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To cite this article: Iuliia Kononenko (2016) Prohibiting the Use of Child Soldiers: Contested Norm in Contemporary Human Rights Discourse, Nordic Journal of Human Rights, 34:2, 89-103, DOI: [10.1080/18918131.2016.1200293](https://doi.org/10.1080/18918131.2016.1200293)

To link to this article: <http://dx.doi.org/10.1080/18918131.2016.1200293>



Published online: 12 Aug 2016.



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Prohibiting the Use of Child Soldiers: Contested Norm in Contemporary Human Rights Discourse

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ABSTRACT

The evolution of international instruments which address the phenomenon of child soldiers demonstrates the international legal community's endeavor to delineate childhood as a violence-free space, in need of special protection. This article explores the development of international legal thought and responses to the problem of child soldiers and addresses the research question: has the prohibition regime on child soldiers achieved the status of international customary law? This article will consider the development of legal responses within two domains of international law – International Humanitarian Law and International Human Rights Law – in light of the broader debate on the definition of childhood. This article outlines contested elements of the norms and legal documents and argues that though some key elements of the prohibition regime have attained the status of international customary law; there is a need to develop the international legal framework further and ensure a clear definition of the beneficiaries of the law.

KEYWORDS

International Customary Law; Child Soldiers; International Humanitarian Law; International Human Rights Law; International Criminal Court; Armed Conflict

I. International Law and Children Involved in Armed Conflict

And quite half of so called men were children – but I mean literally children of sixteen years old at the very most. I remember wondering what would happen if a Fascist aeroplane passed our way – whether the airmen would even bother. (George Orwell *Homage to Catalonia*)¹

International law is not rules. It is a normative system. (Rosalyn Higgins *Problems and Process*)²

As David Rosen observed, the concept of a child soldier seems ‘an unnatural conflation of two contradictory and incompatible terms.’³ Yet, historically, there have been few contradictions between the idea of the child and the life of the soldier. In the 19th century, Carl Clausewitz began his distinguished career in the Habsburg army as a lance corporal at the age of 12. A century later, George Orwell wrote about the Spanish Civil War where ‘here and there, in the militia you came across children as young as eleven, who had been enlisted as militiamen, as the easiest way of providing for them.’⁴ History abounds with

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¹George Orwell, *Homage to Catalonia* (Houghton Mifflin Harcourt, 1952) 29.

²Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford University Press, 1994) 1.

³David Rosen, *Armies of the Young: Child Soldiers in War and Terrorism* (Rutgers University Press, 2005) 8.

⁴Orwell (n 1) 26.

examples of children being recruited to join the armed ranks. However, the introduction of a humanitarian and human rights discourse in the middle of the 20th century has changed the perception of children in conflict, and has shaped treaties, protocols and rules that serve as the normative infrastructure for the protection of children in armed conflict.

The development of international legal thought and policy on the phenomenon of child soldiers has arguably evolved from challenging the appropriateness of the practice of enlisting children in legal documents, to enforcing a prohibition regime on children in armed conflict in the International Criminal Court (ICC). The ICC's first judgment, in which Lubanga, one of the leaders of rebel forces in the DRC, was found guilty of the crime of using children under 15 in his ranks and sentenced to 14 years' imprisonment, is a milestone of this development.⁵ This article will look at the development of international law on child soldiers through two prisms. The first prism that will shape the theoretical framework of this article is the perception advanced by Rosalyn Higgins that the law is a process and not simply a neutral application of rules.⁶ The second prism is the relationship between the development of legal instruments and the underpinning normative language behind it.⁷ In order to comprehend the practice of the law, there is a need to understand the evolution of the normative component of the law. The legal principles aimed at the prohibition of the practice of child soldiering and the normative components emphasising the abhorrent nature of the practice are inherently linked. The relationship between the norm and the law means that *lex lata* and *lex feranda* become mutually reinforcing rather than mutually exclusive. However, the norm on the prohibition of the use of child soldiers does not provide an explicit prescription for action. In fact, the norm abounds with contested elements that generate ambiguities regarding the international laws on children involved in armed conflict, and thus has an impact on policy outcomes. Hence, this article, by exploring the evolution of international legal thought and the legal solutions to the problem of child soldiers, deliberates the research question: has the prohibition regime on child soldiers achieved the status of international customary law?

The first section of the article will introduce the broader normative debate on the definition of childhood and its parameters. Positioning the development of legal responses to the problem of child soldiering within the universalism–relativism debate allows for the examination of whether there are points of convergence between these two perspectives which could lead to a more constructive dialogue and strengthen efforts to improve the international legal framework. The second section explores the development of legal responses within two domains of international law – international humanitarian law (IHL) and international human rights law (IHRL), and examines contested elements of

⁵*Prosecutor v Thomas Lubanga Dyilo* (Decision on Sentence) ICC-01/04-01/06, Trial Chamber I (10 July 2012).

⁶Higgins (n 2) 8.

⁷In the development of the explanation, the analysis benefited from the following research on international norms: Jeffrey Checkel, 'International Norms and Domestic Politics: Bridging the Rationalist–Constructivist Divide' (1997) *European J of Int Rel* 473; Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change' (1998) *Int Org* 867; James March and Johan Olsen, 'The Institutional Dynamics of International Political Orders' (1998) *Int Org* 943; Thomas Risse-Kappen, Stephen Ropp, and Kathryn Sikkink (eds), *The Power of Human Rights: International Norms and Domestic Change* (Vol. 66, Cambridge University Press, 1999); Ann Florini (ed), *Third Force: The Rise of Transnational Civil Society* (Carnegie Endowment, 2000); Thomas Risse, 'Transnational Actors and World Politics', in *Corporate Ethics and Corporate Governance* (Springer Berlin Heidelberg, 2007) 251; Anja Jetschke, *Human Rights and State Security: Indonesia and the Philippines* (University of Pennsylvania Press, 2011).

the norm. This article will scrutinise elements of customary law within the prohibition regime and how contested elements of the norm inhibit its further universalisation.

II. The Definition of Childhood: The Dialogue Between Local and Universal

We know nothing of childhood; and with our mistaken notions the further we advance the further we go astray. (Jean-Jacques Rousseau 'Emile: or, On Education')

The analysis of international legal responses to the issue of child soldiers demands an understanding of how the global community defines childhood. The normative language used to describe childhood is the key to defining the beneficiaries of legal protection. Contingent upon social context and actors within a given political space, childhood is to be understood as a social construction, based on conventions and not on the natural state.⁸

A variance in the perception of childhood is not only a matter of cultural differences but also a reflection of the level of economic and social development of a society. In the historical analysis of the concept of childhood in the West, Philippe Aries demonstrated how the modern idea of childhood was non-existent until the beginning of the 17th century. Aries emphasises that 'awareness of the particular nature of childhood was lacking' and acknowledged the innocence of a child as something that had to be preserved.⁹ It was not until the major technological advances in Western Europe which contributed to the increase in life expectancy and decrease in the child mortality that the concept of childhood gradually started to emerge out of darkness. This resonates with Donnelly's observation that human rights do not stem from Western cultural roots but from the 'social, economic and political transformations of modernity' and 'therefore have relevance wherever those transformations have occurred.'¹⁰

The universalist perception of childhood is founded on three elements. First, 18 years old is defined as a dividing line between childhood and adulthood.¹¹ Innocence and vulnerability are two other existential characteristics of a child which endow children with a right to special protection.¹² These three elements define distinct reasons to protect children in time of peace and armed conflict. The universalist perception of childhood, embedded in the Convention on the Rights of the Child (CRC),¹³ has generated a paradoxical understanding of the concept of the agency granted to children. On the one hand, a child is recognised as a bearer of rights (economic, social and cultural rights, but not political).¹⁴ On the other hand, children can exercise agency only to a certain extent, and most importantly, only within a legal and normative discourse by which they can demand attention, though not redefine their status.¹⁵

Cultural relativism argues that childhood cannot be perceived outside of the cultural and societal context as it will ignore the diversity of children's experiences and the mul-

⁸Chris Jenks, *Childhood: Key Ideas* (London and New York: Routledge, 1996) 60.

⁹Philippe Aries, *Centuries of Childhood: A Social History of Family Life* (Knopf, 1962) 128.

¹⁰Jack Donnelly, 'The Relative Universality of Human Rights' (2007) 29 *Human Rights Quarterly* 281, 287.

¹¹*Convention on the Rights of the Child* (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 art 37(a).

¹²Charli Carpenter, *Innocent Women and Children: Gender, Norms and the Protection of Civilians* (Ashgate Publishing, 2006) 26.

¹³*Convention on the Rights of the Child* art 4.

¹⁴*Ibid.*

¹⁵Jenks (n 8) 124.

tiplicity of responses to violations of children's rights.¹⁶ The cultural relativist argument is substantially based on a wide body of anthropological research, which claims that a plurality of childhoods exists; each culturally codified and defined by age, ethnicity, gender, history, etc. The possibility of the existence of 'multiple childhoods residually abounding within and among societies and localities'¹⁷ conflicts with the attempt to reach a universal understanding of the phenomenon and thus generates a cultural relativism–universalism controversy. An anthropological perspective advances a distinct understanding of children's agency, emphasising children's role as active participants in society.¹⁸ This perspective argues against the universalised conception of childhood by focusing on two contended issues. First, cultural relativists consider age as an inflexible, rigid criterion that supersedes other markers which may indicate the start of adulthood.¹⁹ David Rosen provides examples of ethnographic records that show there is no single, fixed chronological age at which young people are found on the battlefield. The practice of initiation of adolescents, also known as a rite of passage in which they earn status as warriors, is common in many traditional societies. By some estimates, males aged 13 to 14 would be deemed potential warriors in the majority of so-called traditional societies.²⁰ Second, cultural relativists aim to emphasise the concept of a child's agency by rejecting the conceptualisation of childhood as a realm of absolute vulnerability and incompetence. Cultural relativists argue that these characteristics undermine children's resilience and weaken their coping capabilities.²¹ Furthermore, in terms of the protection of children involved in armed conflict, these characteristics generate a representation of children as 'helpless victims' or 'weapons of wars'²² which may affect their potential reintegration into society.

However, child soldiering is not a localised phenomenon. Children are being recruited on a massive scale as a part of military strategy and are becoming an integral part of armed forces.²³ Terrorist organisations such as Boko Haram²⁴ and the Islamic State of Iraq and Levant²⁵ recruit children (often through abduction) and establish training camps to prepare them for future service, citing religious or cultural justifications for recruiting them. This practice begs the question whether culture is being manipulated for the justification of conscripting children.

In order to prevent the recruitment and use of child soldiers and ensure punishment of perpetrators, international law is dependent on the continued development and

¹⁶Joe Boyden, 'Children under Fire: Challenging Assumptions about Children's Resilience' (2003) 13 *Children Youth and Environments* 1, 16.

¹⁷Mark Drumbl, *Reimagining Child Soldiers in International Law and Policy* (Oxford University Press, 2012) 46.

¹⁸Rosen (n 3) 134.

¹⁹Drumbl (n 17) 46.

²⁰Rosen (n 3) 111.

²¹Boyden (n 16) 20.

²²Michael Wessells, *Child Soldiers: From Violence to Protection* (Harvard University Press, 2006); Paul Singer, *Children at War* (University of California Press, 2006); Romeo Dallaire, *They Fight Like Soldiers, They Die Like Children: The Global Quest to Eradicate the Use of Child Soldiers* (Random House LLC, 2010).

²³The recent study of Bernd Beber and Christopher Blattman (2010) performed rigorous qualitative study and provided cross-country to demonstrate the massive scale of child soldiers' recruitment as in half of the groups, at least 20 percent of recruits were aged 14 or younger and at least 40 percent of recruits were aged 17 or younger. Moreover, since 2000, United Nations Office of Special Representative on Children and Armed Conflict publishes Annual Reports on situation of children in armed conflict thus providing qualitative data on the issue. Reports can be accessed at: <<https://childrenandarmedconflict.un.org/virtual-library/>>

²⁴Bayo Oladeji, 'Boko Haram Using Child-soldiers, Women as Human Shields', *Leadership* (14 November 2014). Accessed at: <<http://leadership.ng/news/390115/boko-haram-using-child-soldiers-women-human-shields>>

²⁵Reiassa Su, 'Child Soldiers Become Integral Part of ISIS Army', *CBS* (24 October 2014). Accessed at: <<http://www.cbsnews.com/news/child-soldiers-become-integral-part-of-isis-army/>>

enforcement of coherent standards of childhood.²⁶ There is an urgent need for a common denominator on the definition of childhood as a first step in the process of the universalisation of a prohibition regime. Protection space cannot be constructed without agreed upon limits; without clear definitions of the beneficiaries of the law.

The second missing link in the cultural relativism–universalism dialogue is an understanding of child soldiering as a dynamic phenomenon in which children’s status and agency may change. Children who are recruited into the armed forces could undergo a metamorphosis from the status of ‘disoriented and highly impressionable youngsters into effective combatants.’²⁷ Child soldiering is a time-bound phenomenon and the interests of children should be assessed depending on the time of the conflict and their position within the strife.

The third step involved recognition that local knowledge and practices are indispensable in the development of reconciliation and reintegration programs for former combatants.²⁸ Only dialogue between norm makers (eg international organisations and transnational non-governmental organisations) and norm takers (eg community leaders, local NGOs, regional organisations, etc.) will endow pro-universalist advocates with credibility and improve enforcement of the law.

The debate between cultural relativists and universalists demonstrates the need for international law to reconcile claims which recognise children’s agency and their ‘power to construct their own place in the world’²⁹ with universalist aspirations and language. The key questions of the debate, eg how to define parameters of childhood and the criteria for demarcation between adulthood and childhood, will reemerge in the course of development of international law on the protection of child soldiers.

III. Children in Armed Conflict Between International Humanitarian Law vs International Criminal Law and Human Rights Law

III.i International humanitarian law: How to remove children from the battlefield

There is a plethora of international legal instruments designed to prevent children’s involvement in armed conflict.³⁰ The development of legal responses to the problem of child soldiering has been generated within two domains of international law: international humanitarian law and the international law on human rights. The inconsistencies

²⁶Donnelly (n 10) 281.

²⁷Richard Maclure and Myriam Denov, “I didn’t want to die so I joined them”: Structuration and the Process of Becoming Boy Soldiers in Sierra Leone’ (2006) 18 *Terrorism and Political Violence* 119, 127.

²⁸Susan Shepler, ‘The Rites of the Child: Global Discourses of Youth and Reintegrating Child Soldiers in Sierra Leone’ (2009) 4 *J of Human Rights* 197, 209.

²⁹Mary John, ‘Children’s Rights in Free Market Culture’, in Sharon Stephens (ed) *Children and the Politics of Culture* (Princeton, NJ: Princeton University Press, 1995) 133.

³⁰*Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts* (adopted 8 June 1977, entry into force 7 December 1978) 1125 UNTS 3 (Protocol I), art 77(2); *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts* (adopted 12 December 1977, entry into force 7 December 1978) 1125 UNTS 609 (Protocol II), art 4; *Convention on the Rights of the Child* (n 11) art 4; UN General Assembly, *Rome Statute of the International Criminal Court* (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90, art 8(2)(b)(xxvi); *Optional Protocol II to the Convention on the Rights of the Child on the involvement of children in armed conflict* (adopted 25 May 2000, entered into force 12 February 2002) UN Doc A/RES/54/263; UN Children’s Fund, *The Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups* (adopted February 2007).

between these two corpuses of law engender a fractured view of child soldiers. Children in armed conflict are put in a legal crossroad, where the development of a normative framework is caught between two competing corpuses of law.

Common Article 3 of the Geneva Conventions³¹ is generally accepted as *lingua franca* for international and non-international armed conflicts. Though the article extends a certain minimum of humanitarian protection to non-combatants and to the sick and wounded in both international and non-international armed conflicts, it does not precisely address the issue of children involved in armed conflict.³² However, the processes of decolonisation that have swept the globe and ensuing conflicts have drawn more attention to the phenomenon of child soldiers.³³ To endow the Geneva Conventions with more specific instruments and enforcement strategies to address the issue of child soldiering, specific articles were included within the Additional Protocols when they were adopted in 1977. Article 77 (2) of Protocol I imparts a basic definition of the term child soldier:

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.³⁴

Article 4(3) of Protocol II, referring to conflicts of a non-international nature, basically reflects the ideas and concepts defined in Protocol I.³⁵

The drafters of the second Protocol specifically noted that there is no precise definition of the term 'child' in international law.³⁶ IHL has a limited purpose to govern the conduct of parties involved in an armed conflict and is not intended to be a children's rights instrument. Moreover, it has always strived to attain a compromise between humanitarian and military objectives.³⁷ In drafting the Protocol, the determination of an age-limit for the recruitment of children gave rise to lengthy discussions, but the age of 15, 'proposed on the basis of realistic considerations' was ultimately adopted.³⁸ As such, the legal definition

³¹Article 3 is common for all four Geneva Conventions and can be found in *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (adopted 12 August 1949, entry into force 21 October 1950) 75 UNTS 31 (First Geneva Convention); *Geneva Convention or the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* (adopted 12 August 1949, entry into force 21 October 1950) 75 UNTS 85 (Second Geneva Convention); *Geneva Convention Relative to the Treatment of Prisoners of War* (adopted 12 August 1949, entry into force 21 October 1950) 75 UNTS 135 (Third Geneva Convention); *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (adopted 12 August 1949, entry into force 21 October 1950) 75 UNTS 287 (Fourth Geneva Convention). Specifically, on protection of civilians, article 3 states: '1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and any place whatsoever with respect to the abovementioned persons.'

³²Joseph N Madubuike-Ekwe, 'International Legal Standards Adopted to Stop the Participation of Children in Armed Conflicts' (2005) 11 *Annual Survey of Int & Comp L* 29, 36.

³³David Rosen, 'Who is a Child – The Legal Conundrum of Child Soldiers' (2009) 25 *Conn J Int L* 81, 84.

³⁴See Geneva Convention, Protocol I, art 77(2).

³⁵See Geneva Convention, Protocol II, art 4 (3(c)): 'children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities'.

³⁶Claude Pilloud et al (eds), *Commentary on the Additional Protocols: of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff Publishers, 1987) 902.

³⁷Carolyn Hamilton and Tabatha Abu El-Haj, 'Armed Conflict: The Protection of Children Under International Law' (1997) 5 *International J of Children's Rights* 1, 8.

³⁸Pilloud (n 36) 903.

of a ‘child soldier’ emerged prior to the legal notion of a ‘child’ being adopted within any international convention.

The adoption of the Additional Protocols sparked the international legal debate on the issue of child soldiering.³⁹ However, the Protocols did not put a complete prohibition on the use of children in armed conflict. As Fox summarises, there are three main limitations of article 77(2) of Protocol I.⁴⁰ First, the article makes a distinction between children who have attained the age of 15 and those who have attained the age of 18, which means that persons between ages of 15 and 18 are not explicitly protected by the Protocol. Second, the article only prohibits children’s *direct* participation in hostilities, which limits the type of recruitment covered by the international instrument.⁴¹ While recruited within the military ranks, child soldiers perform a diverse set of functions as sex slaves, cooks, guards, spies, mine sweepers, carriers, etc., and are not necessarily directly participating in hostilities. The article’s narrow definition means that these children are deprived of any special protection by this legal instrument.⁴² Third, the use of the term ‘all feasible measures’ instead of ‘all necessary measures’ limits the pressure on states to undertake preventive measures and/or unconditional obligations.⁴³

With its codification in the IHL Protocols, the recruitment of children in armed conflict received its initial international legal definition, with the call for ending its practice in international and non-international armed conflicts. However, the narrow definition of child soldiers neither settled the question of the age limit of those who are to be protected nor introduced a complete ban of the practice.⁴⁴ In the next sections, we shall see how other legal instruments addressed the issue and offered quite different definitions, resulting in the compartmentalisation of the norm and divergence in legal mechanisms addressing it.

III.ii. International criminal law: Prosecution as a form of prevention

The adoption of the Rome Statute (1998) marked an important development in the prohibition regime of the use of child soldiers. The Statute gave the International Criminal Court the jurisdiction to charge individuals of ‘conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.’⁴⁵ This definition uses language suitable for individual criminal responsibility as opposed to state responsibility. Although the Rome Statute adopted the IHL definition and age limit, the introduction of the wording ‘active participation’ in hostilities allowed attribution of individual responsibility for recruiting and using children in combat, but also with activities such as scouting, spying, sabotage, etc. Furthermore, ‘the Statute

³⁹Steven Freeland, ‘Mere Children or Weapons or War – Child Soldiers and International Law’ (2008) 29 *U of La Verne Law Rev* 19, 31.

⁴⁰Mary-Jane Fox, ‘Child Soldiers and International Law: Patchwork Gains and Conceptual Debates’ (2005) 7 *Human Rights Rev* 27, 34.

⁴¹Freeland (n 39) 37.

⁴²David Francis, ‘“Paper Protection” Mechanisms: Child Soldiers and the International Protection of Children in Africa’s Conflict Zones’ (2007) 45 *J of Modern African Studies* 207, 218.

⁴³Hamilton and Abu El-Haj (n 37) 38.

⁴⁴Amy Abbott, ‘Child Soldiers: The Use of Children as Instruments of War’ (1999) 23 *Suffolk Transnational L Rev* 499, 522.

⁴⁵*Rome Statute of the International Criminal Court* (n 30) art 8 (2)(b)(xxiv).

ends the distinction between domestic and international conflicts', opting to focus on individual responsibility.⁴⁶

Thomas Lubanga Dyilo was the first individual to be convicted by the ICC on charges of conscription of children under the age of 15 years into the *Force patriotique pour la libération du Congo* (FPLC) with the aim of using them as combatants. The verdict vividly delineates how children could be employed as instruments of war in a systematic manner. The text of the judgment shows how international legal instruments may be used to enforce a prohibitive regime on child soldiers.

The judgment emphasised that the accused 'provided an essential contribution to the common plan that resulted in the commission of the relevant crime.'⁴⁷ Therefore, the sentencing judgment proves the personal responsibility of Lubanga 'to conscript, enlist, or use children under the age of 15 to participate actively in hostilities.'⁴⁸ Lubanga was not a cog in the FPLC military establishment, and the ICC Trial Chamber demonstrated that:

... as the Commander-in-Chief of the army and its political leader ... he was informed, on a substantive and continuous basis, of the operations of the FPLC. He was involved in the planning of military operations, and he played a critical role in providing logistical support, including providing weapons, ammunition, food, uniforms, military rations and other general supplies to the FPLC troops.⁴⁹

To indicate that the conscription of children during the conflict in the DRC was intentional, the Court drew attention to the evidence of a vast network of training facilities for child soldiers, not only in the DRC, but also across the border in Uganda. During the training children were subjected to punishment and, as the Court manifests, Lubanga was aware of the children's suffering. The judgment showed that the recruitment of children was not an idiosyncratic event or a culturally defined phenomenon, but part of a military strategy to 'build an army for the purpose of establishing and maintaining political and military control over the Ituri.'⁵⁰ Furthermore, the Court demonstrated that children's direct participation in hostilities constituted only a small fraction of their possible use and role in the armed forces:

The Chamber concluded in the Judgment that the evidence established beyond a reasonable doubt that during the period of the charges, recruitment by the UPC/FPLC of young people, including children under 15, was widespread, that a significant number of children were used as military guards and as escorts or bodyguards for the main staff commanders, and that children under 15 years of age were used by the UPC/FPLC in hostilities.⁵¹

The criminalisation of this practice on a global level was to play a deterrent role on would-be recruiters and to become a cornerstone in the prevention and ultimate prohibition of the use of child soldiers.⁵² However, though the Rome Statute 'came closest to establishing a universal legal standard,'⁵³ it only addressed the recruitment of children below the age of 15.

⁴⁶David Rosen 'Child Soldiers, International Humanitarian Law, and the Globalization of Childhood' (2007) 109 *American Anthropologist* 296, 305.

⁴⁷*Prosecutor v Thomas Lubanga Dyilo* (Decision on Sentence) ICC-01/04-01/06, Trial Chamber I (10 July 2012) 12.

⁴⁸*Ibid.*

⁴⁹*Ibid.* 15.

⁵⁰*Ibid.* 13.

⁵¹*Ibid.* 16.

⁵²Drumbl (n 17) 162–66.

⁵³Rosen, 'Child Soldiers' (n 46) 306.

While the IHL presents a regulatory framework aimed at preventing the recruitment of children, there is a void of rules applicable to the child soldiers' conduct.⁵⁴ While the issue of accountability of adult perpetrators does not posit any normative dilemmas, the question of child soldiers' accountability has become one of the silences of international law. Du Plessis inquires; 'how does the law deal with the crimes committed by children participants in times of armed conflict?'⁵⁵ International criminal law adopts a perception of children as victims,⁵⁶ and when it comes to questions of accountability, there is a lack of distinction between child soldiers who have varying degrees of active participation in hostilities, and who were recruited at different ages. If the ICC adopts a standard of law which does not include jurisdiction over persons under the age of 18, the recruitment of children in this 'responsibility free' age bracket could continue unchecked.⁵⁷ Moreover, avoiding addressing the issue of the accountability of child soldiers has an impact on achieving justice for the victims of an armed conflict. Neglecting to address the matter of criminal responsibility and liability also posits a problem of any further harmonisation between national and international legal practices; each state institutes its own limit of child accountability, which could be lower than the internationally recognised straight 18 level.⁵⁸

The development of legal instruments in the field of International Human Rights Law has led to a continued debate on the definition of childhood and the determination of the scope of protection, and has furthered the idea that obligations towards children involved in armed conflict extend beyond merely refraining and preventing their recruitment in the armed forces or armed opposition groups.⁵⁹

III.iii. International human rights law: Ascribing special protection to children in combat

The perception of the problem of child soldiers as a human rights issue is a new phenomenon. During the 20th century, the issue of children's rights in conflict became more widely recognised and was promoted within the international legal community.⁶⁰ Nevertheless, it was not until the 1990s when the rights of children in conflict were framed as a specific issue area.⁶¹ Systemic changes, triggered by the end of the Cold War, and the efforts of a broader human rights network (UN institutions and NGOs)⁶² generated the

⁵⁴Freeland (n 39) 27.

⁵⁵Max Du Plessis, 'Children under International Criminal Law' (2004) 13 *African Security Studies* 103, 107.

⁵⁶The issue of accountability of children while they are associated with armed forces analysed further by Diane Marie Amann, 'Calling Children to Account: The Proposal for a Juvenile Chamber in the Special Court for Sierra Leone' (2001) 29 *Pepperdine Law Review* 167; Du Plessis, (n 55) 103; Nienke Grossman, 'Rehabilitation or Revenge: Prosecuting Child Soldiers for Human Rights Violations' (2007) 38 *Georgetown J of Int L*; Matthew Happold, 'Child Soldiers: Victims or Perpetrators' (2008) 29 *University La Verne L Rev* 56; Freeland (n 39); Drumbl (n 17).

⁵⁷Grossman (n 56).

⁵⁸Happold (n 56).

⁵⁹Du Plessis (n 56) 109.

⁶⁰Zoe Moody, 'Transnational Treaties on Children's Rights: Norm Building and Circulation in the Twentieth Century' (2014) 50 *Paedagogica Historica* 151, 153.

⁶¹Charli Carpenter, 'Setting the Advocacy Agenda: Theorizing Issue Emergence and Non-emergence in Transnational Advocacy Networks' (2007) 51 *International Studies Quarterly* 103.

⁶²There is a range of international NGOs that are focused on the advancement of the norm on protection of children affected by armed conflict among them are Save the Children, Oxfam, War Child, etc; UN institutions that are concerned with this issue are UNICEF, UNHCR, OCHA, DPKO.

proliferation of IHRL instruments to address the problem of child soldiers. Scholars have mapped the evolution of the norm through several distinct stages,⁶³ which correspond to what Finnemore and Sikkink define as a 'norm lifecycle'.⁶⁴ At first, transnational advocacy networks framed the problem as a human rights issue, resulting in the seminal Graça Machel Report (1996), which described the impact of armed conflict on children and provided recommendations for the protection of children.⁶⁵ The findings from this report engendered the second stage of the norm lifecycle; the proliferation of international documents which addressed the issue of child soldiers from a human rights perspective.

The United Nations' Convention on the Rights of the Child is an example of an international human rights law instrument. The CRC was drafted in order to fill the gap in the international legal framework which lacked a comprehensive and fundamental corpus of laws concerned solely with the protection of children's rights.⁶⁶ However, it failed to become a 'proper vehicle for rewriting international humanitarian law'⁶⁷ in addressing the issue of children's involvement in armed conflict. Article 38 simply reiterates the need 'to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.'⁶⁸ Unfortunately, article 38 also used the phrasing 'feasible measures', which limits states' responsibility to prevent the recruitment of child soldiers. In addition, the article only mentions children who directly participate in hostilities. Moreover, article 38 employed the term 'person' instead of 'child', which means that this human rights instrument defines a '15-year age minimum for child soldiers while in all other respects the CRC's general definitions of a child is any person below the age of 18'.⁶⁹ Hence, in its definition of a child soldier, article 38 repeated key elements of Additional Protocol I without addressing its ambiguities and weak points. Thus, the creation of Optional Protocol II (OP II) to the CRC, concerned primarily with children's involvement in armed conflict, was inevitable to correct the CRC's failure to create a specific human rights legal instrument for children in armed conflict, and to meet the demands of numerous NGOs, such as Amnesty International, Human Rights Watch and Coalition to Stop the Use of Child Soldiers.⁷⁰ ILO Convention No 182, an example of another instrument of international human rights law in the domain of protection of child soldiers, designated children's involvement in armed conflict as the 'worst form of child labor'.⁷¹

Both OP II and the ILO Convention marked a new step in the expansion of a legal toolkit to address the phenomenon of child soldiering. These legal documents perceived a child involved in armed conflict not as an outcast but as an integral member of society, in need of rehabilitation and social integration.⁷² Additionally, the OP II extended

⁶³Works of Charli Carpenter and Tonderai Chikuhwa provide an account on the advancement of the norm on protection of children affected by armed conflict: Carpenter, 'Setting the Advocacy Agenda' (n 61) 103; Tonderai Chikuhwa, 'Evolution of the United Nation's Protection Agenda for Children: Applying International Standards', in Scott Gates and Simon Reich (eds), *Child Soldiers in the Age of Fractured States* (University of Pittsburgh Press: Pittsburgh, 2009).

⁶⁴Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change' (1998) 52 *Int Org* 887.

⁶⁵Graca Machel, *The Impact of War on Children* (New York: Palgrave, 1996).

⁶⁶Madubuike-Ekwe (n 32) 30.

⁶⁷Hamilton and Abu El-Haj (n 37 above) 31.

⁶⁸*Convention on the Rights of the Child* art 38(1).

⁶⁹Madubuike-Ekwe (n 32) 32.

⁷⁰Fox (n 40) 39.

⁷¹International Labor Organization, *Convention No 182 on the Worst Forms of Child Labour* (adopted 17 June 1999, entered into force 19 November 2000) 2133 UNTS 161 art 3(a).

⁷²*Ibid* art 7(b).

the legal protection for children recruited by non-state armed forces by stating that, 'armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years.'⁷³ The major accomplishment of the OP II was to acknowledge the complexity of the phenomenon of children's involvement in armed conflict and the necessity of designing a separate international legal instrument to address the problem. The Optional Protocol succeeded in amending and enhancing the legal definition of a child soldier by raising the age limit of forced recruitment for direct participation in hostilities to 18 and was perceived within the international community as a step forward on the road to stop children's involvement in armed conflict.⁷⁴ However, OP II seemingly contradicted the definition of a child soldier in IHL, because it did not explicitly prohibit voluntary recruitment. Articles 2 and 3 of OP II have the combined effect of 'raising the minimum age of compulsory recruitment to eighteen years, but allowing for voluntary recruitment of children.'⁷⁵ The Concluding Observations of the Committee of the Rights of the Child on reports, submitted from three key liberal democracies, Canada, the United Kingdom, and the United States, demonstrate how a lower baseline for the voluntary recruitment inhibits the establishment of a uniform legal standard for the protection of children.⁷⁶

The accepted doctrine has been that, in situations of armed conflict, humanitarian law serves as a *lex specialis* to human rights law.⁷⁷ The general principle is that a law governing a specific subject matter (*lex specialis*) overrides a law which only governs general matters (*lex generalis*).⁷⁸ The rules provided by humanitarian law are usually quite specific and designed to be interpreted and applied by military commanders, while human rights law applies to interactions between a state and its citizens, requiring the government to respect the individual's rights.⁷⁹ However, as stated by Droege the idea that 'human rights are entirely ill-suited for the context of armed conflicts is misleading.'⁸⁰ For example, the ICJ Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory considers three possible situations in which IHL and IHRL might interact: (i) some rights may be exclusively matters of IHL; (ii) others may be exclusively the concern of IHRL; (iii) others may be matters of both these branches of international law.⁸¹ Some might argue that human rights instruments have no application in times of armed conflict. However, an individual does not cease to have basic rights once an armed conflict begins.⁸² The ICJ outright rejected the position

⁷³Optional Protocol II to the Convention on the Rights of the Child on the involvement of children in armed conflict (adopted 25 May 2000, entered into force 12 February 2002) UN Doc A/RES/54/263 art 4(1).

⁷⁴Ibid.

⁷⁵Happold (n 56) 66.

⁷⁶See Committee on the Rights of the Child 'Concluding Observations: The United States of America' (15 June 2008) CRC/C/OPAC/USA/CO/1, Part I; 'Concluding Observations: Canada' (9 June 2006) CRC/C/OPAC/CAN/CO/1, paras 8–9; 'Concluding Observations: The United Kingdom and Northern Ireland' (7 March 2012) CRC/C/OPAC/COD/CO/1.

⁷⁷Ibid.

⁷⁸Antony Cassimatis, 'International Humanitarian Law, International Human Rights Law, and Fragmentation of International Law' (2007) 56 *Int & Comp L Quarterly* 623, 628.

⁷⁹Ibid 635.

⁸⁰Cordula Droege, 'Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict' (2007) 40 *Isr L Rev* 310, 335. See also International Court of Justice, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996, para 26.8; International Court of Justice, Legal consequences of the construction of a wall in the Occupied Palestinian Territory, Advisory Opinion, 9 July 2004, paras 102–106.

⁸¹Program on Humanitarian Policy and Conflict Research, 'From Legal Theory to Policy Tools: International Humanitarian Law and International Human Rights Law in the Occupied Palestinian Territory' (Harvard University, 2007) 8.

⁸²Cassimatis (n 78) 635.

that the International Covenant on Civil and Political Rights (ICCPR) could only be applied in peacetime.⁸³ As Heintze observes, the evaluation given in the ICJ Opinion clarified that human rights law, cannot be applied 'in an unqualified manner' to armed conflicts but has 'to be inserted into the structure of international humanitarian law in a sensitive manner.'⁸⁴ On the regional level, the European Court of Human Rights (ECHR) had also 'directly applied human rights law to the conduct of hostilities in non-international armed conflicts'⁸⁵ when examining human rights violations conducted during armed conflicts in Chechnya.

The example of the Convention of the Rights of the Child and its Optional Protocols demonstrates not only that IHL and IHRL overlap 'but also that, when examining which duties are incumbent on a State in times of armed conflict, it is not possible to avoid taking international human rights law into consideration.'⁸⁶ So, being put on a legal crossroad, the phenomenon of children's involvement in armed conflict requires cooperation between both IHL and IHRL.

IV. Conclusion

Inconsistencies between IHL and IHRL, especially in terms of the age of young combatants, has resulted in a lack of legal protection from recruitment into the armed forces or armed opposition groups for the most vulnerable age group (children from 15 to 18 years old). Moreover, these two legal instruments differ in terms of the legal protection for children who were so-called voluntarily recruited into the armed forces and those who perform military supportive roles (ie do not participate directly in hostilities).

These gaps and inconsistencies in the protective legal framework are reflected in the legal norm's evolution into international customary law. On the one hand, there is strong evidence that the prohibition of the use of children under the age of 15 in armed conflict has attained the status of custom. In 2004, the Appeals Chamber of the Special Court for Sierra Leone indicated that the prohibition on child recruitment 'had also crystallised as customary international law'⁸⁷ This judgment also emphasised that the continued illegal practice of child recruitment 'does not detract from the validity of the

⁸³Hans-Joachim Heintze, 'On the Relationship between Human Rights Law Protection and International Humanitarian Law.' (2004) 86 *Int Rev of the Red Cross* 792.

⁸⁴*Ibid* 794.

⁸⁵William Abresch, 'A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya' (2005) 16 *Eur J of Int L* 741, 748.

⁸⁶Heintze (n 83) 795.

⁸⁷*Prosecutor v Sam Hinga Norman - (Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment))*. Special Court for Sierra Leone, SCSL-2004-14-AR72(E). Appeals Chamber (31 May 2004), art 17. Article 50 of the Court is also of significant importance to the clarification of a customary character of law on the issue of child soldiering, asserting 'Custom takes time to develop. It is thus impossible and even contrary to the concept of customary law to determine a given event, day or date upon which it can be stated with certainty that a norm has crystallized. One can nevertheless say that during a certain period the conscience of leaders and populations started to note a given problem. In the case of recruiting child soldiers this happened during the mid-1980s. One can further determine a period where customary law begins to develop, which in the current case began with the acceptance of key international instruments between 1990 and 1994. Finally, one can determine the period during which the majority of states criminalized the prohibited behaviour, which in this case, as demonstrated, was the period between 1994 and 1996. It took a further six years for the recruitment of children between the ages of 15 and 18 to be included in treaty law as individually punishable behaviour. The overwhelming majority of states, as shown above, did not practise recruitment of children under 15 according to their national laws and many had, whether through criminal or administrative law, criminalized such behaviour prior to 1996.'

customary norm.⁸⁸ The Court also addressed the second component of customary law, that is *opinio juris*, asserting that, ‘states clearly consider themselves to be under a legal obligation not to practice child recruitment.’⁸⁹ The Study of the International Committee of the Red Cross (ICRC) is another source confirming the customary nature of these laws, which aim to prevent and eliminate the practice of child soldiering.⁹⁰ The study states that ‘the recruitment of children is prohibited in several military manuals including those which are applicable in non-international armed conflicts. It is also prohibited under the legislation of many States.’⁹¹ The study concludes that state practices establish the rules on the prohibition of children’s recruitment into the armed forces as a ‘norm of customary international law applicable in both international and non-international armed conflicts.’⁹² The position of the ICRC is of fundamental importance. The organisation is endowed with a mandate to work for ‘the faithful application of international humanitarian law applicable in armed conflicts’ and for ‘the understanding and dissemination of knowledge of international humanitarian law applicable in armed conflicts and to prepare any development thereof.’⁹³

Further critical evidence of these state practices is demonstrated in numerous resolutions of the United Nations Security Council (UNSC). Since 1999, the UNSC has passed nine resolutions⁹⁴ that created the normative infrastructure for the protection of children affected by armed conflict, thus providing ‘*sources formelles* – a recognised source of law in the form of state practice showing the existence of a custom.’⁹⁵ However, the UNSC has not only demonstrated evidence of this practice but also contributed to the alteration of the understanding of the norm and hence its identification as customary law. Through the adoption of a range of legally binding decisions, the UNSC was involved in the production of what Higgins designates as ‘*sources matérielles*’ of international law as they contribute to the clarification and development of law.⁹⁶ Recruitment of children into armed forces conflict has been gradually reconstituted as an issue which is seen as a direct threat to peace and security⁹⁷ and the prohibition of this practice is viewed as critical for the maintenance of international order. Along with Benin, France led negotiations which ensured the adoption of the 1612 Resolution in 2005, establishing the UN Security Council Working Group on child soldiers, which substantially contributed to the

⁸⁸Ibid.

⁸⁹Ibid art 51.

⁹⁰Jean-Marie Henckaerts, Louise Doswald-Beck, and Carolin Alvermann (eds), *Customary International Humanitarian Law: Rules. Vol. 1* (Cambridge University Press, 2005).

⁹¹Ibid 483.

⁹²Ibid 482.

⁹³Statutes of the International Red Cross and Red Crescent Movement, adopted by the 25th International Conference of the Red Cross, Geneva, October 1986, art 5(2)(c) and (g). The Statutes were adopted by the States party to the Geneva Conventions and the members of the International Red Cross and Red Crescent Movement. This mandate was first given to the ICRC by art 7 of the Statutes of the International Red Cross adopted by the 13th International Conference of the Red Cross, The Hague, 23–27 October 1928, and continuously amended.

⁹⁴United Nations Security Council (UNSC), *Security Resolution 2143* (7 March 2014) UN Doc S/RES/2143 reaffirming its resolutions: UNSC Res 1261 (25 August 1999) UN Doc S/RES/1261; UNSC Res 1314 (11 August 2000) UN Doc S/RES/1314; UNSC Res 1379 (20 November 2001) UN Doc S/RES/1379; UNSC Res 1460 (30 January 2003) UN Doc S/RES/1460; UNSC Res 1539 (22 April 2004) UN Doc S/RES/1539; UNSC Res 1612 (26 July 2005) UN Doc S/RES/1612; UNSC Res 1882 (4 August 2009) UN Doc; UNSC Res 1998 (12 July 2011) UN Doc S/res/1998; UNSC Res 2068 (19 September 2012) UN Doc S/RES/2068.

⁹⁵Rosalyn Higgins, ‘The United Nations and Lawmaking: The Political Organs’ (1970) *Am J of Int L* 38.

⁹⁶Ibid.

⁹⁷UNSC Report, *Cross-Cutting Report: Children and Armed Conflict* (2008) 4.

development of the legal framework.⁹⁸ The primary function of the new institution was to 'provide timely, objective, accurate and reliable information on the recruitment and use of child soldiers in violation of applicable international law.'⁹⁹ Through the dissemination of knowledge of the involvement of children in armed conflict as a threat to peace and security, fixed meanings and categories were altered.¹⁰⁰ This led to the adoption of new resolutions and ensured that the norm on the protection of children in armed conflict secured a firm place on the Security Council agenda.

On the other hand, the 'straight 18 position'¹⁰¹ on the issue of child soldiering defines beneficiaries of the international legal protection as children under 18; this is embedded in the Optional Protocol II and the non-binding Paris principles. The position has not reached the status of customary law at the international level, however, it has been exercising a greater influence in shaping states' policy-making processes. For instance, as a signatory of the OP II, the United States legislated the 'Child Soldier Prevention Act of 2008' which aims to implement a range of measures to prevent the recruitment and use of children in armed conflict, defining a child soldier in accordance with the 'straight 18 position.' The European Union has also been resolute in relying on human rights legal instruments in addressing this issue. Specifically, the EU designated the Paris Commitments definition as 'terminology accepted internationally',¹⁰² despite the document's non-binding nature. Incorporating this definition in its toolkit, the Council of the European Union became a 'policy entrepreneur'¹⁰³ on the issue of children in armed conflict.¹⁰⁴ Finally, the Special Representative of the Secretary-General on Children and Armed Conflict identified the recruitment of children as a serious issue,¹⁰⁵ and an increasing number of States have ratified the OP II and adopted its key premises in national legislation. The latter trend is evident in the Concluding Observations of the Committee on the Rights of the Child on the reports submitted by Iraq, the DRC, Sudan and the Philippines.¹⁰⁶ At the same time, the Observations reiteratively emphasise that the further development of the norm is contingent on three primary recommendations: (1) ensuring age verification in state armed forces;¹⁰⁷ (2) ensuring training of military personnel on the provisions of

⁹⁸Chikuhwa, 'Evolution of the United Nation's Protection Agenda for Children: Applying International Standards', in Scott Gates and Simon Reich (eds), *Child Soldiers in the Age of Fractured States* (Pittsburgh, University of Pittsburgh Press, 2009) (n 63) 44.

⁹⁹UNSC Res 1612 (26 July 2005) UN Doc S/RES/1612, 3.

¹⁰⁰Michael Barnett and Raymond Duvall, 'Power in International Politics' (2005) 59 *Int Org* 39, 57.

¹⁰¹In 1998 the Coalition to stop the use of Child Soldiers, a conglomeration of non-governmental groups, agreed on a specific goal: the adoption and implementation of international standard setting 18 as the minimum age of recruitment

¹⁰²Council of the European Union. *Revised Implementation Strategy of the Guidelines of the EU Guidelines on Children and Armed Conflict* (2010). This definition is used in documents that refer to the issue of child soldiers (adopted by both Council and Commission since 2007).

¹⁰³Helen Wallace, Mark A Pollack, and Alasdair Young (eds), *Policy-Making in the European Union* (OUP, 2009) 51.

¹⁰⁴It was the Council that adopted the initial Guidelines on Children and Armed Conflict in December 2003 that were revised in 2008. In order to operationalise provisions and bolster their enforcement mechanisms among member states, the Implementation Strategy on Guidelines for Children and Armed Conflict was designed in 2006, and amended in 2010. In order to underlie the role of crisis management operations in addressing the issue, which will be discussed further, the Checklist for the Integration of the Protection of Children affected by Armed Conflict in ESDP Operations was adopted in 2006.

¹⁰⁵UNSC 'Children and Armed Conflict. Report of the Secretary General' [2015] A/69/926-S/2015/409.

¹⁰⁶See CRC 'Concluding Observations: The Philippines' (15 July 2008) CRC/C/OPAC/PHL/CO/1; 'Concluding Observations: Sudan,' (8 October 2) CRC/C/OPAC/SDN/CO/1; 'Concluding Observations: Democratic Republic of Congo' (7 March 2012) CRC/C/OPAC/COD/CO/1; 'Concluding Observations: Iraq' (5 March 2015) CRC/C/OPAC/IRQ/CO/1.

¹⁰⁷See Concluding Observations: Sudan paras 19–22; Concluding Observations: Democratic Republic of Congo, paras 26–27; Concluding Observations: Philippines, para 17; Concluding Observations: Iraq, paras 21–22.

the OP II;¹⁰⁸ and (3) promoting the raising of the age of voluntary recruitment to 18 years.¹⁰⁹ While international law remains compartmentalised in its responses towards the issue of child soldiers, depending on their age, the 'trend line arcs toward the straight 18 position.'¹¹⁰

The evolution of international instruments to address the phenomenon of child soldiering clearly demonstrates an endeavor to delineate childhood as a space for the special protection that must be violence free. The continued conscription of children in military ranks by state and non-state armed forces presents one of the greatest challenges to this project. Law-creating processes have achieved some progress in establishing a prohibition regime on child soldiering, and key elements have attained the status of international customary law. At the same time, the ongoing changes in the interpretation and framing of the norm will continue to define the future of a prohibition regime. The resolution of the contested elements within the norm will determine the level and extent of protections for children involved in armed conflict.

¹⁰⁸See Concluding Observations: Sudan, para 13; Concluding Observations: Democratic Republic of Congo, paras 22–23; Concluding Observations: Philippines, para 14–15; Concluding Observations: Iraq, para 15.

¹⁰⁹See Concluding Observations: Sudan, paras 17–18; Concluding Observations: Philippines, paras 18–19; Concluding Observations: Iraq, paras 23–24.

¹¹⁰Drumbl (n 17) 5.