THE ERGA OMNES *OBLIGATION TOWARDS CHILDREN IN ARMED CONFLICT*

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DECLARATION

I, Adv Reece Irvin da Costa, declare that *The* Erga Omnes *obligations towards children in armed conflict* is my own work and that all sources that I have used or quoted have been indicated and acknowledged utilizing complete and proper references.

I have not made use of the previous work of another student and submitted it as my own.

I have not allowed and will not allow anyone to copy my work to present it as his or her own work.

_____ _____

ADV REECE IRVIN DA COSTA **DATE**

DEDICATION

In loving memory of my Grandmother, Joanna Da Costa, who, from when I was very young, instilled in me the value of education and hard work and who taught me always to fight for a better world.

ACKNOWLEDGMENTS

Soli Deo Gloria

I would like to thank my supervisor, Professor Geert Philip Stevens, for his constant encouragement and guidance during this long process. His unwavering confidence in my research career and practice has been the necessary motivation in the moments when the mountain felt daunting and impossible to climb.

I thank my parents, Gloria and Ivan, without whom I would not be the man I am today. I say a big “thank you” to my parents for sacrificing their youth so that I may have a brighter future.

I thank my sister, Candice, and her husband, Sean, for tutoring me in my undergraduate studies and unknowingly firing a spark for education which would go the distance.

I thank my better half, Michaela, for the love and support you have shown me. You truly have stood by me through every obstacle along the way.

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To the Marques family, I am eternally grateful for every meal and coffee prepared for the midnight stretch of my drafting. Uncle Paris, thank you for assisting with my conclusion and reminding me that I was always one word closer to the end goal.

SUMMARY

For centuries, children have been used directly and indirectly in armed conflict. The participation of children in armed conflict has grown in recent years to an estimation of more than 300 000 children currently participating in armed conflict. The growing number of this participation is attributable to the modernisation of armed conflict itself, with many armed conflicts characterised as being non-international in nature and located within heavily populated cities.

In this thesis, the researcher explores the various motivations behind the continuous use of children in armed conflict. The result has shown that children possess a unique risk in times of armed conflict as their vulnerability and age similarly contain characteristics of fearlessness, stamina, and a perceived search for family. These are attributes which make the child an attractive candidate for an armed force in need of members.

The researcher considers international law as a multifaceted body of law which contains international humanitarian law, international human rights law, international customary law, and international criminal law. In canvassing the aforementioned bodies of law, the researcher studies the sources of international law and draws on the characterisation of peremptory norms. In assessing the requirements for peremptory norms and the obligations which consequentially flow from their enforcement, the researcher argues that the modification or creation of a similar norm requiring a peremptory status is permissible. This research studies the international laws that apply to children in armed conflict. The provisions prohibiting the recruitment and use of children in armed conflict are contained in the aforementioned bodies of law. The researcher analytically discusses the strength of these provisions amidst their applicability to the modern child in armed conflict.

In researching the current strength of the relevant provisions and their consequential obligations, the argument is made that the prohibition of the use of children in armed conflict has been elevated to a peremptory norm status. The researcher submits this argument by drawing on international customary law and the potential peremptory

norm created through the modification of a subsequent norm of general international law having the same character.

This thesis examines how the current obligations towards the child's participating in armed conflict may be developed and address the unique needs of the child. In this assessment, the researcher recognises the autonomous rights of the child, the psychological capacity of the child, and the best interests of the child in armed conflict.

In illustrating the purpose of developing legal provisions and obligations which apply directly to the unique needs of the child in armed conflict, the researcher reminds the reader that the deeds committed by children in armed conflict are often war crimes which require accountability. The potential criminal liability of children for the deeds committed during armed conflict has remained an unanswered question within the framework of international law. A reason for this, as discovered in the research, is due to the conflicting views surrounding whether the child participating in armed conflict is indeed a victim or a perpetrator. The researcher provides a case study of the Omar Khadr case and identifies the aspects of its merits which urges a revolutionised approach to children participating in armed conflict. It is within this determination that the *erga omnes* obligations towards children in armed conflict arrive at the intersection between international humanitarian law, international criminal law an international human rights law. It is here that the need to understand the psychology of the child participating in armed conflict fully finds its imperative nature.

The chronology of the obligations protecting children from armed conflict purport to provide that States now possess the responsibility of adopting "legal, administrative or other measures" which aim to strengthen and develop the protection afforded to the child from participating in armed conflict. These obligations lack the necessary particularity, to the extent that they are directed at protecting the child's initial recruitment into armed forces and offer only vague legal mechanisms to the child post armed conflict. It is within this ambiguous arena that the researcher proposes an innovative legal mechanism as a particularised measure to be adopted by states. The proposal contains the framework for establishing a *Special Children's Court.* This proposal intends to be the researcher's original contribution to the body of law, wherein the obligations that are owed to the child participating in armed conflict may adequately

address the unique needs of the child, her vulnerable psyche, autonomous rights, and best interests.

MODE OF CITATION AND REFERENCE TO SOURCES

In order to make the current thesis more user-friendly, the author has elected to abide by the following mode of citation and reference to sources relied upon in support of this study:

- Footnotes will be used throughout this research thesis to provide the requisite recognition to the various authorities used and to ensure that the various sources are adequately accessible to other authors;

- A complete list of authorities used during this study is supplied at the end of this thesis using a bibliography;

- In the event of a specific source being utilized in a subsequent chapter or subchapter, the full reference of such a source will again be provided within the context of the subsequent chapter to render the source more accessible to the reader.

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TO WHOM IT MAY CONCERN

This is to certify that I have completed the English Editing of the text of a thesis to be submitted in partial fulfilment of the requirements for the degree of
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I am qualified to have done such editing, being in possession of a Bachelor's degree in English from Rhodes University, Grahamstown, an Honours Degree in English and HED with English as prime teaching subject from the University of South Africa, and having taught English to Matriculation, First Year University Level, GCSE and A level in both South Africa and the United Kingdom of Great Britain for over 40 years, as well as having been Senior (English) Associate Editor of a national magazine for two years. I have edited Master's Dissertations and Doctoral Theses for several years for several universities and institutions in South Africa and abroad as well as editing documents/papers for publication for various publishing concerns and a number of international academics.

I trust that this declaration is satisfactory.

DAVID JOHN SWANEPOEL

KEYWORDS AND PHRASES

Convention; armed conflict; accountability; children; rehabilitation; criminal accountability; education; international law; international humanitarian law; international human rights law; international criminal law; Rome Statute; recruitment; victim; perpetrator; juvenile responsibility.

TABLE OF CONTENTS

CHAPTER 2

The relevant sources of international law and the development of children's participation in international law

CHAPTER 3

The benefits and limitations of international legal principles applicable to children in armed conflict

CHAPTER 4

The impact of armed conflict on a child's developing psychology

CHAPTER 5

The best interests of the child during and after armed conflict: The *Omar Khadr* case as a guiding light

CHAPTER 6

Conclusion and research findings: A proposal and framework for a *Special Children's Court*

Chapter 1

Factual Background, Conceptualisation, Problem Statement and Research Objectives

1.1 Introduction to background

> *"Everyone talks about 'the impact of war on children'. But how do you measure the impact of war? Who suffers the greater horror, the child who is violated or the child who is forced to become a perpetrator? We are the victim, the perpetrator and the witness, all at once."*[1]

The researcher embarks on this project with the description of children in armed conflict as "child soldiers". The premise of this view stems from the use of children in armed conflict as soldiers. This view is combined with the notion that children, from an international law perspective, are arguably not to be regarded as members of an armed conflict.

The term "child soldier" resembles neither a child nor a soldier.[2] Rather it resembles a young physical being associated with violence, terror, and the inability to distinguish

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[1] K Fallah, "Perpetrators and Victims: prosecuting children for the commission of international crimes", (2006), 14(1), *African Journal of International and Comparative Law* 83. See also The Sierra Leone Truth and Reconciliation Commission (with UNICEF and UNAMSIL), *Truth and Reconciliation Commission Report for the Children of Sierra Leone: Child Friendly Version* (2004) 14.

[2] M.A Thomas, "Malice Supplies the Age: Assessing the Culpability of Adolescent Soldiers", (2013), 44 (1), *California Western International Law Journal* 1-2. See also A Honwana, *Child Soldiers in Africa*, (2006) 51.

right from wrong.[3] This is incomparable to the notion of a true adult soldier whose demeanour is associated with respect, discipline, and often a state-sponsored ideology.[4]

History suggests that the use of children in armed conflict has been a point of contention on the international table for centuries, a point of contention that inconceivably remains untreated. This is said, however, critically, as research will suggest that there have certainly been numerous international steps taken to cure the symptoms and consequences of the effects of children in armed conflict. The Convention on the Rights of the Child[5] ensures that the international community has universally accepted the "best interests" of the child to be the pinnacle of the development of International Human Rights and International Humanitarian Law.[6] The prevention of grave violations involving children in armed conflict is now seen to be the primary concern of the international community.[7] It can further be argued that, should the international community fail to accept and act in accordance with this

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

[4] A Honwana, *Child Soldiers in Africa*, (2006) 51.

[5] Article 3(1) of The Convention on the Rights of the Child, adopted an opened for signature, ratification and accession by the General Assembly resolution 44/25 of 20 November 1989, and entry into force 2 September 1990, in accordance with article 40. - In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

[6] J Willems, *Children's Rights and Human Development- a Multidisciplinary Reader*, (2010) 583. Willems argues that, in considering the best interests of the child and what it demands from adults, one should first consider the child's right to be respected. See also V Odala, "The Spectrum for Child Justice in the International Human Rights Framework: From "Reclaiming the Delinquent Child" To restorative Justice", (2012), 27(3), *The American University International Law Review* 544.

[7] United Nations, General Assembly Security Council, Seventy Second Session, Promotion and Protection of the Rights of Children: Children and Armed Conflict, A/72/865-S/2018/465. 16 May 2018, at paragraph 11.

universal obligation, the effects thereof on children living in devastation and war-torn States are but one negative consequence. The other is that the amplification of grievances between belligerent parties and their likelihood to overcome conflict simply diminishes.[8]

It is an uncontested fact that constant updated statistics surrounding children deemed to be participating in armed conflict either directly or indirectly are never an accurate reflection,[9] mainly as a result of the constantly new emerging battlefields across the globe. The effect of this, however, is that international legislatures will always adopt conventions or treaties which arrive at the battlefield a little late or somewhat out of breath, as their intentions could never reflect or react to the epidemic in its realistic[10] and current form.[11]

In a 2018 report issued by the United Nations Secretary-General, entitled *Children and armed conflict,*[12] the United Nations Secretary-General confirmed in paragraph 2 that all the information provided in the report had been vetted for accuracy by the United Nations. However, where the inability exists to verify such information for whatever reasons, the information will be qualified as such. That said, the information contained

[8] United Nations, General Assembly Security Council, Seventy Second Session, Promotion and Protection of the Rights of Children: Children and Armed Conflict, A/72/865-S/2018/465. 16 May 2018, at paragraph 11-12.

[9] E.A Rossi, "A "Special Track" for former Child Soldiers: Enacting a "Child Soldier visa" as an alternative to asylum protection", (2013), 31, *Berkeley Journal International Law* 405.

[10] Child soldier's world index www.child-soldiers.org/who-are-child-soldiers (Accessed on 24 January 2019).

[11] E.A Rossi, 'A "Special Track" for former Child Soldiers: Enacting a "Child Soldier Visa" as an alternative to asylum protection', (2013), 31, *Berkeley Journal International Law* 405.

[12] United Nations, General Assembly Security Council, Seventy Second Session, Promotion and Protection of the Rights of Children: Children and Armed Conflict, A/72/865-S/2018/465. 16 May 2018.

in the report was indicative only and could never represent the full scale of violations against children in 2017.[13]

Despite the obvious developments in international law, international criminal law is still faced with an unanswered question. The unanswered question relates to the way in which the international community should approach children participating, directly or indirectly, in armed conflict and who have committed deeds seen to be human right violations or other international crimes.[14]

To date, the international community has discussed and attempted to approach the prohibition of children in armed conflict, but no formidable legal framework has been put in place on an international scale for the consequences of children still participating in armed conflict, despite the laws in place prohibiting their involvement. Development and continued analysis of international law is warranted. When considering the protection of children in armed conflict, the development and modernisation of international law are necessary for it to be applicable and effective when responding to the changing nature of the armed conflict.[15]

The purpose of this research is focused on identifying the legal mechanisms that currently exist to protect children from recruitment and participation (by state armed forces and/or non-state armed groups) in armed conflict. Following this there is an analysis regarding the enforceability or the lack thereof of these particular legal mechanisms; and this concludes with the manner in which the international community

[13] United Nations, General Assembly Security Council, Seventy Second Session, Promotion and Protection of the Rights of Children: Children and Armed Conflict, A/72/865-S/2018/465. 16 May 2018.

[14] K Fallah, "Perpetrators and Victims: prosecuting children for the commission of international crimes", (2006), 14(1), *African Journal of International and Comparative Law* 83-88.

[15] G van Bueren, "The international legal protection of children in armed conflicts", (1994), 43(4), *International & Comparative Law Quarterly* 809 - 826.

approaches the breach of these legal mechanisms, particularly the approach in which the child is dealt with after armed conflict.[16]

The researcher aims, through thorough analytical research and critical analysis of the current legal frameworks, to guide and support advocacy efforts towards children in armed conflict.[17] Consideration will be had in particular towards governments and the United Nations' member states to ensure that, at all the stages of armed conflict, the rights and best interests of the child are entrenched.[18]

The final work intends to be a recommendation to the United Nations and its member states who carry the responsibility of protecting children and their rights during armed conflict.[19] The researcher's recommendation intends to assimilate a blueprint for a rehabilitation and reintegration programme for the child in armed conflict based on the child's best interests.

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[16] "A Lease of Life for former child soldiers", online article written by The European Commission, 12 February 2019. https://medium.com/protection-and-aid/a-new-lease-of-life-for-former-child-soldiers-7573e99d3b9d#--responses (Accessed on 22 June 2020). Tailored programmes could help former child soldiers catch up on education or learn a trade. We must think about the impact of a humanitarian crises on children for the next generation.

[17] C Hamilton and L Dutordoir, "Children and Justice During and in the Aftermath of Armed Conflict", Office of the Special Representative of the Secretary General for Children and Armed Conflict. Working Paper 3, 2011 9-12. See also https://childrenandarmedconflict.un.org/publications/WorkingPaper-3_Children-and-Justice.pdf (Accessed on 20 October 2020).

[18] J Willems, Children's Rights and Human Development- a Multidisciplinary Reader, (2010), 583. Willems argues that in considering the best interests of the child and what it demands from adults, one should first consider the child's right to be respected.

[19] C Hamilton and L Dutordoir, "Children and Justice During and in the Aftermath of Armed Conflict", Office of the Special Representative of the Secretary General for Children and Armed Conflict. Working Paper 3, 2011 10. See also https://childrenandarmedconflict.un.org/publications/WorkingPaper-3_Children-and-Justice.pdf (Accessed on 20 October 2020).

1.2 The voice of the unheard child

It is important to consider the different views of children's rights on the international stage.[20] When considering this, one must accept that the starting point, if not the pivotal point of analysing the current state of children's' rights, is the child itself.[21] The child's participation rights are endorsed by the Convention on the Rights of the Child,[22] in particular, Article 12; which provides that:

> *"State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the view of the child being given due weight in accordance with the age and maturity of the child".*[23]

Sloth–Nielsen and Mezmur are of the view that the restoration of a child's duty is conducted through adequate and lawful participation so that children are empowered to take responsibility for their own rights.[24] Through this participation, the child gains confidence and competence to make informed and comprehensive choices. The Convention on the Rights of the Child further entrusts adults to be the proverbial child advocates. It accomplishes this by ensuring that the child is provided with the opportunity to be heard in any judicial and administrative proceedings affecting the

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[20] V Odala, "The Spectrum for Child Justice in the International Human Rights Framework: From "Reclaiming the Delinquent Child" To restorative Justice", (2012), 27(3), *The American University International Law Review* 558. Odala recalls that the international community recognises the Convention as a landmark for children and their rights.

[21] S Grover, *Child Soldier Victims of Genocidal Forcible Transfer* (2012) 2. See also J Willems, *Children's Rights and Human Development- a Multidisciplinary Reader*, (2010) 582.

[22] C Rutgers, *Creating a World Fit for Children: Understanding the UN Convention on the Rights of the Child*, (2011) 200-202.

[23] Article 12(1) of The Convention on the Rights of the Child, adopted an opened for signature, ratification and accession by the General Assembly resolution 44/25 of 20 November 1989, and entry into force 2 September 1990, in accordance with article 40.

[24] J Sloth-Nielsen and B.D Mezmur, "A dutiful child: the implications of Article 31 of the African Children's Charter", (2008), 52(2), *Journal of African Law* 179.

child either directly or through a representative or an appropriate body.[25] This equips the researcher with the knowledge that the majority of the member states of the United Nations promote the participation rights of the child.

The researcher proposes to adopt this viewpoint in discussing the best interests of the child after armed conflict. The participation rights of children in relation to their rehabilitation from armed conflict and their reintegration into society are of vital importance. The primary aim of rehabilitation and reintegration, stemming from article 6(2) of the Convention on the Rights of the Child, ensures that state parties have a duty to ensure, to the maximum extent possible, the survival and development of the child.[26] There is always room for improvement when considering child protection, perhaps more so when one considers that child protection is often breathed into the same conversation as the resolution of conflicts and the enabling of sustainable peace and bilateral commitment frameworks.[27]

1.3 Background into the 'epidemic' known as child soldiers

At the outset, in terms of current international law any person under the age of 18 (eighteen) is deemed to be a child.[28] This is a global standard as each national law for a specific state may possess its own national age of majority, for example 21 (twenty

[25] Article 12 of The Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by the General Assembly resolution 44/25 of 20 November 1989, and entry into force 2 September 1990, in accordance with article 40.

[26] Article 6 (2) of The Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by the General Assembly resolution 44/25 of 20 November 1989, and entry into force 2 September 1990, in accordance with article 40.

[27] United Nations, General Assembly Security Council, Seventy Second Session, Promotion and protection of the rights of children: Children and Armed Conflict, A/72/865-S/2018/465. 16 May 2018, at paragraph 11.

[28] Article 1 of The Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by the General Assembly resolution 44/25 of 20 November 1989, and entry into force 2 September 1990, in accordance with article 40.

one) by the United States.[29] The researcher embarks on this project recognising the Convention on the Rights of the Child as the starting point for what is considered to be the legal age of majority internationally.[30]

Child soldiers are defined as children (as stated above are individuals who have not yet turned 18 years of age) who are used by non-state armed groups or state armed forces for any military purpose,[31] be that direct or indirect participation.[32] The difference between direct and indirect participation will be dealt with in the chapters to follow.

The roles these children are forced to fulfil is as wide as it is shocking to the humanitarian psyche.[33] These roles include fighting in combat to being used as lookouts, porters, intelligence gatherers and sex slaves.[34] In 2018 there had been almost 1 000 cases of rape and other forms of sexual violence towards female and male children,[35] which represents a significant increase from 2016. One has also to

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[29] M Mehdi Ali, "Omar Khadr's Legal Odyssey: The Erasure of Child Soldier as a Legal Category", (2018), 46, *Georgia Journal of International and Comparative Law* 354. Mehdi Ali provides that the America's internal policy is to treat individuals only under the age of sixteen as children.

[30] A McQueen, "Falling through the Gap: The Culpability of Child Soldiers under International Criminal Law", (2018), 94(2) *Notre Dame Law Review Online* 109. McQueen argues that the Convention defines a child as every human being below the age of eighteen.

[31] www.child-soldiers.org/who-are-child-soldiers, The Issue (Accessed on 24 January 2019).

[32] S Bosch, "Targeting and prosecuting 'under-aged' child soldiers in international armed conflicts, in light of the international humanitarian law prohibition against civilian direct participation in hostilities", (2012), *XLV CILSA* 335.

[33] M.A Thomas, "Malice Supplies the Age: Assessing the Culpability of Adolescent Soldiers", (2013), 44 (1), *California Western International Law Journal* 1-2.

[34] www.child-soldiers.org/who-are-child-soldiers, The Issue (Accessed on 24 January 2019).

[35] United Nations, General Assembly Security Council, Seventy Second Session, Promotion and protection of the rights of children: Children and Armed Conflict, A/72/865-S/2018/465. 16 May 2018, at paragraph 9.

bear in mind that cases of sexual violence,[36] exploitation or slavery remain a rather challenging task to document. As a result of the sensitivity of the issue, this remains extremely underreported.

The International Bureau for Children's Rights encapsulates a deafening statement from a former child soldier who suffered from the above-mentioned consequences. She stated as follows:

> *"I was just coming back from the river to fetch water … Two soldiers came up to me and told me that if I refuse to sleep with them, they will kill me. They beat me and ripped my clothes. One of the soldiers raped me… My parents spoke to a commander and he said that his soldiers do not rape and that I am lying. I recognised the two soldiers, and I know that one of them is called Edouard."*[37]

This statement was offered by a 15-year-old girl in Minova, South Kivu. On the one hand, this statement is inserted to reinforce the realistic consequences of the effects children may suffer in armed conflict. On the other hand, it exposes the lack of activism that is applied on the ground despite numerous international laws prohibiting such occurrences. One is left to ponder over the enforceability and strength of the legal mechanisms that currently exist.

The use of child soldiers in armed conflict is in no way centralised or localised, affecting only a particular group of people.[38] This phenomenon is an international problem with consequences which could affect an entire generation for years to come.[39] According to the Child Soldiers' World Index, conducted and used by Child Soldiers international, research indicates that 167 out of 197 United Nations Member States have ratified the

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[36] A McQueen, "Falling through the Gap: The Culpability of Child Soldiers under International Criminal Law", (2018), 94(2), *Notre Dame Law Review Online* 114.

[37] C Rutgers, *Creating a World Fit for Children: Understanding the UN Convention on the Rights of the Child*, (2011) 194.

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

[39] D Crane, "*Strike Terror No More: Prosecuting the Use of Children in Times of Conflict-The West African Extreme*", at Chapter 9 of: From Peace to Justice "International Criminal Accountability and the Rights of Children", Edited by K Arts and V Popovski, 2005 123.

Optional Protocol on the Convention on the Rights of the Child,[40] while at least 46 States still recruit children under the age of 18 into the armed forces and there are at least 18 conflict zones where children have participated in hostilities since 2016.[41]

The Convention on the Rights of the Child and the Optional Protocol on the Involvement of Children in Armed Conflict guides the international community (by its universal acceptance) on the treatment of children during armed conflict. Furthermore, they regulate the child's treatment during recruitment into armed forces and the age at which a child will be allowed to participate in armed conflict.[42] There is strength in the argument that, despite these legal mechanisms which have great intentions, international standards have not yet been fully utilised in protecting children during armed conflict.[43] According to Abraham, "*it may be better suggested that a multifaceted approach for bringing reality closer to the promises of international agreements is required*".[44]

Reports documenting the use by state armed forces or non-state armed groups of children in armed conflict suggest that the biggest exploitation of children can still be found in Central and Northern Africa, along with countries in South Asia and, finally, in

[40] Optional Protocol to the Convention on the Rights of the Child on the involvement of Children in armed conflicts, adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000, entered into force on 12 February 2002.

[41] www.child-soldiers.org/who-are-child-soldiers, child soldiers' world index (Accessed on 24 January 2019).

[42] C Rutgers, *Creating a World Fit for Children: Understanding the UN Convention on the Rights of the Child*, (2011) 193.

[43] "A Lease of Life for former child soldiers" online article written by The European Commission, 12 February 2019. https://medium.com/protection-and-aid/a-new-lease-of-life-for-former-child-soldiers-7573e99d3b9d#--responses (Accessed on 22 June 2020).

[44] C Rutgers, *Creating a World Fit for Children: Understanding the UN Convention on the Rights of the Child*, (2011) 193-195.

Columbia part of South America.[45] The problem that exists is that, despite the number of years (exactly 10 years between 2007 and 2017) between the research, the comment by ITopa suggesting that child soldiers are found on each continent and in most armed conflicts today remains true.[46]

In 2018, a report by Child Soldiers International, entitled "Children pay the heaviest price in conflict", documented that, in June of 2018, there were found to be at least 56 non-state armed groups and more than seven state armed forces who recruited and used child soldiers as late as 2017.[47] There has been an increase of verified cases of child recruitment in conflict-related areas in Central and North Africa, along with hundreds of child abductions in Somalia and the continued exploitation of female children.

In 2018 the United Nations Secretary-General reported that[48]:

> *"In 2017, changing conflict dynamics, including the intensification of armed clashes, directly affected children. Verified cases of the recruitment and use of children quadrupled in the Central African Republic (299) and doubled In the Democratic Republic of Congo (1, 049) compared to 2016. The number of verified cases of the recruitment and use of children in Somalia (2127), South Sudan (1221), the Syrian Arab Republic (961) and Yemen (842) persisted at alarming levels. In addition, boys and girls recruited and used were often doubly*

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[45] www.child-soldiers.org/who-are-child-soldiers, child soldiers' world index (Accessed on 24 January 2019).

[46] I Topa, "The Prohibiton of child soldiering – international legislation and the prosecution of perpetrators", (2007), 3, *Hanse Law Review* 105.

[47] Child Soldiers International, 2018 report: "Children pay the heaviest price in conflict" https://reliefweb.int/report/world/2018-children-pay-heaviest-price-conflict#:~:text=Children%20continue%20to%20pay%20a,using%20child%20soldiers%20in%202017 (Accessed on 28 December 2020).

[48] United Nations, General Assembly Security Council, Seventy Second Session, Promotion and protection of the rights of children: Children and Armed Conflict, A/72/865-S/2018/465. 16 May 2018, at paragraph 6 and 7.

victimized by subsequently being detained for their former association with armed forces or groups.

Surges in the recruitment and use of children often coincided with increasing levels of killing and maiming of children. In addition, spikes in armed clashes and violence led to a substantial increase in the number of child casualties in Iraq (717) and Myanmar (296). Afghanistan, the Syrian Arab Republic and Yemen remained the country situations with the highest number of verified casualties. In Nigeria, Boko Haram continued to force civilians, including children, to participate in suicide attacks, which led to over half of all the verified child casualties in the country."[49]

1.4 The universal obligations owed by states and their deficiencies

It can be argued that recruitment into any armed force, be it a state armed force or non-state armed group, is a form of violence and exploitation against the child.[50] The applicability of Article 19 of the Convention on the Rights of the Child ensures the prohibition of all forms of violence against the child and shifts the duty on the State to protect children from violence by a caretaker or any person who has physical custody over the child.[51]

The applicability of Article 19 extends to children without a primary or proxy caregiver,[52] proving that the responsibility borne by the relevant State to protect the

[49] United Nations, General Assembly Security Council, Seventy Second Session, Promotion and protection of the rights of children: Children and Armed Conflict, A/72/865-S/2018/465. 16 May 2018, at paragraph 6 and 7.

[50] S Grover, *Child Soldier Victims of Genocidal Forcible Transfer, Exonerating Child Soldiers Charged with Grave Conflict-Related International Crimes* (2012) 3.

[51] Article 19(1) of The Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by the General Assembly resolution 44/25 of 20 November 1989, and entry into force 2 September 1990, in accordance with article 40.

[52] UN Committee on the Rights of the Child (CRC), General comment No.13 (2011): The rights of the child to freedom from all forms of violence, 18 April 2011, CRC/C/GC/13, available at:

child and her best interests is not alleviated in instances where commanders of non-state armed groups assume control over a child through recruitment. It is the State's responsibility to prevent such recruitment. One can argue that, according to the Convention on the Rights of the Child, this responsibility is possessed by all states along with the duty to protect children and promote their wellbeing.[53]

The Secretary-General of the United Nations himself is of the view that situations that include the breach of the rights possessed by children in international law must be brought to the attention of national Governments.[54] These national governments bear the primary responsibility of providing effective protection and relief to all affected children. Governments must be encouraged to take remedial measures.[55]

Protection of children in armed conflicts has proven to be an important concern of international law in respect of the rights of the child, but the standard of this protection

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https://www.refworld.org/docid/4e6da4922.html (Accessed on 7 November 2020). See also S Grover, *Child Soldier Victims of Genocidal Forcible Transfer, Exonerating Child Soldiers Charged with Grave Conflict-Related International Crimes* (2012) 4.

[53] Article 6(2) of The Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by the General Assembly resolution 44/25 of 20 November 1989, and entry into force 2 September 1990, in accordance with article 40.

[54] United Nations, General Assembly Security Council, Seventy Second Session, Promotion and protection of the rights of children: Children and Armed Conflict, A/72/865-S/2018/465. 16 May 2018, at paragraph 3.

[55] The United Nations Security Council Resolution 1315 of 14 August 2000. http://www.rscsl.org/Documents/Establishment/S-Res-1315-2000.pdf (Accessed on 20 June 2020). See also A McQueen, "Falling through the Gap: The Culpability of Child Soldiers under International Criminal Law", (2018), 94(2), *Notre Dame Law Review Online* 115. McQueen recalls that the ICTY and ITRC were established in accordance with Security Council resolutions and were granted Chapter VII powers, the Security Council proposed a domestic-international hybrid tribunal in accordance with a treaty based agreement. See further United Nations, General Assembly Security Council, Seventy Second Session, Promotion and protection of the rights of children: Children and Armed Conflict, A/72/865-S/2018/465. 16 May 2018, Paragraph 3.

is somewhat short of comprehensive.[56] The applicable sources of law include international treaties, but the freedom given to states to abide by the treaty consequentially waters down the enforceability of the treaty, as not all states may be signatories of said treaty.[57]

The need for the existence of international customary rules regulating children in armed conflict is of great importance.[58] The reason for this is that customary law applies to all states. This would further set a minimum standard below which states could not fall without being in breach of their respective international obligation irrespective of which treaty they are a party to.[59]

Despite the unequal adoption of treaties by all states, the mere majority acceptance of a treaty encourages its legitimacy and enforceability as international law. The international treaties applicable to children in armed conflict include: The Additional Protocol 1 and 2 of the Geneva Conventions;[60] the Convention on the Rights of the Child;[61] and its Optional Protocol on the Involvement of Children in Armed Conflict.[62] These Treaties are of explicit importance in that they provide the international community with a prohibition on the use of children in armed conflict.

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[56] G van Bueren, "The international legal protection of children in armed conflicts", (1994), 43(4), *International & Comparative Law Quarterly* 811-822.

[57] D M Rosen, *Child Soldiers*, (2012) 6.

[58] M Happold, *Child Soldiers in International Law*, (2005) 86.

[59] M Happold, *Child Soldiers in International Law*, (2005) 86-87.

[60] 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. See also Protocol 2 Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of non-international Armed Conflicts, 8 June 1977.

[61] The Convention on the Rights of the Child, adopted an opened for signature, ratification and accession by the General Assembly resolution 44/25 of 20 November 1989, and entry into force 2 September 1990, in accordance with article 40.

[62] The Optional Protocol to the Convention on the Rights of the child on the involvement of children in armed conflict (2000).

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 states that:

> "***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".*[63](Own emphasis)

Article 3 states that:

> *"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****".*[64]*(Own emphasis)*

The Optional Protocol sets the legal age of recruitment of children in armed conflict at 18 years of age and motivates the principle that children are to receive special protection in armed conflict.[65] The word "recruitment" in this sense may be seen to include both compulsory and voluntary enrolment. This view places a responsibility on state parties to a conflict to refrain from enrolling children who volunteer to join armed forces.[66]

The gaps in the protection provided for in the Optional Protocol include a state's or non-state armed group's ability to use children for <u>indirect</u> participation in armed

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[63] Article 1 of the Optional Protocol to the Convention on the Rights of the child on the involvement of children in armed conflict (2002).

[64] Article 3 of the Optional Protocol to the Convention on the Rights of the child on the involvement of children in armed conflict (2002).

[65] I Topa, "The prohibition of child soldiering – international legislation and the prosecution of perpetrators", (2007), 3, *Hanse Law Review* 110.

[66] G van Bueren, "The international legal protection of children in armed conflicts", (1994), 43(4), *International & Comparative Law Quarterly* 823.

conflict which could be equally as dangerous as direct participation, and also the State's ability to recruit children (as the term "all feasible measures" is not definitive nor absolute) into their armed forces who are older than 15 and who have volunteered out of their own free will.[67]

Taking into account the fact that most armed conflicts currently involve non-state armed groups, the applicability of the above articles is further limited, as Article 1 above is applicable only to State parties.[68] One may argue that, by viewing persons under the age of 18 years to be entitled to special protection,[69] this automatically shifts the notion of child soldiers beyond its scope.[70]

1.5 Factors that contribute to the increase of children in armed conflict

The reality surrounding child soldiers is the fact that this phenomenon stems, or is at least derived from, external issues surrounding the child.[71] The researcher argues that children are often forced into armed conflict.[72] The relevant factors which contribute to

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[67] M Houle, "The Legal responsibility of Child Soldiers", (2018), 8, *International Law Yearbook*, 193 - 194. Houle discusses the various age limits imposed by the leading international legislation drafted to protect the child. See also C McDiarmid *What Do They Know? Child-Defendants and the Age of Criminal Responsibility: A National Law Perspective*, at Chapter 6 of: From Peace to Justice "International Criminal Accountability and the Rights of Children", Edited by K Arts and V Popovski, 2005 87.

[68] Article 1 of the Optional protocol to the Convention on the Rights of the child on the involvement of children in armed conflict (2002).

[69] Article 4(3)(a-e), Protocol 2 Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of non-international Armed Conflicts, 8 June 1977.

[70] G van Bueren, "The international legal protection of children in armed conflicts", (1994), 43(4), *International & Comparative Law Quarterly* 811-822.

[71] A Honwana, *Child Soldiers in Africa*, (2006) 41.

[72] A McQueen, "Falling through the Gap: The Culpability of Child Soldiers under International Criminal Law", (2018), 94(2), *Notre Dame Law Review Online* 105. *"Children's recruitment in armed conflict is either by force or voluntarily*".

the growing number of children participating (directly or indirectly) in armed conflict include:

1) **Armed Conflict.** Armed conflict often has irreparable effects on the population of a state. On a psychological level, armed conflict in itself becomes a day-to-day lifestyle for children growing up in armed conflict.[73] This may encourage children to believe that the adoption of the need for self-protection coupled with violence is the only logical solution.[74]

2) **Poverty.**[75] Poverty is a crucial factor in considering the growing number of child soldiers. During the timeline of an armed conflict where food and shelter are scarce, most homes become parentless as a result. Without the adequate guidance, children can easily be influenced into participating in hostilities.

3) **Education[76] and Employment**. The role that a formal education can play in a child's life can be pivotal.[77] Through education, general social skills are birthed, along with the ability to comprehend what is wrong and right.[78]

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[73] R Pangalangan, "Dominic Ongwen and the Rotten Social Background Defense: The Criminal Culpability of Child Soldiers Turned War Criminals", (2018), 33(3), *American University International Law Review* 617.

[74] A McQueen, "Falling through the Gap: The Culpability of Child Soldiers under International Criminal Law", (2018), 94(2), *Notre Dame Law Review Online* 105. See also A Honwana, *Child Soldiers in Africa*, (2006) 47.

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

[76] Article 28(1) (a) and (b) of The Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by the General Assembly resolution 44/25 of 20 November 1989, and entry into force 2 September 1990, in accordance with article 40.

[77] J Willems, Children's Rights and Human Development- A Multidisciplinary Reader, (2010), at page 436.

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

1.6 Definitions and context of terms to be used

To prevent any confusion which may arise from the terms and concepts utilised in this thesis, the terms and concepts are defined as follows:

1.6.1 Child

The Convention on the Rights of the Child, defines a 'child' as every human being below the age of 18 years.[79] The international community has agreed that 18 years should be the minimum age for recruitment and participation in hostilities by a child.[80]

1.6.2 Taking a direct part in hostilities

In this term the researcher refers to undertaking acts of war that are likely to cause harm to an adversarial party.[81] Direct participation in hostilities refers to being an active participant in combat.[82]

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[79] Article 1 of The Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by the General Assembly Resolution 44/25 of 20 November 1989, and entry into force 2 September 1990, in accordance with article 40.

[80] The Paris Principles, "Principles and Guidelines on Children Associated with Armed Forces or Armed Groups", 2007. https://www.unicef.org/mali/media/1561/file/ParisPrinciples.pdf (Accessed on 20 April 2020). See also M A Thomas, "Malice Supplies the Age: Assessing the Culpability of Adolescent Soldiers", (2013), 44, (1), *California Western International Law Journal* 11. See further R Brett & M McCallin*, Children: The Invisible Soldiers*, (2001) 14.

[81] I Topa, "The prohibition of child soldiering – international legislation and the prosecution of perpetrators", (2007), 3 *Hanse Law Review* 108.

[82] D M Rosen, *Child Soldiers*, (2012) 11.

1.6.3 Duress as a ground of justification

Article 31(1) (d) of the Rome Statute, defines duress 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."*[83]

1.6.4 Child soldiers

Topa argues that a 'child soldier' refers to any person younger than 18 years of age who is part of any armed force or armed group in any capacity,[84] including, but not limited to, cooks, porters, messengers, and anyone accompanying such groups, other than family members. This definition includes girls recruited for sexual purposes and forced marriages.[85] The term "child soldier" used in this research also refers to children participating in armed conflict.

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[83]Article 31(1) (d) of The Rome Statute of the International Criminal Court, Done at Rome on 17 July 1998, in force on 1 July 2002, United Nations, Treaty Series, Vol. 2187, No. 38544, Depositary: Secretary-General of the United Nations, http://treaties.un.org (Accessed on19 April 2020).

[84] I Topa, "The prohibition of child soldiering – international legislation and the prosecution of perpetrators", (2007), 3, *Hanse Law Review* 108.

[85] I Topa, "The prohibition of child soldiering – international legislation and the prosecution of perpetrators", (2007), 3, *Hanse Law Review* 108.

1.6.5 Command responsibility

Veale defines command responsibility as follows: *"the doctrine of command responsibility holds that adult commanders are criminally responsible for the actions of child soldiers".*[86] This doctrine regards the actions or conduct committed by the child soldier to be attributable to the adult commander who exercises control or influence over the child.

1.6.6 Recruitment

The researcher uses the term in relation to the enlisting or conscription of children into a State armed force or non-state armed group.[87] 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 in a group to another group.[88]

1.6.7 Rehabilitation

Rehabilitation refers to a physical programme established with the principal aim of rehabilitating a former child soldier[89] with the intention of ensuring that the individual

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[86] A Veale, "*The Criminal Responsibility of Former Child Soldiers: Contributions from Psychology"* Chapter 7 of: From Peace to Justice "International Criminal Accountability and the Rights of Children", Edited by K Arts and V Popovski, 2005102.

[87] Article 1 and 2 of the Optional Protocol to the Convention on the Rights of the child on the Involvement of Children in Armed Conflict (2002). See also Article 77(3) 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. See also S Grover, Child Soldier Victims of Genocidal Forcible Transfer, (2012) 139.

[88] Article 2(e) of the Genocide Convention (1951).

[89] R Brett and I Specht, Young Soldiers: Why they choose to fight (2004) 131-132.

may assume a productive role in society.[90] Thus, reference to the term 'rehabilitation' includes the rehabilitation of the child's physical and mental wellbeing.

1.6.8 Criminal capacity

Criminal capacity is the accused's understanding of the criminal act in its narrow and wider sense.[91] Lacey defines 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".*[92]

1.6.9 Refugee

The term used in this thesis refers to an individual who is outside of her native land and who is unwilling to return owing to a reasonable fear of persecution on account of her race, religion, nationality, membership of a particular social group, or political opinion.[93]

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[90] Article 10 United Human Rights Council, Tenth Session, and Resolution 10/2. Human Rights in the administration of justice, in particular juvenile justice https://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_10_2.pdf (Accessed on 5 July 2020).

[91] C McDiarmid, *What Do They Know? Child-Defendants and the Age of Criminal Responsibility: A National Law Perspective* Chapter 6 of: From Peace to Justice "International Criminal Accountability and the Rights of Children", Edited by K Arts and V Popovski, 2005 90. See also M Happold, "Child Soldiers: Victims or Perpetrators?", (2008), 56, *University of La Verne Review* 72.

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

[93] M.S Gallagher, "Soldier Boy Bad: Child Soldiers, Culture and Bars to Asylum", (2001), 13, *International Journal Refugee law* 312.

1.6.10 Restorative justice

In this thesis, restorative justice refers to an approach in the administration of international juvenile justice seeking to take into consideration the interests of all the parties in a conflict.[94] This includes the state, the accused, the victims, and the international community as a whole.[95] The term here relates to processes of post-armed conflict development, restitution, participation, and rehabilitation.[96]

1.6.11 Access to justice

Access to justice in this context refers to Article 37 (d) of the Convention on the Rights of the Child,[97] *viz* that every child deprived of her liberty shall have the right to prompt access to legal assistance, as well as the right to challenge the legality of the deprivation of her liberty before a court. The researcher aligns with the way in which it has been described by the United Nations in its Development Programme (UNDP) as

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[94] Article 7 and 9 of the United Human Rights Council, Tenth Session, and Resolution 10/2. Human Rights in the administration of justice, in particular juvenile justice https://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_10_2.pdf (Accessed on 5 July 2020).

[95] 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* 325.

[96] C Rutgers, *Creating a World Fit for Children: Understanding the UN Convention on the Rights of the Child*, (2011) 219. See also 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* 325.

[97] Article 37 (d) of The Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by the General Assembly resolution 44/25 of 20 November 1989, and entry into force 2 September 1990, in accordance with article 40.

"the ability of people to seek and obtain a remedy through formal or informal institutions of justice, and in conformity with human rights standards".[98]

1.6.12 Voluntary conduct

The term 'voluntary' within the context of this thesis is diluted.[99] Musila explains that:

> *"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".*[100]

1.6.13 Right to life

In this context, the term "Right to life" extends further than the mere definition of possessing the right to not be killed or one's right to survival. The term in this context refers to a promotional and progressive definition[101] compared to that found in article

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[98] C Hamilton and L Dutordoir, "Children and Justice During and in the Aftermath of Armed Conflict", Office of the Special Representative of the Secretary General for Children and Armed Conflict. Working Paper 3, 2011 11. See also Parma, Roseman, Siegrist and Sowa (Eds) *Children and Transitional Justice: Truth-Telling, Accountability and Reconciliation*, UNICEF, Innocenti and Harvard Law School, 2010 128. https://www.unicef-irc.org/publications/pdf/tj_publication_eng.pdf (Accessed on 2 November 2020).

[99] C McDiarmid, *What Do They Know? Child-Defendants and the Age of Criminal Responsibility: A National Law Perspective*, Chapter 6 of: From Peace to Justice "International Criminal Accountability and the Rights of Children", Edited by K Arts and V Popovski, 2005 93.

[100] 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* 329. See also M A Thomas, "Malice Supplies the Age: Assessing the Culpability of Adolescent Soldiers", (2013), 44 (1), *California Western International Law Journal* 12.

[101] S Grover, "Child Soldier Victims of Genocidal Forcible Transfer", *Exonerating Child Soldiers Charged with Grave Conflict-related International crimes* (2012) 3.

6(2) of the Convention on the Rights of the Child; providing that State Parties shall ensure the survival and development of the child.[102]

1.7 Recruitment, motive, and the various roles of children in 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.[103] Arguably children would not, of their own free will, volunteer to take part in armed conflict. Nor 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 would otherwise have run away from.

The truth remains that child soldiers are recruited.[104] Honwana believes that recruitment takes place by the child being brutally abducted from her community, or by being captured by rebel armed groups during raids on villages.[105] In times of armed conflict and in areas that are high conflict zones, an easy target in the form of a child could be forcibly recruited by armed groups when merely roaming the streets, schools, and villages by armed groups in search of recruits.[106]

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[102] Article 6 (2) of The Convention on the Rights of the Child, adopted an opened for signature, ratification and accession by the General Assembly resolution 44/25 of 20 November 1989, and entry into force 2 September 1990, in accordance with article 40.

[103] A McQueen, "Falling through the Gap: The Culpability of Child Soldiers under International Criminal Law", (2018), 94(2) *Notre Dame Law Review Online* 105. McQueen states that "*Children's recruitment in armed conflict is either by force or voluntarily"*.

[104] A Honwana, *Child Soldiers in Africa*, (2006) 51.

[105]A Honwana, *Child Soldiers in Africa*, (2006) 54.

[106] C Hamilton and L Dutordoir, "Children and Justice During and in the Aftermath of Armed Conflict", Office of the Special Representative of the Secretary General for Children and Armed Conflict. Working Paper 3, 2011 9.

There are instances in which children have volunteered to participate as child soldiers.[107] Arguably this is done conditionally with the hope that they may receive regular meals and that clothing will be provided.[108] One cannot assume that children volunteer for armed conflict purely for physical rewards alone.[109] Hughes provides a reason why psychological factors may motivate a child to volunteer to participate in an armed conflict when she states that *"the child desires to regain a sense of control and power in what has come to be a life full of uncertainty and fear*".[110]

In this recruitment stage, the child undergoes initiation.[111] 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 her family[112] and by 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 her new home, making it comprehensive that her old life no longer exists.

The motivation behind recruiting children into armed forces differs from country to country and from conflict to conflict. The golden thread that seems to knit its way through each armed force is that child soldiers are recruited simply because of a

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[107] M Houle, "The Legal responsibility of Child Soldiers", (2018), 8, *International Law Yearbook* 206.

[108] K Peters and P Richards, "Why we fight: Voices of Youth Combatants in Sierra Leone", (1998), 68 (2), *Africa: Journal of the International African Institute* 184 and 187. See also M Houle, "The Legal responsibility of Child Soldiers", (2018), 8, *International Law Yearbook* 207.

[109] M A Thomas, "Malice Supplies the Age: Assessing the Culpability of Adolescent Soldiers", (2013), 44 (1), *California Western International Law Journal* 12.

[110] L Hughes, "Can International Law Protect Child Soldiers?", (2000), 12 (3), *Peace Review*, 403. See also M Houle, "The Legal responsibility of Child Soldiers", (2018), 8*, International Law Yearbook* 207.

[111] R Pangalangan, "Dominic Ongwen and the Rotten Social Background Defense: The Criminal Culpability of Child Soldiers Turned War Criminals", (2018), 33 (3), *American University International Law Review* 617.

[112] A Honwana, *Child Soldiers in Africa*, (2006) 58.

shortage of manpower. Other possible reasons include children having more stamina and being more likely to obey even the most unreasonable orders. Children are notably better at surviving in the bush, and, owing to their youthfulness, they appear more fearless because they fail to assess the real risks of combat.[113]

In the base camp of either a non-state armed group or a State armed force, child soldiers play more than simply the role of a soldier, particularly so between male and female children. According to Happold, child soldiers are often victimised by their adult comrades who require them to act as servants and perform personal services.[114] Most military structures project a system which shows the different ranks of hierarchy within the military. In a non-state armed 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 comrades.

The child is left to fulfil the rather lesser-acknowledged roles and these roles include being porters (human carriers/transporters of the 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 mining for natural resources such as oil and diamonds.[115] The role of a female child is far more gruesome.[116] These girls may undertake military training but they serve essentially as guards. They 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 soldier's sexual demands.[117]

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[113]M A Thomas, "Malice Supplies the Age: Assessing the Culpability of Adolescent Soldiers", (2013), 44 (1), *California Western International Law Journal* 9. See also M Happold, *Child Soldiers in International Law*, (2005) 10-11.

[114] M Happold, *Child Soldiers in International Law*, (2005) 16.

[115] A 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* 672.

[116] D M Rosen, *Child Soldiers*, (2012) 21.

[117] A Honwana, *Child Soldiers in Africa*, (2006) 75 – 79.

1.8 Problem statement

The deeds committed by children in armed conflict and the lack of jurisdiction under International Criminal Law

In addition to the horrific circumstances that child soldiers are forced to endure, they are similarly forced to commit even more gruesome deeds merely to survive the camps in which they are staying. The effects of both the physical and psychological impact on the child are far-reaching.[118] The move from the care of one's family to the closed environment of an armed force or rebel group is disturbing, particularly when it is coupled with physical abuse, bullying, and sexual assault.[119]

Taking all of the above into account, one should acknowledge that these children, while participating in armed conflict, commit murder, destroy families, villages and communities.[120] These children 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.[121]

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[118] R Pangalangan, "Dominic Ongwen and the Rotten Social Background Defense: The Criminal Culpability of Child Soldiers Turned War Criminals", (2018), 33(3), *American University International Law Review* 621.

[119] C Dore, "What to do with Omar Khadr? Putting a child soldier on trial: Questions of international Law, Juvenile Justice and Moral Culpability", (2008), 41(4) *John Marshall Law Review* 1281. See also M Happold, *Child Soldiers in International Law*, (2005) 16.

[120] A McQueen, "Falling through the Gap: The Culpability of Child Soldiers under International Criminal Law", (2018), 94(2), *Notre Dame Law Review Online*, 100. McQueen states that, "[*I*]*t is difficult to imagine that children could play any role in armed conflict apart from that of the victim".*

[121] M A Thomas, "Malice Supplies the Age: Assessing the Culpability of Adolescent Soldiers", (2013), 44(1), *California Western International Law Journal* 4. Thomas asks why, if at all, child soldiers should be treated as a special category. This policy question is important because of

International criminal law is at the heart of this issue. Whose side does the law tend to favour, the victim or the perpetrator?[122] In the circumstances of child soldiers, they are one and the same.

The above dilemma seemingly grows when one considers that prosecuting children who participate directly in hostilities, without the requisite authorisation, is rarely dealt with in academic writing or practice. Rather the view is more conveniently directed on the criminal prosecution of the warlords charged with recruiting these under-aged child soldiers.[123]

It is argued that one of the biggest developments in international criminal law is the creation of the International Criminal Court (ICC) in The Hague in 2002, established by the 1998 Rome Statute[124] of the ICC.[125]

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the need for a post-conflict society to gain a sense of closure and to seek justice for the victims.

[122] N Mole, *"Litigating Children's Rights Affected by Armed Conflict before the European Court on Human Rights*" Chapter 13 of: From Peace to Justice "International Criminal Accountability and the Rights of Children", Edited by K Arts and V Popovski, 2005 180. Mole submits that, "[*A]lthough they have often been party to unbelievable violence, often against their own families or communities, such children are exposed to the worst dangers and horrible suffering, both psychological and physical*."

[123] S Bosch, "Targeting and prosecuting 'under-aged' child soldiers in international armed conflicts, in light of the international humanitarian law prohibition against civilian direct participation in hostilities", (2012), *XLV CILSA* 357.

[124] The Rome Statute of the International Criminal Court, Done at Rome on 17 July 1998, in force on 1 July 2002, United Nations, Treaty Series, Vol. 2187, No. 38544, Depositary: Secretary-General of the United Nations, http://treaties.un.org (Accessed on 19 April 2020).

[125] D M Rosen*, Child Soldiers*, (2012) 12.

The Rome Statute in Article 8 provides that it is a war crime to use children under the age of 15 to participate actively in hostilities.[126] The Article awards the ICC with the necessary jurisdiction to prosecute and imprison persons charged and convicted of committing this crime. The problem that arises with the enforceability of article 8 is created by Article 26 of the same statute which specifically denies the ICC the right to have jurisdiction over any person under the age of 18 when committing the crime.[127] This has the consequence of a gap being created by the applicable international laws.[128] Accountability towards children participating in armed conflict falls outside of the jurisdiction of the International Criminal Court, leaving the pursuit of justice to be achieved through national courts or *ad hoc* criminal tribunals.[129] The lack of jurisdiction created by Article 26 creates more confusion by not providing a prescribed international minimum age at which one would be deemed to be criminally responsible.[130]

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[126] A Veale, "*The Criminal Responsibility of Former Child Soldiers: Contributions from Psychology*" Chapter 7 of: From Peace to Justice "International Criminal Accountability and the Rights of Children", Edited by K Arts and V Popovski, 2005 102.

[127] Article 26 The Rome Statute of the International Criminal Court, Done at Rome on 17 July 1998, in force on 1 July 2002, United Nations, Treaty Series, Vol. 2187, No. 38544, Depositary: Secretary-General of the United Nations, http://treaties.un.org (Accessed on 19 April 2020).

[128] M Houle, "The Legal responsibility of Child Soldiers", (2018), 8, *International Law Yearbook* 195.

[129] A McQueen, "Falling through the Gap: The Culpability of Child Soldiers under International Criminal Law", (2018), 94(2), *Notre Dame Law Review Online* 113.

[130] 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* 325. See also C McDiarmid, *What Do They Know? Child-Defendants and the Age of Criminal Responsibility: A National Law Perspective*, at Chapter 6 of: From Peace to Justice "International Criminal Accountability and the Rights of Children", Edited by K Arts and V Popovski, 2005 89.

When considering the status of a child in armed conflict, whether participating for a state or an armed group,[131] one should not ignore the special protection given to children under international law.[132] An appropriate question to be asked is whether criminal responsibility for crimes that are committed by children during their tenure as child soldiers is a viable option, or does their "special protection" include the non-attribution of criminal responsibility?

There is at least an attempt to regulate the recruitment of children in armed conflict at an international level or, for the most part, the prohibition of or ban against the recruitment. How do international laws and the international community respond to the breach of these legal instruments? In what position does one hold a child who still finds himself in an armed conflict and is forced to endure the consequences of its reality?

1.9 Aims of research

Accountability of the child: Through rehabilitation and reintegration

For obvious reasons, turning a blind eye to, or ignoring, the atrocities committed by children in armed conflict does not nullify the deeds committed by children in armed conflict, as there is no accountability on behalf of the alleged perpetrator.[133] The international community has been seen to be drawing closer to holding children in

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[131] A Honwana, *Child Soldiers in Africa*, (2006) 51.

[132] Article 77(1) 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. See also 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*329.

[133] A Veale, "*The Criminal Responsibility of Former Child Soldiers: Contributions from Psychology*", at Chapter 7 of: From Peace to Justice "International Criminal Accountability and the Rights of Children", Edited by K Arts and V Popovski, 2005 103.

armed conflict accountable.[134] In 2002 The Special Court for Sierra Leone was established.[135] This court was the first international court which permitted the prosecution of children under the age of eighteen.[136] However, the latter court also recognizes the importance of granting children in armed conflict extensive protective measures and guarantees[137] with the principal aim being to protect children in armed conflict as opposed to punishing them.[138]

According to Musila, it is not unreasonable to see child soldiers as victims of war, considering the fact that these children are involuntarily recruited and subjected to serving as objects of the recruiters and protagonists of war.[139] With these staggering statistics and opinions, one can assume only that this epidemic is at a stage where the

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[134] Report of the Secretary-General on the establishment of a Special Court for Sierra Leone. https://digitallibrary.un.org/record/424039?ln=en (Accessed on 20 June 2020). In this report the criminal culpability of young people was raised as an aspect to be considered by the Special Court.

[135] The United Nations Security Council Resolution 1315 of 14 August 2000. http://www.rscsl.org/Documents/Establishment/S-Res-1315-2000.pdf (Accessed on20 June 2020).

[136] Article 7(1) and (2) of the Statute of the Special Court of Sierra Leone. http://www.rscsl.org/Documents/scsl-statute.pdf (Accessed on 20 June 2020). See also K Fallah, "Perpetrators and Victims: prosecuting children for the commission of international crimes", (2006), 14(1)*, African Journal of International and Comparative Law* 83-86.

[137] D Crane, "*Strike Terror No More: Prosecuting the Use of Children in Times of Conflict-The West African Extreme*", at Chapter 9 of: From Peace to Justice "International Criminal Accountability and the Rights of Children", Edited by K Arts and V Popovski, 2005 121.

[138] K Fallah, "Perpetrators and Victims: prosecuting children for the commission of international crimes", 2006, 14(1), *African Journal of International and Comparative Law*.

[139] 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* 329.

line between whether child soldiers are victims or perpetrators is blurred,[140] both on paper and in the hearts of the international community.

The research in this project aims at indicating whether children who are deemed to be participating in armed conflict or who have participated in armed conflict, directly or indirectly, may have access to justice.[141] The research study will further illustrate how the current legal mechanisms, international and regional, encourage the definition of juvenile justice whilst promoting the best interest of the child.[142]

The researcher will critically examine the responsibility borne by the child who has committed criminal deeds during her tenure in armed conflict and, in particular, to what extent she should be held accountable. This is done in conjunction with considering the different frameworks that can be used to assist children reintegrating into society.

The researcher aims at encapsulating that accountability is necessary but it is best achieved through processes of rehabilitation and restorative justice of children in armed conflict[143]. Musila argues that:

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

[141] C Hamilton and L Dutordoir, "Children and Justice During and in the Aftermath of Armed Conflict", Office of the Special Representative of the Secretary General for Children and Armed Conflict. Working Paper 3, 2011 10.

[142] Article 37 (d) of The Convention on the Rights of the Child, adopted an opened for signature, ratification and accession by the General Assembly resolution 44/25 of 20 November 1989, and entry into force 2 September 1990, in accordance with article 40.

[143] V Odala, "The Spectrum for Child Justice in the International Human Rights Framework: From "Reclaiming the Delinquent Child" To restorative Justice", (2012), 27(3), *The American University International Law Review* 546. Odala argues that, "*the purpose of child justice has shifted from reclaiming the delinquent child to restoring children in conflict with the law*." See also H Van Ginkel, *"Concluding Observations*", at Chapter 14 of: From Peace to Justice "International Criminal Accountability and the Rights of Children", Edited by K Arts and V Popovski, 2005 184-187.

> *"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."*[144]

The researcher is of the view that children in armed conflict require special protection under international law.[145] The platform of restorative justice is applicable considering that adult guidance and direction towards children must be achieved in accordance with a child's evolving capacities. Sloth–Nielson and Mezmur argue that it should not be seen to be in the child's best interest to enter the wider world completely unprepared and unskilled for the tasks ahead.[146]

The researcher contends that a child raised or affected by armed conflict matures differently from the way a child raised within a typical civil society does.[147] The notion must be stressed that children mature into adulthood and are not spontaneously mature once they are 18 years old.[148] One should not merely expect a former child soldier automatically to assume adult duties without having had any prior experience of them.[149]

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[144] 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* 332.

[145] Article 77(1) 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.

[146] J Sloth-Nielsen and B D Mezmur, "A dutiful child: the implications of Article 31 of the African Children's Charter", (2008), 52(2), *Journal of African Law* 171.

[147] J Boyden, "Children under Fire: Challenging Assumptions about Children's Resilience", (2003), 13(1), *Children Youth and Environments* 1.

[148] C Dore, "What to do with Omar Khadr? Putting a child soldier on trial: Questions of international Law, Juvenile Justice and Moral Culpability", (2008), 41, *John Marshall Law Review* 1307.

[149] J Sloth-Nielsen and B D Mezmur, "A dutiful child: the implications of Article 31 of the African Children's Charter", (2008), 52(2), *Journal of African Law* 171.

The very preamble of the Convention on the Rights of the Child[150] states that:

> *"Recognizing that the child, for the full harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding,*
>
> *Considering that the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity,*
>
> *Taking due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child, Recognizing the importance of international cooperation for improving the living conditions of children in every country, in particular in the developing countries."*

The researcher understands this Preamble to define the drafter's intention and to provide obligations on State Parties. It proves that the child's best interest is a concept which is dependent on her upbringing and development. The Preamble creates an international obligation by recognising that only with international cooperation could a child's best interests be universally protected.

1.10 Objectives of the research

The aim of this project is to encompass all relevant data and knowledge on the protection and best interest of the child prior to, during and after armed conflict. The research study will facilitate the child's best interests by portraying the need for the adoption of an international legislative framework for the treatment of children, relative to their deeds committed during armed conflict as well as strengthening the prohibition towards children in armed conflict.

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[150] The preamble of The Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by the General Assembly resolution 44/25 of 20 November 1989, and entry into force 2 September 1990, in accordance with article 40.

The objectives are as follows:

- To ensure that accountability is the necessary approach for the deeds committed by children during armed conflict;

- To evaluate the best interests of the child in relation to methods of accountability; and

- To recommend and propose a universal blueprint of a restorative justice and rehabilitation platform for all children deemed to be participating in armed conflict with the sole purpose of encouraging the child's reintegration into society and her education.

1.11 Methodology

The researcher intends on using a mixed methodology. This, in part, comprises of desktop research involving a critical analysis of international treaties, conventions, principles, rules and case law. The researcher will, in addition, conduct a comparative study of the minimum age for criminal accountability in various countries and their approach to crimes committed by children. The researcher will use the findings of the above to determine what the most constructive platform is to achieve the best interests of the child. The researcher will illustrate this platform by drafting a regulatory framework which will depict the detailed proposal which the researcher presents.

The primary research approach will be non-empirical and will be focused essentially on relevant literature on the theme of this research project. The research will mainly be a literature review of books, articles, and reports (by prominent academics, the United Nations and other International Organisations). Similar consideration will be given to other documents or data which have been obtained from desk, library and database research.

The literature review will focus on both primary and secondary sources including research material obtained from conference papers and attendance at international

humanitarian law courses. In addition to the above, the research study will be used to establish a benchmark within the English Common Law system applicable to juvenile offenders. The researcher will build on this structure and develop its contents in line with international laws applicable.

The research study will be an original contribution to the field of public international law for the following reasons. The research is directed at not only preventative principles of child protection but also, and rather, at reparation and rehabilitation. The research shifts from focusing only on protecting the child from unlawful recruitment into armed conflict. The research elects to realise the child's best interests and special rights owed to her after involvement in armed conflict by the international community. In its final form, the researcher's findings will attempt to provide guidelines and recommendations to the United Nations for the possible demobilisation, rehabilitation and re-integration of former child soldiers. This will be concluded by offering a draft regulatory framework establishing a juvenile justice initiative, depicting the detailed proposal the researcher offers.

1.12 Overview and structure of the chapters to follow

1.12.1 Chapter 1

Chapter one provides a relevant background to children in armed conflict. The researcher examines how the research problem has been developed and still remains unresolved. This chapter explains the various motives encouraging the participation of children in armed conflict. This chapter briefly explains the lack of jurisdiction by the International Criminal Court and endorses the influence of *ad hoc* criminal tribunals. This chapter incorporates the various terms and definitions to be used throughout the research project. This chapter concludes with the researcher's intended approach to the project and its relevant projected aims.

1.12.2 Chapter 2

This chapter is intended to portray research relating to the universal obligations owed by all states to all states. The chapter sheds light on the definition of "*Erga Omnes*" obligations and how they are developed and enforced. The researcher argues that there is a universal obligation owed by all states to the international community in respect of children in armed conflict. This chapter explains how international customary law is created. Similarly, the benefits are discussed that international customary law has in relation to the rights of children. The researcher argues that the child is owed a special protected status, one which places an obligation on the international community to protect all children from armed conflict. The researcher concludes this chapter by exposing the deficiency between the intended responsibility of the international community and what is achieved practically.

1.12.3 Chapter 3

This chapter focuses on the applicable international law. The latter includes International Human Rights Law, International Humanitarian Law and International Criminal law. The researcher begins this examination by drawing on the history of children's rights and how they have developed over time. The researcher illustrates the differences between the various laws applicable to the child. This chapter includes the researcher's findings on whether the current law is sufficient. This chapter also includes the importance of customary international law and its applicability where its universal authority is concerned. This chapter concludes with the researcher's argument on how the law may be developed in line with the best interests of the child.

1.12.4 Chapter 4

This chapter discusses the numerical age as a determining factor when considering the definition of a child in armed conflict. This chapter depicts the interplay between children and psychology, focusing on the psychological effects of armed conflict on

the child's developing brain. This chapter explores the debate surrounding whether child soldiers are in fact victims or perpetrators. The researcher, in exploring this debate, focuses primarily on the child's vulnerability during armed conflict. This chapter then addresses the issue of whether children should be held criminally liable for the deeds that they commit during armed conflict. The researcher, therefore, consider the minimum age of criminal responsibility in Africa and Europe, and draw on the nexus between youthfulness and duress in respect to criminal capacity. This chapter concludes with the finding that children should be held accountable for the deeds committed during armed conflict. The researcher explains the various options that should be considered in respect of accountability.

1.12.5 Chapter 5

The researcher discusses the child's autonomous rights during and after armed conflict. The research shows that the child possesses a right to be evacuated from armed conflict and to be provided with an education. The chapter includes an analysis of the Omar Khadr case and the numerous lessons learned from the case. The researcher discusses transitional justice mechanisms and, specifically, *ad hoc* criminal tribunals. The research proves that *ad hoc* criminal tribunals are necessary for the modern world and the benefits they offer are necessary for post-armed conflict societies. This chapter also canvasses the definition of rehabilitation and reintegration. The research depicts what rehabilitation programmes for former child soldiers aim to achieve and what they include. The researcher presents the challenges facing rehabilitation for the former child soldier and how to limit them. The researcher discusses what the best interests of the child post-armed conflict require. This Chapter concludes with the researcher's original recommendation to promote the child's best interest in a post-armed conflict society through the proposal of the Special Children's Court.

1.12.6 Chapter 6

In this chapter, the researcher evaluates the aforementioned research and summarises the particular aspects requiring further development. The unique needs of the child participating in armed conflict will be identified, and emphasis will be placed on how these needs can best be addressed in a modern world. This chapter includes the innovative proposal by the researcher and provide a framework for its possible implementation by states. In concluding this thesis, the researcher provides recommendations for further study and concluding remarks on the research that was conducted.

Chapter 2

The relevant sources of international law and the development of children's rights in international law

2.1 Introduction

The first chapter of this research thesis provided a background and brief synopsis of the researcher's aims, recalling that the researcher intended to canvass the protection awarded to children in and after armed conflict through international law. The researcher recognises that the protection of the child entails a multifaceted approach. The researcher holds that a holistic interpretation of protection relates to all stages of armed conflict. It would be incorrect to concentrate only on whether the child is protected from recruitment into armed conflict but not protected from its consequences. The point of departure should, therefore, be focused on the various laws protecting the child from armed conflict, followed by the remedies for the breach of those laws after armed conflict.

In this chapter, the researcher discusses the various sources of international law. In canvassing the various sources, the researcher will argue their respective strengths and weaknesses.

The research will be followed by a discussion on hierarchy of the various sources, concluding with the pivotal role played by international conventions on the rights of the child. This chapter includes an historical overview of the development of children's rights in international treaty law, with the emphasis being placed primarily on the projected best interests of the child and where the law should position itself.[151]

[151] J Mbaku, "International Law, African Customary Law, and the Protection of the Rights of Children", (2020), 28(3), *Michigan State International Law Review* 542-546. See also A Alen

The idea of extra-territorial cooperation between states concerning the protection, development and implementation of children's rights are also argued. In view of this "extra-territorial cooperation", the researcher addresses the concept of *erga omnes* obligations,[152] specifically how these obligations are derived from international law and how far these obligations extend and to whom they extend. The researcher will argue that customary international law is best equipped to be the primary source of law relating to children in armed conflict. The researcher argues this on the premise that customary international law incorporates larger areas of protection than treaty law.[153]

Specific emphasis is placed on the unique nature of international customary law and on how valuable it appears to become when compared to its fellow sources of international law. This comparison, the researcher argues, filters through the inherent and natural deficiencies between treaty law and the acknowledged settled practice of the international community.

In conclusion, the discussion focuses on the sediment that remains after the technicalities of legal jargon have been filtered. Focus is placed on realising the intended purpose of the various sources of law aimed at establishing children's rights and drawing the international community closer to enforcing the same. The questions to be answered are, (1) is the child in armed conflict protected if it is adults who ultimately establish law and dictate whether it is considered to be a settled practice? (2) Where is the child's voice in this process when "extra-territorial" obligations are not adhered to?

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and H Bosly (*et al*), *The UN Children's Rights Convention: theory meets practice. Proceedings of the International interdisciplinary Conference on Children's Rights*, (2007) 42.

[152] S Strong, "General Principles of Procedural Law and Procedural Jus Cogens", (2018), 122 (2), *Penn State Law Review* 392. See also T Begley, "The Extraterritorial Obligation to Prevent the Use of Child Soldiers", (2012), 27(3), *The American University International Law Review* 625.

[153] M Hrestic, "Considerations on the Formal Science of International Law", (2017), 7, *Journal of Law and Administrative Sciences* 110.

2.2 Sources of International Law

International law is described by some as being the law of values and great ideas. Notably, it has been proven that international law applicable to an armed conflict far too often lacks the teeth necessary to implement its good precepts. International law could be viewed in line with international politics and what the majority of states consent to as law. The better description argued here is that international law is best viewed as a derivative of the interests and common political norms of international communities. Irrespective of its description, the importance of international law is unparalleled. International law permits its development to be akin to a nursery grown by different seeds. Each state forming part of the international community brings its domestic ideas and legal views which are birthed and formulated in its native soil. Prost argues that, as a result of the fragmented and decentralized nature of international law, it is best viewed as a largely horizontal system of governance and juridical authority.[154]

It is these individual and separate ways of thinking which make international law diverse, equipping it with the ability to possess qualities of being utilitarian and universal, so that its applicability manifests itself in its majority acceptance. The sources of International law are, therefore, accepted by the international community and are derived from various elements of international law.[155] Article 38 of the Statute of the International Court of Justice[156] provides that there are four distinctive points of departure:

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[154] M Prost, "Hierarchy and the Sources of International Law: A Critique", (2017), 39(2), *Houston Journal of International Law* 286.

[155] M Hrestic, "Considerations on the Formal Science of International law", (2017), 7, *Journal of Law and Administrative Sciences* 103-104.

[156] Article 38, the International Court of Justice. See also J Dugard *International Law, A South African Perspective (*Fourth edition), 2011. Chapter 3, Sources of international law, 24.

1) International conventions,[157] whether general or particular;

2) International custom, as evidence of a general practice accepted as law;

3) The general principles of law recognized by civilised nations; and

4) Judicial decisions[158] and the teachings of the most highly qualified publicists[159] as subsidiary means for the determination of rules of law.

It is important to note that the development of international law and its modernisation extends further than these sources alone. However, one can appreciate the fact that the modernisation of international law derives its authenticity from the above categories. The chronological order of the categories leaves treaties and conventions still being seen as the primary source, with international custom being seen as the secondary source.[160] Arguably, the proposed chronology of the above sources should

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[157] Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda. International Court of Justice. https://www.icj-cij.org/files/case-related/116/10457.pdf (Accessed on 20 August 2020) at 19 Judge Koroma declares that, *"it is a fundamental and customary principle of international law for a State to comply with its obligations under a treaty. The observance of the principle of* Pacta Sunt Servanda *plays an important role in maintaining peace and security between states."*

[158] W A Schabas, *"The Rights of the Child, Law of Armed Conflict and Customary International Law: A Tale of Two Cases*", at Chapter 2 of: From Peace to Justice "International Criminal Accountability and the Rights of Children", Edited by K Arts and V Popovski, 2005 19. Schabas argues that with regards to the Roper's decision*, "the decision confirms the virtual universal abolition of this practice and, thereby, the indubitable entry of the norm into the category of customary international law".*

[159] E Bjorge, "Public Law Sources and Analogies of International Law", (2018), 49 (4), *University of Wellington Law Review* 541.

[160] J Dugard, *International Law, a South African Perspective*. Fourth edition, 2011. Chapter 3, Sources of international law 24. See also A Pellet 'Article 38' in *The Statute of the International Court of Justice: A Commentary* (A Zimmermann, C Tomuschat and K Oellers-Frahm (Eds), 2006. http://pellet.actu.com/wp-content/uploads/2016/02/PELLET-2006-Article-38-of-the-Statute-of-the-ICJ.pdf (Accessed on October 2020).

not be misinterpreted as a defining hierarchy.[161] Both the primary and the secondary sources of international law have one main thread creating the nexus, and the thread is the consent of states.[162] The similar principle of consent is seen as an essential element of the law of contract in any domestic legal system.

Treaties or conventions are written documents between states and, in some cases, between states and relevant international organisations such as the United Nations.[163] The procedure to be followed, the power to enter into a treaty, the treaty's interpretation, its termination and its consequential enforceability are all regulated. This regulation is governed by the Vienna Convention on the Law of Treaties of 1969[164] and the Vienna Convention on the law of Treaties between States and International Organisations of 1986.[165]

The historical principle of consent is the overarching principle behind a treaty entered into between states or states and international organisations. Once consensus has been reached between the relevant parties, the documented treaty or convention is

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[161] M Prost, "Hierarchy and the Sources of International Law: A Critique", (2017), 39(2), *Houston Journal of International Law* 290.

[162] M Hrestic, "Considerations on the Formal Science of International law", (2017), 7, *Journal of Law and Administrative Sciences*104. See also the Lotus principle set out in SS Lotus (France v Turkey) 1927 PCIJ Reports, series A, no 10 where *"the court found that the law binding on states are derived from their own free will as provided in conventions or by usages generally accepted as expressing principles of law"* (own emphasis).

[163] The United Nations Security Council Resolution 1315 of 14 August 2000. http://www.rscsl.org/Documents/Establishment/S-Res-1315-2000.pdf (Accessed on 20 June 2020). See also A McQueen, "Falling through the Gap: The Culpability of Child Soldiers under International Criminal Law", (2018), 94(2), *Notre Dame Law Review Online*, at 115 McQueen recalls that *"the ICTY and ITRC were established in accordance with Security Council resolutions and were granted Chapter VII powers. The Security Council proposed a domestic-international hybrid tribunal in accordance with a treaty based agreement*."

[164] The Vienna Convention on the Law of Treaties, 1969.

[165] The Vienna Convention on the Law of Treaties, 1986.

then signed or ratified by the consenting parties.[166] This action taken by the relevant parties of symbolically accepting the treaty's obligation codifies existing rules of customary international law or creates new rules of customary international law. The importance of consensus as an essential aspect or foundation for any treaty is that this consent cannot be given by a state which is not a party to the treaty. Notably, the treaty would not be binding on states who have failed or neglected to sign the relevant treaty.

Dugard believes that the basic rule governing treaties is *Pacta tertiis nec nocent nec prosunt,* in other words, treaties do not confer an obligation or benefits upon states who have not signed the relevant treaty.[167] At the very least one may acknowledge the codification of the law embodied in the treaty. Arguably one may equally derive from the treaty evidence to substantiate an old or create a new international customary law rule.[168] This may then provide a platform for the proposal that a legal obligation derived from custom has the power to bind states who have not signed the relevant treaty. It is important to take cognisance here that one may already view the connection or rather relationship between primary sources of international law and secondary sources of international law.

Custom, being the secondary source of international law, is more detailed in its origin and more debated amongst authors and practitioners alike. Custom is not necessarily codified in bold black and white letters as a treaty would be, nor is it easily accessible

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[166] E Bjorge, "Public Law Sources and Analogies of International Law", (2018), 49 (4), *University of Wellington Law Review* 558.

[167] J Dugard, *International Law, a South African Perspective*. Fourth edition, 2011. Chapter 3, Sources of international law, 25. See also D Azaria, "The International Law Commission's return to the Law of Sources of International Law", (2019), 13(6) *FIU Law Review* 991. See also J Tobin, "Judging the Judges: Are they adopting the Rights Approach in Matters Involving Children?", (2009), 33, *Melbourne University Law Review* 584- 585.

[168] M Hrestic, "Considerations on the Formal Science of International Law", (2017), 7, *Journal of Law and Administrative Sciences* 105.

from an online database.[169] Rather custom is developed from the day-to-day practice of states and the remanence of the unsigned treaty by the minority of states, as opposed to that of the widely accepted treaty by the majority of states.[170]

Custom, albeit the secondary source, quickly emerges as the big brother when one considers that its real necessity is seen most prominently in third world countries or underdeveloped societies.[171] It is often these states and civil societies that may not have the relevant judiciaries or law-making bodies in place at the time when the law is needed to be developed.[172] The consequence of customary rules being codified is that the rules become written law and, with more particularity, these laws then become enforced or at least applied in judicial decisions, quickly making custom grow into the primary source of law.[173] The result is that customary international law is the birthstone and pivotal role player of modern international law.

The question which then begs to be asked is what is custom and at what stage could one classify a rule of law to be considered customary international law?

Discussed above is that when it comes to treaties, states have to provide their clear consent to be bound by its obligations.[174] The difference that custom encapsulates is that the very consent of a state to a customary international rule is implied by that particular state's actions. This is without a doubt debatable for the main reason that

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[169] M Prost, "Hierarchy and the Sources of International Law: A Critique", (2017), 39(2), *Houston Journal of International Law* 294.

[170] W A Schabas, *"The Rights of the Child, Law of Armed Conflict and Customary International Law: A Tale of Two Cases*" at Chapter 2 of: From Peace to Justice "International Criminal Accountability and the Rights of Children", Edited by K Arts and V Popovski, 2005 19.

[171] A Alen and H Bosly (*et al*), *The UN Children's Rights Convention: theory meets practice. Proceedings of the International interdisciplinary Conference on Children's Rights*, (2007) 42.

[172] J Dugard, *International Law, a South African Perspective*. Fourth edition, (2011). Chapter 3, Sources of international law 26.

[173] M Prost, "Hierarchy and the Sources of International Law: A Critique", (2017), 39(2), *Houston Journal of International Law* 299.

[174] J Tobin, "Judging the Judges: Are they adopting the Rights Approach in Matters Involving Children?", (2009), 33, *Melbourne University Law Review* 584-585.

actions would need to be proved. Consequently, this places the definitive aspect of proving actions that are tantamount to being considered to be conducted relating to custom into the arena of a trial court. The purpose of a trial is the adjudication of a disputed issue and a consequential finding based thereon by a court of law. International courts have identified two main requirements that the international community should consider when it concludes that a customary international law rule exists. The requirements include a settled practice (*usus*) and the acceptance of an obligation to be bound (*opinion juris sive necessitates*).

2.2.1 Settled practice

At the risk of oversimplification, an action by a state could in all fairness amount to any conduct taken by a state. In this particular context, the term 'settled practice' limits its definition to a state's practice regarding its participation in treaties, its role in the judgments of national and international courts, its national legislation, diplomatic relationships, and its policy statements towards the international community on international concerns. Dugard argues that, outside of the actions of a particular state, practice is also considered to be taking into cognisance reports of the International Law Commission and comments by states on these reports, as well as resolutions of the political organs of the United Nations.[175] Each state possesses its own way of keeping data on its international law development; some states publish official reports, while in other countries a written digest could be published by private institutions.

The primary concern relating to any proof of the conduct of a state is where there is no proof of whether the particular state actively supports a particular rule. The difficulty arises in circumstances where there has been no official report on the practice of that particular state. The manner in which one should curb this missing piece of the puzzle is to consider implied consent by a state's actions, which may be done by observing

[175] J Dugard, *International Law, a South African Perspective*. Fourth edition, (2011). Chapter 3, Sources of international law 26.

that particular state's silent or omitted acceptance of a rule.[176] Therefore, one's actions are not only those which you actively promote but rather one's omission to object to a rule in its formative or developmental stages should also be assessed.

The secondary concern relating to custom is the approach one may adopt when a state's actions are argued to be seen as a settled practice but practice of a rule which the particular state has not assented to. In the case of *S v Petane,*[177] this issue was considered. For the current research, it is important to understand that in this particular matter the Cape Provincial Division of South Africa adjudicated on the question of whether a member of the African National Congress political group was entitled to prisoner-of-war status during apartheid. The question was begged as a result of the Additional Protocol 1 of 1977 of the Geneva Conventions of 1949, which provides for prisoner-of-war status for members of national liberation movements.

The question was whether this provision made in the Additional Protocol has become customary international law and was then binding on South Africa. It is important to note that at the time the case was heard before the court, South Africa was not a party to the Additional Protocol and became a party only years later in 1995. The court accepted that at the time just over 60 states had signed the Additional Protocol. Drawing on this basis, the court adopted the view that this did not amount to settled practice. The court reasoned that there was no evidence that the rule extending prisoner of war status to members of national liberation movements had been applied by states in their practice.[178] Taking into account that the two particular states at which the Additional Protocol was aimed, Israel and South Africa, are the states who refused to sign the Additional Protocol or to accept it at the time.[179]

The principle, in this case, was provided by Judge Conradie who stated:

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[176] M Hrestic, "Considerations on the Formal Science of International law", (2017), 7, *Journal of Law and Administrative Sciences* 106.

[177] *S v Petane* 1988 (3) SA 51 (C)

[178] https://legalbrief.co.za/media/filestore/2017/10/S_v_PETANE_1988_3_SA_51_C-OCR.pdf. (Accessed on 20 November 2020).

[179] J Dugard, *International Law, a South African Perspective*. Fourth edition, 2011. Chapter 3, Sources of international law27.

> "*one must…. look for state practice at what states have done on the ground in the harsh climate of a tempestuous world, and not at what their representatives profess in the ideological overheated environment of the United Nations where indignation appears frequently to be a surrogate for action."*[180] (As quoted)

One can consider from the above case that, when deciding on whether the practice of a state has become custom in international law, one must consider the actual conduct of the State and not just its opinions at international conferences.

The question which begs to be asked is, what would be the duration of time that would qualify a practice of a State or States to be considered as custom? One would assume that practice would need to be excessive or at the very least consecutive for it to be seen as custom.[181] This is not necessarily the case with every rule in international law. Certain rules require less practice than others to reach the status of custom. This point was confirmed by the General Assembly when it generally approved the rules governing activities in outer space, even though the Soviet Union and the United States of America were the only states that promoted these rules.[182]

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[180] https://legalbrief.co.za/media/filestore/2017/10/S_v_PETANE_1988_3_SA_51_C-OCR.pdf. (Accessed on 20 November 2020) 6.

[181] *Nicaragua v United States of America*, 1986 International Court of Justice reports 14. In this case the court found that: "*a custom did not need to have absolute rigorous conformity with the rule. It was sufficient for the conduct of the state, in general, to be consistent with such rules, and that instances of a state's conduct seen to be inconsistent with the relevant rule, should be seen or treated as a breach of that rule and not as indications of creating a new rule."* See also https://www.icj-cij.org/en/case/70 (Accessed on 15 April 2020).

[182] J Dugard, *International Law, a South African Perspective*. Fourth edition, (2011). Chapter 3, Sources of international law 27. See also General Assembly Resolution 1962 (XVIII), Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space. http://www.unoosa.org/oosa/oosadoc/data/resolutions/1963/general_assembly_18th_session/res_1962_xviii.html (Accessed on 20 October 2020).

2.2.2 Subjective acceptance (*Opinio Juris*)

The second leg to customary international law is the acceptance by a state to be bound by that obligation, in other words the *Opinio Juris*. This leg of the test is essentially similar to the final element in South African domestic law relating to the law of contracts which is the intentional acceptance of the obligation on a party thereto. It is similarly embodied in the written construction of Article 38 referred to above as settled practice which is "accepted as law"[183] which entails that settled practice is not on its own sufficient to develop a custom. There must be an element of intention or knowledge which creates in the state the cognisance of being bound by the potential customary rule.[184]

The mere acceptance by a state of an obligation is somewhat wholly subjective.[185] Certainly, in a political debate regarding particular rules, this subjective acceptance may change. The problem with this leg of custom is that particular practice by a state or states may exist and may even be considered by some as settled practice, but the rule's customary nature may still not be accepted by other states.

The reason for this is that not all actions by a state in respect of a rule could imply that the state performed purely because it felt legally compelled to do so by justification of a customary law rule. Therefore, the evidence of *Opinio Juris* is exceptionally difficult to prove let alone to attribute owing to the nature of subjectivity itself.[186] It should then

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[183] M Prost, "Hierarchy and the Sources of International Law: A Critique", (2017), 39(2), *Houston Journal of International Law* 303.

[184] E Bjorge, "Public Law Sources and Analogies of International Law", (2018), 49 (4), *University of Wellington Law Review* 544.

[185] M Hrestic, "Considerations on the Formal Science of International law", (2017), 7, *Journal of Law and Administrative Sciences* 106.

[186] North Continental Shelf Cases between West Germany, Netherlands and Denmark, 1969 International Court of Justice Reports 3. Where the court found at Paragraph 44, "*that not only must the acts concerned amount to a settled practice, but they must also be of such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e. the*

be argued that, when considering the customary nature of a rule, one must consider both the objective (practice) and the subjective (acceptance) on a case by case basis. Certainly rules and principles tend to develop over time along with its importance and universality.

The premise of this is that state practice may be seen by only a few states who have to perform certain rules for geographical reasons. The *Opinio Juris* of certain states may also then be more prominent than others because of geographical reasons and the subject matter of the rule itself. For example, rules that relate to the law of the sea may be applicable only to states affected thereby for geographical reasons. This does not limit the rule's customary nature because only fewer states apply or enforce that particular rule.[187]

For the reasons discussed above, custom and its creation may be seen as a grey area within international law. The colour itself, however, may be contrasted by international organisations such as the United Nations and the resolutions that it passes.[188] This is not to say that a resolution by the United Nations is in any way binding on states in the same way as a treaty would ordinarily be. The weight that can be placed on such resolutions is arguable and, even more so, dependent on the particular subject matter. For instance, the Resolutions of the General Assembly on the subject of prohibiting state torture has been seen by courts to have reached the status of customary international law.[189] One may view this subject as forming part of peremptory norms

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existence of a subjective element, is implicit in the very notion of the opinio juris sive necessitates. The states concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency or even habitual nature of the acts is not in itself enough."

[187] A Alen and H Bosly (*et al*), *The UN Children's Rights Convention: theory meets practice. Proceedings of the International interdisciplinary Conference on Children's Rights*, (2007) 29.

[188] M Hrestic, "Considerations on the Formal Science of International law", (2017), 7, *Journal of Law and Administrative Sciences* 107.

[189] J Dugard, *International Law, a South African Perspective*. Fourth edition, (2011). Chapter 3, Sources of international law 32.

and that the status of the subject regarding the prohibition of torture is widely accepted as customary international law.

A further example that weight may be placed on the attitude of states towards United Nations Resolutions is the prominent *Nicaragua case.*[190] In this matter, the court had to consider whether the use of force, Article 2(4) of the United Nations Charter, had reached the status of customary international law. The court found that, applied with caution, the state's subjective acceptance to be bound by a rule may be considered by enquiring into the attitude of states in respect of certain General Assembly resolutions and the effect of consent to the text of such resolutions. This consideration if done cautiously may be seen as an acceptance (*Opinio Juris*) of the rule or principle.[191]

2.3 *Erga Omnes* obligations

As assented to above, public international law confines itself to the rules and principles governing the relationships within the international community. The rules and principles applicable to it are premised on the consent between state parties to that treaty, which, in turn, provides the rules on that particular subject matter. The treaty's limitations are rather more distinguishable when one applies customary international law. This application of customary international law is applied while giving due respect to state sovereignty and the state's subjective consent to be bound by a specific obligation provided for by the treaty.[192] The notion of consent referred to above is strengthened by the fact that, even in private law, a party to a contract would in most cases be assumed to be responsible only for obligations that they have signed. The

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[190] *Nicaragua v United States of America*, 1986 International Court of Justice reports 14. A case concerning Military and Paramilitary Activities in and against Nicaragua. https://www.icj-cij.org/en/case/70 (Accessed on 20 December 2020).

[191] J Dugard, *International Law, a South African Perspective*. Fourth edition, (2011). Chapter 3, Sources of international law 32.

[192] T Begley, "The Extraterritorial Obligation to Prevent the Use of Child Soldiers", (2012), 27(3), *The American University International Law Review* 625.

purpose of consent is the manifestation of voluntarism, which in essence is the free will choice to be bound by an obligation.

This fact consequently provides the notion that the relevant legal rules and principles are equal in the broader sense. The aspect which is then neglected the most is the development and future of international law. The ground on which international law develops is the reason why politicians and academics alike may agree that international law arrives at the battlefield a little late and somewhat out of breath. The future and the development of international law could never account for the ever-emerging moral compass and independent value system of the international community,[193] which, albeit erratic, may include the promotion of human rights, children's rights and the role of children in international humanitarian law.

Apart from the sources alluded to above and the consequence of a legalistic approach to international law, there exist a further two elements which the international community is shaped by and develops through. These are, on the one hand, peremptory norms, and, on the other, obligations *erga omnes.*[194] Peremptory norms are also known as *Jus Cogens*, and the subject itself has been the topic of many academic debates and is the crux of many United Nations conferences.[195] In essence, peremptory norms are rules and principles of international law which are universal and the enforcement of which may not be ignored by any state within the international community.[196] The definition of *Jus Cogen* norms, translated into English as "compelling" norms, in itself suggests the superiority of the norm.

These norms are seen as the highest norms of international law. Obligations *Erga Omnes* may be summarised as obligations owed by all states comprising of the

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[193] T Begley, "The Extraterritorial Obligation to Prevent the Use of Child Soldiers", (2012), 27(3), *The American University International Law Review* 625.

[194] J S Strong, "General Principles of Procedural Law and Procedural Jus Cogens", (2018), 122 (2), *Penn State Law Review* 392.

[195] S Guan, "Jus Cogens: To Revise a Narrative", (2017), 26(2), *Minnesota Journal of International Law* 461.

[196] C Ene, "Jus Cogens (Peremptory Norms) A Key Concept of the International Law", (2019), 8(2) *Perspectives of Law and Public Administration* 302.

international community towards all states in the international community who would consequently have an interest in its enforcement.[197] There exists a clear nexus between peremptory norms and obligations *erga omnes*. On the one hand, there exist the highest rules in international law. On the other hand, there exist the highest obligations owed by all states towards all states as a result of universal interest.

It may not be sufficient merely to allege that peremptory norms are the higher norms in international law.[198] The superiority of peremptory norms would need to be enforced or, at the very least, embodied in a written law.[199] This is so, and one can understand its importance by considering that the Vienna Convention on the law of Treaties,[200] Article 53 in particular, provides that:

> *"A Treaty is void, if, at the time of its conclusion,* ***it conflicts with a peremptory norm*** *of* ***general international law****. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a* ***norm from which no derogation is permitted*** *and which* ***can be modified only*** *by a* ***subsequent norm*** *of general international law having the* ***same character***."[201] (Own emphasis)

The questions which follow, ask which norms are considered peremptory in nature and what in particular contributes to this consideration?

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[197] J Dugard, *International Law, a South African Perspective*. Fourth edition, (2011). Chapter 3, Sources of international law 38.

[198] C Ene, "Jus Cogens (Peremptory Norms) A Key Concept of the International Law", (2019), 8(2), *Perspectives of Law and Public Administration* 303. Ene argues that the rules of *Jus Cogens* are hierarchically superior compared to other ordinary rules of international law.

[199] S Guan, "Jus Cogens: To Revise a Narrative", (2017), 26(2), *Minnesota Journal of International Law* 461. See also S Strong, "General Principles of Procedural Law and Procedural Jus Cogens", (2018), 122 (2), *Penn State Law Review*391.

[200] The Vienna Convention on the Law of Treaties, 1969.

[201] Article 53 of the Vienna Convention on the Law of Treaties, 1969.

The difficulty that exists when analysing a peremptory norm is the uncertainty over which norm is universally recognised as being a peremptory norm.[202] Academics and international scholars recognise that, through general acceptance and in various methods, the following norms are considered peremptory in nature.[203]

a) Prohibition against slavery;
b) Prohibition against genocide;
c) Prohibition against racial discrimination;
d) Prohibition against torture; and
e) Prohibition against aggression.

The notion of *Jus Cogen* norms was identified in the international judicial system in the case of the *Democratic Republic of the Congo v Rwanda.*[204] In this matter, the International Court of Justice accepted the peremptory norm status of the prohibition on genocide and the prohibition on racial discrimination. In the same case, the court recognised the vital role that peremptory norms play in international precedent. In the judgment of the honourable court it was provided that:

> *"Norms of* Jus Cogens *are a blend of principle and policy. On the one hand, they affirm the high principles of international law, which recognize the most important rights of the international order - such as the right to be free from aggression, genocide, torture and slavery and the right to self-determination; while, on the other hand, they give legal form to the most fundamental policies or goals of the international community- the prohibitions on aggression, genocide, torture and slavery and the advancement of self-determination. This explains why they enjoy a hierarchical superiority to other norms in the international legal order. The fact that norms of* Jus Cogens *advance both*

[202] S Strong, "General Principles of Procedural Law and Procedural Jus Cogens", (2018), 122 (2, *Penn State Law Review* 391.

[203] J Dugard, *International Law, a South African Perspective*. Fourth edition, (2011). Chapter 3, Sources of international law 38-39.

[204] *Democratic Republic of the Congo v Rwanda* 2006. The International Court of Justice Reports 579 and 581, at paragraph 64 and 78.

> *principle and policy mean that they must inevitably play a dominant role in the process of judicial choice."*[205]

From the research above, one is informed of the status of *Jus Cogens* norms and the current norms regarded to be *Jus Cogens* in nature. The *erga omnes* obligations which flow from the breach of these norms is what defines the enforceability of *Jus Cogens* norms.[206] An aspect to consider is the definition of what is meant by "universal" in the doctrine of *erga omnes* obligations, for example when a breach of a *Jus Cogen* norm affects only two states, the researcher is of the view that owing to the status of the *Jus Cogen* norm it is not only the affected state that has an obligation to enforce the norm.[207] Instead, it is all states forming part of the international community that possess the *erga omnes* obligation.[208]

In the *Barcelona Traction* case,[209] the International Court of Justice held that the state which is involved in the litigation concerning a *Jus Cogen* norm would not need to prove a national interest. The reasoning here is that a clear distinction had to be drawn between the obligations of a state towards the international community and obligations only between two states. This view recognised the importance of the rights involved in

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[205] *Democratic Republic of the Congo v Rwanda* 2006. The International Court of Justice Reports 611, at paragraph 10.

[206] C Ene, "Jus Cogens (Peremptory Norms) A Key Concept of the International Law", (2019), 8(2), *Perspectives of Law and Public Administration* 302. Ene argues that all peremptory norms involve the prohibition of derogation and are supported by sanctions.

[207] J Dugard, *International Law, a South African Perspective*. Fourth edition, 2011. Chapter 3, Sources of international law 39-41.

[208] S Strong, "General Principles of Procedural Law and Procedural Jus Cogens", (2018), 122 (2), *Penn State Law Review* 392.

[209] Barcelona Traction, Light and Power Company Limited (*Belgium v Spain*) 1970, International Court of Justice Reports 3.

Jus Cogens norms and that it breathes the interest of an *erga omnes* obligation towards its protection by all states.[210]

2.4 Draft articles on state responsibility

One can accept that states ordinarily have national duties to protect and to apply law within their jurisdiction, but the state, along with the globalisation of the world and international law, has extra-territorial obligations.[211] These obligations are those owed by a state or group of states towards individuals in another state's jurisdiction or territory.[212] This may ordinarily include the prohibition of dumping waste or the prevention of pollution that could affect another state's territory or residents. For this paper, the researcher refers to the obligation of preventing children from recruitment and participation in armed conflict. This includes direct or indirect participation and both international and non-international armed conflict.

The notion of *erga omnes* obligations in respect of peremptory norms is not merely an academic opinion, and, certainly, it is not only confined to the writings of textbooks on international law. The International Law Commission made a profoundly written embodiment of the obligations owed by states in its 2001 Draft Articles on the Responsibility of States for Internationally Wrongful Acts.[213] The effectiveness of the

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[210] E Bjorge, "Public Law Sources and Analogies of International Law", (2018), 49 (4), *University of Wellington Law Review* 537. See also Barcelona Traction, Light and Power Company Limited (*Belgium v Spain*) 1970, International Court of Justice, Reports 3.

[211] T Begley, "The Extraterritorial Obligation to Prevent the Use of Child Soldiers", (2012), 27(3), *The American University International Law Review* 626.

[212] T Begley, "The Extraterritorial Obligation to Prevent the Use of Child Soldiers", (2012), 27(3), *The American University International Law Review* 626 - 627.

[213] The Responsibility of States for Internationally Wrongful Acts, 2001. Text adopted by the Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session. The report, which also contains commentaries on the draft articles, appears in *Yearbook of the International Law Commission,*

draft articles is seen by its formulation of obligations owed by states for wrongs considered to be international in nature. The Draft Article's universality is achieved by its recognition of a non-injured or third party state's ability to institute proceedings and to take steps on behalf of the international community as a whole against a state that has violated a "higher norm".

The Draft Articles provide, in Article 40, that its application is intended to encourage the responsibility of states for serious breaches of peremptory norms.[214] Where a clear breach exists, states are bound to cooperate with one another to prohibit any serious breach lawfully. The International Law Commission suggests that not only do *erga omnes* obligations exist but that the duty imposed by them is universal.

What makes these Articles an applicable body of legal principles concerning international children's rights is their description and viewpoint of the word "responsibility". It purports to encourage the actions of states to be seen not only as a cause and effect, but rather it provides clarity and rejects the ambiguity and the notion of a third party state sitting idle. This particular point is stressed throughout the articles but specific cognisance may be taken of article 41(2) where it provides that no state shall even recognize as lawful a situation or state of affairs that was the consequence of a serious breach of a peremptory norm, nor shall that state render any contribution to maintaining that state of affairs.[215] Consequently, the avenue for a state or the

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2001, vol. II (Part Two). Text reproduced as it appears in the annex to General Assembly resolution 56/83 of 12 December 2001, and corrected by document A/56/49(Vol. I)/Corr.4.

[214] Article 40, International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts, 2001. See further *Yearbook of the International Law Commission*, 2001, vol. 2 (Part Two). Text reproduced as it appears in the annex to the General Assembly resolution 56/83 of 12 December 2001, and correct document A/56/49 (Vol.1)/Corr.4. Further see, J Dugard *International Law, a South African Perspective*. Fourth edition, 2011. Chapter 3, Sources of international law 40. Dugard discusses the importance of the Draft Articles and even though the terms *Jus Cogens* and *Erga Omnes* are not specifically used, the meaning thereof is expressly utilised.

[215] Article 41(2), International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts, 2001. See further the *Yearbook of the International Law*

international community to avoid this responsibility is to avoid the acknowledgement that a serious breach has occurred. The articles go a step further in assisting injured states to curb this ignorance by entitling such a state to invoke the responsibility of another state if an obligation towards the breach is owed to the state individually or to the international community as a whole.[216] The invocation referred to above is done by way of a notice invoking the responsibility of another state of its claim.[217]

The adage that there is strength in numbers proves to be accommodated for in the Draft Articles. Article 46, 47 and 48 provide for the plurality of injured states, the plurality of responsible states, and, lastly, the invocation of responsibility by a state other than an injured state.[218]

Commission, 2001, vol. 2 (Part Two). Text reproduced as it appears in the annex to the General Assembly resolution 56/83 of 12 December 2001, and corrected by document A/56/49 (Vol.1)/Corr.4.

[216] Article 42, International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts, 2001. See further *Yearbook of the International Law Commission,* 2001, vol. 2 (Part Two). Text reproduced as it appears in the annex to the General Assembly resolution 56/83 of 12 December 2001, and corrected by document A/56/49 (Vol.1)/Corr.4.

[217] Article 43, International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts, 2001. See further *Yearbook of the International Law Commission,* 2001, vol. 2 (Part Two). Text reproduced as it appears in the annex to the General Assembly resolution 56/83 of 12 December 2001, and corrected by document A/56/49 (Vol.1)/Corr.4.

[218] Article 46, 47 and 48, International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts, 2001. See further *Yearbook of the International Law Commission,* 2001, vol. 2 (Part Two). Text reproduced as it appears in the annex to the General Assembly resolution 56/83 of 12 December 2001, and corrected by document A/56/49 (Vol.1)/Corr.4.

2.5 The international perspective on children's rights

The modernisation and development of international law recognises children and their applicable rights as being separate from the rights of adults. The latter fact reveals its necessity when one considers that children found in armed conflict require "special" protection as they possess a "special" status in armed conflict.[219] This "special" status is supported by the Convention on the Rights of the Child.[220] The Convention on the Rights of the Child is not the first international legal document protecting children and neither was it the last.[221] The appropriate point of departure in understanding international child rights is to consider how these rights afforded to children have developed over time. With this understanding one may similarly assess the strength of these rights and whether they truly meet their intended effectiveness.

History shows that children's rights during the middle to late nineties were focused towards the child's legal autonomy and the modernisation of the child's empowerment.[222] One can see through the development of child rights that the international community has used protection for children as the blueprint or starting blocks with the inclusion of an oral opinion by the child being legally guaranteed.[223]

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[219] J Mbaku, "International Law, African Customary Law, and the Protection of the Rights of Children", (2020), 28(3), *Michigan State International Law Review* 538.

[220] Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by the General Assembly resolution 44/25 of 20 November 1989, and entry into force 2 September 1990, in accordance with article 40.

[221] E Policinski and K Krotiuk, "Childhood in the Crossfire: How to Ensure a Dignified Present and Future for Children Affected by War", (2019), 101(911), *International Review of the Red Cross* 427-431.

[222] J Ogbonnaya and U Agom, "Human Rights of the less Privileged Groups: Jurisprudential and Legal issues in Global Human Rights", (2016), 53, *Journal of Law, Policy and Globalization* 34-35.

[223] J Willems, *Children's Rights and Human Development- a Multidisciplinary Reader*, (2010) 580-583.

Earlier views on children sought to establish a model which viewed the child as being part of a family unit. This family unit aligned itself with the notion of mutual responsibility between parent and child without any need for codification by legislation, be it national or international.[224] This model is important as it shifts the perspective away from the law and views the child and adult relationship as being moral,[225] bearing in mind that morality is upheld by its acceptance by an individual unlike the law which can be enforced.[226] The problem one can immediately see from this approach is that, over time, moral standing and conscience differ from culture to culture and could be weakened from generation to generation. A further problem with this view is that it fails to take into account the child who is parentless or the child who is, unfortunately, living in an environment with no social accountability.[227]

This view of social and moral contracts was not discouraged by the modernisation of international law. As will be seen in the paragraphs to follow, there is recognition of the importance of a family structure and a warm atmosphere that a child needs for his or her growth and development.[228] The researcher considers this model to be one which is best suited in the most idealistic of worlds, to the extent that, if one even considers a social contract, one should also recognise the bargaining power each party may have.

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[224] C Rutgers, *Creating a World Fit for Children: Understanding the UN Convention on the Rights of the Child. International debate Education Association*, (2011) 17.

[225] J Sloth-Nielsen and B Mezmur, "A dutiful child: the implications of article 31 of the African Children's Charter", (2008), 52(2) *Journal of African Law* 174.

[226] C Rutgers, *Creating a World Fit for Children: Understanding the UN Convention on the Rights of the Child. International debate Education Association*. (2011) 16.

[227] J Tobin, "Judging the Judges: Are they adopting the Rights Approach in Matters Involving Children?", (2009), 33, *Melbourne University Law Review* 585-589.

[228] W A Schabas, *"The Rights of the Child, Law of Armed Conflict and Customary International Law: A Tale of Two Cases*", at Chapter 2 of: From Peace to Justice "International Criminal Accountability and the Rights of Children", Edited by K Arts and V Popovski, 2005 20.

A child as a party to this social contract of mutual responsibility would be dependent on its enforcement and on the fairness of adults.[229] In certain instances a child would be a victim of poor social standing and subjected to poverty from birth, leaving the freedom and consent to be non-existent or variable from child to child and family to family.[230] This is the very reason why a natural law approach needs to be balanced or at least governed by the law which aims to provide all children with basic human rights equally.[231]

One important right that children were given in the late 1800s was that schooling between the ages of 5 and 12 was compulsory. One can take away from this development that children were now starting to be seen, irrespective of social class and standing, as equally respected future adults as they would indeed become.[232] Slowly the view shifted away from simply a helpless child needing protection to the future adult needing development.[233]

The development of child rights is focused not only on the battlefield but also in the workplace. In the 1900s when children possessed the right to be educated, their ability to be an active player in the workforce increased along with the exploitation it resulted in. In family and cultural units where the elderly and the youth are often only what exists after the middle-aged members are involved in a war, the notion of child labour became a necessity for the upkeep of the home and family unit.

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[229] S Van Praagh, "Adolescence, autonomy and Harry Potter: the child as decision-maker", (2005), 1(4), *International Journal of Law in Context* 335-341.

[230] C Rutgers, *Creating a World Fit for Children: Understanding the UN Convention on the Rights of the Child. International debate Education Association*. (2011) 17.

[231] J Sloth-Nielsen and B Mezmur, "A dutiful child: the implications of article 31 of the African Children's Charter", (2008), 52(2), *Journal of African Law* 169.

[232] J Ogbonnaya and U Agom, "Human Rights of the less Privileged Groups: Jurisprudential and Legal issues in Global Human Rights", (2016), 53, *Journal of Law, Policy and Globalization* 34-36.

[233] J Tobin, "Judging the Judges: Are they adopting the Rights Approach in Matters Involving Children?", (2009), 33, *Melbourne University Law Review* 585-588.

In many areas in South Africa, the term ‘child-headed home’ is still commonly used today. During the Industrial Revolution in Britain, the plight of exploited child labourers was seen as outrageous, as wealthy factory owners recruited women and children for work in textile factories and coal mines, with children sometimes being as young as five working for 16 hours a day.[234] It goes without saying that most children became sick and died as a result of such unsafe working environments.

International law has developed tremendously since then, and developments, such as the international labour organisation of 1919, have set the standard of when children can be used in the workforce. This can be seen in the limitation of hours worked and the minimum age from which they allowed to work.

2.6 Modernisation versus protection

The early approach towards children viewed the child as the dependent of the parent and the bearer of unrivalled vulnerability which required protection.[235] “Protection” interpreted here means the protection of the child’s physical being as well as the child’s developmental rights such as the right to education.[236] As time progressed and the world wars ended, democracy became more than just a word with an idealistic vision. The international community slowly recognised that children are not merely miniature

[234] C Rutgers, *Creating a World Fit for Children: Understanding the UN Convention on the Rights of the Child*. (2011) 18.

[235] J Mbaku, “International Law, African Customary Law, and the Protection of the Rights of Children, (2020), 28(3), *Michigan State International Law Review* 542.

[236] J Sloth-Nielsen and B Mezmur, “A dutiful child: the implications of article 31 of the African Children’s Charter”, (2008), 52(2), *Journal of African Law* 179.

adults who are at the mercy of their native community.[237] This recognition sought to understand that children required consistent aid as developing individuals.[238]

A dramatic increase in the number of women going to work aligned itself with equality being strived for, which, in turn, birthed the need to negotiate household decisions.[239] In turn, children were given a voice, albeit only in certain respects, and this left parents with a less classical protective role.[240] With this exposure, children were no longer seen as merely the "innocent child" but rather as the more appropriate "vulnerable youth" owing to their susceptible nature.[241]

The role television plays in the mind of the vulnerable child is considerable. Such exposure is more than just a third voice of communication but is rather an extremely powerful marketing tool turning a child very quickly into a consumer.[242] The international child is now seen as a direct target market for sales, as children will eventually be at the steering wheel of the global economy. As a result of these forces,

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[237] J Ogbonnaya and U Agom, "Human Rights of the less Privileged Groups: Jurisprudential and Legal issues in Global Human Rights", (2016), 53, *Journal of Law, Policy and Globalization* 34-37.

[238] E Policinski and K Krotiuk, "Childhood in the Crossfire: How to Ensure a Dignified Present and Future for Children Affected by War", (2019), 101(911), *International Review of the Red Cross* 426.

[239] C Rutgers, *Creating a World Fit for Children: Understanding the UN Convention on the Rights of the Child. International debate Education Association*. (2011) 21.

[240] J Tobin, "Judging the Judges: Are they adopting the Rights Approach in Matters Involving Children?", (2009), 33, *Melbourne University Law Review* 584-589.

[241] S Van Praagh, "Adolescence, Autonomy and Harry Potter: the child as decision-maker", (2005), 1(4), *International Journal of Law in Context* 337-340.

[242] C Rutgers, *Creating a World Fit for Children: Understanding the UN Convention on the Rights of the Child*. (2011) 21.

the area that was black and white in relation to empowering children and weakening the authority or control possessed by parents became very grey.[243]

2.7 The children's rights blueprint provided by Eglantyne Jebb

After world war one, a British woman by the name of Eglantyne Jebb caught the attention of the international community with regards to her charitable acts on behalf of children.[244] Jebb saw that the children in Germany and Austria were in dire straits as a consequence of the aftermath of the war. In 1919, Jebb asked the British people to provide funds towards the assistance of the children in Germany and Austria. Jebb's request was well funded and relief work to assist these children commenced.[245]

A year later, Jebb and her sister Dorothy commenced the first recognized worldwide movement for children known as "The International Save the Children Union". Jebb saw that charity itself is not constant and can be rather limited at crucial times, and, in turn, Jebb realised that having a foundation of dedicated people would make a greater impact on the aid given for children.[246] This shows charity and voluntary assistance as the second approach while international law and political action remain the primary need.

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[243] E Policinski and K Krotiuk, "Childhood in the Crossfire: How to Ensure a Dignified Present and Future for Children Affected by War", (2019), 101(911), *International Review of the Red Cross* 426. See also J Tobin, "Judging the Judges: Are they adopting the Rights Approach in Matters Involving Children?", (2009), 33, *Melbourne University Law Review* 584 - 588.

[244] E Policinski and K Krotiuk, "Childhood in the Crossfire: How to Ensure a Dignified Present and Future for Children Affected by War", (2019), 101(911), *International Review of the Red Cross* 425.

[245] J Kuilema, "Lessons from the First International Conference on Social Work", (2016), 59 (6), *International Social Work* 719.

[246] C Rutgers, *Creating a World Fit for Children: Understanding the UN Convention on the Rights of the Child. International debate Education Association*. (2011) 19.

This brought about the landmark and first crucial document, drafted by Jebb herself in 1924, and known as the "Declaration of the Rights of the Child".[247] This document was adopted by the then League of Nations.[248] The importance of this document in the researcher's opinion is that it declared the need of the international community to view children, irrespective of their gender and nationality, as being helpless and dependent on the adult. The Declaration provided that a child's needs, regardless of the child's race, nationality or creed, should take priority in times of distress and that it is the duty of all men and women of all nations to ensure this priority.

Arguably the weakness of the Declaration was that it was purportedly a list of obligations placed on all individuals, independent of governments and states as a whole.[249] The Declaration was essentially what it was entitled, and that is simply the embodiment of the universal rights of children. The researcher argues that the Declaration of the Rights of the Child lacked any teeth to enforce those rights. The Declaration of the Rights of the Child remains one of the most significant steps taken in respect of international children's rights in history. This is due to the fact that it was then that the universal acceptance of the child's human rights became real and provided further recognition of the differentiating characteristics of a child's needs from those of an adult.

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[247]J Mbaku, "International Law, African Customary Law, and the Protection of the Rights of Children", (2020), 28(3), *Michigan State International Law Review* 542. See also W A Schabas, *"The Rights of the Child, Law of Armed Conflict and Customary International Law: A Tale of Two Cases*", at Chapter 2 of: From Peace to Justice "International Criminal Accountability and the Rights of Children", Edited by K Arts and V Popovski, 2005 19.

[248] J Ogbonnaya and U Agom, "Human Rights of the less Privileged Groups: Jurisprudential and Legal issues in Global Human Rights", (2016), 53, *Journal of Law, Policy and Globalization* 35-36.

[249] C Rutgers, *Creating a World Fit for Children: Understanding the UN Convention on the Rights of the Child". International debate Education Association*. (2011), 20.

2.8 The Convention on the Rights of the Child

The most important international development towards children's rights is the Convention on the Rights of the Child.[250] The Convention on the Rights of the Child has been described as one of the most important human rights instruments ever adopted by the international community.[251] The Convention's origin, some academics believe, was derived from the Declaration of the Rights of the Child. The unanimous support given to the Convention can be gleaned by the fact that the Convention was negotiated in November of 1989, and, within less than a year, it was entered into force.[252] By the late nineties, more than 160 states were state parties thereto, and, by 2020, more than 196 States,[253] making this international covenant the most widely accepted by states to date.[254]

One would recall from the above discussion that treaties are a primary source of international law.[255] The advantage of states being a party thereto is that they are

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[250] Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by the General Assembly resolution 44/25 of 20 November 1989, and entry into force 2 September 1990, in accordance with article 40.

[251] C Allais, "The Exploitation of Children by UN Peacekeepers", (2010), 8(2*), Unisa Press ISSN 1724-7140* 58. See also C Rutgers as editor, *Creating a World Fit for Children: Understanding the UN Convention on the Rights of the Child. International debate Education Association.* (2011) 37.

[252] J Tobin, "Judging the Judges: Are they adopting the Rights Approach in Matters Involving Children?", (2009), 33, *Melbourne University Law Review* 584. See also A Davison, "Child Soldiers: No Longer a Minor Incident", (2004), 12, *Willamette Journal on International Law and Dispute Resolution* 130.

[253] J Ogbonnaya and U Agom, "Human Rights of the less Privileged Groups: Jurisprudential and Legal issues in Global Human Rights", (2016), 53, *Journal of Law, Policy and Globalization* 35.

[254] A Davison, "Child Soldiers: No Longer a Minor Incident", (2004), 12, *Willamette Journal on International Law and Dispute Resolution* 130.

[255] The Vienna Convention on the Law of Treaties, 1969.

bound to the obligations provided by the Convention. With this obligation goes the benefit for the international community that a state's compliance thereto may be monitored. The manner in which compliance is monitored in respect of the Convention is through the established body of the United Nations called the Committee on the Rights of Child.[256] Importantly, the Convention on the Rights of the Child has no court annexed to it, so there could be no order directing a state party to perform.[257]

An advantage of the majority acceptance of the Convention on the Rights of the Child can be seen from the fact that, since Jebb's contribution in the early 1900s, there now existed a clear international consensus on the development of international children's rights.[258] This development existed because there was now a legally-binding document with its own legally-binding obligations which was accepted by the international community.[259]

This brings one to the first principle of customary international law above which is "state practice". The other important impact that the Convention provides is that, for the first time, the international community accepted that children's rights ought to be distinct from those of adults which is why there is the need for its own Convention. It is not surprising to see why some describe the Convention as a milestone in the history of mankind. The researcher is of the view that the correct description for the Convention is what it purports to be, and that is "*the legal obligation for the respect*

[256] J Sloth-Nielsen and B Mezmur, "A dutiful child: the implications of article 31 of the African Children's Charter", (2008), 52(2), *Journal of African Law* 170.

[257] C Rutgers, *Creating a World Fit for Children: Understanding the UN Convention on the Rights of the Child*. (2011) 22.

[258] C Allais, "The Exploitation of Children by UN Peacekeepers", (2010), 8(2), *Unisa Press ISSN 1724-7140* 58.

[259] T Begley, "The Extraterritorial Obligation to Prevent the Use of Child Soldiers", (2012), 27(3), *The American University International Law Review* 619.

and protection of children's rights as the starting point for the full development of the individual's potential in an atmosphere of freedom, dignity and justice".[260]

This description best describes the Convention because, on the one hand, it is the first international legally binding document on children's rights. On the other hand, the Convention, at least in its preamble, is designed to ensure the protection and recognition of children's rights[261] and for this to be done in accordance with the ethos of the United Nations which is freedom, dignity and justice.[262]

Recalling that there are two legs of customary international law, one being settled practice and the second being the intentional knowledge of accepting such obligations, one may argue that ratifying a treaty could conform to either of these two legs. On the one hand, a state takes an action in practice to ratify or be a party to the Convention, and, similarly, a state consents with all the necessary intention to be bound by the obligations provided by the Convention.

The fact remains that children participating in armed conflict still exist.[263] Furthermore, statistics indicate that the obligations provided by the articles contained in the Convention are currently not all adhered to by the signatory states. This is stated with the full knowledge that different states possess different economic statuses as well as different conditions with regard to the exposure of children to armed conflict. The real

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[260] A Davison, "Child Soldiers: No Longer a Minor Incident", (2004), 12, *Willamette Journal on International Law and Dispute Resolution* 130-132. See also C Rutgers as editor, *Creating a World Fit for Children: Understanding the UN Convention on the Rights of the Child*. (2011) 37.

[261] J Mbaku, "International Law, African Customary Law, and the Protection of the Rights of Children", (2020), 28(3), *Michigan State International Law Review* 545.

[262] Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by the General Assembly resolution 44/25 of 20 November 1989, and entry into force 2 September 1990, in accordance with article 40.

[263] E Policinski and K Krotiuk, "Childhood in the Crossfire: How to Ensure a Dignified Present and Future for Children Affected by War", (2019), 101(911), *International Review of the Red Cross* 425.

question is how one could guarantee that the words written down on paper in the Convention are implemented?[264]

For implementation to be effective, one would assume that there has to be legal elements which create the obligation to implementation. The Convention, however, lacks in this regard as the Convention does not strictly provide for any methods of enforcement of its provisions. Where the Convention lacks in enforcement, it attempts to make up with compliance monitoring through the committee on the Convention on the Rights of the Child.[265] The usual United Nations monitoring methods for treaty compliance are not the most effective for this type of Convention. The researcher argues that the obligations provided by this particular Convention are strong in thought but vague in practice.

The researcher argues this point by recalling that statistics surrounding children in armed conflict are often outdated or not truly reflective, mainly owing to the nature of armed conflict itself.[266] One may also realise the difficulty of enforcing universal protection mechanisms in respect of children, in circumstances where each state possesses distinguishable domestic law regarding the protection of children. In concluding this argument, the researcher recalls that the Convention, like many other well-intended international laws, clarifies the prohibited conduct and permitted obligations, whilst failing to provide consequences for the breach thereof.

This is shown in the Convention's obligations towards economic and social collaboration by states towards children in need. This, in essence, sounds academically successful yet it is not viable when one considers the fact that low-income countries and countries which are transitioning in leadership would not be able to meet these obligations at least not immediately.

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[264] C Rutgers as editor, "*Creating a World Fit for Children: Understanding the UN Convention on the Rights of the Child. International debate Education Association*. (2011) 37.

[265] J Sloth-Nielsen and B Mezmur, "A dutiful child: the implications of article 31 of the African Children's Charter", (2008), 52(2), *Journal of African Law* 170.

[266] C Allais, "The Exploitation of Children by UN Peacekeepers", (2010), 8(2), *Unisa Press ISSN 1724-7140* 57-58.

If one looks at Article 4 of the Convention on the Rights of the Child,[267] it provides that:

> *"States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation."*

It may be noted that the convention provides for the cooperation of the international community in implementing the Convention. The problem with this provision is that all it merely purports is an intention and a utopia of how states should operate with one another. The term "available resources" is what limits this article because, on the one hand, the term 'resources' itself is not defined, and, on the other hand, if one assumes that the article correctly refers to finances then what would be available for one state cannot be compared to what might be available in another. Without further detail on the manner of international co-operation on the above article, as it stands this article leaves developing states unsure of when it arrives at implementation.

Arguably, it may be superfluous to place an obligation on a state regarding children's rights if that state has not been prepared in advance through the adoption of a functioning democratic system and the establishment of processes of governance which are at least moderately transparent and effective. In most states, where a legal framework and judicial oversight are weak or non-existent and where national budget restraints exist, the adoption of a rights-based approach would be nearly impossible.[268]

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[267] Article 4 of the Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by the General Assembly resolution 44/25 of 20 November 1989, and entry into force 2 September 1990, in accordance with article 40.

[268] A Philip and J Tobin, "Laying the Foundations for Children's Rights: An Independent Study of Some Key Legal and Institutional Aspects of the Impact of the CRC" *Innocenti Insight*. 10: Florence: UNICEF Innocenti Research Centre, 2005 2-8. See also C Rutgers, *Creating a World Fit for Children: Understanding the UN Convention on the Rights of the Child. International debate Education Association*. (2011) 46.

If there was any doubt as to whether the inefficient implementation relates only to financial resources that are referred to in Article 4 as "available resources", Article 24 of the Convention on the Rights of the Child[269] provides that:

> *"States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child's deprived of his or her right of access to such health care services*.

The term used here as "highest attainable standard of health" waters down a rather extremely important provision. Himes argues that, even if one applies a common-sense approach, these vague obligations become more convenient excuses for justifying non-adherence thereto which in itself merely defeats the purpose of the development of child rights and basic needs provided for in the convention.[270] Philip and Tobin expose the paradox between the convention and its effectiveness by arguing that terrible abuses continue to be committed against children more than ten years after the acceptance of the Convention. Some of these abuses appear to be more chronic and less susceptible to resolution than they were before the Convention was ratified.[271]

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[269] Article 24 of the Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by the General Assembly resolution 44/25 of 20 November 1989, and entry into force 2 September 1990, in accordance with article 40.

[270] J R Himes, "Implementing the United Nations Convention on the Rights of the Child: Resource Mobilisation and the obligations of State Parties" *Innocenti Occasional Paper*, UNICEF, International Child Development Centre, Florence, Italy, November 1992 3. See also C Rutgers, *Creating a World Fit for Children: Understanding the UN Convention on the Rights of the Child. International debate Education Association*. 2011 39.

[271] A Philip and J Tobin, "Laying the Foundations for Children's Rights: An Independent Study of Some Key Legal and Institutional Aspects of the Impact of the CRC." *Innocenti Insight*. 10: Florence: UNICEF Innocenti Research Centre, 20052-8. See also C Rutgers as editor, *Creating a World Fit for Children: Understanding the UN Convention on the Rights of the Child. International debate Education Association*. (2011) 45.

In his report in 2002 to the Children's Summit, Kofi Annan accepted that children's rights may very well be a beacon that could guide the future but one must bear in mind that it is the adults who neglect their responsibilities towards children and that children are too often the victims of the ugliest and most shameful human activities.[272]

2.9 The Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict

The Convention on the rights of the child was the most significant piece of international human rights legislation adopted for children by the international community in 1990. More than ten years later, the international community sought to specify particular protection warranted by children in armed conflict.[273] In doing so, it adopted an Optional Protocol known as the Optional Protocol on the Convention of the Rights of the Child on the involvement of Children in Armed Conflict.[274] The difference between the two bodies of law is more than their respective years of existence. The Convention is essentially a Human Rights Convention as it applies to children irrespective of whether they are in a warzone or in civil society. The latter convention (the Optional Protocol), at least in the researcher's opinion, attempts to bridge the gap between

[272] K Annan, "We the Children, a report prepared by UNICEF, 2001" 12. See also https://www.un.org/en/events/pastevents/pdfs/we_the_children.pdf (Accessed on 20 November 2020). See also C Rutgers as editor, "*Creating a World Fit for Children: Understanding the UN Convention on the Rights of the Child. International debate Education Association* (2011) 45.

[273] J Mbaku, "International Law, African Customary Law, and the Protection of the Rights of Children," (2020), 28(3), *Michigan State International Law Review* 540.

[274] Optional Protocol to the Convention on the Rights of the child on the involvement of children in armed conflict (2002). See also A McIntyre, "Rights, Root Causes and Recruitment-The youth factor in Africa's armed conflicts", (2003), 12(2), *African Security Review* 93.

international human rights law and international humanitarian law by providing specific protection to children from armed conflict.[275]

The need for specificity has grown as it is a particular type of protection that is needed for securing and protecting a child's rights during armed conflict. This is strengthened by the fact that children are exposed to a more specific type of harm in times of war, and the relief needed is more complex than that offered in the more general Convention on the Rights of the Child, from specifying the age of a child and its ideal civilian upbringing to the prohibition of recruitment of children into armed forces.[276] The Optional Protocol takes big strides towards recognising the unique characteristics of the child's needs in armed conflict.

The purpose of the Optional Protocol is that it is directed at specifically addressing the topic of children in armed conflict. The researcher is of the view that this treaty is the international legislation that is at the crux of the international communities' active steps towards the prohibition of child soldiers. Currently, there are more than 173 State Parties to the Optional Protocol. The Optional Protocol was negotiated by states in 2000 and was entered into force in 2002.[277] Similarly to the Convention, the Optional Protocol provides legally-binding obligations for its State Parties relating to children. However, these obligations possess both a human rights and humanitarian law influence, as the obligations focus on the prohibition of the use of children in armed conflict.[278] These obligations, just like the obligations derived from the Convention, are required to be adhered to for a state party to be seen to comply with international law.

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[275] E Policinski and K Krotiuk, "Childhood in the Crossfire: How to Ensure a Dignified Present and Future for Children Affected by War", (2019), 101(911), *International Review of the Red Cross* 426-429.

[276] Article 1 of the Optional Protocol to the Convention on the Rights of the child on the Involvement of Children in Armed Conflict (2002). See also C Allais, "The exploitation of Children by UN Peacekeepers", (2010), 8(2), *Unisa Press ISSN 1724-7140* 59.

[277] Optional Protocol to the Convention on the Rights of the child on the involvement of children in armed conflict (2002).

[278] T Begley, "The Extraterritorial Obligation to Prevent the Use of Child Soldiers", (2012), 27(3), *The American University International Law Review* 619.

The Optional Protocol takes the development of children's rights to new heights in the way that the drafters envisioned the role that children's rights may be impacted on during armed conflict.[279] The Optional Protocol reinforces the responsibility of the international community to protect children's rights by recalling on whose shoulders the implementation of this protection rests. The Optional Protocol acknowledges that children are entitled to a "special privileged status" during armed conflict. This is as a result of children in the armed conflict being viewed as being a highly vulnerable group owing to their age and them being a purely marginalised segment of a population.[280] Importantly, the Optional Protocol further provides that the state should ensure that these special protections are implemented.[281] This development in the international communities' view towards children in armed conflict is mirrored in the preamble to the Optional Protocol which provides that:

> *"Reaffirming that the rights of children require special protection*,[282] *and calling for continuous improvement of the situation of children without distinction, as well as for their development and education in conditions of peace and security*,
>
> *Considering, therefore, that to strengthen further the implementation of rights recognised in the convention on the Rights of the Child there is a need to increase the protection of children from involvement in armed conflict*,
>
> *Noting that the twenty-sixth International Conference of the Red Cross and Red Crescent in December 1995 recommended*, inter alia*, that parties to conflict*

[279] A McIntyre, "Rights, Root Causes and Recruitment- The youth factor in Africa's armed conflicts", (2003), 12(2), *African Security Review* 93.

[280] E Policinski and K Krotiuk, "Childhood in the Crossfire: How to Ensure a Dignified Present and Future for Children Affected by War", (2019), 101(911), *International Review of the Red Cross* 426-429.

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

[282] J Tobin, "Judging the Judges: Are they adopting the Rights Approach in Matters Involving Children?", (2009), 33, *Melbourne University Law Review* 584-589.

> *take every feasible step to ensure that children under the age of 18 years do not take part in hostilities.*[283]

From the widely-accepted Optional Protocol, one may accept that children possess a privileged status during times of war and armed conflict. Grover argues that this privilege could extend to the view that the direct or indirect participation by children in hostilities, whether as part of a national armed force or non-state armed group, results in a violation of a *Jus Cogens* norm, similar to that where non-state armed groups or States themselves are involved in the perpetration of genocide.[284]

This argument holds "privileged status" to mean that children in armed conflict should be differentiated from adults when it comes to being a lawful target in times of war, owing to the fact that children are owed a special protected status under international humanitarian law and that children should actually be regarded as civilians if found to be members of rebel armed groups or non-state armed forces.[285] The latter is a derivative of the principle of "no fruits from the poisonous tree", meaning that non-state armed groups are arguably unlawful in themselves and the recruitment of children would consequently be unlawful.[286]

The key element which makes the Optional Protocol unique is its recognition of modern armed conflicts and the role that non-state armed groups play in armed conflicts today. In Article 4 (1), the Optional Protocol[287] provides that:

> *"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 18 years."*

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[283] The Preamble of the Optional Protocol to the Convention on the Rights of the child on the Involvement of Children in Armed Conflict (2002).

[284] S Grover, *Child Soldier Victims of Genocidal Forcible Transfer*, (2012) 21.

[285] S Grover, *Child Soldier Victims of Genocidal Forcible Transfer*, (2012) 22.

[286] S Grover, *Child Soldier Victims of Genocidal Forcible Transfer*, (2012) 21-23.

[287] Article 4 (1) of the Optional Protocol to the Convention on the Rights of the child on the Involvement of Children in Armed Conflict (2002).

As discussed above, the very notion of a treaty is governed by a state party's consent to be bound by the treaty and its consequential obligations. One would think that the Optional Protocol, therefore, could not apply to a non-state armed force as the latter could never be able to be a state party to the treaty, thus making the treaty's provided obligations inapplicable to non-state parties and consequently unenforceable. The Optional Protocol, however, shifts the duty of this particular obligation to its State Parties as can be noted by subsection 2 of Article 4[288] which provides that:

> *"States Parties shall take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalise such practices*."

This subsection proves that the intention behind the drafting of the legislation is that the international community, as a whole, must be recognised as responsible for treaty implementation, and not just one state. This immediately promotes the idea that states who signed this Convention and its Optional Protocol accepted, intentionally so, that practice would require a universal obligation to implement the treaty and make it effective.[289]

Begley argues that the Optional Protocol directs steps that State Parties must take within their jurisdiction, and it provides obligations on those parties to assist outside of their jurisdiction.[290] The obligations referred to here are stipulated in Article 7(1)[291] of the Option Protocol which provides that:

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[288] Article 4 (2) of the Optional Protocol to the Convention on the Rights of the child on the Involvement of Children in Armed Conflict (2002).

[289] E Policinski and K Krotiuk, "Childhood in the Crossfire: How to Ensure a Dignified Present and Future for Children Affected by War", (2019), 101(911), *International Review of the Red Cross* 429-431.

[290] T Begley, "The Extraterritorial Obligation to Prevent the Use of Child Soldiers", (2012), 27(3), *The American University International Law Review* 620.

[291] Article 7(1) of the Optional Protocol to the Convention on the Rights of the child on the Involvement of Children in Armed Conflict (2002).

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

From the reading of this sub-article, one can see that member states as a collective are responsible for the protection of children and their demobilisation and the reintegration of children who have been involved in armed conflict. The problem with this Article, just like the Convention, is the lack of particularity on the specific action to be taken. This lack of particularity regarding direction is what, in itself, waters down the intention.[292] The researcher argues that the legislature has to marry intention with direction and include consequences for omitting to meet obligations for implementation to be effective. The lack of particularity referred to here is provided by Article 7(2)[293] which provides that:

> *"States Parties in a position to do so shall provide such assistance through existing multilateral, bilateral or other programmes, or,* inter alia*, through a voluntary fund established in accordance with rules of the General Assembly*."

The researcher is of the view that this Article articulates the necessity of the cooperation of States Parties. When one looks at the necessity of this obligation as a vital component for implementation, could effectiveness then logically be attained when the obligation is not truly compulsory as opposed to being merely charitable? The question to be posed asks whether the necessity of having international cooperation is a mere utopian request, or whether international cooperation is the only way implementation of the Convention and its Optional Protocol could be achieved. The researcher is of the view that the Convention and its Optional Protocol can be

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[292] S Strong, "General Principles of Procedural Law and Procedural Jus Cogens", (2018), 122 (2), *Penn State Law Review* 361. Strong argues that many human rights documents are non-binding and aspirational in nature, often as a result of ambiguous treaty language.

[293] Article 7(2) of the Optional Protocol to the Convention on the Rights of the child on the Involvement of Children in Armed Conflict (2002).

effective only if State Parties were directed to act in a specific way, be that through a declaratory order of the International Court of Justice or through an amendment to the current legislation.

As discussed above, there is a gap between the consensual obligations derived from a treaty signed by a state and the actual conduct of states on a daily basis. At the heart of this gap is customary international law as it brings the intentional acceptance of a treaty's provisions and establishes a nexus to the settled practice of a state.

2.10 *Erga Omnes* Obligations versus treaty provisions

As discussed above, the Convention on the Rights of the Child was the first great step the international community has taken towards the recognition of child rights. It has also been discussed that provisions provided for by a treaty affect only the parties that have consented thereto. However, such a powerful majority accepted the treaty that the Convention on the Rights of the Child has the effect of creating accepted state practice, which now brings one into the arena of customary international law, bearing in mind that customary international law has the effect of providing *erga omnes* obligations,[294] which in themselves create the extra-territorial obligation on the implementation of the provisions laid forth by the Convention.

If one places the technical and legal arguments for what is and what is not law or what could or may not be enforceable on the metaphorical back seat, one may acknowledge the Convention and its purpose for what, in the researcher's opinion, it truly purports to be. The researcher argues that the Convention and its Optional Protocol is best described as "the international community's recognition of children as independent human rights bearers whose protection needs to be governed and implemented by

[294] C Ene, "Jus Cogens (Peremptory Norms) A Key Concept of the International Law", (2019), 8(2), *Perspectives of Law and Public Administration* 302.

adults"[295]. The true purpose, lest we forget it, is for the best interest of the child. Article 3 (1) of the convention provides that:

> *"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies,* ***the best interests of the child*** *shall be a primary consideration.*[296] (Own emphasis)

It could be argued that the best interests of the child are susceptible to conceptual permutations that could on occasion, in practice, actually be disadvantageous to a child's interests.[297] Grover argues that the child's best interest is often co-opted by persons who hold diametrically opposing views on what actually constitutes the best interests of a child in a specific situation.[298] In his argument as a tool for change, Himes argues that, when approaching how the Convention could be converted from being merely a body of intentions and aspirations into being an effective tool for the promotion and protection of children whilst ensuring the fulfilment of their rights, recognition needs to be given to the wide variation of its State Parties.[299]

In this argument, the approach which is offered is to accept that different states have different means at their disposal, and, when one embarks on the journey of ensuring

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[295] J Mbaku, "International Law, African Customary Law, and the Protection of the Rights of Children", (2020), 28(3), *Michigan State International Law Review* 545-546.

[296] Article 3(1) of the Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by the General Assembly resolution 44/25 of 20 November 1989, and entry into force 2 September 1990, in accordance with article 40. See also A Alen and H Bosly (*et al*), *The UN Children's Rights Convention: theory meets practice. Proceedings of the International interdisciplinary Conference on Children's Rights*, (2007) 43.

[297] S Grover, *Child Soldier Victims of Genocidal Forcible Transfer*, (2012) 21.

[298] S Grover, *Child Soldier Victims of Genocidal Forcible Transfer*, (2012)21.

[299] J R Himes, "Implementing the United Nations Convention on the Rights of the Child: Resource Mobilisation and the obligations of State Parties" *Innocenti Occasional Paper*, UNICEF, International Child Development Centre, Florence, Italy, November 1992, 1, 2 and 24. See also C Rutgers, *Creating a World Fit for Children: Understanding the UN Convention on the Rights of the Child. International debate Education Association*. (2011) 40.

implementation, one needs to accept that each state would need to decide logistically on how the implementation of the Convention could best be achieved. The purpose of the implementation should always be done in the light of the best interest of the child, with wealthier states needing to decide how the Convention could be better used to promote international cooperation to address the needs of the poorest children.[300]

If one may accept that, although the Convention's provisions may be intended to promote equal obligations, the enforcement of those obligations would never be able to be equal as one state simply will be able to do more or less than another. This is where international customary law is important. It is the very nature of an *erga omnes* obligation that fills the gap that a treaty provision creates.[301] For example, state x and state y both have the responsibility to protect children from armed conflict, state y being the poorer state has insufficient resources to implement this obligation, state x then would have the *erga omnes* obligation towards the child itself to protect the child from armed conflict and to promote its right to life.

Owing to the nature of *erga omnes* obligations, it is not only state parties to the Convention which would have the duty to protect in this scenario, but all states forming part of the international community.[302] It has already been accepted that the prohibition against children in armed conflict has risen to the level of customary international law,[303] therefore creating the universal obligation by all states to promote the prohibition against children in armed conflict and the child's right to life. The researcher advances this argument for the following reasons: the Convention on the Rights of the Child is the most accepted Human Rights document by states forming part of the

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[300] A Alen and H Bosly (*et al*), *The UN Children's Rights Convention: theory meets practice. Proceedings of the International interdisciplinary Conference on Children's Rights*, (2007) 29 and 42.

[301] S Strong, "General Principles of Procedural Law and Procedural Jus Cogens", (2018), 122 (2), *Penn State Law Review* 391-393.

[302] Article 7(1) of the Optional Protocol to the Convention on the Rights of the child on the Involvement of Children in Armed Conflict (2002).

[303] T Begley, "The Extraterritorial Obligation to Prevent the Use of Child Soldiers", (2012), 27(3), *The American University International Law Review* 621.

international community; and the Optional Protocol thereto is similarly a majority accepted treaty by the international community. It may be argued that both of these bodies of law are to be seen as settled state practice.

In considering the International Criminal Court, the Rome Statute which governs the court provides that it is an international crime in both international and non-international armed conflict to use or recruit children below the age of fifteen in hostilities.[304] The universal acceptance of this international rule prohibiting the use of children in armed conflict proves that the rule is customary international law, which then requires universal implementation derived from universal obligations owed by all states.[305]

Recognising a rule as customary international law does not, on its own, force a state or group of states within a specific region to take action. If this were the case, the international community would not sit silently amidst the genocide committed in Crimea in 2014 and the genocide committed in Aleppo in 2017. This could be partly owing to the fact that state sovereignty versus extra-territorial obligations still remains the largest conflict the international community has yet to resolve methodically.

The researcher argues that the conflict regarding state sovereignty and extra-territorial obligations must modernise itself along with the fast developing world which is becoming smaller and smaller, as politics, economics and globalisation forces the international community to become more unified or, at the very least, interactive.

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[304] J Mbaku, "International Law, African Customary Law, and the Protection of the Rights of Children", (2020), 28(3) *Michigan State International Law Review* 538. See also A Di Giovanni, "The Prospect of ICC Reparations in the Case Concerning Northern Uganda: On a Collision Course with Incoherence?", (2006), 2(25), *Journal of International Law and International Relations* 6-7. See also G 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* 330.

[305] C Ene, "Jus Cogens (Peremptory Norms) A Key Concept of the International Law", (2019), 8(2), *Perspectives of Law and Public Administration* 302.

What this means is not just evolution in the legal sense but rather that states should recognise that a state, now more than ever, needs to consider how its conduct towards a specific norm affects people outside of its borders. To consider *erga omnes* in a different light, one could view that a state party's inclusion in the enforcement of an obligation of the Convention is not only warranted for better implementation but rather it may be best to argue that a state party possesses the responsibility of not allowing the continued breach of the obligations provided for by the Convention and its Optional Protocol.

This means shifting the narrative from requesting a state to act positively to requiring a state to assist in ending the negative act of another state, better described as protection of the obligation. If one considers the doctrine of the duty to protect and respect in upholding the rights of people in a state's jurisdiction, the duty to respect provides that a state must avoid breaching a right codified in a treaty[306]. The Convention in Article 2 provides that its member states should respect and ensure the rights set forth by the Convention.[307]

The only interpretation one should allow to be derived from this article is that the state and the international community would be obligated not to breach the rights set forth by the Convention and its Optional protocol, and this, in turn, has the consequence that the international community in terms of *erga omnes* obligations should not permit children continually to be placed or remain in territories in which armed conflicts are currently underway. The latter would undoubtedly infringe upon the child's right to life and arguably not be in the child's best interest[308] as the child would not be able to

[306] T Begley, "The Extraterritorial Obligation to Prevent the Use of Child Soldiers", (2012), 27(3)*, The American University International Law Review* 626.

[307] Article 2 of the Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by the General Assembly resolution 44/25 of 20 November 1989, and entry into force 2 September 1990, in accordance with article 40.

[308] J Mbaku, "International Law, African Customary Law, and the Protection of the Rights of Children", (2020), 28(3), *Michigan State International Law Review* 546.

grow up in an atmosphere of a family environment or gain access to adequate medical care and basic education.[309]

The duty to protect suggests that state parties shall avoid breaches of a child's rights provided for in the Convention by other states or non-state armed groups. This was included in Article 19 of the Convention which provides that:

> *"States Parties shall* ***take all appropriate****……. Measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s)* ***or any other person*** *who has the care of the child*.[310] (Own emphasis)

This Article proves the *erga omnes* obligation that all states possess in respect of taking responsibility for the actions of other states or guardians over a child to protect the child and its best interests.[311] The theory applied here is that, when considering children, one country's conduct should affect another country's obligated responsibility in respecting and implementing the Convention and its Optional Protocol.[312]

In order to protect the rights provided by the Convention, legal remedies must be made available. In order to have a legal remedy available which is accessible, a state should in conjunction have an operating judicial system and national legal principles that could allow any person within that jurisdiction to issue a complaint regarding a breach of a

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[309] A Alen and H Bosly (*et al*), The UN Children's Rights Convention: theory meets practice. Proceedings of the International interdisciplinary Conference on Children's Rights, (2007) 42.

[310] Article 19 of the Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by the General Assembly resolution 44/25 of 20 November 1989, and entry into force 2 September 1990, in accordance with article 40.

[311] J Tobin, "Judging the Judges: Are they adopting the Rights Approach in Matters Involving Children?", (2009), 33, *Melbourne University Law Review* 584-594. See also A Alen and H Bosly (*et al*), *The UN Children's Rights Convention: theory meets practice. Proceedings of the International interdisciplinary Conference on Children's Rights*, (2007) 42.

[312] T Begley, "The Extraterritorial Obligation to Prevent the Use of Child Soldiers", (2012), 27(3), *The American University International Law Review* 627.

right provided by the Convention.[313] The problem that most "failed states" have is the lack of a functioning judicial system, and so the need for third-state extraterritorial assistance becoming a warranted obligation.[314]

Hakimi argues that there are three legs of determining whether a state possesses an extraterritorial obligation, the first being control over the rights holder, the second being control over the territory in which the abuse occurs, and the third being the influence over the abuser.[315] The first approach focusses on a particular state's control over a right bearer. The common sense approach applied here is that a state should protect individuals over whom it has control. The second approach is more applicable to extraterritorial obligation and encompasses a state's obligation towards more than just an individual but rather control over a foreign territory. Hakimi refers to the judgement in the "*Armed Activities"* case where the court found that Uganda had an obligation to protect people in portions of the Congo that Uganda occupied.[316] The court specifically noted that:

> *"The Republic of Uganda, by the conduct of its armed forces, which committed acts of killing, torture and other forms of inhumane treatment of the Congolese civilian population, destroyed villages and civilian buildings, failed to distinguish between civilian and military targets and to protect the civilian population in fighting with other combatants,* ***trained child solders****; incited ethnic conflict and failed to take measures to put an end to such conflict; as well as by* ***its failure, as an occupying Power****, to take measures* ***to respect and ensure respect*** *for human rights and international humanitarian law in Ituri district,*

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[313] A Alen and H Bosly (*et al*), *The UN Children's Rights Convention: theory meets practice. Proceedings of the International interdisciplinary Conference on Children's Rights*, (2007) 29.

[314] A McIntyre, "Rights, Root Causes and Recruitment-The youth factor in Africa's armed conflicts", (2003), 12(2*), African Security Review* 94.

[315] M Hakimi, "State Bystander Responsibility", (2010), 21(2), *European Journal of International Law* 376-378.

[316] Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda). International Court of Justice. https://www.icj-cij.org/files/case-related/116/10457.pdf (Accessed on 20 August 2020).

> ***violated its obligations under human rights law and international humanitarian law***.[317] (Own emphasis)

Hakimi argues that albeit this was a good judgment, the court failed in not properly considering whether Uganda could have been obligated to restrain rebel groups in unoccupied Congo.[318] The third approach focuses on influence as opposed to the mere technically legal constraints of jurisdiction, where the approach is directed at considering the state's actual relationship with the breach of the right. Here the word "influence" refers to whether a state is able to affect the conduct of another state. This could be done either through trade agreements or just simple bilateral agreements. The consequence here is that, if a state is found to have influence over another state where human rights violations are occurring within its jurisdiction, then the influential state has an obligation to prevent that state from continuing in its breach of international law.

2.11 Conclusion

From the research discussed above, the observation is made that customary international law works parallel to treaty law in respect of the sources of international law. The development of treaty law consequentially develops custom through the state's intention to be bound by its obligations. The custom itself has its own requirements in the form of settled practice and *opinio juris*, both of which can be interpreted from the contents and acceptance of certain treaties. Most treaties contain language which creates extraterritorial obligations, and, specifically in this project, it has been addressed that the Convention and its Optional Protocol provide for these

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[317] Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda). International Court of Justice, 16. https://www.icj-cij.org/files/case-related/116/10457.pdf (Accessed on 20 August 2020).

[318] M Hakimi, "State Bystander Responsibility". (2010), 21(2), *European Journal of International Law* 376-378.

types of obligations.[319] This, in itself, proves that extraterritorial obligations exist with regard to the protection of the child and the implementation of the Convention on the Rights of the Child and its Optional Protocol on the Convention of the Rights of the child in relation to children in armed conflict.[320]

The majority of the international community are members of the United Nations and every single State that has accepted the Convention on the Rights of the Child is a United Nations member. If one could take a step back from considering the Convention on the Rights of the Child only, it can be gleaned from the very Charter of the United Nations that extraterritorial obligations not only exist but are needed. Read together, Article 55 and 56 of the United Nations Charter provide for universality in ensuring the respect for human rights by all states, and the pledge by state parties to take action and cooperation to achieve this purpose.[321] The universality is the aspect which creates the extraterritorial obligation for states to promote human rights outside of their territory.[322]

The researcher argues that the modern world requires international laws protecting children's rights to be recognised as a *Jus Cogens* norm to protect children from armed conflict and its effects.[323] This obligation rests primarily on the parties to a conflict as well as on all the states forming part of the international community. This protection should be awarded immediately and considered necessary at all times as provided for

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[319] T Begley, "The Extraterritorial Obligation to Prevent the Use of Child Soldiers", (2012), 27(3), *The American University International Law Review* 626. See also C Allais, "The exploitation of Children by UN Peacekeepers", (2010), 8(2), *Unisa Press ISSN 1724-7140* 58.

[320] A McIntyre, "Rights, Root Causes and Recruitment- The youth factor in Africa's armed conflicts", (2003), 12(2), *African Security Review* 93.

[321] Article 55 and 56 of the Charter of the United Nations. https://legal.un.org/repertory/art56.shtml (Accessed on 19 August 2020).

[322] T Begley, "The Extraterritorial Obligation to Prevent the Use of Child Soldiers", (2012), 27(3), *The American University International Law Review* 629.

[323] S Grover, *Child Soldier Victims of Genocidal Forcible Transfer*, (2012) 24.

by customary international law which affords children during armed conflict special protection.[324]

The argument that the protection of children from participating in armed conflict is a *Jus Cogens* norm which is derived not only from the majority acceptance of the treaties relating to children but rather also their formidable purpose and preambles which prove that a child's participation, directly or indirectly, in an armed conflict is purely an inhumane practice.[325] The importance of this view, the *Jus Cogen* status of prohibiting children from participating in armed conflict, is that even where the Convention's obligations fall short as a result of political and bureaucratic reasons, the pillar of non-derogation remains firm.[326] Strong argues that, although human rights require their own analysis, their character may fall within the realm of *Jus Cogens.*[327] On this argument, the researcher views the child's human rights protecting the child from participation in armed conflict, provided for by the Convention and its Optional Protocol, similarly to fall within the ambit of *Jus Cogens*.

This is encouraged by principles such as "the best interest of the child"[328] and the child's "special protected status".[329] Thus, in circumstances where state parties to the Convention or its Optional Protocol intend to defy its purpose by justifying a military

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[324] E Policinski and K Krotiuk, "Childhood in the Crossfire: How to Ensure a Dignified Present and Future for Children Affected by War", (2019), 101(911), *International Review of the Red Cross* 430. W A Schabas, *"The Rights of the Child, Law of Armed Conflict and Customary International Law: A Tale of Two Cases*", at Chapter 2 of: From Peace to Justice "International Criminal Accountability and the Rights of Children", Edited by K Arts and V Popovski, 2005 19.

[325] S Grover, *Child Soldier Victims of Genocidal Forcible Transfer*, (2012) 24.

[326] C Ene, "Jus Cogens (Peremptory Norms) A Key Concept of the International Law", (2019), 8(2), *Perspectives of Law and Public Administration*302.

[327] S Strong, "General Principles of Procedural Law and Procedural Jus Cogens", (2018), 122 (2), *Penn State Law Review* 393.

[328] J Mbaku, "International Law, African Customary Law, and the Protection of the Rights of Children", (2020), 28(3), *Michigan State International Law Review*546.

[329] A McIntyre, "Rights, Root Causes and Recruitment- The youth factor in Africa's armed conflicts", (2003), 12(2), *African Security Review* 96.

necessity of recruiting or using children in armed conflict, this military necessity would come second to the *Jus Cogens* norm[330] which provides the special protection owed to the child as the child's best interest includes her right to life[331] owing to the superior hierarchy of a *Jus Cogens* norm.[332]

The researcher argues that, when interpreting the International Law of Treaties and International customary law, one has to revisit the Vienna Convention in order to draw the nexus between obligations between State Parties and obligations *erga omnes*. Article 53 of the Vienna Convention on the Law of Treaties,[333] referred to above, provides for how one should consider *Jus Cogen* norms when interpreting treaties:

> *"A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and* ***which can be modified only by a subsequent norm of general international law having the same character****."* (Own emphasis)

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[330] S Guan, "Jus Cogens: To Revise a Narrative", (2017), 26(2), *Minnesota Journal of International Law*.

[331] G 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* 329. See also A Alen and H Bosly (*et al*), *The UN Children's Rights Convention: theory meets practice. Proceedings of the International interdisciplinary Conference on Children's Rights*, (2007) 42.

[332] C Ene, "Jus Cogens (Peremptory Norms) A Key Concept of the International Law", (2019), 8(2), *Perspectives of Law and Public Administration* 302-303. See also S Strong, "General Principles of Procedural Law and Procedural Jus Cogens", (2018), 122 (2), *Penn State Law Review* 361. See also S Guan, "Jus Cogens: To Revise a Narrative", (2017), 26(2), *Minnesota Journal of International Law*461.

[333] Article 53 of the Vienna Convention on the Law of Treaties, 1969.

In these circumstances, one's attention is drawn to another *Jus Cogen's* norm which is the prohibition against genocide.[334] According to Article 53 above, a *Jus Cogens* norm may be modified, the researcher argues modification could be interpreted as "created" by a subsequent *Jus Cogens* norm. The prohibition of genocide is closely related to the plight facing children involved in armed conflict, as, when a child is recruited by a non-state armed group, it is very often done with the intention and sole purpose of committing mass atrocities and/or genocide.[335]

Since there is no legal criminal accountability offered to children by the Rome Statute of the International Criminal Court,[336] the child's recruitment into a non-state armed group is arguably without lawfully authorised consent as it could never be seen as being in the best interests of a child,[337] recalling that this manner of recruitment is explicitly prohibited under of the Optional Protocol.[338] Thus, the child who is recruited by a non-state armed group for the purpose of committing mass atrocities, in the researcher's opinion should arguably be seen as the victim of genocidal forcible transfer[339] which is prohibited by the Genocide Convention of 1951.[340] On this interpretation alone, the *Jus Cogens* norm of protecting children from being recruited into or participating in armed conflict could, therefore, be seen to be modified,

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[334] The Genocide Convention, 1951.

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

[336] G 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* 329. See also Section 26 of The Rome Statute of the International Criminal Court 1998.

[337] C Allais, "The exploitation of Children by UN Peacekeepers", (2010), 8(2), *Unisa Press ISSN 1724-7140* 58. See also A Alen and H Bosly (*et al*), *The UN Children's Rights Convention: theory meets practice. Proceedings of the International interdisciplinary Conference on Children's Rights*, (2007) 42. See also A McIntyre, "Rights, Root Causes and Recruitment- The youth factor in Africa's armed conflicts", (2003), 12(2), *African Security Review* 93.

[338] Article 4 (1) of the Optional Protocol to the Convention on the Rights of the child on the Involvement of Children in Armed Conflict (2002).

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

[340] Article 2(e) Genocide Convention, 1951.

alternatively created, by the prohibition against genocide. Without oversimplifying the phenomenon of children participating in armed conflict, the same *Jus Cogens* norm could similarly be developed by accepting the prohibition against slavery and the prohibition of crimes against humanity. The child's special protected status during armed conflict would arguably be in conflict with all of the above if a state failed to protect the child from armed conflict. The Vienna Convention not only proposes the modification of a *Jus Cogen* norm through Article 53 but permits the emergence of a new *Jus Cogens* norm under Article 64 which provides that:

> *"Emergence of a new peremptory norm of general international law ("Jus Cogens"). If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates."*[341]

The fact remains that armed conflict could arguably never be in the best interests of the child as it would potentially affect the child's right to life and violate the majority of the Convention on the Rights of the Child along with its Optional Protocol. This paradox leaves one with the logical assumption that a child should never be able voluntarily to consent to be recruited by a non-state armed force,[342] while taking into account that the child's actions may be influenced through factors such as duress, age and, according to Article 2(e) of the Genocide Convention, genocidal forcible transfer, not forgetting that children, irrespective of the reason for their participation in armed conflict, are exposed to a myriad risks which essentially deprive them of childhood.[343]

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[341] Article 64 of the Vienna Convention on the Law of Treaties, 1969. See also C Ene, "Jus Cogens (Peremptory Norms) A Key Concept of the International Law", (2019), 8(2), *Perspectives of Law and Public Administration* 302.

[342] G 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* 329.

[343] E Policinski and K Krotiuk, "Childhood in the Crossfire: How to Ensure a Dignified Present and Future for Children Affected by War", (2019), 101(911), *International Review of the Red Cross* 425.

The researcher argues that, should a child still be found to be participating in armed conflict, the child is actually in the position of an act closely related to slavery.[344] The international community has an *erga omnes* obligation to prevent slavery and to recognise this obligation as a *Jus Cogens* norm. The researcher argues that, if one had to hold a child who committed a grave breach of international law criminally accountable for participating in armed conflict while her very participation above is prohibited, the international community would have failed in its obligation to prevent such an occurrence. To persist with seeking such accountability would be to punish the child for the performance of an act of which in itself the prohibition rested on another.

Any work done by the child whilst participating in armed conflict once the child is recognised as the victim of genocidal forcible transfer or a victim of slavery would conflict with a third international principle provided for by the international labour organisation which is "a worst form of child labour".[345] The researcher emphasises that this is an international obligation placed on state parties thereto and that the international community owes the child protection from this type of labour.[346] Grover argues that, if child soldiers are to be held accountable for conflict-related international crimes which they commit under highly coercive circumstances, then on this logic any child engaged in any other form of "worst child labour" is also subjected to be held accountable.[347] Such should then be the case for prosecuting ex-trafficked children for prostitution or for recruiting other children into a sex-trafficking network.[348]

The researcher submits that, in concluding with the analysis of *erga omnes* obligations towards children, these obligations do exist, both in treaty law and in international

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

[345] Article 3(a) of the International Labor Organisation No. 182, 1999.

[346] C Allais, "The exploitation of Children by UN Peacekeepers", 2010, 8(2), *Unisa Press ISSN 1724-7140* 59. See also S Grover, *Child Soldier Victims of Genocidal Forcible Transfer*, (2012) 51.

[347] S Grover, *Child Soldier Victims of Genocidal Forcible Transfer*, (2012) 52.

[348] J Willems, *Children's Rights and Human Development- a Multidisciplinary Reader*, (2010), at page 261-270.

customary law.[349] The particular aspect which the researcher argues is that the prohibition of children in armed conflict has now been elevated to the level of a *Jus Cogen* norm status, owing to the following;

1) Children found to be in armed conflict are arguably victims of Article 2(e) of the Genocide Convention, a circumstance of genocidal forcible transfer which is already absolutely prohibited, with genocide itself being recognized as *Jus Cogens* norm. The latter gives rise to the applicability of Article 53 of the Vienna Convention on the Law of Treaties.[350]

2) The child's participation in armed conflict even for a state armed force is a form of labour, which could result in only one of two interpretations. Firstly, the child would have no capacity to volunteer legally for such recruitment and, therefore, his or her "labour" therein would constitute an adaptation of modern-day slavery. Secondly, even if the child were recruited properly, his or her "labour" would be contradictory to the best interests[351] of the child and so violate the "worst form of child labour" principle.

3) The Convention on the Rights of the Child and the Optional Protocol discussed above beg for the assistance of the international community providing for

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[349] W A Schabas, *"The Rights of the Child, Law of Armed Conflict and Customary International Law: A Tale of Two Cases*", at Chapter 2 of: From Peace to Justice "International Criminal Accountability and the Rights of Children", Edited by K Arts and V Popovski, 2005, 19-20.

[350] S Strong, "General Principles of Procedural Law and Procedural Jus Cogens", (2018), 122 (2), *Penn State Law Review* 391.

[351] J Mbaku, "International Law, African Customary Law, and the Protection of the Rights of Children", (2020), 28(3), *Michigan State International Law Review* 546. See also A Alen and H Bosly (*et al*), *The UN Children's Rights Convention: theory meets practice. Proceedings of the International interdisciplinary Conference on Children's Rights*, (2007) 42.

> cooperation by the international community to be the sole reason implementation could be best achieved.[352]

The researcher argues that the child's continued participation in armed conflict through state or non-state armed groups has been prohibited by international law which has reached the status of both Customary International Law and a *Jus Cogens* norm, both of which the international community has an *erga omnes* obligation in protecting and assuring.

[352] A McIntyre, "Rights, Root Causes and Recruitment- The youth factor in Africa's armed conflicts", (2003), 12(2), *African Security Review* 94.

Chapter 3

The benefits and limitations of international legal principles applicable to children in armed conflict

3.1 Introduction

In this chapter, the researcher critically analyses various legal instruments which were drafted with the intention of protecting the child from armed conflict, be it in respect of the child's initial recruitment into armed conflict or the protection offered to the child during her tenure in armed conflict. The researcher deals with the legal instruments governing the recruitment of the child into armed forces by both the state and non-state armed groups.[353] This study is conducted while recognising that international law has accepted, through its express and implicit provisions, that armed conflict has modernised itself to be more non-international in nature than international.[354] The researcher then critically analyses the status of the child who is still found to be participating in armed conflict as viewed by international law.

This chapter begins to consider the argument of the potential criminal liability of deeds committed by a child during an armed conflict in contrast to the legal instruments governing the role of the child in armed conflict. In this analysis of the legal instruments, the researcher compares and exposes the distinction between the relevant international legal instruments and relevant regional legal instruments to

[353] T Begley, "The Extraterritorial Obligation to Prevent the Use of Child Soldiers", (2012), 27(3), *The American University International Law Review* 614.

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

reveal the disparity between the two. The researcher will follow this by arguing that specific geographical areas require stronger norms for protecting the child.

A further discussion will be presented in respect of the applicability and enforceability of the relevant legal instrument concerning its provisions that require international cooperation for its full implementation. In essence the researcher's argument deals with how the legal instruments protecting children from and during armed conflict have developed over time. Notably one will comprehend that, despite their respective development, these legal instruments contain limitations and deficiencies which require international cooperation infused with emerging international customary law to reach their intended purpose.

3.2 Legal standards provided by treaties

From the preceding chapters, one may accept the approach to children's rights in international law as a doctrine of law which is continually in need of development and readjustment to meet the ever-emerging phenomenon of child soldiers. It is a disappointing, yet unsurprising, fact that the international community still views the plight of child soldiers as a continuous problem. The researcher uses the term "child soldiers" purposefully to highlight the fact that there is no specific definition for "child soldiers" in International law.[355] The latter term refers only to the child who plays the role of a soldier in an armed conflict despite international law prohibiting this occurrence.

It is submitted that the assumption may be drawn that the term "child soldiers" is not properly defined possibly as a direct consequence of the humane fear that such a state of affairs should never be indirectly condoned through technical definitions and legal concepts. Instead one should always approach the child in armed conflict purely

[355] The Convention on the Rights of the Child, adopted an opened for signature, ratification and accession by the General Assembly resolution 44/25 of 20 November 1989, and entry into force 2 September 1990, in accordance with article 40.

with the view that she is a young individual who, at the behest of an adult, finds herself in armed conflict.[356]

The intention behind this opinion is not wholly incorrect as it is certainly based on the assumption that the phenomenon of child soldiers as one of the most inhumane statistics of war is purposefully not given its due authority. It is clear that the term is not one which any legislature would ordinarily wish to include in any drafting of legislation.

Despite the lack of a precise definition, the international community, in its own way, recognises children in armed conflict as a prohibited circumstance.[357] Hence the response of adopting international and regional treaties directed at prohibiting the recruitment and use of the child in armed conflict be it international or non-international in nature.[358] One may recall that treaties or conventions are recognised as a crucial source of international law as described by Article 38 of the International Court of Justice.[359] Their importance should not be underestimated as authors, academics and courts alike view them as being the primary source of international law.[360] The view of treaties or conventions as the primary source of international law is purely as a

[356] S Bosch, "Targeting and prosecuting 'under-aged' child soldiers in international armed conflicts, in light of the international humanitarian law prohibition against civilian direct participation in hostilities" (2012), *XLV CILSA* 328.

[357] T Begley, "The Extraterritorial Obligation to Prevent the Use of Child Soldiers", (2012), 27(3), *The American University International Law Review* 614.

[358] D M Rosen, *Child Soldiers*, (2012) 6.

[359] J Dugard, *International Law, a South African Perspective*. Fourth edition, (2011). Chapter 3, Sources of international law 24. See also A Pellet 'Article 38' in "The Statute of the International Court of Justice: A Commentary (a Zimmermann, C Tomuschat and K Oellers-Frahm (Eds), 2006 736-742.

[360] E Bjorge, "Public Law Sources and Analogies of International Law", (2018), 49 (4), *University of Wellington Law Review* 558. See also M Hrestic, "Considerations on the Formal Science of International Law", (2017), 7, *Journal of Law and Administrative Sciences* 105.

result of their foundation and authority being built on the notion of consent.[361] Consent certainly has the effect of inclusion as well as exclusion, and customary international law fills this gap by recognising a state's actions and opinions as implicit consensus to a particular law.[362] So, in all respects, whether one wishes to observe custom or codified legal principles, the starting point is to observe the relevant treaty and gauge from its provisions the status of legal principles that apply to a specific subject, such as child soldiers.[363]

3.3 International Humanitarian Law

The history of children's rights extends as far back as the documented work of Eglantyne Jebb and her written work in 1924 which was known as the "Declaration of the Rights of the Child" .[364] This document was adopted by the then League of Nations. As important as this declaration was in codifying children's international human rights, the researcher focuses his argument on the specific treaties which encompass not only regulations relating to the child's human rights but also on those rules which regulate the child's participation in armed conflict. By recognising both subjects of law, one may better determine the strength of the obligations placed on a state and the international community in protecting the child from armed conflict.[365]

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[361] J Dugard, *International Law, a South African Perspective*. Fourth edition, (2011). Chapter 3, Sources of international law 25.

[362] W A Schabas, *"The Rights of the Child, Law of Armed Conflict and Customary International Law: A Tale of Two Cases*", at Chapter 2 of: From Peace to Justice "International Criminal Accountability and the Rights of Children", Edited by K Arts and V Popovski, 2005 19.

[363] D M Rosen, *Child Soldiers*, (2012) 6.

[364] C Rutgers, *Creating a World Fit for Children: Understanding the UN Convention on the Rights of the Child. International debate Education Association*. (2011) 19.

[365] T Begley, "The Extraterritorial Obligation to Prevent the Use of Child Soldiers", (2012), 27(3), *The American University International Law Review* 617.

3.3.1 The Geneva Conventions and its Additional Protocols

The Geneva Conventions and their Additional Protocols find their roots within international humanitarian law. International humanitarian law is a branch of public international law that embodies rules in times of war to protect persons who are no longer directly participating in armed conflict. The core element in international humanitarian law is for parties in a conflict to differentiate continually between civilians and combatants. The purpose of this is to better facilitate the protection of the civilian population's right to life and to restrict certain methods and means of warfare.[366] This reasoning focuses on the importance of separating a lawful target from an individual who should, for humane reasons, not be targeted. It is on this basis that the Geneva Conventions find their critical importance in international law.[367]

It is important to take into cognisance that International Humanitarian Law contains two branches of law. The first branch is the law of Geneva. According to the International Community of the Red Cross, the law of Geneva is the body of rules that protects victims of armed conflicts, such as military personnel who are *hors de combat* and civilians who are not, or are no longer, directly participating in hostilities.[368]

The second branch is the law of The Hague, which is the body of rules establishing the rights and obligations of belligerents in the conduct of hostilities and which limits the means and methods of warfare.[369]

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[366] S Bosch, "Targeting and prosecuting 'under-aged' child soldiers in international armed conflicts, in light of the international humanitarian law prohibition against civilian direct participation in hostilities", (2012), *XLV CILSA* 338.

[367] M Happold, "Child Soldiers: victims or perpetrators?", (2008), 29, *University of La Verne Review* 63. See also https://heinonline.org>HOL>landingpage>jjuvle29 (Accessed on 03 October 2020).

[368] F De Mulinen, *Handbook on the Law of War for Armed Forces*, (1987) 2-7.

[369] F Kalshoven & L Zegveld, *Constraints on the Waging of War – An introduction of International Humanitarian Law*, (2001) 20 - 29.

In 1949 the Law of Geneva codified four important conventions, and these four Geneva Conventions are:[370]

i. Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field;
ii. Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea;
iii. Treatment of Prisoners of War; and
iv. Protection of Civilian Persons in Times of War.

In 1977, the above Geneva Conventions were supplemented by the addition of two Protocols:[371]

I The Additional Protocol 1 was aimed at the strengthening of protection for victims of international armed conflicts.[372]

II The Additional Protocol 2 was aimed at strengthening the protection for victims of non-international armed conflict.[373]

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[370] I Topa, "The Prohibiton of child soldiering – international legislation and the prosecution of perpetrators", (2007), 3, *Hanse Law Review* 111-112.

[371] T Begley, "The Extraterritorial Obligation to Prevent the Use of Child Soldiers", (2012), 27(3), *The American University International Law Review* 621 Begley argues that the prohibition of the use of child soldiers in these Additional Protocols is essential because the Geneva Conventions and their Additional protocols have risen to the level of customary international law.

[372] 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.

[373] Protocol 2 Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of non-international Armed Conflicts, 8 June 1977.

One may take cognisance of the fact that international law developed during the late nineties when it recognised not only that the battlefield became more localised and non-international, but also that humanity required a stronger level of protection of victims and the civilian population found to be within an armed conflict.

As stated above, International Humanitarian Law applies in times of war. With the development of the above conventions and their additional protocols, one can see that International Humanitarian Law affords two separate systems of protection. These systems include international armed conflict and non-international armed conflict. The rules applied to a particular set of facts would, therefore, depend on the classification of the armed conflict, be it international or non-international in nature.

The theme of international humanitarian law is, in general, multifaceted and rather broad in all that it encompasses. The researcher, in dissecting the relevant portions of this subject, places emphasis on how the Geneva Conventions and their Additional Protocols canvass the protection afforded to children and their recruitment into armed conflict. The distinction between non-international and international armed conflicts is not the crux, but rather their importance is found in the rules which are applicable under the different classifications of an armed conflict. This is due to the fact that the two Additional Protocols are unique in that they operate parallel to one another.

For one firstly to classify a situation as being an international armed conflict the facts need to identify that one or more states resort to the use of force against another state or an international organisation. There are more detailed exceptions to this rule found in Additional Protocol 1 in Article 1 Paragraph 4[374] and Article 96 Paragraph 3.[375] For example, in wars of national liberation where a state's citizens are at war with a colonial power or racist regime one could classify this as an international armed conflict.

For one to classify an armed conflict as non-international in character, the armed conflict in question would possess hostilities taking place between a state armed force and a non-state armed group, or between two or more non-state armed groups. The

[374] Article 1 (4) 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.

[375] Article 96 (3) 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.

distinction between international armed conflicts and non-international armed conflicts is repeated by Common Article 3 of the four Geneva Conventions.[376] The Common Article would apply to armed conflicts of a non-international nature, and this includes conflicts where one or more non-state armed groups are involved.

3.3.2 Additional Protocol 1 to the Geneva Convention, 1977

Both the Additional Protocols[377] elevated their importance in history because, at the time of their creation, these were the first international instruments which directly attempted to regulate the recruitment of children into armed conflict.[378] Article 77 (1) of Additional Protocol 1, entitled the 'protection of children', provides that:

> *"Children shall be the object of special respect and shall be protected against any form of indecent assault. The Parties to the conflict shall provide them with the care and aid they require, whether because of their age or for any other reason.*[379]

The above illustrates the "special" classification of children by the international community and proves that children on the international stage are equally deserving of care and aid irrespective of their age or for any other reason. The remainder of Article 77 does, however, go further by providing a minimum age for children to be recruited into armed conflict. The researcher is of the view that this particular minimum age was stipulated within the framework of the above "special respect" awarded to the

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[376] G Waschefort, "Justice for Child Soldiers? The RUF Trial of the Special Court for Sierra Leone", (2010), 1, *International Humanitarian Legal Studies* 193.

[377] I Topa, "The Prohibiton of child soldiering – international legislation and the prosecution of perpetrators", (2007), 3, *Hanse Law Review* 111-112.

[378] M Happold, "Child Soldiers: victims or perpetrators?", (2008), 29, *University of La Verne Review* 63. See also https://heinonline.org>HOL>landingpage>jjuvle29 (Accessed on 03 October 2020).

[379] Article 77(1) 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.

child.[380] The minimum age set for the recruitment of the child and the conditions governing this recruitment are found in Article 77 (2) which provides:

> *"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 a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among those persons who have not 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.*[381]

When attempting to analyse this article, and in considering the weight of protection awarded to the child under this article, one has to keep in mind that this was the intention of the legislation in 1977. The methods, gravity and sheer modernisation of armed conflict today would, in the researcher's opinion, require a stronger application of protection towards children.

The above article reveals room for improvement in three specific areas, the first area being the minimum age of fifteen as the age set for recruitment. The article itself suggests that the age of eighteen is the preferred age for recruitment and places an obligation on state parties to prioritise that age instead of the age of fifteen. Years later, the Convention on the Rights of the Child, along with many other international instruments provides that the actual age when one is considered to be a minor is anyone below the age of eighteen.[382] This makes the provision of this article permitting the recruitment of children at the age of fifteen, a mere concept of the past, which is preferably seen as a measuring stick as opposed to the law that should be applied today. This argument holds more weight when one considers the aforementioned

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[380] S Bosch, "Targeting and prosecuting 'under-aged' child soldiers in international armed conflicts, in light of the international humanitarian law prohibition against civilian direct participation in hostilities", (2012), *XLV CILSA* 330.

[381] 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.

[382] Article 1 of the Convention on the Rights of the Child, adopted an opened for signature, ratification and accession by the General Assembly resolution 44/25 of 20 November 1989, and entry into force 2 September 1990, in accordance with article 40.

Article 77(1) which encourages the special status of **all** children during armed conflict and promotes the care and aid owed to these children by the international community.

The second aspect to consider in Article 77(2) is the obligation for parties to take "all feasible measures". The intention of the legislative drafters, one can only assume, was correct and directed at the utmost protection towards children, but the words used here are legally open to various interpretations and debate.[383] To take all feasible measures possesses in itself limitations and gaps which could easily be avoided with well thought-out legal jargon. A state could simply adopt the approach of recruiting a child younger than fifteen into its armed forces if all other feasible measures were taken to avoid such recruitment.[384]

The appropriate response that the legislation should have included should rather have been the blanket prohibition of recruitment of children into armed forces replacing the words "all feasible" with "all necessary". The latter was what the International Committee of the Red Cross originally proposed.[385] By adopting this approach one is placed in the situation of promoting every available avenue of protecting the child from armed conflict instead of being obligated to adhere only to the minimum standard of not recruiting children into armed conflict as a feasible measure.[386] This argument is strengthened when one considers that this article is drafted for circumstances in times of war, which in itself warrants that its provisions be detailed and absolute.[387]

The third aspect to consider in Article 77(2) is the obligation on the state to ensure that the child who is recruited below the age of eighteen, but older than the age of fifteen,

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[383] I Topa, "The Prohibition of child soldiering – international legislation and the prosecution of perpetrators", (2007), 3, *Hanse Law Review* 109-112.

[384] G Waschefort, "Justice for Child Soldiers? The RUF Trial of the Special Court for Sierra Leon" (2010), 1, *International Humanitarian Legal Studies* 195.

[385] D M Rosen, *Child Soldiers*, (2012) 11.

[386] I Topa, "The Prohibition of child soldiering – international legislation and the prosecution of perpetrators", (2007), 3, *Hanse Law Review* 110.

[387] D M Rosen, *Child Soldiers*, (2012) 11-12.

does “not take a direct part in hostilities”.[388] Perhaps this argument is not only brought about by legal debate but can further be strengthened by the psychological aspects regarding the mind of the child.[389] What is truly meant by the word “direct” is left open for various interpretations and, surely, one could view that the converse of “indirect” participation does not alleviate the negative impacts on the psyche of the child. It simply requires one to assume, incorrectly so, that the recruitment of a child into armed conflict is considered to be in the utmost best interest of the child. The researcher argues that the child’s recruitment conflicts with the best interests of the child. One could strengthen this argument by comparing the developing psyche of the child who was never recruited at all to the child who was recruited under the auspices of indirect participation.[390]

The point the researcher argues is that, whether one takes a direct or indirect part in armed conflict, it is an armed conflict in its multifaceted existence from which the child with her special status should be protected. It simply could never be assumed that the best interests of the child coincide with her recruitment into armed forces, regardless of the legal position in place. Grover argues that this special status could extend to the view that children’s direct or indirect participation in hostilities, whether as part of a national armed force or non- state armed group, results in a violation of a *Jus Cogens*

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[388] 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.

[389] M Houle, “The Legal responsibility of Child Soldiers”, (2018), 8, *International Law Yearbook* 195.

[390] M A Thomas, “Malice Supplies the Age: Assessing the Culpability of Adolescent Soldiers”, (2013), 44(1), *California Western International Law Journal* 7. Thomas argues that while this is a harsh conclusion, a fifteen to seventeen year old individual in western Africa may be expected to display a higher degree of maturity in his or her community than someone of the same age who has grown up in a western country. See also S Bosch, “Targeting and prosecuting ‘under-aged’ child soldiers in international armed conflicts, in light of the international humanitarian law prohibition against civilian direct participation in hostilities”, (2012), *XLV CILSA* 344-351.

norm, similar to that where non-state armed groups or states themselves are involved in the perpetration of genocide.[391]

3.3.3 Additional Protocol 2 of the Geneva Conventions, 1977

The Additional Protocol 2 was drafted to regulate and provide provisions applicable to non-international armed conflicts. The modernisation of war brings about the circumstances where children are found to be members of armed groups who play a role in hostilities within armed conflicts not of an international character.[392]

This protocol similarly possesses provisions which are aimed at prohibiting the recruitment of children, specifically by non-state armed groups. It is within Part II of the Additional Protocol dealing with "Humane Treatment" that one finds the fundamental guarantees towards the protection of children from recruitment into armed forces. In particular, Article 4(3) provides that:[393]

> *"Children shall be provided with the care and aid they require, and in particular:*
>
> *(a) They shall receive an education, including religious and moral education, in keeping with the wishes of their parents, or in the absence of parents, of those responsible for their care;*
>
> *(b) All appropriate steps shall be taken to facilitate the reunion of families temporarily separated;*

[391] S Grover, *Child Soldier Victims of Genocidal Forcible Transfer*, (2012) 21.

[392] I Topa, "The Prohibiton of child soldiering – international legislation and the prosecution of perpetrators", (2007), 3, *Hanse Law Review* 105-110.

[393] G Waschefort, "Justice for Child Soldiers? The RUF Trial of the Special Court for Sierra Leone" (2010), 1, *International Humanitarian Legal Studies* 192.

(c) 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".[394]

The striking difference between the first and second Additional Protocol is seen by the wording of Article 4(3) (c). For certain reasons the drafters of this legislation found it prudent to remove any measures, albeit feasible or necessary, to ensure that children under the age of fifteen are absolutely prohibited from being recruited by an armed force or group.[395] Further on in this article, the word "direct" was also removed from preceding the manner of hostilities in which the child would be prohibited from taking part. On the mere *prima facie* view, one can assume that Article 4(3) (c) is stronger, at least in its wording and construction, than its sibling, Article 77(2) of the First Additional Protocol.

The blatant similarity between the two articles is found in the same weakness of each. This is with respect to the age of the child that the respective provisions aim to protect, the age of fifteen. This limitation in itself undoubtedly creates a very vulnerable situation for children aged fifteen to seventeen. An aspect which is open for much debate is found in the intention behind both pieces of legislation. In particular, what purpose could there be to create different standards for the protection of the child in circumstances of international armed conflict compared to circumstances of non-international armed conflict?[396]

The differentiation and the stronger underlying ethos behind Article 4(3) (c) inherently and indirectly purport to suggest the incorrect notion. It has already been concluded

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

[395] M Happold, "Child Soldiers: victims or perpetrators?", (2008), 29, *University of La Verne Review* 64. See also https://heinonline.org>HOL>landingpage>jjuvle29 (Accessed on 03 October 2019).

[396] S Bosch, "Targeting and prosecuting 'under-aged' child soldiers in international armed conflicts, in light of the international humanitarian law prohibition against civilian direct participation in hostilities", (2012), *XLV CILSA* 334.

unequivocally that all children, irrespective of their age, race, religion or any other reason, are owed equal protection and possess an equal special status under international law.[397] Considering this, there exists no real narrative which is good in law that justifies the increase or decrease of the protection owed to children in respect of their recruitment and participation in armed conflict. The researcher argues that one should always approach the protection of the child in armed conflict from the "best interests of the child" principle and not based on what wording may be favourably received by a signing party to a treaty.

3.4 International Human Rights law: a closer look at the Optional Protocol to the Convention on the Rights of the Child regarding the involvement of children in armed conflict

As discussed in chapter 2, one would recall that the Convention on the rights of the child was the most significant international human rights legislation adopted for children by the international community in 1990.[398] More than ten years later the international community sought to specify the protection warranted by children in armed conflict, and it adopted an Optional Protocol known as the "Optional Protocol on the Convention of the Rights of the Child on the involvement of Children in Armed Conflict".[399]

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[397] Article 77(1) 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.

[398] V Odala, "The Spectrum for Child Justice in the International Human Rights Framework: From "Reclaiming the Delinquent Child" To Restorative Justice", (2012), 27(3), *The American University International Law Review* 558. Odala recalls that the international community recognises the Convention as a landmark for children and their rights.

[399] The Optional Protocol to the Convention on the Rights of the child on the involvement of children in armed conflict (2002).

The difference between the two bodies of law is more than their respective years of existence.[400] The Convention is essentially an international human rights treaty as it applies to children irrespective of whether they are in a war zone or not. The latter could be viewed as an addendum, with only the difference in the parties that have ratified it.[401]

The need for specificity has developed, as it is a particular type of protection that is needed for securing and enforcing a child's rights during armed conflict. This includes the prohibition of recruitment of children into armed forces.[402] The Optional Protocol recognises the earlier success of the Additional Protocols in their direct approach to the prohibition of the recruitment of children in armed conflict. However, it separates itself by being constructed within the framework of the later developments of international law along with the principles provided by the original Convention on the Rights of the Child.[403]

The Optional Protocol as an international legal instrument was drafted to increase the development of children's rights by envisioning a future where children play no role in an armed conflict.[404] The Optional Protocol acknowledges that children are entitled to a "special privileged status" during armed conflict. This could be attributable to the fact that children are seen as a highly vulnerable group owing to their age and the fact that

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[400] I Topa, "The Prohibiton of child soldiering – international legislation and the prosecution of perpetrators", (2007), 3, *Hanse Law Review* 110.

[401] M Happold, "Child Soldiers: victims or perpetrators?", (2008), 29, *University of La Verne Review* 62-64. See also https://heinonline.org>HOL>landingpage>jjuvle29 (Accessed on 03 October 2019).

[402] Article 1 of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (2002).

[403] T Begley, "The Extraterritorial Obligation to Prevent the Use of Child Soldiers", (2012), 27(3), *The American University International Law Review* 619.

[404] I Topa, "The Prohibiton of child soldiering – international legislation and the prosecution of perpetrators", (2007), 3, *Hanse Law Review* 110.

they are a marginalised part of a population. The Protocol, however, also provides that the state must ensure that these special protections are implemented.[405]

From the widely accepted Protocol, one can assert that children possess a privileged status during armed conflict. This argument holds "privileged status" to mean that children in armed conflict should be differentiated from adults when it comes to being a lawful target in times of war.[406] The latter is a derivative of the principle of no fruits from the poisonous tree. This, in essence, means that the recruitment of the child (under fifteen) is prohibited under international law and, therefore, the targeting of children in armed conflict contrary to the special status would further consequently be prohibited.[407]

The key element which makes the Optional Protocol unique is that it recognises both elements of armed conflict, international and non-international.[408] Where the Additional Protocols of 1977 were separated into two separate legal instruments, the Optional Protocol canvassed both viewpoints in the same body of law.[409] The purpose of the Optional Protocol seems to supplement what the original Convention on the Rights of the Child lacked, with specific reference to improving the protection towards children from and during armed conflict. It is with this view in mind that one can immediately view the focus of the Optional Protocol from the outset and see it realised in the wording of its respective articles. Its focus is first aimed at the recruitment of children by state armed forces and its increased protection from what is provided by

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

[406] S Grover, *Child Soldier Victims of Genocidal Forcible Transfer*, (2012) 22.

[407] S Grover, *Child Soldier Victims of Genocidal Forcible Transfer*, (2012) 22.

[408] T Begley, "The Extraterritorial Obligation to Prevent the Use of Child Soldiers", (2012), 27(3), *The American University International Law Review* 619.

[409] S Bosch, "Targeting and prosecuting 'under-aged' child soldiers in international armed conflicts, in light of the international humanitarian law prohibition against civilian direct participation in hostilities", (2012), *XLV CILSA* 357.

the Geneva Conventions Additional Protocols.[410] Article 1 of the Optional Protocol provides that:

> *"States 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."*[411](Own emphasis)

One immediately notices that the protection towards children in respect of age has increased from the age of fifteen and is now eighteen.[412] The weaknesses found in Article 77 of the First Additional Protocol still arises when one comprehends that the obligation of "all feasible measures" remains the standard of the prohibition, and the term "direct part in hostilities" remains the limitation placed on the child's role in armed conflict. The argument to both these aspects remains, at least in the researcher's opinion, the two main flaws with Article 1 of the Optional Protocol.

Before dealing with the articles provided by the Optional Protocol concerning non-state armed groups and their recruitment of children into armed forces, it is important to note that, for the first time, international legislation encompasses the option for children to enlist voluntarily into state armed forces and permits such enlistment. Article 2 of the Optional Protocol provides that:

> *"State Parties shall ensure that persons who have not attained the age of eighteen years are not compulsorily recruited into their armed forces".*[413]

In the researcher's opinion, this Article should be considered not only for what it stipulates but rather for what it indirectly permits. If carefully perused, this Article permits that children under the age of eighteen would be permitted to enlist voluntarily

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[410] I Topa, "The Prohibiton of child soldiering – international legislation and the prosecution of perpetrators", (2007), 3, *Hanse Law Review* 107-109.

[411] Article 1 of the Optional Protocol to the Convention on the Rights of the child on the Involvement of Children in Armed Conflict (2002).

[412] T Begley, "The Extraterritorial Obligation to Prevent the Use of Child Soldiers", (2012), 27(3), *The American University International Law Review* 619.

[413] Article 2 of the Optional Protocol to the Convention on the Rights of the child on the Involvement of Children in Armed Conflict (2002).

to join a state armed force.[414] When read together with Article 1 and 3, the outcome is that a child under the age of eighteen may in fact "voluntarily" form part of a state armed force and take a direct part in hostilities if all feasible measures were taken to prevent such participation.[415] The reality is that the protection awarded to children from armed conflict at the recruitment stage, despite a 30-year gap in the drafting of the legislation, has not increased nearly enough as the modernisation of armed conflict has required it to. Whether in 1977 or the 2000s a child would still be able to find herself in armed conflict on behalf of a state, if "*all feasible"* measures were taken by the state. The crux of the child soldier phenomenon is that not enough has been done, at the level of legislation, to prohibit the child's involvement from armed conflict absolutely.

If one were to remove the legal analysis of these two bodies of law and apply a common-sense approach, or even a logistical approach, the following problems arise;

1) The state that the child is dependent on to protect its special status would be in a time of war. It simply could never be assumed that all feasible measures in times of war would bring about a child-rights based approach when considering necessary military objectives. It would be simply naïve to expect a state, which has the legal authority of strengthening its armed forces with children never to utilise its authority.

2) When one considers the voluntary enlistment of a child into armed forces,[416] one has also to consider the lawfulness of the child's mental capacity to make such a decision. Should the decision then be made by the lawful guardian?

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[414] M Happold, "Child Soldiers: victims or perpetrators?", (2008), 29, *University of La Verne Review* 66. See also https://heinonline.org>HOL>landingpage>jjuvle29 (Accessed on 03 October 2019).

[415] I Topa, "The Prohibiton of child soldiering – international legislation and the prosecution of perpetrators", (2007), 3, *Hanse Law Review* 110.

[416] I Topa, "The Prohibiton of child soldiering – international legislation and the prosecution of perpetrators", (2007), 3, *Hanse Law Review* 110-111.

> Similarly one should reconsider whether such guardianship should allow for such a serious decision to be made on behalf of the child.[417] Chapter 4 of this research project will encompass and analyse the psychological aspect of the child and the effects armed conflict has on the developing psyche of the child.[418]

As stated above, the Optional Protocol caters for both international and non-international armed conflicts. It, therefore, respects Additional Protocol 2 to the Geneva Convention and stipulates regulations applied to armed groups in respect of their recruitment and use of children in armed conflict. Article 4 of the Optional Protocol[419] is, therefore, of great importance and provides that:

> *"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*."[420] (Own emphasis)

As alluded to above, the very notion of a treaty is governed by a state party's consent to be bound by the treaty and its consequential obligations. One would assume that the Optional Protocol, therefore, could not apply to a non-state armed group as the latter could never be a state party to the treaty, making its obligations to non-state

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[417] Article 2 and 3 of the Optional protocol to the Convention on the Rights of the child on the involvement of children in armed conflict (2000).

[418] N Mole, *"Litigating Children's Rights Affected by Armed Conflict before the European Court on Human Rights*", at Chapter 13 of: From Peace to Justice "International Criminal Accountability and the Rights of Children", Edited by K Arts and V Popovski, 2005 180. Mole states that, although they have often been party to unbelievable violence, often against their own families or communities, such children are exposed to the worst dangers and horrible suffering, both psychological and physical.

[419] Article 4 (1) of the Optional Protocol to the Convention on the Rights of the child on the Involvement of Children in Armed Conflict (2002).

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

parties inapplicable and consequently unenforceable.[421] The Optional Protocol, however, shifts the duty of this particular obligation to its state parties as directed by subsection 2 of Article 4, which provides that:

> *"States Parties shall take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalise such practices".* [422]

The wording contained in Article 4 tends to avoid the description of hostilities and, in essence, prohibits the recruitment of children for any intended use in hostilities, be they direct or indirect. The question which remains is why there should be a stronger standard of protection from child recruitment by non-state armed groups by comparison with those applicable to state armed forces?[423] It has already been proved that children should be the bearers of equal rights and equal protection from hostilities. Their special protected status should not shift depending on who is responsible for their recruitment.[424]

The researcher submits that the Optional Protocol is the most recent international legal authority which is used to protect the child from armed conflict and provides obligations to which adults on the international stage should adhere. The positive element which the Optional Protocol offers, however, is that it correctly elevates the intended

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[421] T Begley, "The Extraterritorial Obligation to Prevent the Use of Child Soldiers", (2012), 27(3), *The American University International Law Review* 619.

[422] Article 4 (2) of the Optional Protocol to the Convention on the Rights of the child on the Involvement of Children in Armed Conflict (2002).

[423] S Bosch, "Targeting and prosecuting 'under-aged' child soldiers in international armed conflicts, in light of the international humanitarian law prohibition against civilian direct participation in hostilities", (2012), *XLV CILSA*335.

[424] Article 77(1) 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.

protection afforded to the child to the age of eighteen, which is an increase from that of the age of fifteen, provided by the Geneva Conventions Additional Protocols.[425]

The obvious flaw that remains is that the protection offered by the Optional Protocol towards the child is in no way absolute. The limitations to the Optional Protocol not being absolute can be found in Article 1, 2 and 4, where a state party possesses the lawful ability to use children for indirect participation in armed conflict which could, in essence, similarly put the life of the child at risk. Furthermore, a state party possesses the lawful ability to recruit children who are older than fifteen and who have volunteered out of their own free will into their armed forces.[426] It is within these limitations that one could find child soldier statistics increasing around the globe even though the Optional Protocol is older than the children it aims to protect.[427]

3.5 Regional legal instruments aimed at protecting the child's recruitment into armed forces

The phenomenon of child soldiers is without a doubt a global issue. However, it would be naïve to ignore the fact that some of this phenomenon's gravest statistics can be found on the African continent. The difference in statistics on the phenomenon of child soldiering could be attributed to many external and socio-economic problems that exist on poorer continents.[428] This, in turn, creates the need for the protection of all children

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[425] M Happold, "Child Soldiers: victims or perpetrators?" (2008), 29, *University of La Verne Review* 66. See also https://heinonline.org>HOL>landingpage>jjuvle29_(Accessed on 03 October 2019).

[426] T Begley, "The Extraterritorial Obligation to Prevent the Use of Child Soldiers", (2012), 27(3), *The American University International Law Review* 614.

[427] T Begley, "The Extraterritorial Obligation to Prevent the Use of Child Soldiers", (2012), 27(3), *The American University International Law Review* 614-615.

[428] M Gallagher, "Soldier Boy Bad: Child Soldiers, Culture and Bars to Asylum", (2014), 13, *International Journal of Refugee Law* 330.

from armed conflict to be absolute and strong enough so that all children are provided with the protection they deserve. Grover argues that:

> "*Western and many non-Western States have signed into and/or ratified and/or acceded to the Optional Protocol above, as was also the case for the Convention on the Rights of the Child, though the rates for ratification of the Optional Protocol are less for Africa and Asia-Pacific region than for other parts of the globe".*[429]

The United Nations is founded primarily on the international stage as the largest international organisation. The African Union, however, is regional to the continent of Africa and finds its use and applicability in regulating the phenomenon of child soldiers on its own continent.

The African Union adopted the African Charter on the Rights and Welfare of the Child[430] on July 1, 1990. Almost ten years later, on 29 November 1999, the Charter was entered into force. This treaty is also the only regional human rights treaty which regulates children's involvement in armed conflict.[431] One may further note that, perhaps due to the type of armed conflicts which plague this continent being non-international, the Charter applies to both state and non-state armed groups.[432] Adapting to the fact that the phenomenon of child soldiers has grown on the African Continent, the Charter notes with concern in its preamble that:

> *"The situation of most African children remains critical due to the unique factors of their socio-economic, cultural, traditional and developmental circumstances, natural disasters, armed conflicts, exploitation and hunger, and on account of the child's physical and mental immaturity he/she needs special safeguards and care"*.[433]

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[429] S Grover, *Child Soldier Victims of Genocidal Forcible Transfer*, (2012) 17-18.

[430] The African Charter on the Rights and Welfare of the Child 1999.

[431] M Happold, *Child Soldiers in International Law*, (2005) 83.

[432] S Grover, *Child Soldier Victims of Genocidal Forcible Transfer*, (2012) 18.

[433] Noting with concern, The African Charter on the Rights and Welfare of the Child 1999.

The article of importance here is Article 22 (1) – (3). This Article provides regulations for armed conflict and, in particular, deals with the obligations placed on a state and the prohibition of child recruitment. Article 22 reads as follows:

> *"1 States Parties to this Charter shall undertake to respect and ensure respect for rules of international humanitarian law applicable in armed conflicts which affect the child.*
>
> *2 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.*
>
> *3 States Parties to the present Charter shall, in accordance with their obligations under international humanitarian law, protect the civilian population in armed conflicts and shall take all feasible measures to ensure the protection and care of children who are affected by armed conflicts".*[434]

According to Article 2 of the African Charter,[435] a child is defined as every human being below the age of eighteen years. This is similar to the age set by Article 1 of the Convention on the Rights of the Child.[436] Article 22(1) proposes that State Parties have the obligation of ensuring that international humanitarian law applicable to an armed conflict which affects the child should be respected. It is here suggested that this respect for the principles of international humanitarian law are derived from similar principles found in Article 6 of the Convention on the Rights of the Child which provides that:

> *1) "States Parties recognize that every child has the inherent right to life,*

[434] Article 22 of the African Charter on the Rights and Welfare of the Child 1999.

[435] Article 2 of the African Charter on the Rights and Welfare of the Child 1999.

[436] Article 1 of the Convention on the Rights of the Child, adopted an opened for signature, ratification and accession by the General Assembly resolution 44/25 of 20 November 1989, and entry into force 2 September 1990, in accordance with article 40.

2) *States Parties shall ensure to the maximum extent possible the survival and development of the child".*[437]

The researcher argues that, by applying Article 22(1) and in performing the state's obligations which essentially means the implementation of international humanitarian law applicable to the child, this obligation would best be implemented by furthering the best interests of the child. This is achieved by ensuring the child's survival and good development.[438] Article 22, therefore, applies to all individuals under the age of eighteen.[439] The latter is important pertaining to the protection of children because, unlike the treaties discussed above, this treaty extends its protection to children between the ages of sixteen and seventeen as well. The inclusivity of these ages encourages unconditional equality as the children falling within this age range are equally deserving of protection.[440]

From the international treaties listed above, a State Party is permitted to accept the voluntary recruitment of the child aged 16 and above.[441] Once the child is enlisted into its armed forces, the State Party is then obliged to take only feasible measures in ensuring that these children do not take a direct part in hostilities.[442]

Article 22(2)[443] of the Charter provides a stronger measure of protection from the child's recruitment into armed conflict than that of Article 1 of the Optional Protocol. In

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[437] Article 6 (1) and (2) of the Convention on the Rights of the Child, adopted an opened for signature, ratification and accession by the General Assembly resolution 44/25 of 20 November 1989, and entry into force 2 September 1990, in accordance with article 40.

[438] S Grover, *Child Soldier Victims of Genocidal Forcible Transfer*, (2012) 17.

[439] M Happold, *Child Soldiers in International Law*, (2005) 84.

[440] Article 77(1) 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.

[441] Article 3 (1) of the Optional Protocol to the Convention on the Rights of the child on the Involvement of Children in Armed Conflict (2002).

[442] Article 1 of the Optional Protocol to the Convention on the Rights of the child on the Involvement of Children in Armed Conflict (2002).

[443] Article 22(2) of the African Charter on the Rights and Welfare of the Child 1999.

Article 22(2) the States obligation regarding protection from recruitment is to take "all necessary measures" to ensure that no child shall take a direct part in hostilities. This provision illustrates two important aspects, the first being that the drafters of the Charter did not water down the measure of protection to "feasibility". Instead, they kept the ground that "necessity" is the more appropriate measure. The second aspect is clear when one considers that the African Charter[444] is older than the Optional Protocol[445] and that many state parties are parties to both treaties, so that there is no legal reason for the distinction of protection measures. The only reason could be political, to apply where one would wish to appeal to a wider audience and to receive majority acceptance.

The problem that a wider or majority acceptance of a treaty creates is that if one applies a "one shoe fits all" approach one could then conversely lessen the very importance of the actual treaty. The researcher argues that when applying Article 6 of the Convention on the Rights of the Child[446] the best interests of the child and the development of the child must be the priority. This priority, in turn, dictates that the protection awarded to the child from recruitment into armed conflict should be equal and not differ from regional to international instruments.

The degree of participation that Article 22(2) aims to protect the child from is direct participation. The problem with this narrative is that the child is still not protected from indirect participation. The psychological effects of armed conflict on the child's developing capacity are discussed in chapter 4, but at this juncture it is argued that the best interests of the child suggest that neither forms of participation are conducive to the child.

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[444] The African Charter on the Rights and Welfare of the Child 1999.

[445] Optional Protocol to the Convention on the Rights of the child on the Involvement of Children in Armed Conflict (2002).

[446] Article 6 (1) and (2) of the Convention on the Rights of the Child, adopted an opened for signature, ratification and accession by the General Assembly resolution 44/25 of 20 November 1989, and entry into force 2 September 1990, in accordance with article 40.

3.6 International Labour Organisation, the Worst Forms of Child Labour Convention, 1999 (No. 182)

From the application of the above treaties and conventions, the specific articles regulating the recruitment of children into armed conflict permit the voluntary enlistment of the child who is older than 15 and who enlists into a state armed force intending to take an indirect role participating in the armed conflict.[447] This "indirect participation" could imply many acts and would include military training, scouting, and, if all feasible measures were taken, the child could take a direct part in hostilities.[448] This occurrence may become a reality despite the articles classifying any individual under the age of eighteen to be considered a child under international law.[449]

The gap that is left open by the current international instruments aimed at protecting the child from armed conflict permits that the child between the ages of fifteen to seventeen could be labouring on behalf of her state's armed forces. At this juncture, the researcher argues that one can see that this gap in international law leaves a vulnerable child defeated by the very instruments which guarantee her a special status to be protected. Those who view this discrepancy in the law as a violation of the child's human rights would then seek guidance from international law on whether the child's tenure as a voluntary recruit is justified labour. The most applicable Convention here is the "Worst Forms of Labour Convention". In 1999 the International Labour

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

[448] S Bosch, "Targeting and prosecuting 'under-aged' child soldiers in international armed conflicts, in light of the international humanitarian law prohibition against civilian direct participation in hostilities", (2012), *XLV CILSA* 343.

[449] Article 1 of the Convention on the Rights of the Child, adopted an opened for signature, ratification and accession by the General Assembly resolution 44/25 of 20 November 1989, and entry into force 2 September 1990, in accordance with article 40.

Organisation adopted the Convention concerning the Prohibition and Immediate Action for Elimination of the Worst Forms of Child Labour No 182.[450]

This Convention provides for a clear understanding of the view of the International Labour Organisation towards children in armed conflict.[451] In Article 1, the Convention directs member states to take immediate action and effective measures to prevent and stop the continued occurrence of the worst forms of child labour.[452] The Convention provides further detail on what comprises of the worst forms of child labour.[453] In Article 3(a) the Convention provides:

> *"The term the worst forms of child labour comprises of all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict".*[454](Own emphasis)

The above article fails to acknowledge the voluntary recruitment by the child herself and only prohibits the forced or compulsory recruitment of the child. What the Convention surely lacks in subsection (a), the researcher argues, it makes up for in Article 3(d) which provides that the worst form of child labour could include work which,

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[450] The Convention (No. 182) concerning the Prohibition and Immediate Action for Elimination of the Worst Forms of Child Labour Convention, International Labour Organisation, 1999.

[451] T Begley, "The Extraterritorial Obligation to Prevent the Use of Child Soldiers", (2012), 27(3), *The American University International Law Review* 621.

[452] Article 1 of The Convention concerning the Prohibition and Immediate Action for Elimination of the Worst Forms of Child Labour Convention, International Labour Organisation, 1999.

[453] M Happold, "Child Soldiers: victims or perpetrators?", (2008), 29, *University La Verne Review* 66.

[454] Article 3(a) of The Convention concerning the Prohibition and Immediate Action for Elimination of the Worst Forms of Child Labour Convention, International Labour Organisation, 1999.

> *"By its nature or circumstances in which it is carried out, is likely to harm the health, safety or morals of children.*[455]

The argument is that children should be prohibited from armed conflict for any role in hostilities that they could be a part of, be it by direct or indirect participation. Indirect participation, even in the general sense, could equally possess the possibility of harming the child's safety and health. This argument is submitted, taking into cognisance the preamble provisions of the above convention which state that the convention was adopted:

> *"Considering that the effective elimination of the worst forms of child labour requires immediate and comprehensive action, taking into account the importance of free basic education and the need to remove the children concerned from all such work and to provide for their rehabilitation and social integration while addressing the needs of their families*.[456](Own emphasis)

3.7 The International Criminal Court and the Rome Statute

The researcher takes cognisance of the fact that when considering criminal deeds committed by individuals on the international stage, or deeds committed by individuals which in themselves are considered to breach international law,[457] it is the subject of international criminal law which becomes applicable. For instance, international criminal law codifies the violation of crimes against humanity and the act of torture, which, in turn, are prohibited by international legal instruments and regulated by

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[455] Article 3 (d) of The Convention concerning the Prohibition and Immediate Action for Elimination of the Worst Forms of Child Labour Convention, International Labour Organisation, 1999.

[456] The Preamble to The Convention concerning the Prohibition and Immediate Action for Elimination of the Worst Forms of Child Labour Convention, International Labour Organisation, 1999.

[457] I Topa, "The Prohibiton of child soldiering – international legislation and the prosecution of perpetrators", (2007), 3*, Hanse Law Review* 113.

international treaties and conventions. There are stipulated bodies that oversee and adjudicate on cases where individuals have committed internationally recognised crimes. Consequently, it would be imperative that an international judicial body has the necessary jurisdiction to accept and prosecute cases over non-international armed conflicts where a particular national government fails, or elects not, to take action.[458]

The most applicable international judicial body in these circumstances is the International Criminal Court. The court itself is an intergovernmental organisation and international tribunal that is situated in The Hague, Netherlands. The court's applicability to regulate the international legal instruments referred to above, concerning children in armed conflict is premised on this particular court's jurisdiction. The International Criminal Court possesses the jurisdiction to prosecute individuals for specific international crimes.

These crimes include the crime of Genocide, Crimes against Humanity, and Crimes of Aggression amongst other war crimes.[459] The jurisdiction of the International Criminal court is complimentary in the sense that it works parallel to national judicial systems. The inherent jurisdiction of the International Criminal Court would then be enacted upon once certain conditions are met and under certain circumstances where a failed state or national judicial body fails, or is unable, to prosecute criminals.[460] Matters may also be referred to the International Criminal Court.

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[458] L Moreno-Ocampo, *"The Rights of Children and the International criminal Court"*, at Chapter 8 of: From Peace to Justice "International Criminal Accountability and the Rights of Children", Edited by K Arts and V Popovski, 2005, at page 115 it is argued that the International criminal Court is a court of last resort, not forgetting that the court only will intervene selectively and when the responsible state does not act.

[459] Article 5 (a-d)The Rome Statute of the International Criminal Court, Done at Rome on 17 July 1998, in force on 1 July 2002, United Nations, Treaty Series, Vol. 2187, No. 38544, Depositary: Secretary-General of the United Nations, http://treaties.un.org (Accessed on 28 September 2019).

[460] S Bosch, "Targeting and prosecuting 'under-aged' child soldiers in international armed conflicts, in light of the international humanitarian law prohibition against civilian direct participation in hostilities" (2012), *XLV CILSA*, at page 327 Bosch argues that whilst the

It is important to note that the International Criminal Court commenced operating in July 2002. The importance of this is found in the statute which regulates the Court, The Rome Statute. The Rome Statute was similarly entered into force on 1 July 2002.[461] The Rome Statute itself is a multilateral treaty that is utilised as the blueprint and procedural constitution of the International Criminal Court.

The Rome Statute comprises of 81 pages in length and consists of (the researcher identifies only the aspects which are relevant to this project) the regulation and guidelines of the International Criminal Court: (1) the preamble and establishment of the court; (2) the Jurisdiction, Admissibility and Applicable Law; (3) the General Principles of Criminal law; (4) the Composition and Administration of the Court; (5) the Powers of investigation and Prosecution; (6) the stages and rules relating to Trials; (7) the Penalties awarded by the Court; (8) the Court's appeals and revision procedures; and (9) The Court's obligations requiring International Cooperation and Judicial assistance.

In Part 2 of the Rome Statute, the statute provides for Jurisdiction, Admissibility and Applicable Law. In this part, the statute compiles the list of crimes which fall within the jurisdiction of the Court. Under Article 5(c), described as "War Crimes",[462] one is informed of the Court's jurisdiction and stance with regards to children forming part of, or being recruited into, an armed conflict of an international nature.[463] In particular Article 8(2) (b) (xxvi) provides that:

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international prosecutions of 2012, are a significant achievement, almost no one has been prosecuted by national courts for recruiting and using children.

[461] The Rome Statute of the International Criminal Court, Done at Rome on 17 July 1998, in force on 1 July 2002, United Nations, Treaty Series, Vol. 2187, No. 38544, Depositary: Secretary-General of the United Nations, http://treaties.un.org (Accessed on 28 September 2019).

[462] G Waschefort, "Justice for Child Soldiers? The RUF Trial of the Special Court for Sierra Leon" (2010), 1, *International Humanitarian Legal Studies* 192.

[463] I Topa, "The Prohibiton of child soldiering – international legislation and the prosecution of perpetrators", (2007), 3, *Hanse Law Review* 113.

> *"For the purpose of this Statute, "war crimes" means: Conscripting or enlisting children under the age of fifteen years into national armed forces of using them to participate actively in hostilities".*[464]

Similarly, in Article 8(2) (e) (vii), the court is also empowered with the jurisdiction over non-international armed conflict. In particular Article 8(2) (e) provides that:

> *"Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the* ***established framework of international law****, namely, any of the following acts;*
>
> *……*
>
> *(vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities".*[465].(Own emphasis)

From the Rome Statute's classification of a "War Crime",[466] it is clear that one may be criminally prosecuted in circumstances where children below the age of fifteen are conscripted or used in armed forces and form an active role therein. This is for both international and non-international armed conflicts.[467] Two issues arise in this

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[464] Article 8 (2) (b) (xxxvi)The Rome Statute of the International Criminal Court, Done at Rome on 17 July 1998, in force on 1 July 2002, United Nations, Treaty Series, Vol. 2187, No. 38544, Depositary: Secretary-General of the United Nations, http://treaties.un.org (Accessed online 28 September 2019).

[465] Article 8 (2) (e) (vii)The Rome Statute of the International Criminal Court, Done at Rome on 17 July 1998, in force on 1 July 2002, United Nations, Treaty Series, Vol. 2187, No. 38544, Depositary: Secretary-General of the United Nations, http://treaties.un.org (Accessed online 28 September 2019).

[466] G Waschefort, "Justice for Child Soldiers? The RUF Trial of the Special Court for Sierra Leone", (2010), 1, *International Humanitarian Legal Studies* 194.

[467] S Bosch, "Targeting and prosecuting 'under-aged' child soldiers in international armed conflicts, in light of the international humanitarian law prohibition against civilian direct participation in hostilities", (2012), *XLV CILSA*, at page 326 Bosch recalls the criminal

prohibition, the first being the modernisation of international law and the substantive growth of international customary law which affects the "established framework" of international law. The second issue to be canvassed by the subsections of Article 8 is in what manner the court approaches the individual, who recruited or conscripted children under the age of fifteen and used these children to play an active part in hostilities, who was under the age of eighteen herself when the crime was committed.

Article 8(2) (e) (vii) referred to above provides that the war crime of conscripting or using children under the age of fifteen for an active role in hostilities is seen as a serious violation of **law** and **custom** applicable to armed conflicts ……., **within an established framework of international law**. When considering the words used in this statute, the conclusion drawn in reaching a logical nexus between what the statute imposes in comparison with what the statute intended is that the prohibition of conscripting and using children actively in hostilities as a war crime is performed under the current legal framework applicable to children.[468] The current legal framework would be ascertained according to both substantive international law and customary international law.

When assessing the strength of the definition of the war crime defined in Article 8(2) (e) (vii), it would be prudent to compare that to the applicable international treaties governing and protecting the child's rights during armed conflict. The analysis, argued by the researcher, should be done in the following manner: one should first look at the substantive international law rules relating to children in the following spheres:

[A] The legal definition of the child's age under international law;

[B] The protection awarded to the child under international human rights law and international humanitarian law;

[C] The obligation on whom that protection ultimately rests;

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prosecution of Thomas Lubango Dyilo by the International Criminal Court for the unlawful recruitment of child soldiers into his militia.

[468] M Happold, "Child Soldiers: victims or perpetrators?", (2008), 29, *University La Verne Law Review* 65.

[D] Whether the provisions in Article 8(2) (b) (xxvi) and Article 8(2) (e) (vii) regulate the breach of these rules effectively, and reflect the current law or custom applicable to armed conflicts in an established international framework of international law.

3.7 [A]

Once embarking on this analysis and taking into cognisance the currently applicable international legal instruments, the following is factually sound, viz. the child's lawful age in terms of international law is any individual under the age of eighteen.[469] This is provided for by the Convention on the Rights of the Child[470] and is uncontested customary international law as the convention's wide acceptance and settled practice leaves very little to dispute.[471]

3.7 [B]

As the standard of the international child's age is set at eighteen, the next point to consider is the protection awarded to the child under international law. According to Topa, the increase in the age limit for participation in hostilities represents a clear

[469] Article 1 of the Convention on the Rights of the Child, adopted an opened for signature, ratification and accession by the General Assembly resolution 44/25 of 20 November 1989, and entry into force 2 September 1990, in accordance with article 40.

[470] I Topa, "The Prohibition of child soldiering – international legislation and the prosecution of perpetrators", (2007), 3, *Hanse Law Review* 107.

[471] M Happold, "Child Soldiers: victims or perpetrators?", (2008), 29, *University of La Verne Law Review* 63.

improvement of the protection provided by international law and strengthens the trend to shield all children from the dangers of armed conflicts.[472]

When one considers the term "protection" in this topic, one should keep in mind that this relates to the status given to the child through the lens of international law prior to, during and after armed conflict. In essence, the researcher refers to the standard the international community has unanimously agreed to use as the bar by which all children should be protected. To ascertain this standard, it is important firstly to identify the status of the child given to her by the international community.

The first time the status of the child was codified in international law was in the adoption of the Additional Protocols to the Geneva Conventions in 1977. It was in Article 77 of the First Additional Protocol that specifically provided for the *protection of children*, and it is within this Article that the child's status was ascertained. According to Article 77:

> ***"Children** shall be the object of **special respect** and shall be **protected against any form of indecent assault**. The Parties to the conflict shall provide them with the care and aid they require, whether because of their **age or for any other reason".***[473]**(Own emphasis)**

The standard set here by the Article 77 shifts the notion of the child being an integral part of any hostility and instead preserves the child's innocence by ensuring that the child is the object of special respect and shall be protected against any form of indecent assault.[474] One would assume that the child's "special status" ensures that certain safeguards are in place which completely obliterate the potential of the child

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[472] I Topa, "The Prohibition of child soldiering – international legislation and the prosecution of perpetrators", (2007), 3, *Hanse Law Review* 110.

[473] Article 77(1) 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.

[474] S Bosch, "Targeting and prosecuting 'under-aged' child soldiers in international armed conflicts, in light of the international humanitarian law prohibition against civilian direct participation in hostilities", (2012), *XLV CILSA* 329.

forming part of an armed conflict, or playing a role therein that is likely to cause an indecent assault on the child.

Perhaps the argument should be that "special status" does not necessarily mean that the child is void of all consequences of armed conflict, as it would be too strong an obligation to attempt to regulate. To ascertain what consequences or affects the term "special status" is meant to be understood as, one can look at the Additional Protocol 2 to the Geneva Conventions, in particular Part 2 dealing with "Humane Treatment" and Article 4 which stipulates the fundamental guarantees of such treatment.[475] These guarantees, the researcher argues, are what one should consider as the blueprint or basis of protection guaranteed by international humanitarian law, at least as it was in 1977.

From Article 4 (3), the international community is informed that "special status" includes action and not an omission on behalf of the international community. The provision is stipulated and is not merely a notion or idea, meaning that the verbal obligation of actually carrying out this provision is required.[476] The measure of what should be provided is "care and aid they require". The researcher argues that these measures are vague and can be conclusively applicable only when one considers children in armed conflict on a case by case basis, as the child's need for care and aid will also differ.[477]

The fundamental guarantees to be provided include the importance of the child being provided with education, being reunited with family, and not being recruited to take part in hostilities if they have not reached the age of fifteen.[478] One must recall, at this

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

[476] T Begley, "The Extraterritorial Obligation to Prevent the Use of Child Soldiers", (2012), 27(3), *The American University International Law Review* 625.

[477] S Bosch, "Targeting and prosecuting 'under-aged' child soldiers in international armed conflicts, in light of the international humanitarian law prohibition against civilian direct participation in hostilities", (2012), *XLV CILSA* 328.

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

juncture, that the Additional Protocols were drafted with the standards in place in 1977. When one looks at the modernisation of the legal instruments, immediately noticeable is the age of the child which the legal instruments aim to protect. It is simply not enough in the current international regime to accept that a child is anyone below the age of eighteen, while the special protection awarded to the child from being allowed to take part in any hostilities extends only to the age of fifteen.

This argument is strengthened by subsection (d) of Article 4 (3), which again recognises the child's special protection, but confines this status to children who have not attained the age of fifteen. It goes further, however, in providing that this "special protected status" remains applicable to the child even if he/she does take a direct part in hostilities and is captured.[479]

The Geneva Conventions' Additional Protocols do shed some light on the "special status" of the child and what is meant by the term in providing the child with protection. However, the age in terms of the Additional Protocols is pertinently similar to the 1977 standard of protection of ages fifteen and under which is simply too low a bar to be considered as part of the current international legal framework.

It would then be prudent to consider more modern and child-specific human rights instruments, such as the Convention on the Rights of the Child, and ascertain exactly what should be the standard of protection owed to the child in the 21st century. The interplay of convergence between international human rights law and international humanitarian law does create in circumstances such as these especially an overlap, as both bodies of law protect the child, both in times of peace and in times of armed conflict.

The child is viewed in the 21st century somewhat more identifiably as a relatable *persona* rather than simply an individual, as the Convention on the Rights of the Child refers also to a child's childhood being entitled to special status rather than just the

[479] Article 4(3) (d) Protocol 2 Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of non-international Armed Conflicts, 8 June 1977.

child,[480] which implies that is it the stages of the child's development that must be protected and not merely the child's physical being.

The aspect of what is meant by childhood was not expressed in vague terms either. The Convention, in a bold fashion, describes childhood to include the beautiful harmonious development of the child's *persona* and recognises that this is best done within the family unit, based in the fertile atmosphere of happiness, love and understanding.[481]

Improving on the 1977 Additional Protocols, the protection afforded to the child by the Convention is more detailed. The detail includes the child's right to be protected from discrimination of any kind or status, including race, colour, sex, religion, nationality, birth, etc. The protection awarded to the child also becomes more specific in the sense

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[480] The Preamble of the Convention on the Rights of the Child, adopted an opened for signature, ratification and accession by the General Assembly resolution 44/25 of 20 November 1989, and entry into force 2 September 1990, in accordance with article 40. "*Recalling that, in the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance*."

[481] The Preamble of the Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by the General Assembly resolution 44/25 of 20 November 1989, and entry into force 2 September 1990, in accordance with article 40. In particular, "*Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding, Considering that the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity, Recalling the provisions of the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally; the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) ; and the Declaration on the Protection of Women and Children in Emergency and Armed Conflict, Recognizing that, in all countries in the world, there are children living in exceptionally difficult conditions, and that such children need special consideration."*

that the vague term "**special protected status"** described in 1977 is now identified in Article 3 (1) which provides that:

> *"In all actions concerning children, **the best interest of the child** shall be the primary consideration".*[482] (Own emphasis)

When taking into consideration the two different aspects of protection awarded to the child, namely the child's special protected status, and the best interests of the child, one needs to understand exactly what these two aspects legitimately ensure. The researcher believes that the standard of protection awarded to the child is accurately summarised to be understood as:

> *"The international community collectively recognises that the child's special status and best interest, include his or her inherent right to life, and in promoting and securing this right, the international community is obligated in ensuring both the survival and the healthy development of the child.*[483]

This would be the very basic summary of the protection afforded to the child, albeit being provided equally and without discrimination. This summary, in the researcher's view, is the current standard of protection awarded to the child. Confirmation of this may be gleaned from the Optional Protocol to the Convention, as it confirms this position, as well as the importance of the child's special status and continuous development without distinction.[484]

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[482] Article 3 (1) of the Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by the General Assembly resolution 44/25 of 20 November 1989, and entry into force 2 September 1990, in accordance with article 40.

[483] Article 6 (1) and (2) of the Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by the General Assembly resolution 44/25 of 20 November 1989, and entry into force 2 September 1990, in accordance with article 40.

[484] The Preamble of the Optional protocol to the Convention on the Rights of the child on the involvement of children in armed conflict (2000). "*Reaffirming that the rights of children require special protection, and calling for continuous improvement of the situation of children without distinction, as well as for their development and education in conditions of peace and security*."

3.7 [C]

In continuing the assessment of the Rome Statute's definition of the war crime of enlisting or conscripting children into hostilities and ensuring that they actively participate therein, it is imperative to understand who bears the responsibility for delivering this protection owed to the child. The obvious assumption is that it is the role of the adult that would be responsible for advocating the protection of children. The difference between having the responsibility to protect and implementing such protection forces one to look not only at the duty to protect but rather the weight placed on performing this duty.

Article 77 of the Additional Protocol 1 sets forth the provision of the child's special status during armed conflict. The same Article ensures this protection by placing the obligation on its state parties to take all feasible measures in ensuring that all children who are not yet fifteen years old do not take a direct part in hostilities. Furthermore, these children aged fifteen and younger are not to be recruited in the state's armed forces.[485] The obligation further includes that, where children are being recruited and the child is younger than eighteen, the priority should be placed on recruiting those children that are oldest.[486]

It is important to note that, despite the disallowance of the child aged younger than fifteen to be recruited into a state's armed forces, the Additional Protocol 1 still acknowledges that exceptional cases exist where children under the age of fifteen are still found to be taking a part in armed conflict.[487] The approach to this provided by

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[485] 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.

[486] M Happold, "Child Soldiers: victims or perpetrators?", (2008), 29, *University La Verne Law Review* 66.

[487] S Bosch, "Targeting and prosecuting 'under-aged' child soldiers in international armed conflicts, in light of the international humanitarian law prohibition against civilian direct participation in hostilities", (2012), *XLV CILSA*337.

Additional Protocol 1 is that these children continue to benefit from the "special protection" afforded by the Additional Protocol 1.[488]

The researcher argues that the standard of protection towards children in armed conflict as set by Additional Protocol 1 is obsolete in its effectiveness with regards to modern armed conflict for two reasons. Firstly, the parties to the conflict to whom this obligation applies are in most circumstances not state parties but rather rebel armed groups.[489] Secondly, the very purpose of special protection, argued here, is that the child, under eighteen but older than fifteen, should not be permitted to be seen as a viable candidate for recruitment into the state's armed forces for any military advantage.[490]

The first leg of this argument is strengthened by the provision of Article 4 (1) of the Additional Protocol 2,[491] which assures the international community that it is a fundamental guarantee that all persons **who do not take a direct part in hostilities** shall in all circumstances be treated humanely, without any adverse distinction. Article 4(2)(a)[492] of the same protocol goes further by providing that the act of violence to the life, health and physical or mental well-being of the persons referred to in Article 4(1) shall remain prohibited at any time and in any place whatsoever.

The researcher concludes that the Additional Protocols contradict each other when reliance is placed on the special status of the child and in particular the protection afforded to the child. This is because, on the one hand, the child below the age of fifteen is prohibited from taking a direct part in hostilities, and the state party should

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[488] Article 77(3) 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.

[489] T Begley, "The Extraterritorial Obligation to Prevent the Use of Child Soldiers", (2012), 27(3), *The American University International Law Review* 619.

[490] T Begley, "The Extraterritorial Obligation to Prevent the Use of Child Soldiers", (2012), 27(3), *The American University International Law Review* 617.

[491] Article 4(1) Protocol 2 Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of non-international Armed Conflicts, 8 June 1977.

[492] Article 4(2) (a) Protocol 2 Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of non-international Armed Conflicts, 8 June 1977.

take all feasible measures in ensuring this. Yet, on the other hand, if the child is found to take a direct part in hostilities then this "special protection" still accrues to the child. However, if the child is not permitted to take a direct role in hostilities then article 4(1) and 4(2) (a) prohibit, under all circumstances whatsoever, anyone from acting against the child with the intention of violence to the life, health and physical, or mental well-being of the child.

This, in turn, suggests an argument whereby a child who does take a direct part in hostilities and who refuses to surrender this role should be neither a lawful target nor a lawful combatant. Thus, the child could only be an objective pawn in the battlefield that opposing combatants should attempt not to harm,[493] an unrealistic and ludicrous state of affairs at best.

The second argument with regards to the purpose of the special protection afforded to the child relates to the fact that the Additional Protocols simply fail to clarify that the special protection provided to children includes the fundamental guarantees of humane treatment provided in Article 4 of the Additional Protocol 2. If this were the case then the appropriate position should be that the prohibited recruitment of the child into armed forces should be obsolete. This is because the child's special protected status should, in turn, include even the risk of being subjected to violence to life, or having his/her health and physical or mental well-being negatively impacted.[494]

When one turns to the Optional Protocol to the Convention on the Rights of the Child and considers the weight placed on the international community in protecting the child from armed conflict,[495] one notices not only that the Convention was adopted more

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[493] S Bosch, "Targeting and prosecuting 'under-aged' child soldiers in international armed conflicts, in light of the international humanitarian law prohibition against civilian direct participation in hostilities", (2012), *XLV CILSA* 337.

[494] S Bosch, "Targeting and prosecuting 'under-aged' child soldiers in international armed conflicts, in light of the international humanitarian law prohibition against civilian direct participation in hostilities", (2012), *XLV CILSA* 338.

[495] T Begley, "The Extraterritorial Obligation to Prevent the Use of Child Soldiers", (2012), 27(3), *The American University International Law Review* 620.

than 20 years after the Additional Protocols but also that the Convention serves to illustrate what is to be the suggested guaranteed human rights of the child.

The first improvement from the Additional Protocols is that the Convention now sets the age of the child at that of eighteen. This implies that the international community acknowledges as a custom that the age of fifteen is no longer regarded as the minimum age for protecting a child.[496] Similarly to the Additional Protocols, the Convention places the obligation on state parties to ensure that the protection of the child is necessary for his or her well-being.[497] This obligation on state parties ensures the implementation of the Convention and its provisions in accordance with the parties' national laws.[498]

Arguably the Convention in its Article 38 does little to clarify or increase the notion of the "special protected status" of the child despite its obvious improvement with regard to the numerical number of the child's age.[499] The improvement quickly diminishes in importance when considering that the obligation placed on state parties to the Convention is still only to take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities. Ironically, when recruiting "children" who have not attained the age of eighteen years, priority must (similarly as stated in the Additional Protocols') be given to those who are older.

The purpose of raising the child's age to eighteen is arguably of no legal value if the child who is afforded the protection is younger than fifteen. Further, it is argued that,

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[496] M Happold, "Child Soldiers: Victims or Perpetrators?", (2008), 29, *University La Verne Law Revie*w 65.

[497] Article 3 (2) of the Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by the General Assembly resolution 44/25 of 20 November 1989, and entry into force 2 September 1990, in accordance with article 40.

[498] Article 7 (2) of the Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by the General Assembly resolution 44/25 of 20 November 1989, and entry into force 2 September 1990, in accordance with article 40.

[499] S Bosch, "Targeting and prosecuting 'under-aged' child soldiers in international armed conflicts, in light of the international humanitarian law prohibition against civilian direct participation in hostilities", (2012), *XLV CILSA* 331.

by allowing this disparity in the protection afforded to the child from being recruited into armed forces, the Convention contravenes its own Article 2(1).[500] This Article obliges the state to respect and ensure the rights outlined in the Convention to each child within its jurisdiction without discrimination of any kind, irrespective of the child's race, colour, sex, language, birth or other circumstance. The researcher argues that, by not allowing stronger protection from recruitment into armed conflict to children younger than eighteen, the article ignores the purpose of setting the child's age under international law to eighteen. Instead, this also directly discriminates against the child who is older than fifteen as a result of birth or other circumstances covered by article 2(1) of the Convention.

More than 10 years later the Optional Protocol to the Convention was adopted. The adoption was done whilst recognizing the adoption of the Rome Statute,[501] as well as the unanimous adoption of the International Labour Organisation Convention No.182.[502] The Optional Protocol intended to embark on a chain of thought which the prior legal instruments had failed to acknowledge and that is the ongoing improvement in the protection owed to the child in armed conflict and not only its existence.[503]

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[500] Article 2 (1) of the Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by the General Assembly resolution 44/25 of 20 November 1989, and entry into force 2 September 1990, in accordance with article 40.

[501] The preamble Optional Protocol to the Convention on the Rights of the child on the Involvement of Children in Armed Conflict (2002). "*Noting the adoption of the Statute of the International Criminal Court and, in particular, its inclusion as a war crime of conscripting or enlisting children under the age of 15 years or using them to participate actively in hostilities in both international and non-international armed conflicts*."

[502] The preamble Optional Protocol to the Convention on the Rights of the child on the Involvement of Children in Armed Conflict (2002). "*Welcoming the unanimous adoption, in June 1999, of International Labour Organization Convention No. 182 on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, which prohibits, inter alia, forced or compulsory recruitment of children for use in armed conflict."*

[503] M Happold, "Child Soldiers: victims or perpetrators?", (2008), 29, *University La Verne Law Review* 67.

The Optional Protocol not only places the obligation on state parties to be at the driving seat of ensuring the child's special protected status but further acknowledges that, in order to promote the implementation of its provisions, there exists the need to **increase** the protection towards children in armed conflict.[504]

For the first time, an international legal instrument directly drafted for children clarified the position of the child's "special protected status". Firstly, the Optional Protocol broke down the barrier of the implied discrimination against children of the ages of sixteen and seventeen by the drafting of Article 3(1). This Article obliges state parties to raise the minimum age of voluntary recruitment from that set out in Article 38 of the Convention. Recalling that the age prohibiting recruitment was only for children fifteen and below, and that it now provides that the principle of protecting the child from armed conflict recognises that children **under the age of eighteen** are also entitled to **special protection**. Secondly, the Optional Protocol prohibited the recruitment or use of children under the age of eighteen by armed groups and specifically avoids the classification of "direct" use only.[505]

Where the Optional Protocol finds its strength in creating a blanket ban for rebel armed groups from recruiting or using children below the age of eighteen, it ironically fails to create the same prohibition for state parties. Instead, it implies that children older than fifteen may voluntarily enlist into their state armed forces.[506] By this creating the following gap in the law, a child below the age of eighteen is entitled to special protection so much so that the child is prohibited from playing any role in an armed conflict if it is at the behest of a non-state armed group only. The child may still become

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[504] The preamble Optional Protocol to the Convention on the Rights of the child on the Involvement of Children in Armed Conflict (2002). "*Considering, therefore, that to strengthen further the implementation of rights recognized in the Convention on the Rights of the Child there is a need to increase the protection of children from involvement in armed conflict.*"

[505] Article 3(1) of the Optional Protocol to the Convention on the Rights of the child on the Involvement of Children in Armed Conflict (2002).

[506] Article 2 of the Optional Protocol to the Convention on the Rights of the child on the Involvement of Children in Armed Conflict (2002).

a victim of an armed conflict if it is at the behest of the state party permitting the voluntary enlistment of the child older than fifteen.[507]

In drawing a conclusion with regard to the relevance and applicability of the Rome Statute, the above research dictates the following with regards to the child's special protected status.

Until 2002, and with the adoption of the Optional Protocol, a child is any individual under the age of eighteen years old and is entitled to special protection.[508] The protection is special in the sense that the child is prohibited from being recruited or used in hostilities by any armed group distinct from the armed forces of a State. The child may voluntarily enlist into its national armed forces from the age of fifteen, but may not take a direct part in hostilities.

International law recognises that it is the state's responsibility to implement the provisions of the Convention on the Rights of the Child and that state parties are obligated to cooperate with one another in the implementation of the Optional Protocol.[509] This cooperation includes providing assistance through existing multilateral, bilateral or other programmes established through the General Assembly. The special protected status of the child includes the continuous improvement of the situation of children without distinction, as well as, for their development and education in conditions of peace and security. Furthermore, raising the age of possible recruitment into armed forces and their participation in hostilities will contribute effectively to the implementation of the principle that the **best interests of the child** are to be the primary consideration in all actions concerning children.

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[507] S Bosch, "Targeting and prosecuting 'under-aged' child soldiers in international armed conflicts, in light of the international humanitarian law prohibition against civilian direct participation in hostilities", (2012), *XLV CILSA* 342.

[508] M Happold, "Child Soldiers: victims or perpetrators?", (2008), 29, *University La Verne Law Review* 67.

[509] T Begley, "The Extraterritorial Obligation to Prevent the Use of Child Soldiers", (2012), 27(3), *The American University International Law Review* 620.

3.7 [D]

Do the provisions contained in Article 8(2) (b) (xxvi) and Article 8(2) (e) (vii) respectively (a) regulate the breach of these rules effectively and (b) Do they reflect the current law or custom applicable to armed conflicts in an established international framework of international law?

Recalling that Article 8 of the Rome Statute classifies the term "war crimes"[510] and reminds its member states that conscripting or enlisting children under the age of fifteen into their national armed forces or using these children to participate actively in hostilities is a war crime.[511] Similarly, it is also considered a war crime if these children were enlisted or conscripted by armed groups distinct from a state armed force.[512]

It is important to note that the "War Crimes" determined by the Rome Statute and referred to above are considered to be serious violations of the laws and customs applicable in armed conflict. In further elaborating on this point, these particular "War Crimes" should reflect the **current** custom and framework of international law and, in particular, international humanitarian law and international criminal law. Surprisingly, Article 8 (a) describes war crimes to mean grave breaches of the Geneva Conventions of 12 August 1949. The consequence of this is that the framework of what should constitute a war crime or even a grave breach under international law is codified by reference to a standard which was accepted more than 70 years ago.

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[510] G Waschefort, "Justice for Child Soldiers? The RUF Trial of the Special Court for Sierra Leone", (2010), 1, *International Humanitarian Legal Studies* 192.

[511] Article 8 (2) (b) (xxxvi)The Rome Statute of the International Criminal Court, Done at Rome on 17 July 1998, in force on 1 July 2002, United Nations, Treaty Series, Vol. 2187, No. 38544, Depositary: Secretary-General of the United Nations, http://treaties.un.org (Accessed on 28 September 2019).

[512] Article 8 (2) (e) (vii)The Rome Statute of the International Criminal Court, Done at Rome on 17 July 1998, in force on 1 July 2002, United Nations, Treaty Series, Vol. 2187, No. 38544, Depositary: Secretary-General of the United Nations, http://treaties.un.org (Accessed on 28 September 2019).

The researcher submits this argument owing to the fact that the applicable international legal instruments and custom which has developed since the adoption of the Geneva Conventions of 1949 suggests an amendment from the old to the current international law framework with regards to the protection of children.

Article 8 of the Rome Statute simply does not meet the current needs of children deemed to be participating in an armed conflict. The difficulty which arises is that the Rome Statute regulates the International Criminal Court and authorises the court with the necessary jurisdiction to adjudicate over particular crimes. This, in turn, elevates the Rome Statute to be the metaphorical gatekeeper of the purest standards to which the child under international criminal law is protected. The researcher argues that it is not enough for human rights instruments or customary international law to grow and develop with time if the body of law which was created to apply and enforce these principles fails to adapt and modernise itself to the current phenomenon of child soldiers.

The argument entailing that the International Criminal Court lacks in its classification of “War Crimes” and consequently fails in properly defining the protection afforded to the child in armed conflict is not difficult to accept,[513] purely because what the law requires and urges from the international community, compared to what the International Criminal court may exercise jurisdiction over, are worlds apart.

The Rome Statute was adopted in July 2002, almost twelve years after the adoption of the Convention on the Rights of the Child, in 1990. The Rome Statute still provides only for the protection of children under the age of fifteen actively participating in armed conflict. This could be understood when one considers what standard of protection was afforded to the child by the Geneva Convention’s Additional Protocols, namely

[513] A McQueen, “Falling through the Gap: The Culpability of Child Soldiers under International Criminal Law”, (2018), 94(2), *Notre Dame Law Review Online,* at page 112 McQueen argues that the United Nations international criminal tribunals and the ICC have sidestepped the question of children’s culpability.

that it was the child under the age of fifteen years old who was guaranteed humane treatment and provided the special protected status.[514]

Over time and with the development of the Convention on the Rights of the Child, we now know that eighteen years of age is the age that is the most widely accepted under international law as the universally agreed age of the child.[515] The international community further accepts that it is not just the age of the child that the law aims to protect, but rather the child's childhood, recalling that the Convention on the Rights of the Child noted that "childhood" is entitled to special care and assistance.

This means that the childhood tenured by the child is for the full eighteen years. This very childhood is guaranteed by the Convention to be special and, in viewing this, the child is entitled to special care and assistance. This special care and assistance, one could argue, is achieved through recognising that, for the full and harmonious development of the child's personality, the child should grow up in a family environment, in an atmosphere of happiness, love and understanding. This as understood by the researcher means that the child, viewed in light of her "best interests", is a child removed from the battlefield of an armed conflict. This, thus, makes any condoning of the child's role in armed conflict, be it direct or indirect, a contradiction of the child's best interests.

The Optional Protocol to the Convention was adopted in the same year as the Rome Statute, but the legislatures did not align their respective intentions towards protecting the child in a parallel fashion. The Optional Protocol, in the researcher's opinion, possesses three very important qualities which may encourage a possible amendment of the Rome Statute. The Optional Protocol, firstly, urges state parties to raise the minimum age for the voluntary recruitment of persons into their armed forces from that set out in article 38, paragraph 3 of the Convention. This is to be conducted by taking into account the principles contained in that article (the prohibition against recruiting

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[514] S Bosch, "Targeting and prosecuting 'under-aged' child soldiers in international armed conflicts, in light of the international humanitarian law prohibition against civilian direct participation in hostilities", (2012), *XLV CILSA* 330.

[515] I Topa, "The Prohibiton of child soldiering – international legislation and the prosecution of perpetrators", (2007), 3, *Hanse Law Review* 109.

any person under the age of fifteen and prioritising those who are older[516]) and recognising that, under the Convention, persons under eighteen are entitled to special protection.[517]

The second quality which the Optional Protocol possesses is that an armed group as distinct from state armed forces should not be permitted under any circumstances from recruiting or using in any way persons under the age of eighteen. As a result, children as defined in international law are prohibited under all circumstances from participating in armed conflict at the behest of a non-state armed force.

The third quality that the Optional Protocol possesses is that it recognises that the raising of the age of possible recruitment of persons into armed forces and their participation in hostilities will contribute effectively to the implementation of the principle that the best interests of the child are to be the primary concern.

As a result, Article 8 of the Rome Statute, in respect of the protection afforded to children, fails to meet the standards of the current laws and customs applicable to the protection of children within the established and modern framework of international law. In this respect, the definition of a "War Crime" relating to the conscription, enlistment or use of children in hostilities is set too low as a standard of protection. This is especially so when one considers that any individual below the age of eighteen is entitled to a special protected status. This is void of any distinction of the child's age, therefore, so regulating the protection of children under the age of fifteen only is not sufficient in a modern international framework relating to the laws applicable to children in armed conflict.

To arrive at this conclusion, the researcher also considers the International Labour Organisation's Convention No 182, as well as the African Charter on the Rights and Welfare of the Child. The Rome Statute requires a new definition of the "War Crime"

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[516] I Topa, "The Prohibiton of child soldiering – international legislation and the prosecution of perpetrators", (2007), 3, *Hanse Law Review* 109.

[517] S Bosch, "Targeting and prosecuting 'under-aged' child soldiers in international armed conflicts, in light of the international humanitarian law prohibition against civilian direct participation in hostilities", (2012), *XLV CILSA* 329.

for enlisting and recruiting children into hostilities, not only to be more aligned with the latter conventions but also to fill the gap created by its own provisions.

By providing that it is only a war crime to enlist, conscript and utilise children in hostilities below the age of fifteen, it is suggested that children between fifteen and eighteen are void of any consequences by the International Criminal Court, recalling that Article 26 of the Rome Statute excludes the jurisdiction of the court over any person under the age of eighteen.[518] This, thus, creates a gap in the law whereby individuals under the age of eighteen who do conscript, enlist and utilise children in hostilities are void of any prosecution by the International Criminal Court, a position which is surely untenable and suggests the need for the correction and modernisation of the Rome Statute for its applicability to be effective.[519]

3.8 Conclusion

The international and national legal instruments discussed above illustrate a sound sense of development in considering how children are viewed in international law.[520]

Both international human rights law and international humanitarian law apply simultaneously, as both bodies of law contribute equally to the standards set by the international community. The convergence between these two bodies of law tend to create an overlap even more when considering that the child is entitled to a "special protected status", which assimilates and includes the child's protected childhood, thus

[518] Article 26 of The Rome Statute of the International Criminal Court, Done at Rome on 17 July 1998, in force on 1 July 2002, United Nations, Treaty Series, Vol. 2187, No. 38544, Depositary: Secretary-General of the United Nations, http://treaties.un.org (Accessed on 28 September 2019).

[519] S Bosch, "Targeting and prosecuting 'under-aged' child soldiers in international armed conflicts, in light of the international humanitarian law prohibition against civilian direct participation in hostilities", (2012), *XLV CILSA* 328.

[520] M Happold, "Child Soldiers: victims or perpetrators?", (2008), 29, *University La Verne Law Review* 67.

making the child's rights in armed conflict and outside of armed conflict that much more effective. The researcher argues here that is the principle of the best interests of the child which makes international humanitarian law and international human rights law equally applicable. One is more relevant only depending on the circumstances surrounding the child.[521]

When considering the timeline of the above legal instruments, one becomes aware that the notion of the child being seen as merely the autonomous right bearer shifts to the modern view of the child being the recipient of the international community's collective ideals and moral standards. You see this point develop through the early Geneva Convention's Additional Protocols, protecting the child under fifteen from being used as a soldier, to the more modern Optional Protocol which confirms the child's age of eighteen and provides that the child is entitled to special protected status during these years. This special protected status includes the child's schooling and harmonious development to the extent that the legislation even includes words such as family, love, happiness and peace. These words are all but exact opposites to the orthodox image of an armed conflict.

International law has also developed to include the principle of the best interests of the child and encourage this principle to be the primary concern in all matters relating to children. In this way, one notices the encouraging overlap between international human rights law and international humanitarian law.

In critically analysing the current legal instruments applicable to children in armed conflict, one needs to understand that the legal provisions alone are not sufficient. Preferably, it is the bridge that is built by the criminal sanctions imposed for the breach of those legal provisions which will prove their effectiveness. One acknowledges the importance of this parallel need, while accepting that the above legal instruments are more than eighteen years old but the phenomenon they were intended to ameliorate merely accrues with age or at the very least remains alive.

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[521] S Bosch, "Targeting and prosecuting 'under-aged' child soldiers in international armed conflicts, in light of the international humanitarian law prohibition against civilian direct participation in hostilities", (2012), *XLV CILSA* 342.

Chapter 4

The impact of armed conflict on a child's developing psychology

4.1 Introduction

Shown to be a separate school of thought yet to be canvassed is the idea that the deeds committed by children during their tenure as child soldiers are void of any personal attribution. There are various reasons for the lack of an internationally codified legal approach. When embarking on such a consideration, one has to acknowledge that the complexity of various international laws overlap,[522] for example, the rules of international human rights law, international humanitarian law and international criminal law require the sanctioning of specific deeds committed by the child in armed conflict, starting with the determination of the requirements for such deeds and concluding with a regulatory process for holding these specific deeds accountable.

From the research discussed earlier in this thesis, one accepts that children have no lawful right to take a direct part in hostilities,[523] and, in fact, a child participating in

[522] M A Thomas, "Malice Supplies the Age: Assessing the Culpability of Adolescent Soldiers", (2013), 44 (1), *California Western International Law Journal*, at page 1-2. Thomas submits that there are numerous international conventions that have sought to address and prevent the use of child soldiers.

[523] M Houle, "The Legal responsibility of Child Soldiers", (2018), 8, *International Law Yearbook*, at page 195 Houle argues that the international community has already deemed it a crime to utilize children in war, the issue is whether or not they should be prosecuted, due to their age or circumstances surrounding their participation in the armed conflict, whether through reconciliation, restorative justice or traditional prosecution, child soldiers that commit grave international crimes should be held accountable.

armed conflict possesses the elusive "special protected status".[524] One may similarly accept that children who are found to be directly participating in armed conflict are a product of the breach of the adult's obligation to prohibit such involvement under international law,[525] not forgetting that the International Criminal Court does not possess the necessary jurisdiction to prosecute the child who commits a prohibited deed.[526]

Despite the prohibition of children being recruited into armed conflict, this does not escape the fact that child soldiers are still being deployed, used and detained across the world.[527] There is support for the view that, as a result of the child's recruitment being prohibited or declared unlawful, the consequent prosecution of this child should not be permitted.[528] The inevitable question relates to whether international law takes

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[524] M Mehdi Ali, "Omar Khadr's Legal Odyssey: The Erasure of Child Soldier as a Legal Category", (2018), 46(2), *Georgia Journal of International and Comparative Law* 352. See also M Happold, "Child soldiers: Victims or Perpetrators?", (2008), 29, *University La Verne Law Review* 86.

[525] M Houle, "The Legal responsibility of Child Soldiers", 2018, 8, *International Law Yearbook*, at page 193 Houle recognises that the use of child soldiers has been criminalized, however, there still remains debate regarding the criminal responsibility of these children upon reaching the age of majority.

[526] Article 26 of The Rome Statute of the International Criminal Court, Done at Rome on 17 July 1998, in force on 1 July 2002, United Nations, Treaty Series, Vol. 2187, No. 38544, Depositary: Secretary-General of the United Nations, http://treaties.un.org (Accessed online 19 April 2020). A McQueen, "Falling through the Gap: The Culpability of Child Soldiers under International Criminal Law", (2018), 94(2), *Notre Dame Law Review Online*, at page 118 McQueen reminds the reader that Article 26 of the Rome Statute may limit the International criminal Court's jurisdiction, but it does not limit other international tribunals from assessing the child's culpability.

[527] M A Thomas, "Malice Supplies the Age: Assessing the Culpability of Adolescent Soldiers", (2013), 44(1), *California Western International Law Journal* 2.

[528] M Mehdi Ali, "Omar Khadr's Legal Odyssey: The Erasure of Child Soldier as a Legal Category", (2018), 46, *Georgia Journal of International and Comparative Law*354.

into account the background of the child who has been raised in and by an armed conflict, despite these circumstances being prohibited. Is it then justice to apply uniform rules in the face of such an exceptional and misguided upbringing?[529] The researcher will argue that the modernisation of the law is required and that the manner in which international law views the child requires adaptation.

In this chapter, the emphasis is placed on the child's numerical age being regarded as a determining factor for protection under international law, whilst comparing this age to the psychology of the child in armed conflict.[530] The researcher then considers the ongoing debate about whether child soldiers are victims or perpetrators.[531] This will be concluded by offering an attempt to answer the question about the criminal responsibility of child soldiers for deeds committed during armed conflict.

4.2 Should numerical age be the determining factor when considering the definition of a child in armed conflict?

It is well established in international human rights law that a child is considered to be any human being below the age of eighteen years, unless the domestic law applicable to the child establishes majority to be at an earlier age.[532] One may accept that in circumstances where domestic law stipulates that majority is attained at a younger

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[529] A McQueen, "Falling through the Gap: The Culpability of Child Soldiers under International Criminal Law", (2018), 94(2), *Notre Dame Law Review Online* 101.

[530] A Veale, "*The Criminal Responsibility of Former Child Soldiers: Contributions from Psychology*" Chapter 7 of: From Peace to Justice "International Criminal Accountability and the Rights of Children", Edited by K Arts and V Popovski, 2005 97.

[531] M A Thomas, "Malice Supplies the Age: Assessing the Culpability of Adolescent Soldiers", (2013), 44(1), *California Western International Law Journal*2.

[532] Article 1 of The Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by the General Assembly resolution 44/25 of 20 November 1989, and entry into force 2 September 1990, in accordance with article 40.

age,[533] the international community still encourages the age of eighteen to be the universal norm.[534] *The Beijing Rules* focus on juvenile justice, and rule 4 of these rules provides that:

> *"National legal systems adopting a specific age for criminal responsibility and provides that the beginning of that age shall not be fixed at too low an age level and that facts of emotional, mental and intellectual maturity must be kept in mind".*[535]

Thomas is of the opinion that this provision is vague and unhelpful, owing to the fact that the minimum age for criminal responsibility varies from region to region.[536]

This norm is amplified when one recalls that children below the age of eighteen are prohibited from taking a direct part in hostilities under international human rights law. This makes sense when one further recalls that the International Criminal Court does

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[533] M Mehdi Ali, "Omar Khadr's Legal Odyssey: The Erasure of Child Soldier as a Legal Category", (2018), 46, *Georgia Journal of International and Comparative Law,* at page 354 Mehdi Ali provides that the America's internal policy is to treat individuals only under the age of sixteen as children.

[534] Article 4 of The Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by the General Assembly resolution 44/25 of 20 November 1989, and entry into force 2 September 1990, in accordance with article 40. See also A McQueen, "Falling through the Gap: The Culpability of Child Soldiers under International Criminal Law", (2018), 94(2), *Notre Dame Law Review Online*, at page 109 McQueen argues that the Convention defines a child as every human being below the age of eighteen.

[535] Rule 4, "Age of Criminal Responsibility", United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("*The Beijing Rules*"), A/RES/40/33, and 29 November 1985. See also C McDiarmid, "*What Do They Know? Child-Defendants and the Age of Criminal Responsibility: A National Law Perspective"* Chapter 6 of: From Peace to Justice "International Criminal Accountability and the Rights of Children", Edited by K Arts and V Popovski, 2005 86.

[536] M A Thomas, "Malice Supplies the Age: Assessing the Culpability of Adolescent Soldiers", (2013), 44(1), *California Western International Law Journal* 8.

not have jurisdiction[537] over persons who were eighteen and below when an alleged crime was committed.[538]

In considering the historical timeline of children's rights in international law, one recognises that, with modernisation, albeit its being a slow process, the law does develop over time. The actual term "childhood" is a relatively modern concept attributable to Western-European ideals.[539] The early documents, drafted by Jebb and referred to in Chapter 2 of this project, served merely to be a blueprint for what the Convention on the Rights of the Child purports to offer. The strong narrative being considered with the modernisation of children's rights is the actual age limit imposed for their protection, but "age" in times of war is not always an easy determination. In most instances, there is a lack of available documentation confirming the child's real age.[540]

Houle suggests that non-governmental organisations and academics over recent years have argued that the "Straight-18" position is what the modern world requires. This position views that children under the age of eighteen are prohibited from being recruited into armed conflict, but they are also barred from criminal prosecution for war

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[537] Article 26 of The Rome Statute of the International Criminal Court, Done at Rome on 17 July 1998, in force on 1 July 2002, United Nations, Treaty Series, Vol. 2187, No. 38544, Depositary: Secretary-General of the United Nations, http://treaties.un.org (Accessed online 19 April 2020). See also A McQueen, "Falling through the Gap: The Culpability of Child Soldiers under International Criminal Law", (2018), 94(2), *Notre Dame Law Review Online* 118.

[538] M Houle, "The Legal responsibility of Child Soldiers", (2018), 8, *International Law Yearbook*, at page 198-199.

[539] M Houle, "The Legal responsibility of Child Soldiers", (2018), 8, *International Law Yearbook*, at page 200.

[540] M A Thomas, "Malice Supplies the Age: Assessing the Culpability of Adolescent Soldiers", (2013), 44(1), *California Western International Law Journal*, at page 7 Thomas argues that, some former Burmese child soldiers claim to have been simply ignored when they informed recruitment staff of their age and, in other cultures, age is of less importance and a child may simply not know or care if he or she is sixteen, seventeen, or eighteen years old.

crimes.[541] Herein lies the debate about whether the strongest protection is afforded to the child only under the age of fifteen and not to the child eighteen and younger.[542] According to Davison, *there is palpable tension in considering when child soldiers are victims, when they are criminals, and at what age it shifts*.[543]

There are various reasons for this determination, but, if one focusses purely on international human rights documents, the most cogent reason is that the upbringing and development of the child are paramount to its best interest.[544] Recalling that the Optional Protocol to the Convention on the Rights of the Child provides that the best interests of the child are to be the primary consideration in all actions concerning children.

International Humanitarian Law also has its voice on the topic and, if one considers the wording of Article 77 of Additional Protocol 1 to the Geneva Conventions, it provides that:

> "*Children shall be the object of special respect and shall be protected against any form of indecent assault. The Parties to the conflict shall provide them with care and aid they require*, *whether because of their age or for any other reason."*[545](Own emphasis)

[541] M Houle, "The Legal responsibility of Child Soldiers", (2018), 8, *International Law Yearbook*, at page 198.

[542] M A Thomas, "Malice Supplies the Age: Assessing the Culpability of Adolescent Soldiers", (2013), 44 (1), *California Western International Law Journal*, at page 10 Thomas submits that there is a lack of consensus on the minimum age for participation in armed conflicts.

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

[544] Article 3(1) of The Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by the General Assembly resolution 44/25 of 20 November 1989, and entry into force 2 September 1990, in accordance with article 40.

[545] Article 77(1), 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. See also A

The importance of the wording used by the drafters of this article is critical. After proper dissection, one can glean the following:

1) International Humanitarian Law attempts to walk across the bridge of including all children deemed to be protected under international human rights law. This is done by recognising the minimum age of fifteen (which was set then in 1977), yet also allowing room to protect children that fall under the auspices of "or for any other reason".

2) The word "or" here implies conjunction, despite its common use for separating various conditions, where it joins "age" with "for any other reason". The researcher argues that this article proves that one should not merely look at "age" as the main determining factor of the definition of a "child" under international law but "any other reason" that may be relevant.

3) The article itself is vague. What would fall under the ambit of "for any other reason"? What issues should the international community take into account when providing special respect and protection towards children against any form of indecent assault?

4) Since this article is drafted for times of war, should this article limit the lawful targeting (indecent assault) of a child directly taking part in hostilities if his or her tenure as a child soldier falls under the "for any other reason" condition?

The reason the researcher focusses this subtopic on the child's age is because of the opinion that it appears somewhat naive to view all children with the same blanket age whilst acknowledging that different children develop and grow at various psychological levels and at different ages.[546] This is even more the case when the child is placed in

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McQueen, "Falling through the Gap: The Culpability of Child Soldiers under International Criminal Law", (2018), 94(2), *Notre Dame Law Review Online* 107-108.

[546] M Houle, "The Legal responsibility of Child Soldiers", (2018), 8, *International Law Yearbook*, at page 195 Houle states that, The difficulty in arguing that these individuals should not be exempt from legal responsibility, whether through prosecution or mandatory reconciliation

armed conflict.[547] Boyden argues that when one generalizes by stating that all children are immature and dependent, one consequently ignores the resourcefulness of many children of all age groups and the social development of some children beyond those early stages of childhood.[548]

The difference in the specific age of the child also plays a large role. Thomas argues that in children aged sixteen and above the preference for risk-taking is at its peak.[549] It is, therefore, submitted that one should not apply a blanket age of protection on individual children with the expectation that a fifteen-year-old girl in a first world country reacts, responds and matures similarly to a fifteen-year-old girl in a developing country.[550]

Age in respect of children in armed conflict should not be the yardstick of innocence, as Pangalangan correctly points out:

> "*surely the hunted does not* ipso facto *become the hunter upon his eighteenth birthday. Indeed, if the laws were meant to protect the child, it is inapposite to*

programs, begins with the misconception that childhood is a rigid and universal concept, and certain stereotypes impeding understanding an argument for responsibility.

[547] A Cowley, J Edwards and K Salarkia, "Responding to children's mental health in conflict", a report by Save the Children: Road to Recovery, First Published 2019. Savethechildren.org.uk. last accessed online 28 February 2020, at page 5 of the report the authors analyse the war on children and closely examine the mental health of the child affected by armed conflict.

[548] J Boyden, "Children under Fire: Challenging Assumptions about Children's Resilience", (2003), 13 (1), *Children Youth and Environments* 1. See also M Houle, "The Legal responsibility of Child Soldiers", (2018), 8, *International Law Yearbook* 213.

[549] M A Thomas, "Malice Supplies the Age: Assessing the Culpability of Adolescent Soldiers", (2013), 44(1), *California Western International Law Journal*9.

[550] J Boyden, "Children under Fire: Challenging Assumptions about Children's Resilience", (2003), 13(1), *Children Youth and Environments* 1. See also M Houle, "The Legal responsibility of Child Soldiers", (2018), 8, *International Law Yearbook*214.

> *suggest that individual criminal liability can then be imposed by the sheer passage of time"*.[551]

The researcher takes two very important aspects into consideration. On the one hand, there is the view from international human rights law which places strong prohibitions on children forming any part of an armed conflict. On the other hand, if one considers international humanitarian law, the child, irrespective of his or her right to not take part in an armed conflict, is still a lawful target in executing a military objective.

We now recall the gap,[552] discussed in chapter 3 of this project, left open in respect of the child's "age"[553] and its afforded protection under international law. Here we recall that Article 38(2) of the Convention on the Rights of the Child provides that state parties should take all feasible measures to ensure children under the age of fifteen do not take a direct part in hostilities.[554]

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[551] R Pangalangan, "Dominic Ongwen and the Rotten Social Background Defense: The Criminal Culpability of Child Soldiers Turned War Criminals", (2018), 33(3), *American University International Law Review* 619-620.

[552] M Houle, "The Legal responsibility of Child Soldiers", (2018), 8, *International Law Yearbook*, at page 194 Houle discusses the various age limits imposed by the leading international legislation drafted to protect the child.

[553] M A Thomas, "Malice Supplies the Age: Assessing the Culpability of Adolescent Soldiers", (2013), 44(1), *California Western International Law Journal*, at page 4 Thomas notes that particularly ages fifteen to seventeen represent a more complex category than those aged fourteen and below.

[554] Article 38(2) of the Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by the General Assembly resolution 44/25 of 20 November 1989, and entry into force 2 September 1990, in accordance with article 40. See also A McQueen, "Falling through the Gap: The Culpability of Child Soldiers under International Criminal Law", (2018), 94(2), *Notre Dame Law Review Online*, at page 110 McQueen argues that this provision lacks in certain areas, this article does not protect children who indirectly participate in armed conflict, nor does it protect the child who "volunteers" for armed conflict participation.

Contrasting this fact with another, which is that the Optional Protocol to this Convention stipulated the age of the child as eighteen to be the bar for armed groups when recruiting children,[555] whilst the Rome Statute criminalises the use of child soldiers below the age of fifteen.[556] Unsurprisingly, no international tribunal has ever prosecuted a child soldier for crimes committed under either age threshold.[557]

The inequality the researcher exposes is that international human rights law obligates the international "adult" to protect the child's human right in not being a pawn in armed conflict. If we as the adults fail, which history has taught us is a past, present and future certainty, it is the child in the battlefield and under the auspices of international humanitarian law who pays the biggest price, which is the child's life.

The researcher argues that international humanitarian law and international human rights law need both to be directed towards the rehabilitation and best interests of the child.[558] The most recent consensus regarding the age limit of children in armed conflict is the Paris Principles,[559] even though the principles are not universal treaty law yet. They, however, prove that the international community sets an age for armed

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[555] Article 4 of the Optional Protocol to the Convention on the Rights of the child on the Involvement of Children in Armed Conflict (2002).

[556] Article 8 (2) (b) (xxvi) of The Rome Statute of the International Criminal Court, Done at Rome on 17 July 1998, in force on 1 July 2002, United Nations, Treaty Series, Vol. 2187, No. 38544, Depositary: Secretary-General of the United Nations, http://treaties.un.org (Accessed on 19 April 2020).

[557] D Crane, "*Strike Terror No More: Prosecuting the Use of Children in Times of Conflict-The West African Extreme*", at Chapter 9 of: From Peace to Justice "International Criminal Accountability and the Rights of Children" Edited by K Arts and V Popovski, 2005 119-127. See also M Houle, "The Legal responsibility of Child Soldiers", (2018), 8, *International Law Yearbook* 195.

[558] M Mehdi Ali, "Omar Khadr's Legal Odyssey: The Erasure of Child Soldier as a Legal Category", (2018), 46, *Georgia Journal of International and Comparative Law* 356.

[559] The Paris Principles, "Principles and Guidelines on Children Associated with Armed Forces or Armed Groups", 2007. https://www.unicef.org/mali/media/1561/file/ParisPrinciples.pdf (Accessed on 20 April 2020).

conflict involvement and confirms the age of eighteen to be the limit .[560] The "straight 18" argument has grown in strength over recent years.[561] Houle argues that international legislation that limits the child's protection from armed conflict to the age of fifteen, is not in accordance with other international instruments offering the child protection up to the age of eighteen.[562] This creates a greater risk to the child as a lack of uniformity brings about confusion.[563] The issue of "age" being the determining factor of protection, is that the child participating in armed conflict relinquishes the protection of international law when he or she reaches the age of eighteen. Therefore, metaphorically replacing his or her badge of being a victim, with summarily being cast as the adult perpetrator in a war that the child was supposed to be protected from.[564]

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[560] C Dore, "What to do with Omar Khadr? Putting a child soldier on trial: Questions of international Law, Juvenile Justice and Moral Culpability", (2008), 41, *John Marshall Law Review* 1299. A McQueen, "Falling through the Gap: The Culpability of Child Soldiers under International Criminal Law", (2018), 94(2), *Notre Dame Law Review Online* 120.

[561] M A Thomas, "Malice Supplies the Age: Assessing the Culpability of Adolescent Soldiers", (2013), 44 (1), *California Western International Law Journal*, at page 11 Thomas argues that this international organisations call for a complete ban on anyone under eighteen participating in armed conflicts, irrespective of whether it is at the behest of a national army or a rebel group. This has been opposed because many national governments continue to recruit children under the age of eighteen into their national forces.

[562] M Houle, "The Legal Responsibility of Child Soldiers", (2018), 8, *International Law Yearbook* 200.

[563] M A Thomas, "Malice Supplies the Age: Assessing the Culpability of Adolescent Soldiers", (2013), 44 (1), *California Western International Law Journal*, at page 4 Thomas reminds the reader that there is blanket prohibition on using children below the age of fifteen in armed conflict, but not a blanket ban on fifteen to seventeen year olds.

[564] R Pangalangan, "Dominic Ongwen and the Rotten Social Background Defense: The Criminal Culpability of Child Soldiers Turned War Criminals", (2018), No 3(33), *American University International Law Review*, at page 630 Pangalangan states that a *Verba Legis* appreciation of this provision suggests that in the eyes of the law, upon the child soldier's eighteenth birthday, he *ipso facto* sheds the protected status of victim, and dons the role of perpetrator.

At the time of writing this thesis, there exists no global agreed-upon age for adulthood nor criminal culpability.[565] The individual age limits set at a national level are vast and range considerably, irrespective of the assumption that eighteen is the universal age limit.[566] The submission is that the "straight 18" position is what the present and the future of children's protection from armed conflict requires,[567] as history to date has proven that any other limit has not solved the pandemic of the ever-growing numbers of child soldiers. If international human rights law and international humanitarian law remain parallel but not married, the child will always be the one who is at risk of the greatest punishment.

4.3 The psychological effects of armed conflict versus criminal responsibility

Psychology is a vital consideration when one looks at why international law affords protection to the child in armed conflict. The Convention on the Rights of the Child considers that the child, for her full and harmonious development of personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding.[568] The psychology of the child does not become a less important

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[565] A Veale, "*The Criminal Responsibility of Former Child Soldiers: Contributions from Psychology*", at Chapter 7 of: From Peace to Justice "International Criminal Accountability and the Rights of Children", Edited by K Arts and V Popovski, 2005 97.

[566] M Houle, "The Legal Responsibility of Child Soldiers", (2018), 8, *International Law Yearbook* 199.

[567] M A Thomas, "Malice Supplies the Age: Assessing the Culpability of Adolescent Soldiers", (2013), 44 (1), *California Western International Law Journal* 9-11. See also M Houle, "The Legal Responsibility of Child Soldiers", (2018), 8, *International Law Yearbook* 200.

[568] The preamble to The Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by the General Assembly resolution 44/25 of 20 November 1989, and entry into force 2 September 1990, in accordance with article 40.

consideration once the child is found to be taking part in hostilities; in fact, it becomes more important under international criminal law.

The child is legally prohibited from taking a direct part in hostilities making his role therein unlawful in itself. The Convention on the Rights of the Child provides that:

> *"A child should be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which take into account the child's age and the desirability of promoting the child's re-integration and the child assuming a constructive role in society".*[569]

Despite this illegality surrounding the child in armed conflict, the fruits from this poisonous tree enable the opposing side to lawfully target the child on the battlefield, even though international criminal law suggests that the child itself is acting under duress or at the very least at the behest of illegal instructions. One, therefore, has to look beyond the legal obligations prohibiting the use of children in armed conflict and consider the child's deeds in the light of her psychological capacity and potential culpability.[570]

According to Dore, adolescence is undoubtedly a time of unrest and a complicated period in any individual's life.[571] It may well be accepted that juveniles are more likely to be unable to resist peer pressure with a limited ability to restrain impulses and aggression, and the inability to understand long-term consequences.[572] While Thomas

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[569] Article 40, The Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by the General Assembly resolution 44/25 of 20 November 1989, and entry into force 2 September 1990, in accordance with article 40.

[570] M Houle, "The Legal Responsibility of Child Soldiers", (2018), 8, *International Law Yearbook* 195.

[571] C Dore, "What to do with Omar Khadr? Putting a child soldier on trial: Questions of international Law, Juvenile Justice and Moral Culpability", (2008), 41, *John Marshall Law Review*1281.

[572] A McQueen, "Falling through the Gap: The Culpability of Child Soldiers under International Criminal Law", (2018), 94(2), *Notre Dame Law Review Online*103. See also C Dore, "What to

argues that children are more docile and easily manipulated compared to adults, they are equipped with a greater susceptibility to be fearless and take larger risks.[573] In the researcher's opinion, in either of the above views, when that impressionable and youthful mind is placed in the arena of an armed conflict, it negatively affects a child's psyche by abandoning typical civil behaviour and social constructs and replacing it with conflict/war themed philosophies.[574]

The information alluded to above provided by Dore is rather easy to digest and it appears to be a logical consequence of any individual maturing through life. The researcher suggests that all of these factors mentioned above are merely a micro-organism of the psychological aspect relating to children in armed conflict.[575] These factors might make the child more susceptible to being a useful tool in armed conflict,

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do with Omar Khadr? Putting a child soldier on trial: Questions of international Law, Juvenile Justice and Moral Culpability", (2008), 41, *John Marshall Law Review*1303.

[573] M A Thomas, "Malice Supplies the Age: Assessing the Culpability of Adolescent Soldiers", (2013), 44 (1), *California Western International Law Journal* 9.

[574] R Pangalangan, "Dominic Ongwen and the Rotten Social Background Defense: The Criminal Culpability of Child Soldiers Turned War Criminals", (2018), 33(3), *American University International Law Review*, at page 62 Pangalangan describes this as, a brutal process where a child is brainwashed to abandon well-known social paradigms and adopt a war-themed philosophy.

[575] A Veale, "*The Criminal Responsibility of Former Child Soldiers: Contributions from Psychology*", at Chapter 7 of: From Peace to Justice "International Criminal Accountability and the Rights of Children", Edited by K Arts and V Popovski, 2005, at page 99 Veale recalls that, The very little outcome evidence that exists on the psychosocial well-being of former child soldiers is mixed…….ex-child fighters have developed important skills and leadership experience and, in his experience are more confident, self-reliant, mature and developmentally advanced than many of those that stayed their families and never fought.

but they do not suggest clinically that the child is not *compos mentis* nor does the child fail in recognising right from wrong.[576]

Properly to suggest that one understands the role that psychology plays in children's involvement in armed conflict, one should analyse not only the child's demeanour or lack thereof, but also analyse the child's psychological capacity. The researcher argues that both the child's psychological capacity and her physical environment will affect the child's behaviour. We recall that The Beijing Rules require that, when setting an age for criminal responsibility, one considers the facts of emotional, mental and intellectual maturity.[577]

According to Dore, research over the last twenty years has indicated that, specifically, the frontal lobe of the brain undergoes drastic changes during the teenage years.[578] In fact, the only time that the brain develops more quickly is in the first three years of being born.

Dore argues that:

> *"Generally, two major brain centres control how a person acts. The amygdala, nestled in the core of the brain, controls basic functions and instinct and survival, and notably, identifies and reacts to perceived threats. Actions controlled by this sector of the brain are characterised as emotional, impulsive, and often aggressive. In contrast, the frontal lobe (including prefrontal cortex)*

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[576] C Dore, "What to do with Omar Khadr? Putting a child soldier on trial: Questions of international Law, Juvenile Justice and Moral Culpability", (2008), 41, *John Marshall Law Review* 1304.

[577] Rule 4, "Age of Criminal Responsibility", United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("*The Beijing Rules*"), A/RES/40/33, and 29 November 1985. See also M A Thomas, "Malice Supplies the Age: Assessing the Culpability of Adolescent Soldiers", (2013), 44 (1), *California Western International Law Journal* 8.

[578] J Aronson, "Brain imaging, Culpability and the Juvenile Justice System", (2007), 13 (2), *Psychology Public Policy and Law* 115. See also C Dore, "What to do with Omar Khadr? Putting a child soldier on trial: Questions of international Law, Juvenile Justice and Moral Culpability", (2008), 41, *John Marshall Law Review* 1306.

> *controls higher functioning, such as impulse control, reasoning, perspective and moral judgment."*[579]

It goes without saying that a fully-functioning individual, with the potential to contribute effectively to society, enjoys the full benefit of both of these brain centres. With a specific focus on children in armed conflict and this particular body of work, proper consideration of the "frontal lobe" is paramount. The child's deeds committed during armed conflict all originate from her assumed impulse control, reasoning, perspective and moral judgment.

At this juncture, one has to recall the dilemma surrounding most children affected by armed conflict as alluded to in chapter 1 and 2 of this thesis, recalling specifically that children of all ages have been victims of recruitment into armed conflict, even those that are below the age of thirteen.[580]

The researcher argues that, before one can technically decipher the definition of maturity, the children aimed to be protected often fall within age groups (twelve and younger) that at a biological level exclude them from any psychological capacity relating to a developed brain.[581] Research indicates that the frontal lobe does not develop fully until late in the child's teenage years and it has been referred to as the executive function of the brain as it displays executive control over various other parts of the brain. Dore argues that because the frontal lobe displays control over the

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[579] C Dore, "What to do with Omar Khadr? Putting a child soldier on trial: Questions of international Law, Juvenile Justice and Moral Culpability", (2008), 41, *John Marshall Law Review*, at page 1306 Dore argues that the frontal lobe is often referred to as the CEO of the brain, at it displays executive control over various other parts.

[580] A McQueen, "Falling through the Gap: The Culpability of Child Soldiers under International Criminal Law", (2018), 94(2), *Notre Dame Law Review Online*, at page 103 McQueen states that, a paradigmatic child soldier is in his or her late preteen to midteenage years with the average being between twelve and thirteen years old.

[581] R Pangalangan, "Dominic Ongwen and the Rotten Social Background Defense: The Criminal Culpability of Child Soldiers Turned War Criminals", (2018), 3(33), *American University International Law Review* 619.

amygdala, the child's brain will rely heavily on the amygdala when making decisions and processing information.[582]

At a biological level, the brain develops literally back to front, which means that basic functions, such as senses and survival develop first, while more complex functions, such as impulse control, recognising future consequences and moral judgement are all developed last. Dore describes this physical development as follows:

> *"First, there is an increase of myelin, or white matter, around brain cells, which increases the speed and reliability of brain communication; second, there is a decrease in gray matter through a process of "pruning", whereby brain cells become more efficient. Both of these sequences show measurable increases in the frontal lobe during adolescence, while the rest of the brain completes these two phases much earlier in childhood."*[583]

One gathers from the above that, simply put, the child is not only different from an adult with respect to simple demeanour and behavioural characteristics alone, but also the child's psychological capacity merely does not allow for a more mature reaction and understanding at such a young age. In essence, one has to comprehend that children's rights and the international law applicable to children are legal principles protecting those individuals who are below the age of eighteen and who have not developed full psychological capacity.[584]

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[582] C Dore, "What to do with Omar Khadr? Putting a child soldier on trial: Questions of international Law, Juvenile Justice and Moral Culpability", (2008), 41, *John Marshall Law Review*1307.

[583] C Dore, "What to do with Omar Khadr? Putting a child soldier on trial: Questions of international Law, Juvenile Justice and Moral Culpability", (2008), 41, *John Marshall Law Review* 1306-1308.

[584] A McQueen, "Falling through the Gap: The Culpability of Child Soldiers under International Criminal Law", (2018), 94(2), *Notre Dame Law Review Online* 120.

This particular psychology of the child requires to be understood in the light of the most difficult circumstances and surroundings facing any human being.[585] The psychological capacity referred to above and discussed by Dore relates to the average child's psychological capacity, which is very broad compared to that of the child within the arena of an armed conflict.

If one were to take a fifteen-year-old child who is considered mature and position her within a normal schooling environment which is surrounded by peace, and then use this child as the benchmark of a child's psychological capacity, this same mature fifteen-year-old, would undoubtedly respond differently if she were placed in an armed conflict and, even more so compared to an adult subjected to armed conflict.[586] The researcher argues that when one considers the psychology of the child participating in armed conflict, there needs to be an understanding that there is a considerable difference between the child's psychological capacity and that of an adult.[587]

Furthermore, there exists a greater inequality between the average child's psychological capacity and that of the psychological capacity of a child who was raised

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[585] N Mole, *"Litigating Children's Rights Affected by Armed Conflict before the European Court on Human Rights*", at Chapter 13 of: From Peace to Justice "International Criminal Accountability and the Rights of Children", Edited by K Arts and V Popovski, 2005, at page 180 Mole states that, although they have often been party to unbelievable violence, often against their own families or communities, such children are exposed to the worst dangers and horrible suffering, both psychological and physical.

[586] M A Thomas, "Malice Supplies the Age: Assessing the Culpability of Adolescent Soldiers", (2013), 44 (1), *California Western International Law Journal*, at page 7 Thomas argues that, while this is a harsh conclusion, a fifteen to seventeen year old individual in western Africa may be expected to display a higher degree of maturity in his or her community than someone of the same age who has grown up in a western country.

[587] A Veale, "*The Criminal Responsibility of Former Child Soldiers: Contributions from Psychology*", at Chapter 7 of: From Peace to Justice "International Criminal Accountability and the Rights of Children", Edited by K Arts and V Popovski, 2005, at page 102 Veale argues that, Conflict impacts massively on developmental transition opportunities from childhood to adulthood.

within the environment of an armed conflict. Even to comprehend what psychological impact such a background has on a developing frontal lobe of any individual is virtually impossible. The researcher submits that, as a result of the child's brain being underdeveloped, the prosecution of the child should be the last resort and rehabilitation the primary goal.[588] One simply should not ignore the decreased psychological development possessed by the child in armed conflict.

A report from Save the Children entitled "Responding to children's mental health in conflict" excellently encapsulates the mental state of children in armed conflict.[589] The report suggests that approximately twenty-four million children in armed conflict today experience high levels of stress which develop into mental health disorders requiring an appropriate level of support. The report identifies that the child's brain development and the stresses that fear and anxiety cause by traumatic events as well as separation from caregivers all contribute to negative or impeded brain development.

Mehdi Ali argues that, when one considers statistics and empirical data, it would be appropriate to look further than philosophical reasons for law-making as children should often not be held biologically responsible for their crimes.[590] When considering the "guilty mind" or the lack thereof, the child's age and mental development are equally contributing factors.

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[588] A McQueen, "Falling through the Gap: The Culpability of Child Soldiers under International Criminal Law", (2018), 94(2) *Notre Dame Law Review Online* 119. See also M Houle "The Legal Responsibility of Child Soldiers", (2018), 8, *International Law Yearbook* 213.

[589] A Cowley, J Edwards and K Salarkia, "Responding to children's mental health in conflict", a report by Save the Children: Road to Recovery, First Published 2019. www.Savethechildren.org.uk (Accessed on 28 February 2020) 5 and 6.

[590] M Mehdi Ali, "Omar Khadr's Legal Odyssey: The Erasure of Child Soldier as a Legal Category", (2018), 46, *Georgia Journal of International and Comparative Law* 353.

4.4 Is the child in armed conflict a victim or a perpetrator?

Pangalangan enlarged on this aspect when he conducted research into the effect on children abducted by the Lord's Resistance Army. Pangalangan writes:

> *"The methods employed by the LRA range from the unacceptable to the outlandish. Children were "required to participate not only in the murderous attacks on civilian camps but in the individual acts of torture and murder designed to convince recently abducted children that they were so steeped in blood that there could be no consequence for them back in civilian society". If not on the receiving end of the blow, it was common for the LRA to force children to witness or commit violent acts against their fellow abductees. On the other hand, "young recruits were made to taste the blood of the dead child after such a killing or eat with bloodied hands while sitting atop a dead body".*[591]

An aspect which affects the interpretation of the notion of "child soldiers" is whether these children are to be viewed in the light of their role in armed conflict as perpetrators of heinous crimes or whether these adolescents are to be seen as victims of a breach of international law prohibiting their recruitment.[592] This question in itself strikes at not only the human conscience but also at what degree justice equates itself with fairness. Thomas argues that this question is important because a post-conflict society yearns for a sense of closure and to seek justice for the victims.[593]

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[591] R Pangalangan, "Dominic Ongwen and the Rotten Social Background Defense: The Criminal Culpability of Child Soldiers Turned War Criminals", (2018), 33 (3), *American University International Law Review* 617. See also *Prosecutor v Ongwen*, Case No. ICC-02/04-01/15-T-22-ENG, Transcript of the Confirmation of Charges, at page 56.

[592] A McQueen, "Falling through the Gap: The Culpability of Child Soldiers under International Criminal Law", (2018), 94(2), *Notre Dame Law Review Online*, at page 100 McQueen states that, It is difficult to imagine that children could play any role in armed conflict apart from that of the victim.

[593] M A Thomas, "Malice Supplies the Age: Assessing the Culpability of Adolescent Soldiers", (2013), 44 (1), *California Western International Law Journal*, at page 4 Thomas asks why, if at

There are various avenues by which one could approach this question, and the answer will undoubtedly rest on what elements of the child's background or role in armed conflict is most emphasised. One is well aware of the fact that international law prohibits the participation of children in armed conflict. International criminal law considers it a war crime to enlist and use children below the age of fifteen in armed conflict.[594] The area of grey becomes rather more confusing when one considers that children in armed conflict are not able to be prosecuted for the deeds they commit under international law by the International Criminal Court,[595] and this makes the deeds that they commit during armed conflict a complicated conundrum when apportioning blame.

It is not universally accepted that children in armed conflict are seen simply as being faultless pawns.[596] Instead some authors and academics believe that this view could

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all, child soldiers should be treated as a special category. This policy question is important because of the need for a post-conflict society to gain a sense of closure and to seek justice for the victims.

[594] Article 8 of The Rome Statute of the International Criminal Court, Done at Rome on 17 July 1998, in force on 1 July 2002, United Nations, Treaty Series, Vol. 2187, No. 38544, Depositary: Secretary-General of the United Nations, http://treaties.un.org (Accessed on 19 April 2020). See also A Veale, "*The Criminal Responsibility of Former Child Soldiers: Contributions from Psychology*", at Chapter 7 of: From Peace to Justice "International Criminal Accountability and the Rights of Children", Edited by K Arts and V Popovski, 2005102.

[595] Article 26 of The Rome Statute of the International Criminal Court, Done at Rome on 17 July 1998, in force on 1 July 2002, United Nations, Treaty Series, Vol. 2187, No. 38544, Depositary: Secretary-General of the United Nations, http://treaties.un.org (Accessed on 19 April 2020). A McQueen, "Falling through the Gap: The Culpability of Child Soldiers under International Criminal Law", *Notre Dame Law Review Online*, (2018), 94(2) 118.

[596] R Pangalangan, "Dominic Ongwen and the Rotten Social Background Defense: The Criminal Culpability of Child Soldiers Turned War Criminals", (2018), 33 (3), *American University International Law Review*, at page 619 Pangalangan argues that, on the one hand many children are used as puppets in an adult conflict, they are exploited as couriers and sex slaves. Whilst becoming unfortunate and expendable casualties of war.

only be detrimental to the development of children's rights.[597] The researcher submits that, while one is not able to paint all children below the age of eighteen with the same brush of innocence and blamelessness, one similarly cannot take each deed committed by a child in armed conflict and assess it on a case-by-case basis. This would defeat the ends of justice and prohibit the real-life development of the law.

According to Thomas, the picture that one conjures up in one's mind when considering children in armed conflict is that of a young, skinny, African boy kidnapped from his family, addicted to drugs and clinging to a large machine gun.[598] This picture is most common and fills one with a natural notion of empathy for the child's assumed loss of innocence and dignity during armed conflict.[599]

While some academics dedicate their work to the belief that a child, irrespective of her actions, remains a victim,[600] there are authors who view the child's "victim" character merely to be a stereotype which is derived from a western ideology which presumes all children in armed conflict to be abused or kidnapped children who are then forced to commit heinous crimes.[601] Houle, in particular, argues that "*the international*

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[597] C McDiarmid, *What Do They Know? Child-Defendants and the Age of Criminal Responsibility: A National Law Perspective*, at Chapter 6 of: From Peace to Justice "International Criminal Accountability and the Rights of Children", Edited by K Arts and V Popovski, 2005, at page 86 McDiarmid submits that, this model is problematic in that it tends to perpetuate an image of children, as a group, as completely lacking in basic understandings and skills.

[598] M A Thomas, "Malice Supplies the Age: Assessing the Culpability of Adolescent Soldiers", (2013), *44 (*1), *California Western International Law Journal* 1-2.

[599] M A Thomas, "Malice Supplies the Age: Assessing the Culpability of Adolescent Soldiers", (2013), 44(1), *California Western International Law Journal* 2-3.

[600] A Veale, "*The Criminal Responsibility of Former Child Soldiers: Contributions from Psychology*", at Chapter 7 of: From Peace to Justice "International Criminal Accountability and the Rights of Children", Edited by K Arts and V Popovski, 2005 102.

[601] M Houle, "The Legal Responsibility of Child Soldiers", (2018), 8, *International Law Yearbook* 204.

community should not simply give them carte blanche because of their age, especially if the age is as high as 18 for a bar to prosecution".[602]

The researcher submits that the technical arguments that claim that not all children in armed conflict are victims but that instead they are perpetrators, require one to do the following:

1) Assume that the child in armed conflict possesses the necessary *mens rea;*

2) Ignore the fact that the child biologically possesses an underdeveloped brain;

3) Ignore that children in armed conflict are extremely vulnerable, without a traditional civil society to protect them nor provide regular forms of education:[603]

4) Assume that children in armed conflict are individuals who make choices and embark on their own decision making in order to survive:[604]

5) Ignore that many non-governmental organisations view the child in armed conflict as being a victim of institutionalised child abuse who has suffered human rights violations and psychological harm;[605]

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[602] M Houle, "The Legal Responsibility of Child Soldiers", (2018), 8, *International Law Yearbook* 203-204.

[603] A McQueen, "Falling through the Gap: The Culpability of Child Soldiers under International Criminal Law", (2018), 94(2), *Notre Dame Law Review Online* 101.

[604] M Houle, "The Legal Responsibility of Child Soldiers", (2018), 8, *International Law Yearbook* 204.

[605] C Kimmel and J Roby, "Institutionalised Child Abuse: The Use of Child Soldiers", (2007), No. 50 (6), *International Social Work*. See also M Houle, "The Legal Responsibility of Child Soldiers", (2018), 8, *International Law Yearbook*209.

6) Assume that the child is awarded rights similar to those of an adult only in respect of risking her life, but not to vote, not to drive, and, in some instances, not to enlist in its national armed forces;[606]

7) Forget that children do not have a choice about whether war finds them, but that, instead, they are subjected to one at the behest of the adult world;[607] and

8) Forget that children always lose the most in war, if not by risking their physical life then by the fact that their long-term access to education and healthcare is interrupted.[608]

When considering the child's status, be it that of victim or perpetrator in armed conflict and whether the culpability of the child is assumed because of her choices made during this tenure, one has to consider whether the child has volunteered for this role or been forcibly placed in this position.[609]

History proves that not all child soldiers are kidnapped and that a somewhat diminished sense of choice is made by the child. Some authors are of the view that this election by the child to play a role in armed conflict is not necessarily watered

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[606] C McDiarmid, *What Do They Know? Child-Defendants and the Age of Criminal Responsibility: A National Law Perspective*, at Chapter 6 of: From Peace to Justice "International Criminal Accountability and the Rights of Children", Edited by K Arts and V Popovski, 2005 93.

[607] M A Thomas, "Malice Supplies the Age: Assessing the Culpability of Adolescent Soldiers", (2013), 44 (1), *California Western International Law Journal* 12.

[608] R Pangalangan, "Dominic Ongwen and the Rotten Social Background Defense: The Criminal Culpability of Child Soldiers Turned War Criminals", (2018), 33 (3), *American University International Law Review* 619.

[609] A McQueen, "Falling through the Gap: The Culpability of Child Soldiers under International Criminal Law", (2018), 94(2), *Notre Dame Law Review Online*, at page 105 McQueen states that, Children's recruitment in armed conflict is either by force or voluntarily.

down because of the child's age and neither is the choice only the sum of the best possible solution.[610]

Some children elect to partake in an armed conflict because it provides a sense of purpose[611] and it is even recorded that, for some female children, it is a sign of independence and emancipation for a female to carry such a responsibility.[612] One must not forget either that, irrespective of their intention, these children remain responsible for extreme brutality.[613]

Houle argues that it is for these reasons (and yet others), that these particular children should be seen as individuals and that the narrative of child soldiers as faultless victims of circumstance is quite skewed.[614] Not only is viewing all child soldiers as victims inaccurate, but describing former child soldiers as emotionally crippled and damaged leads only to a one-dimensional image of complex individuals.[615] Houle argues that

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[610] A Veale, "*The Criminal Responsibility of Former Child Soldiers: Contributions from Psychology*", at Chapter 7 of: From Peace to Justice "International Criminal Accountability and the Rights of Children", Edited by K Arts and V Popovski, 2005, at page 99 Veale argues that participation in political violence may in some circumstances be an active coping strategy that serves a protective psychological function compared to an alternative of frustration, poverty, hopelessness, and learned helplessness.

[611] A McQueen, "Falling through the Gap: The Culpability of Child Soldiers under International Criminal Law", (2018), 94(2), *Notre Dame Law Review Online* 105.

[612] M Houle, "The Legal Responsibility of Child Soldiers", (2018), 8, *International Law Yearbook* 203-205.

[613] M A Thomas, "Malice Supplies the Age: Assessing the Culpability of Adolescent Soldiers", (2013), 44 (1), *California Western International Law Journal* 12.

[614] M Houle, "The Legal Responsibility of Child Soldiers", (2018), 8, *International Law Yearbook* 211.

[615] N Mole, *"Litigating Children's Rights Affected by Armed Conflict before the European Court on Human Rights*", at Chapter 13 of: From Peace to Justice "International Criminal Accountability and the Rights of Children", Edited by K Arts and V Popovski, 2005, at page 180 Mole states that although they have often been party to unbelievable violence, often against their own families or communities, such children are exposed to the worst dangers and

there are four main reasons why children participating in armed conflict should not be automatically exempt from legal responsibility:[616]

- The first is that some children voluntarily join armed groups and that not all children participating in armed conflict have been brutally kidnapped.

- The second is that the action of the child unilaterally volunteering is surrounded by the fact that in the child's mind there are benefits[617] to being a soldier, for example protection, food and an assimilated family.

- The third is it is not fair to assume that children from the outset lack individual agency and the willingness to participate in armed conflict.

- The fourth is children in armed conflict are a complex group that should not all be viewed with the lenses that assess them as "faultless victims".

The researcher has a different view of these aspects and submits the following in response thereto:

- Firstly, if one assumes that children voluntarily enlist, then one similarly has to assume that this voluntary action is done lawfully. In most instances, children who are "volunteering" for armed conflict are doing it in countries where their

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horrible suffering, both psychological and physical. See also M A Thomas, "Malice Supplies the Age: Assessing the Culpability of Adolescent Soldiers", (2013), 44(1), *California Western International Law Journal* 12.

[616] M Houle, "The Legal Responsibility of Child Soldiers", (2017-2018), 8, *International Law Yearbook* 195.

[617] K Peters and P Richards, "Why we fight: Voices of Youth Combatants in Sierra Leone", (1998), 68 (2), *Africa: Journal of the International African Institute* 183, 184 and 187.

own national laws would not even allow them to vote or drive legally. [618] The irony is that the argument for "voluntary" behaviour by a child merely asks the reader to assume that the child can be lawfully prohibited from choosing a democratic leader, and from legally driving a vehicle, but that full culpability should be bestowed on the child when she wishes to participate in hostilities.

- Secondly, the phrase "benefits" referred to here is rather ironic. One needs to understand that the benefits the child could possibly see are the crumbs of normality left after the devastation of an armed conflict.[619] Necessities such as shelter, protection, food and family for a child ought not to be "benefits" from armed conflict or reasons to join armed groups as they result from the armed conflict and all that the child might have left.[620] Choosing this because of being

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[618] C McDiarmid, *What Do They Know? Child-Defendants and the Age of Criminal Responsibility: A National Law Perspective*, at Chapter 6 of: From Peace to Justice "International Criminal Accountability and the Rights of Children", Edited by K Arts and V Popovski, 2005, at page 93 McDiarmid argues that, the age of criminal responsibility is not the only line which the law draws to delineate childhood from adulthood. Most legal systems draw similar lines in relation to, for example, the consumption of alcohol, the age of consent in sexual matters, the ability to drive or marry, and the right to vote. See also M A Thomas, "Malice Supplies the Age: Assessing the Culpability of Adolescent Soldiers", (2013), 44(1), *California Western International Law Journal*, at page 8 Thomas considers the United Kingdom's position towards children's criminal responsibility and states that, a person must be eighteen years old to vote in general elections and purchase alcohol, seventeen to drive a car, and sixteen to marry and join the army, yet someone as young as ten years old is deemed capable of possessing the necessary *mens rea* to commit a criminal offense.

[619] A McQueen, "Falling through the Gap: The Culpability of Child Soldiers under International Criminal Law", (2018), 94(2), *Notre Dame Law Review Online* 105.

[620] *Prosecutor v Ongwen*, Case No. ICC-02/04-01/15-T-22-ENG, Transcript of the Confirmation of Charges, *"Look at a small boy, a child who has been brought in the bushes and has not had the opportunity to relate with common society, common decent society, a boy who has no hope at all of ever returning to normal society, a boy who has no governmental protection, a*

left with no other option is not the same as "freely volunteering". It cannot be right to suggest that out of three horrible gifts offered by adults to the child, the child chooses the least horrible and, for this, we try to find advantages as to why the bad is better than the worst. The researcher submits that a child should not have to choose between basic needs such as shelter, security, and food on the one hand and devastation or certain death on the other.

- Thirdly, the words "agency" and "willingness" should be differentiated from each other more carefully. The researcher argues that "willingness" is a by-product of childhood enthusiasm. "Agency" is a lawfully recognised capacity as an individual. In most instances, the same child would not be permitted to play other roles that adults often enjoy playing and, therefore, one cannot simply pick and choose when the child must be given adult status.[621]

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boy whose only protection and guarantee to life was compliance, compliance or death. That is what I earlier on said, he was left with "the devils choice". Your honours, what do we mean by the devil's choice? In a decision in the Ugandan Court…. Dictator Idi Amin directed a certain woman to sell her property to the embassy of Somalia. The woman was left with no choice but to sell the property. When Idi Amin was overthrown, this lady went to court, but the defendant brought the sale agreement and said, "But you signed the document, selling your property". And the decision was as to whether she voluntarily consented to sell her property. Their Lordships in that case, your Honours, said no, that was not consent. Given the dictatorship of Idi Amin and his propensity to kill anybody who stood in his way, the lady was left with no choice but the devil's choice…. Your honours, we submit that in everything that Dominic Ongwen did, he was left with the devil's choice" 49. See also R Pangalangan, "Dominic Ongwen and the Rotten Social Background Defense: The Criminal Culpability of Child Soldiers Turned War Criminals", (2018), 33 (3), *American University International Law Review* 619.

[621] C McDiarmid, *What Do They Know? Child-Defendants and the Age of Criminal Responsibility: A National Law Perspective*, at Chapter 6 of: From Peace to Justice "International Criminal Accountability and the Rights of Children", Edited by K Arts and V Popovski, 2005 93. See also M.A Thomas, "Malice Supplies the Age: Assessing the Culpability of Adolescent Soldiers", (2013), 44(1), *California Western International Law Journal* 8.

- Fourthly, one may agree that children in armed conflict are rarely faultless passive victims, but no matter how active and blameworthy one may see them to be, these children are still victims of the breach of international human rights and international humanitarian law.

Without looking too deeply into specific reasons why each child is motivated to join an armed group, the general psychological factors suggest that children imagine a safer life outside the realms of being a mere civilian.[622] Instead, the child searches for a perceived sense of power which is associated with carrying an automatic weapon.[623] There is a propensity to consider only the day-to-day choices of the child over her cumulative tenure as a child in armed conflict.

The researcher recognises that, for some children, armed conflict participation can last for a very long time and, during this time, the child grows and matures and makes further decisions.[624] Would it be considered right to apportion blame on some of the decisions the child takes during her tenure in armed conflict or does the breach of the child's right to be protected from armed conflict provide a blanket of innocence over

[622] A McQueen, "Falling through the Gap: The Culpability of Child Soldiers under International Criminal Law", (2018), 94(2), *Notre Dame Law Review Online*, at page 105 McQueen states that many children join merely trying to survive, understandably feeling safer as armed soldiers than as defenceless civilians.

[623] M Houle, "The Legal Responsibility of Child Soldiers", (2018), 8*, International Law Yearbook* 207.

[624] N Mole, *"Litigating Children's Rights Affected by Armed Conflict before the European Court on Human Rights*", at Chapter 13 of: From Peace to Justice "International Criminal Accountability and the Rights of Children", Edited by K Arts and V Popovski, 2005, at page 180 Mole states that the age of the defendant was such as to warrant periodic review of the continuing legality of his detention as his personality and attitude would be subject to change as he matured.

the child during this period?[625] Some authors believe that the child's conduct is ever-changing and needs to be assessed on its own merits as there is room to believe that some children, even though forcibly recruited, could become willing combatants.[626]

However, there has to be overlap between both views, where the child, who is both victim and perpetrator, receives the necessary help and assistance.[627] Houle suggests that oversimplification of either view, by casting all children as faultless victims or by casting them as war-torn hardened criminals, leads to neither an appropriate rehabilitation of these children nor their reintegration in society[628]. Veale suggests that the child's participation in armed conflict will always be the result of some form of influence, cultural, political or even mere necessity of survival.[629]

The researcher finds that the appropriate and most accurate way to view the child participating in armed conflict is to accept that the child is, in fact, both a victim and a perpetrator.[630] The researcher argues that the circumstances affecting the child's initial choices in armed conflict, along with the continued choices made by the child, should

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[625] M A Thomas, "Malice Supplies the Age: Assessing the Culpability of Adolescent Soldiers", (2013), 44(1), *California Western International Law Journal*, at page 11 Thomas argues that since there is no international consensus as to what constitutes a child or childhood, there is thus no connection between the age of criminal responsibility and the age for participating in armed conflict. The result is that children in armed conflict should be treated as victims.

[626] M Houle, "The Legal Responsibility of Child Soldiers", (2018), 8, *International Law Yearbook* 206.

[627] M A Thomas, "Malice Supplies the Age: Assessing the Culpability of Adolescent Soldiers", (2013), 44(1), *California Western International Law Journal* 12.

[628] M Houle, "The Legal Responsibility of Child Soldiers", (2018), 8, *International Law Yearbook* 195 - 196.

[629] A Veale, "*The Criminal Responsibility of Former Child Soldiers: Contributions from Psychology*", at Chapter 7 of: From Peace to Justice "International Criminal Accountability and the Rights of Children", Edited by K Arts and V Popovski, 2005 102.

[630] R Pangalangan, "Dominic Ongwen and the Totten Social Background Defense: The Criminal Culpability of Child Soldiers Turned War Criminals", (2018), 33 (3), *American University International Law Review* 619.

be considered and must be evaluated. This must be done only to the extent that the rehabilitation and social reintegration required by the child are the sole aim, and not for the attribution of guilt.

4.5 The potential criminal responsibility of a child in armed conflict

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 punishable offences.[631] This topic results in a controversial debate exacerbated by the realisation that criminal responsibility is a complex legal issue[632] on the international stage.[633] At a national level, children under the age of eighteen are subjected to prosecution for violent crimes they commit, so for what reason does international law elect to not take the same approach despite it being seen as necessary in some instances.[634]

International law affecting the child faces the same dilemma that general international law faces, and that is with reference to acceptance and applicability. Various countries

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[631] M A Thomas, "Malice Supplies the Age: Assessing the Culpability of Adolescent Soldiers", (2013), 44 (1), *California Western International Law Journal*, at page 3 Thomas argues that, international criminal law simply fails to suggest that children should be held criminally responsible for their participation in armed conflict, regardless of their involvement.

[632] A McQueen, "Falling through the Gap: The Culpability of Child Soldiers under International Criminal Law", (2018), 94(2), *Notre Dame Law Review Online*, at page 112 McQueen argues that, the United Nations international criminal tribunals and the International Criminal Court have sidestepped the question of children's culpability.

[633]C McDiarmid, *What Do They Know? Child-Defendants and the Age of Criminal Responsibility: A National Law Perspective*, at Chapter 6 of: From Peace to Justice "International Criminal Accountability and the Rights of Children", Edited by K Arts and V Popovski, 2005 85.

[634] M Houle, "The Legal Responsibility of Child Soldiers", (2018), 8, *International Law Yearbook* 195.

and regions have completely different approaches and standards for criminal responsibility. The researcher focuses specifically on the varying age limits for criminal responsibility.

If one looks at Africa and Europe, the minimum age for criminal responsibility varies considerably. The online-based Child Rights International Network[635] has compiled a list of the minimum age of criminal responsibility of each country within recognised regions. The relevant data from the above online-based network are referred to below. In considering the various minimum ages and regions, the researcher considers prominent countries within Africa and Europe. In the African region, the minimum age for criminal responsibility varies from state to state as seen below:

- In Algeria, children under the age of thirteen can only be sentenced to protection and education measures.

- In Botswana, children under the age of fourteen are presumed incapable of committing a criminal offence unless it can be proved that at the time of committing the offence that the child indeed had the capacity to know right from wrong. No child in Botswana under the age of eight may be criminally responsible.

- In the Central African Republic, a child under the age of fourteen may be subjected only to rehabilitation measures.

- In Chad, children under the age of thirteen are found to not meet the threshold for criminal responsibility.

- In the Democratic Republic of the Congo, children under the age of fourteen are not held criminally responsible.

[635]Child Rights International Network, Policy, Minimum Ages, "Stop making children criminals, minimum age of criminal responsibility in Africa", https://archive.crin.org/en/home/ages/Africa.html (Accessed on 20 April 2020).

·In Ethiopia, no child under the age of nine may be criminally responsible.

- In Libya, children under the age of fourteen are not held criminally responsible, further noting that children over than fourteen can be held criminally responsible if they are capable of showing discernment but it must be in the light of preventative measures, which include juvenile education and guidance centres.

- In Mozambique, at the time of drafting this thesis, there is no definitive minimum age for criminal responsibility, but children under the age of sixteen fall under the jurisdiction of the juvenile court.

- In Rwanda, children may be held criminally responsible from the age of fourteen.

- In Sierra Leone, the minimum age for criminal responsibility is below the age of fourteen.

- In South Africa, the minimum age for criminal responsibility is the age of ten. A child who is older than ten but is younger than fourteen is presumed not to have criminal capacity unless the state proves otherwise.[636]

- In South Sudan, the minimum age for criminal responsibility is the age of twelve.

- In Tanzania, the minimum age for criminal responsibility is seven.

[636] M A Thomas, "Malice Supplies the Age: Assessing the Culpability of Adolescent Soldiers", (2013), 44(1), *California Western International Law Journal*, at page 10 Thomas argues that when children under the age of eighteen are prosecuted, it is typically done under a juvenile justice system focusing on rehabilitation rather than punishment.

Similarly in the European region, the minimum age for criminal responsibility varies from state to state as seen below:

- In both Albania and Austria, the minimum age for criminal responsibility is fourteen.

- In Belgium, children can be criminally responsible from the age of twelve.

- In Croatia, specifically, no child may be tried for a crime committed when that child was below the age of fourteen and any case involving a child below that age must be dealt with by the Centre for Social Welfare.

- In the Czech Republic, Denmark, Finland, Iceland, Norway and Sweden surprisingly, the minimum age for criminal responsibility is fifteen, amongst the very few countries setting the standard as high as international law accepted it to be in 1977 with the Geneva Conventions.

- In France, the ages between thirteen and eighteen with specific mention that ages sixteen to eighteen may be subjected to adult sentences.

- Germany joins the realm or the generally accepted minimum age of fourteen, yet allows ages between fourteen to eighteen to be subjected to criminal responsibility if the child is shown to have been mature enough to identify the risks and to act upon such appreciation.

- Greece separates itself from the majority by dividing its attribution of criminality between three age groups, ages between eight and thirteen may not be held criminally responsible (the assumption is that ages seven and below are automatically barred from prosecution), ages thirteen to fifteen may only be subjected to therapeutic or reformative measures, while ages fifteen to eighteen may be prosecuted and possibly deprived of their liberty.

- In Ireland, children above the age of ten may be held criminally liable for murder, manslaughter and rape or aggravated sexual assault.

- In Italy, the minimum age for criminal responsibility is fourteen, yet ages fourteen to seventeen may be held criminally liable if they are proven to show the necessary criminal intent in respect of a specific crime.

- In the Netherlands, from the age of twelve children may be held criminally responsible for a crime.

- Thus far Poland sets the highest standard, with children over the age of seventeen only being held criminally responsible.

- In Portugal, the minimum age for criminal responsibility is sixteen, with ages twelve to sixteen being subjected to penalties under the guardianship and education law, allowing for the detention of the child to be in closed educational centres.

- Switzerland comes in surprisingly low with setting the minimum age for criminal responsibility at the age of ten.

- In England, an individual is presumed to possess the necessary *mens rea* to commit a criminal offence at the age of ten.[637] Ironically, in the same country, the same individual is required to obtain parental consent when joining the army

[637] M A Thomas, "Malice Supplies the Age: Assessing the Culpability of Adolescent Soldiers", (2013), 44(1), *California Western International Law Journal*, at page 8 Thomas considers the United Kingdom's position towards children's criminal responsibility and states that, a person must be eighteen years old to vote in general elections and purchase alcohol, seventeen to drive a car, and sixteen to marry and join the army, yet someone as young as ten years old is deemed capable of possessing the necessary *mens rea* to commit a criminal offens*e*.

> or seeking to get married as young as sixteen. In fact, the same country only allows for persons eighteen and above to vote or drink a pint at a local pub.[638]

As a result of the above, there are a plethora of varying age limits to consider, and, for various reasons, depending on the cultural perspective they are strongly endorsed. The questions then to be asked relate to what age limit does international law accept, and who makes that call, considering that each country or region has its own varying minimum ages of criminal responsibility. One can only suggest that the guidance offered by international legislation and agreements affecting the child ensures a yardstick that national governments should utilise. What is surprising is that the minimum age of criminal responsibility in most countries is far less than what these national governments have consented to abide by in the form of conventions and charters.

The area which the researcher understands to be the illusion created in international criminal law is that, where most countries might set the minimum age for criminal responsibility at ages ten to fourteen,[639] the gap between fifteen and eighteen is filled with measures such as "proven to show intent", or "if the child can be proven to know right from wrong and act in accordance with that appreciation". These are tests which

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[638] C McDiarmid, *What Do They Know? Child-Defendants and the Age of Criminal Responsibility: A National Law Perspective*, at Chapter 6 of: From Peace to Justice "International Criminal Accountability and the Rights of Children", Edited by K Arts and V Popovski, 2005, at page 93 McDiarmid states that, the age of criminal responsibility is not the only line which the law draws to delineate childhood from adulthood. Most legal systems draw similar lines in relation to, for example, the consumption of alcohol, the age of consent in sexual matters, the ability to drive or marry, and the right to vote.

[639] C McDiarmid, *What Do They Know? Child-Defendants and the Age of Criminal Responsibility: A National Law Perspective*, at Chapter 6 of: From Peace to Justice "International Criminal Accountability and the Rights of Children", Edited by K Arts and V Popovski, 2005, at page 89 McDiarmid argues that, with children below the age of fourteen, there is a rebuttable presumption that the child is *doli incapax*, that is incapable of committing a crime.

require two things; firstly, one would need a trial in order to test the child's intention and maturity. Secondly, one would need to understand that children in armed conflict have a completely different and more complex psychology than the "general" child affected under these national laws above.

The researcher argues that national laws provide an assumption that children above the age of fourteen are presumed possibly to understand right from wrong owing to the overwhelming support for a lower age at national level.[640] It is argued that this assumption is not properly positioned within the realm of armed conflict and that the *erga omnes* approach to children in armed conflict needs to be a completely separate field of thought, recalling that international law expressly assures that children in armed conflict are entitled to a "*special protected status*".[641]

A further point to strengthen this submission is found in the fact that, on the one hand, national governments predict the "general" child to be mature enough from the age of fifteen to appreciate right from wrong under its domestic law, yet, on the other hand, at international level communities have accepted that children under eighteen in armed conflict are entitled to a "*special protected status*". What exactly is this "*special protected status"* for, if not for protecting the child from the harsh realities and at the very least the consequences of armed conflict.[642]

When embarking on what the universal minimum age for criminal responsibility should be, one needs firstly to recognise what elements criminal responsibility requires. National governments evidently have their own individual standards for what meets the threshold for criminal responsibility. From the information given above, one draws

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[640] M A Thomas, "Malice Supplies the Age: Assessing the Culpability of Adolescent Soldiers", (2013), 44(1), *California Western International Law Journal*, at page 9 Thomas argues that, the notion that children can inherently appreciate right from wrong can be deduced from the countries that have set their national minimum age for criminal responsibility below eighteen.

[641] R Pangalangan, "Dominic Ongwen and the Rotten Social Background Defense: The Criminal Culpability of Child Soldiers Turned War Criminals", (2018), 33(3), *American University International Law Review* 619.

[642] Article 77(1) 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.

the inference that somewhere between the ages of twelve and fourteen individual criminal responsibility shifts from one's deeds to one's mental state. Consequently, if the appreciation of the deed is proven, then criminal responsibility is attributed.

In defining what constitutes criminal responsibility, McDiarmid submits that, firstly, one needs to prove that the child committed the defined crime, in most national systems this will be on a burden of beyond reasonable doubt. Secondly, the child should also be proven to possess the required mental element, in most national systems this is regarded as "fault" which would ordinarily arrive in the form of intention or negligence.[643] McDiarmid submits that there is a third requirement which consequently underlies both the "conduct"[644] and the "fault", which is that the accused must also possess criminal capacity. Criminal capacity is understood to mean that the accused understands the criminal act and appreciates its consequences, both immediately and in the future.

When one looks for the universally accepted standard, one needs to turn to Article 30 of the Rome Statute.[645] Article 30 of the statute is headed "Mental Element" which suggests to the reader that the drafters of this legislation recognised the importance of cognition as an independent requirement for criminal responsibility. Article 30 provides:

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[643] C McDiarmid, *What Do They Know? Child-Defendants and the Age of Criminal Responsibility: A National Law Perspective*, at Chapter 6 of: From Peace to Justice "International Criminal Accountability and the Rights of Children", Edited by K Arts and V Popovski, 2005 90.

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

[645] Article 30 of The Rome Statute of the International Criminal Court, Done at Rome on 17 July 1998, in force on 1 July 2002, United Nations, Treaty Series, Vol. 2187, No. 38544, Depositary: Secretary-General of the United Nations, http://treaties.un.org (Accessed on 18 April 2020).

"1. *Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of this Court only if the material elements are committed with intent and knowledge.*

2. For the purpose of this article, a person has intent where:

(a) In relation to conduct, that person means to engage in the conduct;

(b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

3. *For the purpose of this article, "Knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly".*[646]

In the subtopic aforementioned, dealing with the psychology of the child in armed conflict, one gathers that a child's psychology is a crucial part of its development and even more so a crucial period in its life during his or her teenage years. To apportion the level of intention and knowledge required by Article 30 to a child in armed conflict, it is not only a far stretch of the imagination but also a morally crippling assumption to draw.

The conduct by the child is not in question. It is not beyond any child's means to commit criminal offences. The most important aspect of criminal law relating to children is the question of criminal capacity. In other words, has the child in armed conflict developed the necessary cognition? The researcher submits that if the child's cognition is insufficiently developed then the child simply does not meet the requirements of criminal responsibility.[647]

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[646] Article 30 (1), (2) and (3) of The Rome Statute of the International Criminal Court, Done at Rome on 17 July 1998, in force on 1 July 2002, United Nations, Treaty Series, Vol. 2187, No. 38544, Depositary: Secretary-General of the United Nations, http://treaties.un.org (Accessed on 18 April 2020).

[647] C McDiarmid, *What Do They Know? Child-Defendants and the Age of Criminal Responsibility: A National Law Perspective*, at Chapter 6 of: From Peace to Justice

To be fully dealt with in chapter five of this thesis is the success and/or failures that have been brought about by international tribunals, and how these international tribunals have responded in times of war, especially where child recruitment was a major contributing factor to the hostilities. If one considers the international criminal Tribunal for the Former Yugoslavia or the International Criminal Tribunal for Rwanda, in both these tribunals no minimum age for criminal responsibility was set. The statutes for both the former Yugoslavia and Rwanda fail to provide any particular exemptions or condonations in relation to ages eighteen and below,[648] as it was assumed that child prosecution would not take place.[649]

Probably the most famous post-war framework built to address the wrongs of the past was the Special Court for Sierra Leone.[650] According to Crane, this court drew its fame from being a "hybrid" tribunal that is independent from the United Nations and any state. It is often referred to as the next generation of a war-crimes tribunal.[651] This court permitted jurisdiction over children deemed to be taking part in the armed conflict, and, despite this authority, no persons under the age of eighteen were tried.[652]

"International Criminal Accountability and the Rights of Children", Edited by K Arts and V Popovski, 2005 91.

[648] M Houle, "The Legal Responsibility of Child Soldiers", (2018), 8, *International Law Yearbook* 198.

[649] M Mehdi Ali, "Omar Khadr's Legal Odyssey: The Erasure of Child Soldier as a Legal Category", (2018), 46, *Georgia Journal of International and Comparative Law* 355.

[650] The Special Court for Sierra Leone (2002). See also M A Thomas, "Malice Supplies the Age: Assessing the Culpability of Adolescent Soldiers", (2013), 44 (1), *California Western International Law Journal*, at page 4 Thomas recalls that the special court had jurisdiction over persons above the age of fifteen.

[651] D Crane, "*Strike Terror No More: Prosecuting the Use of Children in Times of Conflict-The West African Extreme*", at Chapter 9 of: From Peace to Justice "International Criminal Accountability and the Rights of Children", Edited by K Arts and V Popovski, 2005 123.

[652] M Mehdi Ali, "Omar Khadr's Legal Odyssey: The Erasure of Child Soldier as a Legal Category", (2018), 46, *Georgia Journal of International and Comparative Law*355.

Crane, the prosecutor for the Court, made it known that he would not prosecute anyone under the age of eighteen,

> *"The children of Sierra Leone have suffered enough both as victims and perpetrators. I am not interested in prosecuting children. I want to prosecute the people who forced thousands of children to commit unspeakable crimes."*[653]

Houle argues that international law does not explicitly prohibit the prosecution of child soldiers. It is, however, only limited by Article 37[654] of the Convention on the Rights of the Child in respect of the particular punishments allowed.[655]

According to Mehdi Ali, it should be taken into cognisance that children are treated differently according to international criminal law and specifically for war crimes,[656] recalling that the child's frontal lobe does scientifically mature late into the child's teenage years[657] and that the international criminal court itself does not possess the jurisdiction to prosecute children under the age of eighteen for crimes that they commit.[658] The Rome Statute, which regulates the International Criminal Court,

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[653] A McQueen, "Falling through the Gap: The Culpability of Child Soldiers under International Criminal Law", (2018), 94(2), *Notre Dame Law Review Online* 116.

[654] Article 37, The Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by the General Assembly resolution 44/25 of 20 November 1989, and entry into force 2 September 1990, in accordance with article 40.

[655] M Houle, "The Legal Responsibility of Child Soldiers", (2018), 8, *International Law Yearbook* 193 – 194.

[656] M Mehdi Ali, "Omar Khadr's Legal Odyssey: The Erasure of Child Soldier as a Legal Category", (2018), 46, *Georgia Journal of International and Comparative Law* 353.

[657] C Dore, "What to do with Omar Khadr? Putting a child soldier on trial: Questions of international Law, Juvenile Justice and Moral Culpability", (2008), 41, *John Marshall Law Review* 1307.

[658] Article 26 of The Rome Statute of the International Criminal Court, Done at Rome on 17 July 1998, in force on 1 July 2002, United Nations, Treaty Series, Vol. 2187, No. 38544, Depositary: Secretary-General of the United Nations, http://treaties.un.org (Accessed on 19 April 2020). See also M A Thomas, "Malice Supplies the Age: Assessing the Culpability of

contains, in its Article 31[659], "Grounds for excluding Criminal Responsibility", and it provides that:

> *"In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:*
>
> *(a) The person suffers from a **mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct**, or capacity to control his or her conduct to conform to the requirements of the law;*
>
> *(b) That person is **in a state of intoxication** that destroys that person's **capacity to appreciate the unlawfulness or nature of his or her conduct**, or capacity to control his or her conduct to conform to the regulations of law, unless that person has become voluntarily intoxicated under such circumstances that person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the court.*
>
> *(c) The person **acts reasonably to defend himself or herself** or another person or, in the case of war crimes, the property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent or unlawful use of force in a manner*

Adolescent Soldiers", (2013), 44 (1), *California Western International Law Journal*, at page 3 Thomas argues that, the Rome Statute presents a barrier and fails to assist in answering why child soldiers should not be held criminally responsible under international law.

[659] Article 31 of The Rome Statute of the International Criminal Court, Done at Rome on 17 July 1998, in force on 1 July 2002, United Nations, Treaty Series, Vol. 2187, No. 38544, Depositary: Secretary-General of the United Nations, http://treaties.un.org (Accessed on 19 April 2020).

proportionate to the degree of danger to the person or the other person or property protected.

*(d) 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 or serious bodily harm against that person or another person, and the person acts necessarily or reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:*

(i) Made by other persons; or

(ii) *Constituted by other **circumstances beyond that person's control***." (Own emphasis)

The International Criminal Court, is originally designed not to exercise jurisdiction over children in armed conflict, but this is not merely an election created by Article 26[660] but rather, the researcher submits, is a consequence of Article 31. Article 37 of the Rome Statute (discussed below) informs state parties on prohibitions relating to the detention and prosecution of children. The importance of Article 31 is found in its particular wording and consequent interpretation which creates fallacies in the attribution of criminal responsibility to child soldiers. The researcher dissects Article 31 and analyses the wording as follows.

In subsection (a), the drafters use the words **"a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct"**. The ordinary interpretation implies that a defendant relying on this defence would need to prove that at the time of the offence he suffered from a mental defect, and, secondly, that the defect hampered his capacity to appreciate the unlawfulness of his conduct. When one isolates the basic meaning of "capacity to appreciate the unlawfulness or nature of his or her conduct", one finds it increasingly difficult to ascertain how a child, clouded by the realistic effects of armed conflict, could

[660] A McQueen, "Falling through the Gap: The Culpability of Child Soldiers under International Criminal Law", (2018), 94(2), *Notre Dame Law Review Online* 118.

then be expected to appreciate his/her conduct properly. It could be argued that "age" should also be included in the wording of this subsection, as its inclusion may similarly eliminate many problems related to children recruited into armed conflict.

The very atmosphere of armed conflict that the child is being matured by is outside the realm of normal civilian life. Pangalangan is of the opinion that the child's rotten background constitutes a mental disturbance which affects the capacity to appreciate the unlawfulness of certain conduct.[661] It is, therefore, unsurprising that the Rome Statute limited the Court's jurisdiction to individuals over the age of eighteen.

In subsection (b) the drafters use the words "**in a state of intoxication** that destroys that person's **capacity to appreciate the unlawfulness or nature of his or her conduct".** The researcher argues that "intoxication" has been a word used in the past when describing the indoctrination of children into rebel armed forces. Research indicates that children in armed conflict are often confronted with alcohol and drugs and owing to their young age are very susceptible to peer pressure.[662] The developmental period that children endure is extremely critical for their development and their ability to appreciate right from wrong.

In subsection (c) the drafters use words such as "The person ***acts reasonably to defend himself or herself***". The researcher argues that private self-defence would be most applicable to a mature adult in the light of assessing objectively reasonable conduct. The cognitive element is important, and to impose this on a child one would need to accept that the child possesses the cognitive ability to understand that he or she is acting in self-defence. This is certainly debatable, however, what should be

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[661] R Pangalangan, "Dominic Ongwen and the Rotten Social Background Defense: The Criminal Culpability of Child Soldiers Turned War Criminals", (2018), 33(3), *American University International Law Review*, at page 626-627 Pangalangan states that The Rotten Social Background defence is analogous to that of coercive indoctrination- the changing of a person's values or beliefs through forceful means.

[662] T Begley, "The Extraterritorial Obligation to Prevent the Use of Child Soldiers", (2012), 27(3), *The American University International Law Review*, at page 614 Begley submits that Children are recognized as a vulnerable group because, among other attributes, they are young, immature, impressionable, and physically smaller than adults.

seen as a positive assumption is that the child's actions are at the very least objectively "reasonable" considering his/her atmosphere.

In subsection (d) the drafters use the words "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 or serious bodily harm". The reality for most children participating in armed conflict is that they are operating under the apprehension of fear of imminent death or serious bodily harm. Some argue that a child soldier's life is a continued state of duress.[663] The submission is that criminal responsibility is not attributed if a person's conduct was a direct result of a threat of death or serious bodily harm and the person in response acts reasonably to avoid this threat.

If one has to look beyond the clear limitations placed on holding a child in armed conflict criminally responsible, and, if the child was subjected to prosecution and tried for his or her wrongful conduct, what would be the appropriate sentence? How would one elect to punish the child for the deeds committed during armed conflict? Or does the child's "special protected status" apply to his or her punishment as well?

The United States is not a party to the Convention on the Rights of the Child, which is a strong motivating factor for the research conducted in chapter 2 of this project, identifying the customary law nature of children's rights in armed conflict. Despite the United States' lack of ratification of the Convention on the Rights of the Child, the United States still has a strong presence in the development of international children's rights. The United States has contributed to enhancing children's rights, and, in one way, this is found in the legal principles applied in the famous *Roper Decision*,[664] which involved the moral question surrounding a juvenile death penalty.

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[663] R Pangalangan, "Dominic Ongwen and the Rotten Social Background Defense: The Criminal Culpability of Child Soldiers Turned War Criminals", (2018), 33(3), *American University International Law Review* 622.

[664] Donald P. Roper, Superintendent, Potosi Correctional Centre, Petitioner v. Christopher Simmons, 543 U.S 551 (2005), https://www.apa.org/about/offices/ogc/amicus/roper.pdf, (Accessed on 20 April 2020).

The Supreme Court, at the outset, recognised that there are clear differences between adults and children on a psychological scale. These differences prevent a child from being classified in the category of the "worst offenders" being worthy of the harshest punishment.

The court summed up these differences in three important categories, namely:

1) The court first found that children lack maturity and have an underdeveloped sense of responsibility.

2) The court then found that children are susceptible to negative influences and outside pressures, including peer pressure.

3) In concluding its third difference, the court found is that the character of a child is not as well-formed as that of an adult.

As a result of the above differences, the Supreme Court found that a child is not as morally reprehensible as is an adult. The assumption the researcher draws from the court's reasoning is that the court found it incorrect to compare the wrongs of a minor with those of an adult. Similarly, as a result purely of age and psychological capacity, the child has a greater possibility of being reformed.[665]

Although the United States is not a party to the Convention, this decision still illustrates a confirmation with sound reasoning of Article 37 of the Convention on the Rights of the Child which provides that:

[665] C Dore, "What to do with Omar Khadr? Putting a child soldier on trial: Questions of international Law, Juvenile Justice and Moral Culpability", (2008), 41, *John Marshall Law Review*, at page 1309 Dore provides his own emphasis on the supreme courts conclusion in the roper decision, he noted that from paragraph 570 of the judgment, it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character.

"A) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without the possibility of release shall be imposed for offences committed by persons below eighteen years of age (own emphasis);

B) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time."[666]

The researcher argues that, owing to its *erga omnes* application and modern acceptance, Article 37 of the Convention is the benchmark to be used when considering culpability and the child. The article uses specific words which indicate the legislature's intention. For example, subsection "A" uses the words "possibility of release" and places an obligation on the court to ensure this. This means that the drafters of this article already accepted and preferred rehabilitation over punishment.

A further aspect which must not be ignored is that the drafters of this article, by their mere concession of limiting the court's power in respect of sentencing,[667] conversely confirm that the child's actions during armed conflict could never be assessed in the same light as if they were committed by an adult.

If one looks at the purpose of punishing an individual for deeds committed, one needs within the eyes of the law to understand that the framework for the said punishment is

[666] Article 37, The Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by the General Assembly resolution 44/25 of 20 November 1989, and entry into force 2 September 1990, in accordance with article 40.

[667] M Houle, "The Legal Responsibility of Child Soldiers", (2018), 8, *International Law Yearbook* 193 – 194.

based on "retribution" and "deterrence".[668] Both of these terms require that the unlawful deed is committed by the perpetrator. However, according to the Roper decision, it would not be proportional retribution if the death penalty were awarded to the child whose psychological capacity itself is diminished compared with that of an adult. The effect here is that the child's age, mental capacity and maturity affect her culpability and blameworthiness.[669]

For various reasons discussed above, the child in armed conflict should not be detained or sentenced without the possibility of release.[670] The researcher argues that the child in armed conflict is not fit to endure a criminal trial.

Thus far, international law has appropriately taken to pointing a finger at those who have unlawfully recruited child soldiers.[671] In 2012 the International Criminal Court took to prosecuting and convicting Thomas Lubango Dyilo successfully for the war crime of enlisting child soldiers.[672] Thomas argues that, "*international criminal law targets those responsible for recruiting children into armed conflict, and not holding the actions of the child itself responsible"..*[673]

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[668] A McQueen, "Falling through the Gap: The Culpability of Child Soldiers under International Criminal Law", (2018), 94(2*), Notre Dame Law Review Online* 119.

[669] C Dore, "What to do with Omar Khadr? Putting a child soldier on trial: Questions of international Law, Juvenile Justice and Moral Culpability", (2008), 41, *John Marshall Law Review* 1309.

[670] A McQueen, "Falling through the Gap: The Culpability of Child Soldiers under International Criminal Law", (2018), 94(2), *Notre Dame Law Review Online* 119.

[671] M Houle, "The Legal Responsibility of Child Soldiers", (2018), 8, *International Law Yearbook* 194.

[672] *The Prosecutor v Thomas Lubanga Dyilo*, ICC-/01/04-01/06, Final Judgement (14 March 2012, ICC Trial Chamber), http://www.icc-cpi.int/CourtRecords/CR2012_03942.PDF (Accessed on 20 November 2020).

[673] M A Thomas, "Malice Supplies the Age: Assessing the Culpability of Adolescent Soldiers", (2013), 44 (1), *California Western International Law Journal*, at page 3 Thomas argues this point by referring to the Rome Statute and elaborates on the war crime of enlisting or

The aspect which should not be forgotten is that the issues discussed above relate to legal principles and signed treaties that national governments have either signed or apply to states as a result of customary international law. It, therefore, fails to take into account the role of society and the community into which the child would be reintegrated. This is important because it would be superfluous at best to save the child from armed conflict only to sentence him to certain death by community justice.

According to Veale, post-war communities generally believe that children are criminally responsible for their actions and must be punished accordingly to ensure accountability under the established social order.[674] They also believe that, if children possess that physical attributes to commit a crime, they should then be treated as adults. Therefore, there has to be a line between the attribution of criminal responsibility of the child and impunity. The researcher argues that the middle ground falls in the realm of the child's taking "responsibility" and "accountability".[675]

This does not mean that the child is subjected to a criminal trial and harsh punishment, nor does it mean that there should be a blind and blanket approach of impunity. Instead, it enforces justice for both views and brings the child what the child needs most, viz. restoration and rehabilitation.

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conscripting children below the age of fifteen into national armed forces or actively using children in hostilities.

[674] A Veale, "*The Criminal Responsibility of Former Child Soldiers: Contributions from Psychology*", at Chapter 7 of: From Peace to Justice "International Criminal Accountability and the Rights of Children", Edited by K Arts and V Popovski, 2005 104.

[675] H Van Ginkel, Concluding observations, at Chapter 14 of: From Peace to Justice "International Criminal Accountability and the Rights of Children", Edited by K Arts and V Popovski, 2005, at page 185 Van Ginkel reiterates that *accountability is essential to peace building*.

4.6 Conclusion

> *"We must not close our eyes to the fact that child soldiers are both victims and perpetrators. They sometimes carry out the most barbaric acts of violence. But no matter what the child is guilty of, the main responsibility lies with us, the adults. There is simply no excuse, no acceptable argument for arming children."*[676]

The evidence provided above is a reflection of what purports to be international law's existing approach to children in armed conflict. The researcher shed light on how the child in armed conflict is psychologically affected and at what age he or she receives the strongest protection. The thesis then reaches its climax in considering whether the child soldier is the victim or the perpetrator and whether this answer impacts on her criminal culpability.

When looking at the age of the child and whether it is a determining factor in being protected from armed conflict, one notices that there does not exist a universal consensus on adulthood.[677] The gap referred to earlier in this chapter is one created by international criminal law which suggests that only children under the age of fifteen

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[676] The Retired Archbishop Desmond Tutu's reported comment on children in armed conflict, http://edition.cnn.com/WORLD/9610/31/child.soldiers/index.html (Accessed on 25 April 2020).

[677] A Veale, "*The Criminal Responsibility of Former Child Soldiers: Contributions from Psychology*", at Chapter 7 of: From Peace to Justice "International Criminal Accountability and the Rights of Children", Edited by K Arts and V Popovski, 2005 97. See also Article 1 of The Convention on the Rights of the Child, adopted an opened for signature, ratification and accession by the General Assembly resolution 44/25 of 20 November 1989, and entry into force 2 September 1990, in accordance with article 40.

are protected from armed conflict.[678] Article 8 of the Rome Statute limits the war crime of recruiting children into armed conflict only to children fifteen years of age and younger.[679]

This results in making children between the ages of sixteen and seventeen, in the researcher's opinion, the most neglected. This argument is premised on the fact that protection for this marginalised group is either never clear or simply does not exist. Mole argues that, although very serious cases do involve very young children, the common and complex cases are usually of older children or teenagers who are still technically children but who could be approaching the realm of adulthood.[680] As a result, this particular age group can be seen as the most targeted, owing to the likelihood that in many cases this age group could be easily confused with an adult, but also because this age group is the most vulnerable to slipping through the cracks of the protection afforded by international law.

The research alluded to above suggests to the reader that the psychology of the child could be even more important than the child's age.[681] This, in turn, makes the protection afforded only to a particular age group under the umbrella of "children" to be a naive process. This, in itself, exacerbates the need for a child-centred approach a distinct from an adult framework imposed on children. By focusing on a child-centred approach, one aligns with the universal paramountcy of the best interests of the child.

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[678] M A Thomas, "Malice Supplies the Age: Assessing the Culpability of Adolescent Soldiers", (2013), 44 (1), *California Western International Law Journal*, at page 10 Thomas submits that there is a lack of consensus on the minimum age for participation in armed conflicts.

[679] Article 8 of The Rome Statute of the International Criminal Court, Done at Rome on 17 July 1998, in force on 1 July 2002, United Nations, Treaty Series, Vol. 2187, No. 38544, Depositary: Secretary-General of the United Nations, http://treaties.un.org (Accessed on 18 April 2020).

[680] N Mole, *"Litigating Children's Rights Affected by Armed Conflict before the European Court on Human Rights*", at Chapter 13 of: From Peace to Justice "International Criminal Accountability and the Rights of Children", Edited by K Arts and V Popovski, 2005 177.

[681] A McQueen, "Falling through the Gap: The Culpability of Child Soldiers under International Criminal Law", (2018), 94(2), *Notre Dame Law Review Online* 119. See also M Houle, "The Legal responsibility of Child Soldiers", (2018), 8, *International Law Yearbook* 213.

The psychology of the child is not only a consideration which one takes into account prior to the child's involvement in armed conflict. Instead, its importance is found in how the child develops and matures over his tenure as a child soldier and it is even more meaningful after the armed conflict, when his "post-war psychology" needs to be reintegrated with society.[682] In assessing the child's psychology during and after armed conflict, one would need to seek the guidance of expert evidence from mental health professionals. This implies a further reason why children who committed deeds in armed conflict should not be automatically prosecuted for those deeds.

Any psychological testing is undoubtedly subjective and would differ from child to child and even region to region. Despite armed conflict's effects on the child's demeanour, international law requires it to be examined psychologically when considering the attribution of criminal responsibility for the deeds committed by the child during armed conflict.

One may use the child's psychological state to understand the child's demeanour more comprehensively, but also to assess these deeds committed by the child from a moral point of view. This is where the debate between the "victim" and "perpetrator" arrives. This classification is as important to make as it is difficult to digest. The moral compass of humanity points towards children through the basic glasses of innocence and purity, and it is usually with a heavy heart that one turns to accept that the innocent and mostly helpless individuals are capable of, and have already been seen to be capable of, committing human rights violations.

This difficult question remains complex in argument and remains so for as long as the gap referred to above continues to exist.[683] How can one individually attribute criminal responsibility to a child when the international community has accepted a law not permitting the jurisdiction to prosecute the child who commits deeds as a child soldier,

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[682] H Van Ginkel, Concluding observations, at Chapter 14 of: From Peace to Justice "International Criminal Accountability and the Rights of Children", Edited by K Arts and V Popovski, 2005, at page 185 Van Ginkel reiterates that accountability is essential to peace building.

[683] A McQueen, "Falling through the Gap: The Culpability of Child Soldiers under International Criminal Law", (2018), 94(2), *Notre Dame Law Review Online* 119.

at least not by the International Criminal Court?[684] The world is left with the following proposition:

- The need to protect children from armed conflict is the universal adult's responsibility.

- The age that children are deemed to require protection involves any child under the age of eighteen, equally and without exception.

- The current international legal system in respect of international criminal law (children under the age of fifteen) and international human rights law (children under the age of eighteen) simply does not clarify the child's age in armed conflict when read together. This creates more confusion when attempting to attribute the deeds committed by these children during their tenure in armed conflict.

The question that remains relates to how these particular deeds are supposed to be assessed. The researcher argues that the doctrine of command responsibility should apply, and that the child should be evaluated as if she were acting at the behest of the controlling adult.[685] To clarify this argument, it is not merely submitted that the child is granted impunity nor that turning a blind eye to grave atrocities is justified. The researcher comprehends that to the extent that impunity is the primary option, the phenomenon of child soldiers will merely continue to increase if not worsen by the

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[684]Article 26 of The Rome Statute of the International Criminal Court, Done at Rome on 17 July 1998, in force on 1 July 2002, United Nations, Treaty Series, Vol. 2187, No. 38544, Depositary: Secretary-General of the United Nations, http://treaties.un.org (Accessed on 19 April 2020).

[685] A Veale, "*The Criminal Responsibility of Former Child Soldiers: Contributions from Psychology*", at Chapter 7 of: From Peace to Justice "International Criminal Accountability and the Rights of Children", Edited by K Arts and V Popovski, 2005, at page 102 Veale submits that The doctrine of command responsibility holds that adult commanders are responsible criminally responsible for the actions of child soldiers.

implied endorsement created by the lack of consequence. Research indicates that many post-war communities do not, in fact, welcome former child soldiers with impunity.[686] The obvious reason is the lack of responsibility the child takes for the heinous crimes that he or she may have committed. In fact, what the child needs is not only protection from armed conflict and recruitment but also its consequences. According to Mole, it is the displacement that arrives after the conflict has dissipated in a country that is equally damaging to the child, leaving them without adequate homes or education.[687]

What the researcher submits in clear and unambiguous terms is the following. Command responsibility should be the yardstick that is used for the criminalisation of the use of child soldiers, and demobilisation and rehabilitation programmes should be the primary goal in reintegrating children who are deemed to have been or are currently participating in armed conflict. Veale suggests that it is the international community's responsibility to the child to rehabilitate and reintegrate former child soldiers.[688]

The researcher draws this view by assimilating what states have already accepted, which is that the child is owed a special protected status and that it is in the best interest of the child to mature in an environment outside the realm of armed conflict and violence.[689]

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[686] A Veale, "*The Criminal Responsibility of Former Child Soldiers: Contributions from Psychology*", at Chapter 7 of: From Peace to Justice "International Criminal Accountability and the Rights of Children", Edited by K Arts and V Popovski, 2005 104.

[687] N Mole, *"Litigating Children's Rights Affected by Armed Conflict before the European Court on Human Rights*", at Chapter 13 of: From Peace to Justice "International Criminal Accountability and the Rights of Children", Edited by K Arts and V Popovski, 2005 177.

[688] A Veale, "*The Criminal Responsibility of Former Child Soldiers: Contributions from Psychology*", at Chapter 7 of: From Peace to Justice "International Criminal Accountability and the Rights of Children", Edited by K Arts and V Popovski, 2005 103.

[689] A McQueen, "Falling through the Gap: The Culpability of Child Soldiers under International Criminal Law", (2018), 94(2), *Notre Dame Law Review Online* 119.

The majority of states have endorsed the approach of rehabilitation and education initiatives for juvenile offenders instead of subjecting these children to the same punishment methods awarded to adults. The Optional Protocol to the Convention on the Rights of the Child encourages "*States to take all feasible measures to ensure that children within their jurisdiction participating in hostilities are to be demobilized and given all appropriate assistance for their physical and psychological recovery and social reintegration".*[690]

In essence, there needs to be a re-evaluation of how the child in armed conflict is viewed for there to be a valuable change in the law.[691] International criminal law possesses the fundamental principles relating to the requirements of criminal responsibility, but its silence in relation to the international criminal law applicable to children in armed conflict creates more confusion and hampers the development of the law. The researcher suggests that, instead of simply exposing the gap created by international law, one fills that gap by establishing alternative measures which acknowledge the best interest of the victim, the perpetrator and the child. The blueprint for this alternative measure endorsing a child-centred approach is discussed in chapter 5 to follow.

[690] A McQueen, "Falling through the Gap: The Culpability of Child Soldiers under International Criminal Law", (2018), 94(2), *Notre Dame Law Review Online* 111.

[691] M Houle, "The Legal Responsibility of Child Soldiers", (2018), 8, *International Law Yearbook* 196.

Chapter 5

The best interests of the child during and after armed conflict: The *Omar Khadr* case as a guiding light

5.1 Introduction

At this juncture one has been made aware of the statistics relative to children in armed conflict. The child's initial recruitment and continued participation in armed conflict are not aspects of the child soldier pandemic which have decreased in recent years. Possibly the more accurate description relative to former child soldiers is the "lost generation",[692] the generation of children who have been tainted by war and who have received irreparable emotional and physical scars.[693]

The researcher aims to consider in this chapter the child who has not been protected from armed conflict and how that child is dealt with by post-war society.[694] How does the international community respond to the difficulties faced by the child who was once a "soldier" but is now a civilian?

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[692] D Crane, "*Strike Terror No More: Prosecuting the Use of Children in Times of Conflict-The West African Extreme*", at Chapter 9 of: From Peace to Justice "International Criminal Accountability and the Rights of Children", Edited by K Arts and V Popovski, 2005 123.

[693] C Rutgers, *Creating a World Fit for Children: Understanding the UN Convention on the Rights of the Child*, (2011) 196-199.

[694] "A Lease of Life for former child soldiers", Online article written by The European Commission, 12 February 2019. https://medium.com/protection-and-aid/a-new-lease-of-life-for-former-child-soldiers-7573e99d3b9d#--responses (Accessed on 22 June 2020). Tailored programmes could help former child soldiers catch up on education or learn a trade. We must think about the impact of a humanitarian crisis on children for the next generation.

Concepts such as rehabilitation and reintegration re-emerge, but these concepts are merely ideas if they do not contain any factual illustration or roadmap on how they should be implemented in accordance with the best interests of the child. Where rehabilitation might seem like an all-encompassing child diversion programme that is in the child's best interest, demobilisation and detention might be more appropriate for this particular child. Perhaps transitional justice mechanisms are what the modern war on children participating in armed conflict requires.

In this chapter, the researcher will canvass these various options, concluding by describing what the best interests of the child require in the researcher's opinion.

5.2 The child as an autonomous right bearer

The rights which the child possesses during and after armed conflict involve an understanding of international human rights and international humanitarian law. To be applicable in modern times, these laws need to develop in line with safeguarding the child's best interest.[695] This is encouraged by the foundational principles of the Convention on the Rights of the Child[696] and its Optional Protocol on the involvement of children in armed conflict.[697] When considering the demobilisation of children participating in armed conflict, one has to accept that while these children need to be

[695] J Willems, *Children's Rights and Human Development- a Multidisciplinary Reader*, (2010), at page 583 the best interests of the child are considered in conjunction with what it requires from adults, therefore, one should first consider the child's right to be respected.

[696] Article 3(1) of The Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by the General Assembly resolution 44/25 of 20 November 1989, and entry into force 2 September 1990, in accordance with article 40. - In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

[697] C Rutgers, *Creating a World Fit for Children: Understanding the UN Convention on the Rights of the Child,* (2011) 200-202.

removed from the battlefield these children also remain the bearers of rights. These rights coincide with underlying principles of the best interests of the child.[698] One should not be able to relocate the child again in her young life on simple individual authority. This could be extremely traumatic to the child who has now to lose her second family or home.

Children today are known for the rights that they possess both during times of peace and during armed conflict.[699] These rights, the researcher argues, are complicated in the sense that, in most instances, their fulfilment relies on the actions of adults. As a result, the adult should not be able to select which rights of the child can possess or which should be upheld. The Convention on the Rights of the Child clarifies that the child is owed these human rights without discrimination based on sex, age, race, or nationality.

The foundation of children's rights is entrenched in the drafting of the Convention on the Rights of the Child. The Convention recognises the civil, political, economic, social, and cultural rights of the child which makes it the perfect all-encompassing legislative framework for children.[700] While most human rights documents are not specific to a specific class of person's future needs, the Convention regulates the standard of living required by the child for her physical, mental, spiritual, moral, and social development. The keyword here is development. The Convention makes it known that the child's

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[698] V Odala, "The Spectrum for Child Justice in the International Human Rights Framework: From "Reclaiming the Delinquent Child" To Restorative Justice", (2012), 27(3), *The American University International Law Review*, at page 544 Odala argues that the best interests of the child and his special needs as a juvenile, should be considered when deciding on incarceration of a child.

[699] J Willems, *Children's Rights and Human Development- a Multidisciplinary Reader,* (2010), at page 582.

[700] V Odala, "The Spectrum for Child Justice in the International Human Rights Framework: From "Reclaiming the Delinquent Child" To restorative Justice", (2012), 27(3), *The American University International Law Review*, at page 558 Odala recalls that the international community recognises the Convention as a landmark for children and their rights.

development is of the utmost importance when defining the child's best interests. Article 7 of the Convention on the Rights of the Child provides that:

> *"1 the Child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the* ***right to know and be cared for by his or her parents****.*
>
> *2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless."*.[701].(Own emphasis)

Importantly the concept of children as right bearers for their own account implies that children's rights are not a derivative of the rights of the adults in their community.[702] As a result, children's rights are not dependent on whether they align themselves with a specific community. We are reminded of the importance of the "*erga omnes* obligation towards children in armed conflict", which fills the "gap" left open by human rights laws applicable to the child with customary law. The researcher argues that children require the enforcement of their rights perhaps to an even stronger degree when they are outside the realms of their original civil community.[703]

Grover suggests that the "Martens Clause" is noteworthy when considering the existence of the rights that children possess during times of war.[704] Grover derives this

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[701] Article 7 of The Convention on the Rights of the Child, adopted an opened for signature, ratification and accession by the General Assembly resolution 44/25 of 20 November 1989, and entry into force 2 September 1990, in accordance with article 40.

[702] V Odala, "The Spectrum for Child Justice in the International Human Rights Framework: From "Reclaiming the Delinquent Child" To Restorative Justice", (2012), 27(3), *The American University International Law Review* 549.

[703] C Rutgers, *Creating a World Fit for Children: Understanding the UN Convention on the Rights of the Child*, (2011), at page 200-202.

[704] S Grover, *Child Soldier Victims of Genocidal Forcible Transfer*, (2012) 169-171.

argument from the interpretation of Article 21 of the Rome Statute, which according to her *allows the International Criminal Court to consider not just the Rome statute but also customary law which is based on minimum standards of civilised behaviour during armed conflict.*[705]

Article 21 of the Rome Statute provides that a court shall apply:

(a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;

(b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict.[706]

The Marten's Clause suggests that, in respect of children's rights where certain protections or obligations towards children are not specifically provided for in a treaty, they are to be read in. Thus it is not plausible to suggest that an obligation owed to all children, if not specifically written down, does not exist.

The Marten's clause finds importance where the Convention on the Rights of the Child fails in particularity. The Convention on the Rights of the Child encourages the overlap of international human rights law and humanitarian law when creating rights for children.[707] Article 38 calls on State Parties to protect the rights of children in situations of armed conflict and to ensure respect for rules of international humanitarian law,[708] ensuring that children are owed protection at all times, irrespective of the arena in

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[705] S Grover, *Child Soldier Victims of Genocidal Forcible Transfer*, (2012) 169.

[706] Article 21 of The Rome Statute of the International Criminal Court, Done at Rome on 17 July 1998, in force on 1 July 2002, United Nations, Treaty Series, Vol. 2187, No. 38544, Depositary: Secretary-General of the United Nations, http://treaties.un.org (Accessed on 28 June 2020).

[707] C Rutgers, *Creating a World Fit for Children: Understanding the UN Convention on the Rights of the Child*, (2011) 200-202.

[708] Article 38 of The Convention on the Rights of the Child, adopted an opened for signature, ratification and accession by the General Assembly resolution 44/25 of 20 November 1989, and entry into force 2 September 1990, in accordance with article 40.

which they find themselves. These “rights”, if interpreted correctly, apply similarly to the child after armed conflict.[709] The question which then begs to be answered relates to what right the child possesses after armed conflict.

The Convention on the Rights of the Child does answer this important question. Article 39 provides that the promotion of post-conflict recovery and reintegration in an environment that fosters the health, self-respect, and dignity of the child is encouraged.[710] The researcher understands this article to contain two nuances; on the one hand, the article provides that it is the right of the child after armed conflict to recover and to be reintegrated into society. The second nuance is that the right exists because it promotes the child’s health, self-respect, and dignity.

Like many other utopian ideas of protecting childhood, the rights of the child required after armed conflict vary with respect to the rights of the child before participating in an armed conflict. The researcher argues that the effect armed conflict has on children requires a different set of rules in order to limit its negative consequences. In a Harvard study on children and transitional justice, it was noted that, when analysing the impact of war on children it was found that a great number of children had died as a result of economic, social, and cultural rights violations during displacement and flight[711] and it recognised that children had in fact died owing to a lack of access to health care, basic nutrition, and necessities such as water and adequate housing.

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[709] S Parmar, M Roseman, S Siegrist, T Sowa, “Children and Transitional Justice- Truth Telling, Accountability and Reconciliation”, *Human Rights Program at Harvard Law School*, (2010) 3-7.

[710] Article 39 of The Convention on the Rights of the Child, adopted an opened for signature, ratification and accession by the General Assembly resolution 44/25 of 20 November 1989, and entry into force 2 September 1990, in accordance with article 40.

[711] S Parmar, M Roseman, S Siegrist, T Sowa, “Children and Transitional Justice- Truth Telling, Accountability and Reconciliation”, *Human Rights* Program *at Harvard Law School*, (2010) 4-8.

It may be regarded as well-established law that the child in armed conflict has a right to recovery and reintegration.[712] One may further accept that, for this to be achieved successfully, the child must first be demobilised or removed from the armed conflict. This is precisely where the child's right under the auspices of international human rights law converges with international humanitarian law.

Where international human rights law provides the right that children are to be the objects of special protection and to be able to recover from armed conflict with the aim of reintegration, it is international humanitarian law which provides for the demobilisation and evacuation of the child from armed conflict. The Geneva Conventions stipulate the fundamental principles of humanitarian law and, embodied in the Geneva Conventions, are the Articles which provide that children are to be demobilised and evacuated from armed conflict.

Article 78 of the First Additional Protocol to the Geneva Conventions deals with the protection awarded to victims of international armed conflicts. The evacuation of children is provided therein. Article 78 provides that:

> *"1. No Party to the conflict shall arrange for the evacuation of children, other than its own nationals, to a foreign country except for a temporary evacuation where compelling* ***reasons of the health*** *or medical treatment of the children or, except in occupied territory,* ***their safety, so require****. Where the parents or legal guardians can be found, their written consent to such to such evacuation is required. If these persons cannot be found, the written consent to such evacuation of the* ***persons who by law or custom are primarily responsible for the care of children is required****. Any such evacuation shall be supervised by the Protecting Power in agreement with the Parties concerned, namely, the Party arranging for the evacuation, the Party receiving the children, and any Parties whose nationals are being evacuated. In each case****, all Parties***

[712] V Odala, "The Spectrum for Child Justice in the International Human Rights Framework: From "Reclaiming the Delinquent Child" To restorative Justice", (2012), 27(3), *The American University International Law Review*, at page 555 Odala recalls that since the late nineties, the diversion of child offenders became common as an alternative to incarceration.

to the conflict shall take all feasible precautions to avoid endangering the evacuations*.*

2. *Whenever an evacuation occurs pursuant to paragraph 1, each child's* ***education****, including his religious and moral education as his parent's desire,* ***shall be provided*** *while he is away with the greatest possible continuity.*

3. *With a view to facilitating the return to their families and country of children evacuated pursuant to this Article, the authorities of the Party arranging for the evacuation and, as appropriate, the authorities of the receiving country shall establish for each child a card with photographs, which they shall send to the Central Tracking Agency of the International Committee of the Red Cross. Each card shall bear, when-ever possible, and whenever it involves no risk of harm to the child, the following information:*

a) Surname of the child;

b) The child's First name(s);

c) The child's sex;

d) ……..

s) Should the child die before his return, the date, place, and circumstances of the death and the place of internment".[713]

The First Additional Protocol is drafted for regulating international armed conflicts. Unsurprisingly, modern armed conflicts often exist within the non-international arena. International Humanitarian Law does provide steps for the demobilization and

[713] Article 78, 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.

evacuation of children from non-international armed conflicts. These steps are provided for in the Second Additional Protocol, Article 4(3) (e) which states that:[714]

> *"3. Children shall be provided with the care and aid they require, and in particular:*
>
> *(a) They shall **receive an education**, including religious and moral education, in keeping with the wishes of their parents, or in the absence of parents, of those responsible for their care;*
> *(b) All appropriate steps shall be taken **to facilitate the reunion of families** temporarily separated;*
> *(c) ……*
> *(d) The **special protection provided** by this Article to children who have not attained the age of fifteen years **shall remain applicable** to them if they take a direct part in hostilities despite the provisions of subparagraph (c) and are captured;*
> *(e) Measures shall be taken, **if necessary, and whenever possible** with the **consent** of their parents or persons who by law or custom are primarily responsible for their care, **to remove children temporarily** from the area in which hostilities are taking place to a safer **area within the country** and ensure that they are **accompanied by persons responsible for their safety** and well-being." (Own emphasis)*

Both additional protocols to the Geneva Conventions provide that children are prohibited from taking a direct part in armed conflict. Recalling the prohibitions provided for and explained in chapter 3 of this thesis. The same additional protocols ensure that children who are found to still be in armed conflict must be evacuated, so encouraging the thought that the demobilization of the child is the primary objective for the best interest of the child who is currently in armed conflict.

In international and non-international armed conflict, the basic principle is to evacuate the child to a safer place. This safer place should provide education for the child and

[714] Article 4(3)(a-e), Protocol 2 Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of non-international Armed Conflicts, 8 June 1977.

encourage religious education.[715] Despite its obvious good intentions, the additional protocols, apart from being more than 50 years old, lack the teeth necessary to apply them. Article 78 limits the international community to evacuating and demobilising children in armed conflict to the national government to whom the child belongs. This has caveats such as “compelling reasons” or “their safety so require” which diminish the veracity of the actual threat that children face when involved in armed conflict. Arguably one should not replace the good intention behind legislation with the limitations by imposing words that State Parties’ agree to as a bare minimum. This article was drafted for times of war. To encourage parties to a conflict to take only “feasible” precautions to avoid endangering the evacuation of children is a provision which modern times simply do not justify.

From 1977 to the 2000s the law and its consequential rights applicable to children have grown tremendously. Children are not only owed a special protected status. Children are the beneficiaries of the obligation to be protected by States and their best interests are seen to be of the utmost importance.[716] The researcher argues that enforcing the best interests of the child is not adequately achieved by “feasible” means but by doing all that is necessary.

This Article further limits the evacuation of children to their own nationals. The limitation may be understood in the light of the territorial sovereignty of a State, and the State’s inherent obligation to protect its own nationals. What were to happen in circumstances where the state party referred to becomes a failed state as a result of the armed conflict, or where a state party responsible for its nationals simply elects not to take action?

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[715] J Willems, *Children’s Rights and Human Development- A Multidisciplinary Reader*, (2010), at page 436 it is argued that where education was once a privilege reserved for the few, it is now owed universally, with every child’s right to education reaffirmed by the Convention on the Rights of the Child.

[716] C Rutgers, *Creating a World Fit for Children: Understanding the UN Convention on the Rights of the Child*, (2011) 219.

The researcher argues that, even ignoring the limitations imposed, it may be claimed that the child's special protected status and its best interest[717] is above the outdated limitation imposed by Article 78. To argue this point, one may consider the ambit of the Marten's clause, that where certain essential protections to groups and individuals are not allegedly afforded under a particular treaty, they are to be read into the treaty. Therefore, in circumstances where State Parties fail to, or elect not to, take action, the international community should be held responsible for ensuring the evacuation and demobilisation of children in armed conflict.

With regards to non-international armed conflicts, Article 4(3) of the Second Additional Protocol assists the reader in defining the principles related to "special protection".[718] The Article creates room to understand that children from different backgrounds may require unique rules to protect them. It facilitates this by providing that "children shall be provided with the care and aid **they require".** This suggests that the level of assistance is dependent on a specific set of facts, consequentially adapting its applicability to the needs of the different child under the auspices of "they require".

The same Article illustrates that education and reintegration are what "special protection" encompasses. The Article includes words such as "all appropriate steps" and "they shall receive an education", suggesting that these provisions are firm and undeniable.[719] In avoiding any confusion about the timeous applicability and definition of special protection, subsection (d) unambiguously provides that the special protection provided by this article shall remain applicable.

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[717] V Odala, "The Spectrum for Child Justice in the International Human Rights Framework: From "Reclaiming the Delinquent Child" To Restorative Justice", (2012), 27(3), *The American University International Law Review* 544.

[718] Article 4(3)(a-e), Protocol 2 Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of non-international Armed Conflicts, 8 June 1977.

[719] J Willems, *Children's Rights and Human Development- A Multidisciplinary Reader*, (2010) 436.

International humanitarian law, therefore, provides necessary rights for the child and it places obligations on the international community which require global participation in order to meet their intended effectiveness.[720]

Just as many other international laws, these specific principles are either mildly outdated or they lack the strength of particularity to be truly effective. Despite these obvious limitations, the fact that the rules do exist creates uniformity and codification. For instance, the researcher may draw on the provision that the child's special protected status is a customary international law rule. The researcher argues that one may briefly conceptualise the applicable rights of the child in armed conflict as follows: firstly, the child has a right to be demobilised and evacuated from the battlefield; secondly, the child has a right to be rehabilitated and provided with a safe environment which endorses education; and, thirdly, the child has a right to be reintegrated back into society.

5.3 Evacuation *versus* detention: an analysis of the *Omar Khadr* case

Customary international law and international humanitarian law indicate that the child's rights do not fall away simply because the child is participating in armed conflict. There are various reasons for this exception. One may assume that a reason might be the result of the child's age and susceptibility to hierarchical orders. Perhaps, fundamentally, it is the child's special protected status which begs for its continued state of existence irrespective of circumstances.[721]

Irrespective of the ideology and philosophical reasoning behind the application of the limitation, it is the international community that has consented to the notion that the

[720] V Odala, "The Spectrum for Child Justice in the International Human Rights Framework: From "Reclaiming the Delinquent Child" To Restorative Justice", (2012), 27(3), *The American University International Law Review* 545.

[721] V Odala, "The Spectrum for Child Justice in the International Human Rights Framework: From "Reclaiming the Delinquent Child" To Restorative Justice", (2012), 27(3), *The American University International Law Review* 544.

child's rights do not simply cease to exist. The special protection afforded to children remains applicable even if the child takes a direct part in hostilities.[722]

History is plagued with events which prove the adage that law and practice barely relate; it is the law which simply attempts to regulate the practice. Interestingly the lesson learned or which ought to be learned by errors of the past could be the yardstick used to measure a necessary amendment to the law.

One such event which affected how the world views children's rights in armed conflict today was the case of Omar Khadr. The researcher provides a factual matrix of the important aspects of this case below.

Omar Ahmad Khadr was born on 19 September 1986 in Canada.[723] Omar's father, Ahmed Said Khadr, an Egyptian, and his mother, Maha Elsamnah, a Palestinian, had six children, Omar being the fourth. It has been documented that Omar Khadr's family had a strong history and connection with Afghanistan and Pakistan.[724] The United States' intelligence indicated that the Khadr family had actually moved to Peshawar, Pakistan, where Omar's father had taken a job with a Canadian charity called Human Concern International. It was during this time that Omar's father became friends with Osama Bin Laden.

It has also been noted that the Khadr family had, during the late nineties, spent time at the Osama Bin Laden compound in Afghanistan. Allegedly Omar's family was connected to the extremist element of the Taliban affiliated with Al Qaeda.[725] In a report conducted by the International Human Rights Programme at the University of

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[722] Article 4(3) (d), Protocol 2 Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of non-international Armed Conflicts, 8 June 1977.

[723] http://www.internationalcrimesdatabase.org/Case/968/Khadr/ (Accessed on 20 July 2020).

[724] M Mehdi Ali, "Omar Khadr's Legal Odyssey: The Erasure of Child Soldier as a Legal Category", (2018), 46, *Georgia Journal of International and Comparative Law* 349-350.

[725] C Dore, "What to do with Omar Khadr? Putting a child soldier on trial: Questions of international Law, Juvenile Justice and Moral Culpability", (2008), 41, *John Marshall Law Review* 1283.

Toronto, it was indicated that the United States alleged that Omar received basic training by Al Qaeda while he was still a child.[726] This training consisted of training in firearms and explosives. Omar had often travelled between Canada and Pakistan and later on moved to Afghanistan before he was fifteen years old. Dore argues that Omar was, for all intents and purposes, a child soldier.[727]

A closer look at Omar's upbringing indicated that his father, Ahmed Khadr, was arrested in 1996 by the Pakistani Government for involvement surrounding the 1995 Egyptian embassy bombing in Pakistan, proving the family's connection with Al Qaeda. Dore confirms that Omar was very close to his father and suggests that, "Omar was deeply affected and radicalised by his father's beliefs, it would not be a misplaced assumption to say that at the age of ten, Omar was marked for life".[728] In July 2002, Omar Khadr was captured by American Forces. Omar was fifteen years old at the time.[729] The researcher pauses to mention that this age is the tipping point between the gap of child protection from armed conflict which is sixteen and seventeen.

Omar was captured after he and four others were positioned in a building near Khost in Afghanistan. The building was stormed by American soldiers and, after an exchange

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[726] T Navaneelan and K Oja, The United States v Omar Khadr: Pre-trial Observation Report, October 22 2008. International Human Rights Program, Faculty of Law, University of Toronto. https://www.law.utoronto.ca/documents/ihrp/Khadr Pre Trial Observation Report FINAL March 2009.pdf (Accessed on 1 June 2020).

[727] C Dore, "What to do with Omar Khadr? Putting a child soldier on trial: Questions of international Law, Juvenile Justice and Moral Culpability", (2008), 41, *John Marshall Law Review* 1282.

[728] C Dore, "What to do with Omar Khadr? Putting a child soldier on trial: Questions of international Law, Juvenile Justice and Moral Culpability", (2008), 41, *John Marshall Law Review*, at page 1284 Dore recalls that the Pakistani government also held Omar and his family for a short time (when Ahmed Khadr was arrested in 1996), Omar was very close to his father and was said to be traumatized and radicalised by the whole ordeal, at the age of ten, was marked for life.

[729] Human Rights Watch, Omar Khadr: A Teenager Imprisoned at Guantanamo Bay, June 2007. www.hrw.org/legacy/backgrounder/usa/us0607/us0607web.pdf (Accessed on June 2020) 1.

of gunfire, the American air force destroyed the building. Omar was the only survivor of the five inside the building. It is reported that, just before Omar was captured, Omar threw a grenade at an American soldier's vehicle and it killed the soldier. The American soldier in question was Sergeant First Class Christopher Speer.[730]

During his capture, Omar Khadr was significantly injured, reports indicating that he himself was shot in the back and was covered in shrapnel from an American grenade.[731] At this juncture in the factual matrix, one should recognise that Omar directly participated in the armed conflict despite being prohibited from doing so. Omar was captured, leaving one to imagine whether the definition of demobilisation and evacuation could be associated with "capture". All that one knows is that Omar was not killed and force was used to prohibit his further participation in armed conflict. Arguably, the American soldiers acted in a reasonable manner and in compliance with international humanitarian law. Direct participation in an armed conflict would make him a lawful target under military objectives.

To revisit the rights that Omar has under international law, one may acknowledge that Omar had a right to be evacuated from the armed conflict. States were to take precautions not to endanger this evacuation. After being evacuated, Omar had a right to be educated both academically and in religion and moral values.[732] The purpose of these rights was to be enforced with the aim of reintegrating Omar with his family or community.[733] The researcher argues that, after considering the facts below, these

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[730] http://www.internationalcrimesdatabase.org/Case/968/Khadr/ (accessed on 20 July 2020).

[731] Affidavit by Omar Khadr, https://www.pouromarkhadr.com/info/about-omar/affidavit-of-omar-ahmed-khadr/?lang=en (Accessed on 20 June 2020). See also https://freeomarakhadr.files.wordpress.com/2012/04/affidavit_khadr_redacted_20082.pdf. (Accessed 20 June 2020).

[732] Article 4(3)(a-e), Protocol 2 Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of non-international Armed Conflicts, 8 June 1977.

[733] Article 78 (3), 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.

rights are little more than paper directions which were clearly ignored without any consequence.

After being captured by American soldiers, Omar was detained at a U.S airbase in Afghanistan (Bagram Air Force Base).[734] Dore recalls that Omar spent four months at the airbase where he was even interrogated.[735] One would have assumed that, once Omar had been demobilised and evacuated from the armed conflict, the American soldiers would release Omar either to the Canadian Embassy or the Afghanistan government.[736] Despite this assumption being hopelessly incorrect, Omar was transferred from Afghanistan to Guantanamo without his parent's or his consent.

Omar was fifteen years old at the time. In October of 2002, and at the age of sixteen, Omar was transferred to Guantanamo in Cuba. Mehdi Ali confirms that in Guantanamo Omar was not granted counsel for two whole years.[737] Importantly, at the time that Omar was transferred to Guantanamo, there were no charges against him. According to international law, the United States had no legal right to transfer a Canadian-born child from Afghanistan to Guantanamo and detain him without due process for two years. Thus, one may argue that the transfer of Omar from Afghanistan to Guantanamo was unlawful in itself.

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[734] http://www.internationalcrimesdatabase.org/Case/968/Khadr/ (Accessed on 20 July 2020).

[735] C Dore, "What to do with Omar Khadr? Putting a child soldier on trial: Questions of international Law, Juvenile Justice and Moral Culpability", (2008), 41, *John Marshall Law Review* 1286.

[736] Article 78(1) 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. "*No Party to the conflict shall arrange for the evacuation of the children, other than its own nationals, to aa foreign country except for a temporary evacuation where compelling reasons of the health or medical treatment of the children or, except in occupied territory, their safety, so require. Where the parents or legal guardians can be found, their written consent to such evacuation is required*."

[737] M Mehdi Ali, "Omar Khadr's Legal Odyssey: The Erasure of Child Soldier as a Legal Category", (2018), 46, *Georgia Journal of International and Comparative Law* 350.

Considering the conditions that Omar would face once brought to Guantanamo, one needs to recall that the United States did not apply the Geneva Convention or its consequential rights to detainees until mid-2006.[738] Once Omar had been sent to Guantanamo, he met with harrowing conditions. When Omar was able to seek legal counsel two years after his arrival at Guantanamo, he was already reaching the age of majority. Consequently, the necessary maturing teenage years of Omar's life were void of any civility or typical social interaction.

The truth of what actually occurred during Omar's detention came to light years later when Omar deposed to an affidavit.[739] Omar informed his legal counsel that, during his two-year solitary detention, he was subjected to torture. This was confirmed when the Canadian Supreme Court ordered the release of a video showing the interrogation of Omar at Guantanamo.[740] Dore describes the video showing Omar crying and asking for help while lifting his shirt, exposing the wounds he had received from being tortured.[741]

In 2005, after more than two years of detention, Omar was charged with murder. The Commission of the US Military found that no law or custom law prohibited the trial of a person for violations of the law of nations at fifteen years.[742] Omar's trial was set to

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[738] M, Mehdi Ali, "Omar Khadr's Legal Odyssey: The Erasure of Child Soldier as a Legal Category", (2018), 46, *Georgia Journal of International and Comparative Law* 352.

[739] Affidavit by Omar Khadr, https://www.pouromarkhadr.com/info/about-omar/affidavit-of-omar-ahmed-khadr/?lang=en (Accessed on 20 June 2020). See also https://freeomarakhadr.files.wordpress.com/2012/04/affidavit_khadr_redacted_20082.pdf (Accessed 20 June 2020).

[740] C Dore, "What to do with Omar Khadr? Putting a child soldier on trial: Questions of international Law, Juvenile Justice and Moral Culpability", (2008), 41, *John Marshall Law Review* 1285- 1288.

[741] C Dore, "What to do with Omar Khadr? Putting a child soldier on trial: Questions of international Law, Juvenile Justice and Moral Culpability", (2008), 41, *John Marshall Law Review* 1288-1289.

[742] M, Mehdi Ali, "Omar Khadr's Legal Odyssey: The Erasure of Child Soldier as a Legal Category", (2018), 46, *Georgia Journal of International and Comparative Law* 364.

be held by the military commission in 2005 but owing to a change in policies in the American legal system, his trial commenced only in 2008,[743] thus making Omar's detention last for more than five years, depriving him of his youth and the basic human rights afforded to children.

Omar's actions in 2002 are best described as those of a child directly participating in armed conflict. The Convention on the Rights of the Child, its Optional Protocol along with the Geneva Conventions are applicable, owing to Omar's age at the time and his participation in armed conflict. Arguably it is impossible to understand the connection between what international law prescribes as the rights Omar possesses and what the United States permitted and enforced.

The researcher argues that Omar Khadr should be accurately described as both a child directly participating in armed conflict and a rights bearer under international law. These rights are not interdependent on the manner in which the child became an active participant in the armed conflict. Nor do these rights become blurred depending on the deeds committed by the child.

This argument is supported by Article 4 (3) (d) of the Additional Protocol II.[744] The rights applicable to the child in armed conflict remain so despite the child's taking a direct part in hostilities. It is ironic that the United States would use the Geneva Conventions so strongly when promoting its strong view on the war against terror. The Geneva Convention's Additional Protocols, despite being fifty years old, not only regulate how prisoners of war are dealt with but also regulate how children are to be treated. The researcher argues that, if one relies on a particular law, one has to apply and read the law *in toto* and not selectively.

The tragedy in the Omar Khadr case lies not only in the obvious human rights violations, such as torture and unlawful detention, but also in the blatant disregard for

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[743] T Navaneelan and K Oja, The United States v Omar Khadr: Pre-trial Observation Report, October 22 2008. International Human Rights Program, Faculty of Law, University of Toronto. https://www.law.utoronto.ca/documents/ihrp/Khadr Pre Trial Observation Report FINAL March 2009.pdf (Accessed on 1 June 2020).

[744] Article 4(3)(d), Protocol 2 Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of non-international Armed Conflicts, 8 June 1977.

children's rights as a separate body of international law. When classifying Omar Khadr as a child directly participating in armed conflict, one similarly accepts that there should be oversight over his detention. Omar should be given access to legal counsel and his family as soon as possible after being evacuated from the armed conflict. Arguably, Omar Khadr's classification as a child participating in armed conflict entitles him to receive legal treatment different from that received by accused adult criminals.[745]

The researcher argues that the Geneva Conventions and their Protocols are the very basic and rudimental level of what the universal standard was for humanitarian law in 1977, arguing that, where the Conventions provide for "Fundamental Guarantees", they refer to those guaranteed rights that for all intents and purposes should not be infringed upon. This is what Part 2 of Additional Protocol two refers to as "Humane Treatment".[746]

Should the United States argue that Omar was a combatant or terrorist in an attempt to justify the morally inexcusable treatment Omar was subjected to? The all-inclusive tone of Article 4(3) (d) confirms that the special protection afforded to children remains even if they **"take a direct part in hostilities"**… "**And are captured."** The researcher contends that the conclusion of this particular Article is purposefully inserted to afford the child the fullest protection possible.

The researcher submits that the conduct by the United States referred to here was in direct breach of its international law obligations. Unfortunately, no order by an international court against the United States could erase the damage that has been

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[745] C Dore, "What to do with Omar Khadr? Putting a child soldier on trial: Questions of international Law, Juvenile Justice and Moral Culpability", (2008), 41, *John Marshall Law Review*, at page 1317 Dore argues that Omar Khadr was entitled to many rights, rights which were dramatically different from that of an adult in the same circumstances, Omar's classification currently entitles him to legal treatment different from those that committed their crimes as adults, a general disposition as a victim over a perpetrator, and access to psychological rehabilitation program.

[746] Part II Humane Treatment, Article 4- Fundamental Guarantee's, of Protocol 2 Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of non-international Armed Conflicts, 8 June 1977.

done. Nor could any compensation recover time that has been stolen, or the youthful years during which he was tortured. The international community can only ensure that there is not another Omar Khadr case in the future. Dore accurately suggests that *looking backward, however, only helps those that will follow in Omar's footsteps.*[747]

In protecting the future, one needs to look at Omar Khadr's life before capture. No child should be exposed to such an upbringing. Recalling the vivid facts of Omar's young life, it was not in his best interest that Omar should have stood trial without first being provided with rehabilitation as an option.[748] The researcher argues that where the United States government had truly failed was by deleting the possibility of hope of recovery for Omar.[749] It did this by opting for detention and interrogation over education and rehabilitation.[750]

In considering Omar's best interest, arguably his torture and detention over a period of more than five years would only encourage a mindset that is rooted in conflict,[751]

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[747] C Dore, "What to do with Omar Khadr? Putting a child soldier on trial: Questions of international Law, Juvenile Justice and Moral Culpability", (2008), 41, *John Marshall Law Review* 1317.

[748] Article 78, 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. See also Article 39 of The Convention on the Rights of the Child, adopted an opened for signature, ratification and accession by the General Assembly resolution 44/25 of 20 November 1989, and entry into force 2 September 1990, in accordance with article 40.

[749] V Odala, "The Spectrum for Child Justice in the International Human Rights Framework: From "Reclaiming the Delinquent Child" To Restorative Justice", (2012), 27(3), *The American University International Law Review*, at page 546 Odala argues that the purpose of child justice has shifted from reclaiming the delinquent child to restoring children in conflict with the law.

[750] J Willems, *Children's Rights and Human Development- A Multidisciplinary Reader*, (2010) 436.

[751] C Dore, "What to do with Omar Khadr? Putting a child soldier on trial: Questions of international Law, Juvenile Justice and Moral Culpability", (2008), 41, *John Marshall Law Review*, at page 1317 Dore argues that his time in detention has undoubtedly sealed in any

leaving Omar with an even worse mindset than when he was captured at the impressionable age of fifteen.[752]

Article 3(2) of the Convention on the Rights of the Child provides that:

> *"State Parties undertake to ensure to the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative means."*[753]

One should not be able, without good cause, to deviate from the inclusion of the word "necessary". The obligation is clear and the exception far too narrow for a state not to meet this requirement. Notably, the United States is not a party to the Convention on the Rights of the Child, making it more necessary for the international community to operate on the basis that the Convention is considered customary international law.

The researcher concludes that detention in itself is not an evacuation. The child's maturing teenage years are of utmost importance, and each day draws closer to the child's eventually turning eighteen and foregoing the benefits of childhood. The Omar Khadr case proves this argument to the extent that the crucial teenage years for child development were lost and could never be replaced. Evacuation or demobilisation must be strictly adhered to under the auspices of rehabilitation and not detention.

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anger and animosity towards the United States that was planted in his brain during his childhood. At the time of his capture, Omar's chances of rehabilitation and reintegration were far higher for precisely the same reasons he was so susceptible to negative environmental influences- juveniles are impressionable, both to their benefit and to their detriment.

[752] V Odala, "The Spectrum for Child Justice in the International Human Rights Framework: From "Reclaiming the Delinquent Child" To Restorative Justice", (2012), 27(3), *The American University International Law Review* 574.

[753] Article 3 (2) of The Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by the General Assembly resolution 44/25 of 20 November 1989, and entry into force 2 September 1990, in accordance with article 40.

Irrespective of the events which led to Omar Khadr's participation in hostilities and despite the prohibitions against the involvement of children in armed conflict, children remain entitled to special treatment when captured and imprisoned. Kuper argues that this is a basic rule which military personnel should learn in their training and that any breach of these rules may result in prosecution.[754]

5.4 Accountability through transitional justice mechanisms

In chapter 4, the Roper decision was discussed. The Roper decision was famous for its landmark judgment declaring the death penalty for crimes committed by children unconstitutional. As alluded to in chapter 4, this decision is, however, effective only within the United States of America. It remains, however, a decision that echoes through the international community as setting a standard for juvenile justice. Schabas argues that this decision has developed into customary international law.[755]

For obvious reasons, the connection between international children's rights and customary international law continues to grow parallel to one another.[756] Where the

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[754] J Kuper, *"Bridging the Gap: Military Training and International Accountability Regarding Children*", at Chapter 12 of: From Peace to Justice "International Criminal Accountability and the Rights of Children", Edited by K Arts and V Popovski, 2005 162.

[755] W. A. Schabas, *"The Rights of the Child, Law of Armed Conflict and Customary International Law: A Tale of Two Cases*", at Chapter 2 of: From Peace to Justice "International Criminal Accountability and the Rights of Children", Edited by K Arts and V Popovski, 2005, at page 19 Schabas argues that with regards to the Roper's decision, the decision confirms the virtual universal abolition of this practice and, thereby, the indubitable entry of the norm into the category of customary international law.

[756] C Rutgers, *Creating a World Fit for Children: Understanding the UN Convention on the Rights of the Child*, (2011), at page 216 it is argued that The Convention on the Rights of the child has no general derogation clause. In light of this, the Committee on the Rights of the Child has stressed that the most positive interpretation should always prevail to ensure the

modernisation of children's rights relies heavily on customary international law, it is the courts, or in some cases *ad hoc* international criminal tribunals, which create significant developments in the law.[757]

Notably, the International Criminal Court does not have the necessary jurisdiction to adjudicate on matters where the defendant is a child. Section 26 of the Rome Statute limits the court's jurisdiction to individuals above the age of eighteen[758]. Consequently, victims of children's deeds during armed conflict and even the children themselves search for accountability and for justice to be seen to be done. As a result, the establishment of *ad hoc* international tribunals with the aim of attempting to achieve justice in times of war became necessary. Whether these tribunals actually met this attempt accurately is still to be discussed.

The researcher argues that one should not merely overlook the hierarchy of laws and courts in the light of the International Criminal Court's being a court of last resort.[759] It is not an opportunity but a right for national courts to take the first action and investigation. Arguably, it is simply more viable for *ad hoc* criminal tribunals and national criminal courts to regulate their own processes. The probability of a national court or *ad hoc* criminal tribunal adjudicating on a matter more quickly than the

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widest possible respect for children's rights, particularly during war when they are most at risk.

[757] C Rutgers, *Creating a World Fit for Children: Understanding the UN Convention on the Rights of the Child*, (2011), at page 232.

[758] Article 26 of The Rome Statute of the International Criminal Court, Done at Rome on 17 July 1998, in force on 1 July 2002, United Nations, Treaty Series, Vol. 2187, No. 38544, Depositary: Secretary-General of the United Nations, http://treaties.un.org (Accessed online 18 April 2020).

[759] L Moreno-Ocampo, *"The Rights of Children and the International criminal Court*", at Chapter 8 of: From Peace to Justice "International Criminal Accountability and the Rights of Children", Edited by K Arts and V Popovski, 2005, at page 115 the author argues that the International criminal Court is a court of last resort, not forgetting that the court will intervene only selectively and when the responsible state does not act.

International Criminal Court is very high, owing to the location and the administration required.

Just as in the Roper decision in the United States, a precedent provided by an International Criminal Tribunal does encourage state practice and sets an example of a perceived standard.[760] The International Criminal Tribunals for the Former Yugoslavia and the Criminal Tribunal for Rwanda have played major roles in the adjudication of cases involving the merits of rape amongst other gender-based crimes.[761] Moreno-Ocampo suggests that this may have been a result of the female influence on the judicial panel of these tribunals.[762]

The International Criminal Tribunal for the Former Yugoslavia (the researcher refers herein to it as the ICTY) commenced in 1993.[763] The establishment of the tribunal was conducted by the United Nations Security Council. The Tribunal was established to address the widespread and flagrant violations of international humanitarian law occurring within the territory of the former Yugoslavia from 1 January 1991. The ICTY is not as famous as the Special Court for Sierra Leone in relation to advancing

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[760] V Odala, "The Spectrum for Child Justice in the International Human Rights Framework: From "Reclaiming the Delinquent Child" To Restorative Justice", (2012), 27(3), *The American University International Law Review* 558.

[761] C Rutgers, *Creating a World Fit for Children: Understanding the UN Convention on the Rights of the Child,* (2011), at page 218.

[762] L Moreno-Ocampo, *"The Rights of Children and the International criminal Court*", at Chapter 8 of: From Peace to Justice "International Criminal Accountability and the Rights of Children", Edited by K Arts and V Popovski, 2005, at page 115 Moreno-Ocampo argues that the practice of the Tribunals changed how gender based violence was viewed in times of war, and states that this may have occurred because women judges were presiding over these particular matters and that they could have directed the required changes including the definition of rape.

[763] Resolution 827 (1993) Adopted by the Security Council at its 3217th meeting on 25 May 1993. https://www.icty.org/x/file/Legal%20Library/Statute/statute_827_1993_en.pdf (Accessed online 10 June 2020).

children's rights. The Convention on the Rights of the Child came into force only in 1990, and so the ICTY and the Convention were both very young in age.

Tolbert argues that it was only when the Special Court for Sierra Leone and the International Criminal Court was established that children's rights became a focus of international law.[764] The ICTY was one of the first of its kind and was strikingly different from its relatives in relation to the enforcement of children's rights. For instance, the Special Court for Sierra Leone attracted the displeasure of the world by having the nature of the armed conflict itself involve more children as participants than that of the conflict within the Former Yugoslavia.[765]

The ICTY makes its mark in history on children's rights by the inclusion of the child's voice in the justice system as a witness. Child witnesses at the ICTY were granted their own provision regulating same. Section 90(B) of the ICTY's Rules of Procedure and Evidence reads:

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[764] D Tolbert, *"Children and International Criminal Law: The Practice of the International Tribunal for the Former Yugoslavia (ICTY)*", at Chapter 11 of: From Peace to Justice "International Criminal Accountability and the Rights of Children", Edited by K Arts and V Popovski, 2005, at page 147 Tolbert argues that it obviously took some time for international lawyers and political decision-makers to take into account, in a systematic way, the rights and special circumstances of children profiled in this Convention. Thus, it was only when later courts and tribunals were established, including the Special Court for Sierra Leone (SCSL) and the International Criminal Court that children's rights had become a central focus of international law. In the meantime, domestic policies and non-governmental organisations (NGOs) committed to children's issues also actively advanced children's rights causes much more than was the case before.

[765] *Prosecutor v Blaskic*, Case No. IT-95-14-T, Trial Judgment, 3 March 2000, https://www.icty.org/en/case/blaskic (Accessed on 20 June 2020). See also D Tolbert, *"Children and International Criminal Law: The Practice of the International Tribunal for the Former Yugoslavia (ICTY)*", at Chapter 11 of: From Peace to Justice "International Criminal Accountability and the Rights of Children", Edited by K Arts and V Popovski, 2005 148.

> *"A child who, in the opinion of the Chamber, does not understand the nature of a solemn declaration, may be permitted to testify without that formality, if the Chamber is of the opinion that the child is sufficiently mature to be able to report the facts of which the child had knowledge and understands the duty IT/32/Rev. 50 92 8 July 2015 to tell the truth. A judgment, however, cannot be based on such testimony alone. (Amended 30 Jan 1995)."*[766]

The court itself recognised that the mental development of the child is important to the extent that the child's maturity could be used as a yardstick in measuring her ability to testify. Undeniably the child's testimony is wanted. This indicates its value, but, at the same time, its evidentiary weight is limited to the fact that it alone will not satisfy a judgment.[767]

The researcher argues that the implication of this rule is that children are given a voice in judicial proceedings, yet both the child's vulnerability and youthful mental development are considered and respected.[768] To consider this rule from another angle, one may argue that, if the child's testimony is approached with such caution, then such caution should also be applied when considering the child's deeds committed in armed conflict.

A few years later, the International Criminal Court provided a different approach to children participating in a judicial process as witnesses. The International Criminal Court permits children to participate as witnesses without a limitation being placed on

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[766] The United Nations, IT/32/REV.50 International Tribunal for the prosecution of the persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991. The Hague, the Netherlands, 8 July 2015 Rules of Procedure and Evidence, https://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev50_en.pdf (Accessed on20 June 2020).

[767] D Tolbert, *"Children and International Criminal Law: The Practice of the International Tribunal for the Former Yugoslavia (ICTY)"*, at Chapter 11 of: From Peace to Justice "International Criminal Accountability and the Rights of Children", Edited by K Arts and V Popovski, 2005 149.

[768] C Rutgers, *Creating a World Fit for Children: Understanding the UN Convention on the Rights of the Child*, (2011), at page 200-202.

the evidentiary weight of the evidence provided by the child.[769] Tolbert suggests that the International Criminal Court leaves it to the judges to accord the appropriate weight to the testimony.[770]

A problem that the ICTY possessed through its limitation on the evidentiary weight attributed to the child's testimony (the evidence requiring corroboration) was that it left the child who had been raped without any recourse if there were no other witnesses to corroborate her evidence. This problem would not exist a few years later before the International Criminal Court. It is these developments which international law constantly requires.

A further aspect to consider from the ICTY is how the child witnesses were treated. Tolbert states that the ICTY adopted procedures to assist in working with children who are witnesses.[771] This included financing the travel to the tribunal and for the child to be accompanied by an adult, for example the child's parent or guardian. It could also

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[769] Rule 66 of the International Criminal Court Rules of Procedure and Evidence,

(1) Except as described in sub-rule 2, every witness shall, in accordance with article 69, paragraph 69, paragraph 1, make the following solemn undertaking before testifying:

"I solemnly declare that I will speak the truth, the whole truth and nothing but the truth."

(2) A person under the age of 18 or a person whose judgment has been impaired and who, in the opinion of the Chamber, does not understand the nature of a solemn undertaking may be allowed to testify without this solemn undertaking if the chamber considers that the person understands the meaning of the duty to speak the truth.

[770] D Tolbert, *"Children and International Criminal Law: The Practice of the International Tribunal for the Former Yugoslavia (ICTY)*", at Chapter 11 of: From Peace to Justice "International Criminal Accountability and the Rights of Children", Edited by K Arts and V Popovski, 2005 151.

[771] D Tolbert, *"Children and International Criminal Law: The Practice of the International Tribunal for the Former Yugoslavia (ICTY)*", at Chapter 11 of: From Peace to Justice "International Criminal Accountability and the Rights of Children", Edited by K Arts and V Popovski, 2005 150- 151.

include the provision of special counselling regarding the judicial process and terminology. The reasoning behind these procedures was firstly based on understanding that the child requires the support of someone the child trusts, and, secondly, understanding that testifying for a child could very well be traumatic in itself.

The ICTY might not have prosecuted a child, but there are circumstances where the accused was prosecuted for crimes that involved victims who were children. The most relevant case would be the matter of the *Prosecutor v Kunarac.*[772] In this matter the appeal chamber of the ICTY adjudicated on the following facts. In the early nineties the area of Foca was the scene of an armed conflict. In this armed conflict, non-Serbian civilians were killed, raped, and mistreated. One of the targets of this campaign were Muslim civilians and women in particular.

According to reports, the Muslim women were detained and kept in centres where they were subjected to various acts of physical violence and multiple rapes.[773] In 2001, the appellant was found guilty of crimes against humanity on the counts of rape and torture as well as violations of the laws and customs of war on the counts of rape and torture[774]. The appellant consequently appealed against the court *a quo*'s finding. The importance of this appeal is found on page seven of the appeal court's judgment rendered on 12 June 2002. Subparagraph 3 reads:

> *"Issue of the age of the victims, all but one younger than 19:*
>
> *The Trial Chamber rightly took into consideration the evidence of the Defence expert witness on the sentences incurred for the crime of rape in the former*

[772] Appeals Chamber Judgement in the Kunarac, Kovac and Vukovic (Foca) Case: The Hague, 12 June 2002, CVO/P.I.S./ 679 E. https://www.icty.org/x/cases/kunarac/acjug/en/020612_Kunarac_Kovac_Vukovic_summary_en.pdf (Accessed on 20 June 2020).

[773] J Kuper, *"Bridging the Gap: Military Training and International Accountability Regarding Children*", at Chapter 12 of: From Peace to Justice "International Criminal Accountability and the Rights of Children", Edited by K Arts and V Popovski, 2005158.

[774] Appeals Chamber Judgement in the Kunarac, Kovac and Vukovic (Foca) Case: The Hague, 12 June 2002, CVO/P.I.S./ 679 E. https://www.icty.org/x/cases/kunarac/acjug/en/020612_Kunarac_Kovac_Vukovic_summary_en.pdf (Accessed on 20 June 2020).

> *Yugoslavia who confirmed that, in that country, aggravating factors were attached to the rape of young girls under the age of 18. In the view of the Appeals Chamber, the expert's evidence did not contradict the prevailing practice in the former Yugoslav Republic of Bosnia and Herzegovina. By virtue of its inherent discretionary power, the Trial Chamber was entitled to consider that the age of 19 is sufficiently close to the protected age of special vulnerability for it to view that age as an aggravating factor. As for the Appellant Vukovi's allegation that an error was committed in evaluating the age of victim FWS-50, the Appeals Chamber responds that the fact that two slightly different ages were given to the victim in the Trial Judgement (approximately 16 and 15½) takes nothing away from the fact that she was young, and that this could constitute an aggravating factor. The Appeals Chamber, therefore, finds that the Trial Chamber did not make an error in taking into consideration the young age of the victims specified in the Trial Judgement. Accordingly, these grounds of appeal are dismissed.* (Quoted from the summarised judgment)

This judgment acknowledges the vulnerability of age and it goes to the extent of suggesting that the age of nineteen is not outside the realm of equal protection owed to the child.[775] The ages of fifteen and below are deemed to be the most protected ages of children. It is, however, the older children that are the problematic cases as they are technically children but are arriving at the doorsteps of adulthood.[776] One may argue that by the Appeal Chamber, recognising the special vulnerability of the child as

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[775] J Kuper, *"Bridging the Gap: Military Training and International Accountability Regarding Children*", at Chapter 12 of: From Peace to Justice "International Criminal Accountability and the Rights of Children", Edited by K Arts and V Popovski, 2005 158.

[776] N Mole, *"Litigating Children's Rights Affected by Armed Conflict before the European Court of Human Rights*", at Chapter 13 of: From Peace to Justice "International Criminal Accountability and the Rights of Children", Edited by K Arts and V Popovski, 2005 177.

an aggravating factor, implies the need to remove the presence of children from the battlefield altogether.[777]

The Special Court for Sierra Leone was established in 2002. The Sierra Leone Government requested the United Nations to set up a special court aimed to address the serious violations of international law committed as a result of Sierra Leone's decade-long civil war.[778] After much deliberation on the court's structure and mandate, the Special Court was established. Commonly known as the world's first hybrid court, the court was established with the aim of localising and prosecuting those responsible for crimes committed in Sierra Leone after November 1996.[779] The infamous "hybrid" connotation is drawn from the fact that the Special Court would embody the influences

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[777] J Kuper, *"Bridging the Gap: Military Training and International Accountability Regarding Children*", at Chapter 12 of: From Peace to Justice "International Criminal Accountability and the Rights of Children", Edited by K Arts and V Popovski, 2005 158.

[778] The United Nations Security Council Resolution 1315 of 14 August 2000. http://www.rscsl.org/Documents/Establishment/S-Res-1315-2000.pdf (Accessed on 20 June 2020). See also A McQueen, "Falling through the Gap: The Culpability of Child Soldiers under International Criminal Law", (2018), 94(2), *Notre Dame Law Review Online*, at page 115 McQueen recalls that the ICTY and ITRC were established in accordance with Security Council resolutions and were granted Chapter VII powers, the Security Council proposed a domestic-international hybrid tribunal in accordance with a treaty based agreement. See also D Crane, "*Strike Terror No More: Prosecuting the Use of Children in Times of Conflict-The West African Extreme*", at Chapter 9 of: From Peace to Justice "International Criminal Accountability and the Rights of Children", Edited by K Arts and V Popovski, 2005, at page 121 Crane argues that Sierra Leone being rich in minerals and diamonds were what cursed Sierra Leone, it was the corruption and diamonds which ignited the conflict that caused the murder and mutilation of more than 500 000 people. See also the Statute of the Special Court for Sierra Leone: http://www.rscsl.org/Documents/scsl-statute.pdf (Accessed on 20 June 2020).

[779] The Special Court for Sierra Leone. History and Jurisprudence. http://www.rscsl.org/index.html (Accessed on 20 June 2020).

of both international law and the Sierra Leonean's domestic law.[780] Both of these laws would be jointly administered by the United Nations and the Sierra Leonean government.[781]

In his report on the establishment of the Special Court for Sierra Leone, the Secretary-General of the United Nations noted that the Special Court is a treaty-based *sui generis* court of mixed jurisdiction and composition.[782] Importantly, this court is seated in Sierra Leone, the country where the violations took place. The age-old adage that justice must not only be done but also be seen to be done was given recognition. The distinctive aspect for which the Special Court for Sierra Leone was mandated was that, in the civil war that plagued Sierra Leone, children specifically were used in vast numbers.

These children were known throughout history as being particularly responsible for some of the most brutal and horrific violations of human rights.[783] In 2013, Justice Teresa Doherty, a Judge at the Special Court for Sierra Leone, stated in a presentation in Auckland New Zealand, that:

> *"The* Modus Operandi *for child soldiers, as they became known, was to go into villages, round up the population and kill some of them as an example of what happens should you resist, abduct the able-bodied and particularly the young woman and publicly rape quite a lot of them as an act of terror."*[784]

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[780] C Rutgers, *Creating a World Fit for Children: Understanding the UN Convention on the Rights of the Child*, (2011), at page 218.

[781] A McQueen, "Falling through the Gap: The Culpability of Child Soldiers under International Criminal Law", (2018), 94(2), *Notre Dame Law Review Online* 115.

[782] Report of the Secretary-General on the establishment of a Special Court for Sierra Leone. https://digitallibrary.un.org/record/424039?ln=en (Accessed on 20 June 2020).

[783] S Parmar, M Roseman, S Siegrist, T Sowa, "Children and Transitional Justice- Truth Telling, Accountability and Reconciliation", 2010, Human Rights Program at Harvard Law School, 3-7.

[784] On 9 May 2013, the University of Auckland hosted Justice Teresa Doherty of the Special Court for Sierra Leone. Justice Doherty spoke to the Legacy of the Special Court. Justice Doherty commented specifically on the jurisprudential and attitudinal advances on gender

Judge Doherty recalls that many of the children were given drugs. In one instance, she specifically recalls that a particular child's evidence explained that he did not know what he was doing, he was mad, his eyes were red, he was made brave by the drugs and sent back home to kill members of his own family.

Factually, the civil war in Sierra Leone involved the national government's army and the Revolutionary United Front's non-state armed forces, more commonly known as the RUF. McQueen recalls that both of these warring sides equally disregarded the best interests of the child by using children as young as seven in hostilities. Not only were these children used as pawns, but they were in fact spreading fear and were responsible for murders, rapes, torture, and sexual slavery.[785]

The use of children as child soldiers within Sierra Leone led the Special Court to address this in its statute. The Statute recognised the breach of international humanitarian law to conscript and use children under the age of fifteen.[786] This was met with a lot of criticism as many at the time did not believe that this provision was, either through customary law or culturally, applicable to Sierra Leone at the time.[787]

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issues and providing particularly frank and nuanced comments on the extent to which the court was able to conform impunity. https://www.youtube.com/watch?v=HL72vzO8uks (Accessed on 20 June 2020).

[785] A McQueen, "Falling through the Gap: The Culpability of Child Soldiers under International Criminal Law", (2018), 94(2), *Notre Dame Law Review Online* 114. See also D Crane, "*Strike Terror No More: Prosecuting the Use of Children in Times of Conflict-The West African Extreme*", at Chapter 9 of: From Peace to Justice "International Criminal Accountability and the Rights of Children", Edited by K Arts and V Popovski, 2005 122.

[786] Article 4 (C) Statute of the Special court for Sierra Leone, on conscripting or enlisting children under fifteen into armed forces or groups or using them to participate actively in hostilities.

[787] On 9 May 2013, the University of Auckland hosted Justice Teresa Doherty of the Special Court for Sierra Leone. Justice Doherty spoke to the Legacy of the Special Court. Justice Doherty commented specifically on the jurisprudential and attitudinal advances on gender issues and providing particularly frank and nuanced comments on the extent to which the

Despite this legal prohibition of conscripting and using children under the age of fifteen to participate in armed conflict, children remained a majority stakeholder on the frontline of the civil war. The unprecedented use of children as child soldiers grew to an extent that even the manner in which these children were viewed by the international community was affected. The then Secretary-General of the Security Council of the United Nations, Kofi Annan, submitted that, when considering responsibility, one should not look at military or political leadership but rather the severity and scale of the crimes.[788] This adaptation of focus on the crimes committed in Sierra Leone led many to stop seeing these children only as victims and, instead, to view them with the perspective that their involvement in the hostilities had reached an unprecedented level of brutality.[789]

For the first time in international history, there were suggestions that child soldiers be put on trial for the crimes that they committed during their tenure in the civil war.[790] One can only assume that this was a hugely contentious issue.[791] Article 3 of The

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court was able to conform impunity. https://www.youtube.com/watch?v=HL72vzO8uks (Accessed on 20 June 2020).

[788] Report of the Secretary-General on the establishment of a Special Court for Sierra Leone. https://digitallibrary.un.org/record/424039?ln=en (Accessed on 20 June 2020). In this report the criminal culpability of young people was raised as an aspect to be considered by the Special Court.

[789] M A Thomas, "Malice Supplies the Age: Assessing the Culpability of Adolescent Soldiers", (2013), 44 (1), *California Western International Law Journal* 16.

[790] A McQueen, "Falling through the Gap: The Culpability of Child Soldiers under International Criminal Law", (2018), 94(2), *Notre Dame Law Review Online* 115.

[791] D Crane, "*Strike Terror No More: Prosecuting the Use of Children in Times of Conflict-The West African Extreme*", at Chapter 9 of: From Peace to Justice "International Criminal Accountability and the Rights of Children", Edited by K Arts and V Popovski, 2005 120-121. David Crane was the Chief Prosecutor of the Special court for Sierra Leone between April 2002 and July 2005 states that the rights of children and accounting for crimes against them and humanity are linked to all of our attempts to ensure that children grow up healthily and secure from impunity. It is my belief that children under fifteen per se are legally not capable of

Convention on the Rights of the Child, *prima facie*, rejects the suggestion of putting a child on trial for crimes committed during armed conflict. The Convention on the Rights of the Child provides for the best interests of the child to be a primary consideration.[792] International Humanitarian law equally provided the child a special protected status which required the child's evacuation from armed conflict.[793] The researcher argues that subjecting a child to prosecution is in conflict, both theoretically and morally, with these provisions.

The researcher challenges the weight placed behind the best interest of the child as described in Article 3 (1) of the Convention on the Rights of the Child. The argument is that the wording of the article referring to the best interest of the child being "a" primary consideration be reassessed by arguing, instead, that the best interest of the child should be "the" primary consideration.[794]

Article 2 of the Statute of the Special Court for Sierra Leone defines "Crimes against Humanity" and provides the court with the power to prosecute persons who committed

committing a crime against humanity and are not indictable for their acts at the international level. The atrocity is not what the child has done, but the opportunity, conditions, and circumstances that allow them to commit these horrors.

[792] Article 3(1) of The Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by the General Assembly resolution 44/25 of 20 November 1989, and entry into force 2 September 1990, in accordance with article 40. – "*In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."*

[793] Article 4(3)(a-e), Protocol 2 Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of non-international Armed Conflicts, 8 June 1977. See also Article 78, 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.

[794] J Willems, *Children's Rights and Human Development- a Multidisciplinary Reader*, (2010), at page 583.

the listed crimes.[795] The Article does not define who is meant to be incorporated under the auspices of "power to prosecute persons". The blanket and all-encompassing use of the word "persons" leads one to believe that, without a specific exclusion, its interpretation implies the inclusion of all individuals. The possibility of prosecuting children was thus born.

The importance of the Statute for this Special Court in its relation to children is found in its Article 7. Article 7 reads:

1) *"The Special Court shall have no jurisdiction over any person who was under the age of 15* ***at the time of the alleged commission of the crime****. Should any person who was at the time of the alleged commission of the crime between* ***15 and 18 years of age come before the Court****, he or she shall be treated with dignity and a sense of worth,* ***taking into account*** *his or her young age and* ***desirability of promoting his or her rehabilitation, reintegration*** *into and assumption of a constructive role in society, and* ***in accordance with international human rights standards****, in particular the rights of the child.*

2) *In the disposition of a case against a juvenile offender, the Special Court shall order any of the following: care guidance and supervision orders, community service orders,* ***counselling, foster care, correctional, educational and vocational training programmes, approved schools*** *and, as appropriate, any programmes of* ***disarmament, demobilization and reintegration*** *or programmes of child protection agencies."*[796] (Own emphasis).

If one considers the wording of Article 7 subsection 1, the drafters of this legislation have established that the rights awarded to children apply retrospectively by including

[795] Article 2 of the Statute of the Special Court of Sierra Leone. http://www.rscsl.org/Documents/scsl-statute.pdf (Accessed on 20 June 2020).

[796] Article 7 (1) and (2) of the Statute of the Special Court of Sierra Leone. http://www.rscsl.org/Documents/scsl-statute.pdf (Accessed on 20 June 2020).

"shall have no jurisdiction over any person who **was** under the age of 15 at the time of the alleged commission of the crime". This article encourages the view that children's rights apply not only to current children but to adults whose childhood was not protected in accordance therewith.

Surprisingly, and in a great step towards the abolition of children on the battlefield, Article 7(1), albeit with the designated power and authority for prosecuting the child, opts instead for promoting the child's recovery over punishment.[797]

The incorporation of the wording "desirability of promoting his or her rehabilitation, reintegration" takes the argument for the rehabilitation of the child outside the realm of only an election or subtopic of accountability but rather a preference in seeking justice.[798] A major contributing factor to this statute's impact in the field of juvenile justice is that, as mentioned above, this particular civil war in Sierra Leone was infamous for its unprecedented number of children participating in the hostilities.[799]

Despite the flexible narrative in respect of how the Sierra Leonean children should be dealt with for the deeds they committed during the armed conflict, Article 7(2) ensures that even the child who is prosecuted for the most heinous crimes should be ordered to undergo care guidance, community service, counselling, foster care, educational

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[797] A McQueen, "Falling through the Gap: The Culpability of Child Soldiers under International Criminal Law", (2018), 94(2), *Notre Dame Law Review Online*, at page 116 McQueen argues that although children could be prosecuted in terms of this article, they were presumed worthy of rehabilitation and reintegration into Sierra Leonean society.

[798] V Odala, "The Spectrum for Child Justice in the International Human Rights Framework: From "Reclaiming the Delinquent Child" To restorative Justice", (2012), 27(3), *The American University International Law Review*, at page 574-575 Odala recalls that traditional justice systems have been understood acknowledge the restoration in community, forgiveness and reconciliation.

[799] M Ramgoolie, "Prosecution of Sierra Leone's Child Soldiers: What Message is the UN Trying to Send?", (2001), 12, *Journal of Public and International Affairs*, at page 147-148 Ramgoolie argues that child soldiers played an unprecedented, large and violent role in the armed conflict, with UNICEF confirming that more than 5000 children were directly participating in the armed conflict.

and vocational training programmes. The clear intention filtered through Article 7 ensures that the child, albeit the perpetrator of various humanitarian violations, should still be judicially approached with the aim of restoration rather than punishment.

For the first time in history, children were viewed by society as individuals responsible for heinous breaches of international law through their actions in the Sierra Leone civil war.[800] Article 7 of the Statute of this Special Court codified how these perceived perpetrators may be held accountable. To the extent that children were the frontline warriors in Sierra Leone during the early 2000s, one may argue that there was no better time for juvenile justice to create a precedent of prosecuting child soldiers.[801]

Despite the full permission to do so, the Special Court for Sierra Leone has not recorded a single case of prosecuting a child. The prosecutor for the Special Court, David Crane, has noted that:

> *"The rights of children and accounting for crimes against them and humanity are linked to all of our attempts to ensure that children grow up healthily and secure from impunity. It is my belief that children under fifteen per se are legally not capable of committing a crime against humanity and are not indictable for their acts at the international level. The atrocity is not what the child has done,*

[800] Report of the Secretary-General on the establishment of a Special Court for Sierra Leone. https://digitallibrary.un.org/record/424039?ln=en (Accessed on 20 June 2020). In this report the criminal culpability of young people was raised as an aspect to be considered by the Special Court, paragraph 36 of the report it states that given these highly diverging opinions, it is not easy to strike a balance between the interests at stake. I am mindful of the Security Council's recommendation that only those who bear *the greatest responsibility* should be prosecuted. However, in my view of the most horrific aspects of the child combatancy in Sierra Leone, the employment of this term would not necessarily exclude persons of young age from the jurisdiction of the Court.

[801] A McQueen, "Falling through the Gap: The Culpability of Child Soldiers under International Criminal Law", (2018), 94(2), *Notre Dame Law Review Online*, at page 118 McQueen argues that, given the use of child soldiers through the civil war in Sierra Leone, the criminal culpability of these children were one of the most contentious aspects when establishing the Special Court for Sierra Leone.

> *but the opportunity, conditions, and circumstances that allow them to commit these horrors."*[802]

The researcher argues that the approach taken by Crane is in line with the doctrine of command responsibility and the adults' responsibility to protect the child from the opportunity and circumstances in which these children commit these horrors.[803] The researcher argues that Crane's belief in respect of children under fifteen not being legally capable of committing a crime warrants, with modernisation, an increase in age to eighteen. To limit it to fifteen only prohibits and prevents the protection afforded to all children. This isolates potentially the most vulnerable group of children, those between sixteen and seventeen. When glancing at the wording of Article 7(1) of the Statute for Sierra Leone, one can see that the concluding remarks include "*taking into account his or her young age and the desirability of promoting his or her rehabilitation, ……, and in* ***accordance with international human rights standards, in particular, the rights of the child****".* (Own emphasis)

The fact that no child was prosecuted before the Special Court of Sierra Leone suggests that international law requires more emphasis to be placed on juvenile justice being achieved outside the realms of a courtroom.[804] Therefore, international criminal tribunals are pivotal for the development of the law. To quote an aspect of J Kuper's argument on the benefit of International tribunals in relation to children:

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[802] D Crane, "*Strike Terror No More: Prosecuting the Use of Children in Times of Conflict-The West African Extreme*", at Chapter 9 of: From Peace to Justice "International Criminal Accountability and the Rights of Children", Edited by K Arts and V Popovski, 2005 121.

[803] V Odala, "The Spectrum for Child Justice in the International Human Rights Framework: From "Reclaiming the Delinquent Child" To Restorative Justice", (2012), 27(3), *The American University International Law Review*, at page 546 Odala recalls that the international community owes the child the best it has to give.

[804] V Odala, "The Spectrum for Child Justice in the International Human Rights Framework: From "Reclaiming the Delinquent Child" To restorative Justice", (2012), 27(3), *The American University International Law Review*, at page 547 Odala argues that, the adoption of rehabilitation programmes for child offenders focusing on diversion from the formal criminal justice system is recommended.

"It is also worth recalling the multiple roles played by international criminal tribunals. They provide a forum in which victims and survivors of violations can seek redress and some form of justice, and in which those accused as perpetrators can argue their case and, if found guilty, face punishment. This process can also enable countries to both chronicle and come to terms with their history to some extent".[805]

5.5 Rehabilitation and reintegration of the former child in armed conflict

Throughout the Convention on the Rights of the Child, it's Optional Protocol, and the Geneva Conventions applicable to children in armed conflict, the golden thread appears to develop the child's ideology as being associated with vulnerability and developmental capabilities.[806] Even though children may not be recruited into armed conflict lawfully, statistics prove that children are still being recruited and used in armed conflicts around the world.[807] While the law may focus on justice through the lenses of accountability and responsibility for crimes committed, some argue that searching for truth and accountability can be a hindrance to the transition of peace.[808] Keeping in

[805] J Kuper, *"Bridging the Gap: Military Training and International Accountability Regarding Children*", at Chapter 12 of: From Peace to Justice "International Criminal Accountability and the Rights of Children", Edited by K Arts and V Popovski, 2005 160.

[806] V Odala, "The Spectrum for Child Justice in the International Human Rights Framework: From "Reclaiming the Delinquent Child" To restorative Justice", (2012), 27(3), *The American University International Law Review*, at page 573 Odala argues that when dealing with children and preparing them to be responsible citizens one should keep in mind that they are still developing mentally.

[807] C Rutgers, *Creating a World Fit for Children: Understanding the UN Convention on the Rights of the Child*, (2011), at page 205-207.

[808] H Van Ginkel, *"Concluding Observations*", at Chapter 14 of: From Peace to Justice "International Criminal Accountability and the Rights of Children", Edited by K Arts and V Popovski, 2005 185.

mind that when dealing with the protection of children's rights in times of war or after armed conflict, urgency and time effectiveness are essential in protecting the remaining childhood that is left.[809] Hence the researcher argues that, while adults establish platforms to prosecute those responsible for using children in armed conflict, equal efforts should be directed at rebuilding the childhood that was stolen from children as a result of their being used in armed conflict.

The first step in understanding rehabilitation is to seek why at the outset rehabilitation is warranted. The researcher argues that it is the international community's duty and responsibility to rectify the breach of its laws.[810] It is this rectifying of the breach of the prohibition from the recruitment of children into armed conflict which one can connect to the process of rehabilitating the child.[811]

Crane argues that, when the civil war in Sierra Leone reached its conclusion in 2002, the devastation that was left behind ruined an entire generation.[812] The children who remained after the civil war were often left without families, education, or a community

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[809] R Brett and I Specht, "Young Soldiers: Why they choose to fight, Improving Socioeconomic Reintegration", (2004), at page 131 Brett argues that by the time of demobilization and reintegration occurs, many of these former child soldiers will in fact be adults. See also Article 20 (1) of The Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by the General Assembly resolution 44/25 of 20 November 1989, and entry into force 2 September 1990, in accordance with article 40. "*A Child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to Special protection and assistance provided by the State."*

[810] V Odala, "The Spectrum for Child Justice in the International Human Rights Framework: From "Reclaiming the Delinquent Child" To Restorative Justice", (2012), 27(3), *The American University International Law Review* 546.

[811] C Rutgers, *Creating a World Fit for Children: Understanding the UN Convention on the Rights of the Child*, (2011), at page 200-202.

[812] D Crane, "*Strike Terror No More: Prosecuting the Use of Children in Times of Conflict-The West African Extreme*", at Chapter 9 of: From Peace to Justice "International Criminal Accountability and the Rights of Children", Edited by K Arts and V Popovski, 2005, at page 123.

able to nurture the remainder of their childhood. According to Crane, this "lost generation" now sits on the roads of Sierra Leone with no hope and only the knowledge of fighting, raping, and murdering their fellow citizens.

In reminding the reader that this chapter is focused primarily on the post-war consequences that the child faces, it is the world that the child is exposed to after her tenure as a "child soldier" that is important. This gap between participation in the armed conflict and social reintegration is what the researcher canvasses.[813]

The proposition the researcher offers is that the notion that "people do not easily change" is the very prohibition against the child's automatic reintegration into civil society. Understandably so, it is difficult to comprehend that an individual with a past as traumatic as that of a child participating in armed conflict may act differently from her learned nature once placed back into civil society. It is then not only the physical evacuation of the child from an armed conflict which is of importance but also the rejuvenation of the child's mental and psychological wellbeing which will have an impact on reintegration.[814]

The merits to identify in respect of the child's mental health are that the child too has the right under Article 24 of the Convention on the Rights of the Child to undergo health rehabilitation and be provided with the necessary medical assistance.[815] The

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[813] "A Lease of Life for former child soldiers", Online article written by The European Commission, 12 February 2019. https://medium.com/protection-and-aid/a-new-lease-of-life-for-former-child-soldiers-7573e99d3b9d#--responses (Accessed on 22 June 2020). The Commission recalls that in 2018, more than 900 children were demobilised in South Sudan. However, the story does not end there. After the challenge of releasing the children comes the even bigger test of reintegration.

[814] V Odala, "The Spectrum for Child Justice in the International Human Rights Framework: From "Reclaiming the Delinquent Child" To Restorative Justice", (2012), 27(3), *The American University International Law Review*, at page 547 Odala submits that restorative justice focuses on recovery through healing, reparation and rehabilitation

[815] Article 24 (1) of The Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by the General Assembly resolution 44/25 of 20 November 1989, and entry into force 2 September 1990, in accordance with article 40. "*State*

researcher argues that, although "mental" health is not specifically provided for in this article, it defeats the ends of the justice if it were to be severed from the interpretation of the drafter's intention, as it is included in Article 25 of the same Convention which includes the periodic review of the mental health treatment provided to the child.[816]

Brett argues that there are numerous challenges facing the former child soldier who intends to reintegrate into civil society. These challenges overlap and are dependent on one another, but the purpose behind them should take into cognisance the vulnerability of former child soldiers and the main principle of rehabilitation which is sustainable reintegration preventing re-recruitment.[817] These challenges may include:

1) Education;[818]
2) Employment; and

Parties recognise the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services."

[816] K Sevenants, Unicef- Evaluation Community based Reintegration Programme for Children Released from Armed Forces and Armed Groups in Boma State (former Greater Pibor Administrative Area), 2015-2018. Final Report: 17 September 2019. Also available online at https://www.unicef.org/evaldatabase/files/Final_CAAFAG_UNICEF_PIBOR_EVALUATION_SouthSudan_2019.pdf (Accessed online 25 June 2020) at page 58 Sevenants notes that a possible improvement required in this reintegration programme in South Sudan was that there was a need for greater access to mental health services as well as more specialised care, as social workers observed that some of the participants suffered from mental health disorders. See also Article 25 of The Convention on the Rights of the Child, adopted an opened for signature, ratification and accession by the General Assembly resolution 44/25 of 20 November 1989, and entry into force 2 September 1990, in accordance with article 40.

[817] R Brett and I Specht, *Young Soldiers: Why they choose to fight*, (2004), Improving Socioeconomic Reintegration 131-132.

[818] J Willems, *Children's Rights and Human Development- A Multidisciplinary Reader*, (2010), at page 436.

3) The rebuilding of social relationships.

The researcher argues that, for rehabilitation to be effective, the voice of the child herself should be considered.[819] Gender may play a determining factor in considering the demobilisation of the child from armed conflict because of societal attitudes in associating girls with armed groups or forces.[820] Brett proposes that programmes assisting the child need to be broadly available and take into cognisance the distinct needs of different genders to the extent that their actual situations, prospects, and societal roles may be significantly different.[821] For example, the international community would need to recognise "war-time marriages" and their consequences with regard to youthful consent in comparison to the definition of the age for lawful voluntary enlistment into armed forces. Then there is also the need for the consideration for instances where the reintegration of former girl child soldiers who are impregnated or who have mothered babies of whom the father is a boy soldier still participating in armed conflict.

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[819] C Rutgers, *Creating a World Fit for Children: Understanding the UN Convention on the Rights of the Child*, (2011) 200-202. See also Article 12(1) of The Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by the General Assembly resolution 44/25 of 20 November 1989, and entry into force 2 September 1990, in accordance with article 40. "*State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child*."

[820] "A Lease of Life for former child soldiers", Online article written by The European Commission, 12 February 2019. https://medium.com/protection-and-aid/a-new-lease-of-life-for-former-child-soldiers-7573e99d3b9d#--responses (Accessed online 22 June 2020). Out of the 900 children demobilised from South Sudan in 2018, almost one-third of them were girls.

[821] R Brett and I Specht, Young Soldiers: *Why they choose to fight, 2004, Improving Socioeconomic Reintegration* 129.

Childhood and education appear to be terms which run parallel to one another when imagining any civil society.[822] It is this parallel concept that is destroyed through armed conflict. Rehabilitation and reintegration programmes should then be aimed at salvaging this nexus. The obligation to educate the child has developed over time and has found its way into human rights documents such as the Convention on the Rights of the Child and International Humanitarian Law. The Geneva Convention provides that, when demobilizing a child from armed conflict, be it of an international or non-international nature, one must provide the child with education of the greatest possible continuity.[823] This education includes moral and religious education. The child's access to education was made a human right under Article 28 of the Convention on the Rights of the Child, and subsection 1 (a) and (b), in particular, provides that:

> *"1. State Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:*
>
> *a) Make primary education compulsory and available free to all;*
> *b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need."*[824]

Considering when International Humanitarian Law codified the regulation of child education with that of International Human Rights Law, one can see that there is

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[822] J Willems, *Children's Rights and Human Development- A Multidisciplinary Reader*, (2010), 436.

[823] Article 78(2) 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. See also Article 4(3) (a) Protocol 2 Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of non-international Armed Conflicts, 8 June 1977.

[824] Article 28(1) (a) and (b) of The Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by the General Assembly resolution 44/25 of 20 November 1989, and entry into force 2 September 1990, in accordance with article 40.

approximately a 20-30 year difference between the two. In this lengthy period, the importance of education has grown and developed to the extent that, under international humanitarian law, the child's education was considered to be a by-product of evacuation and, therefore, would affect only those children who were evacuated under the auspices of the Geneva Conventions. Years later, Article 28 included the basic right to education and accepted that this was to be provided to all children, with no exception or limitation with regards to finances.[825]

The overlap between the two bodies of law, one must recall, is that times of war and armed conflict in general bring about destabilised governments and often the lack of or the unavailability of basic education.[826] It may be rather naïve not to take into cognisance the fact that developing countries who might from the outset have poor access to basic education, find that it is completely unavailable after an armed conflict.[827] Does the law then cater for these children from developing countries? And does it provide more than merely an instruction but also additionally a sound solution?

The wording of Article 28(3) finds purpose in addressing the above queries. The Convention on the Rights of the Child does go further than providing blanket instructions such as "free education for all". It realistically accepts that developing countries may require aid and assistance in order to meet certain provisions. Subsection 3 of Article 28 provides that

> *"3. States Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern*

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[825] J Willems, *Children's Rights and Human Development- A Multidisciplinary Reader*, (2010), 436.

[826] C Rutgers*, Creating a World Fit for Children: Understanding the UN Convention on the Rights of the Child*, (2011)220.

[827] V Odala, "The Spectrum for Child Justice in the International Human Rights Framework: From "Reclaiming the Delinquent Child" To Restorative Justice", (2012), 27(3), *The American University International Law Review* 548.

> *teaching methods. In this regard, particular account shall be taken of the needs of developing countries".*[828]

This article is notably different from its sibling subsection. It creates the child's right to education to be seen as an obligation that requires the responsibility of more than just one State. It encourages the collective responsibility of the international community whilst similarly recognising the inequality inherited by children of developing countries.

Where the researcher interjects and proposes possible criticism is that this particular article, like much of other international law, lacks the necessary clarity and specificity. The researcher argues that the only obligation created by this article for States Parties is to promote and encourage international cooperation. This fails to stipulate what active steps this international cooperation should consist of and raises the issue of whether certain member states are more responsible than others simply because of their individual GDP.[829]

In the researcher's opinion, Article 28 (3) provides the platform on which States may rely on other States for their cooperation and assistance in providing education to all children within their territory. Having identified the fact that all children are entitled to an education, it is important to consider the effect and purpose of its importance. Brett argues that education may be the answer to limiting the number of child soldier re-

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[828] Article 28(3) of The Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by the General Assembly resolution 44/25 of 20 November 1989, and entry into force 2 September 1990, in accordance with article 40.

[829] K Sevenants, Unicef-Evaluation Community based Reintegration Programme for Children Released from Armed Forces and Armed Groups in Boma State (former Greater Pibor Administrative Area), 2015-2018. Final Report: 17 September 2019. Also available online at https://www.unicef.org/evaldatabase/files/Final_CAAFAG_UNICEF_PIBOR_EVALUATION_SouthSudan_2019.pdf (Accessed on 25 June 2020). At page 13 and 47, the author recognises the Government of Denmark as being a main financial contributor to the reintegration programme. It is also recognised, however, that an investment in building structures would have increased the chances of the sustainability of the programme.

recruitments because the child is exposed to a different environment which in itself provides an alternative future.[830]

The connection between education and decreased poverty continues to grow in strength. Early brain development and quality education from the early stages of one's life are crucial for all aspects of child development.[831]

The researcher argues that education for most children is the blueprint of social interaction and is equally responsible for building one's self-esteem and social intelligence. This, in turn, affects the remaining two challenges of reintegration, which are employment and social relationships.[832] Education is more than simply the academic component of progression learning but rather the tool that every child needs as an essential component for childhood development. As a result, the term education comprises of more than formal education alone, but includes vocational training and apprenticeships.

Realistically education may also vary in standard from country to country, and vary to an unprecedented degree specifically in developing countries owing to a complete lack of infrastructure. For some children attending school is impossible without economic or societal support.

In 2019, the European Commission noted that, in helping former child soldiers reintegrate into society, schools offer a protective environment and restore the notion of civil society to children who are psychologically traumatised from the armed

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[830] R Brett and I Specht, *Young Soldiers: Why they choose to fight, Improving Socioeconomic Reintegration,* (2004) 130.

[831] J Willems, *Children's Rights and Human Development- A Multidisciplinary Reader*, (2010), 438.

[832] V Odala, "The Spectrum for Child Justice in the International Human Rights Framework: From "Reclaiming the Delinquent Child" To Restorative Justice", (2012), 27(3), *The American University International Law Review*, at page 575 Odala argues that by providing the child with what is in the child's best interest, is similarly providing society with its best interest as the two are connected.

conflict.[833] A South Sudan based organisation called Grassroots Empowerment and Developmental Organisation ("GREDO") teaches former child soldiers practical skills like carpentry and sewing.[834] The European Commission notes that the aim of this organisation is to provide former child soldiers with a livelihood while helping them to process the past.[835]

These physical skills which increase the opportunity for employment assist the child in being welcomed back into social relationships. This ensures that they and their families have at the least a means of survival and a decent standard of living.[836] The ability to feel needed by the child increases her sense of self-worth and builds a strong character. With a properly administered rehabilitation programme, the stigma borne by former child soldiers would be lessened.

The researcher recalls that organisations such as GREDO require the influence and protection of international communities to perform these initiatives in order for this type of education to be more widespread and easily accessible for all children.[837] In 2017,

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[833] "A Lease of Life for former child soldiers", Online article written by The European Commission, 12 February 2019. https://medium.com/protection-and-aid/a-new-lease-of-life-for-former-child-soldiers-7573e99d3b9d#--responses (Accessed online 22 June 2020).

[834] K Sevenants, Unicef- Evaluation Community based Reintegration Programme for Children Released from Armed Forces and Armed Groups in Boma State (former Greater Pibor Administrative Area), 2015-2018. Final Report: 17 September 2019. Table 13: GREDO, achievement analysis, at page 39. Also available online at https://www.unicef.org/evaldatabase/files/Final_CAAFAG_UNICEF_PIBOR_EVALUATION_SouthSudan_2019.pdf (Accessed on 25 June 2020).

[835] "A Lease of Life for former child soldiers", Online article written by The European Commission, 12 February 2019. https://medium.com/protection-and-aid/a-new-lease-of-life-for-former-child-soldiers-7573e99d3b9d#--responses (Accessed on 22 June 2020).

[836] R Brett and I Specht, *Young Soldiers: Why they choose to fight, Improving Socioeconomic Reintegration,* (2004) 131-132.

[837] V Odala, "The Spectrum for Child Justice in the International Human Rights Framework: From "Reclaiming the Delinquent Child" To Restorative Justice", (2012), 27(3), *The American University International Law Review* 573.

six employees of GREDO were tragically killed while travelling from the South Sudan's capital, Juba to the town of Pibor.[838] States and individual armed groups need to appreciate the customary nature of protecting children from the battlefield as well as the ramifications of failing to adhere to this principle.

The rebuilding of social relationships is a by-product of successful and sustainable rehabilitation and reintegration. However, its hierarchy, compared to education and employment, should not be confused with its importance. The reunification of the family creates the rejuvenation of need and self-purpose within society. It is for many former child soldiers a reminder of the life which was taken away from them at the commencement of the armed conflict.

When considering family reunification, one has to consider the tracing of family members and the acceptance by families and communities to be open to the possibility of reunification. Similarly, consideration has to be directed at the willingness of the former child soldier to return to a community or family that they originally came from. For some former child soldiers, returning may be a reminder of a life they had run away from. For others, it may be filled with guilty reminders of the society they had been ordered to torture.

It is prudent to consider that reintegration and rehabilitation programmes are established in reasonably close proximity to the child's original place of birth.[839] Brett argues that children might be willing to re-establish those broken relationships and reunite with their family but that this does not change the reality owed to who these children have become; they cannot simply live at home again.[840] As a result, and without counselling, for many former child soldiers family reunification and social

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[838] Aid Groups Determined to Continue Operations in South Sudan, News Article By Jill Craig, 27 March 2017, VOA News. https://www.voanews.com/africa/aid-groups-determined-continue-operations-south-sudan (Accessed on 20 June 2020).

[839] J Willems, *Children's Rights and Human Development- A Multidisciplinary Reader*, (2010) 902.

[840] R Brett and I Specht, *Young Soldiers: Why they choose to fight, Improving Socioeconomic Reintegration, (2004)* 131-132.

relationships are an important challenge but this is only one part of the maze of rehabilitation and social reintegration.

5.6 Conclusion

International law will arrive at the choice of either punishment or recovery of former child soldiers as substantive international law meets procedure. It is clear that rehabilitation programmes aimed at reintegration contain the ideology of recovery as opposed to the punitive ideology of penal measures. As the Omar Khadr case indicates, he was left in a worse condition after his encounter with the justice system than he was before. Therefore, there is purpose in considering the child's best interest and focusing on the child's recovery and rehabilitation over her punishment. This approach not only benefits and restores the child's childhood but, in turn, benefits the interests of her society.[841]

In 2009, the United Nations resolved in its tenth session on Human Rights on the administration of justice and, in particular, juvenile justice and adopted in Article 7 that:[842]

> *"every child and juvenile in conflict with the law must be treated in a manner consistent with his or her rights, dignity and needs, in accordance with international law, including relevant international standards on human rights in the administration of justice, and calls on States parties to the Convention on the Rights of the Child to abide strictly by its principles and provisions and to improve the status of information on the situation of juvenile justice.*

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[841] V Odala, "The Spectrum for Child Justice in the International Human Rights Framework: From "Reclaiming the Delinquent Child" To Restorative Justice", (2012), 27(3), *The American University International Law Review* 575.

[842] Article 7 United Human Rights Council, Tenth Session, and Resolution 10/2. Human Rights in the administration of justice, in particular juvenile justice. https://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_10_2.pdf (Accessed on 5 July 2020).

In the same session, the United Nations considered the involvement of rehabilitation programmes as alternatives to formal juvenile justice systems. In this way the United Nations confirmed, under Article 9[843] that it:

> *"Encourages States that have not yet integrated children's issues in their overall rule of law efforts to do so, and to develop and implement a comprehensive juvenile justice policy to prevent and address juvenile delinquency as well as with a view to promoting, inter alia, the use of alternative measures, such as diversion and restorative justice, and ensuring compliance with the principle that deprivation of liberty of children should only be used as a measure of last resort and for the shortest appropriate period of time, as well as to avoid, wherever possible, the use of pre-trial detention of children.*

These two articles complement each other and their intended purposes are better read parallel to each other. The international community, under the auspices of the United Nations, recognises the importance of juvenile justice, accepting that it comes equipped with its own rules in relation to the needs of the child and respecting the dignity of the child. The articles propose that children in conflict with the law need to be regulated in line with the principles provided by the Convention on the Rights of the Child. The articles provide that the administration of justice encourages the international community to develop juvenile justice policies and to use diversion programmes and restorative justice, to implement the rule that children should be detained for the shortest amount of time and as a last resort.

The child, as a bearer of autonomous rights, is entitled to her protection from armed conflict, and, even more so, entitled to her protection and development after armed conflict.[844] The researcher argues that one must acknowledge that the child's participation in armed conflict does not take away the child's status as a child under

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[843] Article 9 United Human Rights Council, Tenth Session, and Resolution 10/2. Human Rights in the administration of justice, in particular juvenile justice. https://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_10_2.pdf (Accessed on 5 July 2020).

[844] C Rutgers, *Creating a World Fit for Children: Understanding the UN Convention on the Rights of the Child*, (2011) 219.

international law, not forgetting the special respect and protection owed to the child by the international community.[845] It is within the best interests of the child, under Article 19 of the Convention on the Rights of the Child, for the State where there is armed conflict to have the responsibility of adopting legislative, administrative, and social measures to protect the child,[846] and not merely the obligation to evacuate and demobilise the child.[847]

Subsection 2 of Article 19 stipulates that these protective measures established by the host State should include effective procedures for the establishment of social programmes that endorse the terms "treatment" and "judicial involvement".[848] The researcher argues that the responsibility of the host State to demobilise and evacuate the child is merely the first step in the process owed to the child. The second step is building rehabilitation programmes under the auspices of future social reintegration, concluding with judicial involvement which implements necessary administrative and juvenile justice measures.[849]

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[845] J Willems, *Children's Rights and Human Development- A Multidisciplinary Reader*, (2010) 902-904.

[846] Article 19 (1) of The Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by the General Assembly resolution 44/25 of 20 November 1989, and entry into force 2 September 1990, in accordance with article 40.

[847] Article 32 of The Convention on the Rights of the Child, adopted an opened for signature, ratification and accession by the General Assembly resolution 44/25 of 20 November 1989, and entry into force 2 September 1990, in accordance with article 40. "*Member States have the responsibility to protect the child from exploitation and from performing any work which is dangerous or likely to interfere with the child's education, health or physical and mental social development*."

[848] Article 19 (2) of The Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by the General Assembly resolution 44/25 of 20 November 1989, and entry into force 2 September 1990, in accordance with article 40.

[849] C Rutgers, *Creating a World Fit for Children: Understanding the UN Convention on the Rights of the Child*, (2011) 219.

The overarching principle of the aforementioned rehabilitation and reintegration programmes is premised on education. The aim is to have former child soldiers assuming a constructive role in society.[850] In constructing juvenile justice policies, it recognises that former child soldiers have a special need for aid and assistance in the recovery and protection of their childhood.[851] States may need to rely on the assistance of other states to cooperate in providing this need to former child soldiers. The Optional Protocol to the Convention on the Rights of the Child encourages the need to strengthen international cooperation in the implementation of the protocol.[852]

Odala argues that, in considering restorative justice, the paradigm that shifts from punishment to restoring broken relationships and effecting social harmony is emerging as a human right for victims, offenders, and the community. Odala submits that it is the appropriate response to human rights violations and inadequate justice systems.[853] It has emerged with the modernisation of laws affecting the child that concepts such as reconciliation and development of childhood are to be emphasised.[854] To learn from the ill-treatment of Omar Khadr, the international community requires juvenile justice courts to implement the provisions of Article 37 (d)

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[850] Article 10 United Human Rights Council, Tenth Session, and Resolution 10/2. Human Rights in the administration of justice, in particular juvenile justice. https://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_10_2.pdf (Accessed on 5 July 2020).

[851] Article 3(1) of The Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by the General Assembly resolution 44/25 of 20 November 1989, and entry into force 2 September 1990, in accordance with article 40.

[852] The Preamble of the Optional Protocol to the Convention on the Rights of the child on the Involvement of Children in Armed Conflict (2002).

[853] V Odala, "The Spectrum for Child Justice in the International Human Rights Framework: From "Reclaiming the Delinquent Child" To Restorative Justice", (2012), 27(3), *The American University International Law Review* 578.

[854] J Willems, *Children's Rights and Human Development- A Multidisciplinary Reader*, (2010) 902-904.

of the Convention on the Rights of the Child.[855] This provides that every child deprived of his liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court. This is essential to rebuilding the relationship between youth and the justice system, ensuring that the facts of Omar Khadr's case are never repeated in the next generation.

The researcher submits that former child soldiers require the international community to take the necessary steps after an armed conflict in order to repair, as best as is possible, what has been lost. The international law discussed thus far in this project informs the reader that collectively there is an *erga omnes* obligation towards children in armed conflict. To this end, the obligation owed to the child is to protect her from the recruitment into armed conflict. Undeniably, children continue to be used in armed conflicts today. This obligation towards children does not dissolve as the child bears arms in the conflict, but rather it is strengthened as the armed conflict reaches its culmination. International law obliges its member States to evacuate and demobilise the child from armed conflict. Importantly it equally obliges the same international community to strengthen its legislative and administrative processes when considering juvenile justice.[856]

The researcher endorses the fact that international law has not prosecuted children for international crimes, particularly in respect of war crimes committed by the child during armed conflict. The closest that international law has arrived at international juvenile justice was when the statute for the Special Court for Sierra Leone permitted the prosecution for children above the age of fifteen. Notably, even this permission was not met with performance. David Crane, as the senior prosecutor for the special court, did not take advantage of this position.

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[855] Article 37 (d) of The Convention on the Rights of the Child, adopted an opened for signature, ratification and accession by the General Assembly resolution 44/25 of 20 November 1989, and entry into force 2 September 1990, in accordance with article 40.

[856] C Rutgers, *Creating a World Fit for Children: Understanding the UN Convention on the Rights of the Child*, (2011) 219.

The researcher is more concerned with the rationale as to why, despite the permission, the international community was steadfast in accepting that one should hold the adults responsible for recruiting the child into armed conflict as opposed to the child who committed heinous deeds as a result thereof.

The Special Court for Sierra Leone left more footsteps in the sand to be followed than merely its provisions for jurisdiction relating to children below the age of eighteen. One can assimilate other useful and practical ideas, for example that the Special Court's hybrid nature proves that, with the appropriate combination of diplomacy and necessity, the United Nations can align itself with the requests and timeous needs of a particular State or group of States. The Special Court also proved that a court built on the soil of the territory of a State which needed justice showed its people that justice is physically being done.[857]

The researcher draws the following argument. The notion of juvenile justice policies being made available where the child is in conflict with the law should be seen holistically and not from one dimension only. For example, in common domestic law, juvenile justice describes children who have breached the domestic law and then metaphorically owe society retribution for the unlawful deeds committed. In dealing with children in armed conflict, the first law that is breached is the international obligation for children to be protected from any circumstance which may be potentially harmful to his or her health (mental or physical) and or development.

The deeds that the child committed during her tenure as a child soldier is merely the consequence of the first breach of the legal obligation owed to the child under international law by the international community. Initiating the notion that there should be no fruits from the poisonous tree, it then flows that the conflict with the law arose when the child was unlawfully recruited into armed conflict. Therefore, juvenile justice on the international law stage does not necessarily mean that the child is in conflict with the law at the behest of her election, but rather that the law is in conflict with the child by failing from the outset to protect the child.

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[857] J Willems, *Children's Rights and Human Development- A Multidisciplinary Reader,* (2010) 902.

Nevertheless, the deeds committed by the child during armed conflict do not fall away with her almost forgotten childhood. The researcher argues that a court needs to have judicial oversight. This does not necessarily imply punishment, but instead restitution. The argument is that the Special Court for Sierra Leone should be the influence of the proposal behind a Special Children's Court.[858] The proposed implementation and establishment of the court would similarly be hybrid in nature as seen with the Special Court for Sierra Leone. The hybrid nature should consist of the following:

1) For any particular State or group of States (as was the case in Sierra Leone) to request the United Nations to establish a court within its territory for its territory.[859] Van Ginkel argues that, although international crimes may be universal in definition, the approaches to dealing with them should be country-specific and justice should be local.[860]

[858] Article 14 United Human Rights Council, Tenth Session, and Resolution 10/2. Human Rights in the administration of justice, in particular juvenile justice. https://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_10_2.pdf on 5 July 2020. (Accessed on) "*Invites States, upon their request, to benefit from technical advice and assistance in juvenile justice provided by the relevant United Nations agencies and programmes, in particular the Interagency Panel on Juvenile Justice, in order to strengthen national capacities and infrastructures in the field of the administration of justice, in particular juvenile justice*."

[859] J Willems, *Children's Rights and Human Development- A Multidisciplinary Reader*, (2010) 902. See also Article 45 (a), (b) and (d) of The Convention on the Rights of the Child, adopted an opened for signature, ratification and accession by the General Assembly resolution 44/25 of 20 November 1989, and entry into force 2 September 1990, in accordance with article 40.

[860] H Van Ginkel, *"Concluding Observations*", at Chapter 14 of: From Peace to Justice "International Criminal Accountability and the Rights of Children", Edited by K Arts and V Popovski, 2005 186.

2) The purpose of the court is to regulate only matters concerning children in armed conflict, past and present.[861] Some authors believe that children are best suited for such an idea as arguably children are better suited to be reformed than adults are.[862]

3) The jurisdiction of the court is limited to ages 25 and below. Many children who participated in armed conflict at the time of rehabilitation are adults. After armed conflict these children are age defined as adults, but their needs are more akin to those of children owing to their underdeveloped childhood. Brett argues that programmes that address only those below the age of eighteen at the time of demobilization, overlook many young people who were recruited as child soldiers. The definition of "youth" could include ages up to 25.[863]

4) The powers of the court are limited to providing only retributive justice awards,[864] e.g. the declaration or order of specified rehabilitation and reintegration programmes for former child soldiers.

The researcher provides a detailed framework for the structure of the proposed court in chapter 6 to follow, whilst concluding the research findings.

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[861] Article 40 (1) of The Convention on the Rights of the Child, adopted an opened for signature, ratification and accession by the General Assembly resolution 44/25 of 20 November 1989, and entry into force 2 September 1990, in accordance with article 40.

[862] V Odala, "The Spectrum for Child Justice in the International Human Rights Framework: From "Reclaiming the Delinquent Child" To Restorative Justice", (2012), 27(3), *The American University International Law Review*, 580.

[863] R Brett and I Specht, *Young Soldiers: Why they choose to fight, Improving Socioeconomic Reintegration*, (2004) 131-132. See also J Willems, *Children's Rights and Human Development- A Multidisciplinary Reader,* (2010) 902-905.

[864] Article 40 (3) (b) of The Convention on the Rights of the Child, adopted an opened for signature, ratification and accession by the General Assembly resolution 44/25 of 20 November 1989, and entry into force 2 September 1990, in accordance with article 40.

Chapter 6

Conclusion and research findings: A proposal and framework for a *Special Children's Court*

6.1 Introduction

This doctoral thesis has shed much-needed light on the consequences faced by the child who participates in armed conflict. The researcher has attempted to engage with the reader and draw a nexus between the various laws which protect the child from armed conflict versus the realities faced by the child owing to her participation in armed conflict. Chapter 1 sought to provide a blueprint of the researcher's intended aims of the study, while providing the methodology that was used in addressing the issues raised in the problem statement.[865]

The researcher adopted a strategy of analysing and discussing the applicable laws and principles related to children in armed conflict and examining the respective areas that warranted improvement. In doing so, the research lent itself to be more than a critical analysis of law but rather a targeted approach of addressing international obligations towards children in armed conflict and where these obligations can be improved.

In Chapter 2, the research dissected international law and its various sources,[866] showing that the law applicable to children is constantly developing and requiring the

[865] R Pangalangan, "Dominic Ongwen and the Rotten Social Background Defense: The Criminal Culpability of Child Soldiers Turned War Criminals", 2018, 33 (3), *American University International Law Review* 621.

[866] M Hrestic, "Considerations on the Formal Science of International law", 2017, 7, *Journal of Law and Administrative Sciences*103-104.

collective efforts of the international community to achieve its greatest success.[867] The researcher canvassed the role that customary international law plays in the development of the law, and he argued that *Jus Cogens* norms require development and modification to be applicable.[868] The researcher concluded the chapter by arguing that children in armed conflict should be prohibited from participating in armed conflict as a *Jus Cogen* norm owing to the special protected status[869] afforded to the child..

Chapter 3 critically examined the current laws applicable to children in armed conflict. In doing this, the research simultaneously exposed gaps within the law that if left untreated would prove to weaken the legitimacy of the currently applicable laws.[870] Chapter 3 further exposed the weaknesses contained within the currently applicable international laws, in particular the Rome Statute of the International Criminal Court, and it found that accountability for the child's deeds as a "soldier" is an unaddressed issue at international level.[871]

Chapter 4 canvassed the varying impacts and effects of armed conflict on a child's physical and mental attributes. The effects alluded to here focused on the psychological aspects of the child's continuous development. The research found that,

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[867] J Ogbonnaya and U Agom, "Human Rights of the less Privileged Groups: Jurisprudential and Legal issues in Global Human Rights", (2016), 53, *Journal of Law, Policy and Globalization* 34-37.

[868] T Begley, "The Extraterritorial Obligation to Prevent the Use of Child Soldiers", (2012), 27(3), *The American University International Law Review* 621.

[869] E Policinski and K Krotiuk, "Childhood in the Crossfire: How to Ensure a Dignified Present and Future for Children Affected by War", (2019), 101(911), *International Review of the Red Cross* 430.

[870] S Bosch, "Targeting and prosecuting 'under-aged' child soldiers in international armed conflicts, in light of the international humanitarian law prohibition against civilian direct participation in hostilities", (2012), *XLV CILSA* 342.

[871] Article 26 of The Rome Statute of the International Criminal Court, Done at Rome on 17 July 1998, in force on 1 July 2002, United Nations, Treaty Series, Vol. 2187, No. 38544, Depositary: Secretary-General of the United Nations, http://treaties.un.org (Accessed on 28 September 2020).

while psychological development is vital and in need of protection, it is negatively affected by the atmosphere of armed conflict.[872] The researcher drew the nexus between psychology and the requirements for criminal capacity as described by the Rome Statute.[873]

This nexus argues that it is not accurately possible to prosecute a child for the deeds committed during armed conflict for the lack of jurisdiction and the lack of mental capacity.[874] The facts that remain suggest that impunity for the child's deeds committed during the armed conflict should be the most appropriate option. The researcher argued that impunity does not solve the issue at hand nor can it be said to be in the best interests of the child.[875] The researcher concluded the chapter by arguing that alternative legal mechanisms with the aim of achieving justice through accountability need to be considered if the child's best interest is to be realised.

In Chapter 5 the researcher embarked on establishing the rights that the child possesses at all stages of her childhood and in all physical areas.[876] The research

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[872] A Cowley, J Edwards and K Salarkia, "Responding to children's mental health in conflict", a report by Save the Children: Road to Recovery, First Published 2019. https://resourcecentre.savethechildren.net/node/15721/pdf/road_to_recovery_final_low_res.pdf (Accessed on 28 February 2020), 5 .

[873] Article 30 (1), (2) and (3) of The Rome Statute of the International Criminal Court, Done at Rome on 17 July 1998, in force on 1 July 2002, United Nations, Treaty Series, Vol. 2187, No. 38544, Depositary: Secretary-General of the United Nations, http://treaties.un.org (Accessed on 20 September 2020).

[874] C McDiarmid, *What Do They Know? Child-Defendants and the Age of Criminal Responsibility: A National Law Perspective*, at Chapter 6 of: From Peace to Justice "International Criminal Accountability and the Rights of Children", Edited by K Arts and V Popovski, 2005 91.

[875] A Veale, "*The Criminal Responsibility of Former Child Soldiers: Contributions from Psychology*", at Chapter 7 of: From Peace to Justice "International Criminal Accountability and the Rights of Children", Edited by K Arts and V Popovski, 2005 104.

[876] J Willems, *Children's Rights and Human Development- a Multidisciplinary Reader*, (2010) 582.

specifically considered the state's obligations which are owed to the child during armed conflict, finding that the child has a right to be evacuated from armed conflict.[877] In considering both the application of this obligation and who is responsible for its performance, the research indicated that it is a universal responsibility for states to perform in accordance with international humanitarian law. The researcher argues that the international right the child possesses to be evacuated is akin to the child's best interest and, therefore, it is a universal norm that the international community should not only accept but adequately enforce.

Chapter 5 included a case study of Omar Khadr in which the details of the Omar Khadr case were discussed.[878] In this discussion, the details of Omar's history in armed conflict were assessed and critically analysed in contrast to the applicable laws relating specifically to the evacuation and detention of the child in armed conflict.[879] The researcher argued that the manner of detention that Omar Khadr was subjected to was in direct conflict with applicable international law. The researcher in turn focused on what the best interests of the child require in order to recognise the child fully as an autonomous rights bearer. The research found that the child's best interest when seen in the light of armed conflict requires innovative and unique approaches to meet the special character and nature of the child participating in armed conflict. This entails a

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[877] Article 4(3)(a-e), Protocol 2 Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of non-international Armed Conflicts, 8 June 1977. See also Article 78, 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.

[878] http://www.internationalcrimesdatabase.org/Case/968/Khadr/ (Accessed on 20 September 2020).

[879] C Dore, "What to do with Omar Khadr? Putting a child soldier on trial: Questions of international Law, Juvenile Justice and Moral Culpability", (2008), 41, *John Marshall Law Review*, at page 1317 Dore argues that Omar Khadr was entitled to many rights, rights which were dramatically different from that of an adult in the same circumstances, and states, Omar's classification currently entitles him to legal treatment different from those that committed their crimes as adults, a general disposition as a victim over a perpetrator, and access to psychological rehabilitation program.

multifaceted approach and one which considers the deeds that the child has committed whilst remaining cognizant of the child's particular vulnerability.

The approaches discussed included a consideration of the benefits derived from international tribunals as legal mechanisms adopted by individual states.[880] The tribunals were shown to be necessary and unique to a particular state, finding their advantage by providing justice to territories which desperately required the same.[881] The imperative nature of these systems was that they went further than their respective national courts could go. They, in essence, addressed the factual violations of the armed conflict and prosecuted those responsible for war crimes. The limitation was that children were not prosecuted by these particular tribunals, leaving still unanswered the question of what to do with the child's deeds during armed conflict.

In attempting to answer this question, the research was then focused primarily on investigating the obligations of a state which has removed or evacuated the child from armed conflict, and, in particular, how the child should be treated once removed from the conflict. The applicable laws, academics and international organisations purport to require from the responsible state that the child requires recovery over punishment in line with her best interests.[882] This narrative may not be holistically acceptable as victims of the child's deeds during armed conflict would ideally fail to recognise the child's best interest above their own individual loss that was suffered.[883] The balancing

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[880] C Rutgers, *Creating a World Fit for Children: Understanding the UN Convention on the Rights of the Child*, (2011) 218.

[881] J Willems, *Children's Rights and Human Development- A Multidisciplinary Reader*, (2010) 902.

[882] V Odala, "The Spectrum for Child Justice in the International Human Rights Framework: From "Reclaiming the Delinquent Child" To Restorative Justice", (2012), 27(3), *The American University International Law Review* 578.

[883] M Houle, "The Legal Responsibility of Child Soldiers", (2018), 8, *International Law Yearbook* 203-205.

act that is justice requires both perspectives to be taken into account.[884] The emphasis on the child's recovery through mechanisms of rehabilitation and reintegration that are underpinned by education and social reintegration proves to be not only in the child's best interest but also that of the community.

In this chapter, the research concludes with how the best interests of the child participating in armed conflict can be achieved most effectively in the future. This will be done by drawing on the current applicable laws to children participating in armed conflict and examining what they require regarding the protection of the child's future development. The researcher will argue that the failure to prevent a child from participating in armed conflict does not exclude the responsibility of the child's autonomous right to a childhood nor the child's right to be protected after armed conflict.

To motivate this argument, the researcher will consider the current view of children in armed conflict held by the international community by utilising the provisions consented to in the "Paris Principles".[885] The acceptance of the Paris Principles by the international community may arguably align itself with the characteristics of *Opinio Juris.*[886] The researcher places emphasis on the potential accountability of the child for deeds committed during armed conflict not to enforce punishment but to encourage justice through the adoption of innovative legal measures relating to international juvenile justice. The researcher argues that a child-centred international court built on the blueprints of a tribunal similar to the Special Court for Sierra Leone[887] may very

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[884] 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* 332.

[885] UNICEF: Principles and Guidelines on Children Associated with Armed Forces or Armed Groups. January 30th 2007. Https://www.unicef.org/mali/media/1561/file/ParisPrinciples.pdf (Accessed on 30 August 2020).

[886] M Prost, "Hierarchy and the Sources of International Law: A Critique", (2017), 39(2), *Houston Journal of International Law* 303.

[887] The Statute of the Special Court for Sierra Leone: http://www.rscsl.org/Documents/scsl-statute.pdf (Accessed on20 June 2020).

well meet the needs that the Rome Statute and Convention on the Rights of the Child do not. This chapter will conclude with the researcher's findings, recommendations and closing remarks.

6.2 The unique needs of the child participating in armed conflict.

In considering the nature of the child's rights whilst participating in armed conflict, one should by now have comprehended that the complexity of laws is extensive.[888] Amidst the diversification of international human rights law, international humanitarian law and domestic law, there exists the arena in which the child's rights require accurate applicability to modern times.[889] The enforcement of children's rights is a separate subject matter concerning whether or not they apply to all children, recalling that the foundational principles of children's rights were far less comprehensive than what it has developed up to today.[890] The same can be said for international law in general. In examining the needs of the modern child participating in armed conflict, it may be appropriate to differentiate particularly between children's rights in the general application of international law and the children's rights specific to armed conflict.

In many circumstances the two categories of children's rights are married when considering children's best interests and desired development, but the distinction is

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[888] M A Thomas, "Malice Supplies the Age: Assessing the Culpability of Adolescent Soldiers", (2013), 44 (1), *California Western International Law Journal*, at page 1-2 Thomas submits that there are numerous international conventions that have sought to address and prevent the use of child soldiers.

[889] V Odala, "The Spectrum for Child Justice in the International Human Rights Framework: From "Reclaiming the Delinquent Child" To restorative Justice", (2012), 27(3), *The American University International Law Review*, at page 544 Odala recalls that the best interests of the child and his special needs as a juvenile, should be considered when deciding on incarceration of a child.

[890] J Ogbonnaya and U Agom, "Human Rights of the less Privileged Groups: Jurisprudential and Legal issues in Global Human Rights", (2016), 53, *Journal of Law, Policy and Globalization* 34-37.

recognised at the stage of the enforcement of these principles. Hence, there is the need for the Optional Protocol to the Convention on the Rights of the Child. The very addition of the Protocol implies that children in armed conflict are unique and require a distinct approach. In attempting to dissect what these unique needs currently require, the researcher deems it appropriate to revisit the development of children's rights briefly. Chapter 2 of this thesis discussed how children's rights had developed over time from how dependent the child was on her parent for protection and provision to the eventual encouragement of the child's empowerment.[891]

This shift meant that the obligation towards the child went further than merely the protection of the child, and it placed more emphasis on the child's best interest.[892] The researcher has argued that the best interests of the child supported the argument that the child's prohibition from armed conflict should be a *Jus Cogen's* norm. This argument was built on the universal acceptance of the Convention on the Rights of the Child and the majority acceptance of its Optional Protocol. The researcher argues that the Convention on the Rights of the Child is international customary law, making it applicable to all children and all States.[893]

As modern children's rights protect "childhood" as a necessary element of the child in armed conflict,[894] this implies that it is the various stages of childhood development which must be protected and not only the child's physical being. One of the important

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[891] J Ogbonnaya and U Agom, "Human Rights of the less Privileged Groups: Jurisprudential and Legal issues in Global Human Rights", (2016), 53, *Journal of Law, Policy and Globalization* 34-35.

[892] Article 3(1) of The Convention on the Rights of the Child, adopted an opened for signature, ratification and accession by the General Assembly resolution 44/25 of 20 November 1989, and entry into force 2 September 1990, in accordance with article 40.

[893] M Hrestic, "Considerations on the Formal Science of International law", (2017), 7, *Journal of Law and Administrative Sciences* 105.

[894] E Policinski and K Krotiuk, "Childhood in the Crossfire: How to Ensure a Dignified Present and Future for Children Affected by War", (2019), 101(911), *International Review of the Red Cross* 425.

developing characteristics of "childhood" is the child's age,[895] with particular reliance placed on the international community to ensure that the child's youth is protected and nurtured appropriately.

The term "youth" may often be associated with vulnerability, but the vulnerability of the child merely advances the reason why the child's needs require it to possess autonomous rights that are not purely a derivative of the rights of adults in their community.[896] This is imperative as it proves that children's rights require enforcement regardless of the circumstances, political or otherwise, surrounding the armed conflict.

In considering how the modernisation of children's rights has developed, one can only assume that it should be constantly attempted to align international children's rights firstly with what the child needs, followed by what can be enforced by the state. The researcher finds it imperative to understand the unique needs of the child in armed conflict for the simple fact that that unique atmosphere suggests a uniquely focused set of laws to be applicable in modern times. Notably, the idea of a particular set of rules applicable to children in armed conflict was canvassed by the Optional Protocol. Distinctively so, this particularity requires constant revisiting to assess its intended outcomes, if any.

The researcher contends that children participating in armed conflict are not automatically regarded as child combatants. The term "combatant" defined in international law refers to someone who is not a civilian and someone who has an unqualified right to participate directly in hostilities and whose participation, therefore,

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[895] R Pangalangan, "Dominic Ongwen and the Totten Social Background Defense: The Criminal Culpability of Child Soldiers Turned War Criminals", (2018), 33 (3), *American University International Law Review*, at page 619 Pangalangan states that the dangers posed to children are not isolated to physical well-being alone, but psychosocial difficulties that greatly affect their development. This is because children derive from their environment are the primary factors that determine their physical, emotional, social, and cognitive progress or delay.

[896] V Odala, "The Spectrum for Child Justice in the International Human Rights Framework: From "Reclaiming the Delinquent Child" To Restorative Justice", (2012), 27(3), *The American University International Law Review* 549.

is lawful.[897] This in itself implies that international humanitarian law does not afford the child's deeds committed in armed conflict any asylum from prosecution.

Owing to the unique circumstances of children in armed conflict and regardless of the child's participation in armed conflict, be it direct or indirect, the child is still owed special protection.[898] Arguably the first unique need of the child participating in armed conflict is to be protected from engaging in such participation, be it a legitimate engagement or otherwise. This argument is amplified by the fact that, despite there being numerous laws prohibiting such participation, the breach of these laws does not answer the debate about whether this child should face prosecution for the deeds she has committed in armed conflict.[899]

The child's human right to appropriate childhood development is not in dispute. One can confidently submit that the child participating in armed conflict requires additional comprehensive protection. The protection referred to here should involve a protected childhood equipped with adequate education and development in conditions of peace and security.

Children exposed to the harsh realities of armed conflict are often subjected to this as a result of external circumstances.[900] Factors such as poverty, social status and gender are all contributing factors which call for the greater strength of protection of

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[897] Article 43, 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. See also S Grover, "Child Soldiers as Non Combatants: The Inapplicability of the Refugee Convention Exclusion Clause", (2008), 12 (1), *The International Journal of Human Rights* 54.

[898] Article 4(3) (d), Protocol 2 Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of non-international Armed Conflicts, 8 June 1977.

[899] M Houle, "The Legal responsibility of Child Soldiers", (2018), 8, *International Law Yearbook*, at page 193 Houle recognises that the use of child soldiers has been criminalized, however, there still remains debate regarding the criminal responsibility of these children upon reaching the age of majority.

[900] A McQueen, "Falling through the Gap: The Culpability of Child Soldiers under International Criminal Law", (2018), 94(2), *Notre Dame Law Review Online* 105. See also A Honwana, *Child Soldiers in Africa*, (2006) 47.

the child's needs.[901] The child is undoubtedly placed in a more vulnerable position in armed conflict. The Rome Statute adopts the view that children under the age of fifteen should not be recruited into an armed conflict (international or non-international) and it codified this as a war crime if breached.[902] Klamberg notes that the Rome Statute merely codified in 1998 what was already existing customary international law.[903]

The protection offered to children by the Rome Statute coincidentally divides children between the ages of fifteen and sixteen. This inconsistency of protection does no more than expose the child to being more marketable as a soldier, as applicable international law fails to provide a legal consequence for deeds committed by the child aged sixteen and seventeen during armed conflict. Ironically the child is separated from falling within the same legal category as an adult.[904] With this clear distinction between minor and major arrives the ambiguity surrounding the child's accountability in armed conflict. This exposure merely convolutes the unique characteristics of the child's needs during armed conflict.

The child's needs may increase depending on specific geographical regions. The African Charter on the Rights and Welfare of the Child particularly noted that, with most African children, their needs remain critical owing to the unique factors of their socio-economic, cultural, traditional circumstances, developmental circumstances,

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

[902] Article 8 (2) (b) (XXVI) and (VII) of The Rome Statute of the International Criminal Court, Done at Rome on 17 July 1998, in force on 1 July 2002, United Nations, Treaty Series, Vol. 2187, No. 38544, Depositary: Secretary-General of the United Nations, http://treaties.un.org (Accessed on 28 September 2020).

[903] M Klamberg, Commentary on the Law of the International Criminal Court, Torkel Opsahl Academic EPublisher Brussels, (2017), at page 105. Accessed online https://www.legal-tools.org/doc/aa0e2b/pdf/ (Accessed on 20 September 2020).

[904] Rule 2.2 (a), "Scope of the Rules and definitions used", United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("*The Beijing Rules*"), A/RES/40/33, and 29 November 1985.

armed conflict and hunger.[905] Gallagher argues that in certain cultures in West Africa it is commonly accepted that to be a soldier is to be an adult.[906] In Sierra Leone, the world watched as children were recruited on both sides of the civil war, to the extent that, in fact, children played a majority role in the atrocities that were committed.[907] It, therefore, goes without saying that the child in armed conflict in Africa requires special safeguards to protect her physical and mental well-being.

The inevitable question with respect to the particular vulnerability possessed by the child in armed conflict relates to how the child's applicable international rights can better align themselves by endorsing her best interests and special protected status. The best interest of the child and her special protected status should be read together. Arguably, the child's "best interest" changes once the child is situated within the arena of armed conflict. One notes this by examining the drafting of the Convention on the Rights of the Child and its Optional Protocol.

The Convention, in its Article 3 (1), provides, amongst other things, that the best interests of the child shall be a primary consideration.[908] It is important to comprehend that the Convention came into force in 1990 which suggests an overdue update drafted in accordance with the current risks facing the child. Owing to its originality, the Convention is also the drawing board for all children's rights including those of children who are in and out of armed conflict. This broad set of laws relating to children finds

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[905] The African Charter on the Rights and Welfare of the Child (1999). the Preamble: Noting with Concern.

[906] M Gallagher, "Soldier Boy Bad: Child Soldiers, Culture and Bars to Asylum", (2001), 13 (3), *International Journal of Refugee Law* 330.

[907] A McQueen, "Falling through the Gap: The Culpability of Child Soldiers under International Criminal Law", (2018), 94(2*), Notre Dame Law Review Online* 114.

[908] Article 3(1) of The Convention on the Rights of the Child, adopted an opened for signature, ratification and accession by the General Assembly resolution 44/25 of 20 November 1989, and entry into force 2 September 1990, in accordance with article 40. – "*In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."*

its applicability and relevance in establishing a universal standard for children's basic human rights.

With the particularity offered in the text of the Optional Protocol on the Involvement of Children in Armed Conflict, one may observe how the unique needs and characteristics of the child in armed conflict achieve their status as a separate category of children's rights. The Optional Protocol draws on many of the provisions laid down by its older brother, but, in its own way, it reinforces the fact that there is a need to increase the protection of children from their involvement in armed conflict.

The manner in which the protection of children may be increased, according to the Optional Protocol, is by raising the minimum age of possible recruitment of persons by armed forces and those persons participating in hostilities.[909] If this were to be effectively implemented through the Optional Protocol, this would indeed contribute greatly to the notion that the best interests of the child are to be the primary consideration.

As a consequence of the breach of these laws, thousands of children are subjected to the realities of armed conflict and have to endure its contradictory nurturing atmosphere. The researcher argues that owing to the unique needs of these particular children, the continuous development of the applicable laws is imperative to strengthening their best interests. Certainly, it is not only the prevention of the recruitment of children into an armed conflict which warrants consideration, but also the facets of the child which require stronger protection such as the quality of life with which the child is provided during armed conflict and her future after it.[910]

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[909] Articles 1-3 of the Optional Protocol to the Convention on the Rights of the child on the involvement of children in armed conflict (2002).

[910] V Odala, "The Spectrum for Child Justice in the International Human Rights Framework: From "Reclaiming the Delinquent Child" To Restorative Justice", (2012), 27(3), *The American University International Law Review*, at page 546 Odala recalls that the international community owes the child the best it has to give. See also D Crane, "*Strike Terror No More: Prosecuting the Use of Children in Times of Conflict-The West African Extreme*", at Chapter 9

6.3 The development of legal obligations protecting the best interests of the child during armed conflict

In Chapter 3 of this thesis, the researcher examined the various legal instruments protecting children from involvement in armed conflict. These various instruments indicated development over time, but they have not eradicated the use of children in armed conflict. They nonetheless reveal the intention of the future protection offered towards children. The necessary development of the law is interconnected with the relevant applicability of its provisions. To the extent that the child is deemed adequately protected from the realities of armed conflict, equal attention should be directed towards the breach of this protection. The researcher argues that the rights of the child and the protection owed to the child during and after armed conflict have similarly developed over time. The reason could very well be that the importance of the next generation has been given due respect, or the rule of law itself has suggested stronger legal principles in respect of children's rights. Irrespective of the philosophical reasoning, one should understand the history of the law whilst examining its development. To this end, the applicable legislation can be assessed on what it should become and not only on what its current shortcomings are.

The researcher considers the Additional Protocols to the Geneva Conventions as a starting point. To avoid prolixity the researcher differentiates from already referred to provisions relating to the age of the child and its protection from recruitment. To the extent that Article 77 (1), (2) and (3) of Additional Protocol 1 have their applicability towards the protection of children in armed conflict, these provisions have been discussed in detail. Hence, one is referred to Article 77 (4) and (5),[911] which read as follows:

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of: From Peace to Justice "International Criminal Accountability and the Rights of Children", Edited by K Arts and V Popovski, 2005 123.

[911] Article 77 (4) and (5), 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.

> *"(4) If arrested, detained or interned for reasons related to the armed conflict, children shall be held in quarters separate from the quarters of adults, except where families are accommodated as family units as provided in Article 75, paragraph 5.* (own emphasis)
>
> *(5) The death penalty for an offence related to the armed conflict shall not be executed on persons who had not attained the age of eighteen years at the time the offence was committed."*

Sub article 4 suggests to the reader that, despite the child's prohibition from participating in armed conflict, the child may still "for reasons related to the armed conflict" come into conflict with the law. Importantly, the child is regarded as an object of special respect and is provided with the right to be held separately from the quarters of adults, indicating a recognition of their vulnerability and need for distinctive treatment. Sub article 5 stipulates as international humanitarian law what the *Roper v Simmons*[912] decision declared more than a quarter of a century later which abolished the option of the death penalty for children (persons below the age of eighteen). Interestingly one may note from these 1977 provisions that children participating in armed conflict were distinguished from adult combatants, irrespective of their involvement.

We see an amplification of the above articles by the article which followed, namely Article 78 (1). This article endorsed the child's evacuation from armed conflict and further stipulated that no party to the conflict was to endanger such an evacuation.[913]

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[912] Donald P. Roper, Superintendent, Potosi Correctional Centre, Petitioner v Christopher Simmons, 543 U.S. 551 (2005), https://www.apa.org/about/offices/ogc/amicus/roper.pdf (Accessed on 20 September 2020).

[913] Article 78 (1) 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. "*No Party to the conflict shall arrange for the evacuation of the children, other than its own nationals, to a foreign country except for a temporary evacuation where compelling reasons of the health or medical treatment of the children or, except in occupied territory, their safety, so require. Where the parents or legal guardians can be found, their written consent to such evacuation is required*."

The child who is evacuated is to be provided with education, including religious and moral education.[914] The Additional Protocol 1 today stands as a strong basis for the fundamental rights towards children in armed conflict and after armed conflict. One could argue that difficulties of interpretation could arise by not particularly stipulating for how long the child who has been arrested or detained under the provisions of Article 77 (4) is permitted to be detained. Without a limit to this detention, one can understand the unjustified and lengthy detention[915] applied in the Omar Khadr case by the United States.[916]

Irrespective of current critique, the Additional Protocols proved that children were not to be given the highest punishment culminating in the death penalty, despite the deeds they had committed during armed conflict. This clearly distinguished legal principle teaches one that it is universally accepted for the child not to be held criminally accountable to the same extent as adults would be for the same deeds committed during armed conflict. Instead, the child should be accorded special respect and the necessary aid and care that they require in armed conflict.[917]

Years later the Convention on the Rights of the Child became the applicable authority on all matters concerning children. Although the Convention on the Rights of the Child encompasses a broad range of provisions, many of which do not apply to this particular scope of work, the particular provision which is of relevance is Article 3 (2) which provides:

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[914] J Willems, *Children's Rights and Human Development- A Multidisciplinary Reader*, (2010) 436.

[915] Affidavit by Omar Khadr, https://www.pouromarkhadr.com/info/about-omar/affidavit-of-omar-ahmed-khadr/?lang=en (Accessed on 20 September 2020).

[916] C Dore, "What to do with Omar Khadr? Putting a child soldier on trial: Questions of international Law, Juvenile Justice and Moral Culpability", (2008), 41, *John Marshall Law Review* 1286.

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

> *"States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being… to this end, shall take all appropriate legislative and administrative measures."*[918] (Own emphasis)

This article emphasises the child's "well-being" as a characteristic worthy of legal protection. The 1977 obligation was limited to the child's respect and aid required in armed conflict.[919] Importantly the obligation is further placed on State Parties to adopt legal and administrative measures to protect the child's well-being. The researcher argues that involvement in armed conflict could not be adequately or justifiably considered as promoting the child's well-being.[920]

In summary, the research at this juncture proves that, under the applicable law, a State Party would be permitted to adopt legal or administrative measures to evacuate the child from armed conflict in order to advance the child's best interest and well-being. Where the initiating State Party is bound by its available resources, it should be permitted to rely on the framework of international co-operation as provided for by Article 4 of the Convention on the Rights of the Child.[921]

Is the evacuation of a child from armed conflict permitted by a State of which the child is not a national citizen? The very question proves the unique needs of the child participating in armed conflict. One could answer this question by considering Article 9 (1) of the Convention on the Rights of the Child. Article 9 (1) provides:

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[918] Article 3 (2) of The Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by the General Assembly resolution 44/25 of 20 November 1989, and entry into force 2 September 1990, in accordance with article 40.

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

[920] G 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* 329.

[921] Article 4 of The Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by the General Assembly resolution 44/25 of 20 November 1989, and entry into force 2 September 1990, in accordance with article 40.

> *"States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child."*[922]

This article permits a legally authorised State Party that is subject to review to take the necessary steps in light of the child's best interest. This in no way limits the child's right to family as the child regulated in accordance with Article 9 (1) will still have the right to maintain, on a regular basis, save in exceptional circumstances, personal relations and direct contact with both parents. The Convention further provides that applications by a child or her parents to enter or leave a State Party for the purposes of family reunification will be dealt with in a positive, humane and expeditious manner.[923]

When considering the evacuation of the child participating in armed conflict one must not forget that individual national laws of a state party may still permit the prosecution of the child for deeds committed during armed conflict. Article 37 of the Convention on the Rights of the Child specifies how the child should be approached by a State Party once placed under its law. Article 37 provides:

> *"(a) No child shall be subjected to torture or other cruel, inhumane or degrading treatment or punishment. <u>Neither capital punishment nor life imprisonment</u> without the possibility of release shall be imposed for offences committed by persons below eighteen years of age;*
>
> *(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity*

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[922] Article 9 (1) of The Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by the General Assembly resolution 44/25 of 20 November 1989, and entry into force 2 September 1990, in accordance with article 40.

[923] Article 10 (1) and (2) of The Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by the General Assembly resolution 44/25 of 20 November 1989, and entry into force 2 September 1990, in accordance with article 40.

with the law and shall be used only as a measure of last resort and for the shortest period of time.

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and it shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances.

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance." [924]

From first glance this article does go further and offers more particularity than the earlier 1977 Additional Protocols by including that the child accused of committing offences should be protected from any torture, cruel, inhuman or degrading treatment, thus indicating more comprehensive protection offered to the child who is exposed to juvenile justice. The researcher argues that, according to this article, the child may be deprived of her liberty under the auspices of it being done so lawfully and being subject to review.

For an interpretation of this article to be applicable and find the connection between human rights and humanitarian law, it would require the necessary adaptation. It would be superfluous to suggest that a child should be arrested or detained only as a measure of last resort whilst participating in armed conflict. This is solely due to the fact that states have a responsibility to evacuate the child from participating in armed conflict and to do so immediately in the light of the child's best interest. The researcher argues that the inclusion of the words "shall be in conformity with the law" suggests that the creation and development of the law are encouraged when regulating the arrest or detention of a child under international law.

[924] Article 37 (a) - (d) of The Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by the General Assembly resolution 44/25 of 20 November 1989, and entry into force 2 September 1990, in accordance with article 40.

One must consider what the needs of the child require after evacuation. The majority of states or post-war societies will not merely ignore the deeds committed by the child during her tenure as a participant in the armed conflict. Instead, the need for community justice may be warranted, and, to this end, the administrative and legislative obligations placed on the state becomes relevant.[925]

The manner in which legislative and administrative measures may be affected is by conforming to the requirements of the aforementioned Article 37 (d). This article places an obligation on State Parties to provide the child who has been deprived of her liberty with immediate access to legal assistance as well as the right to challenge the legality of the deprivation of her liberty before a competent court or authority.

From the rules provided by the Additional Protocol to Geneva Conventions and the Convention on the Rights of the Child, one may note that a child detained or imprisoned as a consequence of participation in armed conflict must be treated with special respect and not be exposed to life imprisonment. The child should be deprived of her liberty only if it is done lawfully and if the arrest, detention or imprisonment is done for the shortest appropriate period of time. The particular needs of the child and her age must be considered. Importantly, the child must be provided with prompt access to legal assistance and the right to challenge the legality of the deprivation of her liberty before a court or other competent authority.

The researcher argues that this places an obligation on the State evacuating and detaining the child or intending to arrest the child to do so in full accordance with a legally imposed authority. One way that this can be achieved is through a specialised court declaring such actions lawful while adequately possessing the stage on which the child may challenge such a decision. One may not ignore the fact that the Convention was drafted in 1989 and the rules provided therein were not specifically focused on children participating in armed conflict. States should, therefore, seek guidance from the focused particularity of rules stipulated in the specialised Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict.

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[925] 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*332.

Reference to the adoption of legal measures necessary to prohibit and criminalise the use of children in armed conflict is limited to armed groups by Article 4 (2) of the Optional Protocol.[926] The particularity of what exact legal measures that are to be adopted to prohibit these practices is, however, not provided under Article 4 (2). The Optional Protocol does, however, go further than its older siblings by providing certain particularity regarding the legal mechanisms to be adopted, by the drafting of Article 6. Article 6 (1) and (3) in particular provides:

> *"1. Each State Party shall take all necessary legal, administrative and other measures to ensure the effective implementation and enforcement of the provisions of this Protocol within its jurisdiction.*
>
> *3. States Parties shall take all feasible measures to ensure that persons within their jurisdiction recruited or used in hostilities contrary to this Protocol are demobilized or otherwise released from service. State Parties shall, when necessary, accord to these persons all appropriate assistance for their physical and psychological recovery and their social reintegration."*[927] (Own emphasis)

The wording of this article provides stronger obligations than those provided by the aforementioned applicable laws. The words "take all necessary" stresses the importance of the obligation placed on states to protect children who are involved in armed conflict. The reference to "other measures" implies that one may look outside of the realms of the ordinary protection offered to the child generally under international law. The obligation placed on State Parties to demobilize the child participating in armed conflict achieves the similar purpose of Article 78 of the Additional Protocol 1 by removing the child from armed conflict. Importantly, under the Optional Protocol, the child is offered more than simply education but also physical and psychological recovery with the aim of social reintegration.

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[926] Articles 4 (2) of the Optional Protocol to the Convention on the Rights of the child on the involvement of children in armed conflict (2002).

[927] Articles 6 (1) and (3) of the Optional Protocol to the Convention on the Rights of the child on the involvement of children in armed conflict (2002).

The researcher argues that the obligation permitting a state to take all necessary legal, administrative and other measures should be viewed as an empowering provision and not merely as a forceful obligation. The State Party now possesses the ability to be flexible in the adoption of legal and administrative measures. Article 37 (c) of the Convention on the Rights of the Child encourages that the deprivation of the child's liberty must be done in a manner which takes into account the needs of the child and her age. The nature of this obligation on a State Party presents an opportunity to address the unique needs of the child participating in armed conflict legally.

The legal measures to be taken, albeit necessary, are not defined in practical or tangible steps that a State Party is expected to adopt. Instead, the freedom provided by the lack of a definitive framework allows the researcher to present a recommended legal measure which would be best applicable in endorsing the child's best interest.

6.4 How should the best interests of the child after armed conflict be achieved?

The law applicable to children in armed conflict emphasis two important aspects. The first aspect is that legal obligations placed on State Parties have developed over time from a paternal role of protecting the child simply by removing the child from an atmosphere which could potentially be harmful to the preferred maternal role of encouraging the child's well-being, development, psychological recovery and social reintegration.

The second aspect is the constant development of the law, with a clear recognition of the child who is participating in armed conflict to be accepted as a separate discipline under international law. This encourages the legal, administrative and other measures to be adopted by a state similarly to develop accordingly. To this end, a State Party to the Optional Protocol may, with authority and where it be deemed necessary, propose an amendment and file it with the Secretary-General of the United Nations.[928] This provision in itself implies the humble recognition of the international community to be

[928] Article 12 of the Optional Protocol to the Convention on the Rights of the child on the involvement of children in armed conflict (2002).

accepting of new and innovative measures which may be better suited to protecting the child participating in armed conflict.

What is the next step for developing the best interests of the child after armed conflict, and why focus primarily on the child's best interest after armed conflict?

In the researcher's view, the laws applicable to the recruitment of the child in armed conflict, albeit not perfect, are headed in the right direction with the straight 18 positions becoming increasingly popular amongst academics and legal practitioners alike.[929] The researcher identifies the missing nexus to be the gap between the child's participation in armed conflict and the child's social reintegration, remembering that these children who are abandoned by society after armed conflict were referred to by Crane as the "lost generation".[930] The Optional Protocol under Article 6(3) has certified the position that State Parties are permitted, when necessary, to provide all appropriate assistance for the child's physical and psychological recovery with the aim of social reintegration.[931] The researcher argues that the intended aims of the provision are indeed noble and suggest a clear intention, yet they fall short by not identifying that all children exposed to armed conflict require such assistance. The provision possesses the caveat of "when necessary", which in itself detracts from the unique needs of the child involved in armed conflict. Ironically, and not included as an

[929] A McQueen, "Falling through the Gap: The Culpability of Child Soldiers under International Criminal Law", (2018), 94(2), *Notre Dame Law Review Online* 120. See also M.A Thomas, "Malice Supplies the Age: Assessing the Culpability of Adolescent Soldiers", (2013), 44 (1), *California Western International Law Journal*, at page 11 Thomas argues that international organisations call for a complete ban on anyone under eighteen participating in armed conflicts, irrespective if it's at the behest of a national army or rebel group. This has been opposed because many national governments continue to recruit children under the age of eighteen into their national forces.

[930] D Crane, "*Strike Terror No More: Prosecuting the Use of Children in Times of Conflict-The West African Extreme*", at Chapter 9 of: From Peace to Justice "International Criminal Accountability and the Rights of Children", Edited by K Arts and V Popovski, 2005 123.

[931] Articles 6 (3) of the Optional Protocol to the Convention on the Rights of the child on the involvement of children in armed conflict (2002).

article in the Optional Protocol is the reaffirmation stated in its preamble, which provides:

> *"Reaffirming that the rights of children require special protection, and calling for continuous improvement of the situation of children without distinction, as well as for their development and education in conditions of peace and security"*.[932] (Own emphasis)

The reference to the special protection offered to the child as well as the continuous improvement of the child's atmosphere without distinction can, in the researcher's view, imply that Article 6(3) of the Optional Protocol should operate at all times and not only "when necessary". The argument is that the child's special protection does not fall away or achieve a lessened status after evacuation or demobilisation.[933] How does one then bridge the gap between the child who is removed from armed conflict and the child's placement in an environment conducive to achieving the aims Article 6(3)?

The child, for psychological reasons and general community mores, does not enjoy the benefits of automatically returning home and continuing with life as it were before her involvement in armed conflict. It is in this arena that perhaps the applicable laws and obligations provided by states and placed on states becomes the most important resource for the child.[934]

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[932] The Preamble to the Optional Protocol to the Convention on the Rights of the child on the involvement of children in armed conflict (2002).

[933] S Parmar, M Roseman, S Siegrist, T Sowa, "Children and Transitional Justice- Truth Telling, Accountability and Reconciliation", (2010), *Human Rights Program at Harvard Law School* 3-7.

[934] "A Lease of Life for former child soldiers", Online article written by The European Commission, 12 February 2019. https://medium.com/protection-and-aid/a-new-lease-of-life-for-former-child-soldiers-7573e99d3b9d#--responses (Accessed online 12 October 2020). In 2018, more than 900 children were demobilised in South Sudan, However, the story does not end there. After the challenge of releasing the children comes the even bigger test of reintegration.

How to approach the child within this gap is not a simple matter and a multifaceted understanding of the child's position needs to be considered. For instance, the deeds committed by the child during armed conflict do not disappear after armed conflict just as the child's right to special protection retains its strength. The deeds that are not ignored must, however, be considered when approaching the various legal and administrative measures to be adopted. In Chapter 4 of this thesis, the researcher explored how impunity for the deeds committed by the child may, in fact, not be beneficial to the child nor her psychology and physical well-being.[935] Not forgetting that the community of the child's origin may not be welcoming or offer acceptance to the idea that the child is to be automatically returned to a community which has suffered at her hands. The result is that the child and the community at large require justice to be achieved and recognised to satisfy the interests of both parties.[936]

Also discussed in Chapter 4 was the potential criminal liability of the child for deeds committed in armed conflict. History has proved that the deeds committed by children in certain armed conflicts have been assessed and have been reported to be heinous, vicious and violent.[937] One must recall that children in armed conflict do not have the same mental aptitude relating to the reasoning of right and wrong and the identification of fear as a child generally or as an adult would.[938] These characteristics very well

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[935] H Van Ginkel, Concluding observations, at Chapter 14 of: From Peace to Justice "International Criminal Accountability and the Rights of Children", Edited by K Arts and V Popovski, 2005, at page 185 Van Ginkel states that, *accountability is essential to peace building*.

[936] 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* 332.

[937] M Ramgoolie, "Prosecution of Sierra Leone's Child Soldiers: What Message is the UN Trying to Send?", (2001), 12, *Journal of Public and International Affairs*, at page 147-148 Ramgoolie recalls that child soldiers played an unprecedented, large and violent role in the armed conflict, with UNICEF confirming that more than 5000 children were directly participating in the armed conflict.

[938] M A Thomas, "Malice Supplies the Age: Assessing the Culpability of Adolescent Soldiers", (2013), 44 (1), *California Western International Law Journal*, at page 7 Thomas argues that

make the child in armed conflict a ruthless, brave and agile killer. In certain armed conflicts, history has remembered the child as the prominent face of both warring sides.[939]

For reasons best known to the drafters of the Rome Statute, the child who had committed deeds during the armed conflict would not have her day in court appearing before any of the eighteen judges of the International Criminal Court.[940] Instead, the child's possible prosecution was left to the jurisdiction of national courts,[941] as was the position provided for by Article 7 of the Statute of the Special Court for Sierra Leone relating to children fifteen and above.[942]

Notably, and despite the permission awarded by Article 7, no child was prosecuted under the auspices of this article. The difficulty with attributing criminal responsibility to the deeds committed by children in armed conflict arises from Article 31 of the Rome Statute. The researcher argues that as a ground for excluding criminal responsibility of the child's deeds during armed conflict, the child's actions may be considered in light of Article 31 (b) and (d). Accordingly, and with an appreciation of the child's initial recruitment, participation in armed conflict and the nature of the child's age, her

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while this is a harsh conclusion, a fifteen to seventeen year old individual in western Africa may be expected to display a higher degree of maturity in his or her community than someone of the same age who has grown up in a western country.

[939] A McQueen, "Falling through the Gap: The Culpability of Child Soldiers under International Criminal Law", (2018), 94(2), *Notre Dame Law Review Online* 91-118.

[940] Article 26 of The Rome Statute of the International Criminal Court, Done at Rome on 17 July 1998, in force on 1 July 2002, United Nations, Treaty Series, Vol. 2187, No. 38544, Depositary: Secretary-General of the United Nations, http://treaties.un.org (Accessed on 28 September 2020).

[941] M Klamberg, Commentary on the Law of the International criminal Court, Torkel Opsahl Academic EPublisher Brussels, (2017), at page 274. https://www.legal-tools.org/doc/aa0e2b/pdf/ (Accessed on 20 September 2020).

[942] Article 7 (1) and (2) of the Statute of the Special Court of Sierra Leone. http://www.rscsl.org/Documents/scsl-statute.pdf (Accessed on 20 September 2020).

conduct is arguably a result of either intoxication and/or duress resulting from a threat of imminent death or imminent serious bodily harm.

Duress in this instance should not be confused with necessity, the difference being that necessity, according to the commentary on the Rome Statute, is a threat which is the result of natural circumstances.[943] Duress has been defined and considered as a defence according to the criteria provided by the minority judgment of Judge Cassese in the *Prosecutor v Erdemovic* case.[944] The four criteria, according to Judge Cassese are:

a) A severe threat to life or limb;
b) No adequate means to escape the threat;
c) Proportionality in the means taken to avoid the threat; and
d) The situation of duress should not have been self-induced.

In light of the impact of armed conflict on the child's mental and physical development, it would be, the researcher's opinion, reasonable to view the above criteria as being directly applicable to the child's deeds in armed conflict. In particular point (b) and (d) are applicable, understanding that the child does not have the means and developmental capabilities adequately to escape the threat, nor can the armed conflict surrounding the child be deemed to have been induced by the child herself.

As a result, the international community is unable to hold children criminally accountable for the deeds committed during armed conflict, at least in the arena of the International Criminal Court. The researcher adds that this is for good reason. Therefore, once the child is removed from armed conflict, the legal measures adopted by the State having jurisdiction over the child must be in accordance with promoting the child's rehabilitation and recovery. The researcher argues that, for reasons alluded

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[943] M Klamberg, Commentary on the Law of the International criminal Court, Torkel Opsahl Academic EPublisher Brussels, (2017) 325. https://www.legal-tools.org/doc/aa0e2b/pdf/ (Accessed on 12 October 2020).

[944] *Prosecutor v Drazen Erdemovic*, In the Appeals Chamber, 7 October 1997. Separate and dissenting opinion of Judge Cassese, at paragraph 41. https://www.icty.org/x/cases/erdemovic/acjug/en/erd-adojcas971007e.pdf (Accessed on 12 October 2020).

to in applicable international law, the child should not be subjected to conflicting views which, on the one hand, seek the child's physical and psychological recovery, and, on the other hand, seek the child's punishment for the very same deeds. The applicable laws urged the development of the conditions relating to children in armed conflict without distinction.[945] These include, in the researcher's opinion, the characterisation of the child who participates in armed conflict.[946]

In considering the applicable legal principles, the international community is obligated to develop the law in light of the child's best interest, and, in doing so, it must endorse the special protection awarded to the child.[947] This is not to be done with a narrow approach, as ideals and utopian ideas are only as good as the viability of their execution. This instead entails a multi-faceted approach. One needs first to acknowledge the unique needs of the child in armed conflict, while further understanding that, without structured legal mechanisms to be adopted, the life of the child in and after armed conflict becomes more vulnerable to elements contrary to the child's development.

The converse is a cycle which, unfortunately, if left untreated, is merely perpetuated. The child who has been exposed to the realities of armed conflict should not be expected automatically to assume a different role in society once the armed conflict is no longer her residential atmosphere.[948] History bears witness to the fact that, without properly administered legal mechanisms which respect the rule of law or a functioning

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[945] The Preamble to the Optional Protocol to the Convention on the Rights of the child on the involvement of children in armed conflict (2002).

[946] A McQueen, "Falling through the Gap: The Culpability of Child Soldiers under International Criminal Law", (2018), 94(2) *Notre Dame Law Review Online*, at page 100 McQueen submits that, it is difficult to imagine that children could play any role in armed conflict apart from that of the victim. See also M. A Thomas, "Malice Supplies the Age: Assessing the Culpability of Adolescent Soldiers", (2013), 44 (1), *California Western International Law Journal* 12.

[947] J Mbaku, "International Law, African Customary Law, and the Protection of the Rights of Children", (2020), 28(3), *Michigan State International Law Review* 542-546.

[948] J Sloth-Nielsen and B D Mezmur "A dutiful child: the implications of Article 31 of the African Children's Charter", (2008), 52(2) *Journal of African Law* 171.

child-centred education and recovery programme, the child either returns to the armed conflict or remains unable to add any constructive value to civil society.[949]

One should note that the Optional Protocol and its provisions stipulated in Article 6 thereof reflect the universally-accepted position as it was in 2002. Despite the acceptance of the Optional Protocol, statistics regarding children participating in armed conflict and the consequences thereof have not failed to increase.[950] Years later, in 2007, the Government of France in collaboration with UNICEF held a conference which was entitled "Free Children of War".[951] At this conference, the Paris Commitments and Principles were adopted.[952] Since their adoption, 105 states have endorsed these Principles and Commitments. The recorded priorities of the conference were to put an end to the use of children in armed conflict and to make every effort to have the Paris Principles observed and applied through political, diplomatic, humanitarian, technical assistance and funding actions.

Amongst the several goals of the conference was the removal of children enlisted into armed groups and the reintegration of child soldiers. This was to be achieved by affirming the need for adequate funding granted sufficiently early to allow the child's

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[949] Article 10 United Human Rights Council, Tenth Session, and Resolution 10/2. Human Rights in the administration of justice, in particular juvenile justice. https://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_10_2.pdf (Accessed on 5 October 2020). See also R Brett and I Specht, *Young Soldiers: Why they choose to fight, Improving Socioeconomic Reintegration,* (2004) 130.

[950] United Nations, General Assembly Security Council, Seventy Second Session, Promotion and protection of the rights of children: Children and Armed Conflict, A/72/865-S/2018/465. 16 May 2018, at paragraph 6 and 7.

[951] The Paris Principles and Commitments, https://www.diplomatie.gouv.fr/en/french-foreign-policy/human-rights/children-s-rights/protecting-children-from-war-conference-21-february-2017/article/what-are-the-paris-principles-and-paris-commitments (Accessed on 20 September 2020).

[952] UN Children's Fund (UNICEF), the Paris Principles. Principles and Guidelines on Children Associated with Armed Forces or Armed Groups, February 2007, available at: https://www.refworld.org/docid/465198442.html (Accessed on 20 September 2020).

full and effective reintegration into civilian life. The Paris Principles define what the best interests of the child refer to in armed conflict. Paragraph 3.4.0 provides:

1) *"The release of children from armed forces or armed groups, their reintegration and prevention of recruitment and re-recruitment require priority attention. Actions in this regard must not be dependent or contingent on or attached in any way to the progress of peace processes. All measures to assure the release of children, their protection and the prevention of the recruitment of children shall be determined by the best interests of such children".*[953] (Own emphasis)

Accordingly, the 105 states who have assented to the Paris Principles recognise that the "best interests of the child" refer to having the child's removal from armed conflict and her consequential reintegration to receive priority attention. This obligation placed on the international community is not dependent on peace processes, and this implies a sense of urgency. One way, therefore, in which the best interests of the child in armed conflict may be guaranteed is by respecting and protecting the child's life after armed conflict as an independent priority and by utilising all possible measures in doing so.

The Paris Principles are comprehensive to the extent that they consider the national laws of a state which may permit a child to be held criminally accountable for the deeds committed during armed conflict. The Paris Principles respectfully do not dictate what national courts may adjudicate, but, instead, the principles provide how children should be treated when they are accused of crimes under international law. Paragraph 3.6 and 3.7 read as follows:

"3.6 Children who are accused of crimes under international law allegedly committed while they were associated with armed forces or armed groups should be considered primarily as victims of offences against international law; not only as perpetrators. They must be treated in accordance with international law

[953] Paragraph 3.4.0 of the Paris Principles, "Principles and Guidelines on Children Associated with Armed Forces or Armed Groups", 2007. https://www.unicef.org/mali/media/1561/file/ParisPrinciples.pdf (Accessed on 14 October 2020).

framework of restorative justice and social rehabilitation, consistent with international law which offers children special protection through numerous agreements and principles.

3.7 Wherever possible, alternatives to judicial proceedings must be sought, in line with the Convention on the Rights of the Child and other international standards for juvenile justice."[954] (Own emphasis)

The Paris Principles provide a firmly-written answer to the question of whether children participating in armed conflict are victims or perpetrators. Importantly the role of courts (national and international), or alternative legal mechanisms, is not diminished nor nullified. Instead, it is the international law framework of restorative justice and social rehabilitation which is encouraged.

The principles recognise that throughout the applicable international law regulating the plight of children participating in armed conflict the child is awarded "special protection". This, with respect, is often an elusive term. However, in paragraph 3.6 above, it has been identified and associated with social rehabilitation and restorative justice. The firm stance provided by paragraph 3.7 mentioned above merely confirms the decision taken by the senior prosecutor of the Special Court for Sierra Leone of not prosecuting children for the deeds committed during armed conflict.[955]

One may acknowledge that the Paris Principles are no more than principles that were assented to by states as a result of an international conference. One would, however, be remiss in ignoring its successful acceptance which, in essence, is proved by the consent of more than one hundred states. The principles provide a clear intention towards the direction of the legal, administrative, and other

[954] Paragraph 3.6 and 3.7 of the Paris Principles, "Principles and Guidelines on Children Associated Armed Forces or Armed Groups", 2007. https://www.unicef.org/mali/media/1561/file/ParisPrinciples.pdf (Accessed on14 October 2020).

[955] D Crane, "*Strike Terror No More: Prosecuting the Use of Children in Times of Conflict-The West African Extreme*", at Chapter 9 of: From Peace to Justice "International Criminal Accountability and the Rights of Children", Edited by K Arts and V Popovski, 2005 121.

measures that State Parties to the Convention on the Rights of the Child and its Optional Protocol are obliged to take in protecting the child from armed conflict.

The researcher argues that the best interests of the child do require priority attention, which is to be independent and unique if it is to be able to adapt to the needs of the child who is or has participated in armed conflict appropriately. The priority attention which the researcher refers to is to be directed at the adoption of legal, administrative and other mechanisms which are underpinned with values focused on the child's rehabilitation and social reintegration.

The term 'legal mechanisms' is vague in relaying its true purpose. However, the wording may be appropriate given the intention of not directing a state to be confined to adopting any particular mechanism. The researcher submits that the approach towards adopting legal or other mechanisms in this context is one which supports the urgency of assisting the child whilst guaranteeing that the necessary legal authority is permitted to secure the child's best interest.

6.5 A time for a new measure: *The Special Children's Court*

Ten years after the Paris Principles and Commitments were consented to, the French Government and UNICEF established a ministerial conference in Paris. This conference was entitled "Protecting Children from War" and it was organised to continue and review the standard set in 2007 by the prior "Paris Principles and Commitments".[956] The conference was attended by all actors who were working to protect children in armed conflict, which included more than a hundred delegations comprising of States, International and non-governmental organisations, keynote contributors and public figures.

[956] "Protecting Children from War", an international conference held in Paris on 21 February 2017. https://www.diplomatie.gouv.fr/en/french-foreign-policy/human-rights/children-s-rights/protecting-children-from-war-conference-21-february-2017/ (Accessed on 12 October 2020).

An important goal of this conference was to assess the current situation of children in armed conflict in contrast to the adoption of the Paris Commitments and Principles in 2007. Once assessed, it would be followed by the identification of various avenues for progress. The conference produced an important document for the future development of the child's protection in armed conflict, known as the "Conclusions" of the international "Protect Children from War" conference.[957]

To this end, the "Conclusions" provide the necessary insight and modern perspectives which the history relating to the child's protection from armed conflict has desperately required. The "Conclusions" transparently expose the identified gaps and challenges faced by the international community in fully implementing the child's best interest. As a result, the various needs, recommendations and the warranted next steps to take were identified. The recommendations made by the participants at the conference are as follows;[958]

1) The participants stressed the need to reaffirm international commitments and respect international humanitarian and human rights law, emphasizing the importance of developing, strengthening and enforcing national legal frameworks.

2) The participants highlighted the need to design prevention and reintegration programmes which are age-appropriate, culturally sensitive, and take into account the different needs of boys and girls, and provide access to education,

[957] The "Conclusions" of the international conference held in Paris on the 21 February 2017: "Protect Children from War". https://www.diplomatie.gouv.fr/IMG/pdf/protegeons_enfants_de_la_guerre_ccl_eng_cle839d5f.pdf (Accessed on 28 September 2020).

[958] Preventing the recruitment and use of children by armed forces and armed groups- release and reintegration of children, page 3, at paragraph 2, 4 and 7 of "The Conclusions" of the international conference held in Paris on the 21 February 2017: "Protect Children from War" https://www.diplomatie.gouv.fr/IMG/pdf/protegeons_enfants_de_la_guerre_ccl_eng_cle839d5f.pdf (Accessed on 12 October 2020).

vocational training and livelihood options, as well as the need to empower children and recognise their role in building sustainable peace.

3) The participants recognised the importance of a community-based protective environment for children.

4) The participants recognised that there is a need to strengthen the monitoring and data collection of the statistics surrounding children in armed conflict.

The ten-year difference between the principles accepted in 2007, compared to the conclusions drawn in 2017, highlights a common weakness, which in essence is the lack of administrative and legal mechanisms established at a national level. The basis for this obligation is that national legal frameworks would be in the best physical position to secure the child's special protection during and post-armed conflict, confirm community-based environments and collect the latest statistics and data relating to children in armed conflict within its territory.

Arguably the error of application sits neatly between the state's international obligations, documented from the 1977 Additional Protocols up to the Paris Principles of 2007, and the lack of particularity regarding the measures that a state could adopt in accordance with the child's best interest. The applicable laws either imply, make reference to or expressly provide the obligation of State Parties to adopt legal, administrative or other measures.[959] The adoption of these measures is to secure the child's post armed conflict protection and to realise her best interests by providing recovery, rehabilitation and social reintegration.[960]

A reason why the recommendation identified by the 2017 Conclusions in respect of "National Legal Frameworks" is still a concern could simply be a result of two issues. The first relates to the lack of knowledge and innovation by a state on how adequately

[959] Articles 6 (1) and (3) of the Optional Protocol to the Convention on the Rights of the child on the involvement of children in armed conflict (2002).

[960] Paragraph 3.6 and 3.7 of the Paris Principles, "Principles and Guidelines on Children Associated Armed Forces or Armed Groups", 2007. https://www.unicef.org/mali/media/1561/file/ParisPrinciples.pdf (Accessed on 14 October 2020).

to establish a viable measure in compliance with the state's obligation, as the obligation itself fails to provide any specificity of a viable measure. The second issue is that different states have varying financial and judicial resources at their disposal, which, in essence, limits international compliance. The balancing of these two aspects must be met with an appreciation of the urgency and strength of the obligations relating to the protection of the child and her best interest.

The researcher argues that history has forced the modern world to adopt initiatives and prepare for the better world that we advocate for. In doing so the initiative should be practical and serve a need. The unique nature of the proposed initiative should ideally be equal and done with the necessary respect and consent for it to be adopted. The researcher, in proposing something new to the field and in attempting to identify a possible solution, offers the following recommendation, viz. the establishment of a *Special Children's Court of Justice for children involved in armed conflict.*

From the outset, the idea behind the Special Children's Court is not to punish the child who has participated in armed conflict. Nor is it aimed at forcing an obligation on the international community. The purpose is simply to provide a solution and to present an option of legal and/or other measures which States may freely amend and adopt in accordance with their specific needs. The researcher will briefly discuss the relevant establishment, framework, jurisdiction, scope of the court, the problem it aims to address and its relevant purpose.

The establishment of a Special Children's Court:

1) The court will be established purely as a result of a bilateral agreement between the State Party and the United Nations.[961] The court will be recorded in accordance with Security Council Resolutions and will simply for consistency function in accordance with the framework described below.

[961] The Agreement between the United Nations and the Government of Sierra Leone on the establishment of a Special Court for Sierra Leone, Security Council Resolution 1315 (2000) of 14 August 2000. http://www.rscsl.org/Documents/scsl-agreement.pdf (Accessed on 12 October 2020).

2) The court will be established in the territory of a state which has control over children in armed conflict, or the state who has the relevant duty to protect the child who is involved in armed conflict.

3) The court will be established for an initial (3) three-year term, with the option for its annual renewal.

The Framework of the Special Children's Court:

1) The court will be completely voluntary and be consensually agreed upon by the respective State's government and the relevant authority of the United Nations.

2) The Special Children's Court will function in accordance with its developed Statute. The Statute itself must conform to the principles provided in the Additional Protocols to the Geneva Conventions of 1977,[962] the "Beijing Rules", the United Nations Minimum Standards on the Administration of Juvenile Justice of 1985,[963] the Convention on the Rights of the Child of 1990[964] and the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, of 2002.[965]

[962] Protocol 1 and 2 Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of international Armed Conflicts, 8 June 1977.

[963] United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("*The Beijing Rules*"), A/RES/40/33, and 29 November 1985. https://www.witsjusticeproject.co.za/uploads/beijingrules.pdf (Accessed on 12 October 2020).

[964] The Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by the General Assembly resolution 44/25 of 20 November 1989, and entry into force 2 September 1990, in accordance with article 40.

[965] The Optional Protocol to the Convention on the Rights of the child on the Involvement of Children in Armed Conflict (2002).

3) At all times the purpose of the court will be directed at fulfilling the best interests of the child and providing the child with special protection to enable peaceful and harmonious development.

4) The court shall be comprised of three permanent Judges, two of whom will be appointed by the United Nations, with the remaining Judge being appointed by the host State.

5) Judges shall be appointed for a three-year term and shall be eligible for re-appointment.

The procedure of the court and the child's voice:

1) The matter will be presented by the appointed family advocate who will address the court on the experiences of the child and the outcome of any preliminary investigations into the child's physical and mental well-being.
2) The child will, in accordance with Article 12 of the Convention on the Rights of the child, be presented with the opportunity to express his or her opinion in her native language.

3) The court will, without delay and in a period of not more than five working days, deliver its decision along with written reasons for the decision.

Location, jurisdiction and scope of discretion:

1) The contracting/host state shall assist in the establishment of the court, its utilities and its facilities within its own territorial borders. As such, the seat of the court will be in the territory of the contracting/host State.

2) The court's jurisdiction will be limited to individuals below the age of eighteen who have been involved, whether directly or indirectly, in armed conflict.[966]

3) The Special Children's court and the national courts of the contracting/host state will have concurrent jurisdiction.

4) No child shall be tried before a national court for acts which were committed during armed conflict and which fall within the jurisdiction of the Special children's Court.

5) The court's powers will be limited to:

a) Entering into agreements with other States as may be necessary for the best interests of the child and its protection;
b) The appropriate scope of discretion taking into cognisance the special needs of the child as well as the variety of measures which will include, but are not limited to:[967]

- Investigations;
- Follow-up of orders;
- Orders relating to diversion;
- Orders relating to rehabilitation;
- Orders relating to community-based programmes;
- Orders relating to family advocate supervision;
- Orders relating to education; and
- Orders relating to physical and psychological recovery.

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[966] Article 1 of The Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by the General Assembly resolution 44/25 of 20 November 1989, and entry into force 2 September 1990, in accordance with article 40.

[967] Rule 6, "Scope of Discretion", United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("*The Beijing Rules*"), A/RES/40/33, and 29 November 1985. https://www.witsjusticeproject.co.za/uploads/beijingrules.pdf (Accessed on 12 October 2020).

Qualification of Judges:

1) The Judges appointed for the court shall each have no less than ten years of judicial experience within the framework of either family law, child law, international human rights law, international criminal law or international humanitarian law.

2) The Judges shall be persons of high moral character and integrity.[968]

3) The Judges shall be independent in the performance of their functions.

4) Judges who are academically qualified and possess physical experience within the field of humanitarian law relating to juveniles will be preferred.

Decisions and Review:

1) Decisions will be made by the Judges of the court.

2) The decisions should be delivered in private, in keeping with the confidentiality of the court.

3) The decision will be accompanied by a written opinion or recommendation by the senior Judge.

4) The review of the decision will be made possible at the request of the child or the family advocate upon written notice to the court and will be conducted without undue delay.

[968] Article 13 (1) of the Statute of the Special Court of Sierra Leone. http://www.rscsl.org/Documents/scsl-statute.pdf (Accessed on 12 October 2020).

5) The review will be conducted before six Judges, three of whom will be the resident judges of the court and the remaining three from the superior national courts of the host State Party.

Documents, records and their relevant confidentiality:

1) Any child falling within the jurisdiction of this court will, in accordance with the *Beijing Rules,* be respected at all stages of the proceedings in order to avoid any harm being caused to the child by undue publicity or by the process of labelling.[969]

2) Save for the relevant parties directly involved in the execution of the order, and for statistical reports and research purposes authorised by the President of the Special Children's Court,[970] the court and its records will be kept strictly confidential and closed to the public at large.

3) The viewing of the court proceedings will be limited to the child, the Learned Judges, investigating officers, a family advocate, the court registrar, and parents or guardians of the child, if available.

Financial Administration:

1) The expenses of the court will be funded by voluntary contributions from the international community. Similarly to what was done *vis-à-vis* the Special Court for Sierra Leone, the Secretary-General of the United Nations would establish the court only when there are sufficient contributions in hand to finance the

[969] Rule 8, "Scope of Discretion", United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("*The Beijing Rules*"), A/RES/40/33, and 29 November 1985. https://www.witsjusticeproject.co.za/uploads/beijingrules.pdf (Accessed on 12 October 2020).

[970] Article 25 of the Statute of the Special Court of Sierra Leone. http://www.rscsl.org/Documents/scsl-statute.pdf (Accessed on 12 October 2020).

establishment of the court and one full year of its operations and anticipated further expenses for the possible two full years of the court's operations.[971]

2) Any alternate means to increase voluntary contributions of the court may be sought for the extension of the initial three-year period. This will be done in accordance with Article 7 (1) and (2) of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict.[972]

3) The court's finances, assets and other property should be immune from every form of legal processes. The court may, on its own accord, be free to hold or use its funds and operate its accounts nationally or internationally in any currency and convert any currency it has acquired into any other currency.[973]

6.6 Conclusion

The purpose of this research thesis was directed at providing an analysis of the international obligations owed towards children in armed conflict together with the aim that the researcher would be able to identify particular avenues of improvement to address the current needs of the child. This was accomplished through various stages. The research commenced by providing a historical background into the plight of children in armed conflict and by identifying the various difficulties still faced by

[971] Article 6 of The Agreement between the United Nations and the Government of Sierra Leone on the establishment of a Special Court for Sierra Leone, Security Council Resolution 1315 (2000) of 14 August 2000. http://www.rscsl.org/Documents/scsl-agreement.pdf (Accessed on 12 October 2020).

[972] Article 7 (1) and (2) of The Optional Protocol to the Convention on the Rights of the child on the Involvement of Children in Armed Conflict (2002).

[973] Article 9 (1) and (2) of The Agreement between the United Nations and the Government of Sierra Leone on the establishment of a Special Court for Sierra Leone, Security Council Resolution 1315 (2000) of 14 August 2000. http://www.rscsl.org/Documents/scsl-agreement.pdf (Accessed on 12 October 2020).

children in armed conflict today. The researcher followed this by discussing the various sources of international law and how the law develops through legislation, case law and custom, despite the difficulties possessed through the universal consensus of applicable treaties.

The researcher found that the sources of international law are well documented and encouraged, through various precedents, the continuous development of the law. The difference in custom by particular regions of states explains the need for particular norms which are universal and peremptory. The researcher argues that, in the light of the universal acceptance of the Convention on the Rights of the Child, together with the universal recognition of the imperative protection owed towards children in armed conflict, the prohibition of the child's involvement in armed conflict has reached the status of a peremptory norm.

When considering the international laws applicable to children in armed conflict, the research found that inconsistencies between international human rights law and international humanitarian law do exist. Where international humanitarian law views the child as a special protected individual in need of evacuation, international human rights law provides implied provisions where children below the age of eighteen may still find themselves participating in an armed conflict.

The research turned to international criminal law to assess the position of children who have committed war crimes during their tenure in armed conflict. The international criminal court is limited in its jurisdiction and provides no assistance in ascertaining a direct answer as to whether children should be held criminally liable for deeds committed during armed conflict.

In the ongoing debate surrounding the role of children in armed conflict, the research explored the various psychological effects endured by children participating in armed conflict. In researching this topic, it was found that the child generally at its core requires continuous guidance, love and support in conjunction with universally accepted standards of education and moral development if she is to be a constructive member of society. On the converse side of the spectrum, the child in armed conflict is almost irreparably prejudiced and is consequently limited to the atmosphere of her environment, which further destroys the child's mental development.

The researcher argued that it is, for ethical as well as legal reasons, that this particular child's upbringing and circumstances should be considered when deciding whether the child should be held criminally accountable. In further strengthening this line of argument, the research discusses the various factors which exclude criminal responsibility in terms of the Rome Statute. This discussion shed light on the fact that the psychological and physical trauma the child is commonly exposed to in modern armed conflicts warrants the exclusion of criminal accountability for the deeds committed by the child in armed conflict.

With the international obligations aligning themselves to the principles of the child's best interest and special protected status, the research examined examples of children who had been involved in armed conflict and had been detained and prosecuted at a domestic level. The finding was that the child's best interests had not been considered. The researcher argues that, without a clearly ascertainable legal mechanism, states who are not a party to the applicable laws protecting children in armed conflict would undoubtedly act contrary to them.

Not to single out a particular State's actions, a closer examination of alternatives to domestic courts was warranted, resulting in the consideration of *ad-hoc* international criminal tribunals. The importance found through the establishment of these tribunals was the impact that they had on a community and its endorsement of justice being seen, and, therefore, achieved. The researcher concentrated on the Special Court for Sierra Leone, particularly for its unique establishment and relationship between the government of Sierra Leone and the United Nations. The Special Court for Sierra Leone is famous for the fact that it boldly provided the platform to prosecute children for the deeds committed during its civil war. The researcher draws from the benefits of such a unique hybrid court and acknowledges that innovative legal mechanisms such as these are able to restore hope, peace and structure to a state which was once plagued by armed conflict.

Ironically, and despite the permission to do so, children were not prosecuted in this special court of Sierra Leone. The lead prosecutor found that the child who participated in armed conflict and committed heinous deeds, albeit unlawfully, would not be cured by the child's additional prosecution for such deeds. Instead, an approach of rehabilitation and recovery is better suited. In exploring this idea, the research

canvassed what rehabilitation and psychological recovery meant for the child in armed conflict. The finding was that the child's rehabilitation and recovery included, to a large extent, the child's education and social reintegration amongst other tools which would encourage the child's continuous development.

The statistics regarding children in armed conflict have not been eradicated or, at least to any particular degree, been lessened by the commencement of the applicable laws protecting children. An exploration into the position of the child who is between these two polar opposite atmospheres is necessary with regard to both the armed conflict itself and the eventual rehabilitation and recovery of the child. In considering this position the researcher focused on the unique needs of the child in armed conflict and what the child requires under the auspices of the child's best interest. The finding was that the child's best interest requires her removal or evacuation from the armed conflict and placement in a programme which fosters the child's rehabilitation, education, physical and mental recovery, with the aim of achieving the child's eventual social reintegration.

The researcher found that, although programmes of rehabilitation and recovery are indeed what the child needs, the obligations both customary and legally placed on states require more comprehensive particularity. The applicable laws and their development concerning the child's removal from armed conflict were canvassed with the common denominator being the legal and administrative measures that the state is obligated to adopt according to the child's best interest. The obligation to adopt "legal", "administrative" and "other measures" is in itself too vague a concept to define narrowly. However, the ambiguous obligations create an arena to provide a detailed option that could be considered. The solution that the researcher proposes is described in the form of a *Special Children's Court*. This court as an option for a legal and administrative mechanism to be adopted by states provides the following solutions:

1) The proposal will be the comprehensive face of the ever-elusive phrase of "legal, administrative and other measures".

2) Any state would be able to adopt the proposal, irrespective of whether or not they are party to a particular treaty or convention, thus making its applicability

universal and not dependent on secondary considerations of politics at an international level.

3) The proposal focuses solely on the child's best interest.

4) The adoption of this proposal would ultimately respect the sources of international law, firstly by establishing a bilateral written agreement and, secondly, by promoting custom through state practice and acceptance.

5) The adoption of the proposal provides the special respect owed to the child and does not distinguish between children aged fifteen to eighteen unlike the currently applicable laws.

6) The proposal conforms to the Convention on the Rights of the Child, which, in turn, encourages the development of the law and independent initiatives by states to further the protection owed to the child.

7) The proposal takes into account the psychological impact that armed conflict has on the child and does not further strain the child's development by exposing the child to a trial or public humiliation.

8) The proposal recognises the child as a victim of armed conflict and not a perpetrator.

9) The proposal respects the child's rights and unique needs in armed conflict by securing her release and providing an order securing her future development in line with her best interests.

10) The proposal will benefit the child's community, as justice will be seen to be done. This creates a sense of hope for communities and states who have lost more than their economic growth and physical infrastructure.

11) The proposal provides the child in armed conflict with a revised psychological approach to justice and the national government which was responsible for her protection from armed conflict at the outset.

12) The proposal recognises the concerns raised in the Paris Conference of 2017 to the extent that a court which is built on the native soil that endured the armed conflict ensures community-based protection.

13) The proposal provides the child with a voice in matters affecting her.

14) The proposal provides the child with the necessary confidentiality and privacy.

15) The court would have confidential records and reports, addresses concerns raised regarding the upkeep of data and statistics of children in armed conflict.

16) The proposal protects the child at a domestic level from attempts to re-recruit the child by armed groups or forces. This may result in more arrests and investigations from other international instruments such as the International Criminal Court.

17) The child undoubtedly will be considered in the light of her best interests as legal measures are adopted purely to secure her protection, recovery, education, development and social reintegration.

6.7 Recommendations

Notably, this research thesis focusses on the state's obligations under international law to adopt legal, administrative and other measures to promote the child's best interest. The recommendations suggested here are relevant to the child's protection from armed conflict as a whole, as various states have unique needs in adapting to the protection of children from armed conflict.

In conjunction with the proposal provided herein, there remains the need to strengthen the prevention of the child's initial recruitment into armed conflict at any age below eighteen. Universal acceptance of the child's position in armed conflict as a victim of the breach of the laws protecting the child from the armed conflict itself requires advocacy. The international minimum age of criminal responsibility for deeds committed by a child in armed conflict, or its prohibition, requires codification for

proposals such as the one recommended in this research thesis to be universally endorsed. One could similarly advocate the idea that children's rights may include individuals older than eighteen but who are psychologically impaired purely because of direct exposure to an armed conflict from an earlier age.

Further recommended research may be directed at an individual state's actions which are contrary to the provisions contained in the Convention on the Rights of the Child, with particular consideration aimed at whether the state's non-membership of the Convention is a justification for its actions. The facts contained in the Omar Khadr case, albeit disturbing, encourage research statements inquiring into whether Omar Khadr himself is entitled to any reparations for his childhood which was made obsolete.

In considering the development of the law, one must not forget that the law is a sum of the collective moral standards of the community. In embarking on the development of this standard, it will be necessary to educate the public at large on the rights of the child and ensure that this education is adequately and continuously delivered. It may be argued that international law applicable to children suffers the same fate as other laws to the extent that it develops through crises and trial by error. This argument needs to be rejected at international conferences and in legislative agreements, as the best interests of the child suggest its urgency and warrant its immediate priority.

One could research in more depth the psychological impact of armed conflict on the child and provide findings on the particular methods or manner of treatment the child in armed conflict should be provided with[974]. This research requires continuous assessment which should be reviewed often and in line with the ever-changing methods and means used in armed conflict.

Alternative bilateral agreements require innovative adaptations to build custom and to create initiatives and ideas that fellow states may adopt or refer to in a consideration of their own legal and administrative measures. It would be naïve to ignore the fact that particular states within the international arena possess a larger bargaining power

[974] N Boothby, "What happens when child soldiers grow up?", (2006), 4 (3, *The Mozambique Case Study Intervention* 251.

than their allies do. To this end, these states, in particular, should be encouraged to align themselves with the applicable principles protecting children in armed conflict. Proposals akin to a *special children's court* may be better suited to particular states owing to their system of governance, and, it is for this reason that further proposals aimed at strengthening the legal protection offered to the child should be constantly provided for universal application to be effected.

The need to recognise the different construction of legal systems operating within various states and regions must be met with the same recognition of setting an equal standard for the rights of the child. This is the only way that international law could ensure that a child born on African soil can hold on to the same human rights as those enjoyed by a child born on another continent.

6.8 Concluding remarks

When the dust settles on an armed conflict and the soldiers that are left standing are able to return home, it should be the right of every soldier to be met by loved ones, a hero's welcome and, at the very least, financial remuneration. For many, if not all children in armed conflict, the battles they fight are not their own, yet arguably they have the most at stake. The child's role in armed conflict compared to that of a legitimate combatant of an organised armed force is strikingly different. This difference is exacerbated after the armed conflict. Individuals participating in their national armed forces often possess rights which either secure their pension and/or their medical assistance after war service.

For the majority of children in armed conflict, this is not a benefit which they accrue. Instead, not only are they the non-recipients of any state-funded benefits but they possess limited opportunities for any employment. This is a noticeable contributing factor for the re-recruitment of many children, as, without any guidance to the contrary, the child is forced to continue the habit of what she perceives as being reality.

The law, particularly international law, should be the standard which the international community desires. For too long it has been the standard which the international community would merely accept. It is this divide between acceptance and attainment that international law applicable to children in armed conflict needs to cross. The

child's best interest is no longer an ideal which finds its way into the preambles of international treaties, it is now the primary consideration in all aspects relating to the child or, at least, it should be.

The universal obligations owed to the child in armed conflict are not the perfect laws at this time in history. No law is perfect immediately on its inception, as it requires development and modernisation in a similar manner to the way everything else in the world at large automatically does. With this being appreciated one can argue that it may take one individual to set a standard which others may follow to change a collective mindset. We have seen this happen before with international criminal tribunals being established where they were deemed necessary and this in itself encouraged others to follow suit, even if only as a measure of last resort. The proposal produced in this research thesis offers an option and framework for a state to establish legally recognised measures that promote the child's best interest in armed conflict.

In order to assess the applicability of legal measures and principles which are directed at child protection and development, the child must be a part of that regulatory process. For justice to be done it must be seen to be done. The same principle may be applied to the extent that international obligations require direction through practical examples to encourage their application. In conclusion, for the current universal obligations towards children in armed conflict to reach their full potential, it requires the action of one state establishing a higher standard, so that others may follow.

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