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30 May 2023

Re: Submission on OTP Policy on Children

Dear Mr. Khan and Ms. Aubert,

Thank you for your invitation to suggest changes to the OTP 2016 Policy on Children. I commend your efforts to ensure that OTP policy meets the important goal of protecting children during conflict. Please find attached my respectful submission.

My submission proposes that the OTP adopt, as a matter of policy, an interpretation of the status requirement in international humanitarian law that extends the protections afforded civilians in armed conflict to children unlawfully incorporated into armed formations vis-à-vis the adult members of the formation that unlawfully incorporated them. I hope that this submission prompts constructive discussions in your office.

I remain available to assist you with this important project in any way that I can.

Respectfully,

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Submission on OTP Policy on Children

Overview

1. This submission proposes that the OTP, as a matter of policy, advocate for an interpretation of international humanitarian law (IHL) that extends maximal protection to children who have been unlawfully incorporated into armed formations. I propose that IHL must develop a third status in addition to that of combatant and civilian; a hybrid status to address the unique character of child soldiers. OTP, as a matter of policy, should advocate for the recognition of the unique situation of child soldiers who simultaneously bear characteristics of both civilians and combatants when they are unlawfully made part of an armed group.
2. A hybrid status for this class of persons best reflects their situation and the international protections that should attach as a result. This hybrid status would retain the child's combatant status vis-à-vis belligerent forces as defined by well-established tests, yet treat them as civilians vis-à-vis members of the armed force that has unlawfully incorporated them. Perpetrators of crimes against child soldiers should not be able to strip children of the protections they have as civilians under international law by committing the crime of unlawful conscription against them and perpetrators should not be able insulate themselves from liability for the variety of war crimes typically committed against children by those who unlawfully incorporate them into armed formations.

The Ntaganda Case

3. This particular vulnerability faced by child soldiers came into sharp focus during the *Ntaganda* case when the Prosecutor charged members of the UPC/FPLC with the crimes of sexual violence against children unlawfully incorporated into that armed force. On 10 January 2014, the Office of the Prosecutor (OTP) filed the Document Containing the Charges against Ntaganda.[1] Counts 6 and 9 allege that Ntaganda is criminally liable for rape and sexual slavery against child soldiers within his UPC/FPLC in violation of Article 8(2)(e)(vi) of the ICC Statute. During the confirmation hearing, *Ntaganda's* Defense registered its strong objection to counts 6 and 9 arguing "that the crimes committed by members of armed forces on members of the same armed force do not come within the jurisdiction of international humanitarian law nor within international criminal law."[2]

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[1] *Prosecutor v. Ntaganda*, ICC-01/04-02/06, "Prosecution's Submission of Document Containing the Charges and the List of Evidence (Annex A)", 10 January 2014.

[2] Transcript of hearing of 13 February 2014, ICC-01/04-02/06-T-10-RED-ENG, page 27, lines 15-17. The Defence continued the argument:

> [T]he Defence asserts that the crimes committed by members of armed forces on members of the same armed force do not come within the jurisdiction of international humanitarian law nor within international criminal law. Customary international law applying to all armed conflicts, be it international or non-international, is made up of several principles that are intended to protect civilians and making a clear distinction between civilians and combatants. Such law also sets out rules relating to the ways in which war is waged. International humanitarian law is not intended to protect combatants from crimes committed by combatants within the same group. Such crimes

4. The Pre-Trial Chamber received written submissions on the issue and ultimately confirmed Counts 6 and 9 of the DCC.[3] The Chamber, after considering Defence arguments, found that girls alleged to have been raped and sexually enslaved by members of the UPC/FPLC were non-combatants during the commission of these crimes and thus protected by the prohibitions against rape and sexual slavery. It found that their enlistment or conscription into the UPC/FPLC was not determinative of their combatant status because their incorporation was in violation of the prohibition against child soldiers. The Chamber held that child soldiers lose the protections afforded them by international humanitarian law only when, and for as long as, they are active participants in hostilities.[4] The Chamber then considered that the crimes of rape and sexual slavery "involve elements of force/coercion or the exercise of rights of ownership" and concluded that "those subject to rape and/or sexual enslavement cannot be considered to have taken active part in hostilities during the *specific time* when they were subject to acts of sexual nature, including rape".[5]

5. On 1 September 2015, the *Ntaganda* Defence, for the first time, formally challenged the ICC's jurisdiction pursuant to Article 19(4) asserting that the Chamber and the ICC did not have jurisdiction over crimes committed upon child soldiers by members of their own force. Trial Chamber VI decided this application on 9 October 2015, finding that the issue was not a jurisdictional one requiring immediate resolution, but one involving the substantive interpretation of Article 8(2)(e)(vi), "to be addressed when the Chamber makes its assessment of whether the Prosecution has proved the crimes charged".[6] The Defence appealed this decision[7] and on 22 March 2016, the Appeals Chamber found that the "question of whether there are restrictions on the categories of persons who may be victims of the war crimes of rape and sexual slavery is an essential legal issue which is jurisdictional in nature"[8] and remanded the issue for the Trial Chamber's determination "in accordance with the requirements of article 19 of the Statute".[9]

6. On 4 January 2017, the Trial Chamber, issued its second decision on the matter.[10] The Trial Chamber found that "members of the same armed force are not *per se* excluded as potential victims of the war crimes of rape and sexual slavery."[11] The Chamber reasoned that the prohibitions against rape and sexual slavery were peremptory norms implicating special

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> come under national law and human rights law. Thus, the charges found in counts 6 and 9 cannot be confirmed in accordance with the principle of legality.

[3] *Prosecutor v. Ntaganda*, ICC-01/04-02/06, "Decision Pursuant to Article 67(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Bosco Ntaganda", 9 June 2014.

[4] *Ibid,* para. 78.

[5] *Ibid,* para. 79, (*emphasis added*).

[6] *Prosecutor v. Ntaganda*, ICC-01/04-02/06, "Decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9", 9 October 2015, para. 28.

[7] *Prosecutor v. Ntaganda*, ICC-01/04-02/06, "Appeal on behalf of Mr Ntaganda against Trial Chamber VI's 'Decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9'", 19 October 2015.

[8] *Prosecutor v. Ntaganda*, ICC-01/04-02/06 OA2, "Judgment on the Appeal of Mr Bosco Ntaganda against the 'Decision on the Defence's Challenge to the Jurisdiction of the Court in Respect of Counts 6 and 9'", 22 March 2016. Para. 40.

[9] *Ibid,* para. 42.

[10] *Prosecutor v. Ntaganda*, ICC-01/04-02/06, "Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9", 4 January 2017.

[11] *Ibid*, para. 54.

consideration of issues related to jurisdiction.[12] The Trial Chamber established a specific basis for jurisdiction over crimes of sexual violence that did not depend upon the combatant/civilian status of the victim or the fact that the victims were unlawfully incorporated into UPC/FPLC armed formations – its jurisdiction arose out of the unique character of the crimes. While it is laudatory that the *Ntaganda* decision expands protections for victims of conflict related sexual violence, the decision does not protect child soldiers from other violations of Article 8 not involving sexual violence. An interpretation of IHL that allows for a third hybrid status for children unlawfully deployed as soldiers would afford children with broader protections vis-à-vis perpetrators who conscript them and subsequently victimize them in other ways.

Creating a hybrid status for child soldiers does not undermine the effective application of IHL.

7. An OTP policy that advocates for child soldiers to be treated as having a hybrid status does not diminish the important distinction between combatants and civilians and the different regimes of protections that flow from that distinction. Rather, this submission proposes a hybrid definition for child soldiers that defines them vis-à-vis the actor who is engaging in criminal conduct against them and thus maintains a level of clarity necessary to effectively apply IHL. It affords the child civilian protections vis-à-vis members of the armed forced that unlawfully incorporated them in to its fighting formation. The impact of this proposal of hybrid status on the effective application of IHL is best understood within the context of the purpose and requirements of the combatant/civilian distinction.[13]

8. From its earliest days, international humanitarian law (IHL) has had two paramount objectives: first to protect civilians and non-combatants from the deleterious effects of hostilities; and second, to regulate the conduct of hostilities in such a way as to strike the balance between military necessity and humanitarian considerations. Central to realization of these objectives is the principle of distinction, - "Rule Number One" of international customary law and a principle that draws a clear unequivocal line about the difference between civilians and combatants:

> The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians.[14]

9. The Principle of Distinction sets forth the most foundational principle of the laws and customs of war and in its expression of definitional status conveys the most fundamental protections afforded civilians: "attacks must not be directed at civilians." For the purposes of distinction, an individual is either a combatant or a civilian; there are no additional categories; there is no gradient of statuses to reflect the nuances of a particular situation. There is no exception for children, even those who are forcibly conscripted. Persons deemed to have combatant status, irrespective of why, are lawful objects of attack.

10. The concept of "civilian" is one of the most important concepts in IHL. Important because those who are appropriately categorized in law as being "civilians" are protected from direct attack as long as they themselves do not take any direct part in hostilities. Even if they should sporadically

[12] *Ibid*, para. 52. "As a consequence of the prohibition against rape and sexual slavery being peremptory norms, such conduct is prohibited at all times, both in times of peace and during armed conflicts, and against all persons, irrespective of any legal status."

[13] The ICJ has observed that, "[o]ne is entitled to test the soundness of a principle by the consequences which would flow from its application." Barcelona Traction, Light and Power Company, Ltd. (Belgium v. Spain), Second Phase, I. C.J. Reports 1970.

[14] ICRC, Rule 1, The Principle of Distinction between Civilians and Combatants, Customary International Humanitarian Law. https://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter1_rule1

take direct part, the protection they enjoy is only suspended for the duration of that sporadic participation.[15] Similarly, those with special protected status under IHL such as medics and chaplains lose that protection during any periods in which they directly participate in hostilities.[16]

11. The key definitional trait of "civilian" is that they are identified negatively; civilians are the mutually exclusive remainder of all those who are combatants under the law. There are no clear unequivocal positive definitions of what it means to be a "civilian," rather one is a civilian is he or she is not a combatant as that term is defined in the various relevant texts. The starting point for the negatively defined status of civilian can be found in Article 3 common to all four Geneva Conventions which extends its basic protections to "persons taking no active part in the hostilities." The phrase "persons taking no active part in the hostilities" is the essential criterion for identifying those who have the protections of the conventions and are thus legally immune from attack.

12. A more complete definition by exclusion is found in Article 50(1) of Additional Protocol I to the Geneva Conventions which states:

> 1. A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 (A) (1), (2), (3) and (6) of the Third Convention [definition of types of combatants] and in Article 43 [definition of armed forces] of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.

13. In addition to creating a presumption of "civilian" status in cases of doubt, Article 50 (2) and 50 (3) define the term of "civilian population" as being comprised of individuals with civilian status and similarly protected even when combatants are within that population. The ICRC noted that even prior to the First Protocol's definition the concept of civilian has always been defined in the negative.[17]

14. Embedded within the conceptual structure of the definition is the clear unequivocal line between civilians and combatants. Defining one as the residual of the other yields a binary definition with no possibility of a gray in between; it is as clear as the difference between "1" and "0", "on" and "off." The Laws of War Manual of British Forces makes this mutual exclusivity clear: "one class is not permitted at the same time to enjoy the privileges of the other class."[18] The US Department of Defense in its updated manual on the Laws of War Manual in which it defines civilians as:

> 5.9.2 Persons to Whom This Rule Applies.
>
> For the purpose of applying the rule discussed in this section, "civilians" are persons who do not fall within the categories of combatants listed in § 5.8.2 (Categories of Persons Who Are Combatants for the Purpose of Assessing Their Liability to Attack). Accordingly, for the purposes of this section, "civilians" include:

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[15] 7 Arts 51 [3] AP I; 13 [3] AP II. *See also,* ?? Henckaerts and ?? Doswald-Beck, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOLUME I: RULES (2005) (Henckaerts, Customary Law), Rule 6.

[16] *See e.g.,* First Geneva Convention, Article 21; Additional Protocol II, Article 11(2).

[17] ICRC Direct Participation Guidance, p. 21. "other words, under all instruments governing international armed conflict, the concept of civilian is negatively delimited by the definitions of armed forces and of levée en masse…" (The term levée en masse, is a spontaneous mass uprising by the civilian population during an attack by the enemy under circumstances under which they are unable to form organized units. *See,* Geneva Convention III Article 4(6). During such uprising those participating in the levée en masse would not enjoy the protections of civilian status.). *See also, See also,* Yves Sandoz *et al. (eds.)* COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (1987), §§ 1916 (Sandoz, Additional Protocols Commentary).

[18] GET UK LAWS OF WAR CITE

- members of the civilian population;
- persons authorized to accompany the armed forces; and
- members of the merchant marine and civil aircraft of parties to a conflict.[19]

While the U.S. Laws of War Manual offers examples of persons with civilian status, their status is still defined by virtue that they "do not fall within the categories of combatants."[20] The ICRC reinforces this definitional concept in its interpretive guidance:

> For the purposes of the principle of distinction in non-international armed conflict, all persons who are not members of State armed forces or organized armed groups of a party to the conflict are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities.[21]

15. The protections IHL extends to those with civilian status applicable in non-international armed conflicts are articulated in Article 13 of Additional Protocol II Protection of the Civilian Populations:

> 1. The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give effect to this protection, the following rules shall be observed in all circumstances.
>
> 2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.
>
> 3. Civilians shall enjoy the protection afforded by this part, unless and for such time as they take a direct part in hostilities.

16. Once again, the concept of civilian is defined negatively by the definition in Article 1 of the Additional Protocol I of what constitutes the types of forces the protocol applies to.[22] Somewhat different to Common Article 3, Additional Protocol II uses the terms "armed forces," "dissident armed forces," and "organized armed groups" to describe the groups subject to its provisions – once again, a "civilian" is someone who does not fall within these categories.[23]

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[19] US DOD Laws of War Manual (2015) §5.9.2 pp. 223-224.

[20] US DOD Laws of War Manual (2015) §5.9.2 pp. 223-224.

[21] ICRC Direct Participation Guidance, p. 27. "As the wording and logic of Article 3 GC I-IV [Geneva Conventions] and Additional Protocol II (AP II) reveals, civilians, armed forces, and organized armed groups of the parties to the conflict are mutually exclusive categories also in non-international armed conflict." *Id.,* 28.

[22] Article 1 Material Field of Application, of Additional Protocol II states:

> 1. This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions or application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.
> 2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

[23] The ICRC has given interpretative guidance to the meaning of these terms. *See*, ICRC Direct Participation Guidance, p.30

> For the purposes of this Interpretive Guidance, the armed forces of States party to a non-international armed conflict are referred to as "State armed forces", whereas the armed forces of

17. The implications for this stark binary determination are significant – a person classed as a civilian is immune from direct attack, while a combatant is the legitimate and lawful target of direct attack. The merits of such a "black-and-white" definition are clear in the context and chaos of war. While a spectrum or gradient might more accurately reflect the realty of complex modern warfare, applying a nuanced non-binary approach would likely undermine the effectiveness of IHL's protections. Even a rule with such a clear black-and-white definition has proven fraught with practical challenges in its application.

18. But the impracticality or even impossibility of applying a non-binary definition does not diminish the fact that in modern war there is an increasing proliferation of persons who are underage. Children who by their immaturity or through coercion are forced to enlist in armed formations (perhaps not even made to carry weapons) and thus become the lawful target of attack by virtue of the on/off switch of protections. This "black-and-white" definition raises particular problems in the case of child soldiers. If they are enlisted in an army they lose civilian protections and become subject to attack despite being the "victim" of being enlisted in violation of the international prohibition against child soldiers. As the US Department of Defense Laws of War Manual states:

> Certain provisions of treaties and U.S. law seek to restrict the use or recruitment of children in armed conflict. If children are nonetheless employed in armed conflict, they generally are treated on the same basis as adults, although children may be subject to special treatment in detention because of their age.[24]

19. The injustice of this becomes even more apparent when child soldiers are raped and sexually enslaved by their commanders or are used as suicide bombers. These acts, prosecutable under the laws of war, should they be committed against civilians, evaporate in the case of child soldiers. The extent to which these child soldiers fall outside some of the intuitive protections they should have under IHL is a function of the different ways in which they are engaged as combatants by their superiors.

20. In reality, modern war with its incorporation of contractors and personnel who may not directly engage in combat has made the formerly clear distinction less clear. The aspirational clarity of such a binary classification system dissipates quickly among the myriad of problems in its practical application to modern conflicts. Over the course of the last twenty years the manner in which war is conducted has undergone fundamental changes. The proliferation of insurgent campaigns has often brought the battlefield into the living rooms of civilians. Combatants, the lawful targets of attack, are very often not easily distinguishable from the civilians they hide among. In some cases, these fighters hold ordinary jobs some days of the week and are activated sporadically to engage in hostile actions.

21. This proposal submits that advocating for a hybrid status for child combatants that affords them the protections of civilian status vis-à-vis members of the armed force that incorporated them

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> non-State parties are described as "organized armed groups". Where not stated otherwise, the concept of "organized armed group" includes both "dissident armed forces" and "other organized armed groups." (fn omitted).

These concepts do not include members who perform essentially a civilian supportive function to the armed units in these irregular forces.

[24] US Department of Defense Law of War Manual, §4.20.5 p. 168.

allows for a clear and effective application of IHL and one that is easier to apply than the traditional combatant/civilian distinction in the context of contemporary conflicts.

Creating a hybrid status interprets IHL in a way that reflects its underlying purpose with respect to children.

22. The prohibition against child soldiers seeks to not only protect them from the harm ordinarily associated with armed conflict but "first and foremost they are directed at securing the physical and psychological well-being."[25] The objective of this prohibition is not only to protect children from injury or death as a result of direct combat but "the potentially serious trauma that can accompany recruitment including separating children from their families, interrupting or disrupting their schooling and exposing them to an environment of violence and fear."[26] While the prohibition against using child soldiers ordinarily contemplates their deployment in hostilities the Rome Statute does not include such a limitation. The *travaux préparatoires* to Rome Statute requires that there be some link between how the children are used and hostilities but does not suggest that direct participation is required.[27] A hybrid status for child soldiers recognizes and offers protections from the myriad of harms that befall them when they are unlawfully incorporated into a fighting formation.

Article 8 and IHL should be interpreted in light of customary international law prohibiting the use of child soldiers.

23. When the UN Security Council adopted the ICTY and ICTR statutes in 1993 and 1994 respectively, many of the crimes enumerated in the statutes had already been committed. The Council adopted the Secretary-General's admonition that the legality principle required judicial determinations that these crimes already existed in customary law. The prohibition of rape one of the crimes that the *ad hoc* tribunals determined was a matter of customary international law. The first, post-World War II case to consider the crime of rape under international law was *Akayesu* in 1998.[28] The Chamber defined the customary international prohibition as 'a physical invasion of a sexual nature, committed on a person under circumstances which are coercive'.[29] In the context of the *Ntaganda* case, one of the coercive circumstances contributing to the crime of rape was the

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[25] *Lubanga* Trial Judgment, para. 605

[26] *Lubanga* Trial Judgment, para. 605.

[27] UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute for the International Criminal Court, U.N. Doc. A/CONF.183/2/Add.1, 14 April 1998, page 21 and footnote 12.

> The words "using" and "participate" have been adopted in order to cover both direct participation in combat and also active participation in military activities linked to combat such as scouting, spying, sabotage and the use of children as decoys, couriers or at military checkpoints. It would not cover activities clearly unrelated to the hostilities such as food deliveries to an airbase or the use of domestic staff in an officer's married accommodation. However, use of children in a direct support function such as acting as bearers to take supplies to the front line, or activities at the front line itself, would be included within the terminology.

[28] ICTY, *Prosecutor v. Akayesu,* ICTR-96-4-T, Judgement, 2 September 1998, para. 597. The *Akayesu* Chamber considered that 'the crime of rape cannot be captured in a mechanical description of objects and body parts'. It looked to the crime of torture as defined in the Torture Convention and observed that rather than cataloguing specific prohibited acts, the convention 'focus[ed] rather on the conceptual frame work of state sanctioned violence.' In defining the crime of rape the Chamber applied a similar conceptual approach.

[29] *Akayesu* TJ, paras. 597-598.

induction of the victims into the armed forces of the UPC/FPLC. Some of the girls were kidnapped and all were held in coercive circumstances. Girls who under the banner of membership in an armed force they were deprived of parental protection and supervision, taken to camps far from their homes, subjected to a practice within the training camps in which they were required to provide "combined cooking and love services."[30] Article 8(2)(E)(vi) cannot be interpreted in a way that the coercive effects of unlawfully incorporating victims into a military structure eludes scrutiny under IHL. Rather, IHL should be interpreted in way that empowers its to extend maximum protection to those most vulnerable during armed conflict.

24. The prohibition against enlisting or conscripting children into the armed forces is a norm of customary international law and applies to both international and non-international conflicts.[31] Both Additional Protocols to the Geneva Conventions prohibit it.[32] It is prohibited in several conventions.[33] While there is some disagreement whether the prohibition should apply with respect to children under 15 or children under 18 there is agreement that no child under 15 should be incorporated into an armed force or armed group. Theodor Meron has recognized that state practice and *opinio juris*, the sources of international law contemplated by Article 38 of the ICJ statute were not 'comprehensive and immutable', and that '[i]t may well be that these sources will be expanded by, for example, attributing a more direct law-creating role to normative resolutions of the General Assembly'.[34] Meron also considered that another method of 'building customary law' was through the 'general principles of law recognized by civilized nations' referred to in Article 38(c) of the ICJ statute.[35] As Richard Lillich has asserted, the evaluation of the customary status of a human right 'looks not only to traditional but also to new sources of state practice and new expressions of *opinio juris* to determine and develop the content and contours of the emerging customary international law of human rights'.[36]

25. The harm this customary norm seeks to protect children from is not simply the rigors and dangers of military service. The norm recognizes the particularly harmful physical and psychological impacts that military service can have for children. If this norm seeks to shield children from all the deleterious impacts connected to military service that are not criminal *per se,* it is only logical that constituent within this norm is the protecting children from overtly criminal acts by members of the force they have been unlawfully incorporated into and are a direct consequence of it.

Article 8 and IHL should be interpreted in a way that is faithful to the Martens Clause.

26. To the extent that any gaps in the IHL protections afforded children during conflict exist, the Martens Clause should serve to legitimize an interpretation of Article 8 and IHL that fills those gaps. The Martens Clause is named after Professor Fyodor von Martens, a Russian diplomat and

[30] *Prosecutor v. Ntaganda*, ICC-01/04-02/06, *Decision Pursuant to Article 67(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Bosco Ntaganda* , 9 June 2014, para. 82 (quoting the evidence of P-0016).

[31] "Rule 136, Children must not be recruited into armed forces or armed groups." Rule 136, Recruitment of Child Soldiers, Customary International Humanitarian Law.

[32] Additional Protocol I, Article 77(2) and Additional Protocol II, Article 4(3)(c).

[33] See *e.g.,* Convention on the Rights of the Child (Article 38(3), African Charter on the Rights and Welfare of the Child (Article 22(2)), Convention on the Worst Forms of Child Labor (Articles 1 and 3).

[34] T. Meron, Human Rights and Humanitarian Norms as Customary Law, (Oxford: Clarendon Press, 1989) at 88.

[35] Ibid, at 88.

[36] R. Lillich, 'The Growing Importance of Customary International Human Rights Law', 25:1 *Georgia Journal of International and Comparative Law* (1995/96) at 18.

a member of the faculty of law of St Petersburg University who represented the Russian Empire at the Hague Conference in 1899. This ambitious conference, concluded with two conventions and three declarations related to the conduct of war and the convention that created the Permanent Court of Arbitration (Convention for the Pacific Settlement of International Disputes).

27. As in most treaty negotiations, there were some matters that appeared incapable of consensus. In the absence of agreement, Martens proposed the inclusion of a paragraph in the preamble to the Second Hague Convention, that broke the stalemate and allowed progress where there was consensus:

> Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.[37]

28. Absent full agreement on every issue, this language was incorporated into the text of the convention itself so that the conduct of war would not "for want of a written provision, be left to the arbitrary judgment of the military Commanders."[38] A few years later, the same principle, albeit slightly different language, was incorporated into the Fourth Hague Convention. The Martens Clause was included in the Two Additional protocols to the Geneva Convention. It is found in paragraph 2 of Article 1 of Additional Protocol I of 1977 which states:

> In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.

29. Although, the Geneva Conventions of 1949 do not include this language in their preambles, they do make clear in the articles governing denouncements, that even if a Contracting Party should at some point denounce the Geneva Conventions, it is still bound by the principles annunciated here.[39] At present, the Martens Clause is considered an important principle in Customary International Law – Its customary status recognized by the International Committee of the Red Cross[40] and the International Court of Justice.[41]

30. The broadest interpretation of the Martens Clause was promoted by Judge Mohamed Shahabuddeen a former judge at both the ICJ and the ICTY. For Shahabuddeen, the Martens Clause is a principle of customary international law for determining the boundaries of permissible conflict; a principle that delineates those boundaries by relying on four sources of law: i) prohibitions found in conventions; ii) established principles of customary international law; iii.) general principles of humanity; and iv.) the dictates of public conscious.[42]

31. A textual analysis of the Martens Clause supports Shahabuddeen' s expansive interpretation. The phrase "[n]ot covered by this Protocol or by other international agreements" invokes The Martens

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[37] Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. (1899), preamble.

[38] *Ibid.*

[39] (Geneva I, Art. 63; Geneva II, Art. 62; Geneva III Art. 142; Geneva IV, Art. 158).

[40] 1987 commentary

[41] Nuclear Weapons Opinion

[42] *Ibid*

Clause anytime a void in protection is discovered such in the case of a new means or method of war. Turning to the phrase "remain under the protection and authority of the principles of international law" suggests that despite a void in explicitly referenced protections there are still protections in force. The word "remain" indicates that these protections can be pre-existing and are independent of international agreements. They act as a safety net, filling the gaps of explicit protections.

32. The words "derived from" indicates the three sources of law constituent to this safety net of protections. The first source are "established customs," a reference to customary international law. The second source, "principles of humanity" is a reference to custom making state practice and *opinio juris* that while insufficient to rise to the status of customary international law provides interpretative guidance nonetheless.

33. The last source of law invoked by operation of the Martens Clause is the "dictates of the public conscience." The dictates of the public conscience are evidenced in authoritative international instruments reflecting a consensus of states on a particular issue. Documents such as declarations and resolutions of the General Assembly, the Security Council or Human Rights Council.[43] For the purposes of this submission, there is ample authoritative evidence of this type indicating the international community's universal condemnation of underage enlistment and the ancillary crimes committed against the children by their superiors.

34. The Martens Clause should be invoked in cases of *non liquet*, (situations in which the law is not clear or there not be directly applicable law).[44] As Meron has opined, "Where there already is some legal basis for adopting a more humanitarian position, the Martens clause enables decision makers to take the extra step forward."[45] Similarly, Shahabuddeen in his dissent in the ICJ Nuclear Weapons case asserted that the Martens Clause:

> [P]rovided authority for treating the principles of humanity and the dictates of public conscience as principles of international law, leaving the precise content of the standard implied by these principles of international law to be ascertained in the light of changing conditions, inclusive of changes in the means and methods of warfare and the outlook and tolerance levels of the international community.[46]

[43] *See, e.g.,* UN Security Council Resolution 1261 (1999), "Noting recent efforts to bring to an end the use of children as soldiers in violation of international law…[E]xpresses its grave concern at the harmful and widespread impact of armed conflict on children." S/RES/1261(1999). In 2000, the UN General Assembly adopted the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict. A/RES/54/263 (adopted 25 May 2000, entry into force, 12 February 2002).

[44] In the ICJ's Advisory Opinion on the Use of Nuclear Weapons, the court adopted the most restrictive interpretation of the Martens Clause necessitating a finding of *non liquet.* Judge Shahabuddeen in his dissenting opinion disagreed and pointed to the Martens Clause opining that it would have allowed the ICJ to consider these other sources of law in making its determination. For Shahabuddeen, the Nuclear Proliferation Treaty was a clear reflection of the humanitarian principles and public conscience of the international community. ICJ, Legality of the Threat or Use of Nuclear Weapons (8 July 1996) dissenting opinion J. Shahabuddeen, p. 411/189.

[45] Theodor Meron, *The Martens Clause, Principles of Humanity, and Dictates of Public Conscience,* 94 AJIL 78-89 at 88.

[46] ICJ, Legality of the Threat or Use of Nuclear Weapons (8 July 1996) dissenting opinion J. Shahabuddeen, p. 406/184. See also, Krupp case:

> The Preamble [of Hague Convention No. IV of 19071 is much more than a pious declaration. It is a general clause, making the usages established among civilized nations, the laws of humanity and the dictates of public conscience into the legal yardstick to be applied if and when the specific provisions of the Convention and

35. With respect to crimes committed against child soldiers by those who unlawfully incorporate them, a special hybrid status under IHL is supported by if not mandated by the Martens clause.

Perpetrators of the crimes against the children they unlawfully conscript should not benefit from their violation of the prohibition against child soldiers.

36. The current gap in protections for child soldiers grants impunity to those who conscripted them when they commit additional crimes in connection with their unlawful incorporation of children into their force. The *Ntaganda* Trial Chamber noted in *obiter dicta* that, "as a general principle of law, there is a duty not to recognize situations created by certain serious breaches of international law.[47] The principle that an actor cannot profit from his criminal wrongdoing is also reflected in the Napoleonic Code.[48]

An interpretation of IHL that treats child soldiers as having a hybrid status would act as a general deterrent and strengthen the moral credibility of IHL

37. A policy that advocated for an interpretation of IHL that treated child soldiers as having a hybrid status would create a general deterrence with respect to incorporating child soldiers into armed formations. Those who unlawfully incorporated children would not only bear criminal responsibility for the crime of unlawful conscription but may also bear criminal responsibility for crimes committed by members of the force against the children thereby creating an additional deterrence to conscripting them. Creating a clear comprehensive cloak of protections around those victimized as child soldiers would also strengthen the moral credibility of IHL.

Conclusion

38. For the foregoing reasons, I respectfully submit that the OTP's revised Policy on Children should include a policy statement that the OTP will advocate for an interpretation of IHL that affords child soldiers special hybrid status and extends the protections of civilian status to them vis-à-vis those who unlawfully incorporate them into an armed force.

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the Regulations annexed to it do not cover specific cases occurring in warfare, or concomitant to warfare.

Annual Digest and reports of Public International Law Cases, 1948, p. 622.

[47] *Prosecutor v. Ntaganda*, ICC-01/04-02/06, "Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9", 4 January 2017. The Chamber cited in support of this proposition, International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* 9 July 2004, paras. 155-159.

[48] Section 727 of the Code of Napoleon states in part: "Unworthy to succeed, and as such excluded from successions, are, 1st. He who shall be condemned for having caused or attempted to cause the death of the defunct." *See,* THE CODE NAPOLEON OR THE FRENCH CIVIL CODE, (London: William Benning, Law Booksellers, 1827). See also, Mackeldy's Roman Law, 530, 550.