



MIDLANDS STATE UNIVERSITY
FACULTY OF LAW

NDLOVU GUGULETHU MPUMELELO
R104343V

CHILD SOLDIERS, INTERNATIONAL CRIMES
AND ACCOUNTABILITY: RESOLVING THE
DILEMMA

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SUPERVISOR: DR T TSABORA

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APPROVAL FORM

The undersigned certify that they have read and recommended to the Midlands State University, for a research entitled “Child Soldiers, International Crimes And Accountability: Resolving The Dilemma, submitted by **Gugulethu Mpumelelo Ndlovu**, in partial fulfilment of the requirements of a Degree of Bachelor of Laws Honours Degree.

.....

SUPERVISOR

.....

PROGRAM CO-ORDINATOR

.....

EXTERNAL EXAMINOR



DECLARATION

I declare that, “**CHILD SOLDIERS, INTERNATIONAL CRIMES AND ACCOUNTABILITY: RESOLVING THE DILEMMA**,” is my work and has not been submitted before for any degree or examination in any other university and that all sources I have used or quoted have been indicated and acknowledged as references.

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NDLOVU GUGULETHU MPUMELELO

R104343V



Dedication

To my mother **Nobuhle**, the one who remembers but keeps silent



Acknowledgements

I would like to thank my supervisor Doctor Tsabora, for his uncompromising standard. Without you Doc my work may not have reached such standard.

To Aunt Dee. I would never have made it to law school without you. To Zie, my young brother and my mum thank you for taking care of me for five long years even when you had so little yourselves. I know what I put you through and I will never be able to repay the debt.

And to my classmates you have been my family. I love you and wish you all the best.

And finally to Mr Manyatera, the Dean of Law. Thank you Dean for all the inspiration and those long moot court trips all over the globe. You opened a whole new world for me, sir.



LIST OF ABBREVIATIONS

ACRWC African Charter on the Rights and Welfare of the Child

(AFRC) Armed Forces Revolutionary Council

CRC Convention on the Rights of the Child

DRC Democratic Republic of Congo

(FPLC) Forces patriotiques pour la libération du Congo

ICC International Criminal Court

ICTR International Criminal Tribunal for Rwanda

ICTY International Criminal Tribunal for the former Yugoslavia

ILO International Labour Organization

LRA Lord's Resistance Army

SCSL Special Court for Sierra Leone

UN United Nations

UNICEF United Nations Children's Fund



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CHAPTER 1

1.1.INTRODUCTION AND BACKGROUND

From the Lord's Resistance Army in Uganda to the Small Boys Unit in Sierra Leone, the commission of atrocities, ranging from killings, torture, rape, and maiming of the civilian population by child soldiers has become one of the most disturbing and persistent features of modern armed conflict. It is estimated that 300,000 children are actively engaged in combat; some 120,000 of these are thought to be in Africa.¹ The commission of atrocities by child soldiers in hostilities has not only sparked both international outrage and concern but also ignited controversy and debate on about accountability for atrocities perpetrated by child soldiers.

Child soldiers have traditionally been viewed as, recruited and forced to commit military acts against their will². As such the international legal framework has inadequate provisions dealing with children who commit international criminal acts. The various conventions relating to children's rights fail to establish a comprehensible description of a child as a perpetrator.³

Faced with an inadequate international legal framework, states have increasingly resorted to their domestic laws to deal with children who commit international crimes. In 2000, the Democratic Republic of Congo executed a 14 year-old child soldier for war crimes⁴ and in 2001, condemned another four aged between 14 and 16 years to death.⁵ In 2010 a United

¹Morini C. (2010) First victims then perpetrators: child soldiers and International Law. ACIDI, Bogotá, ISSN: 2027-1131/ISSNe: 2145-4493, Vol. 3 Especial, pp. 187-208, 2010 at pg. 189

²Leveau . F (2013) Liability Of Child Soldiers Under International Criminal Law, Osgoode Hall Review Of Law And Policy Volume 4 Spring 2013 Issue 1 p.36

³Fallah K (2006) "Perpetrators and Victims: Prosecuting Children for the Commission of International Crimes" 2006, 14 African Journal of International and Comparative Law 85.

⁴ Human Rights Watch, "Letter to Foreign Minister of Democratic Republic of Congo" (2 May 2001), online: Human Rights Watch <http://www.hrw.org/wr2k1/index.html> (accessed 10/09/2014)

⁵ Human Rights Watch, Press Release "Congo: Don't Execute Child Soldiers: Four Children to be Put to Death" (2 May 2001), online: Human Rights Watch <http://www.hrw.org/press/2001/05/congo0502.html> (accessed 10/09/2014)



States Special Military Tribunal sentenced 16 year old Omar Khadr anal Qaeda militant charged with war crimes, to eight years imprisonment.⁶

However the holding of children accountable for war crimes by states has proved a fracture line among scholars and jurists. It has been argued that international crimes transcend national boundaries and are of concern to the international community⁷ as a whole and therefore cannot be left to the whims of various domestic laws. Others have argued against the prosecution of children on the basis that they are also victims, while others are of the view that justice for victims and deterrence demands retribution.⁸ Rather if there is anyone to be held responsible it should be those who recruit the child soldiers.⁹ Of course this becomes a thorny issue as states are also some of the greatest recruiters of child soldiers.¹⁰

This study examines the moral dilemma of the accountability of crimes committed by child soldiers. It will focus on who should bear the responsibility for such crimes and how to end impunity without compromising the rights of child soldiers guaranteed by various child treaties.

1.2.PROBLEM STATEMENT

There are several controversies that require discussion in dealing with the phenomenon of accountability for international crimes perpetrated by child soldiers. Firstly unlike adults involved in armed conflict, children, because of their age, their victimization and limited appreciation of their actions, pose a unique situation when the question of responsibility arises for crimes committed during a war. In short, child soldiers have the dual status of both victims and perpetrators.¹¹

⁷Brownlie I.(2003)Principles of Public International Law, 5th ed., Oxford: Oxford University Press at 303

⁸Report of the Secretary-General on the establishment of a Special Court for Sierra Leone. Document S/2000/915, United Nations, Security Council, 4 October 2000, para. 7

⁹MagneFrostad (2014) Child Soldiers: Recruitment, Use and Punishment International Family Law, Policy and Practice Vol. 1.1

¹⁰Child Soldiers International,(2012) Louder than words: An agenda for action to end state use of child soldiers ,found at http://www.child-soldiers.org/global_report_reader.php?id=562(accessed 07/09/14)

¹¹Machel G. (2000) The Impact of Armed Conflict on Children A critical review of progress made and obstacles encountered in increasing protection for war-affected children, presented at the International Conference On War affected Children September 2000 Winnipeg, Canada p.6



Therefore, should child soldiers be visited with judicial retribution considering that most are forcibly recruited and forced to commit atrocities? Prosecuting could certainly lead to double suffering for the children while lack of prosecution could arguably lead to impunity.

Furthermore if the alternative is not prosecuting children, is it a better alternative to prosecute those who recruit those children, in order to end impunity. How would such goal be achieved? Would it need the creation of new laws or better enforcement of the existing ones?

More importantly how will the need for retribution, deterrence and justice be balanced against the human rights principles of the best interests of the child and juvenile justice.

1.3.RESEARCH OBJECTIVES

- i. To discuss who should be held accountable for international crimes committed by child soldiers. Should it be the child soldiers themselves or their recruiters and commanders.
- ii. To explore the most effective ways to end impunity with regards to the recruitment and use of child soldiers to commit atrocities.
- iii. To discuss how the need for achieving the goals of international criminal law that is, justice, deterrence and retribution can be balanced against the need to protect children and act in their best interests as guaranteed by international human rights law.

1.4.METHODOLOGY

This research will employ a doctrinal approach to outline the law with regards to the use of child soldiers, through utilizing primary sources like international treaties and statutes of international criminal tribunals. The research will also employ a desktop study approach, utilizing secondary sources, that is, academic books dealing with the criminal liability of children, the relevant law journal articles, and the electronic resources on the subject.



1.5.LITERATURE REVIEW

Romero, argues for the prosecution of children for war crimes pointing out that lack of retribution makes impossible the attainment of just results and neglects to effectuate fundamental notions of deterrence and retribution and will breed impunity.¹²

However, **Lawrence** opposes retribution and advocates rehabilitation arguing that the threat of punitive sanction has negligible deterrent effect on desperate youth who foresee little future for themselves.¹³

Frostad, argues that child soldiers should be considered victims of war, participants who have been forcibly recruited. Focus for punishment should shift to those recruit children.¹⁴

Morini argues that though it would be necessary to hold children accountable to their actions, children should not be dealt with in the same way as adults. Guarantees of juvenile justice must be observed in order to balance deterrence and retribution with the best interests of the child recalled in the Convention on the Rights of the Child.¹⁵

1.6.SYNOPSIS OF CHAPTERS

Chapter 1

This chapter will introduce the research and give a brief background to the problems associated with accountability when children commit international crimes. It will also lay out the objectives, scope and literature review of the study.

Chapter 2

Will give an in-depth discussion of the debate surrounding who should be held accountable for international crimes committed by child soldiers. It will conclude with a position on who should be held accountable.

¹² Romero J(2004), The Special Court for Sierra Leone and the Juvenile Soldier Dilemma, Northwestern University Journal of International Human Rights, Vol. 2, at www.law.northwestern.edu/journals/jihr/v2/8 (accessed 08/09/2014)

¹³ Lawrence R. (1998) School Crime and Juvenile Justice, New York: Oxford University Press, at 213.

¹⁴Supra note 9 at 85

¹⁵ Supra note 1 at pg. 202



Chapter 3

Building on Chapter 2, this Chapter will discuss the law prohibiting the use and recruitment of child soldiers and how this law can be effectively applied to end impunity and hold accountable those who recruit and use child soldiers.

Chapter 4

Building on previous Chapters it will explore the most equitable way to balance the need for children to have some measure of accountability without compromising the protections guaranteed by international human rights law and without robbing the victims of justice.

Chapter 5

The research will then sum up give recommendations and conclude.



CHAPTER 2

CHILD SOLDIERS AND INTERNATIONAL CRIMINAL JUSTICE

2.1. INTRODUCTION

The issue of accountability with regards to international crimes committed by child soldiers has proved a divisive issue among legal scholars. This Chapter will explore current debates among legal scholars on who to hold accountable for such crimes. It will extensively discuss the views of those scholars who argue that children themselves should be held accountable and also present the view of the other school of thought which argues that the recruiters and those who give commands should themselves be held accountable for the crimes of the child soldiers.

For the purposes of this research a child is anyone below the age of 18 years as defined in the Article 1 of the United Convention on the Rights of the Child and also in Article 2(1) of the African Charter on the Rights and Welfare of the Child.

2.2. The Case for Holding Child Soldiers Accountable For International Crimes.

i) Holding children accountable would help end impunity by the recruiters.

It is not disputed among scholars that children are at most times victims of their recruiters and commanders. However an absolute “immunity” for child perpetrators of international crimes might lead to impunity. It may have the perverse effect of commanders assigning criminal acts to children, content in the knowledge that these would never face prosecution.¹⁶ Indeed the Special Representative of the Secretary General, highlighted this fear in a Report stating: *“If minor children who have committed serious war crimes are not prosecuted, this could be an incentive for their commanders to delegate to them the dirtiest orders, aiming at impunity.”*

¹⁶ Supra note 9 at 86



Ironically therefore, granting children immunity may actually increase their recruitment and the number of atrocities committed by them, since their recruiters would be content delegating such tasks to them knowing that such children would never face prosecution, unlike adult soldiers, who may be reluctant to commit atrocities out of fear of prosecution.

- ii) Holding children accountable would help end impunity by the children themselves.

Scholars like Fisher, totally reject the generalized image that all children who join armed groups are forcibly abducted drugged and coerced children in combat. She points out that at times some children though a small number voluntarily join militias for “employment, adventure, freedom, excitement; to support a cause, defend or fight for autonomy of ethnic, religious or social groups; and to avenge a death, among other reasons.”¹⁷

Interestingly Amnesty International, though acknowledging these are generally few cases, points out that, there are some cases in which the child soldier concerned was clearly in control of his or her actions, and not coerced, drugged, or forced into committing atrocities. Some have committed atrocities voluntarily out of revenge or to prove their courage.¹⁸ It would only increase impunity not to prosecute such children.

Furthermore and very importantly, it must be considered that international treaties do allow some voluntary conscription of children aged fifteen to eighteen years, into national armed forces.¹⁹ It would not be logical to permit such children to commit horrendous crimes but enjoy *de facto* immunity while doing so.

However it is worth noting that this author is of the view that even though some children may join voluntarily or willingly commit atrocities, this does not automatically engender them with criminal capacity as Fisher’s armchair approach would seem to infer. Children tend to

¹⁷ Fisher K. (2013) Transitional Justice for Child Soldiers: Accountability and Social Reconstruction in Post-Conflict, Palgrave Macmillan

¹⁸ Amnesty International (2000) “Child Soldiers: Criminals or Victims? AI Index: IOR 50/02/00

¹⁹ Article 38 of the CRC



be socialized by the environment they are brought up in. Children who grow up in a war environment may begin to view joining armed groups as normal and expected and at the same time desensitized to the wrongfulness of committing atrocities, since such atrocities would have been a part of their lives from birth.

iii) The need for justice for the victims and community.

Holding children accountable for their actions would also be in the interests of the victims of the crimes. Those who have suffered at the hands of child soldiers would want to see perpetrators held accountable in some way or another. For example, as Reis points out, after the Rwanda genocide, public opinion favored holding children responsible. Many Rwandans believed that if a child was mature enough to distinguish between a Tutsi and a Hutu and commit murder, then a child was mature enough to be punished.²⁰

Failing to hold child soldiers accountable, denies victims their right to justice or at the very least an apology. It would only lead to continuing hatred and bitterness even after the conflict is over. It might even lead to former child soldiers being rejected by society after the conflict as, which of course would hardly be in their best interests.

iv) The prosecution of children is not a novel idea.

It can also be argued that that child soldiers are no different from other children who commit crimes. Child soldiers have been responsible for some of the worst crimes against humanity. Under domestic law children who commit crimes are prosecuted unless they are truly infants, that is aged 0 to about 12 years. Indeed most domestic laws create an age of criminal responsibility is much lower than 18. Thus, if a child can be convicted for murder under these domestic laws there should be no exception for child soldier's just because their crimes occurred in wartime.²¹ They are two sides of the same coin and should both face justice equally.

²⁰ Reis C. (1997) Trying the Future, Avenging the Past: The Implications of Prosecuting Children for Participation in Internal Armed Conflict, 28 Colum. Hum. Rts. L. Rev., at 634-635

²¹ Child Soldiers.: Victims or Perpetrators-Summative Essay, found at <http://childsoldiersinvisiblechildren.weebly.com/child-soldiers--summative-essay.html> (accessed 5/05/2015)



However this writer will concede that the above allegory may not necessarily be appropriate for child soldiers. Child soldiers are different from other child criminals. Furthermore, I consider child soldiers different from ordinary child criminals. Child soldiers are usually abducted and then forced to commit international crimes. In short they have limited choice or no choice at all. Child criminals, on the other hand, are not usually compelled by threats of violence or death to commit crimes; they do it through a motive usually.

2.3.Child Soldiers and International Criminal Punishment.

However some argue that priority should be focused on prosecuting those who committed crimes against children, particularly those who recruit the children into armed groups or forces not the children themselves. These arguments will be discussed below.

i) Children are often victims of recruiters

It is not seriously disputed by any scholar or international law authority that children are often forcibly recruited and forced to commit atrocities under duress, threats or drugs. Indeed the Paris Principles reiterate this position stating:

“Children who are accused of crimes under international criminal law allegedly committed while they were associated with armed forces or armed groups should be considered primarily as victims of offences against international law; not only as perpetrators”²²

Tellingly, in his report to the Special Court of Sierra Leone (SCSL), Kofi Annan then Secretary-General of United Nations reflected the view of the international community stating:

“The children of Sierra Leone may be amongst those who have committed the worst crimes, they are to be regarded first and foremost as victims.”²³

²² UNICEF, The Paris Principles: Principles and Guidelines on Children Associated with Armed Forces or Armed Groups, February 2007 Para 3.6.



It is a fact that in many cases child soldiers are forcibly recruited and forced to commit atrocities under threats and intimidation. Recent Amnesty International Reports on Uganda and Sierra Leone have provided many case studies which illustrate the way in which children have been drugged, brutalized or threatened with physical abuse or death if they did not comply with orders to commit atrocities²⁴ In such cases clearly the child soldier is more a victim than perpetrator and it would be unjust to visit retribution upon him. It would in effect victimise the child twice. It is therefore more logical to prosecute the recruiter.

Indeed international Tribunals also largely seem to support this view. For example, despite the Statute of the Special Court for Sierra Leone (SCSL), being the first international instrument that expressly provided for the prosecution of children charged with international crimes,²⁵ the Special Court's Prosecutor affirmed that he would not prosecute child soldier because that would be tantamount to categorising them with those who bear the greatest responsibility of the crime committed during the conflicts.²⁶

ii) The need to end impunity.

There is no question that those who recruit and force child soldiers to commit crimes should be visited with criminal sanctions. This seems to be the most effective way to end impunity. The indictments and convictions of Charles Taylor²⁷ and the Thomas Lubanga²⁸, by the Special Court of Sierra Leone and the International Criminal Court respectively, crystalized the threat of criminal sanctions for recruitment of child soldiers, into a reality. Some have argued that pursuing criminal charges against recruiters and commanders of child soldiers has the effect of useful deterrence.²⁹ Indeed the Special Representative of the Secretary General for Children and Armed Conflict has stated that:

²³ Report of the Secretary General on the establishment of a Special Court for Sierra Leone para 7.

²⁴ Amnesty International (1997) "Breaking the Lord's commands: the destruction of childhood by the Lord's Resistance Army." AI Index AFR 59/01/97

²⁵ Article 7

²⁶ Novogrodsky, N. (2006) Litigating child recruitment before the Special Court for Sierra Leone. San Diego Int'l L. J., 7, 2006, at 421

²⁷ Prosecutor v. Charles Ghankay Taylor, SCSL-03-01-T, judgment (trial chamber II), 18 May 2012,

²⁸ Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-2842, judgment (trial chamber), 14 March 2012.

²⁹ Report of the Special Representative of the Secretary-General for Children and Armed Conflict, UN Doc. A/67/256, 6 August 2012, para. 7.



“parties to conflicts seem to be “cognizant of the [Lubanga and Taylor] cases and the implication on their own behaviour.”³⁰

Even where children have joined voluntarily to or committed atrocities willingly, that cannot be a loophole to allow their commanders to escape liability for the actions of the children. Children in a war situation may join voluntarily because of the wartime push factors. They may be under the belief that joining would lead to a safer life and necessities such as food, water and shelter. However, once they are recruited the children become over reliant on their commanders for shelter, money, water, drugs and alcohol that they find an extreme difficulty to leave.³¹

Furthermore as pointed out above, the fact that children join voluntarily does not automatically clothe them with the criminal capacity to understand their actions.

iii) Lack of a minimum age for criminal responsibility.

It can be argued that the lack of a minimum age of criminal responsibility militates against the prosecution of children for international crimes. No international treaty currently lays down a minimum age of criminal responsibility for international crimes. International criminal law meanders between the vague and hazy when it comes to its stance on the age of criminal responsibility and what, if any, punishments should be imposed on child soldiers guilty of war crimes.³² Even the Convention on the Rights of the Child (CRC), shies away from this issue, instead holding that that State parties to the Convention shall seek to establish a minimum age below which children shall be presumed not to have the capacity to infringe criminal law³³. However, no minimum age of criminal responsibility is stipulated. States have therefore used their domestic laws on minimum criminal responsibility to prosecute children who commit war crimes. It is left to each State to decide what that age should be.

³⁰ Supra note 29 at para. 3

³² “Analysis: Should child soldiers be prosecuted for their crimes?” IRIN Global 2015, Article found at <http://www.irinnews.org/report/93900/analysis-should-child-soldiers-be-prosecuted-for-their-crimes> (accessed 31/03/2015)

³³ Article 40(3a)



Arguably such a situation is undesirable. Happold argues, that without a minimum age of criminal responsibility there should be no basis for holding child soldiers accountable.³⁴ Morini, in support of this position, points out that establishing a minimum age helps to strike a balance between attributing responsibility appropriately and protecting the child from a trial he is too young to understand, thereby rendering the whole process unjust and worthless.³⁵

However as noble as the idea to have a minimum age of criminal responsibility, this writer is of the view that it may not actually be ideal to have one. The *opinio juris* of states as revealed by the Prosecutor of the SCSL refusing to try children below the age of 18 years and also Article 26 of the ICC Statute, denying the Court jurisdiction to try anyone below 18 years is clearly gravitating towards not actually having a minimum age of international criminal responsibility. Rather no child soldier below 18 years should be prosecuted at all for international crimes at all.

Furthermore it must be acknowledged that children all over the world due to their differing socio-economic contexts and experiences, develop differently and do not mature at an equal rate. This could explain why the CRC leaves the decision of establishing a minimum age of criminal responsibility to each state. In the light of children maturing the same way it would clearly be difficult to have an outright minimal age of criminal responsibility. Such might for example be appropriate for children in peaceful country in Europe while totally unsuited for a child who was born and grew up to conflict in an African or Middle East State and vice versa.

In light of the above it is therefore easier and more logical and safer to prosecute the recruiters of the children rather than risk holding to account minors who could not even understand the implications of their actions.

³⁴Happold M (2007) International Criminal Accountability and Children's Rights, (Karin Arts and VesselinPopovski (eds), The Hague: T.M.C. Asser Press

³⁵Supra note 1 at .202



2.4.CONCLUSION

It is clear that while arguments are there for both courses of action , the arguments for not prosecuting child soldiers for international crimes and instead going after those who recruit them instead, are more compelling. The primary concern is that children are victims of their recruiters even where they voluntarily enlist they are usually forced by the socio-economic conditions and socialization. However, as has been stated in the Chapter this is not to say that children should not be in some way held accountable. Accountability does not always involve criminal prosecution. Other methods exist and these will be discussed later in the research.

In light of the compelling arguments to hold recruiters of child soldiers accountable, Chapter 3 will therefore discuss the law prohibiting the use and recruitment of child soldiers and how to effectively apply it to end impunity and hold those who recruit child soldiers liable for the crimes of those children.



CHAPTER 3

THE LAW PROHIBITING THE USE OF CHILD SOLDIERS AND METHODS OF ENFORCEMENT

3.1. INTRODUCTION

As was shown in Chapter 2, the main contentions against holding child soldiers accountable is that not only do they lack criminal capacity, but most of them are forcibly recruited into armed groups and commit atrocities under the threat of death or some other form of violence from their commanders. It follows therefore that it would be only logical to attribute the crimes of this child soldiers to their commanders under the principle of command responsibility. As Leveau comments, child soldiers are, in essence, tools used to commit crimes against civilians, therefore it makes intuitive legal sense that adult liability for use of child soldiers includes liability for the actual crimes committed by child soldiers. The reasoning here is that, if child soldiers had not been used at the first place, they would not have committed crimes.”³⁶

It is argued therefore, that holding the recruiters accountable involves not only their prosecution for recruiting child soldiers in the first place but also impugning liability upon them for the crimes committed by child soldiers. This Chapter will therefore analyse the international instruments prohibiting the use of child soldiers and whether more law is needed in this area. It will then discuss how to effectively apply the law to end impunity and demonstrate how tribunals have linked recruiting child soldiers and liability of the commander for their crimes.

3.2. International law instruments prohibiting the recruitment and use of child soldiers.

There is already an ample body of international legal instruments prohibiting the recruitment and use of child soldiers, under international human rights law, international labour law, international humanitarian law and international criminal law. This study will focus in particular on the following instruments:

³⁶Leveau F. (2012) Liability under International Criminal Law for the War Crime of Recruitment and Use of Child Soldiers, The Africa Institute Occasional Paper Series Vol. 1, Issue.1, at 30



- i) The Additional Protocols to the Geneva Conventions
- ii) The United Nations Convention on the Rights of the Child
- iii) The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children
- iv) The African Charter on the Rights and Welfare of the Child,
- v) The International Labour Organization's Convention Number 182 on the Elimination of the Worst Forms of Child Labour
- vi) The Rome Statute Establishing the International Criminal Court.

i) The Additional Protocols to the Geneva Conventions.

They were the first treaties to the prohibition on the recruitment and use of children. Article 77(2) of the Additional Protocol I to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, requires parties to a conflict:

“to take all feasible measures in order that children who have not attained the age of 15 years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, the Parties to the conflict shall endeavour to give priority to those who are oldest.”

However as the International Committee of the Red Cross points out, this is not a complete ban on the use of children in conflict. Parties are only required to take “feasible measures” which is not a total prohibition on recruiting children so because feasible should be understood as meaning "capable of being done, accomplished or carried out, possible or practicable".³⁷

³⁷ ICRC Commentary on AP I: Article 77 at para 3183-3191 <https://www.icrc.org/applic/ihl/ihl.nsf/COM/470-750099?OpenDocument>



Furthermore there is no prohibition from recruiting children under fifteen who volunteer for armed service.

In the same vein the very fact that the prohibition applies to children being made to "take a direct part in hostilities" opens up the possibility that child volunteers could be involved indirectly in hostilities, gathering and transmitting military information, helping in the transportation of arms and munitions, provision of supplies and so on.^[14]

The protection is a bit better in Article 4(3)(c) of Protocol, Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, adopted in 1977 which states.

"children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities"

In short in non international armed conflicts children who are below the age of 15 years cannot take any part in armed conflict whether directly or indirectly. Furthermore the International Committee of the Red Cross in its commentary to article 4(3)(c) states that:

"The principle of non-recruitment also prohibits accepting voluntary enlistment. Not only can a child not be recruited, or enlist himself, but furthermore he will not be "allowed to take part in hostilities",³⁸

However it can be said that both treaties fall short of the goal, by not containing a complete ban on the recruitment and use of anyone below the age of 18. In effect children between 15+ and 18 years fall through the cracks.

i) The United Nations Convention on the Rights of the Child (CRC)

Article 38 of the CRC specifically deals with the problem of the recruitment of child soldiers and it will be the author's focus. Articles 38(2 and 3) state:

2. States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.

³⁸ Commentary to APII, para 4557, online: ICRC <http://www.icrc.org/ihl.nsf/COM/475-760008?OpenDocument>



3. States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces.

Insofar as protecting children below the age of 15 years from recruitment the treaty is arguably adequate. However its main weakness becomes evident when Article 38 is juxtaposed with Article 1 of the CRC defines a child as anyone below the age of 18 years and entitled to special protections. This is a serious drawback. It may be misconstrued to mean that the recruitment and use of children between fifteen and eighteen is acceptable and not a crime.

Further it can be noted from the text of the treaty, that State parties are only required to take “feasible measures” to prevent the recruitment of children under the age of fifteen. This less than mandatory formulation is inadequate as it raises the spectre of State Parties avoiding obligation by claiming they took all feasible measures.³⁹

ii) The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children

Cognisant of the shortcomings of the CRC, the United Nations in May of 2000, adopted the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict.

Article 1 of the Protocol adopts the so called “straight 18” position establishing 18 years as the minimum age for direct participation in hostilities. Article 2 places an obligation on state parties to ensure that that persons who are below 18 years are not compulsorily recruited into their armed forces while Article 4(1), places an outright prohibition on rebel or other nongovernmental armed groups recruiting persons under 18 years of age or using them in hostilities..

³⁹Renteln A.D (1999)The Child Soldier: The Challenge of Enforcing International Standards, 21 Whittier L. Rev., 203-204 at 191



However the Protocol also suffers from a weakness that it obliges governments to take only “feasible measures” to prevent the recruitment of children by armed groups,⁴⁰ and does not raise the age for voluntary recruitment.⁴¹ Despite such shortcomings, it however must be acknowledged that the provision that rebel prohibiting rebel groups from recruiting under any circumstances affords better protection to children, considering that non-state groups are the greatest users of child soldiers.

Further by taking a “straight 18” position with regards to forced recruitment enhances protection to children. It is a fact that in developing countries mainly in Africa where the use of child soldiers is comparatively higher, birth registration is often non-existent and many children have no birth records.⁴² However raising the age limit to 18 years of age makes it hard for perpetrators to pass children off as being older than they really are, since their physical appearance will speak for itself.⁴³

iii) The African Charter on the Rights and Welfare of the Child

The African Charter on the Rights and Welfare of the Child is more far reaching with regards to the prohibition of the recruitment of children than both the CRC and its Optional Protocol. It uncompromisingly states in Article 22(2) that State Parties shall:

“take all necessary measures to ensure that no child shall take a direct part in hostilities and shall refrain, in particular, from recruiting any child.”

Article 2(1), defines a child as anyone one below the age of 18 years, so unlike the CRC, the provisions of the Charter apply to all children with no exception. Furthermore, the African Charter uses stronger language of “necessary measures”, as compared to the CRC “feasible measures” in ensuring State Parties’ protection of children involved in armed conflict.⁴⁴

⁴⁰ Article 4(2)

⁴¹ Article 3(1)

⁴² Optional Protocol to the Convention on the Rights of the Child Concerning Involvement of Children in Armed Conflicts: Position of the International Review of the Red Cross, International Review of the Red Cross, no. 322, 107-125 (1998) at 251

⁴³ Supra note 40 at 251.

⁴⁴ Morini, Supra Note 1 at 198



In this regard though it is a regional instrument its impact is significant to Africa where the recruitment of child soldiers is rampant as demonstrated by the situation in the DRC, Uganda and the Central African Republic.

iv) The International Labour Organization (ILO) Convention 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (1999)

The ILO Convention 182, at Article 2 defines a child as anyone under eighteen years old. Article 3 of the Convention out rightly bans the forced recruitment, drastically categorising it as a form of slavery along with child trafficking among others. To ensure maximum protection to the children and adherence to the treaty ILO recommends that States make such recruitment practices a criminal offence.⁴⁵ The impact of this treaty cannot be overstated. As Morini points out:

“The importance of the ILO Convention 182 lays in the circumstance that it offered for the first time the opportunity to set an eighteen-year minimum age limit in relation to child soldiering in an international treaty. Moreover, it was the first legal recognition of child soldiering as a worst form of child labour.”⁴⁶

v) The Rome Statute Establishing the International Criminal Court

Article 8(2) of the Rome Statute proscribes the war crime of conscripting or enlisting children under the age of fifteen years into national armed forces or using them to participate actively in hostilities.⁴⁷

Though it unfortunately still retains the low age threshold of 15 years, the Statute is laudable that it is the first international treaty where the recruitment of children is recognized as war crime.⁴⁸ Indeed the International Criminal Court, on 26 January 2009 began the trial of

⁴⁵ ILO Recommendation 190 on Worst Forms of Child Labour Recommendation, Para 12(a)

⁴⁶ Morini Supra note 1 at 195

⁴⁷ Article 8(2)(b)(xxvi))

⁴⁸ Topa I. (2007) Prohibition of child soldiering – international legislation and prosecution of perpetrators. Hansel Law Review Vol3, No1 at 113 www.hanselawreview.org/pdf5/Vol3No1Art06.pdf (accessed 13/03/)



Thomas Lubanga, who was charged with the recruitment and use of child soldiers as prohibited by 8(2) of the Rome Statute. In a landmark first decision, the Court found him guilty and in March 2012 sentenced, him to 14 years of imprisonment.⁴⁹

3.3. Is there a need for more law?

It is evident that there is already a robust international legal framework prohibiting the recruitment of children into the armed forces or armed groups. While the law is not perfect and has its shortcomings, it indisputably reflects the *opinio juris*, that the recruitment of children is an international crime. In any event where one treaty has shortcomings these are usually compensated for by another treaty.

It is therefore argued, that there is no need for new laws in this area, given the number of treaties, declarations and resolutions on the subject. Child recruitment is still thriving despite these laws. Clearly therefore, if those who recruit child soldiers still do so despite the existence of current laws, new laws are hardly likely to deter them. As Singer points out:

‘Those using child soldiers are willing to ignore the longstanding ethical norms and will likely be un-deterred by new ones or persuaded by moral appeal.’⁵⁰

Rather the focus should shift towards the enforcement of the existing law. Recruiters are rarely held accountable for recruiting children. International law must therefore be effectively applied to eliminate the sense of impunity enjoyed by those who use child soldiers.⁵¹ The most effective ways to achieve this goal shall be discussed in the next section of this chapter.

⁴⁹Supra Note 28

⁵⁰ Singer P.W. (2004) Talk is Cheap: Getting Serious about Preventing Child Soldiers, 37 Cornell Int'l L.J. 561 at 573

⁵¹ Singer, supra Note 50 at .575



3.4. Enforcing the Law to End Impunity

It only makes logical sense that where an act is considered criminal under international law the most effective enforcement mechanism is international criminal law.⁵² The next section will therefore discuss how international criminal law has been used and can be used at both an international level, through international tribunals and at a domestic level through the domestic courts, to end impunity with regards to the crime of recruiting child soldiers.

In particular it will focus on the contributions of the International Criminal Court and the Special Court of Sierra Leone the only two international bodies that have had occasion to try the crime of recruiting child soldiers

3.4.1. Enforcing the law at an international level

a) The International Criminal Court

Though the International Criminal Court has completed only one case where an accused was specifically charged with the crime of recruiting child soldiers, the importance of this decision is still immense in its contribution towards ending impunity.

In February 2006, the ICC Prosecutor issued an arrest warrant for Thomas Lubanga Dyilo charging him under Article 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Rome Statute, that is enlisting and conscripting of children under the age of fifteen years into the *Forces patriotiques pour la libération du Congo* (FPLC) and using them to directly participate in hostilities. He was arrested on the 17 March 2006 and his trial, began on 26 January 2009. He was subsequently found guilty on 14 March 2012 and sentenced, to a total of 14 years of imprisonment.⁵³

This case was singularly important for its contribution towards ending impunity as Leaveau comments:

⁵²The High Commissioner for Human Rights (2011) International Legal Protection of Human Rights in Armed Conflict, New York : United Nations Publications, at 8

⁵³Supra Note 28



*“The Lubanga case demonstrates the severity of the war crime of recruitment and use of child soldiers because Thomas Lubanga, as the first individual to be charged by and transferred to the ICC was indicted on this sole ground. The positive aspect of this trial is the strong message it sends to the world, confirming that impunity no longer exists for those accused of such a war crime.”*⁵⁴

Géraldine Mattioli-Zeltner, the international justice advocacy director at Human Rights Watch also echoed the same sentiments stating:

*“Military commanders in Congo and elsewhere should take notice of the ICC’s powerful message: using children as a weapon of war is a serious crime that can lead them to the dock.”*⁵⁵

Furthermore the ICC has demonstrated its potential impact in ending impunity of this crime by issuing arrest warrants against several individuals from the DRC, namely: Germaine Katanga, Mathieu, Bosco Ntaganda. All three have been charged with the crime of recruitment and use of child soldiers.⁵⁶

Further on 8 July 2005, the ICC issued arrest warrants against Joseph Kony, the leader of the LRA in Uganda, Vincent Otti, Second-in-Command of the LRA and Okot Odhiambo, Deputy Army Commander of the LRA. They are accused of having committed crimes against humanity and war crimes, including the war crime of recruitment and use of child soldiers.⁵⁷

Clearly therefore the ICC is making a significant contribution towards curbing the use of child soldiers and has the potential for more use by the international community as an effective measure to bring to book those who would recruit child soldiers.

⁵⁴Leveau, supra note 36 at 4

⁵⁵ICC: Landmark Verdict a Warning to Rights Abusers, Human Rights Watch (2012) found at <http://www.hrw.org/news/2012/03/14/icc-landmark-verdict-warning-rights-abusers> (accessed 01/04/2015)

⁵⁶Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui, ICC-01/04-01/07, Decision on the Confirmation of the Charges (30 September 2008) (ICC, Pre-Trial Chamber I); Prosecutor v Bosco Ntaganda, ICC-01/04-02/06, Warrant of Arrest (7 August 2006) (ICC, Pre-Trial Chamber I).

⁵⁷ Office of the Prosecutor, “Warrant of Arrest for Joseph Kony”, “Warrant of Arrest for Vincent Otti”, “Warrant of Arrest for Okot Odhiambo” ICC-02/04 (8 July 2005), found at ICC <http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200204/related%20cases/icc%200204%200105/uganda>



Interestingly and of major concern to this study, though the International Criminal Court has not yet convicted under it, Article 25(3)(b) of the Rome Statute allows for an individual to be held liable if he orders the commission of a crime or under the mode of command responsibility. This would of course allow for holding accountable a commander for the crimes committed by child soldiers.

b) The Special Court of Sierra Leone (SCSL)

The SCSL was established is under treaty between the United Nations and Sierra Leone in 2002, to try perpetrators of war crimes in the aftermath of the Sierra Leone Conflict (1991-2002) and was the first non-national tribunal to try perpetrators for the crime of recruitment of child soldiers. Its contribution towards ending impunity has been very significant as demonstrated below.

In May 2004, the SCSL became the first international tribunal to not only affirm that that an individual may be held criminally responsible for the recruitment but also that the prohibition against recruiting child soldiers had crystallised into a crime under customary international law.⁵⁸

In addition, the SCSL, was also the first international tribunal to find commanders who gave instructions to child soldiers to commit criminal acts, liable for the crimes committed by child soldiers under the principle of command responsibility.⁵⁹ Most noteworthy Alex Tamba Brima, senior commander of the Armed Forces Revolutionary Council (AFRC) in Sierra Leone, was found liable under Article 6(1) and 6(3) of the SCSL Statute, under the principle of command responsibility for the crimes of enslavement, sexual violence committed by child soldiers in Freetown and the Western Area and sentenced to 50 years imprisonment.⁶⁰

⁵⁸Prosecutor v Samuel Hinga Norman, SCSL-2004-14-AR729E

⁵⁹Prosecutor v Moinina Fofona, SCSL-04-14-T, Indictment (5 February 2004) (SCSL, Trial Chamber I), para 20; Prosecutor v Sesay, SCSL-04-15-T, Indictment (2 August 2006) (SCSL, Trial Chamber I), para 38.

⁶⁰The Prosecutor v. Alex Tamba Brima "SCSL-03-06-I:



Though the SCSL concluded its mandate in 2013, it demonstrated for the first time how international tribunals could be effective in ending impunity with regards to the recruitment of child soldiers.

Furthermore it sent the message that all those who recruit children that would not only be held accountable for the particular crime of recruiting children but also for the crimes that may be committed by those children. As the Special Representative to the Secretary General pointed out:

“Some find that these indictments and judgments usefully deter recruitment of child soldiers in armed conflict.”⁶¹

3.4.2. Enforcing the Law at State Level

a) Domestic Courts

It is very unfortunate that the prosecution of international crimes by international tribunals usually receives more media and scholarly focus, while side-lining the very important role played by domestic courts in prosecuting the same crimes.

It must however be noted that for much of the 20th century, in the absence of an international enforcement mechanism for international crimes, international criminal law was primarily the concern of domestic courts.⁶² For example the four 1949 Geneva Conventions contain provisions requiring state parties to enact legislation to punish breaches, to search for persons alleged to have committed such breaches, and to either bring such persons before one’s own State courts, or else extradite them to another State for prosecution.⁶³

Even today the recognition of the important role by domestic Courts is highlighted by the Rome Statue which provides that the International Criminal Court is intended only to complement existing national judicial systems will only exercise its jurisdiction when

⁶¹ Report of the Special Representative of the Secretary-General for Children and Armed Conflict, UN Doc. A/67/256, 6 August 2012, para. 7.

⁶² Gevers C. (2014) A Beginners Guide to International Criminal Law, Rosebank Johannesburg, Open Society Initiative for Southern Africa(OSISA)

⁶³ Article 49, GC1 Article 50 GCII; Article GCIII 129, and Article 146,GCIV



national courts are unwilling or unable to prosecute criminals or when the United Nations Security Council or individual states refer investigations to the Court.⁶⁴

It is argued, that domestic courts have been largely underutilised. If effectively used they offer an even better prospect of ending impunity. Where judicial infrastructure still exists at the end of war domestic courts offer quick and cheaper justice than international tribunals while allowing the community to also participate in the process.

The Gacaca Courts established in 2005, in the aftermath of the Rwanda Genocide to complement the overworked International Criminal Tribunal for Rwanda (ICTR) certainly proved that point. The Courts managed to try almost 1,2 million alleged perpetrators of genocide from 2005 to 2012 compared to the ICTR which completed only 49 during the same period.⁶⁵

3.5.CONCLUSION

It is clear that international law instruments prohibiting the use of child soldiers are largely adequate and no purpose would be served by new law. Priority must shift to enforcement. The ICC and SCSL have shown that there is great potential in the use of International Tribunals to end impunity. They have also demonstrated that liability for the crimes of child soldiers can be impugned on their recruiters under the principle of command responsibility. However, because international criminal systems are slow and expensive they must be complemented by domestic courts.

Having shown that international the law can be enforced to prevent recruitment of child soldiers and to hold recruiters responsible for the crimes of the child soldier, Chapter 4 will focus on the children themselves and how to hold them accountable without compromising the special protections afforded to them under international law.

⁶⁴Articles 17(a)–17(c).

⁶⁵ Outreach Programme on the Rwandan Genocide and the United Nations, found at <http://www.un.org/en/preventgenocide/rwanda/about/bgjustice.shtml>



CHAPTER 4

DEALING WITH CHILDREN WHO COMMIT INTERNATIONAL CRIMES

4.1.INTRODUCTION

In Chapter 2, this study discussed whether child soldiers should be held criminally liable for atrocities committed by them during armed conflict. It was the finding of the study that while it would be unwise to prosecute children, it would be also equally dangerous to impose a blanket immunity on them. A certain level of accountability on the part of the children while not necessarily criminal law oriented in nature, is important for the healing of the child soldier, to impart a lesson that their actions were wrongful and for restoration of the community and victims shattered by the actions of the child soldier.

This Chapter will therefore discuss the most effective mechanisms to hold the child soldier accountable without necessarily resorting to criminal sanctions. However considering the debate around prosecuting child soldiers it will also discuss judicial safeguards to protect the best interests of the child in the event that a State or international tribunal decides to prosecute a child soldier.

4.2.Accountability through non judicial mechanisms- Truth and Reconciliation Commissions

As has been pointed out in Chapter 2, it would not be in the best interests of the child to totally absolve child soldiers from accountability for atrocities committed during armed conflict, though such accountability need not be in the form of criminal prosecution. Furthermore not holding child soldiers accountable in some way would interfere with the process of healing for the victims and communities affected by the crimes of the child soldier. As Fisher bluntly points out such an on blame approach is not particularly useful and potentially dangerous to social reconstruction.⁶⁶ In the same vein Popovski argues that:

⁶⁶ Supra note 17



“Victims and their families want justice to be done even if the crimes were committed by child soldiers,”⁶⁷

Clearly two important competing interests emerge. The need to hold children accountable even if it is through non-judicial process and the equal need for justice and healing for the victims and community. In this regard Truth and Reconciliation Commissions have gained increasing recognition as an effective way to balance these competing interests.

More than 20 truth and reconciliation commissions have been established in the aftermath of conflict in places like Rwanda, Liberia, Sierra Leone and South Africa. All of them have the main goal, to establish what happened during a period of armed conflict or political violence, and by doing so, help to reconcile divided societies and build peace.⁶⁸ The Sierra Leone and Liberia Truth and Reconciliation Commissions in particular made special efforts to involve child soldiers in their proceedings.⁶⁹

This mode of accountability is useful for rendering accountability to former child soldiers and has found increasing support in both domestic law and international law, with specific clauses for its provision being incorporated into several international instruments as shown by the following;

The United Nations Security Council, through Resolution 1379 in 2001, emphasised the need for serious abuses involving children, to be addressed in post-conflict truth and reconciliation processes.⁷⁰

In that regard, the Statute of the SCSL specifically provided that as an alternative to prosecution, Truth and Reconciliation measures could be used for accountability of child soldiers. Article 15(5) of the Statute provides:

⁶⁷ Arts. K and Popovski V., (eds) (2006) International Criminal Accountability and Children's Rights TMC Asser Press, The Hague, Netherlands

⁶⁸ ICBR (2010) Guide on International Human Rights and Humanitarian Law on Children in Armed Conflict, International Bureau for Children's Rights, Montreal at 302

⁶⁹ Cohn I. (2001) The Protection of Children and the Quest for Truth and Justice in Sierra Leone, Journal of International Affairs, vol. 55, no. 1, AT 2

⁷⁰ United Nations Security Council resolution 1379(2001), 20/11/2001, S/RES/1379,



*“in the prosecution of juvenile offenders, the Prosecutor shall ensure that the child-rehabilitation programme is not placed at risk, and that where appropriate, **resort should be had to alternative truth and reconciliation mechanisms**, to the extent of their availability”.*(emphasis)

Clearly therefore, from the *opinio juris* above instruments and the fact that over 20 Truth and Reconciliation Commissions exist all over the world, it is certain that the international community is agreed that that they are an effective alternative to hold child soldiers accountable without resorting to judicial process.

Their advantage as a transitional justice measure lies in the fact that Truth and Reconciliation Commissions serve both the best interests of the child and the interests of the victims and the community as a whole. The child soldier gets a chance to tell his story and often times apologize to the victims and their families.

Furthermore the truth and reconciliation processes through the process of child soldiers telling their stories and apologizing to the victims, impart the lesson to the child that that their actions were wrongful while at the same time reinforcing that despite that they are still a part of the society with a role to play in the peace building process.⁷¹ As Morino points out:

*“The unique position of the child combatant, first victim then perpetrator, is best served by truth telling before the Truth and Reconciliation Commissions to facilitate effective social rehabilitation and reintegration than by trials.”*⁷²

Fisher though initially advocating for criminal prosecution of children acknowledges however that Truth and Reconciliation Commissions offer:

⁷¹“Question of the impunity of perpetrators of human rights violations (civil and political), Final Report prepared by Mr. Joinet pursuant to Sub-commission decision 1996/119”, 26/06/1997, E/CN.4/Sub.2/1997/20, para 17

⁷²Morini supra note 1 at 206



“a combination of approaches which will best symbolically even the scales, communicate condemnation of wrongful behaviour, reaffirm equality and particular values appreciated as necessary for peaceful co-existence for community members, and reject the privileged status that the wrongdoer seized for himself in committing the wrongdoing.”⁷³

4.3.Accountability through judicial mechanisms-the Courts.

However since the issue of the prosecution of child soldiers is still open for debate and the international community is still divided over it, there is a chance, albeit a slim one, that a state or tribunal may one day hold a child soldier accountable through criminal prosecution. It is prudent to discuss how any criminal prosecution of child soldiers would be balanced against the best interests of the child and other protections afforded to them by international law. Any prosecution of child soldiers would have to conform to at least the minimum children’s rights standards as outlined below.

a) Minimum age of Criminal Responsibility.

As argued in Chapter 3, while the idea of fixing an international minimum age of criminal responsibility may be warranted, it may not necessarily be ideal due to the different rates of maturity among different children in different regions of the world.

However if the international community is of the view that criminal prosecution against children for international crimes may be permissible, there will be an urgent need to first fix a minimum age below which a child would be considered incapable of infringing penal law, As pointed out in Chapter 2, international law under Article 40 of the CRC, requires that all States fix a minimum age of criminal responsibility but does not however specify such age. Neither does any international instrument.

⁷³ Fisher supra note 17



However it is indisputable that a fixed minimum age would help strike a balance between attributing responsibility appropriately and protecting the child from a trial he is too young to understand.⁷⁴

Useful guidance for fixing a minimum age limit can be gleaned from international jurisprudence and legal instruments. Firstly the age should not be so low that, the age should not be so low as to result in the prosecution of children for offences which, at the time of commission, they were too young to understand the consequences. Indeed the Beijing Principle of 1985 at paragraph 4(1) make this clear:

“In those legal systems recognizing the concept of the age of criminal responsibility for juveniles, the beginning of that age shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity.”

Secondly the very fact that a customary international law principle exists that no child below the age of 15 should be recruited, can be taken as evidence that under international law there is an implied understanding that a child below 15 is incapable of forming criminal intent. The very fact that the Statute of the SCSL provides that while the Court may prosecute children, it would not prosecute any who was below the age of 15 at the time of committing a crime, is telling.⁷⁵

Thirdly and most importantly the UN Committee on the Rights of the Child in considering this issue, in General Comment No. 10 in 2007 State Parties fix the minimal age in the region of 14 or 16 years, with at least 16 years being more favoured. .

b) Guarantees of Juvenile Justice

Furthermore for any judicial process, prosecuting child soldiers to have any legitimacy, their treatment would have to be in accordance with international human rights juvenile justice guarantees.

⁷⁴Morini supra note 1 at 201

⁷⁵ Article 7



Firstly where criminal proceedings are imitated against children, the CRC underscores that such proceedings would have to be in a manner consistent with the promotion of the child's sense of dignity and worth.⁷⁶

Secondly, Article 40(1) of the CRC enumerates several conditions and guarantees that must be respected in proceedings against children, including the principle of legality and fair trial requirements, like legal assistance and a presumption of innocence among others.⁷⁷

Thirdly when sentencing the child soldier judicial bodies will have to ensure that the sentence are more rehabilitative than penal. Article 37(b) of the CRC affirms this view, providing that “[t]he [...] detention or imprisonment of a child shall be used only as a measure of last resort and for the shortest appropriate period of time.”

The same is reiterated by the Statute of the SCSL Article 7(2) which enjoins the Court, in respect of child offenders to give sentences that emphasize rehabilitative measures like care, guidance, counselling; foster care and so on.

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Finally it would be imperative to note that death sentence cannot be imposed on the child soldiers despite the severity of their crimes. The Geneva Conventions and their Additional Protocols prohibit the execution of persons for crimes committed while under the age of 18.⁷⁸ The CRC outlaws the imposition of the death penalty on any child,⁷⁹ while African Charter on the Rights and Welfare of the Child makes it clear that the death penalty shall not be pronounced for crimes committed by children⁸⁰

⁷⁶ Article 40(1).

⁷⁷ Article 40(2).

⁷⁸ Additional Protocol I, Art. 77(5); Additional Protocol II, Art. 6(5).

⁷⁹ Article 37(a)

⁸⁰ Article 5(3)



4.4.CONCLUSION

It is clear that because of their own special situation children cannot be held accountable the same way as adults. Truth and Reconciliation Commissions are an effective transitional justice mechanisms to hold them accountable. If any resort should be had to judicial mechanisms, it should be with maximum observance of juvenile justice guarantees.

However, it is argued, that child despite being perpetrators soldiers should ultimately be viewed as more victims of war than anything else. A restorative element should therefore be emphasised in any approach to establish the accountability of this special category of perpetrators as opposed to retributive justice.⁸¹

⁸¹ Bakker C. (2010) Prosecuting International Crimes against Children: the Legal Framework, Innocenti Working Paper No. 2010-13. Florence, UNICEF Innocenti Research Centre, at 27



CHAPTER 5

5.1. CONCLUSION

It is clear that the issue of who should be held accountable for the crimes committed by child soldiers will continue to divide scholars and the international community for years to come.

There are convincing arguments to hold the children themselves accountable, and even more convincing arguments to hold those who recruit and give orders to the child soldier to be criminally liable.

However it is the view of this study that a middle ground should be taken. Both the child soldier and the commander should be held accountable in some form, though the methods of accountability should vary. Commanders and recruiters are more suited to be dealt with under international criminal law, not only for the recruiting of child soldiers, which is the cause for the international crimes the children commit in the first place, but also be held criminally liable for those crimes under the principle of command responsibility.

The law is already largely adequate and focus should shift to its enforcement. International Tribunals, namely the ICC and the SCSL, have already shown that it is not only possible to effectively enforce the international criminal law prohibition against recruiting child soldiers but also impugn liability for the crimes committed by children to the commanders and recruiters of those children. However any work by the international courts must be seriously complemented through more effective use of domestic courts, which as shown can impart quicker and cheaper justice.

Child soldiers on the other who are accused of international crimes crime should benefit either alternative accountability mechanisms, for example in the framework of a truth-seeking and reconciliation mechanism.⁸² This serves a threefold purpose, to show the child their actions were wrongful, that they can be reintegrated back into society and also give some measure of justice to the victims, while at the same time healing the community as a whole.

⁸² Bakker, *Supra* Note 80 at 29



However if a state of international tribunal decides to pursue criminal prosecution against child soldiers it would be important to ensure that all judicial safeguards of juvenile justice granted to children by international law are religiously observed.

However ultimately, children are victims, no matter what crimes they commit. They must be first treated as such and any judicial or non-judicial mechanism has to be cognisant of this.

Children under the age of 18 who were recruited by an armed force or group and used to take part in an armed conflict and who are accused of having participated in an international crime should benefit either from an adequate juvenile justice system, or preferably from alternative accountability mechanisms, for example in the framework of a truth-seeking and reconciliation mechanism.⁸³

5.2. RECOMMENDATIONS

To ensure that reduction of child soldiers being recruited, committing international crimes and to hold their recruiters accountable while observing the special protections afforded to children states must;

- i) Become party to and ratify all international instruments that prohibit the recruitment and use of child soldiers.
- ii) Refrain from granting amnesties to those who recruit and use child soldiers. Even where amnesties may be considered as part of a peace negotiation, the crime of recruiting child soldiers must be explicitly excluded from amnesty.⁸⁴
- iii) Ensure that children are reintegrated back into society, through transitional justice mechanisms, counselling and schooling in order to avoid them re enlisting.

⁸³ Baker, supra note 82 at 29

⁸⁴ Baker, Supra note 82 at 33



It must however be conceded that this relies heavily on the community and the family's attitude, since the reintegration of the child soldier is largely depends on the community and family accepting them back. In Uganda, this acceptance was achieved through the uses of cleansing ceremonies, which has assisted in the removal of stigmatization that the child is deemed to be contaminated with.⁸⁵

- iv) Adopt a "straight 18" ban on the recruitment of child soldiers under international law and criminalise any recruitment of a child under 18 be it to national forces or armed groups.

However, as desirable as this may be it may prove a challenge to be adopted by all states. For example, the United States of America has vigorously opposed efforts to establish eighteen as the minimum age for military service, citing its own recruitment policies, which allow seventeen-year olds to enlist voluntarily with their parents' permission.⁸⁶

- v) Incorporate the above mentioned instruments into penal law and be willing to prosecute perpetrators.

However, it is acknowledged that this particular recommendation may be difficult to apply in practice. As stated before, despite the proliferation of international law, prohibiting the practice, it is still endemic and arguably on the increase, especially among rebel groups. Some of them are not aware of the law despite the sterling efforts of the International Committee of the Red Cross (ICRC) to disseminate the law as widely as possible.

⁸⁵ Beth Verhey, (2001) Child Soldiers: Preventing, Demobilizing, and Reintegrating, Africa Region Working Paper Series No. 23, World Bank: November 2001, pp. 16

⁸⁶ Human Rights Watch (2000) United States Opposition Jeopardizes Global Ban on Child Soldiers, found at <http://www.hrw.org/legacy/press/2000/01/cswrkgp.htm>



Furthermore the perpetrators are notoriously difficult to catch. Thomas Lubanga Diyalo was only captured after the end of the Ituri conflict (1999-2007)⁸⁷. Dominic Ongwen. Joseph Kony, commander of the LRA despite being indicted, with several of his commanders., by the ICC , in 2005, still evades capture 10 years later⁸⁸. Once of his commanders Dominic Ongwen was only arrested after he voluntarily surrendered in 2015⁸⁹.

- vi) Universal ratification by states of the Rome Statute and fully co –operation with the ICC in bringing perpetrators to book.

It will be acknowledged though that, while this is a noble ideal, it might prove difficult to make a reality. As of January 2015, 139 out of 193 UN member states have signed the treaty though only 123 have ratified it.⁹⁰ Only half the African countries are signatories despite the phenomenon of child soldiering being most endemic there. Furthermore, Israel, Sudan and the United States despite have initially signed the treaty, have informed the UN Secretary General that they no longer intend to become states parties and, as such, have no legal obligations arising from their former representatives' signature of the Statute.⁹¹ A further 41 UN member states have neither signed nor acceded to the Rome Statute; some of them, including China and India, are critical of the Court.^{92,93} It is therefore unlikely that we will see universal ratification of the treaty in the near future.

⁸⁷ [BBC News](http://news.bbc.co.uk/2/hi/africa/4815966.stm) (17 March 2006). DR Congo rebel faces Hague trial. Retrieved 11/5/15

⁸⁸ "Warrant of Arrest unsealed against five LRA Commanders" (Press release). [International Criminal Court](http://www.iccnyc.gov). 14 October 2005. Retrieved 2 June 2009.

⁸⁹ Ugandan LRA rebel commander Dominic Ongwen to be tried at ICC: army. Daily Nation, 13 January 2015

⁹⁰ United Nations Treaty Database entry regarding the Rome Statute of the International Criminal Court, found at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en

⁹¹ Supra Note 89

⁹² Lu Jianping and Wang Zhixiang (2006) China's Attitude Towards the ICC , Journal of International Criminal Justice,

⁹³ , UshaRamanathan(2005) India and the ICC Journal of International Criminal Law, 2005.



However despite the obvious difficulties in implementing some of the weaknesses it is a fact that even their minimal implementation would go a long way in protecting children from the scourge of child soldiering. Action is certainly better than inaction to if the problem of child soldiers and international crimes is to end.

END



LIST OF REFERENCES

Treaties and Declarations

African Charter on the Rights and Welfare of the Child of 1990, OAU Doc CAB/LEG/24.9/49

International Covenant on Civil and Political Rights of 16 December 1966, GA

International Labour Organization Convention 182 concerning the prohibition and immediate action for the elimination of the worst forms of child labour, 17 June 1999, available on-line at <http://www.un.org/children/conflict/keydocuments/english/iloconvention1828.html>

Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict GA Resolution A/RES/54/263 of 25 May 2000

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) 8 June 1977, 1125 UNTS 3

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) 8 June 1977, 1125 UNTS 609

Rome Statute of the International Criminal Court 1998, A/CONF. 183/9

Statute of the Special Court for Sierra Leone, 14/07/2000, S/R/1315

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



TEXTS

Amnesty International (1997) "Breaking the Lord's commands: the destruction of childhood by the Lord's Resistance Army." AI Index AFR 59/01/97

Amnesty International (2000) "Child Soldiers: Criminals or Victims?" AI Index: IOR 50/02/00

Analysis: Should child soldiers be prosecuted for their crimes?" IRIN Global 2015, Article found at <http://www.irinnews.org/report/93900/analysis-should-child-soldiers-be-prosecuted-for-their-crimes>

Arts. K and Popovski V., (eds) (2006) International Criminal Accountability and Children's Rights TMC Asser Press, The Hague, Netherlands

Bakker C. (2010) Prosecuting International Crimes against Children: the Legal Framework, Innocenti Working Paper No. 2010-13. Florence, UNICEF Innocenti Research Centre,

Beth Verhey, (2001) Child Soldiers: Preventing, Demobilizing, and Reintegrating, Africa Region Working Paper Series No. 23, World Bank: November 2001

Brownlie I.(2003) Principles of Public International Law, 5th ed., Oxford: Oxford University Press

Child Soldiers International,(2012) Louder than words: An agenda for action to end state use of child soldiers ,found at http://www.child-soldiers.org/global_report_reader.php?id=562

Child Soldiers.: Victims or Perpetrators-Summative Essay, found at <http://childsoldiersinvisiblechildren.weebly.com/child-soldiers--summative-essay.html>

Cohn I. (2001) The Protection of Children and the Quest for Truth and Justice in Sierra Leone, Journal of International Affairs, vol. 55, no. 1,

Fallah K (2006) "Perpetrators and Victims: Prosecuting Children for the Commission of International

Justice" Fisher K. (2013) Transitional Justice for Child Soldiers: Accountability and Social Reconstruction in Post-Conflict, Palgrave Macmillan

Gevers C. (2014) A Beginners Guide to International Criminal Law, RosebankJohhanesburg, Open Society Initiative for Southern Africa(OSISA)

Happold M (2007) International Criminal Accountability and Children's Rights, (Karin Arts and Vesselin Popovski (eds), The Hague: T.M.C. Asser Press

ICBR (2010)Guide on International Human Rights and Humanitarian Law on Children in Armed Conflict, International Bureau for Children's Rights, Montreal

International Committee of the Red Cross (1998)Optional Protocol to the Convention on the Rights of the Child Concerning Involvement of Children in Armed Conflicts: Position of the



International Review of the Red Cross, International Review of the Red Cross, no. 322, 107-125 (1998)

Lawrence R. (1998) School Crime and Juvenile Justice, New York: Oxford University Press,

Leveau . F (2013) Liability Of Child Soldiers Under International Criminal Law, Osgoode Hall Review Of Law And Policy Volume 4 Spring 2013 Issue

Leveau F. (2012) Liability under International Criminal Law for the War Crime of Recruitment and Use of Child Soldiers, The Africa Institute Occasional Paper Series Vol. 1, Issue.1

Lu Jianping and Wang Zhixiang (2006) China's Attitude Towards the ICC, Journal of International Criminal Justice,

Machel G. (2000) The Impact of Armed Conflict on Children A critical review of progress made and obstacles encountered in increasing protection for war-affected children, presented at the International Conference On War affected Children September 2000 Winnipeg, Canada

Magne Frostad (2014) Child Soldiers: Recruitment, Use and Punishment International Family Law, Policy and Practice Vol. 1.1

Morini C. (2010) First victims then perpetrators: child soldiers and International Law. ACDI, Bogotá, ISSN: 2027-1131/ISSNe: 2145-4493, Vol. 3 Especial, pp. 187-208, 2010

Novogrodsky, N. (2006) Litigating child recruitment before the Special Court for Sierra Leone. San Diego Int'l L. J., 7, 2006,

Office of the Prosecutor, "Warrant of Arrest for Joseph Kony", "Warrant of Arrest for Vincent Otti", "Warrant of Arrest for Okot Odhiambo" ICC-02/04 (8 July 2005), found at <http://www.iccpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200204/related%20cases/icc%200204%200105/uganda>

Outreach Programme on the Rwandan Genocide and the United Nations, found at <http://www.un.org/en/preventgenocide/rwanda/about/bgjustice.shtml>

Reis C.(1997) Trying the Future, Avenging the Past: The Implications of Prosecuting Children for Participation in Internal Armed Conflict, 28 Colum. Hum. Rts. L. Rev

Question of the impunity of perpetrators of human rights violations (civil and political), Final Report prepared by Mr. Joinet pursuant to Sub-commission decision 1996/119", 26/06/1997, E/CN.4/Sub.2/1997/20

Renteln A.D (1999)The Child Soldier: The Challenge of Enforcing International Standards, 21 Whittier L. Rev., 203-204



Romero J. (2004), The Special Court for Sierra Leone and the Juvenile Soldier Dilemma, Northwestern University Journal of International Human Rights, Vol. 2, at www.law.northwestern.edu/journals/jjhr/v2/8

Singer P.W. (2004) Talk is Cheap: Getting Serious about Preventing Child Soldiers, 37 Cornell Int'l L.J. 561 at 573

Topa I. (2007)Prohibition of child soldiering – international legislation and prosecution of perpetrators, Hansel Law Review Vol3, No1at 113www.hanselawreview.org/pdf5/Vol3No1Art06.pdf

UshaRamanathan(2005)India and the ICC Journal of International Criminal Law, 2005.

United Nations Documents

ILO Recommendation 190 on Worst Forms of Child Labour Recommendation

Report of the Secretary-General on the establishment of a Special Court for Sierra Leone. Document S/2000/915, United Nations, Security Council, 4 October 2000,

Report of the Special Representative of the Secretary-General for Children and Armed Conflict, UN Doc. A/67/256, 6 August 2012

The High Commissioner for Human Rights (2011) International Legal Protection of Human Rights in ArmedConflict, New York : United Nations Publications

United Nations Security Council resolution 1379(2001), 20/11/2001, S/RES/1379,

International Case law

Prosecutor v Alex TambaBrima"SCSL-03-06-I:

Prosecutor v BoscoNtaganda, ICC-01/04-02/06, Warrant of Arrest (7 August 2006) (ICC, Pre-Trial Chamber I).

Prosecutor v Charles Ghankay Taylor, SCSL-03-01-T, judgment (trial chamber II), 18 May 2012,

Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui, ICC-01/04-01/07, Decision on the Confirmation of the Charges (30 September 2008) (ICC, Pre-Trial Chamber I);

Prosecutor v MoininaFofona, SCSL-04-14-T, Indictment (5 February 2004) (SCSL, Trial Chamber I), para 20; Prosecutor v Sesay, SCSL-04-15-T, Indictment (2 August 2006) (SCSL, Trial Chamber I), para 38.

Prosecutor v Samuel Hinga Norman, SCSL-2004-14-AR729E



Prosecutor v Thomas Lubanga Dyilo, ICC-01/04-01/06-2842, judgment (trial chamber), 14 March 2012.

News Articles and Press Releases

BBC News (17 March 2006). DR Congo rebel faces Hague trial.
<http://news.bbc.co.uk/2/hi/africa/4815966.stm> Retrieved 11/5/15

Human Rights Watch (2012) ICC: Landmark Verdict a Warning to Rights Abusers, found at <http://www.hrw.org/news/2012/03/14/icc-landmark-verdict-warning-rights-abusers> (accessed 01/04/2015)

Human Rights Watch (2000) United States Opposition Jeopardizes Global Ban on Child Soldiers, found at <http://www.hrw.org/legacy/press/2000/01/cswrkgp.htm>

Human Rights Watch, Press Release “Congo: Don't Execute Child Soldiers: Four Children to be Put to Death” (2 May 2001), online: Human Rights Watch
<http://www.hrw.org/press/2001/05/congo0502.html> (accessed 10/09/2014)

Ugandan LRA rebel commander Dominic Ongwen to be tried at ICC: army, "Daily Nation, 13 January 2015

Warrant of Arrest unsealed against five LRA Commanders" (Press release). International Criminal Court. 14 October 2005. Retrieved 2 June 2009.

