

***POTENTIAL CRIMINAL LIABILITY OF CHILDREN FOR DEEDS
COMMITTED DURING ARMED CONFLICT***

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TABLE OF CONTENTS

CHAPTER 1

Conceptualisation, Problem Statement, and Factual Background

1.1	Introduction to Background	4.
1.2	Background into the phenomenon known as Child Soldiers	5.
1.3	Definitions and context of terms to be used	8.
1.3.1	Child	8.
1.3.2	Direct Part in hostilities	9.
1.3.3	Duress as a ground of justification	9.
1.3.4	Child soldiers	9.
1.3.5	Command Responsibility	10.
1.3.6	Recruitment	10.
1.3.7	Rehabilitation	11.
1.3.8	Criminal Capacity	11.
1.3.9	Refugee	11.
1.3.10	Restorative justice	12.
1.3.11	Act must be voluntary	12.
1.4	The introduction, motive, and different roles played by children in organised armed conflict	13.
1.5	Conclusion	15.

CHAPTER 2

The international legal framework dealing with child soldiers, the protection provided for by said instruments, or the lack thereof.

2.1	Introduction and outlay of this chapter	17.
2.2	The current legal protection provided for in Treaties	18.
2.2.1	International Treaties	18.
2.2.2	Treaties provided for at regional level	23.

2.2.3	Legislation imposed by international criminal law	24.
2.2.4	Child Soldiers and International Customary Law	25.
2.2.5	The legal implications when children are recruited regardless of the laws in place	27.
2.2.6	Voluntarily enlisting versus conscription	28.
2.2.7	The child's status during participation in armed conflict?	30.
2.3	Conclusion	31.

CHAPTER 3

Defining criminal responsibility and the interplay with age and psychology

3.1	Introduction	33.
3.2	What is Criminal Responsibility?	34.
3.3	Criminal Responsibility and age	37.
3.4	Criminal Responsibility and the interplay with Psychology	40.
3.5	Conclusion	41.

CHAPTER 4

Potential mechanisms and alternative options towards achieving accountability.

4.1	Introduction	43.
4.2	Is impunity an option?	43.
4.3	Justice must be done and it must be seen to be done	45.
4.4	The viability and legality of putting Child Soldiers on trial	46.
4.5	Restorative Justice, Rehabilitation, and Re-integration	49.
4.6	Conclusion	52.

<u>BIBLIOGRAPHY</u>	55.
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Chapter 1

Conceptualisation, Problem Statement and Factual Background.

1.1 Introduction to Background

The concept “Child Soldiers” is a term which in itself creates confusion in the mind not only of the academic but also the ordinary person, partly because the term is not consistently defined or statistically well analysed. It is, furthermore, a concept in the law that unearths our moral compass while deafening our present compassion for humanity. From the outset one can accept only that it is a natural human trait to keep children safe from harm and, more particularly, from an armed conflict. The problem, however, arises when children are used as pawns in a gruesome armed conflict for the simple purpose of obtaining a military advantage.

At present almost 5000 children each day experience the effects of displacement as a result of an armed conflict, and, as a consequence of this displacement, they are being recruited into armed groups¹. The life that these children grew up knowing is then destroyed along with their homes, schools, hospitals, communities, and even their families².

It is important to note that the phenomenon of children participating in armed conflict has been given great international consideration both in international legislation and in the enforcement of international rights³. What follows in this dissertation is not only an analysis of the above consideration but rather a critical analysis of the gap left by a relatively non-existent set of laws applicable solely to children participating in armed conflict.

¹ A Honwana, *Child Soldiers in Africa*, (2006), 26.

² N Boothby, “what happens when child soldiers grow up? The Mozambique case study” 2006, 4, 3, pg 244.

³ M Happold, *Child Soldiers in International Law* (2005) 1.

1.2 Background into the phenomenon known as Child Soldiers

The use of child soldiers in armed conflict is in no way centralised or localised by affecting only a particular group of people⁴, but rather this phenomenon is an international problem with consequences which could affect an entire generation for years to come. According to Topa, child soldiers are found on each continent and in most armed conflicts today⁵ owing to the fact that most modern armed conflicts are non-international in nature, thus allowing rebel groups to take advantage of the citizens within their territories. The nature of child soldiers differs from state to state, for example, boys under the age of ten are recruited into the paramilitaries in Columbia, and then there are the girls trained by the Tamil Tigers in Sri Lanka to be suicide bombers. In Northern Uganda, children are kidnapped from their homes by rebels⁶.

The harsh reality surrounding child soldiers is the unsettling knowledge of the fact that this distressing phenomenon stems, or is at least derived from, external issues surrounding the child⁷. There is a notion that, as humans, we believe that to a certain extent we are not born evil; one can, therefore, assume that humans are not born with hatred or evil intentions which are revealed through acts of violence in armed conflict. Should this notion be widely accepted as truth, the term “child soldier” can never be theoretically related to the natural and voluntary existence of any human being, thus making it a “man-made” or forced form of deployment of child soldiers⁸.

⁴ M Happold, *Child Soldiers in International Law*, (2005), 4.

⁵ I Topa, “The Prohibition of child soldiering – international legislation and the prosecution of perpetrators”, (2007), 3, *Hanse Law review*, 105,105.

⁶ I Topa, “The Prohibition of child soldiering – international legislation and the prosecution of perpetrators”, (2007), 3, *Hanse Law review*, 105,105.

⁷ A Honwana, *Child Soldiers in Africa*, (2006), 41.

⁸ G M Musila, “Challenges in establishing the accountability of child soldiers for human rights violations: restorative justice as an option”, (2005), *African Human Rights Law Journal*, 321, 329.

One could argue that the use of child soldiers has a similar growth rate to the increase in the amount of small arms and light weight weapons being made available⁹. The sad truth is, however, that, in reality, children have become more easily armed and, in different continents across the world, it is believed that more than 300 000 children are participating in armed conflict¹⁰.

Despite the current statistics regarding child soldiers, one cannot overlook the fact that the use of children in armed conflict is a phenomenon that has been alive for generations stemming as far back as the middle ages¹¹. The question which has to be raised here is why the phenomenon itself has been allowed to continue for so long and why the large role players in international law have failed to utilise their power and resources to promote the enforcement of the protection of children when compared to the military advantages gained by employing children in armed conflict?

Owing to the reality that children are very often forced into armed conflict, it is only academically correct to discuss the different factors which contribute to the growing number of children participating in armed conflict. There are a vast number of factors, but the most important ones include:

- 1) **War.** The very presence of a war has devastating effects on a population of a state, if one has to consider only the fact that on a psychological level war in itself becomes a day-to-day lifestyle for children growing up in armed conflict. Within these unorthodox surroundings these children believe that the adoption of the need for self-protection coupled with violence is the only logical solution¹². One cannot negate the fact that children are impressionable by nature; they react to what they see and learn from what they perceive as reality.

⁹ M Happold, *Child Soldiers in International Law*, (2005), 5.

¹⁰ I Topa, "The Prohibition of child soldiering – international legislation and the prosecution of perpetrators", (2007), 3, *Hanse Law review*, 105,105.

¹¹ A Honwana, *Child Soldiers in Africa*, (2006), 47.

¹² A Honwana, *Child Soldiers in Africa*, (2006), 47.

- 2) **Poverty**¹³. Poverty is one of the most crucial factors when considering the theme of child soldiers. In times of war, where food and shelter is scarce and most homes become parentless as a result of the armed conflict, children without proper guidance can easily be influenced and bribed into participating within rebel groups and other armed forces.
- 3) **Education and Employment**. The role that education can play in a child's life can never be overemphasised. Growing up without an education or with an education which is harmful to the child can have an impact on that child for the rest of his/her life. Through education, general social skills are birthed, along with the opportunity to gain employment and the ability to awaken the mind to what is wrong and right¹⁴. School systems can be one of many ways in terms of which a political idea or movement can be indoctrinated into a child.

These are just a few factors which contribute to the background to the issue of child soldiers. Obviously, depending on the situational background of a particular child, there may be different factors that contribute to the child's participating in armed conflict, and these could include factors such as politics and ideology, family, and friends. One can only imagine the devastation that one, if not all of these factors, can have on the impressionable mind of a child. It is now easy to understand why some journalists are so quick to label a generation of child soldiers as "the lost generation" or "future barbarians" or "armies of children"¹⁵. To hope for anything more from a child whose only view of life is survival in war is somewhat meaningless or hopeless at best.

The term "child soldier" involves two words which are morally in conflict with each other. When these two words are put together the phrase resembles neither a child nor a soldier, but rather a young physical being associated with violence, terror¹⁶, and the inability to distinguish right from wrong. This is derived from the very notion

¹³ R Brett & I Specht, *Young Soldiers: why they choose to fight*, (2004), 14.

¹⁴ R Brett & I Specht, *Young Soldiers: why they choose to fight*, (2004), 15 - 17.

¹⁵ A Honwana, *Child Soldiers in Africa*, (2006), 29.

¹⁶ R Brett & I Specht, *Young Soldiers: why they choose to fight*, (2004), 15 - 17.

of a true soldier whose thinking is associated with respect, discipline, and often a state-sponsored¹⁷ ideology learned by an individual who is no longer a minor. Instead the notion which we are provided with by the term 'child soldier' is one of a fighter who fills the ranks of rebel groups, inadequately trained, and often operating under the influence of alcohol and drugs¹⁸.

1.3 Definitions and context of terms to be used

To defer any confusion which may be born from the terms and concepts utilised in this dissertation, a brief examination of some of the terms and definitions follows:

1.3.1 Child

According to the Convention on the Rights of the Child¹⁹, a child is every human being below the age of eighteen years unless, under national law applicable to the child, the age of majority is attained earlier. Experts appointed to undertake the United Nations study on the impact of armed conflict on children have agreed with the viewpoint of the Convention on the Rights of the Child by stating that eighteen years should be the minimum age for recruitment and participation in hostilities by a child²⁰.

¹⁷ A Honwana, *Child Soldiers in Africa*, (2006), 51.

¹⁸ A Honwana, *Child Soldiers in Africa*, (2006), 51.

¹⁹ Convention on the Rights of the Child, adopted by General Assembly Resolution 44/25 of (1989).

²⁰ R Brett M McCallin, *Children: The Invisible Soldiers*, (2001), 14.

1.3.2 Direct part in hostilities

This means undertaking the acts of war that are likely to cause actual harm to an adverse party²¹. Direct participation in hostilities or playing a direct role in hostilities usually means to be an active participant in combat, for example blowing up a building or shooting at the enemy²².

1.3.3 Duress as a ground of justification

According to Article 31(1)(d) of the Rome Statute, *“The conduct which is alleged to constitute a crime within the jurisdiction of the court has been caused by duress resulting from a threat of imminent death or of continuing of imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided”*²³.

1.3.4 Child soldiers

According to Topa²⁴, a child soldier refers to any person younger than eighteen years of age who is part of any kind of regular or irregular armed force or armed group in any capacity, including, but not limited to, cooks, porters, messengers, and anyone accompanying such groups, other than family members. This definition

²¹ I Topa, “The Prohibition of child soldiering – international legislation and the prosecution of perpetrators”, (2007),3, *Hanse Law review*, 105,108.

²² D M Rosen, *Child Soldiers*, (2012), 11.

²³ Article 31(1)(d) of the Rome Statute of the International Criminal Court (1998).

²⁴ I Topa, “The Prohibition of child soldiering – international legislation and the prosecution of perpetrators”, (2007),3, *Hanse Law review*, 105,108.

includes girls recruited for sexual purposes and forced marriages so the term does not only refer to a child who is carrying or has carried weapons²⁵.

1.3.5 Command Responsibility

According to Arts and Popovski, “*the doctrine of command responsibility holds that adult commanders are criminally responsible for the actions of child soldiers*”²⁶. This doctrine relates to the actions or conduct committed by the child soldier to be attributable to the adult commander who is in charge or control of the child in question.

1.3.6 Recruitment

This relates to the unlawful enlisting of combatants who are of “minor” age into an armed force or rebel group²⁷. According to Article 2(e) of the Convention on the punishment and prevention of the crime of genocide, the act of genocide is defined as containing, amongst other things, the act of forcibly transferring children of the group to another group²⁸. In Grover’s opinion, recruitment refers to the use of a child soldier in hostilities by an armed group or force as committing systematic grave international humanitarian law violations which further constitutes the genocidal forcible transfer of children to another group²⁹.

²⁵ I Topa, “The Prohibition of child soldiering – international legislation and the prosecution of perpetrators”, (2007),3, *Hanse Law review*, 105,108.

²⁶ K Arts & V Popovski, *International Criminal Accountability and the Rights of Children*, (2005), 99.

²⁷ S Grover, *Child Soldier Victims of Genocidal Forcible Transfer*, (2012), 139.

²⁸ Article 2(e) of the Genocide Convention (1951).

²⁹ S Grover, *Child Soldier Victims of Genocidal Forcible Transfer*, (2012), 139.

1.3.7 Rehabilitation

Rehabilitation refers to a programme conducted with the principle aim of rehabilitating an individual with the intention of ensuring that the individual may be an active and productive member of society, with the overall aim of reintegrating the individual back into the community from which the individual originated. With rehabilitation comes the hope that the individual will be able to gain employment and add to the productivity of society³⁰.

1.3.8 Criminal Capacity

Criminal capacity merely suggests that the accused must possess an understanding of the criminal act in its narrow and wider sense³¹. A quote from Lacey further describes this as:

“both a cognitive and volitional element: a person must both understand the nature of her actions, knowing the relevant circumstances and being aware of possible consequences, and have a genuine opportunity to do otherwise than she does – to exercise control over her actions by means of choice”³².

1.3.9 Refugee

In this context, refugee refers to an individual who is outside of his/her native land and who is unwilling to return owing to a reasonable fear of persecution on account of his/her race, religion, nationality, membership of a particular social group, or political opinion³³.

³⁰ R Brett M McCallin, *Children: The Invisible Soldiers*, (2001), 124 - 134.

³¹ K Arts & V Popovski, *International Criminal Accountability and the Rights of Children*, (2005), 90.

³² N Lacey, *State Punishment: Political Principles and Community Values*, (1988), 63.

³³ M S Gallagher, “Soldier Boy Bad: Child Soldiers, Culture and Bars to Asylum”, (2001), 13, *International Journal Refugee law*, 312.

1.3.10 Restorative justice

In this context, restorative justice refers to an approach seeking to take into consideration the interests of all the parties in a criminal prosecution including the state, the accused, the victims, and the international community as a whole³⁴.

The terms here can also be used to relate to similar processes along the lines of restitution, compensation, participation, and rehabilitation³⁵.

1.3.11 Act must be voluntary

The term 'voluntary' in relation to this dissertation topic is diluted. Here the term relates to a child voluntarily enlisting to join an armed force or group. According to Musila:

“Although children may get a sense of security by volunteering into an army, their recruitment into war, either voluntary or otherwise, can never be said to be in their best interest as their development is affected negatively”³⁶.

³⁴ G M Musila, “Challenges in establishing the accountability of child soldiers for human rights violations: restorative justice as an option”, (2005), 5, *African Human Rights Law Journal*, 321, 325.

³⁵ G M Musila, “Challenges in establishing the accountability of child soldiers for human rights violations: restorative justice as an option”, (2005), 5, *African Human Rights Law Journal*, 321, 325.

³⁶ G M Musila, “Challenges in establishing the accountability of child soldiers for human rights violations: restorative justice as an option”, (2005), 5, *African Human Rights Law Journal*, 321, 329.

1.4 The introduction, motive, and different roles played by children in organised armed conflict

When examining the role that child soldiers play in armed conflict, one has to consider the circumstances surrounding these children as well as the manner in which they are introduced into these roles. It is clear that children would not, out of their own free will, volunteer to take part in armed conflict, and neither would such an act prove that legitimate consensus existed. In a state of war, one has to accept that social, political, and economic pressure can lead individuals to commit themselves to acts that they otherwise would have run away from.

The sad truth remains that child soldiers are forcibly recruited³⁷. Honwana is of the opinion that recruitment takes place either by the child being brutally abducted from his/her community and forcefully taken back to military camps, or by being captured by rebels during raids on villages³⁸. There are instances in which children have volunteered themselves to participate as child soldiers, but such act is done conditionally with the hope that they may receive regular meals and that clothing will be provided. According Shaikh, children in Cambodia joined the armed forces with the intention of securing the opportunity of consistent food and protection³⁹.

One cannot assume that children volunteer for armed conflict purely for physical rewards alone. In her article, Hughes provides a reason why psychological factors may motivate a child to volunteer to participate in an armed conflict when she states “the child desires to regain a sense of control and power in what has come to be a life full of uncertainty and fear”⁴⁰.

In this recruitment stage, the child undergoes initiation. The purpose of such initiation is to rip apart the socially-established barriers between childhood and soldiering. This is done by encouraging the child to forget about home and his/her family⁴¹ by

³⁷ A Honwana, *Child Soldiers in Africa*, (2006), 51.

³⁸ A Honwana, *Child Soldiers in Africa*, (2006), 54.

³⁹ A M Shaikh, “Child Soldier”, (2001), 1, 14. www.ma-law.org.pk/pdf/20eidted.pdf accessed on 10 December 2014.

⁴⁰ L Hughes, “Can International Law Protect Child Soldiers?”, (2000), 12:3, *Peace Review*, 403.

⁴¹ A Honwana, *Child Soldiers in Africa*, (2006), 58.

further indoctrinating the child into perceiving other human beings as military targets. The separation between past and present is done so convincingly that the child is very often given a new name upon arrival at his/her new home, thus making it comprehensive that his/her old life no longer exists.

The motivation behind recruiting children into armed forces differs from country to country and, even more so, from conflict to conflict, but the golden thread that does seem to knit its way through each armed force is that child soldiers are recruited simply because of a shortage of manpower. Shortage of manpower is not the only motivation for rebel and army leaders to recruit child soldiers. Other reasons include children having more stamina, children being more likely to obey even the most unreasonable orders, children are also being better at surviving in the bush, and, owing to their youthfulness, they appear more fearless because they very often do not assess the real risks of combat⁴².

In the base camp of either a rebel group or a state armed force, child soldiers play more than simply the role of a soldier, and such a role differs from male to female. For instance, according to Happold, child soldiers are often victimised by their adult comrades who require them to act as servants and perform personal services⁴³. Most military structures project a system which shows the different ranks of hierarchy within the military; surely to the lay man it is a clear conclusion that, in a rebel group where there is no military structure, any unsophisticated system based on hierarchy will leave a child soldier at the bottom of the food chain when compared to his adult comrades⁴⁴.

The child is left to fulfil the rather lesser-acknowledged roles and these roles include being porters (human carriers/transporters of itinerary, supplies, weapons, and ammunition), lookouts (soldiers that keep watch at base camp during the night or when the adults are sleeping), cooks, and/or other routine duties which may include

⁴² M Happold, *Child Soldiers in International Law*, (2005), 10-11.

⁴³ M Happold, *Child Soldiers in International Law*, (2005), 16.

⁴⁴ M Happold, *Child Soldiers in International Law*, (2005), 11-16.

mining for natural resources such as oil and diamonds⁴⁵. The role of female child soldiers is far more gruesome. These female children are often recruited by rebel forces for the purpose of being sexual slaves⁴⁶. On average these girls undertake military training but they serve essentially as guards and take part in reconnaissance missions, and, when they are not in the field, their role is to cook, clean, entertain the troops, and accept the soldiers sexual demands⁴⁷.

The truth remains that amidst the horrific circumstances that child soldiers are forced to endure, they are also forced to commit even more gruesome crimes merely to survive the camps in which they are staying. The effects of both physical and psychological impact on the child are far reaching. The move from the care of one's family to the closed environment of an armed force or rebel group is disturbing, especially when it is coupled with physical abuse, bullying, and sexual assault⁴⁸.

1.5 Conclusion

Taking all of the above into account, one has also to acknowledge that these children, while participating in armed conflict, commit murder, destroy families, villages, and communities. They leave a trail of destruction in their wake, and many innocent people are left without any right of redress for the crimes of which they have felt the consequences. For how long can the world overlook the crimes committed by child soldiers and would it be morally wrong should one even try to punish any child who has been subjected to the hell described above?

The very reason why the international community has to be more active in controlling this epidemic is that new statistics on child soldiers are shocking to say the least, recognizing that 77% of child soldiers witness murder often in large numbers, 88%

⁴⁵ A L Boyland, "Sending mixed messages on combating the use of child soldiers through unilateral economic sanctions: the U.S's manipulation of the Child Soldiers Prevention Act of 2008", (2014), 22.2, *Michigan State International Law Review*, 670, 672.

⁴⁶ D M Rosen, *Child Soldiers*, (2012), 21.

⁴⁷ A Honwana, *Child Soldiers in Africa*, (2006), 75 – 79.

⁴⁸ M Happold, *Child Soldiers in International Law*, (2005), 16.

witness physical abuse and torture, while 63% have witnessed rape and or sexual abuse⁴⁹.

According to Musila, it is not unreasonable to see child soldiers as victims of war especially considering the fact that these children are involuntarily recruited and, furthermore, subjected to serving as objects of the recruiters and protagonists of war⁵⁰. With these staggering statistics and opinions one can assume only that this epidemic is now at a stage where the line between whether child soldiers are victims or perpetrators is becoming more and more blurry, both on paper and in the hearts of the international community.

⁴⁹ N Boothby, "What happens when child soldiers grow up?", (2006), 4, *The Mozambique case study*, 244, 248.

⁵⁰ G M Musila, "Challenges in establishing the accountability of child soldiers for human rights violations: restorative justice as an option", (2005), 5, *African Human Rights Law Journal*, 321, 329.

Chapter 2

The international legal framework dealing with child soldiers, the protection provided for by said instruments, or the lack thereof.

2.1 Introduction and outlay of this chapter

This chapter is designed to inform the reader of the different international mechanisms available to secure the protection of the child. Specific emphasis is placed on the critical analysis of the laws relating to the recruitment of the child into armed forces, either of the state or a rebel group⁵¹.

To assess the potential criminal liability of deeds committed by a child during armed conflict, it is of utmost importance to assess whether his/her initial recruitment into armed forces is indeed legitimate. Should the recruitment of children into armed forces be void in the eyes of the law, the question arises as to the consequences flowing from the deeds that they commit during their tenure as soldiers? Surely the principle of accountability⁵² and criminal liability for such deeds committed needs to be regulated through some process?

This chapter focuses primarily on the international legislation in place protecting the recruitment of children into armed forces, along with a critical analysis of the protection it really provides, whilst considering the legal consequences that occur as a result of disobedience in the face of the legal principles that currently exist. A

⁵¹ S Grover, *Child Soldier Victims of Genocidal Forcible Transfer*, (2012), 139.

⁵² G M Musila, "Challenges in establishing the accountability of child soldiers for human rights violations: restorative justice as an option", (2005), 5, *African human Rights Law Journal*, 321, 321.

concluding discussion will follow about who inevitably bears accountability and liability for the deeds these children commit.

2.2 The current legal protection provided for in Treaties

The international community has recognised child soldiers as a continual problem, and it has responded by the progressive development of international laws banning the recruitment and use of children in armed forces and groups. The most common international legislation is provided through the creation of treaties in which nations agree to abide by rules that restrict the recruitment of children⁵³.

The very allowance given to states to choose to abide to the treaty itself weakens the effect of the treaty, because, if the treaty is binding only on states who are “state parties”⁵⁴ to the treaty, the inevitable consequence is that responsibility is not accepted by all states. The gap left open by, on the one side, the states who have signed or ratified the relevant treaties, and, on the other side, the states who have neglected to do so, has watered down the protection offered to children (youth) that the treaties themselves were intended to provide. Regardless of the unequal effect a treaty may possess, the importance of a treaty can be hugely significant when it comes to regulating the international consequences of child soldiers.

2.2.1 International Treaties

A very important treaty is the Additional Protocol 1⁵⁵ and Additional Protocol 2⁵⁶ of the Geneva Conventions. In these two amendments the existence and recruitment of

⁵³ D M Rosen, *Child Soldiers*, (2012), 6.

⁵⁴ D M Rosen, *Child Soldiers*, (2012), 6.

⁵⁵ Protocol 1 Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of international Armed Conflicts, 8 June 1977.

child combatants is addressed. This is achieved by ensuring that each Protocol is unique in its own way. Protocol 1 is aimed at regulating international armed conflict, while Protocol 2 is aimed at regulating non-international armed conflict.

The questions that remain are just how much weight these protocols carry when being used to protect children and how strict the actual protection provided by this international legislation is. Article 77 of Additional Protocol 1, deals specifically with the protection of children, and subsection 2 states:

*“The parties to the conflict shall **take all feasible measures** in order that children who have not attained the age of **fifteen years** do not take **direct part in hostilities** and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years the parties to the conflict shall **endeavour to give priority** to those who are oldest”⁵⁷.*

From a brief glance at the article one would assume that the international legislators clearly have the intention of putting an end to the phenomenon of child soldiers and offering strong protection to children in terms of armed conflict, but whether the drafters of this specific legislation have achieved this intention is open for debate.

The article itself uses words which are not very convincing, with the inevitable result that one cannot ignore the ever-present suspicion of a few loopholes given by the drafters of this Article. The inclusion of “take all feasible measures” alone is rather vague and honestly poor when considering the fact that this piece of legislation is used in times of war, thus making the word “feasible” somewhat meaningless because what is feasible or not feasible in a time of war is never really clear or that transparent. Simply put, this phrase is not sufficient to protect children and prevent

⁵⁶ Protocol 2 Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of international Armed Conflicts, 8 June 1977.

⁵⁷ Article 77(2) of Protocol 1 Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of international Armed Conflicts, 8 June 1977.

them from being recruited and taking part in hostilities. It is an excessively broad term and does not impose calculable obligations on states⁵⁸.

This phrase, “take all feasible measures”, allows a state to recruit a child easily using the justification that not to do so would not be a feasible measure to adhere to. It can then be argued that it took all feasible measures rather than necessary steps. Instead, the wording should rather have been phrased “take all necessary measures”, which was what the International Committee of the Red Cross originally proposed⁵⁹. Such a change would immediately give much more strength to the protection offered by this Article and reassure the international community that the protection of children is very much more important than the success of a military operation⁶⁰.

In addition, the Article also provides for an age limit set at fifteen years of age. This age limitation leaves one wondering why children aged between fifteen and eighteen are not deserving of the said protection. Are those children between 15 and 18 not equally deserving of the status of youth? The very aim of this Article is to protect children. The key word here is ‘child’, and, according to the Convention on the Rights of the Child, the age of a child begins at birth and ends at the age of eighteen⁶¹. Accordingly, Article 77 should provide for children who have not yet turned eighteen rather than fifteen, so that the protection extended by this legislation can achieve its full purpose.

Another technical flaw in the construction of Article 77 is the phrase “Direct participation in hostilities”. To play a direct role in hostilities usually means to be an active participant in combat, for example blowing up a building or shooting at the enemy. The term ‘direct’, therefore, does not allow for passive involvement which could take the form of intelligence gathering or supplying transportation. This is

⁵⁸ I Topa, “The Prohibition of child soldiering – international legislation and the prosecution of perpetrators”, (2007),3, *Hanse Law review*, 105,110.

⁵⁹ D M Rosen, *Child Soldiers*, (2012), 11.

⁶⁰ D M Rosen, *Child Soldiers*, (2012), 11.

⁶¹ Convention on the Rights of the Child, adopted by General Assembly Resolution 44/25 of 1989.

relevant because very often child soldiers are recruited and are used to play a passive role in hostilities instead of executing conduct considered to be direct participation in hostilities.

The doubt raised by Article 77 of Additional Protocol 1 is somewhat diminished by Additional Protocol 2 which offers stronger protection for children. This Protocol regulates the recruitment of child soldiers in internal and non-international armed conflicts (civil wars between the armed forces of a state and dissident armed forces). Article 4(3)(c) of Additional Protocol 2 states:

“Children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities”⁶².

The drafters of this provision ensured that the legislation is constructed with a great amount of clarity, as the limitations shown by the terms of this provision leave no room for doubt and indicate the drafter’s strong view about recruitment.

The final, but most important, international treaty relating to the protection of children from being recruited as child soldiers is the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict⁶³. This treaty is relevant not only for its construction and modern applicability, but also because of its primary aim which is the protection of children in armed conflict. The Optional Protocol was adopted by the United Nations General Assembly on 25 May 2000, and entered into force on 12 February 2002. Articles 1 and 3 of the Optional Protocol read as follows;

Article 1: *“State parties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of eighteen years do not take a direct part in hostilities”⁶⁴.*

⁶² Article 4(3)(c) Protocol 2 Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of international Armed Conflicts, 8 June 1977.

⁶³ Optional protocol to the Convention on the Rights of the child on the involvement of children in armed conflict (2000).

⁶⁴ Article 1 of the Optional protocol to the Convention on the Rights of the child on the involvement of children in armed conflict (2000).

Article 3: *“State Parties shall raise in years the minimum age for the voluntary recruitment of persons into their national armed forces from that set out in Article 38, paragraph 3, of the Convention on the Rights of the Child, taking account of the principles contained in that article and recognizing that under the convention persons under the age of eighteen years are entitled to special protection”*⁶⁵.

As far as Treaty Law is concerned, this optional protocol is a great step in the right direction with regards to the protection of children from armed conflict. The optional protocol not only raises the age limit of legal recruitment to eighteen, but, in addition, gives further assurances that children under the age of eighteen are entitled to special protection. According to Topa, the increase in the age limit for participation in hostilities represents a clear improvement of the protection provided by international law and strengthens the trend to shield all children from the dangers of armed conflicts⁶⁶.

The greatest advantage drawn from this treaty is that it does not only speak to states but also to the armed groups or rebel forces within the state as well. As most armed conflicts today are conducted on a non-international scale, child soldiers are often recruited by rebel forces and armed groups that do not fall within the definition of a state. Article 4 of the Optional Protocol is, therefore, of great importance and states the following;

*“Armed groups that are distinct from the Armed Forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of eighteen years”*⁶⁷

It is hard to find a negative element surrounding this legislation and its intended aims, considering that the preamble of this particular convention is directly focused on the special protection that needs to be considered when dealing with children and

⁶⁵ Article 3 of the Optional protocol to the Convention on the Rights of the child on the involvement of children in armed conflict (2000).

⁶⁶ I Topa, “The Prohibition of child soldiering – international legislation and the prosecution of perpetrators”, (2007),3, *Hanse Law review*, 105,110.

⁶⁷ Article 4 of the Optional protocol to the Convention on the Rights of the child on the involvement of children in armed conflict (2000).

that there is a need to increase such protection of children from involvement in armed conflict.

The possible limitations to the protection provided for in the Optional Protocol include the state's ability to use children for indirect participation in armed conflict which could easily also put the life of the child at risk, and, also, the state's ability to recruit children into their armed forces who are older than fifteen and who have volunteered out of their own free will. Another limitation of the Optional Protocol is shared by all treaties in general and that is the acceptance of such treaty. The statistics of this treaty reveal that, by May 2006, there have been 107 state parties to the protocol and 121 states have signed it⁶⁸, leaving this treaty internationally accepted but not universally accepted.

2.2.2 Treaties provided for at regional level

When looking for specific protection on the rights of the child at a regional level, there is really only one human rights document to consider, namely the African Charter on the Rights and Welfare of the Child⁶⁹. This treaty is also the only regional human rights treaty which regulates children's involvement in armed conflict⁷⁰. The article of importance here is Article 22(2) which deals with Armed Conflicts and reads as follows:

“States Parties to the Present Charter shall take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain, in particular, from recruiting any child”⁷¹.

⁶⁸ I Topa, “The Prohibition of child soldiering – international legislation and the prosecution of perpetrators”, (2007),3, *Hanse Law review*, 105,110.

⁶⁹ African Charter on the Rights and Welfare of the Child 1998.

⁷⁰ M Happold, *Child Soldiers in International Law*, (2005), 83.

⁷¹ Article 22 of the African Charter on the Rights and Welfare of the Child 1998.

According to Article 2 of the African charter⁷², a child is defined as every human being below the age of eighteen years. Article 22(2), therefore, applies to all individuals under the age of eighteen⁷³. This is important with regard to the protection of children owing to the fact that, unlike most of the other treaties named above, this treaty extends its protection to children between the ages of sixteen and seventeen as well, which is positive as the children falling within this age range are equally deserving of protection.

2.2.3 Legislation imposed by international criminal law

According to Rosen, one of the most ground-breaking developments in International Law was the creation of the International Criminal Court (ICC) in The Hague in 2002, established by the 1998 Rome Statute⁷⁴ of the ICC⁷⁵. According to the Rome Statute, and particularly Article 8 of that statute, the “*conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities*” constitutes a war crime⁷⁶. The Rome Statute, furthermore, extends jurisdiction to the International Criminal Court to prosecute and imprison persons charged with and convicted of committing this war crime.

The advantage of Article 8 is that it provides an absolute ban on the recruitment of children under the age of fifteen by both the state and the non-state rebel group or force⁷⁷. The Rome Statute is a further useful tool in arguing that there is a universal blanket protecting children under the age of fifteen from armed conflict. The

⁷² Article 2 of the African Charter on the Rights and Welfare of the Child 1998.

⁷³ M Happold, *Child Soldiers in International Law*, (2005), 84.

⁷⁴ Rome Statute of the International Criminal Court 1998.

⁷⁵ D M Rosen, *Child Soldiers*, (2012), 12.

⁷⁶ Article 8 of the Rome Statute of the International Criminal Court 1998.

⁷⁷ D M Rosen, *Child Soldiers*, (2012), 12.

disadvantage, however, is that, according to Article 26 of the Rome Statute, the International Criminal Court:

“shall have no Jurisdiction over any person who was under eighteen at the time of the commission of the alleged crime”⁷⁸.

This article makes it rather ambiguous for the reader about whether or not criminal liability is a possibility pertaining to children under the age of eighteen who do in fact commit war crimes⁷⁹. A further disadvantage that exists with regard to the Rome Statute is its implementation, as, similarly to many other treaties, the major powers, such as the United States, Russia, India, and China, are not parties to the treaty⁸⁰.

As a result of this, there is a clear normative gap regarding the responsibility of children in international criminal law. Owing to the fact that international criminal law relating to children does not, in fact prescribe a minimum age at which one is deemed to be criminally responsible, it will inevitably continue to vary from one jurisdiction to another⁸¹. A closer look, therefore, needs to be given to international customary law.

2.2.4 Child soldiers and International Customary Law

One obvious conclusion drawn from the discussion above is that different states are under different legal obligations depending on which treaty they are a party to. The need for the existence of customary rules on recruitment and use of children in

⁷⁸ Article 26 of the Rome Statute of the International Criminal Court 1998.

⁷⁹ D M Rosen, *Child Soldiers*, (2012), 13.

⁸⁰ D M Rosen, *Child Soldiers*, (2012), 13.

⁸¹ G M Musila, “Challenges in establishing the accountability of child soldiers for human rights violations: restorative justice as an option”, (2005), *African human Rights Law Journal*, 321, 325.

armed conflict is, therefore, of great importance⁸². According to Happold, the reason for this is that general customary international law applies to all states. As such, any customary law rule provides a minimum standard of behaviour below which states could not fall without being in breach of their international obligations regardless of which treaties they are a party to⁸³.

A useful distinction between international customary law and treaty law is that the treaties fall somewhat short when enforcing their aims against non-state groups or rebel groups. The Additional Protocol 2⁸⁴ does attempt to regulate the conduct of such groups but it does not cover groups operating in states that are not a party to the treaty, so, instead, only customary international law can govern their activities⁸⁵.

Customary law is the creation of state practice and *Opinio Juris*. Happold is of the opinion that state practice has developed to the extent that the minimum age of recruitment is eighteen, at least in law⁸⁶.

Thus far, most of the treaties have given a blanket ban on the recruitment of children who have not reached the age of fifteen years in armed conflict⁸⁷, but in customary law, the African Charter on the Rights and Welfare of the Child, and in the Convention on the Rights of the Child one can see that children under the age of eighteen are provided equally with the same protection.

⁸² M Happold, *Child Soldiers in International Law*, (2005), 86.

⁸³ M Happold, *Child Soldiers in International Law*, (2005), 86.

⁸⁴ Protocol 2 Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of international Armed Conflicts, 8 June 1977.

⁸⁵ M Happold, *Child Soldiers in International Law*, (2005), 86.

⁸⁶ M Happold, *Child Soldiers in International Law*, (2005), 88.

⁸⁷ Article 77(2) of Protocol 1 Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of international Armed Conflicts, 8 June 1977.

2.2.5 The legal implications when children are recruited regardless of the laws in place

In cases where a child is recruited (despite the clear international laws banning such recruitment) and used in hostilities by an armed group or state armed force committing grave international humanitarian violations, it results in the forcible transfer of children to another group⁸⁸.

Article 2(e) of the Genocide Convention strongly suggests that, regardless of the fact that recruitment may take the form of either conscription or voluntarily enlisting, children who are recruited for the direct purpose of participating in armed conflict, and, in so doing, add to the intentional act of genocide, is an act of genocide itself⁸⁹.

When considering the fact that genocide is, in fact, a war crime, recruitment in this context obliterates a non-derogable *jus cogens* norm of international humanitarian and criminal law relating to the protection of civilians and children during armed conflict⁹⁰. Needless to say, any possible recognition of such recruitment will be in total conflict with the Additional Protocols⁹¹ to the Geneva Conventions and Conventions on the Rights of the Child⁹² discussed above, as the recruiting party in such an instance will have failed to comply with its international obligation to take all necessary and feasible means to prevent such a genocidal forcible transfer of children⁹³.

⁸⁸ S Grover, *Child Soldier Victims of Genocidal Forcible Transfer*, (2012), 139.

⁸⁹ Article 2(e) of the Genocide Convention 1951.

⁹⁰ Rome Statute of the International Criminal Court 1998.

⁹¹ Protocol 1 Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of international Armed Conflicts, 8 June 1977.

⁹² Article 1 of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict 2000.

⁹³ S Grover, *Child Soldier Victims of Genocidal Forcible Transfer*, (2012), 139.

2.2.6 Voluntarily enlisting versus conscription

This is an important element to consider, especially when taking into account the potential criminal liability for the deeds a child may commit during armed conflict. The mere fact that someone has volunteered to do something suggests to one that an element of consensus exists as opposed to straightforward conscription which creates an image all sorts of duress or non-consensual behaviour. One cannot ignore the fact that this fight is far more delicate when it relates to the voluntary conduct of a child and especially a child who has grown up in a time of armed conflict or war⁹⁴.

Statistics on war-torn countries like Uganda show that children are often subjected to a form of indoctrination or severe abuse with the aim that the recruiters may maintain control over them⁹⁵. Indoctrination takes many forms, but it may also appear to be very effective in its influence on a child especially when a family member is killed before his/her eyes for the only reason that it may instil fear or obedience into the child⁹⁶. Child soldiers often volunteer for recruitment with the aim of protecting their families or themselves from threats of violence by soldiers; other psychological motivations may include revenge, or an inner search for justice⁹⁷. Grover states as follows:

“Child soldier victims of this genocidal forcible transfer to another group (children who are under the custody and control of those armed groups or

⁹⁴ A Honwana, *Child Soldiers in Africa*, (2006), 51.

⁹⁵ G M Musila, “Challenges in establishing the accountability of child soldiers for human rights violations: restorative justice as an option”, (2005), *African human Rights Law Journal*, 321, 329.

⁹⁶ G M Musila, “Challenges in establishing the accountability of child soldiers for human rights violations: restorative justice as an option”, (2005), *African human Rights Law Journal*, 321, 329.

⁹⁷ A M Shaikh, “Child Soldier”, (2001), 1, 13. www.malaw.org.pk/pdf/Child%20Soldier%20eidted.pdf accessed on 10 December 2014.

*forces committing mass atrocities and/or various forms of genocide) are properly considered to be under duress without having to adduce any further evidence to this effect*⁹⁸.

The above extract gives a very definitive answer to who wins the fight between voluntarily enlisting *versus* conscription. Every civilised human being cannot help but to agree with this approach or view point especially when taking into account the following factors:

- 1) The recruited children are under the absolute custody and physical control of the armed state or rebel group⁹⁹;
- 2) Actual proof suggests that it is common practice for these children to be brutalized and physically abused by their senior officers or adult colleagues¹⁰⁰; and
- 3) There is actual proof that the senior officials within these rebel groups do not tolerate any form or level of resistance from the children. For example; should a child attempt to evade participating in a conflict, he is then subjected to grievous bodily harm or even death if that is warranted¹⁰¹.

Should a child choose, out of his or her own free will to volunteer for recruitment, it is alarming that the child is then not granted the option of rescinding his decision and, should he/she attempt to change his or her initial decision, his fellow brothers/sisters in arms are forced to kill him or her¹⁰². It is unreasonable to assume anything other than the fact that child soldiers are emotionally and physically captive to the armed group irrespective of the mode of initial recruitment¹⁰³. Musila comments on the dilemma as follows:

⁹⁸ S Grover, *Child Soldier Victims of Genocidal Forcible Transfer*, (2012), 139.

⁹⁹ S Grover, *Child Soldier Victims of Genocidal Forcible Transfer*, (2012), 140.

¹⁰⁰ S Grover, *Child Soldier Victims of Genocidal Forcible Transfer*, (2012), 140.

¹⁰¹ S Grover, *Child Soldier Victims of Genocidal Forcible Transfer*, (2012), 140.

¹⁰² A M Shaikh, "Child Soldier", (2001), 1, 14. www.malaw.org.pk/pdf/Child%20Soldier%20eidted.pdf accessed on 10 December 2014.

¹⁰³ S Grover, *Child Soldier Victims of Genocidal Forcible Transfer*, (2012), 140.

“Although children may get a sense of security by volunteering into an army, their recruitment into war either voluntary or otherwise can never be said to be in their best interest as their development is affected negatively”¹⁰⁴.

2.2.7 The child’s status during participation in armed conflict?

The picture described thus far illustrates an abused child illegally, and perhaps brutally, recruited into an armed force with the sole purpose of that armed force obtaining some sort of military advantage. Although this is tragic, yet real, something must be said regarding the status of the child during his or her tenure as a child soldier, whether it is as a soldier for a state or a rebel armed group¹⁰⁵.

Owing to the very nature of childhood and the unmistakable lack of development, child soldiers who participate in armed conflict or who take part in hostilities do not forfeit the special protection given children under the law¹⁰⁶.

Development in the law since the Additional Protocol 1¹⁰⁷ and Additional Protocol 2¹⁰⁸ to the 1949 Geneva Conventions proves that children are entitled to a special privileged status during armed conflict as a highly vulnerable group on account of age and, also, on account of the child’s being part of a marginalized segment of the

¹⁰⁴ G M Musila, “Challenges in establishing the accountability of child soldiers for human rights violations: restorative justice as an option”, (2005), *African human Rights Law Journal*, 321, 325.

¹⁰⁵ A Honwana, *Child Soldiers in Africa*, (2006), 51.

¹⁰⁶ G M Musila, “Challenges in establishing the accountability of child soldiers for human rights violations: restorative justice as an option”, (2005), *African human Rights Law Journal*, 321, 329.

¹⁰⁷ Protocol 1 Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of international Armed Conflicts, 8 June 1977.

¹⁰⁸ Protocol 2 Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of international Armed Conflicts, 8 June 1977.

population. It is in fact the state which should carry the burden of ensuring that this special protection is provided for¹⁰⁹.

Special protection can be shown in different forms, but a clear example is a situation where child soldiers are considered not to be legitimate targets for attack, especially when they are not posing an imminent or deadly threat. As a result, child soldiers are not considered lawful targets, at least not in the same way as adult enemy soldiers who are considered legitimate targets of attack at all times¹¹⁰. This differentiation between the two ages (minor and major) is a fair result considering the fact that children are entitled to a specially protected status under international humanitarian law, and that, if they are part of an armed group or rebel group, they are seen as being child civilians¹¹¹. To come to any other conclusion would defeat the *jus cogens* obligation owed by all states which is to protect children from recruitment¹¹² into armed conflict and during armed conflict¹¹³.

2.3 Conclusion

In the light of the information given above, it can be stated clearly the international community and the law has developed to an extent where the protection of children in armed conflict is promoted. The present international legislation in place aims to prohibit the participation by children in armed conflict. Although this prohibition may require improvements in the near future, it does provide an invaluable foundation towards the protection and development of the future generation¹¹⁴.

¹⁰⁹ S Grover, *Child Soldier Victims of Genocidal Forcible Transfer*, (2012), 20.

¹¹⁰ S Grover, *Child Soldier Victims of Genocidal Forcible Transfer*, (2012), 20.

¹¹¹ S Grover, *Child Soldier Victims of Genocidal Forcible Transfer*, (2012), 20.

¹¹² Article 1 of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of children in Armed Conflict 2000.

¹¹³ S Grover, *Child Soldier Victims of Genocidal Forcible Transfer*, (2012), 20.

¹¹⁴ R Harvey, "Recruitment and deployment of child soldiers- The beginning of the end?", (2000), *ChildRight*, 164,1.

One cannot refute the fact that the current legislation alone is not strong enough to stop the recruitment of child soldiers which is itself a harsh reality as well as the reality of war and the fact that the aim for any armed group is victory. The brutality of any war, whether it is international in nature or non-international in nature, suggests that rules and regulations are often not considered on the frontline of the battlefield. Instead, if an option for a victory exists, then the likelihood of a rebel leader adding yet another grave breach to his already long list of war crimes turns into a certainty¹¹⁵.

The international legislation that exists does at least provide a base for the international community, as states will find it difficult to ignore the provisions in place along with the obligations which are derived from such provisions. This is especially so if more states make an active stance to align their international relations with the enforcement of the Conventions¹¹⁶ and Additional Protocols¹¹⁷ discussed above.

¹¹⁵ R Harvey, "Recruitment and deployment of child soldiers- The beginning of the end?", (2000), *ChildRight*, 164,4.

¹¹⁶ Convention on the Rights of the Child, adopted by General Assembly Resolution 44/25 of 1989.

¹¹⁷ Protocol 1 Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of international Armed Conflicts, 8 June 1977.

Chapter 3

Defining criminal responsibility and the interplay with age and psychology

3.1 Introduction

The inevitable question, which has yet to be answered, relates to the attribution of criminal responsibility for crimes that are committed by children during their tenure as child soldiers, having regard for the fact that their very tenure is prohibited in international law. In chapter 2 it was stated that children are given special protection in armed conflict and they are seen as a vulnerable group. Does this alone discharge these children from all criminal responsibility for the deeds they commit during armed conflict?

In this chapter, consideration is given to the question of criminal responsibility of child soldiers for deeds committed during armed conflict. Emphasis is placed on developments in international criminal law, such as the Special Court for Sierra Leone¹¹⁸, the ongoing debate surrounding whether child soldiers are victims or

¹¹⁸ G M Musila, “Challenges in establishing the accountability of child soldiers for human rights violations: restorative justice as an option”, (2005), *African human Rights Law Journal*, 321, 326.

perpetrators, and the role that psychology plays with regard to child soldiers and their criminal responsibility¹¹⁹.

3.2 What is Criminal Responsibility within International Criminal Law?

Youthfulness in relation to criminal responsibility usually refers to young children not being held accountable for acts which would, if carried out by adults, constitute offences. This topic results in a controversial debate exacerbated by the realisation that criminal responsibility is a rather more complex legal issue on the international stage¹²⁰.

The question remains as to what constitutes criminal responsibility. According to Arts and Popovski, for a defendant of any age to be criminally responsible, the first prerequisite is proof that he or she has committed the crime with which he or she is being charged. This is usually accompanied by evidence to suggest fault on the part of the accused¹²¹.

Happold is of the opinion that an individual may be criminally liable for illegal conduct if his or her behaviour contains an element of fault. Simply put, this means that, if someone is guilty of a crime¹²², it is not enough for the individual only to have

¹¹⁹ K Arts & V Popovski, *International Criminal Accountability and the Rights of Children*, (2005), 97.

¹²⁰ K Arts & V Popovski, *International Criminal Accountability and the Rights of Children*, (2005), 85.

¹²¹ K Arts & V Popovski, *International Criminal Accountability and the Rights of Children*, (2005), 90.

¹²² M Happold, "Child Soldiers: Victims or Perpetrators?" (2008), *University of La Verne Review*, 56, 72.

committed the illegal act. The requisite *mens rea* as well as the *actus reus*¹²³ should also be present. Consequently, where the accused is a sane adult, the proof of the act accompanied by proof of the relevant mental element is often enough to hold the accused criminally liable for the offence he or she is being charged with¹²⁴.

The underlying issue which combines both these points provided above is that of criminal capacity. Criminal capacity merely suggests that the accused must possess an understanding of the criminal act in its narrow and wider sense¹²⁵. From the researcher's understanding, this means that the accused should appreciate the wrongfulness of his or her act and, furthermore, have the ability to act in accordance with such an appreciation¹²⁶.

A quote from Lacey further describes this as:

“both a cognitive and volitional element: a person must both understand the nature of her actions, knowing the relevant circumstances and being aware of possible consequences, and have a genuine opportunity to do otherwise than she does – to exercise control over her actions by means of choice”¹²⁷.

A child's criminal capacity is complex and multi-dimensional and it cannot be overlooked swiftly within a trial, especially when the finding of criminal liability carries with it consequences which may include the deprivation of liberty. When considering

¹²³ M Happold, “Child Soldiers: Victims or Perpetrators?” (2008), *University of La Verne Review*, 56, 72.

¹²⁴ K Arts & V Popovski, *International Criminal Accountability and the Rights of Children*, (2005), 90.

¹²⁵ K Arts & V Popovski, *International Criminal Accountability and the Rights of Children*, (2005), 90.

¹²⁶ K Arts & V Popovski, *International Criminal Accountability and the Rights of Children*, (2005), 90.

¹²⁷ N Lacey, *State Punishment: Political Principles and Community Values*, (1988), 63.

accused persons who are minors, some issues, therefore, require specific investigation.¹²⁸

Firstly, the developmental ability to act in accordance with the requirements of international criminal law basically entails whether or not the child has developed the appropriate cognitive ability to refrain from or control his or her actions, and if the answer is negative then the child is unable to conform his or her actions to meet the requirements of international criminal law¹²⁹.

In addition, it should be assessed whether the child is capable of understanding the distinction between right and wrong both morally and legally, and, if the child does understand such a distinction, what the understanding of the degrees of wrongdoing is, for example whether it is more reprehensible to burn down a village than to steal a loaf of bread.

The third point of investigation is the element of causation. Causation in this context refers to the sufficient understanding that the child possesses of the real world and, furthermore, that his or her wrongful conduct may have a knock-on effect¹³⁰.

The fourth point of investigation relates to the child's inherent understanding of criminality and criminal consequences. Briefly put, does the child comprehend that his or her conduct may result in consequences broader than merely the present immediate effect?¹³¹

There are a few other points which could also possibly be relevant for investigation purposes. These may include rationality and answerability, relating to whether or not

¹²⁸ K Arts & V Popovski, *International Criminal Accountability and the Rights of Children*, (2005), 91.

¹²⁹ K Arts & V Popovski, *International Criminal Accountability and the Rights of Children*, (2005), 91.

¹³⁰ K Arts & V Popovski, *International Criminal Accountability and the Rights of Children*, (2005), 91.

¹³¹ K Arts & V Popovski, *International Criminal Accountability and the Rights of Children*, (2005), 91.

the child is capable of answering for the crime/s he or she is being charged with in court¹³².

All of these aspects described above should be considered when determining whether a minor possesses criminal capacity or not. Should a minor be found not to possess the required mental ability and comprehension, then clearly he or she lacks criminal capacity and consequently criminal liability.

3.3 Criminal Responsibility and age.

The discussion above describes the theoretical understanding of what international law views as criminal responsibility. The question that remains here is how this definition is connected to the international view on age¹³³, and the underlying problem question which is whether children can be tried at all, especially for international crimes. Davison is of the opinion that, “*there is palpable tension in considering when child soldiers are victims, when they are criminals, and at what age it shifts.*”¹³⁴

The fact is that this question is very difficult to answer given a set international age, because individual legal systems and international legislation create further confusion as a result of their diversity. The international legislation that is relevant here does not provide a designated age either. Considering Article 77(2) of the Additional Protocol 1 would suggest to the reader that the age of fifteen is the minimum age for criminal responsibility for deeds committed in armed conflict, but this is only assumed because of the notion that a child under the age of fifteen may not be recruited and, consequentially, is too young to be held criminally responsible.

¹³² K Arts & V Popovski, *International Criminal Accountability and the Rights of Children*, (2005), 92.

¹³³ K Arts & V Popovski, *International Criminal Accountability and the Rights of Children*, (2005), 92.

¹³⁴ A Davison, “Child Soldiers: No longer a minor incident”, (2004), *Willamette Journal International Law & Dispute Resolution*, 12, 154.

This assumption alone is not authoritative, as the text makes no provision for child soldiers and their associated criminal responsibility.

Different countries have different age requirements. Arts and Popovski state the following in respect of age requirements;

“In South Africa the age is (10) ten (with doli incapax presumption then operating to the age of fourteen) while in Luxemborg it is eighteen. Between these extremes we find many other examples, Scotland at eight, England and Wales at ten, the Netherlands at twelve, Sweden at fifteen and Portugal at sixteen.”¹³⁵

As a result the diversity offered by each individual legal system creates more confusion than clarification.¹³⁶ The determination of the age of criminal responsibility is not the only way to see the divide between childhood and adulthood. Instead this divide can also be seen by the age requirement these individual countries set for the consumption of alcohol, the right to obtain a driver’s licence, or even the right to vote. The disappointing fact about the age limits set for these examples is that they are often ridiculously higher than the age for criminal responsibility, even though being criminally responsible may require a far more complex set of understandings on the part of the child¹³⁷.

One would assume that, where the individual domestic legal systems do not provide clarification, such clarification could be found in human rights instruments. The African Charter on Human and People’s Rights¹³⁸ does not explicitly state who may or may not be prosecuted in terms of age, but rather it provides for conditions in

¹³⁵ K Arts & V Popovski, *International Criminal Accountability and the Rights of Children*, (2005), 93.

¹³⁶ G M Musila, “Challenges in establishing the accountability of child soldiers for human rights violations: restorative justice as an option”, (2005), *African human Rights Law Journal*, 321, 326.

¹³⁷ K Arts & V Popovski, *International Criminal Accountability and the Rights of Children*, (2005), 93.

¹³⁸ African Charter on Human and People’s Rights 1986.

terms of which the accused may be prosecuted.¹³⁹ Other human rights instruments do not provide more hope with regard to clarifying this issue either, as the African Charter on the Rights and Welfare of the Child¹⁴⁰ does not preclude a child of any age being subject to prosecution.¹⁴¹ There is another view to consider, and that is to view children or minors in international law as a “class” of person. In this “class” of person a lack of *mens rea* is the rebuttable presumption and by, accepting this view, children or minors escape the assumed criminal responsibility for their conduct¹⁴².

An argument can be raised to advance the viewpoint that the age of criminal responsibility is an indeterminate matter¹⁴³ with regards to international law mainly because different children mature at different rates, and actually to set a determined age allows a minor who is a day short of his or her relevant birthday to escape criminal liability, while his or her older counterpart by one day will not be subject to the same biologically blessed fate¹⁴⁴. Veale encapsulates the latter dilemma as follows:

“The age of many of the children sheds doubt on whether children can understand what genocide is; that they have been so traumatised by their experiences that they can no longer distinguish between right and wrong; and that the power dynamics of

¹³⁹ G M Musila, “Challenges in establishing the accountability of child soldiers for human rights violations: restorative justice as an option”, (2005), *African human Rights Law Journal*, 321, 326.

¹⁴⁰ African Charter on the Rights and Welfare of the Child 1999.

¹⁴¹ G M Musila, “Challenges in establishing the accountability of child soldiers for human rights violations: restorative justice as an option”, (2005), *African human Rights Law Journal*, 321, 326.

¹⁴² M Happold, “Child Soldiers: Victims or Perpetrators?” (2008), *University of La Verne Review*, 56, 72.

¹⁴³ M Happold, “Child Soldiers: Victims or Perpetrators?” (2008), *University of La Verne Review*, 56, 72.

¹⁴⁴ K Arts & V Popovski, *International Criminal Accountability and the Rights of Children*, (2005), 94.

social norms which demands the obedience of children to adults has to be taken into account in any consideration of ‘intent’ ”.

3.4 Criminal Responsibility and the interplay with Psychology

The preceding subsections to this chapter have described the lack of consensus regarding the age of criminal responsibility and how criminal responsibility itself is heavily dependent on the mental state of the accused¹⁴⁵. It is imperative, therefore, to consider the psychological factors relevant to child soldiers participating in armed conflict. The human mind is the single most powerful feature a person possesses, as an individual’s conduct is often the physical illustration or dramatization of the person’s innate desires, and even more so in the case of an underdeveloped minor.

There are various theories by prominent authors who possess their own arguments as to the weight or justification that psychological factors may have on a child to participate in and commit deeds during armed conflict¹⁴⁶. One argument views the child’s participation in hostilities as stemming from the innate human desire to put an end to injustice and to protect their communities¹⁴⁷, while another view may argue that the child’s participation in armed conflict can be seen merely as an active coping mechanism which provides a protective psychological function as opposed to the alternative of poverty, hopelessness, and even a learnt helplessness¹⁴⁸.

The majority of academic arguments and views stemming from a psychological perspective are founded on a strong assumption of “victimhood” and the underlying

¹⁴⁵ M Happold, “Child Soldiers: Victims or Perpetrators?”, (2008), *University of La Verne Review*, 56, 72.

¹⁴⁶ K Arts & V Popovski, *International Criminal Accountability and the Rights of Children*, (2005), 99.

¹⁴⁷ K Arts & V Popovski, *International Criminal Accountability and the Rights of Children*, (2005), 99.

¹⁴⁸ K Arts & V Popovski, *International Criminal Accountability and the Rights of Children*, (2005), 99.

international obligation placed on states to rehabilitate former child soldiers¹⁴⁹. This assumption is not incorrect when based on the premise that the actual situation of the child in its entirety must be understood, as well as the effects that such participation in hostilities can have on the child's developmental process¹⁵⁰. The reason this thorough understanding is considered important so that we, as adults, do not look past the fact that child soldiers are both victims and perpetrators, and, regardless of their possible guilt arising from their illegal conduct, the main responsibility lies with us, the adults¹⁵¹.

3.5 Conclusion

This chapter consists of various issues of debate regarding the relationship between criminal responsibility, age, and psychological factors. There has been confirmation of the fact that international law views persons under the age of eighteen as vulnerable children in need of protection¹⁵². At present, however, international law fails to address the problem of child soldiers who commit horrible war crimes. The very silence that this issue illustrates, coupled with the harsh reactions given by national courts for war crimes committed by child soldiers, suggests that there is a need to create or adopt an international approach¹⁵³.

¹⁴⁹ K Arts & V Popovski, *International Criminal Accountability and the Rights of Children*, (2005), 103.

¹⁵⁰ K Arts & V Popovski, *International Criminal Accountability and the Rights of Children*, (2005), 103.

¹⁵¹ K Arts & V Popovski, *International Criminal Accountability and the Rights of Children*, (2005), 103.

¹⁵² D M Rosen, "Who is child? The legal Conundrum of Child Soldiers", (2009), *Connecticut Journal of International Law*, 25, 81, 117.

¹⁵³ D M Rosen, "Who is child? The legal Conundrum of Child Soldiers", (2009), *Connecticut Journal of International Law*, 25, 81, 117.

Davison is of the opinion that, in order to facilitate justice and show some sort of remorse from these children towards victims and their families and actually to attempt to reintegrate them into society, there is a clear need for criminal responsibility¹⁵⁴. Rosen argues that age should not be the only bar to legal accountability, but rather that child soldiers should be held accountable for their conduct, and that due consideration should be given to local ideas of justice and the mechanisms of punishment that are lower than those provided for adults¹⁵⁵.

¹⁵⁴ A Davison, "Child Soldiers: No longer a minor incident", (2004) *Willamette Journal International Law & Dispute Resolution*, 12, 154.

¹⁵⁵ D M Rosen, "Who is child? The legal Conundrum of Child Soldiers", (2009), *Conneticut Journal of International Law*, 25, 81, 118.

Chapter 4

Potential mechanisms and alternative options towards achieving accountability.

4.1 Introduction

This chapter contains an analysis of the available or potential mechanisms in terms of which justice may be sought for the deeds committed by child soldiers during armed conflict. This chapter will conclude with recommendations for the best option to be applied and for both the improvement and enforceability thereof.

4.2 Is impunity an option?

Owing to the complex nature of child soldiers and their status during armed conflict and their being seen as both victims and perpetrators, an appropriate question to be asked is whether impunity may be a viable option in relation to the potential criminal responsibility of child soldiers. Some authors argue that impunity is an acceptable option because children are not child soldiers voluntarily, and, therefore, clearly strong elements of duress exist¹⁵⁶. This argument is, furthermore, substantiated by

¹⁵⁶ S Grover, *Child Soldier Victims of Genocidal Forcible Transfer*, (2012), 188.

article 31(1)(d) of the Rome Statute¹⁵⁷ which specifically focuses on the grounds for excluding criminal responsibility.

Article 31(1)(d) of the Rome Statute provides as follows, *“The conduct which is alleged to constitute a crime within the jurisdiction of the court has been caused by duress resulting from a threat of imminent death or of continuing of imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided”*.

Grover argues that children should not face prosecution for international crimes related to child soldiering¹⁵⁸. This argument is premised on the basis that *“all persons under 18 though child soldiers are in fact non-combatants that should not be held responsible for their soldiering and their conduct as soldiers”*¹⁵⁹. Should the international community approve such a drastic option, one would only hope that the decision would be made after taking into consideration all the significant consequences which may inevitably ensue if impunity is awarded.

Should impunity be granted it would also promote the continuance of child recruitment into armed forces and groups¹⁶⁰. Another consequence could also be that, if a child knows that he/she will not be held responsible for his/her conduct irrespective of whether it was voluntary or forced, it is difficult to see why he/she would choose not to commit even more atrocities.¹⁶¹ Another concern to be raised relates to the reality that should impunity be granted to child soldiers, the question inevitably arises as to the doctrine of command responsibility in situations where the

¹⁵⁷ Article 31(1)(d) of the Rome Statute of the International Criminal Court 1998.

¹⁵⁸ S Grover, *“‘Child Soldiers’ as ‘Non-Combatants’: The Inapplicability of the Refugee Convention Exclusion Clause”*, (2008), *International Journal of Human Rights*, 12, 56.

¹⁵⁹ S Grover, *“‘Child Soldiers’ as ‘Non-Combatants’: The Inapplicability of the Refugee Convention Exclusion Clause”*, (2008), *International Journal of Human Rights*, 12, 61.

¹⁶⁰ K Arts & V Popovski, *International Criminal Accountability and the Rights of Children*, (2005), 103.

¹⁶¹ K Arts & V Popovski, *International Criminal Accountability and the Rights of Children*, (2005), 103.

individual who controls the child soldier is a child himself? The only way to answer this positively is to uphold the granting of impunity while disregarding or ignoring the enforceability of the command responsibility doctrine.

According to Rosen, it is not necessary for international law to accept or condone the extreme position of all individuals under eighteen years of age to stand outside the law and the justice system.¹⁶²

On a global scale the consequences for granting impunity are much more severe, mainly because, if such unlawful deeds committed by child soldiers are publicly ignored, this would consequently undermine the international administration of justice as well as its credibility¹⁶³. Having regard to all the concerns and issues raised above, impunity is not only an option which is not viable but it is also an option which does not correct the wrongs of the past but instead merely attempts to sweep it under the carpet.

4.3 Justice must be done and it must be seen to be done.

From the above discussion one can see that international criminal responsibility with regards to children is not easily determined. Nevertheless, child soldiers are responsible for some of the gravest breaches of international law and yet the current punishment-oriented mechanisms do not suffice in achieving accountability for this category of perpetrator¹⁶⁴. This has led to a few cases only in which child soldiers were prosecuted for war crimes under international law. Happold argues that this is a result of the ongoing disagreement about whether child soldiers may be held

¹⁶² D M Rosen, "Who is child? The legal Conundrum of Child Soldiers", (2009), *Conneticut Journal of International Law*, 25, 81, 117.

¹⁶³ K Arts & V Popovski, *International Criminal Accountability and the Rights of Children*, (2005), 103.

¹⁶⁴ G M Musila, "Challenges in establishing the accountability of child soldiers for human rights violations: restorative justice as an option", (2005), *African human Rights Law Journal*, 321, 330.

responsible for deeds they commit during armed conflict or whether they should be treated as innocent tools used by their superiors¹⁶⁵.

Veale argues that it is in the child's best interests, both short and long term that he or she is held accountable.¹⁶⁶ Such accountability is necessary for child soldiers who have actively participated in an armed group for a number of years and where the child soldier himself/herself is responsible for the conduct which violates human rights, and also considering circumstances where the child himself/herself was in a position of authority or control over his own actions or those of or his/her colleagues.¹⁶⁷

4.4 The viability and legality of putting child soldiers on trial

Since the possibility of impunity is not a viable option, an alternative option would be to hold child soldiers accountable for their deeds committed during armed conflict. In order to hold child soldiers accountable for their transgressions, one would need to take into consideration the best possible mechanisms available not only for the international community, but also with due regard to the bests interest of the child.¹⁶⁸

A constructive analysis of putting a child soldier on trial includes the consideration of any prior precedent where a child soldier was put on trial for the deeds he or she committed during armed conflict. The most appropriate case here would be the *United States v Omar Ahmed Khadr*.¹⁶⁹ This case is ground breaking as it creates a baseline of understanding of the realistic result of the possible prosecution of child soldiers, not to mention the importance of the case because Omar Khadr was the

¹⁶⁵ M Happold, "Child Soldiers: Victims or Perpetrators?" (2008), *University of La Verne Review*, 56, 71.

¹⁶⁶ K Arts & V Popovski, *International Criminal Accountability and the Rights of Children*, (2005), 107.

¹⁶⁷ K Arts & V Popovski, *International Criminal Accountability and the Rights of Children*, (2005), 107.

¹⁶⁸ S Grover, *Child Soldier Victims of Genocidal Forcible Transfer*, (2012), 85.

¹⁶⁹ *United States v Omar Ahmed Khadr*, 2010. <http://www.defense.gov/news/d94-D111.pdf>.

first child soldier to be tried since the second world war.¹⁷⁰ Despite the difficulty faced by the prosecution even in deciding how to charge an international minor, Omar Khadr, who was fifteen years of age at the time, was charged with the ‘intentional murder by an unlawful combatant’. He was accused of killing U.S Army Sergeant Christopher Speer by throwing a hand grenade directly at United States troops.¹⁷¹

A brief examination of the facts indicated that Omar Khadr had close ties with Al-Qaeda and that he had been trained in the use of small arms and explosives. In July 2002, United States soldiers infiltrated a compound in which Omar Khadr and other Al-Qaeda members were staying, as a result of which shots were fired and a grenade thrown by Khadr killed Sergeant First Class Christopher Speer.

Omar Khadr, who was badly injured at the time, was then hospitalized, detained, and treated as an enemy combatant. Because he was regarded as an unlawful combatant, he lost any combatant privilege.¹⁷² Owing to the nature of the incident, there were no witnesses available to testify that Omar Khadr had, in fact, thrown the grenade that killed Sergeant Speer. Omar Khadr’s alleged confession, therefore, would be the only evidence keeping this case alive.¹⁷³ During the detention of the fifteen-year old, he was subjected to cruel, inhumane, and degrading treatment. He was even threatened with rape and told that detainees who do not cooperate are sent to Afghanistan to be raped, and that “they like small boys in Afghanistan”.¹⁷⁴ In a report, Khadr himself alleged that he was threatened with a particular “Soldier Number 9” who was going to be sent to interrogate and rape him, or that he would be sent to Egypt or Israel to be raped.¹⁷⁵

The reports and allegations similarly made regarding Khadr’s maltreatment were corroborated by a former army medic who had treated the fifteen-year old child

¹⁷⁰ D M Rosen, *Child Soldiers*, (2012), 104.

¹⁷¹ D M Rosen, *Child Soldiers*, (2012), 104.

¹⁷² D M Rosen, *Child Soldiers*, (2012), 106.

¹⁷³ D M Rosen, *Child Soldiers*, (2012), 104.

¹⁷⁴ D M Rosen, *Child Soldiers*, (2012), 107.

¹⁷⁵ D M Rosen, *Child Soldiers*, (2012), 107.

soldier. The former medic confirmed that he had first met Khadr who was hooded, weeping, and chained by the arms to the door of a cage at a United States lock-up in Afghanistan. The facts of the case are both disturbing and morally reprehensible, not only because we discover what a child is capable of, but also, more disturbingly, what adults are willing to condone as acceptable behaviour as long as it produces a specific result. The military judge who presided over the matter, despite the obvious conditions stated above, still found that the statements made by Khadr during this detention were not a product of torture and, therefore, had been made voluntarily.¹⁷⁶

One cannot overlook the fact that the treaty obligations placed on the United States through the Optional Protocol¹⁷⁷ do not disappear along with the basic human rights belonging to Omar Khadr. These include the requirement that children under the age of 18 are supposed to receive special protection and not to be treated the same as adult detainees, which is exactly what Omar Khadr was subjected to.¹⁷⁸ The United Nations is in agreement on this point. The special representative of the secretary general for children in armed conflict reiterated that this case is another clear example of where children are recruited by adult groups to fight a war the children barely understand.¹⁷⁹

As one can see, the possibility of placing a child soldier on trial is certainly available and, to a certain extent, the victim's family achieves some sort of unqualified justice. The Khadr case resulted in Khadr serving an eight year sentence after being found guilty, but what cannot be denied is the unnatural state of existence of a punishment method being chosen over a reconciliation method. The adult community surely cannot promote the process conducted in the Khadr case, where we fight fire with fire while having concrete knowledge of the fact that a child cannot be held to the same standard of accountability as an adult.¹⁸⁰ Surely there is another way

¹⁷⁶ D M Rosen, *Child Soldiers*, (2012), 104.

¹⁷⁷ Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict 2000.

¹⁷⁸ D M Rosen, *Child Soldiers*, (2012), 107.

¹⁷⁹ D M Rosen, *Child Soldiers*, (2012), 107.

¹⁸⁰ K Arts & V Popovski, *International Criminal Accountability and the Rights of Children*, (2005), 103.

accountability can be achieved without infringing treaty and customary law obligations,¹⁸¹ and pertinently dealing with the protection of the child and the child's best interest.¹⁸²

4.5 Restorative Justice, Rehabilitation and Re-integration.

Neither the option of impunity nor placing a child soldier on trial, as discussed above, meet the requirements of fair justice in all aspects. The option of impunity falls short in that real justice cannot be achieved when there is no accountability on the part of the perpetrator,¹⁸³ and the option of placing a child on trial falls short where the trial is not internationally regulated at least as far as the assurance of human rights is concerned.¹⁸⁴ The result is that all perpetrators should be held accountable for atrocities regardless of age;¹⁸⁵ the important question here is what form of accountability is best suited for child soldiers?

In this context, restorative justice refers to an approach through law that searches to take into consideration the interests of all the parties in a criminal prosecution, including the state, the accused, the victims, and the international community as a

¹⁸¹ Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict 2000.

¹⁸² Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict 2000.

¹⁸³ K Arts & V Popovski, *International Criminal Accountability and the Rights of Children*, (2005), 103.

¹⁸⁴ D M Rosen, *Child Soldiers*, (2012), 107.

¹⁸⁵ G M Musila, "Challenges in establishing the accountability of child soldiers for human rights violations: restorative justice as an option", (2005), *African human Rights Law Journal*, 321, 332.

whole¹⁸⁶. The term can also be used to relate to similar processes along the lines of restitution, compensation, participation, and rehabilitation¹⁸⁷.

Musila encapsulates the notion of restorative justice by saying, “*An approach that embraces restorative justice would incorporate the interests of victims that demand at least the trial of those responsible for atrocities as well as those of child soldiers, who we consider a special category of victims.*”¹⁸⁸

It is true that some may find it too late to save a child soldier’s life once he or she has been exposed to combat and that warfare has transformed these children into preadolescent sociopaths who are addicted to violence and unable to live in a civil society¹⁸⁹. The most of humanity, regardless of culture, race and religion, clings to the hope that these child soldiers are not irretrievable and that their acts which we now judge do not put them outside the boundaries not only of a civil society but of a hopeful life.¹⁹⁰

Children are constantly involved in an active biological and psychological process of development. They are, therefore, not static observers of events.¹⁹¹ This must be taken into account when considering whether rehabilitation and re-integration are

¹⁸⁶ G M Musila, “Challenges in establishing the accountability of child soldiers for human rights violations: restorative justice as an option”, (2005), *African human Rights Law Journal*, 321, 325.

¹⁸⁷ G M Musila, “Challenges in establishing the accountability of child soldiers for human rights violations: restorative justice as an option”, (2005), *African human Rights Law Journal*, 321, 325.

¹⁸⁸ G M Musila, “Challenges in establishing the accountability of child soldiers for human rights violations: restorative justice as an option”, (2005), *African human Rights Law Journal*, 321, 332.

¹⁸⁹ R Brett M Mccallin, *Children: The Invisible Soldiers*, (2001), 124.

¹⁹⁰ R Brett M Mccallin, *Children: The Invisible Soldiers*, (2001), 124.

¹⁹¹ R Brett M Mccallin, *Children: The Invisible Soldiers*, (2001), 124.

viable options, having regard to gender, the age of the children involved, and their length of army service.¹⁹²

When choosing an appropriate mechanism to ensure the accountability of children for deeds deemed to be criminal in nature, one cannot conduct an approach without upholding the most precious concern provided for in the Convention on the Rights of the Child, which is the child's best interest.¹⁹³ This interest must be maintained in the midst of, on the one hand, the protection and care of the child, and, on the other hand, the "reality" that confronts the millions of children caught up in armed conflict.¹⁹⁴

Restorative justice and rehabilitation appear to be mechanisms which do not only ensure justice but can also be seen as one of the realistic legal options for child soldier's accountability in international law. According to Grover, "*Child soldiers must be considered as 'non-combatants' in that they, unlike adult soldiers, have no unqualified right under international law to directly participate in armed conflict*"¹⁹⁵.

Accountability is, therefore, a necessity if any transition to peace is to be achieved. Owing to the status of children in war time and in peace time an alternative to courtroom criminal procedures is more appropriate¹⁹⁶. When considering the best interests of the child, one would need to recognize a mechanism which upholds human rights standards for juvenile justice. The Statute for the Special Court for Sierra Leone guarantees this where it places an obligation on the international

¹⁹² R Brett M McCallin, *Children: The Invisible Soldiers*, (2001), 124.

¹⁹³ Convention on the Rights of the Child, adopted by General Assembly Resolution 44/25 of 1989.

¹⁹⁴ R Brett M McCallin, *Children: The Invisible Soldiers*, (2001), 127.

¹⁹⁵ S Grover, "'Child Soldiers' as 'Non-Combatants': The Inapplicability of the Refugee Convention Exclusion Clause", (2008), *International Journal of Human Rights*, 12, 56.

¹⁹⁶ K Arts & V Popovski, *International Criminal Accountability and the Rights of Children*, (2005), 185.

community to treat child soldiers with dignity and a sense of worth and to promote the rehabilitation and reintegration of the child¹⁹⁷.

4.6 Conclusion

The analyses conducted above reveals the following facts: firstly, child soldiers are both victims and perpetrators¹⁹⁸; secondly, owing to their very nature and age the child's best interest is a core concern of the international community¹⁹⁹; thirdly, impunity is not a viable option where justice is concerned regarding the deeds child soldiers commit during armed conflict²⁰⁰; and, fourthly, criminal accountability is a necessity for victims to be assured of some sort of remorse and for peace and justice to be achieved²⁰¹.

The fact remains that legislation regulating child soldiers in terms of international law has not reached a point which adequately addresses and resolves the phenomenon²⁰². There still remains room for improvement in a house that appears to

¹⁹⁷ G M Musila, "Challenges in establishing the accountability of child soldiers for human rights violations: restorative justice as an option", (2005), *African human Rights Law Journal*, 321, 333.

¹⁹⁸ A Davison, "Child Soldiers: No longer a minor incident". (2004), *Willamette Journal International Law & Dispute Resolution*, 12, 154.

¹⁹⁹ Convention on the Rights of the Child, adopted by General Assembly Resolution 44/25 of 1989.

²⁰⁰ D M Rosen, "Who is child? The legal Conundrum of Child Soldiers", (2009), *Conneticut Journal of International Law*, 25, 81, 117.

²⁰¹ A Davison, "Child Soldiers: No longer a minor incident", (2004), *Willamette Journal International Law & Dispute Resolution* 12, 154.

²⁰² G M Musila, "Challenges in establishing the accountability of child soldiers for human rights violations: restorative justice as an option", (2005), *African human Rights Law Journal*, 321, 330.

be built on the right foundations. The international community has emphasised its intentions through Article 7(1) of the Optional Protocol which provides that:

*“States Parties shall cooperate in the implementation of the present Protocol, including in the prevention of any activity contrary thereto and in the **rehabilitation and social reintegration** of persons who are victims of acts contrary thereto, including through **technical cooperation and financial assistance**. Such assistance and cooperation will be undertaken in consultation with the State Parties concerned and the relevant international organizations.”*²⁰³

This article reiterates the fact that rehabilitation and reintegration are the best available options when regulating criminal deeds committed by child soldiers in armed conflict²⁰⁴. Where there is a choice one should elect rehabilitation mechanisms, including care, guidance, community service, educational, and vocational training programmes, demobilisation, and reintegration programmes²⁰⁵ rather than punishment and prosecution which neglect to address the root of the phenomenon but instead addresses only the consequences.

The possibility of this option becoming internationally enforced in terms of established institutions designated for the promotion of rehabilitation and reintegration of child soldiers back into civil society is not merely a hope but something urgently needed. Musila is of the opinion that one can see, from the Rome Statute of the International Criminal Court²⁰⁶, that there is an obligation placed

²⁰³ Article 7(1) of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (2000).

²⁰⁴ Article 7(1) of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (2000).

²⁰⁵ G M Musila, “Challenges in establishing the accountability of child soldiers for human rights violations: restorative justice as an option”, (2005), *African human Rights Law Journal*, 321, 333.

²⁰⁶ Rome Statute of the International Criminal Court 1998.

on the court to develop principles to give effect to restorative justice, through which the concerns and rights of the victims will be provided.²⁰⁷.

²⁰⁷ G M Musila, “Challenges in establishing the accountability of child soldiers for human rights violations: restorative justice as an option”, (2005), *African human Rights Law Journal*, 321, 334.

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