

**THE UNIVERSITY OF THE WESTERN CAPE**

**FACULTY OF LAW**

**THE ACCOUNTABILITY OF JUVENILES FOR CRIMES UNDER  
INTERNATIONAL LAW**



Thesis submitted in fulfilment of the requirements for the award of the LLD degree

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**Date: July 2016**

## DECLARATION

I, Windell Nortje, declare that *THE ACCOUNTABILITY OF JUVENILES FOR CRIMES UNDER INTERNATIONAL LAW* 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.

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## LIST OF ABBREVIATIONS

CJA	Child Justice Act 75 of 2008
CNRT	Conselho Nacional de Resistencia Timorese
CRC	Convention on the Rights of the Child
ECHR	European Court of Human Rights
FRELIMO	Frente de Libertação
GA	General Assembly
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
LRA	Lord's Resistance Army
RENAMO	Resistencia National Moçambicana
RUF	Revolutionary United Front
SCSL	Special Court for Sierra Leone
UN	United Nations





UNICEF

United Nations Children's Fund

UNTAET

United Nations Transitional Administration in East Timor



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## ABSTRACT

Children have been committing crimes during times of war and other armed conflicts since time immemorial. Yet, it is only over the last few decades that cognisance is being taken of child soldiers as a type of juvenile. The unfortunate sight of a child holding a gun has become a familiar picture throughout armed conflicts, especially in Africa. Both boys and girls are used as child soldiers and they can be as young as 5 years old. They are mainly regarded as victims of crimes under international law and are therefore usually rehabilitated once they have been disarmed and demobilised.

Notwithstanding their need for rehabilitation, it is a fact that child soldiers commit some of the most egregious crimes under international law. They receive military-style training and are presumably not afraid of killing and carrying out orders. Yet it is recognised that generally they do not have the same level of maturity as adults.

The reality of child soldiers who join armed forces therefore presents complex legal questions in the face of contemporary international criminal law principles which, on the one hand, afford protection to all children, and on the other, unequivocally call for the prosecution and punishment of those who are individually responsible for committing crimes under international law. Consequently, various safeguards need to be upheld to ensure that the best interests of the child are maintained once a child soldier is held criminally responsible. This thesis 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.

The thesis proposes that a case-by-case approach should be considered when child soldiers are prosecuted for crimes under international law, thereby investigating and analysing the often distinctive circumstances related to their crimes.

## CHAPTER ONE

### INTRODUCTION

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#### 1.1 Background to the Study

Omar Khadr was only 15 years old when he<sup>1</sup> was taken prisoner by United States soldiers in Afghanistan in 2002.<sup>2</sup>

Omar was born in Toronto, Canada, in 1986.<sup>3</sup> He was the fourth child in a family of six children. He was his mother's (Elsamnah) favourite child, and one of his pastimes was to have one of his favourite books, *The Adventures of Tintin*, read to him.<sup>4</sup> Omar's father, Ahmad Sa'id Khadr, was a member of al Qaeda and a close associate of Osama bin Laden, resulting in Omar spending much of his youth travelling between Canada and Pakistan and finally Afghanistan.<sup>5</sup> Omar's father taught him and his brothers to be martyrs for Islam.<sup>6</sup> Between 1996 and 2002, the Khadr family was consistently on the move as the 1998 US Embassy bombings in Kenya and Tanzania and ultimately the

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1 'He' and 'she' and 'his' or 'her' will be used interchangeably throughout this thesis.

2 See *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44 paragraph 3. Also see Happold M 'Child Soldiers: Victims or Perpetrators?' (2008) 29 *University of La Verne Law Review* 56; Wilson R J 'Omar Khadr: Domestic and International Litigation Strategies for a Child in Armed Conflict Held at Guantanamo' (2012) 11 *Santa Clara Journal of International Law* 32.

3 For a detailed background of the birth of Omar Khadr, see Shephard M *Guantanamo's Child: The Untold Story of Omar Khadr* (2008) 27-29. Also see Dore C L 'What to do With Omar Khadr? Putting a Child Soldier on Trial: Questions of International Law, Juvenile Justice, and Moral Culpability' (2007-2008) 41 *The John Marshall Law Review* 1283; Levant E *The Enemy Within: Terror, Lies and the Whitewashing of Omar Khadr* (2011) 9-30.

4 See Shephard M *Guantanamo's Child: The Untold Story of Omar Khadr* (2008) 27, 31.

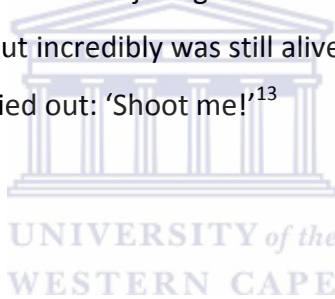
5 See Happold M (2008) 29 *University of La Verne Law Review* 58; Levant E *The Enemy Within: Terror, Lies and the Whitewashing of Omar Khadr* (2011) 14; Wilson R J (2012) 11 *Santa Clara Journal of International Law* 36.

6 See Shephard M *Guantanamo's Child: The Untold Story of Omar Khadr* (2008) 43. Also see Levant E *The Enemy Within: Terror, Lies and the Whitewashing of Omar Khadr* (2011) 11, 30.



September 11 terrorist attacks, transformed Afghanistan into a war zone.<sup>7</sup> During this time, Omar became an al Qaeda warrior, but not for long.

On 27 July 2002, Omar and four other al Qaeda fighters were stationed at a compound in Ab Khail, a small town in Afghanistan near the Pakistan border.<sup>8</sup> US soldiers operating nearby received a local tip that a few al Qaeda fighters were at the compound.<sup>9</sup> The soldiers approached the compound and a firefight broke out.<sup>10</sup> The fighting continued for several hours until the US Air Force bombed the compound.<sup>11</sup> Following the air raid, the soldiers approached the flattened compound, seemingly having killed all of the al Qaeda fighters. However, Omar survived the attack. Concealed behind a broken door, Omar suddenly rose while throwing a grenade towards the soldiers, killing US Special Forces Sergeant Christopher Speer and injuring another.<sup>12</sup> Simultaneously, Omar was shot three times in the chest, but incredibly was still alive when the soldiers approached him. Barely conscious, Omar cried out: 'Shoot me!'<sup>13</sup>



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- 7 See Shephard M *Guantanamo's Child: The Untold Story of Omar Khadr* (2008) 66-72. Also see Levant E *The Enemy Within: Terror, Lies and the Whitewashing of Omar Khadr* (2011) 20-30.
- 8 See Dore C L (2007-2008) 41 *The John Marshall Law Review* 1286; Krauss C 'Threats and Responses: Detainee; Canadian Teenager Held by U.S. in Afghanistan in Killing of American Medic' *The New York Times* 14 September 2012 <http://www.nytimes.com/2002/09/14/world/threats-responses-detainee-canadian-teenager-held-us-afghanistan-killing.html> (accessed 17 June 2014); Mayr C 'Juvenile Enemy Combatants and the Unconstitutional Application of American Military Law' (2008) 29 *University of La Verne Law Review* 245. Also see Rossi E A 'A "Special Track" for Former Child Soldiers: Enacting a "Child Soldier Visa" as an Alternative to Asylum Prosecution' (2013) 31 *Berkeley Journal of International Law* 432-433.
- 9 See Mayr C (2008) 29 *University of La Verne Law Review* 245. Also see Levant E *The Enemy Within: Terror, Lies and the Whitewashing of Omar Khadr* (2011) 46-47.
- 10 See Mayr C (2008) 29 *University of La Verne Law Review* 245-246; Rosen D M 'The Dilemma of Child Soldiers: How Should International Law Treat Children Engaged in Armed Conflicts?' (2010) 10 *Insights on Law and Society* 8.
- 11 Shephard M *Guantanamo's Child: The Untold Story of Omar Khadr* (2008) 3; Wilson R J (2012) 11 *Santa Clara Journal of International Law* 71.
- 12 See Rosen D M (2010) 10 *Insights on Law and Society* 8; Rossi E A (2013) 31 *Berkeley Journal of International Law* 432-433.
- 13 See Levant E *The Enemy Within: Terror, Lies and the Whitewashing of Omar Khadr* (2011) 10; Shephard M *Guantanamo's Child: The Untold Story of Omar Khadr* (2008) 16.

Omar was subsequently detained at the Bagram Air Force Base near Kabul until 28 October 2002, after which he was transferred to Guantánamo Bay in Cuba.<sup>14</sup> He became the first child soldier to be prosecuted by the United States.<sup>15</sup> The US Military Commission at Guantánamo charged Omar with the commission of five crimes under international law, namely: murder in violation of the laws of war, attempted murder in violation of the laws of war, conspiracy to commit terrorism, providing material support for terrorism, and spying.<sup>16</sup> He would eventually stay at Guantánamo for nearly a decade before he entered into a plea bargain and pleaded guilty to all the charges on 13 October 2010. He was sentenced to 40 years imprisonment at the sentencing hearing on 31 October 2010. However, the plea bargain provided that Omar would not have to serve more than eight years in prison.<sup>17</sup> He said that he only pleaded guilty so that he could get out of Guantánamo and return to Canada.<sup>18</sup> He was repatriated to Canada on 29 September 2012. He was released on bail on 7 May 2015 and is appealing his conviction in the US Military Commission.<sup>19</sup>



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- 14 See Shephard M *Guantanamo's Child: The Untold Story of Omar Khadr* (2008) 97. Also see Happold M (2008) 29 *University of La Verne Law Review* 58; Lafayette E 'The Prosecution of Child Soldiers: Balancing Accountability with Justice' (2013) 63 *Syracuse Law Review* 314-315.
- 15 Generally see Dore C L (2007-2008) 41 *The John Marshall Law Review* 1281-1320; Rikhof J 'Child Soldiers: Should they be Punished?' *Sword and Scale*, May 2009, CBA National Military Law Section Newsletter (2009) [http://www.cba.org/CBA/newsletters-sections/pdf/05-09-military\\_2.pdf](http://www.cba.org/CBA/newsletters-sections/pdf/05-09-military_2.pdf) (accessed 3 February 2010); Wilson R J (2012) 11 *Santa Clara Journal of International Law*.
- 16 *United States of America v Omar Ahmed Khadr*, Referred Charges (24 April 2007). Also see Shephard M *Guantanamo's Child: The Untold Story of Omar Khadr* (2008) 204; Wilson R J (2012) 11 *Santa Clara Journal of International Law* 70.
- 17 *United States of America v Omar Ahmed Khadr*, Offer for Pre-Trial Agreement (13 October 2010). Also see Lafayette E (2013) 63 *Syracuse Law Review* 315; Wilson R J (2012) 11 *Santa Clara Journal of International Law* 73.
- 18 See The Canadian Press 'Omar Khadr Sued by Soldier's Widow and Blinded Soldier: Widow of a U.S. Special Forces Soldier Killed in Afghanistan and an American soldier Blinded by a Grenade are Suing Canada's Omar Khadr' *Toronto Star* 22 May 2014 [http://www.thestar.com/news/canada/2014/05/22/omar\\_khadr\\_being\\_sued\\_by\\_widow\\_us\\_soldier\\_for\\_50m.html](http://www.thestar.com/news/canada/2014/05/22/omar_khadr_being_sued_by_widow_us_soldier_for_50m.html) (accessed 17 June 2014).
- 19 See Ackerman S 'Canada Frees Omar Khadr, once Guantánamo Bay's Youngest Inmate' *The Guardian* 7 May 2015 <http://www.theguardian.com/world/2015/may/07/canada-free-bail-omar-khadr-guantanamo-bay-youngest> (accessed 23 June 2015).

Omar Khadr is not one of a kind. There are approximately 300,000 child soldiers in the world today, serving in at least 11 armed conflicts across the world.<sup>20</sup> Child soldiers are generally regarded as victims of international crime since they are mainly forcefully recruited into armed groups, while they are also sometimes sent into the frontline conflict ahead of adult troops or used as human mine detectors.<sup>21</sup> Omar Khadr's story is a reminder, however, of one aspect of child soldiering that many people tend to forget: many child soldiers are not only victims; they are also perpetrators. They commit atrocious crimes against other soldiers, rebels and civilians. While the rights of child soldiers as victims of crimes under international law is a topic that has been adequately researched,<sup>22</sup> the consideration of child soldiers as perpetrators and their criminal responsibility for the crimes they have committed has largely been neglected. This thesis aims to fill that gap. It will thus focus on the commission of the core crimes under international law, and in particular war crimes,<sup>23</sup> by juveniles<sup>24</sup> and analyse the particular problems of material and procedural law that arise with regard to this particular group of offenders. One particular problem of material law that will be dealt with in this thesis concerns the minimum age of criminal responsibility<sup>25</sup> under

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- 20 See Freeland S 'Mere Children or Weapons of War - Child Soldiers and International Law' (2008) 29 *University of La Verne Law Review* 25; Grossman N 'Rehabilitation or Revenge: Prosecuting Child Soldiers for Human Rights Violations' (2007) 38 *Georgetown Journal of International Law* 325; McKnight J 'Child Soldiers in Africa: A Global Approach to Human Rights Protection, Enforcement and Post-Conflict Reintegration' (2010) 18 *African Journal of International and Comparative Law* 113; Udombana N J 'War is not Child's Play! International Law and the Prohibition of Children's Involvement in Armed Conflicts' (2006) 20 *Temple International and Comparative Law Journal* 61.
- 21 See Kahn L (ed) *Child Soldiers* (2008) 101. Also see Briggs J *Innocents Lost: When Child Soldiers go to War* (2005) 6; Draft Policy on Children, Office of the Prosecutor, International Criminal Court, June 2016; Wessells M *Child Soldiers: From Violence to Protection* (2006) 1-2.
- 22 See, for example, Cohn I and Goodwin-Gill G S *Child Soldiers: The Role of Children in Armed Conflict* (1994); Happold M *Child Soldiers in International Law* (2005); Mezmur B D 'Children at Both Ends of the Gun: Towards a Comprehensive Legal Approach towards the Problem of Child Soldiers in Africa' (2005) (Unpublished LLM Thesis submitted to the University of the Western Cape); Quéniwet N 'The Liberal Discourse and the "New Wars" of/on Children' (2013) 38 *Brook Journal of International Law*; Suárez G P *Kindersoldaten und Völkerstrafrecht: Die Strafbarkeit der Rekrutierung und Verwendung von Kindersoldaten nach Völkerrecht* (2009). Also see Draft Policy on Children, Office of the Prosecutor, International Criminal Court, June 2016.
- 23 The term 'war crimes' and the term 'crimes under international law' will be used interchangeably throughout this thesis.
- 24 The term 'juveniles' and the term 'child soldiers' will be used interchangeably throughout this thesis.
- 25 The term 'minimum age of criminal responsibility' and 'age of criminal responsibility' will be used interchangeably throughout this thesis.

international law and domestic law. This is an important matter to examine, as there is no consensus at the moment between domestic and international role players concerning the minimum age of criminal responsibility.<sup>26</sup> In regard to procedural law, the various fair trial guarantees in relation to juveniles who have committed crimes under international law will be discussed. The fair trial guidelines that are afforded to juveniles under international law are different to those afforded to adult offenders. For example, three important juvenile trial guarantees that are commonly found in practice are that: (1) juveniles should never be detained together with adult offenders; (2) the trial must be held *in camera*; and (3) juveniles should only be detained as a measure of last resort and for the shortest time possible.

These and many other juvenile fair trial guarantees play an important role to ensure that child soldiers are lawfully prosecuted and are separated from the ordinary rules and procedures applicable to adult offenders. This raises the question whether criminal prosecution is the most appropriate measure to deal with child soldiers who have committed crimes under international law. The general view has been to rehabilitate child soldiers instead of prosecuting them.<sup>27</sup> This is as a result of various international instruments, including the Rome Statute of the International Criminal Court (hereafter, ICC Statute), which provides that the enlistment and conscription of child soldiers under the age of 15 is a crime under international law.<sup>28</sup> Moreover, the Convention on the Rights of the Child (hereafter, CRC) is one of a number of international instruments that

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26 See Aptel C 'Children and Accountability for International Crimes: The Contribution of International Criminal Courts' (2010) [http://www.unicef-irc.org/publications/pdf/iwp\\_2010\\_20.pdf](http://www.unicef-irc.org/publications/pdf/iwp_2010_20.pdf) (accessed 8 February 2012) 21; Happold M (2008) 29 *University of La Verne Law Review* 73; Happold M 'The Age of Criminal Responsibility for International Crimes under International Law' in Arts K and Popovski V (eds) *International Criminal Accountability and the Rights of Children* (2006) 72-81, 83.

27 Generally see Grover S C *Child Soldier Victims of Genocidal Forcible Transfer: Exonerating Child Soldiers Charged with Grave Conflict-related International Crimes* (2012) 61-136; Lafayette E (2013) 63 *Syracuse Law Review* 298-299.

28 See Article 8(2)(b)(xxvi) of the ICC Statute, for the conscripting and enlisting of children under the age of 15 during international armed conflicts and Article 8(2)(e)(vii) of the ICC Statute, in terms of non-international armed conflicts. The Rome Statute was adopted on 17 July 1998 and came into force on 1 July 2002.

regulate the rehabilitation of child soldiers who have been demobilised subsequent to a war.<sup>29</sup>

Consequently, the prosecution of child soldiers for the commission of crimes under international law has not been prevalent, since it is not regulated under international law. However, it is argued in this thesis that prosecution should be considered when child soldiers have committed crimes under international law. There are child soldiers who commit extremely violent crimes under international law and such acts can in some cases only be remedied by prosecuting the relevant child soldiers. Impunity will not be combatted if these child soldiers are merely rehabilitated. Yet, difficulties surrounding the prosecution of child soldiers arise, because most of the child soldiers who join militias are forced to commit atrocities.<sup>30</sup> The thesis will therefore look at the factors that need to be taken into consideration when determining whether child soldiers should be prosecuted, including the maturity of the child soldier and the circumstances under which the child soldier committed the crime under international law. The thesis will also look at various alternative mechanisms to prosecution especially in the case where the court decides that it is not in the interest of justice to prosecute a child soldier for crimes under international law. In such a case, alternative mechanisms like a truth and reconciliation commission and the giving of an apology will be required to hold the child soldier accountable for the commission of crimes under international law.<sup>31</sup>

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29 See Article 39 of the CRC. Generally see Article 38(2) of the CRC which provides that States Parties to the CRC should ensure that child soldiers under the age of 15 do not directly take part in hostilities. The CRC was adopted on 20 November 1989 and ratified on 2 September 1990.

30 See Grover S C (2008) 12 *The International Journal of Human Rights* 57. Also see Bosch S 'Targeting and Prosecuting 'Under Aged' Child Soldiers in International Armed Conflicts, in Light of the International Humanitarian Law Prohibition Against Civilian Direct Participation in Hostilities' (2012) 45 *The Comparative and International Law Journal of Southern Africa* 359.

31 See 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 Scholarly Journal of Human Rights* 355-357; Morgan R and Newburn T 'Youth Crime and Justice: Rediscovering Devolution, Discretion, and Diversion?' in Maguire M, Morgan R and Reiner R (eds) *The Oxford Handbook of Criminology* 5ed (2012) 491-492.

The global commission of crimes under international law by child soldiers is not a recent phenomenon.<sup>32</sup> However, in the last decades the problem has become more and more pressing. The first international efforts to prosecute child soldiers for the commission of crimes under international law emerged in 2001 in East Timor, while child soldiers have also been prosecuted in the Democratic Republic of Congo. These cases indicate that child soldiers are not immune to prosecution; however this matter has not sufficiently been dealt with under international criminal law. It is in this vein that this study will seek to provide an in-depth examination of the prosecution of child soldiers for crimes under international law.

## 1.2 Research Question

The question that will be focussed on throughout this thesis is: to what extent are juveniles accountable for crimes under international law, in particular war crimes? This question can also be formulated as follows: can child soldiers be prosecuted for the commission of crimes under international law?

Child soldiers actively participate in warfare and commit crimes without being prosecuted for such crimes. This occurs, because child soldiers are usually rehabilitated after a conflict.<sup>33</sup> This is a major concern since crimes under international law have been

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32 Generally see Briggs J *Innocents Lost: When Child Soldiers go to War* (2005) 45; Freeland S 'Child Soldiers and International Crimes – How Should International Law Be Applied?' (2005) 3 *New Zealand Journal of Public and International Law* 303; Wessells M *Child Soldiers: From Violence to Protection* (2006) 7.

33 See Brett R 'Adolescents Volunteering for Armed Forces or Armed Groups' (2003) 85 *International Review of the Red Cross* 857; Leveau F 'Liability of Child Soldiers under International Criminal Law' (2013) 4 *Osgoode Hall Review of Law and Policy* 41, 48. The rehabilitation of a child soldier starts when he is disarmed and demobilized, for example, when he is rescued from the armed group. Hereafter, the child would normally be placed in an intense rehabilitation programme, where after he would be reintegrated back into the community where he originates from, that is, if he has any family or friends that live there and if the town/village has not been destroyed during the war. The child will be placed in an orphanage if he has nowhere else to go. However, Young notes that governments barely contribute towards the effective rehabilitation and reintegration of child soldiers. See Young A 'Preventing, Demobilizing, Rehabilitating, and Reintegrating Child Soldiers in African Conflicts' (2007) 7 *The Journal of International Policy Solutions* 20.



committed which more often than not result in the loss of the lives of and the infliction of pain on the victims, which in turn creates a problem for the authorities that have to deal with the matter.<sup>34</sup> The problem is threefold. First, there is a child soldier who has committed atrocious crimes under international law, which raises the question whether the child soldier should be held accountable for his conduct. Secondly, a fact that cannot be ignored is that a child soldier is only a child and that begs the question: what is a child doing in a war situation in the first place?<sup>35</sup> Thirdly, if a child soldier has committed an offence under international law, it is unquestionable that the victim has, or relatives of the victim have, suffered as a result of the child soldier's conduct.

As regards the first problem identified above, namely, whether the child soldier should be held accountable for his conduct, there are those who are of the opinion that, irrespective of age, child soldiers who participated in the commission of war crimes should be criminally accountable.<sup>36</sup> In other words, if it were not for the conduct of the child soldier who committed a crime under international law, then such crime would not have been committed. The definition of a 'child soldier' will be examined in order to establish who and what a child soldier is and why child soldiers commit these crimes. In addition, the mental element attached to the conduct of the juvenile needs to be critically analysed. It is necessary to establish whether children possess the required *mens rea* to be convicted of an offence.<sup>37</sup>

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34 Briggs explains that: 'It is impossible to explore the lives of kids carrying guns in conflict without seeing those who've been displaced, orphaned, denied access to education, or directly victimized, sexually or otherwise'. See Briggs J *Innocents Lost: When Child Soldiers go to War* (2005) 6. Also see Wessells M *Child Soldiers: From Violence to Protection* (2006) 226-227.

35 Generally see Udombana N J (2006) 20 *Temple International and Comparative Law Journal* 61. Also see Singer P *Children at War* (2005) 140.

36 See Happold M in Arts K and Popovski V (eds) *International Criminal Accountability and the Rights of Children* (2006) 69; 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.

37 See Freeland S (2008) 29 *University of La Verne Law Review* 30; Rikhof J Sword and Scale, May 2009, CBA National Military Law Section Newsletter (2009) [http://www.cba.org/CBA/newsletters-sections/pdf/05-09-military\\_2.pdf](http://www.cba.org/CBA/newsletters-sections/pdf/05-09-military_2.pdf) (accessed 3 February 2010) 6-7.

Secondly, this thesis deals with the criminal accountability of children who commit crimes under international law. It does not deal with the accountability of the individuals who use child soldiers. There are those who argue that child soldiers should rather be rehabilitated instead of prosecuted as children do not belong in a war.<sup>38</sup> The dilemma here is that you have an innocent child who becomes involved in a war, who is transformed into a child soldier and then commits grave violations under international law.<sup>39</sup> This thesis will attempt to strike a balance between the fact that crimes under international law have been committed and that these child soldiers are only children, who have a right to special fair trial guidelines and other measures specific to children.<sup>40</sup>

The third problem is that victims and their relatives have had to endure tremendous pain and suffering as a result of the crimes that have been committed by child soldiers.<sup>41</sup> The question arises: to what extent should the voices of these people be heard? Do they have any say in the outcome of the case against a child soldier who has committed crimes under international law? The thesis will examine the role of the community in the prosecution of child soldiers and how a child soldier who has committed crimes under international law returns to his community. The problems faced with prosecuting child soldiers underline the distinctive nature of this study.

### **1.3 Objectives and Significance of the Study**

In view of the research questions, it is the objective of this study to determine whether and how child soldiers can be prosecuted for crimes under international law. This

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38 See Musila G (2005) 5 *African Human Rights Law Journal* 322; Singer P *Children at War* (2005) 155. Also see Drumbi M A *Reimagining Child Soldiers in International Law and Policy* (2012) 1.

39 Many child soldiers are involved in war for their entire childhood. See Robinson J A 'The Right of Child Victims of Armed Conflict to Reintegration and Recovery' (2012) 15 *Potchefstroom Electronic Law Journal* 49.

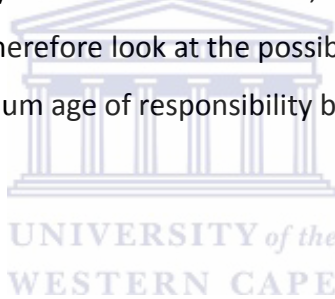
40 See Norbert M 'Children at War: The Criminal Responsibility of Child Soldiers' (2011) 3 *Pace International Law Review Companion* 37-38.

41 Generally see Briggs J *Innocents Lost: When Child Soldiers go to War* (2005) 6; Wessells M *Child Soldiers: From Violence to Protection* (2006) 226-227. Also see Draft Policy on Children, Office of the Prosecutor, International Criminal Court, June 2016.



objective is examined by looking at the position of domestic and international law regarding the said matter. In this regard, specifically the minimum age of criminal responsibility and the fair trial guidelines for child soldiers under domestic law and international law must be examined.

The current international legal framework that regulates the accountability of juveniles is vague and inconclusive.<sup>42</sup> The ICC Statute and the relevant children's rights instruments criminalise the use of child soldiers, but none of the instruments substantially deal with the criminal accountability of child soldiers themselves.<sup>43</sup> It is therefore increasingly significant to work on the formulation of a universal minimum age of criminal responsibility, thereby giving the opportunity to States that do not have an age of criminal responsibility embedded in their law, to include such age into their juvenile law.<sup>44</sup> The thesis will therefore look at the possibility of establishing an international or uniform minimum age of responsibility below which child soldiers cannot be prosecuted.



#### **1.4 Research Methodology**

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

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42 Happold M (2008) 29 *University of La Verne Law Review* 67. Also see Leveau F (2013) 4 *Osgoode Hall Review of Law and Policy* 37-38.

43 Happold M (2008) 29 *University of La Verne Law Review* 67.

44 Generally see Cipriani D *Children's Rights and the Minimum Age of Criminal Responsibility: A Global Perspective* (2009). Also see Leveau F (2013) 4 *Osgoode Hall Review of Law and Policy* 38.

## 1.5 Thesis Outline

Chapter 2 examines the conceptual aspects of the study and in particular the definition of a child soldier. Chapter 3 discusses whether criminal prosecution should be considered when dealing with the matter of holding child soldiers accountable for crimes under international law and also looks at alternative measures to prosecution. Chapter 4 provides a historical background to the commission of crimes under international law by juveniles, specifically focussing on child soldiers. Chapter 5 is reserved for a study regarding the prosecution of child soldiers under domestic law.

Chapter 6 examines the accountability of juveniles under the Statutes of international courts and tribunals as well as soft law instruments, like General Comment No. 10 to the CRC. This chapter will also examine whether a universal minimum age of criminal accountability is regulated under international law, as well as look at the various procedural rules that will apply to child soldiers who have committed crimes under international law. Chapter 7 consists of the conclusions and recommendations of the thesis.

## CHAPTER TWO

### CONCEPTUAL ASPECTS OF THE STUDY

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The commission of crimes under international law by juveniles can include the commission of such crimes by child soldiers as part of an armed group or juveniles as part of a gang, to name but two examples.<sup>1</sup> This thesis, however, will focus primarily on the accountability of child soldiers for the commission of crimes under international law. It is important to examine various concepts and definitions relevant to the accountability of child soldiers in order to explain the intricacies and challenges included in this study.

First, children do not have the same level of maturity as adults, which plays a significant role when dealing with issues related to the age of criminal responsibility.<sup>2</sup> This warrants an examination of the definition of criminal responsibility and specially the age of criminal responsibility. This study is important to establish whether child soldiers under a certain age should not be held accountable. Secondly, what exactly is meant by holding juveniles and in particular child soldiers, accountable, and for which crimes should they be held accountable? These matters will be examined by looking at the following questions: (1) how is a 'juvenile' defined in the context of this thesis and under international law; (2) how is a 'child soldier' defined under international law and why does the thesis specifically deal with child soldiers; (3) what does 'accountability' mean and for which crimes under international law can juveniles be held accountable within the context of this thesis.

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1 See, for example, Goldson B (ed) *Youth in Crisis? 'Gangs', Territoriality and Violence* (2011).

2 See Cohn I and Goodwin-Gill G S *Child Soldiers: The Role of Children in Armed Conflict* (1994) 7; Morgan R and Newburn T in Maguire M, Morgan R and Reiner R (eds) *The Oxford Handbook of Criminology* 5ed (2012) 491-492; Rosen D M *Armies of the Young: Child Soldiers in War and Terrorism* (2005) 3.

## 2.1 Criminal Responsibility and the Age of Criminal Responsibility

There is not a universal definition for the criminal responsibility of juveniles or child soldiers. The term 'criminal responsibility' has mainly been defined by domestic legal frameworks and finds its roots in common law and civil law principles, as well as customary international law. Yet, how will a court establish whether a child soldier is criminally responsible or not? Having looked at various domestic legal regimes and how they define criminal responsibility, it has been established that the criminal responsibility of children is generally determined by looking at the *actus reus*, criminal capacity and the *mens rea* of the accused.<sup>3</sup>

First, the *actus reus* refers to the unlawfulness of the crime that was committed by the juvenile.<sup>4</sup> The offence must also be a crime under the respective laws of the respective jurisdiction. Secondly, it needs to be established whether the juvenile is criminally capable of committing the offence that he is accused of. This is determined by looking at whether the juvenile was able to distinguish between right and wrong at the time of the commission of the offence and whether the child was able to act in accordance with such understanding.<sup>5</sup> The test comprises two steps. The courts have to first establish whether the child soldier could distinguish between right and wrong at the time of the commission of the offence. In the case of child soldiers, various factors like maturity, forceful recruitment, intoxication and others play a role in the child soldier's ability to distinguish between right and wrong. Moreover, the child soldier must also have the capacity to act in accordance with the understanding of doing right or wrong. A child soldier will be held criminally responsible if he knew that the act was wrong, but nevertheless committed the act with the understanding that the act was unlawful.

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3 See Kemp G (*et al*) *Criminal Law in South Africa* 2ed (2015) 25-27; Snyman C R *Strafreg* 6ed (2012) 30-36.

4 See Kemp G (*et al*) *Criminal Law in South Africa* 2ed (2015) 25-27; Snyman C R *Strafreg* 6ed (2012) 30-36.

5 See, for example, Ashworth A and Horder J *Principles of Criminal Law* 7ed (2013) 140-141; Burchell J *Principles of Criminal Law* 4ed (2013) 257; Kemp G (*et al*) *Criminal Law in South Africa* 2ed (2015) 159; Ormerod D *Smith and Hogan's Criminal Law* 13ed (2011) 340-341.

Thirdly, the last step in determining the criminal responsibility of a juvenile is whether the juvenile had the requisite *mens rea* to be held accountable.<sup>6</sup> The scope of this requirement varies among States, but in this thesis, *mens rea* will refer to the intention of the child soldier at the time of the offence.<sup>7</sup> Because of the highly complex nature and composition of crimes under international law, it is necessary to look at whether a juvenile understands the nature and the wrong of the offence for which he is culpable.<sup>8</sup> Yet, not all children are able to understand the nature and unlawfulness of an offence. The age of criminal responsibility will thus have to be established below which a child soldier would be presumed to be incapable of forming the necessary *mens rea* to commit a crime under international law.<sup>9</sup>

The age of criminal responsibility is a concept that prevents the prosecution of juveniles under an age determined by law. The question arises whether juveniles under a specific age should be exempted from prosecution. It is argued that not all children can be prosecuted and that a minimum age of criminal responsibility has to be established, because juveniles do not have the same level of maturity as adults and can therefore not be prosecuted like adults.<sup>10</sup> Children aged below the minimum age have no criminal responsibility although they may of course have some degree of maturity. The characteristic feature of a minimum age requirement is that it establishes an irrefutable

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6 See Grover S C *Child Soldier Victims of Genocidal Forcible Transfer: Exonerating Child Soldiers Charged with Grave Conflict-related International Crimes* (2012) 66; Leveau F (2013) 4 *Osgoode Hall Review of Law and Policy* 37-38.

7 See Kemp G (et al) *Criminal Law in South Africa* 2ed (2015) 25-27; Leveau F (2013) 4 *Osgoode Hall Review of Law and Policy* 38; Snyman C R *Strafreg* 6ed (2012) 30-36.

8 See Duff A 'Punishing the Youth' in Duff A and Weijers I *Punishing Juveniles: Principle and Critique* (2002) 118. Also see Haines K and Drakeford M *Young People and Youth Justice* (1998) 236; Leveau F (2013) 4 *Osgoode Hall Review of Law and Policy* 38.

9 See Grover S C *Child Soldier Victims of Genocidal Forcible Transfer: Exonerating Child Soldiers Charged with Grave Conflict-related International Crimes* (2012) 66. Also see Leveau F (2013) 4 *Osgoode Hall Review of Law and Policy* 37-38.

10 See Fortin J *Children's Rights and the Developing Law* 3ed (2009) 83; Scott E S and Steinberg L 'Adolescent Development and the Regulation of Youth Crime' (2008) 18 *The Future of Children* 19-20.

presumption of a lack of sufficient maturity.<sup>11</sup> A ten year old child, for example, will not have the same level of maturity as a 17 year old child.<sup>12</sup> Indeed, Fontin states:

‘It is the older adolescents’ ability to conceptualise, to think about the meaning of their experiences and to establish concepts about themselves as distinctive persons that marks out adolescence from the earlier years of life’.<sup>13</sup>

An ‘adolescent child’ generally refers to a child between the ages of 13 and 18, and marks the time when a child’s puberty evolves, while there is also a shift in maturity the older the child becomes. What is the minimum age threshold supposed to guarantee? It primarily ensures that child soldiers, who were under the minimum age of criminal responsibility at the time of the offence, cannot be prosecuted for an offence. Practically, courts do not have the jurisdiction to try these child soldiers. Does this mean that child soldiers who are below the minimum age of criminal responsibility do not have to take responsibility for their wrongdoings? No, but such children are normally subjected to non-punitive measures geared towards the rehabilitation of the child.<sup>14</sup> The minimum age of criminal responsibility thus fulfils an important role in determining to what extent child soldiers are responsible for crimes under international law. The age of criminal responsibility of juveniles will be discussed throughout this thesis, first looking

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11 See Munn N J ‘Reconciling the Criminal and Participatory Responsibilities of the Youth’ (2012) 38 *Social Theory and Practice* 145. Also see Duff A in Duff A and Weijers I *Punishing Juveniles: Principle and Critique* (2002) 116.

12 See Rutter M and Rutter M *Developing Minds: Challenge and Continuity Across the Life Span* (1993) 6, 7. Also see Fortin J *Children’s Rights and the Developing Law* 3ed (2009) 83-84; Newbury A ‘Youth Crime: Whose Responsibility?’ (2008) 35 *Journal of Law and Society* 140; Scott E S and Steinberg L (2008) 18 *The Future of Children* 20.

13 Fortin J *Children’s Rights and the Developing Law* 3ed (2009) 84. Also see Rutter M and Rutter M *Developing Minds: Challenge and Continuity Across the Life Span* (1993) 252.

14 Article (7)1 of the Optional Protocol to the CRC on the Involvement of Children in Armed Conflict, provides that child soldiers should be rehabilitated and socially reintegrated. The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict was adopted on 25 May 2000 and came into force on 12 February 2002. Generally also see Duff A in Duff A and Weijers I *Punishing Juveniles: Principle and Critique* (2002) 120; Walgrave L ‘Not Punishing Children, but Committing Them to Restore’ in Duff A and Weijers I *Punishing Juveniles: Principle and Critique* (2002); Wessells M *Child Soldiers: From Violence to Protection* (2006) 181-182.

at its application under domestic law in Chapter five and thereafter how it is applied under international law in Chapter six.

## 2.2 The Definition of 'Juvenile'

A child soldier can also be categorised as a juvenile, yet how is a juvenile defined under international law? There is a specific definition of 'juvenile' under international law, but an age limit is not specified. Rule 2.2(c) of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (hereafter, the Beijing Rules) of 1985 provides: 'A juvenile offender is a child or young person who is alleged to have committed or who has been found to have committed an offence'.<sup>15</sup> The age of the juvenile ranges in age from seven to 18, and even above 18 in some national legislations.<sup>16</sup> The reason why there has not been a universal definition of 'juvenile' is that the relevant age of juveniles varies significantly between countries. In Germany, for example, a person who commits an offence between the ages of 18 and 21 is classified as a young adult and is prosecuted under the juvenile justice system under certain circumstances, while in Australia, only children who commit crimes under the age of 18 are juveniles.

Why does the age of the juvenile vary between countries? It is submitted that each country has its own views and perspectives on establishing an age below which a person can be categorised as a juvenile and be treated in a way different to adult offenders. This is partly as a result of the different approaches followed by common and civil law jurisdictions, coupled with the development of customary law principles over the centuries. In addition, not all countries are agreed when it comes to the question of maturity.<sup>17</sup> Maturity in the case of child soldiers refers to the ability of the child soldier

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15 The Beijing Rules was adopted by General Assembly Resolution 40/33 on 29 November 1985.

16 Commentary of Rule 2 of the Beijing Rules.

17 See *Centre for Child Law v Minister of Constitutional Development, Centre for Child Law* CCT 98/08 (2009) ZACC paragraph 28. Also see Seiler A 'Buried Alive: The Constitutional Question of Life without Parole for Juvenile Offenders Convicted of Homicide' (2013) 17 *Lewis and Clarke Law Review*

to act in a reasonable manner, make important decisions by himself, take responsibility for such decisions and understand the consequences of committing a crime under international law.<sup>18</sup> In one jurisdiction it may be argued that a child older than 16 has the same level of maturity as an adult, while in other jurisdictions it is held that children under the age of 18 cannot be placed in the same category of maturity.<sup>19</sup> There has to be a distinction between how juveniles and adults are perceived within the realm of international criminal law. Seiler states that juveniles are 'vastly different from the average adult offender in cognitive capacity, character development, and potential for maturation and change'.<sup>20</sup> It is important that children be treated differently to adults, an aspect which shall be focussed on throughout this thesis. This does not imply that juveniles should be protected when they commit an offence under international law, but illustrates that there must be special measures put in place when dealing with children who have committed such crimes.<sup>21</sup>

That being said, how is 'juvenile' defined within the scope of this thesis? Under international law, a 'child' is broadly defined as a person under the age of 18.<sup>22</sup> Consequently, there has been a general tendency under international law to

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297; Moyo A 'Youth, Competence and Punishment: Reflections on South Africa's Minimum Sentencing Regime for Juvenile Offenders' (2011) 26 *SA Public Law* 230.

18 See Crofts T *The Criminal Responsibility of Children and Young Persons: A Comparison of English and German Law* (2002) 142. Also see Duff A in Duff A and Weijers I *Punishing Juveniles: Principle and Critique* (2002) 117-120.

19 See Seiler A (2013) 17 *Lewis and Clarke Law Review* 328. Also see Horowitz M A 'Kids who Kill: A Critique of How the American Legal System Deals with Juveniles who Commit Homicide' (2000) 63 *Law and Contemporary Problems* 152, 163; Keating H 'The 'Responsibility' of Children in the Criminal Law' (2007) 19 *Child and Family Law Quarterly* 185, 187.

20 Seiler A (2013) 17 *Lewis and Clarke Law Review* 329. Also see Horowitz M A (2000) 63 *Law and Contemporary Problems* 165; Sloth-Nielsen J 'Juvenile Sentencing Comes of Age' (2005) 16 *Stellenbosch Law Review* 100.

21 See Seiler A (2013) 17 *Lewis and Clarke Law Review* 293. Also see Kirton D 'Young People and Crime' in Hale C (et al) (eds) *Criminology* (2005) 398.

22 Article 1 of the CRC provides that: 'a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier'. Article 2 of the African Charter on the Rights and Welfare of the Child of 1990, provides that: 'a child means every human being below the age of 18 years'. The African Charter on the Rights and Welfare of the Child was adopted on 11 July 1990 and entered into force on 29 November 1999.



differentiate between offenders above the age of 18 and those below the age 18.<sup>23</sup> It is thus argued that under international law and in the context of this thesis, that persons who commit offences above the age of 18 are defined as adult offenders, while persons who commit offences under the age of 18 are defined as juveniles. In the next part of the chapter we look at why this thesis focusses on child soldiers and critically examine the definition of 'child soldier'.

### 2.3 The Definition of 'Child Soldier'

The thesis will focus on child soldiers. But why specifically child soldiers? The commission of crimes under international law by child soldiers increased significantly in the 1970s, as the availability of small arms, like lightweight machine guns, made it possible for children to participate in warfare.<sup>24</sup> Armed groups throughout the world have recruited thousands of children into their forces without any difficulty. Child soldiers are easy targets since they are recruited at will and can easily be manipulated to commit any crime, including crimes under international law.<sup>25</sup> Indeed, child soldiers in Sierra Leone committed some of the most heinous crimes under international law, most notably, the crime of mutilation. Moreover, the Special Court for Sierra Leone (hereafter, SCSL) has jurisdiction to prosecute child soldiers between the ages of 15 and 18 who have committed crimes.<sup>26</sup> Child soldiers are therefore the biggest group of juveniles who have committed and are still committing crimes under international law. It is for this reason that the thesis will focus in the prosecution of child soldiers.

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23 See also Article 26 of the ICC Statute. Article 26 will be analysed in Chapter 6.1.1.

24 See Freeland S (2008) 29 *University of La Verne Law Review* 26; Honwana A M 'Children's Involvement in War: Historical and Social Contexts' (2008) 1 *Journal of the History of Childhood and Youth* 140. Also see Cryer R (et al) (eds) *An Introduction to International Criminal Law and Procedure* 3ed (2014) 303.

25 See Wessells M *Child Soldiers: From Violence to Protection* (2006) 79. Also see Kahn L (ed) *Child Soldiers* (2008) 100.

26 Article 7(1) of the Statute of the Special Court for Sierra Leone. Article 7(1) will be discussed in Chapter 6.1.4.

The term 'child soldier' consists of two contradictory notions.<sup>27</sup> First, 'child' refers to a young person between infancy and youth and implies simplicity, immaturity and an absence of physical, mental and emotional development.<sup>28</sup> Secondly, 'soldier' usually refers to men and women as skilled warriors.<sup>29</sup> Although the terms 'child' and 'soldier' are contradictory in nature, children have been used in armed conflicts transforming them into skilled warriors.

Child soldiers are furthermore defined by their age. A former child soldier in Colombia once stated that: 'The commanders prefer minors because they learn better.... The ideal recruit is about 13 because then they can get a full political education'.<sup>30</sup> This is a disturbing statement, as child soldiers even as young as 7 are susceptible to the vile and cowardly recruitment tactics by rebel groups and militias in times of wars and conflicts.<sup>31</sup> Most international conventions concerning the rights of a child regard a child to be any person below the age of 18 years.<sup>32</sup> Rosen refers to the 'straight 18' position, which defines a child soldier as: 'any person under eighteen years of age who is recruited or used by an army or armed group'.<sup>33</sup> The 'straight 18' position can also be compared to the military recruitment age of 18 that is being used by most States.<sup>34</sup> The

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- 27 See Francis D J 'Paper Protection' Mechanisms: Child Soldiers and the International Protection of Children in Africa's Conflict Zones' (2007) 45 *The Journal of Modern African Studies* 210-211; Rosen D M 'Who is a Child? The Legal Conundrum of Child Soldiers' (2010) 25 *Connecticut Journal of International Law* 96; Rosen D M *Armies of the Young: Child Soldiers in War and Terrorism* (2005) 3.
- 28 Cohn I and Goodwin-Gill G S *Child Soldiers: The Role of Children in Armed Conflict* (1994) 7; Rosen D M *Armies of the Young: Child Soldiers in War and Terrorism* (2005) 3.
- 29 Rosen D M *Armies of the Young: Child Soldiers in War and Terrorism* (2005) 3.
- 30 See Kahn L (ed) *Child Soldiers* (2008) 100; Briggs J *Innocents Lost: When Child Soldiers go to War* (2005) 47. For a discussion of child soldiers in Colombia see Briggs J *Innocents Lost: When Child Soldiers go to War* (2005) 39-80.
- 31 See Kahn L (ed) *Child Soldiers* (2008) 100. Also see Brett R (2003) 85 *International Review of the Red Cross* 861-862.
- 32 See Freeland S (2008) 29 *University of La Verne Law Review* 28; Cohn I and Goodwin-Gill G S *Child Soldiers: The Role of Children in Armed Conflict* (1994) 6.
- 33 Rosen D M (2010) 25 *Connecticut Journal of International Law* 96-98; Rosen D M *Armies of the Young: Child Soldiers in War and Terrorism* (2005) 3. Also see Cohn I and Goodwin-Gill G S *Child Soldiers: The Role of Children in Armed Conflict* (1994) 8; Drumbl M A *Reimagining Child Soldiers in International Law and Policy* (2012) 4-5.
- 34 Cohn I and Goodwin-Gill G S *Child Soldiers: The Role of Children in Armed Conflict* (1994) 8; Rosen D M (2010) 25 *Connecticut Journal of International Law* 99. If a State's military age is determined at the age of 18, children under the age of 18 cannot join that military.

military age of 18 generally determines that children under the age of 18 may not be recruited by the military of a State. In this context, the term 'child soldier' implies that the recruitment of children under the age of 18 is illegal. In other words, by calling a child soldier, a soldier, identifies the illegal nature of children who participate in warfare. Indeed, the Optional Protocol to the CRC on the Involvement of Children in Armed Conflict provides that child soldiers under the age of 18 may not take a direct part in hostilities,<sup>35</sup> may not be forced to join the military<sup>36</sup>, and that sufficient safeguards must be put in place when a child voluntarily joins the military where it is legal to do so.<sup>37</sup> However, the military age differs among States, while the 'straight 18' concept is not welcomed by every national legal order and culture.<sup>38</sup>

Thus, child soldiers may be defined as child soldiers in one country, but described as soldiers in another country. These child soldiers and soldiers can be victims and perpetrators of criminal acts. Should the States that have a minimum age of recruitment below the age of 18, increase the age of recruitment to 18? This is not clear, but what is clear is that it is contradictory to treat a person as not entirely mature (e.g. to marry, to have a driver's licence, to vote, or to consume alcohol) but to consider his recruitment as legal.<sup>39</sup> It is submitted that States should not be allowed to forcibly recruit children under the age of 18, in accordance with the Optional Protocol to the CRC on the Involvement of Children in Armed Conflict. Moreover, States who voluntarily recruit

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35 Article 1 of the Optional Protocol to the CRC on the Involvement of Children in Armed Conflict.

36 Article 2 of the Optional Protocol to the CRC on the Involvement of Children in Armed Conflict.

37 Article 3(3) of the Optional Protocol to the CRC on the Involvement of Children in Armed Conflict. Armed groups that have no association with the military of the State may not in any circumstances recruit children under the age of 18, albeit voluntarily or forcibly. See Article 4(1) of the Optional Protocol to the CRC on the Involvement of Children in Armed Conflict.

38 See Rosen D M *Armies of the Young: Child Soldiers in War and Terrorism* (2005) 3. Also see Cohn I and Goodwin-Gill G S *Child Soldiers: The Role of Children in Armed Conflict* (1994) 8-9.

39 For a detailed examination of the relationship between participatory responsibility and the criminal responsibility of children see Munn N J (2012) 38 *Social Theory and Practice*. Generally, also see McDiarmid C *Childhood and Crime* (2007). Also see Carroll J E 'Brain Science and the Theory of Juvenile Mens Rea' (2015-2016) 94 *North Carolina Law Review* 569. In *Eddings v Oklahoma* 455 U.S. 104 (1982) paragraph 115-166, the Court expressly notes that juveniles do not possess the same decision-making skills as adults.

children under the age of 18 must ensure that the necessary safeguards are in place and are implemented.<sup>40</sup>

Child soldiers are also defined by what they do, as they perform various tasks and duties. It is generally assumed that child soldiers mainly consist of boys with machine guns and machetes. A Liberian psychologist describes the following profile of a typical child soldier in Liberia:

‘He is 15 years and may be as young as 9. He carries a gun that is sometimes heavier than his body weight. He is very deadly. He has been programmed to carry out orders without question. He is too immature to differentiate what is good from what is evil. He has been catapulted from childhood to adulthood. He has been taught to get everything he desires forcibly. Patience, perseverance, respect for elders are not part of the make-up of his faculty. He enjoys the cracking of his gun and the sound of a gun going off, the menacing noise of an RPG [rocket propelled grenade] while oblivious to the destruction and taking of life it may cause’.<sup>41</sup>

From this description of a child soldier, one is to believe that a child soldier is a boy with a gun involved in a situation of armed conflict. However, it is a common misconception that child soldiers consist of boys with guns, because many child soldiers are girls.<sup>42</sup> This misconception occurs mainly, because girl soldiers are not always as much involved in

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40 It is not within the scope of this thesis to examine the minimum age of recruitment, but States that provide for an age of recruitment under the age of 18 have generally not set a minimum age of recruitment lower than 16. See, for example, States like Cuba (legal conscription age of 16), United Kingdom (no legal conscription, but voluntary recruitment age of 16) and the United States of America (voluntary conscription age of 17). See Child Soldiers International ‘Louder than Words: An Agenda for Action to End State Use of Child Soldiers’ (2012) [http://www.child-soldiers.org/publications\\_archive.php](http://www.child-soldiers.org/publications_archive.php) (accessed 4 August 2014) 146, 159.

41 See Ellis S *The Mask of Anarchy: The Destruction of Liberia and the Religious Dimension of an African Civil War* (1999) 131; Happold M *Child Soldiers in International Law* (2005) 17-18. Also see Gallagher K ‘Towards a Gender-Inclusive Definition of Child Soldiers: The Prosecutor v. Thomas Lubanga’ (2010-2011) 7 *Eyes on the ICC* 117.

42 Apart from the fact that child soldiers consist of boy and girl soldiers, London points out that they are more powerful than they appear, when he states that: ‘Child soldiers are seen as such a great threat to society in part because they undermine accepted roles for children. In war, an armed child holds power over the civilian adults. This throws off any sort of comfortable power dynamic’. See London C *One Day the Soldiers Came: Voices of Children in War* (2007) 174.

frontline combat, as boy soldiers are. However, their involvement is much more complex than that of boy soldiers.<sup>43</sup> It is complicated, because girl soldiers are susceptible to sexual offences by rebels, while the rebels also force the girls to marry them.<sup>44</sup> The inclusion of girl soldiers within the definition of 'child soldier' is crucial in legally cementing their participation as child soldiers.

Moreover, how does the difference between child soldiers who play an active part in hostilities and child soldiers who play an indirect role affect the definition of 'child soldier'? Child soldiers who play an active part in hostilities are those who take part in active combat on the frontline, while child soldiers who play an indirect role are those who join an armed group solely for the purpose of serving as cooks, messengers and spies, among other roles. Another horrific example of a child soldier who plays an indirect role in the conflict is that of a girl soldier who is forced to marry a rebel or who is sexually abused and raped.<sup>45</sup> Such a girl soldier does not play a direct role in the conflict, but the terrible consequences of being a girl soldier are beyond imagination.<sup>46</sup> While the notion of girl soldiers who are sexually abused cannot be compared to child soldiers who fight on the frontline and child soldiers who serve as cooks and messengers, the overarching concept of 'child soldier' includes all of these and many other forms of child soldiering. Child soldiers who play a direct role in the conflict should

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43 See Leibig A 'Girl Child Soldiers in Northern Uganda: Do Current Legal Frameworks Offer Sufficient Protection?' (2005) 3 *Northwestern University Journal of International Human Rights* 2. Generally, also see Fujio C C 'Invisible Soldiers: How and Why Post-Conflict Processes Ignore the Needs of Ex-Combatant Girls' (2008) 10 *Journal of Law and Social Challenges*; Gallagher K (2010-2011) 7 *Eyes on the ICC*.

44 See United Nations Impact of Armed Conflict on Children: Report of the Expert of the Secretary General, Ms Graça Machel, GA Res 48.157 (A/51/306) 26 August 1996 paragraph 45, 46, 51, 68 and 96. Also see Amann D A 'Children' in Schabas W A (ed) *The Cambridge Companion to International Criminal Law* (2016) 253; Gallagher K (2010-2011) 7 *Eyes on the ICC* 121; Human Rights Watch 'Facts about Child Soldiers' (2008) <http://www.hrw.org/news/2008/12/03/facts-about-child-soldiers> (accessed 4 August 2014); Leibig A (2005) 3 *Northwestern University Journal of International Human Rights* 2.

45 See, for example, London C *One Day the Soldiers Came: Voices of Children in War* (2007) 166; Peters K and Richards P 'Why We Fight: Voices of Youth Combatants in Sierra Leone' (1998) 68 *Journal of the International African Institute* 186. Also see Kahn L (ed) *Child Soldiers* (2008) 101.

46 Generally see Valder K 'A Stolen Childhood: A Look Into the World of Female Child Soldiers and the Initiatives Targeting the Ending of the Practice' (2014) 7 *Albany Government Law Review*; Wessells M *Child Soldiers: From Violence to Protection* (2006) 85-107.

not be distinguished from children who play an indirect role in terms of the definition of 'child soldier' in the light of protecting the rights of the child.<sup>47</sup> However, it is submitted that in terms of the criminal responsibility of child soldiers for crimes under international law, there is a distinction between child soldiers who play a direct role and child soldiers who play an indirect role. There is an immediate link to the attribution of criminal responsibility in the case of child soldiers who are directly involved in a conflict, because of their direct involvement in the commission of crimes under international law. Such a direct link, however, is not as prominent in the case of child soldiers who merely serve as cooks and messengers.<sup>48</sup>

Gates takes a different view by stating that: 'A child soldier is defined as a child who participates actively in a violent conflict as a member of an organization that applies violence in a systematic way'.<sup>49</sup> This definition touches on two aspects of child soldiering. First, Gates's definition refers to the active participation of the child soldier. This is confusing: does it mean that child soldiers must play an active, and therefore, a direct role in the conflict? No, it does not, because active participation can also mean serving as a cook or a messenger, since the child soldier is physically participating. What Gates might be alluding to is that the child soldier does not necessarily have to participate in active combat, but can be active in any manner, including acting as a cook, messenger or in any other indirect role. Unfortunately, this is not very clear from his definition.

Secondly, Gates states that the aspect of violence must be prevalent. In other words, a child soldier cannot be classified as a child soldier if the child is not participating in an armed conflict or war situation. However, the author does not agree with this argument.

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47 See Coalition for the International Criminal Court 'How to Define "Child Soldiers" Debated at Lubanga Trial' (2010) [http://www.coalitionfortheicc.org/blog/?p=510&langswitch\\_lang=en](http://www.coalitionfortheicc.org/blog/?p=510&langswitch_lang=en) (accessed 6 September 2010).

48 Child perpetrators also become use to the life as a merciless rebel. Wessells points out that: 'Child combatants also learn to be repeat killers who show scant mercy or remorse.' See Wessells M *Child Soldiers: From Violence to Protection* (2006) 78-79.

49 Gates S 'Why do Children Fight? Motivations and the Mode of Recruitment' in Özerdem A and Podder S (eds) *Child Soldiers: From Recruitment to Reintegration* (2011) 31.

The definition of 'child soldier' should not be limited to child soldiers who participate in armed conflicts. The armed group or armed force that the child soldier is part of does not have to participate in an armed conflict. The definition of 'child soldier' should also include any child soldier who is part of any type of armed group or armed force. The armed group or armed force does not have to apply 'violence in a systematic way' as stated in the definition of Gates. The moment the child is part of an armed group or armed force, is the moment that a child becomes a child soldier.

From the various situations canvassed above, it is clear that there exist various types of child soldiers. Francis points to three ways of distinguishing different types of child soldiers, namely: (1) child soldiers in non-conflict and conflict situations; (2) child soldiers within national armies and child soldiers recruited by rebel groups; and (3) child soldiers who fight as direct combatants on the front line and those who play supportive roles, for example, as sex slaves, cooks and porters.<sup>50</sup> In relation to the first type of 'child soldier' mentioned above, child soldiers have participated in various types of conflicts around the world.<sup>51</sup> While war crimes, for example, are limited to acts committed in an armed conflict situation, the concept of the child soldier is not restricted to such a situation. Regarding the second type of 'child soldier', it is important for legal systems to draw a distinction between child soldiers in national armies and child soldiers in armed groups. A State's law cannot prohibit the use of child soldiers if its own military is using child soldiers.<sup>52</sup> Importantly, this distinction has no bearing on the illegality of child soldiering. It is as illegal to use child soldiers in a national army as it is to use child soldiers in an armed group, since children in a national army who commit crimes under international law should be treated in the same manner as children who commit such crimes as part of an armed group. Referring to the third type of 'child soldier', child

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50 See Francis D J (2007) 45 *The Journal of Modern African Studies* 215-217. Also see McKnight J (2010) 18 *African Journal of International and Comparative Law* 113.

51 See Norbert M (2011) 3 *Pace International Law Review Companion* 12; Valder K (2014) 7 *Albany Government Law Review* 35-36.

52 This was the case, for example, in Mozambique and many other States. See Singer P *Children at War* (2005) 115. Also see Briggs J *Innocents Lost: When Child Soldiers go to War* (2005) vii; Francis D J (2007) 45 *The Journal of Modern African Studies* 208.



soldiers can either fulfil a direct role, eg as foot soldiers, or an indirect role, eg as messengers.<sup>53</sup> Should child soldiers who serve in an organised armed force as cooks be considered as child soldiers even though they do not serve on the frontline?<sup>54</sup> Yes, child soldiers who are cooks, for example, were also recruited under the same circumstances as child soldiers who are serving on the frontline, the only difference being the nature of their participation.

Nevertheless, the term 'child soldier' has been widely misinterpreted throughout the 20th century.<sup>55</sup> This is so mainly because the role of child soldiers within armed conflicts has changed dramatically in this period, while armed conflicts have also evolved throughout the last century.<sup>56</sup> The outcome is that we have a mixed bag of definitions, which results in the misinterpretation of the term 'child soldier'. Thus, the question arises: who exactly can be defined as a 'child soldier', since someone who cooks or delivers messages during the war, among various duties, can also be classified as a child soldier. In the mid-1990s, the use of child soldiers in armed conflict dramatically increased, prompting international children's rights actors to work on a definition of 'child soldier'. A universal definition of 'child soldier' finally emerged during the establishment of the Cape Town Principles and the Paris Principles.<sup>57</sup>

### **2.3.1 The Cape Town and Paris Principles**

In 1997, a symposium was held in Cape Town on the Prevention of Recruitment of Children into the Armed Forces and on Demobilization and Social Reintegration of Child

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53 Also see Wessells's discussion of the different types of child soldiers. See Wessells M *Child Soldiers: From Violence to Protection* (2006) 5-7.

54 See Wessells M *Child Soldiers: From Violence to Protection* (2006) 5-7.

55 See Wessells M *Child Soldiers: From Violence to Protection* (2006) 5. Also see Francis D J (2007) 45 *The Journal of Modern African Studies* 208-209.

56 See Freeland S (2008) 29 *University of La Verne Law Review* 26; Honwana A M (2008) 1 *Journal of the History of Childhood and Youth* 140.

57 Generally see Quénivet N (2013) 38 *Brook Journal of International Law* 1084-1085; Tiefenbrun S 'Child Soldiers, Slavery and the Trafficking of Children' (2008) 31 *Fordham International Law Journal* 444.



Soldiers in Africa.<sup>58</sup> The purpose of this symposium was to gather experts to develop strategies for preventing the recruitment of children in Africa and focussed specifically on the use of child soldiers in Africa.<sup>59</sup> As a result, the Cape Town Principles were established, thus becoming the first legislative tool to officially define 'child soldier'. Ten years later, the Paris Commitments and Principles: The Principles and Guidelines on Children Associated with Armed Forces or Armed Groups, also known as the Paris Principles, were established. The Paris Principles are based on the Cape Town Principles, but its definition of 'child soldier' differs from that found in the Cape Town Principles.

The Cape Town Principles defines a 'child soldier' as:

'any person under 18 years of age who is part of any kind of regular or irregular armed force or armed group in any capacity, including but not limited to cooks, porters, messengers and anyone accompanying such groups, other than family members. The definition includes girls recruited for sexual purposes and for forced marriage. It does not, therefore, only refer to a child who is carrying or has carried arms'.<sup>60</sup>

Regarding the determination of age, the definition states that a child soldier cannot be older than 18.<sup>61</sup> This notion is in accordance with the CRC's definition of a child, which also provides that a child is any person under the age of 18. This is an important aspect of the definition, because many soldiers between the ages of 15 and 18 have been regarded by some States as ordinary soldiers rather than child soldiers.

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58 The symposium was held from 27-30 April 1997. The Cape Town Principles were made possible as a result of the collaboration between UNICEF, international policy, child protection agencies and development practitioners based on African experiences. See Francis D J (2007) 45 *The Journal of Modern African Studies* 219.

59 Generally see Francis D J (2007) 45 *The Journal of Modern African Studies* 219; Quéniévet N (2013) 38 *Brook Journal of International Law* 1084-1085.

60 UNICEF 'Cape Town Principles and Best Practices: Adopted at the Symposium on the Prevention of Recruitment of Children into Armed Forces and on Demobilization and Social Reintegration of Child Soldiers in Africa' [http://www.unicef.org/emerg/files/Cape\\_Town\\_Principles\(1\).pdf](http://www.unicef.org/emerg/files/Cape_Town_Principles(1).pdf) (accessed 12 October 2010).

61 See Francis D J (2007) 45 *The Journal of Modern African Studies* 219; Wessells M *Child Soldiers: From Violence to Protection* (2006) 7.

The definition also provides that the child must form part of a regular or irregular armed force or armed group in any capacity. This refers to the armed groups that recruit child soldiers. Regular armed forces generally include the police, the army and other internal armed forces. Irregular armed forces are those forces that are not regular armed forces, like the Revolutionary United Front (hereafter, RUF), a rebel group during the civil war in Sierra Leone. The definition also includes other armed groups that may recruit child soldiers. It is once again important to note that a child is a child soldier once he joins any sort of armed group or force.

The definition furthermore incorporates various other types of child soldiering including messengers, porters, cooks and anyone accompanying armed groups, emphasising the fact that child soldiers are not limited to children who fight at the frontline of a war. Girls who are recruited for sexual purposes and forced marriages also fall under the definition.<sup>62</sup> This means that girls, who are recruited into armed forces solely for sexual purposes, are defined as child soldiers even if they do not participate at the frontline of the conflict or as a messenger or cook or any other related role. In fact, 40 per cent of all child soldiers in the world today are reportedly girls.<sup>63</sup> This emphasises how important it is to include the concept of girl soldiers in the definition of child soldiers. The Paris Principles took this matter into consideration when it structured its definition of 'child soldier'.<sup>64</sup>

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62 For example, the child soldiers in Sierra Leone mainly consisted of boys, although many girl soldiers were also recruited. Girl soldiers had to endure countless instances of rape and other forms of sexual abuse. See Peters K and Richards P (1998) 68 *Journal of the International African Institute* 186. Also see Kahn L (ed) *Child Soldiers* (2008) 101.

63 Save the Children 'Forgotten Casualties of War: Girls in Armed Conflict' (2005) [http://www.peacewomen.org/assets/file/Resources/NGO/HR\\_ForgottenGirls\\_SC\\_2005.pdf](http://www.peacewomen.org/assets/file/Resources/NGO/HR_ForgottenGirls_SC_2005.pdf) (accessed 5 September 2013). Also see Drumbl M A *Reimagining Child Soldiers in International Law and Policy* (2012) 8; Gallagher K (2010-2011) 7 *Eyes on the ICC* 116. One study found that girl soldiers were involved in 34 conflicts between 1990 and 2003. See Kahn L (ed) *Child Soldiers* (2008) 101.

64 UNICEF 'The Paris Principles: Principles and Guidelines on Children Associated with Armed Forces or Armed Groups' <http://www.unicef.org/emerg/files/ParisPrinciples310107English.pdf> (2007) (accessed 5 September 2013).

The Paris Principles define a 'child soldier' 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 taking or has taken a direct part in hostilities'.<sup>65</sup>

This definition is similar to the Cape Town Principles's definition of a child soldier, but differs in some aspects. First, the Paris Principles specifically refer to boys and girls as child soldiers, thereby emphasising that boys as well as girls can be fighters, cooks, porters, messengers and spies. Although the Cape Town Principles referred to the use of girl soldiers for sexual purposes and for forced marriages, the Paris Principles go one step further and refer to child soldiers as 'boys and girls'.

Secondly, whereas the Cape Town Principles refer to girl soldiers recruited for sexual purposes and for forced marriages, the Paris Principles refer to boys and girls being used for sexual purposes, thus including the sexual abuse of boy soldiers within the ambit of the definition of child soldiers. This is important, because some boys are subject to sexual abuse after having been recruited.<sup>66</sup> The definition in the Paris Principles is much more gender specific than the one embedded in the Cape Town Principles, while it also clearly sets out who and what a child soldier is.

It is submitted that the 'child soldier' definitions in the Cape Town Principles and Paris Principles are both good and broad definitions. They cover all the aspects of child soldiering and, importantly, refer to the issue of girl soldiers. The Cape Town and Paris Principles are not binding, but States should be encouraged to incorporate either the

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65 UNICEF <http://www.unicef.org/emerg/files/ParisPrinciples310107English.pdf> (2007) (accessed 5 September 2013).

66 See Humphreys G 'Healing Child Soldiers' (2009) 87 *Bulletin of the World Health Organization* 330. Contrarily, boys also abuse girl soldiers. See Honwana A M *Child Soldiers in Africa* (2006) 91-92; Waschefort G *International Law and Child Soldiers* (2015) 16.

Cape Town or Paris Principles's definition of 'child soldier' into their child justice laws.<sup>67</sup> As the most complete definition of a child soldier, the Paris Principles's definition should be incorporated into an international child rights instrument and even the ICC Statute, to ensure the prevention of the recruitment of children during armed conflict and to identify which soldiers are child soldiers when States are considering prosecuting child soldiers for the crimes they have committed. The culture based definition of child soldier will now be examined to determine whether it has an impact on the implementation of the definition of child soldier within the legislation of those States who rely on culture based legal definitions.

### 2.3.2 Culture Based Definition

Many States find it difficult to incorporate a definition of child soldier into their national legal systems due to the influence of culture based law. This is reflected in many cultures where children are deemed to be adults years before they reach the age of 18.<sup>68</sup> However, this is in contradiction with the provisions of international law which declare that persons below the age of 18 should be categorised as children. In pre-industrial societies there is no fixed chronological age at which young children join armies and participate in the rituals of war.<sup>69</sup> Schafer states that: 'the concept of the child is malleable and constructed within the bounds of particular times and places'.<sup>70</sup> This makes the culture based definition so important. In certain tribes and cultures,

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67 See Francis D J (2007) 45 *The Journal of Modern African Studies* 219; McKnight J (2010) 18 *African Journal of International and Comparative Law* 119.

68 See Freeland S (2008) 29 *University of La Verne Law Review* 29. Generally, also see Lafayette E (2013) 63 *Syracuse Law Review* 307-308.

69 See Quénivet N (2013) 38 *Brook Journal of International Law* 1094; Rosen D M *Armies of the Young: Child Soldiers in War and Terrorism* (2005) 4; Wessells M and Jonah D 'Recruitment and Reintegration of former Youth Soldiers in Sierra Leone: Challenges of Reconciliation and Post-accord Peace Building' in McEvoy-Levy S (ed) *Troublemakers of Peacemakers? Youth and Post-accord Peace Building* (2006) 27, 29.

70 Schafer J 'The Use of Patriarchal Imagery in the Civil War in Mozambique and its Implications for the Reintegration of Child Soldiers' in Boyden J and De Berry J (eds) *Children and Youth on the Frontline* (2004) 88. Also see Cryer R (et al) (eds) *An Introduction to International Criminal Law and Procedure* 3ed (2014) 303. In some states the age of the juvenile is not properly documented. See Quénivet N (2013) 38 *Brook Journal of International Law* 1078.

children of an extremely young age are regarded as adults and might be asked to support the adults in war. Although these children are very young, they are, on the other hand, very dangerous and can commit crimes under international law.

There are many examples of children becoming adults before the age of 18. The boys of the Dinka tribe in Sudan are initiated into adulthood between the ages of 16 and 18 and subsequent gifts, including spears, symbolise the military recruitment of youth.<sup>71</sup> In the 19th century, a group of boys among the Native American Cheyenne started having war parties at the ages of 14 and 15, while the female warriors of the Dahomey tribe were recruited between the ages of nine and 15.<sup>72</sup>

The above examples illustrate the fact that children below the age of 18 are in some circumstances well equipped and trained to fight in wars. The question is whether these child soldiers are depicted as children or adult combatants? It is submitted that many of these children are seen as adults in their respective cultures, whereas the international audience tends to depict them as victims of war.<sup>73</sup> The reality, however, is that child soldiers have been involved in warfare and have committed crimes under international law. Therefore, to shed some light on this confusing matter, it is important that States implement the universal definition of a child soldier into their legal systems. If this is not done, child soldiers could then be prosecuted as adults within the societies that enforce a culture based definition of 'child soldier'. It is thus the duty of the CRC, in particular, to

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71 See Deng F M *The Dinka of Sudan* (1972) 68-73; Rosen D M *Armies of the Young: Child Soldiers in War and Terrorism* (2005) 4. Also see Cohn I and Goodwin-Gill G S *Child Soldiers: The Role of Children in Armed Conflict* (1994) 7.

72 In the Brazilian Favela Gang, most children between the ages of 12 and 14 are considered to be adults since they are only considered to be children if they are not able to handle guns and perform certain tasks. See Gates S in Özerdem A and Podder S (eds) *Child Soldiers: From Recruitment to Reintegration* (2011) 31. Also see Edgerton R B *Warrior Women: The Amazons of Dahomey and the Nature of War* (2000); Hoebel E A *The Cheyennes: Indians of the Great Plains* (1966) 77. Also see Rosen D M *Armies of the Young: Child Soldiers in War and Terrorism* (2005) 4; Twum-Danso A *Africa's Young Soldiers* (2003) 35.

73 See Freeland S (2008) 29 *University of La Verne Law Review* 29. Also see Draft Policy on Children, Office of the Prosecutor, International Criminal Court, June 2016; Wessells M *Child Soldiers: From Violence to Protection* (2006) 220.

oversee the implementation of one of the two international definitions of 'child soldier' in countries where a culture based definition of child soldier is followed, in order to prevent the prosecution of child soldiers as adults.

What can be concluded from this examination of the various definitions of child soldiers is that there is not a uniform definition regulated by international law.<sup>74</sup> There are various definitions, leaving States to question whether they are dealing with child soldiers or not. Although the Cape Town and Paris Principles's definitions of child soldiers are well known, they are however, not enforceable under international law.<sup>75</sup> McKnight submits that a more broader and comprehensive definition of child soldiers is required.<sup>76</sup> McKnight's argument in this regard is persuasive, because if an international definition of child soldiers is not established, then the inconsistent manner in which various States define child soldiers will continue. However, even an international definition might not necessarily be adopted by States where child soldiers are active. Nonetheless, the Cape Town and Paris Principles's definitions of a child soldier remain the only benchmarks for States to review their definition of 'child soldier'.

That being said, it is imperative to work on the establishment of a definition of 'child soldier' that is regulated under international law. This will in turn protect the rights of child soldiers as victims of international criminal law and when they are to be prosecuted for crimes under international law, while underlining the importance of child soldiers within the realm of international criminal law.

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74 Generally see Francis D J (2007) 45 *The Journal of Modern African Studies* 215; Wessells M *Child Soldiers: From Violence to Protection* (2006) 5.

75 See Francis D J (2007) 45 *The Journal of Modern African Studies* 219; McKnight J (2010) 18 *African Journal of International and Comparative Law* 119.

76 McKnight J (2010) 18 *African Journal of International and Comparative Law* 129. Also see Wessells M *Child Soldiers: From Violence to Protection* (2006) 5.

## 2.4 Defining 'Accountability'

The accountability of juveniles or child soldiers for the commission of crimes under international law has been an issue that has never received any international attention.<sup>77</sup> In fact, even the rights of children who were victims of international crimes were neglected by international organs until the mid-late 20th century when their rights were eventually acknowledged and regulated. Thus, the focus has been on children as victims of crimes under international law and not as perpetrators of such crimes, although many juveniles have committed crimes under international law without being held accountable for those crimes.<sup>78</sup> This has contributed to the fact that international criminal law has mainly focussed on the prosecution of individuals who are most responsible for crimes under international law. Nevertheless, the question arises whether child soldiers can be held accountable for crimes under international law?

Yet, what is meant with holding child soldiers 'accountable' for crimes under international law and for which crimes should they be held accountable? The thesis will not look at the various definitions of accountability that exist; instead, it is important to look at what is meant by 'accountability' in the context of this thesis. Juveniles, and in particular child soldiers, can be held accountable in a number of different ways. Child soldiers have participated in a Truth and Reconciliation Commission in Sierra Leone, while most of the former child soldiers throughout the world have been rehabilitated and reintegrated into their societies.<sup>79</sup> These are forms of accountability that are restorative in nature, and do not subject the child soldier to stricter measures of

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77 See, for example, Happold M (2008) 29 *University of La Verne Law Review* 67. Also see Leveau F (2013) 4 *Osgoode Hall Review of Law and Policy* 37-38.

78 Generally see McKnight J (2010) 18 *African Journal of International and Comparative Law* 134; Norbert M (2011) 3 *Pace International Law Review Companion* 35.

79 See, for example, Romero J A 'The Special Court for Sierra Leone and the Juvenile Soldier Dilemma' (2004) 2 *Northwestern University Journal of International Human Rights* 35; Wessells M *Child Soldiers: From Violence to Protection* (2006) 222.



accountability, like prosecution.<sup>80</sup> The aim of this thesis is to examine whether and how juveniles who have committed crimes under international law can be prosecuted for these crimes. Thus, in this thesis, accountability will refer to the prosecution of juveniles, while it is also imperative to look at alternative measures to prosecution. The other part of the question regarding 'accountability' focusses on the type of crimes that can be committed by child soldiers. Child soldiers have committed some of the worst atrocities over the last few decades. However, none more so than war crimes. War crimes are core crimes under the ICC Statute that deals with the commission of crimes during a war or armed conflict.<sup>81</sup> This thesis will therefore focus on the commission of war crimes by juveniles and whether they can be held accountable for such crimes by way of prosecution.<sup>82</sup>

## 2.5 Conclusion

This chapter has examined and clarified certain terms and definitions in order to avoid a sense of ambiguity in relation to these concepts. It is submitted that all States should ensure that various juvenile justice concepts, such as, criminal responsibility, age of criminal responsibility, juvenile and child soldier, be defined in their domestic legal regimes in order to safeguard the rights of children who have committed crimes under international law. Moreover, States that define a juvenile as persons of the age of 16 and 17 should reconsider their position and define all juveniles as persons under the age of 18 years, because any person under the age of 18 should not be prosecuted as an adult, but as a child. A child soldier is well defined within the Cape Town and Paris

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80 See Musila G (2005) 5 *African Human Rights Law Journal* 330; Thomas M A 'Malice Supplies the Age? Assessing the Culpability of Adolescent Soldiers' (2013) 44 *California Western International Law Journal* 4.

81 See Article 8 of the ICC Statute. Also see Grover L *Interpreting Crimes in the Rome Statute of the International Criminal Court* (2014) 279-286; Kemp G (et al) *Criminal Law in South Africa* 2ed (2015) 570-573; Schabas W A 'Atrocity Crimes (Genocide, Crimes Against Humanity and War Crimes)' in Schabas W A (ed) *The Cambridge Companion to International Criminal Law* (2016) 208-210; Werle G and Jessberger F *Principles of International Criminal Law* 3ed (2014) 391.

82 As noted earlier, the term 'war crimes' and the term 'crimes under international law' will be used interchangeably throughout this thesis.



Principles and it is hoped that States will include one of the two definitions into their juvenile justice legal frameworks. Although girl soldiers are included in the Cape Town and Paris Principles's definitions, further research has to be done on girl soldiers, in order to cement their status as child soldiers, especially in the regions where girl soldiers are rife. Finally, juveniles who commit crimes under international law should be held accountable for such crimes, but how should this be enforced? Should they be prosecuted or rather subjected to less punitive measures?

In the following chapter, the rationale for the criminal prosecution of juveniles for crimes under international law as opposed to alternative measures, will be examined.



## CHAPTER THREE

### CRIMINAL PROSECUTION OF CHILD SOLDIERS VERSUS THE USE OF ALTERNATIVE MEASURES

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The guilty can be prosecuted. They should be taken to court, and let them explain what happened. Thinking about the part I've played, I'm thinking I may be liable to appear in court.<sup>1</sup>

- Child soldier, aged 14.

No one expected the sudden influx of child soldiers into armed groups and national armies over the last few decades.<sup>2</sup> The picture of a child holding a gun has become all but synonymous with the image of armed conflicts, especially in Africa. Thousands of victims have suffered because of the crimes committed by child soldiers.<sup>3</sup> Yet, how should international and domestic criminal justice systems deal with these juveniles? Lafayette argues that:

'Any child under the age of eighteen should be treated with the primary goal of rehabilitation and reintegration into society. However, this does not exclude the possibility that prosecution of a minor may be lawful, justified, and in society's best interest'.<sup>4</sup>

Indeed, child soldiers are generally rehabilitated after a conflict; yet, can they be subjected to criminal prosecution and why should this be a conceivable avenue for

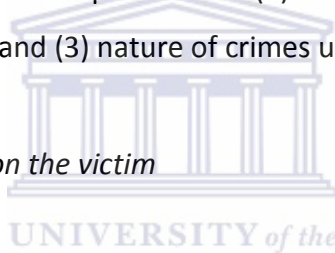
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- 1 See Masland T 'Voices of the Children: We Beat and Killed People' Newsweek 13 May 2002 <http://www.unitedjerusalem.org/index2.asp?id=98771&Date=5/22/2002> (accessed 27 May 2015). Also see Singer P *Children at War* (2005) 155.
  - 2 See, for example, Norbert M (2011) 3 *Pace International Law Review Companion* 12.
  - 3 See Briggs J *Innocents Lost: When Child Soldiers go to War* (2005) 6. Also see Wessells M *Child Soldiers: From Violence to Protection* (2006) 226-227.
  - 4 Lafayette E (2013) 63 *Syracuse Law Review* 325. Also see Singer P *Children at War* (2005) 200-202.

authorities to consider?<sup>5</sup> This central question will be examined by looking at the following aspects: (1) the rationale for prosecuting juveniles; (2) the rationale for excluding the prosecution of juveniles and the use of alternative measures to prosecution; (3) balancing the prosecution of juveniles and the use of alternative measures; and (4) the context of international crimes and the balancing exercise.

### 3.1 Rationale for Prosecuting Child Soldiers

Child soldiers have committed grave violations under international law that cannot be overlooked. Yet, what are the reasons for prosecuting child soldiers who have committed crimes under international law?<sup>6</sup> The following matters will be examined to establish why child soldiers should be prosecuted: (1) retribution and the impact on the victim, (2) prevention of crime and (3) nature of crimes under international law.

#### *(1) retribution and the impact on the victim*



The retributive theory would suggest that child soldiers be criminally prosecuted for the harm they inflict on the victims when they commit a crime under international law.<sup>7</sup>

Drumbl points out that:

‘Although there are many divergent schools of retributivism, what all retributivists generally share is the understanding that the infliction of punishment rectifies the moral balance insofar as punishment is what the perpetrator deserves’.<sup>8</sup>

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5 Generally see Brett R (2003) 85 *International Review of the Red Cross* 857; Leveau F (2013) 4 *Osgoode Hall Review of Law and Policy* 41, 48.

6 Leveau has also done an extensive study on the rationale for prosecuting child soldiers. See Leveau F (2013) 4 *Osgoode Hall Review of Law and Policy* 43-60.

7 See Ashworth A and Roberts J ‘Sentencing: Theory, Principle and Practice’ in Maguire M, Morgan R and Reiner R (eds) *The Oxford Handbook of Criminology* 5ed (2012) 867; Leveau F (2013) 4 *Osgoode Hall Review of Law and Policy* 45; Singer P *Children at War* (2005) 154-155; Wessells M *Child Soldiers: From Violence to Protection* (2006) 218-220.

8 Drumbl M A *Atrocity, Punishment, and International Law* (2007) 61. Also see Musila G *Rethinking International Criminal Law: Restorative Justice and the Rights of the Victims in the International*

Do child soldiers deserve to be prosecuted for the commission of crimes under international law?

Countless offences have been committed by child soldiers over the last few decades, but while most child soldiers have been rehabilitated and released back into their communities, the victim's quest for justice was left in the dark. Yes, some of the commanders of armed groups who have enlisted and conscripted child soldiers in their armed groups have been indicted and sentenced, but more is needed, as those child soldiers who physically perpetrated the acts should also be held accountable.<sup>9</sup> It is submitted that the effects of the crime by the child soldier on the victim and their relatives have a profound impact on the criminal responsibility of the child soldier. In this vein, it can be argued that a child soldier deserves to be prosecuted for crimes under international law, taking into consideration the severity of the effects of the crime on the victim of the offence. For example, a child soldier who kills the breadwinner or a potential breadwinner of a family, places a lot of pressure on the progress of such a family. Consequently, if such a child soldier is not prosecuted, a complete disregard is shown towards the victims.<sup>10</sup> The victims of these crimes will be the first to contend that child soldiers should be prosecuted, in order to prevent the increase in the number of victims who fall into the hands of child soldiers. It has been nearly three decades since child soldiers have been committing crimes under international law and the victims of these crimes have not seen justice. Luis Moreno Ocampo, former prosecutor of the International Court, referring to the plight of victims of crimes under international law at the ICC, once said that: 'We are a permanent court. We will wait. But the victims cannot wait'.<sup>11</sup>

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*Criminal Court* (2010) 8-11. Norrie A *Crime, Reason and History: A Critical Introduction to Criminal Law* 3ed (2014) 22.

9 See, for example, Norbert M (2011) 3 *Pace International Law Review Companion* 16-17; Thomas M A (2013) 44 *California Western International Law Journal* 3.

10 See Lafayette E (2013) 63 *Syracuse Law Review* 324. Also see Singer P *Children at War* (2005) 200.

11 See Kahn L (ed) *Child Soldiers* (2008) 13. Also see Wessells M *Child Soldiers: From Violence to Protection* (2006) 218-219.

## (2) prevention of crime

By prosecuting child soldiers, will the commission of crimes under international law be prevented? In this regard, it is also important to consider the role of general deterrence which alludes to the prosecution and punishment of an offender, in order to dissuade others from committing offences in the future.<sup>12</sup> It is submitted that these offences can only be prevented if child soldiers respect the rule of law. Thus, it is important to look at whether child soldiers consider the consequences of committing an offence.<sup>13</sup> This matter is twofold. Do child soldiers have a fear of being caught and would they commit less crime if they knew that they would be prosecuted for crimes under international law?

Are child soldiers afraid to be punished for the crimes they have committed? Child soldiers are easy to manipulate and become extremely dangerous once they overcome the initial fear of frontline combat.<sup>14</sup> They furthermore create a persona of invincibility and bravery which acts as a facade for a child with a gun.<sup>15</sup> Nonetheless, although these child soldiers are merely children, these children are not afraid to kill. Military commanders encourage child soldiers that their inclusion in an armed group is for a just cause and that they will never be caught.<sup>16</sup> Child soldiers are furthermore brainwashed to believe that their families have abandoned them and that the armed group is the only

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12 See Ashworth A and Roberts J in Maguire M, Morgan R and Reiner R (eds) *The Oxford Handbook of Criminology* 5ed (2012) 868; Drumbl M A *Atrocity, Punishment, and International Law* (2007) 61. Also see Goldstone R J 'Justice as a Tool for Peace-Making: Truth Commissions and International Criminal Tribunals' (1995-1996) 28 *New York University Journal of International Law and Politics* 490; Norrie A *Crime, Reason and History: A Critical Introduction to Criminal Law* 3ed (2014) 337.

13 See Norrie A *Crime, Reason and History: A Critical Introduction to Criminal Law* 3ed (2014) 338-339. Also see Wessells M *Child Soldiers: From Violence to Protection* (2006) 181-182.

14 See Wessells M *Child Soldiers: From Violence to Protection* (2006) 79. Also see Kahn L (ed) *Child Soldiers* (2008) 100.

15 See Freeland S (2008) 29 *University of La Verne Law Review* 26; Wessells M *Child Soldiers: From Violence to Protection* (2006) 82-84.

16 See, for example, Singer P *Children at War* (2005) 72. There are various ways to manipulate child soldiers. In Liberia, child soldiers believed that the scars that were carved on their chests were to protect them from bullets. See Wessells M *Child Soldiers: From Violence to Protection* (2006) 77.

family that they have left.<sup>17</sup> Some child soldiers also see their participation in an armed group as a new lease on life, as many child soldiers are orphans, even before they join an armed group. Thus, social factors and the location of the child are some of the main determinative factors that cause child soldiers to join armed groups and commit atrocities, even though they are aware that it is morally wrong.<sup>18</sup> This, coupled with the emotion of being fearless, creates a child soldier who believes that he is beyond reproach. It is submitted that child soldiers may not always be fearful of the consequences of the commission of crimes under international law, as a combination of factors, especially indoctrination and manipulation in an armed group, plays a significant role in the child soldiers' development and how they view the rule of law.<sup>19</sup>

One can look at this matter from a different angle: would child soldiers commit fewer crimes if they were aware that they would be prosecuted for the commission of crimes under international law?<sup>20</sup> Lafayette holds that: 'If children believe they are immune from legal punishment, they are more likely to commit crimes and adults may use them for the most heinous acts in an effort to escape liability themselves'.<sup>21</sup> Indeed, if a child soldier resides in a community that supports a war effort and grows up in a family that does not condemn the use of child soldiers and the commission of crimes under international law by child soldiers, then the child soldier will be more likely to commit such offences. However, it is submitted that in cases where child soldiers are aware that the commission of crimes by child soldiers are unlawful, that many of these child

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17 See Boyden J 'The Moral Development of Child Soldiers: What Do Adults Have to Fear?' (2003) 9 *Peace and Conflict: Journal of Peace Psychology* 354; Nagle L E 'Child Soldiers and the Duty of Nations to Protect Children from Participation in Armed Conflict' (2011) 19 *Cardozo Journal of International and Comparative Law* 11-12; Singer P *Children at War* (2005) 72; Wessells M *Child Soldiers: From Violence to Protection* (2006) 80-83.

18 See Norrie A *Crime, Reason and History: A Critical Introduction to Criminal Law* 3ed (2014) 341; Wessells M *Child Soldiers: From Violence to Protection* (2006) 46-47.

19 Wessells rightly notes that: 'The more children see people being killed, the more they become desensitized and numbed to it". See Wessells M *Child Soldiers: From Violence to Protection* (2006) 79. Also see Kahn L (ed) *Child Soldiers* (2008) 100.

20 Generally see Norrie A *Crime, Reason and History: A Critical Introduction to Criminal Law* 3ed (2014) 338-339.

21 Lafayette E (2013) 63 *Syracuse Law Review* 324.

soldiers will reconsider committing atrocious crimes at will. Although it is difficult to say whether many crimes would be prevented if child soldiers were to be punished for these crimes, it is submitted that there would be a reduction in the number of crimes committed by child soldiers.

### *(3) nature of crimes under international law*

Child soldiers commit some of the most atrocious crimes under international law. In the Sierra Leone conflict, for example, child soldiers were especially feared by their victims for their brutality.<sup>22</sup> Du Plessis, alluding to the child soldiers in Sierra Leone, notes that: 'Many of the worst mutilations were committed by aggressive and violent 16 and 17 year olds, and the populace demanded that they be punished'.<sup>23</sup> Should child soldiers who commit crimes under international law be prosecuted just because of the severe nature of the offence? In the case of international criminal law, for example, the International Criminal Tribunal for the Former Yugoslavia (hereafter, ICTY) and the International Criminal Tribunal for Rwanda (hereafter, ICTR) have identified the gravity and seriousness of the offence as a primary consideration in the decisions of the Trial Chambers.<sup>24</sup> Furthermore, Norbert holds that the child soldiers who commit the most unimaginable and worst crimes should be prosecuted.<sup>25</sup> Norbert touches on a very important point which should be considered by courts upon deciding whether to prosecute child soldiers. This is important, because child soldiers commit some of the

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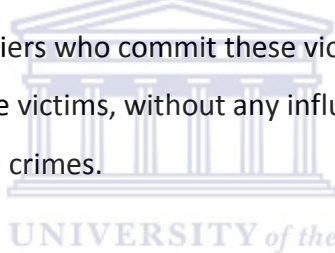
22 See, for example, Rosen D M *Armies of the Young: Child Soldiers in War and Terrorism* (2005) 57. Also see Wessells M *Child Soldiers: From Violence to Protection* (2006) 78-79.

23 Du Plessis M 'Children under International Criminal Law' (2004) 13 *African Security Review* 109-110. For a useful discussion concerning the various crimes committed by child soldiers during the war in Sierra Leone, see Rosen D M *Armies of the Young: Child Soldiers in War and Terrorism* (2005) 57-90.

24 In the case of the ICTY, see, for example, *Prosecutor v. Jelisić*, Case No. IT-95-10-T paragraph 130 (ICTY Trial Chamber, 14 December 1999). In the case of the ICTR, see, for example, *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze* Case No. ICTR-99-52-T paragraph 1102 (ICTR Trial Chamber, 3 December 2003). Also see Drumbl M A *Atrocity, Punishment, and International Law* (2007) 63-64.

25 However, while Norbert maintains that child soldiers should be prosecuted, she is not in favour of conviction. For a detailed discussion of this argument of Norbert, see Norbert M (2011) 3 *Pace International Law Review Companion* 38.

worst crimes imaginable, but also some of the less serious crimes under international law. Thus, not all child soldiers should be regarded as having committed atrocious crimes. It is submitted that the commission of a serious war crime, like murder,<sup>26</sup> by a child soldier places a higher burden of responsibility on the child soldier, as opposed to the commission of the war crime of pillaging.<sup>27</sup> The character and intent of the juvenile at the time of the offence will be crucial in determining whether the juvenile understood the gravity and seriousness of committing an atrocious crime and whether he acted in accordance with such an understanding. It needs to be established whether there was a link between the atrocious nature of the offence, the state of mind of the child soldier and his intent when he committed the offence.<sup>28</sup> By doing this, it can be determined whether the child soldier had a violent state of mind and that he knew that what he was doing was wrong, but intended to commit the offence nevertheless. It is submitted that those child soldiers who commit these violent crimes with the intent to cause harm and suffering to the victims, without any influence from another person, should be prosecuted for these crimes.



It is furthermore important to prosecute juveniles who have committed the worst crimes, because if all juveniles are to be excluded from prosecution, then those juveniles, who perpetrated the worst crimes, might believe that the commission of such crimes are allowed, even if these child soldiers are rehabilitated subsequent to a war.<sup>29</sup> Thus, it is submitted that child soldiers who committed the worst crimes should be prosecuted, as this is the most effective way of ensuring that the child soldier understands that what he did was wrong. It is further submitted that the rehabilitation of a child soldier who has committed serious crimes is pivotal to the overall well-being

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26 See Article 8(2)(a)(i), Article 8(2)(b)(vi) and Article 8(2)(c)(i) of the ICC Statute.

27 See Article 8(2)(b)(xvi) and Article 8(2)(e)(v) of the ICC Statute.

28 See, for example, Leveau F (2013) 4 *Osgoode Hall Review of Law and Policy* 47-48; Rikhof J Sword and Scale, May 2009, CBA National Military Law Section Newsletter (2009) [http://www.cba.org/CBA/newsletters-sections/pdf/05-09-military\\_2.pdf](http://www.cba.org/CBA/newsletters-sections/pdf/05-09-military_2.pdf) (accessed 3 February 2010).

29 See, for example, Norbert M (2011) 3 *Pace International Law Review Companion* 16-17; Thomas M A (2013) 44 *California Western International Law Journal* 3.



and further development of the child. However, it is equally important to prosecute these child soldiers.

### **3.2 Rationale for Excluding the Criminal Responsibility of Child Soldiers and the Use of Alternative Measures**

#### **3.2.1 Rationale for Excluding the Criminal Responsibility of Child Soldiers**

Child soldiers have been subjected to disarmament, demobilisation and reintegration efforts subsequent to armed conflicts.<sup>30</sup> They have not been prosecuted. What are the reasons for excluding the prosecution of child soldiers for crimes under international law? Drumbl argues that juveniles should not be prosecuted for the crimes committed as part of an armed group, because: 'When the child inflicts horror, responsibility passes entirely to the adult abductor, enlister, recruiter or commander'.<sup>31</sup> Drumbl's submission raises questions concerning the criminal responsibility of the individual who used the child soldiers and the responsibility of the child soldiers themselves. Does international legislation shed any light on the matter? Grover believes so, and argues that it would be unjust to prosecute child soldiers under the age of 15, as international humanitarian law prohibits the use of child soldiers under the age of 15.<sup>32</sup> Indeed, it is in the first place a crime under international law to enlist and conscript a child soldier under the age of 15.<sup>33</sup> Thus, Grover's analysis that it would be illegitimate to prosecute these children, who should be regarded as victims, is a valid argument. Yet, what about child soldiers between the ages of 15 and 18? Grover holds that child soldiers under the age of 18 should receive blanket immunity, since most child soldiers are forced to commit

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30 See, for example, Honwana A M *Child Soldiers in Africa* (2006) 104-134; Mezmur B D 'Children at Both Ends of the Gun: Towards a Comprehensive Legal Approach towards the Problem of Child Soldiers in Africa' (2005) (Unpublished LLM Thesis submitted to the University of the Western Cape) 28; Young A (2007) 7 *The Journal of International Policy Solutions* 22.

31 Drumbl M A *Reimagining Child Soldiers in International Law and Policy* (2012) 18.

32 Grover S C "'Child Soldiers' as 'Non-Combatants': The Inapplicability of the Refugee Convention Exclusion Clause' (2008) 12 *The International Journal of Human Rights* 57. Also see Bosch S (2012) 45 *The Comparative and International Law Journal of Southern Africa* 359.

33 Article 8(2)(b)(xxvi) of the ICC Statute.

atrocities.<sup>34</sup> It is submitted that while Grover makes a good point in that many child soldiers should be excluded from prosecution due to coercion and many other circumstances which may occur, however, to completely exclude all child soldiers from prosecution is inconceivable, as argued in this thesis.

Nevertheless, this thesis also argues that there are certain grounds that exclude the criminal responsibility of child soldiers. The thesis will focus on the following factors that are commonly found regarding child soldiers who commit crimes under international law, namely (1) involuntary recruitment, (2) coercion, (3) intoxication and (4) the commission of a minor crime.<sup>35</sup>

### *(1) involuntary recruitment*

The involuntary or forceful recruitment of child soldiers into armed groups or forces frequently occurs where children are used in armed conflict.<sup>36</sup> In some cases when they are forcibly recruited, they are also forced to kill a relative or friend.<sup>37</sup> This has a profound impact on the development and future of the child. Begley notes that: 'When children are forced to fight they are deprived of security, education, family, and other needs essential for a stable upbringing'.<sup>38</sup> Consequently, the armed group becomes their new home, one that is filled with violence and desolation. After being compulsorily recruited, the child soldier remains in a state of fear seeing that he was taken away from his family. Over time, these children learn how to become ruthless fighters who commit

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34 Grover S C (2008) 12 *The International Journal of Human Rights* 57. Also see Bosch S (2012) 45 *The Comparative and International Law Journal of Southern Africa* 359.

35 See Freeland S (2008) 29 *University of La Verne Law Review* 26. The grounds for excluding the criminal responsibility of child soldiers in this section will only be discussed in brief, since the defences available to child soldiers within a domestic legal context will be thoroughly examined in Chapter five.

36 See Wessells M *Child Soldiers: From Violence to Protection* (2006) 43. Also see Singer P *Children at War* (2005) 71.

37 Wessells M *Child Soldiers: From Violence to Protection* (2006) 144. Also see Briggs J *Innocents Lost: When Child Soldiers go to War* (2005) 4; Singer P *Children at War* (2005) 91-92.

38 Begley T B C 'The Extraterritorial Obligation to Prevent the Use of Child Soldiers' (2011-2012) 27 *American University International Law Review* 614. Also see Singer P *Children at War* (2005) 114.

some of the most atrocious crimes. Should these children be criminally responsible for these crimes? It is submitted that the forceful recruitment of child soldiers is a factor that all courts should take into account when the criminal responsibility of a child soldier is being ascertained. Child soldiers who are forcibly recruited face numerous mental challenges during their stay in an armed group which have an impact on their personality and why they do certain things in a certain manner. The younger the child soldier is, the bigger impact the recruitment will have on the child's mental and physical abilities.<sup>39</sup>

Yet, what about child soldiers who voluntarily join armed groups?<sup>40</sup> Should they be prosecuted for the commission of crimes under international law? Many authors argue that the voluntary recruitment of child soldiers is not voluntary at all.<sup>41</sup> There are five factors which generally motivate child soldiers to participate in armed conflict.<sup>42</sup> The factors are: poverty; war; lack of education; unemployment and family situation, while political ideology, friends and the struggle for liberation also play a role.<sup>43</sup> Thus, it cannot be argued that all child soldiers who voluntarily join armed groups, do so out of their free will without any influence.<sup>44</sup> These cases must be dealt with on a case-by-case basis in order to examine the reasons why child soldiers join armed groups. Only then can a court decide whether to try such child soldiers.

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39 See Freeland S (2008) 29 *University of La Verne Law Review* 26. Also see Cohn I and Goodwin-Gill G S *Child Soldiers: The Role of Children in Armed Conflict* (1994) 7; Rosen D M *Armies of the Young: Child Soldiers in War and Terrorism* (2005) 3.

40 See, for example, London C *One Day the Soldiers Came: Voices of Children in War* (2007) 157.

41 See Brett R (2003) 85 *International Review of the Red Cross* 859-863; Dallaire R *They Fight like Soldiers, They Die like Children* (2010) 110. Also see London C *One Day the Soldiers Came: Voices of Children in War* (2007) 163.

42 See Brett R (2003) 85 *International Review of the Red Cross* 859. Also see Wessells M *Child Soldiers: From Violence to Protection* (2006) 46-55.

43 See Brett R (2003) 85 *International Review of the Red Cross* 859. Also see Ferreira R 'Child Soldiers in African Wars' (2009) 7 *Commonwealth Youth and Development* 38; Hausler K, Urban N and McCorquodale R *Protecting Education in Insecurity and Armed Conflict: An International Law Handbook* (2012) 175; Blattmann R 'International Criminal Justice in Africa: Specific Procedural Aspects of the First Trial Judgment of the International Criminal Court' in Werle G Fernandez L and Vormbaum M (eds) *Africa and the International Criminal Court* (2014) 37-38.

44 See Brett R (2003) 85 *International Review of the Red Cross* 859. Also see Ferreira R (2009) 7 *Commonwealth Youth and Development* 38.

(2) duress

Child soldiers are also sometimes forced to commit atrocious crimes.<sup>45</sup> As is the case with involuntary recruitment, the lives of child soldiers are threatened by rebel commanders if they refuse to participate in frontline combat.<sup>46</sup> This is possible, as child soldiers are easily manipulated, while they may also feel like outcasts if they ignore the threats of the commander.<sup>47</sup> The question arises whether child soldiers who were forced to commit atrocities should be criminally responsible. It is submitted that child soldiers who were under duress to commit crimes under international law should not be held criminally responsible, and therefore duress should be seen as a factor that excludes criminal responsibility. Child soldiers cannot be expected to reason with the commander in order to prevent the commander from forcing them to participate in the conflict.<sup>48</sup> Some of these children are younger than 10 years old, and one can only imagine how demanding it must be for these children when they are subjected to the dangers of coercion. It cannot be expected for a child soldier who is being forced to commit a crime to think about the consequences of harming the victim, while his own life is under threat.<sup>49</sup> Hence, the duress of a child soldier during the commission of a crime under international law should be regarded as a ground to exclude criminal responsibility.

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45 See Drumbl M A *Reimagining Child Soldiers in International Law and Policy* (2012) 6-7; Singer P *Children at War* (2005) 155; Spiga V 'Indirect Victims' Participation in the Lubanga Trial' (2010) 8 *Journal of International Criminal Justice* 183, 192.

46 See Briggs J *Innocents Lost: When Child Soldiers go to War* (2005) 22; Wessells M *Child Soldiers: From Violence to Protection* (2006) 144.

47 See Kahn L (ed) *Child Soldiers* (2008) 100; Wessells M *Child Soldiers: From Violence to Protection* (2006) 144.

48 Wessells M *Child Soldiers: From Violence to Protection* (2006) 144. Also see Briggs J *Innocents Lost: When Child Soldiers go to War* (2005) 22; Singer P *Children at War* (2005) 72-75.

49 See Wessells M *Child Soldiers: From Violence to Protection* (2006) 144. Singer notes that: 'When the target is a child, these often brutal training-induction ceremonies, which may involve beating and humiliation, becomes acts of sadism. See Singer P *Children at War* (2005) 71.

### (3) intoxication

Many juveniles who commit crimes under international law are intoxicated during the commission of the offence.<sup>50</sup> They are regularly forced to take drugs when they join the armed group and develop an addiction to these drugs over time.<sup>51</sup> Child soldiers will often sniff gunpowder, mixed with other drugs in order to prepare them for war.<sup>52</sup> They also become intoxicated before they engage in frontline combat in order to suppress any fears of being killed.<sup>53</sup> Accordingly, some child soldiers might be heavily intoxicated when they commit a crime under international law. Should child soldiers who are intoxicated at the time of the commission of the offence be criminally responsible? This is answered by looking at two key points, namely, does a child soldier who has been intoxicated (1) possess the culpability and (2) intent to be criminally responsible for the offence?<sup>54</sup>

First, regarding the culpability of the child soldier, it is submitted that an intoxicated child soldier cannot distinguish between right and wrong at the time of the commission of the offence and would not be in a position to act in accordance with such an

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50 See Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone UN Doc. S/2000/915 (4 October 2000) paragraph 32. Generally, also see Ashworth A and Horder J *Principles of Criminal Law* 7ed (2013) 194; Freeland S (2005) 3 *New Zealand Journal of Public and International Law* 305; Grossman N (2007) 38 *Georgetown Journal of International Law* 345; Morgan R and Newburn T in Maguire M, Morgan R and Reiner R (eds) *The Oxford Handbook of Criminology* 5ed (2012) 500-503.

51 See, for example, Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone UN Doc. S/2000/915 (4 October 2000) paragraph 32; Singer P *Children at War* (2005) 81; Tiefenbrun S (2008) 31 *Fordham International Law Journal* 423.

52 This mixture of gunpowder and other drugs is commonly known as 'brown-brown'. See Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone UN Doc. S/2000/915 (4 October 2000) paragraph 32. Also see Grossman N (2007) 38 *Georgetown Journal of International Law* 345; Singer P *Children at War* (2005) 81; Wessells M *Child Soldiers: From Violence to Protection* (2006) 76.

53 See Freeland S (2005) 3 *New Zealand Journal of Public and International Law* 305; Wessells M *Child Soldiers: From Violence to Protection* (2006) 76-77.

54 Grossman N (2007) 38 *Georgetown Journal of International Law* 345.

understanding.<sup>55</sup> Secondly, with this in mind, it will be difficult to prove that an intoxicated child soldier has the necessary intent to commit a crime under international law.<sup>56</sup> It is submitted that the criminal responsibility of a child soldier could be excluded in the cases where the child soldier was forced to use substances that impaired his faculties and resulted in the child soldier not having a motive or intent to commit an offence. What happens in many cases is that a child soldier commits an offence on the instruction of the commander who uses the child soldier as a pawn in the conflict, which illustrates the way in which child soldiers are manipulated and sometimes intoxicated to commit an offence which the commander has the motive for, and not the child soldier.<sup>57</sup>

Having looked at the situation of child soldiers who have been involuntarily intoxicated, what about child soldiers who become voluntarily intoxicated. It is assumed that most child soldiers are forced to take drugs and alcohol before they commit an offence; however, there might be cases where child soldiers voluntarily become intoxicated. As was the case above, the culpability and the intent of the child soldiers at the time of the offence will have to be determined in order to establish whether child soldiers who were voluntarily intoxicated during the offence should be criminally prosecuted. However, one has to ask the question how voluntary such intoxication really is.<sup>58</sup> The voluntary action of a child soldier who intoxicates himself remains highly questionable, considering the fact that child soldiers are very fearful of rebel leaders and commanders and will follow most orders.<sup>59</sup> In addition, child soldiers who use drugs and alcohol at a young age could become addicted to these substances, which has a harmful impact on

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55 Generally see Cryer R (*et al*) (eds) *An Introduction to International Criminal Law and Procedure* 3ed (2014) 402; Foley B 'Same Problem, Same Solution? The Treatment of the Voluntarily Intoxicated Offender in England and Germany' (2001) 4 *Trinity College Law Review* 119.

56 See Singer P *Children at War* (2005) 81; Tiefenbrun S (2008) 31 *Fordham International Law Journal* 423; Wessells M *Child Soldiers: From Violence to Protection* (2006) 76-77.

57 See Wessells M *Child Soldiers: From Violence to Protection* (2006) 57, 71-72; Singer P *Children at War* (2005) 74.

58 For a general discussion concerning the voluntary nature of the participation of a child soldier in an armed group, see Brett R (2003) 85 *International Review of the Red Cross* 859-862; Freeland S (2005) 3 *New Zealand Journal of Public and International Law* 305.

59 Singer points out that child soldiers are initially forced to take drugs. See Singer P *Children at War* (2005) 81. Also see Wessells M *Child Soldiers: From Violence to Protection* (2006) 71-72.

the decision making ability of the child. That being said, it still remains very important to investigate whether intoxication was voluntary or involuntary.

*(4) the commission of a minor crime*

Should child soldiers who commit minor or less serious crimes be excluded from criminal responsibility? It is submitted that child soldiers who commit minor crimes should be excluded from being criminally responsible. Take the war crime of pillaging as an example. Child soldiers who travel with armed groups see these militias as their home and a place of refuge in times of war.<sup>60</sup> However, times might get tough within an armed group and they may resort to the pillaging of towns and villages in order to stock up on their resources. Should a child soldier be prosecuted for such a minor crime in these conditions? This question can also be asked in the case of crimes such as taking a hostage or attacking a victim's personal dignity. Yet, how can the minor nature of an international crime be ascertained? It is proposed that courts should critically look at the type of offence that was committed by the child soldier, in relation to the role of the child soldier within an armed conflict. It is submitted that the nature and severity of a minor crimes does not justify the prosecution of a child soldier who has had to endure various daunting challenges, while being part of an armed group during a war.

It is rather proposed that child soldiers who commit minor crimes be subjected to alternative measures to criminal prosecution.

### **3.2.2 Alternative Measures to Criminal Prosecution**

The world has experienced a sudden rise in the number of conflicts in the last few decades. This, coupled with the common deterioration of the legal systems of countries subsequent to an armed conflict, has made it vital for countries to include alternative

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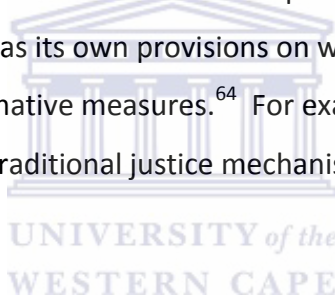
<sup>60</sup> See, for example, Singer P *Children at War* (2005) 70-75; Wessells M *Child Soldiers: From Violence to Protection* (2006) 79-81.



measures to criminal prosecution in their legal frameworks.<sup>61</sup> Indeed, not all child soldiers can be criminally prosecuted, but this does not mean that they should be exempted from all types of punishment. Alternative measures to criminal prosecution provide an ideal platform for child soldiers to reflect on their actions and to understand that it is wrong to commit crimes under international law.<sup>62</sup>

There exists a multitude of alternative measures to criminal prosecution, including, truth and reconciliation commissions; short detention in a child and youth care centre; community service; and the making of an apology, to name but a few.<sup>63</sup>

However, when should child soldiers who have committed crimes under international law be subjected to alternative measures to criminal prosecution? This is a complex question, because each State has its own provisions on when to criminally prosecute a child or when to consider alternative measures.<sup>64</sup> For example, in Uganda, a few communities adopted certain traditional justice mechanisms to reintegrate child



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61 In Sierra Leone, the lack of legal professionals combined with the disintegration of the legal system during the conflict, as well as the sheer number of child soldiers who committed crimes under international law, made it impossible to solely rely on the criminal prosecution of child soldiers. Alternative measures to prosecution were rather implemented, which mainly consisted of the rehabilitation of child soldiers and telling their story before a truth and reconciliation commission. Generally see, Corriero M A (2002) 18 *New York Scholarly Journal of Human Rights*; Crane D M 'Strike Terror No More: Prosecuting the Use of Children in Times of Conflict – The West African Extreme' in Arts K and Popovski V (eds) *International Criminal Accountability and the Rights of Children* (2006).

62 For a detailed examination of the various alternative measures to the criminal prosecution of those who commit crimes under international law, see Bassiouni M C (ed) *Introduction to International Criminal Law: Second Revised Edition* (2013) 937-972.

63 For a discussion concerning the establishment of a truth and reconciliation commission as an alternative measure to prosecution subsequent to the Sierra Leone conflict, see Corriero M A (2002) 18 *New York Scholarly Journal of Human Rights* 355-357; Schabas W A 'A Synergistic Relationship: The Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone' in Schabas W A and Darcy S (eds) *Truth Commissions and Courts: The Tension Between Criminal Justice and the Search for Truth* (2004) 3-54.


64 See Among H 'The Application of Traditional Justice Mechanisms to the Atrocities Committed by Child Soldiers in Uganda: A Practical Restorative Justice Approach' (2013) 13 *African Human Rights Law Journal* 444.



soldiers back into their communities.<sup>65</sup> That being said, Uganda is one of the few countries that has made an effort to implement alternative measures in the case of child soldiers who have committed crimes. But why is this the case? There are many factors, but it is submitted that child soldiers have mainly been rehabilitated instead of being subjected to alternative measures to prosecution, because of the sympathy that authorities have for child soldiers.

Moreover, it must be noted that children are more likely to suffer from emotional and psychological harm during an armed conflict than adults. Children are the most vulnerable group during the entire duration of the war and are protected by special safeguards embedded in the CRC.<sup>66</sup>

Musila submits that child soldiers should rather be subjected to a restorative justice approach as he holds that:



‘Punishment-oriented mechanisms are ill-suited to establish accountability for this class of perpetrator. The restorative justice approach is more suited to establish the accountability of such children because such children must continue to be regarded as beneficiaries of special protections attributable to their vulnerable status’.<sup>67</sup>

Consequently, even though child soldiers commit some of the most heinous crimes, criminal prosecution may not always be the most desired course of action.<sup>68</sup> Alternative measures to criminal prosecution provide the courts with an alternative in the case where it is clear that the prosecution of the child soldier will not be in the best interest

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65 See Among H (2013) 13 *African Human Rights Law Journal* 441-443; Akello G, Richters A and Reis R ‘Reintegration of Former Child Soldiers in Northern Uganda: Coming to Terms with Children’s Agency and Accountability’ (2006) 4 *Intervention* 230, 233.

66 For an analysis of children as victims before the ICC, see Draft Policy on Children, Office of the Prosecutor, International Criminal Court, June 2016.

67 Musila G (2005) 5 *African Human Rights Law Journal* 330. Also see Wessells M *Child Soldiers: From Violence to Protection* (2006) 221-224; Singer P *Children at War* (2005) 193.

68 See Wessells M *Child Soldiers: From Violence to Protection* (2006) 221. Also see Singer P *Children at War* (2005) 114, 154-155.

of justice. It is imperative that a set of alternative measures to prosecution in the case of child soldiers be contained in an international legal instrument. This will provide a necessary guideline for countries that are not familiar with the implementation of these alternative measures within their respective legal frameworks. In particular, the author submits that rehabilitation and alternative models of reconciliation and juvenile truth and reconciliation commissions are alternative measures to prosecution which should be considered by courts in the case of child soldiers who commit crimes under international law. These measures are ideal in the case of child soldiers, since they provide an effective accountability mechanism for juveniles who have committed crimes under international law.<sup>69</sup>

### 3.2.2.1 Rehabilitation and Alternative Models of Reconciliation

Rehabilitation allows the perpetrator to heal emotionally and psychologically.<sup>70</sup> In fact, rehabilitation has been the primary measure imposed by domestic legal systems to ensure the return of the former child soldier to his community. However, once the child soldier who committed the crimes is demobilised, the child soldier has a deep fear returning home to the same community that suffered at his hands.<sup>71</sup> This occurs, because children are often abducted from their communities and forced to commit atrocious crimes against the members of their own community. The situation is even made worse when a former child soldier has been informed that the community is not willing to accept him back into the community. The author recommends that in some cases where it is very hard for a community to welcome a former child soldier back into

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69 See Leveau F (2013) 4 *Osgoode Hall Review of Law and Policy* 48; Romero J A (2004) 2 *Northwestern University Journal of International Human Rights* 21. Also see Singer P *Children at War* (2005) 155.

70 See Romero J A (2004) 2 *Northwestern University Journal of International Human Rights* 21. Also see Singer P *Children at War* (2005) 155.

71 See Guyot J 'Suffer the Children: The Psychosocial Rehabilitation of Child Soldiers as a Function of Peace-Building' (2007) [http://www.crin.org/docs/Linked\\_Guyot\\_2007.pdf](http://www.crin.org/docs/Linked_Guyot_2007.pdf) (accessed 25 June 2014) 11; Hill K and Langholtz H 'Rehabilitation Programs for African Child Soldiers' (2003) 15 *Peace Review* 280.

the community, rehabilitation should be accompanied by an alternative model of reconciliation and social healing.<sup>72</sup>

Cleansing ceremonies, for example, are often used in post-war afflicted areas when offenders return to their former communities, aimed at cutting the child soldier's link with the past, and in particular, the war or conflict.<sup>73</sup> This and other indigenous forms of reconciliation and social healing have the advantage of being accepted by the community and are more sustainable over a long time.<sup>74</sup> Child soldiers have the opportunity to return to their communities and attend these indigenous ceremonies that are not nearly as formal as a domestic or international court. This and the fact that the child's family or relatives may attend proceedings, make indigenous forms of reconciliation and social healing an ideal alternative to prosecution, while these ceremonies are also authentic to the culture of the local communities.<sup>75</sup>

### 3.2.2.2 Juvenile Truth and Reconciliation Commission

If a domestic court is not able to prosecute juveniles for the commission of international crimes, the establishment of a Juvenile Truth and Reconciliation Commission is an effective way of creating a platform for the juveniles to be held responsible for the commission of crimes, by way of acknowledging the truth. By telling their side of the story to a Juvenile Truth and Reconciliation Commission, juveniles avoid the harsh

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72 See Guyot J [http://www.crin.org/docs/Linked\\_Guyot\\_2007.pdf](http://www.crin.org/docs/Linked_Guyot_2007.pdf) (accessed 25 June 2014) 11.

73 See Green E C and Honwana A M 'Indigenous Healing of War-Affected Children in Africa' Paper for the World Bank, *IK Notes* (1999) <http://www.worldbank.org/afr/ik/iknt10.pdf> (accessed 16 January 2015) 3. Also see Singer P *Children at War* (2005) 193; Women's Commission for Refugee Women and Children 'Against All Odds: Surviving the War on Adolescents: Promoting the Protection and Capacity of Ugandan and Sudanese Adolescents in Northern Uganda' (2001) <http://www.forcedmigration.org/psychosocial/inventory/psychosocial-working-group-inventory-of-key-resources/pwg012/pwg012.pdf> (accessed 25 February 2015) 13.

74 See Hill K and Langholtz H (2003) 15 *Peace Review* 283. Also see Guyot J [http://www.crin.org/docs/Linked\\_Guyot\\_2007.pdf](http://www.crin.org/docs/Linked_Guyot_2007.pdf) (accessed 25 June 2014) 11.

75 See Green E C and Honwana A M <http://www.worldbank.org/afr/ik/iknt10.pdf> (accessed 16 January 2015) 2. Also see Guyot J ([http://www.crin.org/docs/Linked\\_Guyot\\_2007.pdf](http://www.crin.org/docs/Linked_Guyot_2007.pdf) (accessed 25 June 2014) 11.

reality of prosecution and possible imprisonment. Acknowledgement of the offence, implies that the juvenile admits his crimes and recognises that his conduct was wrong. Child soldiers who appeared before the Sierra Leonean Truth and Reconciliation Commission were not charged with criminal offences, but by acknowledging the truth, they accepted responsibility for their crimes.<sup>76</sup> It is suggested to look at the establishment of a Truth and Reconciliation Commission that specifically deals with juvenile cases, and in this situation, of course cases that exclusively deal with child soldiers who have committed crimes under international law. By doing this, a Truth and Reconciliation Commission is created that will have legal professionals that will only deal with cases where child soldiers have committed crimes under international law.<sup>77</sup>

### **3.3 Balancing the Prosecution of Child Soldiers and the Use of Alternative Measures**

Upon ruling that a child soldier should be held responsible for his actions, the court will then have to decide whether the child soldier should be criminally prosecuted or subjected to alternative measures. Thus, it is important to find a balance between prosecution and alternative measures in order to determine the most effective way to deal with child soldiers who have committed crimes under international law.

Newbury describes the relationship between the prosecution of juveniles and the use of alternative measures as follows:

'Responsibility' can be defined in two ways. It may invoke a more negative, historical perspective of 'taking responsibility' for past offensive behaviour and 'facing its consequences', which seems to mark a broadly punitive approach. Alternatively, it can encourage a more positive, forward looking perspective of helping young people to

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76 Generally see Schabas W A in Schabas W A and Darcy S (eds) *Truth Commissions and Courts: The Tension Between Criminal Justice and the Search for Truth* (2004).

77 Generally see Corriero M A (2002) 18 *New York Scholarly Journal of Human Rights*; Crane D M in Arts K and Popovski V (eds) *International Criminal Accountability and the Rights of Children* (2006).

understand and appreciate the impact of their behaviour on others and enabling them, by addressing social, educational, emotional or behavioural needs, to become more responsible in the future - a truly restorative approach'.<sup>78</sup>

Newbury's description of responsibility touches on certain key aspects of taking responsibility, especially referring to the behaviour or conduct of the child. During and after criminal prosecution, the child soldier must realise that his conduct resulted in the commission of a serious offence. Moreover, the child soldier has to understand that his actions were of a serious violent nature, which carry certain consequences, like long-term detention or imprisonment. While in the case of alternative measures, the child soldier must realise the impact that his conduct had on the life of the victim and that he will have to take accountability for his wrongful conduct, as well as dealing with various aspects of his life that have been affected by committing these crimes.<sup>79</sup>

The court should compare the possible effects of criminal prosecution and alternative measures on the child soldier. By doing this, the court is in a position to impose a measure that is most appropriate to the situation and circumstances of the child soldier. If the court finds that neither criminal prosecution, nor alternative measures are suitable, then it is important for the court to find a balance between criminal prosecution and alternative measures.

It is further important that alternative measures, like restorative justice mechanisms, are widely accessible within a State's juvenile justice system as the use of these mechanisms have been recognised under international customary law.<sup>80</sup> Thus, the court is in a position to impose the best possible alternative measures in relation to the crime that has been committed by the child soldier.

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78 Newbury A (2008) 35 *Journal of Law and Society* 132.

79 See Among H (2013) 13 *African Human Rights Law Journal* 443.

80 See Among H (2013) 13 *African Human Rights Law Journal* 443. For a definition of the concept of restorative justice in the context of child soldiers, see Musila G (2005) 5 *African Human Rights Law Journal* 325-326.

### 3.4 The Context of International Crimes and the Balancing Exercise

Crimes under international law can be described as any offence that involves direct individual responsibility under international law.<sup>81</sup> The prosecution of the perpetrators of such crimes is complex, due to the problems faced with material and procedural law, while some of these perpetrators are prosecuted before international courts that incorporate both civil and common law principles.<sup>82</sup> That being said, the matter of child soldiers who commit crimes under international law cannot be swept under the rug. Yet, what are the effects of, specifically, the commission of crimes under international law by child soldiers on the balancing of criminal prosecution and the use of alternative measures?

The particular nature of crimes under international law has a significant impact when dealing with child soldiers who have committed such crimes. The various particularities of these crimes have to be considered, as crimes under international law cannot be compared to the commission of crimes under domestic law. The following aspects will be discussed to determine the effects of international crimes on the balancing exercise of criminal prosecution and the use of alternative measures: (1) *nullum crimen sine lege* (2) material law and (3) procedural law.

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81 See Werle G and Jessberger F *Principles of International Criminal Law* 3ed (2014) 31. Also see O'Keefe R *International Criminal Law* (2015) 49; Schabas W A in Schabas W A (ed) *The Cambridge Companion to International Criminal Law* (2016) 200. International criminal law can be defined as the law that: 'encompasses all norms that establish, exclude, or otherwise regulate responsibility for crimes under international law'. See Werle G and Jessberger F *Principles of International Criminal Law* 3ed (2014) 31. Bassiouni describes international criminal law as a complex legal discipline that strives for the enhancement and reduction of impunity, the prevention and suppression of international criminality and the establishment of international criminal justice. See Bassiouni M C (ed) *Introduction to International Criminal Law: Second Revised Edition* (2013) 1.

82 See Bassiouni M C (ed) *Introduction to International Criminal Law: Second Revised Edition* (2013) 13-14. Also see Cryer R (et al) (eds) *An Introduction to International Criminal Law and Procedure* 3ed (2014) 150.

### 3.4.1 *nullum crimen sine lege*

The principle of legality or *nullum crimen sine lege* provides that a person may only be held responsible for the commission of an offence if that offence was regarded as a criminal offence under the applicable law at the time of the commission of the offence.<sup>83</sup> When an international crime is defined as such in national criminal law is irrelevant from the perspective of international criminal law. The criminal nature of an international crime follows from international law, not domestic law. It is thus important that when child soldiers are prosecuted for crimes under international law, that the relevant international law is applied in courts. Where child soldiers are prosecuted for predicate offences like murder and rape under domestic law, it is important that the relevant domestic law is applied in courts.

If the crime under international law is not provided for under the domestic law and if a court is unwilling to prosecute a child soldier for the commission of an international crime as regulated under international criminal law, then one might find the situation where a prosecutor decides not to prosecute the child soldier, even though the possibility of the prosecution for the underlying offence exists. As a result, an imbalance between the prosecution of a child soldier for an international crime and a domestic crime occurs, even though an international offence flows from international law. It is imperative that States incorporate the core crimes under international law into their national legal regimes. Thus the public, including child soldiers, are made aware of the repercussions of committing such crimes.

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83 While *nullum crimen sine lege* requires that there be no crime without a law, *nulla poena sine lege* requires that there can be no punishment without a law. See Cassese A (et al) *Cassese's International Criminal Law* 3ed (2013) 22-24; Cryer R (et al) (eds) *An Introduction to International Criminal Law and Procedure* 3ed (2014) 18-21; Werle G and Jessberger F *Principles of International Criminal Law* 3ed (2014) 39-40. Also see Bassiouni M C (ed) *Introduction to International Criminal Law: Second Revised Edition* (2013) 246-247; De Than C and Shorts E *International Criminal Law and Human Rights* (2003) 135-136; Shahabuddeen M 'Does the Principle of Legality Stand in the Way of Progressive Development of Law?' (2004) 2 *Journal of International Criminal Justice* 1008-1009.



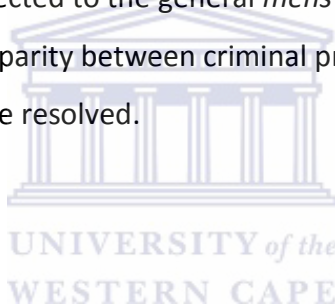
### 3.4.2 Material Law

The aspects of material law in the context of crimes under international law affect the balancing exercise between the criminal prosecution of child soldiers and the use of alternative measures. This section will look at one of the most important aspects of material law, namely, *mens rea* or the mental element, as it is a matter that has not been sufficiently dealt with under international criminal law in the case of child soldiers who have committed grave violations under international law.<sup>84</sup> The *mens rea* of an offence is normally an element that is required by the legal order for the conduct of the accused to be punishable.<sup>85</sup> Under customary international law, it is an essential requirement that the accused have the intent to commit the requisite material elements of the crime and have knowledge of the relevant facts of the offence.<sup>86</sup> What is required in order to satisfy the mental element of the offence depends on the specific crime.<sup>87</sup> The *mens rea* for crimes under international law has a different dimension to it as opposed to the mental element for crimes committed under domestic law.<sup>88</sup> In the case of child soldiers who commit crimes under international law, it is understandable why the aspect of *mens rea* and child soldiers, becomes even more complex.

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- 84 Rikhof briefly touches on the matter of *mens rea* and its effects on the prosecution of child soldiers. See Rikhof J Sword and Scale, May 2009, CBA National Military Law Section Newsletter (2009) [http://www.cba.org/CBA/newsletters-sections/pdf/05-09-military\\_2.pdf](http://www.cba.org/CBA/newsletters-sections/pdf/05-09-military_2.pdf) (accessed 3 February 2010). Generally, also see Burchell J *Principles of Criminal Law* 4ed (2013) 258-259; Carroll J E (2015-2016) 94 *North Carolina Law Review*.
- 85 Cassese A (et al) *Cassese's International Criminal Law* 3ed (2013) 22-24. Also see Bassiouni M C (ed) *Introduction to International Criminal Law: Second Revised Edition* (2013) 304-313; Werle G and Jessberger F 'Unless Otherwise Provided': Article 30 of the ICC Statute and the Mental Element of Crimes under International Law' (2005) 3 *Journal of International Criminal Justice* 35.
- 86 See O'Keefe R *International Criminal Law* (2015) 122; Werle G and Jessberger F *Principles of International Criminal Law* 3ed (2014) 180. Also see Grover L *Interpreting Crimes in the Rome Statute of the International Criminal Court* (2014) 295.
- 87 See O'Keefe R *International Criminal Law* (2015) 122. Also see Cryer R (et al) (eds) *An Introduction to International Criminal Law and Procedure* 3ed (2014) 381.
- 88 The mental element that is applied in cases before the ICC is contained in Article 30 of the ICC Statute. The mental element embedded in the ICC remains a source of controversy. See Werle G and Jessberger F (2005) 3 *Journal of International Criminal Justice* 37-38. Also see Cryer R (et al) (eds) *An Introduction to International Criminal Law and Procedure* 3ed (2014) 382.



The problem is that it may be too difficult to prove that the child soldier had the necessary intent and knowledge to commit a crime under international law. This is as a result of the lack of maturity on the part of a child as opposed to adult perpetrators who are more mature.<sup>89</sup> Consequently, a balancing exercise might occur, whereby, a child soldier might rather be subjected to alternative measures to prosecution or even acquitted if it is decided that the *mens rea* could not be proven in the case of a child soldier who has committed crimes under international law.<sup>90</sup> The only way that the criminal prosecution and the use of alternative measures for child soldiers can be balanced is if an international legal instrument sets out a number of provisions which specifically deal with the aspect of *mens rea* and child soldiers who commit crimes under international law. If this is not done in the future, then it is submitted that child soldiers will be unlawfully subjected to the general *mens rea* provisions under international law, while the disparity between criminal prosecution and the use of alternative measures will not be resolved.



### 3.4.3 Procedural Law

To what extent do the procedural law aspects under international criminal law affect the balancing exercise between criminal prosecution and the use of alternative measures? As is the case with the section above, this section will only deal with one specific aspect of procedural law under international criminal law, namely, the fair trial rights of the accused. The fair trial rights of children is a factor in the balancing exercise due to the possible implications that it may have for the prosecution of a child if it is not afforded to juveniles who commit international law crimes. Under international criminal law, the fair trial rights of the accused are provided under Article 66 of the ICC Statute,

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89 Carroll states that: 'This one-size-fits-all approach to *mens rea* is not only inconsistent with scientific evidence that the cognitive processes of adolescents differ from those of adults, but also undermines the purpose of *mens rea* when applied to juvenile offenders'. See Carroll J E (2015-2016) 94 *North Carolina Law Review* 541.

90 See Rikhof J Sword and Scale, May 2009, CBA National Military Law Section Newsletter (2009) [http://www.cba.org/CBA/newsletters-sections/pdf/05-09-military\\_2.pdf](http://www.cba.org/CBA/newsletters-sections/pdf/05-09-military_2.pdf) (accessed 3 February 2010). Also see Carroll J E (2015-2016) 94 *North Carolina Law Review* 541.

while the fair trial guarantees for children are embedded in Article 40 of the CRC. Children enjoy further protection during the trial, like *in camera* proceedings, while their age also plays a significant factor in the way they are treated by the court, especially with regard to the explanation of certain terms and other particulars of the trial.<sup>91</sup> However, the situation has been different in certain cases where child soldiers have committed crimes under international law. In Rwanda, for example, children who were accused of participating in the genocide were detained for many years without being tried.<sup>92</sup>

In effect, one of the unfortunate consequences of the commission of crimes by child soldiers is that a State may tend to overlook the fair trial rights of a child, because of the immediate dangers posed by the child soldier. As a result, there is a divide between the criminal prosecution of child soldiers and the use of alternative measures. There are many reasons for such a divide and it remains important to find solutions for these problems. One such problem is that more often than not, child soldiers participate in conflicts that leave the criminal justice system in tatters. There is not a lot one can do to prevent a State from unlawfully detaining child soldiers in such a situation. However, States should view child soldiers as one of the most vulnerable groups in a conflict, while they should also be treated in accordance with the fair trial guidelines embedded in the CRC and the various other provisions under international law. The rights of the accused child soldier and the implementation thereof play an important part in protecting the rights of a child soldier under international criminal law, while creating a balance between the criminal prosecution of child soldiers and the use of alternative measures to prosecution.

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91 See Article 40 of the CRC.

92 See Report of the Special Representative of the Commission of Human Rights on the Situation of Human Rights in Rwanda UN Doc. A/55/269 (4 August 2000) paragraph 125. Also see Coalition to Stop the Use of Child Soldiers 'Child Soldiers Global Report 2008' (2008) [http://www.childsoldiersglobalreport.org/files/country\\_pdfs/FINAL\\_2008\\_Global\\_Report.pdf](http://www.childsoldiersglobalreport.org/files/country_pdfs/FINAL_2008_Global_Report.pdf) (accessed 30 August 2011) 289. Generally, also see Briggs J *Innocents Lost: When Child Soldiers go to War* (2005) 6-7.

### 3.5 Conclusion

Goldstone significantly points out that criminal prosecution: 'is not the only form [of justice], nor necessarily the most appropriate form in every case'.<sup>93</sup> In the case of child soldiers, the decision whether to criminally prosecute child soldiers for the commission of crimes under international law raises various questions and concerns. Factors like forceful recruitment and duress, intoxication, age, and a lack of maturity are some of the key issues that fuel the arguments of those who maintain that child soldiers should be exempted from being criminally responsible. This thesis does not support the idea to prosecute child soldiers in a formal court with formal procedures, but rather to hold child soldiers responsible for their misconduct in a setting fit for children and where their rights as children are safeguarded. Nonetheless, in those cases where child soldiers commit less serious crimes under international law and even in the cases of a serious nature, the use of alternative measures to prosecution must also be considered in addition to criminal prosecution. Thus, the child soldier should also accept responsibility for his wrongdoing, albeit in a less procedural and punitive way. Courts are thus left with an important and complex decision whether to prosecute child soldiers, exclude them from prosecution or subject them to alternative measures. What makes the commission of crimes under international law by child soldiers so complex is that the criminal justice system has to deal with children who have committed crimes under international law, like war crimes, which are crimes that are highly complex in nature. In this regard, it is thus imperative for courts to find a balance between the criminal prosecution of child soldiers and the use of alternative measures, while considering the peculiarities of international criminal law in the context of child soldiers.

In sum, the ongoing prosecutions by international courts of those individuals who have used child soldiers is praiseworthy. However, the criminal prosecution of child soldiers

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93 Goldstone R J (1995-1996) 28 *New York University Journal of International Law and Politics* 491. Also see Boas G 'What is International Criminal Justice?' in Boas G, Schabas W A and Scharf M P (eds) *International Criminal Justice: Legitimacy and Coherence* (2012) 12.

and the use of alternative measures to prosecution are required to prevent and reduce the number of crimes committed by child soldiers. In the next chapter we will look at the history of child soldiers in order to examine when the commission of crimes by child soldiers started and why child soldiers commit crimes. In addition, the number of child soldiers has sharply risen over the years and this chapter will explore how this impacts on the commission of crimes under international law by child soldiers.



## CHAPTER FOUR

### CHILD SOLDIERS: HISTORICAL PERSPECTIVES

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Child soldiering is deeply rooted in the history of Western and non-Western civilisations.<sup>1</sup> Interestingly, the term 'infantry' originates from the Italian word 'infante', which refers to children who battled alongside medieval knights.<sup>2</sup> David, the Psalmist, fought as a young boy in King Saul's war against the Philistines. David was a child soldier, killed many men, and later became King of Israel. One would assume that being a child soldier in King Saul's army would have been an obligation that all young boys had to experience during that period, and for many other child soldiers in the years and centuries that followed.

More recently, child soldiers also participated in World War One and World War Two. Some child soldiers who participated in World War Two were even sentenced to death and executed, such as, Heinz Petry, sixteen, and Josef Schörner, seventeen, who were part of the Hitler Youth when they were captured behind American lines prior to their execution.<sup>3</sup>

The number of child soldiers has increased over the last two decades, since civil wars and armed conflicts have occurred at an alarming rate.<sup>4</sup> One of the main reasons why child soldiers were initially recruited by armed groups was that they were easy to

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- 1 See Honwana A M (2008) 1 *Journal of the History of Childhood and Youth* 139. Also see Bezuidenhout C 'Introduction and Terminology Dilemma' in Bezuidenhout C and Joubert S (eds) *Child and Youth Misbehaviour in South Africa: A Holistic View* (2003) 4; Wessells M *Child Soldiers: From Violence to Protection* (2006) 5.
  - 2 See Honwana A M (2008) 1 *Journal of the History of Childhood and Youth* 139. Also see Lafayette E (2013) 63 *Syracuse Law Review* 307.
  - 3 See Rempel G *Hitler's Children: The Hitler Youth and the SS* (1989) 248. Also see Kater M H *Hitler Youth* (2004) 228; Wilson R J (2012) 11 *Santa Clara Journal of International Law* 48. Also see Nagle L E (2011) 19 *Cardozo Journal of International and Comparative Law* 1.
  - 4 See Cohn I and Goodwin-Gill G S *Child Soldiers: The Role of Children in Armed Conflict* (1994) 23; Honwana A M (2008) 1 *Journal of the History of Childhood and Youth* 139.

recruit, and considering the development of artillery since the middle of the twentieth century, it was possible for these children to now carry light weight guns, instead of the old conventional weaponry that children had some difficulty to manage.<sup>5</sup> Ferreira says that child soldiers 'are carriers of lightweight weapons such as grenades and AK-47s, which they use with great competence'.<sup>6</sup> Today's child soldiers, especially those who are armed, are extremely dangerous and feared by communities affected by armed conflict.<sup>7</sup> As a result of a significant increase in the number of child soldiers, questions concerning the accountability of child soldiers themselves have come to the fore.<sup>8</sup> Yet, how do child soldiers end up in armed conflicts and who gives them the authority to fight in a war? This chapter will look at two cases of past conflicts to practically illustrate how child soldiers have been used in war situations and how they have committed crimes under international law. This is important for the study as the cases will shed light on the various methods of recruitment of child soldiers, the activities of the child soldiers and how this affects the commission of crimes under international law by child soldiers.



The first case that will be discussed deals with the conflict in Mozambique in the late 1900s. The thesis focusses on this specific conflict since there were no prosecutions of

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- 5 Quénivet states that: 'In military terms the rapid changes in weapons technology have allowed for the creation of light weapons, such as AK47, that are easily stripped, reassembled, loaded, and fired by any child'. See Quénivet N 'Girl Soldiers and Participation in Hostilities' (2008) 16 *African Journal of International and Comparative Law* 221. Also see Briggs J *Innocents Lost: When Child Soldiers go to War* (2005) 150-153; Cohn I and Goodwin-Gill G S *Child Soldiers: The Role of Children in Armed Conflict* (1994) 23; Cryer R (et al) (eds) *An Introduction to International Criminal Law and Procedure* 3ed (2014) 303; Freeland S (2008) 29 *University of La Verne Law Review* 26.
- 6 Ferreira R (2009) 7 *Commonwealth Youth and Development* 38. Also see Cryer R (et al) (eds) *An Introduction to International Criminal Law and Procedure* 3ed (2014) 303.
- 7 According to Cohn and Goodwin-Gill: 'More children can be more useful in battle with less training than ever before, putting them in more danger and making them more dangerous to their adversaries-a factor that makes them attractive as recruits'. See Cohn I and Goodwin-Gill G S *Child Soldiers: The Role of Children in Armed Conflict* (1994) 23; Freeland S (2008) 29 *University of La Verne Law Review* 26; Honwana A M (2008) 1 *Journal of the History of Childhood and Youth* 140; Singer P *Children at War* (2005) 75-77.
- 8 See Musila G (2005) 5 *African Human Rights Law Journal* 322. Also see Rikhof J Sword and Scale, May 2009, CBA National Military Law Section Newsletter (2009) [http://www.cba.org/CBA/newsletters-sections/pdf/05-09-military\\_2.pdf](http://www.cba.org/CBA/newsletters-sections/pdf/05-09-military_2.pdf) (accessed 3 February 2010) 1; Singer P *Children at War* (2005) 154.

those who committed crimes during the conflict, including child soldiers. Moreover, since the author of this thesis is from South Africa, the author wanted to include a historical case study on the use of child soldiers in a conflict where South Africa played a major role. The second case focusses on the Sierra Leonean conflict. The author undertakes a study on this conflict since the Statute for the Special Court for Sierra Leone became the first international instrument to criminalise the commission of crimes by child soldiers. The RUF in Sierra Leone was also known to be a youthful army, making it a perfect platform to recruit child soldiers. Let us now examine the first historical case where Mozambican child soldiers committed crimes under international law.

#### 4.1 The Child Soldiers of Mozambique

The war in Mozambique started in 1977 and lasted until 1992. Hundreds of thousands of people lost their lives during the armed conflict, while five million people were internally displaced and 250,000 children were separated from their families or orphaned.<sup>9</sup> The conflict was mainly between two Mozambican parties, the Frente de Libertação (hereafter, Frelimo) and the Resistência Nacional Moçambicana (hereafter, Renamo). Renamo, a movement opposed to the socialist ideologies of Frelimo, was formed in Rhodesia (now Zimbabwe) in 1975 by political opponents of Frelimo.<sup>10</sup>

In June 1976, Renamo started to broadcast propaganda in opposition to Frelimo.<sup>11</sup> From 1977 to 1980, Renamo disrupted the economic and social policies of the government

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9 A few authors maintain that several hundred thousand people died during the conflict and refrain from stating an exact number of casualties. See Alao A *Brothers at War: Dissidence and Rebellion in South Africa* (1994) 53; Barkley D W 'Hope for the Hopeless: International Cooperation and the Refugee' (1989) 21 *Columbia Human Rights Law Review* 340; Hoile D *Mozambique Resistance and Freedom: A Case for Reassessment* (1994) 1; Honwana A M *Child Soldiers in Africa* (2006) 11.

10 See Hoile D *Mozambique Resistance and Freedom: A Case for Reassessment* (1994) 12. Also see Wessells M *Child Soldiers: From Violence to Protection* (2006) 97. The English translation for Frelimo is the Liberation Front of Mozambique and Renamo is the Mozambican National Resistance.

11 See Chan S and Vênancio M *War and Peace in Mozambique* (1998) 3. Also see Alusala N and Dye D 'Reintegration in Mozambique: An Unresolved Affair' (2010) 217 *Institute for Security Studies Paper* 49. The propaganda during the civil war was of an internal nature, which led to a lack of credible

while causing unrest in rural areas.<sup>12</sup> By 1983, Renamo was in control of eight of the country's eleven provinces. In 1987, the civil warfare reached its peak when Renamo made gains into the southern, northern and central parts of Mozambique.<sup>13</sup> Both Renamo and Frelimo were characterised by certain beliefs and ideologies, but it was Renamo which received the backing of the people in the rural areas of Mozambique. Renamo in particular attracted the sympathy of the civilian population and peasants in rural areas in spite of committing violent acts of crimes in these areas.<sup>14</sup> The peasants condemned the socialist manner in which Frelimo was governing the country.<sup>15</sup> Moreover, Frelimo would from time to time confiscate land from peasants, only for Renamo to give it back to them. Renamo respected the traditional principles of rural communities, whereas Frelimo failed to acknowledge the presence of rural communities.

Zimbabwe and later South Africa supported Renamo in its activities. Frelimo backed the Anti-Apartheid regime in South Africa and in particular the African National Congress.<sup>16</sup> South Africa provided Renamo with the necessary means to facilitate the civil war against Frelimo.<sup>17</sup> From then onwards, Renamo's numbers rapidly increased as it grew in

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documentation subsequent to the war. See Hoile D *Mozambique Resistance and Freedom: A Case for Reassessment* (1994) 2.

12 See Bowen M L 'Mozambique and the Politics of Economic Recovery' (1991) 15 *Fletcher Forum of World Affairs* 47; Honwana A M *Child Soldiers in Africa* (2006) 8; Sinjela M 'Mozambique: A Successful Conflict Resolution?' (1996) 4 *African Yearbook of International Law* 39.

13 See Honwana A M *Child Soldiers in Africa* (2006) 9. Also see Sinjela M (1996) 4 *African Yearbook of International Law* 39.

14 See Honwana A M *Child Soldiers in Africa* (2006) 8. Also see Hoile D *Mozambique Resistance and Freedom: A Case for Reassessment* (1994) 57.

15 See Hoile D *Mozambique Resistance and Freedom: A Case for Reassessment* (1994) 55. Also see Honwana A M *Child Soldiers in Africa* (2006) 11. For example, between 1977 and 1981 the government bought 3,000 tractors and 300 harvesters for the state communal village program. See Hoile D *Mozambique Resistance and Freedom: A Case for Reassessment* (1994) 55.

16 See Chan S and Vênancio M *War and Peace in Mozambique* (1998) 4. Also see Alusala N and Dye D (2010) 217 *Institute for Security Studies Paper* 46-47; Hoile D *Mozambique Resistance and Freedom: A Case for Reassessment* (1994) 31; Honwana A M *Child Soldiers in Africa* (2006) 8.

17 See Chan S and Vênancio M *War and Peace in Mozambique* (1998) 6. Also see Alusala N and Dye D (2010) 217 *Institute for Security Studies Paper* 46-47; Hoile D *Mozambique Resistance and Freedom: A Case for Reassessment* (1994) 31.



size and military effectiveness, and also became more violent in its tactics.<sup>18</sup> During this time, Mozambique was relying increasingly on foreign aid as its economy was lacking growth. As a result, the government dropped its Marxist-style policies and decided to concentrate on economic reform. In 1990, Mozambique started to embrace the principles of a multiparty democracy with the adoption of a new constitution. Nonetheless, for this study, it is important to note that many child soldiers were used in the conflict, while also committing crimes themselves.

Renamo, as well as Frelimo, used child soldiers in Mozambique.<sup>19</sup> A study carried out in the Manica Province of Mozambique estimated that half of the Renamo and Frelimo troops consisted of child soldiers.<sup>20</sup> Renamo alone used approximately 10,000 child soldiers in their forces.<sup>21</sup> Children were mainly forcefully recruited into armed forces.<sup>22</sup>



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- 18 See Honwana A M *Child Soldiers in Africa* (2006) 8; Sinjela M (1996) 4 *African Yearbook of International Law* 38.
- 19 See Schafer J in Boyden J and De Berry J (eds) *Children and Youth on the Frontline: Ethnography, Armed Conflict and Displacement* (2004) 87; Wessells M *Child Soldiers: From Violence to Protection* (2006) 97.
- 20 See Schafer J in Boyden J and De Berry J (eds) *Children and Youth on the Frontline: Ethnography, Armed Conflict and Displacement* (2004) 87. Also see Action for the Rights of Children 'Critical Issues Child Soldiers' (2002) [http://www.worldwideopen.org/uploads/resources/files/509/CNFL015\\_Critical\\_Issues\\_Child\\_Soldiers.pdf](http://www.worldwideopen.org/uploads/resources/files/509/CNFL015_Critical_Issues_Child_Soldiers.pdf) (accessed 26 October 2011) 92; Schafer J 'Soldiers at Peace: The Post-War Politics of Demobilized Soldiers in Mozambique 1964-1996' D. Phil Thesis, University of Oxford (1999) 123.
- 21 See Honwana A M *Child Soldiers in Africa* (2006) 29. Out of the 92,881 soldiers that were demobilised after the war, 25,498 were younger than 18 when they were recruited. Of these, 13,982 soldiers were between the ages of 16 and 17 when recruited, 6,829 between the ages of 14 and 15 and 4,678 under the age of 13. The group included a vast number of government soldiers, although the government maintained that the Mozambican army never recruited children under the age of 13. See Grahn-Farley M 'A Theory of Child Rights' (2003) 57 *University of Miami Law Review* 922; Honwana A M *Child Soldiers in Africa* (2006) 137. Of the 92,881 soldiers above, 76,3 percent were Frelimo and 23,7 percent were Renamo. See Action for the Rights of Children (2002) [http://www.worldwideopen.org/uploads/resources/files/509/CNFL015\\_Critical\\_Issues\\_Child\\_Soldiers.pdf](http://www.worldwideopen.org/uploads/resources/files/509/CNFL015_Critical_Issues_Child_Soldiers.pdf) (accessed 26 October 2011) 134. Also see Alden C 'The United Nations, Elections and the Resolution of Conflict in Mozambique' in Chan S and Vênancio M (eds) *War and Peace in Mozambique* (1998) 70.
- 22 See Cohn I and Goodwin-Gill G S *Child Soldiers: The Role of Children in Armed Conflict* (1994) 26-27; Nagle L E (2011) 19 *Cardozo Journal of International and Comparative Law* 15; Schafer J in Boyden J and De Berry J (eds) *Children and Youth on the Frontline: Ethnography, Armed Conflict and Displacement* (2004) 92.

The age of forced recruitment varied, but included children as young as 8 years old.<sup>23</sup> When children were kidnapped they would be separated from their families and integrated into the armed forces. In many cases, Renamo would recruit children only to take them back to the village they were abducted from and force them to kill someone they knew.<sup>24</sup>

There were cases where children voluntarily joined Renamo in order to fight against the injustices of the Frelimo government.<sup>25</sup> Some joined the armed forces in search of food, shelter, physical protection and the possibility of avenging the death of a relative.<sup>26</sup> Many children migrated from villages to urban areas in search of employment. However, in 1984 the government decided to clear the cities of unproductive urban dwellers, sending them back to rural communities where food and work opportunities were particularly scarce.<sup>27</sup> The youth wanted to prove a point and Renamo offered a platform to launch their assault in opposition to the Mozambican government.<sup>28</sup> The youth wanted liberation from the system that had held them captive for so long. Renamo used child soldiers to its benefit as it increased the size of its army, while child soldiers recklessly looted and killed innocent civilians. Frelimo unlawfully recruited

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- 23 See Mamou J 'Soldier Boys and Girls' *Le Monde Diplomatique* September 2001 <https://mondediplo.com/2001/09/13soldiers> (accessed 23 May 2016); Singer P *Children at War* (2005) 145. Also see Action for the Rights of Children (2002) [http://www.worldwideopen.org/uploads/resources/files/509/CNFL015\\_Critical\\_Issues\\_Child\\_Soldiers.pdf](http://www.worldwideopen.org/uploads/resources/files/509/CNFL015_Critical_Issues_Child_Soldiers.pdf) (accessed 26 October 2011) 93.
- 24 See Cohn I and Goodwin-Gill G S *Child Soldiers: The Role of Children in Armed Conflict* (1994) 27. Also see Legrand J and Weissman F 'Les Enfants Soldats et usages de la Violence au Mozambique' (1995) 18 *Cultures & Conflits* 165-166; Quénivet N (2013) 38 *Brook Journal of International Law* 1070.
- 25 See Action for the Rights of Children (2002) [http://www.worldwideopen.org/uploads/resources/files/509/CNFL015\\_Critical\\_Issues\\_Child\\_Soldiers.pdf](http://www.worldwideopen.org/uploads/resources/files/509/CNFL015_Critical_Issues_Child_Soldiers.pdf) (accessed 26 October 2011) 92. Also see Honwana A M *Child Soldiers in Africa* (2006) 37.
- 26 See Honwana A M *Child Soldiers in Africa* (2006) 37. Some children also joined due to the high unemployment rate during that time. See Honwana A M *Child Soldiers in Africa* (2006) 9.
- 27 See Honwana A M *Child Soldiers in Africa* (2006) 9. Also see Sinjela M (1996) 4 *African Yearbook of International Law* 38-39.
- 28 Honwana expressly states that: 'Renamo offered these discontented youth a new purpose in life by putting a gun in their hands'. See Honwana A M *Child Soldiers in Africa* (2006) 9.

children under the age of 18 years, while they went as far as to go to schools to forcefully recruit children.<sup>29</sup>

While it is known that many child soldiers were used during the war in Mozambique, as seen above, a lesser known fact is that many of these child soldiers committed crimes in this period. The commission of crimes by child soldiers in Mozambique is an area that has not been sufficiently researched by other scholars, which leaves the author with few materials to work with. This is because child soldiers who committed crimes during the war were granted amnesty, and not prosecuted for the commission of these crimes in Mozambique.<sup>30</sup> Nevertheless, when child soldiers committed crimes during the war they were seen by the communities as perpetrators of war.<sup>31</sup> As mentioned before, this was especially the case when a child soldier was forced to return to his community and forced to kill someone known to him.<sup>32</sup> Renamo was known for burning down villages and looting civilians. Child soldiers were at the forefront of the commission of these crimes as child soldiers were regarded as better fighters than adult soldiers due to their enthusiasm and brutality.<sup>33</sup> After the war, Mozambique's infrastructure was left in ruins. Thus, the prosecution of those responsible for the crimes committed during the war, not

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29 For example, they would go to a school, identify the boys they would like to recruit, put the boys in a group and take their shirts off so that they would be unable to flee without being noticed. See Action for the Rights of Children (2002)

[http://www.worldwideopen.org/uploads/resources/files/509/CNFL015\\_Critical\\_Issues\\_Child\\_Soldiers.pdf](http://www.worldwideopen.org/uploads/resources/files/509/CNFL015_Critical_Issues_Child_Soldiers.pdf) (accessed 26 October 2011) 92.

30 In 1987, an amnesty law was passed which regulated this amnesty in Mozambique. Adult soldiers were also granted amnesty.

31 See Schafer J in Boyden J and De Berry J (eds) *Children and Youth on the Frontline: Ethnography, Armed Conflict and Displacement* (2004) 88. It has also been estimated that about 10,000 children participated in the war. See Honwana A M *Child Soldiers in Africa* (2006) 11.

32 See Human Rights Watch 'Conspicuous Destruction: War, Famine and the Reform Process in Mozambique' (1992) <http://www.hrw.org/reports/1992/07/01/conspicuous-destruction> (accessed 8 March 2013). Also see Cohn I and Goodwin-Gill G S *Child Soldiers: The Role of Children in Armed Conflict* (1994) 27.

33 See Cohn I and Goodwin-Gill G S *Child Soldiers: The Role of Children in Armed Conflict* (1994) 26. Also see Amnesty International 'Sierra Leone: Childhood – A Casualty of Conflict' (2000) <http://www.amnesty.org/en/library/asset/AFR51/069/2000/en/363960d1-de07-11dd-a3e1-93acb0a12d8/afr510692000en.pdf> (accessed 12 April 2010); Happold M *Child Soldiers in International Law* (2005) 10.

to mention the prosecution of child soldiers for crimes committed during the war, was inconceivable.

## 4.2 The Child Soldiers of Sierra Leone

Nowadays, when one mentions the child soldiers of Sierra Leone, one may be asked: 'have you seen the movie 'Blood Diamond'?'<sup>34</sup> The movie serves as a remembrance to those who lost their lives in the tragic events that unfolded during the civil war in Sierra Leone, and also briefly touches on the recruitment and use of child soldiers in Sierra Leone. However, it would have been impossible for the film to capture the sheer scale of the brutality of the war. Rebels and child soldiers killed, maimed and burned their victims in one of the most ruthless wars ever.

From 1970 until the end of the civil war, youth violence became a building block of political life in Sierra Leone.<sup>35</sup> Poverty, failure to develop the economy, a high level of unemployment, and a lack of education resulted in an endless supply of alienated youth.<sup>36</sup> Rosen points out that: 'As Sierra Leone slid deeper into economic crisis, a volatile mixture of poor youth and radicalized students emerged'.<sup>37</sup> This and many other factors led to revolutionary ideologies and consequently the establishment of the RUF in Sierra Leone.<sup>38</sup>

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34 Blood Diamond, Warner Brothers Entertainment Incorporated (2006).

35 See Mitchell III A F 'Sierra Leone: The Road to Childhood Ruination through Forced Recruitment of Child Soldiers and the World's Failure to Act' (2004) 2 *Regent Journal of International Law* 90. Also see Rosen D M *Armies of the Young: Child Soldiers in War and Terrorism* (2005) 80.

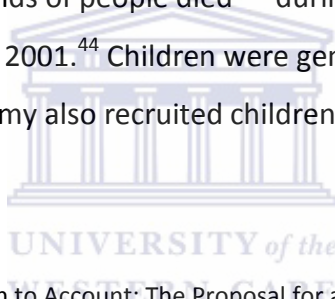
36 See Rosen D M *Armies of the Young: Child Soldiers in War and Terrorism* (2005) 80. Also see Montague D 'The Business of War and the Prospects for Peace in Sierra Leone' (2003) 9 *The Brown Journal of World Affairs* 233.

37 Rosen D M *Armies of the Young: Child Soldiers in War and Terrorism* (2005) 80. Also see Iacono M 'The Child Soldiers of Sierra Leone: Are they Accountable for their Actions in War?' (2003) 26 *Suffolk Transnational Law Review* 447-449.

38 See Montague D (2003) 9 *The Brown Journal of World Affairs* 231. Also see Rosen D M *Armies of the Young: Child Soldiers in War and Terrorism* (2005) 80.

The RUF was an army of children and youths.<sup>39</sup> In fact, with the exception of its leader, Foday Sankoh, the entire RUF was under the age of 30.<sup>40</sup> Indeed, children would rather join an armed group with a youth culture background than one with stringent rules and regulations like the Sierra Leonean army. The RUF was motivated by power and money instead of political ideologies and ethnic rivalries.<sup>41</sup> Many children voluntarily joined the RUF, because of its unique background, while many children were also forcefully recruited.

The civil war in Sierra Leone started in March 1991 when Charles Taylor assisted Sankoh in launching two strikes into the eastern part of Sierra Leone.<sup>42</sup> Their main goal was not only to gain control of the diamond fields, but also of the entire population of Sierra Leone.<sup>43</sup> Subsequently, thousands of people died during the internal armed conflict that continued from 1991 until 2001.<sup>44</sup> Children were generally recruited by the RUF, although the Sierra Leonean army also recruited children. It is estimated that over 5,000



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- 39 See Amann D M 'Calling Children to Account: The Proposal for a Juvenile Special Court for Sierra Leone' (2001) 29 *Pepperdine Law Review* 170; Nicol-Wilson M C 'Accountability for Human Rights Abuses: The United Nations' Special Court for Sierra Leone' (2001) 8 *Australian International Law Journal* 173; Rosen D M *Armies of the Young: Child Soldiers in War and Terrorism* (2005) 83.
- 40 See Iacono M (2003) 26 *Suffolk Transnational Law Review* 448; Rosen D M *Armies of the Young: Child Soldiers in War and Terrorism* (2005) 80; Schuler C 'Sierra Leone: 'A Wrenching Peace, Part 1' *Christian Science Monitor* 15 September 1999 <http://reliefweb.int/report/sierra-leone/sierra-leone-wrenching-peace-sierra-leones-see-no-evil-pact> (accessed 14 September 2013).
- 41 See Akinrinade B 'International Humanitarian Law and the Conflict in Sierra Leone' (2001) 15 *Notre Dame Journal of Law and Ethics and Public Policy* 400; Iacono M (2003) 26 *Suffolk Transnational Law Review* 447; Schuler C *Christian Science Monitor* 17 September 1999 (1999) <http://www.reliefweb.int/node/52757/pdf> (accessed 21 September 2011); Saunders L 'Rich and Rare are the Gems they War: Holding De Beers Accountable for Trading Conflict Diamonds' (2001) 24 *Fordham International Law Journal* 1403-1404, 1424.
- 42 See Akinrinade B (2001) 15 *Notre Dame Journal of Law and Ethics and Public Policy* 399; Crane D M 'Prosecuting the Use of Children in Times of Conflict' in Arts K and Popovski V (eds) *International Criminal Accountability and the Rights of Children* (2006) 122; Mitchell III A F (2004) 2 *Regent Journal of International Law* 91.
- 43 See Akinrinade B (2001) 15 *Notre Dame Journal of Law and Ethics and Public Policy* 396; Crane D M in Arts K and Popovski V (eds) *International Criminal Accountability and the Rights of Children* (2006) 122; Mitchell III A F (2004) 2 *Regent Journal of International Law* 92.
- 44 For a detailed discussion of the civil war in Sierra Leone, generally see Gberie L *A Dirty War in West Africa: The RUF and the Destruction of Sierra Leone* (2005); Mitchell III A F (2004) 2 *Regent Journal of International Law* 87-100.

child soldiers were used as foot soldiers.<sup>45</sup> Another 5,000 child soldiers were associated with armed forces and served as cooks, porters and sex slaves.<sup>46</sup> The child soldiers on the frontline of the battle mostly committed atrocious crimes and acts. One former RUF child soldier reported that:

‘We were ordered to kill any civilian we might come across. Any fighter or children suspected of being reluctant to do the killings were severely beaten. We are asked to advanced and to do everything possible to terrorize the civilians. It was during this period that people’s hands and limbs were cut off’.<sup>47</sup>

The RUF was infamously known for amputating their victim’s limbs.<sup>48</sup> Very young child soldiers also took part in the commission of these and various other crimes. In fact, it has been estimated that half of the RUF combatants were between the ages of 8 to 14 years.<sup>49</sup> Peters and Richards point out that: ‘Male and female under-age irregulars are rated highly by their officers’, certainly a technique used by the RUF commanders to indoctrinate child soldiers.<sup>50</sup> Under-age combatants are fearless killers and they kill

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- 45 See Corriero M A (2002) 18 *New York Scholarly Journal of Human Rights* 338. Also see Happold M *Child Soldiers in International Law* (2005) 10; Harman D ‘Sierra Leone: Aid Agencies Help to Rid Child Soldiers of War’s Scars’ *Christian Science Monitor* 30 October 2001 [http://reliefweb.int/sites/reliefweb.int/files/reliefweb\\_pdf/node-88977.pdf](http://reliefweb.int/sites/reliefweb.int/files/reliefweb_pdf/node-88977.pdf) (accessed 21 September 2011); Romero J A (2004) 2 *Northwestern University Journal of International Human Rights* 2; Zarifis I ‘Sierra Leone’s Search for Justice and Accountability of Child Soldiers’ (2002) 9 *Human Rights Brief* 18.
- 46 See Amann D M (2001) 29 *Pepperdine Law Review* 170. Also see Amnesty International (2000) <http://www.amnesty.org/en/library/asset/AFR51/069/2000/en/363960d1-de07-11dd-a3e1-93acb0aal2d8/afr510692000en.pdf> (accessed 12 April 2010) 1; Happold M *Child Soldiers in International Law* (2005) 10.
- 47 See Amnesty International (2000) <http://www.amnesty.org/en/library/asset/AFR51/069/2000/en/363960d1-de07-11dd-a3e1-93acb0aal2d8/afr510692000en.pdf> (accessed 12 April 2010). Also see Happold M *Child Soldiers in International Law* (2005) 10.
- 48 The amputation of limbs is a war crime under Article 3(a) of the Statute for the Special Court for Sierra Leone and Article 8(2)(a)(iii) of the ICC Statute. The amputation of limbs is also a crime against humanity under Article 7(1)(k) of the ICC Statute.
- 49 See Peters K and Richards P (1998) 68 *Journal of the International African Institute* 186; United Nations Impact of Armed Conflict on Children: Report of the Expert of the Secretary General, Ms Graça Machel, GA Res 48.157 (A/51/306) 26 August 1996, paragraph 35.
- 50 Peters K and Richards P (1998) 68 *Journal of the International African Institute* 186. Also see Amann D M (2001) 29 *Pepperdine Law Review* 171; United Nations Impact of Armed Conflict on Children:



without any inhibitions.<sup>51</sup> Child soldiers undoubtedly committed atrocities under the influence of drugs and alcohol.<sup>52</sup> This made them fearless especially during times of conflict. Sierra Leonean child soldiers mainly consisted of boys, although girl soldiers were also recruited.<sup>53</sup> Girl soldiers had to endure countless cases of rape and other forms of sexual abuse.<sup>54</sup>

After the war, the relatives and friends of those who had died during the war vowed to take revenge against the child soldiers who were responsible for their loss. However, no major incidents of vigilante justice were recorded. It has been more than a decade since the end of the civil war and child soldiers have undergone extensive rehabilitation. Child soldiers have yet to be prosecuted by the SCSL, but it is highly unlikely that children would be prosecuted, due to the Court's undertaking of first and foremost prosecuting those who bore the greatest responsibility. This matter will be critically discussed in Chapter Six since the Statute for the Special Court of Sierra Leone is the only legal document that criminalises the commission of crimes by child soldiers, which is an important step towards addressing the issue of the accountability of juveniles for the commission of international crimes.

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Report of the Expert of the Secretary General, Ms Graça Machel, GA Res 48.157 (A/51/306) 26 August 1996, paragraph 34, 43.

- 51 See United Nations Impact of Armed Conflict on Children: Report of the Expert of the Secretary General, Ms Graça Machel, GA Res 48.157 (A/51/306) 26 August 1996, paragraph 42-43; Peters K and Richards P (1998) 68 *Journal of the International African Institute* 186.
- 52 See Amann D M (2001) 29 *Pepperdine Law Review* 170; Singer P *Children at War* (2005) 81.
- 53 See Additional Report of the Special Representative of the Secretary-General for Children and Armed Conflict, Mr Olara Otunnu, submitted in accordance with General Assembly Resolution 53/128, United Nations Human Rights Commission, U.N. Doc. E/CN.4/2000/71, Annex paragraph 11. Also see Amann D M (2001) 29 *Pepperdine Law Review* 170; Peters K and Richards P (1998) 68 *Journal of the International African Institute* 186.
- 54 See Peters K and Richards P (1998) 68 *Journal of the International African Institute* 186. Also see Kahn L (ed) *Child Soldiers* (2008) 101.

### 4.3 Conclusion

Children have committed, and are still committing, crimes under international law throughout the world. The cases of Mozambique and Sierra Leone not only remind us of the bloodshed that occurred during these conflicts, but that child soldiers were unquestionably involved in the commission of crimes under international law. However, the cases also paint a disheartening picture of child soldiers who are forcefully recruited by armed groups and forced to commit atrocious crimes. Indeed, the responsible individuals, like the commanders and officials who recruit child soldiers, were and are being held accountable, but a concerted effort is required to address the matter of the child soldier's own accountability for the commission of crimes under international law. The child soldiers in the Mozambican and Sierra Leonean conflicts were not held accountable for the crimes they committed, as is the case with other child soldiers who participated in various other conflicts around the world. Yet, as we have learned from past cases, it is not easy for a criminal justice system that has been left in ruins after a war, to prosecute those individuals who are responsible for the crimes that were committed during the war. The emergence of the ICC has made it possible for States Parties to the ICC Statute to refer a situation to the Prosecutor of the ICC.<sup>55</sup> However, it is more complex in the case of child soldiers, since the ICC Statute provides that the ICC does not have jurisdiction to prosecute persons under the age of 18. As a result, if a State would like to prosecute child soldiers, then it would have to prosecute them by way of the domestic courts, except where an international tribunal is set up after the war that has jurisdiction to try juveniles. In the next chapter, the thesis examines how domestic legislation deals with the matter of the criminal accountability of juveniles.

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55 Article 14 of the ICC Statute. See also Article 17 of the ICC Statute for the rules concerning the admissibility of a case before the ICC.



## CHAPTER FIVE

### THE PROSECUTION OF CHILD SOLDIERS UNDER DOMESTIC LAW

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#### 5.1 Introduction

Domestic and international courts have widely ignored the commission of crimes under international law by juveniles and more specifically child soldiers.<sup>1</sup> 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 soldiers by domestic courts is non-existent as these children are mostly rehabilitated.

The question that this chapter seeks to answer is whether domestic courts have the capacity to prosecute child soldiers for the commission of crimes under international law. It is therefore important to establish whether domestic courts have the necessary regulations in place to prosecute these juveniles. This question will be discussed by way of a comparative study between England, South Africa, Germany and Uganda. Apart from Germany which follows a civil law legal system, England and Uganda are firmly grounded in common law foundations, while South Africa follows 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 a 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 system; (3) Germany, as its juvenile justice regime is based on the civil law system, while its age of criminal responsibility is set at a high age, compared to most common law countries;

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1 In this chapter the author will refer to juvenile and child soldier interchangeably even though the various provisions of the countries might not necessarily refer to either term.

and (4) Uganda, since it is a country that has experienced a number of conflicts where child soldiers have committed crimes under international law.<sup>2</sup> Before looking at the legal aspects that will be compared in this study, are these four countries in a 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 Africa, Germany and Uganda have all adopted and ratified the ICC Statute, while the core crimes of 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 to ascertain, is whether child soldiers could be prosecuted for the commission of crimes under international law by these domestic courts.

This question will be analysed by looking at the following aspects of domestic juvenile justice compared between the four States, namely, (1) age of criminal responsibility; (2) procedural law matters; and (3) defences. 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<sup>3</sup> 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 law.

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2 The legal position in England will be discussed before that of South Africa, since the South African juvenile justice system is based on the English system, as well as Roman Dutch law. See, for example, Hoorntje S 'Tracing the Origins of the Defence of Non-Pathological Incapacity in South African Criminal Law' (2011) 17 *Fundamina* 70-74.

3 Compulsion in this comparative study and thesis includes the defence of duress, since the term "duress" is not found in all of the countries that are compared in this chapter. Necessity may also be included in the broader term of compulsion in terms of this chapter.

## 5.2 Age of Criminal Responsibility

### 5.2.1 England

The age of criminal responsibility of ten years as regulated by the Child and Young Persons Act of 1969, is still in force.<sup>4</sup> In 1998, a significant change was made to the age of criminal responsibility, not in the age itself, but in 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 malice.<sup>5</sup> In this part we will look at why this 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.

#### (1) abolition of the *doli incapax* rule

The *doli incapax* rule which provides that children under a specific age are rebuttably presumed to be incapable of committing a crime, was part and parcel of the English criminal law until its abolition in 1998, with the enactment of the Crime and Disorder Act.<sup>6</sup> Before its abolition, the rule provided that child offenders older than ten, but

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- 4 For a discussion of the multitude and complexity of the statutes in the English juvenile justice system, see Fox D and Arnall E *Social Work in the Youth Justice System* (2013) 12-20. Also see Brown S *Understanding Youth and Crime: Listening to Youth?* (1998) 53-78.
- 5 See Ashworth A and Horder J *Principles of Criminal Law* 7ed (2013) 140; Card R Card, Cross and Jones *Criminal Law* 20ed (2012) 611; Ormerod D *Smith and Hogan's Criminal Law* 13ed (2011) 342.
- 6 See Ashworth A and Horder J *Principles of Criminal Law* 7ed (2013) 140; Card R Card, Cross and Jones *Criminal Law* 20ed (2012) 611; Ormerod D *Smith and Hogan's Criminal Law* 13ed (2011) 342. The presumption of criminal capacity rule is firmly entrenched in international customary law. In 1338, the presumption of criminal capacity came into being under civil law and common law, as children over the age of seven were presumed to lack the capacity to commit a crime. However, the presumption could be rebutted by proof of malice on the part of the child offender. The age at which the presumption was deemed to be irrebuttable was not fixed at that time, as it was only in the seventeenth century that it was fixed at 14 years. As a result, children between the ages of seven and 14 were presumed to be incapable of committing an offence, but the presumption was rebuttable. See Lafave W R *Criminal Law* 4ed (2003) 486. For a detailed overview of the history of the *doli incapax* presumption in England, see Crofts T *The Criminal Responsibility of Children and Young Persons: A Comparison of English and German Law* (2002) 40-45; Keating H (2007) 19 *Child*

younger than fourteen at the time of the commission of the crime, were deemed not to be criminally responsible. The only way for the child to be prosecuted was for the prosecution to prove that the child knew the difference between right and wrong at the time of the commission of the offence. The rule protected children under the age of fourteen from prosecution since these children were not regarded as having the same degree of criminal responsibility as children older than fourteen.

The abolition of the *doli incapax* principle emerged from the brutal killing of two-year-old Jamie Bulger by two ten-year-old boys in Liverpool in 1993.<sup>7</sup> Public protests followed, demanding the criminal prosecution of the two boys.<sup>8</sup> They were both prosecuted and sentenced to eight years in prison.<sup>9</sup> The public was also of the opinion

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*and Family Law Quarterly* 190-195; Wortley N 'Hello Doli?... or is it Goodbye?' (2007) 16 *Journal of Mental Health Law* 236-237.

- 7 The facts of the case are as follows: On 12 February 1993, Jon Venables and Robert Thompson, both aged 10, abducted two-year-old Jamie Bulger from a shopping precinct near Liverpool, after they had stayed away from school. The boys assaulted the toddler over a four-kilometre walk from the shopping centre to a railway line where they beat him to death and left him on a railway line to be run over. The abduction was recorded on the shopping centre security video system. The murder caused widespread media coverage with the two child offenders at the centre of the attention. They were arrested in February 1993 and detained pending trial. The boys were tried with murder when they were only 11 years old. Psychologist, Dr Eileen Vizard, held that the boys knew that killing Jamie was wrong. The prosecution rebutted the *doli incapax* presumption, and the Court ruled that the boys knew that what they were doing was wrong. See *T v the United Kingdom - 24724/94* [1999] ECHR and *V v the United Kingdom - 24888/94* [1999] ECHR paragraph 7-19. The ECHR stands for the European Court of Human Rights. Also see Ashworth A and Horder J *Principles of Criminal Law* 7ed (2013) 140; Card R *Card, Cross and Jones Criminal Law* 20ed (2012) 613; Ormerod D *Smith and Hogan's Criminal Law* 13ed (2011) 342. For a discussion of the effects of violent videos and video games in the case of Venables and Thompson, see Brown S *Understanding Youth and Crime: Listening to Youth?* (1998) 49-51.
- 8 In addition, Muncie notes that: 'Venables and Thompson were consistently characterized in sensational and extensive tabloid newspapers headlines as 'evil', unreformable and unpunished'. See Muncie J, Hughes G and McLaughlin E (eds) *Youth Justice: Critical Readings* (2002) 20. Brown also notes that: 'How could children behave like this? The innocent and angelic 2-year-old, horrifically – that is, violently and 'deliberately' – killed by two boys who were themselves children'. See Brown S *Understanding Youth and Crime: Listening to Youth?* (1998) 2.
- 9 In fact, the boys were effectively sentenced to 15 years imprisonment, however, the ECHR ruled that the sentenced must be reduced to 8 years. See *T v the United Kingdom - 24724/94* [1999] ECHR and *V v the United Kingdom - 24888/94* [1999] ECHR. Also see Muncie J *Youth and Crime* 3ed (2009) 7; Brown S *Understanding Youth and Crime: Listening to Youth?* (1998) 81.

that the boys should have been sentenced for a longer period.<sup>10</sup> This sparked numerous debates within England regarding the protective nature of the *doli incapax* presumption and how it favoured the juvenile. The matter became political as both the Conservative Party and the Labour Party competed against each other to see who can be the toughest on juveniles.<sup>11</sup> Consequently, in *C v DPP* [1995] 2 WLR 383,<sup>12</sup> Judge Laws ruled that the *doli incapax* presumption was outdated and should not form part of English law.<sup>13</sup>

A White Paper called: '*No more Excuses: A New Approach to Tackling Youth Crime*' served before the British Parliament in 1997. The White Paper provided that the *doli incapax* presumption was preventing the prosecution from prosecuting child offenders between the ages of ten and fourteen. The White Paper had no sympathy for juvenile offenders, stating that: 'we must stop making excuses for children who offend'.<sup>14</sup>

Practical difficulties, like preventing the child offender from being prosecuted due to a lack of evidence rebutting the presumption of criminal capacity, caused problems for the effective prosecution of these child offenders.<sup>15</sup> It further asserts that children over the age of ten are capable of distinguishing between mere naughtiness and serious

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- 10 See Gelsthorpe L and Morris A 'Restorative Youth Justice: The Last Vestiges of Welfare?' in Muncie J, Hughes G and McLaughlin E (eds) *Youth Justice: Critical Readings* (2002) 313-314. Also see Muncie J *Youth and Crime* 3ed (2009) 5.
- 11 Crofts T *The Criminal Responsibility of Children and Young Persons: A Comparison of English and German Law* (2002) 66. Also see Ashworth A and Horder J *Principles of Criminal Law* 7ed (2013) 140; Haines K and Drakeford M *Young People and Youth Justice* (1998) 27-28; Muncie J *Youth and Crime* 3ed (2009) 5; Ormerod D *Smith and Hogan's Criminal Law* 13ed (2011) 342.
- 12 See *C v DPP* [1995] 2 WLR 383. Briefly, the facts in *C v DPP* are as follows: On 8 June 1982, two police officers saw two young boys under the age of 13, tampering with a motor cycle, parked in a driveway of a house in Liverpool. The defendant was holding the handlebars, while the other boy tried to break the chain and padlock, which secured the motorcycle. The boys saw the police and ran away, but a police officer managed to apprehend one of the boys. Also see *C (A Minor), Re* [1995] UKHL 15 paragraph 11.
- 13 See Card R *Card, Cross and Jones Criminal Law* 20ed (2012) 611; Ormerod D *Smith and Hogan's Criminal Law* 13ed (2011) 342.
- 14 Home Office White Paper 'No More Excuses: A New Approach to Tackling Youth Crime in England and Wales' (1997) Chapter 4.1. Also see Ashworth A *Sentencing and Criminal Justice* 4ed (2005) 360-361. For a discussion of the negative perception of youth in Great Britain during the 1990s, see Goldson B 'Youth in Crisis?' in Goldson B (ed) *Youth in Crisis? 'Gangs', Territoriality and Violence* (2011) 3; Haines K and Drakeford M *Young People and Youth Justice* (1998) 1-25.
- 15 Home Office White Paper 'No More Excuses: A New Approach to Tackling Youth Crime in England and Wales' (1997) Chapter 4.4. Also see Ormerod D *Smith and Hogan's Criminal Law* 13ed (2011) 342.

wrongdoing, and that denying this is contrary to common sense.<sup>16</sup> The White Paper made a substantial impact in Parliament, as the *doli incapax* presumption for children above the age of ten was eventually abolished in 1998, following the enactment of the Crime and Disorder Act of 1998.<sup>17</sup>

## (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 prosecuted for the commission of an offence and are now considered being capable of understanding the difference between right and wrong at the time of the commission of the offence.<sup>18</sup> In effect, no regard is given to the fact that children between ten and fourteen are still in the process of maturing.<sup>19</sup> Although the *doli incapax* rule has been abolished, some authors have argued that the *doli incapax* rule can still be used as a defence.<sup>20</sup> Yet, this possibility has been rejected by the British Parliament and leaves children older than ten but younger than fourteen, solely with the general defences of criminal law to prove their lack of maturity.<sup>21</sup>

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16 Home Office White Paper 'No More Excuses: A New Approach to Tackling Youth Crime in England and Wales' (1997) Chapter 4.3.

17 Section 34 of the Crime and Disorder Act 1998 states that: 'The rebuttable presumption of criminal law that a child aged 10 or over is incapable of committing an offence is hereby abolished'. See further Ashworth A and Horder J *Principles of Criminal Law* 7ed (2013) 140; Muncie J *Youth and Crime* 3ed (2009) 275; Ormerod D *Smith and Hogan's Criminal Law* 13ed (2011) 343.

18 See Ashworth A and Horder J *Principles of Criminal Law* 7ed (2013) 140-141; Card R *Card, Cross and Jones Criminal Law* 20ed (2012) 611; Crofts T *The Criminal Responsibility of Children and Young Persons: A Comparison of English and German Law* (2002) 84; Keating H (2007) 19 *Child and Family Law Quarterly* 194; Ormerod D *Smith and Hogan's Criminal Law* 13ed (2011) 341-342.

19 See Crofts T *The Criminal Responsibility of Children and Young Persons: A Comparison of English and German Law* (2002) 84; Keating H (2007) 19 *Child and Family Law Quarterly* 194-195, 200. Also see Gelsthorpe L and Morris A in Muncie J, Hughes G and McLaughlin E (eds) *Youth Justice: Critical Readings* (2002) 241.

20 See Crofts T 'Catching Up With Europe: Taking the Age of Criminal Responsibility Seriously in England' (2009) 17 *European Journal of Crime, Criminal Law and Criminal Justice* 276-277; Keating H (2007) 19 *Child and Family Law Quarterly* 193.

21 See Crofts T *The Criminal Responsibility of Children and Young Persons: A Comparison of English and German Law* (2002) 85. Also see Ormerod D *Smith and Hogan's Criminal Law* 13ed (2011) 342.



Secondly, the standard of recklessness, or the taking of unjustified risks is also a cause for concern.<sup>22</sup> The *Caldwell* test determines whether an offender took an unjustified risk, knowing that it was the wrong thing to do.<sup>23</sup> 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 impulse.<sup>24</sup> It is clear from the above, that the abolition of the *doli incapax* presumption can create a few problems when a child between the ages of ten and fourteen has committed an offence which he did not plan and foresee.<sup>25</sup> The courts need to consider these matters, especially when children between the ages of 10 and 14 commit crimes.

The author submits that it was the correct decision by the British Parliament to abolish the *doli incapax* rule as the commission of offences by juveniles in England has been on the rise over the last two decades. What is the consequence 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 innocence would

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22 Crofts T *The Criminal Responsibility of Children and Young Persons: A Comparison of English and German Law* (2002) 85.

23 See Smith J C and Hogan B *Smith and Hogan's Criminal Law* 9ed (1999) 64; Crofts T *The Criminal Responsibility of Children and Young Persons: A Comparison of English and German Law* (2002) 87. The Caldwell test provides that a person is reckless if: '(1) he does an act which in fact creates an obvious risk that property will be destroyed or damaged and (2) when he does the act he either has not given any thought to the possibility of there being any such risk or has recognized that there was some risk involved and has nonetheless gone on to do it'. See *R v Caldwell* [1981] 1 All ER 967. Also see Ashworth A and Horder J *Principles of Criminal Law* 7ed (2013) 179-181; Crofts T *The Criminal Responsibility of Children and Young Persons: A Comparison of English and German Law* (2002) 86; Ormerod D *Smith and Hogan's Criminal Law* 13ed (2011) 121-122.

24 See Crofts T *The Criminal Responsibility of Children and Young Persons: A Comparison of English and German Law* (2002) 87. Also see Ormerod D *Smith and Hogan's Criminal Law* 13ed (2011) 122.

25 Ashworth A and Horder J *Principles of Criminal Law* 7ed (2013) 140-141; Ormerod D *Smith and Hogan's Criminal Law* 13ed (2011) 342-343.

be rebutted. 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.

### 5.2.2 South Africa

The age of criminal responsibility of 10 years is regulated by Section 7(1) of the Child Justice Act (hereafter, CJA).<sup>26</sup> 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 rebutted.<sup>27</sup> 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 analysed as well as the application of the age of criminal responsibility of children between the ages of 14 and 18. 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.

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26 The Child Justice Act 75 of 2008. The CJA was signed into law on 7 May 2009 and entered into force on 1 April 2010. The process to regulate juvenile justice in South Africa began as far back as 1997 with the appointment of the Project Committee of the South African Law Commission. The Committee finalised its work in 2000 and produced a Draft Child Justice Bill which was eventually introduced to Parliament in 2002, then known as Bill 49 of 2002. After the Bill was introduced into Parliament, it was the subject of extensive debates from 2002 until 2008 when Parliament decided to accept the Bill. Consequently, the CJA was enacted in 2010. For an overview of the initial stages of the formal law reform processes concerning a separate juvenile justice system in South Africa, see Sloth-Nielsen J 'The Business of Child Justice' (2003) 7 *Acta Juridica* 175-180. Also see Prinsloo J 'Young Offenders and Presentencing Reports: A Criminological Perspective' (2005) 18 *Acta Criminologica* 4.

27 See Burchell J *Principles of Criminal Law* 4ed (2013) 256; Gallinetti J 'Child Justice in South Africa: The Realisation of the Rights of Children Accused of Crime' in Boezaart T (ed) *Child Law in South Africa* (2009) 652; Kemp G (et al) *Criminal Law in South Africa* 2ed (2015) 178-179.



(1) children older than 10 years but younger than 14

The CJA provides that children older than 10 years old, but younger than 14, are presumed to lack criminal capacity unless the State proves that the child has criminal capacity.<sup>28</sup> 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.<sup>29</sup> 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 between right and wrong and to act in accordance with the appreciation that the act was wrong.<sup>30</sup> If the child lacked one of the components, he lacks criminal capacity, but this does not mean that he cannot be held responsible, because *mens rea* must also be proved and is required in addition to criminal capacity.<sup>31</sup>

The age of criminal responsibility was only recently increased from 7 to 10 years. It is interesting to note the role that the presumption of criminal capacity test played in this regard, the same test that was abolished in England following the Jamie Bulger case.<sup>32</sup> The presumption was created to protect children who committed offences while they were older than seven, but younger than 14. The purpose of the 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 and 10 are not able to differentiate between right and wrong and act in accordance with

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28 Section 7(2) of the CJA.

29 Kemp G (*et al*) *Criminal Law in South Africa* 2ed (2015) 179.

30 See Burchell J *Principles of Criminal Law* 4ed (2013) 257; Kemp G (*et al*) *Criminal Law in South Africa* 2ed (2015) 178-179; Snyman C R *Strafreg* 6ed (2012) 184-187; Skelton A and Badenhorst C *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review* (2011) 14-15.

31 As a result of the immaturity of the mind of a child, it is difficult to prove that a child acted with intent and knowledge at the time of the commission of the crime. See Burchell J *Principles of Criminal Law* 4ed (2013) 258-259, 396-397; Kemp G (*et al*) *Criminal Law in South Africa* 2ed (2015) 178-179; Snyman C R *Strafreg* 6ed (2012) 184-187.

32 See Gallinetti J *Getting to Know the Child Justice Act* (2009) 18; Kemp G (*et al*) *Criminal Law in South Africa* 2ed (2015) 178-179. Also see Burchell J *Principles of Criminal Law* 4ed (2013) 256.

such understanding.<sup>33</sup> This led to the questioning of the presumption's legitimacy in South African law. Some of the main criticisms were that the age of seven was set at a low age standard and that the prosecutor should include the testimony of a child psychologist to achieve the rebuttal.<sup>34</sup>

In 2000, the South African Law Commission discussed various approaches regarding the age of criminal responsibility and recommended that the age of criminal capacity be increased from seven to 10 years and that the rebuttable presumption for children older than 10, but younger than 14 be retained.<sup>35</sup> The Commission submitted that the presumption of criminal incapacity serves as a 'protective mantle' for children between the ages of 10 and 14.<sup>36</sup> Thus, child soldiers who commit offences while between the ages of 10 and 14 are presumed incapable of being criminally responsible for 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 the commission of the offence and is able to act in accordance with such understanding. If a child soldier between the ages of 10 and 14 commits a serious crime under international law, the

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- 33 See Burchell J *Principles of Criminal Law* 4ed (2013) 255-256; Kemp G (et al) *Criminal Law in South Africa* 2ed (2015) 178; Skelton A and Badenhorst C *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review* (2011) 14-15. Also see Ramages K 'Investigating the Minimum Age of Criminal Responsibility in African Legal Systems' (2008) (Unpublished LLM Thesis submitted to the University of the Western Cape, South Africa) 141.
- 34 In 1997, the South African Law Commission launched an investigation into the possibility of a separate child justice system. An Issue Paper and a Discussion Paper were published in 1997 and 1999 respectively, and included several options for dealing with the age of criminal capacity and the presumption of criminal capacity. These included: (1) not abolishing the *doli incapax* rule, as well as leaving the age of criminal responsibility at seven, while putting more emphasis on rebutting the presumption; (2) raising the minimum age from seven to 10 years, but not abolishing the presumption of criminal capacity for children older than 10, but younger than 14 years; (3) raising the minimum age of criminal responsibility to 12 or 14 and abolishing the *doli incapax* rule and (4) to establish one specific minimum age. See Skelton A 'Developing a Juvenile Justice System for South Africa: International Instruments and Restorative Justice' (1996) 1 *Acta Juridica* 180-196; Skelton A and Badenhorst C *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review* (2011) 14-15.
- 35 South African Law Commission *Report on Juvenile Justice* Project 106 (2000) 30.
- 36 South African Law Commission *Report on Juvenile Justice* Project 106 (2000) 29. Also see Gallinetti J in Boezaart T (ed) *Child Law in South Africa* (2009) 650. Skelton A and Badenhorst C *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review* (2011) 17.

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.

*(2) children older than 14 years but younger than 18*

Child offenders who were older than 14, but younger than 18 at the time of the commission of the offence are considered to be criminally capable of committing an offence under the provisions of the CJA.<sup>37</sup> 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 law.<sup>38</sup> Burchell points out that 'On attaining the age of 14, a child is regarded in law as being no different from an adult with regard to criminal capacity'.<sup>39</sup> 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 crimes, should be prosecuted in the same manner as juveniles 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 CJA. Therefore, court proceedings 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.

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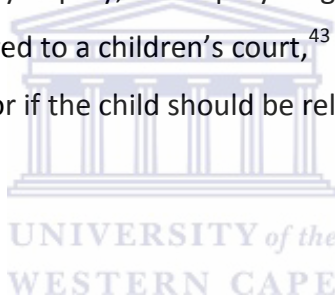
37 See Burchell J *Principles of Criminal Law* 4ed (2013) 259; Kemp G (*et al*) *Criminal Law in South Africa* 2ed (2015) 179; Snyman C R *Strafreg* 6ed (2012) 184.

38 See Section 4 of the CJA.

39 Burchell J *Principles of Criminal Law* 4ed (2013) 259. Also see Kemp G (*et al*) *Criminal Law in South Africa* 2ed (2015) 179.

### (3) evaluation of criminal capacity

There are various factors that a prosecutor has to consider when the criminal capacity of a child soldier who committed crimes under international law is in question. These factors include: (1) education; (2) cognitive ability; (3) age and maturity of the child; (4) nature and seriousness of the offence; (5) impact of the offence on the victim; and (6) interests of the community.<sup>40</sup> If these factors have been taken into account and the prosecutor decides that the child soldier is not criminally responsible for the crime, the matter will be referred to the probation officer and the child may be placed in his parents' care.<sup>41</sup> If it is decided that the child is criminally responsible, then the matter can be diverted if it is a minor offence, or the matter can be referred to a preliminary inquiry.<sup>42</sup> During the preliminary inquiry, the inquiry magistrate has to make a decision whether the child will be referred to a children's court,<sup>43</sup> whether diversion of the matter is more appropriate,<sup>44</sup> or if the child should be released or referred to the child justice court.<sup>45</sup>



### 5.2.3 Germany

In Germany, a juvenile is someone who is older than the age of 14, but younger than 18, pursuant to Section 1(2) of the Jugendgerichtsgesetz (Youth Courts Law) 1989.<sup>46</sup>

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40 There are two other factors that can be considered by the prosecutor, namely, the probation officer's assessment and the appropriateness of diversion. See Section 10(1) of the CJA. Also see Skelton A and Badenhorst C *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review* (2011) 20. A few of these factors overlap with the corresponding section under German law, and will be discussed there. See Chapter 5.2.3.4.

41 Section 10(2)(b) of the CJA.

42 Section 10(2)(a)(i)(ii) of the CJA.

43 Section 43(2)(d) of the CJA. Children's Court refers to the court established under Section 42 of the Children's Act. See Chapter 1 of the CJA.

44 Section 43(2)(c) of the CJA.

45 Section 43(2)(h)(ii) of the CJA. Child Justice Courts refers to 'any court provided for in the Criminal Procedure Act, dealing with the bail application, plea, trial or sentencing of a child'. See Chapter 1 of the CJA.

46 In Germany, the Jugendgerichtsgesetz regulates the laws that deal with juveniles and is primarily focussed on the principle of education. See Section 2 of the Jugendgerichtsgesetz 1974. Also see

Moreover, Section 19 of the Strafgesetzbuch (German Criminal Code) provides that persons can only be criminally responsible, once they have attained the age of 14 at the time of the commission of the offence.<sup>47</sup> Thus, child soldiers under the age of 14 will therefore not be criminally responsible for an offence. However, depending on the seriousness of the offence and whether the offence is punishable, child soldiers under the age of 14 at the time of the offence may be subjected to educational measures.<sup>48</sup> In such a case, the public prosecutor's office will refer the case to the Youth Welfare Office.<sup>49</sup>

### *(1) determining criminal responsibility*

Section 3 of the Jugendgerichtsgesetz requires that the criminal responsibility of juveniles has to be determined before the start of criminal proceedings. This way, the juvenile is not unnecessarily exposed to criminal proceedings if it was found that he was

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Crofts T *The Criminal Responsibility of Children and Young Persons: A Comparison of English and German Law* (2002) 93; Pfeiffer C 'Juvenile Crime and Violence in Europe' in Tonry M (ed) *Crime and Justice: A Review of Research*, Volume 23 (1998) 318; Robbers G *An Introduction to German Law* 5ed (2012) 135-136. In addition, 'young adults' are defined as persons older than 18, but younger than 21. They also fall under the jurisdiction of the Youth Courts Law, but this thesis will not deal with this age group. For a discussion of the criminal responsibility of 'young adults', see Albrecht H J 'Youth Justice in Germany' in Tonry M H and Doob A N (eds) *Crime and Justice: Youth Crime and Youth Justice: Comparative and Cross National Perspectives* Volume 31 (2004) 474. Also see Crofts T *The Criminal Responsibility of Children and Young Persons: A Comparison of English and German Law* (2002) 131; Dünkel F 'Juvenile Justice in Germany' in Jensen E L and Jepsen J (eds) *Juvenile Law Violators, Human Rights and the Development of New Juvenile Justice Systems* (2006) 137-144.

47 The Jugendgerichtsgesetz does not have a separate schedule of offences, but provides in Section 1 of the Act that general criminal law will apply, which refers to the schedule of offences included in the German Criminal Code. See Bohlander M *Principles of German Criminal Law* (2009) 22; Crofts T *The Criminal Responsibility of Children and Young Persons: A Comparison of English and German Law* (2002) 131. Also see Robbers G *An Introduction to German Law* 5ed (2012) 135.

48 Section 27 of the Aches Buch, Sozialgesetzbuch, Kinder und Jugendhilfe (Eight Book of the Social Code Concerning Youth and Child Welfare), (hereafter Kinder und Jugendhilfegesetz). The Kinder und Jugendhilfegesetz was enacted in 1989. Also see Crofts T *The Criminal Responsibility of Children and Young Persons: A Comparison of English and German Law* (2002) 129; Kaiser G 'The Juvenile Justice System: The Case of Germany' (1994) 18 *Legal Studies Forum* 323; Teske and Albrecht notes that children under the age of 14 may be subject to civil procedures and administrative procedures as decided by the Juvenile Court. See Teske R H C Jr. and Albrecht H 'Prosecution and Sentencing Patterns in the Federal Republic of Germany' (1992) 2 *International Criminal Justice Review* 88.

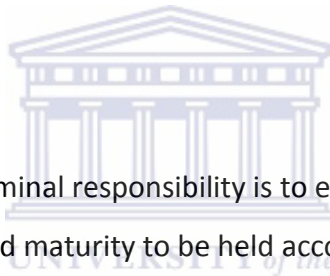
49 Section 8 of the Kinder und Jugendhilfegesetz 1989. Also see Crofts T *The Criminal Responsibility of Children and Young Persons: A Comparison of English and German Law* (2002) 129; Kaiser G (1994) 18 *Legal Studies Forum* 323.

incapable of committing the offence. A child soldier will be acquitted and ordered to be subjected to certain educational measures if it is found that he is not capable of committing the crime due to a number of factors including a lack of maturity.<sup>50</sup>

The test to establish the criminal responsibility of child soldiers pursuant to Section 3 of the Jugendgerichtsgesetz is twofold.<sup>51</sup> The first step is to determine whether the child soldier had the required maturity at the time of the commission of the offence.

Secondly, it must be established whether the juvenile understood the wrongfulness of the alleged offence and whether he controlled his actions in accordance with his understanding. The two elements of the criminal responsibility test are respectively discussed below.

(a) *the element of maturity*



The first stage of the test of criminal responsibility is to establish whether the child soldier has reached the required maturity to be held accountable for the alleged offence. This maturity is judged according to the child soldier's moral and mental development. Moral development refers to the internalisation of social norms and the ability to distinguish between right and wrong.<sup>52</sup> Moreover, the child soldier needs to understand that there are certain legal norms, which each citizen needs to adhere to, while the child soldier also needs to grasp the seriousness of these norms.<sup>53</sup> Thus, the court has to examine whether the child soldier has reached a certain level of maturity, by establishing whether the child soldier understands that it is wrong to commit crime.

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50 Section 3 of the Jugendgerichtsgesetz 1989.

51 See Bohlander M *Principles of German Criminal Law* (2009) 22. Also see Crofts T *The Criminal Responsibility of Children and Young Persons: A Comparison of English and German Law* (2002) 135; Robbers G *An Introduction to German Law 5ed* (2012) 135-136.

52 See Crofts T *The Criminal Responsibility of Children and Young Persons: A Comparison of English and German Law* (2002) 136; Dammer H R and Albanese J S *Comparative Criminal Justice Systems* (2014) 295; Robbers G *An Introduction to German Law 5ed* (2012) 135-136.

53 See Crofts T *The Criminal Responsibility of Children and Young Persons: A Comparison of English and German Law* (2002) 136; Robbers G *An Introduction to German Law 5ed* (2012) 135.

Mental development, on the other hand, involves the ability of the child soldier to distinguish between right and wrong and to understand that it is wrong to commit an offence.<sup>54</sup> Furthermore, it has to deal with the child soldier's intellectual capability and the ability to control emotion and willpower.<sup>55</sup> The court has to examine whether the child soldier has reached a certain level of maturity, by establishing whether the child soldier is able to distinguish right from wrong and understands that the commission of an offence could lead to prosecution and even imprisonment.

The court will consider several factors whilst examining the mental development of the child soldier, namely: (1) school knowledge; (2) understanding of concepts and imagination; (3) general experience; (4) ability to remember things; and (5) the ability to plan and foresee, amongst other factors.<sup>56</sup> These factors will assist the court in determining whether the child soldier has the required maturity to be held accountable for the alleged offence. Unfortunately in practice, often the court only relies on the level of intelligence of the juvenile and overlooks other important factors mentioned above, which could determine whether the juvenile has reached a certain level of maturity.<sup>57</sup> Failure to examine such factors could play a role in determining the level of maturity of the child soldier. Nonetheless, once the court has established that the child soldier has the maturity to be held criminally liable, the court will examine the child soldier's ability to understand the wrongfulness of the act and whether the child soldier acted in accordance with such understanding.

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54 See Crofts T *The Criminal Responsibility of Children and Young Persons: A Comparison of English and German Law* (2002) 137; Robbers G *An Introduction to German Law* 5ed (2012) 136.

55 See Crofts T *The Criminal Responsibility of Children and Young Persons: A Comparison of English and German Law* (2002) 137. Generally, also see Dammer H R and Albanese J S *Comparative Criminal Justice Systems* (2014) 259.

56 See Section 43 of the Jugendgerichtsgesetz 1989. Also see Crofts T *The Criminal Responsibility of Children and Young Persons: A Comparison of English and German Law* (2002) 137.

57 See Crofts T *The Criminal Responsibility of Children and Young Persons: A Comparison of English and German Law* (2002) 137.



(b) *capacity to understand and control actions*

The second stage of the test of criminal responsibility in Germany refers to the ability to understand and to act in accordance with this understanding. The ability to understand means that the child soldier understands the fact that his act caused harm to the victim and community and he must furthermore understand that the act is unlawful.<sup>58</sup> The child soldier needs to be able to distinguish between those acts which are harmless, like behaving in an ill-disciplined manner, as opposed to conduct that is unlawful.<sup>59</sup>

The ability to act in accordance with this understanding refers to the ability of the child soldier to appreciate that he is committing an offence, yet continues to commit the act, knowing that it is wrongful. However, even when a child soldier knows that the offence is wrong, he may still not be mature enough to resist committing the offence.<sup>60</sup> In order for the child soldier to have acted in accordance with the understanding that an act was wrongful, it needs to be proved that the child soldier has reached a level of maturity where he can act in a reasonable manner and where he can make important decisions by himself and take responsibility for such decisions.<sup>61</sup> After the test for criminal responsibility has been dealt with by the court, various factors determining the criminal responsibility of the child soldier will also have to be considered.

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58 See Robbers G *An Introduction to German Law* 5ed (2012) 135-136. Also see Crofts T *The Criminal Responsibility of Children and Young Persons: A Comparison of English and German Law* (2002) 139.

59 See Crofts T *The Criminal Responsibility of Children and Young Persons: A Comparison of English and German Law* (2002) 140; Streng F *Jugendstrafrecht* 3ed (2012) 27.

60 See Crofts T *The Criminal Responsibility of Children and Young Persons: A Comparison of English and German Law* (2002) 142. Also see Streng F *Jugendstrafrecht* 3ed (2012) 27.

61 See Crofts T *The Criminal Responsibility of Children and Young Persons: A Comparison of English and German Law* (2002) 142. Also see Dammer H R and Albanese J S *Comparative Criminal Justice Systems* (2014) 295.



## *(2) factors determining criminal responsibility*

In German law, the following factors have been prevalent in the determination of the criminal responsibility of juveniles: (1) age; (2) type of offence; (3) family circumstances; and (4) diverging cultural systems.<sup>62</sup>

### *(a) age*

The levels of maturity among children with different ages cannot always be compared.<sup>63</sup> Indeed, a child soldier aged 14 might be seen to have lesser criminal responsibility than a child soldier aged 16, for example. The age of the offender will therefore play a prominent role in the criminal responsibility of the child soldier.

### *(b) type of offence*

Some offences are more severe than others and this has an impact on the criminal responsibility of child soldiers. Two of these acts include theft and offences against the person. A child is taught from a young age that it is wrong to take something from another person, without asking. What is more, a child knows from a young age that it is wrong to apply violence and that it is not in the interest of the community to behave in a violent manner.<sup>64</sup> In contrast, the commission of sexual offences by child soldiers, for example, might have the opposite effect, since a young child soldier might not be developed and mature enough to understand the wrongfulness of a sexual offence. It is

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62 These factors are not limited to German juvenile justice, but are a summary of factors that have been common in German law. See Crofts T *The Criminal Responsibility of Children and Young Persons: A Comparison of English and German Law* (2002) 143-163.

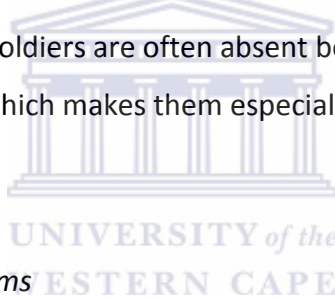
63 See Crofts T *The Criminal Responsibility of Children and Young Persons: A Comparison of English and German Law* (2002) 144. Also see Enzmann D 'Germany' in Junger-Tas J (et al) (eds) *Juvenile Delinquency in Europe and Beyond: Results of the Second International Self-Report Delinquency Study* (2010) 49.

64 See Crofts T *The Criminal Responsibility of Children and Young Persons: A Comparison of English and German Law* (2002) 146. Generally, also see Dammer H R and Albanese J S *Comparative Criminal Justice Systems* (2014) 259.

important to examine whether the child soldier was aware that his conduct was unlawful and that the community does not accept such behaviour.<sup>65</sup>

(c) *family circumstances*

The role of the family plays a major role in the overall development of the juvenile and especially in the child soldier's life and ultimately whether the child soldier is criminally responsible or not. Lack of parental care, adverse family circumstances and many other factors within the family, may have severe long-lasting effects on the child soldier.<sup>66</sup> The education principle, which has been embedded in German juvenile law for many years, focusses on the family circumstances of the juvenile and encourages families to raise their children in a healthy environment. It must be reiterated that particularly in child soldier cases, parents of child soldiers are often absent before these children are recruited into armed groups, which makes them especially vulnerable during recruitment by armed groups.



(d) *diverging cultural systems*

Child soldiers who find themselves in Germany might find it difficult to cope with the everyday cycle of life and might tend to commit offences. Moreover, one needs to take into account that a criminal offence under German law might not be a criminal offence in another country and the court duly needs to take this into account when examining the criminal responsibility of a juvenile from a different cultural system.<sup>67</sup>

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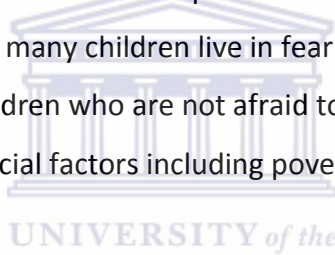
65 See Robbers G *An Introduction to German Law* 5ed (2012) 136. Also see Crofts T *The Criminal Responsibility of Children and Young Persons: A Comparison of English and German Law* (2002) 147.

66 See for example Enzmann D in Junger-Tas J (et al) (eds) *Juvenile Delinquency in Europe and Beyond: Results of the Second International Self-Report Delinquency Study* (2010) 54. Also see Crofts T *The Criminal Responsibility of Children and Young Persons: A Comparison of English and German Law* (2002) 150.

67 See Crofts T *The Criminal Responsibility of Children and Young Persons: A Comparison of English and German Law* (2002) 154. Generally, also see Enzmann who discusses the effects of migration on juvenile delinquency. See Enzmann D in Junger-Tas J (et al) (eds) *Juvenile Delinquency in Europe and Beyond: Results of the Second International Self-Report Delinquency Study* (2010) 53.

## 5.2.4 Uganda

Uganda has experienced and is still experiencing widespread commission of international crimes. The Lord's Resistance Army (hereafter, LRA) is responsible for some of the most atrocious crimes that have been committed in Uganda.<sup>68</sup> The LRA was established in the mid-1980's and has abducted more than 25,000 children since then.<sup>69</sup> The rebel group is led by Joseph Kony, who is currently wanted by the ICC for war crimes and crimes against humanity committed in Uganda during 2002 and 2004.<sup>70</sup> The problems since then have not subsided. In 2010, the United Nations Children's Fund (hereafter, UNICEF) reported that: 'In the conflict-affected districts around 40,000 unaccompanied children, "the night commuters", walk every night from their home in outlying villages to urban centres in search of protection from the threat of LRA abduction and attacks'.<sup>71</sup> Thus, many children live in fear of being forcefully recruited by the LRA. Yet, there are also children who are not afraid to join rebel groups, but do so, because of various other social factors including poverty and war.



This influx of children into the LRA over the years has resulted in the large scale commission of crimes under international law by child soldiers themselves. Many child soldiers have been disarmed, demobilised and rehabilitated. However, child soldiers

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68 Jamie Briggs summarises the rule of the LRA as follows: 'The history of the Lord's Resistance Army is punctuated by innumerable abductions and civilian attacks of unimaginable savagery, which truly means something in a nation that endured Idi Amin'. See Briggs *J Innocents Lost: When Child Soldiers go to War* (2005) 115.

69 UNICEF 'Background on Uganda' (2010) [http://www.unicef.org/infobycountry/uganda\\_background.html](http://www.unicef.org/infobycountry/uganda_background.html) (accessed 12 August 2010). A United Nations source estimates the number of child abductees to be around 20,000. Also see Freeland S (2008) 29 *University of La Verne Law Review* 27; Office of the Special Representative of the Secretary-General for Children and Armed Conflict 'Former Girl Soldiers Bring Hope to their Peers in Uganda, 9 November 2007' (2007) <http://reliefweb.int/node/2485355> (accessed 23 September 2011). The LRA originated in the mid-1980s mainly protecting the rights of the Acholi people of Northern Uganda. However, today the rebels are notorious for the abduction of children into their ranks.

70 See *Situation in Uganda, Pre-Trial Chamber II Decision, Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005*, ICC-02/04-01/05. For a background on Joseph Kony and the LRA, see Briggs *J Innocents Lost: When Child Soldiers go to War* (2005) 110-115, 140.

71 Briggs *J Innocents Lost: When Child Soldiers go to War* (2005) 108; UNICEF (2010) [http://www.unicef.org/infobycountry/uganda\\_background.html](http://www.unicef.org/infobycountry/uganda_background.html) (accessed 12 August 2010).

have not been prosecuted for committing crimes under international law. If they were to be prosecuted, how will they be held criminally responsible?

The age of criminal responsibility in Uganda is provided in Section 88 of The Children Act 1997 and establishes the minimum age of criminal responsibility at the age of 12 years.<sup>72</sup> Child soldiers under the age of 12 years are therefore not criminally responsible. The local government council presides over cases where the child soldier is under the age of 12 and where a restorative justice approach is followed, which normally includes sanctions like an apology or a payment of a small amount of money to the victim of the offence.<sup>73</sup>

Before the enactment of the Children Act in 1997, the age of criminal responsibility was set at the age of seven, while the presumption of criminal incapacity rule was also applicable.<sup>74</sup> Children older than seven, but younger than 12, were rebuttably presumed to be incapable of committing an offence, and the State had to prove that the juvenile between the said ages had the criminal capacity to commit the crime.<sup>75</sup> After 1997, the rebuttable presumption was abolished. Also, the age of criminal responsibility was increased from seven to 12 years. Thus, child soldiers between the ages of 12 and 18 are presumed to be capable of committing crimes.

### 5.2.5 Comparative Commentary

As discussed earlier, the age of criminal responsibility in England and South Africa is set at the age of 10 years, 14 years in Germany and 12 years in Uganda. The rather low ages

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72 The Children Act 1997, entered into force on 1 August 1997.

73 If a local government council is unable to resolve the issue, a Children's and Family Court will make a care and supervision order. See Skelton A and Badenhorst C *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review* (2011) 11.

74 See Brown D and Allen P A P J *An Introduction to the Law of Uganda* (1968) 89. There are a limited number of scholarly writings on Ugandan criminal law.

75 See Brown D and Allen P A P J *An Introduction to the Law of Uganda* (1968) 89. Also see Skelton A and Badenhorst C *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review* (2011) 11.

of criminal responsibility in England, South Africa and Uganda, to an extent, can be attributed to the impact of common law principles such as the *doli incapax* rule, as opposed to the civil law jurisdiction in Germany. It is submitted that the age of criminal responsibility in England and South Africa is set at too low an age and should be increased, especially in the case when child soldiers are prosecuted. This submission is partly due to the provisions of two international instruments that will be discussed in the next chapter.<sup>76</sup> One of these instruments recommends that the age of criminal responsibility should not be set at too low an age,<sup>77</sup> while the other calls for a minimum age of criminal responsibility of 12 years.<sup>78</sup> A very young child soldier who commits the war crime of murder for example in an armed conflict situation and a juvenile of the same age who commits a domestic murder, cannot be compared to one another. It is important that the age of criminal responsibility must be carefully assessed by courts when a child soldier is prosecuted, since the same standards for juveniles who commit domestic crimes cannot be applied in the case of child soldiers who commit crimes under international law. Thus, the specific domestic court will have to look at the crime that was committed by the child soldier and determine whether the child soldier had the criminal responsibility to commit the offence and whether his low age is a factor that excludes such responsibility, and at the age below which the child soldier cannot be held responsible at all.

The countries in this comparative study essentially provide that a child soldier will only be responsible for an offence if the child soldier is able to distinguish between right and wrong at the time of the commission of the offence, and act in accordance with such understanding. A child soldier will therefore be criminally responsible for an offence if it can be proved that the child soldier was aware that it was wrong to commit the crime under international law, but continued to commit the crime regardless. It is here where the age of the child soldier becomes an important aspect for courts to consider,

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76 See Chapter 6.1.5 and Chapter 6.1.6.

77 See Chapter 6.1.5.

78 See Chapter 6.1.6.

especially in States where child soldiers can be prosecuted at a very young age. Let us hope that domestic courts take these aspects into consideration when determining the criminal responsibility of child soldiers, otherwise child soldiers will be deprived of their right to a fair trial and various other procedural law aspects.

### 5.3 Procedural Law

#### 5.3.1 England

The criminal accountability of juvenile offenders in English law can be traced back as early as 688 AD in Anglo-Saxon Law.<sup>79</sup> However, back then, the Laws of the King regulated the accountability of children and children were treated in the same manner as adults.<sup>80</sup> It was only in the early 20th century that the idea of a separate children's court was considered. The first youth court was established in 1908.<sup>81</sup> The English juvenile justice system has made a lot of progress over the last century, while the evolution of juvenile procedural law has been one of the focal points.<sup>82</sup> Yet, how will the English juvenile courts deal with the procedural rights of a child soldier who has committed crimes under international law?

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79 See Bottoms A and Dignan J 'Youth Justice in Great Britain' in Tonry M H and Doob A N (eds) *Crime and Justice: Youth Crime and Youth Justice: Comparative and Cross National Perspectives* Volume 31 (2004) 21-28; Crofts T *The Criminal Responsibility of Children and Young Persons: A Comparison of English and German Law* (2002) 5. For a detailed discussion of the history of youth justice in England, see Crofts T *The Criminal Responsibility of Children and Young Persons: A Comparison of English and German Law* (2002) 5-35.

80 See Campbell A M 'Trying Minors as Adults in the United States and England: Balancing the Goal of Rehabilitation with the Need to Protect Society' (1995) 19 *Suffolk Transnational Law Review* 345; Crofts T *The Criminal Responsibility of Children and Young Persons: A Comparison of English and German Law* (2002) 5; Gelsthorpe L 'Recent Changes in Youth Justice Policy in England and Wales' in Weijers I and Duff A (eds) *Punishing Juveniles: Principle and Critique* (2002) 47.

81 See Campbell A M (1995) 19 *Suffolk Transnational Law Review* 346. The majority of the prosecutions of children under the age of 18 are brought before youth courts. Hearings are less formal and magistrates are specifically trained to deal with juvenile cases. See Ashworth A and Horder J *Principles of Criminal Law* 7ed (2013) 7; Card R Card, *Cross and Jones Criminal Law* 20ed (2012) 6, 613.

82 Ashworth notes that: 'For almost the whole of the last century there were different sentencing procedures for younger offenders'. See Ashworth A *Sentencing and Criminal Justice* 4ed (2005) 359.

### 5.3.1.1 Arrest and Detention

In England, the majority of juveniles are released after they have been arrested.<sup>83</sup> The exceptions to the rule will be discussed shortly, but let us first see, which juveniles may be arrested. Sections 24 to 33 of the Police and Criminal Evidence Act of 1984, deal with the arrest of criminal offenders. In addition, Code G of the Police and Criminal Evidence Act of 1984, sets out the code of practice for arresting criminal offenders.<sup>84</sup> Two elements that are required to make a lawful arrest are an individual's involvement or suspected involvement in the commission of an offence and reasonable grounds for believing that the individual's arrest is necessary.<sup>85</sup> Thus, child soldiers under the age of 10 may not be arrested, while child soldiers between the ages of 10 and 18 at the time of the commission of the offence, may be arrested.

Once the child soldier has been arrested and taken to the police station, his parents, guardian or any other person responsible for the juvenile's well-being must be informed about the arrest and come to the police station as soon as possible.<sup>86</sup> This includes informing the appropriate person why the child soldier has been arrested and where the child soldier is being detained.<sup>87</sup> The custody officer shall release the juvenile unless: (a) the juvenile's name or address cannot be identified; (b) the juvenile is a threat to

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83 For a critical discussion of the practical implications of arrest and detention in England, see Haines K and Drakeford M *Young People and Youth Justice* (1998) 99-140.

84 See Police and Criminal Evidence Act 1984, Code G: Revised Code of Practice for the Statutory Power of Arrest by Police Officers, 12 November 2012. Section 24 of the Police and Criminal Evidence Act 1984, has been substituted by Section 110 of the Serious Organised Crime and Police Act 2005, which provides that constables have a statutory power to make arrests for all offences, without a warrant. Also see Haines K and Drakeford M *Young People and Youth Justice* (1998) 100.

85 Police and Criminal Evidence Act 1984, Code G: Revised Code of Practice for the Statutory Power of Arrest by Police Officers, 12 November 2012 paragraph 2.1.

86 See Section 57(3) of the Police and Criminal Evidence Act 1984. Also see Police and Criminal Evidence Act 1984, Code C: Revised Code of Practice for the Statutory Power of Arrest by Police Officers, 12 November 2012 paragraph 3.13-3.14. Also see Haines K and Drakeford M *Young People and Youth Justice* (1998) 100.

87 See Section 57(3) of the Police and Criminal Evidence Act 1984. Also see Police and Criminal Evidence Act 1984, Code C: Revised Code of Practice for the Statutory Power of Arrest by Police Officers, 12 November 2012 paragraph 3.13. Also see Haines K and Drakeford M *Young People and Youth Justice* (1998) 100.



society, because of the commission of the offence of murder; and (c) the juvenile will fail to appear in court.<sup>88</sup>

After a child soldier between the ages of 12 and 18 has been charged with an offence and continued detention is authorised, the custody official needs to arrange that the child soldier be detained and taken into the care of a local authority, like a community home.<sup>89</sup> It is assumed that most juvenile offenders older than 10, but younger than 12, will be warned or reprimanded, unless the juvenile has committed a serious offence as in the case of a child soldier who commits a crime under international law, for which he will therefore be detained.<sup>90</sup> Juveniles aged 15 and older who are detained at a local authority may be relocated to a youth detention centre if the court is of the opinion that the juvenile's behaviour has a negative influence on the rest of the detainees at the local authority.<sup>91</sup>



### 5.3.1.2 Sentencing

In England, convicted juveniles who commit serious acts of violence are mainly ordered to serve a period of detention in a youth detention centre. However, juveniles may be imprisoned when a juvenile is remanded in custody or sent in custody for trial at the

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88 Section 38(1) of the Police and Criminal Evidence Act 1984.

89 Section 28(4) and 29(1) of the Child and Young Persons Act 1969. Section 38(6) of the Police and Criminal Evidence Act 1984. Also see Police and Criminal Evidence Act 1984, Code C: Revised Code of Practice for the Statutory Power of Arrest by Police Officers, 12 November 2012 paragraph 16.7. A juvenile who has just been arrested may not be placed in a police cell, unless no other accommodation is available, and a juvenile may not be placed in a cell with an adult. See Police and Criminal Evidence Act 1984, Code C: Revised Code of Practice for the Statutory Power of Arrest by Police Officers, 12 November 2012 paragraph 8.8. Furthermore, if a juvenile is authorised to be detained, he has to be brought before a Magistrate within 72 hours after the arrest. See Section 29(5) of the Child and Young Persons Act 1969. Also see Card R Card, *Cross and Jones Criminal Law* 20ed (2012) 613; Haines K and Drakeford M *Young People and Youth Justice* (1998) 118-119.

90 See Ashworth A *Sentencing and Criminal Justice* 4ed (2005) 362. Also see Haines K and Drakeford M *Young People and Youth Justice* (1998) 119.

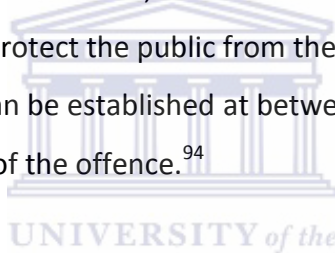
91 Section 31(1) of the Child and Young Persons Act 1969. Youth prisons in England are also called 'Borstal Institutions' and was initially included in the Prevention of Crime Act 1908. The term is derived from the first youth prison that was opened in Borstal, a small town in Kent, England.



Crown Court.<sup>92</sup> Thus, convicted juveniles will seldom be sentenced to a long period of imprisonment in England; however, they can be sentenced to serve a mandatory life sentence. The court can impose (1) detention and training orders or (2) mandatory life sentences.

*(1) detention and training order*

The court may sentence a juvenile to a detention and training order if the following requirements are met: (1) a juvenile is convicted of an offence, which is punishable with imprisonment in the case of a convicted offender older than 21; (2) the offence was so serious that only a detention and training order is a sufficient sentence; and (3) the offence was of a sexual and violent nature, and that a detention and training order is the only sentence that would protect the public from the offender.<sup>93</sup> The term of a detention and training order can be established at between four and 24 months, depending on the seriousness of the offence.<sup>94</sup>



On the other hand, the court shall refrain from making a detention and training order in the case of: (a) a juvenile offender under the age of 15 at the time of the commission of the offence, unless he is a persistent offender and (b) a juvenile offender under the age of 12 at the time of the commission of the offence, unless a custodial sentence would be appropriate to protect the public from him.<sup>95</sup> Thus, only child soldiers above the age of

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92 A child soldier may also be imprisoned when the child soldier is committed in custody for trial and sentence. See Section 89(2) of the Powers of Criminal Courts (Sentencing Act) 2000. For an overview of the various sentencing options in England, see Fox D and Arnull E *Social Work in the Youth Justice System* (2013) 83.

93 Section 100(1) of the Powers of Criminal Courts (Sentencing Act) 2000. Also see Ashworth A *Sentencing and Criminal Justice* 4ed (2005) 367; Fox D and Arnull E *Social Work in the Youth Justice System* (2013) 76.

94 The sentence of a detention and training order may not exceed the maximum sentence that a Crown Court will impose for the commission of the offence by an offender aged 21 years or older. See Section 101(1) of the Powers of Criminal Courts (Sentencing Act) 2000. Also see Ashworth A *Sentencing and Criminal Justice* 4ed (2005) 367.

95 Section 100(2) of the Powers of Criminal Courts (Sentencing Act) 2000. Also see Ashworth A *Sentencing and Criminal Justice* 4ed (2005) 367.

15 who have committed a serious crime under international law can be subjected to a detention and training order.

*(2) mandatory life sentence*

The mandatory life sentence or detention during Her Majesty's Pleasure, as it is otherwise known, is a sentence that a court may impose on a child soldier when the court is of the opinion that the seriousness of the offence is exceptionally high.<sup>96</sup> These offences include: (1) the murder of two or more persons where the murder was planned or the victim was abducted or where the victim was exposed to sexual or sadistic conduct; (2) the murder of a child; (3) a murder done in support of a political, religious or ideological cause; and (4) the murder by a juvenile who has already been convicted of murder.<sup>97</sup>

The commission of crimes under international law by child soldiers can be included under these exceptionally serious offences. For example, if child soldiers during a civil war mutilate or permanently disfigure a prisoner of war, the child soldiers could be charged with the commission of war crimes, which would constitute an exceptionally serious offence under the Criminal Justice Act.<sup>98</sup> The minimum term that a child soldier can be sentenced for the commission of such offences is a sentence of 12 years or half

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96 Schedule 21(4)(1)(a) of the Criminal Justice Act 2003. Also see Ashworth A *Sentencing and Criminal Justice* 4ed (2005) 368.

97 Schedule 21(4)(2) of the Criminal Justice Act 2003.

98 The war crime of mutilation in a non-international armed conflict is provided for under Article 8(2)(c)(i) and 8(2)(e)(xi) of the ICC Statute. It is also regulated as a crime committed during an international armed conflict under Article 8(2)(b)(x) of the ICC Statute. See De Than C and Shorts E *International Criminal Law and Human Rights* (2003) 164-165; Werle G and Jessberger F *Principles of International Criminal Law* 3ed (2014) 437-438. Also see Cryer R (et al) (eds) *An Introduction to International Criminal Law and Procedure* 3ed (2014) 285; Grover L *Interpreting Crimes in the Rome Statute of the International Criminal Court* (2014) 279-286; Newton M A 'Charging War Crimes: Policy and Prognosis from a Military Perspective' in Stahn C (ed) *The Law and Practice of the International Criminal Court* (2015) 742; Schabas W A in Schabas W A (ed) *The Cambridge Companion to International Criminal Law* (2016) 209.

to three-quarters of the sentence that an adult offender would get.<sup>99</sup> The maximum period of this detention may not exceed the maximum term of imprisonment which a 21-year-old or older would get for the same offence.<sup>100</sup> Yet, the courts will rarely sentence a child soldier to serve a detention longer than 12 years, as this is merely a starting point for the minimum term of detention.<sup>101</sup> This does not mean that all child soldiers who commit serious offences will be sentenced to a mandatory life sentence of 12 years or more. Child soldiers aged 14 or less will not be subjected to a long term detention unless if it is considered by the court that the child soldier who has committed a serious offence may commit further offences and cause harm to the public.<sup>102</sup> The length of detention will be shorter for a child soldier aged 14 or less than for a child soldier aged between 15 and 18 for the same offence.<sup>103</sup>

Having now looked at the most serious sentences that can be imposed by English courts, what are the elements that a court will consider when determining the appropriate sentence? The court must first determine whether the child soldier should be subjected to a custodial sentence or whether such a sentence should rather be avoided.<sup>104</sup> Here, the maturity and the age of the child soldier are key elements which the court will consider to determine which sentence is most appropriate.<sup>105</sup> The closer the child soldier is to the age of 18 and the greater the maturity, a greater possibility exists of a court imposing a custodial sentence on a child soldier.<sup>106</sup> The English Juvenile Justice

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99 Schedule 21(7) of the Criminal Justice Act 2003. Also see Sentencing Guidelines Council: Overarching Principles – Sentencing Youths: Definitive Guideline (2009) Paragraph 11.16 (hereafter, Sentencing Guidelines). The Sentencing Guidelines are issued in accordance with Section 170(9) of the Criminal Justice Act 2003 and issues these Guidelines as a definitive guideline. The Sentencing Guidelines apply to the sentencing of youth offenders on or after 30 November 2009.

100 Section 91(3) of the Powers of Criminal Courts (Sentencing Act) 2000. Guidelines regarding the use of Section 91 was comprehensively laid down in *R v Mills* [1998] 1 Cr App R (S) 128. Also see Ashworth A *Sentencing and Criminal Justice* 4ed (2005) 368.

101 See Schedule 21(7) of the Criminal Justice Act 2003.

102 See Sentencing Guidelines Paragraph 11.16.

103 See Sentencing Guidelines Paragraph 11.16.

104 See Sentencing Guidelines Paragraph 11.16. Also see *R v Chief Constable* [1993] 1 All ER 756, 759 (Q.B.); Campbell A M (1995) 19 *Suffolk Transnational Law Review* 348.

105 See Sentencing Guidelines Paragraph 11.15.

106 See Sentencing Guidelines Paragraph 11.16.

System consists of a well-structured sentencing framework as contained in the various statutes and does not shy away from imposing custodial sentences on children who have committed serious offences.<sup>107</sup> Nevertheless, English law also provides alternatives to detention and imprisonment in the case of child soldiers who have committed crimes under international law.

### 5.3.1.3 Alternatives to Detention and Imprisonment

In England, provision is made for (1) supervision orders, (2) action plans, (3) reparation orders and (4) reprimands and warnings amongst the most important alternatives to detention and imprisonment.<sup>108</sup>

#### (1) supervision orders

Supervision orders involve the supervision of the convicted juvenile by (1) a local authority designated by the order; (2) a probation officer; or (3) a member of a youth offending team.<sup>109</sup> In addition, a supervision order may not exceed a period of 3 years.<sup>110</sup> Supervision orders fulfil an important role in rehabilitating the child soldier, since the supervisor will form a close relationship with the child soldier.

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107 Fox and Arnull, while discussing juvenile custody in England, note that it is very important for the juvenile to turn his life around while he is in custody. It is therefore important that the custody is set at a reasonable term. See Fox D and Arnull E *Social Work in the Youth Justice System* (2013) 79.

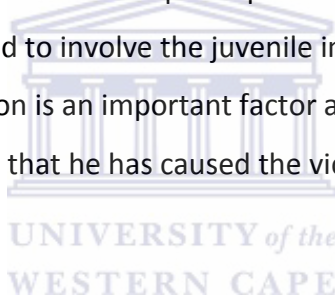
108 Other alternatives to prosecution regulated by juvenile law, include curfew orders, community service orders and probation orders. Curfew orders may be imposed on all juvenile offenders, while community service orders and probation may only be imposed in the case where juvenile offenders are above the age of 16. See Section 37-46 of the Powers of Criminal Courts (Sentencing Act) 2000 and Section 177 of the Criminal Justice Act 2003. For an overview of the various alternatives to detention, see Bottoms A and Dignan J in Tonry M H and Doob A N (eds) *Crime and Justice: Youth Crime and Youth Justice: Comparative and Cross National Perspectives* Volume 31 (2004) 85-91. Generally, also see Fox D and Arnull E *Social Work in the Youth Justice System* (2013) 97-105.

109 Section 63(1) of the Powers of Criminal Courts (Sentencing Act) 2000. Also see Ashworth A *Sentencing and Criminal Justice* 4ed (2005) 367-368.

110 Section 63(7) of the Powers of Criminal Courts (Sentencing Act) 2000.

## *(2) action plans*

An action plan is a three-months order, which requires the child soldier to participate in a series of activities in order to rehabilitate the young offender.<sup>111</sup> The action plan will be supervised by a social worker, a probation officer or a member of a youth offending team, as is the case with a supervision order.<sup>112</sup> An action plan order requires the juvenile to: (1) participate in certain activities; (2) present himself to a person or person at a specific time; (3) attend an attendance centre; (4) stay away from certain places at specific times; (5) comply with arrangements concerning his accommodation; (6) make reparations to community members, for example an apology; and (7) attend hearings fixed by the court.<sup>113</sup> The action plan order, which is a short order compared to other lengthy orders, requires the child soldier to participate in various activities to rehabilitate the child soldier and to involve the juvenile in community activities. The added requirement of reparation is an important factor as it makes the child soldier aware of the extent of the pain that he has caused the victims.



## *(3) reparation orders*

As discussed above, reparation forms part of the action plan, but it is also available as a separate order by the court. The court may order the child soldier to make reparation to either a specific individual, or the community at large and the court must specify whether the individual is a victim of the crime or someone affected by it.<sup>114</sup> Before the court makes the order, it must obtain a written report from a probation officer, local authority, social worker or a member of a youth offending team, which states which

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111 Section 69(1)(3) of the Powers of Criminal Courts (Sentencing Act) 2000. Also see Ashworth A *Sentencing and Criminal Justice* 4ed (2005) 366.

112 Section 69(4) of the Powers of Criminal Courts (Sentencing Act) 2000.

113 Section 70(1) of the Powers of Criminal Courts (Sentencing Act) 2000. Also see Ashworth A *Sentencing and Criminal Justice* 4ed (2005) 366; Fox D and Arnull E *Social Work in the Youth Justice System* (2013) 98.

114 Section 73(1) of the Powers of Criminal Courts (Sentencing Act) 2000. Also see Also see Ashworth A *Sentencing and Criminal Justice* 4ed (2005) 366. Also see Fox D and Arnull E *Social Work in the Youth Justice System* (2013) 98.

reparation is suitable for the juvenile and indicates the attitude of the victim of the offence towards the proposed reparation order.<sup>115</sup>

#### *(4) reprimands and warnings*

Reprimands and warnings differ from the above-mentioned measures as they can be handed down directly after the child soldier has been arrested. The constable has the authority to give a reprimand or warning to a juvenile when certain factors are present in the case.<sup>116</sup> A reprimand or warning will be issued if (1) the juvenile admits to committing the offence; (2) he has no previous convictions; (3) the constable has sufficient evidence to prove that the juvenile has committed the offence; and (4) the constable believes that the case is of a *prima facie* nature and the constable is of the opinion that it is not in the public interest to prosecute the juvenile.<sup>117</sup> The constable needs to explain the effect of the reprimand or warning to the child soldier in the presence of an appropriate adult.<sup>118</sup> Thereby, it is hoped that the child soldier will realise that he acted wrongfully and that he is fortunate not to have received a heavier sentence.

### **5.3.2 South Africa**

It has been over two decades since South Africa became a democracy after the horrors of the Apartheid regime. At the time, many children were arrested for engaging in anti-apartheid movements between 1976 and 1990.<sup>119</sup> Children often committed offences,

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115 Section 73(5) of the Powers of Criminal Courts (Sentencing Act) 2000.

116 Section 65(1) of the Crime and Disorder Act 1998. Also see Ashworth A *Sentencing and Criminal Justice* 4ed (2005) 362.

117 Section 65(1) of the Crime and Disorder Act 1998. Also see Ashworth A *Sentencing and Criminal Justice* 4ed (2005) 362.

118 See Section 65(5)(a) of the Crime and Disorder Act 1998. Juveniles who get a warning are referred to the so-called 'youth offending teams' for assessment, while they may also be referred to undergo rehabilitation. See Section 66(1) and (2) of the Crime and Disorder Act 1998.

119 See Chubb K and Van Dijk L *Between Anger and Hope: South Africa's Youth and the Truth and Reconciliation Commission* (2001) 235; Kipperberg E 'The TRC Structures and Resulting Violence' in

and even juveniles as young as seven were detained.<sup>120</sup> Between 1960 and 1990, the South African Human Rights Commission estimated that about 20,000 children were detained without a fair trial.<sup>121</sup> In effect, the South African justice system is familiar with holding children accountable for the commission of serious crimes, although many of these children were unfairly detained under the Apartheid rule. In South Africa, the juvenile justice system follows a welfare-based approach rather than the strict procedural approach used in England. Nevertheless, for the commission of serious crimes, like the commission of crimes under international law, how will child soldiers be dealt with by South African courts in terms of procedural law matters?

### 5.3.2.1 Arrest and Detention

Section 20 of the CJA and the relevant provisions of the National Instruction on Children in Conflict with the Law (hereafter, National Instruction) issued in terms of Section 97(5) of the CJA, regulate the apprehension of juveniles, while Sections 21-31 of the CJA provide for the detention of juveniles.<sup>122</sup> We will first look at the apprehension of juveniles and thereafter the detention of juveniles for the commission of crimes under international law.

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Burton P (ed) *Someone Else Stole My Smile: An Exploration into the Causes of Youth Violence in South Africa* (2007) 70. Also see Saffy J A 'A Historical Perspective of the Youthful Offender' in Bezuidenhout C and Joubert S (eds) *Child and Youth Misbehaviour in South Africa: A Holistic View* (2003) 19.

120 See Kipperberg E in Burton P (ed) *Someone Else Stole My Smile: An Exploration into the Causes of Youth Violence in South Africa* (2007) 70. Also see Notshulwana V 'Rehabilitation of Youth Offenders in South Africa: The Relevance of Ecological Model and Graduated Sanctions' (2012) 41 *Africa Insight* 139.

121 See South African Truth and Reconciliation Commission Children's Hearing Johannesburg 12 June 1997, day 1 <http://www.justice.gov.za/trc/special/children/acoleman.htm> (accessed 9 May 2012). Also see Kipperberg E in Burton P (ed) *Someone Else Stole My Smile: An Exploration into the Causes of Youth Violence in South Africa* (2007) 72.

122 National Instruction 2 of 2010: Children in Conflict with the Law, (Issued in terms of Section 97(5) of the Child Justice Act) Government Gazette No. 33508, No. 759. The Instruction was published for general information on 2 September 2010.



*(1) apprehension of juveniles*

The National Instruction categorises the apprehension of children that have committed serious offences<sup>123</sup> into two groups, namely, children older than 10 but younger than 14, and children older than 14 years.

First, a child soldier older than 10 but younger than 14, may be arrested for crimes under international law.<sup>124</sup> However, Section 20(1) of the CJA provides that a juvenile may only be arrested if the juvenile poses a danger to society and if it is believed that the juvenile will commit further offences if not arrested. It is submitted that juveniles who commit crimes under international law, commit crimes of a serious nature and should not be released from detention on the grounds laid out in Section 20(1) of the CJA. If a police official decides to arrest the child in light of the grounds mentioned in Section 20(1), the child will be assessed by a probation officer and placed in a child and youth care centre if his relatives are not reachable. If a child and youth care centre is not available, the child will be detained at the police station.

Secondly, the same procedure applies to children older than 14, apart from one exception. Children who are older than 14 who commit serious offences will not be placed in a child and youth care centre.<sup>125</sup> They will be held in police custody until the preliminary inquiry has taken place or can also be released on bail, like children older than 10 but younger than 14, if the relatives can be reached.

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123 This includes crimes like murder and rape. See Schedule 3 offences of the CJA. To see how the CJA regulates the apprehension of children who commit Schedule 2 offences, see Paragraph 12 of the National Instruction.

124 Paragraph 13(1) of the National Instruction.

125 See paragraph 14(7) of the National Instruction.



## *(2) detention of juveniles*

The child offender can either be detained in (1) a youth care centre or (2) a prison.<sup>126</sup>

First, the presiding officer may order detention in a child and youth care centre after considering the following factors, namely: (1) age and maturity of the child; (2) the seriousness of the offence; (3) the danger that the child poses to himself and the community; (4) the appropriateness of the level of security of the child and youth care centre; and (5) the availability of accommodation in the child and youth care centre.<sup>127</sup>

Secondly, the presiding officer will order the detention of a child in prison if: (a) an application for bail has been denied; (b) the child is older than 14 years; (c) a serious offence has been committed; (d) a prison sentence is in the interest of the administration of justice; and (e) if there is a likelihood that the child will be sentenced to imprisonment, if convicted.<sup>128</sup> It is submitted that child soldiers older than 14 years, who commit serious crimes under international law in South Africa, should be detained.

### **5.3.2.2 Sentencing**

It is the duty of the Child Justice Court to impose a sentence once the child soldier has been convicted of an offence. Section 69 of the CJA provides a list of objectives that the court can consider when sentencing children. First, the child must understand that he caused harm and that he should be held accountable for the offence.<sup>129</sup> Secondly, it is

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126 For an overview of the release of children see Section 21-25 of the CJA.

127 Section 29(2) of the CJA.

128 Section 30(1) of the CJA. It is important to note that only children over the age of 14 may be detained in a prison. The 2007 version of the Child Justice Bill actually included the detention of children under the age of 14 in a prison awaiting trial, but this provision was never included in the CJA. See clause 27(b) and clause 30(2) of the Child Justice Bill 32 of 2007. Also see Ehlers L *Child Justice: Comparing the South African Child Justice Reform Process and Experiences of Juvenile Justice Reform in the United States of America* (2006) 9; Gallinetti J in Boezaart T (ed) *Child Law in South Africa* (2009) 659.

129 Section 69(9) of the CJA.

important to strike a balance between the interests of the child and the community.<sup>130</sup> Vigilante justice and violent activities by community members are common especially when former child soldiers return to their communities.<sup>131</sup> Moreover, the court will also need to look at the type of offence to establish an appropriate sentence.<sup>132</sup> The type of offence has a direct impact on the kind of sentence imposed by the court.<sup>133</sup> The various types of offences are categorised and listed under Schedules 1, 2 and 3 offences in the CJA. Schedule 1 contains minor offences, while Schedules 2 and 3 contains serious offences.<sup>134</sup> When a child soldier commits a minor crime under Schedule 1, the child soldier will generally receive a lenient sentence, while a harsher sentence may be imposed on a child soldier who commits a serious Schedule 3 offence. Imprisonment is the harshest sentence contained in the CJA.

Section 77 of the CJA makes provision for the sentence of imprisonment. Section 77(1)(a) of the CJA provides that the court may not impose a prison sentence on a child who was under the age of 14 at the time of the commission of the crime. Thus, only child soldiers who commit crimes between the ages of 14 and 18 at the time of the commission of the offence can be incarcerated. The maximum period of imprisonment for juveniles in South Africa is 25 years.<sup>135</sup> The Child Justice Court must consider several factors when imposing a sentence of imprisonment, namely: (1) the seriousness of the offence; (2) the protection of the community; (3) the impact of the offence on the

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130 Section 69(1)(b) of the CJA.

131 Wessells points out that: 'Former child soldiers who attempt to run home enter a difficult terrain awash in unhealed grievances, vigilante justice, and contested privileges'. See Wessells M *Child Soldiers: From Violence to Protection* (2006) 218. Also see Patel A C, De Greiff P and Waldorf L (eds) *Disarming the Past: Transitional Justice and Ex-combatants* (2009) 197.

132 Section 69(1)(b) of the CJA.

133 The Court must consider the following when imposing a prison sentence or detention in a child and youth care centre: '(a) whether the offence is of such a nature that it indicates that the child has a tendency towards harmful activities, (b) whether the harm caused by the offence indicates that a residential sentence is appropriate, (c) the extent to which the harm caused by the offence can be apportioned to the culpability of the child in causing or risking the harm and (d) whether the child is in need of a particular service provided at a child and youth care centre'. See Section 69(3) of the CJA.

134 See appendix of the CJA.

135 See Section 77(4) of the CJA.

victim; and (4) the previous failure of the child to respond to sentences other than imprisonment.<sup>136</sup> The seriousness of the offence is one of the most significant factors in deciding whether a child soldier should be sentenced to imprisonment. The court will consider the amount of harm caused by the child soldier during the offence and the culpability of the child soldier in causing this harm and risk.<sup>137</sup>

The author submits that the maximum sentence for imprisonment of 25 years is too long. Even those child soldiers who have committed some of the most atrocious crimes should never be imprisoned for up to 25 years. This is because most child soldiers are psychologically scarred as a result of the experience of war. The last thing these children need is to be imprisoned for a large part of their life, taking into account that the participation of a child soldier in an armed group may in itself resemble a form of imprisonment. It is in this vein that South Africa must seriously consider reducing the maximum period of imprisonment for juveniles. It is important to note that the Constitution of the Republic of South Africa,<sup>138</sup> provides that children should only be imprisoned as a matter of last resort and for the shortest period possible.<sup>139</sup> Therefore, the court must consider all other sentencing alternatives before imposing a prison sentence on a child soldier.

### **5.3.2.3 Alternatives to Detention and Imprisonment**

There are several alternatives to detention and imprisonment embedded in the CJA.<sup>140</sup> Community service, restorative justice sentences and fines are some of the most

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136 See Section 69(4) of the CJA.

137 Section 69(4)(a) of the CJA.

138 Constitution of the Republic of South Africa 1996. The Constitution was promulgated on 10 December 1996 and came into effect on 4 February 1997.

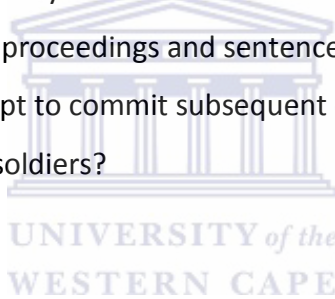
139 Section 28(1)(g) of the Constitution of the Republic of South Africa 1996. Also see Terblanche S S 'Sentencing a Child who Murders – DPP, *KwaZulu-Natal v P* 2006 (1) SACR 243 (SCA)' (2007) 20 *South African Journal of Criminal Justice* 244. Section 77(1)(b) of the CJA provides that when a child of 14 years and older is sentenced to imprisonment, it should only be a measure of last resort and for the shortest period of time.

140 See Section 72-77 of the CJA.

common sentences.<sup>141</sup> The court may impose such alternative sentences when a child soldier has committed a less serious crime or when the court rules that a harsh sentence is not in the best interest of the child soldier. Other alternatives to detention and imprisonment provided for by the CJA include: sentences involving correctional supervision and the sentence of compulsory residence in a child and youth care centre.<sup>142</sup> These sentences will, however, only be imposed when a child soldier has been convicted for the commission of a serious offence and also after the court has ruled that imprisonment is not a suitable sentence under the circumstances.

### 5.3.3 Germany

Juvenile procedural law in Germany is based on the education principle.<sup>143</sup> The goal of subjecting a juvenile to certain proceedings and sentences is to educate the juvenile so that the juvenile will not attempt to commit subsequent offences. Yet, is a similar goal achievable in the case of child soldiers?



#### 5.3.3.1 Arrest and Detention

The Strafprozessordnung (Criminal Procedure Code) of 1987 regulates the apprehension of juveniles in Germany. The general grounds for arrest in German law are embedded in Section 112 of the Criminal Procedure Code. A juvenile who has been accused of committing crimes under international law shall be arrested if: (1) the accused has fled or is hiding; (2) it is considered that the accused will not attend the criminal proceedings; and (3) the accused's conduct gives rise to suspicion that he might destroy

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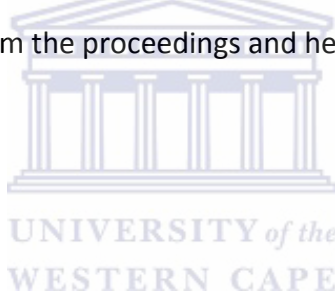
141 See Section 72-74 of the CJA.

142 See Section 75 and 76 of the CJA.

143 See Bohlander M *Principles of German Criminal Procedure* (2012) 212. Also see Crofts T *The Criminal Responsibility of Children and Young Persons: A Comparison of English and German Law* (2002) 129; Kaiser G (1994) 18 *Legal Studies Forum* 323; Robbers G *An Introduction to German Law* 5ed (2012) 136. Generally, also see Dammer H R and Albanese J S *Comparative Criminal Justice Systems* (2014) 295.

evidence and influence the co-accused or witnesses.<sup>144</sup> In addition, Section 112(a)(1) of the Criminal Procedure Code provides a list of offences for which an accused might be arrested.

Section 72 of the Jugendgerichtsgesetz and Sections 112 and 113 of the Strafprozessordnung regulate matters related to pre-trial detention. Generally, pre-trial detention may only be ordered if the purpose of pre-trial detention cannot be achieved by a preliminary supervision or any other measure, and if the detention is in proportion to the significance of the case.<sup>145</sup> When the detention order is issued, it must set out the reasons why an alternative measure, such as the placement of a child soldier in a youth and welfare centre, was not sufficient, and why pre-trial detention has been ordered.<sup>146</sup> Child soldiers older than 14, but younger than 16, will not be detained, except when the child soldier has absconded from the proceedings and he has no fixed address or residence.<sup>147</sup>



### 5.3.3.2 Sentencing

The Jugendgerichtsgesetz regulates three main sentences under juvenile law in Germany, namely: (1) educational measures; (2) disciplinary measures; and (3) imprisonment. The judge will decide which measure is most appropriate and the juvenile will serve the specific sentence.<sup>148</sup> Educational measures are normally imposed after the commission of minor crimes, while disciplinary measures and youth

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144 See Section 72(1) of the Jugendgerichtsgesetz 1989; Section 112(2)(1-3) of the Strafprozessordnung 1987. See Section 114 of the Strafprozessordnung 1987, for the rights of the accused in terms of arrest.

145 Section 112(1) of the Strafprozessordnung 1987.

146 Section 72(1) of the Jugendgerichtsgesetz 1989.

147 Section 72(2)(1-2) of the Jugendgerichtsgesetz 1989.

148 There exist three different juvenile courts where the judge will be able to make such an order, namely: youth courts, lay assessors' courts and youth panels. See Section 33(2) of the Jugendgerichtsgesetz. To view the regulations concerning the substantive and geographical jurisdiction of the Youth Court, see Section 39-42 of the Jugendgerichtsgesetz.

imprisonment are largely handed down in the case of serious offences, like child soldiers who have committed crimes under international law.<sup>149</sup>

*(1) educational measures*

The purpose of educational measures would not be to punish the child soldier for the offence he has committed, but rather to educate him and develop a sense of personal dignity that will prevent the child soldier from committing future offences.<sup>150</sup> It is important to foster the child soldier's personal dignity seeing that all sense of personal dignity is usually diminished during the child soldier's time with an armed group. Deliberate tactics by rebels to break the self-esteem of child soldiers include various brainwashing techniques, while the mere act of taking part in an armed conflict is enough to damage any soldier's psyche, let alone a child soldier. In this regard, educational measures will play a significant role in the case of child soldiers. Section 9 of the Jugendgerichtsgesetz regulates the ordering of educational measures by the court and this includes: (a) the issuing of instructions and (b) supervisory assistance.

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149 Disciplinary measures may be ordered with the commission of minor and serious offences and are not limited to the commission of serious offences. If the judge is of the opinion that juvenile imprisonment is not an appropriate punishment, the judge may opt to sentence the juvenile to serve a disciplinary measure instead. See Section 9-18 of the Jugendgerichtsgesetz. Also see Robbers G *An Introduction to German Law* 5ed (2012) 136.

150 See Bohlander M *Principles of German Criminal Procedure* (2012) 213-214; Kaiser G (1994) 18 *Legal Studies Forum* 330; Robbers G *An Introduction to German Law* 5ed (2012) 136. These educational measures are also categorised as non-custodial educational measures. See Kaiser G (1994) 18 *Legal Studies Forum* 329. Also see Jehle J 'Criminal Justice in Germany: Facts and Figures' 5ed Federal Ministry of Justice (2009) [http://www.bmj.de/SharedDocs/Downloads/EN/StudienUntersuchungenFachbuecher/Criminal\\_Justice\\_in\\_Germany\\_Numbers\\_and\\_Facts.pdf?\\_\\_blob=publicationFile](http://www.bmj.de/SharedDocs/Downloads/EN/StudienUntersuchungenFachbuecher/Criminal_Justice_in_Germany_Numbers_and_Facts.pdf?__blob=publicationFile) (accessed 17 May 2016) 35; Jung H 'Some Reflections on the German System of Sanctions' (1996) 30 *Israel Law Review* 231.

(a) *instructions*

The goal of instructions is to promote the education and general lifestyle of the juvenile.<sup>151</sup> The instructions issued by the judge should not be unreasonable, but should be a sufficient reaction subject to the principle of proportionality in order to reduce the future commission of crimes by the offender.<sup>152</sup> These instructions include: (1) instructions concerning the juvenile's place of residence; (2) to live with another family; (3) accepting employment; and (4) performing tasks.<sup>153</sup>

An instruction order may not exceed a period of two years.<sup>154</sup> The general purpose of an educational measure is not to punish a child soldier over a long period, but rather aspires to educate the child soldier, while guiding him or her to make the right decisions in the future.



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151 Section 10(1) of the Jugendgerichtsgesetz 1989. Also see Albrecht H 'Youth Justice in Germany' in Tony M H and Doob A N (eds) *Crime and Justice: Youth Crime and Youth Justice: Comparative and Cross National Perspectives* Volume 31 (2004) 472; Bohlander M *Principles of German Criminal Procedure* (2012) 214; Dünkel F in Jensen E L and Jepsen J (eds) *Juvenile Law Violators, Human Rights and the Development of New Juvenile Justice Systems* (2006) 120.

152 Other instructions include: (1) placement under the care and supervision of an appointed person; (2) attendance of social training courses; (3) settlement with aggrieved person; (4) to avoid contact with specific persons or places (5) and to attend a traffic course. See Section 10(1) of the Jugendgerichtsgesetz 1989. Also see Bohlander M *Principles of German Criminal Procedure* (2012) 214; Crofts T *The Criminal Responsibility of Children and Young Persons: A Comparison of English and German Law* (2002) 172; Pfeiffer C in Tony M (ed) *Crime and Justice: A Review of Research*, Volume 23 (1998) 318.

153 Section 10(1) of the Jugendgerichtsgesetz 1989. Specialist rehabilitative treatment may also be ordered by the judge, but only with the consent of the parent or guardian. See Section 10(2) of the Jugendgerichtsgesetz 1989. Also see Jehle J Federal Ministry of Justice (2009) [http://www.bmj.de/SharedDocs/Downloads/EN/StudienUntersuchungenFachbuecher/Criminal\\_Justice\\_in\\_Germany\\_Numbers\\_and\\_Facts.pdf?\\_\\_blob=publicationFile](http://www.bmj.de/SharedDocs/Downloads/EN/StudienUntersuchungenFachbuecher/Criminal_Justice_in_Germany_Numbers_and_Facts.pdf?__blob=publicationFile) (accessed 17 May 2016) 35; Robbers G *An Introduction to German Law* 5ed (2012) 136.

154 For an overview of the various durations of instructions, see Section 11(1) of the Jugendgerichtsgesetz 1989. A judge may even extend the duration of an instruction to three years, but only if the extension will contribute to the educational reform of the juvenile.



(b) *supervisory assistance*

The court may also consider imposing supervisory assistance.<sup>155</sup> The judge may impose two types of supervisory assistance measures, including: educational support from a social worker or residence in an institutional home or any other supervisory institution.<sup>156</sup> Younger child soldiers or child soldiers who find it difficult to learn on their own might find it beneficial to be assisted by a social worker in order to help the child. If the court is of the opinion that the child soldier should be under continual supervision, the court can order the child soldier to stay in a supervisory home. If a child soldier ignores or does not respond to the specific educational measures, a judge may look to impose various other disciplinary measures contained in the Act.<sup>157</sup>

(2) *disciplinary measures*

The aim of disciplinary measures is to make it known to the child soldier that he must assume responsibility for the offence he has committed.<sup>158</sup> This forms a crucial part of the rehabilitation of the child soldier in order to prevent the child soldier from committing future offences, but only if the child soldier accepts responsibility for the offence that he has been convicted of. Disciplinary measures include: (a) reprimands or warnings; (b) orders; and (c) juvenile detention.<sup>159</sup>

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155 See Section 12 of the Jugendgerichtsgesetz 1989. Educational assistance is another term used for supervisory assistance.

156 Section 12(1)(2) of the Jugendgerichtsgesetz 1989. These measures are subject to Section 27(1) of the Kinder und Jugendhilfegesetz 1989, which provides that an educational measure shall be made if a juvenile's education cannot be guaranteed without ordering educational measures, while the order of educational measures will assist the juvenile in his future education.

157 See Section 5(2) of the Jugendgerichtsgesetz 1989. Section 8(1) of the Jugendgerichtsgesetz 1989, provides that educational measures and disciplinary measures may be ordered in combination with each other. Also see Albrecht H in Tonry M H and Doob A N (eds) *Crime and Justice: Youth Crime and Youth Justice: Comparative and Cross National Perspectives* Volume 31 (2004) 473.

158 Section 13(1) and 90(1) of the Jugendgerichtsgesetz 1989. Also see Robbers G *An Introduction to German Law* 5ed (2012) 136.

159 Section 13(2)(1-3) of the Jugendgerichtsgesetz 1989. Section 13(3) of the Act provides that a disciplinary measure will not carry the same weight as a criminal sentence.

(a) *reprimands or warnings*

The judge can make the child soldier aware of the wrongfulness of his conduct by issuing a reprimand or a warning.<sup>160</sup> If the child soldier admits guilt, the judge may decide to dismiss the case and the child soldier will be reprimanded by the judge.<sup>161</sup> It is submitted that a warning is an ideal sentence for a child soldier who did not commit a serious offence, for example theft or breaking and entering premises, and for younger child soldiers that lack the maturity of older child soldiers.

(b) *orders*

The second disciplinary measure under Section 13 of the Jugendgerichtsgesetz deals with the issuing of orders by the court. At first, there may not seem to be a difference between orders and instructions, provided for in Section 10(1) of the Jugendgerichtsgesetz. Instructions and orders both deal with the juvenile performing a certain task assigned by the judge. However, an order pursuant to Section 15(1) of the Act can be seen as an intensified warning.<sup>162</sup> An example of a specific order is where the child soldier is in indirect or direct contact with the victim of the crime, in order to make the child soldier aware of the consequences that the offence has on the victim.<sup>163</sup> The following orders may be issued: (a) to the best of his ability, make good, the damage

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160 See Section 14(1) of the Jugendgerichtsgesetz 1989. A reprimand or warning is a formal verdict which may be registered in the criminal record of the child soldier. See Albrecht H in Tonry M H and Doob A N (eds) *Crime and Justice: Youth Crime and Youth Justice: Comparative and Cross National Perspectives Volume 31* (2004) 473; Kaiser G (1994) 18 *Legal Studies Forum* 333.

161 See Section 45(3) of the Jugendgerichtsgesetz 1989. Also see Kaiser G (1994) 18 *Legal Studies Forum* 333.

162 Bohlander M *Principles of German Criminal Procedure* (2012) 215; Crofts T *The Criminal Responsibility of Children and Young Persons: A Comparison of English and German Law* (2002) 174.

163 Section 10(1) of the Jugendgerichtsgesetz 1989. Also see Frehsee D 'Restitution and Offender-Victim Arrangement in German Criminal Law: Development and Theoretical Implications' (1999-2000) 3 *Buffalo Criminal Law Review* 240; Hoffmann A 'Mediation in Germany and the United States: A Comparison' (2007) 9 *European Journal of Law Reform* 519; Albrecht H 'Criminal Prosecution: Developments, Trends and Open Questions in the Federal Republic of Germany' (2000) 8 *European Journal of Crime, Criminal Law and Criminal Justice* 247.

caused by his conduct; (b) apology; (c) perform certain tasks; and (d) pay a sum of money to a charity.<sup>164</sup>

(c) *juvenile detention*

Juvenile detention is intended to be a short, yet sharp removal of freedom, to make it clear to the child soldier that it is wrong to engage in criminal activities.<sup>165</sup> It also helps the child soldier in overcoming the difficulties, which may have contributed to the commission of the offence.<sup>166</sup> The Jugendgerichtsgesetz provides for the establishment of three types of juvenile detention orders, namely: (1) free-time detention; (2) short-term detention; and (3) long-term detention.<sup>167</sup> Free-time detention will be imposed over a child soldier's leisure time, like the child soldier's weekends or holidays, either for one or two periods.<sup>168</sup> Short-term detention is carried out for a maximum of four days, keeping in mind that the child soldier's education, training or employment should not be affected.<sup>169</sup> Long-term detention, on the other hand, should last for one week, and may not exceed a period of four weeks.<sup>170</sup>

Juvenile detention provides an effective platform for the court to sentence a child soldier who has committed a serious crime under international law, especially in a case where the court is of the opinion that the child soldier should not be detained for more than 4 weeks. It is also the most severe disciplinary measure and is somewhat similar to

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164 Section 15(1) of the Jugendgerichtsgesetz 1989. Also see Albrecht H (2000) 8 *European Journal of Crime, Criminal Law and Criminal Justice* 247; Terblanche S S 'Die Boete as Straf in die Duitse Reg' (2008) 19 *Stellenbosch Law Review* 355.

165 See Albrecht H (2000) 8 *European Journal of Crime, Criminal Law and Criminal Justice* 247; Bohlander M *Principles of German Criminal Procedure* (2012) 216; Robbers G *An Introduction to German Law* 5ed (2012) 136. Youth detention was first used as a sentence in Germany in 1940, and was included in the 1943 and 1953 Youth Courts Acts. See Crofts T *The Criminal Responsibility of Children and Young Persons: A Comparison of English and German Law* (2002) 175.

166 Section 90(1) of the Jugendgerichtsgesetz 1989.

167 Section 16(1) of the Jugendgerichtsgesetz 1989.

168 Section 16(2) of the Jugendgerichtsgesetz 1989.

169 Section 16(3) of the Jugendgerichtsgesetz 1989.

170 Section 16(4) of the Jugendgerichtsgesetz 1989. Also see Pfeiffer C in Tonry M (ed) *Crime and Justice: A Review of Research*, Volume 23 (1998) 318.

the sentence of imprisonment, in that the juvenile is deprived of his liberty. However, the main difference between juvenile detention and the sentence of imprisonment in Germany is that the period of imprisonment can be extended for up to 10 years.

### *(3) imprisonment*

Imprisonment, or youth imprisonment as it is known in Germany, shall be imposed by the court in two instances: when (1) all other measures contained in the Jugendgerichtsgesetz have been applied and have not been successful, due to the dangerous character of the juvenile; and (2) the offence is of such a serious nature, that imprisonment is the most appropriate sanction.<sup>171</sup>

First, the method of applying all other alternatives before imprisonment is similar to an important principle contained in the Beijing Rules, which provides that imprisonment should be seen as a measure of last resort.<sup>172</sup> Indeed, it is also in the best interests of the child soldier to apply the other sentencing measures first, before reverting to imprisonment.

Secondly, when a juvenile commits a very serious act, the Jugendgerichtsgesetz provides that the sentence of imprisonment may be applied.<sup>173</sup> The seriousness of the offence may indicate to the court that the child soldier knew and understood the seriousness of the offence and that he could have decided not to commit the offence. Therefore, the test to prove that the juvenile was able to distinguish between right and wrong and

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171 Section 17(2) of the Jugendgerichtsgesetz 1989. See Bohlander M *Principles of German Criminal Procedure* (2012) 217; Crofts T *The Criminal Responsibility of Children and Young Persons: A Comparison of English and German Law* (2002) 175; Kaiser G (1994) 18 *Legal Studies Forum* 335; Robbers G *An Introduction to German Law* 5ed (2012) 136. Imprisonment and juvenile detention are also categorised as custodial educational measures. See Kaiser G (1994) 18 *Legal Studies Forum* 329.

172 See Rule 19 of the Beijing Rules. Also see Article 37(b) of the CRC and Article 46 of the Riyadh Guidelines. See Chapter 6.2.3 for a discussion of the Riyadh Guidelines.

173 Jehle notes that: 'Youth imprisonment is the only real criminal punishment available under the Act on Juvenile Courts'. See Jehle J Federal Ministry of Justice (2009) [http://www.bmj.de/SharedDocs/Downloads/EN/StudienUntersuchungenFachbuecher/Criminal\\_Justice\\_in\\_Germany\\_Numbers\\_and\\_Facts.pdf?\\_\\_blob=publicationFile](http://www.bmj.de/SharedDocs/Downloads/EN/StudienUntersuchungenFachbuecher/Criminal_Justice_in_Germany_Numbers_and_Facts.pdf?__blob=publicationFile) (accessed 17 May 2016) 35.

acted in accordance with such understanding is of grave importance with regard to handing down a sentence of imprisonment on a child soldier who has been convicted of committing a serious crime under international law.<sup>174</sup>

The minimum duration of youth imprisonment is six months, while the maximum penalty is five years.<sup>175</sup> However, if a serious act has been committed and general criminal law suggests a maximum sentence of more than ten years, then youth imprisonment shall not exceed a maximum of ten years.<sup>176</sup> There are no specific guidelines to assist the court in determining the length of the sentence for a convicted juvenile offender, as the relevant penalties embedded in the Strafgesetzbuch only apply to adult offenders.<sup>177</sup> The only relevant principle contained in the Jugendgerichtsgesetz is that the penalty must be in accordance with the educational goals set out for the juvenile. In other words, the sentence must be of such a nature and duration that it rehabilitates and educates the child soldier.

It is submitted that when a child soldier commits a serious crime under international law, a sentence like youth imprisonment has to be considered by German courts. It is further submitted that imposing a prison sentence on a child soldier might well have the desired effect of educating the child soldier in that the child soldier takes responsibility

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174 Public opinion will also be considered by the court, but has no direct influence on the outcome of the trial or the sentence. In the context of a child soldier committing a serious criminal offence, the community can indicate that it has been affected by the seriousness of the commission of the offence and that they might feel in danger if the juvenile is not imprisoned. See Crofts T *The Criminal Responsibility of Children and Young Persons: A Comparison of English and German Law* (2002) 175.

175 Section 18(1) of the Jugendgerichtsgesetz 1989. Also see Jehle J Federal Ministry of Justice (2009) [http://www.bmj.de/SharedDocs/Downloads/EN/StudienUntersuchungenFachbuecher/Criminal\\_Justice\\_in\\_Germany\\_Numbers\\_and\\_Facts.pdf?\\_\\_blob=publicationFile](http://www.bmj.de/SharedDocs/Downloads/EN/StudienUntersuchungenFachbuecher/Criminal_Justice_in_Germany_Numbers_and_Facts.pdf?__blob=publicationFile) (accessed 17 May 2016) 35; Teske R H C Jr. and Albrecht H (1992) 2 *International Criminal Justice Review* 100.

176 Section 18(1) of the Jugendgerichtsgesetz 1989. The probation period will not be less than two years, but will not exceed three years. However, in some cases it may be shortened to one year minimum and four years maximum. See Section 22(1) of the Jugendgerichtsgesetz 1989. Also see Section 24 and 25 of the Jugendgerichtsgesetz 1989 to view the duties of the probation officer.

177 Section 18(1) of the Jugendgerichtsgesetz 1989. Also see Bohlander M *Principles of German Criminal Procedure* (2012) 220; Crofts T *The Criminal Responsibility of Children and Young Persons: A Comparison of English and German Law* (2002) 175.

for his wrongdoings, while also receiving an opportunity to start or finish his school education during his time in prison.

### **5.3.3.3 Alternatives to Detention and Imprisonment**

The Jugendgerichtsgesetz does not have a specific provision that provides for alternatives measures to detention and imprisonment. However, these measures are included under the sentence of educational measures, and in particular certain instructions that a court can order, like performing certain tasks, attending a social training course and various other measures that have been dealt with in the previous section concerning sentencing.<sup>178</sup>

### **5.3.4 Uganda**

Procedural law is an extremely important part of juvenile justice in Uganda considering the fact that many child soldiers have committed serious crimes in Uganda. It is thus important to examine how child soldiers have been dealt with by Ugandan courts so far and how the procedural rights of child soldiers have been applied, and whether any changes to the procedural law framework are required.

#### **5.3.4.1 Arrest and Detention**

Once a child soldier has been arrested in Uganda, the parents or guardians and the secretary for children's affairs in that area shall be informed of the arrest by the police.<sup>179</sup> It is the police's responsibility to ensure the attendance of the parents or guardians during the police interview with a child soldier.<sup>180</sup> Where the child soldier's

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178 See Chapter 5.3.3.2.

179 See Section 89(3) of the Children Act 1997.

180 See Section 89(4). Except where it is not in the best interest of the child, the police interview will be conducted without the presence of the parents or guardians. See Section 89(4).

parent or guardian is absent, a social welfare officer will be appointed to attend the police interview.<sup>181</sup> According to a report by Marianne Moore, in many cases, police officers are not informing the relatives or guardians of children who have been arrested.<sup>182</sup> This leads to children being detained without the knowledge of their parents, and even appearing before the court without the presence of their relatives. It is submitted that this is as a result of policemen not receiving sufficient training in dealing with juvenile offenders. The most effective way of dealing with this problem is to ensure that the police are well trained in dealing with child soldier cases and are familiar with the regulations concerning juvenile justice.

A child soldier shall not be detained in police custody for longer than 24 hours or until the child soldier has been brought before a court, whichever is sooner.<sup>183</sup> Moreover, the police have the discretion to release child soldiers from custody, yet many children that should be released are not and are detained for lengthy periods.<sup>184</sup> The court will grant bail unless the release of the child into the community poses a serious danger to the child soldier, and where the magistrate or person presiding over the court decides otherwise.<sup>185</sup> Whenever bail is not granted, the court shall provide the reasons for refusal.<sup>186</sup> When a child soldier is not released on bail, the court may make an order to

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181 See Section 89(5) of the Children Act 1997. Probation or social welfare officers are also tasked with representing child soldiers who have been charged with less serious offences, yet sometimes, due to a lack of lawyers, they also take on cases of a more serious nature. In Gulu, for example, staff of the detention centre have represented juveniles in court. See Moore M 'Juvenile Detention in Uganda: Review of Ugandan Remand Homes and the National Rehabilitation Centre' (2010) <http://www.africanprisons.org/documents/Juvenile-Detention-in-Uganda-October-2010.pdf> (accessed 3 August 2012) 21.

182 Moore M (2010) <http://www.africanprisons.org/documents/Juvenile-Detention-in-Uganda-October-2010.pdf> (accessed 3 August 2012) 19.

183 See Section 89(7) of the Children Act 1997. Children may not be detained with adult detainees, and girls, while in custody, will be under the care of a female officer. See Section 89(8)(9) of the Children Act 1997.

184 Section 89(2) of the Children Act 1997. The police do not have an established list of criteria to determine whether a child may be released from custody or not. This may be a reason for police officers detaining children for longer periods than what is needed. See Moore M (2010) <http://www.africanprisons.org/documents/Juvenile-Detention-in-Uganda-October-2010.pdf> (accessed 3 August 2012) 18.

185 Section 90(1) of the Children Act 1997.

186 Section 90(2) of the Children Act 1997.



place the child soldier in a remand home within the area of the court.<sup>187</sup> If there is not a remand home within the area of the court, the court shall place the child soldier in a place of safe custody.<sup>188</sup> Detention shall not exceed 6 months for an offence punishable by death or three months in the case of any other offence.<sup>189</sup>

It can be deduced from the above that Ugandan authorities will have to be very meticulous when implementing the rules of arrest and detention with regard to child soldiers who commit crimes under international law. Child soldiers pose a unique challenge in this regard as many child soldiers are brainwashed to believe that an armed group is where they belong. This makes it very hard for authorities to apprehend child soldiers in a peaceful manner.

#### 5.3.4.2 Sentencing

Sentencing in Uganda is based on welfare principles and the majority of juveniles are either detained for a short period or rehabilitated, as has been the case with former child soldiers in Uganda. The Village Executive Committee Courts<sup>190</sup> can impose the following sentences specific to the court: (1) reconciliation; (2) compensation; (3) restitution; (4) apology; (5) caution; and (6) guidance and supervision orders.<sup>191</sup> These sanctions are not linked to an extensive time period, as it is seen as a duty, which needs to be performed in order to remind the child soldier that he must accept responsibility

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187 Section 91(1) of the Children Act 1997.

188 Section 91(2) of the Children Act 1997.

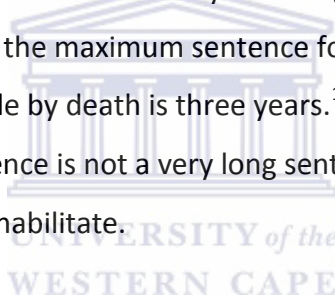
189 Section 91(5)(a)(b) of the Children Act 1997.

190 The Village Executive Committee Courts deal with minor civil and criminal matters concerning children. These courts consist of local councils and are important since local communities are able to handle crime within the community in a fast and efficient manner. The jurisdiction of the Village Executive Committee Courts is regulated by Schedule 3 of the Children Act 1997. See Section 92(1) and 92(2) of the Children Act 1997. Also see Moore M (2010) <http://www.africanprisons.org/documents/Juvenile-Detention-in-Uganda-October-2010.pdf> (accessed 3 August 2012) 20-21.

191 Section 92(4)(5) of The Children Act 1997. A guidance and supervision order shall not exceed a period of six months. The Court is not restricted to the sanctions named in this list, as it may also decide to order penalties included in the Penal Code Act of Uganda.

for his wrongdoings. The Family and Children Court has the power to make any of the following orders: (1) absolute discharge; (2) caution; (3) conditional discharge for not more than 12 months; (4) compensation; (5) probation order for not more than 12 months; and (6) detention.<sup>192</sup> Detention is the harshest sentence that can be imposed by a Ugandan court in a juvenile case.

Detention and imprisonment are similarly defined under the Children Act, thus the author will be referring to detention as an umbrella term that encompasses both detention and imprisonment. Detention will only be ordered if the court has considered all the other measures and if the specific offence that has been committed, warrants the issuing of the detention order.<sup>193</sup> The period of detention shall not exceed a maximum of three months for a child soldier less than 16 years of age and three years for child soldiers older than 16.<sup>194</sup> Thus, the maximum sentence for a child soldier who has been convicted for a crime punishable by death is three years.<sup>195</sup> It is submitted that the three-year imprisonment sentence is not a very long sentence. However, it gives the child soldier enough time to rehabilitate.



Before a child soldier can be sentenced to a detention or probation order, a probation and social welfare officer is required to submit a report on the child soldier's case to the court.<sup>196</sup> The report shall include: (a) the social and family background; (b) the circumstances in which the child soldier is living; and (c) the conditions under which the offence was committed.<sup>197</sup> This report should be drafted with caution, since it plays an important role in the issuing of the detention order by the court.

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192 Section 94(1) of the Children Act 1997.

193 Section 94(4) of the Children Act 1997.

194 See Section 94(1)(g) of the Children Act 1997.

195 See Section 94(1)(g) of the Children Act 1997. Also see Moore M (2010)

<http://www.africanprisons.org/documents/Juvenile-Detention-in-Uganda-October-2010.pdf>  
(accessed 3 August 2012) 21.

196 See Section 95(1) of the Children Act 1997.

197 See Section 95(2) of the Children Act 1997.

Factors such as poverty, lack of education, living conditions and children without any family members, can have a crucial impact on the decision by the court.<sup>198</sup> Before making the order, the court has to confirm that a suitable place of detention has been allocated.<sup>199</sup> In a country like Uganda where there are only a few detention centres, it is important that a court make additional arrangements to accommodate child soldiers.<sup>200</sup> Although these child soldiers have committed serious crimes, one must not neglect the fact that they are only children and should be treated accordingly.

### 5.3.4.3 Alternatives to Detention and Imprisonment

Alternative measures to imprisonment include reconciliation, compensation, restitution, apology and caution.<sup>201</sup> Moreover, an alternative to imprisonment that has been granted by Uganda over the past few years, is amnesty. At times, amnesty is the only and most viable solution to prevent further conflict, as was the case in post-Apartheid South Africa and more recently in Sierra Leone. The Refugee Law Project made the following statement about the amnesty in Uganda: 'With its emphasis on *restorative* justice, it offers a striking contrast to the more retributive or punitive forms of justice that have grown increasingly salient within mainstream international human rights law over the past decades'.<sup>202</sup> Indeed, Uganda's legal system at the time would not have been able to prosecute thousands of soldiers, including child soldiers. Amnesty was the only solution to the problem at that time. Yet, to what extent does the amnesty in Uganda apply to child soldiers who have committed crimes under international law?

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198 Moreover, the court should also consider the period of pre-trial detention when the detention order is being issued. See Section 94(3) of the Children Act 1997.

199 Section 94(5) of the Children Act 1997.

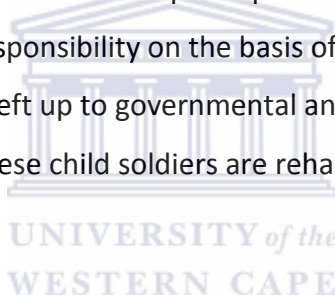
200 There are four detention centres in Uganda, namely, Fort Portal Remand Home, Gulu Remand Home, Naguru Remand Home and Mbale Remand Home. See Moore M (2010) <http://www.africanprisons.org/documents/Juvenile-Detention-in-Uganda-October-2010.pdf> (accessed 3 August 2012) 9.

201 See Section 92(4)(a)-(e) of the Children Act 1997.

202 Refugee Law Project 'Working Paper No. 15: Whose Justice? Perceptions of Uganda's Amnesty Act 2000: The Potential for Conflict Resolution and Long-Term Reconciliation' (2005) [http://www.refugeelawproject.org/files/working\\_papers/RLP.WP15.pdf](http://www.refugeelawproject.org/files/working_papers/RLP.WP15.pdf) (accessed 24 August 2010) 4.

Uganda's Amnesty Act of 2000,<sup>203</sup> makes provision for former soldiers and child soldiers to return to civilian life. The Act offers pardon to all Ugandans engaged in conflict since 26 January 1986.<sup>204</sup> The amnesty program started in 2005, while it was estimated in the beginning that over 20,000 individuals could apply for amnesty.<sup>205</sup> The Act defines persons who have come forward and embrace amnesty as 'reporters'.<sup>206</sup> In Northern Uganda the reporters are particularly young.<sup>207</sup> In May 2006, the Amnesty Commission had demobilised 6,059 children.<sup>208</sup>

The Commission grants amnesty to children between the ages of 12 and 18.<sup>209</sup> Child soldiers between the ages of 12 and 18 who have participated in the conflict can apply for amnesty and safely return to their communities or complete their rehabilitation. Child soldiers below the age of 12 have also participated in the conflict in Uganda, but are exempted from criminal responsibility on the basis of the Ugandan age of criminal responsibility of 12 years. It is left up to governmental and Non-Governmental partner organisations to ensure that these child soldiers are rehabilitated and reintegrated into their communities.<sup>210</sup>



Child soldiers are often scared to return back to their communities due to the fear of what the community might do. Nevertheless, the purpose of amnesty in this regard is to reconcile the child soldier with his family and community. However, what about the

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203 The Amnesty Act 2000. The Act entered into force on 21 January 2000.

204 Refugee Law Project (2005) [http://www.refugeelawproject.org/files/working\\_papers/RLP.WP15.pdf](http://www.refugeelawproject.org/files/working_papers/RLP.WP15.pdf) (accessed 24 August 2010) 4.

205 News and Noteworthy No. 12 'Uganda's Amnesty Commission in Final Phase of Issuing Resettlement Packages to Ex-Combatants' (2006) [http://www.mdrp.org/PDFs/N&N\\_12\\_06.pdf](http://www.mdrp.org/PDFs/N&N_12_06.pdf) (accessed 23 August 2010).

206 Section 2 of the Amnesty Act 2000. Section 2 defines amnesty as 'a pardon, forgiveness, exemption or discharge from criminal prosecution or any other form of punishment by the State'.

207 News and Noteworthy No. 12 (2006) [http://www.mdrp.org/PDFs/N&N\\_12\\_06.pdf](http://www.mdrp.org/PDFs/N&N_12_06.pdf) (accessed 23 August 2010).

208 News and Noteworthy No. 12 (2006) [http://www.mdrp.org/PDFs/N&N\\_12\\_06.pdf](http://www.mdrp.org/PDFs/N&N_12_06.pdf) (accessed 23 August 2010).

209 News and Noteworthy No. 12 (2006) [http://www.mdrp.org/PDFs/N&N\\_12\\_06.pdf](http://www.mdrp.org/PDFs/N&N_12_06.pdf) (accessed 23 August 2010).

210 News and Noteworthy No. 12 (2006) [http://www.mdrp.org/PDFs/N&N\\_12\\_06.pdf](http://www.mdrp.org/PDFs/N&N_12_06.pdf) (accessed 23 August 2010).

victims of the conflict and their quest for justice? Should these soldiers and child soldiers not have been prosecuted instead? Communities in the Northern Uganda region are usually opposed to any form of punishment against child soldiers.<sup>211</sup> One of the cultural leaders in Kitgum said that he supports the amnesty, because it provides a means for their children that are in the bush to return home.<sup>212</sup> A cultural leader in the Gulu Town district had the following remark with regard to the amnesty in Uganda:

'I think amnesty is not very different with our traditional ways, because here, the Acholi do not have corporal punishment...We believe that a wrongdoer will not be punished by death because he will not realize the effect...We want him to be alive and see – let him feel the shame'.<sup>213</sup>

In some cases as seen above, people just want the offenders to take responsibility for what they have done, even if the offenders only make an apology to the victims. Consequently, the question arises whether amnesty without the admission of guilt or an acknowledgement of the wrongdoing, is a fair means of justice. In other words, will justice be served if a child soldier, who has killed several people, receives pardon and returns back to his community without accepting responsibility for his wrongdoing? It is thus necessary to look at the goal of amnesty within the context of the Ugandan conflict. The main objective of the Amnesty Act is to establish reconciliation and restore tranquillity in Uganda.<sup>214</sup> However, will reconciliation be achieved if child soldiers are successfully reintegrated into their communities, yet weeks after their integration,

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- 211 See Refugee Law Project (2005) [http://www.refugeelawproject.org/files/working\\_papers/RLP.WP15.pdf](http://www.refugeelawproject.org/files/working_papers/RLP.WP15.pdf) (accessed 24 August 2010) 9. Also see Keller L M 'Achieving Peace with Justice: The International Criminal Court and Ugandan Alternative Justice Mechanisms' (2008) 23 *Connecticut Journal of International Law* 215; Yarbrough S 'Amnesty or Accountability: The Fate of High-Ranking Child Soldiers in Uganda's Lord's Resistance Army' (2014) 47 *Vanderbilt Journal of Transnational Law* 539.
- 212 Refugee Law Project (2005) [http://www.refugeelawproject.org/files/working\\_papers/RLP.WP15.pdf](http://www.refugeelawproject.org/files/working_papers/RLP.WP15.pdf) (accessed 24 August 2010) 9.
- 213 See Refugee Law Project (2005) [http://www.refugeelawproject.org/files/working\\_papers/RLP.WP15.pdf](http://www.refugeelawproject.org/files/working_papers/RLP.WP15.pdf) (accessed 24 August 2010) 27. Also see Keller L M (2008) 23 *Connecticut Journal of International Law* 215; Yarbrough S (2014) 47 *Vanderbilt Journal of Transnational Law* 539.
- 214 Preamble of the Amnesty Act 2000.

participate in the further commission of crimes under international law? It is submitted that amnesty in Uganda should only be granted if a person comes forward and accepts responsibility for the crimes he has committed. Indeed, the Refugee Law Project points out that amnesty needs to be complemented by a:

‘specific mechanism that allows for dialogue and the telling of truth within communities...the admittance of guilt on the part of the combatant is vital to creating the necessary condition for healing to take place’.<sup>215</sup>

Presently, there is no such mechanism in place, as the Amnesty Act does not make provision for truth-telling mechanisms in communities.<sup>216</sup> Section 3(2) of the Amnesty Act provides that reporters shall not be confined to any form of prosecution or punishment for their participation in the rebellion. The question arises whether admission of guilt subsequent to a pardoning would constitute a breach of Section 3(2) of the Act. Specifically, does the admission of guilt fall under the ambit of punishment as provided in Section 3(2) of the Act? It is mostly argued that even if the admission of guilt is a form of prosecution, amnesty alone is not a sufficient form of justice for those who have suffered at the hands of the offenders.<sup>217</sup> It is submitted that the admission of guilt would be in contravention of Section 3(2) of the Amnesty Act as it can be regarded as a form of punishment. It is thus proposed that Section 3(2) of the Amnesty Act should be amended to include the admission of guilt or the making of an apology as a requirement to receive amnesty.

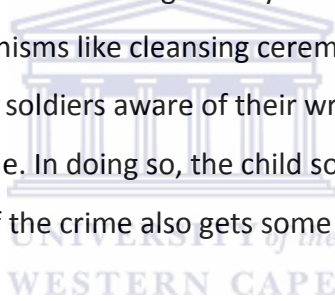
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215 Refugee Law Project (2005) [http://www.refugeelawproject.org/files/working\\_papers/RLP.WP15.pdf](http://www.refugeelawproject.org/files/working_papers/RLP.WP15.pdf) (accessed 24 August 2010) 25.

216 See Refugee Law Project (2005) [http://www.refugeelawproject.org/files/working\\_papers/RLP.WP15.pdf](http://www.refugeelawproject.org/files/working_papers/RLP.WP15.pdf) (accessed 24 August 2010) 25. Also see Raymond R E ‘When Two Elephants Fight, It is the Grass that Suffers: Proposed Amnesty Legislation for Peace and Justice’ (2013) 40 *Syracuse Journal of International Law and Commerce* 423-424.

217 See Refugee Law Project (2005) [http://www.refugeelawproject.org/files/working\\_papers/RLP.WP15.pdf](http://www.refugeelawproject.org/files/working_papers/RLP.WP15.pdf) (accessed 24 August 2010) 27. Also see Raymond R E (2013) 40 *Syracuse Journal of International Law and Commerce* 422-423.

Even though the Amnesty Act does not allow for any punishment in relation to the granting of amnesty, certain forms of alternative punishment mechanisms have been used in Uganda. In Gulu and Kitgum, the practice of cultural cleansing ceremonies is well known.<sup>218</sup> Cultural cleansing ceremonies encourage dialogue between the victim and the perpetrator.<sup>219</sup> In some cases, the perpetrator also admits guilt.<sup>220</sup> Cleansing ceremonies are not a widespread practice in Uganda, but serve as a possible solution to the aforementioned dilemma.<sup>221</sup> The author believes that the amnesty in Uganda must be accompanied by an element of punishment. The admission of guilt by the offender or the making of an apology, for example, are two ways how child soldiers can be punished before the child soldier can receive amnesty. In the meanwhile, it does not look like the provisions of the Amnesty Act will be amended to include the element of punishment, yet it does not mean that child soldiers will get away scot-free. There are various alternative punishment mechanisms like cleansing ceremonies that are used by communities to make the child soldiers aware of their wrongdoing and how it has affected the victims of the crime. In doing so, the child soldier accepts responsibility for the offence, while the victim of the crime also gets some sort of comfort.



### 5.3.5 Comparative Commentary

By comparing various aspects of procedural law in relation to child soldiers under domestic law, notable similarities and differences were identified between the domestic legal regimes that were compared. The four countries have similar provisions relating to the arrest and detention of child soldiers and essentially provide that child soldiers will

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218 See Akello G, Richters A and Reis R (2006) 4 *Intervention* 230, 233. Also see Refugee Law Project (2005) [http://www.refugeelawproject.org/files/working\\_papers/RLP.WP15.pdf](http://www.refugeelawproject.org/files/working_papers/RLP.WP15.pdf) (accessed 24 August 2010) 26.

219 Refugee Law Project (2005) [http://www.refugeelawproject.org/files/working\\_papers/RLP.WP15.pdf](http://www.refugeelawproject.org/files/working_papers/RLP.WP15.pdf) (accessed 24 August 2010) 26. Also see Singer P *Children at War* (2005) 202-203; Wessells M *Child Soldiers: From Violence to Protection* (2006) 196, 198.

220 Refugee Law Project (2005) [http://www.refugeelawproject.org/files/working\\_papers/RLP.WP15.pdf](http://www.refugeelawproject.org/files/working_papers/RLP.WP15.pdf) (accessed 24 August 2010) 26. Also see Akello G, Richters A and Reis R (2006) 4 *Intervention* 234-235; Singer P *Children at War* (2005) 202-203.

221 See Yarbrough S (2014) 47 *Vanderbilt Journal of Transnational Law* 547; Wessells M *Child Soldiers: From Violence to Protection* (2006) 196.



only be detained when a serious crime has been committed, while the age of the child soldier must also be taken into consideration. The most severe sentence that can be imposed on a child soldier under the legal provisions of the compared countries, is imprisonment. In England, the mandatory life sentence is the most severe sentence that can be imposed on a child soldier with the judge to determine the maximum term of such a detention, while the maximum sentence of imprisonment in South Africa is 25 years, 10 years in Germany and three years in the case of Uganda. The maximum sentence in Uganda is remarkably lower when compared to the maximum sentences in the other countries. It means that a child soldier in Uganda who commits the most serious crime under international law will only be imprisoned for up to three years. This approach by Uganda has its advantages and disadvantages. One of the advantages is that a convicted child soldier who has been psychologically scarred during his time with an armed group will not have to face a lengthy prison sentence which may bring with it the danger of damaging his psyche even further. One of the disadvantages is that the victims of the crime may feel that such a light sentence does not present them with the closure they would have experienced if a lengthier sentence would have been imposed on the child soldier. It is submitted that the maximum term of imprisonment in Uganda includes an element of retribution and rehabilitation. On the one hand, the child soldier will be punished for the commission of crimes under international law by way of the sentence of imprisonment, but will also be rehabilitated whilst in prison and will not be an outcast when he returns to his community.

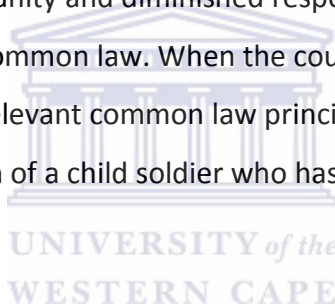
Regarding the alternatives to detention and imprisonment, England, South Africa and Germany have similar provisions, while Uganda invited child soldiers to apply for amnesty. The education principle provided for by the German juvenile justice system requires special mentioning. The education principle focusses on preventing children from becoming offenders, instead of focussing on prosecution only. It is submitted that by focussing on education, child soldiers who commit crimes under international law realise that their conduct was wrong and that they should strive to live within the

boundaries set out by the law. However, this does not mean that child soldiers will not be prosecuted and only rehabilitated, but that Courts should consider the application of the education principle throughout the trial. It is hoped, that domestic juvenile justice regimes around the world will incorporate the education principle into their domestic laws in order to deal with the complicated nature of prosecuting child soldiers for crimes under international law.

## 5.4 Defences

### 5.4.1 England

In England, the defences of insanity and diminished responsibility, intoxication and compulsion are regulated by common law. When the court deals with one of the defences, it will examine the relevant common law principles embedded in case law and apply it to the specific situation of a child soldier who has committed a crime under international law.



#### 5.4.1.1 Insanity and Diminished Responsibility

The defence of insanity may be raised if the defence is of the opinion that the child soldier was too disordered at the time of the commission of the offence.<sup>222</sup> The rules and the requirements of the insanity defence in England were laid down in *M’Naghten’s Case* in 1843.<sup>223</sup> In this case, the accused, Daniel M’Naghten, assaulted and fatally

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222 See Ashworth A and Horder J *Principles of Criminal Law* 7ed (2013) 141; Card R Card, *Cross and Jones Criminal Law* 20ed (2012) 622-623; Ormerod D *Smith and Hogan’s Criminal Law* 13ed (2011) 294-296.

223 *M’Naghten*, House of Lords, 10 Cl. & F. 200, 8 Eng. Rep. 178 (1843). Also see Ashworth A and Horder J *Principles of Criminal Law* 7ed (2013) 142; Burchell J *Principles of Criminal Law* 4ed (2013) 272; Card R Card, *Cross and Jones Criminal Law* 20ed (2012) 623; Ormerod D *Smith and Hogan’s Criminal Law* 13ed (2011) 295; Yannoulidis S *Mental State Defences in Criminal Law* (2012) 9-14. For a comprehensive discussion of the defence of insanity in English law, see Law Commission *Insanity and Automatism: A Scoping Paper* (2012). Yeo presents an enlightening study on the defence of insanity

wounded the deceased, Edward Drummond.<sup>224</sup> He pleaded not guilty and contended that he suffered from a mental condition at the time of the commission of the offence.<sup>225</sup> The legal question was whether the accused at the time of the commission of the offence, knew and understood that he was doing wrong.<sup>226</sup> Moreover, was the accused aware that the commission of a wrongful offence is unlawful and was he able to distinguish between right and wrong? The court then established what a person had to prove in order to raise the defence of insanity: (1) that at the time of the commission of the offence the accused was 'labouring under such a defect of reason, from disease of mind' (2) that he did not know what he was doing (3) or if he knew what he was doing, he did not know that it was wrong.<sup>227</sup>

First, it has to be proven that at the time of the commission of the act, the child soldier did not have the ability to reason as a result of a mental illness. This 'defect of reason' also refers to a deprivation of reasoning power and does not apply to a state of confusion or absent-mindedness.<sup>228</sup> The mental illness or disease of mind refers to a condition that affects the functioning of the mind.<sup>229</sup> Secondly, a child soldier can raise the defence of insanity if he did not know what he was doing at the time. In *R v Clarke*, the accused stole a few goods in a grocery store, without knowing what she was actually doing, because she suffered from severe depression at the time, which caused the

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in commonwealth nations. See Yeo S 'The Insanity Defence in the Criminal Laws of the Commonwealth of Nations' (2008) *Singapore Journal of Legal Studies*.

224 *M'Naghten*, House of Lords, 10 Cl. & F. 200, 8 Eng. Rep. 178 (1843).

225 *M'Naghten*, House of Lords, 10 Cl. & F. 200, 8 Eng. Rep. 178 (1843).

226 *M'Naghten*, House of Lords, 10 Cl. & F. 200, 8 Eng. Rep. 178 (1843).

227 *M'Naghten*, House of Lords, 10 Cl. & F. 200, 8 Eng. Rep. 178 (1843). Also see Ashworth A and Horder J *Principles of Criminal Law* 7ed (2013) 142; Burchell J *Principles of Criminal Law* 4ed (2013) 272; Card R Card, *Cross and Jones Criminal Law* 20ed (2012) 623; Kemp G (et al) *Criminal Law in South Africa* 2ed (2015) 159; Ormerod D *Smith and Hogan's Criminal Law* 13ed (2011) 295.

228 *R v Clarke* (1972) 56bCr App Rep 225. Also see Ashworth A and Horder J *Principles of Criminal Law* 7ed (2013) 142; Card R Card, *Cross and Jones Criminal Law* 20ed (2012) 625; Ormerod D *Smith and Hogan's Criminal Law* 13ed (2011) 296; Yannoulidis S *Mental State Defences in Criminal Law* (2012) 13-14.

229 See Ashworth A and Horder J *Principles of Criminal Law* 7ed (2013) 142-143; Burchell J *Principles of Criminal Law* 4ed (2013) 274-275; Card R Card, *Cross and Jones Criminal Law* 20ed (2012) 625; Kemp G (et al) *Criminal Law in South Africa* 2ed (2015) 159; Ormerod D *Smith and Hogan's Criminal Law* 13ed (2011) 296; Yannoulidis S *Mental State Defences in Criminal Law* (2012) 11-12.

accused to do things without her knowing of it.<sup>230</sup> The accused had no intention to steal the goods and the court ruled that she was not criminally responsible for the offence. Thirdly, even if the child soldier knew what he was doing, he can still raise the defence of insanity if he was unable to distinguish between right and wrong at the time of the commission of the offence. Therefore, if a child soldier commits an offence, without knowing that it was wrong to commit an unlawful offence, he will not be criminally responsible for the offence. Medical evidence is crucial to determine whether the child soldier suffered from a mental illness during the commission of the crime, while the court plays an important role in applying the rules as laid down in *M'Naghten's Case*.<sup>231</sup> If the defence of insanity is raised during the trial of a child soldier for the commission of crimes under international law, the defence will have to prove that the juvenile has invoked the three grounds of the defence of insanity set out in the English law. In sum, the defence will have to prove that the child soldier for example was suffering from a mental disease and at the time of the commission of the offence did not know what he was doing and that the commission of the crime under international law was wrong. Many of these child soldiers are forcefully recruited and this leaves an emotional and psychological scar on the child. Thus, a thorough psychological examination of the juvenile's experiences during his stay at an armed group is required in order to determine whether the juvenile suffered any kind of mental disease.

Diminished responsibility is regulated by Section 52(2)(1) of the Coroners and Justice Act 2009.<sup>232</sup> It can be raised as a partial defence when the accused who is accused of murder was suffering from an abnormality or mental functioning that substantially impaired his ability to understand his actions, form a rational judgment and to exercise

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230 *R v Clarke* (1972) 56 Cr App Rep 225.

231 See Ashworth A and Horder J *Principles of Criminal Law* 7ed (2013) 142; Card R Card, Cross and Jones *Criminal Law* 20ed (2012) 624; Ormerod D *Smith and Hogan's Criminal Law* 13ed (2011) 296.

232 The Act came into force on 25 July 2013. See further Ashworth A and Horder J *Principles of Criminal Law* 7ed (2013) 268; Card R Card, Cross and Jones *Criminal Law* 20ed (2012) 249; Ormerod D *Smith and Hogan's Criminal Law* 13ed (2011) 527.

self-control at the time of the commission of the offence.<sup>233</sup> Under English law, diminished responsibility is only available to reduce a charge of murder to manslaughter.<sup>234</sup> Consequently, if a child soldier commits a war crime but it is decided by the Court that he had diminished responsibility at the time of the offence, the charge will be reduced to manslaughter and he will also receive a reduced sentence.

#### 5.4.1.2 Intoxication

In *Attorney-General for Northern Ireland v Gallagher*, Lord Denning held that when a person plans a murder and intoxicates himself to give himself 'Dutch courage' (courage gained from the consumption of alcohol) to commit the murder, the person cannot rely on the defence of intoxication, since the person intended to commit the crime.<sup>235</sup> The person is also responsible, because he could have prevented the crime from taking place, by making a decision not to intoxicate himself.

In the *Gallagher* case, the person intoxicated himself and intended to commit the offence, but how does the English justice system deal with cases where a person intoxicated himself, but did not have any intention of committing an offence? In this

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233 See Section 52(2)(1) of the Coroners and Justice Act 2009. Also see *R v Byrne* [1960] 2 QB 396; Woodward K 'In Defence of Diminished Responsibility: Considering Diminished Responsibility in the New Zealand Context' (2009) 15 *Auckland University Law Review* 172; Yeo S (2008) *Singapore Journal of Legal Studies* 256. The English Law Commission in 2009 argued that the definition of diminished responsibility omits reference to developmental immaturity and the ground of infancy. In other words, it decided that children should be able to raise the defence of diminished responsibility in cases where it is clear that they lacked the requisite maturity to be guilty for the offence of murder. See Law Commission *Partial Defences to Murder* (2004) 108. Also see Ashworth A and Horder J *Principles of Criminal Law* 7ed (2013) 267; Card R Card, *Cross and Jones Criminal Law* 20ed (2012) 248.

234 See Ashworth A and Horder J *Principles of Criminal Law* 7ed (2013) 267; Card R Card, *Cross and Jones Criminal Law* 20ed (2012) 248; Norrie A *Crime, Reason and History: A Critical Introduction to Criminal Law* 3ed (2014) 237; Ormerod D *Smith and Hogan's Criminal Law* 13ed (2011) 294.

235 *Attorney-General for Northern Ireland v Gallagher* (1963) AC 349 paragraph 382. Also see Ashworth A and Horder J *Principles of Criminal Law* 7ed (2013) 194-195; Card R Card, *Cross and Jones Criminal Law* 20ed (2012) 647, 656; Ormerod D *Smith and Hogan's Criminal Law* 13ed (2011) 312.

case, the intoxicated person commits an offence, but claims that he would not have committed the act if he did not consume alcohol or drugs.<sup>236</sup>

In *DPP v Majewski*, the question was whether there was a difference between the commission of crimes with a specific intent and crimes with a basic intent, as committed by the voluntarily intoxicated accused.<sup>237</sup> The accused, who was intoxicated at the time, assaulted four men, three of whom were policemen.<sup>238</sup> The defence argued that the accused should not be criminally responsible, because he took a considerable amount of drugs and consumed large quantities of alcohol before the commission of the offence, which led to the accused not being able to remember what he was doing, while he also had no memories of the event.<sup>239</sup> The Court ruled that the defence of intoxication is only available in cases where the crime that has been committed requires a specific intent, like murder. The crime of assault, with which the accused was charged, does not require a specific intent, but only a basic intent.<sup>240</sup> Therefore, even though the accused was severely intoxicated, the Court ruled that this was a case of self-induced intoxication and that the accused had the basic intent to commit the offence.<sup>241</sup>

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236 See Ashworth A and Horder J *Principles of Criminal Law* 7ed (2013) 195; Card R Card, *Cross and Jones Criminal Law* 20ed (2012) 647; Ormerod D *Smith and Hogan's Criminal Law* 13ed (2011) 311.

237 *DPP v Majewski* (1977) UKHL 2, 1. Also see Ashworth A and Horder J *Principles of Criminal Law* 7ed (2013) 195; Burchell J *Principles of Criminal Law* 4ed (2013) 315; Card R Card, *Cross and Jones Criminal Law* 20ed (2012) 648; Foley B (2001) 4 *Trinity College Law Review* 122-124; Ormerod D *Smith and Hogan's Criminal Law* 13ed (2011) 314-315.

238 *DPP v Majewski* (1977) UKHL 2, 1-2.

239 *DPP v Majewski* (1977) UKHL 2, 1. Also see Ashworth A and Horder J *Principles of Criminal Law* 7ed (2013) 195-196; Ormerod D *Smith and Hogan's Criminal Law* 13ed (2011) 314-315.

240 *DPP v Majewski* (1977) UKHL 2, 1. Also see Ashworth A and Horder J *Principles of Criminal Law* 7ed (2013) 195; Card R Card, *Cross and Jones Criminal Law* 20ed (2012) 649; Foley B (2001) 4 *Trinity College Law Review* 122; Ormerod D *Smith and Hogan's Criminal Law* 13ed (2011) 315.

241 The Court also discussed the defence's criticism of the defence of intoxication at that time. The defence argued that the defence of intoxication should be allowed in cases where a person was so severely intoxicated that he could not remember what he was doing. They furthermore submitted that the defence of intoxication at that time was illogical and morally wrong. The Court held that it is an illogical defence, but the fact that Parliament has not sought to review the defence, illustrates its functioning in the English criminal law and that it is not unjust to prosecute a person for committing a crime, while he was voluntarily intoxicated at the time of the commission of the offence. The Court also provides that to prevent the self-intoxicated accused from relying on the defence of intoxication is not morally wrong, as stated by the defence of the accused in this case. The Court furthermore argues that by intoxicating oneself, one acts recklessly and one becomes a danger to society. The person knew that when he decided to intoxicate himself, that he could place himself in a position to

Hence, the type of offence plays a vital role in establishing whether the accused can rely on the defence of intoxication. Only in crimes that require a specific intent, can the accused rely on the defence of intoxication, but then it must be proved that the accused was not able to form the specific intent required for the offence as a result of the intoxication.<sup>242</sup> Moreover, the fact that the accused acted in a reckless manner as a result of voluntary intoxication, means that the accused could have prevented the offence from taking place if he did not become intoxicated.

In the case of child soldiers who have committed crimes under international law, the defence will have to prove that the child soldier was not able to form the specific intent of the crime and that he could not prevent himself from being intoxicated before the commission of the offence. Child soldiers are often forced to take drugs and alcohol before the commission of the offence, so it can hardly be seen as voluntary intoxication. Furthermore, it will be hard to prove that child soldiers who were intoxicated at the time of the commission of the offence were able to commit a crime with specific intent.

#### 5.4.1.3 Compulsion

Over the years, the development of the defence of compulsion has been specifically characterised by issues concerning the pressure to which the accused was subjected and the right of the victims.<sup>243</sup> The court looks at the amount of pressure the accused was

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commit an offence. See *DPP v Majewski* (1977) UKHL 2, 21-25. Also see Ashworth A and Horder J *Principles of Criminal Law* 7ed (2013) 195-196; Card R Card, *Cross and Jones Criminal Law* 20ed (2012) 649; Ormerod D *Smith and Hogan's Criminal Law* 13ed (2011) 315.

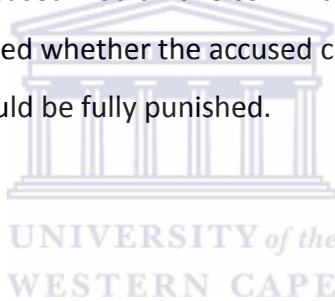
242 For a detailed discussion of basic and specific intent in relation to the intoxication defence, see Ormerod D *Smith and Hogan's Criminal Law* 13ed (2011) 314-323. Courts have dealt with the question whether intoxicated persons can rely on the defence of intoxication, but the issue concerning the sentencing of these individuals remains a contested matter. See Ashworth A and Horder J *Principles of Criminal Law* 7ed (2013) 200; Burchell J *Principles of Criminal Law* 4ed (2013) 315.

243 See Ashworth A *Principles of Criminal Law* 5ed (2006) 219; Norrie A *Crime, Reason and History: A Critical Introduction to Criminal Law* 3ed (2014) 201, 218. Also see Card R Card, *Cross and Jones Criminal Law* 20ed (2012) 691; Ormerod D *Smith and Hogan's Criminal Law* 13ed (2011) 343.



under at the time of the commission of the offence and determines whether the defence of compulsion can be called upon under these circumstances. The court also weighs the right of the victim and the right to life or threat against the accused.

One of the requirements of the defence of compulsion is that the accused had to act out of fear of serious injury or death.<sup>244</sup> The threats have to be connected to the accused, for example, a threat needs to be directed to someone the accused is responsible for, like a family member or a close friend.<sup>245</sup> Moreover, the threats do not have to be immediate, as long as the implementation of the threat is imminent.<sup>246</sup> Another requirement is that a reasonable sober person would not have resisted the threats to commit an offence.<sup>247</sup> The question needs to be asked whether the reasonable person in the same situation as the accused would have committed the offence or not.<sup>248</sup> In the light hereof, it can be determined whether the accused can rely on the defence of compulsion or whether he should be fully punished.



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244 See *DPP for Northern Ireland v Lynch* [1975] AC 653. Also see Ashworth A *Principles of Criminal Law* 5ed (2006) 206; Card R Card, *Cross and Jones Criminal Law* 20ed (2012) 691; Norrie A *Crime, Reason and History: A Critical Introduction to Criminal Law* 3ed (2014) 218; Ormerod D *Smith and Hogan's Criminal Law* 13ed (2011) 345.

245 See *R v Hasan* [2005] UKHL 22 paragraph 21. Also see Ashworth A and Horder J *Principles of Criminal Law* 7ed (2013) 207; Card R Card, *Cross and Jones Criminal Law* 20ed (2012) 691; Fletcher G 'The Individualisation of Excusing Conditions' (1974) 47 *Southern California Law Review* 1274-1278; Norrie A *Crime, Reason and History: A Critical Introduction to Criminal Law* 3ed (2014) 218; Ormerod D *Smith and Hogan's Criminal Law* 13ed (2011) 345.

246 See *R v Hudson and Taylor* [1971] 2 QB 202. Also see Ashworth A and Horder J *Principles of Criminal Law* 7ed (2013) 207-208; Card R Card, *Cross and Jones Criminal Law* 20ed (2012) 697-698; Norrie A *Crime, Reason and History: A Critical Introduction to Criminal Law* 3ed (2014) 218; Ormerod D *Smith and Hogan's Criminal Law* 13ed (2011) 354. Norrie explains that 'Duress affects neither act nor intention. It affects the motive behind act and intention by imposing extreme fear upon the individual'. See Norrie A *Crime, Reason and History: A Critical Introduction to Criminal Law* 3ed (2014) 221.

247 See *R v Graham* (1982) 74 Cr App Rep 235. Also see Ashworth A and Horder J *Principles of Criminal Law* 7ed (2013) 206; Card R Card, *Cross and Jones Criminal Law* 20ed (2012) 691; Ormerod D *Smith and Hogan's Criminal Law* 13ed (2011) 349.

248 See *R v Pommel* [1995] 2 Cr App R 607. Also see Norrie A *Crime, Reason and History: A Critical Introduction to Criminal Law* 3ed (2014) 218.

The defence of compulsion is also subject to the doctrine of prior fault.<sup>249</sup> In *R v Sharp*, the accused voluntarily joined a gang and when an offence was being committed he attempted to withdraw, but the gang threatened him and forced him to commit the offence.<sup>250</sup> The Court of Appeal held that the accused did not have a right to call on the defence of compulsion, because he should have realised that when he joined the gang, the situation might arise where he could be forced to commit a crime.<sup>251</sup> If a child soldier commits a crime under international law and is charged by an English Court, what will happen when it arises out of the facts that the child soldier joined an armed group voluntarily, but subsequently committed crimes under international law, while being forced by other members of the armed group? If the argument in *R v Sharp* was to be applied in the case of the child soldier, then the child soldier would not be able to call on the defence of compulsion, since he joined the armed group voluntarily. However, did the child soldier join the armed group voluntarily? As discussed before, child soldiers are sometimes left with no option, but to join an armed group, due to social factors like poverty and the lack of education for example.<sup>252</sup> It is thus questionable whether child soldiers join armed groups voluntarily. The court will have to determine whether the child soldier joined the armed group voluntarily or whether he had no other option but to join the group. If it is found that the child soldier did not act voluntarily when he joined the armed group, then the child soldier can call on the defence of compulsion.

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249 See Ashworth A and Horder J *Principles of Criminal Law* 7ed (2013) 208; Card R Card, *Cross and Jones Criminal Law* 20ed (2012) 698; Ormerod D *Smith and Hogan's Criminal Law* 13ed (2011) 355.

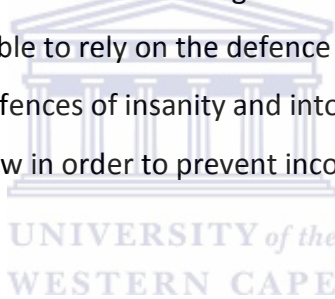
250 *R v Sharp* [1987] 1 QB 353. Also see Ashworth A and Horder J *Principles of Criminal Law* 7ed (2013) 208-209; Card R Card, *Cross and Jones Criminal Law* 20ed (2012) 698; Norrie A *Crime, Reason and History: A Critical Introduction to Criminal Law* 3ed (2014) 227; Ormerod D *Smith and Hogan's Criminal Law* 13ed (2011) 356.

251 *R v Sharp* [1987] 1 QB 353. In *R v Hasan* [2005] UKHL 22, at paragraph 38, the Court also maintained that compulsion will not be a defence where a person should know or ought to reasonably know that he would be subjected to compulsion. Also see Ashworth A and Horder J *Principles of Criminal Law* 7ed (2013) 209; Card R Card, *Cross and Jones Criminal Law* 20ed (2012) 698-699; Norrie A *Crime, Reason and History: A Critical Introduction to Criminal Law* 3ed (2014) 227; Ormerod D *Smith and Hogan's Criminal Law* 13ed (2011) 356.

252 See Chapter 3.2.1.

It is clear from the above that the courts will have to look at a number of matters before determining whether an accused can rely on the defence of compulsion. A genuine threat of harm or serious injury directed at the accused, the fact that a reasonable person would also have committed an offence under the circumstances, and the determination of whether the accused acted voluntarily when joining a group, are some of the key factors in determining whether an accused can rely on the defence of compulsion. The court should consider the mitigation of a sentence when the accused was granted the defence of compulsion. The type of mitigation will also depend on the seriousness of the offence.

It is submitted that legislation needs to be put in place to regulate the defence of compulsion, since an accused who has been charged with murder, but who was forced to commit the offence, is not able to rely on the defence on the basis of the court's assessment of the case. The defences of insanity and intoxication should also be regulated by English criminal law in order to prevent inconsistent judgments.



## **5.4.2 South Africa**

### **5.4.2.1 Insanity and Diminished Responsibility**

Section 78(1) of the Criminal Procedure Act 51 of 1977 regulates the defence of insanity in South Africa.<sup>253</sup> This section regulates all instances where a child with a mental illness or defect commits a crime. Section 78(1) further provides that when a person commits an offence and at the time suffers from a mental illness or mental defect, which makes

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253 The Act came into force on 22 July 1977. For a detailed analysis of the defence of insanity in South Africa, see Burchell J *Principles of Criminal Law* 4ed (2013) 271-302; Kemp G (*et al*) *Criminal Law in South Africa* 2ed (2015) 164-173; Snyman C R *Strafreg* 6ed (2012) 174-184. Generally, also see Yeo S (2008) *Singapore Journal of Legal Studies*.

him incapable of understanding the wrongfulness of the act or of acting in accordance with such understanding, he will not be criminally responsible for the offence.<sup>254</sup>

The defence consists of two elements as set out in Section 78(1). First, for the child soldier to call on the defence of insanity, the child soldier had to be suffering from a mental disease at the time of the commission of the offence and not before or after.<sup>255</sup>

If the child soldier had a mental disease prior to the commission of the offence and not at the time of the commission of the offence, the child soldier would not be able to rely on the defence of insanity. Secondly, if it is found that the child soldier suffered from a mental illness or mental defect, it needs to be established whether the child soldier was able to appreciate and understand the wrongfulness of the offence and act in accordance with such understanding. If it is determined that the child soldier did not have the ability to distinguish between right and wrong or to act in accordance herewith at the time of the act, the child soldier cannot be held accountable.

Diminished responsibility is provided for under Section 78(7) of the Criminal Procedure Act. If the offender's capacity to appreciate the wrongfulness of the offence and to act in accordance with such appreciation was diminished at the time of the offence due to mental illness or defect, diminished responsibility will be considered by the Court during sentencing.<sup>256</sup>

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254 For a discussion of the history of the defence of insanity in South Africa, see Ladikos A 'Historiese Oorsig oor die Hantering van Psigiatriese Pasiënte met Misdadige Neigings' (2012) 18 *Fundamina* 34-41. Also see Hoctor S (2011) 17 *Fundamina* 76-78.

255 The question whether the accused suffered from a mental illness or defect is assisted by the admission of psychiatric evidence. See *S v Mabena and another* 2007 (1) SACR 482 (SCA). Also see Burchell J *Principles of Criminal Law* 4ed (2013) 274; Kemp G (et al) *Criminal Law in South Africa* 2ed (2015) 165-166; Ladikos A (2012) 18 *Fundamina* 51-54; Snyman C R *Strafreg* 6ed (2012) 175.

256 See Section 78(7) of the Criminal Procedure Act 51 of 1977. Also see Burchell J *Principles of Criminal Law* 4ed (2013) 300; Kemp G (et al) *Criminal Law in South Africa* 2ed (2015) 173-175; Snyman C R *Strafreg* 6ed (2012) 182.

### 5.4.2.2 Intoxication

In South Africa, the defence of intoxication can be raised as a complete defence, while in some circumstances it cannot be raised as a defence. This is linked to the fact that intoxication is divided into involuntary intoxication and voluntary intoxication. The defence of intoxication can be raised as a complete defence under South African law when a child soldier is involuntarily intoxicated through no will or desire of his own.<sup>257</sup> Hence, when a child soldier is forced to take drugs or alcohol and he subsequently commits a crime, the child soldier cannot be held accountable for such an offence.

Voluntary intoxication is also a defence, but it has not always been regarded as a defence in South Africa.<sup>258</sup> Only in 1981, with the case of *S v Chretien*,<sup>259</sup> did the Court decide that a person who voluntarily intoxicates himself can raise the defence of intoxication.<sup>260</sup> A person who intoxicates himself is excluded from criminal liability when (1) a person intoxicates himself so much that he is unconscious and does not know what he is doing; (2) is so intoxicated that he cannot distinguish between right and wrong and act in accordance with such appreciation; and (3) where an intoxicated person fails to

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257 See Burchell J *Principles of Criminal Law* 4ed (2013) 304; Kemp G (et al) *Criminal Law in South Africa* 2ed (2015) 186; Snyman C R *Strafreg* 6ed (2012) 229. Also see Botha R and Van Rooyen M 'Dronkenskap as Verweer in die Suid-Afrikaanse Strafreg: 'n Sober benadering?' (2016) 13 *Litnet Akademies* <http://www.litnet.co.za/dronkenskap-verweer-die-suid-afrikaanse-strafreg-n-sober-benadering/> (accessed 1 June 2016).

258 See Burchell J *Principles of Criminal Law* 4ed (2013) 304-305; Kemp G (et al) *Criminal Law in South Africa* 2ed (2015) 187. Also see Botha R and Van Rooyen M (2016) 13 *Litnet Akademies* <http://www.litnet.co.za/dronkenskap-verweer-die-suid-afrikaanse-strafreg-n-sober-benadering/> (accessed 1 June 2016).

259 *S v Chretien* 1981 (1) SA 1097 (A). In *S v Chretien*, the appellant who was intoxicated at the time, left a party and drove his car into a number of people outside the building where the party was being held. One person was killed, while several people were injured. The Court held that the appellant did not have the intention to commit the offence. Also see Burchell J *Principles of Criminal Law* 4ed (2013) 303-305; Hoctor S (2011) 17 *Fundmina* 79; Kemp G (et al) *Criminal Law in South Africa* 2ed (2015) 187-188; Snyman C R *Strafreg* 6ed (2012) 229-230, 236-237. For a detailed overview of the defence of intoxication in South Africa, see Burchell J *Principles of Criminal Law* 4ed (2013) 303-322; Kemp G (et al) *Criminal Law in South Africa* 2ed (2015) 185-190; Snyman C R *Strafreg* 6ed (2012) 228-243.

260 See Burchell J *Principles of Criminal Law* 4ed (2013) 304; Kemp G (et al) *Criminal Law in South Africa* 2ed (2015) 187; Snyman C R *Strafreg* 6ed (2012) 228-229.

foresee the possible outcome of his actions.<sup>261</sup> However, the defence would soon see another change. In 1988, Parliament decided to intervene and passed the Criminal Law Amendment Act 1 of 1988.<sup>262</sup> It generally provides that a person, who intoxicates himself and subsequently commits an offence, will be criminally responsible, even though at the time of the commission of the offence, the person was not able to distinguish right from wrong and act in accordance with such understanding.<sup>263</sup>

Thus, a child soldier commits an offence in a state of voluntary intoxication, but argues that he did not understand what he was doing, then the child soldier will still be criminally responsible, because the child soldier knew that the specific substance would affect his ability to act rationally. In *S v Eadie*,<sup>264</sup> Eadie was convicted for the murder of Kevin Duncan. Eadie held that he suffered severe emotional stress prior to the incident, while he was also provoked and intoxicated during the commission of the offence.<sup>265</sup> The Court held that even when an intoxicated person is provoked, it gives that person no reason to commit an offence.<sup>266</sup> The court dismissed the appeal and ruled that Eadie had the necessary intention to kill, particularly considering the ferocity of the attack.<sup>267</sup> Be that as it may, the intoxicated state of the child soldier during the commission of the offence will be considered as a mitigating factor during sentencing.<sup>268</sup>

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261 See Burchell J *Principles of Criminal Law* 4ed (2013) 303; Kemp G (et al) *Criminal Law in South Africa* 2ed (2015) 188; Snyman C R *Strafreg* 6ed (2012) 232-235.

262 The Act came into force on 4 March 1988. The Act was passed as a result of the judgment in *S v Chretien*. See Burchell J *Principles of Criminal Law* 4ed (2013) 304; Kemp G (et al) *Criminal Law in South Africa* 2ed (2015) 188; Snyman C R *Strafreg* 6ed (2012) 236-237.

263 Section 1(1) of the Criminal Law Amendment Act 1988.

264 *S v Eadie* 2002 (1) SACR 663 (SCA).

265 A defence of non-pathological criminal incapacity was raised by the defence. This defence consists of a person being intoxicated, provoked or suffering from severe mental stress during the commission of the crime, and therefore not having control of his actions at the time of the commission of the offence. See *S v Eadie* 2002 (1) SACR 663 (SCA) paragraph 1.

266 In *S v Eadie*, Eadie (the appellant) and Duncan (the deceased) confronted each other in the early morning hours in Cape Town, after a road rage incident. Both men were intoxicated and after a struggle, Eadie murdered Duncan by hitting him with a hockey stick over the head. Eadie disposed of the hockey stick and drove off. See *S v Eadie* 2002 (1) SACR 663 (SCA) paragraph 1.

267 *S v Eadie* 2002 (1) SACR 663 (SCA) paragraph 66.

268 Section 2 of the Criminal Law Amendment Act regulates intoxication as a mitigating factor.

One instance where voluntary intoxication cannot be raised as a defence is where a person plans an offence with the intent to commit the crime while being intoxicated.<sup>269</sup> The intent for the offence is formed when the person is in a sober state of mind.<sup>270</sup> Voluntary intoxication would therefore not be a defence where child soldiers agree to kill a group of civilians, but are only able to commit the offence once they have reached a certain level of intoxication.

### 5.4.2.3 Compulsion

The defence of compulsion in South Africa generally provides that a person, who is forced to commit an offence by a third party, will not be criminally responsible for that offence.<sup>271</sup> The theory behind this principle is based on the notion that if a reasonable person would submit to the compulsion, it cannot be expected that the accused act as a martyr or hero by preventing the unlawful act from taking place.<sup>272</sup>

The requirements for the defence of compulsion are that the child soldier must be aware of the threat and must believe that the third party will follow through with the threat if the child soldier does not commit the offence.<sup>273</sup> The child soldier must believe if he does not commit the offence, the third party will cause him or her harm.<sup>274</sup>

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269 See Snyman C R *Strafreg* 6ed (2012) 230. Also see Burchell J *Principles of Criminal Law* 4ed (2013) 308; Kemp G (et al) *Criminal Law in South Africa* 2ed (2015) 188-190.

270 See Snyman C R *Strafreg* 6ed (2012) 230.

271 See Burchell J *Principles of Criminal Law* 4ed (2013) 160-161; Snyman C R *Strafreg* 6ed (2012) 118-120. Generally see Yeo S 'Compulsion and Necessity in African Criminal Law' (2009) 53 *Journal of African Law*.

272 *S v Mandela* 2001 (1) SACR 156 (C) 167. Also see Burchell J *Principles of Criminal Law* 4ed (2013) 160-161; Snyman C R *Strafreg* 6ed (2012) 121.

273 See Burchell J *Principles of Criminal Law* 4ed (2013) 163; Snyman C R *Strafreg* 6ed (2012) 122-123. In *S v Goliath*, the accused killed the deceased while he was being threatened by a third party and believed that he would be killed the next day if he did not commit the offence. The Court was of the opinion that the threat was genuine and the defence of compulsion was upheld. See *S v Goliath* 1972 (3) SA 1 (A).

274 In *S v Mandela*, the accused relied on the defence of compulsion after he was charged with killing two victims. The defence argued that the accused was threatened by a third party during the time of the commission of the crime and that he had no other option but to commit the offence. However, the court established that there was a possibility that the accused could have refrained from



However, the child soldier would not be able to call on the defence of compulsion if it was in any way possible for the child soldier to avoid the commission of the crime.<sup>275</sup>

### 5.4.3 Germany

#### 5.4.3.1 Insanity and Diminished Responsibility

Section 20 of the Strafgesetzbuch regulates the defence of insanity in Germany. The defence in a juvenile case has to prove two grounds.<sup>276</sup> First, for the insanity defence to be raised, the child soldier had to be incapable of appreciating the unlawfulness of the crime under international law and to act in accordance with this appreciation. Secondly, the defence will also have to prove that the child soldier was incapable of appreciating the wrongfulness of the offence and to act in accordance with his actions, due to a profound consciousness disorder, debility or any other serious mental abnormality. The different mental conditions include: (a) pathological mental disorder; (b) profound consciousness disorder; (c) debility; and (d) any other serious mental abnormality.<sup>277</sup>

Diminished responsibility is embedded in Section 21 of the Strafgesetzbuch. It provides that a sentence of the accused may be mitigated if the capacity of the accused to appreciate the unlawfulness of his conduct or to act in accordance with such understanding is substantially diminished at the time of the commission of the crime

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committing the offence, as he was aware of the danger that might follow and could have informed the deceased or the police before the incident in order to prevent the commission of the offence. See *S v Mandela* 2001 (1) SACR 156 (C) 158, 168. Also see Burchell J *Principles of Criminal Law* 4ed (2013) 166; Snyman C R *Strafreg* 6ed (2012) 125.

275 See Burchell J *Principles of Criminal Law* 4ed (2013) 165-166; Snyman C R *Strafreg* 6ed (2012) 123.

276 Section 20 of the Strafgesetzbuch 1998. Also see Bohlander M *Principles of German Criminal Law* (2009) 116; Wszalek J A 'Soziale Kompetenz: A Comparative Examination of the Social-Cognitive Processes that Underlie Legal Definitions of Mental Competency in the United States, Germany, and Japan' (2015-2016) 39 *Fordham International Law Journal* 112. Generally see Robbers G *An Introduction to German Law* 5ed (2012) 121.

277 Section 20 of the Strafgesetzbuch 1998. Also see Bohlander M *Principles of German Criminal Law* (2009) 116; Wszalek J A (2015-2016) 39 *Fordham International Law Journal* 112. Also see Robbers G *An Introduction to German Law* 5ed (2012) 121.

due to one of the insanity grounds in terms of Section 20 of the Strafgesetzbuch.<sup>278</sup>

Insanity under German law also includes intoxication, so a child soldier would be able to raise the defence of diminished responsibility if he was intoxicated at the time of the offence, and said condition impaired his ability to appreciate the unlawfulness of his conduct or to act in accordance with such understanding.<sup>279</sup>

#### 5.4.3.2 Intoxication

The general rule in Section 20 of the Strafgesetzbuch is that intoxication that involves profound consciousness disorder obliterating the accused's capacity to appreciate the wrongfulness of his conduct or to act, is a defence, regardless of whether the accused intoxicated himself voluntarily or not. In addition, Section 323a(1) provides for a special crime of intoxication.<sup>280</sup> It holds that a person who intentionally or negligently intoxicates himself shall be responsible for the crime if he commits an unlawful act.<sup>281</sup> In the case of child soldiers, the defence will have to prove that the child soldier suffered from a mental condition at the time of the commission of the crime under international law, which resulted in him not knowing the difference between right and wrong or being unable to act in accordance with such understanding.<sup>282</sup> Child soldiers are often forced by rebels to take various drugs or alcohol before they take part in armed conflict. Such a child soldier, who has committed a crime under international law under these circumstances, can thus raise the defence of intoxication, seeing that he was forced to

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278 See Section 21 of the Strafgesetzbuch 1998. Also see Bohlander M 'When the Bough Breaks – Defences and Sentencing Options Available in Battered Women and Similar Scenarios under German Criminal Law' in Reed A and Bohlander M (eds) *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (2011) 258-259; Wszalek J A (2015-2016) 39 *Fordham International Law Journal* 112.

279 See Bohlander M *Principles of German Criminal Law* (2009) 116; Wszalek J A (2015-2016) 39 *Fordham International Law Journal* 112. Also see Robbers G *An Introduction to German Law* 5ed (2012) 121.

280 For a detailed discussion of the highly complex nature of the defence of intoxication in German law, see Foley B (2001) 4 *Trinity College Law Review* 126-131.

281 See Bohlander M *Principles of German Criminal Law* (2009) 134; Foley B (2001) 4 *Trinity College Law Review* 127.

282 This has to be proven in accordance with Section 20 of the Strafgesetzbuch 1998.

take an intoxicating substance before the commission of the offence and as a result was not able to differentiate between right and wrong and act in accordance with such understanding.

#### 5.4.3.3 Compulsion

Section 35 of the Strafgesetzbuch regulates the defence of compulsion. It provides that a person, who is faced with an imminent danger to life and who therefore commits an offence in order to avert the danger from himself or someone else, will not be criminally responsible for the act.<sup>283</sup> For a child soldier to call on the defence of compulsion, the child soldier had to face the danger of getting killed, injured or losing his freedom. The danger needs to be imminent and at the time of the commission of the offence. Child soldiers are often threatened and forced by rebel commanders to kill a fellow child soldier unless they do not want to be killed themselves. The defence can only be raised if the child soldier committed the act to avert the danger from himself or someone else. A child soldier cannot raise the defence of compulsion if the court is of the opinion that the child soldier could have accepted the danger, since he himself caused the danger, and that he was under an obligation to cause the danger or the danger was not serious enough to justify the commission of the offence.<sup>284</sup> If a child soldier is subsequently prosecuted, then he would still be able to raise the defence of compulsion during the mitigation of sentencing.<sup>285</sup>

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283 Section 35(1) of the Strafgesetzbuch 1998. Also see Bohlander M in Reed A and Bohlander M (eds) *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (2011) 253; Robbers G *An Introduction to German Law* 5ed (2012) 121.

284 Section 35(1) of the Strafgesetzbuch 1998.

285 When a person mistakenly assumes that there is a danger and subsequently commits an offence, the person will be able to raise the defence of compulsion, unless the mistake was avoidable. See Section 35(2) of the Strafgesetzbuch 1998.

## 5.4.4 Uganda

### 5.4.4.1 Insanity and Diminished Responsibility

Section 11 of the Penal Code Act of Uganda provides that any person who commits an offence is not criminally responsible if that person had a disease that affected his mind to such an extent that the person did not understand what he was doing and that it is wrong to commit an offence.<sup>286</sup> There are thus three grounds that are required to maintain a defence of insanity in Ugandan law. First, a child soldier had to have a disease that affected his mind at the time of the commission of the offence. The disease has to be one that affected the child soldier's ability to act rationally. Medical tests need to be performed to evaluate the severity of the disease and how it may have influenced the child soldier's decision-making skills.

Secondly, a child soldier will be able to raise the defence of insanity if it can be determined that at the time of the commission of the offence, that the child soldier did not understand what he was doing. The psychiatrist needs to establish whether the child soldier had the ability to establish between right and wrong at the time of the commission of the offence.

Thirdly, the court will uphold the defence of insanity if the child soldier did not know that the specific act, was a wrongful act, and that he should not have committed the act. In other words, if it can be proved that the child soldier did not act in accordance with this understanding, then the child soldier will be able to raise the defence of insanity.

Diminished responsibility in Uganda is regulated by Section 194 of the Penal Code Act. It can be raised as a defence where a person is guilty of murder and the Court is satisfied that he is suffering from a disease that substantially impaired his mental responsibility

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<sup>286</sup> Section 11 of the Penal Code Act 1950. Also see Brown D and Allen P A P J *An Introduction to the Law of Uganda* (1968) 88. The Penal Code Act entered into force on 15 June 1950.

for his actions during the offence.<sup>287</sup> This is an important defence in Uganda where many child soldiers would have suffered from mental illnesses during their activities with the LRA and which could have impaired their ability to act rationally.<sup>288</sup>

#### 5.4.4.2 Intoxication

Most child soldiers are intoxicated at the time of the commission of the crime. However, in Uganda, it is interesting to note that Kony prohibited the use of alcohol, smoking and various other acts like unsanctioned sex by any of his soldiers, since it is believed in the Acholi culture, that a soldier who commits these forbidden acts will attract the enemy's bullets at the battlefield.<sup>289</sup> Nevertheless, it cannot be excluded that child soldiers were intoxicated at the time of the commission of the offence under Kony's rule. Be that as it may, Section 12 of the Penal Code Act regulates the defence of intoxication in Uganda. Under the Act, the defence of intoxication includes the physical consumption of alcohol or the use of narcotics or drugs.<sup>290</sup> For intoxication to be a defence in Ugandan law, three elements have to be proven by the defence counsel, depending on the facts of the case. In order to raise the defence, the child soldier at the time of the commission of the offence had to be intoxicated to such an extent that the child soldier: (1) did not know that it was wrong to commit the offence; or (2) did not know what he was doing; or (3) the state of intoxication was caused by someone else without his consent.<sup>291</sup>

First, the defence has to prove that the child soldier was not aware of the consequences of committing an offence. As a result of the intoxication, the child soldier could no

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287 See Section 194 of the Penal Code Act 1950.

288 See Moore M <http://www.africanprisons.org/documents/Juvenile-Detention-in-Uganda-October-2010.pdf> (accessed 3 August 2012) 28.

289 See Oloya O *Child to Soldier: Stories from Joseph Kony's Lord's Resistance Army* (2013) 89. Generally see Briggs J *Innocents Lost: When Child Soldiers go to War* (2005) 113.

290 Section 12(5) of the Penal Code Act 1950. Also see Brown D and Allen P A P J *An Introduction to the Law of Uganda* (1968) 88.

291 See Section 12(2) of the Penal Code Act 1950. Also see Brown D and Allen P A P J *An Introduction to the Law of Uganda* (1968) 88. An additional ground for the defence of intoxication is when a child soldier has become so intoxicated that he becomes insane and commits an offence as a result.

longer distinguish between right and wrong at the time of the commission of the offence and was not able to realise that it is wrong to commit an offence. Secondly, it has to be proven that the child soldier did not know what he was doing when the offence was committed. In this case, the child soldier was intoxicated up to such a level that he was unaware of the fact that he was committing an offence. Thirdly, a child soldier can also rely on the defence of intoxication if another person, as part of a malicious act, intoxicated him. For instance, a child soldier will be able to raise the defence of intoxication, if a child soldier unknowingly accepts a drink from a rebel commander that has been drugged and that child soldier subsequently becomes intoxicated and commits an offence.

#### 5.4.4.3 Compulsion

A child soldier who is forced to commit an offence is not criminally responsible for that act. In Uganda, a child soldier can rely on the defence of compulsion if: (1) the crime is committed by two or more persons; (2) and during the whole time the child soldier is being forced to commit the offence; and (3) by way of threats by the other offender(s) to immediately kill the child soldier or cause him or her grievous bodily harm if the child soldier refuses to commit the offence.<sup>292</sup>

Regarding the third ground in particular, this threat includes (a) the threat to kill the child soldier or (b) the threat of causing grievous bodily harm if the child soldier refuses to commit the offence. Child soldiers in Uganda have often been forced to kill their own parents or neighbours when they are recruited, none more so than children recruited by Joseph Kony.<sup>293</sup> Unfortunately for child soldiers, this is usually only the beginning of forceful treatment that can last until the child soldier is demobilised and disarmed. It is

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292 See Section 14 of the Penal Code Act 1950. Also see Brown D and Allen P A P J *An Introduction to the Law of Uganda* (1968) 88.

293 See Briggs J *Innocents Lost: When Child Soldiers go to War* (2005) 108, 117.

for this reason that the defence of compulsion is a crucial defence for child soldiers who have committed crimes under international law.

#### 5.4.5 Comparative Commentary

Being part of an armed group places a lot of pressure on child soldiers and is detrimental to the overall mental health of the child, while it can also diminish the responsibility of the child. Moreover, child soldiers are often involuntarily intoxicated at the time of the commission of crimes under international law, as well as being forced to commit such crimes. Consequently, if child soldiers are prosecuted in domestic courts, it is important that child soldiers are in a position to raise various defences in relation to the facts of the case. It can be concluded that child soldiers will be able to raise the specific defences that were discussed in England, South Africa, Germany and Uganda. There are, however, certain aspects that require further analysis.

The basis of the defences of insanity, intoxication and compulsion are similar between the four countries, the only difference being the grounds upon which the defence can be raised by child soldiers. The partial defence of diminished responsibility, however, needs further deliberation. The partial defence of diminished responsibility is applied similarly in England, South Africa and Uganda, but in Germany the defence takes a different approach. Unlike in the three countries above, it is submitted that the partial defence of diminished responsibility in Germany applies to any crime, and not just murder.<sup>294</sup> It is submitted that this is the best approach as the ability of child soldiers to act rationally is also impaired during the commission of many other atrocious crimes apart from murder. Furthermore, the defence can only be raised if the accused suffered from a mental condition, however, it is hoped that this can be extended to include other grounds, including youth and immaturity.<sup>295</sup> If this is done, especially very young child

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294 See Bohlander M in Reed A and Bohlander M (eds) *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (2011) 247.

295 See Law Commission *Partial Defences to Murder* (2004) 108.



soldiers who commit atrocious crimes could raise the defence of diminished responsibility on the ground that they lacked the sufficient maturity to commit the offence.

Now that the thesis has looked at the matter whether child soldiers can be prosecuted for crimes under international law by domestic courts, what is the situation under international law?



## CHAPTER SIX

### THE PROSECUTION OF CHILD SOLDIERS UNDER VARIOUS INTERNATIONAL LEGAL REGIMES

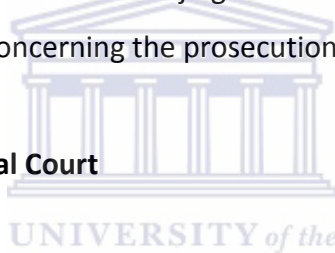
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The scope of international criminal law mainly consists of high-ranking criminal offenders being brought to justice. The masterminds of crimes under international law are those who orchestrate the commission of these offences. Without their involvement, the crimes would hardly take place. However, it is impossible for one person to solely commit crimes under international law. The leader needs a workforce to carry out his plan. Child soldiers often form part of such a plan. The ICC and the SCSL have heard cases where the accused has conscripted and enlisted child soldiers. In these cases, however, the accountability of the child soldiers themselves was not in question, as the courts have only focussed on the responsibility of those who have used child soldiers in armed conflict. The question arises whether child soldiers should be prosecuted for the commission of international crimes by the various bodies of international criminal law. International criminal law, international children's rights law and international juvenile justice deal with certain aspects of the prosecution of child soldiers for the commission of crimes under international law, but many aspects, and two in particular, remain unclear and therefore require critical attention. First, how can child soldiers be held criminally responsible under international law, and particularly, at what age under international law can child soldiers be held accountable for crimes under international law. Secondly, which procedural rules need to be followed under international law when child soldiers are accused of committing such crimes? Moreover, this chapter will critically examine a judgment of the East Timor International Tribunal concerning the prosecution of a juvenile who was accused of committing crimes under international law. Hereby, the questions regarding the practical application of international criminal law regarding the prosecution of child soldiers will be analysed.

## 6.1 Criminal Responsibility

The age of criminal responsibility under international law is a very controversial issue. In fact, a universal minimum age of criminal responsibility does not exist under international law. The age of criminal responsibility differs between States, raising the question whether a universal age of criminal responsibility should be regulated internationally. In part I of this chapter, the thesis will examine the age of criminal responsibility under international law, which includes a thorough analysis of the relevant provisions of the ICC Statute, the ICTY Statute, the ICTR Statute, the Statute of the Special Court for Sierra Leone, the Beijing Rules and General Comment No. 10 to the CRC. These Statutes are important, because they primarily regulate the commission of crimes under international law, while the Beijing Rules and General Comment No. 10 specifically deal with matters concerning the prosecution of child soldiers.

### 6.1.1 The International Criminal Court



The criminal responsibility of juveniles and especially child soldiers was briefly discussed at the Rome Conference, where the foundation of the ICC Statute was formed.<sup>1</sup> In fact, only two principles distantly related to the accountability of child soldiers were discussed, namely, to ensure the greatest protection of a child's rights and to prosecute child rights offenders.<sup>2</sup> These matters focussed on the protection of child soldiers as

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1 See Freeland S (2008) 29 *University of La Verne Law Review* 51; Grover L *Interpreting Crimes in the Rome Statute of the International Criminal Court* (2014) 332; Happold M *Child Soldiers in International Law* (2005) 148. Freeland critically points out that: 'It is almost as if the drafters of the Rome Conference would prefer that a consideration of this important aspect of the shameful problem of Child Soldiers be delegated elsewhere'. See Freeland S (2008) 29 *University of La Verne Law Review* 51. For a general discussion of the establishment of the ICC, see Sadat L 'The International Criminal Court' in Schabas W A (ed) *The Cambridge Companion to International Criminal Law* (2016) 137-154; Werle G and Jessberger F *Principles of International Criminal Law* 3ed (2014) 17-27.

2 See 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. Also see Grover L *Interpreting Crimes in the Rome Statute of the International Criminal Court* (2014) 332.

victims of crimes, while the accountability of child soldiers for the commission of international crimes was not discussed. Despite various objections that will be discussed later, the ICC Statute does not include any regulations concerning the prosecutions of child soldiers for crimes under international law. The age of criminal responsibility was also not discussed in any enlightening manner at the Conference, while many delegations argued in favour of the age of criminal responsibility in accordance with their domestic legal systems.<sup>3</sup> The age of criminal responsibility was, however, included in Article 26 of the ICC Statute.

Article 26 of the ICC Statute provides that the ICC has no jurisdiction over individuals under the age of 18 years.<sup>4</sup> Consequently, the Court excludes itself from matters related to the prosecution of children under the age of 18 years, while it is left up to States Parties to determine whether children should be prosecuted.<sup>5</sup> The question arises why the ICC excludes the jurisdiction of persons under the age of 18?

There are three main grounds why the drafters of the ICC Statute fixed the age of criminal responsibility at 18 in accordance with Article 26. First, the drafters wanted to avoid arguments and extensive discussions regarding the appropriate minimum age of

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3 See 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) 775; Holmes J T in Politi M and Nesi G (eds) *The Rome Statute of the International Criminal Court: A Challenge to Impunity* (2005) 121.

4 See Happold M *Child Soldiers in International Law* (2005) 148; Happold M (2008) 29 *University of La Verne Law Review* 79; Amann D A in Schabas W A (ed) *The Cambridge Companion to International Criminal Law* (2016) 258. The first time that the international criminal arena specifically dealt with the issue of the minimum age of criminal responsibility was at the Belgrade Conference in 1980. At the Conference, the 1979 International Law Association's Draft Statute for an International Court, in Article 21, provided for the defence of infancy and the establishment of a minimum age of criminal responsibility in States, even though the minimum age of criminal responsibility was never established thereafter. For a useful discussion of the drafting history of Article 26 of the ICC Statute, see Clark R S and Triffterer O in Triffterer O (ed) *Commentary on the Rome Statute of the International Criminal Court: Observer's Notes, Article by Article* (2008) 771-774.

5 See Clark R S and Triffterer O in Triffterer O (ed) *Commentary on the Rome Statute of the International Criminal Court: Observer's Notes, Article by Article* (2008) 775; Happold M *Child Soldiers in International Law* (2005) 148. Also see De Than C and Shorts E *International Criminal Law and Human Rights* (2003) 5.

criminal responsibility.<sup>6</sup> During the Preparatory Committee meetings prior to the Rome Conference, various Non-Governmental Organisations called for the ICC Statute to determine the minimum age of criminal responsibility at the age of 18.<sup>7</sup> However, national approaches differed as they expressed divergent views regarding the age of criminal responsibility.<sup>8</sup> The age of criminal responsibility asserted by States varied from 12 to 18 years.<sup>9</sup> Amnesty International has also criticised Article 26 of the ICC Statute and holds that the provision is not a statement of principle, but rather a political compromise between States.<sup>10</sup> Nevertheless, a jurisdictional approach was followed in order to avoid further disagreements.<sup>11</sup> However, Grover indicates that Article 26 of the ICC Statute can be found under part III of the ICC Statute that deals with general principles of criminal law and not under part II of the Statute that deals with procedural law, including jurisdictional matters.<sup>12</sup> Grover further argues that, because Article 26 forms part of the general principles of international criminal law in accordance with part

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- 6 See Clark R S and Triffterer O in Triffterer O (ed) *Commentary on the Rome Statute of the International Criminal Court: Observer's Notes, Article by Article* (2008) 774-775; De Than C and Shorts E *International Criminal Law and Human Rights* (2003) 5; Happold M *Child Soldiers in International Law* (2005) 148; Happold M (2008) 29 *University of La Verne Law Review* 79.
  - 7 See Clark R S and Triffterer O in Triffterer O (ed) *Commentary on the Rome Statute of the International Criminal Court: Observer's Notes, Article by Article* (2008) 773; Happold M *Child Soldiers in International Law* (2005) 148; Happold M (2008) 29 *University of La Verne Law Review* 79.
  - 8 See Clark R S and Triffterer O in Triffterer O (ed) *Commentary on the Rome Statute of the International Criminal Court: Observer's Notes, Article by Article* (2008) 773-774; De Than C and Shorts E *International Criminal Law and Human Rights* (2003) 5; Happold M (2008) 29 *University of La Verne Law Review* 79; Happold M *Child Soldiers in International Law* (2005) 148; Holmes J T in Politi M and Nesi G (eds) *The Rome Statute of the International Criminal Court: A Challenge to Impunity* (2005) 121.
  - 9 See Clark R S and Triffterer O in Triffterer O (ed) *Commentary on the Rome Statute of the International Criminal Court: Observer's Notes, Article by Article* (2008) 771-774; Happold M *Child Soldiers in International Law* (2005) 148; Happold M (2008) 29 *University of La Verne Law Review* 79.
  - 10 Amnesty International is of the view that Article 26 of the ICC Statute can be seen as a compromise 'due to the great variety of opinion among the negotiating states on the appropriate limit for the age of criminal responsibility, and does not represent a consensus that children could not be held criminally responsible by national courts or other international jurisdictions under certain circumstances'. See Amnesty International (2000) <http://www.amnesty.org/en/library/asset/IOR50/002/2000/en/f1883757-dc60-11dd-bce7-11be3666d687/ior500022000e.pdf> (accessed 4 August 2011) 8.
  - 11 See Clark R S and Triffterer O in Triffterer O (ed) *Commentary on the Rome Statute of the International Criminal Court: Observer's Notes, Article by Article* (2008) 775; Happold M *Child Soldiers in International Law* (2005) 148; Happold M (2008) 29 *University of La Verne Law Review* 79.
  - 12 Grover S C *Child Soldier Victims of Genocidal Forcible Transfer: Exonerating Child Soldiers Charged with Grave Conflict-related International Crimes* (2012) 101.

III of the ICC Statute, the fact that the ICC does not prosecute child soldiers, means that child soldiers should never be prosecuted for crimes under international law. This thesis does not agree with the views of Grover above. It is submitted that it was not the purpose of the ICC to include Article 26 of the ICC Statute in order to prevent States Parties prosecuting child soldiers for crimes under international law. It is further argued that the provision was indeed included in the ICC Statute to prevent future discussions concerning the minimum age of criminal responsibility and the prosecution of child soldiers at the ICC. It is misleading to say that the ICC is opposed to the global prosecution of child soldiers, when the ICC is the very institution that is built on the cornerstone of individual criminal responsibility.

The second reason why the drafters of the ICC Statute fixed the age of criminal responsibility at the age of 18 is that it would have been difficult to develop a separate system of juvenile criminal justice for the ICC.<sup>13</sup> Such a separate justice system would have needed to adhere to the high standards set by international children's rights instruments like the CRC. For example, such a juvenile chamber would have to implement different rules and procedures as opposed to the procedures that are applied at the ICC. As a result, additional judges and legal staff would have to be appointed. Moreover, the establishment of a juvenile justice system within the ICC would be a challenging matter for the ICC that is already burdened by financial restraints.<sup>14</sup>

Thirdly, it is submitted that the ICC was established to prosecute individuals most responsible for crimes under the ICC Statute, rather than to prosecute juveniles who do

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13 See Clark R S and Triffterer O in Triffterer O (ed) *Commentary on the Rome Statute of the International Criminal Court: Observer's Notes, Article by Article* (2008) 775; Holmes J T in Politi M and Nesi G (eds) *The Rome Statute of the International Criminal Court: A Challenge to Impunity* (2005) 121.

14 See Clark R S and Triffterer O in Triffterer O (ed) *Commentary on the Rome Statute of the International Criminal Court: Observer's Notes, Article by Article* (2008) 774-775.

not carry the same level of responsibility.<sup>15</sup> In its first case, the ICC tried the former leader of the Union of Congolese Patriots, Thomas Lubanga Dyilo.<sup>16</sup> Holding those most responsible sets a precedent and deters others from committing atrocities as high-ranking officials. That being said, is it sufficient to only prosecute the most responsible individuals or should to ICC Statute have also included the regulation of the prosecution of juveniles? If the ICC Statute had included the prosecution of juveniles, the Court would have been overburdened with too many cases, considering the fact that the ICC took ten years to hand down its first judgment. Nevertheless, prosecuting those most responsible like Lubanga, could possibly reduce the use of child soldiers in many countries, but this would not solely deter the commission of international crimes by juveniles.<sup>17</sup> It is therefore important to examine to what extent child soldiers should be held accountable.



### 6.1.2 The International Criminal Tribunal for the former Yugoslavia

In 1993, the ICTY was the first judicial organ created by the Security Council after the establishment of the International Military Tribunals in Nuremberg and Tokyo.<sup>18</sup> The

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15 See De Than C and Shorts E *International Criminal Law and Human Rights* (2003) 5.

16 *The Prosecutor v. Thomas Lubanga Dyilo* ICC-01/04-01/06. The conscripting and enlisting of child soldiers under the age of 15 is the first offence to be punished before the ICC. See Park A S J 'Child Soldiers and Distributive Justice: Addressing the Limits of Law' (2010) 53 *Crime, Law and Social Change* 335. For a detailed overview of the Lubanga case with a special focus on child soldiers, see Blattmann R in Werle G Fernandez L and Vormbaum M (eds) *Africa and the International Criminal Court* (2014) 35-48; Graf R 'The International Criminal Court and Child Soldiers: An Appraisal of the Lubanga Judgment' (2012) 10 *Journal of International Criminal Justice*; Jenks C 'Law as Shield, Law as Sword: The ICC's Lubanga Decision, Child Soldiers and the Perverse Mutualism of Participation in Hostilities' (2013-2014) 3 *University of Miami National Security and Armed Conflict Law Review*. For a discussion of the Union of Congolese Patriots under the rule of Thomas Lubanga, see Vélez S 'Ituri: The Pursuit of Justice' (2001) <http://www.lubangatrial.org/2011/02/10/ituri-the-pursuit-of-justice/> (accessed 1 September 2011).

17 London states that: 'The cost in punishment for using child soldiers or supporting those who do must become so astronomical that it is no longer worth it'. See London C *One Day the Soldiers Came: Voices of Children in War* (2007) 181.

18 The ICTY was established by UN Security Council Resolution 827, adopted under Chapter VII of the UN Charter. See United Nations Security Council Resolution on the Establishment of an International Criminal Tribunal for the Former Yugoslavia S/RES/827 (25 May 1993). The ICTY is situated in The Hague. For a general discussion of the ICTY see Brown B S 'The International Criminal Tribunal for the Former Yugoslavia' in Bassiouni M C (ed) *International Criminal Law: Volume 3 International*



ICTY has jurisdiction over the violations of the laws and customs of war, including grave breaches of the 1949 Geneva Conventions, genocide and crimes against humanity perpetrated from 1 January 1991 in the territory of the former Yugoslavia.<sup>19</sup>

War and ethnic conflict occurred in the former Yugoslavia over a sustained period. Ethnic tensions increased with the death of Josip Broz Tito in 1980 and finally ended with the signing of the Dayton Peace Accord in 1995.<sup>20</sup> Approximately 4,000 children participated in the conflict.<sup>21</sup> It was reported that children as young as 10 years old participated in the war.<sup>22</sup> The ICTY considered the matter of juvenile prosecution, but not in any great detail. For instance, in a Security Council Report of 1993, paragraph 58 states that: 'The International Tribunal itself will have to decide on various personal defences which may relieve a person of individual criminal responsibility, such as

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*Enforcement* 3ed (2008) 69; De Than C and Shorts E *International Criminal Law and Human Rights* (2003) 280; Sluiter G 'Ad Hoc International Criminal Tribunals (Yugoslavia, Rwanda, Sierra Leone)' in Schabas W A (ed) *The Cambridge Companion to International Criminal Law* (2016) 117-136; Tolbert D 'Children and International Criminal Law: The Practice of the International Tribunal for the Former Yugoslavia (ICTY)' in Arts K and Popovski V (eds) *International Criminal Accountability and the Rights of Children* (2006) 147; Werle G and Jessberger F *Principles of International Criminal Law* 3ed (2014) 14-15.

- 19 Although the Tribunal's jurisdiction is effective from 1991, it has mainly focussed on crimes committed between 1992 and 1995. See Tolbert D in Arts K and Popovski V (eds) *International Criminal Accountability and the Rights of Children* (2006) 148; Werle G and Jessberger F *Principles of International Criminal Law* 3ed (2014) 15.
- 20 See Werle G and Jessberger F *Principles of International Criminal Law* 3ed (2014) 15. Also see Brown B S in Bassiouni M C (ed) *International Criminal Law: Volume 3 International Enforcement* 3ed (2008) 69; Sluiter G in Schabas W A (ed) *The Cambridge Companion to International Criminal Law* (2016) 118-123. The Final Report of the Commission of Experts concludes that approximately 200,000 Yugoslavs were killed, 50,000 tortured, 20,000 raped, while there were 700 concentration camps and 150 mass graves. See Final Report of the Commission of Experts Pursuant to Security Council Resolution 780 (1992) U.N. Doc. S/1994/674 (27 May 1994). Between 1991 and 1995, approximately 2.5 million people were displaced from or within Croatia and Bosnia-Herzegovina. There was no distinction between civilians and soldiers and therefore many civilians died, while countless women and adolescent girls were raped. See Beasley R 'Hidden Casualties of Conflict' in Amnesty International (ed) *In the Firing Line: War and Children's Rights* (1999) 41.
- 21 Coalition to Stop the Use of Child Soldiers 'Global Report on Child Soldiers 2001' (2001) [http://www.child-soldiers.org/library/global-reports?root\\_id=159&directory\\_id=215](http://www.child-soldiers.org/library/global-reports?root_id=159&directory_id=215) (accessed 31 July 2011) 81.
- 22 Serbian paramilitaries famously used children as young as 10 during the conflict in Bosnia and Croatia between 1992 and 1995. See Coalition to Stop the Use of Child Soldiers (2001) [http://www.child-soldiers.org/library/global-reports?root\\_id=159&directory\\_id=215](http://www.child-soldiers.org/library/global-reports?root_id=159&directory_id=215) (accessed 31 July 2011) 81.

minimum age'.<sup>23</sup> In accordance with its mandate, however, the ICTY has primarily focussed on the prosecution of the military and political leadership who committed offences during the conflict in the former Yugoslavia.<sup>24</sup> Even in the lower level investigations, the ICTY does not investigate children as perpetrators, while domestic courts have also not prosecuted juveniles who have committed crimes during the war.<sup>25</sup>

Moreover, there is no evidence of children as perpetrators in the ICTY's jurisprudence or in its investigations generally.<sup>26</sup> The Statutes of the ICTY do not contain a provision regulating the minimum age of criminal responsibility.<sup>27</sup> It is clear from the above that the ICTY never had any intention to prosecute children as perpetrators of war. It focusses on those individuals who planned the offences committed in the former Yugoslavia, while an age of criminal responsibility is not included in the ICTY Statute. Thus, as in the case of the ICC, the ICTY does not deal with the issue of prosecuting juveniles for the commission of international crimes.

### 6.1.3 The International Criminal Tribunal for Rwanda

The ICTR was created to prosecute individuals who committed crimes under international law during the 1994 genocide in Rwanda.<sup>28</sup> The Tribunal has jurisdiction

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23 Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993) UN Doc. S/25704 (3 May 1993) paragraph 58. Also see Happold M *Child Soldiers in International Law* (2005) 147; Sluiter G in Schabas W A (ed) *The Cambridge Companion to International Criminal Law* (2016) 127-128.

24 See United Nations Security Council Resolution on the Establishment of an International Criminal Tribunal for the Former Yugoslavia S/RES/827 (25 May 1993). Also see Tolbert D in Arts K and Popovski V (eds) *International Criminal Accountability and the Rights of Children* (2006) 148; Werle G and Jessberger F *Principles of International Criminal Law* 3ed (2014) 15.

25 See Natarajan M (ed) *International Crime and Justice* (2011) 46; Tolbert D in Arts K and Popovski V (eds) *International Criminal Accountability and the Rights of Children* (2006) 149.

26 See Tolbert D in Arts K and Popovski V (eds) *International Criminal Accountability and the Rights of Children* (2006) 149.

27 Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808 UN Doc. S/25704 (3 May 1993). Also see Happold M *Child Soldiers in International Law* (2005) 147.

28 The ICTR was established by Security Council Resolution 955 and was adopted under Chapter VII of the UN Charter. See United Nations Security Council Resolution on the Establishment of an International Criminal Tribunal for Rwanda S/RES/955 (8 November 1994) paragraph 1. The Court is situated in Arusha. For a general discussion of the ICTR, see Sluiter G in Schabas W A (ed) *The*

over genocide and other serious violations of international humanitarian law committed in the territory of Rwanda between 1 January 1994 and 31 December 1994.<sup>29</sup> The ICTR also has jurisdiction over natural persons who committed offences under the ICTR Statute.<sup>30</sup> In principle, this would include children who committed crimes during the 1994 genocide, while the same can be said of child perpetrators in the former Yugoslavia.<sup>31</sup> However, the ICTR does not prosecute juveniles, as it only prosecutes individuals who have committed offences who were above the age of 18 at the time of the commission of the crime.

The issue of child perpetrators received scant attention after the Rwandan genocide.<sup>32</sup> In fact, the issue of child perpetrators was not discussed in the recommendations formulated during a conference held in Kigali in 1995, which dealt with matters concerning the Rwandan genocide.<sup>33</sup> The recommendations focussed on the prosecution of genocide perpetrators in order to combat impunity, while at the same time declaring that blanket amnesty was not to be considered.<sup>34</sup> In addition to the

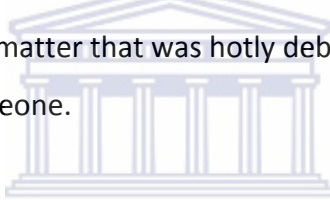
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*Cambridge Companion to International Criminal Law* (2016) 117-136; Wibabara C *Gacaca Courts Versus the International Criminal Tribunal for Rwanda and National Courts* (2014) 61-106. The relationship between the ICTR and the Rwandan Government has at times been tense. The government criticised the slowness of the proceedings, as well as some of the decisions made by the Tribunal. See Bornkamm P C *Rwanda's Gacaca Courts: Between Retribution and Reparation* (2012) 29.

- 29 United Nations Security Council Resolution on the Establishment of an International Criminal Tribunal for Rwanda S/RES/955 (8 November 1994) paragraph 1. Also see Article 1-7 of the ICTR Statute; De Than C and Shorts E *International Criminal Law and Human Rights* (2003) 295; Sluiter G in Schabas W A (ed) *The Cambridge Companion to International Criminal Law* (2016) 120-123.
- 30 Article 5 of the ICTR Statute.
- 31 See Natarajan M (ed) *International Crime and Justice* (2011) 46; Van Krieken P 'Children in Conflict with the Law: A Case Study' (2000) [http://repository.forcedmigration.org/show\\_metadata.jsp?pid=fmo:3058](http://repository.forcedmigration.org/show_metadata.jsp?pid=fmo:3058) (accessed 31 August 2011) 31.
- 32 Briggs explains that thousands of juveniles were part of local militia groups, as well as the Interhamwe. Generally see Briggs J *Innocents Lost: When Child Soldiers go to War* (2005) 20.
- 33 To view the recommendations, see Office of the President of the Republic of Rwanda 'Recommendations of the Conference held in Kigali from November 1st to 5th, 1995 on Genocide, Impunity and Accountability: Dialogue for a National and International Response' (1995) <http://www.grandslacs.net/doc/3186.pdf> (accessed 18 August 2011).
- 34 See Office of the President of the Republic of Rwanda (1995) <http://www.grandslacs.net/doc/3186.pdf> (accessed 18 August 2011) 16. Also see Sluiter G in Schabas W A (ed) *The Cambridge Companion to International Criminal Law* (2016) 120-123; Van

ICTR's view not to prosecute child soldiers, domestic courts in Rwanda did not deal with the prosecution of juveniles for the commission of crimes either. Thus, it was left up to the Rwandan domestic Gacaca courts to shed some light on the issue of juvenile prosecution.<sup>35</sup>

In conclusion, Rwanda did not formally prosecute juvenile offenders, but kept them in detention for an extended period, which amounted to *de facto* punishment.<sup>36</sup> This was not the ideal method of dealing with these children, as they did not have any right to fair trial measures, which should have been imposed.<sup>37</sup> Consequently, thousands of juveniles were detained from four up to 15 years for crimes they have not been charged with in a criminal court in Rwanda.<sup>38</sup> Nevertheless, the Rwandan justice system generally viewed children who committed offences during the genocide as perpetrators of crimes and not as victims, a matter that was hotly debated prior to the establishment of the Special Court for Sierra Leone.



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Krieken P (2000) [http://repository.forcedmigration.org/show\\_metadata.jsp?pid=fmo:3058](http://repository.forcedmigration.org/show_metadata.jsp?pid=fmo:3058) (accessed 31 August 2011) 31.

- 35 The Gacaca courts were established to speed up the process of prosecuting individuals who committed crimes during the 1994 genocide. Gacaca which translates to 'law' refers to informal court proceedings, normally held under a tree. The prosecution of juveniles in Gacaca Courts is provided under Article 78 of Organic Law No. 16/2004 of 19/6/2004. No child soldier was prosecuted at the Gacaca Courts seeing that they were already detained for a long period after the genocide. For a detailed discussion of the Gacaca Courts, generally see Bornkamm P C *Rwanda's Gacaca Courts: Between Retribution and Reparation* (2012); Wibabara C *Gacaca Courts Versus the International Criminal Tribunal for Rwanda and National Courts* (2014); Coalition to Stop the Use of Child Soldiers (2004) [http://www.crin.org/docs/resources/treaties/crc.36/dprk\\_CSCS\\_ngo\\_report.doc](http://www.crin.org/docs/resources/treaties/crc.36/dprk_CSCS_ngo_report.doc) (accessed 30 August 2011).
- 36 Briggs, does however, note that: 'Several 1995 court cases in Kigali, for example, involved boys under eighteen years old who admitted to killing, many up to ninety civilians'. See Briggs J *Innocents Lost: When Child Soldiers go to War* (2005) 18.
- 37 See Coalition to Stop the Use of Child Soldiers (2004) [http://www.crin.org/docs/resources/treaties/crc.36/dprk\\_CSCS\\_ngo\\_report.doc](http://www.crin.org/docs/resources/treaties/crc.36/dprk_CSCS_ngo_report.doc) (accessed 30 August 2011). Also see Briggs J *Innocents Lost: When Child Soldiers go to War* (2005) 21.
- 38 In fact, it was reported that many juveniles were detained with adult perpetrators. Moreover, juveniles under the age of 14 were also detained even though Rwandan law stated at the time that children under the age of 14 cannot be imprisoned. See Coalition to Stop the Use of Child Soldiers 'Child Soldiers: CRC Country Briefs' (2004) [http://www.crin.org/docs/resources/treaties/crc.36/dprk\\_CSCS\\_ngo\\_report.doc](http://www.crin.org/docs/resources/treaties/crc.36/dprk_CSCS_ngo_report.doc) (accessed 30 August 2011); Briggs J *Innocents Lost: When Child Soldiers go to War* (2005) 21.

#### 6.1.4 The Special Court for Sierra Leone

The commission of mass atrocities in Sierra Leone resulted in the establishment of the SCSL, created by a bilateral treaty between the United Nations Security Council and the Sierra Leonean Government.<sup>39</sup> The Court was situated in Freetown, which unlike other international courts, was located within the former conflict zones.<sup>40</sup> Since the Court was situated in Freetown, it had a greater impact on the judiciary and the people of Sierra Leone.<sup>41</sup> The SCSL consists of a hybrid court structure, due to its mixed subject matter jurisdiction and composition.<sup>42</sup> The Court's main objective was to prosecute those individuals who were most responsible for the atrocities committed in Sierra Leone between 30 November 1996 and 18 January 2002.<sup>43</sup> The SCSL is the first Court to

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39 See UN Security Council Resolution 1315 on the Establishment of a Special Court for Sierra Leone S/RES/1315 (14 August 2000). Also see Crane D M 'The Special Court for Sierra Leone' in Bassiouni M C (ed) *International Criminal Law: Volume 3 International Enforcement* 3ed (2008) 195. The SCSL officially opened its doors on 10 March 2004. Several groups, including various Non-Governmental Organisations, were opposed to the establishment of the SCSL and argued that ex-combatants would be reluctant to disarm and come forward for fear of prosecution. See Report of the Security Council Mission to Sierra Leone UN Doc. S/2000/992 (16 October 2000) paragraph 49. It is estimated that between 50,000 and 75,000 individuals died during the civil war in Sierra Leone. See Corriero M A (2002) 18 *New York Scholarly Journal of Human Rights* 338. Also see Custer M 'Child Soldiers: The Special Court for Sierra Leone and the Lessons to be Learned from The United States Juvenile System' (2005) 19 *Temple International and Comparative Law Journal* 451.

40 See Crane D M in Bassiouni M C (ed) *International Criminal Law: Volume 3 International Enforcement* 3ed (2008) 195.

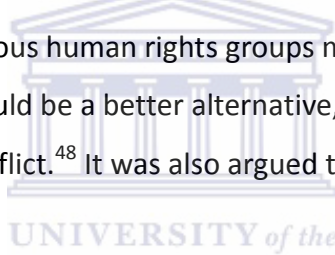
41 See Crane D M in Bassiouni M C (ed) *International Criminal Law: Volume 3 International Enforcement* 3ed (2008) 201. David Crane provides that: 'Most importantly, the Special Court sits in the country where the violations occurred. This is exactly the right place for the Court to be – in the heart of Sierra Leone, delivering justice directly to the people who suffered during the civil war'. See Crane D M in Arts K and Popovski V (eds) *International Criminal Accountability and the Rights of Children* (2006) 124.

42 See Crane D M in Bassiouni M C (ed) *International Criminal Law: Volume 3 International Enforcement* 3ed (2008) 195. Also see Freeland S (2008) 29 *University of La Verne Law Review* 20. Discussions lasted from August 2000 until January 2002, at which time the agreement to establish the Special Court was signed. The SCSL is completely independent from Sierra Leone's domestic courts, the UN and any State. See Crane D M in Arts K and Popovski V (eds) *International Criminal Accountability and the Rights of Children* (2006) 123. For a detailed account of the history of the events concerning the armed conflict from 1961, see Crane D M in Bassiouni M C (ed) *International Criminal Law: Volume 3 International Enforcement* 3ed (2008) 195-201.

43 See Article 1(1) of the SCSL Statute. Also see Morss J R 'The Status of Child Offenders under International Criminal Justice: Lessons from Sierra Leone' (2004) 9 *Deakin Law Review* 215; Williams S *Hybrid and Internationalised Criminal Tribunals: Selected Jurisdictional Issues* (2012) 217.

prosecute individuals who conscripted and enlisted child soldiers in a war.<sup>44</sup> More importantly for this thesis though is the fact that child soldiers also took part in the commission of crimes during the civil war. This begs the question whether these juveniles should be accountable for these crimes. This issue sparked serious debate within Sierra Leone and the international community.<sup>45</sup>

In addition to the victims and their relatives, the Sierra Leone Government argued that child soldiers who committed crimes during the war should be prosecuted for such crimes.<sup>46</sup> Child soldiers tortured, raped and killed civilians, thus being directly involved in the atrocities committed in Sierra Leone. However, many child soldiers were drugged and forced into committing violent acts. Therefore, many human rights organisations contended that child soldiers who committed crimes during the war were victims and not perpetrators of war.<sup>47</sup> Various human rights groups maintained that a Truth and Reconciliation Commission would be a better alternative, since up to 10,000 child soldiers participated in the conflict.<sup>48</sup> It was also argued that children should not be



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44 See *The Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu (the AFRC Accused)*, SCSL-04-16-T, Special Court for Sierra Leone, 20 June 2007. All of the defendants were convicted and sentenced for the conscription and enlisting of child soldiers. Kamara was sentenced to 45 years imprisonment, while Brima and Kanu were sentenced to 50 years imprisonment. See *The Prosecutor of the Special Court v. Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu (the AFRC accused) (Sentencing Judgment)*, SCSL-2004-16-T, Special Court for Sierra Leone, 19 July 2007 41. Charles Taylor is the first former head of State to be prosecuted for conscripting and enlisting child soldiers under the age of 15. See *The Prosecutor v. Charles Ghankay Taylor* SCSL-03-01-I-001. In total, the Court convicted and sentenced nine individuals. After the Court's closure in 2013, the Residual Special Court for Sierra Leone was established to oversee the continuing legal obligations of the SCSL.

45 See Amann D M (2001) 29 *Pepperdine Law Review* 167; Custer M (2005) 19 *Temple International and Comparative Law Journal* 449, 459; Happold M *Child Soldiers in International Law* (2005) 149.

46 See Report of the Security Council Mission to Sierra Leone UN Doc. S/2000/992 (16 October 2000) paragraph 49; Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone UN Doc. S/2000/915 (4 October 2000) paragraph 35. Also see Romero J A (2004) 2 *Northwestern University Journal of International Human Rights* 9.

47 See Freeland S (2008) 29 *University of La Verne Law Review* 52; Grossman N (2007) 38 *Georgetown Journal of International Law* 323, 329; Iacono M (2003) 26 *Suffolk Transnational Law Review* 456; Report of the Security Council Mission to Sierra Leone UN Doc. S/2000/992 (16 October 2000) paragraph 50; UN Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone UN Doc. S/2000/915 (4 October 2000) paragraph 35.

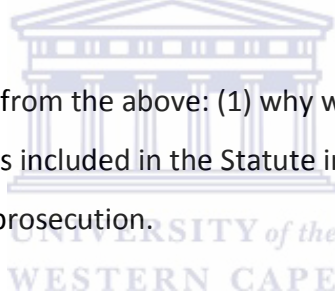
48 See Report of the Security Council Mission to Sierra Leone UN Doc. S/2000/992 (16 October 2000) paragraph 49. By 1998, 25 per cent of the armed forces in Sierra Leone consisted of children under



prosecuted before an international court, seeing that the ICC Statute does not have jurisdiction to prosecute child soldiers.<sup>49</sup> Let us now have a look at how the SCSL dealt with the issue of the age of criminal responsibility and the prosecution of child soldiers.

In 2000, the then Secretary-General of the UN, Kofi Annan, sought jurisdiction over child soldiers between the ages of 15 to 18.<sup>50</sup> Consequently, Article 7 of the SCSL Statute was included to regulate the prosecution of child soldiers between the ages of 15 to 18. Article 7(1) provides that the Court has jurisdiction over child soldiers who were 15 years old when the crime was committed.<sup>51</sup> Hereby, child soldiers between the ages of 15 to 18 who have committed crimes under the Statute fall under the jurisdiction of the SCSL.<sup>52</sup> However, David Crane, the prosecutor of the SCSL at that time, eventually confirmed that child soldiers would never be prosecuted at the court.<sup>53</sup>

Two important questions arise from the above: (1) why was the provision concerning the prosecution of child soldiers included in the Statute in the first place and (2) why did the prosecutor decide against prosecution.



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the age of 18 years. See Coalition to Stop the Use of Child Soldiers (2008) <http://www.childsoldiersglobalreport.org/> (accessed 27 May 2010) 299.

49 See Amnesty International (2000)

<http://www.amnesty.org/en/library/asset/IOR50/002/2000/en/f1883757-dc60-11dd-bce7-11be3666d687/ior500022000e.pdf> (accessed 4 August 2011) 8.

50 See Iacono M (2003) 26 *Suffolk Transnational Law Review* 455. Also see Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone UN Doc. S/2000/915 (4 October 2000) paragraph 29.

51 See Article 7(1) of the SCSL Statute also provides that juvenile offenders shall be treated with dignity and respect and their young age shall be taken into account.

52 In the Secretary-General's Special Report on the SCSL, he explains what types of crimes are included in the jurisdiction of the court: 'It covers the most egregious practices of mass killing, extrajudicial executions, widespread mutilation, in particular amputation of hands, arms, legs, lips and other parts of the body, sexual violence against girls and women, and sexual slavery, abduction of thousands of children and adults, hard labour and forced recruitment into armed groups, looting and setting fire to large urban dwellings and villages'. See Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone UN Doc. S/2000/915 (4 October 2000) paragraph 12.

53 Crane D M 'Prosecuting Children in Times of Conflict: The West African Experience' (2008) 15 *Human Rights Brief* 15. Also see Amann D A in Schabas W A (ed) *The Cambridge Companion to International Criminal Law* (2016) 259.



*(1) prosecution of child soldiers*

There are limited reasons why the Secretary-General decided to include a provision on child soldier accountability. First, David Crane states that: 'The basis for including this controversial provision was to give the Prosecutor legal authority to prosecute any child soldier he might consider as having borne the greatest responsibility'.<sup>54</sup> The provision played an important part in legitimising and justifying the Special Court and its mission.<sup>55</sup> Many child soldiers committed crimes during the war, a fact that the drafters of the Statute of the Special Court could not avoid. By including the provision, the Special Court was legally able to hold children accountable.<sup>56</sup> The Secretary General also made it clear from the start that imprisonment would be excluded, rather focussing on the rehabilitation of the child offender instead.<sup>57</sup>

Secondly, did the violent nature of the offences by child soldiers play a role in the inclusion of the accountability provision? The nature of the atrocities committed during the Sierra Leonean conflict was horrific. Prior to the establishment of the SCSL, there was a huge amount of pressure on the Sierra Leonean Government and the Security Council to take some kind of action against children who committed offences during the armed conflict. In particular, the relatives of the victims of the atrocities raised their concern at the violent nature of the atrocities that had been committed by child offenders and called for the prosecution of such offenders. Certain offences are extremely violent in nature and cannot be tolerated by international criminal law, for

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54 Crane D M (2008) 15 *Human Rights Brief* 14.

55 See Iacono M (2003) 26 *Suffolk Transnational Law Review* 455. Also see Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone UN Doc. S/2000/915 (4 October 2000) paragraph 36.

56 See Iacono M (2003) 26 *Suffolk Transnational Law Review* 456. Also see Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone UN Doc. S/2000/915 (4 October 2000) paragraph 36.

57 See Iacono M (2003) 26 *Suffolk Transnational Law Review* 456. Also see Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone UN Doc. S/2000/915 (4 October 2000) paragraph 36.

example, the amputation of limbs.<sup>58</sup> It must be noted that many child soldiers in Sierra Leone committed similar acts. The act of shooting and killing a civilian is not of the same gravity as amputating a civilian's limbs and then leaving him to die. A number of these acts were committed with intent to cause extreme harm to the victims, which in some cases resulted in death. It is submitted that the violent nature of the offences that were committed by child soldiers in Sierra Leone was a key contributing factor in including the prosecution of child soldiers in the Statute of the SCSL. That being said, the Special Court decided not to prosecute juveniles, but why?

*(2) decision not to prosecute child soldiers*

The decision not to prosecute child soldiers at the SCSL did not come as a surprise to many, because it is the appropriate international norm to rehabilitate child soldiers, as opposed to prosecution.<sup>59</sup> First, the Security Council decided against the prosecution of child soldiers as it was recommended that the Court's personal jurisdiction be extended to those individuals who bear the greatest responsibility for the commission of an offence.<sup>60</sup> The question arises whether child soldiers can ever fall within the ambit of "those who are most responsible".<sup>61</sup> Generally, the most responsible would refer to the mastermind or architect of a crime or those individuals who aided and abetted, sustained and planned the atrocities, like the commanders of the RUF.<sup>62</sup> David Crane asserts that no children were ever involved in the planning and ordering of atrocities in Sierra Leone.<sup>63</sup> The SCSL finally held that child soldiers could not be seen as being the most responsible, even though the Special Report emphasised that the phrase "those who bear the greatest responsibility" does not necessarily exclude children between the

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58 See, for example, Freeland S (2008) 29 *University of La Verne Law Review* 52.

59 See Crane D M (2008) 15 *Human Rights Brief* 15; Singer P *Children at War* (2005) 155.

60 See Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone UN Doc. S/2000/915 (4 October 2000) paragraph 29. Also see Crane D M (2008) 15 *Human Rights Brief* 15.

61 See Crane D M (2008) 15 *Human Rights Brief* 15. Also see Singer P *Children at War* (2005) 155.

62 See Crane D M (2008) 15 *Human Rights Brief* 15. Also see Singer P *Children at War* (2005) 155.

63 Crane D M (2008) 15 *Human Rights Brief* 15.

ages of 15 to 18.<sup>64</sup> In essence, the term “most responsible”, was included in the Statute to limit the number of accused at the SCSL, which ultimately excluded the prosecution of child soldiers at the Court.<sup>65</sup>

Secondly, human rights organisations and various other groups condemned the decision by the Security Council to include a provision on child soldier accountability.<sup>66</sup> They argued that all child soldiers should be rehabilitated and reintegrated into their communities.<sup>67</sup> According to Article 15(5), the prosecutor of the SCSL has to ensure that prosecution of child soldiers does not interfere with child rehabilitation in Sierra Leone.<sup>68</sup> The prosecution of child soldiers could have had an undesirable impact on the goals of rehabilitation, especially where a former child soldier might have been involved as a witness or an accused in a case.

Thirdly, and probably the most important reason why child soldiers were not criminally responsible at the SCSL, was that child soldiers between the ages of 15 and 18, did not have the sufficient blameworthy state of mind to be prosecuted for crimes under international law.<sup>69</sup> The Prosecution argued that most children were forced to commit atrocities.<sup>70</sup> This and the fact that many child soldiers were also forcibly recruited, contributed to child soldiers not being criminally responsible for the atrocities that they

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64 See Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone UN Doc. S/2000/915 (4 October 2000) paragraph 31. Also see Coalition to Stop the Use of Child Soldiers (2008) <http://www.childsoldiersglobalreport.org/> (accessed 27 May 2010) 300.

65 See Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone UN Doc. S/2000/915 (4 October 2000) paragraph 29. Note, that the SCSL also functioned with a limited budget, thereby forcing the Court to prosecute only those most responsible for the atrocities.

66 See Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone UN Doc. S/2000/915 (4 October 2000) paragraph 35. Also see Happold M (2008) 29 *University of La Verne Law Review* 80.

67 See Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone UN Doc. S/2000/915 (4 October 2000) paragraph 35. Also see Crane D M (2008) 15 *Human Rights Brief* 15.

68 See Cryer R ‘A “Special Court” for Sierra Leone?’ (2001) 50 *International and Comparative Law Quarterly* 442; Custer M (2005) 19 *Temple International and Comparative Law Journal* 458.

69 Crane D M (2008) 15 *Human Rights Brief* 15.

70 See Crane D M (2008) 15 *Human Rights Brief* 15. Generally, also see Singer P *Children at War* (2005) 155.

committed. Moreover, it is submitted that the Prosecutor viewed child soldiers as victims of the conflict, rather than perpetrators, which was a significant factor in the discretion used by the Prosecutor.

In sum, thousands of child soldiers that could have been convicted and sentenced under the Statute of the SCSL, were freed from prosecution. The general focus shifted from holding the Sierra Leonean child soldiers accountable, to ensuring that former child soldiers are rehabilitated and returned back to their communities.<sup>71</sup> It is submitted that the Special Court, especially because of the large-scale commission of crimes by child soldiers in the Sierra Leonean War, should have established a juvenile chamber or an alternative justice mechanism to deal with the child soldiers who committed crimes. This matter will be discussed in the last chapter as one of the recommendations of this thesis. Now that this chapter has looked at how international courts deal with the matter of child soldier accountability, and especially the age of criminal responsibility, what is the position under the relevant international legal frameworks?



#### **6.1.5 The Beijing Rules**

The Beijing Rules provides guidelines for countries concerning the age of criminal responsibility, including other important provisions which will be discussed later in this chapter. This part will first look at the scope and application of the Beijing Rules and whether it is binding on all States. Secondly, the relevant objectives and conceptual aspects of the Beijing Rules will be examined and thirdly, it is important to look at what age a child soldier could be held accountable for the commission of crimes under international law, and whether such an age of criminal responsibility can be regulated globally.

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71 See, for example, Crane D M (2008) 15 *Human Rights Brief* 15; Singer P *Children at War* (2005) 155.

### *(1) scope and application of the Beijing Rules*

The following questions will be examined in order to analyse the binding power of the Beijing Rules: (1) are the Rules binding to the Member States and non-Member States of the UN; and (2) do they form part of customary international law.

First, the Beijing Rules are not legally binding upon Member States and non-Members of the UN, but provide recommendations for Member States when dealing with juveniles in conflict with the law.<sup>72</sup> It is recommended for all States to follow these Rules as it is the only international legal instrument that is specifically geared towards the administration of juvenile justice.<sup>73</sup> States that have implemented the Beijing Rules should encourage other States to implement the Rules in furtherance of international juvenile justice.

Secondly, can the Beijing Rules be classified as customary international law? Many provisions of the Beijing Rules have been incorporated in the CRC and various other children's rights instruments. However, as an international instrument, Member and non-Member States cannot be legally bound by the Rules and are not under a customary international law obligation to implement these rules. It is, however, hoped that the Beijing Rules can be recognised as customary international law in the future, because of its relevance in the area of juvenile justice, and in particular the prosecution of child soldiers.

### *(2) objectives and conceptual aspects*

The objectives and conceptual aspects of the Beijing Rules play an important part in the development of international juvenile justice. Two objectives contained in the Beijing Rules require special mentioning. First, the promotion of the well-being of the juvenile is

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72 See Happold M (2008) 29 *University of La Verne Law Review* 75, 84.

73 See Happold M (2008) 29 *University of La Verne Law Review* 75.

of utmost importance.<sup>74</sup> Juvenile justice deals with juveniles who are vulnerable and who need special protection, especially when it comes to sanctions and procedures. Secondly, the principle of proportionality also needs to be considered in juvenile justice cases, and not only in adult cases.<sup>75</sup> This refers to the juvenile's personal life and circumstances before and after the offence and his attitude towards the victims of the offence. The juvenile has to realise that unlawful conduct is wrong.

It is important for States to consider implementing the conceptual framework of the Beijing Rules. In this regard, the definition of a "juvenile" is very important, as this can be regarded as a universal definition of a juvenile. A "juvenile" is defined in the Beijing Rules as: 'a child or young person who, under the respective legal system, may be dealt with for an offence in a manner which is different from an adult'.<sup>76</sup> What stands out in the definition of a juvenile is that juveniles will be prosecuted differently from adults. For example, this refers to the difference in legal procedures to which adult and juvenile offenders are subjected. Once such a difference can be found where the juvenile's case is held *in camera* whereas the adult offender's case is held in an open court. This difference between juveniles and adults results from the fact that juveniles have not yet reached the level of maturity that adults have, while juveniles are also regarded as minors who do not have access to the certain rights that adults have.<sup>77</sup> This does not mean that juveniles cannot be held responsible for the crimes they have committed, but that they are subjected to juvenile justice provisions that take into consideration that they must be treated differently from adult offenders.

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74 Rule 1.1 and 5.1 of the Beijing Rules.

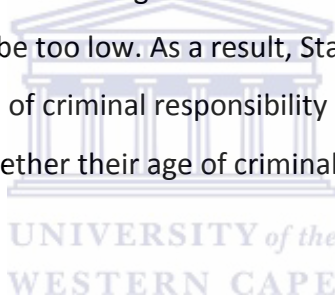
75 Rule 5.1 of the Beijing Rules.

76 Rule 2.2(a) of the Beijing Rules. The Havana Rules defines a juvenile as any person below the age of 18. See Rule 11(a) of the Havana Rules.

77 Generally see McDiarmid C *Childhood and Crime* (2007); Munn N J (2012) 38 *Social Theory and Practice*. Also see Carroll J E (2015-2016) 94 *North Carolina Law Review* 569.

### *(3) age of criminal responsibility*

The Beijing Rules was the first legal instrument to specifically deal with the age at which a juvenile should be held accountable. The Beijing Rules states that: ‘In those legal systems recognizing the concept of the age of criminal responsibility for juveniles, the beginning of that age shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity’.<sup>78</sup> Moreover, the definition of a juvenile under Rule 2.2 of the Beijing Rules only refers to a juvenile as a young person and does not provide a specific minimum age. This means that a juvenile offender can be as young as seven years old under the definition of “juvenile” in the Beijing Rules. However, to prevent such a misleading interpretation of the definition of juvenile, the Beijing Rules provide that the minimum age of criminal responsibility should not be set at an age that is considered to be too low. As a result, States are recommended to ensure that their minimum age of criminal responsibility is not set at a low age. A duty rest on States to determine whether their age of criminal responsibility is set at an appropriate age.



In addition, courts also have to consider certain factors like emotional, mental and intellectual maturity.<sup>79</sup> In other words, courts should establish whether the juvenile is capable of distinguishing between good and evil and whether he has reached a certain level of emotional, mental and intellectual maturity. Nevertheless, the implementation of this provision into the domestic legal frameworks of Member States has not always been fruitful. The minimum age of criminal responsibility differs from State to State. Reports submitted by States Parties to the CRC indicate that there is a wide range of minimum ages of criminal responsibility.<sup>80</sup> Worldwide, minimum ages range from the

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78 Rule 4.1 of the Beijing Rules.

79 Rule 4.1 of the Beijing Rules.

80 See, for example, General Comment No. 10 to the CRC paragraph 30. See Chapter 6.1.6 for a discussion of General Comment No. 10 to the CRC.



age of seven up to 18.<sup>81</sup> India has one of the lowest ages of criminal responsibility set at the age of seven years, as opposed to Belgium and Luxembourg, who provide an age of criminal responsibility of 18 years. Other examples are New Zealand (10), Canada and Netherlands (12), France (13) and Spain (16).<sup>82</sup> The differences in age limits between States occur due to each State's individual domestic laws concerning criminal responsibility and its interpretation thereof. The Commentary to the Beijing Rules provides that:

'The modern approach would be to consider whether a child can live up to the moral and psychological components of criminal responsibility; that is, whether a child, by virtue of her or his individual discernment and understanding can be held responsible for essentially anti-social behaviour'.<sup>83</sup>

The notion of responsibility would become meaningless if the age of criminal responsibility is fixed too low or if there is no lower age limit at all.<sup>84</sup> Also, there is a close relationship between the juvenile's criminal behaviour, social rights and responsibilities such as marital status and voting age.<sup>85</sup> Some States may not agree with comparing the age of criminal responsibility with the marital status age, yet it can serve as a guideline for States that are uncertain of how to go about fixing a minimum age of

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81 For example, Article 82 of the Indian Penal Code 1860 sets the minimum age of criminal responsibility in India at the age of seven. Article 83 of the Indian Penal Code 1860 provides that there is a rebuttable presumption that children between the ages of seven and 12 are incapable of committing any crimes. In contrast, Belgium's minimum age of criminal responsibility is established at the age of 18. The Protection of Young Persons Act 1965 provides that minors between the ages of 16 and 18 can only be placed in detention if they commit a serious offence, and if such offence would receive an adult sentence of five to ten years or more. If the minor's offence would receive a sentence of less than five years or where the minor was under the age of 16 when he committed the crime, the minor will then be subject to custodial, preventive or educational measures. See Article 38 of the Protection of Young Persons Act 1965. The Act was enacted on 8 April 1965. Also see Consideration of Reports Submitted by State Parties under Article 44 of the Convention: Third and Fourth Periodic Reports of States Parties due in 2007, Belgium CRC/C/BEL/3-4 (4 December 2009).

82 See Ashworth A and Horder J *Principles of Criminal Law* 7ed (2013) 139-140; Ormerod D *Smith and Hogan's Criminal Law* 13ed (2011) 611.

83 Commentary to Beijing Rule 4.1. Note that the Commentary to the Beijing Rules is included within the Beijing Rules document.

84 Commentary to Beijing Rule 4.1.

85 See Commentary to Beijing Rule 4.1.

criminal responsibility. It is thus important for States to establish an age of criminal responsibility that is not too low. If States fail to do so, then child soldiers who commit crimes under international law could be unlawfully prosecuted, considering that they might be too young to stand trial for the commission of international crimes.

#### **6.1.6 General Comment No. 10 to the CRC**

General Comment No. 10 to the CRC (hereafter, General Comment No. 10) was published subsequent to the forty-fourth session of the Committee on the Rights of a Child which was held in Geneva from 15 January to 2 February 2007.<sup>86</sup> States Parties to the CRC are required to submit an initial report within two years after ratification and to submit a progress report every five years.<sup>87</sup> The CRC reviewed the reports of the States Parties prior to the 2007 session and held that States Parties required further guidance and recommendations concerning the administration of juvenile justice.<sup>88</sup> States Parties to the CRC are required to develop and implement a comprehensive juvenile justice policy.<sup>89</sup> That being said, what does General Comment No. 10 provide regarding the age of criminal responsibility of child soldiers in States Parties?

After reviewing the reports of the States Parties regarding the age of criminal responsibility, the CRC noted that there are several countries that define the age of

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86 General Comment No. 10 to the Committee on the Rights of a Child: Children's Rights in Juvenile Justice, CRC/C/GC/10, 25 April 2007.

87 Article 44(1) of the CRC. The Committee to the CRC examines the reports of States Parties and gives recommendations by way of concluding remarks. See Office of the United Nations High Commissioner for Human Rights 'Committee on the Rights of the Child: Monitoring Children's Rights' (2012) <http://www2.ohchr.org/english/bodies/crc/> (accessed 2 May 2012). It is submitted that States Parties to the CRC need to be pressurised by the Committee to the CRC to submit their progress reports to the CRC, in order for their juvenile justice systems to be in accordance with the regulations of the CRC. It is also important for the CRC to communicate with States Parties when there is a problem with the juvenile justice regime of a State Party. The accountability of juveniles primarily remains a matter for domestic courts, but international instruments like the CRC need to guide States Parties into dealing with this issue in a manner which effectively deals with both the perpetrator of the offence and those affected by the offence.

88 General Comment No. 10 paragraph 3.

89 General Comment No. 10 paragraph 4.

criminal responsibility in light of a multi-level minimum age approach.<sup>90</sup> This approach occurs in a few countries, including South Africa, where the lower minimum age is 10 and the higher minimum age is 14 years, hereby creating a multi-level minimum age.<sup>91</sup> Thus, children who at the time of the commission of a crime, are above the minimum age, but below the higher minimum age, are presumed to be incapable of committing a crime.<sup>92</sup> The onus is on the State to prove that the juvenile had the required maturity and understanding to know that what he did was wrong and that he is criminally responsible for the commission of the offence.

General Comment No. 10 also notes that in practice, the evaluation of the juvenile's maturity is left up to the court to decide, often without the testimony of a psychological expert.<sup>93</sup> As a result, the lower minimum age is used to prosecute young juveniles believed to have the required maturity to commit a crime.<sup>94</sup> Consequently, General Comment No. 10 asserts that the system of two minimum age limits is confusing and leaves too much to the discretion of the court, which it feels may result in discrimination against juveniles.<sup>95</sup> The author of this thesis, however, disagrees with this notion. What is clear and should not cause any confusion is that there is a lower minimum age and that there is a higher minimum age of criminal responsibility. When a juvenile offender falls between these age levels, a rebuttable presumption of non-responsibility may exist in certain domestic courts.

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90 General Comment No. 10 paragraph 30.

91 See Article 4(2) of the CJA. Sri Lanka also applies a multi-level minimum age of criminal responsibility. Section 76 of the Sri-Lankan Penal Code provides that: 'Nothing is an offence which is done by a child above eight years of age and under twelve, who has not attained sufficient maturity of understanding to judge of the nature and consequence of his conduct on that occasion'.

92 See General Comment No. 10 paragraph 30.

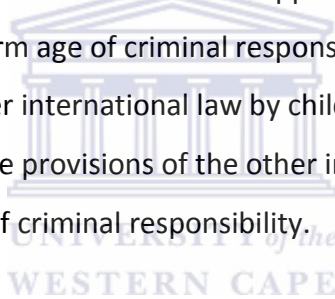
93 General Comment No. 10 paragraph 30.

94 See General Comment No. 10 paragraph 30.

95 General Comment No. 10 paragraph 30. Also see General Comment No. 10 paragraph 34, where the use of a lower minimum age of criminal responsibility by States Parties is criticised, in cases where the child committed a serious crime or where the child is criminally responsible for the commission of the offence.

The two levels of minimum ages are important, because some States submit that younger children are capable of crime. If this was not the case, young children would be immune from prosecution. However, this does not mean that children of a young age will be prosecuted on a large scale, as the onus is on the State to prove that the juvenile acted wrongfully. On the whole, it is difficult to prove that the juvenile acted wrongfully since the juvenile's level of maturity is not as developed as with adults.<sup>96</sup> It is therefore also important that juvenile cases are heard before a judge and bench that are experienced in dealing with juveniles in conflict with the law.

Apart from the multi-level age of criminal responsibility, General Comment No. 10 importantly provides for a ground-breaking section concerning the age of criminal responsibility. It is important, because it offers the opportunity for States Parties to consider implementing a uniform age of criminal responsibility, which can be applied to the commission of crimes under international law by child soldiers. This provision will be discussed, while considering the provisions of the other international instruments concerning the minimum age of criminal responsibility.



### **6.1.7 Uniform Age of Criminal Responsibility**

General Comment No. 10 establishes the minimum age of criminal responsibility at the age of 12 years. It goes without saying that this is an important step in the right direction concerning the prosecution of child soldiers under international law. General Comment No. 10 affirms that an age of criminal responsibility below the age of 12 years is not an acceptable international standard.<sup>97</sup> The aim of the provision is not to allow States Parties to lower their minimum ages to 12.<sup>98</sup> They should rather be encouraged

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96 See Maher G 'Age and Criminal Responsibility' (2005) 2 *Ohio State Journal of Criminal Law* 495; Saffy J A in Bezuidenhout C and Joubert S (eds) *Child and Youth Misbehaviour in South Africa: A Holistic View* (2003) 43.

97 General Comment No. 10 paragraph 32. Also see Cipriani D *Children's Rights and the Minimum Age of Criminal Responsibility: A Global Perspective* (2009) 58.

98 General Comment No. 10 paragraph 32.

to increase the minimum age, especially those countries whose minimum ages are below 12 years.<sup>99</sup> Joseph Rikhof, who also argues in favour of a minimum age of 12, bases his argument on the fact that during the negotiations leading up to the Rome Statute, the international consensus was that an age of criminal responsibility had to be established when a child were to commit an international crime.<sup>100</sup> The preparatory documents reveal that a minimum age of 12 was consistently recommended during the meetings, yet it was decided that the ICC will not have the jurisdiction to prosecute children under the age of 18.<sup>101</sup> General Comment No. 10 becomes the first international instrument to establish a uniform minimum age of criminal responsibility, even though States Parties to the CRC are not legally obliged to incorporate the age limit into their domestic legal frameworks. Nonetheless, with the uniform minimum age of 12, General Comment No. 10 sheds some much needed light on this gloomy area of juvenile justice.

However, the author of this thesis believes that a minimum age of criminal responsibility of 12 is set at too low an age. It is submitted that the minimum age of criminal responsibility should be set at the age of 15. Thus, children older than 15, but younger than 18, should be held accountable for the commission of international crimes. Why recommend an increase of the age of 12 to 15? Although children between the ages of 12 and 15 have reached puberty, they can still be considered to lack a level of maturity.<sup>102</sup> It is submitted that such a level of maturity is required to be held accountable for the commission of an international crime by domestic courts.<sup>103</sup> The defence would also have to argue that the juvenile had the requisite intent when he

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99 General Comment No. 10 paragraph 32. Also see Cipriani D *Children's Rights and the Minimum Age of Criminal Responsibility: A Global Perspective* (2009) 58.

100 Rikhof J Sword and Scale, May 2009, CBA National Military Law Section Newsletter (2009) [http://www.cba.org/CBA/newsletters-sections/pdf/05-09-military\\_2.pdf](http://www.cba.org/CBA/newsletters-sections/pdf/05-09-military_2.pdf) (accessed 3 February 2010) 8.

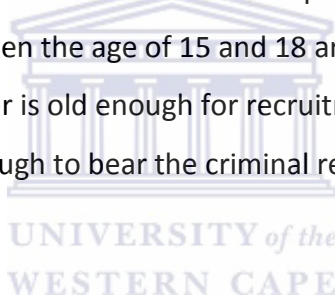
101 See Rikhof J Sword and Scale, May 2009, CBA National Military Law Section Newsletter (2009) [http://www.cba.org/CBA/newsletters-sections/pdf/05-09-military\\_2.pdf](http://www.cba.org/CBA/newsletters-sections/pdf/05-09-military_2.pdf) (accessed 3 February 2010) 8.

102 See, for example, Kahn L (ed) *Child Soldiers* (2008) 100. Also see Happold M *Child Soldiers in International Law* (2005) 33.

103 See Crane D M (2008) 15 *Human Rights Brief* 15.

committed the offence.<sup>104</sup> It is submitted that children under the age of 15 do not have the capacity to form such intent due to a lack of maturity and understanding of the core crimes under international law.<sup>105</sup>

Moreover, it is submitted that a child under the age of 15 may know that the commission of an international crime is wrong, but does the child act in accordance with such appreciation? The author believes that a child under the age of 15 does not know how to act in accordance with the understanding that a crime under international law is unlawful. The child may commit the act and know that it is wrong, but he does not know and understand the consequences of such an act. The question can then be asked, why not set an age limit of 14 years or 16 years? Article 8(2)(b)(xxvi) and Article 8(2)(e)(vii) of the ICC Statute criminalises the enlistment and conscription of child soldiers under the age of 15. Child soldiers between the age of 15 and 18 are therefore not included in this provision. Thus, if a child soldier is old enough for recruitment in the armed hostilities, he must be considered old enough to bear the criminal responsibility for his conduct as a child soldier.<sup>106</sup>



The minimum age of 15 is further recommended, because the Special Court for Sierra Leone criminalises the commission of offences by child soldiers, who were between 15 and 18 years at the time of the commission of the offence. This is the only international instrument to criminalise the commission of an international offence by a child soldier.<sup>107</sup> In effect, the regulation provides that children below the age of 15 at the time of the commission of the offence cannot be held responsible for the commission of international crimes. Clark and Triffterer argue that children under the age of 15 who

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104 See Crane D M (2008) 15 *Human Rights Brief* 15.

105 See, for example, Crane D M (2008) 15 *Human Rights Brief* 15.

106 Grover S C *Child Soldier Victims of Genocidal Forcible Transfer: Exonerating Child Soldiers Charged with Grave Conflict-related International Crimes* (2012) 62.

107 See Clark R S and Triffterer O in Triffterer O (ed) *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (2008) 777; Cohn I 'The Protection of Children and the Quest for Truth and Justice in Sierra Leone' (2001) 55 *Journal of International Affairs* 1.

have been recruited into an armed group and who have committed an international crime should not be prosecuted, because they should rather be seen as victims and not perpetrators of international crimes.<sup>108</sup> Indeed, they are victimised twice, the first time when they are recruited into an armed group and used as a soldier, and the second time when they are alleged to have committed an international crime.<sup>109</sup> Moreover, Clarke and Triffterer submit that children under the age of 15 can be held responsible for the commission of international crimes if they were not victimised and used as child soldiers as embedded in Article 8(2)(b)(xxvi) of the ICC Statute.<sup>110</sup>

However, while the author agrees with the first statement of Clarke and Triffterer that children under the age of 15 should not be held responsible for the commission of international crimes, the second statement that children under the age of 15 may well be held responsible when they were not used as child soldiers, is unclear. Children who commit international crimes and do so while they are not in an armed group or who are not being used by another individual, should not be held accountable, because they lack the level of maturity that those children older than 15 have. Even if they are not used in an armed group, they may have been influenced by various social factors like a lack of education and poverty, which may have affected their level of development and growth to maturity. The statement of Clarke and Triffterer is especially vague, because it is hard to imagine a child who commits an international crime and who is not part of an armed group who is controlled by an individual older than the age of 18. However, there may exist armed groups that consist only of persons under the age of 18, but this is not well documented. Yet, even if such groups exist or are formed, children under the age of 15 should not be held responsible as they will also have to deal with the authority of older

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108 See Clark R S and Triffterer O in Triffterer O (ed) *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (2008) 777; Wessells M *Child Soldiers: From Violence to Protection* (2006) 220.

109 See Clark R S and Triffterer O in Triffterer O (ed) *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (2008) 777.

110 Article 8(2)(b)(xxvi) of the ICC Statute makes it a war crime to conscript and enlist child soldiers under the age of 15 years into national armed forces or to use them in hostilities during an international armed conflict.



children in that group and may be subjected to indoctrination, intoxication and duress among other factors, notwithstanding the fact that they do not have the same level of maturity than children older than 15.<sup>111</sup> Happold argues that there are different levels of maturity evident in younger children and those who are more mature.<sup>112</sup> Although Happold does not distinctly define what he means by 'younger children', it can be inferred from his discussion that he refers to children under the age of 15, seeing that he constantly makes a distinction between children older than 15 and children younger than 15.<sup>113</sup> While referring to 'younger children', Happold states that: 'Their lack of inhibition and suggestibility means they are less disciplined and more likely to commit atrocities'.<sup>114</sup> Indeed, children under the age of 15 are not as disciplined and matured as children older than 15 and these younger children do not fully understand the consequences of committing an international crime. It is submitted that children under the age of 15 should not be held responsible for the commission of international crimes, while child soldiers between the ages of 15 and 18 could be held accountable for the commission of crimes under international law on a case-by-case basis.<sup>115</sup> The author uses the wording "could" in the above-mentioned sentence to indicate that it is not the intention of the author to argue that all child soldiers between the ages of 15 and 18 should be prosecuted, but the proposal is merely that 15 should be regarded as a uniform age of criminal responsibility in the event where a juvenile has committed a crime under international law. Once it has been established that a child soldier can be held responsible under international law and that he will be prosecuted, various procedural law matters have to be considered before and after judgment and sentencing to ensure that the child soldier receives a fair trial.

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111 See, for example, Kahn L (ed) *Child Soldiers* (2008) 100.

112 Happold M *Child Soldiers in International Law* (2005) 33. Also see Cohn I and Goodwin-Gill G S *Child Soldiers: The Role of Children in Armed Conflict* (1994) 7; Morgan R and Newburn T in Maguire M, Morgan R and Reiner R (eds) *The Oxford Handbook of Criminology* 5ed (2012) 491-492; Rosen D M *Armies of the Young: Child Soldiers in War and Terrorism* (2005) 3.

113 Happold M *Child Soldiers in International Law* (2005) 33.

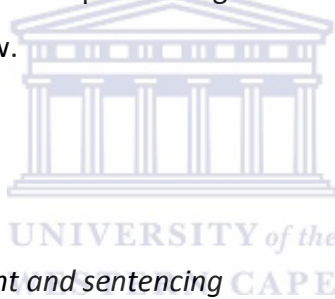
114 Happold M *Child Soldiers in International Law* (2005) 33. Also see Cohn I and Goodwin-Gill G S *Child Soldiers: The Role of Children in Armed Conflict* (1994) 7; Rosen D M *Armies of the Young: Child Soldiers in War and Terrorism* (2005) 3.

115 See, for example, Thomas M A (2013) 44 *California Western International Law Journal* 5. Also see Wessells M *Child Soldiers: From Violence to Protection* (2006) 218-220.

## 6.2 Procedural Law

Procedural law matters are often overlooked in juvenile cases. There are only a few cases where child soldiers have committed crimes under international law, thus making it important to examine the relevant procedural law regulations under international law and their possible application in child soldier cases. We will specifically examine the proceedings before and after trial and sentencing. First, we will examine the relevant provisions of the Beijing Rules. Secondly, the provisions of General Comment No. 10 to the CRC will be examined. Lastly, the United Nations Guidelines for the Prevention of Juvenile Delinquency (hereafter, the Riyadh Guidelines) and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (hereafter, the Havana Rules), specifically provide guidelines on the proceedings after the trial and sentencing of child soldiers under international law.

### 6.2.1 The Beijing Rules



#### *(1) proceedings before judgment and sentencing*

Rule 10.1 of the Beijing Rules deals with the situation after the juvenile has been apprehended for the commission of a crime. A judge or competent official shall consider releasing the juvenile from apprehension if the juvenile is in a situation that may be harmful to the juvenile, for example, the apprehension of a seven-year-old as a first time offender.<sup>116</sup> Rule 11 deals with diverting the case of the juvenile from formal trial procedures to other alternative proceedings provided by the court. The practice of diversion serves to prevent the negative effect of subsequent trials and proceedings on the juvenile.<sup>117</sup> The practice usually applies to minor offences like theft and other less serious crimes.<sup>118</sup>

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116 Rule 10.2 of the Beijing Rules.

117 Commentary to Rule 11 of the Beijing Rules.

118 Commentary to Rule 11 of the Beijing Rules.

Rule 13 deals with detention pending trial. It provides furthermore that detention pending trial should be used as a measure of last resort and an alternative to detention should be considered whenever possible. Rule 14 provides that where a juvenile's case has not been diverted, a competent authority (e.g. court, tribunal, board) will deal with the juvenile's case in accordance with the principles of a fair and just trial. The trial has to adhere to due process of law, the fair and just trial guidelines and the rights of the juvenile enshrined in the Beijing Rules.<sup>119</sup> The juvenile's parents or guardians can attend the proceedings and may also be instructed by the court to attend, while they may also be prohibited from attending if their presence would have a negative effect on the proceedings.<sup>120</sup>

In many child soldier cases, the attendance of the child's parents or guardians and legal representation might not be feasible.<sup>121</sup> Many child soldiers are orphans or become orphans subsequent to a war, and consequently have little or no contact with other family members or friends. Moreover, in those areas of the world where child soldiers are prevalent, the justice systems are often depleted of their resources due to the effect of war, which means that the former child soldiers would be deprived of the right to legal representation if they were to be prosecuted. The juvenile's living conditions and circumstances prior and subsequent to the commission of the crime are also of grave importance. Rule 16.1 requires that a social inquiry report be written of such circumstances which may have affected the child soldier before the crime.<sup>122</sup> A social inquiry report includes information such as the juvenile's living conditions, education and health prior and after the commission of the offence and forms an integral part of the juvenile's case.

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119 Commentary to Rule 14 of the Beijing Rules. Also see Rule 7.1 of the Beijing Rules to view the various rights of the juvenile.

120 Rule 15.2 of the Beijing Rules.

121 The legal representation of juveniles is contained in Rule 15.1 of the Beijing Rules.

122 The social inquiry report should include the juvenile's social and family background and educational experiences, like the juvenile's school career for example. See Commentary to Rule 16 of the Beijing Rules.

## *(2) proceedings after judgment and sentencing*

Rules 17-19 of the Beijing Rules deal with the important provisions concerning juvenile sanctioning and institutionalisation. Various factors should be considered by the court when juveniles are sanctioned, including: (1) the circumstances and the gravity of the offence; (2) the circumstances and the needs of the juvenile; and (3) the circumstances and needs of society.<sup>123</sup> Rule 18 sets out the alternatives to imprisonment, including community service.<sup>124</sup> Rule 19 determines that the incarceration of a juvenile shall always be a measure of last resort and for the minimum necessary period. Rule 19 restricts institutionalisation in quantity ('last resort') and in time ('minimum necessary period').<sup>125</sup> In other words, a juvenile will only be detained if all other alternatives have been considered and that detention shall only be applied for the shortest time.<sup>126</sup> One aspect, which Rule 19 does not refer to, is whether it is in the interest of public safety to release the juvenile. The judge who presides over the juvenile's case will have to decide whether the juvenile will pose a danger to society if he is released from detention. It can be a difficult decision for a judge to release a child soldier from detention, especially in the case where a child soldier was severely indoctrinated by the armed group and poses an imminent danger to the society, if released.

There are organisations that support institutional measures like juvenile imprisonment, while other groups are opposed to such measures. Human rights organisations and

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123 See Rule 17.1(a) of the Beijing Rules.

124 Other alternatives to institutionalisation as set out in Rule 18.1 of the Beijing Rules, include care, guidance and supervision orders; probation; financial penalties, including compensation and restitution; intermediate treatment orders; orders to participate in group counselling and similar activities; orders concerning foster care, living communities or other educational settings; and other relevant orders.

125 Commentary to Rule 19 of the Beijing Rules.

126 Rule 19 is in accordance with one of the principles of resolution 4(10) in Chapter 1(c) of the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders 1980, providing that juveniles should not be incarcerated unless a serious crime has been committed; a serious crime has been committed against another person; persistence of the commission of a crime; and where there is no other appropriate response. Also see Commentary to Rule 19 of the Beijing Rules.

children's rights activists generally lean towards non-institutionalisation measures like rehabilitation, seeing that they are not in favour of the incarceration of juveniles. The Beijing Rules provides that juvenile justice is regularly faced with unresolved conflicts, such as, rehabilitation versus incarceration, assistance versus punishment and general deterrence versus individual incapacitation.<sup>127</sup> The debate regarding rehabilitation and incarceration is particularly relevant in child soldier cases, such as the case in Sierra Leone where child soldiers were rehabilitated instead of being prosecuted and imprisoned. It is submitted that human rights groups and other institutions that demand the implementation of non-institutional measures, must not influence the justice system of a State where juveniles have committed crimes under international law. It is imperative that these courts look at each juvenile case on an individual basis and determine whether it is necessary to implement institutional measures.

In addition, children are generally seen as vulnerable and dependent on their relatives, thus juveniles who are convicted of serious offences will only be subjected to institutional measures like imprisonment, if the court has taken all the circumstances of the juvenile into account. This is very protective in nature, but it does not mean that juveniles cannot be imprisoned. What is important is that a juvenile's case must be handled differently from adult cases, especially when a juvenile's sentence is determined. For example, child soldiers face many challenges when they initially volunteer to join armed groups, which need to be considered when the child soldier is sentenced for the commission of an offence. The aim of institutional measures like imprisonment is to make the juvenile aware of the fact that he committed a serious offence.<sup>128</sup> Therefore, ideally the juvenile should acknowledge that his conduct was unlawful and realise that there is more to life than just war.

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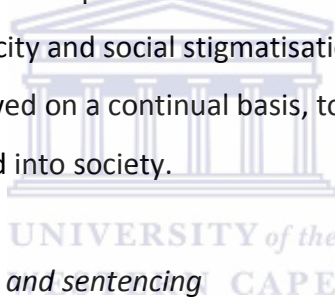
127 Commentary to Rule 17 of the Beijing Rules.

128 Moreover, the objective of institutionalisation according to Rule 26.1 of the Beijing Rules is to provide education and vocational skills and assist the juvenile to assume socially constructive and productive roles in society.

## 6.2.2 General Comment No. 10 to the CRC

### *(1) proceedings before judgment and sentencing*

The Committee of the CRC provides that States Parties should consider all other possible measures, before detaining a juvenile prior to the trial.<sup>129</sup> The Committee also holds that the use of pre-trial detention violates the presumption of innocence and argues that a juvenile should only be detained for the shortest period of time.<sup>130</sup> Here, it is the presiding judge of the State Party who must decide how long a child soldier will be detained, taking into consideration the child's circumstances prior to and after the commission of the offence. The Committee furthermore reminds States Parties that the deprivation of liberty should not hamper the child's reintegration into his community, such as through negative publicity and social stigmatisation.<sup>131</sup> It is submitted that juvenile cases should be reviewed on a continual basis, to establish when the juvenile will be ready to be reintegrated into society.



### *(2) proceedings after judgment and sentencing*

During the trial, a decision has to be made regarding the measures that will be imposed on the convicted juvenile.<sup>132</sup> The penal law of the State needs to provide the judge of the court with a list of measures and alternatives to institutional care and the deprivation of liberty.<sup>133</sup>

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129 General Comment No. 10 paragraph 28. Also see Article 37(b) of the CRC.

130 General Comment No. 10 paragraph 28 and 80. Also see Article 37(b) of the CRC.

131 General Comment No. 10 paragraph 29.

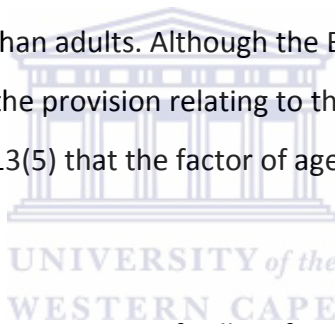
132 General Comment No. 10 paragraph 70.

133 General Comment No. 10 paragraph 70. See Article 40(4) of the CRC to view the alternative measures to institutionalisation.

Regarding the decision of the judge in juvenile cases to revert to institutional measures or non-institutional measures, the Committee asserts that:

‘the reaction to an offence should always be in proportion not only to the circumstances and the gravity of the offence, but also to the age, lesser culpability, circumstances and needs of the child, as well as the various and particularly long-term needs of the society’.<sup>134</sup>

As is the case with the Beijing Rules, certain factors like the type of offence, the age of culpability of the juvenile and the needs of society all play a crucial role during sanctioning.<sup>135</sup> General Comment No. 10 additionally provide that States Parties should not only look at the circumstances and needs of the juvenile, but also at the juvenile’s age at the time of the commission of the crime and the fact that juveniles are less capable of committing crimes than adults. Although the Beijing Rules do not specifically refer to the age of the child in the provision relating to the criteria for sanctioning, it does however provide in Rule 13(5) that the factor of age should be considered once the child has been detained.



The fact that General Comment No. 10 specifically refers to the age and culpability of the juvenile is of paramount importance. The age of the juvenile at the time of the commission of the offence and to a lesser extent, the time of sanctioning, play a vital role during sanctioning. The lower the age of the juvenile at the time of the commission of the offence, the lesser the sanction that will then be imposed, for example, a community service order of 1 month instead of 9 months. General Comment No. 10 also maintains that the culpability of the juvenile should be taken into consideration when a juvenile sanction is imposed. Juveniles are presumed to have a lower level of culpability than adults, which need to be taken into account especially when sentencing is considered.<sup>136</sup>

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134 General Comment No. 10 paragraph 71.

135 See Rule 17(1)(a) of the Beijing Rules.

136 See, for example, Crane D M (2008) 15 *Human Rights Brief* 15; Happold M *Child Soldiers in International Law* (2005) 33; Kahn L (ed) *Child Soldiers* (2008) 100.



### 6.2.3 The Riyadh Guidelines

The United Nations Guidelines for the Prevention of Juvenile Delinquency (hereafter, the Riyadh Guidelines) is a set of international guidelines that deal with matters concerning juvenile sanctioning.<sup>137</sup> It is referred to as the Riyadh Guidelines, since a meeting was held in Riyadh in 1988, where a draft text of the Riyadh Guidelines was discussed. Both the Riyadh Guidelines and the Havana Rules (which will be dealt with next) complement the Beijing Rules regarding the administration of juvenile justice.<sup>138</sup> The Riyadh Guidelines is soft law as it is not legally binding on States. However, Article 4 of the Guidelines provides that the guidelines should be implemented by States in accordance with the States' national legal system, while Article 7 of the Riyadh Guidelines provides that the provisions of the Riyadh Guidelines should be implemented in all the United Nations instruments related to children's rights, most importantly, the CRC. Thus, it is important also for States to incorporate the Riyadh Guidelines into their domestic legal regimes.



The Guidelines mainly deals with the institutionalisation of juveniles under international law. As is the case with the Beijing Rules and General Comment No. 10, the Riyadh Guidelines provides that the institutionalisation of juveniles should be a measure of last resort, for the shortest period, and that the best interests of the juvenile should be taken into consideration.<sup>139</sup> The Riyadh Guidelines also provides that institutionalisation should be avoided in the following situations: (a) where the parents or guardians caused harm to the juvenile; (b) where the juvenile has suffered sexual, physical or emotional abuse; (c) where the juvenile has been abandoned or neglected by his parents or

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137 The Riyadh Guidelines were adopted and proclaimed by General Assembly Resolution 45/112 on 14 December 1990.


138 Cappelaere G 'United Nations Guidelines for the Prevention of Juvenile Delinquency: The Riyadh Guidelines' (2013) [http://www.child-abuse.com/childhouse/childrens\\_rights/dci\\_del8.html](http://www.child-abuse.com/childhouse/childrens_rights/dci_del8.html) (accessed 21 May 2013).

139 Article 46 of the Riyadh Guidelines. In addition, the Riyadh Guidelines provides that harsh disciplinary measures and sanctions like corporal punishment should be avoided. See Article 21(b) of the Riyadh Guidelines.

guardians; (d) where the behaviour of his parents or guardians has caused physical or moral danger/risk to the juvenile; and (e) where a psychological or physical danger/risk has manifested itself in the juvenile's own behaviour and the only means of dealing with this danger is to institutionalise the juvenile.<sup>140</sup>

Most of these situations focus on the abuse of juveniles. These abusive practises have a profound impact on the behaviour of the juvenile and may result in the commission of an offence by a juvenile. Therefore, juveniles who fall within the scope of these institutional limitations as regulated by the Riyadh Guidelines, should not be subjected to harsh sentences. Alternatives to the deprivation of liberty, including community service and house arrest, should rather be considered.

#### **6.2.4 The Havana Rules**



The United Nations Rules for the Protection of Juveniles Deprived of their Liberty (hereafter, the Havana Rules) deals with issues specific to the detention and imprisonment of juveniles.<sup>141</sup> The Havana Rules was birthed out of the Eight United Nations Congress on the Prevention of Crime and the Treatment of Offenders held in Havana from 27 August to 7 September 1990. Rule 7 of the Havana Rules provides that the provisions of the Havana Rules should be implemented in the national legal system of States. The Havana Rules does not have the same binding power as the Riyadh Guidelines, since it was not recommended by the General Assembly that the Havana Rules be implemented into United Nations instruments like the CRC. In addition to providing guidelines for the proceedings before and after judgment and sentencing, the Havana Rules also includes important guidelines on the minimum age for the deprivation of liberty, also known as the minimum age of institutionalisation, which shall be discussed first.

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140 Article 46 of the Riyadh Guidelines.

141 The Havana Rules was adopted by General Assembly Resolution 45/113 of 14 December 1990.

### *(1) minimum age for the deprivation of liberty*

The minimum age for the deprivation of liberty is an issue that has received scant international attention. There is a difference between the minimum age of criminal responsibility and the minimum age for the deprivation of liberty. Whereas the minimum age of criminal responsibility exempts children of a specified age from prosecution, the minimum age for the deprivation of liberty refers to the age below which a juvenile may not be incarcerated or institutionalised. This important task of regulating a minimum age for deprivation of liberty, lies solely in the hands of the Havana Rules since this regulation is omitted in the Beijing Rules and General Comment No. 10. It is not exactly clear why the provision is omitted from these instruments. However, it is assumed that this matter was exclusively reserved for discussion at the Havana Rules meeting, which specifically dealt with juvenile sanctioning provisions. Nonetheless, Rule 11(a) of the Havana Rules provides that: 'The age limit below which it should not be permitted to deprive a child of his or her liberty should be determined by law'. It is unclear from the above provision what is meant by the phrase 'should be determined by law', but it is submitted that it is essentially left up to States to determine a minimum age below which juveniles will not be institutionalised. In this vein, it is of utmost importance to ensure that convicted child soldiers are not institutionalised at an age that is too low, otherwise the rehabilitation of such child soldiers could be placed in serious jeopardy. It is thus recommended that States review their minimum age for the deprivation of liberty to be in line with the multiple traumas faced by child soldiers during and after a war.

### *(2) proceedings after judgment and sentencing*

Rule 1 of the Havana Rules provides that juveniles should only be deprived of their liberty as a measure of last resort, for the shortest minimum time and only for serious cases. The Havana Rules is the only international instrument that explicitly limits the

deprivation of liberty to serious cases, for example, when a crime under international law has been committed by a child soldier. The Havana Rules does not provide a list of offences, which would be categorised as serious crimes. Therefore, it is submitted that domestic courts should apply their domestic law in determining the seriousness of the crimes committed by child soldiers.

In conclusion, the sanctioning component of juvenile justice remains a highly challenging area of juvenile law, because it deals with the restriction of the juvenile's liberty. The various legal instruments that have been discussed under juvenile procedural law all place the welfare and best interests of the child as the most important considerations when depriving a juvenile of his liberty. Indeed, in cases where juveniles have committed serious offences, the gravity of the offence and the need for public safety have to be considered, yet the well-being and reintegration of the juvenile should be met with even consideration.<sup>142</sup> It is submitted, that in more serious cases, juveniles have to be incarcerated as they pose a danger to society, but at the same time the incarceration of juveniles should be for the shortest time possible as provided under international law. The CRC, in particular, has to be less protective and more pro-active in clarifying the age under which a child soldier may be placed under detention. Moreover, regional and international co-operation between countries is important to develop and improve their juvenile justice regulations.<sup>143</sup> In East Timor, said co-operation was pivotal in furtherance of its juvenile justice regime.

### **6.3 Prosecuting Child Soldiers in East Timor**

No child soldier has ever been prosecuted for crimes under international law before an international court. As discussed earlier, there has been a notable domestic law case,

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142 General Comment No. 10 paragraph 71. General Comment No. 10 constantly reminds States Parties to keep the juvenile's well-being and best interest in mind, and in this case, even when a serious crime has been committed by the juvenile, underlining the protective nature of the CRC. The Beijing Rules also concentrate on protecting the rights of juveniles.

143 Article 62 of the Riyadh Guidelines. Also see Rule 2.3 of the Beijing Rules.

namely that of Omar Khadr, who was charged before the Military Commission in Guantánamo Bay. However, in 2002, the United Nations Special Panels for Serious Crimes in East Timor (hereafter, Special Panels), convicted and sentenced a juvenile for crimes committed during the conflict in East Timor.<sup>144</sup> This marked the first time that a child soldier was prosecuted before an international court. Interestingly, the juvenile was initially charged with the commission of crimes against humanity, but only for the Court to later amend the charge to murder only. The charges and various other aspects of the case will be examined to establish to what extent the child soldier was accountable for the commission of crimes under international law.

### 6.3.1 Formation and Jurisdiction of the Special Panels

Indonesia's brutal 24 year long reign of East Timor that started in 1975 and came to an abrupt end in 1999, resulted in the commission of many atrocities committed in the area of East Timor, especially during 1999.<sup>145</sup> In 1999, the United Nations appointed its own experts to investigate the atrocities that were committed. This eventually resulted in a call to create an international tribunal that would try the 1999 East Timor atrocities.<sup>146</sup> The Tribunal would be an international tribunal, complete with

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144 Timorese boys and girls often joined resistance movements during the conflict. See Wessells M *Child Soldiers: From Violence to Protection* (2006) 52-53, 182.

145 See Linton S 'New Approaches to International Justice in Cambodia and East Timor' (2002) 84 *International Review of the Red Cross* 103. For a discussion of the history of the conflict in East Timor, generally see Kohen A and Taylor J *An Act of Genocide: Indonesia's Invasion of East Timor* (1979); Linton S (2002) 84 *International Review of the Red Cross*; Taylor J *East Timor: The Price of Freedom* (1999); Reiger C and Wierda M 'The Serious Crimes Process in Timor-Leste: In Retrospect' International Center for Transitional Justice (2006) <https://www.ictj.org/sites/default/files/ICTJ-TimorLeste-Criminal-Process-2006-English.pdf> (accessed 19 May 2016).

146 See United Nations Security Council Resolution 1264 on the Situation in East Timor S/RES/1264 (1999). Also see Burgess P 'Justice and Reconciliation in East Timor: The Relationship Between the Commission for Reception, Truth and Reconciliation and the Courts' in Schabas W A and Darcy S (eds) *Truth Commissions and Courts: The Tension Between Criminal Justice and the Search for Truth* (2004) 136-137; Cryer R (et al) (eds) *An Introduction to International Criminal Law and Procedure* 3ed (2014) 191; Linton S (2002) 84 *International Review of the Red Cross* 104; O'Keefe R *International Criminal Law* (2015) 381; Khan K A A and Dixon R *Archbold International Criminal Courts: Practice, Procedure and Evidence* 3ed (2009) 41-42. Many perpetrators who committed less serious crimes participated in the East Timorese Commission for Reception, Truth and Reconciliation, that was

international judges and domestic judges, although the crimes would be prosecuted throughout domestic courts in East Timor.<sup>147</sup> Here, a novel phenomenon occurs in the enforcement of international criminal law by domestic courts that are also internationalised.<sup>148</sup> The Special Panels in East Timor are similar to the Special Court for Sierra Leone and Extraordinary Chambers in Cambodia, as they are a combination of national and international elements, also referred to as a hybrid court.<sup>149</sup> The Special Panels in East Timor were administered by the United Nations Transitional Administration in East Timor (hereafter, UNTAET).<sup>150</sup> These courts are usually established in such cases where the domestic courts are unable to prosecute perpetrators of crimes under international law, as was the case in East Timor.<sup>151</sup>

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created on 7 February 2002. See Burgess P in Schabas W A and Darcy S (eds) *Truth Commissions and Courts: The Tension Between Criminal Justice and the Search for Truth* (2004) 138, 143-144.

- 147 Each Special Panel consisted of two international judges and one domestic judge. Domestic judges had to be trained. A number of international judges presided over the cases at the Special Panels, including judges from Brazil, Burundi, Cape Verde, Germany, Italy, Portugal, Uganda and the United States. See Reiger C and Wierda M International Center for Transitional Justice (2006) <https://www.ictj.org/sites/default/files/ICTJ-TimorLeste-Criminal-Process-2006-English.pdf> (accessed 19 May 2016). Also see UNTAET Regulation No. 2000/15 of 6 June 2000; Cryer R (et al) (eds) *An Introduction to International Criminal Law and Procedure* 3ed (2014) 193.
- 148 Werle G and Jessberger F *Principles of International Criminal Law* 3ed (2014) 27. Also see Cryer R (et al) (eds) *An Introduction to International Criminal Law and Procedure* 3ed (2014) 193; O'Keefe R *International Criminal Law* (2015) 381-382.
- 149 See Reiger C and Wierda M International Center for Transitional Justice (2006) <https://www.ictj.org/sites/default/files/ICTJ-TimorLeste-Criminal-Process-2006-English.pdf> (accessed 19 May 2016); Werle G and Jessberger F *Principles of International Criminal Law* 3ed (2014) 28. Also see O'Keefe R *International Criminal Law* (2015) 382-383.
- 150 See Cryer R (et al) (eds) *An Introduction to International Criminal Law and Procedure* 3ed (2014) 192; Reiger C and Wierda M International Center for Transitional Justice (2006) <https://www.ictj.org/sites/default/files/ICTJ-TimorLeste-Criminal-Process-2006-English.pdf> (accessed 19 May 2016); Werle G and Jessberger F *Principles of International Criminal Law* 3ed (2014) 28. Also see O'Keefe R *International Criminal Law* (2015) 382. Burgess explains that: 'In addition to military and police components, the job of UNTAET was to create all the structures required for a new nation: to write laws and build institutions dealing with banking and finance, health, education, electricity and water, taxation, immigration, border control, garbage collection, law-making, policing, national defence, elections, justice, the courts and the judiciary, airports, electricity, roads and much more'. See Burgess P in Schabas W A and Darcy S (eds) *Truth Commissions and Courts: The Tension Between Criminal Justice and the Search for Truth* (2004) 136-137.
- 151 See Werle G and Jessberger F *Principles of International Criminal Law* 3ed (2014) 26. Also see Khan K A A and Dixon R *Archbold International Criminal Courts: Practice, Procedure and Evidence* 3ed (2009) 42; O'Keefe R *International Criminal Law* (2015) 381. There was a serious lack of human resources, since most judges, prosecutors and lawyers fled the war-torn area. See Reiger C and Wierda M

The Special Panels for Serious Crimes in East Timor were established within the District Court in Dili, East Timor, pursuant to Section 10 of UNTAET Regulation No. 2000/11 as amended by UNTAET Regulation No. 2001/25.<sup>152</sup> The Special Panels were established to exercise jurisdiction with respect to the commission of genocide, war crimes, crimes against humanity, murder, sexual offences and torture as contained in Sections 4 to 9 of UNTAET Regulation 2000/15. The Special Panels had jurisdiction for the commission of serious criminal offences between 1 January 1999 and 25 October 1999 in accordance with Section 2.3 of UNTAET Regulation 2000/30.<sup>153</sup>

### 6.3.2 Facts of the Case

The accused boy or “X” as referred to in the case, was 14 years old at the time of the commission of the offence.<sup>154</sup> The Court did not disclose the accused’s name during the court proceedings since he was a minor at the time of the commission of the offence and at the time of the court proceedings.<sup>155</sup> The accused was a member of the Sakunar militia group (hereafter, Sakunar) in East Timor.<sup>156</sup> Sakunar operated within the area of Oecussi between April and October 1999.<sup>157</sup> On 9 September 1999, Gabriel Kolo, police officer and commander of Sakunar in the Passabe Village in East Timor, ordered the accused and other members of Sakunar to report to the office of the village chief in

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International Center for Transitional Justice (2006) <https://www.ictj.org/sites/default/files/ICTJ-TimorLeste-Criminal-Process-2006-English.pdf> (accessed 19 May 2016).

152 UNTAET Regulation No. 2000/11 entered into force on 6 March 2000. UNTAET Regulation No. 2001/25 entered into force on 14 September 2001. Also see Cryer R (*et al*) (eds) *An Introduction to International Criminal Law and Procedure* 3ed (2014) 193; Khan K A A and Dixon R *Archbold International Criminal Courts: Practice, Procedure and Evidence* 3ed (2009) 41.

153 The Special Panels under UNTAET administration operated until 2005. The international judges and prosecutors also departed. The domestic courts now handle cases involving crimes under international law. See Cryer R (*et al*) (eds) *An Introduction to International Criminal Law and Procedure* 3ed (2014) 193; Khan K A A and Dixon R *Archbold International Criminal Courts: Practice, Procedure and Evidence* 3ed (2009) 42.

154 *The Prosecutor v. “X”* Case No. 04/2002 paragraph 54.

155 *The Prosecutor v. “X”* Case No. 04/2002 paragraph 8. This is also in accordance with the juvenile fair trial guarantees embedded in Article 40(2)(b)(vii) of the CRC. Article 40(2)(b)(vii) of the CRC provides that States Parties to the CRC should ensure that the juvenile’s privacy is respected during all stages of the proceedings.

156 *The Prosecutor v. “X”* Case No. 04/2002 paragraph 26.

157 *The Prosecutor v. “X”* Case No. 04/2002 paragraph 26.



Passabe.<sup>158</sup> Upon their arrival at the office of the village chief, Kolo ordered them to search for Conselho Nacional de Resistencia Timorese (hereafter, CNRT) members who were believed to be hiding in Passabe, and ordered them to take the CNRT members to the office of the village chief in Imbate in West Timor.<sup>159</sup> However, they were unable to find and capture the CNRT members.<sup>160</sup>

In a turn of events, the accused with the rest of the Sakunar members, including many villagers from Kiobiselo, Tumin and Nbin, had gathered at Imbate on 9 September 1999.<sup>161</sup> Sakunar forced the villagers to register at the Imbate sub-district office.<sup>162</sup> After they had been registered, 75 young men, all from the villages of Tumin and Kiobiselo, were separated from the rest of the villagers.<sup>163</sup> The young men were grouped into pairs and tied together with ropes by Sakunar.<sup>164</sup>

At around 00h00 on 10 September 1999, the young men were forced to leave Imbate on foot.<sup>165</sup> Sakunar escorted them back from the West Timorese village of Imbate towards the East Timorese village of Passabe.<sup>166</sup> At around 03h00 on 10 September 1999, the group reached the border between West Timor and East Timor at Tionlasi.<sup>167</sup> Here, the group crossed the Noel Passabe River into East Timor.<sup>168</sup> Once the group crossed the river at a place called Nifu Panef, Sakunar commenced the killing of the young men who were tied together.<sup>169</sup> The victims were either shot, hacked with a machete or stabbed

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158 *The Prosecutor v. "X"* Case No. 04/2002 paragraph 27.

159 *The Prosecutor v. "X"* Case No. 04/2002 paragraph 27.

160 *The Prosecutor v. "X"* Case No. 04/2002 paragraph 27.

161 *The Prosecutor v. "X"* Case No. 04/2002 paragraph 28.

162 *The Prosecutor v. "X"* Case No. 04/2002 paragraph 28.

163 *The Prosecutor v. "X"* Case No. 04/2002 paragraph 28.

164 *The Prosecutor v. "X"* Case No. 04/2002 paragraph 28.

165 *The Prosecutor v. "X"* Case No. 04/2002 paragraph 29.

166 *The Prosecutor v. "X"* Case No. 04/2002 paragraph 29.

167 *The Prosecutor v. "X"* Case No. 04/2002 paragraph 29.

168 *The Prosecutor v. "X"* Case No. 04/2002 paragraph 29.

169 *The Prosecutor v. "X"* Case No. 04/2002 paragraph 30.

with a sword.<sup>170</sup> More than 47 young men died, while the other victims sustained bad injuries.<sup>171</sup>

The 14 year old accused took part in the bludgeoning murders of three victims.<sup>172</sup> The accused made three victims face the river.<sup>173</sup> He killed the first victim by striking the victim with a machete on the left cheek.<sup>174</sup> He hit the second victim with a machete on the right side of his neck.<sup>175</sup> The accused hit the third victim with a machete on the left side of his neck. All the victims died on the scene.<sup>176</sup>

### 6.3.3 Charges

On 17 May 2002, the Public Prosecutor presented the Dili District Court with an indictment regarding the commission of crimes under international law by the 14 year old accused.<sup>177</sup> The indictment included the charges of crimes against humanity, extermination and attempted extermination in terms of Section 5.1 of the UNTAET Regulation 2000/15.<sup>178</sup> The prosecutor also submitted an additional charge in the indictment of crimes against humanity in terms of Section 5.1(k) of the UNTAET Regulation 2000/15 against the accused for being responsible together with others for the extermination of 47 men from the villages of Tumin and Kiobiselo, as part of a widespread or systematic attack against a civilian population with knowledge of the

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170 *The Prosecutor v. "X"* Case No. 04/2002 paragraph 30.

171 *The Prosecutor v. "X"* Case No. 04/2002 paragraph 30.

172 *The Prosecutor v. "X"* Case No. 04/2002 paragraph 31.

173 *The Prosecutor v. "X"* Case No. 04/2002 paragraph 31.

174 *The Prosecutor v. "X"* Case No. 04/2002 paragraph 31.

175 *The Prosecutor v. "X"* Case No. 04/2002 paragraph 31.

176 *The Prosecutor v. "X"* Case No. 04/2002 paragraph 31.

177 *The Prosecutor v. "X"* Case No. 04/2002 paragraph 4.

178 *The Prosecutor v. "X"* Case No. 04/2002 paragraph 4. 'Crimes against humanity' is defined as any crime committed under Section 5.1 as 'part of a widespread or systematic attack and directed against any civilian population, with knowledge of the attack'. See Section 5.1 of UNTAET Regulation 2000/15. 'Extermination' is defined as including 'the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population'. See Section 5.2(a) of UNTAET Regulation 2000/15.

attack.<sup>179</sup> On 23 October 2002, the prosecutor submitted an amended indictment against the accused.<sup>180</sup> The previous charge of crimes against humanity was amended and the accused was rather charged as being responsible together with others for the murder of three unidentified men at Nifu Panef on 10 September 1999 in violation of Section 338 of the Indonesian Penal Code of 1946.<sup>181</sup> Section 338 of the Indonesian Penal Code provides that: ‘The person who with deliberate intent takes the life of another person, shall, being guilty of manslaughter, be punished by a maximum imprisonment of fifteen years’.<sup>182</sup>

Moreover, the accused was charged with committing the murders, jointly with others, in terms of Section 14 of the UNTAET Regulation 2000/15.<sup>183</sup> The modes of responsibility embedded in Section 14, mirrors Article 25 of the ICC Statute that deals with the same provisions on individual criminal responsibility.<sup>184</sup>



#### 6.3.4 Legal Arguments

Why did the prosecutor decide to drop the charge of crimes against humanity against the accused and was this a wrong decision? The Court did unfortunately not provide reasons why the prosecutor decided to amend the charges from crimes against humanity to murder. It does, however, mention that the prosecution and the defence submitted a joint motion reflecting an agreement whereby the accused would plead guilty to the charge of murder.<sup>185</sup> Thus, the prosecution and defence agreed that it

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179 *The Prosecutor v. "X"* Case No. 04/2002 paragraph 4.

180 See *The General Prosecutor of the Democratic Republic of East Timor against X*, Amended Indictment, Case No. OE-12-B-99-SC (2002).

181 *The General Prosecutor of the Democratic Republic of East Timor against X*, Amended Indictment, Case No. OE-12-B-99-SC (2002) 5. The Indonesian Penal Code 1946 was enacted in 1918, but was later repealed by the 1946 Penal Code.

182 *The Prosecutor v. "X"* Case No. 04/2002 paragraph 32.

183 *The Prosecutor v. "X"* Case No. 04/2002 paragraph 4.

184 See Section 14 of UNTAET Regulation 2000/15 and Article 25 of the ICC Statute. Also see *The General Prosecutor of the Democratic Republic of East Timor against X*, Amended Indictment, Case No. OE-12-B-99-SC (2002) 4.

185 *The Prosecutor v. "X"* Case No. 04/2002 paragraph 13.

would be better not to charge the 14 year old accused with the commission of crimes against humanity. It is submitted that the defence convinced the prosecution that the Court would not convict the accused of crimes against humanity, as it would have been difficult for the prosecution to prove that the 14 year old accused met all the legal elements of the offence of crimes against humanity under Section 5.1 of the UNTAET Regulation 2000/15.

The accused was in a state of fear from the moment he joined the Sakunar Militia hours before the massacre and at the time of the offences. The accused was merely a boy and subjected to various threats and challenges that made it extremely difficult for him to control his emotions and actions. It is submitted that the prosecution would not have been able to prove that the accused committed crimes against humanity considering the fact that the accused was a child soldier and was forced to commit these crimes.

The author furthermore submits that there would have been grounds to exclude the criminal responsibility of the accused for the commission of crimes against humanity. It can be argued that the accused had the *actus reus* to be held accountable for crimes against humanity, as he physically killed three young men with his own hands. In addition, it is submitted that the accused was criminally capable at the time of the commission of the offence. He knew that the act was wrong, but nevertheless committed the act with the understanding that the act was unlawful.

However, it is questionable whether the accused would have the requisite *mens rea* to be criminally responsible for the offence of crimes against humanity. Was the 14 year old child soldier criminally responsible for the systematic and widespread attack against the civilian population? It is submitted that this can only be established by looking at the circumstances to which the child soldier was subject at the time of meeting up with the armed group and at the time of the commission of the crime. A statement by the accused that was accepted by the Court as evidence casts a serious doubt on whether

the accused had any knowledge of a systematic and widespread attack against a civilian population:

‘Because at that time the situation was very scared and we were ordered by Gabriel Kolo as our chefe of the village as acting also as commander of the militia Sakunar and I am young and afraid I didn’t have a plan to kill him’.<sup>186</sup>

Could the criminal responsibility of the accused have been excluded solely on the basis of following the orders of the commander? Prior to the establishment of the Nuremberg Trials, under the principle of *respondeat superior*, superior orders always excluded criminal responsibility on the part of subordinates who committed offences while under such orders.<sup>187</sup> Only superiors used to be held accountable, but that changed after Nuremberg. Under customary international law, international case law and in accordance with Article 33 of the ICC Statute, even though a soldier might have committed a crime because of a direct order from a superior, that soldier is still individually responsible for the offence.<sup>188</sup> Thus, the criminal responsibility of the accused cannot be excluded on the basis of superior orders.<sup>189</sup> That being said, the accused was only a 14 year old boy when the commander ordered him to commit the atrocities.<sup>190</sup> It is submitted that the young age of the accused and the fact that he admitted that he was scared of the commander, placed an unreasonable burden on the

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186 *The Prosecutor v. “X”* Case No. 04/2002 paragraph 59.

187 See Werle G and Jessberger F *Principles of International Criminal Law* 3ed (2014) 249. Also see Khan K A A and Dixon R *Archbold International Criminal Courts: Practice, Procedure and Evidence* 3ed (2009) 1282-1284; O’Keefe R *International Criminal Law* (2015) 219-220.

188 See Werle G and Jessberger F *Principles of International Criminal Law* 3ed (2014) 248-253; O’Keefe R *International Criminal Law* (2015) 219-220. Generally, also see Gaeta P ‘The Defence of Superior Orders: The Statute of the International Criminal Court Versus Customary International Law’ (1999) 10 *European Journal of International Law*.

189 Section 33 of the ICC Statute, however, does state three grounds where superior orders may relieve a person of criminal responsibility, namely: (a) that the person was under a legal obligation made by the Government or the superior; (b) the person was unaware of the unlawfulness of the order; and (c) the order was not manifestly unlawful. See Section 33(1)(a-c) of the ICC Statute.

190 *The Prosecutor v. “X”* Case No. 04/2002 paragraph 54.

rational decision making abilities of the accused at the time of the commission of the crime.<sup>191</sup>

The Court points out an important fact in that there were not a lot of child soldiers involved in the conflict in East Timor, and especially child soldiers of the young age of the accused.<sup>192</sup> Thus, the accused might have been alienated in the group, providing another reason for the accused to be fearful of the commander and to strictly follow orders. Moreover, due to the small numbers of children in the conflict, the emphasis would rather have been on prosecuting the individuals who actually committed the majority of the crimes, and in this case, the adults. In Sierra Leone, the situation was different, in that thousands of child soldiers committed gruesome crimes under international law. Nevertheless, it was thus the correct decision by the prosecution to amend the charges of the accused from crimes against humanity to murder. Yet, should the child soldier have been prosecuted at all, let alone for manslaughter?

During the preliminary hearing on 25 October 2002, the accused pleaded guilty to the charge of the murder of three men in violation of Article 338 of the Indonesian Penal Code, which criminalises the commission of the offence of manslaughter.<sup>193</sup>

Manslaughter is defined in the Indonesian Penal Code as homicide committed with the intention to cause death.<sup>194</sup> The Court discussed the matter whether the accused should have been charged with murder instead of manslaughter.<sup>195</sup> The Court noted that the indictment did not contain any allegations that the accused acted with premeditation.<sup>196</sup>

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191 See *The Prosecutor v. "X"* Case No. 04/2002 paragraph 55.

192 *The Prosecutor v. "X"* Case No. 04/2002 paragraph 57.

193 *The Prosecutor v. "X"* Case No. 04/2002 paragraph 14. In verifying the validity of the guilty plea by the accused, the Court asked the accused: (1) if the accused understood the nature and consequences of the guilty plea; (2) if the admission of guilt was made voluntarily; (3) if the accused clearly understood the charges against him; and (4) if the accused understood that the guilty plea made by him could not be refuted by any line of defence. The accused replied in the affirmative to all the questions that were put to him. See *The Prosecutor v. "X"* Case No. 04/2002 paragraph 20-21.

194 *The Prosecutor v. "X"* Case No. 04/2002 paragraph 32.

195 *The Prosecutor v. "X"* Case No. 04/2002 paragraph 35.

196 *The Prosecutor v. "X"* Case No. 04/2002 paragraph 35.

In effect, the accused did not plead guilty to murder, but murder without premeditation, namely manslaughter.<sup>197</sup>

The Court examined whether the accused met all the legal elements of the offence of manslaughter, namely that: (1) the victim is dead (2) as a result of an act of the accused (3) committed with the intention to cause death.<sup>198</sup> The Court established that the facts of the case confirmed that the accused brutally attacked three men with a machete which resulted in their deaths, while also committing these crimes with the intent to cause their deaths.<sup>199</sup> Consequently, on 28 October 2002, the accused was convicted of manslaughter.

### 6.3.5 Sentencing

On 2 December 2002, the Court sentenced the accused to 12 months imprisonment.<sup>200</sup> The mitigating and aggravating circumstances considered by the Court, are crucial in understanding the complexities of prosecuting child soldiers as opposed to adults. Various mitigating factors were discussed, namely, (a) the age of the accused; (b) orders of a superior; and (c) guilty plea and previous convictions.<sup>201</sup>

First, the accused was 14 years old when he committed the offences.<sup>202</sup> The Court said that the accused was like a tool in the hand of the commanders who were truly responsible for the crimes that were committed.<sup>203</sup> By this statement, it is submitted that the Court meant that the accused was easily manipulatable and was not in a position to make decisions contrary to those of the commanders. Moreover, the

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197 *The Prosecutor v. "X"* Case No. 04/2002 paragraph 35.

198 *The Prosecutor v. "X"* Case No. 04/2002 paragraph 33.

199 *The Prosecutor v. "X"* Case No. 04/2002 paragraph 34.

200 *The Prosecutor v. "X"* Case No. 04/2002 paragraph 56.

201 *The Prosecutor v. "X"* Case No. 04/2002 paragraph 57-60.

202 *The Prosecutor v. "X"* Case No. 04/2002 paragraph 57.

203 *The Prosecutor v. "X"* Case No. 04/2002 paragraph 57.



situation and conditions in which the accused committed the offences were of such a tense nature that it would be difficult for any 14 year old boy to act rationally.<sup>204</sup>

Secondly, the accused acted on the orders of a superior, which is a mitigating circumstance in accordance with Section 21 of the UNTAET Regulation 2000/15.<sup>205</sup> The accused followed the orders of Simao Lopez and Laurentinho Soares, otherwise known as Moko and Gabriel Kolo.<sup>206</sup> At the time of the commission of the crimes, the accused was ordered to kill three young men, which he did.<sup>207</sup> The accused said that he was very scared when he was ordered to kill the men.<sup>208</sup> He further mentioned that Gabriel Kolo who gave him the orders was the chief of the Sakunar Militia and a feared man.<sup>209</sup> This fear and anxiety experienced by the 14 year old accused would have made it impossible for the accused to ignore or refuse the orders of Kolo. As mentioned before, the accused stated that he was young, afraid and did not plan to commit the murders.<sup>210</sup> It is submitted that the accused had no other choice, but to follow the orders of the commander and did not have the intention to kill the three young men. Thirdly, the plea of guilty by the accused, and the fact that the accused did not have any prior convictions, added to the weight of the mitigation factors considered by the Court.<sup>211</sup>

The aggravating circumstances of the accused's case that were considered by the Court included (a) the fact that the victims were defenceless young men and (b) that the victims were killed in an extremely violent manner.<sup>212</sup> The victims must have also experienced a considerable amount of fear and anguish before the killings commenced, but this did not deter the accused from committing the offences. The viscous manner in which the accused carried out the murders is very unusual, especially since the accused

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204 See *The Prosecutor v. "X"* Case No. 04/2002 paragraph 57.

205 *The Prosecutor v. "X"* Case No. 04/2002 paragraph 59.

206 *The Prosecutor v. "X"* Case No. 04/2002 paragraph 59.

207 *The Prosecutor v. "X"* Case No. 04/2002 paragraph 59.

208 *The Prosecutor v. "X"* Case No. 04/2002 paragraph 59.

209 *The Prosecutor v. "X"* Case No. 04/2002 paragraph 59.

210 *The Prosecutor v. "X"* Case No. 04/2002 paragraph 59.

211 See *The Prosecutor v. "X"* Case No. 04/2002 paragraphs 58 and 60.

212 *The Prosecutor v. "X"* Case No. 04/2002 paragraph 61-62.

was only a 14 year old boy at the time of the murders. However, the commission of violent crimes by child soldiers has been on the rise over the last few decades.

Nevertheless, the Court was of the opinion that the exceptional circumstances in mitigation carried more weight than the aggravating circumstances, which were considered during sentencing.<sup>213</sup> The accused was sentenced to 12 months imprisonment, but since he had already been in detention for a period of 11 months and 21 days, the Court ruled that the remaining time of the sentence of nine days, would not be served.<sup>214</sup>

In conclusion, the prosecution of the 14 year old boy in East Timor is a significant milestone in providing solutions to the question how child soldiers should be dealt with once they have committed crimes under international law. Although the boy was not prosecuted for crimes against humanity, but manslaughter, the fact that he was prosecuted is a massive step for those who argue that child soldiers should be prosecuted. There were a few things that stood out in this case. The accused's right to a fair trial as a juvenile was respected throughout the proceedings and not at any moment did the Court treat the juvenile as an adult offender. The best interests of the juvenile were always held in high regard. It is submitted that the prosecution considered the fact that the accused was merely a boy, which played a significant role in charging the boy with murder instead of crimes against humanity.<sup>215</sup> The Court was also very considerate in terms of sentencing and took into account that the accused was placed under tremendous pressure by the commander at the time of the commission of the crimes.

It is submitted that this case could pave the way for future prosecutions of child soldiers. However, this does not mean that every child soldier who commits crimes

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213 *The Prosecutor v. "X"* Case No. 04/2002 paragraph 62.

214 *The Prosecutor v. "X"* Case No. 04/2002 paragraph 56. This ruling is pursuant to Article 14.a of the Indonesian Penal Code 1946 relating to the enforcement of sentence.

215 See *The General Prosecutor of the Democratic Republic of East Timor against X*, Amended Indictment, Case No. OE-12-B-99-SC (2002) 5.

under international law should be prosecuted. In fact, the main reason, according to the author, why the child soldier in this case was prosecuted is because the accused committed three murders with extreme violence, even though the child soldier was forced to commit these crimes. Although an arrangement had to be made between the defence and the prosecution not to charge the boy with crimes against humanity, the fact that the boy was convicted of crimes committed during an armed conflict is important and a step in the right direction for global juvenile justice.



## CHAPTER SEVEN

### CONCLUSIONS AND RECOMMENDATIONS

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‘Instead of the frivolity and joy-or even the defiance and rebellion-of childhood, we see the deadly seriousness of the machinery of death in the hands of teenagers’.<sup>1</sup>

#### 7.1 General

Atrocious crimes have and are still being committed by child soldiers throughout the world. These crimes have gone unpunished, while the emphasis has rather been on the prosecution of those individuals who use child soldiers, like Thomas Lubanga, who has been convicted and sentenced by the ICC.<sup>2</sup> It is submitted that child soldiers will continue to commit crimes under international law without any repercussions, unless this problem is brought to the attention of the international community and measures are put in place to hold these child soldiers accountable. As Shamila Batohi, Senior Legal Advisor to the Prosecutor of the International Court, puts it:

‘We cannot pretend that the world we live in today is one in which genocide, crimes against humanity and war crimes are no longer committed. But we can say most emphatically that it is a world in which we no longer expect perpetrators of such crimes to escape being held accountable’.<sup>3</sup>

Children who fight in wars are merely children, and cannot be compared to adult soldiers. Moreover, they cannot be subjected to adult prosecuting standards, while they

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1 Kahn L (ed) *Child Soldiers* (2008) 11.

2 See Thomas M A (2013) 44 *California Western International Law Journal* 3.

3 Batohi S ‘Africa and the International Criminal Court: A Prosecutor’s Perspective’ in Werle G Fernandez L and Vormbaum M (eds) *Africa and the International Criminal Court* (2014) 56.

should also be treated in a different manner as opposed to adults.<sup>4</sup> The thesis will conclude by looking at three important aspects, namely: (1) criminal responsibility; (2) domestic and international courts; and (3) the prosecution of former child soldiers, followed by the recommendations of the thesis.

## 7.2 Criminal Responsibility

In the course of this thesis, establishing the criminal responsibility of child soldiers has proved to be a fundamental part of determining to what extent a child soldier is accountable for crimes under international law. There is, however, no universal consensus between States on the criminal responsibility of juveniles under international law, as every national legal system has a different view on the determination of criminal responsibility.<sup>5</sup> Nevertheless, two aspects of criminal responsibility, namely the lack of maturity and age are of crucial importance when establishing criminal responsibility.

It is submitted that child soldiers do not have the same levels of maturity as adult soldiers, although the levels of maturity increase as the child becomes older. Because of this, before a child soldier can be prosecuted, a Court has to determine (apart from the *actus reus* and *mens rea*) whether the child soldier was criminally capable of committing the offence. Children, because of their young age, lack the decision making skills of adults and are easily manipulated, which furthermore plays a considerable role in establishing criminal responsibility.<sup>6</sup>

Moreover, children do not belong in a war situation in the first place. However, not all child soldiers can be exempted from prosecution. For example, a 17 year old child soldier commits an offence a day before his eighteenth birthday and is later exempted

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4 See Singer P *Children at War* (2005) 155. Also see Fortin J *Children's Rights and the Developing Law* 3ed (2009) 83; Scott E S and Steinberg L (2008) 18 *The Future of Children* 19-20.

5 See Thomas M A (2013) 44 *California Western International Law Journal* 11.

6 See Carroll J E (2015-2016) 94 *North Carolina Law Review* 541, 569; Haines K and Drakeford M *Young People and Youth Justice* (1998) 234-235; Kahn L (ed) *Child Soldiers* (2008) 100.

from prosecution. Should this child soldier have been exempted from prosecution, since he was still a child soldier at the time of the commission of the offence? No, this is why it is important to set a minimum age of criminal responsibility by which all child soldiers should be held responsible for the commission of crimes under international law.

One of the objectives of the study was to suggest a uniform minimum age of criminal responsibility. It is submitted that only children who have reached a certain level of maturity have the intent that is required for a child to be prosecuted for the commission of a crime under international law. The thesis finds that the minimum age of 12 as recommended by General Comment No. 10 to the CRC is applicable only to the prosecution of juveniles for the commission of crimes under domestic law.<sup>7</sup> In the case of crimes under international law, only juveniles between the ages of 15 and 18 should be held accountable, while children under the age of 15 should be exempted from criminal prosecution. This submission is based on two arguments.

First, Article 8(2)(b)(xxvi) and Article 8(2)(e)(vii) of the ICC Statute only criminalises the recruitment of child soldiers under the age of 15, while child soldiers between the ages of 15 and 18 are excluded. Hence, if a child soldier is old enough for recruitment in the armed hostilities, he must be considered old enough to bear the criminal responsibility for his conduct as a child soldier.<sup>8</sup> Furthermore, Honwana notes that: 'Being prepared to fight a war is understood to go beyond physical strength and mastery of weapons to include a sense of responsibility, of right and wrong, and of good and bad war practices'.<sup>9</sup> It is therefore submitted that child soldiers between the ages of 15 and 18 have the ability to understand that committing a crime is wrong and that they may be held accountable for such conduct.

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7 Nevertheless, under domestic law, it remains the responsibility of the State to increase its minimum age of criminal responsibility if it is significantly lower than the age of 12. See General Comment No. 10 paragraph 32. Also see Cipriani D *Children's Rights and the Minimum Age of Criminal Responsibility: A Global Perspective* (2009) 58.

8 Grover S C *Child Soldier Victims of Genocidal Forcible Transfer: Exonerating Child Soldiers Charged with Grave Conflict-related International Crimes* (2012) 62.

9 Honwana A M *Child Soldiers in Africa* (2006) 54.

Secondly, the Statute for the Special Court for Sierra Leone criminalises the commission of crimes under international law by child soldiers between the ages of 15 and 18. The Special Court Statute established the age of criminal responsibility at 15 as a result of the violent nature of the crimes that were committed by child soldiers during the war. Indeed, as noted before, violent crimes are committed by child soldiers on a regular basis, a fact that cannot be overlooked when determining criminal responsibility.<sup>10</sup> It is submitted that the age of 15 is an age that has been consistently used under international law to differentiate between juveniles who should be prosecuted, namely juveniles between the ages of 15 and 18, and juveniles who should not be prosecuted, namely those juveniles under the age of 15 at the time of the commission of the crime.

In order to fairly assess the criminal responsibility of child soldiers, we also need to consider, among other factors, the realities of wartime, the brutal way in which child soldiers are frequently recruited into armed groups and how these groups systematically engage child soldiers in perpetrating crimes under international law.<sup>11</sup> Thus, in order for a court to examine the criminal responsibility of the child soldier, a number of factors need to be considered by the court, while the court should keep in mind that it is dealing with a child, who's understanding of the crime and the consequences of such a crime are remarkably different from those of an adult perpetrator.<sup>12</sup>

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10 See Thomas M A (2013) 44 *California Western International Law Journal* 12. London gives an apt description of a child soldier, which points out the difficulty of establishing their criminal responsibility, when he states that: 'Children can be a real threat in combat, one that is unavoidable on the modern battlefield. They think less about consequences; they act more rashly than adults, are less risk averse, and because they are children, can cause confusion and hesitation in the enemy'. See London C *One Day the Soldiers Came: Voices of Children in War* (2007) 170.

11 See Grover S C *Child Soldier Victims of Genocidal Forcible Transfer: Exonerating Child Soldiers Charged with Grave Conflict-related International Crimes* (2012) 117. Also see Singer P *Children at War* (2005) 155.

12 See Singer P *Children at War* (2005) 155. Generally, also see London C *One Day the Soldiers Came: Voices of Children in War* (2007) 182.



### 7.3 A Case for Domestic Courts or International Courts?

If it is decided to criminally prosecute a child soldier, should the case be adjudicated in a domestic court or an international court, taking into account that both courts would have jurisdiction? There is a duty in terms of international customary law on States to prosecute any individual who has committed a crime under international law within its territory.<sup>13</sup> The domestic courts within the conflicted States will only be able to prosecute crimes under international law if these crimes have been incorporated into their domestic law. Moreover, in some cases, the prosecution of individuals in the country where the offence has been committed may not be conceivable. This could be as a result of a legal system that was left in tatters after a war or a country that is simply not willing to prosecute the individual.

It is submitted that child soldiers should be prosecuted in domestic courts. The collection of evidence in a case before an international court, has a major effect on the length of the entire trial.<sup>14</sup> Also, in various cultures, children are deemed to be adults before the age of 18. This will be a unique and strange concept for international courts, whereas domestic courts would know how to deal with these cases as the officials involved are accustomed to the various traditions found within their own countries. Moreover, it is not ideal to subject child soldiers to the rules and procedures of international courts. Indeed, child soldiers who have been demobilised after a war are traumatised and should therefore not be exposed to formal and tedious court proceedings.<sup>15</sup> Domestic courts normally have a juvenile justice division that prosecutes children in a setting that is less formal. This is important, for example, so that a child

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13 When a crime under international law has been committed in the territory of a State Party to the ICC, then the ICC will usually defer the situation to the national court as it is seen as the frontline of prosecution in terms of the doctrine of complementarity. See Drumbl M A *Atrocity, Punishment, and International Law* (2007) 68.

14 See May R and Wierda M *International Criminal Evidence* (2002) *supra* note 23 at 8.47. Also see Bassiouni M C (ed) *Introduction to International Criminal Law: Second Revised Edition* (2013) 849.

15 See, for example, Robinson J A (2012) 15 *Potchefstroom Electronic Law Journal* 51; Singer P *Children at War* (2005) 42; Wessells M *Child Soldiers: From Violence to Protection* (2006) 220-221.

soldier who suffered from post-traumatic stress disorder or any other similar mental disorder during the conflict, is not subjected to further trauma which may be caused during a trial that includes formal procedures and rules.

The view that national courts should rather prosecute child soldiers, has also received international support. During the Preparatory Committee Meetings prior to the establishment of the ICC Statute, it can be concluded from the discussions concerning the prosecution of child soldiers, that national States are better equipped to deal with juveniles who have committed international offences.<sup>16</sup> Furthermore, Article 26 of the ICC Statute holds that persons under the age of 18 will not be prosecuted before the ICC. However, this does not imply that child soldiers will not be able to be prosecuted before an international court or should be acquitted in all cases, but merely that the ICC will rather focus on those individuals who are most responsible for the commission of crimes under international law. Grover, however, holds that it is erroneous to suggest that the ICC defers jurisdiction over child soldier cases to domestic courts, since Article 26 of the ICC Statute sets a universal minimum age of criminal responsibility of 18.<sup>17</sup> The author, however, disagrees with the arguments of Grover and submits that Article 26 was solely included in the ICC Statute to exclude the ICC from ever prosecuting persons under the age of 18 at the Court. It does therefore not imply that domestic courts do not have jurisdiction to prosecute child soldiers. In fact, the overarching purpose of the ICC is to prosecute the commission of crimes under international law by individuals who have not been held responsible for such offences. It is definitely not the aim of the ICC to prevent the prosecution of crimes under international law by domestic courts, including the prosecution of child soldiers. While the author argues that child soldiers should be prosecuted in domestic courts, if the situation arises where an international

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16 See, for example, Clark R S and Triffterer O in Triffterer O (ed) *Commentary on the Rome Statute of the International Criminal Court: Observer's Notes, Article by Article* (2008) 773-774; Holmes J T in Politi M and Nesi G (eds) *The Rome Statute of the International Criminal Court: A Challenge to Impunity* (2005) 121-122. Also see Leveau F (2013) 4 *Osgoode Hall Review of Law and Policy* 53.

17 Grover S C *Child Soldier Victims of Genocidal Forcible Transfer: Exonerating Child Soldiers Charged with Grave Conflict-related International Crimes* (2012) 101-102.

court or tribunal decides to prosecute child soldiers, it is submitted that these courts should work closely together with the national courts of the countries where the crimes were committed. Hereby, the notion of individual criminal responsibility and the fair trial guarantees of the child soldier are met with even consideration.

#### **7.4 Prosecuting Former Child Soldiers**

This thesis focusses on the prosecution of child soldiers, while they are still under the age of 18 at the time of prosecution. However, what about the prosecution of former child soldiers who are only apprehended and prosecuted once they become adults? Former child soldiers who have become adult soldiers or even military commanders in armed groups are very dangerous, seeing that they have been part of the armed group for many years. The question arises how such individuals should be prosecuted considering the fact that they were initially child soldiers themselves and could have even been forced to join armed groups. In this vein, there are two ongoing cases which will be briefly discussed, namely, Thomas Kwoyelo and Caesar Acellam, who are currently in detention in Uganda, and Dominic Ongwen who is standing trial at the ICC.

##### *(1) Thomas Kwoyelo and Caesar Acellam*

Thomas Kwoyelo and Caesar Acellam were abducted by the LRA in Uganda when they were young boys.<sup>18</sup> Consequently, both of them were forced to commit atrocities as members of the LRA.<sup>19</sup> As time progressed, they became high-ranking officials in the

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18 Kwoyelo was abducted at the age of 13 and spent 19 years with the LRA. See Raymond R E (2013) 40 *Syracuse Journal of International Law and Commerce* 407, 416. Also see Yarbrough S (2014) 47 *Vanderbilt Journal of Transnational Law* 534. Acellam was abducted in the family garden when he was attending primary school. See Ojwee D 'Acellam Flown to Gulu Barracks, Meets Family' *New Vision* 30 May 2012 <http://www.newvision.co.ug/mobile/Detail.aspx?NewsID=631497&CatID=1> (accessed 20 July 2015). Also see Yarbrough S (2014) 47 *Vanderbilt Journal of Transnational Law* 534.

19 See Raymond R E (2013) 40 *Syracuse Journal of International Law and Commerce* 407, 416. Also see Yarbrough S (2014) 47 *Vanderbilt Journal of Transnational Law* 534.

LRA.<sup>20</sup> The Amnesty Act in Uganda granted the opportunity for them to receive amnesty. However, they have been in detention since they were apprehended, because of their status as high-ranking officials in the LRA.<sup>21</sup> The question remains whether they should receive amnesty or whether they should be prosecuted. Given the fact that they were initially child soldiers and that the Amnesty Act grants amnesty to former soldiers, it is submitted that Kwoyelo and Acellam should be granted amnesty. However, since these men committed atrocities as well as being part of the leadership of the LRA, it is submitted that a Court should order them to make a public apology to the victims or be ordered to be subject to other restorative justice mechanisms.

## (2) *Dominic Ongwen*

Dominic Ongwen said that he was abducted by the LRA when he was only 10 years old.<sup>22</sup> He subsequently became the deputy to Joseph Kony.<sup>23</sup> He is suspected of war crimes and crimes against humanity allegedly committed in Gulu, Uganda, in May 2004.<sup>24</sup> The ICC issued a warrant for his arrest in 2005.<sup>25</sup> He surrendered to ICC custody in the Central African Republic on 16 January 2015. The confirmation of charges hearing took place on 26 January 2016. The charges against Ongwen were confirmed on 24 March 2016. This will be the first case where the ICC will prosecute a former child soldier. It will be interesting to see whether the defence builds Ongwen's case on the fact that he was forced to join the LRA as a young boy. If the ICC argues that Ongwen was individually

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20 See Yarbrough S (2014) 47 *Vanderbilt Journal of Transnational Law* 532.

21 See Akena M 'Public Divided over Kwoyelo Trial' *The Daily Motion* 10 July 2011 <http://www.monitor.co.ug/News/National/-/688334/1197660/-/bylc79z/-/index.html> (accessed 20 July 2015). Also see Yarbrough S (2014) 47 *Vanderbilt Journal of Transnational Law* 534-535. For a discussion regarding the amnesty of Kwoyelo and Acellam, generally see Yarbrough S (2014) 47 *Vanderbilt Journal of Transnational Law*.

22 See BBC News 'LRA Commander Dominic Ongwen Appears before ICC in The Hague' BBC News 26 January 2015 <http://www.bbc.com/news/world-africa-30976818> (accessed 20 July 2015).

23 See BBC News, 26 January 2015 <http://www.bbc.com/news/world-africa-30976818> (accessed 20 July 2015).

24 See *The Prosecutor v. Dominic Ongwen*, ICC (Pre-Trial Chamber II) Warrant of Arrest, 8 July 2005 paragraph 30.

25 See *The Prosecutor v. Dominic Ongwen*, ICC (Pre-Trial Chamber II) Warrant of Arrest, 8 July 2005.

responsible for war crimes and crimes against humanity as an adult, it would be hard to see how the fact that he was a former child soldier, would have any effect on the individual criminal responsibility of Ongwen. However, it is submitted that this would be a defining factor in the mitigation of sentence if Ongwen is convicted. Be that as it may, further research is required on this topic, while it is submitted that this case and the cases of Kwoyelo and Acellam will make a significant contribution to the question whether child soldiers should be prosecuted for crimes under international law. It is now proposed to look at the recommendations of the thesis.

## **7.5 Recommendations**

### **7.5.1 Special Domestic Courts**

In a follow-up to the above conclusion regarding domestic courts, it is recommended that juveniles, who are alleged to have committed international crimes, be prosecuted in special domestic courts that exclusively deal with child soldier matters only. These courts would not have to be permanent in nature, although, if there is an ongoing conflict in the country, the court should consider to function as long as possible. This recommendation is based on the following grounds. First, child soldiers cannot be treated in the same manner as adult perpetrators, a fact that has to be taken into consideration, when proceedings are set to start.<sup>26</sup> Secondly, where it is alleged that many children have committed international crimes, like in the case of Sierra Leone, a special domestic court will be the most effective court to deal with child soldiers. It is submitted that having a special domestic court that would deal with child soldier perpetrators only, would speed up the process of determining whether to prosecute the child soldiers or whether to impose alternative measures to prosecution. This is so, because the court officials that would work with these cases will become versed in the

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26 See Clark R S and Triffterer O in Triffterer O (ed) *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (2008) 775. Also see Wessells M *Child Soldiers: From Violence to Protection* (2006) 219-221.

execution of their duties and how to effectively deal with child soldier perpetrators. Thirdly, a special domestic court law should be established to regulate the fair trial guidelines and the proceedings of the court, an aspect which is very important in child soldier cases where it is imperative for the child soldier's identity to be safeguarded during the entire trial.<sup>27</sup> In the Omar Khadr case, the United States prosecuted Omar Khadr as an adult and disregarded the fact that he was still a child when the trial commenced.<sup>28</sup> The establishment of special domestic courts will go a long way in preventing the future occurrence of cases such like that of Khadr.

### 7.5.2 Imprisonment

It is proposed that juveniles between the ages of 15 and 18 who have been convicted of crimes under international law may be sentenced to imprisonment by domestic and international courts. The courts should mainly consider the juvenile's circumstances prior to the commission of the offence, the type of offence, and the juvenile's character subsequent to the offence. In child soldier cases, the social factors like poverty, war and lack of education among other factors, will play a significant role in the decision by the judge to impose imprisonment or not.<sup>29</sup> Not to mention the fact that many child soldiers are forced to commit atrocities.<sup>30</sup> Hence, these factors require a serious examination by the court prior to sentencing. Although the author argues that child soldiers between the ages of 15 and 18 may be sentenced to imprisonment, the author also submits that

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27 For a discussion of certain juvenile guidelines and rules see Clark R S and Triffterer O in Triffterer O (ed) *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (2008) 775; Happold M in Arts K and Popovski V *International Criminal Accountability and the Rights of Children* (2006) 79; Happold M *Child Soldiers in International Law* (2005) 149-150; Maher G (2005) 2 *Ohio State Journal of Criminal Law* 510-511.

28 See Clark R S and Triffterer O in Triffterer O (ed) *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (2008) 775. Also see Happold M *Child Soldiers in International Law* (2005) 149-150.

29 See, for example, Dallaire R *They Fight like Soldiers, They Die like Children* (2010) 110; Nagle L E (2011) 19 *Cardozo Journal of International and Comparative Law* 11-12; Singer P *Children at War* (2005) 72; Wessells M *Child Soldiers: From Violence to Protection* (2006) 80-83.

30 See, for example, Bosch S (2012) 45 *The Comparative and International Law Journal of Southern Africa* 359; Grover S C (2008) 12 *The International Journal of Human Rights* 57; Honwana A M *Child Soldiers in Africa* (2006) 50.

imprisonment should be the absolute last measure that a court should consider when imposing a sentence. Many of these child soldiers have been scarred for life and subsequent imprisonment may only serve to aggravate the problem. It is thus recommended that convicted juveniles be sent for a short-term rehabilitation period in order to determine whether the child is fit and mentally capable to serve a prison sentence. This will ensure that a court does not sentence a child soldier to imprisonment who should have rather been rehabilitated or subjected to other alternative measures.

The thesis finds that criminal prosecution is merely one way of holding child soldiers accountable for the commission of crimes under international law. There exist various other methods of punishment. The author recommends that domestic legal systems should in particular look at rehabilitation and alternative models of reconciliation and a juvenile truth and reconciliation commission in cases where child soldiers have committed crimes under international law, and consider the implementation of such measures within their legal systems. In conclusion, an important decision rests with the court that needs to determine whether prosecution or alternative measures should be imposed. There is no legislation governing the prosecution of child soldiers for crimes under international law, while each child soldier's case is different.<sup>31</sup> The few cases where child soldiers have been prosecuted have therefore been crucial in understanding to what extent child soldiers should be held accountable for crimes under international law. It is argued that each case should be dealt with on a case-by-case basis.<sup>32</sup> Hereby, the specific circumstances under which the child soldier committed the offence are analysed in order to determine how and if the child soldier should be held responsible. Criminal prosecution should be the last resort in determining how to bring child soldiers to account. It is submitted that child soldiers should only be criminally prosecuted if all

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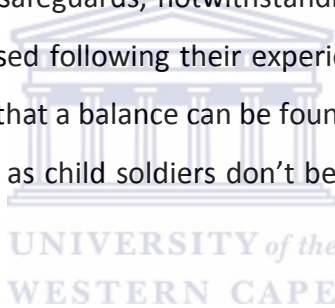
31 See Kahn L (ed) *Child Soldiers* (2008) 100. Also see Wessells M *Child Soldiers: From Violence to Protection* (2006) 218-220.

32 See Thomas M A (2013) 44 *California Western International Law Journal* 5. Also see Wessells M *Child Soldiers: From Violence to Protection* (2006) 218-220.



the other alternatives to prosecution have been considered. The use of restorative justice measures like the making of an apology for example, are measures that reflect the desire to deploy mechanisms inclusive of victims.<sup>33</sup> Thus, the use of alternative measures to prosecution not only helps to rehabilitate the child soldier, but also plays an important role in helping the child soldier understand, to a certain degree, the impact of the crime on the victim and his or her relatives. The use of restorative justice measures, in particular rehabilitation, is not as demanding and expensive as opposed to criminal prosecution, while it furthermore has a profound impact on the social reconstruction and development of the child.<sup>34</sup>

Child soldiers have to be treated in a way that takes into account their international rights to a fair trial and other safeguards, notwithstanding the fact that many of these children are severely traumatised following their experience within an armed group or conflict situation.<sup>35</sup> It is hoped that a balance can be found between the prosecution and rehabilitation of child soldiers, as child soldiers don't belong in a war, but in the loving arms of their relatives.



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- 33 See Musila G *Rethinking International Criminal Law: Restorative Justice and the Rights of the Victims in the International Criminal Court* (2010) 13-14; Wessells M *Child Soldiers: From Violence to Protection* (2006) 221-224.
- 34 See Campbell A M (1995) 19 *Suffolk Transnational Law Review* 354-355. Also see Pimentel D 'The Widening Maturity Gap: Trying and Punishing Juveniles as Adults in an Era of Extended Adolescence' (2013-2014) 46 *Texas Tech Law Review* 94; Wessells M *Child Soldiers: From Violence to Protection* (2006) 224.
- 35 See Singer P *Children at War* (2005) 42; Wessells M *Child Soldiers: From Violence to Protection* (2006) 220-221. Also see Kirton D in Hale C (*et al*) (eds) *Criminology* (2005) 398.

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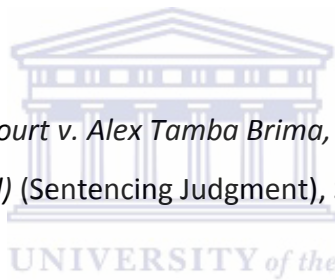
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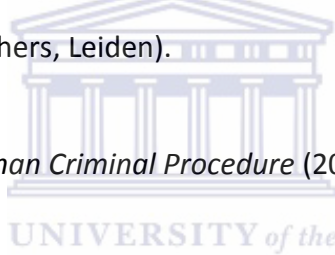
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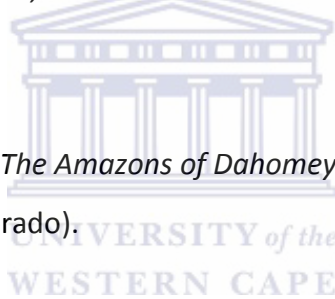
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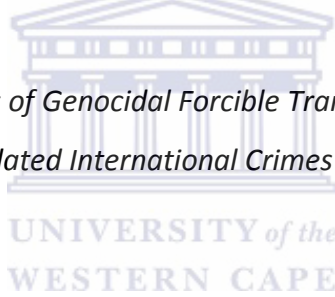
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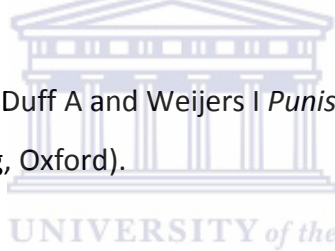
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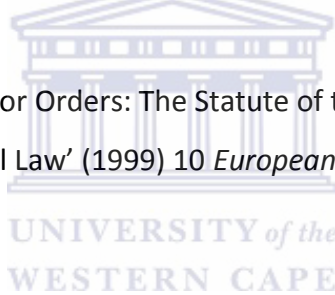
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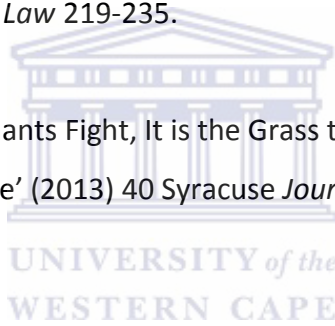
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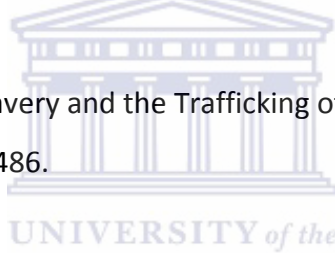
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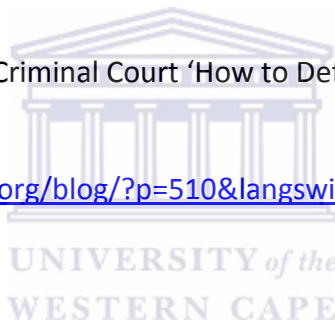
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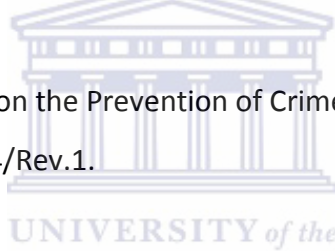
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