



## **Accountability for crimes committed by child soldiers**

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by

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## CHAPTER 1

### INTRODUCTION

#### 1. Research Problem

The recruitment of child soldiers is prohibited by law. Globally, international treaties, conventions as well as national legislation enacted to enforce international laws that provide strict guidelines with regard to the recruitment of child soldiers who partake in national or international armed conflict. However, the recruitment of child soldiers still occur. This recruitment might be a result of the lack of the necessary resources or the lack of government intervention. Commanders recruit child soldiers to commit atrocities, and these commanders are later merely charged with enlisting and conscripting of child soldiers among other war crimes committed by themselves, but not for the crimes committed by the child soldier. Their trials run for years, and they are usually sanctioned to only a few years in prison – a light sentence when considering the atrocious war crimes they have actually committed. This can be seen in the *Prosecutor vs. Sam Hinga Norman, Moinina Fofana and Allieu Kondewa*, wherein Mr Kondewa was only sentenced to 8 years in prison, for *inter alia* enlistment and conscription of child soldiers (before the appeal judgement).<sup>1</sup> Furthermore, apart from the November 2019 Judgement in the International criminal Court (hereinafter “the ICC”), the highest sentence imprisonment granted in respect of war crimes and recruitment of child soldiers was 14 years in the matter of Lubanga,<sup>2</sup> discussed later in this paper. The question arises who are the real perpetrators of the crime, and why are they not punished accordingly?

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<sup>1</sup> *Prosecutor vs. Sam Hinga Norman, Moinina Fofana and Allieu Kondewa* (the CDF Accused), SCSL-04-14-T-785

<sup>2</sup> *The Prosecutor vs. Thomas Lubanga Dyilo* (Judgement), ICC-01/04-01/06



This paper explores who is to be held accountable for the recruitment of child soldiers, and the crimes these children commit during the war. Case law on this matter is discussed in terms of the rights of children, especially when prosecuted for war crimes. The criminal liability of child soldiers and recruiters are compared, as well the application of international treaties in cases where child soldiers and recruiters were prosecuted. Recommendations for the way forward conclude this paper.

## **2. Research Questions**

The main research question, which guided this study, was:

What accountability measures are in place for war crimes committed by child soldiers and their commanders?

This question was supported by the following sub-questions:

- I. What is the criminal liability of a child soldier who commit war crimes?
- II. Who bears the criminal responsibility of the war crimes committed by a child soldier?
- III. What accountability measures are in place to provide for child soldiers who are over the age of 18 years old?

## **3. Methodology**

The methodology used in this paper was a desktop approach, which included both a socio-legal approach and a comparative approach. The socio-legal approach essentially looked at the fundamental rights of the child, and his or her criminal responsibility in respect of crimes committed while under the age of 18 years old. The comparative approach was used in comparing the enforcement of the different international treaties and its impact on the lives of child soldiers and



their recruiters on a national level, as well as the effect thereof in different countries globally. Special courts established for the adjudicating of international crimes were also compared to the adjudicating in the International Criminal Court.

#### 4. Terminology

For the purpose of a better understanding of this dissertation, the following recurring terms need clarification in the context of this study. Terms have also been used interchangeably.

Accountability:

The Cambridge dictionary defines accountability as “*the fact of being responsible for what you do and able to give a satisfactory reason for it...*”<sup>3</sup> In essence, it refers to the blameworthiness of a person. This paper seeks to investigate prosecution as a means to hold child soldiers and / or their commanders accountable for the war crimes they partook in, and the various methods of sentences that may be administered after conviction.

Prosecution:

This refers to the formal legal investigation (also known as a trial) into the actions of a person who partook in a crime.<sup>4</sup> Prosecution leads to conviction if the evidence proves that a person is guilty of the crime, or the charges may later be dismissed, and the person is released if no evidence is found to prove the former.

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<sup>3</sup> Accountability. In *Cambridge Dictionary*. Retrieved from <https://www.google.co.za/amp/s/dictionary.cambridge.org/amp/english/accountability> accessed on 5 February 2020.

<sup>4</sup> Prosecution. In *the Merriam-Webster Dictionary*. Retrieved from <https://merriam-webster.com/dictionary/prosecution> accessed on 6 February 2020.



Conviction:

Conviction in this paper refers to when a person has been formally charged with a crime and been found guilty of that crime by a jury or a judge in a court of law.<sup>5</sup>

Armed forces versus armed groups:

International Humanitarian law defines armed forces as a country's military forces used in an armed conflict by the State,<sup>6</sup> while armed groups refer to groups of people who are against the governing/ruling party, such as the governing party's oppositions and rebels. However, as both armed forces and armed groups conscript and enlist child soldiers, this paper refers to both armed forces and the armed groups when referring to recruiters of child soldiers.

Child soldier:

In terms of International standards, "*any individual under the age of 18 who is a member of or attached to any regular or irregular armed group, whether or not an armed conflict exists*" is defined as a child soldier by the Coalition to stop the use of Child soldiers (CSUCS).<sup>7</sup>

## 5. Background

### A. Introduction

Kofi Annan, the former Secretary General of the United Nations, and also the founder of the Kofi Annan Foundation once said:

*"There is no trust more sacred than the one the world holds with children. There is no duty more important than ensuring that their rights are respected, that their welfare is protected, that their lives are free from fear and want and that they can grow up in peace."*<sup>8</sup>

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<sup>5</sup> Conviction. In *Cambridge Dictionary*. Retrieved from <https://www.google.co.za/amps/s/dictionary.cambridge.org/amp/english/conviction> accessed on 5 February 2020

<sup>6</sup> Rule 4, Customary International Humanitarian law, *Cambridge University Press* 2005

<sup>7</sup> Schmidt 'Volunteer Child Soldiers as reality: A developmental issue for Africa' (2007) 2(1) *New School Economic Review* 49

<sup>8</sup> United Nations International Children's Fund: The State of the World's Children 2000 found at <https://www.unicef.org/sowc/archive/ENGLISH/The%20State%20of%20the%20World%27s%20Children%202000.pdf> accessed on 15 May 2018



It is a well-known fact that the children are the leaders of tomorrow, but the sad reality is that, despite legislative measures put in place for their protection and welfare, the rights of some children are still violated on a daily basis in the most appalling ways possible. The recruitment of child soldiers is one example of how a child's basic rights are violated. Thousands of children are recruited as child soldiers to partake in civil wars and revolutions in countries where civil wars rage. Children are still recruited, whether voluntary or by force, despite all the laws and sanctions prohibiting their recruitment.

This section discusses the recruitment of child soldiers, children's rights, and case law on the recruitment of child soldiers.

A child is defined by the African Charter on the Rights and Welfare of the Child<sup>9</sup> as *"every human being below the age of 18 years"* while the Convention on the Rights of the Child<sup>10</sup> describes a child as *"every human being below the age of 18 years, unless under the law applicable to the child, majority is attained earlier"*. A child soldier can be defined as:

*"...any person below 18 years of age who is or who has been recruited or used by an armed force or armed group in any capacity, including but not limited to children, boys and girls, used as fighters, cooks, porters, messengers, spies or for sexual purposes. It does not only refer to a child who is taking or has taken a direct part in hostilities."*<sup>11</sup>

The Convention on the Rights of the Child (CRC) points out that the best interest of the child is the primary consideration when it comes to actions

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<sup>9</sup> Article 2, The African Charter on the Rights and Welfare of the Child, 1990 (hereinafter "the African Charter")

<sup>10</sup> Article 1, The United Nations Convention on the Rights of the Child, 1989 (hereinafter "the CRC") and

<sup>11</sup> Art 2.1, Principles and Guidelines on Children associated with armed forces or armed groups (hereinafter "The Paris Principles").





taken that concern the welfare of children,<sup>12</sup> and furthermore cautions States that international humanitarian law must be respected and abided by in all situations of armed conflict.<sup>13</sup>

Despite hereof, children from countries where civil wars rage are still being traumatized, killed and maimed.<sup>14</sup> Most groups who recruit child soldiers are armed forces who are rebels, clashing with the governing party in their respective countries, and therefore do not concern themselves with any laws that may apply to them. Children are thus taken from their communities, displaced and orphaned.<sup>15</sup> This isolation makes them more vulnerable and more susceptible to sexual abuse and exploitation. They are deprived of their basic, socio-economic, civil and political rights. Their rights to life, dignity, health, a safe environment, and education among others, are grossly violated.<sup>16</sup> This is especially the case when a child is forcefully recruited to become a child soldier.

Child soldiers are indoctrinated to such an extent that the atrocities they commit and witness may make it impossible for them to be eventually re-integrated back into society. This leads to them becoming “adult-soldiers”. Once a child soldier is no longer “classified” as such, he/she becomes criminally responsible, and can be held fully accountable for the crimes they committed, whereas a child soldier will only be held criminally responsible if the State he/she finds he/herself in has the necessary jurisdiction.

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<sup>12</sup> Article 3(1), The CRC (n 10 above).

<sup>13</sup> Art 38(1), The CRC (n 10 above),

<sup>14</sup> Children in Conflict: Child Soldiers found at <http://www.child-soldier.org/> accessed on 12 August 2017

<sup>15</sup> Children in Conflict: Child Soldiers (n 14 above).

<sup>16</sup> Children in Conflict: Child Soldiers (n 14 above).



## B. Recruitment of child soldiers

The rights of children are guaranteed in numerous charters and conventions, as well as legislative documents. The specific rights of children related to being recruited as soldiers are guaranteed in *inter alia* the following documents:

The African Charter on the Rights and Welfare of the Child, which states that a child, being a person under the age of 18 years, may not be recruited or take direct part in armed conflict.<sup>17</sup> However, the African Charter only applies and legally binds countries on the continent of Africa who ratifies the treaty. Additional Protocols I<sup>18</sup> and II<sup>19</sup> to the Geneva Conventions and the Convention on the Rights of the Child<sup>20</sup> explicitly state that children under the age of 15 years may not be recruited to take direct part in hostilities, while Additional Protocol I further state that children who are under the age of 15 years may not lose their special protection if they do participate in such acts.<sup>21</sup> I will later discuss the special protection afforded to child soldiers in the event of arrest. Additionally, the Fourth Geneva Convention also provides for children under the age of 15 years, who have been orphaned and/or separated from their families due to war, who must not be left to their own devices.<sup>22</sup> These protocols are in place because vulnerable children are easy targets for armed groups to recruit.

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<sup>17</sup> Article 22, The African Charter on the Rights and Welfare of the Child (n 9 above)

<sup>18</sup> Article 77, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 8 June 1977 (hereinafter "Additional Protocol I")

<sup>19</sup> Article 4, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), of 8 June 1977 (hereinafter "Additional Protocol II")

<sup>20</sup> Article 38, the CRC (n 10 above)

<sup>21</sup> Article 77, Additional Protocol I (n 18 above)

<sup>22</sup> Article 24, Geneva Convention relative to the protection of civilian persons in time of war of 12 August 1949 (hereinafter "the Fourth Geneva Convention")



The Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict provides a stricter stance on the recruitment of child soldiers.<sup>23</sup> To date, same has been ratified by 170 Countries around the world. It firstly obliges States to take measures to ensure children under the age of 18 years do not take direct part in hostilities, and further that the compulsory recruitment of children under the age of 18 years old be prohibited,<sup>24</sup> and do not take direct part in hostilities<sup>25</sup>. It furthermore obliges States to deposit a binding declaration, setting the minimum age for the recruitment of soldiers, and provides children under the age of 18 years, who have been recruited as child soldiers, special protection, afforded to all children, despite their combatant status.<sup>26</sup> Lastly, it provides conditions for the voluntary recruitment of child soldiers under the age of 18 years such as:

- a. It must be genuinely voluntary;
- b. There must be informed consent from the child's parents;
- c. The child must be fully informed of their military duties once recruited;
- d. The child must provide reliable proof of age.<sup>27</sup>

There are two ways in which a child becomes a child soldier. Either the armed force group abducts the child, or the child voluntarily enlists. There are various processes for the recruitment of child soldiers, some of which include the following:

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<sup>23</sup> Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, 2000 (hereinafter "the Optional Protocol to the CRC")

<sup>24</sup> Article 1, The Optional Protocol to the CRC (n 23 above)

<sup>25</sup> Article 2, The Optional Protocol to the CRC (n 2324 above)

<sup>26</sup> Article 3(1), The Optional Protocol to the CRC (n 23 above)

<sup>27</sup> Article 3(3), The Optional Protocol to the CRC (n 23 above)



## **i. Abduction**

In cases of abduction recruitments, children are more easily manipulated and controlled than adults.<sup>28</sup> This, coupled with their emotional and physical immaturity, makes it much easier for the armed forces to indoctrinate them to become killing machines.<sup>29</sup> They can be persuaded to work for non-monetary rewards. Because of their young age, children do not fully understand the risks involved in being a soldier in combat - they are braver because they lack a sense of fear, which is preferred by their recruiters.<sup>30</sup> They are also drugged in order to numb any thoughts and fears they might have.

Furthermore, armed forces make use of certain tactics when abducting child soldiers, in order to ensure that they remain soldiers. This include tactics such as forcing the abducted children to commit atrocities against their own families and in their own villages as an initiation ritual.<sup>31</sup> This leads to these children being stigmatized in their communities, and they would not be welcomed back into their villages at all. Their own families would reject them, as they are believed to be cursed. Where they committed the atrocities against their own families, they have no family to return to, and thus have nothing to lose by remaining a child soldier.<sup>32</sup> This also negatively affects the obligation of the state to later re-integrate the child as part of a rehabilitation programme, as re-integration becomes impossible, and in some cases, unwanted by both the child and the family.

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<sup>28</sup> Understanding the Recruitment of Child Soldiers in Africa found at <http://www.accord.org.za/conflict-trends/understanding-recruitment-child-soldiers-africa/> accessed on 12 August 2017

<sup>29</sup> Children as Soldiers: Children at War – The State of the World’s Children 1996 found at <https://www.unicef.org/sowc96/2csoldrs.htm> accessed on 12 August 2017

<sup>30</sup> Understanding the Recruitment of Child Soldiers in Africa (n 28 above)

<sup>31</sup> Children as Soldiers (n 29 above)

<sup>32</sup> Children as Soldiers (n 29 above)



In addition to this, children are psychologically abused by the abduction propaganda. The armed groups make use of abuse methods such as starvation, fatigue, thirst, beatings, the use of drugs and alcohol as well as sexual abuse to coerce the child soldiers into performing atrocities against civilians.<sup>33</sup> Armed forces also harass and threaten families to provide them with child soldiers. In some cases, families trade off young children to the armed forces for food and necessary supplies, as food is a scarce necessity during armed conflict.<sup>34</sup>

## ii. Voluntary enlistment

The state of mind of children who voluntarily enlist as child soldiers is not to be dismissed as a factor that must be taken into account. Children who voluntarily enlist are often orphaned and frightened, and would turn to the armed forces in order to find a sense of belonging. In these groups, they are also able to form their own identity as child soldiers, which can be called an “identity with a cause”. Child soldiers also gain respect among their peers when they partake in war crimes, which provides them with a sense of pride and the illusion of family.<sup>35</sup>

Children who live in poverty also enlist voluntarily, as a means of escaping the poverty. They believe that joining the armed forces would bring an end to hunger and homelessness, because as part of the armed forces, they would be provided with food, shelter and security or employment.<sup>36</sup>

Some children voluntarily enlist as a child soldiers merely for a sense of adventure. It also occurs that, because they grow up in a violent environment, violence becomes the only means they know. This leads to trauma that scars the child soldier for life, as is discussed later in this paper.

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<sup>33</sup> Children as Soldiers (n 29 above)

<sup>34</sup> Children as Soldiers (n 29 above)

<sup>35</sup> Children as Soldiers (n 29 above)

<sup>36</sup> Understanding the Recruitment of Child Soldiers in Africa (n 28 above)



The lack of education also leads to children not knowing any better than to become child soldiers. Alternatively, the school they have attended has taught them that being a child soldier is the only option.

However, the meaning of “voluntarily” must be looked at in the context of the situation that these children find themselves in. The choice they make to “voluntarily enlist” are influenced by their cultural, social and economic circumstances such as their history, or a specific trigger event.<sup>37</sup> Among other things, child soldiers have identified reasons for voluntary enlistment as revenge, community protection, money, pressure from community and believing that soldiers who voluntarily enlist will be treated better than those who were abducted.<sup>38</sup> Their circumstances leave them with no alternative option but to “voluntarily enlist” as child soldiers, causing them to think that it was voluntary, when in fact it was not.

Whether a child becomes a child soldier by abduction or by voluntarily enlisting, the question remains if he or she realises the full consequences of his or her acts by partaking in war crimes, and if they have the necessary mental capacity and criminal responsibility to be punished for their crimes, a question which is explored later in this paper.

### **C. Rights of Children**

All children are guaranteed fundamental rights, on a national and international level. Other rights that are guaranteed in various legislative documents include socio-economic rights, civil rights and political rights of the child. The child’s specific right to be protected from recruitment as a soldier was discussed in the previous section, referencing the relevant

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<sup>37</sup> Schmidt (n 7 above) 52.

<sup>38</sup> Schmidt (n 7 above) 53.



documents and legislation in which these rights are guaranteed. Other documents that also guarantee a child's rights are discussed in this section.

The African Charter on Rights and Welfare of the Child<sup>39</sup> is one of the instruments, which proclaims *inter alia* the right to life,<sup>40</sup> the right to free association,<sup>41</sup> the right to participate in cultural life,<sup>42</sup> the right to enjoy the best attainable state of physical, mental and spiritual health.<sup>43</sup> It further obligates states to protect children “*from all forms of economic exploitation and from performing any work that is likely to be hazardous or to interfere with their physical, mental, spiritual, moral and social development*”<sup>44</sup> and “*protection against torture, inhumane, or degrading treatment, especially physical and mental abuse, neglect or maltreatment*”<sup>45</sup>. The Convention on the Rights of the Child also obliges the state to ensure that children are protected and cared for,<sup>46</sup> and that the child is not separated from his/her parents against his/her will.<sup>47</sup>

Most countries also further guarantee socio-economic rights in their Constitutions. These rights include the right to food, shelter, education, health care, culture, religion, social security, work, family and a healthy environment. Civil and political rights guaranteed by these Constitutions further include the right to life, dignity, a fair trial, the prohibition of torture, free association, liberty and security. Children as the leaders of tomorrow are granted the fundamental rights necessary to live an adequate life. These rights are also guaranteed in various Conventions,<sup>48</sup> Treaties, and other legislation ratified by various states around the world. When children

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<sup>39</sup> The African Charter (n 9 above)  
<sup>40</sup> Article 5, The African Charter (n 9 above)  
<sup>41</sup> Article 8, The African Charter (n 9 above)  
<sup>42</sup> Article 12, The African Charter (n 9 above)  
<sup>43</sup> Article 14, The African Charter (n 9 above)  
<sup>44</sup> Article 15, The African Charter (n 9 above)  
<sup>45</sup> Article 16, The African Charter (n 9 above)  
<sup>46</sup> Article 3(2), The CRC (n 10 above)  
<sup>47</sup> Article 9, The CRC (n 10 above)  
<sup>48</sup> International Covenant on Economic, Social and Cultural Rights, 1966  
International Covenant on Civil and Political Rights, 1966



are abducted and turned into child soldiers, they are deprived of these rights.

Further rights of paramount importance are the children's rights after they have been arrested for acts committed while a child soldier, under the age of 18 years. It is interesting to note that a child soldier who turns 18, and who still continues to commit war crimes, is tried as an adult with complete criminal responsibility. Technically, the definition of a "child soldier" no longer applies to them. This is despite the fact that they have the same mental capacity as the child soldier that they were recruited as, even though they are over the age of 18 years. Trauma and violence, among other factors, have an effect on the cognitive development of a child soldier, and it has been found that it results in these child soldiers not having the necessary mental ability to process situations as a normal adult would.<sup>49</sup> This is discussed later in Chapter 2, and further illustrated in case law in Chapter 3.

#### **D. Child Soldiers**

The Child Soldiers Annual Report for 2016/2017 identifies 14 countries around the world that have been formally verified as countries where child soldiers are recruited by the government.<sup>50</sup> These countries include Afghanistan, Central African Republic, Colombia, Democratic Republic of Congo, Iraq, Mali, Myanmar, Nigeria, Philippines, Somalia, South Sudan, Sudan, Syria, and Yemen.

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<sup>49</sup> Lafayette 'The Prosecution of Child Soldiers: Balancing Accountability with Justice' (2013) 63 No. 2 *Syracuse Law Review* 297

<sup>50</sup> Child Soldiers International: Annual Report 2016-2017 found at <https://www.child-soldiers.org/Handlers/Download.ashx?IDMF=245a3b5b-83ea-429e-9467-53398f4c4d86> accessed on 15 May 2018





However, the Child Soldier Index shows that in 2016, there have been reports of child soldiers being used in Colombia, Mali, Nigeria, Cameroon, African Central Republic, Democratic Republic of Congo, South Sudan, Sudan, Libya, Somalia, Yemen, Iraq, Syria, Afghanistan, Pakistan, India, Myanmar and the Philippines.<sup>51</sup> Of these 18 countries, the Central African Republic, Myanmar, and Somalia have signed, but not yet ratified, the Optional Protocol, which prohibits the recruitment of soldiers under the age of 18 years, and prescribes their treatment after arrest, while South Sudan has taken no action towards the Optional Protocol.<sup>52</sup> All other states have ratified the Optional Protocol, but are yet to strictly enforce same. In the Child Soldiers Annual Report for 2017/2018, it is recorded that 167 states have ratified this Optional Protocol, and that only 30 states have to date not ratified same.<sup>53</sup>

The recruitment of child soldiers, whether voluntary or forced, is still not deterred by the Protocol. It would seem that poverty is the main driving factor leading to this recruitment. In Myanmar, parents volunteer their children as child soldiers because the Karen Army will provide food and clothing for that family. In Sudan, children in poverty-stricken villages and schools are kidnapped by the army, and forced to become soldiers.

In the past, countries had different ways in which they recruited and retained child soldiers. In Sri Lanka, children were indoctrinated and trained in schools to become child soldiers, while in Peru they were forced to undergo political indoctrination.<sup>54</sup> In Cambodia, acts of terror and physical violence were used to manipulate children into a life of war. Sierra Leone's armed groups used force when raiding villages, forcing the children to

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<sup>51</sup> Child Soldiers World Index found at <http://childsoldiersworldindex.org/hostilities> accessed on 9 June 2018

<sup>52</sup> Optional Protocol (n 23 above)

<sup>53</sup> Child Soldiers International Report 2017-2018 found at <https://www.child-soldiers.org/Handlers/Download.ashx?IDMF=841fa200-9315-4e8a-9a6c-cdf63a0af22a> accessed on 15 July 2019

<sup>54</sup> Children as Soldiers (n 29 above)



witness and/or commit atrocities against their own families.<sup>55</sup> The children were then forced to use drugs, and also forced to commit the same crimes in other villages.

#### **E. Case law on the recruitment of child soldiers**

Armed conflict that involved child soldiers in Sierra Leone has now calmed, and a Special Court was established for Sierra Leone.

In this court, the matter of *The Prosecutor v Sam Hinga Norman, Moinina Fofana and Allieu Kondewa*,<sup>56</sup> declared that under international law, the use of child soldiers was a crime. In the matter *The Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, the court held that the “use of child soldiers [is an] other serious violation of international humanitarian law”.<sup>57</sup> It was further ruled that the recruitment of children under the age of 18 years old was expressly prohibited by law, and this rule has crystalized as customary international law.<sup>58</sup>

A big win for child soldiers, this time before the International Criminal Court, was the conviction of Thomas Lubanga Dyilo. He was the first to be charged with and convicted of the enlistment and conscription of children under the age of 15 years into the Patriotic Force for the Liberation of Congo.<sup>59</sup>

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<sup>55</sup> Children as Soldiers (n 29 above)

<sup>56</sup> *Prosecutor v Sam Hinga Norman, Moinina Fofana and Allieu Kondewa* (n 1 above)

<sup>57</sup> *The Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (the RUF Accused), SCSL-04-15-T, Special Court For Sierra Leone, 8 April 2009, found at [http://www.rscsl.org/RUF\\_Trial\\_Chamber\\_Decisions.html](http://www.rscsl.org/RUF_Trial_Chamber_Decisions.html) accessed on 17 June 2018

<sup>58</sup> *The Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu* (the AFRC Accused), SCSL-04-16-T, Special Court for Sierra Leone, 20 June 2007, found at: <http://www.refworld.org/cases,SCSL,467fba742.html> accessed on 17 June 2018

<sup>59</sup> *The Prosecutor v Thomas Lubanga Dyilo* (n 2 above)



This paper investigates the accountability for crimes committed by child soldiers. The above section set out the research problem and questions that guided the study, and provided a broad introduction to the various ways in which child soldiers are recruited, the rights of children and case law on the recruitment of child soldiers. The next chapter provides an overview of the criminal liability of the child soldier, while the structure of the whole paper is set out below.

## **6. Structure**

This section provides an overview of the structure of this paper, and concludes the first chapter.

### Chapter 1: Introduction

This chapter introduces the child soldier. It further explores the laws against the recruitment of child soldiers and different reasons and motives as to how and why children are still recruited. The recurring terminology, as it is used in the context of this study, is defined. It further outlines which countries still make use of child soldiers and explores case law that sets a precedent for the prohibition of the recruitment of child soldiers.

### Chapter 2: The criminal liability of child soldiers

The implementation of a minimum age of criminal responsibility is examined as well as the difficulty in the enforcement of different ages of majority in different countries. Furthermore, the mental capacity of the child soldier is explored in an effort to establish if a child soldier could be held criminally responsible for their acts. Chapter 2 also investigates the laws governing the prosecution and protection of child soldiers while in the criminal justice system, as well as the reasons why child soldiers are hardly prosecuted.



### Chapter 3: The criminal liability of the recruiters of child soldiers

In theory, it is law that someone must always be held responsible, and punished, if they committed a crime, while it is not always practiced as such. It thus stands to reason that, when atrocities are committed, such as the recruitment of child soldiers, and the accompanying war crimes, someone must be prosecuted and punished accordingly. The notion that persons who bear the “greatest responsibility” must be prosecuted, is looked at in Chapter 3. The chapter further explores case law regarding the prosecution of child soldiers who have become commanders in the armed groups, as well as the commanders of the child soldiers.

### Chapter 4: Recommendations.

Chapter 4 looks at the possibility of re-integration and rehabilitation of child soldiers, and explores possible alternatives that have been tried and tested, and suggested by legal philosophers. Proposals on the way forward is suggested.

### Chapter 5: Conclusion

This chapter concludes the paper by summarising and highlighting the findings, and thus providing conclusive answers to the research questions.



## CHAPTER 2

### THE CRIMINAL LIABILITY OF CHILD SOLDIERS.

#### 1. Minimum Age of Criminal Responsibility and a Court's Jurisdiction to Hear a Child Soldier Matter.

As mentioned in Chapter 1, both national and international treaties and legislation prohibit the recruiting of child soldiers. However, some legislation prohibits the recruitment of children under the age of 15, while the majority of treaties and legislation prohibit the recruitment of children under the age of 18. It is thus evident that there is ambiguity in the laws regulating the recruitment, and later the prosecution, of children between the ages of 15 and 18 years old.

It must be noted that there is no international instrument that sets the minimum age of criminal responsibility.<sup>60</sup> There has been a call for same to be set, however, legislatures have decided to leave this obligation in the hands of the national legislature in each state. This implies that a child soldier will only be tried if the state in which he/she faces prosecution, has jurisdiction in terms of the domestic laws of that state. The General Comments on the International Covenant on Civil and Political Rights highlighted this, by stating that each state must determine their own minimum age of criminal responsibility in terms of that State's social and cultural conditions.<sup>61</sup> The minimum age of criminal responsibility will therefore differ from one jurisdiction to another.<sup>62</sup> Furthermore, in theory, all states are obligated to investigate any and all war crimes that have

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<sup>60</sup> Quénivet 'Does and Should International Law Prohibit the Prosecution of Children for War Crimes?' (2017) 28 no.2 *The European Journal of International Law* 433 437

<sup>61</sup> Comment No. 24, United National International Covenant on Civil and Political Rights General (1994) as in Nair 'Child Soldiers and International Criminal Law: Is the Existing Legal Framework adequate to prohibit the use of children in conflict' (2017) 2 *Perth International Law Journal* 40 42

<sup>62</sup> Musila 'Challenges in establishing the accountability of child soldiers for human rights violations: Restorative justice as an option' (2005) *African Human Rights law Journal* 321 326



occurred in their territory during international armed conflict, and at the same time they have an obligation to prosecute the person or persons responsible for such crimes, regardless of the fact that such persons may be child soldiers.<sup>63</sup>

The United Nations Convention on the Rights of the Child does not prohibit children from being prosecuted (or in other words, being held accountable for their actions), but rather provides guidelines under which a child may be tried. Comment number 10 of The General Comments on the United Nations Convention on the Rights of the Child suggests that there is international consensus that children below the age of 12 do not have any criminal responsibility, but at the same time, it urges states to not set their minimum age for criminal responsibility at 12 years old.<sup>64</sup> While the African Charter also does not prohibit child prosecution, it does recognise that children must be tried under domestic penal laws. The African Charter applies to all children who find themselves in a state with internal armed conflict that is regulated by the domestic law of that state.<sup>65</sup> The Convention on the Rights of the Child and African Charter, applied together, are aimed at providing children with as much protection as possible.

Article 26 of the Rome Statute states that the International Criminal Court shall have no jurisdiction to hear matters of an individual who was under the age of 18 when committing a crime.<sup>66</sup> As States are tasked with setting their own age of criminal responsibility, certain States, being conscious of their reputations, refused to set their minimum age of criminal responsibility at 18 years, as they

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<sup>63</sup> Geneva Convention for the Amelioration of the Condition of the wounded and sick in armed forces in the field, 1949 (First Geneva Convention); Geneva Convention for the Amelioration of the condition of the wounded, sick and shipwrecked members of armed forces at sea, 1949 (Second Geneva Convention); Geneva Convention Relative to the treatment of prisoners of war, 1949 (Third Geneva Convention); Geneva Convention relative to the protection of civilian persons in time of war, 1949 (Fourth Geneva Convention); and Additional Protocol I (n 18 above) as in (n 6060 above) 437

<sup>64</sup> General Comment No. 10, United Nations Convention of the Rights of the Child (2007) as in Quénivet (n 60 above) 440

<sup>65</sup> Musila (n 62 above) 326

<sup>66</sup> Article 26, UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998 (hereinafter "The Rome Statute")



either knowingly use child soldiers as part of their military establishment, or know of child soldiers recruited unlawfully in their countries by rebel groups - practices contrary to the applicable international laws, such as the Rome Statute. The Special Court for Sierra Leone however, has jurisdiction to hear matters of individuals aged 15 years and older.<sup>67</sup> However, the Prosecutor for the Special Court for Sierra Leone made a decision not to indict child soldiers between the ages of 15 and 18 years old, as they do not bear the greatest responsibility and therefore renders the exercise impractical.<sup>68</sup>

The minimum age of criminal responsibility varies between the ages of seven and 18 internationally. In Rwanda, the minimum age is set at individuals aged 14 years and older;<sup>69</sup> in the DRC, individuals 13 years and older may be prosecuted.<sup>70</sup> In India, South Africa, and Sudan, the age is set at individuals older than 7 years old,<sup>71</sup> and in England individuals 10 years and older may be prosecuted. France set the age at individuals 13 years and older. In Argentina, individuals 16 and older, in China individuals 14 years and older and in Peru, individuals 18 years or older may be prosecuted.<sup>72</sup> Furthermore, the War Crimes Chamber for Bosnia-Herzegovina has set their minimum age for criminal responsibility at 14 years and older, while the Special Panels for Serious Crimes in East Timor has set their domestic law for child prosecution at 12 years old.<sup>73</sup> It is interesting to note that in Kenya, when a child commits a crime together with an adult, both are tried as adults. However, the young age of the child will be considered as a mitigating factor in the juvenile's sentencing and application of his/her rights.<sup>74</sup>

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<sup>67</sup> Article 7, Statute of the Special Court for Sierra Leone 2002

<sup>68</sup> Ursini 'Prosecuting Child Soldiers: The Call for an International Minimum Age of Criminal Responsibility' (2015) 89 No. 2 and 3 *St. John's Law Review* 1023 1031

<sup>69</sup> Musila (n 62 above) 330

<sup>70</sup> Ursini (n 68 above) 1024

<sup>71</sup> Grossman 'Rehabilitation or Revenge: Prosecuting Child Soldiers for Human Rights Violations' (2007) 38 *Georgetown Journal of International Law* 323 340

<sup>72</sup> Grossman (n 71 above) 1024

<sup>73</sup> Quénivet (n 60 above) 447-448

<sup>74</sup> Fritz 'Child Pirates from Somalia: A Call for the International Community to support the further Development of Juvenile Justice Systems in Puntland and Somaliland' (2012) 44 No. 3 *Case Western Journal of International Law* 891 900



As mentioned before, the Convention on the Rights of the Child does not expressly set a minimum age for criminal responsibility, however, it does state that, to determine whether an individual can be held criminally accountable for a crime, one must look at that individual's right to "*form and express his/her own opinions to be examined in light of the psychological development and cultural perspective*".<sup>75</sup> This implies that the CRC recognizes the ability of the individual to form these processes. Therefore, they possess the necessary logical and moral reasoning before they turn 18 years old, and can thus be held criminally accountable.<sup>76</sup> However, there are many arguments regarding an individual's mental capacity as a child soldier that must be taken into consideration.

The United Nations Standards of Minimum Rules for the Administration of Juvenile Justice, better known as the Beijing Rules, provide protection and guidelines for children who find themselves involved in the criminal system. The Commentary on the Beijing Rules states that the test to determine the criminal responsibility of an individual, is whether he/she is able to judge and understand his/her situation or the act he/she has committed, as a normal adult would be able to.<sup>77</sup> Further to this, the culpability of a child soldier is compromised, as he/she does not possess the "*normal functioning set of executive processes*" and lacks maturity based on the fact that the individual is a child soldier, and therefore has a lower moral agency.<sup>78</sup> Consequent studies have shown that when an individual is constantly exposed to war trauma, they possess a lower moral reasoning and their identity thought process is reformed according to those around them as well as the social and political context they find themselves in.<sup>79</sup> Ursini states that children under the age of 15 years do not have the necessary mental capacity to understand the nature together with the consequences of the

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<sup>75</sup> Lafayette (n 49 above)

<sup>76</sup> Lafayette (n 49 above) 306

<sup>77</sup> United Nations Standard Minimum Rules for the administration of Juvenile Justice "The Beijing Rules" (1985), hereinafter referred to as "The Beijing Rules" as found in Fagan, Hirstein, and Sifferd 'Child Soldiers, Executive Functions, and Culpability' (2016) 16 *International Criminal Law Review* 258 272

<sup>78</sup> Fagan, Hirstein and Sifferd (n 77 above) 277

<sup>79</sup> Shalhoub-Kevorkian 'Childhood: A Universalist Perspective for how Israel is using Child Arrest and Detention to further its colonial Settle Project' (2015) 12 No. 3 *International Journal of Applied Psychoanalytic Studies* 223 226-227





act, and as a result of this lack of necessary *mens rea*, they cannot be held criminally responsible.<sup>80</sup>

Due to the difference in domestic laws from jurisdiction to jurisdiction, opinions by legal philosophers, and psychological reports of child soldiers, it is extremely difficult to know when and how to apply the necessary provisions. As a result, the enforcement against the recruitment of child soldiers and prosecution of child soldiers are problematic. One reason for this is the lack of consistency between the institutions that must apply international criminal law, foreign laws and international court cases.<sup>81</sup> It is believed that all the treaties to which states are bound, are “*nothing more than paper protection*”, which is evident in the fact that the United Nations Security Councils Resolutions call for states who has ratified certain instruments to oblige, comply, monitor and report, but such treaties never ensure any provisions to coerce states into actually complying with the laws regarding child soldiers.<sup>82</sup> The responsibility to comply with the treaties mostly fall on commanders. However, some commanders are illiterate due to the fact that they were recruited as child soldiers.<sup>83</sup> Furthermore, due to these commanders being uneducated, compliance is further compromised, and generally fails. On the other hand, commanders who are literate and do understand that they are acting unlawfully in the recruitment of child soldiers, believe that they are out of reach of the state authority, and mere compliance laws is not a strict enough factor to deter them.<sup>84</sup> Provisions dealing with enlistment and conscription of child soldiers should bear strict sentences, such as longer prison sentences, and higher reparations, which set precedent and deter recruitment. Government institutions should also exercise raids on the affected areas in order to arrest the commanders. This “paper protection” can further be seen in the inconsistent application of laws in certain countries. They pay lip service to the treaties and conventions in place, but apply their domestic

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<sup>80</sup> Ursini (n 68 above) 1043-1044

<sup>81</sup> Muslia (n 62 above) 325

<sup>82</sup> Park ‘Child Soldiers and distributive justice: Addressing the Limits of Law’ (2010) 53 No. 4 *Crime, Law and Social Change: An Interdisciplinary Journal* 329 333-334

<sup>83</sup> Park (n 82 above) 334

<sup>84</sup> Park (n 82 above) 334



laws more favourable to their situation, regardless of the fact that their domestic laws might not be in line with international standards.<sup>85</sup>

## 2. The Prosecution of Child Soldiers

As there is no specific provision that prohibits the prosecution of child soldiers, and as it is implied in further conventions that child soldiers can be prosecuted, it must be noted that special provisions then apply to their prosecution. Moreover, as treaties and most courts call for the prosecution of individuals who bear the “greatest” responsibility for the various violations of international law, it can be seen that child soldiers are not the target of legislatures, but that child soldiers who have been in positions of authority, and have committed a grave violation during this time, cannot be excluded from this scope, and must be held accountable.<sup>86</sup>

It should be noted that international human rights protect child soldiers, as it distinguishes between the prosecution of adult perpetrators and juveniles, while no such distinction is made in international humanitarian law.<sup>87</sup> International human rights prohibits the recruitment of child soldiers who participate in international and non-international armed conflict. In cases of international humanitarian law, no provision is made for the prohibition of the prosecution of child soldiers below a certain age. Furthermore, humanitarian laws are mostly applied to armed conflict of an international character only, but same is currently changing in terms of customary international law.<sup>88</sup> In international Criminal Law, the Special Court for Sierra Leone states that the Court has the jurisdiction to try juveniles between the ages of 15 and 18 years old, however, that juvenile must

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<sup>85</sup> Francis ‘Paper Protection mechanisms: Child Soldiers and the International Protection of Children in Africa’s conflict zones’ (2007) 45 No. 2 *Journal of Modern African Studies* 207 221

<sup>86</sup> Musila (n 62 above) 331

<sup>87</sup> Grover ‘Trial of the Child Soldier: Protecting the Rights of the Accused’ (2005) 65 *ZaöRV* 217 219

<sup>88</sup> Grover (n 87 above) 219



be tried “...with dignity and a sense of self-worth...”,<sup>89</sup> while the CRC states that juveniles must be treated with human dignity and in accordance with their relevant age.<sup>90</sup> Convention on the Rights of the Child further provide juveniles with the following rights: the right to the presumption of innocence, to be promptly notified of the charges against him/her, assistance to prepare a defence, the right to be tried without any delay and same to be done by an impartial body, the right to a fair hearing, the right to remain silent and not testify, the right to present a case, the right to cross-examine a witness, the right to appeal a decision made against him/her, the right to an interpreter, and the right to privacy.

Additional Protocol I and II provide special protection for individuals under the age of 15 years who participate in armed conflict.<sup>91</sup> Additional Protocol I to the Geneva Conventions makes provision for the protection of children by granting them the right to be protected from any form of indecent assault, to be provided with the necessary care and aid they require, and goes further by stating that:

*“ If, in exceptional cases, ..., children who have not attained the age of fifteen years take part in hostilities and fall into the power of an adverse Party, they shall continue to benefit from the special protection accorded by this Article, whether or not they are prisoners of war.”<sup>92</sup>*

*“ If arrested, detained or interned for reasons related to the armed conflict, children shall be held in quarters separate from the quarters of adults, except where families are accommodated as family units ...”<sup>93</sup>*

Further to this, Additional Protocol II of the Geneva Conventions provides children with the right to care and aid as they require, the right to education, reunion of temporarily separated families and further:

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<sup>89</sup> Grover (n 87 above) 220 and Article 7 of the Statute of the Special Court for Sierra Leone (n 67 above)

<sup>90</sup> Article 40, the CRC (n 10 above)

<sup>91</sup> Lafayette (n 49 above) 302

<sup>92</sup> Article 77(3), Additional Protocol I (n 18 above)

<sup>93</sup> Article 77(4), Additional Protocol I (n 18 above)



*“The special protection provided by this article to children who have not yet attained the age of fifteen years shall remain applicable to them if they take direct part in hostilities ... and are captured”.*<sup>94</sup>

The Beijing Rules furthermore also state that as a child soldier is himself/herself a victim of crime, they do not forfeit their special protection under laws, when accused and prosecuted for their crime.<sup>95</sup>

In the event that a child soldier is captured, that child also attains “Prisoner of War” status, as provided for in the Geneva Conventions and the Additional Protocols thereto, and all the protections that is contained in this title, however, prisoner of war protection can only be applied when the armed conflict is of an international character.

The basis of International Criminal Law is retribution, and therefore the State has a duty to punish the person responsible for that act, as harm was caused to an individual, and the international society at large. It must be noted that retribution focuses solely on the perpetrator and does not take into consideration circumstances such as the fact that it is a child perpetrator or that the child is simultaneously both a victim and perpetrator in the crimes committed. However, when dealing with child soldiers, International Law is based on restorative justice, which focuses on all the parties affected by the war crimes, and involves reparations such as reintegration, rehabilitation, restoration and compensation. Basically, retribution deals with punishing the accused, while reparations deal with the healing of all the parties involved. In addition to this, if an individual who does in fact have criminal responsibility for his actions is not held accountable, his victims will be denied justice, which in itself leads to another breach of

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<sup>94</sup> Article 4(3)(d), Additional Protocol II (n 19 above)

<sup>95</sup> The Beijing Rules (n 77 77above)



international law.<sup>96</sup> Regardless of this, special protection also apply in the sentencing of child soldiers.

As a result of the above, the following sanctions were suggested by the Special Court for Sierra Leone in the prosecution of child soldiers who were under the age of 18 at the commission of the crime: limited rehabilitative orders; care, guidance and supervision orders; community service orders; counselling orders; foster care orders; and educational and vocational training programmes.<sup>97</sup> Furthermore, the Rome Statute,<sup>98</sup> the Convention on the Rights of the Child,<sup>99</sup> the Geneva Conventions as well as the additional Protocols thereto,<sup>100</sup> provide that under no circumstances may the death penalty be imposed on an individual under the age of 18 years old. Moreover, except for the *Omar Khadr* case below, there is no precedent for the maximum imprisonment sentence that can be imposed on a child soldier who was under the age of 18 when he committed the war crime and was arrested for same, as no other Court has to date tried, and sentenced a juvenile to imprisonment.

Courts have concluded that it is not in the best interest of the child or the best interest of justice to prosecute children, but as states are having difficulties in enforcing treaties and domestic law differs from jurisdiction to jurisdiction, child soldiers nonetheless end up in the prosecution process, although they are hardly ever sentenced to imprisonment. During the process, the child is still protected by his/her fundamental rights, such as the presumption of innocence, the right to a fair trial and the right to seek legal advice. In addition to this, the Beijing Rules state that “*the wellbeing of the accused child shall be the guiding factor in consideration of his/her case*”.<sup>101</sup>

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<sup>96</sup> Musila (n 62 above)

<sup>97</sup> Special Court for Sierra Leone (n 67 above)

<sup>98</sup> The Rome Statute (n 66 above)

<sup>99</sup> Article 37(a), The CRC (n 9 above)

<sup>100</sup> Article 77, Additional Protocol I (n 18 above) and Article 6(4), Additional Protocol II (n 19 above)

<sup>101</sup> Article 17(1)(d) of the Beijing Rules (n 77 above)



### 3. The Detention of Child Soldiers

The Beijing Rules suggest alternatives to detention, while the juvenile is awaiting trial, such as granting the juvenile release with close supervision, intensive care, and placement with a family or in an educational setting. However, the detention of a juvenile may only be considered as a last resort, it may still occur, and in such event, there are special protections for the detained juvenile.

In Palestine, the media, as well as human rights organizations have reported that juveniles were kept in horrific conditions, *inter alia*, as detainees, they were forced to sleep outside, in metal cages during the winter. Not only is this in contravention of multiple treaties, including those protecting the fundamental rights of the child, such as their right to dignity and their best interests, but is also contrary to the prohibition against cruel, inhumane and degrading treatment.<sup>102</sup>

The Al-Shabab armed group in Somalia recruits child soldiers, and further to this, children are arrested and detained for security offences. While in detention, children are kept in poor conditions, interrogated for hours, they are kept in dark cells, and there is not enough space for them to lie down to sleep. The juveniles are sometimes kept in the same cells with adults, and the only opportunity they have to exercise is on common ground, with the adults.<sup>103</sup>

The above occurs despite the fact that there are certain guidelines that apply to the detention of juveniles *inter alia* separation from adults, access to educational and medical facilities, their socio-economic rights, and that detention can only

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<sup>102</sup> Shalhoub-Kevorkkian (n 79 above) 233 and 235

<sup>103</sup> Human Rights Watch - Interview: How Security Forces in Somalia Fail to protect children found at <https://www.hrw.org/news/2018/02/21/interview-how-security-forces-somalia-fail-protect-children> accessed on 15 October 2019



take place under conditions “*that take full account of their particular needs, status, and special requirements...*”<sup>104</sup>

In Somaliland, the Juvenile Justice Law provisions stipulate that the juvenile’s well-being is the primary consideration when the juvenile is to be punished. Furthermore, it discourages detention before sentencing (pre-trial), and prohibits the death penalty and other harsh sentences.<sup>105</sup>

#### **4. Examples of Prosecution of Juveniles**

In Rwanda, during the 1994 genocides, thousands of detainees who were child soldiers, some as young as 5 years old at the time when the atrocities were committed, were eventually released without a trial or sentencing. Rwanda has since set their minimum age for criminal responsibility at 14 years old.<sup>106</sup> In the Congo, in the year 2000, a 14 year-old child soldier was executed, and in 2001, Human Rights Watch had to intervene, and stop the death penalty as ordered by Court, on four child soldiers.<sup>107</sup> In Burundi, in 2007, child soldiers were arrested for atrocities committed while they were under 18, but were released without any trial soon after. Two child soldiers were charged with war crimes in which they partook while under the age of 18 years in Uganda, but soon after the charges were withdrawn, and they were released, as Uganda’s International Crimes Division of the High Court cannot prosecute a person who was under the age of 18 at commission of the crime, in line with the Rome Statute.<sup>108</sup>

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<sup>104</sup> Article 28, United Nations Rules for the Protection of Juveniles Deprived of their liberty [Adopted by General Assembly resolution 45/113 of 14 December 1990] (hereinafter the Havana Rules)

<sup>105</sup> Fritz (n 74 above) 913

<sup>106</sup> Musila (n 62 above) 330

<sup>107</sup> Fagan, Hirstein and Sifferd (n 77 above) 260

<sup>108</sup> Quénivet (n 60 above) 443



Two cases must be considered where the Court has dealt with the prosecution of child soldiers under the age of 18 years, which has set a precedent.

The first case was the matter of *Roper v Simmons*, in which a 17 year old was charged with ordinary capital murder and sentenced to death.<sup>109</sup> This matter relates to the mental capacity of an individual who was under the age of 18 years old when committing a crime, and the lack of mental capacity was applied when considering the case. The accused herein petitioned his sentence and used USA Supreme Court Judgement, which prohibited the death sentence for a mentally disabled person. This same approach was applied when an offender under the age of 18 years old was prosecuted, and the death sentence was then found to be unconstitutional for juveniles who committed an act before reaching the age of 18. The Court found that juveniles under the age of 18 are less culpable than adults, and they do not have the necessary mental capacity to form the required criminal responsibility for the following three reasons:

- a. Juveniles lack maturity and have and their sense of criminal responsibility has not yet fully developed;
- b. Juveniles are easily influenced by peer pressure; and
- c. The character of juveniles under the age of 18 has not yet formed as well as that of an adult.<sup>110</sup>

Therefore, the above matter set precedent on the death-penalty sentence for individuals under the age of 18, who has committed murder, and international instruments, such as the Rome Statute, as mentioned above, codified this prohibition in terms of child soldiers as well.

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<sup>109</sup> *Roper v Simmons*, 543 U.S. 551 (2005) as found in Seyfarth 'Child Soldiers to War Criminals: Trauma and case for personal mitigation' (2013) 14 No. 1 *Chicago-Kent Journal of International and Comparative Law* 1 15

<sup>110</sup> *Roper v Simmons* (n 109 above) 15





The second case concerns the matter of *United States of America v Omar Khadr*.<sup>111</sup> This is the biggest case thus far involving the prosecution of a child under the age of 18. In this matter, neither customary international law, nor international treaties binding on the United States, prohibited the prosecution of an individual who was only 15 years old at the time of the commission of the crime.<sup>112</sup>

Khadr's father belonged to the Al-Qaeda armed forces, and he was taught the ways (of Islam), and underwent military training since the age of 10 years old. Thereafter, he was sent to fight in Afghanistan. At the age of 15 (in 2002), he was captured and detained in Guantanamo Bay. While in detention, his rights to not be tortured or exposed to cruel, inhumane and degrading treatment was violated. In 2004, he was charged, and the charges against him were dismissed due to his "unlawful enemy combatant" status, being a person who is actively engaged or supporting hostilities against the United States of America, such as Al- Qaeda. He was therefore imprisoned, with no formal charge against him. However, in 2007, he was charged again under new law, and again the charges were dismissed, this time for lack of jurisdiction. The Government then appealed the matter, and the judgement was reversed. The reasons why Khadr participated in the armed conflict were due to his belief that "*his faith was under attack and that he had to fight for his salvation and purification*".<sup>113</sup> Due to his upbringing, it can be seen that he was indoctrinated, or even brainwashed into believing that he was doing what was right and expected of him.

Further to this, as Khadr was tried in a Military Tribunal, the Convention on the Rights of the Child was not considered, and neither was rehabilitation or re-integration. However, the USA is not a party to the Convention on the Rights of Children, and is not bound by the Beijing Rules. They therefore only breached International Customary Law by prosecuting a juvenile under the age of 18 years

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<sup>111</sup> *United States v Omar Khadr* (D-094)

<sup>112</sup> Fritz (n 74 above) 897

<sup>113</sup> Ursini (n 68 above) 315 – 316.



old, instead of keeping to the primary goal, being rehabilitation and reintegration under international customary law.<sup>114</sup> Further to this, at no stage was Khadr's mental capacity examined, despite the fact that studies have shown that when an individual is constantly exposed to violence, especially from a young age, the violence becomes the norm, and the child therefore does not have the necessary mental capacity to develop as a normal adult would, and also has a diminished moral compass.<sup>115</sup> Since World War II, this has been the only matter where a juvenile under the age of 18 years at commission of the crime, was prosecuted and imprisoned. However, after this matter, courts took note of the diminished criminal responsibility of a juvenile under the age of 18, and started moving towards the approach of holding the person with the greater criminal responsibility accountable.

## **5. Criminal Liability of Child Soldiers Partaking in Armed Conflict Voluntarily**

To date, there has been no provision in treaties and conventions on juveniles under the age of 15 years old, who voluntarily commit atrocities, and possess the necessary criminal capacity to be prosecuted. Amnesty International has suggested that when child soldiers join armed forces and they voluntarily partake in the armed conflict, they have the necessary judgement and understanding to be held accountable for their actions. In some cases, child soldiers voluntarily use certain drugs in order to complete their tasks and to forget the horror of the acts that they have committed, which indicates that they have enough understanding of the situation to know that their deeds are unlawful, and this indicates criminal responsibility.<sup>116</sup> However, justifications and excuses to dismiss criminal responsibility are available to juveniles, which include command responsibility, duress, intoxication, and in some cases, only mental immaturity.<sup>117</sup> Youth, however, only determines the jurisdiction of the domestic court to try a

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<sup>114</sup> Lafayette (n 49 above) 317

<sup>115</sup> Seyfarth (n 109 above) 15

<sup>116</sup> Lafayette (n 49 above) 313

<sup>117</sup> Fagan, Hirstein and Sifferd (n 77 above) 261



juvenile, and is used as a mitigating factor for sentencing, but is not in itself a legal defence in law.<sup>118</sup>

As stated above, the ICC does not have jurisdiction to hear matters where the child soldier was under the age of 18 years old when committing the crime. However, various international treaties make provisions for States to set their own minimum age of criminal responsibility, and furthermore, most States have ratified the Rome Statute and must therefore enforce same. Article 31(1)(b) of the Rome Statute states the following with regard to the above, illustrating that if a child soldier voluntarily consumes drugs or alcohol in order to commit atrocities, they will still be held criminally responsible:

*“...a person shall be not be criminally responsible if, at the time of that person’s conduct:*

- (b) *The person is in a state of intoxication that destroys that persons capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court...”*

It must be noted that there are child soldiers who are fully in control of their actions, who are not coerced and drugged to commit the atrocities, but who enjoy killing. This killing is a form of liberation or social justice to them, and is meaningful to them. In such instances, it can be seen that the child soldiers do appreciate their actions, and therefore, do indeed possess criminal responsibility.

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<sup>118</sup> Lafayette (n 49 above) 312



## 6. Is the Prosecution of Child Soldiers a True Deterrent?

To date, no causal link has been established between the prosecution of child soldiers and the actual deterrent thereof.<sup>119</sup> Most writers are of the view that the prosecution of child soldiers cannot create a deterrent, as most child soldiers are abducted to join armed forces or their circumstances force them to voluntarily enlist, and are coerced to perform their daily tasks.<sup>120</sup> Further to this, commanders/recruiters of child soldiers generally do not care about the existing provisions, and the prosecution of child soldiers will not deter them to abduct more child soldiers if need be.

In the case where the minimum age of criminal responsibility is set too low, commanders/recruiters of child soldiers will merely abduct more child soldiers. While these children commit the atrocious crimes, the commanders escape their liability, knowing that the child soldiers will eventually face criminal liability for those crimes, while they (the commanders) are out of reach of state authority.

The prosecution of child soldiers is mostly discouraged by prosecutors, firstly because of limited resources, and secondly because children play a minimal role in the armed conflict. There are more authoritative individuals who play a much greater role, and commit grievous atrocities on a larger scale who should actually be prosecuted.<sup>121</sup> Moreover, this reluctance is also caused by the fact that, although there is no provision prohibiting the prosecution of child soldiers, there is also no provision expressly stating that child soldiers must be held criminally responsible for their actions. This then leads to difficulties in establishing jurisdiction of the matter. Furthermore, the reputational damage that will be done to some states outweigh the good that the prosecution will bring. Finally, the

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<sup>119</sup> Park (n 82 above) 330

<sup>120</sup> Fritz (n 74 above) 910

<sup>121</sup> Lafayette (n 49 above) 308



prosecution of child soldiers will not eradicate the child soldier crisis, as the children mostly do not have any say in the matter.<sup>122</sup>

Another point that must be noted is the fact that some child soldiers form close bonds with their commanders during armed conflict, and also become more dependent on their commanders. Eventually they see the armed force as a surrogate family, where the child soldier is nurtured to become a commander, which leads to further problems in international criminal law. These problems are explored in the next chapter.<sup>123</sup>

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<sup>122</sup> Quénivet (n 60 above) 443 – 444

<sup>123</sup> Denov and Maclure 'Turnings and Epiphanies: Militarization, Life Histories, and the making and unmaking of two child soldiers in Sierra Leone (2007) 10 No. 2 *Journal of Youth Studies* 243 253



## CHAPTER 3

# THE CRIMINAL LIABILITY OF THE RECRUITERS OF CHILD SOLDIERS

### 1. The Rights of Victims

Every victim has the right to the truth, and to reparation for the harm he/she has suffered.<sup>124</sup> Furthermore, the UN Resolution on Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law further codifies this right to reparations.<sup>125</sup> The Resolution further provides for reparations to be “*adequate, effective, prompt and proportional to violations of rights/the harm caused*”.<sup>126</sup> The Resolution further makes provision for a two-fold order; one order in respect of the accused and victim directly (e.g. restitution and compensations) and secondly, a collective order for the broader community (e.g. rehabilitation). The Rome Statute provides the following in terms of reparations:

*“1. The Court shall establish principles relating to reparations to, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope*

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<sup>124</sup> Musila (n 62 above) 324

<sup>125</sup> The United Nations Resolution on Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2005) [E/CN.4/RES/2005/35] as found in Yogendran ‘Did the ICC Fail Child Victims in the Lubanga Order?’ (2017) 9 No. 2 *Amsterdam Law Forum* 65 68

<sup>126</sup> Article 15, the United Nations Resolution on Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (n 125 above) 69



*and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.*

2. *The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.*
3. *Before making an order under this article, the Court may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States.”*<sup>127</sup>

It is therefore important to note that there is no fixed prescribed maximum sentence for the individuals for their actions, and in the case of a child soldier, it will be possible to persuade the court on mitigating and aggravating matters of the crime, and for the sentencing then to be completely made at the discretion of the Judge(s).

## **2. Who Shall Bear the Criminal Responsibility?**

*Security Council Resolution regarding the situation in Côte d'Ivoire only targeted individuals who were “responsible for serious violations of human rights and international humanitarian law” in that specific jurisdiction.*<sup>128</sup> *The Security Council Resolution regarding the situation in the Democratic Republic of the Congo provides a provision stating that “political and military leaders recruiting or using children in armed conflict in violation of applicable international law” are individuals targeted to be held criminally responsible for their actions.*<sup>129</sup>

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<sup>127</sup> Article 75(1) – (3), The Rome Statute of the International Criminal Court (n 66 above)

<sup>128</sup> Security Council Resolution 1572 on the situation in Côte d'Ivoire (2004) [S.C.Res.1572, para 9, U.N.Doc.S/RES/1572] as found in Happold 'Protecting Children in Armed Conflict: Harnessing the Security Council's Soft Power' (2010) 43 No. 2 *Israel Law Review* 360 369

<sup>129</sup> Security Council Resolution 1698 on the Situation on the Democratic Republic of Congo (2004) [S.C.Res.1698,para13, U.N.Doc.S/RES/1698] as found in Happold (n 128 above) 369



In the International Military Tribunal at Nuremburg, the retributive paradigm was established, which stated that persons responsible for war crimes must be punished as their breaches of international law “*jeopardises international peace and Security*”.<sup>130</sup>

As mentioned in Chapter 2, due to limited resources, and the minor role that child soldiers play in these conflicts, commanders are the targets of criminal liability, as they bear the greatest responsibility. Commanders, if convicted one day, will be prosecuted for the enlistment and conscription of child soldiers. This however will not put an end to the recruitment of child soldiers between the ages of 15 and 18 years old. Commanders will still order the child soldiers to perform the most atrocious acts, as they have a diminished criminal responsibility - which commanders are fully aware of, and take advantage of.

**A. Prosecution of child soldiers who become recruiters/commanders**

In the matter of *The Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, the Special Court for Sierra Leone held that child soldier recruitment is a violation of international humanitarian law. The Court also examined the mental capacity of the child soldiers.<sup>131</sup> It must be noted that Sesay was abducted as a child soldier. However, his status as “victim” as a child soldier ended when he entered adulthood, and he was mentally, or physically, unwilling or unable to leave the armed forces. It is once again important to point out, as mentioned before, that if a child is continuously exposed to violence from a young age, violence becomes the norm, which contributes to the lack of mental capacity of that child soldier, and results in a diminished moral compass and under-developed criminal responsibility, even as an adult. Regardless of the above, the Court found that, the fact that Sesay was abducted as a child soldier and exposed to many years of

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<sup>130</sup> Musila (n 62 above) 323 – 324

<sup>131</sup> *The Prosecutor v Issa Hassan Sesay and two others* (n 57 above)





violence, did not necessarily influence his criminal liability, and it was suggested that the above factors could only be taken into consideration in his sentencing. Sesay was sentenced to 52 years in prison.<sup>132</sup>

The International Criminal Court heard the matter of *The Prosecutor v Dominic Ongwen*.<sup>133</sup> Ongwen was abducted at the age of 10 years old, and forced to become a child soldier. He is the first former child soldier who was charged with a crime he was once a victim of. As in the matter of Sesay above, he was also exposed to violence over a long period, resulting in possible diminished criminal responsibility. Ongwen was charged with *inter alia* murder, attempted murder, torture, rape, sexual slavery, conscription of children under the age of 15 years old, forced pregnancy and forced marriage. It must be noted that these crimes were committed between 2003 and 2005, when he was between 28 and 30 years old. Ongwen surrendered himself in 2015, at the age of 40, and Court proceedings started only at the end of 2016. The date for closing statements have been set for 10 March 2020.

## **B. Prosecution of child soldiers recruiters/commanders**

In the matter of *Prosecutor v Sam Hinga Norman, Moinina Fofana and Allieu Kondewa*, it was stated that the enlisting and conscripting of child soldiers under the age of 15, was in itself a war crime in terms of customary law, and that the Rome Statute merely codified these customary laws, as was confirmed by the Special Court for Sierra Leone.<sup>134</sup> It must also be noted that Mr Norman was a Minister in the government of Sierra Leone. The accused's excuse, stating that the Rome Statute was not yet in force at the time of commission of the crime, was dismissed, and further to this,

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<sup>132</sup> Seyfarth (n 109 above) 4, 5, 9, and 16

<sup>133</sup> *The Prosecutor v Dominic Ongwen* ICC-02/04-01/15

<sup>134</sup> *The Prosecutor v Sam Hinga Norman and 2 others* (n 1 above) and Bell and Abrahams 'The use of child soldiers in armed conflict' (2008) 29 No.2 *Obiter* 162 183-184



the Court illustrated that it was indeed the parties who bear the greatest criminal responsibility, who were targeted by international and domestic laws. Mr Fofana was however acquitted of the charge of recruiting child soldiers under the age of 18, as his presence on the base where the child soldiers was held, was insufficient to establish a causal link, or criminal responsibility.<sup>135</sup> Mr Kondewa was found guilty of the crime of enlisting and conscripting child soldiers, but this conviction was later overturned in the appeal matter.

In the *Lubanga* case,<sup>136</sup> a reparations regime was established in terms of the accused and his criminal responsibility towards the victim.<sup>137</sup> The Court established that the following five elements must be present in terms of Article 75 of the Rome Statute, for an order for reparations when criminal responsibility has been established:

- a. Directing the order for reparation against the convicted person,*
- b. Clearly indicating the convicted person's liability with respect to reparations awarded and harm caused to the victim;*
- c. Explain the reasoning behind the type of reparations;*
- d. Whether reparation is collective, individual or both; and*
- e. Identify all eligible victims.”<sup>138</sup>*

In this matter, the Appeals Chamber held that there must be a proportional link between the criminal responsibility of the accused and the harm caused to the victims. The Court further stated that the obligation to reparation stemmed from the criminal responsibility of the crimes committed that caused the harm. Therefore, if you are found guilty of the crime, you are liable for reparation. Lubanga was found guilty, and was therefore liable for

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<sup>135</sup> Nair (n 61 above) 52.

<sup>136</sup> *The Prosecutor v Thomas Lubanga Dyilo* (n 2 above).

<sup>137</sup> Yogendran (n 125 above) 76.

<sup>138</sup> Article 75, The Rome Statute (n 66 above) and Yogendran (n 125 above) 77.



the reparation claim of \$10 million US dollars, together with his prison sentence of 14 years. However, the Court stated that in cases of conscription of child soldiers, restitution was unachievable and impossible, as a collective reparation would not restore the child soldier victims back to *status quo ante*.<sup>139</sup> As in the matter of Lubanga, most perpetrators found guilty of conscription and enlistment are sentenced to imprisonment, and a hefty reparation claim in respect of the victims of their crimes.

In the matter of *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, the International Criminal Court illustrated that an accused can be indirectly guilty or an accessory to the crime of enlistment and conscription of child soldiers.<sup>140</sup> In this matter, Katanga was initially charged with war crimes, and crimes against humanity, including but not limited to murder, sexual slavery, rape, using children to participate actively in hostilities, pillaging and the destruction of property. However, he was only convicted as an accessory to one count of crimes against humanity and four war crimes.

Moreover, in the *Ntaganda* case, the International Criminal Court found Mr Ntaganda guilty, directly of murder as a crime against humanity, murder as a war crime and persecution.<sup>141</sup> Furthermore, he was found guilty, indirectly of attempted murder, rape, sexual slavery, forcible transfer and deportation, ordering the displacement of civilians, conscripting and enlisting children under the age of 15 years old and having them participate directly in armed conflict, intentionally directing attacks on protected objects and the destruction of the enemy's property. He was sentenced to 30 years in prison, and for the crime of enlisting and conscripting of child soldiers, he must serve a sentence of 18 years.

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<sup>139</sup> Yogendran (n 125 above) 77.

<sup>140</sup> *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* [ICC-01/04-01/07]

<sup>141</sup> *The Prosecutor v Bosco Ntaganda* [ICC-01/04-02/06]



### 3. Conclusion

This chapter looked at criminal liability, and who should be held accountable for war crimes committed by child soldiers. The main research question of this paper poses the question of which accountability measures are in place for war crimes committed by child soldiers and their commanders. Through the cases mentioned above, it is evident that, in spite of treaties and conventions that prescribe accountability for war crimes, the law is applied inconsistently in the respective states. However, the one common factor that was applied consistently in the mentioned cases was the approach of holding the person with the greatest criminal responsibility accountable. The next chapter discusses possible rehabilitation measures, and proposes the way forward with regard to accountability for war crimes.



## CHAPTER 4

### RECOMMENDATIONS

#### 1. Rehabilitation and Re-Integration

The aim of the prosecution of an individual, be it a child soldier or recruiter, is to achieve restorative justice, which encompasses restitution, compensation, participation, and rehabilitation in terms of international law.<sup>142</sup> Enforcing these measures is the best way to balance the rights of all the victims, the accused and the broader community, and it achieves the goal of restitution, which is ensuring the healing of the victim and the community.

When a criminal act has been committed, in theory, the state has the obligation to punish the offender, irrespective of whether it is a child soldier, however in practice same is rarely exercised. As is evident from the above, rehabilitation and re-integration is the better form of reparation in respect of the child soldier and the victims of their crimes. In most cases, the reparation sanction is two-fold, in that the individual must himself/herself do something, such as pay compensation to the victim, etc. as well as a sanction for the broader community such as community service. The Office of the Public Counsel for Victims (OPCV) of the International Criminal Court have found that giving money to victims who were child soldiers as a reparation measure, may have a negative effect, or may even defeat the purpose of giving them reparations.<sup>143</sup> Yogendran stated that there are other alternative reparation measures for child soldiers, such as public apologies and acknowledgements of responsibility, commemorations, tributes and accurate account of violations, and lastly education and guarantees of non-repetition as symbolic measures.<sup>144</sup> Further to this, physical and mental health

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<sup>142</sup> Musila (n 62 above) 325

<sup>143</sup> Yogendran (n 125 above) 73

<sup>144</sup> Yogendran (n 125 above) 74



care, educational and vocational training and sustainable work opportunities can also be seen as part of the re-integration process. However, the *Lubanga* case stated that the individual needs of a specific individual must be looked at for the re-integration to be successful.<sup>145</sup>

Furthermore, Article 7 of the Statute for the Special Court for Sierra Leone states that, in the event that a child soldier is tried, while being between the ages of 15 and 18 at the commission of the crime, they must be treated with “*dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, re-integration into and assumption of a constructive role in society.*”<sup>146</sup> It is also not reasonable to hold the criminal capacity of a child the same as that of an adult, and this can also be seen by the various different sanctions imposed on child soldiers compared to the sanctions imposed on adults.<sup>147</sup>

It is further evident that children can still be rehabilitated, as their young age makes their brains more susceptible to overriding the bad, and easily influenced to doing good deeds. Further to this, by the same principle that violence is learned by being exposed to violence, the same holds that, if juveniles only see good behaviour, and starts imitating the same, they will eventually be rehabilitated.<sup>148</sup>

Regardless of the fact that re-integration and rehabilitation is a better sanction to be imposed on child soldiers than imprisonment, it may also have negative consequences, and a detrimental effect on the child soldier. In some cases, the rehabilitation is not successful, and the child soldier remains very violent, eventually becoming a danger to society. In other cases, demobilization and disarmament in re-integration are not sustained, and the state provides no further

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<sup>145</sup> Yogendran (n 125 above) 73

<sup>146</sup> Article 7, Statute of the Special Court for Sierra Leone (n 67 above)

<sup>147</sup> Fagan, Hirstein and Sifferd (n 77 above) 279

<sup>148</sup> Seyfarth (n 109 above) 14



commitment, resulting in child soldiers being neglected, ill-treated and abandoned. Rehabilitation and re-integration processes also make child soldiers relive the trauma, which leads to a setback in his/her progress.

It is thus evident that demobilization programmes are successfully implemented in some countries, while it is not as successful in others. In line with re-integration and rehabilitation, demobilization programmes in El Salvador offered former combatants a choice between a scholarship at a university, technical training, a small business loan, or agricultural training. However, in Liberia, re-integration and rehabilitation measures failed because the education vouchers provided were ineffective and family tracing for former child soldiers were only provided to child soldiers under the age of 18 at the time of demobilization, leaving much to be desired in the way of proper re-integration and rehabilitation.

## 2. Proposals for the Way Forward

With a view to answering the research questions, this section examines various proposals for the way forward with regard to the criminal responsibility of child soldiers.

Fagan, Hirstein and Sifferd proposed the following:

- a. Individuals under the age of 15 cannot be held responsible for crimes committed on the basis of irrebuttable presumption of incapacity to form the necessary *mens rea*;
- b. Individuals between the ages of 15 and 17 are awarded the same presumption, but in this case, there is a possibility that the presumption may be rebutted; and



- c. While individuals 18 years and older are under a rebuttable presumption of culpability.<sup>149</sup>

Ursini, on the other hand recommends the establishment of a special juvenile criminal tribunal for individuals between the ages of 15 and 18 years old. These tribunals are to balance the rights and responsibilities of the child soldiers, the victims and the community at large and to promote rehabilitation, re-integration and ensures accountability. Further to this, if a juvenile is tried and sentenced to time in prison, he recommends that sentencing be kept to five years, so that when the individual is released, he/she is still young enough to fulfil a constructive role in society.<sup>150</sup>

Further suggestions on the best way for re-integration is to make use of non-judicial mechanisms to reconcile the victims and juveniles, such as Truth and Reconciliation Commissions (that have been shown to be more child friendly in that children are allowed to give their testimony in camera and involve child care officers),<sup>151</sup> local traditional and cultural rites, and community based programmes set and run by the state. Another method that have been used in some states, are cleansing ceremonies to welcome the child soldier back into the community while at the same time removing all the spirits of that child soldier's victims.<sup>152</sup>

The Democratic Republic of the Congo have established the "Traditional Local Baraza", a tribunal made up of a group of elders who are responsible for the prevention, management and resolving of conflict. These elders hold juveniles accountable for their crimes, while at the same time educate them and discourage juvenile delinquency. They go as far as punishing the juveniles with sanctions such as community service, where the juveniles must cultivate a field,

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<sup>149</sup> Fagan, Hirstein and Sifferd (n 77 above) 262

<sup>150</sup> Ursini (n 68 above) 1041

<sup>151</sup> Among 'The Application of traditional justice mechanisms to the atrocities committed by child soldiers in Uganda: A practical restorative justice approach' (2013) 13 *AHRLJ* 441 457

<sup>152</sup> Lafayette (n 49 above) 309





or build a hut, or they restrict movement in certain areas, as well as reparative penalties, and only as a last resort will they use penal sanctions, as the main aim is restoration.<sup>153</sup> This process is entirely community based and it is proposed that more communities should have a tribunal such as this.

The next chapter concludes this study by summarising the answers to the research questions.

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<sup>153</sup> Kiyala 'Utilising a Traditional Approach to Restorative Justice in the Reintegration of former child soldiers in the North Kivu Province, Democratic Republic of Congo 46 No. 3 *Africa Insight* 33 36-38



## CHAPTER 5

### CONCLUSION

This chapter concludes the study by summarising answers to the research questions posed in Chapter 1. These answers highlight the current situation regarding the recruitment and accountability of child soldiers, despite the various treaties and case law that has set precedent against this recruitment.

This study set out to investigate *inter alia* the recruitment (voluntary and forced) of child soldiers, their criminal liability, as well as that of their recruiters. Furthermore, children's rights and the guarantee thereof in various legislative documents were highlighted and evaluated. Case law on the recruitment (and prosecution) of child soldiers was discussed extensively. As a result, answers to the research questions can be set out as follows:

With regard to answering the first sub-question, is it clear that child soldiers are still held accountable for their actions, and must face prosecution. Even though factors such as indoctrination and their exposure to violence, which causes a diminished moral compass, are taken into consideration during their prosecution, and they are not held criminally responsible, child soldiers are still punished with lesser sentences such as reparation sanctions, and only in rare instances imprisoned, as this is in line with restorative international law. The surroundings that child soldiers are exposed to on a daily basis do not always alter their culpability, and it can be seen that same is only considered as a mitigating factor in sentencing procedures. To date, the prosecution of child soldiers has not been a deterrent in combating the child soldier phenomenon, as becoming a child soldier is not always their choice. The one exception to these provisions is the *Omar Kahdr case*, wherein an individual was arrested and detained at the age of 15, with no consideration being given to his circumstances and lack of criminal responsibility.



As soon as an individual turns 18, they may be tried as an adult, despite the fact that he/she might still have the mental capacity of a child, as can be seen in the cases of *Ongwen* and *Sesay*, were child soldiers eventually became the commanders and were held fully accountable for their actions. This deals with the sub-question concerning the accountability measures that are in place to provide for child soldiers who are over the age of 18 years old.

As for the sub-question on who bears the criminal responsibility of the war crimes committed by a child soldier, the following was evident from the research: The recruiters of child soldiers bear the greatest responsibility for the crimes committed. They will be held accountable for their war crimes and crimes against humanity, and eventually punished. The sentence imposed on the recruiter should be in proportion to the atrocities he committed. However, even the prosecution of the recruiters of child soldiers are not a deterrent, as all the other commanders are of the opinion that they are out of the state authorities' reach, and never paid any attention to any laws, treaties or legislation in the first place.

The aim of this study was to examine the accountability of child soldiers and their recruiters/commanders. The main question posed concerned the accountability measures that are in place for war crimes committed by child soldiers and their commanders. It was found that, in terms of international law, the focus is on restorative justice, which still holds child soldiers accountable for their crimes. However, due to their surroundings, the sentence imposed deals with reintegration and rehabilitation of the child soldier. With regard to the measures in place for their recruiters, it was evident that surroundings were not taken into account. The recruiters are held fully accountable for the war crimes, prosecuted and imprisoned.

From the discussion throughout this paper, it is clearly evident that, despite many treaties and conventions that prohibit the recruitment of child soldiers, some still



occurs every day. Furthermore, as a result of limited resources and weak compliance provisions, this will stay the *status quo* for the indefinite future.



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