First victims then perpetrators: child soldiers and International Law

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Resumen: Este artículo examina la cuestión de los niños soldados en el Derecho Internacional. Después de haber hecho algunas observaciones preliminares sobre el enfoque del derecho internacional de los derechos humanos y del derecho humanitario sobre la protección de los derechos de los niños que se encuentren en un conflicto armado, el artículo revisa la prohibición del reclutamiento de los menores y la responsabilidad penal personal de los que los reclutan. También, será analizada la jurisprudencia sobre el reclutamiento de los niños. En la cuarta parte del artículo, se dará cuenta de la hipótesis de los menores autores de crímenes internacionales y se considerarán los enfoques de la justicia retributiva y de la justicia restaurativa.

Palabras clave: Niños soldados, derecho penal internacional, Sierra Leona.

Abstract: This article examines the issue of the position of child soldiers under International Law. After preliminary remarks on the approach of international human rights and humanitarian law to the protection of children involved in armed conflicts, the article discusses the prohibitions on recruiting children and the individual criminal responsibility of recruiters. Case-law on the child soldiers' recruitment is considered. In the fourth part the position of the child soldiers as perpetrators is discussed and the retributive approach to the issue is explored. The last section offers an overview

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of the restorative justice-oriented solution to the dilemma of the criminal responsibility of child soldiers adopted in the context of the post-conflict situation in Sierra Leone.

Keywords: Child soldiers, international criminal law, Sierra Leone.

Introduction

"Child soldiers" sounds like two simple words; however, nowadays they outline a world of cruelties committed against children and sometimes by them.

The question of the involvement of children in armed conflicts emerged at international level when Graca Machel presented her impressive report, "Impact of Armed Conflict on Children".[1]

One of the most alarming trends relating to children and armed conflicts is their participation as soldiers.

In order to try to understand this phenomenon it is important to consider its root causes.

One of the reasons why armed forces and groups recruit child soldiers is that they are more easily guided and more suggestible than adults are. Children, in fact, are more obedient and ductile than adults and hence are more easily persuaded or forced into committing atrocities.

As long as hostilities keep going on, poverty, social dislocation and other environmental factors, create conditions to extreme vulnerability to recruitment.

If those conditions facilitating child recruitment persist, it will remain easy for armed groups to exploit children. That is because many children have few alternatives to, or defences against, joining armed groups.

Modern warfare has exposed children to the worst possible violence and harms. The increasing number of the so-called "internal wars", have destabilized communities and destroyed families; the consequence of this is that many children have been left unprotected.

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1 See *The Secretary-General, Promotion and Protection of the Rights of Children: Impact of Armed Conflict on Children.* UN Doc., A/51/306, 26 August 1996. After the UN General Assembly adopted Resolution 48/157 (G.A. Res. 48/157, UN Doc. A/RES/48/157, 7 March 1994), which sought to protect children from armed conflict, it appointed Ms. Machel to survey comprehensively this social pandemic. Her report outlines the scope of child soldiery, the methods of recruitment, and the reasons children enlist.

Children in refugee camps and those separated from their families are at highest risk for recruitment in armed groups where they may be forced to commit atrocities against their own families, friends and community.

Children take up arms in order to survive, to defeat feelings of helplessness, sometimes to seek vengeance or to protect their families or simply for lack of a better alternative. This last reason is primarily important in order to understand the so-called "voluntary" recruitment of many children.

Moreover, for orphaned children, the need for protection renders the army a better option to life. What child "volunteers" simply seek, is often a less precarious alternative to an otherwise very unsafe reality.

As with recruitment into armed forces, education merits particular consideration because schools are convenient sites for recruitment and indoctrination of children. These risks are heightened in situations where the public schooling system is inadequate.

It is estimated that 300,000 children are actively engaged in combat; some 120,000 of these are thought to be in Africa. In recent years, the use of child soldiers by both government forces and insurgent groups in African countries such as Angola, Burundi, the Democratic Republic of the Congo, Sierra Leone, and Sudan has been witnessed and harshly condemned by the international community.

Though the number of children involved in African armed conflicts is great, the problem is neither a solely African issue nor a "third world" issue, but is far more widespread than media reports and popular prejudice might suggest.

Rather, the phenomenon is a worldwide problem and children –aged between fifteen and eighteen but the youngest reported age is seven– are fighting in nearly every major conflict in the World today.[2]

Child soldiers may generally be considered victims of war. More specifically, as participants who have been involuntarily recruited, they have to serve as objects of the recruiters. By focusing on those who recruit children, international law reflects the view that children involved in armed conflicts are themselves victims. In recent years, the international focus on accountability has led to the establishment of transitional justice mechanisms in a number of post conflicts situations. Accountability for crimes against

2 See *Annual Report of the Secretary-General on Children and Armed conflict to the Security Council.* UN Doc. A/62/609 S/2007/757, 21 December 2007, available at <http://daccessdds.un.org/doc/UNDOC/GEN/N07/656/04/PDF/N0765604.pdf?OpenElement> (last visited 27 February 2009).

children is included as a focus of transitional justice and, as a result, children have become participants as victims and witnesses, both in judicial and non-judicial post-conflict truth and justice-seeking processes.[3]

However, although often seen as victims, child soldiers have perpetrated atrocious crimes. Indeed, in a number of recent conflicts it appears that they have been specifically recruited to do so, and even if not specifically recruited for such a purpose, children's lack of mental and moral development may mean that they are more prone to behaving badly than are adult troops.

Therefore, while child soldiers are victims of circumstances in which they find themselves, and should therefore be treated as such, they have been responsible for some of the worst breaches of international law. There exist well-documented serious cases of rape, murder and other gross human rights violations committed by children, in the course of wars in places like Sierra Leone and Uganda.

The aim of this paper is to underline the double *status* of children involved in armed conflicts: first victims then persecutors.[4] Having in mind the twofold role they play during hostilities, we will analyse the different aspects of the problem and we will give examples of possible answers to the dilemma between impunity and accountability.

International norms protecting children against their use in armed conflicts

Over the past twenty years, the international child rights movement has undertaken the development of international law, policies, and programs for the protection of children and legal devices have been created to face the phenomenon of the involvement of children in armed conflicts.

The existence of an adequate legal protection of child soldiers is one of the ways to address that problem.

An ample body of international instruments already exists. They should be used to maximum effect and, to that end, it will be important to engage well-coordinated and multi-faceted actions by a wide range of actors,

3 Reasons to involve children in transitional justice processes are clearly explained at <www.unicef-irc.org/knowledge_pages/resource_pages/children_and_transitional_justice/index.html>.

4 See Arzoumanian, N. & Pizzutelli, F. Victimes et bourreaux: questions de responsabilité liées à la problématique des enfants-soldats en Afrique. *International Review of the Red Cross, 85,* 2003, pp. 827-856.

to exert pressures where it is needed, and to sustain funding for programs to assist returning child soldiers and other war-affected children.

The areas of law interested are human rights law, labour law, humanitarian law and international criminal law. Applicable instruments comprise the Convention on the Rights of the Child (CRC)[5] and its Optional Protocol,[6] the African Charter on the Rights and Welfare of the Child,[7] the International Labour Organization's Convention Nº 182 on the Elimination of the Worst Forms of Child Labour,[8] the four Geneva Conventions of 1949[9] and their two Additional Protocols of 1977[10] and the Rome Statute on the establishment of the International Criminal Court.[11]

In this section, we will go through these treaties in order to verify the way in which they protect child soldiers.

First of all, children are protected by general human rights instruments.[12] Moreover, they are entitled to the protection under child rights

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5 *UN Convention on the Rights of the Child* (adopted on 20 November 1989 and entered into force in September 1990).

6 *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*. GA Res. 54/263, Annex I, UN Doc. A/RES/54/263, 2 (25 March 2000).

7 *African Charter on the Rights and Welfare of the Child*. OAU Doc. CAB/LEG/24.9/49 (adopted in 1990 and entered into force on 29 November 1999). See <http:// www.africa-union.org>.

8 *ILO Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour* (adopted on 17 June 1999).

9 *Geneva Conventions* (first, second, third and fourth) (adopted 12 August 1949 and entered into force 1950).

10 *Additional Protocol I to the Geneva Conventions of 12 August 1949 Relating to the Protection of Victims of International Armed Conflicts* (adopted 1977 and entered into force 1979); *Additional Protocol II to the Geneva Conventions of 12 August 1949 Relating to the Protection of Victims of Non-International Armed Conflicts* (adopted 1977 and entered into force 1979).

11 *Rome Statute of the ICC* (adopted 17 July 1998 and entered into force in 2002).

12 See *Universal Declaration of Human Rights* adopted by General Assembly of the United Nations on 10 December 1948; *International Covenant on Civil and Political Rights* and *International Covenant on Economic, Social and Cultural Rights,* both adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966. In particular, article 25(2) of the Universal Declaration states that "[m]otherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection" and article 10(3) of the *International Covenant on Economic, Social and Cultural Rights* affirmed that "[s]pecial measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be

instruments directly addressed to them. Among these instruments are the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child.

It is possible to state that the Convention on the Rights of the Child is the most comprehensive and widely ratified human rights treaty currently existing and it can be considered a milestone in the establishment and recognition of children's rights.[13] It sets out a comprehensive range of political, civil, economic as well as the social and cultural rights of children.

Article 38 of the Convention on the Rights of the Child addresses explicitly the problem of the involvement of children in armed conflicts. In fact, it states that

> 1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child. 2. States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities. 3. States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest. 4. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.

Even though article 1 of the Convention defines a child as "any person under the age of eighteen unless under the law applicable to the child, majority is attained earlier", article 38 provides instead for a minimum age of recruitment at fifteen years. The so-called "straight 18" position was not accepted in the final draft of that rule as it faced a serious challenge from countries like the US. It was the failure to adopt the "straight 18" position

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protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law".

13 This Convention has been ratified by 193 States.

that led to the initiation of the drafting and subsequent adoption of the Optional Protocol on the Involvement of Children in Armed Conflict.

It was adopted in 2000 and entered into force in 2002. Article 1 of the Optional Protocol raises the minimum age of direct participation in hostilities from fifteen years to eighteen years. However, the Optional Protocol kept fifteen years as the minimum age for voluntary enlistment.

Article 2 provides that Governments "shall ensure that persons who have not attained the age of eighteen years are not compulsorily recruited into their armed forces". Article 4(1), instead, forbids rebel or other non-governmental armed groups from recruiting persons under the age of eighteen years or using them in hostilities under any circumstances. Article 4(2), requires Governments to take all feasible measures to prevent the recruitment and use of children by such groups, including the criminalization of such practices.

A central role in the Optional Protocol has the recognition of the vital need for proper rehabilitation and social reintegration for child soldiers. This is not just an obligation for the States directly involved in the armed conflict. In fact, the Optional Protocol under article 7(1) specifies that State Parties "shall cooperate in [this] […] through technical cooperation and financial assistance". This international instrument, far from being the final solution of the problem, is nevertheless the best protection to date and a very important step along the way of the struggle against the phenomenon of children involved in hostilities.

At regional level, the African Charter on the Rights and Welfare of the Child was Africa's recognition to the ideals of the Convention on the Rights of the Child with an African prospective because of the perceived exposure of the African children to a particular set of dangerous circumstances. It incorporates political, civil, economic, social and cultural rights of the child. It is also important because it is the only regional treaty in the World addressing the issue of child soldiers.

A central role in the system of this instrument should be recognised to its article 22(2), which prohibits the recruitment and use of children under eighteen years in both international and internal armed conflicts. It requires States to "[…] take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain in particular, from recruiting any child". Thus, it is evident that unlike the Convention on the Rights of

the Child and its Optional Protocol, in defining the child it adopts the so-called "straight 18" principle.[14]

The four Geneva Conventions of 1949 and their two Additional Protocols of 1977 form the body of international humanitarian law. In the Geneva Conventions, whose application is limited to international armed conflicts, children are protected as members of the civilian population and therefore, by definition, as nonparticipants in the armed conflict.

Under the fourth Geneva Convention on the Protection of Civilians, specific provisions were drawn up only to ensure special treatment for children concerning material for relief, distribution of food, medical care, as well as family reunification. Therefore, there was no provision addressing the protection of child soldiers specifically.

The two Additional Protocols mended this lack of protection. Additional Protocol I provides for the protection of victims of international armed conflict. Additional Protocol II provides for similar protections in non-international armed conflicts. Article 4(3)(c) of Additional Protocol II specifically prohibits the recruitment of children under fifteen years of age and their participation, whether direct or indirect, in hostilities. Article 4(3)(d) provides that children under fifteen who take direct part in the hostilities and whom enemy forces capture, do not lose the special protections guaranteed under article 4(1) and (2).[15]

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14 The African Children's Charter also established the African Committee of Experts on the Rights and Welfare of the Child whose mission is to promote and protect the rights established by the Charter. It has the power to consider State party's reports as well as individual complaints and inter-State communications.

15 Article 4(1) and (2) states that "1. All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors. 2. Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph I are and shall remain prohibited at any time and in any place whatsoever: (a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment; (b) collective punishments; (c) taking of hostages; (d) acts of terrorism; (e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form or indecent assault; (f) slavery and the slave trade in all their forms; (g) pillage; (h) threats to commit any or the foregoing acts".

The rules of international humanitarian law thus acknowledge the vulnerability of children involved in armed conflicts and set up a series of rules aiming to protect children against the worst consequences of war.

In 1999, all 174 Member States of the ILO unanimously adopted the ILO Convention 182.

Article 1 commits each State which ratified the Convention to "take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labor as a matter of urgency". The term "child" indicates all persons under the age of eighteen years.

Article 3 includes in the worst forms of child labour

> all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict; the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances; the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties; work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.[16]

The importance of the ILO Convention 182 lays in the circumstance that it offered for the first time the opportunity to set an eighteen-year minimum age limit in relation to child soldiering in an international treaty. Moreover, it was the first legal recognition of child soldiering as a worst form of child labour.

Finally, the Rome Statute establishes a permanent International Criminal Court to try persons charged with committing genocide, crimes against humanity, crime of aggression and war crimes. Article 8(2) in its definition of war crimes, includes "conscripting or enlisting children under the age of fifteen years into national armed forces or using them to participate actively in hostilities" (lit. b) and in the case of an internal armed conflict, "conscrip-

16 Recommendation 190 accompanying ILO Convention 182 also encourages States to make forced or compulsory recruitment a criminal offence. Although the recommendation does not have a binding effect, it is an authoritative interpretation of ILO Convention 182, and offers guidance for state parties in complying with their obligations under the Convention.

ting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities" (lit. c).

The words "using" and "participate" should be interpreted in order to cover both direct participation in combat and also active participation in military activities linked to combat such as sabotage, scouting, spying, and the use of children as couriers, decoys or at military checkpoints.

This implies that a broad definition for the notion "child soldier" has been offered and that the Statute affords a wide protection for children involved in hostilities.

The notion of "to enlist", instead, comprises both the act of recruiting and the act of conscripting.

The identification of the recruitment of children into national armed forces or armed groups and their use in hostilities whether the conflict is international or internal as a war crime constitute an important aspect of the Statute of the ICC towards the fight against the tragedy of child recruitment.

This section has shown and analysed that international standards for the protection of child soldiers exist. Despite this, a complete response to the problem calls for bolstering these standards because at practical level child recruitment continues to survive. With some innovation and political will, it would be possible and necessary to rectify the gaps.

The ending of the culture of impunity for child soldiers' recruiters could play an important role in the fight against this phenomenon.[17] The next part of this paper will specifically deal with this issue.

The crime of child recruitment

Many factors contribute to the massive number of children involved in armed conflicts.

An important cause in the recruitment of children lies in their abundance. Years of conflicts in countries such as Congo, Uganda, Sudan and Afghanistan, have destroyed a large part of the available adult soldiers. Faced with shortages of "manpower", militia and national armed forces had to turn to younger bodies to fill the ranks. Because of the lack of inhibitions and sense of proportion that characterised children, they can be persuaded to carry

17 Wells, S. L. Crimes against child soldiers in armed conflict situations: application and limits of international humanitarian law. *Tul. J. Int'l & Comp. L., 12,* 2004, p. 287.

out acts of extreme violence. Indeed, supplying children with tranquilizers, alcohol, marijuana and other drugs frequently amplify this impulsiveness.

Another reason why armed forces choose children is due to their physical features that may be profitably exploited on battlegrounds.[18]

Third, nowadays technology allows large arms to be light and cheap and so the small hands of children can easily handle them.[19]

Under international law, the culture of impunity is a debilitating factor in the struggle against child recruitment. Towards this end, as already pointed out, one of the major outcomes of the Rome Statute establishing the ICC has been the inclusion, as a war crime, of the recruitment of children under the age of fifteen.[20]

Unfortunately, the fault created by the ICC Statute is the low age threshold set out in the definition of the crime, of recruitment or use of children, which is the age of fifteen. This is a wrong drawback because the development of international law pertaining to the child soldiers is adopting the "straight 18" principle.[21] It transmits the wrong message that the recruitment and use of children between fifteen and eighteen is acceptable and not a crime. It could be therefore desirable and necessary to rectify this drawback.

Notwithstanding this flaw, it should be noted that, first, individual criminal responsibility is set in place for the crime of using child soldiers and second the jurisprudence that will develop from the work of the ICC will be a helpful guide for national courts and other international criminal tribunal when required to adjudicate cases pertaining to the crime of recruitment or using child soldiers.

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18 Moreover, their size, weight, and agility make them better suited for certain activities, such as planting and detecting landmines and reclaiming weapons from corpses.

19 This has led one scholar to suggest that gun manufacturers could be held liable for perpetuating wars fought by children. See Morisseau, N. Seen but not heard: child soldiers suing gun manufacturer under the Alien Tort Claims Act. *Cornell Law Review, 89,* 2004, p. 1263.

20 Accordingly, article 8(3)(b) provides that "conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities" is a war crime. It should be stressed that both the conscription and enlistment acts are two forms of recruitment. "Conscription" refers to the compulsory entry into the armed forces while "enlistment" refers to the generally voluntary act of joining armed forces by enrolment.

21 See section 2.

However, an important contribution in the area of international criminal law has to be recognised to the decisions of the Special Court of Sierra Leone[22] in the Norman Case.[23] In May 2004, the Special Court issued a landmark decision affirming that an individual may be held criminally responsible for the recruitment of child soldiers. Moreover, the Court specified that the inclusion of that crime in the Special Court's Statute did not violate the international legal prohibition of *nullum crimen sine lege* because the prohibition against recruiting child soldiers had crystallised into a crime under customary international law.[24]

In addition, the Prosecutor of the International Criminal Court is also currently investigating referrals relating to conflicts (Sudan, Democratic Republic of Congo and Uganda), in which there are many child soldiers involved.

In particular, the Prosecutor began investigating the situation in the Democratic Republic of Congo upon referral by the Congolese Government. Specifically, he began to focus on the war crime of child conscription

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22 On 12 June 2000, Sierra Leone's President Ahmad Tejan Kabbah wrote a letter to United Nations Secretary-General Kofi Annan asking the international community to try those responsible for crimes during the conflict. On 14 August 2000, the United Nations Security Council adopted Resolution 1315 requesting the Secretary-General to start negotiations with the Sierra Leonean government to create a Special Court. On 16 January 2002, the UN and Government of Sierra Leone signed an agreement establishing the Court. The Secretary-General defined the Special Court as a "treaty-based *sui generis* Court of mixed jurisdiction and composition". See, *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone.* U.N. Doc. S/2000/915, 4 October 2000.

23 See SCSL. *The Prosecutor v. Sam Hinga Norman, Decision on Preliminary Motion Based Lack of Jurisdiction (Child Recruitment),* Case N° SCSL-2004-14-AR72(E), 31 May 2004. Sam Hinga Norman was indicted on 7 March 2003. On 28 February 2004 the Trial Chamber ordered the joint trial of Norman, Fofana and Kondewa, and on 5 March prosecutors issued a consolidated indictment. The CDF trial began on 3 June 2004. On 14 July 2005, the Prosecution concluded its case. On 22 February 2007 indictee Sam Hinga Norman died of natural causes while in Dakar for medical treatment and the case against him was closed. On 2 August 2007, the Trial Chamber found Kondewa guilty of the crime of child recruitment. Unfortunately, the Appeals Chamber, that delivered its Appeal Judgment on 28 May 2008, by a majority, overturned Kondewa's conviction on enlistment of child soldiers.

24 This conception has been confirmed in subsequent jurisprudence. On 25 February 2009, in fact, was delivered another important judgment related to the so-called "RUF Trial". Three former leaders of Sierra Leone's rebel Revolutionary United Front have been found guilty of war crimes and crimes against humanity committed during the Country's decade-long civil war. Former RUF Interim Leader Issa Hassan Sesay and RUF commander Morris Kallon were each found guilty of conscripting of child soldiers.

in connection with civil war. In February 2006, the ICC Prosecutor issued an arrest warrant for war leader Thomas Lubanga Dyilo. That warrant charged him, as co-perpetrator, with enlisting and conscripting of children under the age of fifteen years into the *Forces patriotiques pour la libération du Congo (FPLC)* and using them to participate actively in hostilities in the context of an international armed conflict from early September 2002 to 2 June 2003 (punishable under article 8(2)(b)(xxvi) of the Rome Statute) and enlisting and conscripting children under the age of fifteen years into the *FPLC* and using them to participate actively in hostilities in the context of an armed conflict not of an international character from 2 June 2003 to 13 August 2003 (punishable under article 8(2)(e)(vii) of the Rome Statute). By 17 March 2006, the Congolese Government surrendered him to the Court. The trial before Trial Chamber I commenced on 26 January 2009.

Child soldiers as perpetrators: calling them to account

> Increasingly, we are also encountering cases of children being detained for alleged association with armed groups in violation of international standards, for example in Burundi, Colombia, the Democratic Republic of Congo, Iraq, Israel and the Philippines. Many of the detained children are subject to ill treatment, torture, forceful interrogation and deprivation of food and education. The children also lack recourse to prompt and appropriate legal assistance, and usually are not separated from adults. In certain situations, some of these children have been used as guides and informers for Government military operations, usually under coercion.[25]

The previous section has looked at child soldiers as victims and the way they are and should be protected. Therefore, the major focus of international standards outlined previously is on those who recruit and use children.

However, the participation of children in armed conflicts also poses the complex question of their accountability at the end of the war. Even if many argue that child soldiers should be held accountable for their actions, questions remain as to the appropriate modalities. The accountability of child soldiers for acts committed during armed conflict is one of the most controversial issues surrounding their use in hostilities.

25 See *Annual Report of the Secretary-General on Children, op. cit.,* par. 9.

On the one hand, if children are victims, then those who victimized them must face prosecution. However, on the other hand, if children have committed heinous acts, then they are criminals themselves. Therefore, this section of the paper will look at child soldiers not only as victims but also as perpetrators and will focus on how their accountability should be established.

The existing model of international criminal law is largely premised on retribution, as it focuses on the criminal responsibility of perpetrators.[26]

Since the International Tribunal at Nuremberg, the trials of persons responsible for war crimes and other international crimes, such as crimes against humanity and genocide, before international courts such as the International Criminal Tribunals for the former Yugoslavia (ICTY) and the International Criminal Tribunals for Rwanda (ICTR), have consistently been justified by the fact that the perpetration of such crimes jeopardises international peace and security.

The criminal model of justice is inadequate in a number of respects. While trials are desirable or in some cases essential, they improperly address victims' concerns, namely the right to truth and reparation for harm suffered. International criminal law, as currently structured, is also ill suited for the child perpetrator, victims themselves.

The retributive paradigm of international criminal law is narrow in perspective, not only because it solely highlights the criminal liability of perpetrators, but also because even in its focus on the perpetrator, it does not differentiate the different kinds of perpetrator that may require special attention, such as child soldiers.

In general, under international law, the prosecution of children is not prohibited. Although not necessarily directly addressed to the prosecution of child soldiers, article 40 of the Convention on the Rights of the Child foresees the trials of children under eighteen. It requires that, when children are tried, the process should be fair and should take into account their specific needs and vulnerabilities.

In calling child soldiers to account under the criminal justice system, an age of criminal responsibility that adheres to international law is a very important aspect of the whole process. This is because the age of a child

26 However, it is important to note that in the Rome Statute's perspective things are changing and the international criminal law model is now moving towards a more "victims-centred" approach. Concerns and rights of the victims are amongst the goals of the "restorative approach" to criminal law that we believe to be the correct one in the international criminal law system.

helps to strike a balance between attributing responsibility appropriately and protecting the child from a trial he is too young to understand. In relation to the age of criminal responsibility, it is unclear whether international law fixes a minimum age. All that the Convention on the Rights of the Child requires from State parties is that they have to establish "a minimum age below which children shall be presumed not to have the capacity to infringe the penal law".[27] In the area of juvenile justice, the Beijing Rules - Rule 4, 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 too low an age limit, bearing in mind the facts of emotional, mental and intellectual maturity". Apparently, both the Convention and the Beijing Rules do not specify what the suitable age of criminal accountability is.

However, the age should not be so low as to result in the punishment of children for offences in respect of which, at the time of their commission, they were too young to understand the consequences.

To conclude on this issue, if the age of criminal responsibility is fixed too low or if there is no lower age limit at all, the notion of responsibility for child soldiers would become worthless. Efforts should therefore be made to fix a minimum age of criminal responsibility in accordance with international law that takes into account the facts of mental, emotional and intellectual maturity of the child involved.

Moreover, it should be taken into account that in order to be guilty of a crime it is not enough simply to have carried out a particular prohibited act; the requisites of *mens rea* as well as of *actus reus* must be demonstrated. Because in respect of infancy a lack of *mens rea* could be presumed, therefore, it is even more difficult to consider to which extent these children should be held responsible for their actions or simply seen as innocent tools of their superiors.

In the history of international criminal law, children have not been held accountable. Neither the ICTY not the ICTR have jurisdiction to try them. Moreover, article 26 of the ICC Statute explicitly prohibits the prosecution of individuals less than eighteen years of age at the time of the commission of the offence.

Instead, the Statute of the Special Court for Sierra Leone is the first international instrument that expressly provides for the prosecution of those

27 Article 40(3)(a).

children charged with international crimes.[28] Although the Statute's provision represents a precedent that under international criminal law child soldiers could face prosecution, it is important to note that the Special Court's Prosecutor affirmed that he would not prosecute child soldier because they could not be assimilated to those who bear the greatest responsibility of the crime committed during the conflicts.[29]

In any case, if children have to be tried, certain minimum standards should be met to respect their vulnerable positions. Among these minimum standards, those of great importance are the issue relating to fair trials, sentencing and detention.

Accountability does not always involve criminal responsibility and even if held criminally responsible for their actions, children should not necessarily deal with in the same way as adults. This would serve the best interests of the child recalled in article 3 of the Convention on the Rights of the Child.[30]

In the event that child soldiers are prosecuted, the need for special protection mechanisms is high. Their treatment should be in accordance with international human rights standards specific to the rights of the child. They should, as rightly incorporated in article 7(1) of the Statute of the Special Court for Sierra Leone "[b]e treated with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society".

In accordance with international human rights law, the fundamental rights and legal safeguards accorded to children under the Convention on the Rights of the Child should be provided to child soldiers in their trials. These include the right to be notified of charges, presumption of innocence, the right to be heard, the right to counsel, the right to remain silent, the right to confront and cross-examine witnesses, the right to appeal to a

28 Article 7 of the SCSL Statute.

29 The Special Court, in fact, was created only to try that category of perpetrators. See Novogrodsky, N. B. Litigating child recruitment before the Special Court for Sierra Leone. *San Diego Int'l L. J., 7,* 2006, p. 421, and Romero, J. A. The Special Court for Sierra Leone and the Juvenile Soldier Dilemma. *Nw U. J. Int'l Hum. Rts, 2,* 2004, p. 8.

30 Article 3(1) states that "[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration".

higher authority at all stages of proceedings and the right to the presence of a parent or guardian.

Surrounding circumstances in which child soldiers became involved should also be taken into account as a defence or mitigating factor.[31]

Another defence that could be exercised by child soldiers is the defence of "superior orders". International law, in fact, recognizes that war criminals are less culpable if superiors bear part of the responsibility.

According to article 37(b) of the Convention on the Rights of the Child "[t]he […] detention or imprisonment of a child […] shall be used only as a measure of last resort and for the shortest appropriate period of time". Therefore, child soldiers should not face the death penalty nor they should be sentenced to life imprisonment without *parole*.

At last, the Statute of the Special Court for Sierra Leone offers some help in the sentencing of child soldiers. Accordingly, instead of ordering imprisonment as a penalty, article 7(2) of the Statute foresees any of the following rehabilitative measures: care, guidance, and supervision orders; community service orders; counselling; foster care; correctional, educational, and vocational training programs; approved schools; and, as appropriate, any disarmament, demobilization, and reintegration programs of child protection agencies.

Even if those guarantees are respected, the punitive-oriented criminal justice model is mostly inadequate to solve the problem of child soldiers' accountability. A restorative element should therefore be emphasised in any approach to establish the responsibility of this special category of perpetrators.

Concluding remarks: the experience in Sierra Leone

As participants who have been involuntarily recruited, they have to serve as objects of the recruiters and child soldiers have to commit terrible crimes.

If we accept the idea that child soldiers are only victims, most of these violations and crimes would be committed with impunity. Nevertheless, as section 4 of this paper demonstrates, it could be possible for child soldiers

31 As we mentioned in section 1, sometimes, during abductions and forced recruitment, armed groups compel children to follow orders by threatening death, or by forcing the children to commit atrocities against family members and friends so that they become hardened to violence.

to be involved in post-conflict judicial transitional mechanisms aimed at asserting their responsibility.

However, in our opinion, in establishing their accountability, priority should be accorded to non-prosecution alternatives to accountability. The choice between prosecution and non-prosecutional alternatives should depend on what one is seeking to achieve. In the child soldier context the purpose of holding them responsible should primarily be for their rehabilitation and reintegration into society by keeping the best interest of the child at the heart of the whole process. This aid avoids the stigmatizing effect of prosecution and promotes the so-called restorative justice.

Although the best-known alternative to prosecution is the truth and reconciliation commission (TRC), it is not the only one; other options include reports by civil liability, international delegations, reparations and historical inquiry. All those alternative instruments are inspired by the theory of restorative justice that is a concept of justice seeking to take into account to interests of all parties in a criminal prosecution: the State, offenders and victims, or, in the case of international justice, the international community, perpetrators and victims.

In the contest of the child soldiers' accountability issue for serious human rights abuses committed during the armed conflicts, truth commissions offer a high-quality non-judicial alternative.

Truth commissions can play a key role in addressing the past and in re-establishing the rule of in post-conflict situations.[32] By providing a forum for victims and by documenting the crimes committed during the war, those commissions can serve as an important instrument to build stability in societies where entire populations have been traumatized. Truth-seeking mechanisms have the potential to engage communities in accountability processes and are a potentially effective and safe mechanism for children's involvement.

An important experience is the one in Sierra Leone.

The Sierra Leone Truth and Reconciliation Commission was an outcome of the Lomé Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front (RUF).[33] The Truth and Recon-

32 See *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General.* UN Doc. S/2004/616, 23 August 2004.

33 See the *Lomé Agreement,* article XXVI, which states "1. A Truth and Reconciliation Commission shall be established to address impunity, break the cycle of violence, provide a forum

ciliation Commission Act specifically sets out the purposes of the TRC, as follows: to create an impartial historical record of violations and abuses of human rights and international humanitarian law related to the armed conflict in Sierra Leone; to address impunity; to respond to the needs of the victims; to promote healing and reconciliation, and to prevent a repetition of the violations and abuses suffered.[34]

The TRC for Sierra Leone was the first one to focus on children as victims and witnesses, and to profile their role as actors in the reconciliation process.

Concerning child soldiers, the commission treated all children equally, as victims of war, but also examined the "dual identities" of child soldiers as both victims and perpetrators. It underlined that it was not seeking to discover guilt, but to comprehend how children came to carry out crimes, what motivated them, whether they had the capacity to understand their actions, and how such offences might be prevented in the future.

Recognizing that child soldiers are primarily victims of grave abuses of human rights, and prioritizing the prosecution of those who unlawfully recruited and used them, have been essential.

Careful consideration was required to ensure that children's involvement in truth, reconciliation and justice-seeking processes did not put them at risk or expose them to further harm. Special protection and child-friendly procedures serving the child's best interests at all times, were assured (i.e. special hearings for children, closed sessions, a safe and comfortable environment for interviews, protecting the identity of child witnesses, and staff trained in psychological support for children).

The preparation of a child-friendly version of the final report of the Truth and Reconciliation Commission for Sierra Leone was also fundamental because it provided another opportunity to involve children in the Commission's work. The child-friendly version is a much shorter and simpler version of the full report that children can read and understand. It is the first of its kind anywhere in the world.

In conclusion, international law views child soldiers largely as victims insofar as their rights have been violated by their illegal recruitment and use to participate in hostilities; international law takes the view that children

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for both the victims and perpetrators of human rights violations to tell their story, get a clear picture of the past in order to facilitate genuine healing and reconciliation".

34 See *Truth and Reconciliation Commission Act 2000,* section 6(1).

under fifteen years of age lack sufficient mental capacity to weight up the issues involved in enrolling for military service.

However, victims who have suffered abuses at the hands of a child have also right to justice and reparations.[35] Besides, it is reasonable to ask whether absolving children of accountability for crimes that they have committed is automatically in their best interest. At least, when the child was clearly in control of their actions, and not coerced, drugged, or forced into committing atrocities, acknowledgement and expiation, including in some instances prosecution, might be an important part of a personal healing. It may also contribute to their acceptance by families, communities and societies.

Prosecution, however, should not be the first port of call in holding child soldiers accountable. In situations where alternatives to prosecution like TRC and traditional dispute resolution procedures exist, the possibility of using these alternatives should first be inquired. As long as these alternatives put safeguards to ensure the best interest of the child and their purpose is restoratives justice, they could offer an appealing form of accountability for child soldiers.

The unique position of the child combatant, first victim then perpetrator, is best served by truth telling before the Truth and Reconciliation Commissions to facilitate effective social rehabilitation and reintegration than by trials.

Since the possibility of trying children in an international criminal tribunal presents difficult problems and moral dilemmas regarding accountability, it will useful to entrench a restorative element in the concept of international criminal law.[36]

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35 See *Updated set of principles for the protection and promotion of human rights through action to combat impunity*. UN Doc. E/CN.4/2005/102/Add. 1, 8 February 2005; *UN Declaration of basic principles of justice for victims of crime and abuse of power*. UN Doc. A/RES/40/34, 29 November 1985.

36 The Rome Statute itself requires the International Criminal Court to develop principles to implement restorative justice, through which the concerns and rights of victims will be given effect. See article 75 ICC Statute, "Reparations to victims. 1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting. 2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and

As Secretary-General says, "[t]he movement of armed groups across borders to recruit children from refugee camps continues to be alarming. […]. Transportatation of vulnerable children by both the Government and rebel groups across borders during armed conflict constitutes one of the worst forms of child trafficking".[37] This means that the drama of the involvement of children in armed conflicts still exists. Protection strategies should therefore be put in place and they should target identifiably vulnerable children and react to changes that may affect child recruitment patterns.

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rehabilitation. Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79. 3. Before making an order under this article, the Court may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States. 4. In exercising its power under this article, the Court may, after a person is convicted of a crime within the jurisdiction of the Court, determine whether, in order to give effect to an order which it may make under this article, it is necessary to seek measures under article 93, paragraph 1. 5. A State Party shall give effect to a decision under this article as if the provisions of article 109 were applicable to this article. 6. Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law". This opens an avenue to increase the visibility of victims in the processes of the Court, but also to develop jurisprudence relating to victims and thus provide guidance for other tribunals, both national and international.

37 See *Annual Report of the Secretary-General on Children and Armed conflict to the Security Council, op. cit.,* par. 7.

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