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Legal classification and status of forced recruits over the age of fifteen years old: are forced recruits enslaved within the meaning of international law or do they fall within a different legal classification (namely, civilian or combatant)?

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MEMORANDUM FOR THE SPECIAL COURT FOR SIERRA LEONE

ISSUE: LEGAL CLASSIFICATION AND STATUS OF FORCED RECRUITS OVER THE AGE OF FIFTEEN YEARS OLD: ARE FORCED RECRUITS ENSLAVED WITHIN THE MEANING OF INTERNATIONAL LAW OR DO THEY FALL WITHIN A DIFFERENT LEGAL CLASSIFICATION (NAMELY, CIVILIAN OR COMBATANT)?

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ISSUE & SUMMARY OF CONCLUSIONS

There is a general consensus in international law to legally classify participants in armed conflict as civilians, combatants, hors de combat, or prisoners of war. In the Sierra Leonean conflict, many of the rebel forces relied on forced conscription, especially of children, to populate their armies.[*] International Humanitarian Law protects children from forced conscription, but there are no similar protections for those not considered children. In determining the legal status of these forced recruits, a threshold question must be answered: Is the armed conflict of an international or internal nature? For internal armed conflicts, there are fewer provisions in place to protect civilians and combatants. However, many in the international community would argue that the provisions that apply to international armed conflict, mainly the Four Geneva Conventions and additional protocols, are part of customary international law, and thereby, applicable to internal conflicts.

A) If the Sierra Leonean conflict were classified as an internal armed conflict, then the forced recruits would be considered civilians.[1]

Assuming that the Sierra Leonean conflict is only an internal conflict, it appears that the forced recruits would be considered civilians and would be afforded some

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[*] "Regarding civilians over 15 years of age who are captured and forced to join an organized group [where escape is threatened with death, mutilation, beatings], what is the impact of this forced recruitment and use of adults in the organized group on the individual's status as a civilian? At what point does the impact, if any, of the circumstances of the capture and forced recruitment cease to be of legal effect?"

[1] *See* Section I, Part C: The Sierra Leonean conflict is usually viewed as an internal armed conflict. Thus, if it is an internal conflict, forced recruits are not afforded combatant status under Protocol I," *infra* at p. 9.

protections under Common Article 3 and Protocol II to the 1949 Geneva Conventions. However, if the forced recruits actually participated in the hostilities, the recruits would lose their civilian immunity for so long as they engaged in hostilities. Nonetheless, this type of activity would not affect the legal classification of the forced recruit as a civilian.

B) If the Sierra Leonean conflict is deemed "internationlized," and in turn, Protocol I is applicable, then the forced recruits could be considered either civilians or combatants, depending upon the type of activity.[2]

Assuming that Protocol I is applicable to the Sierra Leonean conflict, the legal classification of a forced recruit seems to depend upon the type of activity performed and his "official incorporation" into the armed forces. Generally, all members of the armed forces are combatants, and only members of the armed forces are combatants. Thus, in order to be classified as a combatant, the forced recruit must be incorporated in some way into the armed forces. If the forced recruit is not considered a combatant, then he likewise must be a civilian. (The international legal community does not recognize quasi-combatant status).

There are advantages to classification as either a civilian or a combatant. A civilian is generally afforded immunity and protection from any targeted military attacks. On the other hand, a combatant gives up this "immunity" for the privilege to take part in hostilities.

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[2] *See* "Section II: Protocol I delineates between Civilians and Combatants.", *infra* at p. 20.

C) The forced recruits engaging in hostilities are most likely not considered enslaved—nonetheless, enslavement does not affect the forced recruit's legal classification as a civilian or combatant.[3]

Enslavement, as a crime against humanity, is generally defined as a widespread and systematic attack against a civilian population. However, the International Criminal Tribunal for the Former Yugoslavia recognized that combatants can also be victims of crimes against humanity. Enslavement, a crime against humanity, necessarily requires a captor to exert "ownership" over the forced recruit. Jurisprudence suggests that enslavement has been extended to forced female recruits who were deprived of their liberty and freedom. These female recruits were often forced into marriages and sexual slavery. However, there is no jurisprudence that suggests that forced recruits participating in hostilities are considered enslaved.

However, forced labour, which is defined as involuntary work, can be applied to forced recruitment. While there is a general exception to forced military conscription, there is no law setting forth legal conscription in Sierra Leone—therefore, the forced recruits could be required to perform forced labour. This labour, however, would not affect the underlying status as a civilian or a combatant.

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[3] *See* "Section III: Enslavement and forced labour do not affect a forced recruit's legal status.", *infra* at p. 31.

FACTUAL BACKGROUND

During the Sierra Leonean conflict of the twentieth and twenty-first centuries, the rebel forces relied on child conscription and forced recruitment to staff much of their armies.[4] The international community was outraged by this human rights violations and adopted conventions in order to protect children during periods of armed conflict.[5] The Special Court for Sierra Leone, recognizing the delicate issue of child soldiers, adopted a statute that provided for jurisdiction over persons who were at least fifteen years of age.[6] However, the protections afforded to forced recruits who were children did not extend to forced recruits who were above the age threshold. In addition, it is unclear if these forced recruits can receive protections that are provided based on one's legal classification either as a civilian, combatant, or prisoner of war.

LEGAL ANALYSIS

I) INTERNATIONAL HUMANITARIAN LAW ARGUABLY GOVERNS THE CONFLICT IN SIERRA LEONE. THEREFORE, ALL FOUR GENEVA CONVENTIONS AND SUBSEQUENT PROTOCOLS SHOULD BE APPLICABLE TO THE SIERRA LEONEAN CONFLICT.

A) The Geneva Conventions have limited applicability based on the type of armed conflict.

The 1949 Geneva Conventions and subsequent Protocols are becoming increasingly irrelevant in a world torn apart by internal armed conflicts. Created post-

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[4] Jon M. Van Dyke, *The Fundamental Human Right to Prosecution and Compensation*, 29 Denv. J. Int'l L. & Pol'y 77, 78 (2001). [Reproduced in accompanying Notebook at Tab 30].

[5] *Id.* at 80−82.

[6] Statue for the Special Court for Sierra Leone, U.N. Doc. S/2000/915 (2002). [Reproduced in accompanying Notebook at Tab 15].

World War II, the Conventions were mostly concerned with wars between countries, and therefore, wars of an international nature.[7] Thus, many of the protections and rights extended to civilians and combatants apply only during international armed conflict. However, the world today is more familiar with internal armed conflicts—like the armed conflict in Sierra Leone. Unfortunately, even though civil wars present similar atrocities as international wars, only a few provisions from the 1949 Geneva Conventions govern internal armed conflicts.[8] These provisions include Common Article 3 and Protocol Additional to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of Non-International Armed Conflicts ("Protocol II").[9] "These provisions offer little protection to combatants and civilians in conventional civil wars, resulting in an

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[7] Laura Lopez, *Uncivil Wars: The Challenge of Applying International Humanitarian Law to Internal Armed Conflicts*, 69 N.Y.U. L. REV. 916, 918 (1994). [Reproduced in accompanying Notebook at Tab 32].

[8] *Id*.

[9] *See generally* Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 3, Aug. 12, 1949, 75 U.N.T.S. 31 (hereinafter "First Geneva Convention"). [Reproduced in accompanying Notebook at Tab 6]; Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 3, Aug. 12, 1949, 75 U.N.T.S. 85 (hereinafter "Second Geneva Convention"). [Reproduced in accompanying Notebook at Tab 7]; Geneva Convention (III) Relative to the Treatment of Prisoners of War, art. 3, Aug. 12, 1949, 75 U.N.T.S. 135 (hereinafter "Third Geneva Convention"). [Reproduced in accompanying Notebook at Tab 8]; and Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, art. 3, Aug. 12, 1949, 75 U.N.T.S. 287 (hereinafter "Fourth Geneva Convention") (hereinafter collectively referred to as "1949 Geneva Conventions"). [Reproduced in accompanying Notebook at Tab 9]; *see also* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609 (hereinafter "Protocol II"). [Reproduced in accompanying Notebook at Tab 12].

unfortunate disparity between the protections afforded during international [conflicts when compared with] internal conflicts."[10]

Characterization of the type of armed conflict is important in order to determine which parts of international humanitarian law apply.[11] Typically, an international armed conflict involves two different sovereign States engaging in hostilities, whereas an internal armed conflict involves the armed forces of a State and other forces within the same State.[12] Primarily, the Four Geneva Conventions and the Additional Protocols govern international armed conflicts, whereas only Common Article 3 and Protocol II govern internal armed conflicts.[13]

Individual states are unwilling to fully extend all of the Geneva Conventions to internal armed conflicts.[14] By its very nature, the Conventions, as part of international

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[10] Lopez, *supra* note 7, at 918. [Reproduced in accompanying Notebook at Tab 32].

[11] Babafemi Akinrinade, *International Humanitarian Law and the Conflict in Sierra Leone*, 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y 391, 408 (2001). [Reproduced in accompanying Notebook at Tab 24]. There is no question that the conflict in Sierra Leone is designated as an armed conflict—the key question is whether the conflict is an international armed conflict or an internal armed conflict. Armed conflicts in general are defined as "armed confrontations between: 1) two or more States; 2) a State and a body other than a State; 3) a State and a dissident faction; and 4) two ethnic factions within a State. *Id.*, at 409 (citing Pierto Vieri, Dictionary of the International Law of Armed Conflict 34 (Edward Markee & Susan Mutti trans., Int'l Comm. Of the Red Cross 1992)). *See also Prosecutor v. Tadic* Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Oct 2, 1995) (stating an armed conflict is "protracted violence between governmental authorities and organized armed groups or between such groups within a State."). [Reproduced in accompanying Notebook at Tab 22].

[12] Akinrinade, *supra* note 11, at 410. [Reproduced in accompanying Notebook at Tab 24].

[13] *Id.*

[14] *See generally* William Abresch, *A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya*, 16 EUR. J. INT'L L. 741, 757 (2005).

humanitarian law, conflict with state sovereignty by placing the rights of individuals over the rights of states.[15] In fact, some States believe that providing legal protections to rebel groups by classifying them as combatants under international humanitarian law would encourage more insurgencies and rebellions against their own State governments. Thus, characterizing the armed conflict as an international or internal conflict has significant consequences on application of the various aspects of international humanitarian law.

B) The civil war in Sierra Leone is an armed conflict.

Armed conflict is defined as any armed confrontation between: "1) two or more States; 2) a State and a body other than a State; 3) a State and a dissident faction; and, 4) two ethnic factions within a State."[16] A multitude of conflicts could fall under different parts of this definition, including the Sierra Leonean conflict. The ICTY clarified this definition of armed conflict in *Prosecutor v. Tadic*, stating that an armed conflict occurs:

> "'[W]henever there is…protracted violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until …in the case of internal conflicts, a peaceful settlement is achieved."[17]

[Reproduced in accompanying Notebook at Tab 43]. "States refuse to apply humanitarian law to internal armed conflicts for reasons that are more political than legal." *Id.* There is concern that application of humanitarian law during internal armed conflicts "tacitly concedes that there is another 'party' wielding power in the putatively sovereign state." *Id.*

[15] Lopez, *supra* note 7, at 917. [Reproduced in accompanying Notebook at Tab 32].

[16] Akinrinade, *supra* note 11, at 409. [Reproduced in accompanying Notebook at Tab 24].

[17] *Id.* (citing *Prosecutor v. Tadic*, Appeal on Jurisdiction, *supra* note 11, at 54). *Tadic*, [Reproduced in accompanying Notebook at Tab 22].

The Rwanda tribunal also adopted the ICTY's clarified definition of an armed conflict in *Prosecutor v. Akayesu*.[18]

However, the clarified definition as presented by the ICTY in Tadic still does not clearly determine whether the Sierra Leonean conflict reached the level of an armed conflict. Protocol II suggests that the level of hostilities must surpass a minimum level of intensity.[19] The requisite level may be reached, "for example, when the hostilities are of a collective character or when the government is obliged to use military force against the insurgents, instead of mere police forces. Second, non-governmental groups involved in the conflict must be considered as "parties to the conflict", meaning that they possess organized armed forces. This means for example that these forces have to be under a certain command structure and have the capacity to sustain military operations."[20]

In addition, the Special Court for Sierra Leone specifically referred to the Sierra Leonean conflict as an internal armed conflict in *Prosecutor v Norman*.[21] Combining the jurisprudence from ICTY and the guidance given by Protocol II with the Special Court's judgment in *Norman*, the conflict in Sierra Leone no doubt seems to be an armed conflict.

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[18] Akinrinade, *supra* note 11, at 409. [Reproduced in accompanying Notebook at Tab 24].

[19] Int'l Comm. of the Red Cross, Opinion Paper: How is the term "Armed Conflict" defined in International Humanitarian Law?, at 3 (Mar. 2008). [Reproduced in accompanying Notebook at Tab 48].

[20] *Id.*

[21] *Prosecutor v. Norman*, Case No. SCSL-2003-08-PT, Decision on the Defence Preliminary Motion on Lack of Jurisdiction: Command Responsibility (Oct. 15, 2003). [Reproduced in accompanying Notebook at Tab 19].

C) The Sierra Leonean conflict is usually viewed as an internal armed conflict. Thus, if it is an internal conflict, forced recruits are not afforded combatant status under Protocol I.

Both the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR") discussed ways to determine the international nature (or lack thereof) of an armed conflict. The ICTY Appeals Chamber specifically delineated a test to determine if an armed conflict reached the level of an international armed conflict. The considerations included: 1) whether another state intervened in the conflict through the state's troops; or 2) whether some of the participants in the internal armed conflict acted on behalf of another sate.[22] Interestingly enough, the Prosecutor from the ICTY successfully established the international nature of the armed conflict in seven different cases. In the instant case of Sierra Leone, however, it is more difficult to prove that another state formally intervened, either on its own or through support of participants in the armed conflict.

Rather, the Sierra Leonean conflict seems to fall within the traditional Geneva Convention definition of non-international armed conflict in Protocol II.[23] The Sierra Leonean armed conflict occurred between the Sierra Leonean army and the rebel force, The Revolutionary Unite Front of Sierra Leone ("RUF").[24] Certainly, scholars argue that

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[22] Eve La Haye, War Crimes in Internal Armed Conflicts 321 (2008) (citing *Prosecutor v. Tadic*, Case No. IT-94-1-A, Appeal Judgment, ¶ 84 (15 July 1999). La Haye [Reproduced in accompanying Notebook at Tab 45]; *Tadic* Appeal Judgment [Reproduced in accompanying Notebook at Tab 21]

[23] Akinrinade, *supra* note 11, at 412-13. [Reproduced in accompanying Notebook at Tab 24]. *See also* Protocol II, *supra* note 9, at art. 1(1) (defining a non-international armed conflict not covered by Protocol I). [Reproduced in accompanying Notebook at Tab 12]

[24] Akinrinade, *supra* note 11, at 413. [Reproduced in accompanying Notebook at Tab 24].

the presence of Liberian fighters in the rebel forces suggests that the conflict is characterized as more than just an internal strife. However, there is no nexus between these Liberian fighters and the sovereign state of Liberia.[25] Therefore, because the Sierra Leonean conflict seems to fall within the classic definition, many scholars regard the Sierra Leonean conflict as purely internal in nature.[26]

Assuming that the Sierra Leonean conflict is deemed purely an internal armed conflict, legal classification of forced recruits becomes unclear. As mentioned above, Common Article 3 and Protocol II are applicable during internal armed conflicts. However, these treaties provide protections for civilians only—there is no mention or discussion of combatant status or legal protections for combatants. Both combatants and civilians, however, are afforded protections under the Protocol Additional to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of International Armed Conflicts ("Protocol I").[27] Nonetheless, Protocol I traditionally is inapplicable during internal armed conflicts. This inapplicability of Protocol I during internal armed conflicts has drastic consequences for combatants. For civilians, however, the inapplicability of Protocol I has little effect—it seems as if the same protections in Protocol I are also extended to civilians during internal armed conflict through Protocol

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[25] Akinrinade, *supra* note 11, at 411. [Reproduced in accompanying Notebook at Tab 24].

[26] Many scholars also argue that the Sierra Leonean conflict has become an "internationalized" armed conflict. *See infra*, "Section I, Part D: The laws of international armed conflict arguably apply to the Sierra Leonean conflict," at p. 13.

[27] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 51(3), Dec. 12, 1977, 1125 U.N.T.S. 3 (hereinafter "Protocol I"). [Reproduced in accompanying Notebook at Tab 11].

II.[28] Further, Common Article 3 provides general civilian protection in addition to prohibiting certain acts, such as murder, outrages against personal dignity, cruel punishment, and torture, among others.[29]

During internal armed conflicts, Article 13 of Protocol II provides protection to civilians from military targets and objectives. But, a civilian loses this protection the instant he takes direct part in the hostilities.[30] While a civilian loses this protection, the civilian does not simultaneously lose his civilian status during an internal armed conflict. As stated above, there is no special designation between combatants and civilians during internal armed conflicts. Thus, when a civilian takes a direct part in the hostilities, he will not be granted privileges or protections as a combatant—at the same time, the civilian will also not be granted civilian protections. Nonetheless, it seems that his legal status would continue as a civilian.[31] Certainly, any unlawful actions in which the citizen

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[28] Akinrinade, *supra* note 11, at 419. [Reproduced in accompanying Notebook at Tab 24]. *See also* Int'l Comm. Of Red Cross, Commentary: Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims During Non-International Armed Conflicts (Protocol II), ¶ 4762 (J. Pictet ed. 1987) (hereinafter "Commentary to Protocol II"). [Reproduced in accompanying Notebook at Tab 2].

[29] 1949 Geneva Conventions, *supra* note 9, at art. 3. [Reproduced in accompanying Notebook at Tabs 6−9].

[30] Commentary to Protocol II, *supra* note 28, at ¶¶ 4787−89. [Reproduced in accompanying Notebook at Tab 2].

[31] The Supreme Court of Israel, in *Public Committee Against Torture in Israel v. Government of Israel*, suggested that Article 51(3) of Protocol I is an international norm and part of customary international law. Orna Ben-Naftali & Keren Michaeli, *Public Committee Against Torture in Israel v. Government of Israel. Case No. HCJ 769/02. At <http://elyon1.court.gov.il/files_eng/02/690/007/A34/02007690.A34.pdf>. Supreme Court of Israel, Sitting as the High Court of Justice, December 13, 2006*, 101 AM. J. INT'L L. 459, 461 (2007). [Reproduced in accompanying Notebook at Tab 36]. Article 51(3) of Protocol I states "Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities." Protocol I, *supra* note

or forced recruit participates would lead to criminal liability, including such crimes as murder and treason.[32]

In the instant case, the rebel groups required many of the forced recruits to actively participate in the hostilities. While there is little jurisprudence specifically defining the legal status of a civilian taking part in hostilities during internal armed conflict, states are not obliged to recognize combatant privileges to those taking part in hostilities.[33] Thus, it seems that the forced recruits would be considered civilians and therefore, would be completely liable for any participation during the internal armed conflict.[34]

27, at art. 51(3). [Reproduced in accompanying Notebook at Tab 11]. The Israeli Supreme Court held that civilians who take part in the hostilities do not lose their civilian status; rather, they lose their civilian protections during such time as they take part in the hostilities. Ben-Naftali, *supra* note 31, at 461. [Reproduced in accompanying Notebook at Tab 36].

[32] The Special Court for Sierra Leone is a hybrid court, and the Court can prosecute offenders either under international law or local Sierra Leonean law. Therefore, it is possible that a forced recruit could be liable under either international law or domestic Sierra Leonean law.

[33] Waldemar A. Solf, *The Status of Combatants in Non-International Armed Conflicts Under Domestic Law and Transnational Practice*, 33 AM. U. L. REV. 53, 59 (1983). [Reproduced in accompanying Notebook at Tab 42].

[34] Enslavement is considered a crime against humanity, which is generally targeted at civilian populations. *See* "Section III, Enslavement and Forced Labour Do Not Affect a Forced Recruit's Legal Status," *infra* at p. 31, dealing with the overlap between civilian status and enslavement.

D) The laws of international armed conflict arguably apply to the Sierra Leonean conflict.

International armed conflict typically exists when two sovereign states engage in hostilities, thus triggering international humanitarian law ("IHL"; also know as the laws of armed conflict). International armed conflict includes:

> "1) the use of force in a warlike manner between States, whether or not they recognize themselves being at war; 2) all 'measures short of war' whether or not they are compatible with Article 2(4) of the UN Charter; and 3) wars of national liberation as set out in Article 1(4) of the 1977 Protocol I Addition to the Four Geneva Conventions of 1949."[35]

The Sierra Leonean conflict superficially appears to be purely an internal conflict.[36] While other nationals, including Liberians, were involved in the conflict, the principal actors were Sierra Leoneans, and no State was formally at war with Sierra Leone.[37] However, there were also "external dimensions" involved in the conflict.[38] The Economic Community of West African States ("ECOWAS") provided support to the elected Sierra Leonean government overthrown during the conflict through the Economic Community of West African States Monitoring Group ("ECOMOG") troops.[39] On August 30, 1997, ECOWAS mandated ECOMOG to enforce sanctions against the RUF

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[35] Akinrinade, *supra* note 11, at 410 (internal citations omitted). [Reproduced in accompanying Notebook at Tab 24].

[36] *See supra*, "Section 1, Part C: The Sierra Leonean conflict is usually viewed as an internal armed conflict. Thus, if it is an internal conflict, forced recruits are not afforded combatant status under Protocol I," at p. 9.

[37] Akinrinade, *supra* note 11, at 410. [Reproduced in accompanying Notebook at Tab 24].

[38] *Id.* at 414.

[39] *Id.* at 398, 404.

and to restore constitutional order in Sierra Leone.[40] The ECOMOG subsequently joined the U.N. peace-keeping efforts in Sierra Leone, with most of the ECOMOG's 15,000 soldiers being replaced by U.N. soldiers.[41]

While the conflict in Sierra Leone is primarily of an internal character, there can also be an argument that the presence of ECOMOG troops[42], in particular, gave the conflict international dimensions. If this were the case, it could be argued that all four Geneva Conventions and both Additional Protocols therefore would apply. One commentator addressed this issue of intervention by outside forces and stated that:

> "In the case of peace-keeping interventions by UN forces or UN authorized forces in an internal armed conflict, the UN troops do not become party to the conflict and are often allowed to use force only in restricted cases of self-defense. It is therefore possible to think that the involvement of such peace-keeping forces in an internal armed conflict will not change the nature of the conflict. In those cases, the UN troops strive to remain neutral and the very occasional use of force is self defense should not decisively affect the same nature of the armed conflict.
>
> If the character of the UN forces is not peace-keeping but peace-enforcing or peace-restoring, the forces' mandate…may allow them to use force to restore peace and security in the country. In those circumstances, it seems that the UN forces can therefore become part to the armed conflict and the nature of the conflict will be changed to an international conflict."[43]

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[40] *Id.* at 404. *See also* HUMAN RIGHTS WATCH, *Sierra Leone: The Role of the Int'l Community*, http://humanrightswatch.net/worldreport99/africa/sierraleone3.html. Human Rights Watch, [Reproduced in accompanying Notebook at Tab 46].

[41] *Id.*

[42] Human Rights Watch, *supra* note 40. [Reproduced in accompanying Notebook at Tab 46].

[43] Haye, *supra* note 22, at 19−20. [Reproduced in accompanying Notebook at Tab 45].

UN forces were sent to Sierra Leone to restore the peace in the late 1990s. Their combined efforts with the ECOMOG suggest that perhaps the conflict in Sierra Leone could be considered an international conflict.

Human Rights Watch further suggests that the most basic standards of international humanitarian law, that have acquired the status of customary international law, are binding on all forces operating in Sierra Leone, including those operating under the U.N.-endorsed ECOMOG mandate.[44] In fact, a study conducted by the International Committee of the Red Cross found that state practice has developed a more complete regulation of internal conflicts under customary law than in treaty law.[45] Further, the study argues that the four Geneva Conventions and the Additional Protocols is reflected in customary international law.[46] According to the study, both governmental armed forces and rebel forces are bound by these customary rules and can be held accountable in case of non-compliance.[47]

Further, recognition of belligerency by the Sierra Leone government during the armed conflict can change the nature of the internal armed conflict. When belligerency is applied to internal armed conflict, "it means that the level of conflict has risen to the point where the State recognizes a state of belligerency, as opposed to mere insurgency,

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[44] Human Rights Watch, *supra* note 40, http://www.hrw.org/campaigns/sierra/int-law.htm. [Reproduced in accompanying Notebook at Tab 46].

[45] The Magazine of the International Red Cross and Red Crescent Movement, *Customary International Humanitarian Law*, http://www.redcross.int/EN/mag/magazine2005_2/24-25.htm. [Reproduced in accompanying Notebook at Tab 50].

[46] *Id.*

[47] *Id.*

or rebellion."[48] While there was no formal agreement or recognition of belligerency by the Sierra Leonean government, the International Committee of the Red Cross called upon the parties to "respect the relevant provisions of humanitarian law, stressing the adherence of Sierra Leone to the 1949 Geneva Conventions and the Additional Protocols."[49] Even though no recognition of belligerency occurred, it is clear the Sierra Leone was encouraged to adopt a broader spectrum of protections through the Geneva Conventions and Additional Protocols.

E) Extending combatant privileges to the rebel groups, and in turn, to the forced recruits, is advantageous for the Sierra Leonean conflict.

Failure to extend combatant status to forced recruits raises intricate policy considerations. On the one hand, there is certainly a desire to protect State sovereignty from rebellious groups who could hide under the protections of a legal combatant. However, it could also be argued that, by refraining to extend combatant privileges to the rebel groups, the rebels have no incentive to abide by customary international humanitarian law, including Common Article 3 or Protocol II.[50] In other words, the

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[48] Akinrinade, *supra* note 11, at 422 (citing *Prosecutor v. Tadic*, Case No. IT-94-1-T, Opinion and Judgment (May 7, 1997) "the ICTY noted that it is an established principle of customary international law that the laws of war might become applicable to non-international armed conflicts of a certain intensity through the doctrine of "recognition of belligerency."). Akinrinade [Reproduced in accompanying Notebook at Tab 24]; *Tadic* Trial Opinion and Judgment [Reproduced in accompanying Notebook at Tab 23].

[49] Akinrinade, *supra* note 11, at 425 (emphasis added). [Reproduced in accompanying Notebook at Tab 24].

[50] Solf, *supra* note 33, at 65. [Reproduced in accompanying Notebook at Tab 42]. Interestingly, even though some would not recognize the rebel groups as legal combatants, the Statute for the Special Court for Sierra Leone still holds individuals from these groups criminally responsible for breaches of customary international law under Common Article 3 and Protocol II. *See generally* Statue for the Special Court for Sierra Leone, *supra* note 6. [Reproduced in accompanying Notebook at Tab 15].

RUF, for example, would have no motivation to ensure that they targeted only combatants during military strikes.

Further, as mentioned above, the Geneva Conventions of 1949 were originally created to deal with the atrocities of World War II and international conflicts. However, over the last few decades, an evolution in armed conflict has occurred, where most conflicts have shifted to internal conflicts. While most of the Geneva Conventions do not technically apply to internal conflicts, customary international law suggests otherwise.

For example, the ICTY observed in *Strugar* that attacks on civilian objects, which are protected by Protocol I (only applicable during international armed conflicts), are nevertheless illegal due to an evolution of rules applicable to all armed conflicts, be they international or internal conflicts. "The Appeals Chamber noted that already during the Spanish Civil War the tendency to disregard the distinction between international and internal armed conflicts could be observed." The Chamber concluded that despite the lack of a provision in Protocol II, the general rule prohibiting attacks on civilian objects also applies to internal conflicts.[51]

Further, Common Article 3 actually encourages the Parties to the conflict "to bring into force, by means of special agreements, all or part of the other provisions of the

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[51] *Prosecutor v. Strugar*, Case No. IT-01-42-T, Judgment, ¶ 224 (Jan. 31, 2005) [Reproduced in accompanying Notebook at Tab 20]. *See also Prosecutor v. Hadzihasanovic et al.*, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, ¶ 29 (July 16, 2003) (holding that "the non-reference in Protocol II to command responsibility in relation to internal armed conflicts did not necessarily affect the question whether command responsibility previously existed as part of customary international law relating to internal armed conflicts."). [Reproduced in accompanying Notebook at Tab 16].

present Convention."[52] It is unclear based on the agreements between the Sierra Leonean government and the RUF whether such stipulations were made. However, Sierra Leone did ratify Protocol I on October 21, 1996.[53] Thus, sound public policy seems to dictate application of all of the 1949 Geneva Conventions to the Sierra Leonean conflict.

Finally, the jurisdictional choices of the Special Court seem to also suggest a broader application of treaty law than just Common Article 3 and Protocol II. The statute delineates crimes included in the Rome Statute for the International Criminal Court and encompasses more international crimes than does the International Criminal Tribunal for Rwanda.[54] For example, the ICTR statute criminalizes rape, but the Statute for the Special Court expands the liability for rape to explicitly include sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence.[55] The Statute for the Special Court also includes an additional Article outlining criminal liability that the ICTR Statute does not include. Largely inspired by the Rome Statute for the International Criminal Tribunal, these additional offenses include: 1) committing an attack against a civilian population; 2) committing an attack against peace-keeping

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[52] 1949 Geneva Conventions, *supra* note 9, at art. 3. [Reproduced in accompanying Notebook at Tabs 6−9]. *See also* Akinrinade, *supra* note 11, at 423−24. [Reproduced in accompanying Notebook at Tab 24].

[53] *See generally* International Committee of the Red Cross, *Parties to Protocol I*, http://www.icrc.org/ihl.nsf/ WebSign?ReadForm&id=470&ps=P. [Reproduced in accompanying Notebook at Tab 49].

[54] Haye, *supra* note 22, at 147. [Reproduced in accompanying Notebook at Tab 45].

[55] *Compare* Statute of the Special Court for Sierra Leone, *supra* note 6, at art. 2(g), with Statute of International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994). Sierra Leone, [Reproduced in accompanying Notebook at Tab 15]; Rwanda, [Reproduced in accompanying Notebook at Tab 14].

personnel; and 3) abducting and forcefully recruiting children under the age of fifteen.[56] Finally, the Special Court also has jurisdiction over children ages fifteen to eighteen years old—this type of jurisdiction has yet to be exercised in the international community.[57] While the Statute for the Special Court is similar to the ICTR Statute, the differences suggest that the Special Court crafted the statute to reflect the specific problems that occurred in Sierra Leone.[58] The additional liability included in the Statute for the Special Court "seems to indicate…that more principles and crimes apply in internal conflicts than those stemming [solely] from Common Article 3 or Protocol II."[59]

Thus, in keeping with the spirit of the Geneva Conventions and based on the arguments above, it seems most advantageous to extend Protocol I, and in turn, combatant privileges, to the Sierra Leonean conflict. For the next section of this memorandum, the legal classification of forced recruits will be viewed under the assumption that Protocol I applies to the specific conflict in Sierra Leone.

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[56] Haye, s*upra* note 22, at 146. [Reproduced in accompanying Notebook at Tab 45]. *See also* Statute of the Special Court for Sierra Leone, *supra* note 6, at art. 5, with Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90. Statute of SCSL, [Reproduced in accompanying Notebook at Tab 15]; Rome Statute, [Reproduced in accompanying Notebook at Tab 13].

[57] Haye, *supra* note 22, at 145. [Reproduced in accompanying Notebook at Tab 45]

[58] *Id.* at 146.

[59] *Id.* at 147.

II) PROTOCOL I DELINEATES BETWEEN CIVILIANS AND COMBATANTS.

A) Protocol I protects civilians with immunity from targeting by military objectives.

It is important to distinguish during periods of armed conflicts between the civilian population and those generally involved in the military attacks, because an individual's rights change when his classification changes.[60] The Geneva Conventions adopted Additional Protocol I in order to protect civilian populations from attack and, in turn, force the burden on combatant forces to clearly and accurately plan military objectives to avoid harming the civilian population.[61] Protocol I, which is applicable in some armed conflicts, *supra*, attempts to protect civilian populations and those involved in the military attacks by delineating between civilians and combatants. Protocol I, however, makes no provision for intermediate categories, such as a quasi-combatant. One is either a civilian or a combatant,[62] because the spirit of the Geneva Conventions suggests that "'[N]o one can fall in between the two categories and therefore be protected by neither.'"[63] Article 50(a) states that "a civilian is any person who does not belong to

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[60] Abresch, *supra* note 14, at 757. [Reproduced in accompanying Notebook at Tab 43].

[61] Hamilton DeSaussure, *Civilian Immunity and the Principle of Distinction*, 31 AM. U. L. REV. 883, 886 (1982). [Reproduced in accompanying Notebook at Tab 29].

[62] *Id.*

[63] Barbara J. Falk, *The Global War on Terror and the Detention Debate: The Applicability of Geneva Convention III*, 3 J. INT'L L. & INT'L REL. 31, 48−49 (2007). [Reproduced in accompanying Notebook at Tab 25].

one of the categories of persons referred to [as a prisoner of war or a combatant]. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian."[64]

Further, Protocol I also states that the civilian population and individual civilians shall enjoy general protection against dangers arising from military operations and shall not be the object of military attacks.[65] Thus, when an individual is classified as a civilian, he receives greater protections and immunities than does a combatant.

B) Protocol I also grants privileges to combatants.

A combatant, on the other hand, does not receive immunity from attack. Thus, as a combatant, an individual loses the right to not be attacked at any time, during periods of active and in-active hostilities. Essentially, a combatant gives up his right to life under international humanitarian law.[66] But, a combatant does receive privileges related to the act of war. A combatant, as defined in Protocol I, is a member of the armed forces of a party who has the right to participate directly in hostilities.[67] Thus, a combatant cannot be prosecuted for the murder of enemy combatants.[68] Note, that while Protocol I does allow combatants to take part in hostilities, the action must still conform to the laws of armed conflict. Therefore, combatants can, and are, held criminally liable for illegal actions, such as enslavement or other crimes against humanity.

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[64] Protocol I, *supra* note 27, at art. 50(1). [Reproduced in accompanying Notebook at Tab 11].

[65] *Id.* at art. 51(1)−(2).

[66] Albresch, *supra* note 14, at 757. [Reproduced in accompanying Notebook at Tab 43].

[67] Protocol I, *supra* note 27, at art. 43(2). [Reproduced in accompanying Notebook at Tab 11].

[68] Albresch, *supra* note 14, at 757. [Reproduced in accompanying Notebook at Tab 43].

Finally, all members of the armed forces are considered combatants, and only members of the armed forces are combatants.[69] This further delineates the distinction between civilian and combatants—a civilian must be considered a member of the armed forces before he can be considered a combatant. Thus, there could be a preference to be distinguished either as a civilian or a combatant, since different privileges and protections attach based on the legal classification.

From one perspective, the Sierra Leonean forced recruits may want to be classified as combatants. This way, the forced recruits would not be criminally liable for any activities committed within the confines of IHL. However, even as a combatant, the forced recruit could still be liable for certain crimes.[70] But, if the forced recruit were classified as a civilian, then the forced recruit should be protected from any military attacks. Thus, it seems that the forced recruit's activity is highly indicative and will directly affect the recruit's legal classification.

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[69] Int'l Comm. of Red Cross, Commentary: Protocol Addition to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), ¶ 1677 (J. Pictet ed. 1987) (emphasis added) (hereinafter "Commentary to Protocol I"). [Reproduced in accompanying Notebook at Tab 1].

[70] Many forced recruits claims duress as a defense for their actions. But, as discussed below in "Section IV: Mitigating factors and defenses can have an effect on the outcome of a forced recruit's fate.", *infra* at p. 34, duress is rarely a complete bar to prosecution, but rather, serves as a mitigating factor in sentencing.

C) Protocol I, in reality, creates a blurred line between civilians and combatants; thus, the types of activities in which a forced recruit engages should be indicative of his civilian or combatant status.

(1) Protocol I restricts immunity from civilians taking part in hostilities.

The policy consideration in delineating between civilian populations, while at the same time preventing civilians from taking part in the hostilities, is to prevent any confusion between who is a civilian and who is not. If combatants are unable to distinguish between the enemy combatant and civilians, then the combatant has difficulty preventing attacks on the civilian population and in turn, abiding by the laws of international humanitarian law. It should be noted that a combatant's violation of civilian protections is considered a grave breach by Article 85(3)(a) of Protocol I.[71] Therefore, in order to protect combatants from waging inappropriate attacks and to incentivize civilians to not take part in the hostilities,[72] Protocol I indicates that any civilian who directly participates in the hostilities temporarily loses his immunity protection under the law.[73]

The Commentary related to this restriction emphasizes the need to refrain from participation and elaborates on what is defined as a hostile act. The Commentary states:

> The immunity afforded individual civilians is subject to an overriding condition, namely, on their abstaining from all hostile acts. Hostile acts

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[71] Protocol I, *supra* note 27, at art. 85(3)(a). [Reproduced in accompanying Notebook at Tab 11]. *See also* W. Hays Parks, *Air War and the Law of War*, 32 A.F. L. Rev. 1, 117 (1990). [Reproduced in accompanying Notebook at Tab 41].

[72] Yoram Dinstein, *Interstate Armed Conflict and Wars of National Liberation*, 31 AM. U. L. REV. 849, 852 (1982). [Reproduced in accompanying Notebook at Tab 44].

[73] Protocol I, *supra* note 27, at art. 51(3) (emphasis added). [Reproduced in accompanying Notebook at Tab 11].

> should be understood to be acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces. Thus a civilian who takes part in armed combat, either individually or as part of a group, thereby becomes a legitimate target, though only for as long as he takes part in hostilities.[74]

The first important element in the Commentary's elaboration is the definition of a direct participation. The ICRC further states in the Commentary that a civilian "may directly participate in hostilities by using a weapon, carrying a weapon for use in hostilities, or 'undertak[ing] hostile acts without using a weapon."[75] Antonio Cassese, a renowned legal scholar on international law, similarly defined direct participation as a civilian "'engaging in military deployment' preceding an attack if 'he carries arms openly during the military deployment.'"[76] However, the Israeli Supreme Court took a broader approach and defined direct participation as performing any function of a combatant. [77] [78]

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[74] Commentary to Protocol I, *supra* note 69, at ¶ 1942 (emphasis added). [Reproduced in accompanying Notebook at Tab 1].

[75] Kristen E. Eichensehr, *On Target? The Israeli Supreme Court and the Expansion of Targeted Killings*, 116 YALE L.J. 1873, 1874 (2007) (citing Commentary to Protocol I, s*upra* note 111, at ¶ 1943). Eichensehr, [Reproduced in accompanying Notebook at Tab 31]; Commentary to Protocol I, *supra* note 69, [Reproduced in accompanying Notebook at Tab 1].

[76] Eichensehr, *supra* note 75, at 1874. [Reproduced in accompanying Notebook at Tab 31].

[77] *See* Int'l Comm. of the Red Cross, *Direct Participation in Hostilities*, http://www.icrc.org/Web/Eng/siteeng0.nsf/html/participation-hostilities-ihl-311205, (stating that "it has been suggested, for example, that direct participation not only includes activities involving the delivery of violence, but also acts aimed at protecting personnel, infrastructure or materiel. It has even been suggested that the determination of direct participation rests on the appreciation of the value added brought to the war effort by a civilian post as compared to a purely military activity.").

[78] Eichensehr, *supra* note 75, at 1874. [Reproduced in accompanying Notebook at Tab 31]. *See also* George P. Fletcher, *The Law of War and its Pathologies*, 38 COLUM. HUM. RTS. L. REV. 517, 529 (2007) (stating that the Israeli High Court recognizes that "'a

The approach by the Israeli Supreme Court seems a bit inconsistent with the idea that an individual is either a civilian or a combatant and perhaps blurs the line even more than Protocol I does on its own. Thus, the idea of direct participation does not clearly delineate the line between civilian and combatant.

However, the second important element of the ICRC's Commentary relating to the temporal element of hostility participation is clearer. A civilian retains his protections so long as he is not directly participating. The Commentary specifically does not mention a loss of civilian status based on their participation, but merely a loss of immunity from attack.[79]

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civilian preparing to commit hostilities might be considered a person who is taking a direct part in hostilities, if he is openly bearing arms. When he lays down his weapon, or when he is not committing hostilities, he ceases to be a legitimate target for attack. Thus, a person who merely aids the planning of hostilities or sends others to commit hostilities is not a legitimate target for attack. Such indirect aid to hostilities might expose the civilian to arrest and trial, but it cannot turn him into a legitimate target for attack.'" *Id.* The Israeli Supreme Court seems to suggest that the aforementioned activities would not be indicative of activities performed by a combatant. [Reproduced in accompanying Notebook at Tab 27]. *See, contra*, Maj. Jeffrey S. Thurnher, *Drowning in Blackwater: How Weak Accountability Over Private Security Contractors Significantly Undermines Counterinsurgency Efforts*, 2008-JUL ARMY LAW. 64, 70 (2008) (stating that a small portion of the international community view preparation, similar to what a General would perform in a military army, as combatant activity even though there is no "direct" participation in the hostilities. However, the majority approach, followed by most of the international community, defines a "direct attack" as any "'[act] of war which by [its] nature or purpose [is] likely to cause actual harm to the personnel and equipment of the enemy armed forces.'" Mere preparation is not sufficient to be direct participation.). *Id.* (citing Commentary to Protocol I, *supra* note 69, at ¶¶ 1944−45). Thurnher [Reproduced in accompanying Notebook at Tab 34]; Commentary to Protocol I [Reproduced in accompanying Notebook at Tab 1].

[79] Commentary to Protocol I, *supra* note 69, at ¶¶ 1942, 1944. [Reproduced in accompanying Notebook at Tab 1]. *See also* Ben-Naftali, *supra* note 31, at 461. [Reproduced in accompanying Notebook at Tab 36].

Thus, it seems that a more precise definition is needed in order to characterize between civilians participating in hostile activities and combatants. It has been suggested that during the Sierra Leonean conflict, "children who participate[d] in combat [lost] their civilian status under international humanitarian law," but they retained their civilian status during the initial abduction and forced recruitment.[80] Analogizing to the current situation with forced recruits over the age of 15 years old, it seems that a shift in legal status should be based on a combination of a temporal and type of activity element. In other words, once forced recruits begin actively and directly participating in the hostile activities, their status should shift from civilian to combatant.

(2) Civilians can become Combatants.

In previous discussions above, it seems apparent that a civilian can shift their status to become a combatant. The Geneva Conventions do outline ways to distinguish combatants from civilians (i.e. by carrying arms openly, wearing a uniform, or displaying insignia on his clothing), but in light of modern guerilla warfare, these provisions are not as helpful or useful.[81] Commentary to Protocol I, however, elaborates on who is a member of the armed forces, by stating that "a civilian who is incorporated in an armed organization… becomes a member of the military and a combatant throughout the

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[80] Sarah L. Wells, *Crimes Against Child Soldiers in Armed Conflict Situations: Application and Limits of International Humanitarian Law*, 12 TUL. J. INT'L & COMP. L. 287, 300 (2004). Further, the article stated that any "children who were abducted by armed groups and did not take an active or direct part I hostilities should be considered civilians for the purposes of international humanitarian law." *Id.* [Reproduced in accompanying Notebook at Tab 38].

[81] Protocol I, *supra* note 27, art. 44(3). [Reproduced in accompanying Notebook at Tab 11].

duration of the hostilities (or in any case, until he is permanently demobilized by the responsible command…, whether or not he is in combat, or for the time being armed.)."[82]

The key element in determining when a civilian's status shift is their incorporation into the armed forced itself. This incorporation can be determined by the types of activities and the elapsed time since becoming part of the armed forced. Recall, *supra* at note 69, that all members of the armed forced are combatants, and only members of armed forces are combatants.[83] "Whether [combatants] actually engage in firing weapons is not important. They are entitled to do so, which does not apply to either medical or religious personnel, despite their status as members of the armed forces, or to civilians, as they are not members of the armed forces."[84]

In the instant case, after a forced recruit was conscripted into the army, it seems that his status would be classified as a combatant under the assumption that he was incorporated into the armed forces and he directly participated in hostilities. In contrast, if the forced recruit were solely conscripted to work in the diamond mines, for example, his participation would not likely rise to the level of "incorporation" into the armed forces. Thereby, the forced recruit working in the diamond mines would retain his civilian status.

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[82] Commentary to Protocol I, *supra* note 69, at ¶ 1677. [Reproduced in accompanying Notebook at Tab 1].

[83] *Id*.

[84] *Id.*

(3) Civilians can be Present among the Armed Forces.

Because civilians can be present among armed forces, the definition as set forth by Protocol I is again blurred. The Third Geneva Convention states that "persons who accompany the armed forces without actually being members thereof include civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or service responsible for the welfare of the armed forces."[85] When considering the presence of civilian among armed forces, it seems especially relevant to look at the types of activities the civilian is performing and how long the civilian has been performing those activities. For example, a war correspondent, who is considered a civilian according to Article 4(A), *supra* note 85, would not directly participate in the activities. Similarly, if a forced recruit were not directly participating in the hostilities, it certainly could be argued that the forced recruit retains his civilian status. Retaining civilian status could be advantageous to a forced recruit, because he could then be protected by the immunity from Protocol I and IHL generally.

(4) Combatants can Still be Victims of Crimes Against Humanity.

Not only is it important to define persons legally as citizens or combatants for protection and privilege purposes during armed conflict, but it is also important to define a civilian for the purposes of establishing crimes against humanity. Crimes against humanity are considered "crimes that are part of a wide-spread or systematic attack

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[85] Third Geneva Convention, *supra* note 9, art. 4(A). [Reproduced in accompanying Notebook at Tab 8]. *See also* Lt. Cdr. Stephen R. Sarnoski, *The Statue Under International Law of Civilian Persons Serving with or Accompanying Armed Forces in the Field*, 1994-JUL Army Law. 29, 30−32 (1994). [Reproduced in accompanying Notebook at Tab 33].

against any civilian population."[86] Such crimes include murder, extermination, enslavement, deportation, imprisonment, torture, rape, sexual slavery, persecution based on ideologies, or other inhumane acts.[87] In *Prosecutor v. Mrskic*, the Prosecution suggests that civilian, as defined under the ICTY statute, is any person not the lawful object of attack (i.e. one who does not participate in hostilities) under Protocol I and international humanitarian law.[88] As discussed above, this ability for a civilian to lose its immunity creates a problem when distinguishing between civilians and combatants.

However, the ICTY did not limit crimes against humanity to affect only civilian populations. In *Prosecutor v. Mrskic*, the Tribunal held that "combatants can be victims of crimes against humanity even though they do not fall within the definition of a civilian. This would be in situations in which they are targeted in a manner that is unlawful under IHL, [such as during forced conscription or enslavement]."[89] The ICTY's holding suggests that a Sierra Leonean forced recruit's status as either a civilian or combatant would not affect any protections or immunities he would receive to be free from perpetuation of crimes against humanity.

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[86] Statute of the Special Court for Sierra Leone, *supra* note 6, at art. 2 (emphasis added). [Reproduced in accompanying Notebook at Tab 15].

[87] *Id.*

[88] *Prosecutor v. Mrskic*, Case No. IT-95-13/1, Transcript, at 16284−86 (Mar. 16, 2007). [Reproduced in accompanying Notebook at Tab 18].

[89] *Id*.

(5) A constant "shift" of legal classification provides an unfeasible definition.

Ultimately, Protocol I seems to create a shifting spectrum of when a civilian is protected. For example, a civilian could take part in the hostilities during the day, but then regain his "civilian protection" at night when he is not actively involved in the hostilities. As discussed above, it seems as if a civilian does not lose his status as a "civilian" when taking part in the hostilities. But, the international community generally recognizes the need to avoid "quasi-combatant" status. Thus, this conundrum creates a blurring of lines between the definitions of civilian and combatant, and from a policy perspective, it is best to have more of a bright line rule.

ICRC addressed this important goal of eliminating a shifting status, specifically with combatant status. In the Commentary to Protocol I, the ICRC suggests that any definition that would allow a combatant to shift his status based on his activities (i.e. fighting during a siege as a combatant to becoming a civilian in the armed forces camp while he is eating) is unworkable and unfeasible.[90] Thus, Protocol I explicitly "does not allow [a] combatant to have the status of a combatant while he is in action, and the status of a civilian at other times."[91]

In considering the legal status of the forced recruits during the Sierra Leonean conflict, the following should be incorporated into the analysis: 1) the types of activities in which the forced recruit participates (i.e. is there likely to be harm to the enemy combatant or is the forced recruit engaged in mere preparation or labour within the armed

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[90] Commentary to Protocol I, *supra* note 69, at ¶ 1678. [Reproduced in accompanying Notebook at Tab 1].

[91] *Id.*

forces camp); and 2) whether, and at what time, the forced recruit has been "incorporated" into the armed forces.

III) ENSLAVEMENT AND FORCED LABOUR DO NOT AFFECT A FORCED RECRUIT'S LEGAL STATUS.

A) The key element to enslavement is ownership.

The 1926 Slavery Convention defines slavery as "the status or condition of a person over whom any or all the powers attaching to the right of ownership are exercised."[92] The ICTY considered the following elements to be indicative or relevant of enslavement: 1) detention; 2) requirement to do everything that they were ordered to do; 3) asserting exclusivity for use over a particular individual; 4) the enslaved person was always available and at the captor's disposal; 5) captor's ability to sell the enslaved person; and 6) the enslaved person was denied any control over her life.[93] The required mens rea for enslavement is the captor's international exercise of a power attached to the right of ownership over the victims. However, the ICTY *did not maintain* that the captor has to intend to detain the enslaved person for prolonged periods in order to constitute a crime of enslavement.[94]

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[92] H. Knox Thames, *Forced Labor and Private Individual Liability in U.S. Courts*, 9 MSU-DCL J. Int'l L. 153, 175 (2000) (citing Convention to Suppress the Slave Trade and Slavery, art. 1(1), Sept. 25, 1926, 60 L.N.T.S. 253). Thames, [Reproduced in accompanying Notebook at Tab 28]; 1926 Slavery Convention, [Reproduced in accompanying Notebook at Tab 5].

[93] *Prosecutor v. Kunarec*, Case No. (IT-96-23) & (IT-96-23/1), Transcript, at 6567 (Feb. 22, 2001). [Reproduced in accompanying Notebook at Tab 17].

[94] ICTY Press Release, Kunarac Case: *The Appeals Chamber Judgment in the Kunarac, Kovac and Vukovic Case*, CVO/ P.I.S./ 679-E, (June 12, 2002), www.un.org/icty/pressreal/p679-e.htm. [Reproduced in accompanying Notebook at Tab 47].

Much of the jurisprudence related to slavery involves female recruits that are held captive for sexual slavery and prostitution. However, it has been suggested that forced child recruits are enslaved under customary international law. "The children who are abducted and used as child soldiers are abused badly and enslaved, especially because they are not permitted to leave or return home to the comforts of their family."[95] Clearly, there is an element of ownership with forced conscription. However, the distinguishing factor between classifying child soldiers as enslaved and forced recruits above the age of 15 years old involves the fact that forced conscription of children is illegal.[96] Forced conscription for military purposes can be legal, assuming that certain age requirements are met. Thus, the lack of jurisprudence addressing enslavement of forced recruits over the age of 15 suggests that the Sierra Leonean forced recruits were not enslaved.

B) Forced Recruits engage in forced labour.

However, a sub-category of enslavement is forced or involuntary labour. While forced or involuntary labour is not considered a crime against humanity, the International Labor Organization ("ILO") adopted two conventions in order to attempt to eliminate any kind of forced labour. The first convention, held in 1930, attempted to suppress forced labour, while the convention held in 1957 abolished all forms of compulsory labour as a

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[95] Susan Tiefenbrun, *Child Soldiers, Slavery and the Trafficking of Children*, 31 FORDHAM INT'L L.J. 415, 476 (2008). [Reproduced in accompanying Notebook at Tab 39].

[96] Statute of the Special Court for Sierra Leone, *supra* note 6, art. 4(c). [Reproduced in accompanying Notebook at Tab 15]. *See generally* Convention (No. 182) Concerning the Prohibition and Immediate Action For the Elimination of the Worst Forms of Child Labour, June 17, 1999, http://www.ilo.org/public/english/standards/relm/ilc/ilc87/com-chic.htm. [Reproduced in accompanying Notebook at Tab 3].

means of political coercion.[97] ILO considered the following definition of forced labour in during the 1930 Convention: "forced or compulsory labour shall mean all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily."[98] However, it should be noted that work or service performed in virtue of compulsory military laws for work of a purely military character is exempted from the definition of forced labour.[99] If this were not the case, the forced conscription or a military draft would in turn be illegal. But, in the instant case, Sierra Leone did not have any compulsory military laws in place. Therefore, it seems as if the forced recruit's labour, be it directly participating in hostilities or mere preparation or work within the armed forces' camp would still be considered forced labour.

Nonetheless, the ICTY has indicated that international law does not prohibit all labour by protected persons during armed conflict. To establish that the labour was in fact forced labour, one must prove that the person performing the labour had not real choice as to whether they would work. The ICTY urged that this analysis be performed on a case-by-case basis.[100]

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[97] Melissa Pearson Frugé, *The Laogai and Violations of International Human Rights Law: A Mandate for the Laogai Charter*, 38 SANTA CLARA L. REV. 473, 498 (1998). [Reproduced in accompanying Notebook at Tab 35].

[98] Convention (No. 29) Concerning Forced Labour, art. 2, June 28, 1930, 39 U.N.T.S. 55. [Reproduced in accompanying Notebook at Tab 4].

[99] *Id.*

[100] Daryl A. Mundis, *Current Developments at the Ad Hoc International Criminal Tribunals*, 1 J. INT'L CRIM. JUST. 197, 199 (2003). [Reproduced in accompanying Notebook at Tab 26].

It is unclear the effect of the ICTY's ruling that some forced labour is permitted by international law. However, in looking at a forced recruit's legal status, whether the recruit performed compulsory illegal or legal labour does not seem to affect his underlying status as a civilian or a combatant. The only material effect enslavement or forced labour could have on the prosecution of a forced recruit would be through an affirmative defense.

IV) MITIGATING FACTORS AND DEFENSES CAN HAVE AN EFFECT ON THE OUTCOME OF A FORCED RECRUIT'S FATE.

A) Status as a Combatant allows a forced recruit to engage in legal hostile activities.

As discussed, supra, a forced recruit classified as a combatant can claim the privilege afforded to him under Protocol I. In other words, as long as the forced recruit's conduct is within the legal limits of international humanitarian law, the recruit will not be held liable for his actions. However, if his actions as a combatant fall under crimes against humanity or other international crimes as mentioned in the Statute for the Special Court for Sierra Leone,[101] then his conduct would have criminal implications, and no combatant privilege would be available.

B) Forced recruits between the ages of 15 and 18 years old receive less severe sentences.

Forced recruits engaged either as civilians or combatants whose conduct is illegal are not exempt from criminal liability. However, their young age can act as a mitigating factor during sentencing. The Statute for the Special Court for Sierra Leone states that children between the ages of 15 and 18 years old shall be treated with dignity, taking into

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[101] Statute of the Special Court for Sierra Leone, *supra* note 6, at art. 4. [Reproduced in accompanying Notebook at Tab 15].

account the young age and desirability of promoting his or her rehabilitation and reintegration into society.[102] Further, the Special Court can order any of the following as punishment for criminal liability for children between the ages of 15 and 18 years old: "care guidance and supervision orders, community service orders, counselling, foster care, correctional, educational and vocational training programmes, approved schools and, as appropriate, any programmes of disarmament, demobilization and reintegration or programmes of child protection agencies."[103] Clearly, the Special Court would rather focus on reintegration than punishment for the forced recruits who committed crimes at a young age.

In addition, the international community recognizes that children who commit an offense before they reach eighteen years old cannot receive the death penalty for that offense.[104]

C) Duress can only be a mitigating factor in sentencing.

Generally, duress is not recognized as bar to criminal liability in international criminal law. However, duress can be used as a mitigating defense during sentencing. The ICTY explored the use of duress as an excuse in the *Erdemovic* trial. Erdemovic was essentially told to either participate in killing innocent civilians through a fire squad or consider himself as someone who would be shot by the firing squad. However, the ICTY held that "no rule may be found in customary international law regarding the availability

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[102] *Id.* at art. 7(1).

[103] *Id.* at art. 7(2).

[104] International Covenant on Civil and Political Rights, art. 6(5), Dec. 16, 1966, 999 U.N.T.S. 171. [Reproduced in accompanying Notebook at Tab 10].

or the non-availability of duress as a defense to a charge of killing innocent human beings."[105] While the Statute for the Special Court does not recognize duress as a defense, the Court would recognize duress as an excuse during sentence mitigation as a part of customary international law.[106]

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[105] Valerie Epps, *The Soldier's Obligation to Die When Ordered to Shoot Civilians or Face Death Himself*, 37 New Eng. L. Rev. 987, 1000 (2003) (citing *Prosecutor v. Erdemovic*). [Reproduced in accompanying Notebook at Tab 40].

[106] *See generally,* Robert J. Morrill, Note, The Defenses of Duress and Necessity in International Law. New England School of Law War Crimes Research Lab, http://www.nesl.edu/library/warCrimeMemo.cfm. [Reproduced in accompanying Notebook at Tab 37].