also binds non-state armed groups, it is unfortunate that it does not prescribe consequences for breaches. The only regulatory framework with sanctions for individuals who have violated international law regarding the recruitment and use of child soldiers is thus in the Rome Statute, which only covers the crime of recruiting children under the age of 15. Yet, as discovered, it is a war crime subjected to universal jurisdiction, meaning that domestic courts have the same jurisdiction as the ICC in those cases. However, despite it being prohibited for non-state armed forces to recruit children under the age of 18 in the

²⁰⁸ Article 26, Rome Statute.

²⁰⁹ The Paris Principles, 3.6.

OPAC, perpetrators who breach the provision cannot be convicted as the treaty does not have sanctions.

8.3 Court Case

The Court Case presented in this study was based entirely on international law, which means that the mother could have been tried in any other country as the principle of universal jurisdiction. The verdict could be interpreted as a great achievement as a parent has never before been convicted of war crimes for enabling his or her child to become a child soldier in Sweden. The case may have a precedent effect and guide other states to hold parents accountable for taking their children to armed conflicts where they are exposed to becoming child soldiers. It can also be argued that the Court broadened the interpretation of war crimes when it ruled that war crimes can be committed by omission, which is not explicitly stated in the text of the law. Yet, this does not change the fact that the age limit for child soldiers is still 15 years. Therefore, the verdict is in accordance with current legislation on child soldiers yet a failure due to the fact that the brothers were victims of the same crime despite the age gaps and only one of them was able to receive legal justice.

The case thus shows how the two frameworks of international law, IHL and IHRL, contradict each other. On one hand, human rights law prescribes an 18-year-old limit for non-state armed forces, and on the other hand, in humanitarian law the prohibition is set at 15 with sanctions for recruiters and enablers. In the end, this means that children between 15-18 who are recruited into non-state armed groups can never have their perpetrators convicted even though it is against their rights. The law is therefore inadequate in protecting children, the protection they possess by virtue of just being children.

The verdict also calls into question the distinction between forced and voluntary recruitment from another angle than presented above. In the Court Case, the child was 12 years old when he was recruited, but the prosecution only extends to the day he turned 15, even though continued to fight on the battlefield until his death when he was 16. Despite it being his mother who put him in the situation of becoming a child soldier, she could not be held responsible after he turned 15, which must be seen as noteworthy.

Ultimately, it is considered that the recruiter/enabler is only responsible for his/her action until the child reaches the age of 15. To then claim, that the child is there voluntarily is untenable as it was not a voluntary act to begin with. It seems unreasonable that legal responsibility should disappear after the child turns 15, as it may be very difficult for the child to get out of that situation. Moreover, the prosecutor's proposal to introduce a new law in Sweden prohibiting parents from taking their children to armed conflict means in practice that in such cases prosecutors will not have to investigate the war crime of child soldiering, which requires a high standard of proof. Instead, the very act of taking a child to an area of armed conflict would be illegal, a child under the age of 18.

If states cannot agree on the term childhood and when it ends due to cultural, religious, or political reasons, it should still be in the nature of the states to prohibit the use of child soldiers under the age of 18 by non-state actors. Non-state armed groups are most likely a threat to a state military, meaning that states should make all efforts of preventing child soldiers, under 18 years, in those groups. Therefore, the age in the Rome Statute for non-international armed conflicts should be raised to 18 for conscripting or enlisting child soldiers, to make it possible to prosecute perpetrators. That would also fulfill children's rights in the OPAC as the framework of protecting them already exists, but the lack of legal sanctions means that children's rights in the Protocol cannot be seen as rights, more as ideals.

With everything mentioned above it can be concluded that the current legislation on child soldiers is outdated when looking at the concrete situation of the accused mother in the Court Case. The Additional Protocols were written in a post-World War II era when internal armed conflicts were on the rise. The documents are thus ideas of history and if there is anything that is constantly changing, it is the evolution of society in terms of movements, warfare and politics. It cannot be in the interest of states to allow non-state groups to use child soldiers under the age of 18, especially not with today's threats with terrorism and guerilla groups. That being said, laws and regulations must change with the evolution of societies to be appropriate in contemporary society. Legislation must be renewed to raise the age limit to 18 for child soldiers for non-state actors so that more recruiters, enablers and supporters of child soldiers can be prosecuted for war crimes. It will be more challenging to raise the limit for state militaries, as the state sovereignty is

strong. At the end of the day, it is about protecting children, so it ought to be a limit to strive for.

9 Conclusions and discussion

The purpose of this study was to investigate the international legal response to the issue of recruitment and use of child soldiers between the ages of 15 and 18. In addition, to demonstrate the situation, a Court Case was studied to find out if current legislation is compatible with the contemporary world.

Although previous research has highlighted various inconsistencies in international law regarding child soldiers, this study, together with the Case Study, has demonstrated a concrete situation where the law did not protect a child. It is insufficient that the most comprehensive human rights treaty on children's rights recognizes all human beings under the age of 18 as children, but only those under the age of 15 have the right to not be part of armed hostilities. As legislation is defined today, it is not enough to protect children and their rights. Further, it must be considered rather paradoxical to state in the preamble to the UN Charter that children are the future, yet to establish a porous regulatory system for children's participation in combat, when combat is one of the worst things people can be exposed to.

The conclusion can be drawn that a person over the age of 15 who is participating as a soldier in battles, is not a *child* soldier in the meaning of the law but instead a soldier. Thus, the concept of child soldiers is only applicable to children between 0-15 years old. Yet, the soldier over the age of 15 and under 18, possesses all the other rights, protections and prohibitions a child has, and in times of battle, the special protection according to the Geneva Conventions and Additional Protocols. It is contradictory to prohibit children from buying liquor in stores, not let them vote in the parliament, take a driver's license or decide over their funds until they are 18 years old – but allow them to participate in armed conflicts.

Furthermore, given what has emerged in this study, the lack of legal sanctions for those who violate the rules must be considered a failure as well. The provisions of OPAC are the most protective of children's rights in armed conflict, but the rules must be seen as ideals rather than obligations. Children subjected to forced recruitment who are older than 15 years old can never have their rights recognized in a court of law. Challenges inherent in international law are that it primarily reaches states, but since the Rome Statute has the

jurisdiction to prosecute individuals who have violated international law, there should be no obstacles to raising the age limit from 15 to 18 so that recruitment of child soldiers between 15 and 18 years of age also constitutes a war crime. If states have political issues with not being able to agree on the age limit for national forces, they should still have a common interest in ensuring that non-state actors do not use children under the age of 18.

To conclude this study, the legal international framework aimed at protecting children from being recruited and used as child soldiers in armed conflicts is not sufficient. It is vague, inconsistent and contradictory. In order to protect all children in armed conflicts, their rights must be equal and the same regardless of age. Making a distinction between children aged 0-15 and 15-18 in armed conflicts cannot be adequate with the protection of children's rights or the best interest of the child - because then is a child no longer a child when it comes to the battlefield.

The research process has been interesting but at the same time challenging as it deals with a difficult and tragic subject. Much knowledge has been acquired both about the international regulatory framework and its complexity as state sovereignty will always prevail. The political and cross-border inability to agree on protecting children's rights is deeply tragic. The work has been continuous throughout the writing process. The prime issue has been staying within the word count, as this study could easily have been twice as long as there is so much to write. Much of the previous research has been confirmed in this study, but what has been newly discovered is how the law concretely violates children's rights in combat through the Court Case. It must be seen as completely unjustified and unwarranted that it is legal for a parent to make their 15-year-old a soldier, but to do so to their 14-year-old is illegal. Therefore, an important finding is that legislation on child soldiers is outdated given how terrorism has been a driving force in recent years.

9.1 Future research

The suggestion for future research is to deepen the issue of the distinction between forced and voluntary recruitment of child soldiers, as this distinction has been criticized from several sources. Also, it would be interesting to explore the use of child soldiers by non-

state groups or only by state groups. Furthermore, as this study has addressed the legal discipline of child soldiers and how perpetrators can be held accountable for their crimes, it would be of interest to examine the root causes of why child soldiers exist, e.g., through economic, political or social disciplines.

Bibliography

Treaties

Charter of the United Nations, 1945.

Convention on the Rights of the Child. General Assembly resolution 44/25. 20 November 1989.

Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. International Committee of the Red Cross, Geneva, 12 August 1949.

Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. International Committee of the Red Cross, Geneva, 12 August 1949.

Geneva Convention (III) relative to the Treatment of Prisoners of War. International Committee of the Red Cross, Geneva, 12 August 1949.

Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War. International Committee of the Red Cross, Geneva, 12 August 1949.

International Covenant on Civil and Political Rights. General Assembly resolution 2200A(XXI). 16 December 1966.

International Covenant on Economic, Social and Cultural Rights. General Assembly resolution 2200A (XXI). 16 December 1966.

Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict. International Committee of the Red Cross, General Assembly resolution A/RES/54/263. 25 May 2000.

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I). International Committee of the Red Cross, 8 June 1977.

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II). International Committee of the Red Cross, 8 June 1977.

Rome Statute of the International Criminal Court, Rome 17 July 1998.

Universal Declaration of Human Rights, Paris, 10 December 1948.

Worst Forms of Child Labour Convention, (Convention 182), 1990.

Vienna Convention on the Law of Treaties, Vienna on 23 May 1969.

Articles and reports

Breen, Clarie. *When is a Child Not a Child? Child Soldiers in International Law*. Human Rights Review, January-March 2007, pp.71-103.

Gee, David. *Why 18 Matters: A Rights-Based Analysis of Child Recruitment*. Save the Children. ResearchGate, May 2018.

Haer, Roos. 2018. *Children and armed conflict: looking at the future and learning from the past*. Institute of Political Science, Leiden University, Leiden, The Netherlands.

Ramgoolie, Monique. *Prosecution of Sierra Leone's Child Soldiers in What message is the UN trying to send?* Journal of Public and International Affairs 12, 2001, p.145-162.

Ryu, Kevin. *Children in Armed Conflicts: Inconsistency of the laws, culpability, and criminal responsibility of child soldiers*, 2018. Peace & Conflict Monitor, 6/7/2016, Political Science Complete.

Save the Children, *Stop the war on children: Protecting children in the 21st-century conflict*, 2019.

Save the Children, *Time to end grave violations against children in conflict*, 2018.

Swedish Defence University, *Swedish Foreign Fighters in Syria and Iraq*, 2017.

Principles

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

The Vancouver Principles on Peacekeeping and the Prevention of the Recruitment and Use of Child Soldiers, 2017.

General comments

Commentaries, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

Commentaries, Protocol Additional to the Geneva Conventions of 12 August 1949, and relation to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

United Nations, General comment no.5 (2003): General measures of implementation of the Convention on the Rights of the Child.

Literature

Ang, Fiona, *Article 38: children in armed conflicts*, Martinus Nijhoff, Leiden, 2005.

Bantekas, Ilias & Oette, Lutz, *International human rights law and practice*, Third edition, Cambridge University Press, Cambridge, 2020.

Bring, Ove, Klamberg, Mark, Mahmoudi, Said & Wrangé, Pål, *Sverige och folkrätten*, Sjätte upplagan, Norstedts Juridik, Stockholm, 2020.

Clapham, Andrew., *Human rights obligations of non-state actors*, Oxford University Press, Oxford, 2006.

Sandoz, Yves. "Land Warfare" in Clapham, Andrew & Gaeta, Paola (red.), *The Oxford handbook of international law in armed conflict*, Oxford University Press, Oxford, 2014.

Fisher, David I., *Mänskliga rättigheter: en introduktion*, 6., [uppdaterade] uppl., Norstedts juridik, Stockholm, 2012.

Happold, Matthew, *Child soldiers in international law*, Manchester University Press, Manchester, 2005.

Henckaerts, Jean-Marie. & Doswald-Beck, Louise. (red.), *Customary international humanitarian law Vol. 1 Rules*, Cambridge University Press, Cambridge, 2005.

Hjertstedt, Mattias. "Beskrivningar av rättsdogmatisk metod: om innehållet i metodavsnitt vid användning av ett rättsdogmatiskt tillvägagångssätt" in: Mannelqvist, Ruth, Ingmanson, Staffan & Ulander-Wänman, Carin (ed.), *Festskrift till Örjan Edström*, Juridiska institutionen, Umeå universitet, Umeå, 2019, p.165–173.

D. Evans, Malcolm, *International law*, Fifth edition, Oxford University Press, Oxford, United Kingdom, 2018.

Kleineman, Jan. "Rättsdogmatisk metod". In: Korling, Fredrik och Zamboni, Mauro. (ed.) *Juridisk metodlära*. Lund: Studentlitteratur AB, 2013, p. 21–45.

Linderfalk, Ulf. "Folkrättens källor" in Linderfalk, Ulf (red.), *Folkrätten i ett nötskal*, Studentlitteratur, Lund, 2006

Melzer, "The Principle of Distinction Between Civilians and Combatants" in Clapham, Andrew & Gaeta, Paola (red.), *The Oxford handbook of international law in armed conflict*, Oxford University Press, Oxford, 2014.

Singer, P. W., *Children at war*, University of California Press, Berkeley, 2006.

Strömberg, Håkan & Melander, Göran, *Folkrätt*, 6. uppl., Studentlitteratur, Lund, 2003.

God forskningssed [Electronic resource], Reviderad utgåva, Vetenskapsrådet, Stockholm, 2017.

Swedish sources

Lag (2018:1197) om Förenta nationernas konvention om barnets rättigheter.

Lag (2014:406) om straff för vissa internationella brott.

Proposition 1997/98:182. Strategi för att förverkliga FN:s konvention om barnets rättigheter i Sverige.

Proposition 2013/14:146. Straffansvar för folkmord, brott mot mänskligheten och krigsförbrytelser.

SOU 2016:19. Barnkonventionen blir svensk lag.

Stockholm District Court, Case B 20218-20.

Electronic sources

ICRC, *what is the difference between IHL and human rights law?* 2015,

<https://www.icrc.org/en/document/what-difference-between-ihl-and-human-rights-law>, accessed: 03-05-2023.

ICRC, *Engaging Non-State Armed Groups on the Protection of Children*, 2012,

<https://casebook.icrc.org/case-study/engaging-non-state-armed-groups-protection-children>, accessed: 13-02-2023.

International Criminal Court, *Ongwen case: ICC Appeals Chamber confirms the conviction and sentencing decisions*, 2022, [https://www.icc-](https://www.icc-cpi.int/sites/default/files/CaseInformationSheets/NtagandaEng.pdf)

[cpi.int/sites/default/files/CaseInformationSheets/NtagandaEng.pdf](https://www.icc-cpi.int/sites/default/files/CaseInformationSheets/NtagandaEng.pdf), accessed: 27-03-2023.

International Criminal Court, *Prosecutor vs. Bosco Ntaganda*, 2021, [https://www.icc-](https://www.icc-cpi.int/sites/default/files/CaseInformationSheets/NtagandaEng.pdf)

[cpi.int/sites/default/files/CaseInformationSheets/NtagandaEng.pdf](https://www.icc-cpi.int/sites/default/files/CaseInformationSheets/NtagandaEng.pdf), accessed: 14-03-2023.

International Criminal Court, *The Prosecutor vs. Thomas Lubanga Dyilo*, 2021,

[https://www.icc-](https://www.icc-cpi.int/sites/default/files/CaseInformationSheets/LubangaEng.pdf)
[cpi.int/sites/default/files/CaseInformationSheets/LubangaEng.pdf](https://www.icc-cpi.int/sites/default/files/CaseInformationSheets/LubangaEng.pdf), accessed: 14-03-2023.

Motion till riksdagen, *Barnsoldater*, 2000,

<https://data.riksdagen.se/dokument/GN02U642>, accessed: 13-03-2023.

Open Society Justice Initiative, *The trial of Dominic Ongwen at the International Criminal Court*, 2016, <https://www.refworld.org/pdfid/58b0587e4.pdf>, accessed: 23-02-2023.

Platform for peace and humanity, *Children's Protection During Armed Conflict and the Criminal Responsibility of Child Soldiers*, 2022,

<https://peacehumanity.org/2022/02/17/childrens-protection-during-armed-conflict-and-the-criminal-responsibility-of-child-soldiers/>, accessed: 26-02-2023.

Robin Kirk, *The story behind "Straight 18" on child soldiers*, 2020,

<https://robinkirk.com/the-story-behind-straight-18-on-child-soldiers/>, accessed: 03-03-2023.

Rädda barnen, *Barnkonventionen – kort version*, [https://www.raddabarnen.se/rad-och-](https://www.raddabarnen.se/rad-och-kunskap/skolmaterial/barnkonventionen/barnkonventionen-kort-version/?TSPD_101_R0=088d4528d9ab20004c6fad9aa7554fa2583842d8da766ab5688101155989e9395f2c7f9d43b2ebfd08e02272b11430003526cc33febb1c106ef45ca8ca03e221f50439fe26c)

[kunskap/skolmaterial/barnkonventionen/barnkonventionen-kort-version/?TSPD_101_R0=088d4528d9ab20004c6fad9aa7554fa2583842d8da766ab5688101155989e9395f2c7f9d43b2ebfd08e02272b11430003526cc33febb1c106ef45ca8ca03e221f50439fe26c](https://www.raddabarnen.se/rad-och-kunskap/skolmaterial/barnkonventionen/barnkonventionen-kort-version/?TSPD_101_R0=088d4528d9ab20004c6fad9aa7554fa2583842d8da766ab5688101155989e9395f2c7f9d43b2ebfd08e02272b11430003526cc33febb1c106ef45ca8ca03e221f50439fe26c), 7-02-2023.

UNICEF, *Convention on the Rights of the Child*, <https://www.unicef.org/child-rights-convention>, accessed: 07-02-2023.

United Nations, *In landmark ruling, ICC finds Congolese warlord guilty of recruiting child soldiers*, 2012, <https://news.un.org/en/story/2012/03/406302>, accessed: 07-03-2023.

United Nations Treaty Collection, *OPAC*, 2023,

https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-b&chapter=4&clang=en#EndDec, accessed: 23-02-2023.