THE CRIMINAL ACCOUNTABILITY OF CHILD SOLDIERS IN THE LIGHT OF ARMED CONFLICT

A RESEARCH PAPER SUBMITTED TO THE FACULTY OF LAW OF THE UNIVERSITY OF THE WESTERN CAPE, IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE DEGREE OF MASTERS OF LAW

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28 OCTOBER 2009

Acknowledgements

Firstly, I would like to honour the Lord Jesus Christ who gave me overflowing endurance and enthusiasm to complete this research paper. Trust in the Lord and He will give you the desires of your heart (Psalm 37:4).

I would like to extend my thanks to my family who supported me during this research project.

I would like to extend my appreciation towards my supervisor, Prof. Lovell Fernandez, for his valuable guidance and patience.

I would also like to thank Prof. Gerhard Werle, Ms Gregoria Suarez, Ms Anél Terblanche and Mr. Paul Bornkamm who gave me valuable advice regarding this research paper.

Finally I would like to thank DAAD, for funding this masters program and the University of the Western Cape for generously accommodating us.

DECLARATION:

I declare that *THE CRIMINAL ACCOUNTABILITY OF CHILD SOLDIERS IN THE LIGHT OF ARMED CONFLICT* is my own work, that it has not been submitted for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

Student..... Date.....
Signed.....

Supervisor…….. Date……
Signed……..

LIST OF ABBREVIATIONS

CRC	Convention on the Rights of the Child
DRC	Democratic Republic of Congo
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
MACR	Minimum age for criminal responsibility
NGO's	Non-Governmental Organizations
TRC	Truth and Reconciliation Commission
SCSL	Special Court for Sierra Leone
UNICEF	United Nations Children's Fund
U.S.	United States

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1 The Child Soldier Dilemma

1.1 Background to the Research

It is estimated that there are over 300 000 child soldiers in the world today, with children serving in at least 11 armed conflicts across the world.[1] Child soldiers have served in recent and ongoing conflicts in Africa, Asia and Central and South America.[2] Although often seen as victims, child soldiers have committed atrocious crimes. The question arises whether these children could be held accountable for the aforementioned atrocities. The various statutes relating to children's rights fail to establish a comprehensible description of a child as a perpetrator.[3] International and domestic courts differ in their approach towards this sensitive situation.[4] The victims of mass atrocities demand justice, even if it means prosecuting child soldiers, while Non-Governmental Organizations (hereafter NGO's) strive to promote the protection of child soldiers, underlining the importance of the rehabilitation of these children. In an unprecedented course of action, the Special Court for Sierra Leone (hereafter SCSL) established criminal accountability of child soldiers under the age of 15, but the prosecution of a child soldier has yet to take place.[5] This research paper will examine the moral dilemma of the accountability of child soldiers, while investigating the possibilities of an invariable law regarding the responsibility of child soldiers. This study will firstly look at an assortment of international legislation outlining the accountability of child soldiers globally. Secondly, it will conduct a comparative

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1 Grossman N "Rehabilitation Or Revenge: Prosecuting Child Soldiers For Human Rights Violations" (2007) 38 *Georgetown Journal of International Law* 325. For a discussion on the number of child soldiers in Sierra Leone, see Custer M "Child Soldiers: The Special Court For Sierra Leone And The Lessons to be Learned From The United States" (2005) 19 *Temple International and Comparative Law Journal* 451. See also Freeland S "Child Soldiers and International Crimes – How Should International Law Be Applied?" (2005) 3 *New Zealand Journal of Public and International Law* 304.

2 Happold M "Child Soldiers: Victims or Perpetrators" (2008) 29 *University of La Verne Law Review* 61.

3 Fallah K "Perpetrators and Victims: Prosecuting Children for the Commission of International Crimes" (2006) 14 *African Journal of International and Comparative Law* 85.

4 See Chapter 2 for a discussion on the international and national instruments regarding the accountability of child soldiers, therefore indicating why courts differ in their approach.

5 Custer *op cit* 449.

study of states where the accountability of child soldiers has been apparent. The study will also deal with the mental characteristics attached to the character of the child soldier as a victim or as a perpetrator. Finally, the paper will conclude with a set of recommendations pertaining to the rehabilitation and reintegration of the child soldier.

1.2 Research Question

To what extent are child soldiers accountable for atrocities in times of armed conflicts under international criminal law?

It is imperative to establish whether child soldiers are accountable under international and national law. The study is confined to the responsibility of child soldiers in armed conflict. The author of this research paper will look at international and national instruments regulating the accountability of child soldiers. It is important to clarify the position concerning the accountability of child soldiers under international and national law. As it stands, the position regarding the accountability of child soldiers under international law seems unclear. The adequacy of these instruments will be analysed critically to establish whether child soldiers can be criminally liable. The participation of children in armed conflict poses the question of accountability subsequent to a war.[6] Some hold the view that, irrespective of age, any child involved in the commission of war crimes should be tried and punished.[7] On the other hand, there are those who prefer that child soldiers are susceptible to rehabilitation rather than retribution.[8] Child soldiers either join a militia by force or as volunteers.[9] The question arises whether child soldiers could be criminally liable if they were to be forced by a militia or military group. There is also uncertainty regarding the minimum age of the child soldier who is interpreted as an offender. National and

6 Musila G "Challenges in establishing the accountability of child soldiers for human rights violations: Restorative justice as an option" (2005) 5 *African Human Rights Law Journal* 322.
7 *Ibid*.
8 *Ibid*.
9 Fallah *op cit* 92.

international instruments differ regarding the minimum age of child soldiers.[10] This paper will attempt to discuss the above–mentioned interpretations comprehensively, hereby attempting to clarify whether child soldiers are accountable under international criminal law. International instruments on the rights of the child, as well as the applicable criminal juvenile law of domestic courts, will constitute a crucial aspect of the study.

1.3 Significance of the Research

The present international law regarding the accountability of child soldiers is vague and inconclusive. Article 26 of the International Criminal Court Statute (hereafter the Rome Statute) provides that the ICC will not prosecute persons under the age of 18.[11] The ICC Statute and the CRC makes provision for the criminal accountability for the use of child soldiers, but neither instrument deals with the criminal accountability of child soldiers themselves.[12] The significance of the research lies in the fact that it will contribute towards providing more clarity on the issue of the accountability of child soldiers and the formulation of age criteria in prohibiting the prosecution of child soldiers under that minimum age.

1.4 Research Methodology

This research paper will be based mainly on an analysis of: (a) the primary sources, such as the pertinent international treaties and conventions, as well as the national legislation and case law of the respective countries insofar as these relate to the accountability of juveniles under the criminal law; and (b) secondary sources, which will comprise mainly academic books dealing with the criminal liability of children, the relevant law journal articles, and the electronic resources on the subject. The study will therefore have a strong comparative law aspect.

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10 Happold *op cit* 73.

11 The Rome Statute of the International Criminal Court 1998, A/CONF. 183/9. The Statute entered into force on 1 July 2002.

12 Happold *op cit* 67.

2 International Criminal Accountability of Child Soldiers

2.1 Introduction

There are numerous international and national instruments aimed at protecting the rights of a child during armed conflict. However, prior to 1977, international law did not deal directly with the issue of children participating in armed conflict.[13] When dealing with children's rights one has to look firstly at the Convention on the Rights of the Child of 1989 (hereafter CRC).[14] It is the cornerstone for the rights of children and embodies various rules and regulations regarding children. However, the Convention falls short in clarifying the position on the accountability of the child soldiers themselves. This is a critical weakness since child soldiers across the world fear the reality of prosecution. It is imperative that international organs must strive to create a new legal framework regarding the matter of the age of criminality of child soldiers in particular, thereby protecting the fragile rights of children fighting in armed conflicts daily.

2.2 Additional Protocol I to the Geneva Conventions of 1977

Additional Protocol I to the Geneva Conventions deals with armed conflict, while Additional Protocol II deals with non-international armed conflict.[15] Additional Protocol I was the initial international instrument governing the criminal responsibility of children. Article 77(4) and (5) of Additional Protocol I provide that children who commit offences during armed conflict are accountable. Interestingly, Additional Protocol I does not include a minimum age.[16] Moreover,

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13 Freeland *op cit* 309.

14 Convention on the Rights of the Child, 1989. The Convention entered into force on 2 September 1990.

15 Protocol Additional to the Geneva Convention of August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 1125 UNTS 3 (hereafter Additional Protocol I). The protocol entered into force on 7 December 1979. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) 8 June 1977, 1125 UNTS 609.

16 International Committee on the Red Cross (2009) Additional Protocol I 1977-Commentary http://www,icrc.org/ihl.nsf/COM/470-750099?OpenDocument (accessed 7 October 2009).

there is no precise definition of the term children.[17] However, the age limit of 15 years, which is stated in Article 77(2) and (3), provides a reasonable age for the definition of the age of the child.[18] Some countries have adopted a lower age than 15 years.[19] Nevertheless, within the meaning of this Protocol, persons below the age of 15 years should be classified as children.[20]

Article 77 (4) states that it is reasonable to assume that children under the age of 15 years, should be detained separately from adults.[21] National courts must decide whether persons between the ages of 16 and 18 should be separately detained.[22] In some countries, punitive sanctions may not be imposed on individuals who have not reached a specific age.[23] The International Committee of the Red Cross declared that "In many States, even if the age of criminal responsibility is below the general age of majority, youth constitutes a mitigating factor, and penalties are reduced."[24]

Juvenile courts are occasionally required by national courts to adjudge cases involving children.[25] Article 77(5) provides that the death penalty "shall not be executed on persons who have not attained the age of 18 years."[26] The International Committee of the Red Cross has expressed its hope "that this provision will not be abused, especially by urging young people under eighteen to perform atrocious acts which would not carry the death penalty."[27] Interestingly, one delegate wished to add a sixth paragraph to Article 77.[28] This paragraph entailed the prohibition of criminal prosecution and conviction of children too

17 *Ibid*.
18 *Ibid*.
19 *Ibid*.
20 *Ibid*.
21 *Ibid*.
22 *Ibid*.
23 *Ibid*.
24 *Ibid*.
25 *Ibid*.
26 Article 77(5) of Additional Protocol I to the Geneva Conventions.
27 *Ibid*.
28 *Ibid*.

young to understand the consequences of the offence.[29] According to a general principle of criminal law, "a person cannot be convicted of a criminal offence if he was not able to understand the consequences of that offence."[30] However, national courts are required to decide whether children should be prosecuted in circumstances where they were unable to understand the consequences of the offence.[31] Unfortunately, Additional Protocol I fails to establish a comprehensive provision regarding the accountability of child soldiers, while it is left to national legislation to fill in the voids.

2.3 Convention on the Rights of the Child

The CRC is one of the most comprehensive and unsurpassed treaties aimed at protecting children's rights.[32] Arts and Popovski are of the view that "[t]he CRC is widely embraced as a solid and universal statement of the rights and needs of children in all parts of the world".[33] One of the goals of the CRC is to repair psychological scars and to reintegrate child victims.[34] With regard to child soldiers, the treaty focuses on perpetrators who recruit children for combat.[35] No provisions, however, explicitly address the situation where a child soldier is accused of participating in an offence.[36] Article 40(3)(a) of the CRC provides that States Parties to the Convention shall seek to determine a minimum age below which children will not be held accountable for their acts. The Convention requires that each State should establish a minimum age of criminal

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29 *Ibid*.

30 International Committee on the Red Cross (2009) Additional Protocol I 1977-Commentary http://www,icrc.org/ihl.nsf/COM/470-750099?OpenDocument (accessed 7 October 2009).

31 *Ibid*.

32 Iacono M "The Child Soldiers Of Sierra Leone: Are They Accountable For Their Actions In War?" (2003) 26 *Suffolk Transnational Law Review* 460. The CRC has been ratified by 190 countries. Only Somalia and the United Sates of America have not ratified the treaty.

33 Arts K and Popovski V *International Criminal Accountability and the Rights of Children* (2006) 10.

34 Article 39 of the CRC.

35 Iacono *op cit* 461.

36 *Ibid*.

responsibility, while it is left to each State to decide what that age should be.[37] The relevant provisions of the United Nations Standard Minimum Rules on the Administration of Juvenile Justice[38] (hereafter the Beijing Rules) provide more insight.[39] The rules and the commentary thereto are not binding, They nevertheless signify the shared thinking of States on the issue of criminality.[40]

Rule 2.2 of the Beijing Rules provides that age limits will depend on the respective legal system, thus fully respecting the economical, social, political, cultural and legal systems of Member States.[41] This means that various ages fall under the definition of a juvenile, ranging from 7 years to 18 years and even above.[42] Rule 4 states that "the age of criminality should not be too low an age limit, furthermore bearing in mind the facts of mental, emotional and intellectual maturity."[43]

Article 77(2) of the Additional Protocol I provides that if a child below 15 is too young to fight, he or she should also be considered to be too young to be held criminally responsible for its actions.[44] It is submitted that the above-mentioned treaties fail to establish a clear and legitimate minimum age for criminal responsibility. What is of grave concern is that the CRC, the nucleus of children's rights, falls short of creating a sanctioned provision specifically regarding the accountability of child soldiers in the light of armed conflict.

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37 Happold M (2005) "THE AGE OF CRIMINAL RESPONSIBILITY IN INTERNATIONAL CRIMINAL LAW" 3 http://ssrn.com/abstract=934567 (accessed 22 May 2009).

38 United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") G.A. res. 40/33, 29 November 1985.

39 Happold M (2005) 3 http://ssrn.com/abstract=934567 (accessed 22 May 2009).

40 *Ibid*.

41 Rule 2.2 of the Beijing Rules.

42 Grossman *op cit* 340.

43 Rule 4.1 of the Beijing Rules.

44 Happold M (2005) 3 http://ssrn.com/abstract=934567 (accessed 22 May 2009).

2.4 African Charter on the Rights and Welfare of the Child

The African Charter on the Rights and Welfare of the Child (hereafter African Charter) defines every child as "a human being below the age of 18 years."[45] Article 22 (3) of the African Charter provides that "states are required to take all feasible measures to ensure the protection and care of children who are affected by armed conflicts."[46] The aforementioned provisions stand parallel to the Optional Protocol to the CRC on the Involvement of Children in Armed Conflict[47] (hereafter Optional Protocol to the CRC), by virtue of the fact that these provisions establish the minimum age requirement at the age of 18 years, and require each state to take feasible measures concerning the protection of children in armed conflict.[48]

2.5 Optional Protocol to the CRC

The Optional Protocol to the CRC amended the age of direct participation in hostilities to 18 years,[49] provided that "States Parties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities."[50] This implies that a child soldier below the age of 18 cannot be held accountable for crimes committed throughout the armed conflict. Article 3(1) of the Optional Protocol to the CRC provides that "States Parties shall raise their minimum age for the voluntary recruitment of persons into their national armed forces from that set out

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45 Article 2 of the African Charter. The African Charter on the Rights and Welfare of the Child OAU Doc. CAB/LEG/24.9/49 (1990). The African Charter entered into force only on 29 November 1990, 9 years after its adoption. Article 17(4) of the African Charter provides for a minimum age, below which the child will not have the capacity to infringe the relevant penal law. The specific age is unfortunately not set out in Article 17(4).

46 Article 23 of the African Charter. While protecting the rights of the child, each state is also obliged to act under the rules of international humanitarian law, according to Article 23(3).

47 See Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, G.A. resolution 54/263, 25 May 2000. The Optional Protocol to the CRC entered into force on 12 February 2002.

48 See Article 1 and 3 of the Optional Protocol to the CRC.

49 Grossman *op cit* 331.

50 See Article 1 of the Optional Protocol to the CRC.

in Article 38, Paragraph 3 of the CRC, taking into account of the principles contained in that article."[51]

Although a child beneath the age of 18 may not be compulsorily drafted into an organisation's armed forces, a child may still volunteer to join the forces, as long as he or she does not participate directly in hostilities.[52] Moreover, since the Optional Protocol to the CRC precludes States Parties from allowing children under 18 to participate in direct hostilities, they should be protected from criminal accountability if they are used in armed conflict.[53] The Optional Protocol to the CRC expresses an emerging consensus that children aged 15 to 18 should also be protected against criminal accountability.[54] The Optional Protocol, like the CRC, gives an inconclusive account concerning the criminal accountability of child soldiers themselves. The Optional Protocol to the CRC, however, raises the minimum age for accountability from 15 to 18, which is a fundamental step forward in protecting the rights of the child soldier.

2.6 Rome Statute of the International Criminal Court

The subject of criminal responsibility was addressed in the Rome Statute, but not in any enlightening manner.[55] Two important principles were discussed at the Rome Conference.[56] They were to ensure the greatest protection of children's rights and to end impunity for perpetrators.[57] Many delegations argued in favour of the standard used in their respective countries, however, these ages varied

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51 See Article 3 of the Optional Protocol to the CRC. The age set out in Article 38 (3) of the CRC is 15.

52 Grossman *op cit* 332. See Article 2 of the Optional Protocol to the CRC for the issue of compulsory recruitment.

53 *Ibid* 342.

54 *Ibid*.

55 Happold M (2005) 6 http://ssrn.com/abstract=934567 (accessed 22 May 2009).

56 Holmes J T "The Protection of Children's Rights in the Statute of the International Criminal Court" in Politi M and Nesi G (eds) *The Rome Statute of the International Criminal Court: A Challenge to Impunity* (2005) 121.

57 *Ibid*.

from state to state.[58] The delegations could not agree on a specific age of criminal accountability.[59] Nevertheless, several delegations contended that the minimum age of criminal responsibility could not be established at 18.[60] They constructed their argument on the fact that thousands of children are responsible for crimes worldwide.[61] To prosecute children below 18 would not be conceivable, considering the obligations imposed on states to protect children's rights.

Finally, the question of criminal responsibility was separated from the issue of the jurisdiction of the ICC.[62] Article 26 of the Rome Statute provides that "[t]he Court shall have no jurisdiction over any person who was under the age of eighteen at the time of the alleged commission of the offence."[63] The jurisdiction of the International Criminal Court (hereafter ICC) is thus excluded.[64] Subsequently it appeared that one of the reasons why the ICC excluded the jurisdiction was to avoid arguments as to what the minimum age of responsibility for international crimes should be.[65] Furthermore, it would have been extremely difficult to develop a separate system of criminal justice for the ICC.[66] International human rights instruments set clear standards concerning juvenile justice.[67] If the ICC would assume jurisdiction, it would have to establish a criminal justice system for juveniles, as well as a penal regime.[68]

58 *Ibid*.
59 *Ibid*.
60 *Ibid*.
61 *Ibid*.
62 *Ibid* 122.
63 Article 26 of the Rome Statute.
64 Clark R S and Triffterer O "Article 26: exclusion of jurisdiction over persons under the age of eighteen" in Triffterer O (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (2008) 495.
65 *Ibid op cit* 497.
66 Holmes *op cit* 122.
67 *Ibid*.
68 *Ibid*.

Many believe that the use of children in armed conflict constitutes a violation of their rights.[69] Prosecution of child soldiers would in effect victimise children twice.[70] Nonetheless, the treatment of child soldiers under the age of 18 years is left to national courts to determine.[71] However, national courts are not always willing to take sufficient care of child combatants.[72] National courts in war-torn societies are often unequipped to deal with international juvenile justice.[73] It is submitted that States prosecute children only when this is done in accordance with the CRC, the Beijing Rules and the International Covenant on Civil and Political Rights (hereafter ICCPR).[74] The ICC Statute therefore, needs to include a provision regarding the accountability of child soldiers.

2.7 Statute of the Special Court for Sierra Leone

The Statute for the Special Court for Sierra Leone (hereafter Special Court Statute) contains a very significant provision regarding the accountability of child soldiers.[75] Article 7 of the Special Court Statute provides that children between the ages of 15 and 18 can be held criminally accountable if they committed a crime under the Statute.[76] The International Criminal Tribunals of the former Yugoslavia (hereafter ICTY) and Rwanda (hereafter ICTR) did not include any provisions regulating the age of criminal responsibility, and neither tribunal prosecuted any person below the age of 18.[77]

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69 *Ibid*.
70 *Ibid*.
71 Clark and Triffterer *op cit* 495.
72 Fallah *op cit* 96.
73 *Ibid*.
74 Fallah *op cit* 96. Article 10(2)(b) of the ICCPR provides that "accused juveniles are to be separated from adults and brought to trial as speedily as possible." The ICCPR entered into force on 23 March 1976.
75 Statute of the Special Court for Sierra Leone U.N. SCOR, U.N. Doc S/2002/246.
76 Article 7 of the Special Court Statute.
77 Happold M (2005) 6 http://ssrn.com/abstract=934567 (accessed 22 May 2009).

It was not until 2002 that the Rwandan Government decided to prosecute children accused of committing heinous crimes in the Rwandan genocide.[78] As discussed above, the ICC avoided arguments as to what the minimum age of criminal responsibility should be.[79] The Special Court Statute did not avoid this problem. For the duration of the conflict in Sierra Leone, child soldiers were involved in heinous crimes that led to thousands of civilians being killed.[80] The child soldiers who were seen by the commanders as manipulable and impressionable were assigned to some of the most brutal missions in the war.[81] Victims of the deceased longed for justice to transpire, following the atrocious crimes that shook the nation of Sierra Leone. This inevitably meant that child soldiers as young as eight years faced the retributive desire of justice, on the part of the victims.

Ironically, the child soldiers were victims themselves, seeing that child soldiers were often drugged or forced into armed conflicts by the militia. Furthermore, for some of the children, being taken away from their homes to join a militia exemplified the only way of survival. In his report on the establishment of a Special Court for Sierra Leone, the then United Nations Secretary-General, Kofi Annan, acknowledged the difficulty of prosecuting child soldiers for war crimes and crimes against humanity, given their dual status as victims and perpetrators.[82] The Secretary-General expressed himself thus:

> The question of child prosecution was discussed at length with the Government of Sierra Leone both in New York and in Freetown. It was raised with all the interlocutors of the United Nations team; the members of the judiciary, members of the legal profession and the Ombudsman, and was vigorously debated with members of civil society, non-governmental organizations and institutions actively engaged in child-care and rehabilitation programmes. The Government of Sierra Leone and representatives of Sierra Leone civil society clearly wish to see a process of judicial accountability for child combatants presumed responsible for the crimes falling within the jurisdiction of the Court.

78 See Chapter 3.2 for a discussion on this matter.
79 See Chapter 2.5.
80 Happold M (2005) 6 http://ssrn.com/abstract=934567 (accessed 22 May 2009).
81 Custer *op cit* 451. See Custer *op cit* 451 for an overview of the war in Sierra Leone.
82 Happold M (2005) 6 http://ssrn.com/abstract=934567 (accessed 22 May 2009)

> It is said that the people of Sierra Leone would not look kindly upon a court, which failed to bring to justice children who committed crimes of that nature and spared them the judicial process of accountability. The international non-governmental organizations responsible for child-care and rehabilitation programmes, together with some of their national counterparts, however, were unanimous in their objections to any kind of judicial accountability for children below 18 years of age for fear that such a process would take place and risk the entire rehabilitation programme so painstakingly achieved.[83]

Subsequently the Special Court Statute fixed the age of minimum criminal responsibility at 15.[84] Why the age was fixed at 15 was not made clear, yet it seemed that the intention was to mirror the provisions of both the Additional Protocols and CRC, on the ground that if children under 15 are too young to be recruited as child soldiers, they must be too young to be held responsible for their actions.[85]

In November 2003, the SCSL Chief Prosecutor, David Crane, announced that the Court would not indict any child responsible for crimes against humanity committed during the war.[86] Crane based his decision on the interpretation that children are victims themselves, and that they require rehabilitation and reintegration into their respective communities.[87] Rehabilitation and reintegration highlights an integral part of the overall psychological alleviation of the disheartened child soldier. The SCSL has a limited budget, which affects the objectives of the court. Prosecuting child soldiers could be a lengthy process due to a lack of evidence and witnesses. Prosecuting children for international crimes would be a first in international criminal law history. The children's emotional condition would also be an aspect that contributes to a long trial.

The budgetary constraints of the SCSL do not suffice to enable it to administer extended court proceedings. Moreover, Article 1 of the Special Court Statute

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83 Report of the Secretary General on the establishment of a Special Court for Sierra Leone, UN doc. S/2000/915, 4 October 2000, paras. 34-35.

84 Article 7 of the Special Court Statute.

85 Happold M (2005) 7 http://ssrn.com/abstract=934567 (accessed 22 May 2009).

86 *Ibid*.

87 Happold M (2005) 7 http://ssrn.com/abstract=934567 (accessed 22 May 2009). See Chapter 4 below for a discussion on rehabilitation and reintegration of child soldiers.

declares that the Court will prosecute those "who bear the greatest responsibility."[88] Child soldiers who committed serious crimes would not bear the greatest responsibility. The persons who used the children as soldiers and those who commanded the armed forces, bear the greatest responsibility. When one takes into account the fact that child soldiers are victims themselves, they can certainly not be said to bear the greatest responsibility. Chapter 4 of this study will examine the mental elements pertaining to offences committed by child soldiers.

2.8 General Comment No. 10

General Comment No. 10 to the CRC (hereafter General Comment) was adopted on 25 April 2007. It analyses children's rights in juvenile justice.[89] The General Comment focuses on Article 37 and Article 40 of the CRC regarding juvenile justice. The reports submitted by States Parties regarding the minimum age requirement represent a wide range of minimum ages of criminal responsibility.[90] The age limits range from a very low seven or eight to a higher recommended 14 or 16.[91] Whilst using these lower levels of minimum ages, some States Parties require a maturity element when prosecuting children.[92] It is left to the judge to decide if the child possesses the required maturity to be criminally responsible, which is often confusing at times, and which may result in discriminating practices.[93] In the light of this extensive range of legislative measuring rods fixing minimum ages for criminal responsibility, the Committee on the Rights of a Child was of the view that there was a need for clear guidance regarding the minimum age for criminal responsibility (hereafter MACR).[94]

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88 Article 1 of the Special Court Statute.
89 Convention on the Rights of the Child General Comment No. 10 (2007): Children's Rights in Juvenile Justice, 25 April 2007, CRC/C/GC/10.
90 General Comment para 30.
91 *Ibid*.
92 *Ibid*.
93 *Ibid*.
94 *Ibid*.

Article 40(3) of the CRC requires that States Parties must establish a minimum age below which children shall not be criminally accountable.[95] This implies that if a child under the MACR infringes the criminal law of a States Party, that child shall not be criminally accountable.[96] Furthermore when prosecuting children, the criminal law procedures must comply fully with the principles and provisions of the CRC.[97] The General Comment then focuses on Rule 4 of the Beijing Rules, which recommends that the MACR should not be fixed at too low an age limit.[98] Rule 4 is vague in its recommendation and requires a comprehensible description regarding "too low an age limit." The General Comment achieves some clarity regarding Rule 4 by establishing the MACR at 12 years.[99] States Parties with an MACR higher than 12 should not lower their age limits to 12.[100] The General Comment finally sheds some light on the matter by clearly identifying the MACR.

2.9 Conclusion

It is submitted that the General Comment enlightens the vague regulations of the CRC and the Beijing Rules regarding the MACR. However it fails to clarify the situation regarding the accountability of child soldiers in armed conflict, because child soldiers commit crimes in differing circumstances than children not participating in a war. Arts and Popovski are of the opinion that "the Special Court for Sierra Leone and the International Criminal Court clearly stand out in their efforts to give due attention to the role and rights of children."[101]

In an unprecedented step, the Special Court established that children between the ages of 15 and 18 could be criminally accountable before the Court. The Special Court has, nevertheless, stated that it will not prosecute a juvenile

95 Article 40(3) of the CRC.
96 General Comment para 31.
97 *Ibid*.
98 Rule 4 of the Beijing Rules.
99 General Comment para 32.
100 *Ibid*.
101 Arts K and Popovski V *op cit* 12.

soldier. The ICC Statute established that "[t]he Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime."[102] Moreover, Article 77 of the Additional Protocol I establishes accountability without any reference to a concrete minimum age. However, it is submitted that international instruments are insufficient in establishing a legal framework, encompassing a concrete MACR and the accountability of child soldiers themselves. Thus, giving States Parties the leeway to prosecute child soldiers who are themselves victims, not perpetrators.

The Committee on the Rights of the Child in particular, needs to consider amending the current provisions of the CRC regarding MACR and include a provision prohibiting the accountability of child soldiers below a specific age. If this does not happen, future prosecutions of child soldiers may possibly expand into a worldwide phenomenon.

[102] Article 26 of the ICC Statute.

3 The Accountability of Child Soldiers in Various Countries in Armed Conflict: A Comparative Study

3.1 Introduction

Nations differ in dealing with the sensitive issue of the accountability of child soldiers. International Instruments like the CRC provide standards to which States Parties should adhere. Countries often adapt a different route than that set out in an international instrument, because of internal strife or the existence of popular vigilante groups. What many Rwandan citizens and victims of the genocide would say about this is summed up in the following statement:

> If a child was able to kill, if a child was able to discriminate between two ethnic groups, to decide who was Hutu moderate and who wasn't, and was able to carry out murder in that way, why should that child be considered differently from an adult? And therefore the punishment should be the same.[103]

This study now turns to look at the accountability of child soldiers with regard to three countries, namely Rwanda, the Democratic Republic of Congo (hereafter DRC) and the United States (hereafter U.S.). The fact of the matter is that national legislation and domestic courts depicts a vital role in the implementation of the objectives of international instruments, by enforcing the provisions set out in the international instruments.

3.2 Rwanda

In Rwanda, children under the age of 14 are not criminally responsible for their actions.[104] However due to the genocide victims' desire for justice, child soldiers have been detained and arrested for their participation in the genocide.[105] In the

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103 Hackel J (1995) "When Kids Commit Genocide" http://www.csmonitor.com/1995/1205/05062.html (accessed on 14 August 2009).

104 Reis C "Trying The Future, Avenging The Past: The Implications Of prosecuting Children For Participating In Internal Armed Conflict" (1997) 28 *Columbia Human Rights Law Review* 630.

105 *Ibid*.

1994 genocide, 4 500 out of the 120 000 people detained, were children under the age of 18, who killed or committed serious crimes during the genocide.[106] After the conflict a total of 1 741 children, 550 of whom were under 15, were being held in detention in appalling conditions.[107] Only 20 percent of the judiciary survived the genocide, making it simply impossible for them to process the thousands of cases of children who were detained afterwards.[108] The ICTR was from the outset, never equipped to deal with the prosecution of child soldiers.[109] This is because the Statute of the ICTR[110] made no provision at all for the criminal accountability of children.[111]

In January 2003, all of the "genocide minors" were released from detention.[112] However, "only those who spent the maximum possible sentence in pre-trial detention were eligible to be freed."[113] Over a 1 000 detainees were released in 2003, while another 2 000 were released by the end of March 2007.[114] At present, it is unclear whether any child soldiers are still kept in detention.[115] There are also no reported cases of child soldiers in Rwanda. However, Rwandan child soldiers have been participating in armed conflict in the DRC.[116] By the end of 2007 about 15 300 of the 15 800 Rwandese child soldiers in the DRC were repatriated to Rwanda.[117] Under Rwandan law, military service is

106 COALITION TO STOP THE USE OF CHILD SOLDIERS (2008) "CHILD SOLDIERS Global Report 2008" http://www.childsoldiersglobalreport.org/files/country_pdfs/FINAL_2008_Global_Report.pdf (accessed 22 May 2009).
107 Grossman *op cit* 350.
108 *Ibid*.
109 Fallah *op cit* 87.
110 United Nations Security Council, Statute of the International Criminal Tribunal for Rwanda, 8 November 1994.
111 *Ibid*.
112 COALITION TO STOP THE USE OF CHILD SOLDIERS (2008) http://www.childsoldiersglobalreport.org/files/country_pdfs/FINAL_2008_Global_Report.pdf (accessed 22 May 2009).
113 *Ibid*.
114 *Ibid*.
115 *Ibid*.
116 COALITION TO STOP THE USE OF CHILD SOLDIERS (2008) http://www.childsoldiersglobalreport.org/files/country_pdfs/FINAL_2008_Global_Report.pdf (accessed 22 May 2009).
117 *Ibid*.

prohibited for children under the age 18 years[118] Article 74 of the Law on Crimes against Humanity and Genocide states "that children under the age of 14, at the time of the crime, shall not be held legally responsible for their actions or detained, and that children over 14 but under 18 should receive reduced penalties."[119] There is a tacit understanding that the ICTR is unable to deal with the huge amount of genocide cases, as a result of a limited time period and various other reasons. Shema explains that "[i]n an attempt to quicken the trial process and dispense justice to a country that badly needs it, Rwanda has resurrected its age-old community based approach in resolving disputes and allowing reconciliatory justice,"[120] more familiarly known as gacaca courts. The maximum penalty for juveniles was reduced as a result of a 2007 amendment to a law regulating gacaca proceedings.[121] The penalties were reduced for serious offences such as genocide, from 12 to six years, and from five years to six months imprisonment.[122] Nonetheless, "gacaca courts were widely accused of faulty procedure, judicial corruption and false accusations."[123]

Child soldiers have been effectively held accountable for their offences, in a country that is still recovering from the genocide that occurred 15 years ago. Countries elsewhere could benefit hugely from the Rwandan experience when it comes to dealing with the issue of whether or not child soldiers should be held criminally accountable.

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118 *Ibid*.
119 *Ibid*.
120 Shema RC (2004) "GACACA JURISDICTION IN RWANDA, HOPE AND HOPELESS" http:///www.author-me.com/nonfiction/gacacajurisdictions.htm (accessed 22 October 2009).
121 *Ibid*. *No*. 13/2008 of 19/05/2007 Organic Law modifying and complementing Organic Law no. 16/2004 of 19/6/2004 establishing the organisation, competence and functioning of Gacaca Courts charged with prosecuting and trying the perpetrators of the crime of genocide and other crimes against humanity, committed between October 1, 1990 and December 31, 1994.
122 *Ibid*.
123 *Ibid*.

3.3 United States

There is currently no armed conflict in the U.S. However the U.S. Army was and is still involved in the war in Iraq and Afghanistan. In late 2002, Omar Khadr (hereafter Khadr) a Canadian citizen, whose father was a known Al-Qaeda member, was arrested and detained by U.S. forces in Afghanistan.[124] He was a 15-year-old child soldier at the time. It is therefore appropriate to turn now to examine, by way of a case study, the position of the U.S. with regard to child soldiers.

3.3.1 Omar Khadr: Detention and torture of a child soldier

On 27 July 2002 a firefight erupted between the U.S. Special Forces and a group of five Al-Qaeda operatives in Afghanistan.[125] The battle continued for hours, finally ending with U.S. Air Support bombing the compound, consequently killing four of the five Al-Qaeda fighters, with Khadr, the only survivor.[126] When the Special Forces entered the compound, Khadr allegedly threw a grenade at them, wounding Sergeant Christopher Speer, who later died of his injuries.[127] During the fight Khadr sustained two bullet wounds to the chest.[128] Barely conscious, Khadr cried out "Shoot me! Please just shoot me!"[129] Khadr was consequently detained and received medical treatment for his injuries.[130] In October 2002 he

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124 Happold *op cit* 56.
125 *Ibid*.
126 *Ibid*. Omar Ahmed Khadr is a Canadian citizen, born on 19 September, 1986, in Ottawa Ontario. See Lawyers Rights Watch Canada (2008) "OMAR KHADR The continuing scandal of illegal detention and torture in Guantanamo Bay" http://www.lrwc.org/documents/Omar.Ahmed.%20Khadr.Fact.Summary.June.1.08.pdf (accessed 6 October 2009).
127 Happold *op cit* 56.
128 *Ibid*.
129 *Ibid*.
130 *Ibid*.

was transferred to Camp X-Ray at Guantanamo Bay in Cuba.[131] Khadr has spent over 2 600 days in U.S. custody, virtually one-third of his life.[132]

Bearing in mind that Khadr was detained at the age of 15, he should have been protected by both international and American law relating to children in conflict.[133] Instead, Khadr was subjected to intermittent periods of solitary confinement, while being a minor.[134] What is more, he has been never separated from adult detainees while in Guantanamo Bay.[135] He was only allowed to see a family member, five years into his detention.[136]

At present, he is still being held in detention at Guantanamo Bay. Besides this, since the U.S. Military Commission, or otherwise known as the U.S. military court has no special due process or sentencing procedures to deal with juvenile offenders, Khadr has been tried as an adult.[137] He was tried after his detention, in 2004. The U.S. Government said that Khadr would not be sentenced to death.[138] Khadr has also provided detailed accounts of torture and inhumane treatment during his detention.[139] Illegal treatment included prolonged detention in stress positions, severe sleep deprivation, short shackling and the denial of medical treatment for serious gunshot wounds.[140] These accounts are compatible with admissions made by Khadr's interrogators and independent investigations by the U.N.[141] These are credible allegations and cannot be ignored.[142]

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131 *Ibid* 57.

132 The Omar Khadr Project (2009) "Letter to President Obama" http://www.omarkhadrproject.com/Take-action/Open-Letter-to-Barack-Obama.html (accessed 6 October 2009).

133 *Ibid*.

134 *Ibid*.

135 *Ibid*.

136 *Ibid*.

137 *Ibid*.

138 Lawyers Rights Watch Canada (2008) http://www.lrwc.org/documents/Omar.Ahmed.%20Khadr.Fact.Summary.June.1.08.pdf (accessed on 6 October 2009).

139 The Omar Khadr Project (2009) http://www.omarkhadrproject.com/Take-action/Open-Letter-to-Barack-Obama.html (accessed 6 October 2009).

140 *Ibid*.

141 *Ibid*.

142 *Ibid*.

Khadr is the first child in modern history to stand before a military commission for alleged offences.[143] He is also the youngest detainee ever held in extra-judicial detention by the U.S. authorities.[144] In *Roper v Simmons*[145] the Supreme Court held that "the execution of child soldiers was unconstitutional, finding that juveniles are categorically less culpable than adult criminals."[146]. In *Eddings v Oklahoma*[147] the court expressed itself in the following words:

> Youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults.[148]

The U.S Courts in the above-mentioned cases confirm that children are more prone to be influenced to commit crimes. The courts acknowledge that children are less responsible than adults. Happold is of the opinion that "Khadr was the victim of his family background; an indoctrinated child inducted into a cult-like organization."[149] However, the U.S. Courts failed to apply these standards to the case of Khadr.

3.3.2 Omar Khadr: The case law

Let us now examine the different court rulings in the case of Khadr. Khadr has been subjected to more than 10 court trials between the U.S. and Canada. Here we will look at the most influential of these rulings over the last five years. It is important to keep in mind that Khadr was only 15 years of age at the time of the alleged commission of the offences.

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143 Lawyers Rights Watch Canada (2008) http://www.lrwc.org/documents/Omar.Ahmed.%20Khadr.Fact.Summary.June.1.08.pdf (accessed on 6 October 2009).
144 *Ibid*.
145 *Roper v Simmons*, 543 U.S. 551 (2005).
146 *Ibid* p 18.
147 *Eddings v Oklahoma*, 455 U.S.104 (1982).
148 *Ibid* para 115.
149 Happold *op cit* 58.

In November 2004, the Pentagon charged Khadr with "murder by an unprivileged belligerent, attempted murder by an unprivileged belligerent, conspiracy, and aiding and abetting the enemy."[150] These charges were brought before the Military Commission pursuant to an executive order issued by the U.S. Government.[151] Unbelievably, the Military Commission ruled that the age of Khadr, which was 15 at the time of the alleged offences, would not be considered at the trial.[152] Judge Brownback ruled that matters of international law were irrelevant to the purposes of the trial.[153] Accordingly, the trial considered only the events that occurred on the day of the firefight, back in 2002.[154]

On 29 June 2006, the Supreme Court in *Hamdan v Rumsfeld*[155] ruled that the Military Commission system was invalid.[156] The Court based its decision on the fact that the Military Commission failed to comply with the procedural standards prescribed by Common Article 3 of the Geneva Conventions of 1949.[157]

However, on 17 October 2006, the Military Commission Act[158] was signed into law, re-establishing the Military Commission.[159] In February 2007, Khadr was recharged under the Military Commission Act with "murder, attempted murder, conspiracy, providing material support for terrorism and spying."[160] On 29 June

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150 *U.S.A v Omar Ahmed Khadr. U.S. Department of Defense* (November 5, 2005). Khadr was also known as Akhbar Farhad and Akhbar Farnad.

151 Law Faculty of the University of Toronto (2007) "The Case of Omar Khadr: Summary and Timeline" http://www.law.utoronto.ca/documents/Mackin/Khadr_summary-timeline.pdf (accessed 12 October 2009).

152 Elliot L (2008) "What lies ahead for Omar Khadr?" http://www.cbc.ca/world/story/2008/07/16/f-khadr-legal-options.html (accessed 12 October 2009).

153 *Ibid*.

154 *Ibid*.

155 *Hamdan v Rumsfeld* 126 U.S. 2749 (2006).

156 *Ibid*.

157 *Hamdan v Rumsfeld* p 4. Article 3 Common to the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1949, 75 U.N.T.S. 31. Common Article 3 entered into force on 31 October 1950.

158 Military Commissions Act 2006 [United States of America], 28 September 2006.

159 Law Faculty of the University of Toronto (2007) http://www.law.utoronto.ca/documents/Mackin/Khadr_summary-timeline.pdf (accessed 12 October 2009).

160 *Ibid*.

2007, the Military Commission dismissed the charges against Khadr, due to a lack of jurisdiction.[161] The judge ruled that the court did not have the jurisdiction to try Khadr as an "unlawful enemy combatant".[162] According to Newton, an "unlawful enemy combatant" in the context of Omar Khadr meant a "civilian who had no legal right to attack American soldiers, and kill one of them, during the U.S.-led invasion of Afghanistan."[163] Nonetheless, on 24 September 2007, the Military Commission overturned the ruling of the military judge of the trial on 29 June 2007.[164]

Khadr has now spent over seven years in U.S. detention, while judgment has yet to be handed down. Furthermore, Khadr has received some diplomatic assistance from Canada over the years. On 14 August 2009, the Canadian Supreme Court granted a repatriation order in his favour.[165] In other words, if U.S. authorities execute this order, Khadr would be able to return to his home country, Canada.

3.3.3 Conclusion: Repatriation or detention?

It is submitted that the capture and subsequent detention of Omar Khadr fell squarely within the theoretical framework of retributive justice. Given that there is no proof that Khadr threw the grenade, the U.S. forces detained him solely for purposes of gathering information from him. The U.S. authorities humiliated Khadr physically and psychologically, leaving him scarred for life. He is still subjected to torture, while his accountability as an offender has never been

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161 *Ibid*.

162 *Ibid*.

163 Elliot L (2008) "What lies ahead for Omar Khadr?" http://www.cbc.ca/world/story/2008/07/16/f-khadr-legal-options.html (accessed 12 October 2009).

164 Law Faculty of the University of Toronto (2007) http://www.law.utoronto.ca/documents/Mackin/Khadr_summary-timeline.pdf (accessed 12 October 2009).

165 *The Prime Minister of Canada, The Minister of Foreign Affairs, The Director of the Canadian Security Intelligence Service and the Commissioner of the Royal Canadian Mounted Police v Omar Ahmed Khadr 2009 FCA 246.*

proven. Even if Khadr were to be acquitted by the Military Commission, he could remain at Guantanamo for the rest of his life.[166] In the light of this bleak and ominous prospect, it is hoped that the U.S. Government will repatriate Khadr to Canada.

3.4 Democratic Republic of Congo

At present, there are over 6 000 active child soldiers in the DRC.[167] Child soldiers have been arrested, detained and prosecuted for military offences committed during armed conflict.[168] These trials violate Article 114 of the DRC's Military Justice Code.[169] Article 114 stipulates that "persons below the age of 18 years do not fall under military jurisdiction."[170] The U.S.A, however, ignored such a provision in its Military Commission Act, by prosecuting Omar Khadr. A decree that was issued by the DRC Government in 2000 provides for the rehabilitation of child soldiers in the DRC.[171] This decree was subsequently reinforced in 2005, with a provision stipulating that military prosecutors have to refer child offenders to a "competent civilian court or to a CONADER for demobilization."[172]

The DRC is a member of the CRC and various other international instruments governing the rights of children.[173] However, its court has sentenced nine child

166 Law Faculty of the University of Toronto (2007) http://www.law.utoronto.ca/documents/Mackin/Khadr_summary-timeline.pdf (accessed 12 October 2009).

167 Coalition to Stop the Use of Child Soldiers (2007) 3 "DEMOCRATIC REPUBLIC OF CONGO PRIORITIES FOR CHILDREN ASSOCIATED WITH ARMED FORCES AND GROUPS" "http://www.child-soldiers.org/document/get?id=1244 (accessed 12 October 2009).

168 *Ibid*.

169 *Ibid*. The Military Justice Code of the Democratic Republic of Congo. Law no. 023/2002 of 18 November 2002.

170 Coalition to Stop the Use of Child Soldiers (2007) 10 "http://www.child-soldiers.org/document/get?id=1244 (accessed 12 October 2009).

171 *Ibid*.

172 *Ibid*. CONADER is the French abbreviation for *Commission Nationale de Désarmement, Démobilisation et Réinsertion* (National Commission for Disarmament, Demobilization and Reintegration).

173 Coalition to Stop the Use of Child Soldiers (2007) 10 "http://www.child-soldiers.org/document/get?id=1244 (accessed 12 October 2009).

soldiers to death since 2003.[174] This is a matter that warrants grave concern, especially since the DRC is one of the countries with the highest number of child soldiers currently involved in armed conflict. Nevertheless, "the Coalition to Stop the Use of Child Soldiers has been informed that executions are no longer carried out in the DRC."[175] They went on to state that "this is a welcome development".[176]

Unfortunately, two child soldiers have been sentenced to death in the Eastern parts of the DRC, back in 2007.[177] Unsurprisingly, they have been sentenced by the Military Court in contravention of Article 144. The unlawful conduct of the Military Court could be compared to what happened to Khadr in the U.S.A., with trhe difference being that the Military Commission Act of the U.S. would justify proceedings against Khadr. However, various international organisations have condemned the treatment meted out to Khadr, as well as the trials of child soldiers in the DRC. It is important to abolish the death sentence concerning child soldier offences. While international instruments prohibit the death penalty, national enforcement remains crucial. What can be concluded from the above is that child soldiers are accountable in the DRC. However, the death sentence could never symbolize a reasonable sentence in the light of a child soldier.

3.5 Conclusion

After the genocide, the Rwandan Government enacted legislation prohibiting the prosecution of juveniles under the age of 14. In addition, Rwanda had to prosecute thousands of offenders in the midst of a crumbling judicial system. It was saddled with the detention of several thousands detainees, while the U.S.A and the DRC did not have to carry this responsibility. Child soldiers were detained from 1994 until 2003, hereby holding them accountable. Even if the

174 *Ibid*.
175 *Ibid*.
176 *Ibid*.
177 *Ibid*.

sentenced imposed was disproportionately more lenient in relation to the crimes committed, children were nevertheless rehabilitated and reintegrated into their communities. The situation in the U.S.A. differs considerably from Rwanda and the DRC. Omar Khadr is now 23 years old, and has been in detention since the age of 15. Even if Khadr is found guilty by an American court, the years he spent in Guantanamo bay has represented a sentence no juvenile would like to endure. It is hoped that Canada would successfully cooperate with the U.S.A concerning Khadr's repatriation order. While accountability has not yet been established, Khadr's case is an unfortunate example of how child soldiers could be detained illegitimately and tortured. While there are no reports of torture in the DRC and Rwanda, the DRC have executed several child soldiers just a few years ago.

The Government of Rwanda needs to be wary of the threat posed by the DRC army, in relation to the child soldiers of Rwanda still dwelling in the DRC. The implementation of the accountability of child soldiers in the domestic sphere should be fair and impartial. Moreover, courts should be cautious of admitting suspicious evidence, especially evidence that could severely affect the case of the child soldier who is on trial.

The paper now focuses on the situation where the child soldier could be portrayed as a victim or a perpetrator.

4 The Child Soldier: Victim or Perpetrator?

4.1 Introduction

A self-defined volunteer in Sierra Leone had this to say: "One of my friends… was shot in his head because he refused to join them. He was killed straight in front of me."[178] This child soldier voluntarily joined the armed forces under these horrific circumstances.[179] This Chapter will discuss the possible effects that voluntary participation may have on the accountability of child soldiers. The point of departure here is that child soldiers can be viewed alike as victims and perpetrators of offences in armed conflict. As the Paris Principles state:

> Children who are accused of crimes under international criminal law allegedly committed while they were associated with armed forces or armed groups should be considered primarily as victims of offences against international law; not only as perpetrators.[180]

From the outset child soldiers are seen as perpetrators as a result of their participation in the commission of mass atrocities or acts of brutality. The victims subsequent to a war seek justice and reconciliation, while a newly established judiciary may tend towards a more sensitive approach concerning the battered child soldier. The question is whether child soldiers have a higher degree of accountability if they voluntarily joined the armed forces.[181] It is therefore essential to establish whether the child soldier participated voluntarily or forcibly in the commission of the offence or militia group, to establish the child soldier's status as a victim or perpetrator. One could also argue that the time the crime was committed should be the time of establishing accountability. This would

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178 Brett R (2003) 85 "Adolescents volunteering for armed forces or armed groups" *International Review of the Red Cross* 863.

179 *Ibid*.

180 UNICEF, The Paris Principles: Principles and Guidelines on Children Associated with Armed Forces or Armed Groups, February 2007 Para 3.6. http://wwww.unhcr.org/refworld/docid/465198442.html (accessed 22 October 2009).

181 Fallah *op cit* 92.

mean that the decision to join the armed force would have no bearing on the child soldier's accountability, but rather the time of the commission of the crime. After joining an armed force child soldiers usually get drugged or are forced to commit crimes. They do not act voluntarily in a state of stupor. In his report to the SCSL, Kofi Annan then Secretary-General of United Nations, declared that although "the children of Sierra Leone may be amongst those who have committed the worst crimes, they are to be regarded first and foremost as victims."[182] In many cases child soldiers face threats and intimidation, and are forced to consume intoxicating drugs.[183] This makes them malleable to becoming ruthless fighters. In such cases the child soldier becomes more a victim than a perpetrator.

When a child soldier is forced to commit an offence or to join an armed group, the child soldier will not be held accountable. It is therefore imperative to focus on voluntary participation as opposed to forced submission. Moreover, voluntary participation is motivated by various socially undesirable factors, which will be discussed below.[184] Let us now look at the issue of voluntary participation of child soldiers. This discussion will also deal with the mental element of the offence.

4.2 Voluntary Participation of Child Soldiers

4.2.1 Motivations of voluntary participation

Brett defines volunteering as "not being abducted or physically forced to join the armed forces or armed groups."[185] When prosecuting child soldiers, it is necessary to look at the reasons why children participated. There are five factors which generally motivate child soldiers to participate in armed conflict.[186] The

182 Report of the Secretary General on the establishment of a Special Court for Sierra Leone para 7.
183 Freeland *op cit* 322.
184 Fallah *op cit* 93.
185 Brett *op cit* 863.
186 *Ibid* 859.

factors are: war; poverty; lack of education; family situation; and unemployment.[187] These are not the only factors, for ideology, friends and the struggle for liberation could also play a role.[188] However these factors are not as universal as war and poverty.[189] All of these factors have different influences on the participation of the child.[190]

4.2.1.1 War

Usually children will not go and look for a war in which to fight.[191] The war comes to them, at their school, town, village or family.[192] War invades the lives of children, although in some circumstances it presents an opportunity for some children.[193] It is an opportunity to work and to make money.[194] Additionally, war affords the child an opportunity to escape from an oppressive household and to become a hero.[195] War helps to exacerbate the other factors by causing death to family members or forcing schools to close, resulting in a loss of income.[196] Considering that there may be no alternative for children other than to be involved in a war, war becomes a part of the child's routine.[197] The circumstances of the war motivate the child to become part of the armed forces. The question is whether the child could be held accountable for this decision to join the war. It is submitted that the child could not be responsible for joining the war due to the compelling pressures influencing the child to make an impulsive decision.

187 *Ibid*.
188 *Ibid*.
189 *Ibid*.
190 *Ibid*.
191 Brett *op cit* 859.
192 *Ibid*.
193 *Ibid*.
194 *Ibid*.
195 *Ibid*.
196 *Ibid* 860.
197 *Ibid*.

4.2.1.2 Poverty

Poverty motivates a child to participate in armed conflict. To see poverty as the principal cause of child soldering must not be exaggerated.[198] However, poverty is the most identifiable of all these factors.[199] Poverty leads to children not attending school, which causes children to live without an ambition.[200] This adversely affects the child soldier's decision to participate in violence. The question is whether the impact of poverty reduces the accountability of child soldiers. In other words, can child soldiers be held accountable for offences committed as a result of poverty?

It is submitted that poverty affects the child's decision-making abilities. It is also important to note that children who make decisions, generally do so with the prior consent of a parent or guardian. Unfortunately, in most cases in war-ravaged societies the parent or guardian has passed away, or has been abducted, leaving the child no choice but to the making its own decisions. It is therefore unreasonable to suggest that the child soldier participates voluntarily. Rather, it is submitted that the child soldier is indirectly forced to participate. It is submitted that under these circumstances the child soldier is not accountable for its actions.

4.2.1.3 Family

The family aspect of a child's life is much more significant than in the life of an adult.[201] When the child's family is taken away from him or her, the child tends to join an armed group for survival and support.[202] Moreover, when the child's parents have been killed, the child may have to assume the role as head of the household.[203] Additional responsibilities, like financial maintenance and

198 *Ibid*.
199 Brett *op cit* 860.
200 *Ibid*.
201 *Ibid* 861.
202 *Ibid* 862.
203 *Ibid*.

protection of family members could arise.[204] All of the above-mentioned consequences can have a substantial impact on the disillusioned child soldier. Subsequently the child soldier will participate in armed conflict, even though it would never have done so were not for these factors. However, instances occur where the child will participate without any influence being exercised on it. It is in such cases that the accountability of child soldiers poses legal challenges.

4.2.1.4 Recommendations

Let us now have a look at the situation where the child soldier voluntarily participated without the influence of the motivating factors. Here the child commits an offence intentionally. We also have to look at the conditions the child soldier was exposed to between the joining of the armed group and the commission of the crime. Moreover, it is essential to establish when the accountability occurred. Is it at the time of the voluntary recruitment or is it at the time of the criminal offence of the child soldier? It is submitted that the time of accountability is at the time of the offence. The main reason for this submission is that the commander uses this time between the recruitment and the offence to transform to innocent child into a ruthless fighter. However, it is important to examine the motivational factors in cases where the child soldier, immediately after recruitment commits an offence.

It is submitted that joining an armed group would be rarely voluntarily. Most child soldiers join as a result of the factors discussed in this chapter. Inevitably, the factors imply that the child soldiers had no other choice but to participate in armed conflict. The role of domestic courts and national legislation must not be overlooked. For now, they hold the key to future prosecution of child soldiers, as international instruments fail to shed some light on the subject. Essentially, it would be in the best interests of the child not to prosecute child soldiers.

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[204] *Ibid*.

4.3 Mental element

The elements of the offence need to be proved before child soldiers can be convicted and sentenced. The *actus reus* refers to the conduct of the crime, while the *mens rea* or the mental element, generally refers to the intention or knowledge of the offence. This study will specifically focus on the mental element of the offence.[205]

The ICC Statute has an effective provision regarding the mental element of the offence, which states:

> 1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the Court only if the material elements are committed with intent and knowledge.
>
> 2. For the purposes of this article, a person has intent where:
>
> (a) In relation to conduct, that person means to engage in the conduct;
>
> (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
>
> 3. For the purposes of this article, 'knowledge' means awareness that a circumstance exists or a consequence will occur in the ordinary course of events.[206]

From the above, one may conclude that child soldiers require the necessary intent and knowledge to be convicted of an offence. Intent also refers to being determined, resolute or committed to engaging in an offence. Knowledge relating to child soldiers could be described as the awareness of the child that a specific event is going to take place, and this event could be of a criminal nature. Even if the mental element is established, the person's responsibility could be excluded if certain defences are raised.[207] Article 31 of the ICC Statute includes several

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205 Rikhof J (2009) "Child soldiers: Should they be punished?" http://www.cba.org/CBA/newsletters-sections/pdf/05-09-military_2.pdf (accessed 12 October 2009).

206 Article 30 of the ICC Statute.

207 Rikhof J (2009) http://www.cba.org/CBA/newsletters-sections/pdf/05-09-military_2.pdf (accessed 12 October 2009).

defences which could be raised. These include mental sickness[208], intoxication[209] and duress.[210] Rikhof is of the opinion that child soldiers below the age of 12 should not be accountable for crimes committed during armed conflict.[211] This is based on the fact that the preparatory documents to the Rome Statute did not suggest any age below 12. Also, "this is the same age limit set out for the East Timor Regulations."[212]

Individual assessments need to be conducted to examine whether children between the ages of 12 and 18 possess the required *mens rea* to be convicted of an offence.[213] The *mens rea* requirements in the ICC Statute would therefore be too stringent, considering that children are less culpable than adults. Rikhof suggests that the mental element and the defences should be separated from each other, while the court should focus on the defences raised by the minor.[214] As he puts it: "It might be easier from a practical point of view to obtain information from such children about objective facts such as having taken drugs than about subjective notions such as intention or knowledge of consequences, especially in unfamiliar legal settings."[215] It is thus important to determine whether the children were drugged or forced in order to act the way they did.[216]

In the *Erdemovic case*,[217] the ICTY established that the defence of duress could not be used in a charge of murder.[218] However, Rikhof is of the opinion that the defence of duress is available to child soldiers who commit murder.[219]

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208 Article 31(a) of the ICC Statute.
209 *Ibid* Article 31(b).
210 *Ibid* Article 31(d).
211 Rikhof J (2009) http://www.cba.org/CBA/newsletters-sections/pdf/05-09-military_2.pdf (accessed 12 October 2009).
212 Rikhof J (2009) http://www.cba.org/CBA/newsletters-sections/pdf/05-09-military_2.pdf (accessed 12 October 2009).
213 *Ibid*.
214 *Ibid*.
215 *Ibid*.
216 *Ibid*.
217 *Prosecutor v Drazen Erdemovic* IT-96-22-A.
218 Rikhof J (2009) http://www.cba.org/CBA/newsletters-sections/pdf/05-09-military_2.pdf (accessed 12 October 2009).
219 *Ibid*.

Interestingly, the ICC Statute "did not include a specific exclusion for murder in the duress defence."[220] If none of the above-mentioned defences are raised, the court will have to prove that the child had the required *mens rea* to commit the crime.[221] As stated earlier, a separate mental element needs to be developed for children between the ages of 12 to 18 years, to prevent unjustified proceedings being implemented against alleged juvenile offenders. Given that child soldier trials will occur more frequently in domestic courts, it is therefore imperative that national legislation establishes criteria distinguishing the mental element of the adult from that of the minor.[222]

4.4 Conclusion

Rikhof states that "[u]nlike adults involved in armed conflict, children, because of their age, their victimization and limited appreciation of their actions, pose a unique situation when the question of responsibility arises from crimes committed during a war."[223] Children can join an armed force either voluntarily or by submitting to force. This is an important consideration in establishing accountability when the child soldier commits a crime subsequently. It is widely accepted that children who are forced to join an armed group or who are forced to commit a crime are exempted from accountability. However, children who voluntarily join an armed group and consequently commit a crime, pose a different challenge.

The study looked at several factors which motivate child soldiers to join voluntarily. These factors contribute undeniably to the decision of the child soldier to eventually join an armed group. The court will have to look at these factors in determining the accountability of child soldiers, while it is submitted that the time of accountability is fixed at the time of the commission of the offence. Moreover,

220 *Ibid*.
221 *Ibid*.
222 *Ibid*.
223 *Ibid*.

courts need to determine whether children fulfil the requirements of the mental element of the offence. The author of this study agrees with Rikhof that the court should firstly look at the defences raised by the child. If no valuable defences are raised, the court must proceed in determining the mental element. Courts should deal meticulously with these difficult cases, in order to establish the accountability of child soldiers. Arts and Popovski suggest that "[i]n the end, to determine the best interest of the child a careful analysis and weighing of all interests and circumstances of the particular case is required."[224] It is clear from the above that child soldiers represent both victims as well as perpetrators.

[224] Arts K and Popovski V (2006) "International Criminal Accountability and Children's Rights" http://www.unu.edu/publications/briefs/policy-briefs/2006/PB4-06.pdf (accessed 20 August 2009).

5 Child Soldiers: How Do We Hold Them Accountable?

5.1 Introduction

When establishing the accountability of child soldiers, it is important to regulate the consequences of such accountability. While it is not in the best interests of any child to receive punishment, it is essential that the child acknowledges wrong. By acknowledging the wrongdoing, the child soldier experiences a sense of accountability. This study will evaluate three methods that could be applied to hold child soldiers accountable. Accountability differs from one child to another. It is therefore important to establish different accountability mechanisms. These could take the form of say a juvenile chamber or they could also be rehabilitative measures. Romero is of the opinion that it is logically faulty and pragmatically troubling to maintain that fairness and dignity can be achieved by ignoring the horrendous behavior of child soldiers.[225] In other words, child soldiers who have committed offences must be held accountable. Therefore, let us have a look at the different methods in holding child soldiers accountable.

5.2 Juvenile Chamber

Corriero recommends the establishment of a separate juvenile chamber to adjudicate child soldier offences.[226] A separate juvenile chamber will provide an effective and impartial method to try child soldiers, while maximizing rehabilitative goals.[227] In 2002, the U.N. Secretary General, Kofi Annan recommended a separate juvenile chamber to deal with the accountability of child soldiers.[228] However, the Security Council rejected the proposal, regarding the idea of a

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225 Romero J A "The Special Court for Sierra Leone and the Juvenile Soldier Dilemma" (2004) 2 *Northwestern University Journal of International Human Rights* 25.

226 Corriero M A "The Involvement and Protection of Children in Truth and Justice Seeking Processes: The Special Court for Sierra Leone" (2002) 18 *New York Law School Journal of Human Rights* 337.

227 Romero *op cit* 23.

228 *Ibid*.

separate juvenile chamber as unnecessary.[229] Considering the Special Court's limited budget and funding from the U.N. Member States, this decision seemed inevitable.

As discussed in Chapter 2, General Comment No. 10 to the CRC contains a list of provisions concerning juvenile justice. The General Comment provides for the establishment of a separate juvenile system.[230] The General Comment constructs its argument of a separate juvenile chamber on numerous grounds, including that children are less culpable than adults.[231] Moreover, the General Comment states that "children differ from adults in their psychical and psychological development and their emotional and educational needs."[232] Interestingly, the General Comment provides that the "traditional objectives of criminal justice, such as repression and retribution must give way to rehabilitation and restoration."[233] The General Comment is very ambitious in excluding corporal punishment of juveniles. Although rehabilitation and restoration would seem to be in the best interests of the child, retribution should not be overlooked. In some instances, prosecution would be the best alternative, while rehabilitation would not be appropriate. This could be the case where a juvenile offender has repeatedly failed to adhere to rehabilitation measures, and as a result of this commits crimes.

Many believe that child soldiers should be punished for their wrongdoings. However, according to the broader perspective, "the primary goal of the juvenile chamber remains the rehabilitation and reintegration of juvenile soldiers back into their communities."[234] In sharp contrast, Romero believes that it would be inaccurate to perceive rehabilitation and reintegration as attainable objectives.[235]

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229 *Ibid*.
230 Paragraph 10 of the General Comment No. 10.
231 *Ibid*.
232 *Ibid*.
233 *Ibid*.
234 Romero *op cit* 24.
235 *Ibid* 26.

In Sierra Leone, the average life span of a male is about 37 years.[236] As a result, accountability is assumed at an early age in the child's life.[237] His argument is that punishment should not be taken away altogether, for rehabilitation is itself part of punishment.[238] The juvenile might be motivated to commit an offence, if the child is mindful of the fact he will not face prosecution, but mere rehabilitation. Nevertheless, establishing a separate juvenile chamber is an expensive exercise. Most of the world's child soldiers reside in Africa. African States would generally lack the monetary resources and infrastructure to establish an effective juvenile chamber. It is hoped that even if a juvenile chamber is not conceivable, child soldiers will be separated from adult detainees.

5.3 Truth and Reconciliation Commission

Essentially a Truth and Reconciliation Commission (hereafter TRC) is established to gather the truth with regard to a specific conflict that has taken place. When analysing a child soldier's accountability in this context, many experts believe that accountability is best established through a truth-telling process.[239] This would allow the child to experience psychological and emotional freedom.[240] It is crucial that child soldiers participate is such a process.

More than 95 per cent of Rwandan children had directly witnessed violence, while nearly 70 per cent witnessed somebody being killed.[241] In Sierra Leone, child soldiers were abducted, sexually abused and often forced to kill in armed conflicts.[242] By acknowledging the truth, child soldiers may avoid the harsh reality of detainment. Acknowledgement implies that the child soldier admitted its

236 *Ibid*.
237 *Ibid*.
238 *Ibid*.
239 Fallah *op cit* 100.
240 *Ibid*.
241 Fallah *op cit* 99.
242 *Ibid*.

offences and recognises that its conduct was wrong.[243] In most cases a civilian population will accept the acknowledgement and apologies of the offenders.[244] By acknowledging the truth, the child soldier accepts the accountability of the act as well.

It is important that child soldiers understand the harm, pain and grief that their conduct has on victims, and that their acts were wrong. In Sierra Leone, the TRC and the Special Court held mutually supporting functions.[245] Those who appeared before the TRC were not charged with criminal offences.[246] It was important that the child soldier be protected against self-incrimination.[247] Moreover, statements taken before the TRC were not to be used in ordinary criminal proceedings.[248] In addition, UNICEF made a number of recommendations regarding the TRC process, including that: "child rights standards informing the TRC; equal treatment off all children before the TRC; and voluntary participation."[249] The Sierra Leonean TRC found *inter alia* that children were victims as well as perpetrators, and that they were forced to commit heinous crimes.[250] In their role as perpetrators, violence became the only means of survival.[251]

The TRC recommended that Parliament enact legislation amending the age of majority to 18.[252] Also, the TRC made extensive recommendations regarding the reintegration and demobilisation of former child soldiers.[253] These included the

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243 Hayner P B "Fifteen Truth Commissions-1974-1994: A Comparative Study" (1994) 16 *Human Rights Quarterly* 607.
244 *Ibid*.
245 Fallah *op cit* 100. The TRC in Sierra Leone was regulated by the Truth and Reconciliation Commission Act 2000 [Sierra Leone], 2 March 2000.
246 *Ibid*.
247 *Ibid*.
248 *Ibid*.
249 *Ibid*.
250 Unicef Sierra Leone Child Friendly Report of the TRC (2004) http://www.unicef.org/infobycountry/files/TRCCF9SeptFinal.pdf 14 (accessed 16 October 2009).
251 Fallah *op cit* 100.
252 Child Friendly Report 35.
253 *Ibid*.

establishment of recreational centers for ex-combatants.[254] While it is vital to "prosecute those who bear the greatest responsibility", it is unnecessary to detain thousands of children, as has been the case in Rwandan.[255] Such a detention regime can effectively hamper the reconciliation in a post-conflict society.[256] A TRC is an effective means of establishing and enforcing the accountability of child soldiers in the best interest of the child.

5.4 Rehabilitative Measures

The rehabilitation of child soldiers is understood as the "organized process which follows children's demobilization, escape or capture."[257] Rehabilitation needs to take place in a secure setting, while interaction with trained professionals is indispensable.[258]

The U.N. Security Council recognises the importance of rehabilitation programs.[259] Article 6 of the Optional Protocol to the CRC requires governments to provide programs for the "psychological recovery and social integration of former child soldiers, where necessary." It is submitted that during the rehabilitation period, child soldiers should accept and acknowledge their wrongdoings. This should form an essential aspect of the rehabilitation process. Frequently, child soldiers return to their homes, only to be stigmatised by their own communities.[260] As a result of potential stigmatisation, it is necessary for the child soldier to understand the need to acknowledge accountability. In other

254 Child Friendly Report 36.
255 Fallah *op cit* 102.
256 *Ibid*.
257 Redress (2006) 33 "Victims, Perpetrators or Heroes? Child Soldiers before the International Criminal Court" http://www.redress.org/publications/childsoldiers.pdf (accessed 6 October 2009).
258 *Ibid*.
259 Statement of the President of the U.N. Security Council (23 March 2000) http://www.un.int/usa/spst0010.htm (accessed 6 October 2009).
260 Odeh M and Sullivan C (2004) "Recent Developments in International Rehabilitation of Child Soldiers" http://www.yapi.org/rpchildsoldiersrehab.pdf (accessed 16 October 2009).

words, children who have received the necessary rehabilitation will be able to deal with the probable stigmatisation of the community.

Article 7 of the Special Court Statute promotes the rehabilitation and reintegration of child offenders between the ages of 15 and 18 years. However, the Sierra Leonean Government demands punishment for all juvenile offenders.[261] Despite this, "the Special Court aspires to rehabilitate and reintegrate child soldiers back into their communities."[262] Rehabilitative measures include: community service orders, foster care, counseling and care guidance measures.[263] Romero is of the opinion that "rehabilitative sentencing via the TRC is the most effective alternative to corporal punishment."[264] Many argue that rehabilitative sentencing provides an effective accountability mechanism for child soldiers.[265] They construct their argument on the basis that rehabilitative sentencing "allows the victim and perpetrator to heal emotionally and psychologically."[266]

5.5 Conclusion

Criminal accountability can be established and developed through a juvenile chamber, a TRC or certain rehabilitative measures. It is important that child soldiers acknowledge accountability, in so doing preventing the occurrence of vigilante justice and revenge. The separate juvenile chamber was established on the ground that juveniles should be separated from adults during the trial and sentencing stage. Moreover, the separate juvenile chamber will provide specialized legal assistance for juvenile offenders. A TRC presents an interesting and effective way of acknowledging accountability. By means of telling the truth or making an apology, criminal accountability could be established. Although, it may not seem so effective, truth telling and apologies require a great deal of

261 Romero *op cit* 20.
262 *Ibid*.
263 *Ibid*.
264 *Ibid* 21.
265 *Ibid*.
266 *Ibid*.

courage. More often than not, the victim's desire is to establish the identity of the offender, together with a confession of guilt or an apology by the perpetrator.

It is submitted that the child soldier should be aware of the victim's sorrow, hereby establishing a stronger sense of accountability on the part of the child soldier. Furthermore, rehabilitative measures exist whereby child soldiers could acknowledge the accountability of their crimes. In addition, rehabilitation presents an opportunity to learn from the past and to make a new start to life. It is hoped that accountability would be established, while a brighter future awaits the vulnerable child soldier.

6 The Accountability of Child Soldiers: A Conclusion

The accountability of child soldiers could be described as a morel dilemma. Many believe that child soldiers should be prosecuted according to their participation in armed conflict, whether they do so voluntarily or forcefully. Some are of the opinion that children should never be punished for their participation in armed conflict. However, we should not evade the fact that it is crucially important to establish the accountability of child soldiers. The study illustrates the magnitude of the problem at hand. International instruments regulating the accountability of child soldiers fall well short of being profound.

Moreover, the CRC and the ICC Statute fail to give a clear understanding regarding children accountable in armed conflict. The CRC focuses on the prohibition of the death penalty while the ICC Statute exempts itself from the jurisdiction of juveniles under the age 18. The ICC Statute could have could have provided more clarity on children's accountability, in armed conflict, while it and many other treaties will reiterate that the most responsible need to be prosecuted. The main criticism is that international instruments primarily address the recruitment and use of child soldiers, while the rules applicable to the child soldier's own conduct is neglected.[267]

National legislation and courts therefore have an important obligation to establish the law relating to the conduct of child soldiers. The U.S. and the DRC in particular, need to critically reconsider their present legislation relating to the accountability of child soldiers. Omar Khadr, for example has suffered enough trauma in U.S. detention, while child soldiers are being illegitimately sent to death in the DRC.

[267] Happold *op cit* 67.

Child soldiers can be regarded alike as both victims and perpetrators of offences in armed conflict. The court would also have to consider the difference in the establishment of the mental element of child soldiers as opposed to adults. These factors are important because they could determine whether the child will be held accountable or not.

The victims of mass atrocities demand the punishment of child soldiers, while the Special Court and various NGO's seek to rehabilitate these children.[268] In the case where national courts are unable to prosecute child soldiers, victims could pose a major threat to social stability and the administration of justice. It is therefore essential that rehabilitation measures include the acknowledgement of accountability of the offence on the part of the child soldier. This would facilitate reconciliation. In most cases victims would be satisfied with the acknowledgement of the responsibility of an offence by the offender.

It is submitted that the accountability of child soldiers must be established, as Graça Machel, the U.N Secretary General's Expert on Children's Rights stated: "[i]t is difficult if not impossible, to achieve reconciliation without justice."[269]

[268] Romero *op cit* 22.

[269] Machel G (1996) p 84 "Report to the Secretary General on the impact of armed conflict on children" http://www.unicef.org/graca/a51-306_en.pdf (accessed 22 May 2009).

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