

**THE CRIMINAL LIABILITY OF CHILD SOLDIERS IN
INTERNATIONAL CRIMINAL LAW: DOES RESTORATIVE
JUSTICE OFFER A BALANCE BETWEEN THE RIGHTS OF
THE VICTIM AND THE RIGHTS OF THE CHILD
PERPETRATOR?**

BY

ANNABELLE KAREN RIVET

**SUBMITTED IN PARTIAL FULFILLMENT OF THE DEGREE LLM
INTERNATIONAL LAW**

SUPERVISOR

PROFESSOR KARIN VAN MARLE

CO-SUPERVISOR

ISOLDE DE VILLIERS

2014

UNIVERSITY OF PRETORIA

TABLE OF CONTENTS

CHAPTER 1: INTRODUCTION	1
CHAPTER 2: THE PROSECUTION OF CHILD SOLDIERS FOR WAR CRIMES	8
2.1 The Status of Children in Armed Conflict	9
2.2 Children before International Courts and Tribunals and the Duty of States to Prosecute Persons Who Commit Crimes	10
2.3 The Substantive Legal Difficulties in Prosecuting Children	13
2.3.1 The International Age of Criminal Responsibility.....	13
2.3.2 Do Children Posses the Requisite <i>Mens Rea</i> to Be Held Criminally Liable	15
2.3.3 Is It Possible To View Child Soldiers as Volunteers?	17
2.4 Practical and Procedural Difficulties in Prosecuting Child Soldiers	18
2.5 The Possible Defenses Available To Child Soldiers in the Event Of Prosecution	22
2.5.1 Duress	23
2.5.2 Intoxication	24
2.5.3 The Doctrine of Superior Orders	26
CHAPTER 3: FINDING A BALANCE BETWEEN THE RIGHTS OF THE CHILD TO PROTECTION AND THE RIGHTS OF THE VICTIM TO JUSTICE	28

3.1 The Right To Justice	28
3.2 What Is Restorative Justice?	30
3.2.1 Elements of Restorative Justice	31
3.2.1.1 Encounter	32
3.2.1.2 Reparation/ Amends	33
3.2.1.3 Reintegration	34
3.2.1.4 Inclusion/ Participation	34
3.3 The Restorative Justice Process	35
3.3.1 Rehabilitation	36
3.3.2 Compensation	36
3.3.3 Restitution	38
3.4 Disarmament Demobilisation and Reintegration Under a Restorative Justice Model	39
3.5The Hybrid System That Was Used In Sierra Leone and the Use of Truth and Reconciliation Commissions as an Alternative to Prosecution of Child Soldiers	42
CHAPTER 4: CONCLUSION	46

ABBREVIATIONS

AP	Additional Protocol
CRC	Convention on the Rights of the Child
DDR	Disarmament Demobilisation and Reintegration
DRC	Democratic Republic Of Congo
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
NGO	Non-Governmental Organisation
RUF	Revolutionary United Front
SCSL	Special Court for Sierra Leone
TRC	Truth and Reconciliation Commission
UN	United Nations
USA	United States of America

CHAPTER 1

INTRODUCTION

“I think with sorrow of those living and growing up against the background of war, of those who have known nothing but conflict and violence... What a terrible legacy for their future! Children need peace; they have a right to it.”¹

The war in Sierra Leone was alarmingly brutal with a record number of child soldiers reported to have been involved. In June 2000 the Revolutionary United Front rebels (hereafter referred to as the RUF) violated the Lome Accords by storming Freetown and taking UN peace keepers hostage. In light of this attack the President of Sierra Leone requested the UN Security Council to establish a tribunal for Sierra Leone.² The UN Security Council responded by passing Resolution 1315 in August 2000. This Resolution required the UN Secretary General to negotiate an agreement with the government of Sierra Leone to establish an independent Special Court for Sierra Leone.³

On the 31st of May 2004 the appeals chamber of the Special Court for Sierra Leone (hereafter referred to as the SCSL) held that by November 1996 a rule of customary international law had developed which

¹ His Holiness Pope John Paul II, address at the celebration of the World Day of Peace, 1 January 1999. The theme of the day’s celebrations was “Respect for Human Rights: The Secret of True Peace.” This address was made in light of the impending new millennium, the Algerian War and the stepping down of President Nelson Mandela who was seen as one of the greatest peace makers of our time. It is also important to note that 1998 saw the 15th anniversary of the adoption of the Universal Declaration of Human Rights.

² Custer M, “Punishing Child Soldiers: The Special Court for Sierra Leone and the Lessons to be Learned from the United States Juvenile Justice System,” *Temple International Law and Comparative Law Journal*, 2005 at 453.

³ Custer M, 2005, at 453.

prohibited the “conscripting or enlisting of children under the age of 15 years into the armed forces or groups, [or] using them to participate actively in hostilities.”⁴ Despite the existence of a customary international law which specifically prohibits the use of child soldiers, child soldiering continues to be a problem and many children are still recruited in to both state and non state groups.

In this mini dissertation I will address the issue of whether child soldiers should be held criminally liable for international crimes they commit during armed conflict and if so to what degree should they be held liable.⁵ Some authors are of the view that any child who has committed a war crime should be tried and punished irrespective of their age,⁶ others are of the belief that efforts should rather focus on the rehabilitation and reintegration of these children back into their communities.⁷ There is also a minority of authors who advocate for a blanket immunity for former child soldiers as many child soldiers are forcibly recruited and commit crimes under extremely harsh

⁴ Prosecutor v Sam Hinga Norman, Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), Case No SCSL-2004-14-AR72(E). Available at www.unhcr.innopac.up.ac.za/refworld/docid/49abc0a22.html accessed 2 March 2013.

⁵ Musila G, “Challenges in Establishing the Accountability of Child Soldiers for Human Rights Violations: Restorative Justice as an Option,” *African Human Rights Law Journal* v5 No2 (2005) at 321.

⁶ David Rosen is a supporter of this view and aspects of his work will be analysed in chapter 3. Rosen states that age should not on its own be an absolute barrier to prosecution and that various degrees of culpability should therefore be applicable in the case of child soldiers. Rosen further advocates a very important point namely that the local ideas of justice should be taken in to account. This view will be further discussed in chapter 3 in terms of the restorative justice paradigm.

⁷ Matthew Happold and Ann Skelton are the two primary authors that this dissertation will focus on with regards to restorative justice. Their work will be analysed in greater detail in chapter 3. Other authors that will be analysed in chapter 3 who are in favour of the rehabilitation and reintegration of former child soldiers are, Katherine Fallah, Ann Crawford and Tasneem Deo.

circumstances including, poverty and drug and alcohol abuse.⁸ A discussion with regards to offering former child soldiers blanket immunity due to the various psychological factors present is an aspect that will not be addressed in great detail as the psychological principles and theories core to this argument go beyond the scope of this mini dissertation. This mini dissertation will rather focus on the restorative justice methods of rehabilitating and reintegrating these children back in to their communities.⁹

The story of Omar Khadr stands central to this mini dissertation and excerpts of his story, along with the stories of other child soldiers will be used throughout the dissertation to highlight the circumstances with which child soldiers are faced. In chapter 2 various accounts of events as told by child soldiers will serve as the backdrop for the following discussion of the restorative justice in chapter 3. Omar Khadr, a Canadian citizen was captured in Afghanistan in July 2002 at the age of 15 and was thereafter detained at Guantanamo Bay.¹⁰ Under the Military Commission Act of 2008 Khadr was charged with murder in violation of the law of war, attempted murder in violation of the law of war, conspiracy, providing material support for terrorism and spying.¹¹ At the time of his capture Khadr was still a child, a status which appears to have been disregarded during his captivity. Human Rights Watch reports that amongst other things Khadr was denied contact with his family, he was denied educational opportunities, he was subjected to

⁸ Alcinda Honwana advocates for immunity of child soldiers on the basis of their psychological state at the time of commission of crimes.

⁹ Matthew Happold is the biggest supporter of the rehabilitation and reintegration of these children back in to their communities as is Professor Skelton in terms of the broader restorative justice view.

¹⁰ Wilson R, "Children in Armed Conflict: The Detention of Children at Guantanamo Bay and the Trial for War Crimes by Military Commission of Omar Khadr, A Child," *Washington College of Law Research Paper* No 2009-13, available at <http://ssrn.com/abstract=1368323> accessed 2 March 2013.

¹¹ *Omar Khadr v United States of America & United States Court of Military Commission Review*, 529 F.3d1112, Court of Appeals, Dist of Columbia Circuit, 2008.

abusive interrogations and detained with the general adult population in camp Delta.¹² These are clear violations of the provisions of the Convention on the Rights of the Child (hereafter referred to as the CRC) which guarantees the protection of the rights of all children.¹³ Khadr spent 8 years in military custody before a plea bargain was reached.¹⁴ During Khadr's sentencing the judge barred the defence from presenting evidence of Khadr's ill treatment while in custody and Khadr additionally had to waive his right of appeal as one of the terms of his plea bargain.¹⁵

Until recently the emphasis of international law has been upon the criminalisation of the recruitment of child soldiers and the prosecution of those responsible for their recruitment. Khadr's case brings to light the very important question of what should be done with child soldiers once hostilities have ceased or if these children are captured as was the case with Khadr. However as stated at the beginning of this mini dissertation a rule of customary international law now exists which prohibits the recruitment and use of children in war. For this reason I will not focus on the issue of the recruitment of children to the armed forces in this dissertation.

The importance of an international unified approach with regards to the treatment of child soldiers once hostilities have ceased and for the possible prosecution of child soldiers is best illustrated in the case of Rwanda. Rwanda's government feared that if there was no attempt to hold former child soldiers criminally liable there would be a rejection of the peace process by the general population and a form of mob justice would ensue as the population would have felt that justice was not

¹² Wilson R, 2009, available at <http://ssrn.com/abstract=1368323> accessed 2 March 2013.

¹³ In terms of section 1 of the Convention a child is defined as any person below the age of 18. Khadr therefore falls within the definition of a child and should have been afforded the protections guaranteed by the Convention.

¹⁴ Prasow A, "The Trial that Wasn't: The Sentencing of Omar Khadr," *Huffington Post*, 4 November 2010.

¹⁵ Omar Ahmed Khadr available at www.hrw.org/en/news/2008/12/04/omar-ahmed-khadr accessed 6 March 2013.

served.¹⁶ This same problem was also faced in post conflict Sierra Leone where many former child soldiers were rejected by their communities while others were simply too afraid of the violent reception they might receive that they never attempted to return home.¹⁷

In determining a child soldier's degree of potential liability a careful balance must be struck between seeing the child soldier as not only a perpetrator of human rights violations but also as a victim of human rights abuses.¹⁸ By keeping this duality in mind it ensures that both the rights of the victim to justice and the rights of the child are respected.¹⁹ According to Amnesty International "true reconciliation cannot be achieved if the rights of the victims and their families to justice and redress are ignored."²⁰ In analysing the criminalisation debate I believe we should consider the extraordinary circumstances that child soldiers are faced with and whether children who have voluntarily taken up arms can truly be regarded as volunteers in light of these circumstances.²¹ The question of the child's age also plays an important role in the analysis of this debate as what may be regarded as a child in one state may not be the case in another state due to various domestic laws and cultural sensitivities. The importance of setting a minimum age of criminal responsibility took centre stage in the case of Sierra Leone as there was a record number of child soldier's involved in the war. In the

¹⁶ This can also be linked to Rosen's contention that the local ideas of justice should be taken into account, if this is disregarded and a foreign form of justice is imposed, the victims may feel that justice has not been served and mob justice may still ensue.

¹⁷ Amnesty International "Sierra Leone 1998- A Year of Atrocities against Civilians" AI Index: AFR/51/22/98, November 1998 at 17.

¹⁸ Musila G 2005 at 321. This view is also shared by Happold M "Child Soldiers in International Law" 2005 at 2, who notes that this duality in the status of a child soldier is an important factor that must be considered when determining the potential liability of a former child soldier.

¹⁹ The right to justice is discussed in greater detail in chapter 3.

²⁰ Amnesty International, AI Index:AFR51/22/98 November 1998 at 13.

²¹ The various circumstances that lead a child to join the armed forces and the condition under which child soldier's operate is analysed in more detail in chapter 2.

context of this mini dissertation I have chosen to define a child soldier as any person involved in conflict either directly or indirectly and who is under the age of 18 years. I will analyse the question of whether a child soldier operating in that particular context can fully appreciate his actions and the consequences thereof and whether that child should be held criminally responsible. This question can also be formulated as follows: Does a child soldier have the requisite *mens rea* to be held liable for his crimes?

In this mini dissertation I argue that the current international criminal law model is inadequate as it is premised on retribution and focuses on the criminal responsibility of the perpetrator while placing very little importance on the rights and concerns of the victim as is the case with restorative justice and most traditional African justice systems.²² I will further propose that a restorative justice approach should be followed as it takes into account the interests of all the parties concerned. The work of Ann Skelton is an important point of reference with regards to restorative justice, particularly her doctoral thesis in which she strongly advocates for the use of restorative justice with regards to child justice. Although conflicting in certain regards the work of Mathew Happold and David Rosen will play a crucial role in this discussion as their different views indicate how restorative justice principles best address the issue of rehabilitation and reintegration of former child soldier's. The SCSL will further inform the discussion of restorative justice due to its unique model and the fact that former child soldier's could now for the first time in terms of international law be held criminally liable for crimes they have committed. In terms of the Statute of the Special Court for Sierra Leone, the SCSL was the first ever international tribunal to be granted the jurisdiction to prosecute those who "bore the greatest responsibility for serious violations of international humanitarian law."²³

²² Musila G, 2005 at 323.

²³ This is found in Article 1 of the Statute for the Special Court for Sierra Leone. As record numbers of child soldiers were used in Sierra Leone they were therefore the ones who bore

In chapter 2 I assess the current international law framework *in re* the criminal responsibility of child soldiers. Issues such as the child soldier's age, duress and intoxication will be addressed. In chapter 3 I consider restorative justice and how to find a balance between the rights of all the parties concerned, and I suggest an alternative to the current international law system. I will propose a new system based upon restorative justice and whereby justice may be served without necessarily holding a child soldier criminally liable through the traditional criminal court system. Based on the information presented in chapters 2 and 3, chapter 4 presents my recommendations for what I term a child friendly form of international justice.

In this mini dissertation I argue that by regulating the way in which we approach the potential criminal liability of child soldiers at an international level and placing restorative justice central to child justice a new rule of customary international law will develop which will ensure that the rights of the child are safeguarded while the rights of the victim to justice are met.

It is important to note that at the time of publishing this dissertation there was some uncertainty as to the future of Africa within the International Criminal Court (hereafter referred to as the ICC) the impending prosecution of Kenya's President Uhuru Kenyatta has resulted in the Kenyan parliament voting to withdraw from the Rome Statute. African heads of state have called an extraordinary summit in which to discuss a mass African withdrawal from the Rome Statute.²⁴ Should there be a decision to withdraw from the ICC this leaves the African Union with an exciting opportunity to set up its own special court to try former child soldiers for their crimes, based on their own terms and within the

the greatest responsibility for the violation of international humanitarian law. This coupled with Article 7(1) of the Statute for the Special court for Sierra Leone which granted the SCSL jurisdiction over persons who were over 15 years at the time of the alleged commission of a crime meant that children that child soldiers were liable to prosecution.

²⁴ www.amnesty.org/en/news/african-states-must-reject-calls-withdraw-icc-2013-10-10 accessed 2 November 2013.

restorative justice paradigm. As the majority of child soldiering incidents take place within Africa it seems apt that these children should therefore be tried by an African court that is more aware of the various cultural sensitivities present that the ICC may not be aware of.²⁵ This would certainly avoid a rejection of the peace process which was feared in both Sierra Leone and Rwanda. Further research into the effects of a mass African withdrawal from the ICC is necessary, as this affects not just Africa but the international community as a whole.

²⁵ www.hrw.org accessed 15 November 2013.

CHAPTER 2

THE PROSECUTION OF CHILD SOLDIERS FOR WAR CRIMES

Currently international law does not directly address the issue of whether a child soldier should face prosecution for crimes they commit during conflict. In this chapter I focus on the *status quo* regarding the possible prosecution of child soldiers for the commission of international crimes. Issues such as the minimum age of criminal responsibility as well as the possible defences available to a child soldier in the event of his prosecution will be looked at.

There were previous attempts in Rwanda, Uganda and the Democratic Republic of Congo (hereafter referred to as DRC) to bring child soldiers to justice.²⁶ However, these models all failed in some way or the other to adequately protect the rights of the child or to allow for the successful reintegration of the child back into the community.²⁷ In this chapter I will highlight the pitfalls of the current international legal framework in dealing with the prosecution of former child soldiers while attempting to portray the children's dual status as both a perpetrator and victim of human rights abuses.

²⁶ Happold M, "The Age of Criminal Responsibility in International Criminal Law" available at www.asser.nl/default.aspx?site_id=9&level1=13337&level2=13345 accessed 2 February 2013.

²⁷ Happold M available at www.asser.nl/default.aspx?site_id=9&level1=13337&level2=13345 accessed 2 February 2013. Happold refers to an instance in the DRC in 2001 where intervention from Human Rights Watch was necessary to prevent the imposition of the death penalty on 4 child soldiers who were aged at 14-16 years at the time of their arrest. This follows from a previous execution in 2000 of a 14 year old child soldier.

2.1 THE STATUS OF CHILDREN IN ARMED CONFLICT

Article 77(2) of the First Additional Protocol to the Geneva Convention permits the recruitment of children between the ages of 15-18 years into the armed forces.²⁸ The provision is worded in such a way that it places a positive obligation upon states to prevent the direct participation of children in hostilities, and to refrain from recruiting children.²⁹ This provision is also echoed in Article 22(2) of the African Charter on the Rights and Welfare of the Child which requires all parties to “take all necessary measures to ensure that no child shall take a direct part in hostilities and in particular from recruiting any child.”³⁰

In the case of *Prosecutor v Samuel Hinga Norman* (hereafter referred to as the *Samuel Hinga Norman* case) the appeals chamber in the SCSL made it clear that the recruitment of children under the age of 15 to participate in active hostilities was a crime under international law.³¹ This ruling is in line with provisions found in various international child rights instruments such as the CRC which places the minimum age of recruitment into the armed forces at 15. The judgement in the *Sam Hinga Norman* case further stated that by November 1996 a rule of customary international law had developed which prevented the

²⁸ Article 77(2) of the Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims in International Armed Conflicts, 8 June 1977.

²⁹ Article 77(2) reads “the parties to the conflict shall take all feasible measures in order that children who have not attained the age of 15 years do not take a direct part in hostilities and, in particular they shall refrain from recruiting them into their armed forces. In recruiting amongst those persons who have attained the age of 15 years but who have not attained the age of 18 years, the parties to the conflict shall endeavour to give priority to those who are the oldest.”

³⁰ OAU Doc, CAB/LEG/24.9/49, 1990.

³¹ Happold M, www.asser.nl/default.aspx?site_id=9&level1=13337&level2=13345, accessed 2 April 2013.

recruitment of children below the age of 15.³² The current international legal provisions as confirmed by the *Sam Hinga Norman* case indicates that children below the age of 15 have no place being involved in armed conflict.³³ This, however, is not the case especially in war torn African countries where child recruitment appears to be the norm and children as young as 9 are recruited.³⁴

2.2 CHILDREN BEFORE INTERNATIONAL COURTS AND TRIBUNALS AND THE DUTY OF STATES TO PROSECUTE PERSONS WHO COMMIT CRIMES

All persons have a duty to comply with international humanitarian law and a failure to do so may result in criminal sanctions. States furthermore have a duty to prosecute those who are alleged to have

³² *Prosecutor v Sam Hinga Norman*, Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), Case No SCSL-2004-14-AR74 (E). Available at www.unhcr.org.innopac.up.ac.za/refworld/docid/49abc0a2.html accessed 2 March 2013.

³³ Rosen D, *Armies of the Young: Child Soldiers in War and Terrorism*, 2005 at 139. In addition to the CRC and the Additional Protocols Rosen lists a number of other international law instruments that call for a partial or total ban on the use of child soldiers, namely, the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (2000), the African Charter on the Rights and Welfare of the Child (1990), and the International Labour Organisation Worst Forms of Child Labour Convention (1999).

³⁴ Rosen D, 2005, at 138. See also "Easy Prey: Child Soldiers in Liberia" September 1994, available at www.hrw.org/reports/pdfs/c/crd/liberia949.pdf accessed 3 February 2013, a child care worker reports that she once witnessed a 9 year old kill someone at a check point. Children learn by imitation she says and many of these children see their commanding officers kill and they simply imitate that because they are afraid and have been told they will be killed if they do not follow orders.

failed to comply with the law.³⁵ A state that fails to prosecute an individual for the commission of an international crime may itself be found guilty for violating the international law.³⁶

Treaties such as the International Covenant on Civil and Political Rights³⁷ do not explicitly place a positive obligation upon states to prosecute the violation of international law.³⁸ Upon closer interpretation however, these treaties may be seen as implicitly requiring states to prosecute those who violate the very rights that they protect.³⁹ This duty upon states to prosecute those who violate international law can also be found in the preamble of the Rome Statute, which provides that “it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes.”⁴⁰ The international tribunals set up in Rwanda, the former Yugoslavia and Sierra Leone are a further indication of the duty upon states to prosecute those who are alleged to have committed a violation of international law. Although these were internal conflicts, the international community found it imperative to prosecute those who were alleged to have committed atrocious war crimes and violations of international humanitarian law. It can therefore be argued that the duty to prosecute even children for the alleged commission of war crimes and the violation of international law is undeniable. This is further supported by the fact that the SCSL was granted jurisdiction over child soldiers who were over the age of 15 years at the time of the commission of the alleged offence.⁴¹

³⁵ Happold M, www.asser.nl/default.aspx?site_id=9&level1=13337&level2=13345 accessed 2 March 2013.

³⁶ Orentlicher D, “Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime,” 100 *Yale LJ* 1991 at 2568.

³⁷ The International Covenant on Civil and Political Rights 16 December 1966.

³⁸ Orentlicher M, 1991, at 2568.

³⁹ Orentlicher M, 1991, at 2569.

⁴⁰ Rome Statute of the International Criminal Court, 17 July 1998.

⁴¹ Article 7(1) of the Statute of the Special Court of Sierra Leone 2000, states that, should any person have been between the ages 15-18 at the time of the commission of the crime then

It is common practice for states in terms of their national law to have a positive duty to prosecute children for the commission of unlawful acts and to ensure that justice is served in the eyes of the community.⁴² The hurdle that is now experienced is the prosecution of children by an international court or tribunal for international crimes committed during times of conflict. As stated above in the case of Sierra Leone the Statute of the SCSL made specific provision that children above the age of 15 would fall within the jurisdiction of the court and would therefore be liable to prosecution.⁴³ The statutes of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda made no such pronouncements regarding the prosecution of children and in the end no one under the age of 18 was prosecuted. To date the SCSL is the only international tribunal that was officially granted the jurisdiction to try minors as even the ICC does not have the jurisdiction to do so. Article 26 of the Rome Statute states that “the court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime.” This automatically rules out the possible prosecution of former child soldiers at the ICC.

It therefore stands to reason that unless expressly provided for, as was the case in Sierra Leone, an international court does not have the jurisdiction to prosecute a minor for the violation of international law. This however does not do away with the fact that there is still a positive

the court shall have jurisdiction over such a person. The provision goes on further in Article 7(2) to guarantee that children will be treated with dignity and that their age will be taken into account as the court aims to promote the rehabilitation and reintegration of former child soldiers.

⁴² In 2012, 4 minors were accused of the rape of a 17 year old impaired girl in Soweto and they thereafter uploaded a video of the rape to the internet where it thereafter went viral. 3 of the accused were to stand trial as they were 17 at the time of the commission of a crime; the fourth who was 13 was yet to have his criminal capacity determined. It was imperative that some form of judicial action take place at the time as the community was outraged by this crime. The prosecution of minors such as these are common place in South Africa and other states, however the age of criminal; liability differs from state to state.

⁴³ Article 7(1) of the Statute of the Special Court of Sierra Leone.

duty upon states to prosecute those who have committed violations of international law. Therefore, even though a child may not be prosecuted at international level, a national court may have the jurisdiction to prosecute such a child provided the requirements of the minimum age of criminal responsibility in that particular country are met as the international law duty upon states to prosecute still applies.

2.3 THE SUBSTANTIVE LEGAL DIFFICULTIES IN PROSECUTING CHILDREN

2.3.1 THE INTERNATIONAL AGE OF CRIMINAL RESPONSIBILITY/ THE MINIMUM AGE OF CRIMINAL RESPONSIBILITY FOR CHILD SOLDIER

There is currently no set age in terms of international law by which children will be presumed to have the capacity to commit a crime. The age of criminal responsibility varies from state to state and some countries have the age of criminal responsibility as low as 10 years.⁴⁴ The difficulty this presents is what is the right age that one can put forward as the age of criminal responsibility for the commission of international crimes? As the conviction of a former child soldier for war crimes carries with it harsher consequences than the conviction of a

⁴⁴ Australia, Cameroon, Fiji, Malaysia and Nepal are among many countries that have the minimum age of criminal responsibility set at the age of 10. Saudi Arabia, Singapore and Sudan have the minimum age of criminal responsibility set much lower at 7 years. See www.pmg.org.za accessed 3 January 2014.

child for the crime of theft this is not a decision that should be taken lightly.⁴⁵

The consequences of a war crime conviction are extremely harsh and far reaching. The classification of a child as a war criminal not only attaches great stigma to that child but also adversely affects that child's status under the Refugee Convention.⁴⁶ It is therefore imperative that the international age of criminal responsibility be established with great care and consideration for both the best interests of the child and the need of the victim to feel that justice has been served. The Beijing Rules⁴⁷ set a guideline and state that "in those legal systems recognising the concept of the age of criminal responsibility for juveniles, the beginning of that age should not be fixed too low an age level, bearing in mind the facts of emotional mental and intellectual maturity."⁴⁸

This failure by international law to set a standard universal age of criminal responsibility can be attributed to cultural sensitivities and a

⁴⁵ This brings to light the distinction between crimes that take place at an international level and are subject to prosecution by an international body and crimes that take place domestically and are subject to prosecution on a national domestic court level. In this instance war crimes would be an example of an international crime that can be tried by the ICC whereas petty theft is a domestic crime that should be prosecuted in terms of the national court system.

⁴⁶ United Nations Convention Relating to the Status of Refugees adopted 28 July 1951. In terms of Article 1F(a) a person who has committed a crime against peace a war crime or a crime against humanity will not be able to enjoy the benefit of refugee status in terms of the Convention. Therefore if a child be tried for war crimes and convicted that child's status as a refugee is severely affected. It is a well-known fact that war displaces many and results in countless refugees. Being granted refugee status allows a child soldier the opportunity to rebuild his life in a place that has not been ravaged by war.

⁴⁷ The correct title of this UN resolution is actually The United Nations Standard Minimum Rules for the Administration of Juvenile Justice and was adopted in 1985. It is commonly referred to as the Beijing Rules as much of the drafting of the policy took place at a conference in Beijing.

⁴⁸ United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 29 November 1985 A/RES/40/33.

respect for state sovereignty.⁴⁹ Davidson holds the view that this is due to the fact that it would result in “discrepancies such that a person could be legally defined in one nation as a child and thus not capable of forming criminal intent, and yet in another nation the same child doing the same act fits the legal definition as capable of forming criminal intent.”⁵⁰ This absence of a universal age of criminal responsibility for international crimes creates confusion as to how children should be treated when attempting to establish their degree of culpability for the commission of international crimes. Fallah holds the view that in setting a universal age of criminal responsibility we are taking away an element of state sovereignty.⁵¹ We are then left with a situation where an international law resolution has the power to supersede all the laws of that particular state regarding the criminal accountability of children. States would then have to undertake a process of revising their national laws to comply with this new international standard which may not take in to account the cultural differences that are inherently present in every state. However international crimes are classified as such because they are extreme crimes and their commission affects not only the particular state in which the crime was committed, but the international community as a whole. Therefore the need for a universal age of responsibility for international crimes is of importance to us all. Without a universal age of criminal responsibility the effective disposition of the potential liability of a child soldier for the commission of international crimes becomes a tedious difficult act.

In light of the above a universal age of criminal responsibility is required, as was the case with the SCSL. Thereafter an assessment of each child that complies with that age should be undertaken so as to determine that child’s degree of potential liability. It is important to establish

⁴⁹ Fallah K, “Perpetrator and Victims: Prosecuting Children for the Commission of War Crimes,” *A.J.I.C.L* 2006 14(1), at 91.

⁵⁰ Davidson A, “Child Soldier: No Longer a Minor Incident,” 12 *Willamette Journal of International Law and Dispute Resolution*, (2004) 124, at 134.

⁵¹ Fallah K, 2006, at 91.

whether that particular child holds the requisite moral and psychological components of criminal responsibility. The question to be asked is “whether that child by virtue of his or her individual discernment and understanding can be held responsible for essentially antisocial behaviour.”⁵²

2.3.2 DO CHILDREN POSSESS THE REQUISITE *MENS REA* TO BE HELD CRIMINALLY LIABLE

The elements of culpability and intent as regards international crimes are best illustrated by the case of *Prosecutor v Dusko Tadic*.⁵³ In regards to culpability the appeals chamber held the position that a person may only be deemed accountable if he entertains a frame of mind that involves, expresses or implies his mental participation in the offence.⁵⁴ As international crimes are the most exceptional serious offences it is only right that the requirement of *mens rea* is placed much higher than the standard for normal crimes.

The Convention on the Prevention and Punishment of the Crime of Genocide places a positive obligation upon the prosecution to prove a specific intent “to destroy in whole or in part a national, ethnical, racial or religious group as such.”⁵⁵ Article 85(3) and (4) of the First Additional Protocol to the Geneva Conventions goes further in criminalising a whole list of violations. The important thing to note is that all these violations must take place “wilfully.”⁵⁶ The general rule then appears to be that for anyone whether it is a child soldier or adult perpetrator to be

⁵² Davison A, 2004, at 151.

⁵³ Case No, IT-94-1-A (15 July 1999).

⁵⁴ Cassese A, *International Criminal Law*, 2003, at 137.

⁵⁵ Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide, adopted 9 December 1948, UN GA Res 260 (III) A.

⁵⁶ Article 85(3) and (4) specifically uses the term wilfully to indicate that for one to be held criminally liable for the commission of one of the listed offences, at the time of commission he must have been aware of his actions and acted with intent.

convicted of a crime against humanity his crime or violation must take place knowingly and with an understanding of the broader context in which he acts.

The difficulty appears in having to prove this specific intent and knowledge. This task is taxing in the case of adult offenders but even more so with child offenders. Most children do not have the intention to commit many of the international crimes they commit in times of conflict. In fact, many will attest to the fact that they did not understand what they did or for what purpose.⁵⁷ Regardless of whether these children are forcibly recruited or join the armed forces voluntarily out of fear or poverty, they are left with no choice but to commit such crimes in order to survive.

As war crimes are drastically more serious than domestic crimes, a higher standard of culpability is required.⁵⁸ One therefore has to ask if it is truly possible to expect a child that was most likely forcibly recruited at a young age, and now acts out of fear to understand the broader context of his actions. If that child does not understand the consequences of his actions he cannot possibly be found to have the requisite *mens rea* to be held accountable.

2.3.3 IS IT POSSIBLE TO VIEW CHILD SOLDIERS AS VOLUNTEERS?

There is room in the *status quo* to argue that children who voluntarily join the armed forces and later commit crimes should in some way be held to a higher degree of culpability than those who are forcefully

⁵⁷ "Sierra Leone rebels Forcefully Recruit Child Soldiers," May 2000 available at www.hrw.org/english/docs/2000/05/31/sierra505.htm accessed 3 February 2014. Abubakar a 17 year old RUF child soldier tells of how it was not his wish to fight but because they had captured him and forced him he had no choice. "There was no use arguing with them because in the RUF if you argue with any commander they will kill you" he says.

⁵⁸ Davison A, 2004, at 153.

recruited. This view is however flawed as a child soldier can never truly be regarded as a voluntary recruit. As Happold states most children are either too poor or too scared that they have no choice but to join the armed forces to gain some form of security and money. Their recruitment is therefore never truly voluntary.⁵⁹ This view is also shared by Amnesty International who has stated that it is troubling to label any person under the age of 18 as a voluntary recruit.⁶⁰

The Optional Protocol to the Convention on the Rights of the Child⁶¹ puts in place certain safeguards in terms of Article 3.3 in an attempt to ensure that recruitment truly is voluntary. It requires an underage recruit to provide proof of certain factors such as his age and parental consent. The Optional Protocol is however flawed in the sense that it only makes provision for the voluntary recruitment of underage soldiers to state forces and specifically places a positive duty upon state parties to prove such recruitment is truly voluntary. Most child soldiers though, do not fight for the state's armed forces but rather for militant rebel groups that do not care much for international laws and child rights as was the case in Sierra Leone. Many of the children in rebel groups that have signed up "voluntarily" do so out of a sheer need to survive.⁶² Due to factors

⁵⁹ "Forgotten Fighters: Child Soldiers in Angola," April 2003, at www.hrw.org/reports/2003/angola0403 accessed 3 February 2014. Although some children may initially volunteer they soon realise that the penalties for desertion are severe and may include death. Jao F tells of how they all had to participate in the execution of those who tried to escape even if that person was a family member.

⁶⁰ Amnesty International, *Child Soldiers: Criminals or Victims*, AI Index IQR 50/02/00 (22 December 2000).

⁶¹ General Assembly Resolution A/RES54/263 of 25 May 2000.

⁶² Crawford A, *Child War Criminals: Is It Possible to Prevent Child Soldiers Being Held Criminally Responsible for War Crimes Whilst Also Satisfying the Right to Justice in Sierra Leone*, 2001, at 156. Crawford cites that though the decision to join the armed forces may appear voluntary at first there are various factors which leave a child with no choice but to volunteer. The line between voluntary and forced recruitments is imprecise and ambiguous. The economic situation of child soldiers plays a vital role in their decision to join the armed forces, as many child soldiers are from extremely poor and disadvantaged sectors of society. Crawford goes

such as poverty, low employment prospects, and a lack of education, many of these children have no choice but to take up arms. It is for this reason that I believe that one cannot suggest that a child who “voluntarily” joined the armed forces did so with criminal intent.⁶³

2.4 PRACTICAL AND PROCEDURAL DIFFICULTIES IN PROSECUTING CHILD SOLDIERS

If a child is to be prosecuted for an international crime it is important to ensure that the rights of the child are at all times safeguarded. We should not have a situation where child soldiers are brought to justice at the expense of their rights. The first obstacle we encounter in regards to the prosecution of child soldiers comes in the form of Article 26 of the Rome Statute which states that the ICC “shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime.”⁶⁴ This leaves child soldiers open to prosecution in national courts, in terms of the international law duty on states to prosecute. In most cases, especially with war torn countries like the Democratic Republic of Congo (hereafter referred to as the DRC,) there is a lack of resources to ensure the rights of the accused child are

further to cite that this extreme poverty was especially apparent in Sierra Leone as child soldiers displayed a sense of pride in their new material possessions.

⁶³ Crawford A, 2001, at 147. An ex SLA combatant aged 17 tells of how he liked it in the army because he could do anything he wanted. If a civilian had something he liked he would just take it and the civilian would not try to stop him. This in particular shows how his poverty fuelled his decision to join the armed forces.

⁶⁴ Article 26 of the Rome Statute of the International Criminal Court 17 July 1998 UN Doc A/CONF.183/9.

protected as they would have been if prosecuted at the ICC. In fact the judicial systems in most war torn countries need to be rebuilt before they can adequately enforce international standards of juvenile justice.⁶⁵

One of the most fundamental rights of the child that appears to be overlooked during prosecution at national court level is the requirement that juvenile offenders be detained separately from adult offenders. This requirement, as set out in Article 37(c) of The CRC,⁶⁶ is one of the most fundamental requirements regarding international juvenile justice. International law views this requirement as so fundamental that it is repeated in the International Covenant on Civil and Political Rights and the Beijing Rules.⁶⁷ Despite this grand body of international law, Human Rights Watch reports that it is not common practice that children accused of war crimes are separated from adult offenders.⁶⁸ In fact, even in a first world country such as the United States of America where there is no shortage of resources to ensure the rights of the child are guaranteed, a right as simple as the separation of child offenders was violated as illustrated in the case of Omar Khadr. At the age of 16 Khadr was detained in Guantanamo Bay at Camp Delta along with the adult population.⁶⁹ He was charged with murder, attempted murder, conspiring with Al Qaeda, providing material support for terrorism and spying on U.S. forces.⁷⁰ Khadr was kept in a 6 by 8 foot cell while he was short shackled (wrists and ankles tied together and bolted to the floor), his lights were kept on 24 hours a day and he had a bag placed

⁶⁵ Cassese A, 2003, at 534.

⁶⁶ Convention on the Rights of the Child 20 November 1989.

⁶⁷ International Covenant on Civil and Political Rights 16 December 1966. Article 10(2)(b) of the Covenant states that juveniles are to be separated from adults and brought to trial as speedily as possible. Article 17 of the Beijing Rules states that in the case of juveniles they are to be presumed innocent and detention is to be avoided unless absolutely necessary.

⁶⁸ Human Rights Watch, *Lasting Wounds: Consequences of War and Genocide on Rwanda's Children*, March 2003, at 35.

⁶⁹ Jamison M, "Detention of Juvenile Enemy Combatants at Guantanamo Bay: The Special Concerns of Children," *UC Davis Journal of Juvenile Law and Policy*, 2005, at 139.

⁷⁰ Jamison M, 2005, at 139.

over his head and he was continually threatened with rape.⁷¹ These are extreme violations of Khadr's rights and it is unlikely that even the most hardened of criminals would endure such ill treatment.

It is my contention that in cases such as with Khadr the violation of the rights of the child offender was not due to a lack of resources as is the case in most war torn African countries but rather to political motives and the lack of a larger international monitoring body to ensure such rights are protected. As previously shown the ICC has no jurisdiction over offenders who were under the age of 18 at the time of the alleged crimes therefore a state is essentially left to its own devices to deal with child offenders.⁷² As seen with Khadr even though there is no shortage of resources in the USA as with most war torn African countries, they were still ill equipped to deal with the child offenders alleged to have committed atrocious violations of international humanitarian law. It therefore appears highly unlikely that a war torn African country will be able to effectively rehabilitate and reintegrate former child soldiers without assistance from a larger organ such as the ICC.

Another hurdle faced when prosecuting children for international crimes by national courts is the disregard for international norms regarding the sentencing of children. Article 40 of the CRC provides that rehabilitation should be the main focus of any court order made against a child offender. The CRC along with the Beijing Rules prescribe that detention be a last resort when sentencing child offenders.⁷³ The reality though appears to be that many states would sooner detain child offenders than offer rehabilitation and guidance to child offenders. A prime example of this is the case of Rwanda where in 1994 thousands of child offenders below the age of 14 were detained and almost a decade later they were

⁷¹ Jamison M, 2005, at 141.

⁷² Article 26 of the Rome Statute states that the ICC does not have the jurisdiction to prosecute those who were under the age of 18 at the time of the commission of the offence. The national duty of states to prosecute though is still present and many states do not have a refined juvenile law system, particularly war torn African states.

⁷³ Article 17 of The Beijing Rules.

still detained awaiting trial.⁷⁴ These children were only released by the Government in 2001 as young adults with no rehabilitation provided, nor were there any attempts made to reintegrate these now adults back in to their communities.⁷⁵ The Gacca courts found more success in Rwanda. These courts were a method of transitional justice and focused on healing and moving forward from the atrocities of the genocide.⁷⁶ In light of the success of the Gacca courts as compared to the traditional court system in this mini dissertation I will specifically propose that restorative justice should be used as the primary means in which to promote the rehabilitation and reintegration of former child soldiers.⁷⁷

International law principles also appear to be ignored when sentencing child offenders, particularly when it comes to the prohibition on the imposition of the death penalty. This principle is so fundamental that there is an array of international law documents that absolutely prohibits the pronouncement of the death penalty on persons who were below the age of 18 at the time the offence was committed.⁷⁸ The imposition of the death penalty on child offenders is in fact a breach of customary international law.⁷⁹ It is important to note that United Nations courts or tribunals such as the ICC and the SCSL do not have the jurisdiction to impose the death penalty. In terms of the national court system though the imposition of the death penalty is deemed a just sentence in so far as it is permitted in terms of the national law of that particular state.⁸⁰

⁷⁴ Human Rights Watch, 2003, at 18.

⁷⁵ Human Rights Watch, 2003, at 18.

⁷⁶ Human Rights Watch, 2003, at 19.

⁷⁷ A discussion of restorative justice can be found in chapter 3.

⁷⁸ Article 68(4) of the Fourth Geneva Convention, Article 77(5) of the First Additional Protocol, Article 6(4) of the Second Additional Protocol, Article 6(5) of the International Covenant on Civil and Political Rights and Article 37(a) of the Convention on the Rights of the Child.

⁷⁹ Human Rights Committee, General Comment 24 on Reservations to The International Covenant on Civil and Political Rights, UN doc CCPR/C/21/Rev1/Add6 at (9) 4 November 1994.

⁸⁰ Should the minimum age of responsibility be set at 15 and a child offender who meets the minimum age is found guilty then such a child may be subject to the death penalty as was shown in the DRC.

Therefore if tried by an international body the child offender's right to life is always guaranteed unlike in the case of a trial by a national court. Many child soldiers though are in reality sentenced to death when tried by national courts as per Amnesty International reports. Amnesty International reports of a 17 year old, Nanasi Koala who was sentenced to death in the DRC.⁸¹ This was a trial conducted by a closed military court with no right of appeal and where the norm was for execution to take place within hours or even days after trial.⁸² It is worrying that a child who may not essentially have possessed the requisite *mens rea* at the time of the commission of the crime be faced with death for committing crimes that he was most likely forced or coerced into.

2.5 THE POSSIBLE DEFENCES AVAILABLE TO CHILD SOLDIERS IN THE EVENT OF PROSECUTION

In spite of the uncertainty regarding a universal age of criminal responsibility, a child soldier may be found to be criminally liable. In the case of Sierra Leone the SCSL stated that it would not have jurisdiction over persons who were below the age of 15 at the time of the commission of the offence.⁸³ This therefore means that child soldiers were criminally liable for war crimes committed from the age of 15 and

⁸¹ Amnesty International, Worldwide Appeal-Democratic Republic of Congo: Child Soldier Condemned to Death, November 2001, available at www.amnesty.org/es/library/asset/NWS21/009/2001/es/29ff039a-d8c8-11dd-ad8c-f3d4445c118e/nws210092001en.html accessed 7 April 2013.

⁸² Amnesty International, November 2001, available at www.amnesty.org/es/library/asset/NWS21/009/2001/es/29ff039a-d8c8-11dd-ad8c-f3d4445c118e/nws210092001en.html accessed 7 April 2013.

⁸³ Article 7(1) Statute of the Special Court of Sierra Leone.

there is therefore a duty present to prosecute child offenders for such crimes.

In the event that prosecution does take place there are various grounds available to former child soldiers that may exclude criminal responsibility, namely duress, intoxication and the defence of superior orders. Even though the focus of this mini dissertation is to place restorative justice central in regards to a former child soldier's potential liability a discussion of these various defences is particularly important as well. As I have shown many child soldiers are still prosecuted by national courts and this chapter aims to showcase the pitfalls of the current international legal standards. Former child soldiers facing prosecution will have to avail themselves to these possible defences in order to escape liability or to receive a lighter sentence. The following discussion of the defences available will highlight the pitfalls and inadequacies of the current system. By examining the context in which a child soldier operates will it become evident that a restorative justice approach is the most appropriate way in which to rehabilitate and reintegrate these children back into their communities.

2.5.1 DURESS

As previously discussed a child soldier can never truly be considered a volunteer, therefore former child soldier should be able to make use of the defence of duress in the case of prosecution. Unlike the case of a lack of *mens rea* as I previously discussed, the defence of duress does not mean that the child lacked the mental development to fully comprehend his actions. This defence rather means that at the time of committing the alleged offence the child was fully aware of his actions and the result that would ensue, however he was faced with a threat so imminent and unavoidable that he was left with no alternative but to act as he did.⁸⁴ The threat of death or personal violence must be so great so

⁸⁴ Happold M, *Child Soldiers in International Law*, 2005 at 154.

as to overpower ordinary human resistance and should be seen as a justification to commit acts which the person views as criminal.⁸⁵

It is important to note that even though a child may be forcibly recruited it does not automatically avail that child to the defence of duress as he may still go on to commit international crimes without any direction or threats from his superiors.⁸⁶ It was shown that courts interpret the defence of duress very narrowly in the ICTY appeals chamber case of Erdemovic.⁸⁷ Erdemovic was threatened with death when he initially refused to kill Muslim men from the Srebrenica area, fearing for his life he obeyed the orders given to him. The court found Erdemovic to be criminally liable as it interpreted duress in a narrow manner.⁸⁸ The case was highly criticised and for good reason as the court essentially found that to escape criminal liability Erdemovic had to choose death, which is a direct contradiction to the basic human survival instinct. Even though Erdemovic was not a child soldier the important principle that comes to light in this case is that the courts are more likely to interpret duress very narrowly and view duress as a mitigating factor in sentencing as opposed to a defence against criminal liability.⁸⁹ This indicates that there would have to be exceptional circumstances present for a court to grant a child soldier the defence of duress as a means to escape criminal liability.

2.5.2 INTOXICATION

⁸⁵ Happold M 2005 at 155.

⁸⁶ Fallah K A.J.I.C.L 2006 14 (1) at 93.

⁸⁷ Prosecutor v Brazen Eudemonic (Pelican Farm) case no IT-96-22-A (7 October 1997) (Eudemonic Appeal).

⁸⁸ Happold M, 2005 at 155.

⁸⁹ Happold M, 2005 at 155.

It is common for child soldiers to be plied with drugs and alcohol, particularly before battle, so as to lessen their fears and inhibitions.⁹⁰ An argument therefore exists that if such substances left them unable to fully comprehend the consequences of their actions or control themselves then they should not be held liable for such crimes.⁹¹

This defence of intoxication in international law can be found in the Rome Statute in terms of Article 31 which states that:

A person shall not be criminally responsible if at the time of that persons conduct:

(b) the person is in a state of intoxication that destroys that person's 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 the 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...

According to the Rome Statute it therefore means that a child that was forced or coerced into taking drugs or alcohol to the point where he was so intoxicated he could not fully appreciate the consequences of his

⁹⁰ Happold M, 2005 at 159, and Crawford A 2001 at 158. Crawford gives the example of 16 year old Sayo who states that if one refuses to take drugs it is referred to as technical sabotage and results in that child being killed. Therefore even though some children voluntarily take drugs so as to enable them to fight in most cases it is done so under extreme duress.

⁹¹ "Getting Away with Murder, Mutilation, Rape: New Testimony from Sierra Leone," July 1999, available at www.hrw.org/reports/1999/sierra/index.htm accessed 3 February 2014. 16 year old Lynette from Sierra Leone recalls how they drugged her from the first day, "they showed me some powder and said it was cocaine and was called brown - brown." They would out it in her food and she states how she felt "dizzy" and "crazy" after eating.

action will likely escape criminal liability in terms of this defence.⁹² The intoxication must be so great that it negates *mens rea* which can be quite easily proved in the case of children.

The Rome statute however makes it very clear that voluntary intoxication will not lead to one being able to escape criminal liability. If a child soldier knowingly, and willingly, takes drugs and alcohol to result in intoxication so as to ease his guilt, he will then not escape criminal liability.⁹³ In my opinion it is essential that this safeguard was put in place as without it many offenders, even adult offenders would undeservedly escape criminal liability on the basis of intoxication. It stands to reason that should a person knowingly cause himself to become intoxicated so as to enable him to perform some unlawful act he should be held criminally liable as he possessed the required mental capacity at the time. This therefore means that many child soldiers would not be able to avail themselves to this defence as after months of being fed drugs many of these children become addicted. They willingly turn to drugs so as to enable them to perform the various crimes they are ordered to and as I have shown voluntary intoxication does not enjoy the benefit of this defence.

2.5.3 THE DOCTRINE OF SUPERIOR ORDERS

The defence of superior orders is closely linked to that of duress. Amnesty International makes the argument that child soldiers should not

⁹² Crawford A, 2001 at 158, Komba a 15 year old former child soldier from Sierra Leone attests to how his legs were cut and cocaine was rubbed in to his wounds. He goes on to say that afterwards he felt like a big person who saw everyone else as chickens and rats he wanted to kill. This is a clear example of intoxication so great that the child soldier is unable to appreciate the consequences of his actions. He does not even see his victims as human but rather as rats and chickens that must be killed.

⁹³ Crawford A, 2001 at 158 states that the suppression of one's fear is not synonymous with incapacity to understand ones actions as shown in the case of 16 year old Ibrahim who stated that after sniffing cocaine he was not afraid of anything.

be held responsible for international crimes as they were acting under the instructions of a superior order and most likely duress.⁹⁴

In terms of the superior orders doctrine an individual is held responsible on the basis of a relationship between that individual and his or her subordinates who are or have committed crimes.⁹⁵ This would mean that a child soldier may escape liability for certain crimes if it can be proved it was committed under superior orders. Liability would thereafter fall upon his superior who gave the order. This doctrine is limited and only applies to where an individual omits to exercise proper supervision and control over his subordinates.

At international law level it appears that if a superior order to commit an international crime is given without threat to life or limb, then the subordinate is under a duty to refuse to obey such an order.⁹⁶ If however, after the refusal to obey such an order, a threat against the subordinate's life is made, then it would seem more likely the defence of duress would be raised which would then render the defence of superior orders void.⁹⁷ Article 6(4) of the ICTR Statute and Article 7(4) of the ICTY Statute provides that acting in accordance with a superior order is rather a mitigating factor with regards to sentencing as opposed to a complete defence against criminal liability.⁹⁸ A child soldier would therefore more likely find that the defence of duress even though it has been interpreted narrowly by the courts, would offer them more relief than a defence of superior orders.

In terms of the current international law the defences discussed appear to essentially serve as a mitigating factor in the sentencing of former child soldiers rather than defences to exclude their criminal liability. The

⁹⁴ Amnesty International, *Child Soldiers: Criminals or Victims?* AI Index IQRm 50/02/00 December 2000.

⁹⁵ Du Plessis M, *"African Guide to International Criminal Justice"* 2008 at 145.

⁹⁶ Cassese A (2003) at 246.

⁹⁷ Cassese A (2003) at 246.

⁹⁸ Fallah K A.J.I.C.L 2006 14 (1) at 93.

exception to this is with regards to intoxication, but this goes only as far as it negates the *mens rea* element. The current legal framework for prosecuting child soldiers therefore clearly falls short Children's rights are either disregarded all together or these children are never prosecuted due to a lack of jurisdiction and therefore offered blanket immunity against their crimes. Issues such as the rehabilitation and reintegration of former child soldiers are given very little attention in terms of the *status quo*. In the next chapter I will illustrate how restorative justice is capable of balancing both the rights of the child soldier and the rights of war victims while still encouraging the effective rehabilitation and reintegration of these children.

CHAPTER 3

FINDING A BALANCE BETWEEN THE RIGHTS OF THE CHILD TO PROTECTION AND THE RIGHTS OF THE VICTIM TO JUSTICE

3.1 THE RIGHT TO JUSTICE

A victim's right to justice entails the right of a victim to a fair and effective remedy. This implies that a victim should be afforded the opportunity to assert his rights and receive a fair and effective remedy, by ensuring his oppressors stand trial and by receiving compensation for any loss suffered.⁹⁹ This definition of justice indicates that justice entails two distinct elements, one punitive and the other reparative.

The punitive aspect of justice entails a victim's right to see his perpetrators stand trial for the crimes they committed against him.¹⁰⁰ This includes various obligations such as the state's duty to prosecute, which I discussed in Chapter 2, as well as the duty to punish the perpetrator once guilt has been established. This punitive aspect of justice essentially entails the victim's right to have his perpetrator prosecuted and thereafter punished.¹⁰¹ The second aspect of justice is a victim's right to reparations. The aspect of reparations is often overlooked in the traditional criminal justice model of prosecution, and

⁹⁹ Crawford A, 2001 at 177.

¹⁰⁰ Crawford A, 2001 at 177.

¹⁰¹ Crawford A, 2001 at 177.

this is essentially an action taken to enable the victim to cope with the consequences of the crime committed against him. The Attorney General and Minister of Justice in Sierra Leone, Solomon Berewa, sums up the concept of justice by stating that justice implies trying to make some form of amends for some wrong done to the victim.¹⁰² This right to reparation should actually be seen as an umbrella term which encompasses various principles including restitution, compensation and rehabilitation.¹⁰³

In terms of the above definition of justice it therefore becomes evident that both the punitive and reparative elements are essential and if both are not satisfied the victim may feel that justice has not been served.¹⁰⁴ In the context of child soldiers this can best be illustrated by a simple example which appears common in Amnesty International reports. If say a child soldier amputates a villager's arms or legs and thereafter destroys that villager's home. In the event of prosecution of that particular child the victimised villager may feel that justice has not been done as he is still homeless and has received no compensation or medical rehabilitation for the loss of his limbs. By the same token, should the villager only receive monetary compensation without there being any attempt to hold the particular child liable he may still feel aggrieved and that justice has not been served.

Many of the crimes perpetrated by child soldiers are viewed by the general public as savage and infringe so greatly upon their victims that true justice would be impossible without satisfying both the punitive and reparative elements of justice. Former child soldier Mohammed Kamara reports of how he cut off his victims hands and killed them, or he would cut off their ears and force his victims to eat their own ears instead of killing them. He attests to how his victims simply obeyed because he

¹⁰² Hazley F & Abu A, Dialogue On Justice And Reconciliation In Paying The Price. Sierra Leone Peace Process, Accord, Conciliation Resources 2000 at 1.

¹⁰³ Crawford A, 2001 at 176.

¹⁰⁴ Crawford A, 2001 at 178.

had a gun and they were scared.¹⁰⁵ This story is evidence of the fact that many of the crimes committed by these children go beyond the physical. There is an emotional element of hurt that the victims feel that can only be addressed by satisfying the reparative element of justice. This will also allow for the successful reintegration of the former child soldier back in to the same community as his victim.

In this chapter I will argue for a restorative justice model that is able to achieve both these elements without the need to formally prosecute a child soldier for war crimes and thereby leaving such a child prone to being labelled a war criminal.¹⁰⁶ I will argue for a model whereby both the victim and the perpetrator may live together in the same community once hostilities have ceased. There is a vast body of work on the concept of restorative justice *in re* juvenile justice; however it does not appear as if this is the “go to” option in regards to the disposition of possible liability of child soldiers for war crimes.¹⁰⁷ In this chapter I will illustrate how restorative justice is the method best suited for the determination of the potential degree of liability of child soldiers. I will begin by firstly defining and exploring the general concept of restorative justice and thereafter I will illustrate how this concept can be implemented so as to best rehabilitate and reintegrate former child soldiers back in to their communities while still satisfying the right to justice.

3.2 WHAT IS RESTORATIVE JUSTICE?

¹⁰⁵ Labi N, Families Lost And Found, Times Magazine, Vol 157, No 19, 14 May 2001.

¹⁰⁶ Musila G, 2005, at 325. A formal trial in which a child soldier is thereafter deemed a war criminal negatively impacts that child’s status as a refugee as persons who are deemed war criminals cannot be granted refugee status.

¹⁰⁷ Some of the most prominent writers in the field of restorative justice *in re* juvenile justice that I came across during my research include Skelton A, Honwana A, Happold M, Arts K, and Crawford A.

Restorative justice essentially seeks to take into consideration the interests of all parties involved in a criminal prosecution. In the instance of the prosecution of child soldiers this would be the interests of the international community, the interests of the victim and the child soldier who committed the crimes.¹⁰⁸

Ann Skelton puts forward Marshall's definition of restorative justice as the most widely accepted and restorative justice is defined as "a process whereby all parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of an offence and its implications for the future."¹⁰⁹ Many of the international crimes committed by child soldiers are more than just a mere violation of criminal law or authority, these crimes result in a disruption in the lives of the victim, the offender and the community at large.¹¹⁰

Another important aspect of the Marshall definition as pointed out by Skelton is that it is both backward and forward looking.¹¹¹ The definition put forward by Marshall makes note of attempts to deal with the aftermath of the offence and the further implications of the offence for the future.¹¹² To a certain extent there is a crime prevention element present in restorative justice as an effort is made to identify how future incidents may be prevented. In the traditional criminal justice system of prosecution this is rarely the case as the aim of imprisonment is primarily to incapacitate the offender and not to rehabilitate him so as to prevent further contraventions of the law once released.¹¹³

¹⁰⁸ Musila G, 2005, at 325.

¹⁰⁹ Marshall T, "The Evolution of Restorative Justice in Britain," *European Journal on Criminal Policy and Research* 1996 at 37.

¹¹⁰ Musila G v 5 No 2, 2005, at 326.

¹¹¹ Skelton A, *The Influence of the Theory and Practice of Restorative Justice in South Africa with Special Reference to Child Justice*, 2005 at 15.

¹¹² Skelton A, 2005 at 15.

¹¹³ Skelton A, 2005 at 15.

3.2.1 ELEMENTS OF RESTORATIVE JUSTICE

Even though Marshall's definition is the most widely accepted there is still some difficulty in achieving an ideal definition of restorative justice. This has resulted in many diversion programmes being referred to as restorative justice programmes even though in essence they are not. For this reason some authors have rather opted to identify the elements of restorative justice.¹¹⁴ The four values/ elements of restorative justice that Skelton has identified can be summarised as: encounter, amends, reintegration and inclusion.¹¹⁵ Skelton and Bately argue that without these elements restorative justice appears to be a concept so wide and complex that it defies definition.¹¹⁶ A brief examination of these four main elements of restorative justice is particularly important to this mini dissertation as this mini dissertation does not attempt to conceptualise a new definition of restorative justice but to rather clarify the existing definition as put forward by Marshall and supported by Skelton.

3.2.1.1 ENCOUNTER

Encounter is one of the main pillars of restorative justice and some authors have referred to this element as dialogue.¹¹⁷ With the element of encounter both the victim and offender are given the opportunity to discuss what is important to them. This encounter humanises them to each other and addresses not just the injustice committed but also the future of both parties.¹¹⁸ An encounter allows both the parties to express their emotions about the crime committed. In the traditional adversarial system the victim is not necessarily given the chance to ask the offender

¹¹⁴ Skelton A & Bately M, *Mapping Progress Charting The Future: Restorative Justice In South Africa*, 2006 at 6. Here Skelton and Batley put forth and define the various elements of restorative justice.

¹¹⁵ Van Ness D & Strong K, *Restoring Justice*, 2002 at 58.

¹¹⁶ Skelton A & Bately M, 2006, at 5.

¹¹⁷ Skelton A, 2005, at 19.

¹¹⁸ Skelton A, 2005, at 19.

questions such as “why me” or express his anger or hurt to the perpetrator. By allowing a dialogue between both parties an understanding between them and possibly even agreement may develop.¹¹⁹

In the case of former child soldier Mohammad Kamara who was mentioned above, an encounter in terms of the restorative justice approach would entail that his victims will be given the opportunity to express how they felt having to eat their own ears or having their hands chopped off and of the struggles they now face because of his attack. In turn it also affords Mohammed the right to express his fears and emotions to his victim and offer his victims an explanation as for the reason behind his actions. In fact after an encounter both the victim and perpetrator may empathise with one another and realise that they are actually both victims but in different ways.

3.2.1.2 REPARATION/ AMENDS

This second element of restorative justice places the focus upon repairing the harm caused as opposed to simply handing out punishment to the perpetrator. It involves various elements such as an apology, restitution and changed behaviour on not just the part of the perpetrator but the victim as well. Unlike in the case of the traditional criminal justice model where fines are paid to the state or offenders are imprisoned which essentially offers the victim no tangible benefit, reparation entails the victim receiving direct benefits.¹²⁰ This can be in the form of replacing the property that was destroyed or stolen, the payment of certain monies or the offering of various services to the victim. Child soldiers may not have the financial means to replace all the property they have destroyed, but the simple act of assisting their victims to rebuild their home may offer great emotional relief to the

¹¹⁹ Skelton A, 2005, at 22.

¹²⁰ Skelton A, 2005, at 23.

victim.¹²¹ This also helps the victim and child soldier form a bond that will further facilitate the reintegration of the child soldier in to the community and enable both of them to live in the same community.¹²²

In the traditional criminal justice system after prosecution of the offender, a victim usually has to institute a separate civil claim for reparations.¹²³ With a restorative justice model this divide is done away with and we are left with one process that encompasses all the aspects of justice.¹²⁴ Another important aspect to note is that a restorative justice model goes further in that it not only aims to heal the financial harm caused to the victim but to also attempt to heal the emotional harm that was caused unlike in the criminal justice model which places emphasis on the financial loss suffered. Very little regard is given to the victims feelings unlike in the case of a restorative justice process.¹²⁵

3.2.1.3 REINTEGRATION

In terms of a restorative justice model this refers to the reintegration of both the offender and the victim back into the community as productive persons.¹²⁶ For this to be successful there needs to be a mutual respect and understanding between the offender and the victim. There must be an understanding by the victim in particular and the community of the reasons that caused the child soldier to commit his crimes without condoning the action(s) in question. This step is reached with relative ease once the elements of encounter and reparation have successfully been achieved.¹²⁷

¹²¹ Musila G, 2005, at 327.

¹²² Crawford A, 2001, at 150.

¹²³ Van Ness D & Strong K, 2002 at 60.

¹²⁴ Van Ness D & Strong K, 2002 at 60.

¹²⁵ Skelton A, 2005 at 19.

¹²⁶ Skelton A, 2005 at 20.

¹²⁷ Van Ness D & Strong K 2002 at 70

In the example of a Mohammed Kamara, once he and the victim have successfully met and understood each other and there has been a genuine apology and attempt to repair the harm caused it is easier for Mohammed to be reintegrated in the community as his victim has forgiven him for the harm caused. During the encounter process Mohammed will hopefully realise the gravity and criminality of his actions and this further ensures that this crime is not committed in future as he is now aware of the harm he has caused.¹²⁸

3.2.1.4 INCLUSION/ PARTICIPATION

This is the element that is probably of the most importance to the victims. It offers victims a less formal process where they may participate and express their views and where there is an acknowledgment that each victim's interests are unique and of importance. By including both victim and offender in this process it gives each of them a chance to re-tell their story and express their feelings.¹²⁹

In fact it can be said that this process actually encourages truth telling as opposed to the criminal justice model which inadvertently does the opposite.¹³⁰ In a criminal justice model the victim is not afforded an opportunity to express his views, neither is the offender offered an opportunity to tell his side of the story. The offender is rather left feeling defensive and this may even result in him withholding the truth. A restorative justice model creates a forum where feelings and fears can be vented and questions answered honestly.¹³¹

It is therefore my contention that restorative justice is the ideal forum for dealing with the issue regarding the possible prosecution of child soldiers. In fact it has been acknowledged that African indigenous justice systems contain many elements of restorative justice which has

¹²⁸ Skelton A 2005 at 27.

¹²⁹ Skelton A 2005 at 23.

¹³⁰ Skelton A 2005 at 23.

¹³¹ Skelton A 2005 at 27.

influenced the modern concept of restorative justice.¹³² As many of the current incidents of child soldiering occur in Africa it seems fitting that a process which is similar to the traditional African justice process that would take place should be used.¹³³ The modern criminal justice model is not common in many African traditions and if we are to impose this form of justice upon communities it may result in the rejection of the entire justice process by the community.¹³⁴

3.3 THE RESTORATIVE JUSTICE PROCESS

As discussed above the principle of restorative justice regards the concept of reparation as including, rehabilitation, compensation and restitution. In this section I will analyse these aspects. This section will highlight how restorative justice can satisfy both the victim's need for justice while still respecting the rights of the child.

3.3.1 REHABILITATION

Child soldiers are expected to carry out what is considered to be barbaric acts such as mutilation and gang rape in person as was shown in the case of Sierra Leone.¹³⁵ The victims of child soldiers are left with both physical and emotional scars long after the attacks. The physical

¹³² Skelton A & Bately M 2006 at 8 & 9.

¹³³ "Stolen Children: Abduction and Recruitment in Northern Uganda," March 2003, at www.hrw.org/reports/2003/uganda0303/ accessed 3 February 2014. Susan a 16 year old LRA soldier makes note of the importance of the traditional rites that must take place for her to be forgiven for her crimes. "When I go home I must do some traditional rites because I have killed, I must perform these rites and cleanse myself" she says. This is a prime example of the importance of restorative justice as a restorative justice process allows for the victim and offender to undertake any traditional rites they may feel is necessary.

¹³⁴ Skelton A & Bately M, 2006, at 10.

¹³⁵ Crawford A, 2001 at 184.

scars exist in the case of mutilations and amputations and emotional scars from crimes such as gang rapes.¹³⁶

The rehabilitation of the victims of these child soldiers would essentially involve aspects such as replacing lost limbs and the rehabilitation of these victims is essential for there to be a sense that justice has been served.¹³⁷ However there is very little that these children can offer their victims in the form of physical rehabilitation. These children cannot give their victims back their lost limbs or teach them how to cope with the loss of their limbs. When it comes to the issue of rehabilitation of the victims, child soldiers take on a more indirect role. By apologising and admitting to their crimes and furthermore undertaking whatever traditional rites that may be deemed necessary by the victim and community, child soldiers offer their victims some form of emotional rehabilitation. In many instances victims feel this apology by the child soldier is of greater relief than any other rehabilitation effort made by NGO's and IGO's.¹³⁸ Amnesty International reports indicate that villagers feel they will be able to forgive former child soldiers if they offer a genuine apology for the harm they have caused them.¹³⁹

3.3.2 COMPENSATION

This aspect entails the paying of monies to victims for any physical and mental injury they have suffered, physical damage and any lost opportunities.¹⁴⁰ The principle of the offender compensating his victims for loss he may have caused becomes particularly problematic in the area of child soldiers. If former child soldiers are to be held directly responsible for compensating all their victims they would be left with

¹³⁶ Crawford A, 2001 at 184.

¹³⁷ Crawford A, 2001 at 184.

¹³⁸ Crawford A, 2001 at 184.

¹³⁹ Crawford A, 2001 at 184.

¹⁴⁰ Crawford A, 2001 at 185.

quite a substantial bill to pay which is a task they realistically would not be able to undertake.¹⁴¹ As I had previously mentioned in Chapter 2 there are child soldiers who “voluntarily” join the armed forces as a means to end their poverty.¹⁴² It is therefore unlikely that such a child would now have the resources at his disposal to compensate his victims. In fact many of the African countries where the scourge of child soldiering is rife are plagued with unimaginable poverty. A prime example is the case of Sierra Leone where the UNDP lists Sierra Leone as one of the poorest countries in the world.¹⁴³

Not only is it unrealistic to expect child soldiers to compensate their victims, but it would also seem that it is quite an impossible prospect to expect the governments of these countries to find the funds for such an ambitious aim.¹⁴⁴ I therefore find that Crawford’s assertion that the issue of compensation in the case of the victims of child soldiers should essentially be ruled out to be correct. The injuries suffered by these victims are in most cases so severe that no form of monetary compensation could truly compensate them for their loss.¹⁴⁵ This, coupled with the strained financial landscape that plagues most war torn

¹⁴¹ Crawford A, 2001 at 185.

¹⁴² There are also those who join the armed forces due to a sense of injustice or grievance. John Hart reports of the young people in the Occupied Palestinian territories whose political consciousness is so developed from such a young age that they willingly join the armed forces. However it is unlikely that these children even though not motivated by poverty would have the means to financially compensate their victims. See Arts K & Popovski V, *International Criminal Accountability and The Rights Of Children*, 2006, at 99.

¹⁴³ UNDP Human Development Report, Human Development Index available at www.undp.org accessed July 2013. The report also places the median age in Sierra Leone as 17.5 years. Sierra Leone’s very young population is yet another factor which perpetuates the poverty.

¹⁴⁴ Crawford A, 2001, at 185.

¹⁴⁵ Crawford A, 2005 at 147, makes reference to a 14 year old former child soldier who earned himself the nickname of Nasty Killer on account of the ways in which he used to murder and mutilates the rebels captured by his troops. It becomes an impossibly difficult task to ascertain a sum of money that would truly compensate on of this former child soldiers victims for both the physical and emotional damage suffered.

African countries, makes compensation an almost impossible feat without financial assistance from the international community.

3.3.3 RESTITUTION

Restitution simply defined is the restoration of the victim to his pre crime state, and the various methods of restitution are all dependant on the particular crime, victim and context.¹⁴⁶ Unlike in the case of compensation and rehabilitation children are given the opportunity to take a direct part in the aspect of restitution.¹⁴⁷ By including children in the Truth and Reconciliation Commission (hereafter referred to as the TRC) process it provides them with a forum to restore some of the aspects which their crimes have taken from their victims.¹⁴⁸

The truth telling process is essential and allows victims to recover their sense of human dignity and self-respect in the aftermath of a gross violation of their human rights.¹⁴⁹ This is closely related to the idea of rehabilitation and encounter as without encounter there can be no rehabilitation and for a victim to feel restitution has taken place there must be some form of rehabilitation.

The restorative justice principle advocates for not only the restitution and rehabilitation of victims but also of former child soldiers. In the case of child soldiers this is primarily done through the disarmament, demobilisation and reintegration process. The DDR process finds particular success when undertaken within a restorative justice paradigm. It is essential to discuss DDR as it is a key component of peace building according to the United Nations.

¹⁴⁶ Crawford A, 2001, at 185.

¹⁴⁷ Crawford A, 2001, at 186.

¹⁴⁸ Crawford A, 2001, at 185.

¹⁴⁹ Crawford A, 2001, at 186.

3.4 DISARMAMENT DEMOBILISATION AND REINTEGRATION UNDER A RESTORATIVE JUSTICE MODEL

The process of disarmament, demobilisation and reintegration (hereafter referred to as DDR) is essentially a peace building strategy and involves the disbanding of former combatants and reintegrating them back in to society as functional productive citizens. The DDR process is an essential element to both the initial stabilisation of war torn areas as well as for their long term development.¹⁵⁰ As with restorative justice there is an element of DDR that is forward looking. The UN states that DDR is essential to the long term development of war torn countries.

The DDR process is mentioned in the CRC where it is required of states to take all appropriate measures to promote recovery and reintegration.¹⁵¹ This obligation is further bolstered by the Optional Protocol which obliges states to take all feasible measures to ensure demobilisation and provide appropriate rehabilitation and reintegration when necessary.¹⁵²

DDR consists of the 3 distinct stages according to the UN.¹⁵³ The first being disarmament, which involves the collection, documentation control and disposal of small arms, ammunition, explosives and light and heavy weapons from combatants.¹⁵⁴ This first step essentially involves separating the child soldier from his weapon. This may seem like a

¹⁵⁰ DDR is given special reference to in terms of Article 7(2) of The Statute of the Special Court for Sierra Leone, which illustrates how vital this component is even in the event where there is the possibility of the prosecution of juvenile offenders.

¹⁵¹ Article 39 of the CRC 1990.

¹⁵² Article 6 of the Optional Protocol to the CRC 2002.

¹⁵³ See www.un.org/en/peacekeeping/issues/ddr.shtml

¹⁵⁴ See www.un.org/en/peacekeeping/issues/ddr.shtml

relatively simple task but in a country ravaged by war many of these child soldiers begin to equate their weapons to their only form of protection and therefore an extension of themselves.¹⁵⁵ Many child soldiers may therefore be reluctant to give up their arms especially if they are faced with the possibility of a criminal trial which may result in their imprisonment or the imposition of the death sentence.

The second stage, demobilisation, involves physically separating the child from the armed forces.¹⁵⁶ The UN defines demobilisation as the formal and controlled discharge of active combatants from the armed forces and groups.¹⁵⁷ Once the conflict has come to an end and the area stabilised this is a relatively simple task to undertake.

The third and final stage is that of reintegration. Reintegration is the process whereby ex-combatants acquire civilian status and find sustainable employment. This is a political socio economic process that primarily takes place at a local community level.¹⁵⁸ This stage of reintegration in the case of a child soldiers would be the reconnecting of a child back to his family and community.¹⁵⁹ Reintegration of the child back in to the community and his family is also an important aspect that is best dealt with in terms of a restorative justice process.

The DDR process contributes to both the stability and security in post conflict areas and creates an environment that allows for the political and peace process to take place. Many child protection agencies (hereafter referred to as CPA's) have argued that the threat of criminal prosecution of child soldiers places the DDR process in jeopardy.¹⁶⁰ The threat of prosecution therefore deters those who are still in the armed

¹⁵⁵ Humphrey T, "Child Soldiers: Rescuing the Lost Childhood", *Australian Journal of Human Rights* Vol 13 (1) 2007.

¹⁵⁶ Crawford A, 2001, at 152.

¹⁵⁷ See www.un.org/en/peacekeeping/issues/ddr.shtml.

¹⁵⁸ See www.un.org/en/peacekeeping/issues/ddr.shtml.

¹⁵⁹ Crawford A, 2001, at 152.

¹⁶⁰ Crawford A, 2001, at 152.

factions to demobilise as child protection agencies have pointed out that rebel commanders use distorted information about prosecution to keep these children in the army and under their control.¹⁶¹ CPA's have also pointed out that by prosecuting former child soldiers we stigmatise these children as criminals and therefore this makes the process of reintegration challenging as many families and communities therefore do not accept these children back.

As discussed previously restorative justice is forward looking and like DDR it aims to create an environment whereby both the perpetrator and victim may understand each other and therefore live together in the same community. It is simply not pragmatic to prevent child soldiers from being held liable for their acts. This was pointed out in the case of Sierra Leone where an attempt was made to hold children over 15 accountable as there was a fear that if these children were offered blanket immunity there would be an outright rejection of the peace process. If children are to be held liable to some degree in terms of a restorative justice process it therefore makes the transition to DDR process smoother.

The DDR process would find more success I believe when undertaken under a broader restorative justice process. As a restorative justice process would essentially do away with the traditional criminal prosecution model it therefore alleviates the child soldier's fears of being labelled a war criminal, and the child is therefore more likely to be willing to undergo the DDR process. A former child soldier that has had his liability disposed of in terms of a restorative justice process and who thereafter undergoes DDR is more likely to be rehabilitated and reintegrated with ease. Children who are subjected to the traditional criminal justice system are likely to never receive any form of rehabilitation as was shown earlier in the case of Rwanda.

¹⁶¹ Save The Children UK, Submission by Save the Children UK on the Draft Statute of the Special Court for Sierra Leone, No Date Given, Available at www.savethechildren.org at Page 3.

3.5 THE HYBRID SYSTEM THAT WAS USED IN SIERRA LEONE AND THE USE OF TRUTH AND RECONCILIATION COMMISSIONS AS AN ALTERNATIVE TO PROSECUTION OF CHILD SOLDIERS

The question of the minimum age of criminal responsibility and whether to prosecute child soldiers for their crimes took centre stage in the drafting of the Statute of the Special Court for Sierra Leone (SCSL). The previous statutes drawn up for other international tribunals such as the ICTY and the ICTR did not make provisions regarding the age of criminal responsibility.¹⁶² This issue was unavoidable in the case of Sierra Leone due to the record number of child soldiers involved in the conflict. These children who violated international humanitarian law by committing crimes such as rape and torture were children that were abducted and forcibly recruited and subjected to drug and alcohol abuse by their commanders.¹⁶³

The Secretary General in his report on the establishment of the Special Court for Sierra Leone acknowledged this difficulty that came with the possible prosecution of child soldiers due to their dual status as both victims and perpetrators of human rights abuses.¹⁶⁴ The conflict regarding the prosecution of juvenile offenders can be seen in the following excerpt from the Secretary General's report:

¹⁶² Happold M, 2005, at 147.

¹⁶³ Happold M, 2005, at 147.

¹⁶⁴ Report of the Secretary-General on the Establishment of A Special Court for Sierra Leone, UN Doc S/2000/915, 4 October 2000. See further Crawford A, 2005 at 141 where she makes reference to how UN Secretary General Kofi Annan was shocked by the brutality and violence that greeted him during his visit to Sierra Leone.

The government of Sierra Leone and representatives of Sierra Leone society clearly wish to see a process of judicial accountability for child combatants presumed responsible for crimes falling within the jurisdiction of the court. It is said that the people of Sierra Leone would not look kindly upon a court which failed to bring justice to children who committed crimes of that nature and spared them the judicial process of accountability. The international non-governmental organisations responsible for child care and rehabilitation programmes, together with some of their national counterparts, however, were unanimous in their objection to any kind of judicial accountability for children below 18 years of age for fear that such a process would place at risk the entire rehabilitation programme so painstakingly achieved.¹⁶⁵

What is made strikingly clear in the Secretary General's report is that the people of Sierra Leone would not feel that justice was served if the SCSL did not prosecute child soldiers. This means that the entire exercise of setting up the SCSL would be a waste of time and instead what might ensue would be a form of mob justice so as to appease the civilian population's needs for justice.¹⁶⁶ In light of this great need for justice and rehabilitation the Statute of the SCSL states that those who bore the greatest responsibility for the violation of international humanitarian law and Sierra Leonean law would be liable to prosecution.¹⁶⁷ The minimum age of criminal responsibility was set at 15.¹⁶⁸ The Secretary General did not give any clear reason as to why the minimum age was set at 15; Happold argues that this was possibly

¹⁶⁵ Report of the Secretary General, 2000, at Para 35.

¹⁶⁶ Sierra Leones UN Ambassador, Ibrahim Kamara agreed with this and outright rejected the idea that all child soldiers were traumatised victims and he clearly stated his fear of mob violence should there be an absence of judicial accountability. See Un Says Sierra Leone War Crimes Court, Agence France Presse, 5 October 2000, available at www.globalpolicy.org/security/issues/sierra/court/001005af.htm.

¹⁶⁷ Article 1(1) Of the Statue for The Special Court Of Sierra Leone.

¹⁶⁸ Article 7(1) Of the Statue for The Special Court Of Sierra Leone.

done so as to mirror the provisions of the CRC and the two AP's.¹⁶⁹ I agree with Happold's argument that should children under the age of 15 be too young to be recruited then by that same token they should be too young for us to even begin to consider their potential liability.¹⁷⁰ With this mini dissertation I aim to put forth one unified universal approach with regards to the liability of child soldiers and by setting the minimum age at 15 there is some uniformity with regards to child soldiers in terms of international law.

The final statute for the SCSL made provisions for juvenile offenders to be subjected to a full trial and granted juvenile offenders the presumption of rehabilitation and reintegration into Sierra Leone society and this was a guarantee against imprisonment.¹⁷¹ These provisions however appear weak and minimal in comparison to the Secretary General's suggestion in the Draft Statute which called for a separate juvenile chamber with specialised judges who were experienced in the area of juvenile justice.¹⁷² In the end however, no child was prosecuted by the SCSL. The general view expressed by both the Security Council and the Secretary General appeared to have been that child offenders would be best dealt with by the Truth and Reconciliation Commission.¹⁷³ In fact, it is very important to note that from a very early stage the prosecutor of the SCSL, David Crane, clearly stated that as a matter of prosecutorial discretion he had no intention to prosecute juvenile offenders.¹⁷⁴ Once the decision was made not to prosecute child soldiers in spite of provisions in the statute of the SCSL allowing for

¹⁶⁹ Happold M, 2005, at 149.

¹⁷⁰ Happold M, 2005, at 149.

¹⁷¹ Rosen D, *Armies of the Young; Child Soldiers in War and Terrorism*, 2005, at 148. This provision can also be found in Article 7 of the Statute of the Special Court for Sierra Leone.

¹⁷² Happold M, 2005, at 149

¹⁷³ Happold M, 2005, at 149

¹⁷⁴ Press Release, Public Affairs Office For The Special Court For Sierra Leone, Special Court Says He Will Not Prosecute Children, 2November2002, available at www.scsl.org?LinkClick.aspx?fileticket=XRwCUe%2baVhw%3d&tabid=196.

such the TRC became the only forum in terms of which the criminal liability of child soldiers could be addressed.¹⁷⁵ Rosen points out that under the TRC children were viewed primarily as victims rather than perpetrators and the TRC quickly distanced itself from issues of reconciliation and instead referred this matter to the existing mechanism available in terms of local customary Sierra Leone models.¹⁷⁶ This he states was primarily due to budgetary and time constraints

In December of 2002 the TRC undertook a three month statement taking process and in this short space of time between seven to nine thousand statements were collected before public hearings took place in April 2003.¹⁷⁷ In spite of the large number of statements collected, the TRC did very little to directly affect the lives of former child soldiers. The operational guidelines for the TRC provided for the very limited participation of children. Interviews with children over the age of 12 were restricted to one hour and interviews with children below the age of 12 were restricted to 45 minutes, children were entitled to determine what issues they were willing to discuss and, unlike in a court of law, the TRC did not cross examine these children.¹⁷⁸ Under these guidelines interviews with former child soldiers were guaranteed to be superficial to a certain extent. The operational guidelines of the TRC did not fully allow children to participate and tell their full story. This therefore takes away an element of the encounter and rehabilitation process discussed in chapter 2.¹⁷⁹

It is disheartening that the SCSL did not attempt to hold former child soldiers liable for their crimes despite provisions allowing for the

¹⁷⁵ Rosen D, 2005, at 150.

¹⁷⁶ Rosen D, 2005, at 150.

¹⁷⁷ Rosen D, 2005, at 150.

¹⁷⁸ Rosen D, 2005, at 150 and 151.

¹⁷⁹ Rosen D 2005, at 151 makes the point that by limiting the participation of children who were the greatest perpetrators of human rights violations we are denied a complete picture of the war and the true extent of the involvement of these children.

jurisdiction thereof.¹⁸⁰ This was the ideal forum to set an international precedent with regards to the prosecution of juveniles at an international level in the event that these children were actually found to have been liable. The UN response in Sierra Leone is still hailed as the most progressive yet regarding the issue of child soldiering.¹⁸¹ Sierra Leone was the perfect opportunity to “test the waters” regarding juvenile liability for international crimes. Despite its major short coming with regards to the handling of child soldiers, SCSL does set a solid foundation and guidelines for the future possibility of holding former child soldiers liable for international crimes in a manner that will allow for their successful rehabilitation and reintegration back into their communities.

¹⁸⁰ Prosecutor David Crane exercised his discretion not to prosecute despite Article 7(1) of the Statute for the SCSL allowing for such.

¹⁸¹ Happold M, 2005, at 148.

CHAPTER 4

CONCLUSION

The impetus for this dissertation, as stated in Chapter 1, was the story of Omar Khadr, a child soldier held at Guantanamo bay for a number of grave offences. Khadr eventually chose to accept a plea deal, in terms of which he received an 8 year sentence, of which 1 year was to be served in Guantanamo Bay and the remainder in Canada.¹⁸² In a strange twist of events, despite the plea bargain having been agreed to by Khadr, the jurors were unaware of this and were still to hand down a verdict.¹⁸³ Should the sentence the jurors returned have been lighter than that agreed to in terms of the plea bargain then Khadr would have benefitted from this and therefore been liable to serve the lighter sentence.¹⁸⁴ The jurors having heard very little of Khadr's mistreatment and abuse and more of his violent dangerous behaviour returned a harsh verdict of 40 years.¹⁸⁵

Even though the plea bargain sentence was much lighter than the sentence imposed by the jury it is still a "flawed" sentence. There appears to be no mention made of any attempt to rehabilitate and reintegrate Khadr and throughout his incarceration there was very little effect given to international customary rules regarding juvenile justice.¹⁸⁶ Guantanamo Bay is notoriously known as a prison for the most

¹⁸² Prasow A, *Khadr's Plea Agreement and Sentencing*, November 5 2010, available at www.hrw.org/en/news/2010/11/05/khadrs-plea-agreement-and-sentencing accessed 3rd august 2013.

¹⁸³ Prasow A, 2010.

¹⁸⁴ Prasow A, 2010.

¹⁸⁵ Prasow A, 2010.

¹⁸⁶ Konge P, "International Crimes and Child Soldiers," *Southwestern Journal of International Law* (16)2010 at 60.

hardened of criminals and not for someone like Khadr who was at the time of his recruitment and the commission of his crime a child. Taking into account the allegations of abuse suffered by Khadr discussed previously keeping him in Guantanamo even if for just is year would not a conducive environment for his rehabilitation. In line with the discussion presented in Chapter 3 with regards to the SCSL as Khadr was 15 at the time of the commission of his crime he therefore should have been held liable to some degree and the process to determine his potential liability and punishment should have been undertaken in line with the guidelines set out in the case of Sierra Leone so as to promote his rehabilitation and reintegration. The manner in which his liability was determined via the military court was in essence a violation of his child rights, as shown in Chapter 1. The rules and guidelines proposed by the CRC and other international child rights instruments appear to have been ignored in the case of Khadr as is evidenced by the mistreatment he received.

Keeping the Khadr case in mind in this dissertation I set out to explore the concept of restorative justice and its potential for achieving two distinct but very important aims. Firstly its ability to hold former child soldiers liable to some degree for crimes they have committed and thereby satisfying the victim's right to justice. Secondly for it's potential to protect the rights of these same child soldiers even though they may be liable. The effective reintegration of these children back in to their communities can be seen as directly related to their being held accountable. In the absence of an effective accountability mechanism there is reluctance in the community to embrace these children and welcome them back, instead they are rather isolated and called names which deeply undermines the efforts aimed at reintegration.¹⁸⁷

¹⁸⁷ This idea was proposed by Hope Among during the presentation of her defence for her LLD thesis titled "Restorative Justice and the Reintegration of Former Child Soldiers into Communities: A Case of Uganda", presented on the 24th of May 2013 at the University of Pretoria.

The current international legal framework pertaining to child soldiers places the primary focus upon the accountability of the adults who recruit such children to the armed forces. In terms of the current international law framework child soldiers are portrayed primarily as victims, despite having committed many crimes themselves. International laws and efforts directed at child soldiers have to date placed the focus upon their rehabilitation and reintegration, which at most times have not proved successful. Very little focus, if any, is placed on addressing the liability of these former child soldiers for the crimes they have committed.

It is an accepted fact that most child soldiers are forcibly recruited and act under extreme duress, this fact on its own though is not sufficient to completely negate the criminal liability of these child soldiers for the crimes they have committed. It would not be practical or effective to offer blanket immunity to all those under 18.¹⁸⁸ In Chapter 2 I discussed factors such as intoxication and duress as a means to potentially avoid criminal liability. I found however that in the event of prosecution these factors may only go as far as to be a mitigating factor *in re* the child's sentencing and thereby not completely doing away with a child soldier's criminal liability.

As we have seen in Chapter 3 particularly with the case of Sierra Leone there appears to be a direct correlation between holding child soldiers accountable and their effective reintegration back in to the community. Based upon the case study of Sierra Leone it becomes evident that there is an important immediate need for a minimum age of criminal responsibility to be fixed and not simply determined on an individual basis.¹⁸⁹ I would therefore suggest that a straight 15 approach should be followed as was the case with the SCSL. This is based upon Happold's opinion as stated in Chapter 3 that should a child be eligible for

¹⁸⁸ Rosen D, "Who is a Child? The Legal Conundrum of Child Soldiers", *Connecticut Journal of International Law*, 25, 2009 at 117.

¹⁸⁹ Happold M, 2005 at 152.

recruitment at 15 as per the CRC then that same child should also bear the liability for any crimes he may commit while engaged in hostilities. By setting a minimum age of criminal responsibility we eliminate the problematic issue of child soldiers of a certain age being liable in a certain country whilst not being liable in another due to the difference with regards to the minimum age of criminal responsibility in terms of a particular state's national laws. Once a universal minimum age of criminal responsibility for international crimes has been established, it becomes easier to assess a child's criminal liability if the acts of each child who meets the minimum age, are dealt with on an individual basis as opposed to treating child soldiers as one homogenous group of war criminals.¹⁹⁰

Another important argument of this mini dissertation is that many national courts particularly in Africa simply do not have the resources to effectively deal with child soldiers on an individual basis. The needs of both the child soldier and his victims are so sensitive that great care must be taken so as not to violate the child's rights while attempting to achieve justice for his victim. My second proposition would therefore be for an international court with a specialised juvenile chamber as was initially proposed for Sierra Leone in the Secretary General's draft Statute to be set up as the "go to" forum for the prosecution of former child soldiers. This will provide us with an effective institution that not only establishes the liability of former child soldiers but also promotes their rehabilitation and reintegration. The establishment of a new international juvenile court may however prove to be a cumbersome task to undertake. I would therefore propose that it may be simpler and more expeditious to rather extend the jurisdiction of the ICC. By ratifying the Rome Statute so as to bring it in line with the "straight 15" approach suggested earlier the ICC would therefore have the jurisdiction to prosecute former child soldiers who satisfy the age requirement of 15. The ICC is an already established fully functional court and the extension of its jurisdiction to include a juvenile chamber would prove a

¹⁹⁰ Crawford A, 2001 at 189

much simpler task than the establishment of a new separate international juvenile court. Currently the guidelines proposed by the UN Secretary General in his draft statute for the SCSL with regards to a specialised juvenile chamber are to date the most concise guidelines provided. A juvenile chamber based upon these guidelines would ensure an acceptance of the peace process by all parties concerned.

It is imperative that an effective uniform approach to the potential liability of former child soldiers be established. Rosen makes reference to this by stating that in the absence of an effective international approach to the accountability of child soldiers, the on-going conflict between domestic and international law is likely to continue as are the random interventions by human rights groups.¹⁹¹ The prosecution for war crimes whether it is the prosecution of former child soldier or the most hardened war criminal will always be seen as a symbolic attempt to repair the damage of war.¹⁹² Although the granting of blanket immunity to all former child soldiers would surely satisfy the humanitarian aspirations of the international community it clearly falls short of achieving justice for the victims of war.¹⁹³ The child war criminal is a peculiar phenomenon facing the international community as it pits the rights of the child against the rights of the victim of war, restorative justice appears to have the ability to strike a balance between these two conflicting rights and allow for successful reintegration and rehabilitation.¹⁹⁴

“It is immoral that adults should want children to fight their wars for them... there is simply no excuse, no acceptable argument for arming children”¹⁹⁵ . At the beginning of this mini dissertation Pope John Paul

¹⁹¹ Rosen D, 2009 at 118.

¹⁹² Rosen D, *Armies of the Young*, 2005 at 158.

¹⁹³ Rosen D, 2005 at 158.

¹⁹⁴ Crawford A, 2001 at 191 and LLD defence by Hope Among 2013.

¹⁹⁵ Quoting Archbishop Desmond M Tutu, as seen in, The Children and Armed Conflict, Themes: Child Soldiers, as found at www.essex.ac.uk/armedcon//themes/child_soldiers/index.html accessed 9 September 2013

was quoted and this quote by Archbishop Desmond Tutu indicates that the issue of child soldiers is not merely a political legal issue but one that affects us all and it is so important that prominent religious figures have an opinion on the matter. Both these quotes show that a child has no place in war and every attempt should be made to rehabilitate those children who are unfortunate to have been involved in war.

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