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Recruitment of Child Soldiers, Forced Marriage, and Customary International Law

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CASE WESTERN RESERVE UNIVERSITY
SCHOOL OF LAW

MEMORANDUM FOR THE LIBERIA WORKING GROUP

Issue: Recruitment of Child Soldiers, Forced Marriage, and Customary International Law

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J.D. Candidate, 2009
Fall Semester, 2007**

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I. Introduction and Summary of Conclusions

A. Scope

There is no doubt that officials in Liberia committed the acts of recruitment of child soldiers and forced marriage between 1991 and 2003. However, it is questionable whether or not these acts were crimes in Liberia during this time period. The principle of *nullum crimen sine lege* holds that a person cannot be criminally responsible for conduct that was not considered a crime at the time the conduct took place. Thus, in order to charge an accused with a crime, it must have been a crime at the time the accused committed the corresponding act. Even if the crimes of recruitment of child soldiers and forced marriage were not illegal under Liberian law at the time of the commission, the defense of *nullum crimen sine lege* can still be overcome if the crimes were violations of customary international law. This memorandum surveys the codified international law on recruitment of child soldiers and forced marriage. There are international covenants, United Nations Resolutions, and domestic laws that all outlaw these crimes. Although there are certainly strong arguments supporting the conclusion that the recruitment of child soldiers and forced marriage are not crimes under customary international law, overwhelming evidence suggests that both crimes became violations of customary international law between 1991 and 2003.

B. Summary of Conclusions

1. The recruitment of child soldiers became a violation of customary international law before 1991.

Various international human rights instruments and domestic laws passed before 1991 prohibit the recruitment of child soldiers. Some of the earlier instruments provide for the welfare of the child, and later instruments specifically address recruitment of child soldiers. These

instruments are evidence of both widespread practice and *opinio juris*. They form customary international law and proscribe the recruitment of child soldiers.

a. The recruitment of child soldiers under the age of fifteen became a crime under customary international law by 1991.

Early codified international law labels a child for the purposes of defining a child soldiers as a person under fifteen. The Fourth Geneva Conventions, Protocols I and II, the Convention on the Rights of the Child, the African Charter on Rights and Welfare of the Child, the International Covenant of Civil and Political Rights, and the Declaration on the Protection of Women and Children in Emergency and Armed Conflict were all passed before the end of 1991. In addition, countries passed domestic legislation criminalizing violations of the Geneva Conventions and domestic legislation outlawing the recruitment of soldiers under the age of fifteen. Thus, the recruitment of child soldiers under the age of fifteen crystallized into a crime under customary international law before the crime of recruiting persons less than eighteen years of age for armed forces did.

b. The recruitment of child soldiers under the age of eighteen became a crime under customary international law by 1991.

Even though the recruitment of persons under fifteen became a crime under customary international law before the recruitment of persons under eighteen did, it was still a crime under customary international law to recruit persons under eighteen for the armed forces by 1991. Although no international instruments were passed criminalizing the recruitment of persons over fifteen and less than eighteen, thirty-eight countries passed domestic laws setting the minimum age of recruitment at eighteen before 1991.

2. If the recruitment of child soldiers did not crystallize into a crime before 1991, then it did so before December 31, 1996.

The Organization of African Unity passed a Resolution prohibiting the recruitment of child soldiers during this time, and the Machel Report was passed by the General Assembly; more countries passed domestic laws prohibiting child recruitment as well. Arguably more important than international resolutions and domestic laws passed during this time was the judgment in *Prosecutor v. Norman*, which found the recruitment of child soldiers to be a crime under customary international law before November 1996.

3. If the recruitment of child soldiers did not crystallize into a crime by December 31, 1996, then it did so by December 31, 2003.

An important development in the crystallization of customary international law regarding child soldiers was the adoption of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict. This, along with other international developments like the adoption of the Rome Statute, the Cape Town Principles, the Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, the Latin American and Caribbean Conference on Use of Child Soldiers, and the General Assembly Resolution 51/77, further solidified the fact that the recruitment of child soldiers is a crime under customary international law.

4. Forced marriage crystallized into a crime under customary international law by 1991.

While few international documents directly prohibited forced marriage before 1991, many international documents prohibited sexual violence and gender discrimination. The Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, Convention on the Elimination of Discrimination Against Women, African Charter on Rights and Welfare of the Child, and the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages

were passed before 1991. Because forced marriage is in contravention of these more general prohibitions, the international community showed that customary international law proscribed forced marriage. Moreover, the fact that the right to marry is a prominent part of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights evidences that the international community agrees that forced marriages violate international law.

5. If forced marriage did not crystallize into a crime under customary international law by 1991, then it crystallized into a crime under customary international law by 2003.

States continued to pass laws and ratify international instruments that ban forced marriage between 1991 and 2003. The Declaration on the Elimination of Violence Against Women, the Rome Statute's Element of Crimes, and the Protocol of the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. In addition, the cases of Prosecutor v. Akayesu, Prosecutor v. Tadic, Prosecutor v. Kvočka, and Prosecutor v. Kunarac, Kovac, and Vukovic all occurred in this time period. This continued crystallization of customary international law further strengthens the argument that forced marriage was a violation of customary international law before 2003.

6. If a perpetrator forced a child into a marriage, the perpetrator can be charged with either recruitment of child soldiers or forced marriage.

The crimes of recruitment of child soldiers and forced marriage overlap. If a child is recruited into a military force to serve as a sexual slave, then the child can be considered a child soldier. The Cape Town Principles' definition of child soldiers specifically includes children in forced marriages. A prosecutor can decide to charge the perpetrator with the crime of recruitment of child soldiers or forced marriage or both. Because it is easier to prove that the

former crime had crystallized into a crime under customary international law by 1991, the prosecutor might want to choose to charge the perpetrator with recruitment of child soldiers.

II. Theoretical Background

A. In order to establish customary international law, there must be widespread state practice in accordance with a principle as well as a conception that the practice is required by existing law.

Customary international law is a combination of widespread state practice and *opinio juris*.¹ The International Court of Justice (“ICJ”) defines custom as “evidence of a general practice accepted as law.”² So long as sufficient evidence exists to demonstrate that a principle is customary international law, the principle becomes binding custom.³ In other words, binding customary international law can develop rapidly if there is enough state support. The ICJ went on to specify that

State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.⁴

Thus, as soon as states show general recognition that a legal obligation is involved, *opinio juris* exists. Importantly, if other states do not object to and begin to abide by this newly formed

* Are recruitment of child soldiers and forced marriage crimes under Customary International Law between 1991 and 2003? The Liberia Working Group anticipates charging accused with these crimes and wants to prevent the defense of *nullum crimen sine lege*.

¹ Anthony A. D’Amato, CONCEPT OF CUSTOM IN INTERNATIONAL LAW, 74 (1971) [reproduced in accompanying binders at Tab 74].

² Statute of the International Court of Justice, June 26, 1995, art. 38, 59 Stat. 1055, 1060, T.S. No. 993 [reproduced in accompanying binders at Tab 21].

³ *North Sea Continental Shelf* (F.R.G. v. Den. & Neth.), 1969 I.C.J. 3, para. 72 (page 42) (Feb. 28)) [reproduced in accompanying binders at Tab 62].

⁴ *Id.*, at para. 74 (page 42).

custom, then they officially agree to that new formation of customary international law.⁵

Predominant sources of articulated rules include treaties, UN General Assembly and Security Council Resolutions, and draft conventions of the International Law Commission.⁶

B. Customary international law negates the principle of *nullum crimen sine lege*.

The principle of *nullum crime sine lege*, or no crime without law, requires that there must be reason to believe that certain actions constituted a crime at the time the conduct occurred in order to hold a person criminally liable for it.⁷ The principle is included in the International Covenant on Civil and Political Rights, the European Convention on Human Rights, and the Universal Declaration on Human Rights.⁸ The purpose of the principle is to safeguard citizens from arbitrary government power and excessive judicial discretion.⁹

Different courts give the principle a more lenient or strict interpretation. The International Criminal Tribunal on the Former Yugoslavia in *Prosecutor v. Enver Hadzihasanovic et al.* decided that

⁵ Bin Cheng, *Custom: The Future of General State Practice In a Divided World*, IN THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY DOCTRINE AND THEORY 513, 539 (R. St.J. Macdonald & Douglas M. Johnston eds. 1983) [reproduced in accompanying binders at Tab 78].

⁶ Anthony A. D'Amato, CONCEPT OF CUSTOM IN INTERNATIONAL LAW (1971) at 86 [reproduced in accompanying binders at Tab 74].

⁷ Jordan J. Paust, M. Cherif Bassiouni, Sharon A. Williams, Michael Scharf, Jimmy Gurulé, Bruce Zagaris, INTERNATIONAL CRIMINAL LAW (1996) at 829, *citing* Theodor Meron, International Criminalization of Internal Atrocities, 89 Am. J. Int'l L. 554, 566 (1995) [reproduced in accompanying binders at Tab 76].

⁸ International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, 19 Dec. 1966, at art. 15 [reproduced in accompanying binders at Tab 13]; European Convention on Human Rights, Council of Europe, Rome, 4 Nov. 1950, at art. 7 [reproduced in accompanying binders at Tab 11]; Universal Declaration on Human Rights, GA Res. 217 A (III), 10 Dec. 1948, at art. 11(2) [reproduced in accompanying binders at Tab 27].

⁹ ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW (2003) at 142 [reproduced in accompanying binders at Tab 73].

in order to meet the principle of *nullum crimen sine lege*, it must only be foreseeable and accessible to a possible perpetrator that his concrete conduct was punishable at the time of commission.¹⁰

Importantly, solely the fact that an accused may not have foreseen the formation of a court with the power to try him for his crimes does not suffice for *nullum crimen sine lege*.¹¹ Interestingly, the Rome Statute requires an even stricter interpretation of the principle of *nullum crime sine lege*.¹² The concept that “a person shall not be criminally responsible [...] unless the conduct in questions constitutes, at the time it takes place, a crime”¹³ cannot be extended by analogy.¹⁴ Furthermore, in the International Criminal Court, it must be interpreted in favor of the accused.¹⁵

If customary international law prohibits a crime when the perpetrator acted, then charging and convicting him for this crime does not violate the principle of *nullum crimen sine lege* even if that act was not criminalized domestically at the time.¹⁶ A defense of *nullum crimen sine lege*

¹⁰ Prosecutor v. Enver Hadzihasanovic et al., Case No. IT-01-47-PT, Decision on Joint Challenge to Jurisdiction, Trial Chamber II (12 Nov. 2002) at para. 62 [reproduced in accompanying binders at Tab 66].

¹¹ Prosecutor v. Delalic et al., Case No. IT-96-21-T, Judgment, Trial Chamber II, (16 Nov. 1998) at p. 313 [reproduced in accompanying binders at Tab 65].

¹² Rome Statute of the International Criminal Court, 17 July 1998, Part. 3. General Principles of Criminal Law, Art. 22(2) [reproduced in accompanying binders at Tab 20].

¹³ *Id.*, at art. 22(1).

¹⁴ *Id.* at art. 22(2).

¹⁵ *Id.*

¹⁶ Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, 4 October 2000, UN doc. S/2000/915, para. 12 [reproduced in accompanying binders at Tab 32] ; *see also*, Robert Cryer, Of Custom, Treaties, Scholars and the Gavel: The Influence of the International Criminal Tribunals on the ICRC Customary Law Study, J. OF CONFLICT & SEC. L. 2006 11(2):239-263 [reproduced in accompanying binders at Tab 79].

cannot be invoked unless an accused reasonably believes that his conduct is lawful at the time he is committing it.¹⁷

III. Legal Background

A. The recruitment of child soldiers is the enlistment of a child into an armed group to actively participate in hostilities.

Some states define children as persons under eighteen, and other states define children as persons under fifteen. The age of fifteen is more widely accepted, but there are strong arguments for considering all persons recruited for armed services who are under eighteen to be child soldiers. The International Criminal Court's Elements of Crimes, adopted in 1997 at the Rome Conference, defines the crime of the recruitment of child soldiers as the following:

In order to be convicted of the crime of recruitment of child soldiers, the perpetrator must:

1. The perpetrator conscripted or enlisted one or more persons into an armed force or group or used one or more persons to participate actively in hostilities.
2. Such person or persons were under the age of 15 years
3. The perpetrator knew or should have known that such person or persons were under the age of 15 years.
4. The conduct took place in the context of and was associated with an armed conflict not of an international character.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.¹⁸

A non-governmental organization, Coalition to Stop the Use of Child Soldiers, defines a child soldier as:

¹⁷ Noah B. Novogrodsky, The Special Court for Sierra Leone, 7 SAN DIEGO INT'L L. J. (Spring 2006), at p. 434 [reproduced in accompanying binders at Tab 83].

¹⁸ Elements of Crimes for the International Criminal Court, UN doc. ICC-ASP/1/3, art. 8(2)(e)(vii) [reproduced in accompanying binders at Tab 9]; *see also*, Allison Smith, Child Recruitment and the Special Court for Sierra Leone, J. INT. CRIM. JUST. 2 (2004), 1141-1153 [reproduced in accompanying binders at Tab 85].

Any person under the age of 18 who is a member of or attached to government armed forces or any other regular or irregular armed force or armed political group, whether or not an armed conflict exists. Child soldiers perform a range of tasks including participation in combat, laying mines and explosives; scouting, spying, acting as decoys, couriers or guards; training, drill or other preparations; logistics and support functions, portering, cooking and domestic labour; and sexual slavery or other recruitment for sexual purposes.¹⁹

Regardless of the age difference between the two definitions, it is clear that in order to be a child soldier, a person must be recruited by an armed group.

No exact figures exist as to the number of child soldiers used during the Liberian civil war. This being said, U.N. agencies have estimated that 15,000 children were employed in the fighting between the years of 2000 and 2003.²⁰ It is believed that the opposition groups, Liberians United for Reconciliation and Democracy and the Movement for Democracy in Liberia, as well as governmental militias and paramilitary groups enlisted the aid of child soldiers.²¹

Human Rights Watch interviewed child soldiers in countries including Angola, Burma, Burundi, Colombia, the Democratic Republic of Congo, Lebanon, Liberia, Nepal, Sierra Leone, Sri Lanka, Sudan and Uganda.²² Specifically in Sierra Leone, there were an estimated 5400 child soldiers in 2000.²³ By 2002, an estimated 5,000 Ugandan children had been abducted from

¹⁹ Questions and Answers, Coalition to Stop the Use of Child Soldiers, <http://www.child-soldiers.org/childsoldiers/questions-and-answers> [reproduced in accompanying binders at Tab 98].

²⁰ Summary, Human Rights Watch, http://hrw.org/reports/2004/liberia0204/2.htm#_Toc61673953 [reproduced in accompanying binders at Tab 100].

²¹ *Id.*

²² Child Soldiers, Human Rights Watch, <http://www.hrw.org/campaigns/crp/index.htm> [reproduced in accompanying binders at Tab 94].

²³ U.N. chief recommends prosecuting Sierra Leone child soldiers, CNN.com, Oct. 5, 2000 [reproduced in accompanying binders at Tab 89].

their homes and communities.²⁴ These children subsequently have been forced into roles as child soldiers, laborers, as well as sexual slaves.²⁵

Child soldiers are recruited to commit unimaginable acts of violence.²⁶ The children are often given drugs, including marijuana, cocaine,²⁷ and a substance referred to as “brown-brown”, which is a mixture of cocaine and gunpowder.²⁸

B. A forced marriage is a marriage with the element of duress and the lack of free will.

In order to be a forced marriage, the elements of duress and lack of valid consent or free will must exist.²⁹ To help distinguish between forced marriages from tribal marriages, Karine Belair notes that forced marriages will lack the consent of the wife’s family and the payment of consideration.³⁰

²⁴ Child Soldiers, Human Rights Watch, <http://www.hrw.org/campaigns/crp/index.htm>. [reproduced in accompanying binders at Tab 94].

²⁵ *Id.*

²⁶ *See example*, John Sweeney, Boys taught to torture and maim, GUARDIAN UNLIMITED, May 21, 2000 [reproduced in accompanying binders at Tab 88].

²⁷ Drugged child soldiers flee S.Leone for Guinea, CNN.com, Aug. 11, 2000 [reproduced in accompanying binders at Tab 80].

²⁸ Alex Kuffner, Former teen soldier details horrors of Sierra Leone’s grisly civil war, PROVIDENCE JOURNAL Oct. 5, 2007 [reproduced in accompanying binders at Tab 81].

²⁹ Scharf, Michael and Mattler, Suzanne, "Forced Marriage: Exploring the Viability of the Special Court for Sierra Leone's New Crime Against Humanity" . Case Legal Studies Research Paper No. 05-35 Available at SSRN: <http://ssrn.com/abstract=824291> [reproduced in accompanying binders at Tab 92]; *see also*, 19 July 2007 - CRINMAIL 899 - Special edition on child marriage, Child Rights Information Network, http://www.crin.org/email/crinmail_detail.asp?crinmailID=2280#in [reproduced in accompanying binders at Tab]; Tim Moynihan, Guidelines for Helping Victims of Forced Marriages, PA NEWS, May 20, 2002 [reproduced in accompanying binders at Tab 82].

³⁰ Karine Belair, Unearthing the customary law foundations of "forced marriages" during Sierra Leone's civil war: the possible impact of international criminal law on customary marriage and women's rights in post-conflict Sierra Leone, COLUMBIA J. OF GENDER & L. (Sept. 2006) [reproduced in accompanying binders at Tab 77].

In Sierra Leone, the main perpetrators of sexual violence, including forced marriage, were rebel forces such as the Revolutionary United Front (RUF), the Armed Forces Revolutionary Council (AFRC) and the West Side Boys.³¹ There was widespread practice of combatants abducting women to be wives and forcing them to have sex and bear children.³² Forced marriages prevent women from educating themselves and obtaining a higher societal status.³³ Forced marriages also occurred in Rwanda between 1994 and 1998. The Rwandan Patriotic Army (RPA) was largely responsible for them.³⁴

IV. Substantive Legal Discussion

A. Recruitment of Child Soldiers

Although it is certainly possible to argue that the crime of recruitment of child soldiers crystallized into a crime under customary international law before 1991, there is also evidence of further crystallization after 1991. Accordingly, this memo first separates the international law criminalizing the recruitment of child soldiers before 1991, before 1996, and after 1996. The purpose of this division and the chronological order of this memo is to make it easier for a prosecutor who is trying to prosecute an accused for recruitment of child soldiers between 1991 and 2003. If a prosecutor charges somebody with recruitment of child soldiers in 1997, for example, the prosecutor can look at all the laws passed before that date to argue that the

³¹ We'll Kill you If You Cry, Human Rights Watch, hrw.org/reports/2003/sierraleone/ [reproduced in accompanying binders at Tab 91].

³² Angela Stephens, Forced Marriage Pursued As Crime in Sierra Leone Tribunal Cases, Global Policy Forum (Apr. 16, 2004), <http://www.globalpolicy.org/intljustice/tribunals/sierra/2004/0416marriage.htm> [reproduced in accompanying binders at Tab 86].

³³ *Id.* at 22

³⁴ Struggling to Survive: Barriers to Justice for Rape Victims in Rwanda, HUMAN RIGHTS WATCH, September 2004 Vol. 16, No. 10(A), available at, <http://hrw.org/reports/2004/rwanda0904/rwanda0904.pdf> [reproduced in accompanying binders at Tab 87].

recruitment was a violation of customary international law. The prosecutor can also look to all the laws passed after the date that the accused allegedly recruited child soldiers to see if there had been further crystallization after the date the alleged recruitment occurred.

In addition, while many international conventions and national laws are in agreement that the recruitment of child soldiers is a crime, the conventions and laws differ regarding the age a child must be in order to be considered a child soldier. Some legal instruments hold that only a person under fifteen is a child for the purposes of defining the crime of the recruitment of child soldiers.³⁵ Other international instruments, such as the Optional Protocol to the Convention on the Rights of a Child, hold that a person under eighteen is a child for the purposes of defining the crime of the recruitment of child soldiers.³⁶

Because of the two different maximum ages of children, this memo separates the law on recruitment of child soldiers before 1991 into the two separate categories. This is to highlight which laws apply to children less than eighteen years old and which laws only apply to children less than fifteen. Moreover, it is clear that the recruitment of children under fifteen to be soldiers became a violation of customary international law before the recruitment of children less than eighteen to be soldiers did. Thus, it will be easier to prosecute somebody for the recruitment of children under fifteen to be soldiers between the years of 1991 and 2003 than it will be to prosecute somebody for the recruitment of child soldiers under the age of eighteen.

³⁵ Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [reproduced in accompanying binders at Tab 5]; *see also*, 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) [reproduced in accompanying binders at Tab 17]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 1125 U.N.T.S. 609 (June 8 1977) [reproduced in accompanying binders at Tab 18].

³⁶ Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, May 25, 2000, U.N. GAOR, 54th Sess., U.N. Doc. A/RES/54/263 (2000) [reproduced in accompanying binders at Tab 15].

1. The recruitment of child soldiers was a violation of customary international law before 1991.

a. The recruitment of children under the age of fifteen was a violation of customary international law before 1991.

In the 1940s through 1970s, the international community passed many human rights instruments that protect children. The Fourth Geneva Convention prohibits the recruitment of children under the age of fifteen into the armed services.³⁷ The Fourth Geneva convention held that Parties should protect from the effects of war, the “wounded, sick and aged persons, children under fifteen, expectant mothers and mothers of children under seven.”³⁸ In addition, Parties were expected to ensure that children under fifteen did not become orphaned or separated from their families as a result of war.³⁹ Last, the “Occupying Power may not compel protected persons to serve in its armed or auxiliary forces.”⁴⁰

The International Covenant on Social and Political Rights indirectly prohibits the recruitment of child soldiers. Article 10 requires States to take measures to protect and assist children.⁴¹ In addition, children should be protected from economic and social exploitation, and children’s “employment in work harmful to their morals or health or dangerous to life or likely to

³⁷ Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 75 UNTS (195), 12 August 1949 [reproduced in accompanying binders at Tab 12].

³⁸ *Id.*, at art. 14.

³⁹ *Id.*, at art. 24.

⁴⁰ *Id.*, at art. 51.

⁴¹ International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, 19 December 1966, art. 10 [reproduced in accompanying binders at Tab 13].

hamper their normal development should be punishable by law”.⁴² Being a soldier exploits children and subjects them to conditions harmful to both their morals and health.

Although not specifically enumerating the recruitment of child soldiers, the Declaration on the Protection of Women and Children in Emergency and Armed Conflict, adopted in 1974, held that, “All forms of repression and cruel and inhuman treatment of [...] children, including imprisonment [...] and forcible eviction, committed by belligerents in the course of military operations or in occupied territories shall be considered criminal.”⁴³ The Declaration on the Protection of Women and Children in Emergency and Armed Conflict is a proclamation by the General Assembly and thus is an example of the codification of preexisting customary international law.

In 1977, the international community reiterated that children under fifteen could not be recruited into armed forces or groups.⁴⁴ Liberia ratified the Protocols.⁴⁵ Additional Protocol I requires State parties to take measures to prevent children under fifteen from participating in hostilities.⁴⁶ In addition, Protocol I requires states to treat children with “special respect” and to

⁴² *Id.*

⁴³ Declaration on the Protection of Women and Children in Emergency and Armed Conflict, GA Res. 3318(XXIX), 14 December 1974 [reproduced in accompanying binders at Tab 8].

⁴⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 U.N.T.S. 609, 8 June 1977, art. 4(3)(c) [reproduced in accompanying binders at Tab 18]; *see also*, 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, art. 77 [reproduced in accompanying binders at Tab 17].

⁴⁵ Legal Standards, Human Rights Watch (Feb. 2004) <http://hrw.org/reports/2004/liberia0204/9.htm> (Liberia acceded to Protocol I in 1954 and Protocol II in 1988) [reproduced in accompanying binders at Tab 102].

⁴⁶ 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, art. 77(2) [reproduced in accompanying binders at Tab 17].

protect them from “any form of indecent assault.”⁴⁷ Additional Protocol II prohibits the recruitment of children under fifteen into the armed forces and requires that special protection be given to children regarding of their participation in hostilities.⁴⁸

By 1989, the prohibition on child soldiers became almost universal. The Convention on the Rights of the Child requires State Parties to refrain from recruiting any person who has not attained the age of fifteen years into their armed forces.⁴⁹ The Convention now has the highest acceptance of all international conventions, with 191 State parties.⁵⁰

A year later, African states specifically showed their condemnation of the recruitment of child soldiers. The African Charter on the Rights and Welfare of the Child holds that, “States Parties to the present Charter shall take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain in particular, from recruiting any child.”⁵¹

Many countries’ domestic legislations outlaw the recruitment of child soldiers. Argentina’s Code of Military justice holds that a breach of a treaty provision that provides for special protection of children constitute war crimes.⁵² Similarly, Spain punishes anyone who

⁴⁷ *Id.*, at art. 77(1).

⁴⁸ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 U.N.T.S. 609, 8 June 1977, arts. 4(3)(c), 4(3)(d) [reproduced in accompanying binders at Tab 18].

⁴⁹ Convention on the Rights of a Child, GA Res. 44/25 of 20 November 1989, art. 38(3) [reproduced in accompanying binders at Tab 5].

⁵⁰ Prosecutor v. Norman, Decision on Preliminary Motion Based on lack of Jurisdiction (Child Recruitment), Case No. SCSL-2004-14-AR72(E) (May 31, 2004) at art. 14 [reproduced in accompanying binders at Tab 70].

⁵¹ African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990) at art. 22 [reproduced in accompanying binders at Tab 1].

⁵² Draft Code of Military Justice (1998), Article 292, introducing a new Article 876(4) in the Code of Military Justices, as amended (1951) (Argentina) *cited in*, Curiae Brief for Prosecutor, Prosecutor v.

breaches international treaty provisions that provide for the special protection of children.⁵³ Ireland's Geneva Conventions Act criminalizes the recruitment of child soldiers as well.⁵⁴ Norway's Military Penal Code subjects "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in ... the Geneva Conventions of 12 August 1949 ... [and in] the two additional protocols to these Conventions" to imprisonment.⁵⁵ Both Israel⁵⁶ and Mauritania⁵⁷ have domestic laws that make the minimum age at which a person can be recruited into armed forces between fifteen and seventeen before 1991.⁵⁸ Specifically, Switzerland is an example of a country that recognizes universal jurisdiction for the crime of the recruitment of child soldiers.⁵⁹ Since the 1990s, Switzerland's military courts had universal jurisdictions for cases involving violations of international humanitarian law; thus, "the recruitment, enlistment or use of child soldiers in

Norman, UNICEF (Nov. 2003) [*hereinafter* UNICEF Amicus Brief] [reproduced in accompanying binders at Tab 93].

⁵³ Penal Code (1995), Article 612(3) (Spain) [reproduced in accompanying binders at Tab 36]; *see also*, UNICEF Amicus Brief [reproduced in accompanying binders at Tab 93].

⁵⁴ Geneva Conventions Act, as amended (1962) (Ireland), Section 4(1) and (4); *see also*, UNICEF Amicus Brief, p. 18 [reproduced in accompanying binders at Tab 93].

⁵⁵ Military Penal Code, as amended (1902), § 108 (Norway), *cited in* UNICEF Amicus Brief, p. 18.

⁵⁶ 1986 National Defence Service Law (Israel), *cited in*, UNICEF Amicus Brief, ANNEX [reproduced in accompanying binders at Tab 36].

⁵⁷ 1962 Law on Recruitment of the Army (no 132/162) (Mauritania), *cited in* UNICEF Amicus Brief, ANNEX [reproduced in accompanying binders at Tab 36].

⁵⁸ To see the states that outlaw recruitment of child soldiers under the age of eighteen, see notes *infra* 65-103.

⁵⁹ Convention on the Rights of the Child, Summary Record of the 1082nd Meeting (Chamber A), CRC/C/SR.1082 (Jan. 2006) [reproduced in accompanying binders at Tab 29].

hostilities could be prosecuted in Switzerland even if the acts had been committed during an internal armed conflict in another country.”⁶⁰

b. The recruitment of children under the age of eighteen was a violation of customary international law before 1991.

Although the Convention on the Rights of the Child only prohibits the recruitment of child soldiers under the age of fifteen,⁶¹ the Convention encourages states to give priority to the oldest children if between the ages of fifteen and eighteen when recruiting children for armed forces, so if a state is not found to not be adhering to this, its leaders could be criminally liable for recruiting child soldiers.⁶² In addition, the Convention on the Rights of the Child defines a child as “every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier.”⁶³ Considering the fact that all States except two have ratified the Convention on the Rights of the Child, it is clear that the age of 18 is universally regarded to be the limit on childhood.⁶⁴

Many countries have domestic laws against the recruitment of child soldiers. The following countries set the age at which a person could be recruited for the armed forces at least at eighteen years of age before 1991: Armenia⁶⁵, Australia⁶⁶, Belize⁶⁷, Benin⁶⁸, Bhutan⁶⁹,

⁶⁰ *Id.*

⁶¹ Convention on Rights of the Child, GA Res. 44/25, 20 November 1989 [reproduced in accompanying binders at Tab 5].

⁶² *Id.*, at art. 38(3).

⁶³ *Id.*, at art. 1

⁶⁴ 191 State parties have ratified the Convention on the Rights of a Child.

⁶⁵ Law on Military Duty of 1991 (Armenia) [reproduced in accompanying binders at Tab 38], *cited in* UNICEF Amicus Brief, ANNEX [reproduced in accompanying binders at Tab 36].

Bolivia⁷⁰, Brazil⁷¹, Bulgaria⁷², Chile⁷³, China⁷⁴, Costa Rica⁷⁵, Cote d'Ivoire⁷⁶, Denmark⁷⁷, Egypt⁷⁸, El Salvador⁷⁹, France⁸⁰, Gabon⁸¹, Germany⁸², Guinea⁸³, Haiti⁸⁴, Indonesia⁸⁵, Iran⁸⁶,

⁶⁶ 1903 Defence Act (Australia) [reproduced in accompanying binders at Tab 39], *cited in* UNICEF Amicus Brief, ANNEX.

⁶⁷ 1977 Defence Ordinance (Australia), *cited in* UNICEF Amicus Brief, ANNEX.

⁶⁸ Law 63-5 of 30 May 1963 as amended by ordinance 75-77 of 28 November 1975 (Benin) [reproduced in accompanying binders at Tab 43], *cited in* UNICEF Amicus Brief, ANNEX [reproduced in accompanying binders at Tab 36].

⁶⁹ *See*, UNICEF Amicus Brief, ANNEX.

⁷⁰ Article 1 Decreto Ley 13-907 of 27 August 1976 (Bolivia), *cited in* UNICEF Amicus Brief, ANNEX.

⁷¹ Article 3 of Law 4.375 of 17 Aug 1964 (Brazil) [reproduced in accompanying binders at Tab 44], *cited in* UNICEF Amicus Brief, ANNEX [reproduced in accompanying binders at Tab 36].

⁷² 1195 Law on Defence and Armed Forces (Bulgaria) *cited in* UNICEF Amicus Brief, ANNEX [author is unable to locate the date of this Bulgarian law].

⁷³ Article 13 of the Law on Recruitment and Mobilisation of the Chilean Armed Forces (Decree Law 2.306 of 12 September 1978) (Chile), *cited in* UNICEF Amicus Brief, ANNEX.

⁷⁴ Section 12 of the 1984 Military Service Law (China), *cited in* UNICEF Amicus Brief, ANNEX.

⁷⁵ Article 12 of the Constitution (1949) (Costa Rica), *cited in* UNICEF Amicus Brief, ANNEX [Although UNICEF cites this article as prohibiting the use of child soldiers, the author believes the citation is incorrect. The English translation of Article 12 reads, "The Army as a permanent institution is abolished. There shall be the necessary police forces for surveillance and the preservation of the public order. Military forces may only be organized under a continental agreement or for the national defense; in either case, they shall always be subordinate to the civil power: they may not deliberate or make statements or representations individually or collectively."]

⁷⁶ 1961 Law (Cote d'Ivoire), *cited in* UNICEF Amicus Brief, ANNEX.

⁷⁷ 1980 National Service Act (Denmark), *cited in* UNICEF Amicus Brief, ANNEX.

⁷⁸ 1980 Military and National Service Act 127 (Egypt) [reproduced in accompanying binders at Tab 46], *cited in* UNICEF Amicus Brief, ANNEX [reproduced in accompanying binders at Tab 36].

⁷⁹ Article 215 of the 1983 Constitution (El Salvador), *cited in* UNICEF Amicus Brief, ANNEX.

⁸⁰ Article 88, Law No. 72-662, 13 July 1972 (France), *cited in* UNICEF Amicus Brief, ANNEX.

⁸¹ Law Decree No. 4, 6 December 1960 (Gabon), *cited in* UNICEF Amicus Brief, ANNEX.

Iraq⁸⁷, Jamaica⁸⁸, Japan⁸⁹, Kuwait⁹⁰, Lebanon⁹¹, Libya⁹², Morocco⁹³, Myanmar⁹⁴, Namibia⁹⁵, Nepal⁹⁶, Paraguay⁹⁷, Philippines⁹⁸, Singapore⁹⁹, Thailand¹⁰⁰, Tunisia¹⁰¹, Vietnam¹⁰², and

⁸² Article 12(a) of the Basic Law (Germany); *see also*, 1956 Law on military service (Germany), *cited in* UNICEF Amicus Brief, ANNEX [reproduced in accompanying binders at Tab 36].

⁸³ Article I of Order No. 072/PRG/SGG/90 of July 1900 (Guinea), *cited in* UNICEF Amicus Brief, ANNEX.

⁸⁴ Article 268 of Constitution of 1987 (Haiti), *cited in* UNICEF Amicus Brief, ANNEX.

⁸⁵ 1982 Law on National Defence (Indonesia), *cited in* UNICEF Amicus Brief, ANNEX.

⁸⁶ 1984 Military Service Act (Iran), *cited in* UNICEF Amicus Brief, ANNEX.

⁸⁷ 1969 Military Service Act (Iraq), *cited in* UNICEF Amicus Brief, ANNEX.

⁸⁸ 1962 Defence Act (Jamaica) *cited in* UNICEF Amicus Brief, ANNEX.

⁸⁹ Article 18 of the Constitution (Japan), *cited in* UNICEF Amicus Brief, ANNEX.

⁹⁰ 1980 Compulsory Service Act (Kuwait), *cited in* UNICEF Amicus Brief, ANNEX.

⁹¹ Law 110/1983 (Lebanon) [reproduced in accompanying binders at Tab 49], *cited in* UNICEF Amicus Brief, ANNEX [reproduced in accompanying binders at Tab 36].

⁹² Act No. 9 of 1987 (Libya), *cited in* UNICEF Amicus Brief, ANNEX.

⁹³ Royal Decree of 9 June 1966 (Morocco), *cited in* UNICEF Amicus Brief, ANNEX.

⁹⁴ National Service Law and People's Militia Act of 1959 (Myanmar), *cited in* UNICEF Amicus Brief, ANNEX.

⁹⁵ Articles 15-2 of 1990 (Namibia), *cited in* UNICEF Amicus Brief, ANNEX.

⁹⁶ 1962 Royal Army New Recruitment Rules (Nepal), *cited in* UNICEF Amicus Brief, ANNEX.

⁹⁷ Law 569 of 24 December 1975 (Paraguay), *cited in* UNICEF Amicus Brief, ANNEX.

⁹⁸ 1991 Republic act No, 7610 (July 1991) (Philippines), *cited in* UNICEF Amicus Brief, ANNEX.

⁹⁹ Enlistment Act of 1 August 1970 (Singapore) [reproduced in accompanying binders at Tab 53], *cited in* UNICEF Amicus Brief, ANNEX [reproduced in accompanying binders at Tab 36].

¹⁰⁰ 1954 Thai Military Service Act (Thailand) [reproduced in accompanying binders at Tab 55], *cited in* UNICEF Amicus Brief, ANNEX [reproduced in accompanying binders at Tab 36].

Zimbabwe¹⁰³. Other countries also passed laws against the recruitment of people under the age of eighteen and fifteen to be in armed services, respectively, but the date of each law is unknown.¹⁰⁴

2. The recruitment of child soldiers was a violation of customary international before December 31, 1996.

In the early to mid 1990s, the United Nations regional organizations, and the Special Court for Sierra Leone further confirmed that the recruitment of child soldiers was a violation of customary international law. In July 1996, the Organization of African Unity adopted a resolution that stated that, “the use of children in armed conflicts constitutes a violation of their rights and should be considered as war crimes.”¹⁰⁵ Also in August 1996, different countries expressed their condemnation of the recruitment of child soldiers in Liberia to the Security Council.¹⁰⁶ These statements help establish the argument that the recruitment of child soldiers was a crime under customary international law because they show state practice. Italy called the practice of recruiting, training and deploying child soldiers “despicable” and “intolerable.”¹⁰⁷

¹⁰¹ Law No. 89-51 of 14 March 1989 (Tunisia) [reproduced in accompanying binders at Tab 56], *cited in* UNICEF Amicus Brief, ANNEX [reproduced in accompanying binders at Tab 36].

¹⁰² 1981 Law on Military Service (Vietnam), *cited in* UNICEF Amicus Brief, ANNEX.

¹⁰³ National Service Act of 1980 (Zimbabwe), *cited in* UNICEF Amicus Brief, ANNEX.

¹⁰⁴ *See*, UNICEF Amicus Brief, ANNEX [reproduced in accompanying binders at Tab 36].

¹⁰⁵ Resolution Of The Plight of African Children in Situation of Armed Conflicts, CM/RES.1659 (LXIV) REV. 1 (1996) at para. 7 [reproduced in accompanying binders at Tab 33]; *see also*, UNICEF Amicus Brief, p. 26 [reproduced in accompanying binders at Tab 93].

¹⁰⁶ Statements before the Security Council, UN Doc. S/PV.3694 (30 Aug. 1996) [reproduced in accompanying binders at Tab 35], *cited in*, UNICEF Amicus Curiae brief, p. 26 [reproduced in accompanying binders at Tab 93].

¹⁰⁷ Italy, Statement before the Security Council, UN Doc. S/PV.3694, 30 August 1996, p. 6 [reproduced in accompanying binders at Tab 35], *cited in*, UNICEF Amicus Curiae brief, p. 26 [reproduced in accompanying binders at Tab 93].

Italy went on to say that “words alone do not suffice to condemn this heinous behavior.”¹⁰⁸

Guinea-Bissau said the practice of recruiting child soldiers in Liberia was “odious and abhorrent.”¹⁰⁹ Poland said the practice was “inhumane.”¹¹⁰ Chile said the practice was “inhuman and barbaric,”¹¹¹ and the United States labeled the practice as “abhorrent.”¹¹² Because of the sentiments of these States, the Security Council condemned the practice of recruitment of child soldiers.¹¹³ In a Resolution two months later, the Security Council reiterated its condemnation for the practice of child soldiers.¹¹⁴

In October 1996, the Machel Report on the Impact of Armed Conflict on Children was presented to the General Assembly and the Security Council, and it was promptly endorsed by the General Assembly.¹¹⁵ This report finds one of the “most urgent priorities” of the international community to be the removal of all persons under the age of eighteen from the

¹⁰⁸ *Id.*

¹⁰⁹ Guinea-Bissau, Statement before the Security Council, UN Doc. S/PV.3694, 30 August 1996, p. 13; cited in, UNICEF Amicus Curiae brief, p. 26 [reproduced in accompanying binders at Tab 93].

¹¹⁰ Poland, Statement before the Security Council, UN Doc. S/PV.3694, 30 August 1996, p. 14, *cited in* UNICEF Amicus Curiae brief, p. 27.

¹¹¹ Chile, Statement before the Security Council, UN Doc. S/PV.3694, 30 August 1996, p. 14, *cited in* UNICEF Amicus Curiae brief, p. 27.

¹¹² US, Statement before the UN Security Council, UN Doc. S/PV.3694, 30 August 1996, p. 15, *cited in* UNICEF Amicus Curiae brief, p. 27.

¹¹³ UN Security Council, S/RES/1071 (30 Aug. 1996) § 9 [reproduced in accompanying binders at Tab].

¹¹⁴ UN Security Council, S/RES/1083 (27 Nov. 1996) § 6 [reproduced in accompanying binders at Tab].

¹¹⁵ Promotion and Protection of the Rights of Children, Impact of armed conflict on children, Note by the Secretary-General, GA Res. A/51/306 (26 Aug. 1996) (Report of Graça Machel) [reproduced in accompanying binders at Tab 16].

armed forces.¹¹⁶ The expert, Graça Machel, recommends the launching of a global campaign, encourages diplomatic efforts, suggests peace agreements that include demobilization and reintegration programs for children, and asked states to “ensure the early and successful conclusion of the drafting of the optional protocol to the Convention on the Rights of the Child on involvement of children in armed conflicts.”¹¹⁷

In addition to this Resolution, the Statute of the Special Court for Sierra Leone holds that “Conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities” violates international humanitarian law.¹¹⁸ In addition the Special Court does not have jurisdiction to prosecute any person under the age of 15 when the alleged commission of the crime occurred.¹¹⁹ The former Head Prosecutor at the Court, David Crane, specifically stated that he would not prosecute children at the Special Court, despite the fact that the Court’s statute would allow prosecution of a child aged from 15 to 18 years.¹²⁰ The Special Court has temporal jurisdiction that begins in November 1996.¹²¹ Thus, any violations of the crime of the recruitment of child soldiers must occur after 1996.

In the case of *Prosecutor v. Hinga Norman*, the Appeals Chamber of the Special Court for Sierra Leone sitting in first instance held that the prohibition on child recruitment had

¹¹⁶ *Id.*, at ¶ 49.

¹¹⁷ *Id.*, at ¶ 62.

¹¹⁸ Statute of the Special Court for Sierra Leone, U.N. Doc. S/2000/915 (2002) art. 4(c), [reproduced in accompanying binders at Tab 22].

¹¹⁹ *Id.* at Art. 7.

¹²⁰ Liberia: The promises of peace for 21,000 child soldiers, AMNESTY INTERNATIONAL (17 May 2004) <http://web.amnesty.org/library/index/engaf340062004> [reproduced in accompanying binders at Tab 95].

¹²¹ *Id.* at art. 1.

crystallised into a crime under customary international law before November 1996.¹²² In *Norman*, the defendant argued that Article 4(c) of the Special Court’s statute violated the principle of *nullum crimen sine lege*. Article 4(c) prohibited the recruitment of children under fifteen into armed services or using them to participate in hostilities,¹²³ and the defendant argued that this was not a crime before November 1996. The court disagreed. The court surveyed many international conventions, including the Geneva Conventions, the Convention on the Rights of the Child, and the African Charter on the Rights and Welfare of the Child.¹²⁴ Interestingly, the court also determined that “a norm need not be expressly stated in an international convention for it to crystallize as a crime under customary international law.”¹²⁵

The following countries set the age at which a person could be recruited for the armed forces at least at eighteen years of age in laws passed after before December 31, 1996:

Argentina,¹²⁶ Belarus,¹²⁷ Belgium¹²⁸, Bosnia Herzegovina,¹²⁹ Cameroon,¹³⁰ Chad,¹³¹ Croatia,¹³²

¹²² Prosecutor v. Norman, Decision on Preliminary Motion Based on lack of Jurisdiction (Child Recruitment), Case No. SCSL-2004-14-AR72(E) (May 31, 2004) [reproduced in accompanying binders at Tab 70].

¹²³ Statute of the Special Court for Sierra Leone, U.N. Doc. S/2000/915 (2002) art. 4(c) [reproduced in accompanying binders at Tab 22].

¹²⁴ Summary of Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), <http://www.sc-sl.org/summary-childsoldiers.html> [reproduced in accompanying binders at Tab 72].

¹²⁵ *Id.*

¹²⁶ Law on voluntary military service of 5 January 1995 (Argentina) [reproduced in accompanying binders at Tab 37], *cited in* UNICEF Amicus Brief, ANNEX [reproduced in accompanying binders at Tab 36].

¹²⁷ Article 14 of the Universal Military Duty and Military Service Act of October 1992 (Belarus) [reproduced in accompanying binders at Tab 41], *cited in* UNICEF Amicus Brief, ANNEX [reproduced in accompanying binders at Tab].

¹²⁸ *See*, UNICEF Amicus Brief, ANNEX [reproduced in accompanying binders at Tab 36].

¹²⁹ Article 76 of 1996 Defence Law (Bosnia Herzegovina), *cited in* UNICEF Amicus Brief, ANNEX.

Czech Republic,¹³³ Dominican Republic,¹³⁴ Ecuador,¹³⁵ El Salvador,¹³⁶ Eritrea,¹³⁷ Ethiopia,¹³⁸ Hungary,¹³⁹ Kazakhstan,¹⁴⁰ Kyrgyzstan,¹⁴¹ Lesotho,¹⁴² Mongolia,¹⁴³ Nigeria,¹⁴⁴ Republic of

¹³⁰ Article 11 of Presidential decree 94/185 of September 1994 (Cameroon), *cited in* UNICEF Amicus Brief, ANNEX [reproduced in accompanying binders at Tab 36].

¹³¹ Article 14 of Ordinance 01/PCE/CEDNACVG/91 of 16 January and Article 52 of the General Statute of the Army (Ordinance 006/PR/92) of 1992 (Chad), *cited in* UNICEF Amicus Brief, ANNEX.

¹³² Law of 1991 (Croatia), *cited in* UNICEF Amicus Brief, ANNEX [reproduced in accompanying binders at Tab 36].

¹³³ 1992 Military Act (Czech Republic), *cited in* UNICEF Amicus Brief, ANNEX.

¹³⁴ 1996 Constitution (Dominican Republic), *cited in* UNICEF Amicus Brief, ANNEX.

¹³⁵ 1994 Law on Military Service (Ecuador), *cited in* UNICEF Amicus Brief, ANNEX; *see also*, Publications, Human Rights Watch, http://hrw.org/doc/?t=children_pub&document_limit=120,20.

¹³⁶ Article 215 of the 1983 Constitution and Law on military service and reserve armed forces 298 of 30 July 1992 (El Salvador), *cited in* UNICEF Amicus Brief, ANNEX.

¹³⁷ Article 8 and 9 of the National Service Proclamation 82/95 of 23 Oct 1995 (Eritrea), *cited in* UNICEF Amicus Brief, ANNEX.

¹³⁸ Article 4 of the Defence Force Proclamation 27/1996 (Ethiopia), *cited in* UNICEF Amicus Brief, ANNEX.

¹³⁹ 1993 National Defense Law (Hungary), *cited in* UNICEF Amicus Brief, ANNEX [reproduced in accompanying binders at Tab 36].

¹⁴⁰ 1993 Law “On universal military obligations and military service” (Kazakhstan), *cited in* UNICEF Amicus Brief, ANNEX.

¹⁴¹ 1992 Law on general military duties as amended in 1994 (Kyrgyzstan), *cited in* UNICEF Amicus Brief, ANNEX.

¹⁴² Lesotho Defence Force Act of 1996 Section 18 (Lesotho), *cited in* UNICEF Amicus Brief, ANNEX.

¹⁴³ 1993 Universal Military Service Law (Mongolia), *cited in* UNICEF Amicus Brief, ANNEX.

¹⁴⁴ Decree No. 51 of 1993, National Youth Service Corps Decree (Nigeria) [reproduced in accompanying binders at Tab 51], *cited in* UNICEF Amicus Brief, ANNEX [reproduced in accompanying binders at Tab 36].

Moldova,¹⁴⁵ Romania,¹⁴⁶ Russian Federation,¹⁴⁷ Sweden,¹⁴⁸ Tajikistan,¹⁴⁹ Uganda,¹⁵⁰ Ukraine,¹⁵¹ and Uzbekistan.¹⁵² The following States have domestic laws that make the minimum age at which a person can be recruited into armed forces between fifteen and seventeen before the end of 1996:¹⁵³ Azerbaijan¹⁵⁴, Burundi¹⁵⁵, Cuba¹⁵⁶, Slovenia¹⁵⁷, and Sudan.¹⁵⁸

3. The recruitment of child soldiers crystallized into a crime under customary international law after 1996.

¹⁴⁵ 1992 Law on the Military Duty and Military Service of the Citizens of the Republic of Moldova (Republic of Moldova), *cited in* UNICEF Amicus Brief, ANNEX.

¹⁴⁶ 1996 Law on the Preparation of the Population for Defence (Romania), *cited in* UNICEF Amicus Brief, ANNEX.

¹⁴⁷ 1995 Law on Compulsory Military Service (Russian Federation), *cited in* UNICEF Amicus Brief, ANNEX.

¹⁴⁸ 1994 Total Defence Act (Sweden), *cited in* UNICEF Amicus Brief, ANNEX.

¹⁴⁹ 1994 Law on Military Service (Tajikistan) [reproduced in accompanying binders at Tab 54], *cited in* UNICEF Amicus Brief, ANNEX [reproduced in accompanying binders at Tab].

¹⁵⁰ Article 34(3) & (4) of 1995 Constitution (Uganda), *cited in* UNICEF Amicus Brief, ANNEX.

¹⁵¹ 1992 Universal Liability for Military Service Act (Ukraine) [reproduced in accompanying binders at Tab 57], *cited in* UNICEF Amicus Brief, ANNEX [reproduced in accompanying binders at Tab 36].

¹⁵² Law on Defence (Uzbekistan), *cited in* UNICEF Amicus Brief, ANNEX.

¹⁵³ To see the states that outlaw recruitment of child soldiers under the age of eighteen, see notes *infra* 65-103.

¹⁵⁴ 1991 Law on Armed Forces as amended by decrees in 1992 and 1993 (Azerbaijan), *cited in* UNICEF Amicus Brief, ANNEX [reproduced in accompanying binders at Tab].

¹⁵⁵ Compulsory civic service by decree 1/005 of 1 Dec 1996 (Burundi), *cited in* UNICEF Amicus Brief, ANNEX [reproduced in accompanying binders at Tab 36].

¹⁵⁶ Article 67 of the Law 75 on National Defence of 21 Dec 94 (Cuba), *cited in* UNICEF Amicus Brief, ANNEX.

¹⁵⁷ 1995 Military Service Law (Slovenia), *cited in* UNICEF Amicus Brief, ANNEX.

¹⁵⁸ National Service Law of 1992 (Sudan), *cited in* UNICEF Amicus Brief, ANNEX.

In the late 1990s, regional organizations, the Security Council, and the Rome Statute, further condemned the recruitment of child soldiers, showing that the international community strongly prohibits its practice. On April 30, 1997, the Cape Town Principles were adopted at the Symposium on the Prevention of Children into Armed Forces and Demobilisation and Social Reintegration of Child Soldiers in Africa. It provided that “those responsible for illegally recruiting children should be brought to justice.”¹⁵⁹ It also urged governments to pass national legislation that set the minimum age for voluntary and compulsory recruitment at eighteen.¹⁶⁰

On 29 June 1998, the President of the Security Council condemned the use of child soldiers and called on parties to comply with their obligations under international law and prosecute those responsible for grave breaches of international humanitarian law.¹⁶¹ Specifically, the President said, “The Security Council strongly condemns the targeting of children in armed conflicts, including [...] their recruitment and use in hostilities in violation of international law”. The President of the Security Council’s statement is an announcement that the recruitment of child soldiers violates customary international law. In other words, this is a reiteration of States’ preexisting legal obligations to end the practice of child soldiers.

In July 1998, at the Rome Conference, the drafting parties chose to set the minimum age at which children could be conscripted or enlisted at fifteen.¹⁶² The Rome Statute states that

¹⁵⁹ Cape Town Principles and Best Practices, Adopted at the Symposium on the Prevention of Children into Armed Forces and Demobilisation and Social Reintegration of Child Soldiers in Africa, UNICEF (27-30 Apr. 1997) p. 8, available at [http://www.unicef.org/emerg/files/Cape_Town_Principles\(1\).pdf](http://www.unicef.org/emerg/files/Cape_Town_Principles(1).pdf) [reproduced in accompanying binders at Tab 28].

¹⁶⁰ *Id.*, at 2.

¹⁶¹ Statement by the President of the Security Council, S/PRST/1998/18 (29 June 1998) [reproduced in accompanying binders at Tab 34].

¹⁶² Crimes Within the Jurisdiction of the Court, Herman Von Hebel and Daryl Robinson, IN THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATE, ed. Roy Lee; Chapter 2, at 117-8, cited in UNICEF Amicus Brief, p. 31 [reproduced in accompanying binders at Tab 90].

“Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities” is a war crime under international law.¹⁶³ This codified the recruitment of child soldiers as a crime under international law. Interestingly, Justice Robertson, who dissented in *Prosecutor v. Norman*, held that recruitment of child soldiers did not violate customary international law until 1998.¹⁶⁴ However, it can be argued that the fact that this provision was almost universally accepted in July 1998 evidences that the recruitment of child soldiers was already a crime under customary international law prior to the Rome Conference.¹⁶⁵

Adding to the international community’s many prohibitions on the recruitment of child soldiers, the General Assembly urged States “to adopt all necessary measures to end the use of children as soldiers” in December 1998.¹⁶⁶ States are also encouraged to educate their populations about the rights of the child.¹⁶⁷ This Resolution was adopted by consensus.

¹⁶³ Rome Statute of the International Criminal Court, U.N. Doc. A/CONF. 183/9 (1998), art. 8(2)(b)(xxvi)-(e)(vii) [reproduced in accompanying binders at Tab 65].

¹⁶⁴ *Prosecutor v. Norman*, Decision on Preliminary Motion Based on lack of Jurisdiction (Child Recruitment), Case No. SCSL-2004-14-AR72(E) (May 31, 2004) at ¶47 (Dissent by J. Robertson) (Stating, “I differ with diffidence from my colleagues, but I have no doubt that the crime of non-forcible enlistment did not enter international criminal law until the Rome Treaty in July 1998.”) [reproduced in accompanying binders at Tab 70].

¹⁶⁵ UNICEF Amicus Brief, p. 31 [reproduced in accompanying binders at Tab 93].

¹⁶⁶ The Rights of the Child, GA Res. A/Res/51/77 (Dec. 1998) [reproduced in accompanying binders at Tab 23].

¹⁶⁷ *Id.*, at ¶ 18.

By 1999, the international community defined a child as a person less than eighteen years of age.¹⁶⁸ The Labor Organization named the recruitment of children for use in armed conflicts as one of the worst forms of child labor.¹⁶⁹ While the African Charter on the Rights and Welfare of the Child, which prohibits the use of child soldiers, was adopted in 1990, it did not enter into force until 1999.¹⁷⁰ In fact, the African Charter is the only regional treaty that addresses the issues of child soldiers. On 11 March 1999, The Security Council, acting under Chapter VII of the UN Charter condemned the recruitment of child soldiers in Sierra Leone.¹⁷¹ The Resolution also called for the perpetrators to be brought to justice.¹⁷² The Security Council adopted this Resolution with a vote of fifteen to zero. On 8 July 1999, the Latin American and Caribbean Conference on the Use of Child Soldiers urged all Latin American and Caribbean states to make the recruitment of child soldiers a crime under each country's domestic laws.¹⁷³

Arguably the most significant of the recent international documents that protect children is the Optional Protocol to the Convention on the Rights of the Child. The Optional Protocol

¹⁶⁸ Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (I.L.O. Convention 182), June 17, 1999, 38 I.L.M. 1207, at art. 2-3(a) [reproduced in accompanying binders at Tab 2].

¹⁶⁹ *Id.* at Art. 3.

¹⁷⁰ African Charter on the Rights and Welfare of the Child, art. 22(2), O.A.U. Doc. CAB/LEG/24.9/49 (1990) [reproduced in accompanying binders at Tab 1].

¹⁷¹ SC Res., S/RES/1231 (Mar. 1999) [reproduced in accompanying binders at Tab 26], *cited in* UNICEF Amicus Brief, p. 28 [reproduced in accompanying binders at Tab 93].

¹⁷² *Id.*

¹⁷³ Montevideo Declaration on the Use of Children as Soldiers, Latin American and Caribbean Conference on the Use of Children as Soldiers, UNESCO (8 July 1999), available at <http://www.unesco.org/cpp/uk/declarations/montevideo.htm> [reproduced in accompanying binders at Tab 31].

was adopted by the General Assembly on 25 May 2000.¹⁷⁴ The instrument increases the minimum age for direct participation in hostilities to eighteen years.¹⁷⁵ The General Assembly state that it was convinced that “an optional protocol to the Convention that raises the age of possible recruitment of persons into armed forces and their participation in hostilities will contribute effectively to the implementation of the principle that the best interests of the child are to be a primary consideration in all actions concerning children”. Other relevant sections are:

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

Article 3(3): States Parties that permit voluntary recruitment into their national armed forces under the age of 18 years shall maintain safeguards to ensure, as a minimum, that:

- (a) Such recruitment is genuinely voluntary;
- (b) Such recruitment is carried out with the informed consent of the person's parents or legal guardians;
- (c) Such persons are fully informed of the duties involved in such military service;
- (d) Such persons provide reliable proof of age prior to acceptance into national military service.

The Optional Protocol was adopted without a vote, and as of July 2004, 73 countries had ratified the Protocol.¹⁷⁶

This change in 2000 can be interpreted in two ways. On one hand, it suggests that the recruitment of children between the ages of fifteen and seventeen was not a violation of

¹⁷⁴ Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, G.A. Res. 54/263, 54th Sess., Supp. No. 49 art. 2 (2000) [reproduced in accompanying binders at Tab 15]

¹⁷⁵ *Id.*, at preamble [reproduced in accompanying binders at Tab 15].

¹⁷⁶ Status of the Ratifications of the Principal International Human Rights Treaties, Office of the United Nations High Commissioner for Human Rights (9 June 2004) [reproduced in accompanying binders at Tab 103].

customary international law before 2000. On the other hand, it could also be interpreted as a codification of something that was already customary international law; in other words, the States may have agreed that the recruitment of children under eighteen into armed services violated international law, and this Optional Protocol simply codified those preexisting beliefs. The negotiating record for this Protocol reveals that the most accurate interpretation of the Optional Protocol is that customary international law prohibited the recruitment of children less than seventeen by 1992 for all states, and the prohibition on recruiting seventeen-year-olds only became custom for States other than the United States, Pakistan, Japan, and South Africa.¹⁷⁷ In 1992, a proposal was made to raise the minimum age of soldiers to eighteen.¹⁷⁸ Although most states immediately favored setting the minimum age at eighteen, a few objectors strongly argued for the minimum age to be 17.¹⁷⁹ This resulted in a six-year long negotiation from 1994 to 2000 and the eventual decision to set the age at eighteen.¹⁸⁰

The following countries set the age at which a person could be recruited for the armed forces at least at eighteen years of age in laws passed after 1996: Algeria¹⁸¹, Cambodia¹⁸²,

¹⁷⁷ Matthew Happold, *CHILD SOLDIERS IN INTERNATIONAL LAW* (2005) at 74-76, *citing* UN Doc. CRC/C/625, para. 176 and UN Doc. E/CN.4/1996/96, para. 17 [reproduced in accompanying binders at Tab 75].

¹⁷⁸ *Id.*, *citing* UN Doc. CRC/C/10, paras 61-77.

¹⁷⁹ *Id.*, at 75-76.

¹⁸⁰ *Id.*

¹⁸¹ Article 1, Edict 74-193 of 15 Dec. 1974, Nov. 1998 (Algeria), *cited in* UNICEF Amicus Brief, ANNEX [reproduced in accompanying binders at Tab 36].

¹⁸² Article 42 of the 1997 Law on General Statutes for the Military Personnel of the Royal Cambodian Armed Forces (Cambodia), *cited in* UNICEF Amicus Brief, ANNEX [reproduced in accompanying binders at Tab 36].

Colombia¹⁸³, Democratic Republic of the Congo,¹⁸⁴ East Timor,¹⁸⁵ Finland,¹⁸⁶ Greece,¹⁸⁷ Israel,¹⁸⁸ Mozambique,¹⁸⁹ Portugal,¹⁹⁰ Slovakia,¹⁹¹ South Africa,¹⁹² and Venezuela.¹⁹³ In addition, states that implement domestic legislation for the ICC Statute criminalize the recruitment of child soldiers.¹⁹⁴

B. Forced Marriage

1. Forced marriage materialized into a violation of customary international law before 1991.

¹⁸³ Law on Judicial Cooperation (1997), Articles 13-14 (Columbia); *see also*, Law 548 of 23 Dec. 1999 (Columbia), *cited in* UNICEF Amicus Brief, ANNEX.

¹⁸⁴ Law Decree of 9 June 2000 (Democratic Republic of the Congo), *cited in* UNICEF Amicus Brief, ANNEX.

¹⁸⁵ Regulation of the National Council on the defence Force of January 2001 (East Timor) [reproduced in accompanying binders at Tab 45], *cited in* UNICEF Amicus Brief, ANNEX [reproduced in accompanying binders at Tab 36].

¹⁸⁶ Act of May 2001 (Finland), *cited in* UNICEF Amicus Brief, ANNEX.

¹⁸⁷ Law No 2510 of June 1997 (Greece) [reproduced in accompanying binders at Tab 48], *cited in* UNICEF Amicus Brief, ANNEX [reproduced in accompanying binders at Tab 36].

¹⁸⁸ Amendment No. 13 to the National Defence Service Law (Nov. 2002 (Israel), *cited in* UNICEF Amicus Brief, ANNEX.

¹⁸⁹ Law 24-97 of 12 December 1997, Article 2 (Mozambique) [reproduced in accompanying binders at Tab 50], *cited in* UNICEF Amicus Brief, ANNEX [reproduced in accompanying binders at Tab 36].

¹⁹⁰ Military Service Law (Law 174/99) 21 Sept. 1999 (Portugal) [reproduced in accompanying binders at Tab 52], *cited in* UNICEF Amicus Brief, ANNEX [reproduced in accompanying binders at Tab 36].

¹⁹¹ Conscript Act (Act No. 351/97) & Act on Military Service (Act. No. 370/97) (Slovakia), *cited in* UNICEF Amicus Brief, ANNEX.

¹⁹² Defence Act adopted in 1999 (South Africa), *cited in* UNICEF Amicus Brief, ANNEX.

¹⁹³ Article 4 of the Law on Conscription and Military Enlistment (1999) (Venezuela), *cited in* UNICEF Amicus Brief, ANNEX.

¹⁹⁴ UNICEF Amicus Brief, p. 18 [reproduced in accompanying binders at Tab 93].

Many international human rights documents protect women and female children. While provisions within these instruments rarely specifically refer to “forced marriage” itself, the provisions still prohibit its practice. Any prohibitions on nonconsensual marriage or prohibitions on discrimination against women implicitly prohibit forced marriage. The Universal Declaration of Human Rights, adopted in 1948, recognizes the right to marry. It specifically requires that marriage only be entered into with the “free and full consent of the intending spouses.”¹⁹⁵ Therefore, in 1948, the international community recognized that a person could not be forced into a marriage.

Although the International Covenant on Civil and Political Rights (“ICCPR”) does not explicitly forbid forced marriage, it contains provisions that the act of forced marriage violates.¹⁹⁶ The ICCPR guarantees the right to liberty and security of one’s person.¹⁹⁷ In addition to liberty and security, every person has the right to freedom of movement and freedom to choose his/her residence.¹⁹⁸ The act of forced marriage is in contravention with the rights to liberty, security, freedom of movement, and freedom to choose one’s residence. In forced marriages, the husbands force their wives to comply with their wishes, and the wives are not allowed to leave the marriages.

The International Covenant on Economic, Social and Cultural Rights, which was adopted in 1966 and entered into force in 1976, prohibits forced marriage. Article 10 states that,

¹⁹⁵ Universal Declaration on Human Rights, GA Res. 217 A (III), 10 Dec. 1948, art. 16(2) [reproduced in accompanying binders at Tab 27].

¹⁹⁶ International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, 19 Dec. 1966 [reproduced in accompanying binders at Tab 13].

¹⁹⁷ *Id.* at art. 9.

¹⁹⁸ *Id.* at art. 12.

“Marriage must be entered into with the free consent of the intending spouses.”¹⁹⁹ Forced marriages do not allow the women to enter into the marriage with free consent.²⁰⁰ This Covenant is a codification of existing customary international law; it shows that States believed marriages should be consensual before 1966.

The Convention on the Elimination of all Forms of Discrimination Against Women (“CEDAW”), adopted in 1979 by votes of 130 to none, with 10 abstentions,²⁰¹ requires that State parties work to extinguish the discrimination against women within their borders.²⁰² Article 16 requires State parties to eliminate discrimination against women in all matters relating to marriage.²⁰³ The article goes on to enumerate that both men and women have:

- (a) The same right to enter into marriage;
- (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;
- (c) The same rights and responsibilities during marriage and at its dissolution;
- [...]

¹⁹⁹ International Covenant on Economic, Social and Cultural Rights, GA Res. 2200A (XXI), 16 Dec. 1966 [reproduced in accompanying binders at Tab 14].

²⁰⁰ Scharf, Michael and Mattler, Suzanne, "Forced Marriage: Exploring the Viability of the Special Court for Sierra Leone's New Crime Against Humanity" . Case Legal Studies Research Paper No. 05-35 Available at SSRN: <http://ssrn.com/abstract=824291> [reproduced in accompanying binders at Tab 84], citing, Iman Ngondo A Pitshandenge, “Marriage Law in Sub-Saharan Africa”, in NUPTUALITY IN SUB-SAHARAN AFRICA: CONTEMPORARY ANTHROPOLOGICAL AND DEMOGRAPHIC PERSPECTIVES 118 (Caroline Bledsoe and Gilles Pison ed., 1994).

²⁰¹ Short History of CEDAW Convention, <http://www.un.org/womenwatch/daw/cedaw/history.htm> [reproduced in accompanying binders at Tab 99].

²⁰² Convention on the Elimination of all Forms of Discrimination Against Women, GA Res. 34/180 (18 Dec. 1979), available at <http://www.un.org/womenwatch/daw/cedaw/> [reproduced in accompanying binders at Tab 4].

²⁰³ *Id.* at 16.

(e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;

[...]

(g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;

(h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

The act of forced marriage violate article 16 because forced marriages do not allow the woman the right to freely choose one's spouse, or to have the same rights as her husband, or the right to decide when to have children, or the same property rights as her husband. Importantly, CEDAW also prohibits the marriage of a child.²⁰⁴ Forced marriages often include adult men forcing female children to become their "wives." Therefore, the international community showed that forced marriages are violations of international law when it adopted CEDAW.

CEDAW also includes provisions the crime of forced marriage violates, even though those articles do not explicitly prohibit forced marriage. Article 5 of CEDAW requires State parties to take appropriate measures to "modify the social and cultural patterns of conduct of men and women" to eliminate practices that prejudice one sex, make one sex superior to the other, or that stereotype roles for men and women.²⁰⁵ In addition, State Parties must ensure that family education includes the "recognition of the common responsibility of men and women in the upbringing and development of their children."²⁰⁶ Article 6 requires State parties to "take all appropriate measures, including legislation, to suppress all forms of traffic in women and

²⁰⁴ *Id.* at 16(2) [reproduced in accompanying binders at Tab 4].

²⁰⁵ *Id.*, at art. 5(a).

²⁰⁶ *Id.* at art. 5(b).

exploitation of prostitution of women.” Women in forced marriages are forcibly moved from place to place as her husband moves, and sometimes the husbands prostitute their wives out to other men.²⁰⁷

Many women taken into forced marriages are only children. The African Charter on the Rights and Welfare of the Child forbids child marriage, which includes any person under eighteen.²⁰⁸ The Charter also requires that all marriages must be registered into an official registry.²⁰⁹ In addition, the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, adopted by the General Assembly in 1962, holds that in order for a marriage to occur, it must be entered into with the full and free consent of both parties.²¹⁰ All marriages must be officially registered.²¹¹ Forced marriages are not registered with an official authority; rather, women and girls in forced marriages have no idea when or if the relationship will end, and many men would pass their wives onto other men when they grew tired of them.

The fact that different domestic penal codes outlaw forced marriage is evidence of widespread practice, necessary to create customary international law. Bulgarian Criminal Code holds that

a person who abducts a person of the female gender for the purpose of forcing her to enter into marriage, shall be punished by deprivation of liberty for up to three years, and

²⁰⁷ *Id.* at art. 6.

²⁰⁸ African Charter on the Rights and Welfare of the Child, O.A.U. Doc. CAB/LEG/24.9/49 (1990), art. 21(2) [reproduced in accompanying binders at Tab 1].

²⁰⁹ *Id.*

²¹⁰ Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, General Assembly resolution 1763 A (XVII) of 7 November 1962, art. 1 [reproduced in accompanying binders at Tab 3].

²¹¹ *Id.*, at art. 3.

if the victim is not of full age, the punishment shall be deprivation of liberty for up to five years.²¹²

The Penal Code of the Socialist Republic of Bosnia and Herzegovina prohibits sexual intercourse coerced by taking advantage of the victim's condition, which has rendered her unable to resist.²¹³

Forced marriages would also violate the Married Women's Status Act in Ireland.²¹⁴

2. Forced marriage crystallized into a crime under customary international law before December 31, 2003.

Forced marriage would fall under the definition of "violence against women" in the Declaration on the Elimination of Violence against Women.²¹⁵ The Declaration asks states to condemn violence against women.²¹⁶ Therefore, by 1993, the international community agreed that violence against women violated international law; as a consequence, there was a tacit acceptance that forced marriages violate international law as well.

The Trial Chamber at the International Criminal Tribunal for Rwanda ("ICTR") found Akayesu guilty of sexual violence.²¹⁷ Jean Paul Akayesu was bourgmestre of Taba commune and charged with genocide, murder, sexual violence, and other crimes against humanity.²¹⁸ The

²¹² Article 177(2), Bulgarian Penal Code (1968) [reproduced in accompanying binders at Tab 36].

²¹³ Penal Code of the Socialist Republic of Bosnia and Herzegovina (1991), Ch XI, Art 88(1). Art 90 [reproduced in accompanying binders at Tab 36].

²¹⁴ Married Women's Status Act (1957) (Ireland), available at: <http://www.legislationline.org//legislation.php?tid=99&lid=1648> [reproduced in accompanying binders at Tab 58].

²¹⁵ Declaration on the Elimination of Violence against Women, GA Res. 48/104 (20 Dec. 1993) art. 1 [reproduced in accompanying binders at Tab 7].

²¹⁶ *Id.*, at art. 4.

²¹⁷ Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Trial Chamber Judgment (Sept. 2, 1998) [reproduced in accompanying binders at Tab 63].

²¹⁸ *Id.*

Trial Chamber “defined sexual violence as ‘any act of a sexual nature which is committed on a person under circumstances which are coercive.’”²¹⁹ Regarding coercion,

coercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances.²²⁰

The Trial Chamber determined that, “there is evidence that the Accused ordered, instigated and otherwise aided and abetted sexual violence.” Thus, the ICTR recognized that sexual violence was against the law by April 7, 1994, adding further evidence to the argument that forced marriage was a crime under customary international law by this date.

In May 1997, the Trial Chamber of the ICTY found Tadic guilty of sexual assault and rape.²²¹ This recognition that forced sexual intercourse was a violation of international law when the acts were committed in 1992 helps bolster the argument that forced marriages violate customary international law. Rape and sexual assault are often commonplace in forced marriages.

The Elements of Crimes, defined for the International Criminal Court, lists crimes that include forced marriages. For example, Article 7 prohibits enforced prostitution. A forced marriage is essentially enforced prostitution because both include a perpetrator causing a person to engage in act(s) of a sexual nature by force, or by threat of force or coercion.²²² Forced

²¹⁹ *Id.*, at 688.

²²⁰ *Id.*

²²¹ Prosecutor v. Tadic, Case No. IT-94-1-T, Trial Chamber Judgment (7 May 1997) [reproduced in accompanying binders at Tab 71].

²²² Elements of Crimes for the International Criminal Court, UN doc. ICC-ASP/1/3, art. 7(1)(g)-3 [reproduced in accompanying binders at Tab 9].

marriage is also an example of sexual violence,²²³ prohibited by the International Criminal Court, and the Elements of Crimes also includes the crime of rape.²²⁴

On 11 October 2000, a draft Resolution was presented in the General Assembly expressing deep concern over the continuance of forced marriage in the world.²²⁵ It also urges countries to take actions to prevent forced marriage and other crimes against women. The fact that States continue to condemn forced marriages evidences their conviction to stop the practice.

On 2 November 2001, the International Tribunal for the Former Yugoslavia recognized that forced marriage was a crime of sexual violence.²²⁶ In that case, the Trial Chamber determined that female detainees in Omarska camp were subjected to acts of sexual violence because they “were subjected to forced or coerced acts of sexual penetration, as well as other acts of a sexual nature committed under coercive or abusive circumstances.”²²⁷ Although that case did not find an instance of forced marriage, the holding still supports the submission that forced marriage was a crime under customary international law at the time the acts of sexual violence were committed at the Omarska camp.

²²³ *Id.*, at art. 7(1)(g)-6.

²²⁴ *Id.*, at art. 7(1)(g)-1.

²²⁵ Elimination of all forms of violence and crimes against women, GA Res. A/C.3/55/L.13 (Oct. 11, 2000) [reproduced in accompanying binders at Tab 10].

²²⁶ Prosecutor v. Kvočka et al., Case No. IT-98-30-T, Trial Chamber Judgment (2 Nov. 2001) para. 180. (The Court wrote, “Sexual violence would also include such crimes as sexual mutilation, forced marriage and forced abortion as well as gender related crimes explicitly listed as war crimes and crimes against humanity in Articles 7(1)(g), 8(2)(b)(xxii) and 8(2)(e)(vi) of the Rome Statute of 17 July 1998 establishing the International Criminal Court.”) [reproduced in accompanying binders at Tab 69].

²²⁷ *Id.* at para. 182.

In February 2001, the ICTY found Kunarac, Kovac, and Vukovic guilty of sexual assault and rape.²²⁸ The victims in the case underwent conditions similar to a forced marriage in that they were detained in a house and forced to perform household chores and were frequently sexually assaulted.²²⁹ The fact that the Trial Chamber found these actions to be crimes in 1992 shows that the international community prohibits crimes of sexual violence.

The Protocol of the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted in 2003, requires State parties to prohibit forced marriages.²³⁰ State parties must "ensure that women and men enjoy equal rights and are regarded as equal partners in marriage." In addition, marriages must have free and full consent of both parties, and every marriage must be recorded and registered in accordance with national laws. Importantly, a woman must be eighteen in order to marry. Many forced marriages include girls less than eighteen years of age.²³¹

More domestic laws prohibiting forced marriage were passed between 1991 and 2003. Judge Robertson, dissenting in *Prosecutor v. Norman*, noted that Papua Guinea, India, Singapore, and Indonesia all specifically outlawed forced marriage.²³² Justice Doherty, dissenting in *Prosecutor v. Brima, Kamara, and Kanu*, found that Bulgaria, Papua New Guinea,

²²⁸ *Prosecutor v. Kunarac, Kovac and Vukovic*, Case No. IT-96-23&23/1, Trial Chamber Judgment (22 Feb. 2001) [reproduced in accompanying binders at Tab 68].

²²⁹ *Id.*, at par 1.1 [reproduced in accompanying binders at Tab 68].

²³⁰ Protocol to the African Charter of Human and Peoples' Rights on the Rights of Women in Africa, Adopted by the 2nd Ordinary Session of the Assembly of the Union, (11 July 2003) art. 6 [reproduced in accompanying binders at Tab 19].

²³¹ *Supra* note 198.

²³² *Prosecutor v. Norman*, Decision on Preliminary Motion Based on lack of Jurisdiction (Child Recruitment), Case No. SCSL-2004-14-AR72(E) (May 31, 2004) (Dissent by J. Robertson) (He cites: § 238, Criminal Code of Papua Guinea, Article 366, Penal Code of India, Article 366, Penal Code of Singapore, and Article 332, Penal Code of Indonesia) [reproduced in accompanying binders at Tab 70].

India, Singapore, Indonesia, Nigeria, Venezuela, and Brazil. All have penal laws criminalizing forced marriage.²³³ Also, the Penal Code of Burma prohibits forced marriages.²³⁴ Some countries find ways to criminalize forced marriage even though the specific crime is not in the law. For example, in England and Wales, people are charged with “threatening behaviour, assault, kidnap and murder” when a forced marriage occurs.²³⁵ The Law of the Kyrgyz Republic on Gender Equality, passed in 2003, prohibits gender-based discrimination.²³⁶ The fact that there does not seem to be much on this subject after 2003 supports the contention that it is already settled that forced marriage is a violation of customary international law.

3. If a perpetrator forced a child into a marriage, the perpetrator can be charged with either recruitment of child soldiers or forced marriage.

The forced marriage of a child not only constitutes the crime of forced marriage, but it also constitutes the crime of recruitment of child soldiers. In some circumstances, female children in forced marriages are required to actively participate in hostilities, thus fitting the definition of a child soldier. In the Cape Town Principles and Best Practices, the Symposium on the Prevention of Children into Armed Forces and Demobilisation and Social Reintegration of Child Soldiers in

²³³ Prosecutor v. Brima, Kamara, and Kanu, Case No. SCSL-04-16-T (20 June 2007) (Judge Doherty dissenting), at ¶¶61, 62, *citing* Article 177(2), Bulgarian Penal Code; S. 238, Criminal Code of Papua Guinea; Article 366, Penal Code of India; Article 366, Penal Code of Singapore; Article 332, Penal Code of Indonesia [reproduced in accompanying binders at Tab 64].

²³⁴ Dr. Mohamed Mattar, Comparative Analysis of the Elements of Anti-Trafficking Legislation in the Asia-Pacific-U.S. Region: What Countries in the Region Have to do to Comply with the 2000 UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (13-15 Nov. 2002) <http://www.protectionproject.org/ca.htm> [reproduced in accompanying binders at Tab 96].

²³⁵ What the Law Says, Oxfordshire NHS, available at <http://www.forcedmarriage.nhs.uk/thelaw.asp>, taking excerpts from, A Choice by Right: The report of the working group on forced marriage (June 2000) [reproduced in accompanying binders at Tab 101].

²³⁶ The Law of the Kyrgyz Republic on Gender Equality (2003), available at <http://www.legislationline.org/legislation.php?tid=99&lid=1227> [reproduced in accompanying binders at Tab 59].

Africa defined a child soldier as:

any person under 18 years of age who is part of any kind of regular or irregular armed force or armed group in any capacity, including but not limited to cooks, porters, messengers and anyone accompanying such groups, other than family members. The definition includes girls recruited for sexual purposes and for forced marriage. It does not, therefore, only refer to a child who is carrying or has carried arms.²³⁷

Even though the female child might not brandish a weapon, she is still forced to work in order to help soldiers continue fighting in hostilities. The child “wives” cook, clean, carry packs, just as many child soldiers do. Therefore, because it is easier to prove that the recruitment of child soldiers violates customary international law than it is to prove that forced marriage itself violates international law, charging a perpetrator for recruitment of a child soldier when he forces a female child to “marry” him will likely trump a challenge of *nullum crimen sine lege*. The perpetrator will still be guilty of a serious crime, and the victim will still know that the perpetrator was punished for what he did to her.

C. Conclusion

It is certainly arguable that both the crimes of recruitment of child soldiers and forced marriage violated customary international law before 1991. By that time, many international human rights documents and domestic laws prohibited these crimes. More conclusive is evidence that both crimes violated customary international law by at least the mid 1990s. By establishing that these crimes are violations of customary international law, the prosecution can prevail on an allegation that charging somebody with these crimes between 1991 and 2003 does not violate the principle of *nullum crimen sine lege*.

D. Appendix

²³⁷ Cape Town Principles and Best Practices, Adopted at the Symposium on the Prevention of Children into Armed Forces and Demobilisation and Social Reintegration of Child Soldiers in Africa, UNICEF (27-30 Apr. 1997) p. 8, available at [http://www.unicef.org/emerg/files/Cape_Town_Principles\(1\).pdf](http://www.unicef.org/emerg/files/Cape_Town_Principles(1).pdf) [reproduced in accompanying binders at Tab 28].

The Appendix to this memorandum includes two timelines. One lists the relevant laws and resolutions prohibiting the recruitment of child soldiers. The other lists the relevant laws and resolutions prohibiting forced marriages. By way of listing these codified legal prohibitions, these timelines help suggest what year each crime was recognized as a violation of customary international law.

TIMELINE – RECRUITMENT OF CHILD SOLDIERS

- 1900 – Guinea sets minimum age of recruitment for armed services at 18
- 1903 – Australia sets minimum age of recruitment for armed services at 18
- August 12, 1949 – Geneva Convention (IV) adopted
- 1954 – Thailand sets minimum age of recruitment for armed services at 18
- 1956 – Germany sets minimum age of recruitment for armed services at 18
- 1959 – Myanmar sets minimum age of recruitment for armed services at 18
- 6 December 1960 – Gabon sets minimum age of recruitment for armed services at 18
- 1961 – Cote d'Ivoire sets minimum age of recruitment for armed services at 18
- 1962 – Jamaica sets minimum age of recruitment for armed services at 18
- 1962 – Nepal sets minimum age of recruitment for armed services at 18
- 1962 – Mauritania sets minimum age of recruitment for armed services at 17
- 1962 – Ireland passes Geneva Conventions Act, setting minimum age at 15
- 30 May 1962 – Benin sets minimum age of recruitment for armed services at 18
- 7 August 1964 – Brazil sets minimum age of recruitment for armed services at 18
- 9 June 1966 – Morocco sets minimum age of recruitment for armed services at 18
- 19 December 1966 - International Covenant on Social and Political Rights adopted
- 1969 – Iraq sets minimum age of recruitment for armed services at 18
- 1 August 1970 – Singapore sets minimum age of recruitment for armed services at 18
- 1972 – France sets minimum age of recruitment for armed services at 18
- 14 December 1974 - the Declaration on the Protection of Women and Children in Emergency and Armed Conflict adopted
- 24 December 1975 – Paraguay 24 December 1975
- 27 August 1976 – Bolivia sets minimum age of recruitment for armed services at 18
- 1977 – Belize sets minimum age of recruitment for armed services at 18
- 8 June 1977 – Adoption of Protocol II
- 8 June 1977 – Adoption of Protocol I
- 12 September 1978 – Chile sets minimum age of recruitment for armed services at 18
- 7 December 1978 – Entry into force of Protocol II
- 7 December 1979 – Entry into force of Protocol I
- 1980 – Denmark sets minimum age of recruitment for armed services at 18
- 1980 – Ecuador sets minimum age of recruitment for armed services at 18
- 1980 – Egypt sets minimum age of recruitment for armed services at 18
- 1980 – Kuwait sets minimum age of recruitment for armed services at 18
- 1980 - Zimbabwe sets minimum age of recruitment for armed services at 18
- 1981 – Vietnam sets minimum age of recruitment for armed services at 18
- 1982 – Indonesia sets minimum age of recruitment for armed services at 18
- 1983 – El Salvador sets minimum age of recruitment for armed services at 18
- 1983 – Lebanon sets minimum age of recruitment for armed services at 18
- 1984 – China sets minimum age of recruitment for armed services at 18
- 1984 – Iran sets minimum age of recruitment for armed services at 18
- 1986 – Israel sets minimum age of recruitment for armed services at 17

- 1987 – Haiti sets minimum age of recruitment for armed services at 18
- 1987 – Libya sets minimum age of recruitment for armed services at 18
- 14 March 1989 – Tunisia sets minimum age of recruitment for armed services at 18
- 20 November 1989 – Adoption and Opening for Signature of U.N. Convention on the Rights of the Child, setting the minimum age of recruitment at 15
- 1990 – African Charter on the Rights and Welfare of the Child adopted
- 1990 – Namibia sets minimum age of recruitment for armed services at 18
- 2 September 1990 – Entry into Force of U.N. Convention on the Rights of the Child
- 1991 – Armenia sets minimum age of recruitment for armed services at 18
- 1991 – Croatia sets minimum age of recruitment for armed services at 18
- July 1991 – Philippines sets minimum age of recruitment for armed services at 18
- 1992 – Czech Republic sets minimum age of recruitment for armed services at 18
- 1992 – Republic of Moldova sets minimum age of recruitment for armed services at 18
- 1992 – Ukraine sets minimum age of recruitment for armed services at 18
- 1992 – Azerbaijan sets minimum age of recruitment for armed services at 17
- 1992 – Sudan sets minimum age of recruitment for armed services at 17
- 16 January 1992 – Chad sets minimum age of recruitment for armed services at 18
- 30 July 1992 – El Salvador Chad sets minimum age of recruitment for armed services at 18
- October 1992 – Belarus sets minimum age of recruitment for armed services at 18
- 1993 – Hungary sets minimum age of recruitment for armed services at 18
- 1993 – Kazakhstan sets minimum age of recruitment for armed services at 18
- 1993 – Mongolia sets minimum age of recruitment for armed services at 18
- 1993 – Nigeria sets minimum age of recruitment for armed services at 18
- December 1993 - UN General Assembly resolution Requesting the SG to prepare an expert study on the impact of armed conflict on children
- 1994 – Kyrgyzstan sets minimum age of recruitment for armed services at 18
- 1994 – Sweden sets minimum age of recruitment for armed services at 18
- 1994 – Tajikistan sets minimum age of recruitment for armed services at 18
- September 1994 – Cameroon sets minimum age of recruitment for armed services at 18
- November 1994 – Statute of International Criminal Tribunal for Rwanda adopted
- 21 December 1994 – Cuba sets minimum age of recruitment for armed services at 16/17
- 1995 – Spain passes Penal Code, Article 612(3)
- 1995 – Russian Federation sets minimum age of recruitment for armed services at 18
- 1995 – Uganda sets minimum age of recruitment for armed services at 18
- 1995 – Slovenia sets minimum age of recruitment for armed services at 17
- 5 January 1995 – Argentina sets minimum age of recruitment for armed services at 18
- 23 October 1995 – Eritrea sets minimum age of recruitment for armed services at 18
- 1996 – Bosnia Herzegovina sets minimum age of recruitment for armed services at 18
- 1996 – Dominican Republic sets minimum age of recruitment for armed services at 18
- 1996 – Ethiopia sets minimum age of recruitment for armed services at 18
- 1996 – Lesotho sets minimum age of recruitment for armed services at 18
- 1996 – Romania sets minimum age of recruitment for armed services at 18

- July 1996 - Resolution Of The Plight of African Children in Situation of Armed Conflicts adopted by Organization of African Unity
- 30 August 1996 - Statements before the Security Council, UN Doc. S/PV.3694
- October 1996 – Publication of the Machel Report on the Impact of Armed Conflict on Children
- November 1996 – Application of *Prosecutor v. Norman* decision
- 1 December 1996 – Burundi sets minimum age of recruitment for armed services at 16 (in practice 18)
- 1997 – Cambodia sets minimum age of recruitment for armed services at 18
- 1997 – Colombia sets minimum age of recruitment for armed services at 18
- 1997 – Slovakia sets minimum age of recruitment for armed services at 18
- June 1997 – Greece sets minimum age of recruitment for armed services at 18
- April 30, 1997 – Symposium on the Prevention of Children into Armed Forces and Demobilisation and Social Reintegration of Child Soldiers in Africa adopted
- 12 December 1997 – Mozambique sets minimum age of recruitment for armed services at 18
- 1998 – Argentina passes Draft Code of Military Justice
- 29 June 1998 – President of the Security Council condemned the use of child soldiers (S/PRST/1998/18)
- 17 July 1998 – Adoption of Rome Statute of the International Criminal Court
- November 1998 – Algeria sets minimum age of recruitment for armed services at 18
- December 1998 - A/Res/51/77 passed
- 1999 – South Africa sets minimum age of recruitment for armed services at 18
- 1999 – Venezuela sets minimum age of recruitment for armed services at 18
- 11 March 1999 - S/RES/1231 passed
- 19 March 1999 – Committee on Elimination of Racial Discrimination expresses concern over child soldiers in Sudan (Decision 5 (54) on the Sudan: Sudan. 19/03/99. A/54/18,para.21(5).)
- 17 June 1999 – Adoption of Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour
- 8 July 1999 – Latin American and Caribbean Conference on the Use of Child Soldiers
- 21 Sept. 1999 – Portugal sets minimum age of recruitment for armed services at 18
- 29 November 1999 – Entry into force of African Charter on the Rights and Welfare of the Child
- February 2000 - Air Force Instruction 36-2110 passed by the United States, stating that Air Force members must be “at least 18 years of age to be assigned to a hostile fire or imminent danger area.”
- 25 May 2000 – Adoption and Opening of Signature of Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, raising the minimum age of recruitment to 18
- 9 June 2000 – Democratic Republic of the Congo sets minimum age of recruitment for armed services at 18
- 19 November 2000 – Entry into force of Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour

- January 2001 – East Timor Congo sets minimum age of recruitment for armed services at 18
- May 2001 – Finland sets minimum age of recruitment for armed services at 18
- 31 August 2001 – by this date, there were 149 Signatories and 37 parties to the Rome Statute
- 2002 – Statute for the Special Court for Sierra Leone adopted
- 16 January 2002 – Statute of Special Court for Sierra Leone passed
- 12 February 2002 – Entry into force of Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict
- November 2002 – Israel sets minimum age of recruitment for armed services at 18
- 14 June 2004 – SCSL decides that prohibition against recruitment of child soldiers had crystallized into a violation of customary international law before November 1996 in *Prosecutor v. Norman*.

Sources: UNICEF Amicus Brief, *Prosecutor v. Norman*, UNICEF Amicus Curiae Brief, ICCPR, UNDHR, International Covenant on Economic, Social, and Cultural Rights, Geneva Conventions and Optional Protocols I & II, Convention on the Rights of the Child and its Optional Protocol, Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, African Charter on the Rights and Welfare of the Child, Declaration on the Protection of Women and Children in Emergency and Armed Conflict.

TIMELINE – FORCED MARRIAGE

- 1948 – Universal Declaration of Human Rights adopted
- 1962 – Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages adopted
- 16 December 1966 – International Covenant on Economic, Social and Cultural Rights adopted
- 19 December 1966 - International Covenant on Social and Political Rights adopted
- 1968 – Bulgaria outlaws forced marriages
- 23 March 1976 – International Covenant on Civil and Political Rights adopted
- 1979 – Convention on the Elimination of all Forms of Discrimination Against Women adopted
- 1990 – African Charter on the Rights and Welfare of the Child adopted
- 1991 – Penal Code of the Socialist Republic of Bosnia and Herzegovina passed
- 1992 – Application of Prosecutor v. Kunarac, Kovac and Vukovic in ICTY
- 1992 – Application of Prosecutor v. Kvočka et al. judgment in ICTY
- 1992 – Application of Prosecutor v. Tadic judgment in ICTY
- 20 December 1993 – Declaration on the Elimination of Violence against Women
- April 7, 1994 – application of judgment in *Prosecutor v. Akayesu*
- 1998 – Elements of Crimes for ICC adopted
- 2 September 1998 - Prosecutor v. Akayesu Judgment in ICTR
- 11 October 2000 – GA Res. A/C.3/55/L.13 adopted
- 2 November 2001 – Prosecutor v. Kvočka et al. judgment in ICTY
- 2003 - Kyrgyz Republic Law on Gender Equality passed
- 11 July 2003 – Protocol of the African Charter on Human Rights and Peoples’ Rights on the Rights of Women in Africa adopted
- 20 July 2006 – Democratic Republic of the Congo outlawed forced marriage

[There are other laws that criminalize forced marriage included in the memo, but the author could not locate the dates of these laws.]

Sources:

UNHDR, ICCPR, ICESCR, CEDAW, African Charter on the Rights and Welfare of the Child, Declaration on the Elimination of Violence against Women, Rome Statute, Elements of Crimes for ICC, Protocol of the African Charter on Human Rights and Peoples’ Rights on the Rights of Women in Africa, Law number 06/019 (20 Jul. 2006) (Democratic Republic of the Congo), *Prosecutor v. Akayesu*, *Prosecutor v. Tadic*, *Prosecutor v. Kvočka et. al.*, *Prosecutor v. Kunarac, Kovac, and Vukovic*, UNICEF Amicus Curiae Brief,