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**LEGAL ANALYSIS OF CRIMINAL LIABILITY OF CHILD
SOLDIER IN INTERNATIONAL CRIMINAL LAW**

A Dissertation submitted to the school of law
in partial fulfillment of the Academic
Requirements of the Award of the Bachelor's
Degree in Law

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Kigali, August, 2023

DECLARATION

We, **NSANZIMANA Faustin** and **KAMBABAZI Yvette** hereby declare that to the best of our knowledge, this dissertation entitled “*legal analysis of criminal liability of child soldier in international criminal law*” is our own work. It contains no materials previously published or written by another person, nor material which to a substantial extent has been accepted for the award of any other degree or diploma at ULK or any other educational institution. Where other people’s work has been used, references have been made in footnotes and bibliography. We also declare that the intellectual content of this dissertation is the product of our own work.

Signature.....

Date.....

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CERTIFICATION

It is certified that the work incorporated in this dissertation, titled “legal analysis of criminal liability of child soldier in international criminal law” submitted in partial fulfillment of the requirements for the Bachelor’s Degree in Law, Kigali Independent University (ULK), School of Law was carried out by Mr.(s). **NSANZIMANA Faustin** and **KAMBABAZI Yvette** under my guidance and supervision

Signature.....

Date.....

Supervisor: Dr. ISHEMA Pierre

DEDICATION

To Almighty God,

To our families,

To our friends, and

To our colleagues

ACKNOWLEDGEMENTS

First and foremost, we would like to thank the Almighty God for the life, he granted, the power and the protection he granted us to complete this dissertation.

Therefore, we would like to thank **Professor Dr. RWIGAMBA BALINDA** founder and president of Kigali Independent University, the entire administration of ULK especially in our department of law; we also thank the law faculty lecturers who gave us the knowledge and skills that help us to effectively attain this success of Dissertation.

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NSANZIMANA Faustin

&

KAMBABAZI Yvette

LIST OF ABBREVIATIONS AND ACRONYMS

APs	: Additional Protocols
Art	: Article
CJA	: Child justice Act
Ed	: Edition
FPLC	: Force Patriotique pour la liberation du Congo
DRC	: Democratic Republic of Congo
DDR	: Disarmament Demobilization and Reintegration
EU	: European Union
GCI	: Geneva Convention I
GCI	: Geneva Convention II
GCI	: Geneva Convention III
GCI	: Geneva Convention IV
GPS	: Global Positioning System
HC	: III Hague Convention III
HC	: IV Hague Convention IV
HC	: VI Hague Convention VI
HC	: XIII Hague Convention XIII
IAC	: International Armed Conflict
Ibid	: Previous mentioned
Id	: Idem (same book, same author, but on different pages)
ICC	: International Criminal Court
ICJ	: International Court of Justice
ICRC	: International Committee of the Red Cross
ICTR	: International Criminal Tribunal for Rwanda
ICTY	: International Criminal Tribunal for Yugoslavia
IHL	: International Humanitarian Law
UNSC	: United National Resolution Council
UNCRC	: United Nations Convention on the Right of Children
US	: United Nations
USA	: United state of America
UK	: United Kingdom

UNICEF	: United Nations Children’s Fund
UPC	: Union of Patriots Congolese
VCLT	: Vienna Convention on Laws of Treaties
Vol	: Volume
NIAC	: Non-International Armed Conflicts
OPAC	: Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict
No	: Number
p.	: Page
Supra note	: Already mentioned
ULK	: Kigali Independent University
UN	: United Nations
US	: United States
MCR	: Minimum age of criminal responsibility
IDP	: Internal displaced person
i.e.	: That is to say
SDC	: Sustainable Development Goals
ULK	: Kigali Independent University
NGO	: Non-government organization
Op.cit	: opera citato (already cited above)
P/pp	: page/: pages
LRA	: Lord’s Resistance Army
SCSL	: Special Court for Sierra Leone
WWW	: World Wide Web

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ABSTRACT

The world is filled with war crimes committed by children who have been recruited, trained and used for combat, assigned to support roles such as porters or messengers, used as sex slaves or recruited for tactical advantage as human shields or for political advantage in propaganda. The phenomenon of child soldiers has gained increased attention since 2013 for the condemnation, of Thomas Lubanga for recruiting and using child soldiers. However, not much has been said about the crimes perpetrated by those children. This mini dissertation looks at child soldiers as perpetrators of crimes and examines their potential criminal accountability under international criminal law. The criminal liability of child soldiers under international law is a complex and evolving area that intersects human rights, humanitarian law, and juvenile justice. Interpretation of international instruments suggests that child soldiers could be prosecuted by international criminal tribunals. However, those prosecutions would have to respect specific standards. Criminal capacity concerns the ability of individuals to understand the implications of their actions related to the commission of an offence. The consideration of criminal capacity for children, however, is determined by their age.

1. GENERAL INTRODUCTION AND HISTORICAL BACKGROUND

"I am saddened by the thoughts of those who have experienced only war and have grown up in such an environment.

What a terrible legacy for their future, violence! Children have a right to peace, and they need it.¹ History, world is filled with war crimes committed by children who have been trained and used for combat, assigned to support roles such as porters or messengers, used as sex slaves or recruited for tactical advantage as human shields or for political advantage in propaganda,² in 1814, for example, Napoleon recruited many teenagers for his armies. Thousands of children participated on all sides of the First World War and the Second World War. Children continued to be used and even to commit crimes through the 20th century on every continent, with concentrations in parts of Africa, Latin America, and the Middle East.

I.1. Background of the study

Only since the turn of the millennium has intentional efforts begin to limit and reduce the military use of children. Since the adoption in 2000 of the optional protocol on the involvement of children in armed conflict OPAC the global trend has been towards restricting armed forces recruitment to adults aged 18 or over , known as the straight-18 standard. Most states with armed forces have opted in OPAC, ³ which also prohibits states that still recruit children for using them in armed conflicts and those child commit crimes at the same time.⁴ Nonetheless, child soldiers, international reported in 2018 that children under the age of 18 were being recruited and trained for military purposes in 46 countries; of these most recruit from age 17, fewer than 20 recruit aged 16, and unknown, smaller number, recruit younger children. States that most rely on children to staff their armed forces include the world three most populous countries china , India and united states and the most economically powerful all G7 countries apart from Italy and Japan,⁵. Today, due to the widespread military use of

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

² UNICEF, The State of the World's Children, 2007, Accessed On 01/07/2023

³ www.state.gov/g/drl/hr/treaties

⁴ OCHA, Child soldiers international Annual Report 2017-2018, published 24th September 2018, Accessed On 01/07/2023

⁵ UNHCR, Child soldier international, 2014 available at <https://www.refworld.org> > accessed On 01/07/2023

children in areas where armed conflict and insecurity prevent access by UN officials and parties, it is difficult to estimate how many children are affected. In 2017 child soldiers international estimate that several tens of thousands of children, possibly more than 100,000, were in state and non-state military organization around the world and in 2018 the organization reported that the children were being used to participate in at least 18 conflicts.

According to the aforementioned data, youngsters are more likely to influence than adults making them easy targets for military recruitment due to their greater susceptibility to influence compared to adults. Some children are recruited by force while others choose to join up, often to escape poverty or because they expect military life to offer a rite of passage to maturity. However, not much has been said about the crimes perpetrated by those children. Due to this, it may be appropriate to see child soldiers as criminals and determine whether or not they may be held accountable under international criminal law. International criminal tribunals can prosecute child soldiers, according to the interpretation of international agreements. But those prosecutions must adhere to certain rules. Child soldiers can be viewed as victims, recruited to commit military acts against their will.⁶⁷ Because of this The United Nations committee on the right of the child and others has called for an end to the recruitment of children by the states armed forces, arguing that military training, the military environment, and a binding contract of service are not compatible with children rights and jeopardize development during adolescence.⁸ The act of recruiting child soldiers is a war crime; however, as soldiers, even if they recruited against their will, they may be perpetrators of the crimes of torture, maiming, rape, and the killing of civilians. Therefore, the question arises as to whether they should be held liable for these crimes.

Indeed, one may wonder why children would be shielded from prosecution when they commit such crimes.⁹ In determining a child soldier's degree of potential liability, a careful balance must be struck between seeing the child soldier as not only a perpetrator of human

⁶ United nations, children and armed conflict,2014, available at Childrenandarmedconflict.un.org Accessed on 01/07/2023

⁷ Rome Statute of the International Criminal Court, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) [Rome Statute], arts 8(2)(b)(xxvi) and 8(2)(e)(vii); Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, signed 16 January 2002, 2178 UNTS 138 (entered into force 12 April 2002) [Statute of the SCSL], art 4(c).

⁸ Child soldier international accessed On 01/07/2023

⁹ Amnesty International "Sierra Leone 1998- A Year of Atrocities against Civilians" AI Index: AFR/51/22/98, November 1998 at 17.

rights violations but also as a victim of human rights abuses.¹⁰ By keeping this duality in mind, it ensures that both the rights of the victim to justice and the rights of the child are respected.¹¹ One may feel that children should be held accountable for their crimes because it would serve justice for the victims; however, it appears to be difficult to defend accountability for children who may be too young to be considered capable of committing crimes, or, in many situations, who acted under duress when committing crimes.

The legal discussion on the issue of criminal liability of child soldiers is primarily based on the concept of *mens rea*. In other words, international criminal law must determine whether child soldiers can actually intend to commit international crimes.

In analyzing the criminalization debate I believe we should consider the extraordinary circumstances that child soldiers are faced with and whether children who have voluntarily taken up arms can truly be regarded as volunteers in light of these circumstances.¹² The question of the child's age also plays an important role in the analysis of this debate as what may be regarded as a child in one state may not be the case in another state due to various domestic laws and cultural sensitivities. The importance of setting a minimum age of criminal responsibility took centre stage in the case of Sierra Leone as there were a record number of child soldiers involved in the war. In the context of this mini dissertation, I have chosen to define a child soldier as any person involved in conflict either directly or indirectly and who is under the age of 18 years. I will analyse the question of whether a child soldier operating in that particular context can fully appreciate his actions and the consequences thereof and whether that child should be held criminally responsible. This question can also be formulated as follows: Does a child soldier have the requisite **mens rea** to be held liable for his crimes? In this brief dissertation, I contend that the current international criminal law model is insufficient because it is based on retribution and places a disproportionate amount of emphasis on the criminal responsibility of the perpetrator.

This research aims to explore the complexities surrounding the criminal liability of child soldiers under international law.

¹⁰ Musila G 2005 at 321. This view is also shared by Happold M "Child Soldiers in International Law" 2005 at 2, who note that this duality in the status of a child soldier is an important factor that must be considered when determining the potential liability of a former child soldier.

¹¹ The right to justice is discussed in greater detail in chapter 3.

¹² The various circumstances that lead a child to join the armed forces and the condition under which child soldiers operate is analysed in more detail in chapter 2.

I.2. Statement of the problem

Articles 77(2) of the first additional protocol to the Geneva Convention permit the recruitment of the children between the ages of 15-18 years into armed forces.¹³ The provision is written in such a way that it imposes a positive duty on nations to forbid minors from taking part directly in hostilities and to prohibit from engaging in child recruitment¹⁴ Article 22(2) of the African Charter on the Rights and Welfare of Children, which also mentions this provision, requires on all parties to "take all necessary measures to ensure that no child shall take a direct part in hostilities and in particular from recruiting any child."¹⁵ So far International criminal tribunals have never prosecuted charges against child soldiers. However, given the growing attention being paid to the problem of child soldiers, it is critical to consider the possible possibility of prosecuting youngsters. The criminal liability of children is still a challenging idea to consider on a global scale for two reasons. It might be challenging to determine when the necessary component of *mens rea* is acquired because early psychological development varies from kid to child. Second, due to cultural considerations and respect for state sovereignty, there is no uniform age of criminal liability in international law.

The convention on the prevention and punishment of the crime of genocide places a positive obligation upon the prosecution to prove a specific intent "to destroy in whole or in part a national, ethnical, racial or religious group such as.

Article 85 (3) and (4) of the first additional Protocol to the Geneva conventions goes further in criminalizing a whole list of violations. The important thing to note is that all these violation "willfully."¹⁶ The general rule then appear to be that for anyone whether it is a child or adult perpetrator to be convicted a crime against humanity his crime or violation must take place knowingly and with an understanding of the broader context in which he acts. The

¹³ Articles 77(2) Geneva Conventions and their Additional Protocols | ICRC of 12 August 1949 and relating to the protection of victims in International Armed conflicts, 8 June 1947

¹⁴ Articles 77(2) reads "the parties to the conflicts shall take all feasible measures in order that children who have not attained the age of 15 years do not take a direct part in hostilities and, in particular they shall refrain from recruiting them into their armed forces. In recruiting amongst those persons who have attained the age of 15 years but who have not attained the age of 18 years, the parties to the conflict shall endeavor to give priority to those who are the oldest.

¹⁵ OAU Doc. CAB/LEG/24.9/49 (1990)

¹⁶ Articles 85(3) and (4) specifically uses the term willfully to indicate that for one to held criminal liable for the commission of one of the listed offences, at the time of commission he must have been aware of his actions and acted with intent.

difficulty appears in having to prove this specific intent and knowledge. This task is taxing in the case of adult offenders but even more so with child offenders. Most children do not have the intention to commit many of international crimes they commit in time of conflicts. In fact, many will attest to the fact that they did not understand what they did or for what purpose.¹⁷

Regardless of whether these children are forcibly recruited or join the armed forces voluntarily out of fear or poverty, they are left with no choice but to commit such crimes in order to survive.

Age of criminal responsibility in those legal systems recognizing the concept of the age of criminal responsibility for juveniles, the beginning of that age should not be set at a too young age level, taking into consideration the facts of mental, psychological, and intellectual maturity.¹⁸

Article 26 of Rome statute prevents the court from prosecuting anyone under the age of 18 years. But not for because it believes children should be except from prosecution of international crimes, but “rather that the decision on whether to prosecute should be left so states.¹⁹ There is a case of Dominic Ongwen who was about 10 years when he became a soldier with the Lord’s Resistance Army in the 1980s. The ICC issued an arrest warrant for him in October 2005 for crimes against humanity, including enslavement of children.

Although IHL does not set a minimum age for criminal responsibility for international crimes, it argued that a yardstick has been laid down for some form of indemnity through IHL’s recognition that recruitment of child soldiers less than 15 years was a war crime.

¹⁷ “Sierra Leone rebels Forcefully Recruit Child soldiers,” May 2000 available <https://www.hrw.org/news/2000/05/31/sierra-leone-rebels-forcefully-recruit-child-soldiers> Abubakar was forced to rejoin the RUF when he was abducted while walking near the demobilization camp in Makeni. "It was not my wish to go fight, it was because they captured me and forced me," he told Human Rights Watch, "There was no use in arguing with them, because in the RUF if you argue with any commander they will kill you." Accessed on 07 July 7, 2023

¹⁸ Rules 4 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice available Office of Justice Programs (.gov) <https://www.ojp.gov> (The Beijing Rules) ADOPTED 29 November 1985 BY General Assembly A/RES/40/33 Accessed ON 07 July 7, 2023

¹⁹ Article 27 of the Rome Statute of the ICC available [https://www.icc-cpi.int/default/files/RS-Eng/Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.](https://www.icc-cpi.int/default/files/RS-Eng/Immunities%20or%20special%20procedural%20rules%20which%20may%20attach%20to%20the%20official%20capacity%20of%20a%20person,%20whether%20under%20national%20or%20international%20law,%20shall%20not%20bar%20the%20Court%20from%20exercising%20its%20jurisdiction%20over%20such%20a%20person) Accessed ON 07 July 7, 2023

The serious crimes panels in East Timor have jurisdiction over minors over the age of twelve,²⁰ and the Special Court of Sierra Leone ("SCSL") has jurisdiction to prosecute minors over the age of fifteen. The international criminal tribunal for the former Yugoslavia ("ICTR") statutes is silent on the issue. The Special Court of Sierra Leone's statute, however, severely determines prosecution of minors under the age of 18, favoring rehabilitation over other conventional punishment goals.²¹

A person who was under the age of 15 at the time of the alleged commission of the crime is not subject to the jurisdiction of the special court, according to article 7 of the special court's statute for Sierra Leone. If a person who was between 15 and 18 years old at the time of the alleged crime was under the age of 15 appears before the court, they must be treated with respect and dignity, taking into account his or her young age and the need to encourage their rehabilitation, reintegration into society, and assumption of a constructive role, as well as in accordance with international human rights standards, particularly the rights of the child. " but SCSL has never prosecuted a person younger than eighteen.

Besides that, the main issue would relate to determining who is a child; examining on a case by case basis whether a specific child's psychological development allowed for an understanding of his /her criminal acts, and reaching a consensus on what the minimum age for criminal liability is. Thinking about whether child soldiers should be prosecuted by international criminal tribunals, requires us to overcome these difficulties. It also requires justifications. In light of the above mentioned considerations, one can say that a reasonable age to fix criminal liability should be somewhere in the mid-teens (thirteen, fifteen)²²

Article 40 (3) of the convention on the rights of the child ("CRC") provides that state parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal code²³. Meanwhile child soldiers can be viewed as victims, recruited to commit military acts against their will. On

²⁰ Report of the Secretary-General on the United Nations Transitional Administration in East Timor (for the period 27 July 2000 to 16 January 2001) (S/2001/42)

²¹ Art 4 (3) of the status of Special Court of Sierra Leone ("SCSL")

²² Matthew Happold the Age of Criminal Responsibility in International Criminal Law the Hague: T.M.C Ass

²³ Article 40 (3) of convention on the Rights of the Child ADOPTED 20 November 1989 BY General Assembly resolution 44/25

other side the act of recruiting child soldiers is a war crime²⁴; however, as soldiers, they may be perpetrators and commit crimes against humanity but even if they can commit crimes based on the current practice of ad hoc tribunals, the Special Court for Sierra Leone and the International Criminal Court, there is an emerging consensus that children below the age of 18 should not be prosecuted for war crimes and crimes against humanity by international courts²⁵.

From the above situations, this research attempts to answer the following questions:

1. When a child soldier is held liable under International criminal law?

2. What are the mechanisms to put in place in order to avoid the liabilities of child soldiers under International Criminal Law?

I.4. Hypothesis

Referring to the above questions, the following hypotheses are made:

1. Child soldiers can be viewed as victims, recruited to commit military acts against their will. The act of recruiting child soldiers is a war crime.
2. There is no universally accepted minimum age for criminal culpability, and every country has a distinct minimum age.
3. State parties shall seek to promote the establishment of laws, procedures, authorities and institution specifically applicable to children alleged as, accused of, or organized or as having infringed the penal law, and in particular the establishment of minimum age below the children shall be presumed not to have the capacity to infringe the penal law.²⁶

I.5 Objectives of the research

I.5.1 General Objective

The main objective of this research is to determine whether and how child soldiers can be prosecuted for war crimes under international law. This objective is examined by looking at

²⁴ Rome Statute of the International Criminal Court, opened for signature 17 July 1998,

²⁵ Human Rights Council, Annual Report of the Special Representative of the Secretary-General for Children and Armed Conflict, UNHRCOR, 12th Sess, UN Doc A/HRC/12/49 (2009) 13. online: Human Right Council at 13

²⁶ Convention on the right of child, supra note 7, art 40

the position of domestic and international law regarding the said matter. In this regard specifically the minimum age of criminal responsibility and fair trial guidelines for child soldier under domestic law and international must be examined.

Nevertheless, international criminal law must precise and cannot indiscriminately mandate that children in their mid-teens should be subject to international jurisdiction. Instead, a clear and precise age should be determined. The decision to prosecute minors under the age of eighteen would therefore remain with the court.

2. Specific objectives

In order to achieve this General objective, the following specific objectives were set:

- To analyze the criminal liability of child soldier in international criminal law;
- This disclose the reason behind the minimum age of criminal responsibility of child soldiers;
- Lastly to propose the efficient measure or recommendation to state members for taking action on child soldiers by universalize the minimum age of criminal liability under international law.

I.6. Scope of the study

This research is limited in domain and space and unlimited in time. It focused from ancient periods, when the international armed conflict was evolved in different parts of the world.

I.6.1 In domain

It is oriented in the domain of International criminal Law. We deal with the contribution of international laws in the implementation of the criminal liability of child soldier for crime committed under international law.

I.6.2 In time

This research will deal with the period from 1948 up to 2023 as the year coinciding to the start of this research. We choose this period to analyze the contribution of international laws in implementation in the liability of crime committed by child soldiers in war crimes.

I.6.3 In space

This research will be done in international level.

I.7 Interest of the study

This research is more helpful on orienting and assessing the several strategies and mechanisms which can be adopted for the effective respect of rules governing international armed conflict and answer the quid of non-application of rules governing international armed conflict. In determining a child soldier's degree of potential liability a careful balance must be struck between seeing the child soldier as not only a perpetrator of human rights violations but also as a victim of human rights abuses through propose to find the possible solutions to the problems which will hence to the end of gap of violations of international humanitarian law.

I.8 Research techniques

In order to carry out this research, discourse the legal issues raised in the problem statement and accomplish the objectives, different techniques. The documentary practice (documentary technique) was much used for collecting data from different written documents containing relevant information for this research. These documents include law texts, textbooks, journal, articles, doctrines, judicial decisions etc.

I.9 Research methods

As far as methods are concerned, logical method was also useful in analyzing and interpreting all different collected data. In this study we will use the following methods such as analytical, comparative, historical and synthetic method.

I.9.1 The Analytical method

According to Howell E. Jackson, Analytical method is necessary in order to find information that is relevant to legal problem and researchers must. It consists in analyzing or commenting the written data and information collected in document. It has helped us to analyze or commenting the written data and information collected in document. It engages more deeply with information of the past time.

I.9.2 Comparative method

The comparative method was used in searching the differences and comparisons on different legal issues related to this research. In order to interpret the various relevant law texts, the exegetic method was also supportive.

I.9.3 Exegetic method

The exegetic method was used in our research to enable research to dissect, analyze and interpret legal texts e.g., statutes and international instrument regulating or relates to questions/matters under analysis. It has allowed us an extensive and critical interpretation of legal text particularly international treaties which are in our domain of research.

I.9.4 Historical method

I share the same view with James P. Key who regards the historical methods as method employed by researches who are interested in reporting events or conditions that occurred in the past. An attempt is made to establish facts in order to arrive at conclusions concerning past events or predict future events. The historical methods permitted us to know the background of criminal liability of child soldier; it will enable me to know if it is evolving and predict its future²⁷.

I.9.5 Artificial method

Was helpful in regrouping the collected data in well-organized manner

X. Subdivision of the research

The present study is divided into three chapters in addition to the introduction, general conclusion, and bibliography. The first chapter deals with definitions of key terms used in the study and the theoretical framework of criminal liability. The second chapter discusses on the international legal standards regarding the ineffectiveness of criminal liability of child soldiers. The final chapter concentrates on mechanisms to strengthen the effectiveness of criminal responsibility. The researcher chose to offer suggestions by offering ideas on what could be done in order to assure the criminal culpability of child soldiers in international law after studying the weaknesses of international laws.

²⁷ James P. Key Historical method

CHAPTER I. CONCEPTUAL AND THEORETICAL FRAMEWORK

I.1. Definitions of key concepts

For more understanding our work there are some key element of terms which are important to be defined those are the following:

1.1. Criminal liability

By definition the criminal liability its responsibility for any illegal behavior that causes harm or damage to someone or something²⁸.criminal liability is generally made up two element: (1) the guilty act or omission known as “*actus leus*” and (2) the prohibited state of mind or guilty mind known as “*mens rea*”. The mental element generally requires the proof of an intention on the part of the person who commits the criminal acts. Most criminal offenses require the co-existence of the above to element (i.e *actus reus and mens rea*) at the same time. The concept is delivered from the latin expression “*Actus non facit reum nisi mens sit rea*”. This means that “the acts will not make a person guilty unless the mind is also guilty”.

For example, a person is not guilty of murder if he caused the death of another person by accidentally knocking him down with his car. The *mens rea* for the offence of murder requires an intention to kill another person or cause him very serious bodily injury, which is lacking in this example. However, this person may have committed the offence of dangerous driving causing death because the *mens rea* requires in such an offence is an intention to drive the car, which is present in the example. Whether this person is guilty of that offence depends on when committed the *actus reus*, i.e. whether he drive his car in dangerous manner as define in this legislation²⁹

I.1.2. A child

According to Rwandan law No 27/2001 of 28 April 2001 relating to right and protection of the child against violence:

Art1: says that for the purpose of this law, a child is anybody aged below 18 years with exception of what is provided for in other laws.

²⁸<https://dictionary.cambridge.org/dictionary/english/criminal-liability> (Accessed on 14, April, 2023)

²⁹[Hts/tp//www.hkecliv.org./en/topic/policeAndcrime/criminal liability and penalties](https://www.hkecliv.org/en/topic/policeAndcrime/criminal-liability-and-penalties) accessed on July 14th2017

Art2: say that all the right and their governing laws included in the law are the benefits of all children. No article of this law modifier any other existing law that may provide more favorable rights and protection of the child against violence than those provided than the law. The convention on the right of the child against violence defines a child as any person under the age of 18.³⁰ The Paris principles define associated with an armed force or group as any person below 18 years of age who is or who has been recruited or used by an armed force or any armed group in any capacity, including but not limited to children, boys and girls, used as fighters, cooks, porters, messengers, spies or for sexual purposes. The documents are approved by the United Nations general assembly. It does not only refer to a child who is taking or has taken a direct part in hostilities.³¹

I.1.2.1. Child soldier

While there is no precise definition, the coalition consider a child soldier as any person under the age of 18 who is a member of or attached to government armed forces or any other regular or irregular armed force or armed political group, whether or not an armed conflict exists.³² Child soldier perform a range of tasks including: participation in combatant, laying mines and explosives; scouting, spying, acting as decoys, couriers or guards; training, drill or other preparations; logistics and support functions, pottering, cooking and domestic labor; and sexual slavery or other recruitment for sexual purposes³³.

I.1.2.2. Recruitment of child soldiers

Recruitment of child soldier is mostly voluntarily, due to a combination of the multiple motivation factors mentioned above. However, forced recruitment is a common and carefully planned process in which children are abducted and tortured. In case of forced recruitment, the recruiters typically target places where children are most vulnerable and gathered in large numbers; in particular children are abducted from schools, orphanages, refugee camps, stadium and churches.³⁴

³⁰ UNHCR, International protection consideration,2023, available at: <https://www.refworld.org/docid/46c423cb2.html> [accessed 14 August 2023]

³¹ The convention on the rights of children Accessed on July 5, 2023

³² Child soldier global report 2004 Accessed on July 3, 2023

³³ Jonathan Dwight Jones,2015 available at : www.linkedin.com › posts › a-soldier's-child-foundation

³⁴ <https://childrenandarmedconflict.un.org> ([accessed 14 August 2023])

Children are gauged according to their height and physical condition. To subdue them, recruiters do not hesitate to rape, beat, and torture them and even to kill members of their family....when they aren't required to do themselves

I.1.3. Armed conflict

An armed conflict is a contested incompatibility that concerns government and or territory where the use of armed force between two parties , of which at least one is the government of a state, results in at least 25 battle-related deaths in one calendar year³⁵

I.1.4. Armed force

This refer generally to official government armed forces including the armed forces, including the army, navy and air force, but the terms armed groups and armed political groups are used to refer to non-state or irregular armed groups which use arms for political reasons. They include opposition forces, factual or tribal groups, and armed groups belonging to ethnic or religious minorities and a range of other militia groups. These terms are sometime use to refer to armed groups often paramilitaries or militias which are backed by or allied to government forces but are not officially part of them³⁶.

I.1.5. International law

International law is a body of legal norms and principles that govern the relations between states and other international actors. It encompasses treaties and customary international law, with treaties being negotiated agreements between states and customary law emerging from long-standing state practices. International law is enforced through diplomacy, economic sanctions, military intervention, and legal action before international courts and tribunals. The United Nations and specialized courts play key roles in promoting and enforcing international

³⁵ M.MILANOVIC; Complex battle spaces: the law of armed conflict and the dynamics of modern warfare, New York: Cambridge University Press, 2019,p. 33-59.

³⁶ Jan Willms, "Courts of Armed force – a Tool for Inducing Higher Compliance with International Humanitarian Law?", in H. Krieger, above note 2, p. 150. For a practical approach to the provision of education by non-State armed groups, see PEIC/Geneva Call, Workshop on Education and Armed Non-State Actors: Towards a Comprehensive Agenda, 2015, availableat:www.genevacall.org/wpcontent/uploads/dlm_uploads/2015/12/Geneva_Call_Paper1.pdf. Accessed On July 5, 2023.

law. However, its effectiveness relies on state consent and compliance, which can vary due to political considerations and power dynamics³⁷.

I.1.5.1. Domestic law vs. International law

Domestic law and international law are two distinct legal systems that govern different spheres of human activity. Here's an overview of the differences between them based on general principles and customary practices, although it's important to note that specific articles can vary depending on the legal framework or treaty being referenced.

1. Scope of Application:

- **Domestic Law:** It applies within the borders of a particular country and governs the conduct of individuals, organizations, and the government within that jurisdiction.
- **International Law:** It applies to the relations between sovereign states, international organizations, and sometimes individuals, regardless of their nationality or location.

2. Sources of Law:

- **Domestic Law:** It derives from the constitution, statutes, regulations, and judicial decisions of a specific country. The primary sources are the laws enacted by the country's legislative bodies.
- **International Law:** It draws from various sources, including international treaties, customary practices, general principles of law recognized by nations, and judicial decisions. Treaties are one of the most important sources of international law.

3. Law-Making Process:

- **Domestic Law:** It is created and amended through the legislative process within a country. The legislative body, such as a parliament or congress, passes laws that are enforced by the executive branch and interpreted by the judiciary.
- **International Law:** It is developed through negotiations and agreements between sovereign states. Treaties and conventions are drafted, negotiated, and ratified by

³⁷ <https://www.un.org/en/sections/issues-depth/international-law/>; ([accessed 14 August 2023])

states. Customary international law evolves through the consistent and widespread practice of states.

4. Enforcement Mechanisms:

- **Domestic Law:** It is enforced by domestic authorities, such as police forces, courts, and regulatory agencies, which have jurisdiction within the country. Violations can result in penalties or sanctions imposed by domestic courts.
- **International Law:** It lacks a centralized enforcement mechanism. States are primarily responsible for enforcing international law within their own jurisdictions. Additionally, international organizations like the United Nations may have certain enforcement capabilities, and some disputes are resolved through international tribunals.

5. Relationship with Sovereignty:

- **Domestic Law:** It is based on the principle of national sovereignty, allowing states to exercise authority over their territory and citizens.
- **International Law:** It limits the absolute sovereignty of states by establishing rules and obligations that states voluntarily agree to follow. States still retain a degree of sovereignty but are bound by international legal obligation

I.1.6. International criminal law

International criminal law is a specialized branch of law that focuses on prosecuting and punishing individuals who commit serious crimes of international concern. It encompasses crimes like genocide, war crimes, crimes against humanity, and aggression. Key instruments in international criminal law include the Rome Statute of the International Criminal Court, which established the ICC to prosecute these crimes, the Genocide Convention, the Geneva Conventions and their Additional Protocols for protecting victims of armed conflicts, and the statutes of various international criminal tribunals such as the ICTY, ICTR, and the Special Court for Sierra Leone. These instruments play a crucial role in promoting accountability for the most serious international crimes.³⁸

³⁸. <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf>, Accessed on 20/06/2023

I.1.6.1. International crimes

International crimes are serious offenses that violate established norms of international law and pose a threat to peace, security, and human rights. Examples include genocide, war crimes, and crimes against humanity, aggression, and terrorism. International institutions and mechanisms such as the International Criminal Court (ICC) and ad hoc tribunals have been established to prosecute individuals responsible for these crimes and promote justice and accountability³⁹. The international crime is a crime against International law

I.1.6.1.1. War crimes

War crimes are serious violations of international humanitarian law, also known as the laws of war, as defined by various international treaties and conventions. These violations are committed during armed conflicts and are considered to be among the most severe crimes against humanity. The key articles that define war crimes include: Article 8 of the Rome Statute: The Rome Statute is the treaty that established the International Criminal Court (ICC). Article 8 defines war crimes, including acts such as willful killing, torture, inhumane treatment, intentional attacks against civilians or civilian objects, the use of prohibited weapons, and conscripting or enlisting children under the age of 15 into armed forces. Geneva Conventions: The four Geneva Conventions of 1949 and their Additional Protocols contain provisions that safeguard individuals who are not or no longer participating in hostilities, such as civilians and prisoners of war. They define war crimes related to the treatment of protected persons, including acts such as torture, willful killing, taking hostages, and intentionally causing great suffering or serious injury⁴⁰⁴¹.

The Rwandan penal code defines war crimes as definition of a war crime as any of the following acts committed during the armed conflict and directed against persons or property protected under the provision of the Geneva conventions of August 12, 1949 and their additional protocol 1 and 11 of 8 June 1977

³⁹ <https://www.un.org/en/sections/issues-depth/international-criminal-court/>, on 20/06/2023

⁴⁰ <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf>.

⁴¹ The paris principles and guidelines on children associated with armed forces, February 2007.section “ Treatment of children accused the crimes under international law” Accessed On July 3, 2023

1.1.6.1.2. Crimes against humanity

Crimes against humanity refer to a category of offenses that are considered to be among the most serious and heinous crimes committed against individuals or groups on a large scale. These crimes are typically characterized by their widespread or systematic nature and are committed as part of a deliberate state or organizational policy. The concept of crimes against humanity has its roots in international law and emerged in response to the atrocities committed during World War II, particularly the Holocaust. The term was first formally recognized in the Nuremberg Trials held after the war.

Crimes against humanity encompass a range of acts, including but not limited to:

- a. Genocide: The intentional destruction, in whole or in part, of a national, ethnic, racial, or religious group. This includes killing members of the group, causing serious bodily or mental harm, imposing measures to prevent births, or forcibly transferring children from the targeted group.
- b. Murder: The deliberate killing of individuals as part of a widespread or systematic attack against a civilian population.
- c. Torture: The intentional infliction of severe physical or mental pain or suffering, often carried out to obtain information, punish, intimidate, or coerce individuals.
- d. Enforced disappearance: The arrest, detention, or abduction of individuals by state agents or organized groups, followed by a refusal to disclose their fate or whereabouts.
- e. Rape and sexual violence: The widespread or systematic use of sexual violence, including rape, as a tool of intimidation, terror, or humiliation.
- f. Persecution: The intentional and severe deprivation of fundamental rights based on political, racial, ethnic, or other grounds, carried out as part of a widespread or systematic attack against a civilian population.
- g. Forced deportation or forcible transfer: The expulsion or forcible displacement of individuals from their homes or regions, often with the intention to destroy a particular group.

These crimes are considered to be grave breaches of international law and are subject to prosecution under various international legal mechanisms, such as the International Criminal Court (ICC) and international tribunals established to address specific conflicts, like the International Criminal Tribunal for the former Yugoslavia (ICTY) or the International Criminal Tribunal for Rwanda (ICTR).⁴²

1.1.6.1.3. Genocide

Genocide refers to the deliberate and systematic extermination of a particular ethnic, religious, or national group. It involves the intentional destruction of people based on their membership in a specific group, with the aim of eliminating that group entirely. Genocide is considered a heinous crime under international law and is often recognized as one of the most severe violations of human rights⁴³. Example genocide against tutsi in 1994 in Rwanda

1.1.6.2. International criminal court

The International Criminal Court (ICC) is an intergovernmental organization and tribunal responsible for prosecuting individuals accused of serious international crimes such as genocide, war crimes, crimes against humanity, and the crime of aggression. It was established by the Rome Statute in 1998 and became operational in 2002. The ICC has jurisdiction over crimes committed in states that have ratified the Rome Statute and can also intervene in situations referred by the United Nations Security Council. Its structure includes the Presidency, Judicial Divisions, Office of the Prosecutor, and the Registry. The court's prosecutorial process involves investigation, arrest warrants or summonses, trial, and potential appeals. The ICC is complementary to national jurisdictions and steps in when they are unable or unwilling to prosecute these crimes. However, the court has faced criticisms regarding its focus on African cases, effectiveness, efficiency, and jurisdictional limitations⁴⁴.

⁴² https://www.un.org/en/genocideprevention/documents/atrocitycrimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf

⁴³ United Nations, Genocide prevention and the responsibility to protect, <https://www.un.org/en/genocideprevention/> (Accessed on July 3, 2023)

⁴⁴ International criminal court , Rome Statute (2011),ICC <<https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf>> (Accessed on July 3, 2023)

1.1.6.2.1. Universal jurisdiction

Universal jurisdiction is a legal principle that allows a country's courts to prosecute individuals for serious crimes, regardless of where the crimes took place or the nationality of the people involved. It applies to crimes like genocide, war crimes, crimes against humanity, and torture. This principle enables a state to hold perpetrators accountable when the country where the crimes occurred is unable or unwilling to do so. Universal jurisdiction has been recognized and applied by various countries and international tribunals, including the International Criminal Court. While it is an important tool for fighting impunity, it can also be controversial due to concerns about sovereignty and diplomatic relations⁴⁵.

1.1.6.3. Principle of legality in criminal law

The principle of legality, also known as the principle of legality or legality principle, is a fundamental principle in criminal law that establishes certain requirements and safeguards for criminal prosecution. It ensures that individuals are not subjected to arbitrary or retroactive application of the law and those criminal offenses and penalties are clearly defined.

The principle of legality encompasses several important aspects:

1. ***Nullum crimen sine lege***: This Latin phrase means "no crime without law." It states that there can be no crime or criminal liability without a pre-existing law that defines the specific conduct as an offense. In other words, individuals cannot be punished for an action that was not prohibited by law at the time it was committed.
2. ***Nulla poena sine lege***: This Latin phrase means "no punishment without law." It asserts that no one can be punished except in accordance with established laws. The penalties and sanctions for criminal offenses must be clearly defined by law, and individuals cannot be subjected to arbitrary or excessive punishment.
3. ***Principle of strict construction***: This principle requires that criminal laws be interpreted narrowly and strictly. Any ambiguity or uncertainty in the wording of a criminal statute should be resolved in favor of the accused, as criminal liability should not be based on vague or overly broad provisions.

⁴⁵International justice resource center, European court of human rights (ECTHR), <https://ijrcenter.org/ijr-center-summaries/universal-jurisdiction/> (Accessed on July 3, 2023)

4. ***Retroactivity***: The principle of legality also prohibits the retroactive application of criminal laws. It means that individuals cannot be prosecuted or punished for conduct that was not illegal at the time it occurred. New laws or changes to existing laws generally cannot be applied retroactively to criminalize past behavior⁴⁶

1.1.6.4. Non-combatant

A non-combatant refers to a person who is not directly involved in armed conflict or combat activities. Non-combatants are typically civilians or individuals who are not actively engaged in military operations. They may include men, women, children, and other vulnerable populations such as the elderly or disabled. The protection of non-combatants during times of war or armed conflict is an important principle in international humanitarian law. These individuals are entitled to certain rights and protections under the Geneva Conventions and other international agreements. The principle of distinction is crucial, which means that parties involved in a conflict must distinguish between combatants and non-combatants, and take all feasible precautions to avoid harming civilians. Non-combatants often include individuals such as doctors, nurses, aid workers, journalists, and other civilians who are not directly participating in hostilities. The protection of non-combatants is addressed in various articles of international humanitarian law, including the Geneva Conventions and their Additional Protocols. Here are some key articles that specifically relate to the protection of non-combatants:

1. Article 3 of the Geneva Conventions (Common to the four Conventions, 1949):

- This article applies to armed conflicts not of an international character.
- It states that non-combatants, including those who have ceased to take part in hostilities, shall be treated humanely without any adverse distinction.
- It prohibits violence to life and person, cruel treatment, torture, and degrading treatment.

2. Article 48 of Additional Protocol I to the Geneva Conventions (1977):

- This article applies to international armed conflicts.

⁴⁶Kuhling, C. (2015). *The Principle of Legality in International and Comparative Criminal Law*, Cambridge University Press

- It obligates parties to the conflict to distinguish between civilian objects and military objectives and to direct their operations only against military objectives⁴⁷.

1.1.6.5. A combatant

A combatant typically refers to an individual or group involved in armed conflict or warfare. Combatants can include soldiers, fighters, or members of organized armed forces engaged in combat. They actively participate in military operations and may be equipped with weapons, gear, and training to engage in offensive or defensive actions.

Combatants can be part of regular armed forces, such as the army, navy, air force, or marines, representing a nation-state. They can also be members of paramilitary organizations, insurgent groups, rebel forces, or guerrilla fighters engaged in unconventional warfare.

The roles and responsibilities of combatants vary depending on the specific context and the nature of the conflict. They can engage in direct combat, conduct reconnaissance, provide support, or perform specialized tasks within their respective units⁴⁸.

1.2. Purpose of punishment

The purpose of punishment can vary depending on the context and the underlying philosophy of the legal system or society in question.

1.2.1. General Deterrence

Deterrence prevents future crime by frightening the defendant or the public. The two types of deterrence are specific and general deterrence. Specific deterrence applies to an individual defendant. When the government punishes an individual defendant, he or she is theoretically less likely to commit another crime because of fear of another similar or worse punishment. General deterrence applies to public at large. When the public learns of an individual defendant's punishment, the public is theoretically less likely to commit a crime because of fear of the punishment the defendant experienced.

⁴⁷ Article 3 of the Geneva Conventions (Common to the four Conventions, 1949)

⁴⁸ ICRC, International committee of the red cross, <https://www.icrc.org/en/what-we-do/protecting-civilians-and-detainees/treaties-customary-law/geneva-conventions> (Accessed on July 3, 2023)

When the public learns, for example, that an individual defendant was severely punished by a sentence of life in prison or the death penalty this knowledge can inspire a deep of fear of criminal prosecution.

I.2.2. Deterrence:

Punishment is often used to deter individuals from committing crimes. The fear of punishment, such as imprisonment or fines, can discourage potential offenders by highlighting the negative consequences of their actions.

I.2.3. Retribution:

Punishment can be seen as a form of retribution, seeking to balance the scales of justice by imposing a penalty that is proportionate to the harm caused by the offense. This perspective emphasizes the idea of "an eye for an eye" and the need to hold individuals accountable for their actions.

I.2.3. Rehabilitation:

Another purpose of punishment is to reform and rehabilitate offenders. By providing educational programs, counseling, vocational training, and other interventions, the aim is to address the underlying causes of criminal behavior, reduce the likelihood of reoffending, and facilitate the offender's reintegration into society.

I.2.4. Incapacitation:

Punishment can also serve to protect society by removing dangerous individuals from the community. Incarceration or other forms of confinement prevent offenders from causing further harm to others during the period of punishment.

I.2.5. Restoration:

In some cases, punishment aims to restore the harm done to victims or the community. This can involve requiring the offender to make reparations, perform community service, or engage in restorative justice practices that promote healing, reconciliation, and resolution.

I.2.6.1 Constitutive elements of offence

An act or omission is an offense if, and when the preexisting law has provided for and punished it as such. It is the principle of legality of sentences and penalties often explained by Latin maxim "nullum crimen, nulla poena sine lege" (there is no crime or punishment without legal text). This principle is also one of the essential guarantees of individual freedom; indeed, the citizen is protected against arbitrary of the judge⁴⁹

I.2.6.1 Legal element

In the context of law, a legal element refers to a specific requirement or condition that must be present in order to establish liability or responsibility for a particular offense or claim. Legal elements are the essential components that must be proven in a court of law to establish a legal claim or offense. These elements are typically defined and outlined in statutes, regulations, or case law and vary depending on the specific offense or claim being addressed. For example, the legal elements of a crime may include the actus reus (guilty act), mens rea (guilty mind), causation, and attendant circumstances.

I.2.6.2. Material element

The material element relates to the factual or physical aspects of an offense. It encompasses the tangible or observable elements and circumstances associated with the conduct in question. The material element may involve factors such as the actions or omissions committed, the physical consequences or harm caused, the physical objects involved, the time and place of the incident, and any other relevant physical or factual details. The material element is crucial in establishing the objective or external aspect of an offense.

I.2.6.3. Moral element

The moral element pertains to the mental state or intention of the person committing the act. It involves the subjective or internal aspect of an offense and focuses on the mental state, awareness, or culpability of the individual involved. The moral element considers factors such as the intent, knowledge, recklessness, or negligence of the person, and whether they possessed the required mental state as defined by the law. The moral element helps to

⁴⁹ L. Marie MUGENZI, droit pénal général, ministère de la justice, Edition R.C.N., 1995, pp. 3-4 (translated by the author from french)

distinguish between different levels of culpability and determines the extent of personal responsibility or guilt⁵⁰.

I.2.2.7. Child Reintegration

Refer to the process through which children transition into civil society and enters meaningful roles and identities as civilians who are accepted by their families and communities in a context of local and national reconciliation. Sustainable reintegration is achieved when the political, legal, economic and social conditions needed for children to maintain life, livelihood and dignity have been secured. This process aims to ensure that children can access their rights, including formal and non-formal education, family unity, dignified livelihoods and safety from harm.⁵¹

I.1.2.7.1. Demobilization

“Release” Includes the process of formal and controlled disarmament and demobilization of children from an armed force or armed group as well as the informal ways in which children leave by escaping, being captured or by any other means. It implies a disassociation from the armed force or armed group and the beginning of the transition from military to civilian life. Release can take place during a situation of armed conflict; it is not dependent on the temporary

or permanent cessation of hostilities. Release is not dependent on children having weapons to forfeit⁵².

I.2.2.7.2. Disarmament

“Is the collection, documentation, control and disposal of small arms, ammunition, explosives and light and heavy weapons of combatants and often also of the civilians population.

⁵⁰Munday, R. (2016). Introduction to the English Legal System 2016-2017. Oxford University Press.

⁵¹ Unicef, the state of the world’s children (2023), <https://www.unicef.org> › on 14 August 2023

⁵² Security high council report, for daily insights by SCR on evolving Security Council actions, 01, August,2023, <http://www.securitycouncilreport.org> Accessed On 14 August 2023

Disarmament also includes the development of responsible arms management programmers⁵³.

I.2.2.8. internally displaced persons

People who have been compelled to escape their homes due to armed conflict, widespread violence, violations of human rights, or other unforeseen events, who were looking for protection elsewhere in the neighborhood⁵⁴.

I.2.2.8. Ratification

Ratification refers to the formal process through which a state expresses its consent to be legally bound by a treaty or international agreement. When a state ratifies a treaty, it signifies its intention to comply with the provisions and obligations outlined in that treaty. For e.g. State ratifying the convention on the right of children or its optional protocols must deposit their instruments of ratification with the UN secretary-General.

This chapter focuses on defenses and generalities and conceptual definition of international laws and deals with the meaning of some words in details. Besides that, it divided into two parts such as definition of the key concepts and theoretical frame work. Whereas the second chapter focuses on criminal liability of child soldiers in international law and deals with cases land mark relating to the responsibility of child soldiers.

⁵³ Report of the Secretary General A/60/705 Disarmament, demobilization and reintegration, 5 July 2003

⁵⁴ International Committee of the Red Cross <https://www.icrc.org> › War & Law › Protected persons

CHAPTER II: THE CIRCUMSTANCES OF CRIMINAL LIABILITY FOR A CHILD SOLDIER

This chapter discusses new obstacles to combating inequities in sentencing for criminals that have evolved internationally and the ineffectiveness of criminal culpability for child soldiers. After comparing local and international law, it shows the prosecution of child soldier for war crime and the status of child in armed conflict, it concentrates on the historic case of local child soldiers who are capable of committing either a national or an international crime regardless of their age. Then it demonstrates how the minimum age in international law is a barrier to criminal justice.

II.1.1 The prosecution of child soldiers for war crimes

The issue of whether a child soldier should be held accountable for crimes they commit while engaging in a conflict is not now specifically addressed by international law. In this chapter, I concentrate on the current situation with relation to potential prosecution of juvenile soldiers for committing crimes against humanity. We will examine issues like the minimum age of criminal liability and potential legal defenses offered to a child soldier in the case of his prosecution. In past years Over 20,000 kids are thought to have participated in fighting in Rwanda. Even though the Rwandan government currently asserts that there are no children still serving in its armed forces, there have been reports of child recruitment in both the sporadic conflict with Hutu armed groups in Rwanda and the conflict in the Democratic Republic of the Congo to support its opposition forces. Children are still being recruited by Hutu opposition forces in Rwanda, as well as in the neighboring countries of Burundi and the Democratic Republic of the Congo. Since 1994, hundreds of kids have been detained on genocide-related accusations; many of them were less than 13 at the time⁵⁵. There have been prior attempts to prosecute child soldiers in Rwanda, Uganda, and the Democratic Republic of the Congo (hence referred to as the DRC)⁵⁶. However, none of these approaches succeeded in some manner in providing the child with an adequate level of protection for their rights or in facilitating the child's effective reintegration back into society.⁵⁷ This chapter

⁵⁵ UNHCR, guidance note international protection needs of people fleeing Afghanistan, www.refworld.org, Accessed 14th July, 2023

⁵⁶ Happold M, "The Age of Criminal Responsibility in International Criminal Law" available at www.asser.nl/default.aspx?site_id=9&level1=13337&level2=13345 Accessed 5 July 2023

⁵⁷ Happold M available at www.asser.nl/default.aspx?site_id=9&level1=13337&level2=13345 accessed 2 February 2013. Happold refers to an instance in the DRC in 2001 where intervention from Human Rights Watch

aims to show the children's dual status as both perpetrators and victims of human rights abuses while addressing the weaknesses of the current international legal system in dealing with the prosecution of former child soldiers.

II.1.1 The status of children in armed conflict

Article 77(2) of the First Additional Protocol to the Geneva Convention permits the recruitment of children between the ages of 15-18 years into the armed forces.⁵⁸ The provision is structured in such a way that it imposes a positive duty on nations to forgo recruiting minors and to prohibit children from directly taking part in hostilities.⁵⁹ A similar provision is found in Article 22(2) of the African Charter on the Rights and Welfare of Children, which calls on all parties to "take all necessary steps to ensure that no child shall take a direct participation in hostilities and in particular from recruiting any child."⁶⁰ In the case of *Prosecutor v. Samuel Hinga Norman* (hence referred to as the Samuel Hinga Norman case), the appeals chamber in the SCSL made it abundantly plain that it was illegal under international law to recruit children under the age of 15 in active hostilities⁶¹.

This decision is in accordance with articles found in a variety of international child rights agreements, such as the CRC, which sets a minimum age of 15 for enlistment in the armed forces. According to the decision in the Sam Hinga Norman case, a rule of customary international law had established by November 1996 that prevented the recruitment of children below the age of 15.⁶² According to current international legal principles and the Sam Hinga Norman case, minors under 15 should not participate in armed conflict.⁶³

was necessary to prevent the imposition of the death penalty on 4 child soldiers who were aged at 14-16 years at the time of their arrest. This follows from a previous execution in 2000 of a 14 year old child soldier.

⁵⁸ Article 77(2) of the Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims in International Armed Conflicts, 8 June 1977

⁵⁹ Article 77(2) reads "the parties to the conflict shall take all feasible measures in order that children who have not attained the age of 15 years do not take a direct part in hostilities and, in particular they shall refrain from recruiting them into their armed forces. In recruiting amongst those persons who have attained the age of 15 years but who have not attained the age of 18 years, the parties to the conflict shall endeavour to give priority to those who are the oldest."

⁶⁰ African charter on the rights and welfare of the child, OAU Doc, CAB/LEG/24.9/49, 1990, entered into force Nov.29.1990, (Accessed 05th May 2023)

⁶¹ Happold M, www.asser.nl/default.asp?site_id=9&level1=13337&level2=13345, Accessed 2 July 2023.

⁶² *Prosecutor v Sam Hinga Norman*, Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), Case No SCSL-2004-14-AR74 (E) Available at www.unhcr.org.innopac.up.ac.za/refworld/docid/49abc0a2.html accessed 2 March 2013.

⁶³ Rosen D, *Armies of the Young: Child Soldiers in War and Terrorism*, 2005 at 139. In addition to the CRC and the Additional Protocols Rosen lists a number of other international law instruments that call for a partial or total ban on the use of child soldiers, namely, the Optional Protocol to the Convention on the Rights of the Child

Conflict, this isn't the reality, though, particularly in the war-torn African nations where child recruiting seems to be the norm and kids as young as 9 have enlisted.⁶⁴

II.1.2 Child before international courts and duty of states to prosecute persons who commit crimes

International humanitarian law is a duty that must be respected by everyone, and violating it can lead to legal punishments. Additionally, it is the responsibility of the state to press charges against people who failed to comply with the law.⁶⁵ A state that fails to hold someone accountable for committing an international crime may be found guilty of breaking international law itself⁶⁶.

States are not expressly required to take legal action when international law is violated under treaties⁶⁷ like the International Covenant on Civil and Political Rights.⁶⁸ However, a closer examination of these agreements may reveal that they tacitly call on states to bring legal action against individuals who infringe on the very rights they are meant to defend.^{69 70} This duty upon states to prosecute those who violate international law can also be found in the preamble of the Rome Statute, which provides that “it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes.”⁷¹ A further illustration of the obligation on governments to bring criminal charges against persons who are claimed to have violated international law are the international courts established in Sierra Leone, the former Yugoslavia, and Rwanda. Even though these were domestic wars, the international world believed it was crucial to bring those accused of horrendous war crimes and transgressions of international humanitarian law to justice. Therefore, it might be claimed that it is mandatory to bring charges against anyone, including minors, who is suspected of

on the Involvement of Children in Armed Conflict (2000), the African Charter on the Rights and Welfare of the Child (1990), and the International Labour Organisation Worst Forms of Child Labour Convention (1999).

⁶⁴ Rosen D, 2005, at 138. See also “Easy Prey: Child Soldiers in Liberia” September 1994, available at www.hrw.org/reports/pdfs/c/crd/liberia949.pdf accessed 3 February 2013, a child care worker reports that she once witnessed a 9 year old kill someone at a check point. Children learn by imitation she says and many of these children see their commanding officers kill and they simply imitate that because they are afraid and have been told they will be killed if they do not follow orders.

⁶⁵ Happold M, www.asser.nl/default.aspx?site_id=9&level1=13337&level2=13345 accessed 2 March 2013.

⁶⁶ Orentlicher D, “Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime,” 100 *Yale LJ* 1991 at 2568.

⁶⁷ Orentlicher D, “Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime,” 100 *Yale LJ* 1991 at 2568.

⁶⁸ The International Covenant on Civil and Political Rights 16 December 1966.

⁶⁹ Orentlicher M, 1991, at 2568.

⁷⁰ Orentlicher M, 1991, at 2569.

⁷¹ Rome Statute of the International Criminal Court, 17 July 1998.

committing war crimes or violating international law. The SCSL was given jurisdiction over child soldiers who were older than 15 at the time of the alleged crime, which serves as more evidence in favor of this⁷².

II.1.3. International age of criminal responsibility

In terms of international law, there is no specific age at which minors will be considered to be capable of committing a crime. Article 40 (3) of the CRC encourages states parties to set a minimum age below which minors are assumed to lack the capacity to violate the law. There is considerable debate on the ideal age of criminal responsibility, and there are no international norms that can be categorically applied in this area. A committee on the rights of children decides in General Comment No.10 that a minimum age of criminal responsibility below the age of 12 cannot be considered to be internationally acceptable.⁷³ It also strongly urges governments to create a higher minimum age of criminal responsibility, such as 14 or 16 years of age, while stressing that states shouldn't lower their age of criminal responsibility to 12 when it has already set a high standard. There is nothing to prevent states from making 18 as their minimum age of criminal culpability, and many nations, like Brazil, have done so⁷⁴.

The challenge with this case is determining the appropriate age to propose as the age of criminal responsibility for the commission of international crimes? This is not a choice that should be made lightly since the punishment for a former child soldier convicted of war crimes is more severe than the punishment for a youngster found guilty of theft⁷⁵.

⁷² Article 7(1) of the Statute of the Special Court of Sierra Leone 2000, states that, should any person have been between the ages 15-18 at the time of the commission of the crime then.

⁷³ UN Committee on the Rights of the Child (CRC), General comment No. 10 (2007): Children's Rights in Juvenile Justice, 25 April 2007, CRC/C/GC/10, available at: <https://www.refworld.org/docid/4670fca12.html> [accessed 14 July 2023]

⁷⁴ [https://dspace.lu.lv/dspace/bitstream/by/I/Kronberga/2019/Cited by3](https://dspace.lu.lv/dspace/bitstream/by/I/Kronberga/2019/Cited%20by3) — Justice for Children Briefing No.4. Pieejams: <https://www.penalreform.org/wp-content/uploads/2013/05/justice-for-children-briefing-4->[accessed 14 July 2023]

⁷⁵ *Ibidem*

The consequence of war crime conviction is extremely harsh and far reaching. The classification of a child as war criminal not only attaches great stigma to that child but also adversely affects that child's status under the refugee convention⁷⁶.

The international age of criminal responsibility must be established with extreme caution, taking into account both the child's best interests and the victim's desire to feel that justice has been done. According to the Beijing guidelines, "in those legal systems recognizing the concept of the age of criminal responsibility for juveniles, the beginning of the age should not be fixed at a level too young, taking into account the facts of emotional, mental, and intellectual maturity,"⁷⁷.

This failure by international law to set a standard universal age of criminal responsibility can be attributed to cultural sensitivities and a respect for state sovereignty⁷⁸.

Division holds the view that this is necessary to avoid "discrepancies where a person could legally be defined in one nation as a child and thus not capable of forming criminal intent, and yet in another nation the same child performing the same act fits the legal definition as capable of forming criminal intent," as stated by Division.

It is unclear how to approach minors when seeking to determine their level of responsibility for committing international crimes because there is no set age at which one is criminally responsible. Fallah believes that by establishing a single age of criminal responsibility, we are giving up a crucial aspect of national sovereignty⁷⁹.

This absence of a universal age of criminal responsibility for international crimes creates confusion as to how children should be treated when attempting to establish their degree of

⁷⁶ Article 1F (a) the United Nations Convention relating to the Status of Refugees of 28th July 1951 Available on <https://www.unhcr.org>[accessed 14 July 2023]

⁷⁷United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) ADOPTED 29 November 1985 BY General Assembly A/RES/40/33 available <https://www.ohchr.org> › instruments Accessed on 14th August 14, 2023

⁷⁸ Article 3 of Geneva Convention, 1949

⁷⁹ Perpetrators and victims: prosecuting child for the commission of international crimes, A.J.I.C.L. 2006, 14(1), 83 103 (2006) ("Fallah")...Available <https://papers.ssrn.com> › sol3 › Delivery.cfm[accessed 14 July 2023]

culpability for the commission of international crimes. Fallah holds the view that in setting a universal age of criminal responsibility we are talking away an element of state sovereignty⁸⁰.

They are then left with a situation where an international law resolution has the power to supersede all the laws of that particular state regarding the criminal accountability of children. States would then have to undertake a process of revising their national laws to comply with this new international standard which may not take into account the cultural differences that are inherently present in every state. However international crimes are classified as such as they are extreme crimes and their commission affects not only the particular state in which the crime was committed, but the international community as a whole. Therefore the need for a universal age of responsibility for international crimes is of importance to us all. Without a universal age of criminal responsibility the effective disposition of the potential liability of a child soldier for the commission of international crimes becomes a seditious difficult act⁸¹.

In light of the above a universal age of criminal responsibility is required, as was the case the SPCL. Thereafter an assessment of each child that complete with that age should be undertaken so as to determine that child's degree of potential liability. It is important to establish whether that particular child holds the requisite moral and psychological components of criminal responsibility.

II.1.3.1. Child soldier prosecuted as minors

Omar Khdar, a Canadian national, was 15 years old when he was captured and seriously injured a firefight in Afghanistan on July 27, 2002. The US has accused Khdar of throwing the grenade that killed US Army Sgt Class Christopher Speer an injured two others. He is charged with murder and attempted in violation of war, conspiracy to commit terrorism, providing material support for terrorism, and spying. His trial by military commission began in August 2010 but was recessed after one day due to defense counsel's illness. The trial was scheduled to resume on October 18, on October 14, the military judge issued an order

⁸⁰ A Davison, "Child Soldiers: No longer a minor incident", (2004), Willamette Journal. International Law & Dispute Resolution, 12, 154 Available on <https://repository.up.ac.za> › DaCosta_Potential_2015[accessed 14 July 2023]

⁸¹ Antonio Cassese A -International Criminal Law (2003) Columbia University Available on <http://www.columbia.edu> › [accessed 14 July 2023]

postponing the trial until October 25 and news reports indicated that the two sides are negotiating a plea deal⁸².

Therefore, after came from US, on January 29, 2010, the supreme court of Canada released its much-anticipated decision in *Khdar v. Canada (prime minister)*.2010 SCC 3. Through the federal court and the federal court of Appeal ordered the federal government to request Omar Khdar's reparation as a remedy for breaching his section 7 Charter rights, the Supreme Court declined to go far. Rather, the court unanimously held that although Mr. Khdar's rights had been violated. It was for the federal executive, and not the courts, to decide how to best provide a remedy for that breach⁸³.

Looking into international documents, none of them state that children should not be prosecuted, but simply prohibit recruitment and use of children in armed forces or armed groups, in most cases, below the age of 15. Cleverly, the international criminal law has distanced itself from prosecuting children and left this option to national legislatures, in which age threshold for criminal responsibility goes from as young as six years old⁸⁴.

In the sea of different legislations and different cultures, it is hard to content that everything should be felt in the hands of national authorities. Especially in respect to international crimes committed in armed conflict. With or more or less of unanimity, the international regulation has been clear when stating that children below the age of 15 cannot be recruited. Additionally protocol I from 1997 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 attained the age of fifteen years

⁸² UNITED STATES OF AMERICA v. OMAR AHMED KHADR a/k/a "Akhbar Farhad" ... Case No. 00000001.) Tried at Guantanamo Bay, Cuba) On 4 June 2007 Available <https://islandora.wrlc.org> > Washington Research Library Consortium[accessed 14 July 2023]

⁸³ *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, Canada: Supreme Court, 29 January 2010, available at: https://www.refworld.org/cases, CAN_SC, 4b66c5442.html [accessed 21 July 2023]

⁸⁴ PDF by D Marković · 2015 · Cited by 1 — Fanny Leveau, 'Liability of Child Soldiers Under International Criminal Law' (2013) Vol.4 No.1 Osgoode Hall. Review of Law and Policy 39

but who have not attained the age of eighteen years, the parties to the conflict shall endeavor to give priority to those who are oldest.⁸⁵

Additional protocol II from 1977 prescribes:” 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 hostilities⁸⁶.

In 1989, the convention on the rights of child practically reiterated in its Articles 38, second and third paragraph, what has already been provided by the Additional Protocol I. Under the Rome Statue conscripting children under the age of fifteen years into armed forces or groups constitutes a war crime in both international and non-international armed conflicts⁸⁷.

Under the status of the Special Court of Sierra Leone one of the serious violations of international humanitarian law for which a person can be prosecuted is conscripting or enlisting children under the age of 15 years into armed forces or groups. From such provision, we may conclude that children below the age of 15 are absolutely protected. But since the definition of a child soldier spans over children below the age of 18, it can be deducted that children between the age of 15 and 18 can be held criminally responsible as there are no prescriptions stating the opposite⁸⁸.

However, with consideration for all the Factors of their recruitment and training, can criminal responsibility of child soldiers even be discussed? For an international crime to be prosecuted, a certain person ought to have both committed an international crime, i.e. did the physical of the act of crime (*actus reus*) and had the mental intent to commit that crime (*mens rea*). Surely, proving that a child fulfilled the physical act of a crime is not a problematic in itself, but providing the existence of *mens rea* can be particularly difficult in case of children. Still they find, in psychological studies analyzing the psychological

⁸⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of victims of International Armed conflicts (Protocol 1), of 8 June 1977 s3 (77) (2) Available at <http://www.ra-un.org> [accessed 21 July 2023]

⁸⁶ *Ibidem*

⁸⁷ Section 2(8) (2) (b) (xxvi), and (e) (vii) of the Roman Statute of the International Criminal court 1998 Published by the International Criminal Court ISBN No. 92-9227-232-2 ICC-PIOS-LT-03-002/15_Eng available at <https://www.icc-cpi.int> › default › files [accessed 21 July 2023]

⁸⁸ Section 4 of the Statute of the Special Court for Sierra Leone 2002

development of children and their subsequent ability to commit crimes that it is indeed possible to talk about criminal liability of children to a certain extent⁸⁹.

These study show that children are not able to fully understand their actions or their consequences until reaching a certain age but the studies do not provide us with any clear delimitation in age. The euro scientific research refers to early age abuse and neglect as factors that alter their perception so adolescents actually overact to situations that are threatening to them and therefore their brains do not see difference between delinquent behavior and self defense⁹⁰.

Although the neutron-scientific research does not give minimum age of criminal responsibility either, it can be deduced that it is actually talking about trauma from pre-adolescent stage, which confirms that at adolescent age, children can be held responsible. If criminal responsibility of child soldiers can be addressed, then penal policy should be treated as a matter of great independence especially considering the extenuating circumstances and internationally acknowledged minimum standard of juvenile justice.

II.1.3.2. Ineffectiveness of child soldier's criminal responsibility

So far, child soldiers have never been prosecuted by international criminal tribunals. Nevertheless, it is important to think about the theoretical possibility of the prosecution of children because of the increasing attention being given to the issue of child soldiering. Even so, the criminal liability of children is a difficult concept to think about at the international level for two reasons. First no minimum age for criminal liability exists under international law because countries conflict on what this age should be. Second, psychological development varies from one child to another, which leads to a difficulty in determining when the required element of *mens rea* is acquired.

⁸⁹ Fanny Leveau, supra note 9

⁹⁰ The UN Committee on the Rights of the Child (CRC), General comment No. 10 (2007): Children's Rights in Juvenile Justice, 25 April 2007, Para, 32 CRC/C/GC/10, available at: <https://www.refworld.org/docid/4670fca12.html> [accessed 21 July 2023]

II.1.3.2.1. Absence of minimum age for criminal liability under international law

The minimum age of criminal liability responds the age at which an individual can be helpfully prosecuted for crimes. Under international law, an adult is understood to be an individual who has attained the age of eighteen years⁹¹.

It follows from this that if a child's criminal liability does not exist; only adults can be prosecuted for international crimes. On the other hand, if the liability does not exist the minimum age for criminal liability does not correspond with the age at which majority is attained? This central question has unfortunately stayed unanswered under international law for decades. There is no over searching agreement among nations; the minimum age for criminal liability differs widely from one country to another, which one of the youngest ages fixed at six in some Mexican states for non-federal crimes, while the oldest age fixed at sixteen years in Argentina⁹².

International law does, do however; provide minimal guidance on how to determine what the minimum age should be. United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) provide that in those legal systems recognizing the concept of age of criminal responsibility for juveniles, the beginning of that age shall not be fixed at too low an age limit, bearing in mind the facts of emotional, mental and intellectual maturity⁹³.

The non-binding notion was since codified and expanded in the convention on the rights of the child ("CRC") in its article 40 (3) provides that state parties shall seek to promote the establishment of laws, procedures, authorities and intuitions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular ;

- (a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law⁹⁴. Crisis from the committee are, helpful to the extent that they provide guidance as to criminal liability shall be determined.

⁹¹ Article 1 Convention on the Rights of the Child of 20, November, 1989 entered into force 1990 available at <https://www.cambridge.org/core/books> [accessed 21 July 2023]

⁹² Art 4 of United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) Adopted 29 November 1985 BY General Assembly A/RES/40/33

⁹³ Art 40 (3) supra note 69

⁹⁴ Committee on the Rights of the Child, Report on the 10th session, 10th Sess, UN Doc CRC/C/46(1995) Geneva, 30 October-17 November 1995.

For instance, the committee believes that criminal responsibility should be based on objective factors such as age instead of subjective factors such as “the attainment of puberty, the age of discernment or the personality of the child.

II.1.3.2.2. Psychological development of the child and consequences of the required *mens rea* element

An accused can be found liable under international criminal law only when the *actus reus* is committed with intent.³ This is referred to as *mens rea*. A crucial aspect to take into consideration in any discussion on the criminal liability of children is the ability for one child to act with this required intent. Many authors have written on the psychological development of the child and the subsequent ability to intend to commit a criminal act.⁴ Their studies demonstrate that, up to a certain age, a child is not fully able to understand his or her acts, nor the consequences attached to it; however, the exact age at which an individual can commit a criminal act with the required *mens rea* element is not clearly determined.

This is a problem, in the sense that, from a psychological point of view, some children should be able to be found liable under international criminal law while others should not. This conclusion is supported by neuron scientific research. Professor Naomi Cahn suggests that even though “the law has not historically depended on brain science, (...) the modern study of neuroscience offers the prospect of identifying more specific causes [related to adolescents’ criminal behaviors]⁹⁵.” In her paper dealing with the impact of neuroscience on understanding child soldiers’ actions, she mentions that early abuse and neglect can change the structure of children’s brains: “when children are abused or neglected, their brains may develop so that they overact to situations that are threatening so that delinquent behavior results from the brain using these early lessons of fear to defend itself.”⁶ These elements show that child soldiers are different from adults because their psychological and biological development is different. These observations must be taken into account when examining their criminal liability. Another huge difficulty in determining whether child soldiers could be held liable under international criminal law is the fact that international law does not provide for a minimum age of criminal liability.

⁹⁵ Naomi Cahn, “Poor Children: Child “Witches” and Child Soldiers in Sub-Saharan Africa” (2006) 3 Ohio St J Crim L 413 at 429.

So meanwhile the elements of culpability and intent as regards international crimes are best illustrated by the case of *Prosecutor v Dusko Tadic*.⁵³ In regards to culpability the appeals chamber held the position that a person may only be deemed accountable if he entertains a frame of mind that involves, expresses or implies his mental participation in the offence.⁹⁶ As international crimes are the most exceptional serious offences it is only right that the requirement of *mens rea* is placed much higher than the standard for normal crimes. The Convention on the Prevention and Punishment of the Crime of Genocide places a positive obligation upon the prosecution to prove a specific intent “to destroy in whole or in part a national, ethnical, racial or religious group as such.”⁹⁷ Article 85(3) and (4) the First Additional Protocol to the Geneva Conventions goes further in criminalizing a whole list of violations.

The important thing to note is that all these violations must take place “willfully.”⁹⁸ The general rule then appears to be that for anyone whether it is a child soldier or adult perpetrator to be convicted of a crime against humanity his crime or violation must take place knowingly and with an understanding of the broader context in which he acts.

The difficulty appears in having to prove this specific intent and knowledge. This task is taxing in the case of adult offenders but even more so with child offenders. Most children do not have the intention to commit many of the international crimes they commit in times of conflict. In fact, many will attest to the fact that they did not understand what they did or for what purpose. Regardless of whether these children are forcibly recruited or join the armed forces voluntarily out of fear or poverty, they are left with no choice but to commit such crimes in order to survive. As war crimes are drastically more serious than domestic crimes, a higher standard of culpability is required one therefore has to ask if it is truly possible to expect a child that was most likely forcibly recruited at a young age, and now acts out of fear to understand the broader context of his actions. If that child does not understand the consequences of his actions he cannot possibly be found to have the requisite *mens rea* to be held accountable.

⁹⁶ Cassese A, *International Criminal Law*, 2003, at 137

⁹⁷ V Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide, adopted 9 December 1948, UN GA Res 260 (III) A.

⁹⁸ Article 85(3) and (4) specifically uses the term wilfully to indicate that for one to be held criminally liable for the commission of one of the listed offences, at the time of commission he must have been aware of his actions and acted with intent.

II.1.3.2.3. legal critics of criminal liability of child soldiers

International criminal law does not provide clarity in determining the minimum age of criminal liability. The statutes of various international criminal tribunals are conflicting on this point. While the international criminal tribunal for former Yugoslavia (“ICTY”) and the international criminal tribunal for Rwanda (“ICTR”) statutes are silent on the issue, the serious crimes for panels in East Timor have jurisdiction over minors over twelve years of age and the special court for Sierra Leone (“SCSL”) has jurisdiction to prosecute children over fifteen years of age⁹⁹.

However, the statutes of the SPCL strictly regulate prosecution of children less than eighteen years of age and privileges rehabilitation as opposed to other traditional aims of punishment.

The SPCL has never prosecuted a person younger than eighteen, and the chief of prosecutor, David Crane, had made it very clear that he would not prosecute children¹⁰⁰.

The Rome statute gives jurisdiction to the international criminal court (“ICC”) to prosecute individuals over eighteen years of age. While some may interpret the Rome statute’s provision as establishing a rule under international criminal law because of the permanency of the ICC and its potential universal jurisdiction, this argument neglects two things. Firstly, the provision is more procedural than substantive. Exclusion from the jurisdiction of the ICC simply leaves the task of prosecuting child soldiers to domestic jurisdictions. Second, it appears that the exclusion was to avoid arguments before the ICC as to what the minimum age for criminal liability should be under international law¹⁰¹.

In light of above-international considerations, one can say that a reasonable age to fix criminal liability should be somewhere in the mid-teens (thirteen, fourteen, fifteen). Most domestic systems recognize criminal liability around that age; therefore, this option would follow current state practice. It would also comply with the international guidance given on the issue. As well, it would be supported by psychological analyses that tend to demonstrate that from the age of fifteen years, children may be capable of moral responsibility.

⁹⁹ Sect 5 of the United Nations Transitional Administration in East Timor, Regulation 2000/30

¹⁰⁰ Section 2(8) (2) (b) (xxvi), and (e) (vii) of the Roman Statute of the International Criminal court 1998 , 2187 UNITS 90 entered into force in 2002 Published by the International Criminal Court ISBN No. 92-9227-232-2 ICC-PIOS-LT-03-002/15_Eng available at <https://www.icc-cpi.int › default › files>

¹⁰¹ Matthew Happold, *The Age of Criminal Responsibility in International Criminal Law* (The Hague: TMC Asser Press, 2006) [Happold, “Age of Criminal Responsibility”].

However, international criminal law must be precise and cannot vaguely prescribe that children is their mid-teens should be able to face international jurisdiction. Instead, a clear precise age should be given. It would then be up to the court to determine whether it will prosecute children under eighteen. As was the case in Sierra Leone, a court might decide not to use its prerogative. The SPCL has the jurisdiction to prosecute children of fifteen years and older, and this would be a starting point in trying to determine what the age for criminal liability should be under international criminal law. This choice is reinforced by other provisions of international criminal law that have established fifteen as the minimum age to legally recruit and use children in armed forces¹⁰².

This suggests that from that age, children are capable of making independent choices. Under the age of fifteen, children cannot legally join armed forces and therefore, they should not be held liable for their crimes under that age. This is not to suggest that children under fifteen cannot be perpetrators of international crimes. Prosecuting children at the international level would certainly not be without difficulties. The main issue would relate to determining who is a child; examining on a case-by-case basis whether a specific child's psychological development allowed for an understanding of his or her criminal acts, and reaching a consensus on what the minimum age for criminal liability is. Thinking about whether child soldiers should be prosecuted by international criminal tribunals requires us to overcome these difficulties. It also requires justifications. In other words, if current practice of international criminal tribunals is to refuse to prosecute child soldiers, international criminal law is not clear on the issue of the minimum age for criminal liability. While the ICC does not have jurisdiction to prosecute children under eighteen, the SCSL has jurisdiction for those of fifteen years and over. This indeterminacy indicates that there is no categorical objection to the prosecution of children.

Therefore, it is important to examine the rationales upon which international criminal law could rely. If it was decided that child soldiers could be prosecuted. Several arguments can be developed. First, such prosecutions are in accordance with the aim of international criminal justice. Second, they seem to be unauthorized by international human rights law. Third, most domestic systems allow prosecutions of child soldiers and, in fact, some have done so. Finally, we are currently witnessing a case with in international criminal law that of Dominic

¹⁰² Article 4 (c) of the statute of the SCSL

Ongwen, indicating that the prosecution of individuals for crimes committed as children may be possible.

II.1.3.2.4. The ICC's child soldier provision gap.

Until they reach the age of 15, ICC suspects like Dominic Ongwen are potential child soldier victims. Then from the age of 15 through 17 they have no status as child soldier victims or as potential perpetrators, nor can they be considered the subject of child soldier crimes. However, according to the Rome statute's legal fiction, the moment Ongwen turned 18 he became a potential perpetrator of mass atrocities, since this is the earliest age a person can be prosecuted before the court¹⁰³.

As Dominic Ongwen, a senior commander in the Lord's Resistance Army (LRA), awaits his confirmation of charges hearing at the international criminal court (ICC) in the Hague, the thorny issue of prosecuting former child soldier has come to the forefront, on January 17, 2015, Dominic Ongwen, was transferred from the central Africa republic to ICC custody, where he currently faces several charges of war crimes and crime against humanity, including murder and enslavement, for crimes allegedly committed during Uganda's deadly civil war that dates back to the late 1980s. according to ICC prosecutor Fatou Bensouda: "for more than a quarter of a century, the LRA under Joseph Kony and his high command, that includes Dominic Ongwen, have terrorized the people of Northern Uganda and Neighboring countries," with the LRA having reportedly killed tens of thousands and displaced millions of people, terrorized civilians, abducted children and forced them to kill and serve as sex slaves ". More recently, the prosecution indicated that ongoing investigations may lead to further charges against Dominic Ongwen, including sexual and gender – based violence and even child soldier crimes¹⁰⁴.

However Geneva Convention four do not describes definition of child as international law especially Rome statute do not states about criminal liability of child while domestic laws prescribe minimum age of child soldiers in international law.

¹⁰³ Article 8 of the Rome Statute 2002

¹⁰⁴ Article 8 supra note 16

II.1.3.2.4.1. Paris Principles and Guidelines on Children

Mostly, the Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups (2007) which have been endorsed by over 100 countries, define a child soldiers in article 2.1 as “any person below 18 years of age who is or who has been recruited or used by an armed force or armed group in any capacity, including but not limited to children, boys and girls, used as fighters, cooks, porters, messengers, spies or for sexual purposes. It does not only refer to a child who is asking or has taken a direct part in hostilities¹⁰⁵ .

The UN’s Office for the Special Representative of the secretary-General for Children and Armed Conflict, established in 1996, also uses the Paris Principles’ definition, therefore applying the under 18 criteria. The current Special Representative Leila Zerroungui, together with UNICEF, launched the campaign Children, not soldier in 2014, which seeks to galvanize support to end and prevent the recruitment and use of children by national security forces by 2016 “ and which endorsed by UN Security Council in Resolution 2143 (2014). Strikingly, paragraph 5 of Resolution 2143 exposes the ICC’s outdated provisions by recalling that the conscription, enlistment, and use of children under the age of 15 may constitute a war crime under the Rome Statute and then noting that the provisions of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict requires a minimum age of 18 for compulsory recruitment and participation in hostilities¹⁰⁶ .

The ICC is lagging behind internationally, and according to a leading human rights organization, child soldiers international, there is already wide acceptance that 18 years of age should be the universal international legal threshold otherwise known as the “straight 18 ban”. Moreover, twenty two thirds of UN member’s state have established in law or otherwise committed to a minimum military recruitment age of 18 years,” professor Mark Drumbl, an international law event has observed that this notion is spreading and “international law’s trend-line arts towards the straight 18 horizon.

Tragically, the recruitment and use of child soldiers continues in great numbers today, UNICEF estimates that approximately 300,000 children, defined as boys and girls under the

¹⁰⁵ Article 2.1 of the Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups (2007)

¹⁰⁶ Paragraph 5 of the UN Security Council in Resolution 2143 (2014).

age of 18, are involved in over 30 conflicts worldwide. The case against Dominin Ongwen prompts the call for a fresh discussion on the Rome Statute's age gap and the need to amend the Rome Statute in order to reflect the growing international consensus towards prohibiting the recruitment and use of child soldiers under the age of 18¹⁰⁷.

This may also encourage ICC member states to address the complexities of child soldier's experiences as victims and perpetrators sometimes simultaneously and how rigid age criteria maintain a legal fiction which does not respond meaningfully to the realities that many child soldiers endure.

II.1.3.2.4.2. Case of prosecutor vs. Thomas Lubanga Dyilo

On 17th march 2006, Thomas Lubanga Dyilo, the leader of political and military movement, the Union Congolese Patriots (UPC), became the first ever person arrested under a warrant issued by the international criminal court, his trial, for the war crime of Enlisting and conscripting of children under the age of 15 years using them to participate actively in hostilities. Began on 26 January 2006¹⁰⁸

On 10th February 2006, the Pre-trial Chamber I issued an arrest warrant for Mr Lubanga after ending that there were reasonable grounds to believe that he had committed the war crime of conscripting and enlisting children under the age of eighteen years and using them to participate actively in hostilities. The chamber requested the DRC to arrest and surrenders him to the court. The DRC cooperated by surrendering and transferring of Mr Lubanga to The Hague. The DRC noted a pivotal role in Mr Katanga and Mr Chui's arrest and their transfer for the ICC".

Both Mr Katanga and Mr Chui are believed to have jointly committed through other persons, war civilians. The DRC cooperated with the court in the arrest of Mr Katanga and Mr Chui stems from the fact that under article 86 it is obliged to cooperate fully with the Court in all of its investigations and proceedings. On 3 March 2004, the Government of the DRC referred to the Court the situation (the events falling under the Court's jurisdiction) in its territory

¹⁰⁷ UN Security Council in Resolution 2143 (2014) supra note9

¹⁰⁸ The case prosecutor v. Thomas Lubanga Dyilo, ICC -01/04-01/06 on 14th March 2012

since the entry into force of the Rome Statute on 1 July 2002¹⁰⁹. After a preliminary analysis; the Prosecutor initiated an investigation on 21 June 2004¹¹⁰.

On 14 March 2012, Mr Lubanga Dyilo was convicted of committing, as co-perpetrator, war crimes consisting of: Enlisting and conscripting of children under the age of 15 years into the Force patriotique pour la libération du Congo (Patriotic Force for the Liberation of Congo) (FPLC) and using them to participate actively in hostilities in the context of an armed conflict not of an international character from 1 September 2002 to 13 August 2003 (punishable under article 8(2)(e)(vii) of the Rome Statute)¹¹¹. The verdict was rendered by Trial Chamber I, composed of Judge Adrian Fulford (United Kingdom), as Presiding Judge, Judge Elizabeth Odio Benito (Costa Rica) and Judge René Blattmann (Bolivia). Although the first two judges have written separate and dissenting opinions on some issues, the verdict was unanimous¹¹². On 10 July 2012, Trial Chamber I sentenced Thomas Lubanga Dyilo to a total period of 14 years of imprisonment. The time he spent in the ICC's custody will be deducted from this total sentence. The verdict and the sentence were confirmed by the Appeals Chamber on 1 December 2014. The accused and his co-perpetrators agreed to, and participated in, a common plan to build an army for the purpose of establishing and maintaining political and military control over Ituri. As a result of the implementation of this common plan, boys and girls under the age of 15 were conscripted and enlisted into the UPC/FPLC between 1 September 2002 and 13 August 2003¹¹³.

The DRC ratified the Rome Statute, the founding instrument of the International Criminal Court (the Court), on 11 April 2002. Moreover, the DRC made an express referral of all serious crimes which the Court's jurisdiction alleged to have been committed in its territory since the entry into force of the Rome Statute. The role of France in the surrender of Lubanga is equally significant. French authorities assisted the court in transporting Mr Lubanga to The

¹⁰⁹ International criminal court, press Release, Prosecutor receives referral of the situation in the Democratic Republic of Congo, 19 April 2004.

¹¹⁰ <https://www.icc-cpi.int/sites/default/files/CaseInformationSheets/LubangaEng.pdf>[accessed 21 July 2023]

¹¹¹ International Criminal Court, The Prosecutor v. Thomas Lubanga, warrant of Arrest, 10th February 2006, pretrial chamber I, ICC -01/04-01-06-02

¹¹² <https://www.icc-cpi.int/drc/lubanga>

¹¹³ The case of ICC Prosecutor v. Thomaas Lubanga Dyilo, ICC -01/04-01/06 on 14 March 2012

Hague. The participation of France shows that the assistance of third states in arresting suspects is equally vital the court¹¹⁴.

II.1.3.2.4.3. Case of prosecutor v. Dominic Ongwen

Prosecutor v. Dominic Ongwen is the first trial of international criminal court to pursue an indictment against an individual who was both a victim of war crime of child soldiering, but also guilty of committing war crimes himself. While other domestic and hybrid case have frequently tried individual for crimes they committed as child soldiers and victims themselves, Ongwen is the first individual to be indicted and prosecuted by the international court system, Ongwen surrender himself into custody in the central African republic in December ,2014 and was turned over the ICC's custody on January 16,2015 this trial is being held at the headquarters of the international criminal court in the Hague, the Netherlands, and initial proceedings began on January 26, 2015¹¹⁵ .

Ongwen's initial arrest warrant includes seven separate counts of criminal responsibility under article 25(3), (b), of the statute of the ICC, Including three counts of crimes against humanity for murder (article 7(1),(a)),enslavement 7(1), (c), and inhumane acts of inflicting serious bodily injury and suffering article 7(1), (k)). Further, Ongwen is also being tried under four events of war crimes, including under Article 8(2), (c) (i). Intentionally direction attacks against civilian populations under Article 8(2), (c) (i), and pillaging under Article 8(2), (e) (v)¹¹⁶.

Ongwen has pled not guilty on all counts of his indictment; the opening of the confirmation of charges hearing took place in January 2016. In the confirmation of charges hearing, the prosecutor filed 70 separate counts of war crimes and crimes against humanity against Ongwen, including the conscription and enlistment of child soldiers, during his actions as a senior commander of Lord's Resistance Army (LRA) of Uganda. This is a dramatic increase from the initial seven counts, and was based upon finding gathered by the prosecutor's office during investigation. The additional charges relates to attacks on on the Pajule IDP camp, the Odeck IDP camp and the Abok IDP camp. The count brough against Ongwen include attacks against the civilian population, murder, attempt murder, torture, cruel treatment, other

¹¹⁴ International Criminal Court, Press Release, Prosecutor receives Referral of the Situation in the Democratic Republic of Congo, 19 April 2004.

¹¹⁵ Case of Prosecutor v. Dominic Ongwen, ICC -02/04-01/15, January 26,2015

¹¹⁶ Article 7 and 8 of the Rome Statute of the International Criminal Court 2002,

inhumane acts, enslavement, outrages upon personal dignity, pillaging, destruction of property, and prosecution. Additionally, the expanded list of charges include multiple counts of several and gender-based crimes committed from 2002 to 2005 in Sinia Brigade, such as forced marriage, rape, torture, sexual slavery, and enslavement, as well as the conscription and use of children under the age of 15 to participate actively in hostilities from 2002 to 2005, in Sinia Brigade¹¹⁷.

According to observers at the hearing in January 2016, the Prosecutor acknowledged Ongwen's unique status as both a victim and an alleged perpetrator, but also asserted that Ongwen had command and control over troops during the massacres for which he is charged. During the period in which the crimes alleged occurred, Ongwen would have been in his late 20s to 30 at the time and therefore his actions fall within the scope of jurisdiction set forth by the Rome Convention. However, Ongwen himself was a child soldier, abducted in 1990 and forcibly conscripted by the LRA walking home from school when he was only ten years old¹¹⁸.

According to eyewitness accounts and some of those abducted himself; Ongwen is a complex and unsettling figure, prone to extreme bouts of violence including the abduction of children, extensive acts of violence, the taking of war wives and the commission of many crimes against humanity and war crimes. Within LRA defectors, he was known for his cruelty, however, he is also supposedly the only LRA commander who would release his "wives" and child soldiers return to civilian lives¹¹⁹.

For two thirds of his life, including half his childhood and all of his adult life, Ongwen lived as a rebel Commander of the LRA and participated in its acts of violence throughout Uganda, Chad, the Central African Republic and Sudan. This case highlights the complex realities of trials that apply criminal responsibility to child soldiers. While Ongwen was clearly an adult at the time he allegedly committed the crimes for which he is being charged at The Hague by the ICC, the vast majority of his life and development were at the hands of war criminals such as Vincent Otti and Joseph Kony. This begets the question of how responsible can an individual be for the commission of acts of violence when they themselves began serving as a child as a child soldier at only ten years.

¹¹⁷ International Criminal Court, the Prosecutor v Dominic Ongwen, ICC -02/04-01/15, December 21, 2015

¹¹⁸ The Enough Project, "The Dominic Ongwen Trial", January 29, 2016, available at

¹¹⁹ Ledio Cakaj, 'The complex story of a child soldier', The Washington Post, January 12, 2015

II.1.4. Domestic prosecutions of child soldiers

Domestic and international courts have widely ignored the commission of crimes under international law by juveniles and more specially child soldiers. Domestic courts are often left crippled after the effects of a war, and are only able to prosecute those offenders most responsible for the commission of crimes under international law or sometimes it is decided not to prosecute at all. Indeed, the prosecution of child soldier by domestic courts is non-existent as these children are mostly rehabilitated¹²⁰.

It is therefore to establish whether domestic courts have necessary regulations in place to prosecute these juveniles. This question will be discussed by way of comparative study between England, South Africa, Germany and Uganda. Apart from Germany which flow a civil legal system, England and Uganda are firmly grounded in common law foundations, while South Africa flows a mixed model of English Common law and Roman-Dutch law. These countries have been chosen as the comparative countries for a number of reasons:

- (1) England because it has well established juvenile justice legal framework;
- (2) South Africa since the author is from south Africa and has a good understanding of the south African juvenile justice
- (3) Germany as its juvenile justice regime is based on the civil law system, while the age of criminal responsibility is set at a high age, compared to most common law countries; and
- (4) Uganda, since it is a country that has experienced a number of conflicts where child soldier has committed crimes under international law¹²¹.

Before looking at the system that will be compared in this study, are these four countries in position to prosecute any individuals for the commission of a crime under international law. More specifically, have these countries adopted and ratified the ICC Statute and are the core crimes included in the legal regimes of these countries England, South Arica, Germany and Uganda have all adopted and ratified the ICC Statute have been domesticated within their national law regimes. These states' domestic courts are thus in a position to prosecute individuals for the commission of crimes under international law, yet what this chapter aims

¹²⁰ Tracing the origins of the defense of non-pathological incapacity in South African criminal law November (2011) 17 foundation 70-74.

¹²¹ Fox and Amull E Social Work with Children in the Youth Justice System

to ascertain, is whether child soldiers could be prosecuted for the commission of crimes under international law by these domestic courts. Meanwhile The Rome Statute of the ICC is being implemented at the domestic level by its States Parties. Most of these domestic jurisdictions have a juvenile justice system in place, thereby allowing prosecution of children. This indicates that, child soldiers could be prosecuted by many domestic systems, and this has, in fact, already occurred in several instances.

First, the age of criminal responsibility of the various States will be compared to each other in order to determine at what age the states are able to prosecute child soldiers for crimes under international law. Secondly, the various States' procedural laws will be examined, in particular arrest and detention, sentencing and alternatives to detention and imprisonment. Thirdly, the defences of insanity and diminished responsibility, intoxication and compulsion will also be respectively discussed in order to determine how these defences will be applied when child soldiers are being prosecuted for crimes under international law¹²².

II.5. Age of Criminal Responsibility in England

The age of criminal responsibility of ten years are regulated by the child and young person's act of 1969, is still in force. In 1998, a significant change was made to the age of criminal responsibility, not in the age itself, but the enforcement of the age of criminal responsibility, by abolishing the *doli incapax* principle, a principle which refers to a person who cannot distinguish right from wrong and acts without intention or malice¹²³. It shows us change was implemented and what consequences it has on the current age of criminal responsibility and the criminal responsibility of child soldiers who commit crimes under international law.

II.1.5.1. Abolition of the *doli incapax* rule

In 1998 the Government abolished the principle of *doli incapax*. This was the presumption in law that children aged fewer than 14 did not know the difference between right and wrong and were therefore not capable of committing an offence¹²⁴. This presumption could be rebutted for children between the ages of 10 and 14 if the prosecution could satisfy the court

¹²² Understanding Youth and Crime: Listening to Youth? · NCJ Number. 177534. Author(s). S Brown · Date Published. (1998) · pp 53-78

¹²³ Ashworth A and Horder J, *Principle of Criminal Law*, 7ed (2013) p.140; Card R Cross and James Criminal law 20ed (2012) p.611; Ormerod D Smith and Hagan's Criminal Law 13ed (2011).p.342

¹²⁴ Ashworth A and Horder J, *Principle of Criminal Law*, 7ed (2013) p.140-141

that the child knew that what he was doing was seriously wrong, not “merely naughty or mischievous”¹²⁵.

The change in the law means that children over the age of 9 can be arrested, taken to a police station, interviewed and charged with offences. They can be taken to court and convicted of crimes, receiving a criminal record.

It is the youngest age of criminality in all of Europe. It has been condemned by The United Nations Committee on the Rights of the Child and is held not to be internationally acceptable¹²⁶.

Was this change in law due to evidence-based research? No – the government decided to reform youth justice with the explicit intention to “stop making excuses for children who offend”. A major focus of the reforms was to remove *doli incapax*, which was achieved by the enactment of section 34 of the Crime and Disorder Act 1998¹²⁷.

Undoubtedly the high profile and tragic Jamie Bulger case was a major influence in focusing the government on the issue of the age of criminality. In the House of Lords decision of *C (A Minor) v DPP* Lord Lowry acknowledged that there were ‘popular and political overtones’ which surrounded the abolition.

The shocking killing of 2-year-old Jamie Bulger by two 10-year-olds Jon Venables and Robert Thompson led to worldwide media attention and the two boys were vilified in the British press. *Doli incapax* had not yet been abolished but the boys were deemed to know right from wrong and were therefore prosecuted. They were sentenced to imprisonment at Her Majesty’s pleasure with a tariff of 15 years (a minimum period in custody to be served).

This sentence was passed upon the intervention of the Secretary of State, who set the tariff based on petitions and correspondence from members of the public and national press coverage endorsing a long or whole-life tariff.

The House of Lords quashed the sentence in 2000, in part due to the fact that it was deemed that the conduct of the Secretary of State was contrary to the rule of law. In other words, it

¹²⁵ Ashworth A and Horder J, *Principle of Criminal Law*, 7ed (2013) p.140; Card R Cross and James *Criminal law* 20ed (2012) p.611; Ormerod D Smith and Hagan’s *Criminal Law* 13ed (2011).p.342

¹²⁶ Ashworth A and Horder J, *Principle of Criminal Law*, 7ed (2013) p.140

¹²⁷ Ashworth A and Horder , *supra* note 126

was an abuse of executive power to step in and interfere with the case as a result of public pressure.

The government, in abolishing *doli incapax*, accused it of being antiquated and unnecessary. Yes, the criminal law should mirror the morals of society at the time and evolve to changing attitudes. However, this sad case demonstrates how governments can sometimes bow to whoever's voice is the loudest. This is not true democracy and can lead to widespread unfairness¹²⁸.

Although the terrible violence inflicted by such young boys was and is exceptionally rare, children of 10 years are now held automatically to be criminally responsible across England and Wales.

II.1.5.2. Consequences of abolishing the *doli incapax* rule

What are the consequences for the possible prosecution of child soldiers, now that the *Doli Incapax* principle has been abolished? First all persons between the ages of ten and fourteen can be presumed to be incapable of forming the necessary criminal intent to commit a crime, and are capable of understanding the difference between right and wrong or the consequences of their actions, which is a fundamental aspect of criminal responsibility at the time of the commission of the offence. In effect, no regard is given to the fact that children between ten and fourteen are still in the process of maturing¹²⁹. However, the *Doli Incapax* rule has been subject to criticism and debate over the years. Some argue that *Doli Incapax* rule can still be used as a defense. Yes this possibility has been rejected by British Parliament and leaves children older than ten but younger than fourteen solely with the general defenses of criminal law to prove their lack of maturity¹³⁰.

Secondly, the standard of recklessness, or the taking of unjustified risks is also a cause for concern. The Caldwell test determines whether an offender took an unjustified risk, knowing that it was the wrong thing to do. However, it cannot be expected that a ten-year-old who has taken an unjustified risk, should have reacted differently, since children mainly act on

¹²⁸ Ashworth A and Horder, supra note 126

¹²⁹ Keeping up (tough) appearances: the age of criminal ... Catching up with Europe: Taking the Age of Criminal Responsibility Seriously in England 17 European Journal of Crime, Criminal Law and Criminal Justice 2009, pp.276-277.

¹³⁰ Crofts T. (2002) p.85, The criminal responsibility of children and young persons in England and Germany

impulse¹³¹. It is clear from the above, that the abolition of the *doli incapax* presumption can create a few problems when a child between the age of ten and fourteen has committed an offence which he did not plan and foresee¹³². The court need to consider these matters, especially when children between the ages of 10 and 14 commit crimes.

It was the correct decision by the British Government abolished the principle of *doli incapax* rule as the commission of offences by Juveniles in England has been on the rise over the last two decades. What are the consequences for the child who commits a crime under international law? it is possible for a court in England to prosecute a child soldier for the commission of a crime under international law, even if that child soldier was as young as ten years old at the time of the commission of the offence. The English Courts would not have prosecuted these juveniles for the commission of these crimes before the *doli incapax* provision was abolished, since the rule would have protected child soldiers from prosecution on the grounds of being incapable of understanding the wrongfulness of the offence, bar the case where the presumption of innocent would be rebutted¹³³.

Nevertheless, even though the age of criminal responsibility of ten is set at a low age, English courts will be able to prosecute children between the ages of ten and eighteen who commit crimes under international law.

II.1.5.3. Responsibility of child soldiers in South Africa

The age of criminal responsibility of 10 years is regulated by section 7 (1) of the Child Justice Act (hereafter, CJA). Children who commit crimes while between the ages of 10 and 18 are therefore responsible for such offences. However, children between the ages of 10 and 14 are presumed to be incapable of committing a crime, although this presumption can be rebutted¹³⁴.

This limits the scope of the age of criminal responsibility and its application in South Africa. This part will look at how this limitation will affect the prosecution of juveniles, and especially child soldiers, for crimes under international law in South Africa. The age of criminal responsibility of juveniles between the ages of 10 and 14 will be analyzed as well as

¹³¹ Crofts T supra note 11

¹³² Ashworth A and Horder J, Principle of Criminal Law, 7ed (2013) p.140-141

¹³³ Ashworth A and Horder, supra note 126

¹³⁴ Kemp G (et al) Criminal Law in South Africa 2ed (2015) pp.178-179.

the application of the age of criminal responsibility of children between the ages of 14 and 18¹³⁵.

This part will furthermore also look at how to determine the criminal capacity of child soldiers who have committed crimes under international law in South Africa.

II.1.5.4. Children older than 10 years but younger than 14

The CJA provide that children older than 10 years old, but younger than 14 are presumed lack criminal capacity unless the state provides that the child has criminal capacity. The reason why the age is set at 14 is because the ancient Romans believed that this was the age when a boy reached puberty. The onus rests on the prosecution to prove that the child older than ten, but younger than 14 years, had the ability at the time of the commission of the crime to distinguish right and wrong and to act in accordance with the appreciation that the act was wrong¹³⁶.if the child lacked one of the components, he lacks criminal capacity, but this does not mean that he cannot be held criminal responsible, because *mens rea* must also be proved and is required in addition to criminal capacity¹³⁷.

The age of criminal responsibility was only recently interested from 7 to 10 years; it is interesting to note that the presumption of criminal capacity test played in this regard, the same test that was abolished in England following the Jamie Bulger case. The presumption was created to protect children who committed offences while they were older than seven years, but younger than 14. The purpose of evidence was to show that the child was *doli capax* (capable of committing a crime). However, the presumption was generally rebutted in court, since most children between the ages of 7 to 10 are not able to differentiate between right and wrong and act in accordance with such understanding¹³⁸.This lead to the questioning of the presumption's legitimacy in South Africa law. Some of the main criticisms were that the age of seven was set at a low age standard and that prosecutor should include the testimony of a child psychologist to achieve the rebuttal. In 2000, the South African law commission discussed various approaches regarding the age of criminal responsibility and

¹³⁵ *Ibidem*.

¹³⁶ Kemp G (et al) supra note 14

¹³⁷ Kelly-Anne Ramages , Investigation the Minimum Age of criminal Responsibility in African Legal Systems, University of the Western Cape, 2008

¹³⁸ Skelton and Badenhorst the Criminal Capacity of Children in South Africa: International. Developments & Considerations for Review (2012) pp.14-15

recommended that the age of criminal capacity be increased from 7 to 10 years and that the rebuttable presumption for children older than 10, but younger than 14 be retained¹³⁹.

The commission submitted that the presumption of criminal incapacity serves as a protective mantle for the children between the age of 10 and 14 are presumed being incapable of criminally responsible the crime. However, this presumption can be rebutted in court if it is found that the child soldier was able to distinguish between right and wrong at the time of commission of the offence and is able to act in accordance with such understanding¹⁴⁰.

If a child soldier between the ages of 10 and 14 commits a serious crime under international law, the same regulation will apply, since the CJA does not revoke the presumption of criminal incapacity test depending on the type of crime that has been committed, but only if the person was older than 14 at the time of the commission of the crime.

II.1.5.5. Children older than 14 but younger than 18 years

Child offenders who were older than 14, but younger than 18 at the time of commission of the offence are considered to be criminally capable of committing an offence under the provisions of the CJA. The act does not explicitly deal with juveniles between the ages of 14 and 18, but if one interprets the provisions of the Act, in particular regarding the scope of the Act, it provides that these juveniles may be prosecuted for the commission of crimes under international law¹⁴¹.

On attaining the age of 14, a child is regarded in law as being no different from an adult with regard to criminal capacity; there is not a protective mantle that protects these juveniles, as is the case with juveniles between the ages of 10 and 14. The author argues that juveniles aged between 14 and 18 who commit, for example, war crime, should be prosecuted in the same manner as juvenile who commit crimes under domestic law, except in the cases where the court is of the opinion that alternative measures to prosecution should be considered. They should also be subjected to the procedural rules embedded in the CJA¹⁴².

¹³⁹ Section 10(2) (b) of the CJA.

¹⁴⁰ *Idem*, Section 43(2) (d)

¹⁴¹ *Ibidem*

¹⁴² Crofts T. (2002) 129. The criminal responsibility of children and young persons in England and Germany

Therefore, court proceeding before and after sentencing will not have to be altered in the light of the commission of crimes under international law by a juvenile, it is now appropriate to have a look at certain factors which the prosecutor needs to take into account when the court is in the process of establishing the criminal capacity of the juvenile.

II.1.5.6 Domestic prosecutions of child soldiers in Africa

Theoretical considerations which state that child soldiers could be prosecuted by most domestic systems are supported to some extent by states' practices. Child soldiers have been prosecuted in Africa and more recently by the United States. In Africa, child soldiers have been charged under domestic laws for international crimes including war crimes. For instance, in 2000, the Democratic Republic of Congo ("DRC") executed a fourteen year-old child soldier and, in 2001, another four aged between fourteen and sixteen were condemned to death¹⁴³. In the end, these children were not executed due to pressures from non-governmental organizations ("NGOs")¹⁴⁴. In Uganda, two former child soldiers were accused of treason¹⁴⁵. However, these charges were later withdrawn; following lobbying by Human Rights Watch, on the basis that Uganda was under the international obligation to rehabilitate child soldiers. Another interesting case is the situation in Rwanda mentioned earlier, under which children were charged at the domestic level with committing genocide, an international crime implemented domestically. It was reported that almost 4000 children were detained in Rwanda following the genocide, only 1500 of whom had been released from detention by 2001¹⁴⁶. Two institutions allowed prosecution of child soldiers: the domestic courts and gacaca proceedings.

Gacaca proceedings are a traditional method of dispute resolution adapted to promote accountability for offenses related to genocide¹⁴⁷. Gacaca proceedings are different from the

¹⁴³ Human Rights Watch, "Letter to Foreign Minister of Democratic Republic of Congo" (2 May 2001), online: Human Rights Watch; Human Rights Watch, Press Release "Congo: Don't Execute Child Soldiers: Four Children to be Put to Death" (2 May 2001), online: Human Rights Watch; Human Rights Watch, "Congo Spares Child Soldiers" (June 2001), online: HR

¹⁴⁴ Ibidem.

¹⁴⁵ Human Rights Watch, "Uganda: Letter to Minister of Justice" (19 February 2003), online: HRW; Human Rights Watch, Press Release "Uganda: Drop Treason Charges against Child Abductees" (March 4, 2003), online: HRW.

¹⁴⁶ Nienke Grossman, "Rehabilitation or Revenge: Prosecuting Child Soldiers for Human Rights Violations" (2007) 38 *Geo J Int'l L* 323 at 351.

¹⁴⁷ Mark Drumbl, *Atrocity, Punishment, and International Law* (New York: Cambridge University Press, 2007) at 85 [Drumbl, "Atrocity, Punishment"].

Rwandan conventional courts because their focus is on both retribution and reconciliation¹⁴⁸. Because of this, gacaca proceedings offer a more diversified array of punishment ranging from imprisonment to community service¹⁴⁹. Gacaca proceedings also recognize that minors should be treated differently from adults. Minors under fourteen years cannot face prosecution but can be placed in special solidarity camps, whereas minors between fourteen and eighteen must benefit from reduced punishment¹⁵⁰. Rwandan legislation provides that offenders under the age of fourteen cannot incur penal responsibility.¹⁵¹ Offenders between the age of fourteen and eighteen are entitled to raise their status as minors as a mitigating factor in sentencing.¹⁵² In prosecuting those responsible for genocide, the Rwandan courts applied these mitigating factors. For instance, a minor under eighteen found guilty before domestic courts of killing five Tutsi children was sentenced to only five years' imprisonment.¹⁵³ A last example is the one of DRC where, very recently, a fifteen year-old accused of rape was found to be outside the jurisdiction of a military court which tried individuals for crimes against humanity and was sent to be tried in a domestic juvenile court.¹⁵⁴ Read together, these elements may be interpreted as indicating that child soldiers may be prosecuted under domestic jurisdictions, under the condition that their status as juveniles is respected. Therefore, if they are to be prosecuted, juvenile justice systems should be used.

¹⁴⁸ Ibidem at 86.

¹⁴⁹ Ibidem at 88.

¹⁵⁰ Ibidem

¹⁵¹ Ibidem at 79

¹⁵² Ibidem.

¹⁵³ Ministère Public v. Nzabonimpa, RMP 69.430/S4/KD, RP/R1/98 (28 December 1998) (Gisenyi 1ère Instance)

¹⁵⁴ Kelly Askin, "Guilty", online: Blog Open Society < <http://blog.soros.org/2011/02/fizi-diary-guilty/> >.

CHAPTER III: THE MECHANISM TO STRENGTHEN THE EFFECTIVENESS OF CRIMINAL RESPONSIBILITY OF CHILD SOLDIERS

This chapter focuses on legal and institution mechanisms that can be taken in order to strengthen effectiveness of criminal responsibility of child soldiers and various safeguards need to be upheld to ensure that the best interests of the child are maintained once a child soldiers held criminally responsible. It analyses the extent to which child soldiers can be prosecuted under domestic and international law, as well as the implementation of alternative measures to prosecution and proposes that case by case approach should be considered when child soldiers are prosecuted for crimes under international law, thereby investigating and analyzing the often distinctive circumstances related to their crimes. And international law should be amended¹⁵⁵.

III .1. Legal mechanisms

It has been argue, the enforcement of the international criminal law is very important in order to maintain order and fighting against the international fault in every society. The enforcement of international criminal law is important being either of an international level by national level by national enforcement by international bodies.

As far as the international criminal law is concerned some treaties have been put in place in order to regulate the matter of enforcement of international criminal law. However, some of these treaties have been lacking precision and effectiveness in their implementation especially when it is one state to execute the international obligation. This section intended to propose and clarify the mechanisms in which establishment of a strong legal system for easy enforcement of international criminal law under international level.

III .1.1 Regulation of child soldiers at international law

There are a number of fundamental international law instruments that are directed towards the regulation of child soldiers¹⁵⁶. The majority of relevant instruments set standards for states in their recruitment practices of young persons. Some other instruments deal with the ‘criminalization’ of certain actions relating to child soldiers either conscripting or enlisting

¹⁵⁵ Should child soldiers be prosecuted for their crimes? Available on www.irinnews.org/analysis,[2011]

¹⁵⁶ Netherlands international law reviews,2000[accessed 21 July 2023]

them or forcing them to participate in hostilities, or with respect to the acts perpetrated by the child soldiers him/herself.

III.1.1.1 Prohibition and /or restriction of the recruitment of child soldiers

Prior to 1977, international law did not deal directly with issue of children participating in armed conflict although the 1949 Geneva conventions afforded children protection (as civilian) during times of armed conflict. As the issue of child soldiers began to come within the international political agenda, the international community has, however, more recently sought to address the problem directly. Various fundamental instrumental have been agreed, providing a progressive (although not always consistent) series of international standards¹⁵⁷.

These provisions were introduced largely in reaction to the growing realization within the international community that children were being used as active forces in war and arms conflict. They are binding on governmental and opposition groups. However, the standards were set at 'low' levels, they set the minimum age for the recruitment and use of children in armed conflict as 15years and states parties are only required to take all feasible measures to comply with the provisions.

The African charter come into force on 29 November 1999 and is the only regional instrument in the world that currently addresses the issue of child soldiers. Its adoption reflects the disastrous consequences that use of child soldiers brings to whole communities within a significant number of states in the African Continent. It is therefore highly appropriate that steps continue to be taken in Africa to inform the world about the extent of the problem¹⁵⁸.

Of all the international law instruments currently dealing with the use of child soldiers, the African charters sets the highest standards .it sets 'without exception ' minimum age of 18 years and has stronger language –all necessary measures- than other instrument. The tragic reality is that these laudable standards are not currently being complied with by a number of Africa Member states.

¹⁵⁷ Art 23 of the additional protocols 1977 to the Geneva conventions 1949

¹⁵⁸ African Charter on the Rights and Welfare of the child 1990

III.1.1.2. Convention of the rights of the child

CROC provides rules in relation to the active participation of children and their recruitment. The language used is generally reflective of the provisions set out in the 1977 additional protocols. The provisions of CRC also set a minimum age of 15 years for ‘direct’ participation or recruitment .this seems an anomaly when one considers the overall context of CRC and the fact that it defines a child as any person less than 18years¹⁵⁹.

Indeed, the inclusion of this minimum age in CRC itself was highly controversial and led to contentious debate during the drafting stages. States such as the United States, the United Kingdom and France objected to 18 being set as a minimum age, due to the fact that these and other states regularly recruit people below that age into their armed forces¹⁶⁰.

This instrument came into force on 19th November 2000. Interestingly the United States, which is one of only two states (the other being Somalia) that has not ratified CRC, played an important role in the drafting and finalization of this instrument. Under the terms of this convention, a child is defined as a person under the age of 18 years. States parties to the instrument are under an obligation to take immediate and effective measures to secure the prohibition and elimination of the “worse forms of child labor”. Which include:

(a)... all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and selfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict this is the most recent international instrument that elaborates on standards in relation to the recruitment of children into armed forces. It was formulated in conjunction with another important instrument relating to the welfare of children, child pornography and child prostitution. Both of these instruments were adopted consensus by the United Nations General Assembly on 25th May 2000 and came into force early 2002¹⁶¹.

The two protocols were formulated to strengthen international standards in relation to the specific areas where children were particularly vulnerable. Nevertheless, in certain important respects the 2000 children in Armed Conflict Protocol represents somewhat of a

¹⁵⁹ International labor organization convention No.182 on the prohibition and immediate action for the elimination of the worst forms of child labour 1999,

¹⁶⁰ *ibidem*

¹⁶¹ Optional protocols to the convention on the rights of the child on the involvement of children in armed conflict 2000

disappointment. The opportunity was missed to provide appropriate universal standards for new millennium, the instruments recognizes a need to increase the protection of children from involvement in armed conflict; but it is clear that the specter of real politic continues to play a significant role in these areas – even though the protection of the child should be the overriding concern. While the terms of the 2000 children in armed conflict protocol rise the minimum age to 18 for nongovernment armed forces, they fall short of the standards set by some of the previous instruments in relation to recruitment into state armed forces¹⁶².

Instead, the 2000 children in armed conflict protocols raises the minimum age of compulsory recruitment to 18 years, but allowing for voluntary recruitment at a younger age. States are obliged to rise to some undefined- the age of voluntary recruitment from 15 years. As noted above, most of the ‘voluntary’ recruitment that takes place does not reflect a genuine expression of the child’s free will and, in any event, it will often be difficult to prove a child’s age at the time they volunteer.

III.1.1.3. Criminalization of the recruitment of child soldiers

The rules of international criminal law embody a legal regime that defines certain ‘international crimes’ and provides for the individual criminal responsibility of those who commit these crimes. The international criminal judicial bodies are given specific jurisdiction over particular international crimes in accordance with the terms of their respective constituent documents. The inclusion, within the jurisdiction of tribunals created by the international community, of a specific crime directed towards the recruitment of the children for active participation in armed conflict therefore represents an appropriate ‘law-making’ role for the international community¹⁶³. The Rome statute was finalized in July 1998 and came into force on 2002. It established for the first time a permanent international criminal tribunal to try persons charged with committing various international crimes.

The activities of the ICC reflect the desire of the international community that ‘the most serious crimes of concern to the international community as a whole must not go unpunished. The mandate of the ICC is ‘complementary’ to that of states, meaning that the court is to be

¹⁶² Optional protocols to the convention on the rights of the child supra note 146

¹⁶³ Rome statute 2002

regarded as court of last resort .it has jurisdiction with respect to the following crimes committed after 1 July 2002¹⁶⁴.

1. The crime of Genocide
2. Crimes against Humanity
3. War Crimes
4. The crimes of Aggression

Within the definition of the crime of war crimes, the Rome statute specifies that the recruitment of (certain) child soldiers would constitute a crime. In the context of an international armed conflict, the definition includes:

Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities ‘this is repeated in the definition of war crimes in the context of an armed conflict not of an international character, except that in those circumstances it applies to recruitment into ‘armed forces or groups’ rather than the national armed forces¹⁶⁵ .

When one considers the relevant war crimes definitions in the Rome statute, one is struck by the minimum age limit. It is difficult to reconcile the apparent desire of the international community to protect children under the age of 18 from participating in armed conflict with the criminalization of recruitment activities only in respect of children below the age of 15 years. One can surely accept an argument that the recruitment or use of children of, for example, 15 years of age does constitute(in the absence of other factors that may properly negate criminal responsibility) an action that is act at odds with the basic norms that have now been set by the international community. Such an action could and should constitute an international crime and the definitions in the Rome statute should be ‘upgrade’ accordingly. Yet , to open up for discussion the definition of this aspect of war crimes would almost certainly invite a wholesale renegotiation of many other crucial issues within the Rome statute . This would not appear, at least in the foreseeable future, to be a realistic possibility¹⁶⁶

In other aspect, the provision in the Rome statute is an improvement on the 2000 children in armed conflict protocols. During the drafting process of the Rome statute, it was generally

¹⁶⁴ Supra note 138

¹⁶⁵ Art11(1) of the Rome statute 2002

¹⁶⁶ Daniel Ryan,’’ international laws and laws of war and international criminal law- prosecution of child soldiers- united vs. Omar khadr’’ (2010)33 Suffolk transnat’’ L Rev175 at 184

agreed that the terms 'using' and 'participate' in the relevant war crimes provisions would apply not only to direct participation in conflict, but also to other military activities linked to combat such as 'scouting', spying, sabotage... the use of children as decoys, couriers, or at military checkpoints and carrying supplies to the front line¹⁶⁷

Within the definition of crimes against humanity in the Rome statute, there are a number of other provisions that may also be applicable to the recruitment and use of child soldiers in specific circumstances.

III.1.1.4. Specific court for Sierra Leone

The SCSL is mandated to bring justice those who bear the greatest responsibility for atrocities committed in Sierra Leone after 30 November 1996. The use of child soldiers was common during the conflict in that country. Under the terms of statute of the SCSL, it has the jurisdiction to try persons who are alleged to have committed one (or more) of various international crimes, crimes against humanity, violations of article 3 common to the Geneva conventions and of 1997 additional protocol II or other serious violations of international humanitarian law – as well as certain criminal offences under the national laws of Sierra Leone¹⁶⁸. Mirroring the terms of the Rome statute in the context of armed conflicts not of an international character, article 4(c) of the Sierra Leone statute criminalizes the: 'Conscripting or enlisting of children under the age of fifteen years into armed forces or groups or using them to participate in hostilities'

Overall, the international community has recognized the need to criminalize acts which amount to the recruitment or use of children for participation in armed conflict. This is an important step, though the standards that have been specified relating to the minimum age limit in order to constitute a crime at international law must be reassessed and upgraded¹⁶⁹. With ongoing pressure from civil society and human rights groups, this will hopefully become an achievable goal.

¹⁶⁷ Prosecuting child soldiers for war crimes, Good or Bad Idea? (13 January 2001), online: inter press service

¹⁶⁸ Ilene Cohn, 'The protection of children and the Quest for truth and justice in Sierra Leone' (2001) 55 *INTL Affs* at 14.

¹⁶⁹ Articles 14 of Geneva Convention IV 1949

III.1.2. Additional protocols to the Geneva Convention 1949

The four Geneva conventions of the 1949 and their additional protocols coupled with international customary law makes up the body of international humanitarian law, from the Geneva conventions of the 1949, the fourth Geneva convention Relative to the protection of civilian persons in time of war provides protection to children under the auspices of civilian or non-combatants without any special provision on child sold. For example, under article 14 of Geneva convention IV, hospitals and safety zones and localities so organized as to protect from the effects of war, wounded, sick and aged persons, children under fifteen, expectant mothers and mothers of children under seven are persons protect as civilians, non-combatants. Geneva conventions IV under articles 14,17,23,24 and 132 articulates as special protection for children as civilians taking into account the assumption of vulnerability of children during warfare.¹⁷⁰

However, an advanced protection of child soldiers comes during the 1977 of the additional protocols to the Geneva Convention. Additional protocol 1 article 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 attained the age of fifteen years but who have not attained the age of eighteen years the parties to the conflict shall endeavor to give priority to those who are oldest¹⁷¹.

Though worded in a weak phraseology of obligation of states, AP 1 urge member states to take all feasible measures for children below fifteen years do not take a direct in hostilities. The all feasible measure phrase is an escaping mechanism for states to justify their encroachment on the prohibition on the basis of military necessities. It is implicated that children below fifteen are assumed vulnerable and needs protection on the convention that could emanate from the commission of crimes in warfare. However any children above fifteen years of age are beyond the assumption of vulnerable and can participate in a direct hostility¹⁷².

¹⁷⁰Ibidem

¹⁷¹ Article 77(2) of the Additional protocol 1977

¹⁷² Article 38(1)

III.1.3. UNCRC and its Optional Protocol

The UN convention on the rights of children, which is very comprehensive, regulates also about child soldiers. The language used under article 38 of the CRC is generally reflective of the provisions set out in the 1977 AP I and II and a gross reference is made to humanitarian laws (article38(!) of the CRC. Articles 38(2) is a direct verbatim of the AP I and II : states parties shall take all feasible measure to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities¹⁷³

Article 38(3) urges member states to give first priority of recruiting children older in age than those who are youngest placing fifteen years of age as a minimum threshold for participation in a direct hostility. The policy behind article 38 is twofold: the first policy is the image of children as irreparable damaged goods where prohibition to participate in direct hostilities is made of fifteen years of age. And the second policy is the image of children as faultless passive victims by allowing participation in a direct hostility above the minimum threshold of fifteen years of age but without placing any responsibility on the sides of child soldiers. In addition this, the CRC has crafted a mechanism whereby a child can be major through emancipation despite she/he is below eighteen years of age in fact as per Article I¹⁷⁴.

This is without regulating the consequences of emancipation for criminal responsibilities because the emancipation under the CRC enables children to perform juridical acts including participation in armed conflicts but without a consequences in case of violations of the rules of war, however, this is without denying the regulation of juvenile offender under article 40 of the CRC which is not specific to child soldiers. This article implicates that children could be held liable for criminal offences though there is no clear procedures to this effect¹⁷⁵.

This article provides that children are capable to commit crimes defeating the assumption of children as faultless passive victims. Article 40(3)(a) of the CRC urges states parties to establish a minimum age below which children shall be presumed not to have the capacity to infringe the penal law (*doli incapax*).and the committee on the rights of child, general comment number 10(2007). Children's rights in juvenile justice did not fix the minimum age of responsibility (MACR) but started that any MACR below the age of twelve is not

¹⁷³ Article 38(1)of the CRC

¹⁷⁴ Article 38 supra note 150

¹⁷⁵ Committee on the rights of child, general No.10 (2007): children's Rights in juvenile justice UN doc. CRC/C/GC/10,25 April 2007, para.32\

“intentionally acceptable”. The committee urges state parties to increase their lower MACR to the age of twelve years as the absolute minimum age and to continue to increase it to a higher age level¹⁷⁶.

And failure to fix the minimum age of criminal responsibility amount failure to discharge obligation owed in the international legal parlance. This article articulates that there is a minimum age of criminal responsibility where a child is at volition commits criminal offences. This is because article 12 of the CRC is intended in ensuring that children are engaged actors rather than passive beneficiaries¹⁵⁴ in demanding full enjoyment of their rights. Knowing the Inadequacies of the parent convention under article 38, an optional protocol on the involvement of children in armed conflict comes into its existence on 25th may 2000 to compliment the parent convention on children in armed conflicts. The optional protocol upgrades the minimum threshold of recruitment from 15to 18 for compulsory recruitment as per Article 2¹⁷⁷.

Yet, a voluntary recruitment is possible above the age of 15 to armed groups of governments as provided under article 3 (3(a-d)). Still exemptions are made to emancipated children, military schools (article3 (5) and compulsorily for indirect hostilities as per article1 of the optional protocol for children to participate in hostilities. this is without addressing the issues of criminal responsibilities of children in armed conflicts for potential war crimes¹⁷⁸. Optional Protocol needs an independent ratification to be found by it and in the majority of circumstances almost all countries are ratifying countries to the CRC.

III.1.4. ICC and Rome Statute

The ICC and Rome Statute were considered by many as a success to the international criminal law as means to end impunity. Furthermore, the Rome Statute brought an end for the fragmentation of international criminal law due to the continuous establishment of the ad hoc tribunals by the UNSC. The coming into existence of the Rome Statute was a dream for the

¹⁷⁶ Article 40(3) (a)of the CRC

¹⁷⁷ Art38,an optional protocol on the involvement of children in armed conflict 2000

¹⁷⁸ Idem, Art 40

UNSC because UNSC was under tribunal fatigue and unburnable cost of establishing ad hoc courts¹⁷⁹,

Article 26 of the Rome Statute clearly excludes the *rationae personae* below eighteen years of age following the simple assumption of children as faultless passive victims by assuming children for protection only. However, Article 8(2) (b) (xxvi) and Article 8(2) (e) (vii) of the Rome Statute provides the possibility of adolescents whereby they can participate in warfare below the age of fifteen years without constituting war crime¹⁸⁰.

The Rome Statute is not clear at what age the duty of States to prosecute applies to crimes listed under Article 5 of the Rome Statute when committed by adolescents. This helps to ascertain the extension of duties of States to prosecute children which the ICC Rome Statute surrenders the determination of age to respective member States.

The Rome Statute too imagined child soldiers as faultless passive victims requiring protection and provision only. This can be understood from the readings of the preamble to the Rome Statute stating “mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply schlock the conscience of humanity. Yet it also create anomaly by providing contradicting images under Article 26 that children are not in a position to commit crimes whereas enlisting, conscripting or using children are not in a position to commit crimes whereas enlisting, conscripting or using children from war above the age of fifteen is not a war crime¹⁸¹ .

The letter Articles under the war crimes imagined adolescents between the age of fifteen and eighteen as capable and fit for warfare and States are at liberty to conscript, enlist or use adolescents at this age group for armed conflicts. Article 8(2) (e) (xxvii) prohibits conscripting or enlisting children under the age of fifteen years into national armed forces or using them to participate actively in hostilities. What about armed groups and armed forces? However, and Article 8(2) (e) (vii) prohibits to both armed groups and armed forces without drawing distinction. An illustration on such will be made in the next subtopic¹⁸².

¹⁷⁹ Carsten Stahn and Goran Sluite, the emerging of the international Criminal Court introduction; from “infancy” to anticipation?- A review of the Court’s first practice, Martinus Nijhoff publishers, vol.48.2009, p.15

¹⁸⁰ Article 8(2) (e) (vii) of the Rome Statute 2002

¹⁸¹ Article 8(2) (b) (xxvi) and Article 8(2) (e) (vii) supra note 157

¹⁸² Idem Article 8(2) (b) (xxvi)

As per Article 121 of the Rome Statute, a mechanism for amendment was inserted for possible review. After the expiry of seven years from the entry into force of the Rome Statute, any Statute party may propose amendments. Taking into consideration this provision, a review conference was held in Kampala, Uganda in 31 May-11 June 2010. The review conference was heavily discussed about the definition of the crime of aggression. Though the USA is not a ratifying country to the ICC, most representatives were from USA in the Kampala conference. Any amendment made to Article 5, 6, 7 and 8 of the Rome Statute. There is a need for a Statute Party to accept the amendment so that the ICC could have jurisdiction. Discussions were circulating to delete amendment made to the Rome Statute must be ratified independently by States to bind by such amendments¹⁸³.

However, nothing was pondered about child soldiers and Article 26 cum Article and Article 8(2) (e) (xxvi) and Article 8(2) (e) (vii) of the Rome Statute together with other human rights Conventions like the Optional Protocol on the involvements of Children in Armed Conflicts and the CRC. We must wait seven years in the 2017 to see discussions on these Articles.

III.1.4.1. War Crime and Culpability of persons below the age of eighteen under the Rome Statute

War crime is one of the crimes under the substantive jurisdictions of the ICC Rome Statute. The crime has both general elements and special elements under different constituents. The general requirements include that war crimes must be committed as part of a plan or policy or as a part of a large scale commission as per Article 8 (1) of the Rome Statute during warfare.

The special element under Article 8(2) (b) (xxvi), which was delivered from Article 77 (2) of the API, constitutes the following elements¹⁸⁴:

- a) The perpetrator conscripted or enlisted one or more persons into the national armed forces or used one more persons to participate actively in hostilities.
- b) Such persons or persons were under the age of fifteen years
- c) The perpetrator knew or should have known that such person or persons were under the age of fifteen years
- d) The conduct took place in the context of and was associated with an international armed conflict.

¹⁸³ Article 124 of the Rome Statute

¹⁸⁴ Article 77(2) of the API

- e) The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Under the “*travaux preparatoires*” the word children was used but the Statute use the word person in order to avoid confusions with national legal systems because children may be defined 158 differently under national criminal systems. Hence, the easiest way is to have any person plus his/her age limit for considering the above elements falling under war crimes. Article 8(2) (e) (vii) of the Rome Statute is similar with the above Article’s element of crime with the exception to armed force or groups instead of national armed force. This offence was derived from Article 4(3) (c) of the AP II. As per Article 77 of the ICC Rome Statute the maximum punishment is life imprisonment. There is death penalty under the ICC Rome Statute¹⁸⁵.

The abolishment of death penalty under the Rome Statute is compatible with the urging provision of the ICCPR Article 6(5) for abolishment of the death penalty. Above this, death penalty cannot be passed to children below eighteen under the ICCPR. This is also in line with the United Nations Rules for the Protection of Juveniles.

Deprived of their Liberty which alternative to imprisonment can be made under Article 77(2) of the ICC Rome Statute, Hence, the penalties under the ICC Rome Statute could suit to adolescents committing war crimes if the ICC Rome Statute could assume jurisdiction over such individuals. But crimes, under the jurisdictions of the ICC, are without period of limitation or statute of limitation which shows how horrendous such crimes are¹⁸⁶.

The ICC Rome Statute has a provision where the ICC can use other applicable laws as a source to adjudicate cases before it. These include in hierarchal, the statute itself, applicable treaties and principles and rules of international law (including the established principles of international law of armed conflict). General principles of law derived by the court from national law and judicial precedents of the court as per Article 21 of the ICC Rome Statute. However, the application and interpretation of these laws by the court must be consistent with internationally recognized human rights principles.

¹⁸⁵ Article 6(5) of the ICCPR

¹⁸⁶ Article 21 of the ICC Rome Statute

III.1.4.2. Nature of State Obligations under the Rome Statute with Regard to Child Soldiers

The ICC Rome Statute cannot be implemented without the support from member States due to existence of sovereignty. Trading off and cooperation are in the heart of the implementation stage of the Rome Statute. As described by Judge Antonio Cassese that international courts as “a giant without arms and legs it needs artificial limbs to walk and work”. The ICC is not different in this instance that cooperation of member States of the court to walk effectively is since qua non for implementation. Hence, the court needs cooperation from States, NGOs, intergovernmental Organizations and Civil Societies¹⁸⁷.

However, the nature of State Obligations in the Rome Statute is not strong. An obligation of member States in the Rome Statute regarding child soldier’s perpetration is not regulated because of the assumption that children are faultless passive victims. Yet obligations are imposed upon member states not to enlist, conscript or use children below fifteen into their armed forces or armed groups. Furthermore, States are urged to prosecute, try and punish perpetrators of such offences under their criminal jurisdiction by making such offences part of their criminal law.

Failing this, for reasons of inability or unwillingness on the part of States, member States must cooperate to the ICC in prosecuting, trying and punishing such individuals to put an end to impunity.

The ICC Rome Statute Preamble provides the following: affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation. As it is said elsewhere hereinabove, the first duty to prosecute, try and punish is given to member States under their respective national criminal jurisdictions¹⁸⁸.

Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes, However, if States fails to prosecute an individual (whether an adolescent or adult who violates international criminal law). They may find

¹⁸⁷ Antonio Cassese, available at www.southernafricalitigationcentre.org/.../Cooperation-with-the-ICC.pdf

¹⁸⁸ Nienke Grossman, *Rehabilitation or Revenge: Prosecuting Child Soldiers for Human Rights Violations* Westlaw 38 Georgetown Journal of International Law 323, 2009, p5.

themselves in violations of international criminal law. And hence, States which fails to prosecute will be obligated to prosecute such individuals under international treaty and customary law. This failure amounts to inability or unwillingness on the part of States and the ICC will take the case. But the complementarity of the ICC will work only as regards to adults offenders, not to any person below eighteen at the time of the commission of the crime due to lack of jurisdiction¹⁸⁹.

III.2. Institutional mechanisms of criminal liability of child soldier

The implementation of national criminal law has shifted to national authorities. This shift is reflected in the right to a fair try as well as in the establishment of the Mechanism for specialized courts or chambers, which makes the referral of cases to international jurisdictions a priority in the completion of the criminal liability of child soldier remaining work.

Courts have to establish different institutions and give them the capacity to work in the free environment. This responsibility has been given to different institutions it has been mentioned above. The institutions are many like prosecution, Interpol, civil society organizations, international human rights, ICC, academia, and the media. This means that all of those institutions have to share experience and knowledge so as to strengthen operational, control, protect, prosecute and prevent from violation of criminal liability of child soldiers.

III.2.1 Interpretation of Conventions in case of Inconsistency on Child Soldiers

This question has been raised because the CRC and the Optional on one hand and the ICC Rome Statute on the other regulate child soldiers differently. The CRC and the Optional protocol articulate the possibility of adolescents to participate in armed conflicts above the age of fifteen and below the age of eighteen, whereas the ICC Rome Statute makes conscripting, enlisting or using children below fifteen as war crime. The ICC Rome Statute does not govern what will be the responsibilities of those individuals who are permitted to participate in armed conflicts using voluntary recruitment, anticipated children or military

¹⁸⁹ Ibidem

schools. If participation in armed conflicts is allowed in such circumstances, mechanisms, mechanism must be crafted as to the responsibilities sides of adolescent soldiers in warfare¹⁹⁰.

Hence, the treaties enacted under different imaginations of child soldiers, The CRC and the Optional Protocol imagined children into two categories: the first category is faultless passive victims due to their vulnerability (children below fifteen) and the second category is capable and fit for warfare and with restorative responsibilities. However, the ICC Rome Statute put itself in quandary by imagining children as faultless passive victims under Article 26 and Article 8(2) (e) (xxvi) and Article 8(2) (e) (vii) by making conscripting, enlisting or using children as war crimes without regulating what will be the scenario of the adolescents between the age of fifteen and eighteen. This will be worse if two or more countries are ratifying members to the three treaties bodies (CRC, Optional Protocol and the ICC Rome Statute) or alternatively some may be ratifying countries to either treaties and others may not¹⁹¹.

With these questions, a resort is made towards Vienna Convention on the Laws of Treaties (VCLTs) to explore the resolution if any contradicting treaties in order to achieve the full gamut of child soldiers' rights and responsibilities. Public international law in General, international human rights in particular is highly vulnerable to contradictions due to lack of central legislator, lack of comprehensive hierarchical order, lack of continuity and systematic congruency in international law making and fragmented legal order.

The rapidly increasing numbers of treaties has aggravated the dimension of the problem criminally¹⁹². rules aimed at solving inconsistencies or contradictions between treaties not only enhance legal certainty and clarity; by delimiting the rights and obligations of States Parties to various treaties, they also contribute to the observance of treaties and, therefore, to the observance of international human rights conventions in general and child rights conventions in particular¹⁹³.

¹⁹⁰ United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules) Adopted by General Assembly Resolution 45/110 of 14 December 1990.

¹⁹¹ Article 26 and Article 8(2) (e) (xxvi) and Article 8(2) (e) (vii)

¹⁹² Olivier Do and Kristern. S, Vienna Convention on the Law of Treaties: A commentary. Springer-Verlag Berlin Heidelberg.20012,p.506

¹⁹³ Ibidem

III.2.1.1. Obligation of States Parties

Article 41 of the CRC provides a possibility of applying more conducive laws of a state party or international law in force other than those provisions of the CRC itself if the laws of a state party or international law are more conducive to the realization of the rights of the child. As per article 120 of the Rome Statute, no reservation is permitted to the ICC Rome Statute¹⁹⁴.

Article 40 of the VCLTs may be relevant to my questions. Though there is no apparent contradiction between the Rome Statute and the CRC Optional Protocol, they show inconsistency and incompatibility in regards the rights of children. Article 30(1) of the VCLTs provides UN Charter as superior in hierarchy to other treaties bodies in interpreting treaties as supported by UN Charter Article 103. The very purpose of the CRC Optional Protocol is to better safeguard children's rights in warfare. While the very purpose of the ICC Rome Statute is to hold individuals accountability for violation of serious criminal offences under Article 5 of the Rome Statute and thereby to put an end to impunity¹⁹⁵.

Both conventions are not in position to live their purposes and thereby realize the purposes because the CRC Optional Protocol allows for voluntary recruitment, military schools and emancipated children to participate in active hostilities without strong responsibility on the sides of child soldiers. And the ICC Rome Statute allows adolescents to be conscripted, enlisted or used by national armed forces or groups without constituting war crime while it avoids jurisdiction over such adolescent soldiers. Rome Statute, However, the later prevails over the previous arguments is not tenable for various reasons. some scholars however, argued that the date of adoption should be taken in order to solve the inconsistency of successive treaties which, in this case, the ICC Rome Statute was adopted in 17 July 1998 and CRC Optional Protocol in 25 May 2000¹⁹⁶.

This inconsistency is partly the outcome of minimum dialogue or lack of dialogue between treaties which opens a wide array of incompatibilities creating fertile grounds for the violations of human rights in general and children's rights in particular. Member States will have valid defenses using either treaty to their advantages. The existence of impunity

¹⁹⁴ Article 41 of the CRC

¹⁹⁵ Article 5 of the Rome Statute

¹⁹⁶ ICC Rome Statute was adopted in 17 July 1998 and CRC Optional Protocol in 25 May 2000

reinforces the violations of human rights in general and children's rights in particular due to inconsistent treaties too.

III.2.1.2 Conventions of child rights

Article 41 of the CRC could be a better clause because it provides an opportunity for other international treaties to be applicable in case where such treaties are to the best of interest in realizing children's rights. However, the provisions of the ICC Rome Statute cannot be considered as conducive for children in realizing their right as the Rome Statute provides contradicting images over children creating a responsibility free age bracket¹⁹⁷.

There is no activity which needs more blameworthiness than involving in armed conflicts. Involvement in armed conflict is the highest responsibility an adult can do. And there is no means to categorize such person under the definitions of children as faultless passive victims. The ICC Rome Statute under Article 26 and Article 8(2) (e) (xxvi) and Article 8(2) (e) (vii) criminalizes conscripting, enlisting or using any person below fifteen for warfare. However, conscripting, enlisting or using children above the age of fifteen is not a war implicating that such persons could participate in armed conflicts as being adults. Yet there is no means to hold such persons accountable in case where they commit the abhorrent crimes of concern to the international community which affirmed that the most serious crimes of concern to the international community as a whole must not go unpunished¹⁹⁸.

One of the principles of international criminal law is the principle of legality where a person must be held accountable for actions or omissions which did not constitute as a crime under the Statute as per Article 22(1) of the Rome Statute (*Nullum crimen sine lege*). Hence, there must be a mechanism to hold accountable under the ICC Rome Statute for those adolescents who are recruited to involve in armed conflicts by the time they commit crimes under Article 5 of the Rome Statute¹⁹⁹.

Having a provision to hold such persons accountable in the ICC Rome Statute will reinforce the reintegration process for lasting peace among disputing societies.

¹⁹⁷ Article 41 supra note 171

¹⁹⁸ Article 26 and Article 8(2) (e) (xxvi) and Article 8(2) (e) (vii) of the Rome Statute

¹⁹⁹ Article 22(1) of the Rome Statute

III.2.2. Implications of Exclusion of Jurisdiction by the ICC on Child Soldiers

The International Criminal Court (ICC) is a judicial body established to prosecute individuals for the most serious international crimes, including genocide, crimes against humanity, war crimes, and the crime of aggression. The Rome Statute is the treaty that established the ICC and provides the legal framework for its jurisdiction and operations.

Regarding the implications of exclusion of jurisdiction by the ICC Rome Statute on child soldiers, it's important to note that the ICC generally has jurisdiction over crimes committed on the territory of states that are parties to the Rome Statute or by nationals of such states. However, there are certain limitations and exceptions to this jurisdiction.

The implications of exclusions of jurisdiction by the ICC Rome Statute over child soldiers can be pin down in the following manner²⁰⁰:

- Failure to have jurisdiction encourages members States to apt for conscripting , enlisting and using adolescents between the age of fifteen and eighteen in armed conflicts on the knowledge that these individuals will not be held accountable in the ICC, Because there is neither prohibition not responsibility on such involvements under the Rome Statute. This perversely, encourages the recruitment of children in this “responsibility free” age bracket. Hence, the Rome Statute sends entirely the wrong message to those who are involved in the recruitment of children to participate as child soldiers²⁰¹.
- Failure to have jurisdiction over adolescents between the age of fifteen and eighteen will make difficult reintegration, demobilization and rehabilitation processes which compel adolescent soldiers to apt for the continuation of soldiering.
- What is not clearly prohibited is permitted is the principle of international criminal law and hence, the Rome Statute impliedly allows adolescent soldiers between the age of fifteen and eighteen to participate in armed conflicts. This permission affects the

²⁰⁰ Ibidem

²⁰¹ Prosecutor v. Thomas Lubanga Dyilo, Decision on the Prosecutor’s Application for a Warrant of Arrest, Art. 58 No. ICC-01/04-01/06-8-US-Corr,10/02/2006, para.3, un sealed pursuant to Decision ICC-01/04-01/06-37 Dated on 17/03/2006

rights of children in armed conflicts. Article 8(2) (b) (xxvi) and Article 8(2) (e) (vii) cum Article 26 of the Rome Statute.

- The Rome Statute has completely avoided confronting the issue of the criminal responsibility of a child soldier due to the false images of children below eighteen as faultless passive victims by providing excessive protections. This clearly assures the continuation of impunity and the Rome Statute is not able to live to its promises where it intends to end to impunity as a major goal. The physical strength of children between the age of age of fifteen and eighteen is becoming immaterial for warfare due to the increase advancement of technology in providing lightweight and automatic weapons these days²⁰².
- The ICC Rome Statute did not provide a regulation on adolescents between the age of fifteen and eighteen when they involve in recruiting other children below the age of fifteen by the time member States are unable or unwilling to prosecute. The ICC Rome Statute is impliedly promotes impunity in such affairs. The case of Prosecutor v. Thomas Lubanga Dyilo is the first concerning the recruitment of children below fifteen years of age under the ICC. IN SUCH CASE, Lubanga is charged with only recruitment of children below the age of fifteen for war crimes. However, Lubanga has recruited many children above the age of fifteen and below eighteen compulsory, which is a free age bracket without responsibility. Yet, these individuals equally suffer in the war and must enjoy some protection of law. Therefore, there is a need to harness the interplay of the convention on the Rights of Children and the ICC Rome Statute for better protection, provision and participation of children's rights²⁰³.
- Due to the exclusion of jurisdiction to children below the age of eighteen by the ICC Rome Statute, ICC will lack competence at international level and then the international community will no longer trust such institution anymore. This affects the legitimacy of the Court.

²⁰² Supra note 178

²⁰³ Prosecutor v. Thomas Lubanga Dyilo, Decision on the Prosecutor's Application for a Warrant of Arrest, Art. 58 No. ICC-01/04-01/06-8-US-Corr,10/02/2006, para.3, un sealed pursuant to Decision ICC-01/04-01/06-37 Dated on 17/03/2006

The CRC Optional Protocol Article 3(4) prohibits armed groups, other than armed forces of government, totally from recruiting children below eighteen and there is no voluntarily recruitment of these groups in any case the Force Patriotique pour la Liberation du Congo (FPLC) and using them to participate actively in hostilities, that had occurred in the Ituri region in North-eastern Democratic Republic of the Congo (DRC). Above this, the ICC Prosecutor leaves out many war crime issues under Article 8 of the Rome Statute to Lubanga despite evidences justifying commissions of crimes like sexual violence and other ill-treatments caused by the child soldiers, or with any other crimes 176 which could possible the substantive jurisdictions of the ICC had there been jurisdiction for such persons.

International criminal law is governed by general principles of liability. In order to be found criminally liable, the elements of *actus reus* (criminal act, *mens rea* (intent to commit a criminal act) and grounds for excluding liability have to be examined. Concerning crimes committed by child soldiers, the *actus reus* may be quite easy to prove, assuming prosecutor an locate witnesses or other evidence.

GENERAL CONCLUSION AND RECOMMENDATIONS

Child soldiers are complex political individuals who can be considered both victims and perpetrators. If contrary to calls from most children's rights organizations, child soldiers who committed crimes are to be treated primarily as perpetrators, one should make sure that a child is indeed legally capable of committing crimes. The main issue when trying to answer the difficult question of child criminal liability is the *mens rea* requirement. Can a child have the intention to commit an international crime? No minimum age for criminal liability is determined by international law for the reason that no consensus can be reached. This age depends on the conception each state has of childhood and therefore, it widely differs from one country to another. Arguments in favor of the prosecution of child soldiers find support in the theories of punishment, in international human rights law and in domestic practices.

Moreover, international criminal law provides some openings towards this option. Arguments given against the prosecution of child soldiers are grounded in the idea that the best interests of the child should be respected due to minimum communication/dialogue between various human rights treaties, particularly the CRC Rome Statute, cases of emancipated children, military, schools and voluntarily enlistment under the Optional Protocol where children below eighteen are allowed to participate in armed conflicts are not covered by the ICC Rome Statute. Hence, the blanket/absolute immunity to children in the ICC Rome Statute regime, not to prosecute any person below the age of eighteen at the time of the commission of the crime, leaves children to remain in their problem, continuation of children having the status of a soldier. In addition to this, in the event prosecutions occur, children would benefit from defences provided by international criminal law.

Based on the above considerations, child soldiers should never be prosecuted under the age of fifteen. However, prosecution of children between fifteen and eighteen is not necessarily the best way to implement the right to reintegration promoted by the CRC. This is the reason why children between fifteen and eighteen could be held accountable in ways other than criminal prosecutions, for instance by using mechanisms of transitional justice other than criminal²⁰⁴.

²⁰⁴ Mark Drumbl, "Reimagining Child Soldiers in International Law and Policy" (Working Paper No 2011-17, Washington and Lee University School of Law, September 2011)

The first chapter focuses on defections and generalities and conceptual definitions of International law and deals with meaning of some words in details. Besides that, it divided into two parts such as definition of key concepts and theoretical frame work. Whereas the second chapter focuses on criminal liability of child soldiers in international law and deals with cases land mark relating to the responsibility of child soldiers.

The second chapter deals with international legal standards of ineffectiveness of criminal liability of child soldiers and new challenges that have emerged to fight against inequality of sentencing criminals. It focuses on landmark cases of local child soldiers who are liable to commit International crime and national crime regardless their age after comparing local and international law. Then, it explains how minimum age is an obstacle of criminal justice in international law.

Whereas the third chapter focuses on legal and institutional mechanisms that be taken in order to strengthen effectiveness of criminal responsibility of child soldiers and various safeguards need to be upheld to ensure that the best interests of child are maintained once a child soldier is held criminally responsible. It analyses the extent to which child soldiers can be prosecuted under domestic and international law, as well as the implementation of alternative measures to prosecution and proposes that a case-by-case approach should be considered when child soldiers are prosecuted for crimes under international law, thereby investigating and analyzing the often distinctive circumstances related to their crimes. And international law should be amended.

RECOMMENDATIONS

From the foregoing discussions and analysis; the recommendations can be pin down in the following manner:

- ❖ The states members of Rome Statute must either include persons between fifteen and eighteen ICC for prosecutions of juveniles or upgrade the crime conscripting, enlisting or using in armed conflicts to eighteen as war crime. Hence, the purpose of ending impunity can be realized in the ICC Rome Statute regime by complementing the national criminal systems. However, the inclusion of jurisdiction for persons between the age of fifteen and eighteen in the jurisdiction of the ICC is suitable in order to realize the purpose of the ICC Rome Statute. The accountability procedure for persons between the age of fifteen and eighteen must differ from adults. This must be done without forgetting the lasting solution-ending war, whether international or non-international armed conflicts, through difficult in practice.
- ❖ International treaties on the same subject matter must harness and design their legal frameworks to be comprehensive in order to better protect human rights in human rights in general and children's rights in particular. When human rights treaties are conducted, whether regional or international, there must be a dialogue among states for better communication and protection of human rights. For example, had there been a dialogue between the ICC, Rome Statute and the CRC and its Optional Protocol, there would have been better protection bestowed to children through better international standards that can lead the national criminal systems. Hence, proliferation of human rights treaties can bring about confusions and lacunae where states and individuals can escape from possible obligations and accountabilities respectively if dialogue does not exist.
- ❖ In order to better reintegrate and Rehabilitate former child soldiers, it is worth important to have a procedure to account such persons for it is nearly impossible to reintegrate and rehabilitate former child soldiers without justice. Hence, on the basis of their criminal culpability (mostly from fifteen to eighteen), accountability procedure must exist in the international criminal system in order to complement the national criminal systems when unwillingness, inability or voluntarily jurisdictional relinquishment is made by States to this effect.

- ❖ The ICC Rome Statute on recruitment, conscripting and using children in armed conflicts can be better benefit children if there are procedures of accountability in its jurisdiction protected from the conscription, enlistment or usage in armed conflicts (those persons between fifteen and eighteen years of age in the ICC Rome Statute). Doing this will reveal the reality and this reality will be addressed than ignoring and placing children in the horrific circumstance of armed conflicts.
- ❖ Managing conflicts and solving disputes amicably must be the primary objectives of the international community before the voluntary allowance of persons between fifteen and eighteen in armed conflicts however, in order to seek and assure the continuity of a sustainable peace, justice must be rendered pragmatically.
- ❖ Generally the ICC Rome Statute must introduce a legislative amendment in order to answer and satisfy the conditions of persons between fifteen and eighteen to prosecute such persons as long as a voluntary recruitment, military schools and emancipation exists in order to fight the purported agenda of ending impunity.
- ❖ The international legal framework, including the ICC Rome Statute, must establish a minimum age of establish a procedure of accountabilities in case where violations of human rights occurred by juveniles in armed conflicts when States remain unable or unwilling to prosecute, try and punish such commissions. This is the important for consistency and uniformity in the struggle against impunity to complement national criminal systems in order to realize the much ado of the international community to bring about universality of human rights in the international arena.
- ❖ The international criminal system neglects the rebel groups than imposing duties not to recruit, enlist or use any person below eighteen even voluntarily otherwise such groups will be criminalized by States. But the use of child soldiers by rebel groups is at increasing because the rebel groups are left to the mercy of sovereign States.
- ❖ Whoever recruits, enlists or uses child soldiers below the age of fifteen is punishable for war crimes under the ICC Rome Statute but those persons between fifteen and eighteen must be held accountable whether they are recruited, enlisted or used by rebel groups or government armed forces. Hence, the punishments of recruiters, enlisters and users of child soldiers should not be used to justify the absolute immunity of child soldiers who commit war crimes by themselves.

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