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CRIMINAL RESPONSIBILITY AND CHILD SOLDIERS: DEALING WITH A DUEL IDENTIY DILEMMA

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CONTENTS

ABSTRACT

The victim-perpetrator duel identity of the child soldier creates a moral dilemma with regards to the issue of criminal responsibility under international law. On the one hand attention must be given to the vulnerability of children in the context of war, but on the other it is hard to ignore the atrocities they may commit voluntarily, particularly when these are directed against the civilian population.

This paper seeks to examine the current array of international law dealing with the protection and prosecution of child soldiers and determine whether it effectively deals with the above duel identity child soldier problem. After finding that the law in effect grants impunity to all child soldiers, it is argued that attributing criminal responsibility to those who have voluntarily committed atrocities is not only in the best interests of the children themselves but the wider community.

The paper then proceeds to explore how this can be done by looking to concepts of juvenile justice which promote a restorative justice approach of involving all stakeholders of a crime to repair a wrong. The differing retributive and restorative approaches used in post conflict Rwanda, Uganda and Sierra Leone will then be analysed in order to propose what this author believes is the best way to attribute criminal responsibility to the duel identity victim-perpetrator child solder in the future.

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I INTRODUCTION

When it comes to international armed conflict, children are often viewed as victims. In recent decades they have been said to represent half of the total amount of civilian casualties in armed conflict around the world.[1] UNICEF reports that more than 2 million have died as a result of armed conflict and at least 6 million have been permanently disabled or seriously injured.[2]

However, children may not always be mere civilians in times of armed conflict. In many countries the recruitment of children into the armed forces is a common occurrence and it is estimated that some 300000 children, both boys and girls, are today involved in more than 30 conflicts worldwide.[3] The term 'child soldier' is in itself a paradox. It is hard to imagine a child with a gun or weapon in their hand taking part in warfare, war is not child's play. Nevertheless child soldiers do exist and their roles vary from being used indirectly as messengers, porters, cooks and providing sexual services to being combatants fighting against opposition forces.[4]

In terms of dealing with these child soldiers, international law tends to deal with them as victims, victims who should not be placed in a situation of armed conflict to begin with. Whilst at first this may seem to be an appropriate position to take, it does not make sense when considering some of the heinous acts a child soldier may commit as a combatant. This is especially so in instances where they have committed atrocities against the civilian population.

This paper begins with a brief overview of the nature of child recruitment and their role and use in hostilities with a view to understanding the following section of the paper which examines how international law protects child soldiers as victims of recruitment. Recognising that child soldiers have a duel identity, the paper then examines

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[1] UNICEF "Fact sheet – Child Soldiers" www.unicef.org (accessed 29 September 2008).
[2] Ibid.
[3] Ibid.
[4] Ibid.

how international law deals with child soldiers as perpetrators. It is found that the current array of international law inadequately deals with the duel victim-perpetrator identity of the child soldier as it effectively grants impunity to all child soldiers alike including those above the minimum age of recruitment who may be responsible for committing war crimes. In light of this it is argued that in some instances it is necessary and in the best interests of the child as a perpetrator to recognise their wrongs and to be held criminally responsible for their actions.

With this in mind the paper then looks to the practice and underlying concepts of juvenile justice and proposes that the best solution to deal with child soldiers under international law is through a restorative justice approach. This approach of taking into account all stakeholders to a crime and recognising and repairing the wrongs done has been implemented in both Uganda and Sierra Leone in order to deal with child soldiers post conflict. The paper then proceeds to explore the differing approaches used in both countries and identifies that their shortfall is that they work in isolation of any form of prosecution or punishment which in some instances is needed for the community to see that justice is done. Finally it is submitted that a hybrid approach of dealing with child soldiers which involves both restorative and retributive elements, modelled on the *gacaca* system in Rwanda, is necessary in order to effectively deal with the duel identity dilemma of the child soldier.

II THE RECRUITMENT OF CHILD SOLDIERS – VICTIMS IN NEED OF PROTECTION

A Voluntary Recruitment

In countries constantly the subject of international or civil armed conflict children grow up in situations of hard poverty. As society breaks down children are left with no access to education, some are forced to flee from their homes whilst others are separated from their families often making a choice to join the military forces a choice of survival.[5]

[5] Human Rights Watch www.hrw.org (accessed 12 August 2008).

Some children feel obliged to become soldiers for their own protection, feeling safer with a gun on their hands than without.[6]

Although classification of recruitment is usually split between involuntary and voluntary recruitment, in the case of child soldiers the notion of 'voluntary' recruitment is considered a misnomer because of the cultural, political and natural circumstances surrounding a child's so called free choice to join armed forces.[7] Children in these situations are not true 'volunteers', their choice to join the armed forces is better described as a forced choice.

However, there are situations where children's "expectations and feelings of empowerment and competence, both before and during war" may have an impact on their decision to take up arms.[8] Some may choose to fight to revenge the death of family members while others may see themselves as fighting for a cause in reaction to injustices they or their family may have faced.[9] Children may also choose to take up arms in conflicts where war activities are glorified and where military life is the most attractive option available to gain power in an otherwise powerless and destitute situation.[10] These children may be considered true free willing 'volunteers'.

B Involuntary Recruitment

In other situations, children are abducted from their homes to fill the ranks.[11] They are perceived as cheap and obedient.[12] Not only are children less socialised, more docile and malleable than adults, but because of their evolving mental and moral

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[6] Graca Machel "Impact of Armed Conflict on Children" (26 August 1996) A/51/306, para 41 ["Impact of Armed Conflict on Children"].
[7] No Peace without Justice and UNICEF Innocenti Research Centre *International Criminal Justice and Children* (September 2002) 73 [*International Criminal Justice and Children*].
[8] Illene Cohn *Child Soldiers: The Role of Children in Armed Conflict* (Oxford University Press, New York, 1994) 30 [*Child Soldiers: The Role of Children in Armed Conflict*].
[9] Sierra Leone Truth and Reconciliation Commission *The Final Report of the Truth and Reconciliation Commission of Sierra Leone Volume 3b, Chapter 4: Children and the Armed Conflict in Sierra Leone* (2007) www.trcsierraleone.org (accessed 12 August 2008), para 218 [*The Final Report of the Truth and Reconciliation Commission of Sierra Leone Volume 3b, Chapter 4: Children and the Armed Conflict in Sierra Leone*].
[10] "Impact of Armed Conflict on Children", above n 6, para 42.
[11] *Child Soldiers: The Role of Children in Armed Conflict*, above n 8, 24.
[12] *International Criminal Justice and Children*, above n 7, 73.

development they may also be more prone to behaving badly.[13] These make children an attractive option to military commanders as they are more easily persuaded or coerced into committing atrocities.[14] Furthermore drug use, trauma and deprivation helps these children carry out brutal acts and massacres with little fear and revulsion and with greater enthusiasm and brutality than adults.[15]

Initiation processes ensure there is no going back. Children are made to carry out brutal acts on their own families converting them into perpetrators, closing them off from their community and helping foster a "dependency relationship with their captors, eventually even coming to identify with their cause."[16]

Although there are clearly differences in the way children may find their way into the armed forces, International law tends to view all children in these situations as victims, victims who should not be given the opportunity in the first place to be subjected to a military life in the midst of armed conflict.

III HOW INTERNATIONAL LAW PROTECTS CHILDREN FROM RECRUITMENT IN THE ARMED FORCES

A International Humanitarian Law

The 1949 Geneva Conventions were the first to take into account the special needs and vulnerabilities of children in armed conflict. Geneva Convention IV provides protection for civilians in times of war, this includes children. Article 24 creates an obligation for children under the age of 15 not being left to their own resources after war[17] and article 50 provides for the facilitation and proper working of all institutions

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[13] Matthew Happold "The Age of Criminal Responsibility for International Crimes under International Law" in Karin Arts and Vesselin Popovski (eds) *International Criminal Accountability and the Rights of Children* (Hague Academic Press, Netherlands, 2006)70[*International Criminal Accountability and the Rights of Children*].
[14] Ibid.
[15] *Child Soldiers: The Role of Children in Armed Conflict*, above n 8, 26.
[16] Ibid, 27.
[17] Geneva Convention IV (12 August 1949) 75 UNTS 285, art 24.

dedicated to the care and education of children.[18] More importantly under Article 51, as protected persons, children may not be compelled to serve in the armed or auxiliary forces of an occupying power and they may not be compelled to undertake any work which would involve them taking part in military operations.[19] Furthermore the occupying power may not compel protected persons to work unless they are above the age of 18.[20]

Although these provisions protected children from involuntary recruitment, it was not until the Additional Protocols to the Geneva Conventions in 1977 that specific articles came into existence obliging states to refrain from recruiting persons under the age of 15.[21] Article 77(2) of Additional Protocol I states that parties to an international armed conflict shall take "all feasible measures in order that children who have not attained the age of 15 years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces."[22] However it must be noted that Article 77(3) contemplates the possibility of child recruitment in exceptional cases despite the prohibition by requiring that children benefit from special protection if they are to fall into the power of an adverse party.[23]

Article 4(3) of Additional Protocol II, which applies to internal armed conflicts, states that: "children who have not attained the age of 15 years shall neither be recruited into the armed forces or groups nor allowed to take part in hostilities."[24] This prohibition is more certain and it does not limit their participation to just taking a direct part in hostilities unlike the former article which implies that the prohibition does not extend to children who maybe recruited to undertake more indirect roles in a conflict. The implications of this are considered below where the same problem is encountered in international human rights law dealing with children in armed conflict.

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[18] Ibid, art 50.
[19] Ibid, art 51.
[20] Ibid, art 51.
[21] Additional Protocol I to the Geneva Conventions (8 June 1977) 1125 UNTS 3, art 77; Additional Protocol II to the Geneva Conventions (8 June 1977) 1125 UNTS 609, art 4.
[22] Additional Protocol I to the Geneva Conventions (8 June 1977) 1125 UNTS 3, art 77.
[23] Ibid.
[24] Additional Protocol II to the Geneva Conventions (8 June 1977) 1125 UNTS 609, art 4.

B International Human Rights Law

1 United Nations Convention on the Rights of the Child (CRC)[25]

The CRC sets out the civil, political, economic, social and cultural rights of children. As a widely ratified treaty, it grants many protections to otherwise vulnerable children all over the world. However it does have its limitations, creating only obligations with no real sanctions for a breach.

Although a child is defined in the CRC as any person under the age of 18[26], Article 38 obliges states "to take all feasible measures to ensure persons who have not attained the age of 15 do not take a direct part in hostilities."[27] It also states that states should refrain from recruiting anyone who is not 15 into the armed forces, but with regards to recruiting those between the ages of 15 and 18, priority should be given to the oldest.[28]

The problem with these provisions is that they do not prohibit the use of children indirectly in hostilities. Such indirect use would include participating in military operations such as gathering information, transmitting orders, transporting ammunition and foodstuffs, or acts of sabotage.[29] These are acts which put children at just as great a risk as those children participating directly in hostilities. In fact carrying out roles as spies and messengers in hostilities puts all children under suspicion.[30] If they are captured this may be just as dangerous as placing a gun in their hands and sending them out to fight. Also as noted in the Graca Machel report whilst children of both sexes may start out as indirect support, it does not take long before they are placed in the heat of battle.[31]

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[25] Convention on the Rights of the Child (20 November 1989) 1577 UNTS 3.
[26] Ibid, art 1.
[27] Ibid, art 38(2).
[28] Ibid, art 38(3).
[29] Daniel Helle "Optional Protocol on the Involvement of Children in Armed Conflict to the Convention on the Rights of the Child" (2000) 839 International Review of the Red Cross 797 www.icrc.org (accessed 24 September 2008).
[30] "Impact of Armed Conflict on Children", above n 6, para 44.
[31] Ibid, para 47.

Furthermore the provisions imply that children between the ages of 15 and 18 can be recruited for use in the armed forces. So although the CRC seeks to protect and give rights to all children below the age of 18, it fails to do so with regards to recruitment in the armed forces. This age limit was a result of difficult political compromise and was already considered too low by many at the time of the adoption of the CRC.[32] However when considering the difficulties of arriving at a consensus when issues of age are dealt with differently across different jurisdictions, it is better to have a provision in the CRC prohibiting recruitment which has a minimum age of 15 rather than have no provision at all. In many countries children do not have the luxury of simply being children. Taking on many responsibilities at a young age they are considered to be adults by those around them.[33] It is therefore difficult for some states to endorse a minimum age greater than 15 years when those above this age are no longer seen to have the necessary qualities deserving of protection. Had the minimum age been lifted to 18, the CRC may not have been as widely ratified as it has been.[34]

In 2002 the Optional Protocol to the CRC attempted to deal with this problem in Article 1 by obliging states to "take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities."[35] It also states that anyone below the age of 18 should not be compulsorily recruited into the armed forces.[36] However this still allows for the indirect use of children below the age of 18 who have voluntarily been recruited and under Article 3 of the statute this can be done provided certain safeguards are put in place.[37]

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[32] Vesselin Popovski "Children in Armed Conflict: Law and Practice of the United Nations" in *International Criminal Accountability and the Rights of Children*, above n 13, 38.
[33] Angela Veale "The Criminal Responsibility of Former Child Soldiers: Contributions from Psychology" in *International Criminal Accountability and the Rights of Children*, above n 13, 106.
[34] The Convention on the Rights of the Child has been ratified by 192 States, nearly all the States in the world, with the exception of the United States of America and Somalia.
[35] Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict UNGA Resolution. 54/263 (25 May 2000) A/RES/54/263, art 1.
[36] Ibid, art 2.
[37] Ibid, art 3(3).

As with the CRC, the Optional Protocol too is without sanction for a breach. Although there are committees in place monitoring and reporting on state compliance, realistically this is the limit of its enforceability.

2 *African Charter on the Rights and Welfare of the Child*[38]

The African Charter on the Rights and Welfare of the Child entered into force in 1999 and has been ratified by 37 of the 53 African countries which are party to the Organisation of African Unity. Like the CRC it recognises the uniqueness of children and the need to have in place particular safeguards and guarantees to promote their welfare in an unstable African environment. In fact many of its provisions are modelled on the CRC.

Under Article 22 it obliges state parties to respect and ensure respect for rules of international humanitarian law applicable in armed conflicts to children, thus endorsing the Geneva Convention and the Optional Protocols.[39] More specifically it also obliges State Parties 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."[40] The rules also apply to situations of "internal armed conflicts, tension and strife."[41] What is noticeably missing is a specified minimum age as is present in the CRC. However the Charter defines a child as anyone below the age of 18.[42] So unlike the CRC the protection granted in armed conflict is implied and extended to all children, not just those below the age of 15.

The Charter and its provisions in respect of children in armed conflict are a significant stepping stone for African nations where the use of child soldiers in armed conflict has been most prevalent. However countries such as the Democratic Republic of Congo and Sudan where there has been recent use of child soldiers in civil conflict are yet to ratify this Charter. It must be noted however that Sudan has signed the Optional

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[38] African Charter on the Rights and Welfare of the Child (11 July 1990) CAB/LEG/24.9/49.
[39] Ibid, art 22.
[40] Ibid, art 22(2).
[41] Ibid, art 22(3).
[42] Ibid, art 2.

Protocol to the CRC and some parties to the conflict have collaborated with UNICEF to demobilize and reintegrate child soldiers back to their families and communities.[43]

3 *International Labour Organisation (ILO) Worst Forms of Child Labour Convention 182, 1999*

The ILO Worst Forms of Child Labour Convention 182 which defines a child as "all persons under the age of 18"[44] requires state parties to "take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour."[45] For the purposes of the Convention this includes the recruitment and use of children in armed conflict. The Convention therefore implies a prohibition on the recruitment and use of children under the age of 18 in an armed conflict.

The Convention has been widely ratified, however apart from reporting mechanisms and requiring state parties to "take all necessary measures to ensure the effective implementation and enforcement of the provisions…including the provision and application of penal sanctions,"[46] it too lacks international criminal sanction for a breach.

Although all of the above international humanitarian and human rights law instruments may seem unhelpful when it comes to attributing responsibility and sanctioning breaches of a provision, they still serve as an important indicator towards the customary law prohibition on the recruitment of child soldiers which will be dealt with later in the paper. It also must be remembered that the prohibitions contained in these instruments also serve as a deterrent for the possibility of future abuses of the use of children in armed conflict. The instruments are there to protect and the duty to implement these rights and respect them lies first and foremost with the states parties themselves.[47]

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[43] Coalition to Stop the Use of Child Soldiers *Sudan: Child Soldiers Global Report 2008* www.childsoldiersglobalreport.org (accessed 24 September 2008).
[44] International Labour Organisation Worst Forms of Labour Convention 182, (17 June 1999) art 2.
[45] Ibid, art 1.
[46] Ibid, art 7.
[47] International Committee of the Red Cross *International Humanitarian Law: Answers to your Questions* www.icrc.org (accessed 24 September 2008) 36.

States recognise that the observance of the law is in their interest, and that every violation may also bring particular undesirable consequences.[48] A state which breaches provisions whilst not attracting formal sanction will still receive negative responses and reactions from other states that will not condone their actions. This means that a state may be deterred from allowing recruitment, or be forced to take action from the mere reactions and responses of other states or even non-governmental organisations. Take for example UNICEF, whom upon discovering the use of child soldiers in many states will publish statements and negotiate and work with the governments involved in order to demobilise child soldiers.[49] There is also the risk of losing international reputation and harming relations with other states. This is particularly important for states that rely on the goodwill and economic relations of other states this is an important factor as one does not wish to make an enemy out of a friend. A reputation for honouring commitments benefits a state by increasing the possibilities of future beneficial cooperation with other states.[50]

C International Criminal Law - The Rome Statute

Finally in 2002 the Rome Statute for the International Criminal Court criminalised the use of children in hostilities. Article 8(2)(b)(xxvi) makes the "conscription and enlistment of children under the age of 15 into the national armed forces or using them to participate actively in hostilities"[51] in an international armed conflict a war crime. This provision is a result of negotiation and compromise by countries with divergent opinions on the matter. These compromises are evident from the wording of the provision.

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[48] Louis Henkin *How Nations Behave: Law and Foregin Policy* (2nd ed, Columbia University Press, New York, 1979) 320.

[49] UNICEF has undertaken negotiation and demobilisation processes in many countries such as Sri Lanka where child soldiers have been recruited see BBC News "UNICEF holds child soldier talks" (4 March 2003) www.bbc.co.uk (accessed 24 September 2008).

[50] Robert E Scott, Paul B Stephen "Self-Enforcing International Agreements and the Limits of Coercion" 2004 Wisconsin Law Review 551, 590.

[51] Rome Statute of the International Criminal Court (17 July 1998) A/CONF 183/9; 2187 UNTS 90, art 8(2)(b)(xxvi).

The Statute uses the words 'conscripting' and 'enlisting' as opposed to 'recruiting' which we have seen in the above humanitarian and human law treaties. When drafting the Statute, options ranged from outlawing "recruiting children under the age of 15 years into armed forces or groups; or allowing them to take part in hostilities" to prohibiting "forcing [them] to take direct part in hostilities."[52] Recruiting was used in an earlier draft but was rejected by some countries, however these countries accepted the terms 'conscripting' and 'enlisting' which we now find in the finalised Statute.[53] Compared with 'recruitment,' these terms "suggest something more passive such as putting the name of a person on a list."[54]

Many texts generally state that prohibition also applies to conflicts of a non-international character, however Article 8(2)(e)(vii) which applies to conflicts not of an international character prohibits "conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities."[55] Although not evident at first sight there is a difference between the two provisions. This is the inclusion of the word 'national' before armed forces in Article 8(2)(b)(xxvi). As noted by Schabas this inclusion was a result of the concerns of several Arab States who feared that the term might cover the young Palestinians joining the *intifada*[56] revolt against Israeli occupation.[57]

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[52] See Thomas Graditzky "War Crime Issues Before the Rome Diplomatic Conference on the Establishment of an International Criminal Court" University of California, Davis Journal of International Law and Policy 5:2 1999 199, 206 in Olympia Bekou and Robert Cryer (eds) *The International Criminal Court* (Dartmouth Publishing Company/Ashgate Publishing Limited, England, 2004) 127 ["War Crime Issues Before the Rome Diplomatic Conference on the Establishment of an International Criminal Court"].

[53] Ibid.

[54] William A Schabas *An Introduction to the International Criminal Court* (Cambridge University Press, Cambridge, United Kingdom, 2001) 50 [*An Introduction to the International Criminal Court*]. See also Kofi Annan "Report of the Secretary General on the Establishment of a Special Court for Sierra Leone" (4 October 2000) UN Doc S/2000/915,para 18.

[55] Rome Statute of the International Criminal Court, above n 51, art 8(2)(e)(vii).

[56] Intifada is also known as a mass uprising. In regards to the Israel – Palestinian conflict protest took the form of civil disobedience, general strikes, boycotts, barricades, graffiti and stone throwing demonstrations against heavily-armed occupation troops see BBC News A History of Conflict: Israel and the Palestinians www.news.bbc.co.uk (accessed 22 September 2000).

[57] *An Introduction to the International Criminal Court*, above n 54.

By limiting the prohibition to only "participate actively" in hostilities, on the face of it the Statute, like the CRC, also appears to allow and condone the indirect use of children. However it was made clear whilst drafting this war crime that:[58]

> The words "using" and "participate" have been adopted in order to cover both direct participation in combat and also active participation in military activities linked to combat such as scouting, spying, sabotage and the use of children as decoys, couriers or at military checkpoints. It would not cover activities clearly unrelated to the hostilities such as food deliveries to an airbase or the use of domestic staff in an officer's married accommodation. However, use of children in a direct support function such as acting bearers to take supplies to the front line, or activities at the front line itself, would be included within the terminology.

Much of the time children initially start out in these support functions and are later placed in the heat of battle,[59] the above explanatory statement ensures that commanders can not use the wording of the provision to shirk from responsibility where this has occurred or where there is active participation in military activities linked to combat. It is just as important that these children are protected as their roles are just as life-threatening and dangerous as the children who are fighting with guns.[60]

Thus the Rome Statute appears to provide an adequate coverage of protection for children who are victims of recruitment. It also sufficiently protects children who take part directly and indirectly in hostilities as long as there is a link to combat. The only shortfall of the Rome Statute provisions appears to be maintaining the minimum age for recruitment at 15 years. However this decision would have been influenced by the international humanitarian prohibition at the time which had set the age at 15. The Additional Protocol to the CRC, the African Charter and ILO Worst forms of Child Labour Convention which raised the age to 18 all came into effect after the Rome Statute.

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[58] Draft Statute of the International Criminal Court, Report of the Preparatory Committee on the Establishment of an International Criminal Court, Addendum, Part One (14 April 1998) A/CONF.183/2/Add.1, 2.
[59] "Impact of Armed Conflict on Children", above n 6, para 47.
[60] "Impact of Armed Conflict on Children" above n 6, para 44.

However despite this, the addition of the Rome Statute provision to the current array of international humanitarian and human law finally gave some teeth to the obligation not to recruit child soldiers. The decision on its inclusion in the statute is said to have been one of the most positive results of the Rome Conference.[61] It means that Commanders who recruit those under the age of 15 can now be prosecuted and face individual criminal responsibility under the jurisdiction of the International Criminal Court. Although to date there have been no prosecutions under the Rome Statute provisions, several leaders including Former Liberian President Charles Taylor have been charged for conscripting or enlisting children under the age of 15 years into armed forces or groups under the identical provision in the Statute of the Special Court for Sierra Leone.[62]

D Customary International Law

Opinio Juris and state practice[63] have established that the rules prohibiting the recruitment of children into the armed forces or an armed group and prohibiting their participation in hostilities are norms of customary international law.[64] This is evidenced through the treaties and conventions mentioned above and their almost universal adoption and ratification by States. The prohibition can also be evidenced through resolutions and actions undertaken by States and organisations.

At international conferences of the Red Cross and Red Crescent, resolutions have been adopted prohibiting the recruitment of children and their participation in hostilities. Furthermore a plan of action adopted at the 27th Conference requires state parties to take

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[61] "War Crime Issues Before the Rome Diplomatic Conference on the Establishment of an International Criminal Court", above n 52.

[62] Statute of the Special Court for Sierra Leone, Article 4(c) www.sc-sl.org (accessed 23 September 2008). See also Alex Duval Smith "Charles Taylor's trial for murder, rape and slavery begins in Hague" (4 June 2007) www.independent.co.uk (accessed 24 September 2008).

[63] See *Continental Shelf case (Libyan Arab Jamahiriya v Malta)* (Judgement) [1985] ICJ Rep 13, 29 states that: "the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of states."

[64] Jean-Marie Henckaerts and Louise Doswald-Beck (eds) *Customary International Humanitarian Law* (Cambridge University Press, New York, 2005) 482 – 485 [*Customary International Humanitarian Law*].

all measures including penal measures to stop the recruitment and participation of children in armed hostilities.[65]

The United Nations Security Council since 1999 has also taken action through resolutions condemning the recruitment of children and use of children in armed conflict in violation of international law.[66] The first of these demanded that through political and other efforts, states and all parts of the UN system ensure an end to the recruitment and use of children in armed conflict.[67] Since then through Resolution 1314 it has linked violations of the prohibition to it being able to use its powers under Chapter VII to undertake enforcement measures where there is a threat to international peace and security.[68] Resolution 1314 determined that violations of international humanitarian law such as recruiting child soldiers constitute a threat to the peace. Following from this authority it has taken action through more country specific resolutions such as demanding "an effective end to the recruitment, training and use of children" in armed forces in the Democratic Republic of Congo.[69]

The Organisation of African Unity through its Council of Ministers have also adopted resolutions affirming that "the use of children in armed conflicts constitutes a violation of their rights and should be considered as war crimes" and warning state parties engaged in civil wars to "refrain from recruiting children." [70]

These are only a few examples of actions taken which evidence the prohibition on the recruitment and use of children in hostilities as a norm in international customary law. There are many more as well as condemning statements from States and non-governmental organisations such as Amnesty International, UNICEF the International Committee of the Red Cross and Human Rights Watch where children have been used in

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[65] 27th International Conference of the Red Cross and Red Crescent, Res I (adopted by consensus) (Geneva, 31 October 1999 – 6 November 1999).
[66] UNSC Resolution 1261 (25 August 1999) S/RES/1261/1999.
[67] Ibid, para 13.
[68] Charter of the United Nations (26 June 1945) 59 Stat 1031, Art 39 www.un.org (accessed 24 September 2008).
[69] UNSC Resolution 1341 (22 February 2001) S/RES/1341/2001, para 10.
[70] OAU Council of Ministers Resolution 1659 (1-5 July 1996) CM/Res 1659 (LXIV) Rev 1 1996.

armed conflict such as in Liberia and Sudan, Sri Lanka and the Democratic Republic of Congo.

For example in 1998 the Government of the Democratic Republic of the Congo aired a communication on the national radio calling for children and youth between twelve and twenty years old to enlist in the armed forces. Following this, Human Rights Watch wrote a letter to the President and issued press statements condemning the recruitment of those under the age of 18 and calling for the demobilisation of those under this age already enlisted stating that: "international law prohibits the recruitment of any children under the age of 15, and an international consensus is building on behalf of prohibitions on any military recruitment below the age of 18."[71] A recent United Nations Security Council statement condemning the use of child soldiers and calling upon all parties concerned to comply strictly with their obligations under international law was used to back up this assertion.[72]

Furthermore states and non-governmental organisations continue to collaborate to put an end to the unlawful recruitment and use of children in armed conflict. In 2007 the Paris conference, hosted by the Government of France and UNICEF, brought together countries affected by the use of child soldiers as well as donor nations to tackle the recruitment of children and to harness the political will to confront it. At the conference, the Paris Principles were unveiled detailing a set of guidelines for protecting children from recruitment and for providing effective assistance to those already involved with armed groups or forces. Following the Conference UNICEF's deputy executive director recognised that:[73]

> what this conference has shown is that there is a great deal of political commitment to ending the unlawful recruitment of children... We are very excited to see so much political commitment to tackling this issue. We know it is a long road ahead of us and it will require

[71] Human Rights Watch "HRW Condemns Recruitment of Child Soldiers in Congo" (11 August 1998) *Human Rights News* New York www.hrw.org (accessed 24 September 2008).
[72] UNSC "Children and Armed Conflict" (29 June 1998) Presidential Statement S/PRST/1998/18.
[73] UNICEF "Paris conference on child soldiers concludes with commitment to stop the recruitment of children" (6 February 2007) Press Release www.unicef.org (accessed 24 September 2008).

long-term commitment and support. But we truly hope this marks the beginning of the end for the use of children in warfare.

Continuous action undertaken by organisations and states to put an end to the use of child soldiers and encouraging their demobilisation and reintegration back into society are also evidence of an established customary norm.

The only problem with this norm is that there is not yet a uniform practice regarding the minimum age for recruitment and participation in hostilities.[74] This is evident through the variations amongst the international treaties and conventions. However a rule of customary international law can still be found if state practice is virtually uniform.[75] It is safe to say that there is virtually uniform state practice and agreement that the age of recruitment and participation in hostilities should not be below 15. However for the protection of children aged between 15-18 years under customary international law remains uncertain.

E The Sam Hinga Norman Decision[76]

More recent evidence of this international customary norm is its inclusion in the Statute for the Special Court for Sierra Leone (SCSL) which under Article 4 has the power to prosecute for conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities.[77] Several of the leaders of the armed forces in the conflict in Sierra Leone have been charged under this provision.[78]

However one of those indicted, the now deceased Sam Hinga Norman, challenged the Court's jurisdiction to try him. His alleged unlawful recruitment of children occurred in 1996 before the Rome Statute had recognised the recruitment of children under the age

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[74] *Customary International Humanitarian Law*, above n 64, 485-488.
[75] *North Sea Continental Shelf cases* (Judgement) [1969] ICJ Rep 3, 43.
[76] *The Prosecutor v Sam Hinga Norman* (Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment)) (31 May 2004) SCSL-2004-14-AR72(E) (Appeals Chamber, SCSL).
[77] Statute of the Special Court for Sierra Leone, above n 62, art 4(c).
[78] For example Issa Hassan Sesay, Morris Kallon and Augustine Gbao alleged Leaders and Commanders of the Revolutionary United Front of Sierra Leone were all indicted for the use of child soldiers www.sc-sl.org (accessed 30 September 2008).

of 15 in hostilities as a war crime. Based on the principles of *nullem crimen sine lege* and *nulla poena sine lege*[79] his argument was that in 1996 child recruitment had not yet crystallised as a crime under customary international law, so he could therefore not be punished. Although as illustrated above, the prohibition against the recruitment and participation of children in hostilities may have been an established customary norm, it is arguable whether this norm had been criminalised under customary international law predating its inclusion in the Rome Statute.

The dissenting Judge, Robertson J, believed there was insufficient evidence of state practice and *opinio juris* to imply customary criminalisation. No matter how abhorrent or grotesque we may consider ones conduct it alone is no basis for attributing individual criminal responsibility. Instead what one needs is:[80]

> The clear and unequivocal recognition of the rules of warfare in international law and State practice indicating an intention to criminalise the prohibition, including statements by government officials and international organisations, as well as punishment of violations by national courts and military tribunals.

Although international instruments such as the CRC Optional Protocol encouraged criminalisation, only 5 States could be cited as having specific criminal law against child recruitment before its inclusion in the Rome Statute.[81] The Geneva Conventions and their Optional Protocols, the CRC and the African Charter only demonstrate "a predisposition in the international community to support a new offence of non-forcible recruitment of children, at least for front-line fighting."[82] Furthermore there

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[79] This maxim against retroactive criminal prosecution is set out in the International Covenant on Civil and Political Rights (19 December 1966) 999 UNTS 171, art 15 states: No-one should be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.

[80] *Prosecutor v Dusko Tadic* (Decsion on the Defence Motion for Interlocutory Appeal on Jurisdiction) (2 October 1995) IT-94-1-AR72 (Appeals Chamber, ICTY) para 128.

[81] *The Prosecutor v Sam Hinga Norman* (Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment)) (31 May 2004) SCSL-2004-14-AR72(E) (Appeals Chamber, SCSL) dissenting opinion of Justice Robertson, para 40.

[82] Ibid, para 34.

was no evidence of any prosecution being brought for child recruitment prior to this case.[83]

Based on this, Robertson J concluded that the recruitment of children was not a crime under customary international law in 1996. All that had emerged was a humanitarian rule that obliged states, and armed factions within states, to avoid enlisting children under 15 or involving them in hostilities, whether arising from international or internal conflict. The offence cognizable by international criminal law which permitted the trial and punishment of individuals only arose with the enactment of the Rome Statute.[84]

The majority on the other hand focused on the CRC provisions which embody the international norms established by Additional Protocol I and II of the Geneva Conventions. On the basis of Article 38 and the fact that at the time all but 6 states in the world had ratified the CRC, the majority concluded too that prohibition had in fact "crystallized as customary international law."[85] However they went further than Robertson by looking to the rule as "protecting fundamental values"[86] and using the Optional Protocol which required state parties to criminalise child recruitment to the CRC as evidence to conclude that violation of the prohibition in 1996 could in fact constitute a criminal offence capable of individual responsibility under international law.[87]

The majority came to this conclusion despite Robertson J's firm belief that the addition of child recruitment as a war crime was not a consolidation of existing customary law.[88] William Schabas, a leading expert on the Rome treaty, also describes the provision as "consisting of new law."[89] Even the Secretary-General of the United

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[83] Ibid, para 22.
[84] Ibid, para 33.
[85] *The Prosecutor v Sam Hinga Norman*, above n 76, para 17.
[86] Ibid, para 39.
[87] Ibid, para 36.
[88] *The Prosecutor v Sam Hinga Norman* dissenting opinion of Justice Robertson, above n 81, para 39.
[89] *An Introduction to the International Criminal Court*, above n 54, 49.

Nations in his report on the draft SCSL Statute commented that the Rome Statute provision had a doubtful customary nature, stating that:[90]

> while the prohibition on child recruitment has by now acquired a customary international law status, it is far less clear whether it is customarily recognised as a war crime entailing the individual responsibility of the accused.

This statement was in explanation of his decision to include the narrower offence of 'abduction and forced recruitment of children' in the draft SCSL statute. This proposition was rejected by the President of the Security Council with preference given instead to the wider offence of 'conscription' and 'enlistment' so as to "conform to the statement of law existing in 1996 and as currently accepted in the international community."[91] What is interesting however, as pointed out by Robertson J, is that there is no authority for the proposition that the law in 1996 criminalised individuals who 'enlisted' child volunteers as distinct from forcibly conscripting them or using them to participate actively in hostilities.[92] This lack of authority is evident from the above analysis of international humanitarian and human law and the clear absence of the term 'enlistment' in the provisions dealing with child recruitment.

It is in this author's opinion that Robertson J has a strong argument and it is difficult to see how the prohibition could have crystallized as a crime under customary international law. However to this date there have been no challenges to the *Norman* decision of SCSL Appeals Chamber and the majority's finding still stands.

F Children Primarily Victims

Whether the majority or Robertson J was correct in their approach in the *Norman* decision, nonetheless we can be sure that the prohibition of recruitment and use of children in hostilities is a well established norm under customary international law. We can also be sure that after 1998, for states that are a party to the Rome Statute, the

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[90] Kofi Annan "Report of the Secretary General on the Establishment of a Special Court for Sierra Leone" (4 October 2000) UN Doc S/2000/915, para 17["Report of the Secretary General on the Establishment of a Special Court for Sierra Leone"].

[91] Letter from the President of the Security Council addressed to the Secretary-General (22 December 2000) S/2000/1234, para 3.

[92] *The Prosecutor v Sam Hinga Norman*, dissenting opinion of Justice Robertson, above n 81, para 5.

recruitment and use of children in hostilities is also a crime which will attract individual criminal responsibility.

What is important to note is that Sam Hinga Norman was charged for the recruitment and use of children under the doctrine of command responsibility.[93] This doctrine attributes individual criminal responsibility to commanders for crimes "committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces,"[94] and for crimes "committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates."[95]

Although strictly speaking the doctrine does not operate to the exclusion of other bases of criminal responsibility, it is submitted that the effect of prosecuting those responsible for recruitment is that is that international law subsequently treats those children who are subject to unlawful recruitment as not responsible for their actions. Instead they are treated as victims, "victims of adults arming children."[96] As put by Archbishop Desmond Tutu:[97]

> We must not close our eyes to the fact that child soldiers are both victims and perpetrators. They sometimes carry out the most barbaric acts of violence. But no matter what the child is guilty of, the main responsibility lies with us, the adults. There is simply no excuse, no acceptable argument for arming children.

International law therefore through conventions, treaties and practice prohibits and criminalises the recruitment and use of children in hostilities, and treats child soldiers primarily as victims.

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[93] Statute of the Special Court for Sierra Leone, above n 62, art 4. See also Rome Statute of the International Criminal Court, above n 51, art 28.
[94] Rome Statute of the International Criminal Court, above n 51, art 28(a).
[95] Ibid, art 28(b).
[96] Veronica Beatriz Pinero "The Challenges of Reconstruction and Reconciliation Following an Armed Conflict" (2004) 1 Eyes on the ICC 30, 36.
[97] Archbishop D. Tutu, *No Peace Without Forgiveness* (New York, Random House 1999).

IV CHILDREN ARE NOT ONLY VICTIMS – RECOGNISING A DUEL IDENTITY

Recognising child soldiers as victims in these situations also aligns with common law negative fault principles of involuntary intoxication[98] and duress.[99] It is a harsh reality that child soldiers are commonly subjected to duress and as mentioned earlier, drugs are used to further loosen their inhibitions in order to carry out crimes with little fear and revulsion and greater enthusiasm.[100] Children under the influence of drugs should not be individually responsible for their actions as they are unable to appreciate the unlawfulness of their acts or control their conduct. Individual responsibility should also not attach in circumstances where acts are committed as a result of a threat of death or imminent serious bodily harm. These principles of involuntary intoxication and duress are also recognised in international law in the Rome Statute under grounds for excluding criminal responsibility.[101]

However the problem with the analysis of the international law so far is that it ignores the situations where child soldiers have committed acts voluntarily without the influence of drugs or duress. Therefore by classifying them as victims subjected to harsh treatment and human rights violations, the international community often fails to take into account the fact that child soldiers are also the perpetrators of heinous acts and atrocities in times of armed conflict.

As reported by the Truth and Reconciliation Commission of Sierra Leone, child perpetrators carried out many of the same human rights violations to which they themselves had been subjected. These included killing, abduction, amputation, mutilation, extortion, looting and destruction, rape and sexual violence, abduction and

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[98] See Andrew Ashworth *Principles of Criminal Law* (5 ed, Oxford University Press, New York, 2006) 211-228 [*Principles of Criminal Law*] in certain circumstances a state of intoxication may negate the *mens rea* requirement for the commission of a crime.

[99] Charles Greenbaum, Philip Veerman and Naomi Bacon-Shnoor (eds) *Protection of Children During Armed Conflict: A Multi Disciplinary Perspective* (Intersentia, Oxford, 2006) 318. See also Amnesty International "Child Soldiers: Criminals or Victims?" AI Index: IOR 50/02/00 (December 2000) 6.

[100] *Child Soldiers: The Role of Children in Armed Conflict*, above n 8.

[101] Rome Statute of the International Criminal Court, above n 51, art 31.

forced recruitment, forced displacement, forced detention, assault, torture, beating and forced labour.[102]

These acts were not just carried out against opposition forces but were also inflicted upon the civilian population in Sierra Leone. How can we ignore these acts which would not only be considered to constitute 'grave breaches'[103] under the Geneva Conventions but also 'war crimes'[104] as set out in the Rome Statute? Once within a military environment child soldiers make a switch from victim to perpetrator, taking on a complex duel identity.[105]

V HOW INTERNATIONAL LAW DEALS WITH CHILD SOLDIERS AS PERPETRATORS

A Treaties and Conventions

International law does not directly address the issue of whether child soldiers themselves should face prosecution for atrocities. Under the Rome State the International Criminal Court has no jurisdiction to prosecute persons below the age of 18.[106] In the Special Courts set up for Yugoslavia and Rwanda there is no mention of age, therefore the possibility of prosecuting those under the age of 18 has not been ruled out. The SCSL on the other hand has specified that accused persons who are between the ages of 15 and 18 at the time of commission of crimes may be prosecuted.[107] The prosecutor however has publicly stated on numerous occasions he will not prosecute under 18s as they do not

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[102] *The Final Report of the Truth and Reconciliation Commission of Sierra Leone Volume 3b, Chapter 4: Children and the Armed Conflict in Sierra Leone*, above n 9, para 228.
[103] For grave breaches see Geneva Convention I, above n 17, art 147.
[104] For list of war crimes see Rome Statute of the International Criminal Court, above n 51, art 8.
[105] See "Report of the Secretary General on the establishment of a Special Court for Sierra Leone" above n 90, para 32. See also *The Final Report of the Truth and Reconciliation Commission of Sierra Leone Volume 3b, Chapter 4: Children and the Armed Conflict in Sierra Leone*, above n 9, para 225.
[106] Rome Statute of the International Criminal Court, above n 51, art 26.
[107] Statute of the Special Court for Sierra Leone, above n 62, art 7.

meet the competence to prosecute 'those who bear the greatest responsibility' for crimes within the Court's jurisdiction.[108]

International legal instruments also do not specify an age below which children cannot incur criminal responsibility. Age is an important factor because only those who are old enough to understand and appreciate the significance of their behaviour may be held criminally responsible.[109] The CRC recommends the age of 18 but only binds states which are party to the convention to establish "a minimum age below which children shall be presumed not to have the capacity to infringe the penal law."[110] As the age for criminal responsibility varies across many jurisdictions, it creates tension it creates tension when dealing with fixing an age at which international criminal responsibility attaches.

B An International Prohibition on the Prosecution of Children for International Crimes?

Reis has suggested, using Rwandan law and the crime of genocide to illustrate, that there exists an international prohibition on the prosecution of children for international crimes.[111] Article 40(2) of the CRC states that "no child shall be alleged as, be accused of, or recognised as having infringed the penal law by reasons of acts or omissions that were not prohibited by national or international law at the time they were committed."[112] A similar provision is contained in the International Covenant on Civil and Political Rights (ICCPR) in Article 15(1).[113] For Reis the existence of an age of criminal responsibility of 14 years in Rwanda fulfils the criteria of "acts not prohibited"

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[108] Special Court for Sierra Leone Public Affairs Office "Special Court Prosecutor Says He Will Not Prosecute Children" (2 November 2002) Press Release.
[109] Christina Clark "Juvenile Justice and Child Soldiering: Trends, Challenges, Dilemmas" in Charles Greenbaum, Philip Veerman and Naomi Bacon-Shnoor (eds) *Protection of Children During Armed Conflict: A Multi Disciplinary Perspective* (Intersentia, Oxford, 2006) 313[*Protection of Children During Armed Conflict: A Multi Disciplinary Perspective*].
[110] Convention on the Rights of the Child, above n 25, art 40(3)(a).
[111] Chen Reis "Trying the Future, Avenging the Past: The Implications of Prosecuting Children for Participation in Internal Armed Conflict" (1997) 28 Columbia Human Rights Law Review 629, 643 ["Trying the Future, Avenging the Past: The Implications of Prosecuting Children for Participation in Internal Armed Conflict"].
[112] Convention on the Rights of the Child, above n 25, art 40(2).
[113] International Covenant on Civil and Political Rights (19 December 1966) 999 UNTS 171, art 15.

on a national level.[114] However the counter argument to this is Article 15(2) of the ICCPR which states that: "nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time it was committed, was criminal according to the general principles of law recognised by the community of nations."[115] Therefore an act such as genocide, any other crime against humanity or a war crime would fit into this definition preventing the ex post facto law argument coming into play and allowing a child soldier who has carried out such an act to be prosecuted.[116]

Reis also argues that offences such as genocide are recognised internationally as exempting children because they are incapable of conceptualising such complex forms of intent.[117] However, as pointed out by another author there seems to be no justification for reading an age requirement into the threshold for such an offence.[118] If anything, the provisions of the CRC point against a general prohibition against prosecuting children by setting out standards of juvenile justice which must be adhered to if a child is accused of or recognised as having infringed the penal law.[119] State practice has moved from presumptions of deeming children as incapable of forming the requisite intent for an offence to treating them more like adult offenders when serious crimes are committed.[120] In light of this and a lack of specific treaty based provisions and resolutions on the matter, it is difficult to establish that Reis's claim of a customary norm prohibiting the prosecution of children for international crimes exits.

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[114] See "Trying the Future, Avenging the Past: The Implications of Prosecuting Children for Participation in Internal Armed Conflict", above n 111, 643.
[115] International Covenant on Civil and Political Rights, above n 113, art 15.
[116] John R Morss "The Status of Child Offenders under International Criminal Justice: Lessons from Sierra Leone" 9 (2004) Deakin Law Review 213, 218 ["The Status of Child Offenders under International Criminal Justice: Lessons from Sierra Leone"].
[117] "Trying the Future, Avenging the Past: The Implications of Prosecuting Children for Participation in Internal Armed Conflict", above n 111, 645.
[118] "The Status of Child Offenders under International Criminal Justice: Lessons from Sierra Leone", above n 116, 219.
[119] Convention on the Rights of the Child, above n 25, art 40.
[120] "The Status of Child Offenders under International Criminal Justice: Lessons from Sierra Leone", above n 106, 219.

C Customary Prohibition on Capital Punishment for Children

Although there is no prohibition on the prosecution of children in international law there does exist a prohibition on the capital punishment of children under the age of 18. The first international instrument to recognise the condemnation of juvenile executions was Geneva Convention IV which under Article 68(4) prohibits the execution of persons for crimes committed while under the age of 18, to the extent that the offender is a 'protected person.'[121] This provision followed the penal code of many countries and was based on the idea that "a person who has not reached the age of 18 years is not fully capable of sound judgement, does not always realise the significance of his actions and often acts under the influence of others, if not under constraint."[122]

The Additional Protocols to the Geneva Conventions widened the scope of the prohibition by extending it further than protected persons. Article 77(5) of Additional Protocol I states that the death penalty for an offence relating to armed conflict shall not be executed on persons who have not attained the age of 18 years at the time the offence was committed.[123] According to the commentary to this article the provision effectively ruled out completely the death penalty for persons under 18 years of age.[124] Additional Protocol II extends this prohibition to non-international armed conflict.[125]

The ICCPR also states in Article 6(5) that the "sentence of death shall not be imposed for crimes committed by persons below 18 years of age."[126] However this covenant was either not ratified by all states or states such as the United States had ratified the covenant with a reservation to this particular article. The United States view at this time was that international law did not prohibit the execution of those committing capital crimes under the age of 18 years provided due process guarantees were provided.

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[121] Geneva Convention IV, above n 17, art 68(4).
[122] O.M. Uhler, Henri Coursier, *Commentary, IV, Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (International Committee of the Red Cross, Geneva, 1958) 346.
[123] Additional Protocol I to the Geneva Conventions (8 June 1977) 1125 UNTS 3, Art 77(5).
[124] C Pilloud and J Pictet "Article 77 – Protection of Children" in Y Sandoz et al., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff Publishers, Geneva, 1987) 904.
[125] Additional Protocol II to the Geneva Conventions, above n 22, art 6(4).
[126] Convention on the Rights of the Child, above n 25, art 6(5).

They believed that there was insufficient evidence of state practice and *opinio juris* for it to be a norm of international customary law.[127]

However the CRC changed many states position with regards to juvenile executions and since its entry into international law there has been a growing acceptance of the proposition that the prohibition is a norm of customary international law. Article 37(a) states that: "...Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by the persons below 18 years of age..."[128] Since the CRC other soft law instruments such as Safeguards Guaranteeing the Rights of those Facing the Death Penalty and the Standard Minimum Rules for the Administration of Juvenile Justice 1985 (the 'Beijing Rules') have also banned capital punishment for those under the age of 18.[129]

When the CRC entered into force there were about 10 countries that still carried out juvenile executions but this number shrank to just one, the United States who still to this day has not ratified the CRC. However in the 2005 case of *Roper v Simmons*[130] a 5-4 majority in the Supreme Court prohibited the imposition of capital punishment for crimes committed by those under the age of 18. After examining the differences between juvenile and adult offenders it was stated that "the susceptibility of juveniles to immature and irresponsible behaviour means their irresponsible conduct is not as morally reprehensible as that of an adult."[131] Therefore because of this diminished capacity the justifications of retribution and deterrence applied with lesser force to juveniles then adults justifying a prohibition of capital punishment for their crimes.[132]

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[127] UN Commission on Human Rights "Report of the Special Rapporteur on Summary and Arbitrary Executions" (1990) (E/CN.4/1990/22, para 431.
[128] Convention on the Rights of the Child, above n 25, art 37(a).
[129] See Safeguards Guaranteeing the Rights of those Facing the Death Penalty ECOSOC Resolution 1984/50 (25 May 1984) Art 3; See also Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") UNGA Resolution 40/33 (29 November 1985) A/RES/40/33, rule 17.2.
[130] *Roper v Simmons* (2005)543 US 551.
[131] Ibid, 17.
[132] Ibid.

The case is significant as it can now be safe to say that the prohibition against capital punishment for those under the age of 18 is now a rule of customary international law with sufficient state practice and *opinio juris* to back it up.[133] For the purposes of this paper although such a norm does not outright support the prosecution of child soldiers, it is still evidence that there is no prohibition against not prosecuting them under international law. If a customary norm has had to be established regarding the extent of a child's punishment under the penal law, it must follow that it is possible to prosecute them in the first place.

However the only problem is that with the exception of the Statute of the SCSL there is nothing in international law which expressly allows for the prosecution of those under the age of 18. Rather the array of international law discussed above and in chapter III produces a gap between the minimum age for recruitment and the minimum age for which we tend to attribute criminal responsibility. Thus even when dealing with children as perpetrators, international law still appears to treat them as victims by allowing for this lacuna in the attribution of criminal responsibility to occur.

VI ONE SIZE DOES NOT FIT ALL - IMPUNITY UNDESIRABLE

Whilst we might be more apt to recognise children below the age of 15 as victims, the flaw with the above approach is that it effectively treats all child soldiers alike placing a blanket immunity on accountability for their actions by means of only prosecuting those commanders responsible for their recruitment, and use in hostilities. International law ignores child soldiers aged between 15 and 18 and does not take into account the instances where those children have clearly been in control of their actions, and not

[133] William Schabas "The Rights of the Child, Law of Armed Conflict and Customary International Law: A Tale of Two Cases" in Karin Arts and Vesselin Popovski (eds) *International Criminal Accountability and the Rights of Children*, above n 13, 35.

drugged or forced into committing atrocities but rather have become soldiers voluntarily and committed atrocities voluntary.[134]

There are several reasons why we should not grant impunity to all child soldiers. Firstly it has been argued that forgoing prosecution permits and encourages the continued recruitment of child soldiers.[135] It has also been argued that if perpetrators believe they can get away with committing atrocities then there is little incentive to stop, eventually leading to a spiral of violence especially if there are gains to be made in the process.[136] Amnesty International has a strong stance in the matter believing that those who have committed serious atrocities will continue to do so knowing the matter will not be investigated and they will not be held accountable. In their eyes it is important to set an example for others.[137]

There is also the factor that ignoring atrocities committed by children could undermine the wider administration of justice, and the scope for justice systems to maintain credibility.[138] Following from this is the fact that granting impunity denies victims a right to reparation including a right to an apology and a right to justice.[139]

The final problem to consider is command responsibility and the question of what happens to the doctrine when the person who controls the child soldier is a child themselves?[140] How can we ignore the children who incite others to commit serious atrocities, surely they should be held accountable to some degree? As mentioned earlier international law does have the means to hold these children accountable through juvenile justice standards contained in the CRC and other soft law instruments.

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[134] Amnesty International "Child Soldiers: Criminals or Victims?" AI Index: IOR 50/02/00 (December 2000) 2 ["Child Soldiers: Criminals or Victims?"].
[135] Ibid, 3.
[136] A. Mawson, *Children, Impunity and Justice: Some Dilemmas from Northern Uganda*, presentation to the Conference on 'Children in Extreme Circumstances' (London, London School of Economics 27 November 1998).
[137] "Child Soldiers: Criminals or Victims?" above n 134, 3.
[138] Ibid.
[139] Ibid.
[140] W. McCarney "Child Soldiers: Criminals or Victims: Should Child Soldiers Be Prosecuted for Crimes Against Humanity" Paper presented to the Child and War Conference (Sion, Switzerland, International Institute for the Rights of the Child 2001) 7.

VII JUVENILLE JUSTICE

Under first principles of the criminal law to be guilty of a crime there must be the requisite *mens rea* as well as the *actus reus*.[141] Because of a child's evolving mental and moral state there is a presumption of *doli incapax* (being deemed incapable of committing a crime) for those between the age of 10 and 14.[142] This can be rebutted if the prosecution can prove a "mischievous discretion" which is the capacity of a child to differentiate between right and wrong.[143]

Placing a gun in a child's hand to fight against opposition armed forces is one thing, asking them to spy is another, however in both situations we may still regard these children as victims of adults arming children and therefore not responsible. But when these children voluntarily carry out atrocities such as killing, mutilation, rape and sexual violence against the civilian population they become perpetrators. Returning to the rebuttable *doli incapax* principle in the context of these child soldiers they arguably have more control over these actions and the ability to differentiate between right and wrong. By only applying to children between the ages of 10 and 14 the presumption also favours an argument for child soldiers above this age being deemed capable of criminal responsibility for their actions in times of armed conflict.

In the United Kingdom the presumption has been abolished by statute as it is seen by judges and politicians as an indulgence incompatible with an effective response to juvenile offending.[144] Instead the trend in national jurisdictions over time has been to see children and youth being held accountable for their actions but within a regime specifically catered to their needs and vulnerabilities. This idea is embodied in article 14(4) of the ICCPR which states that in the case of criminal charges against juvenile

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[141] Andrew Ashworth *Principles of Criminal Law*, above n 98, 95; see also AP Simester and GR Sullivan *Criminal Law Theory and Doctrine* (3 ed, Hart Publishing, Oregon, 2007) 6.
[142] AP Simester and GR Sullivan *Criminal Law Theory and Doctrine* (3 ed, Hart Publishing, Oregon, 2007) 663.
[143] Ibid.
[144] Ibid, 664.

persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.[145]

The CRC acts as a guiding tool in this process by setting out standards of juvenile justice which state parties are obliged to follow.[146] There are also non binding recommendations regarding juvenile justice in the form of the Beijing Rules (mentioned earlier in regards to capital punishment) and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty 1990.[147] Justice does not mean imprisonment. In the case of juvenile justice this is only one of many outcomes that may occur. All three instruments have rehabilitative underpinnings with the key considerations being the 'best interests'[148] and 'well-being'[149] of the child. In many cases these considerations will be interpreted as informal approaches to justice and national reconciliation such as community based initiatives or referral to social services rather than formal criminal trial.

In New Zealand we see this reflected in the use of the Family Group Conference (FGC). Although the age for criminal responsibility is 10, children under the age of 14 cannot be prosecuted except for the offences of murder or manslaughter.[150] The alternative therefore is to deal with these children by means of a warning, Police diversion or an FGC.[151] The FGC process enables victims, offenders and their families to confront issues of responsibility, the causes of offending and also decide how an offence should be resolved in an informal non-adversarial environment.[152] It also provides a mechanism through which an offender can apologise and express remorse to their victim. It is also available to those under the age of 16, however for those 16 and above, offences are dealt with in the same manner as adults in the District or High Court.[153]

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[145] International Covenant on Civil and Political Rights, above n 113, art 14(4).
[146] Convention on the Rights of the Child, above n 25, art 40.
[147] United Nations Rules for the Protection of Juveniles Deprived of their Liberty, UNGA Resolution 45/113 (14 December 1999) A/RES/45/113.
[148] See Convention on the Rights of the Child, above n 25, art 3.
[149] See Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") UNGA Resolution 40/33 (29 November 1985) A/RES/40/33, rule 1.1.
[150] See Crimes Act 1961, ss 21-22.
[151] Ministry of Justice www.justice.govt.nz (accessed 12 August 2000).
[152] Ibid.
[153] Ibid.

The Beijing rules also anticipate that just desert and retributive sanctions may be appropriate where a juvenile has committed a serious offence.[154] Where there is grave criminal responsibility it is argued that it is in the child's 'best interests' to be called to account for his or her acts, and the consequences of those acts through a child-orientated criminal process under international law.[155]

Such a proposition is supported by the fact that in national jurisdictions such as New Zealand the serious offences of manslaughter and murder committed by a young person above the age of 10 are dealt with by the High Court in the same manner as an adult. Furthermore those above the age of 16 are dealt with as if they were an adult. In support of dealing with child soldiers as victims commentators commonly refer to the idea of indoctrination.[156] The fact that these children know no better, that they have been taught and grown to accustomed to the ways of the rebel groups of armed forces they are recruited to fight for. It is said that young children who join the fighting no longer recognise right from wrong and what they go through is in effect a process of asocialization where the standards of behaviour are determined by the possession of weapons and the ability to maintain power over others by threatening them with death.[157] Children are raised to follow instructions, their vulnerability as noted earlier making it easier them to be controlled and manipulated by fellow soldiers and commanders.[158]

However it may be said that indoctrination of young children supports the argument of attributing criminal responsibility for their acts. Researchers found amongst a sample of Mozambican boys that the length of time spent in base camps affected the children's capacity to act upon traditional concepts of right and wrong.[159] For children who spent one to two years or more in base camps, it was only after three months in a

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[154] See Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") UNGA Resolution 40/33 (29 November 1985) A/RES/40/33, art 17 commentary.
[155] *Protection of Children During Armed Conflict: A Multi Disciplinary Perspective*, above n 119, 317.
[156] See *Child Soldiers: The Role of Children in Armed Conflict*, above n 8, 27.
[157] "Trying the Future, Avenging the Past: The Implications of Prosecuting Children for Participation in Internal Armed Conflict", above n 111, 645.
[158] Matthew Happold "The Age of Criminal Responsibility for International Crimes under International Law" in *International Criminal Accountability and the Rights of Children* , above n 13, 70.
[159] *Child Soldiers: The Role of Children in Armed Conflict*, above n 8, 110.

rehabilitation centre that they began to show any remorse for previous acts of violence or anxiety in regards to their acts.[160] If children who have committed atrocities do not go through some sort of process of criminal accountability they may never return to these traditional concepts of right and wrong.

In national jurisdiction factors such as circumstances surrounding the crime and a child's upbringing come into account in the mitigation of sentencing. It will never prevent the prosecution for a criminal charge from going ahead. Consider the situation of New Zealand's youngest convicted killer. Bailey Junior Kurariki was just 12 at the time of the killing of a pizza delivery worker but he received a sentence of seven years imprisonment for the manslaughter. He was one of six youths all below the age of 18 who were convicted for the same crime. At the time the crime was committed Kurariki was on the run from a home he had been placed in by Child Youth and Family. As he had been suspended from school in 1999 during his standard four year and given a non-molestation order he was prevented from attending intermediate schools because all the principals blacklisted him. His criminal behaviour had started from at least three years before the attack and he was known to the police from the age of 9 for petty crimes.[161]

From a background of poverty and violence the Children's Commissioner at the time said the boy's background virtually sentenced him to a life of crime.[162] Poverty, violence, separation from family and lack of schooling are conditions which are associated with the case of child soldiers and background excuses which are used for treating them as victims in the context of armed conflict. With no school, no family, Kurariki's choice of a life of crime could be said to just as much a forced choice as in the case of some child soldiers. However these same factors did not prevent Kurariki escaping criminal responsibility. Such an approach makes the blanket immunity for war crimes and crimes against humanity given to child soldiers between the ages of 15 to 18 years under international law questionable.

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[160] Ibid.
[161] One News "Spotllight on Care of Young Killer" (12 September 2002) www.tvnz.co.nz (accessed 25 September 2008). See also One News "Young Killer "Fell Through Cracks" (25 August 2002) www.tvnz.co.nz (accessed 25 September 2008).
[162] Ibid.

Even if one does not agree with retributive sanctions for child solders, the Beijing Rules guiding principles to adjudication and disposition imply that strictly punitive approaches are not always appropriate and not the only option especially in juvenile cases where such considerations should always be outweighed by the interest of safeguarding the well-being and the future of the young person.[163] The rules encourage the use of alternatives to institutionalization to the maximum extent possible, the commentary stating that: "full use should be made of the range of existing alternative sanctions and new alternative sanctions should be developed, bearing the public safety in mind."[164] This supports the case that when dealing with child soldiers a process of accountability can be supplemented by sanctions that incorporate rehabilitation. The two can work together, rather than in isolation to help restore a child's moral sense of right and wrong.

As seen above the appropriate mechanisms already exist in the international legal realm for bringing child soldiers to justice whilst taking into account their duel victim perpetrator identity. Encouraging attributing criminal responsibility to child soldiers does not mean formal criminal trial following imprisonment as with their adult counterparts in specialised tribunals such as the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). It is suggested that given the extreme nature of the crimes under consideration, measures that foster respect for the rights of others are crucial not only to the child's rehabilitation, but to that of the entire community, and for the prevention of future violence.[165] This idea is reinforced by Article 40(1) of the CRC which states that children who have infringed the penal law need to be treated in a manner consistent with the promotion of the child's sense of dignity and worth whilst reinforcing "the child's respect for the human rights and fundamental freedom of others".[166]

This holistic perspective of looking not only to the child but to the victim of the crime as well as the wider community is commonly referred to as taking a restorative

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[163] See Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") UNGA Resolution 40/33 (29 November 1985) A/RES/40/33, art 17 commentary.
[164] Ibid.
[165] *Protection of Children During Armed Conflict: A Multi Disciplinary Perspective*, above n 109, 318.
[166] Convention on the Rights of the Child, above n 25, art 40(1).

justice approach. It is submitted that it is this approach which must be used to deal with child soldiers who have been the perpetrators of atrocities during a time of armed conflict.

VIII RESTORATIVE JUSTICE

Restorative justice is not easily defined because it encompasses a variety of practices at different stages of the criminal process, including diversion from court prosecution, actions taken in parallel with court decisions and meetings between victims and offenders at any stage of the criminal process.[167] However one common element between any restorative justice approach undertaken is that it seeks to take into account all stakeholders to a crime.[168] This usually involves an emphasis on the role and experience of the victim in the criminal process, involvement of all the relevant parties to discuss the offence, its impact and what should be done to 'repair the harm'. Decision making is then carried out by both the stakeholders and any relevant legal actors.[169]

There is a common misconception that taking such an approach is the opposite to a retributive justice approach and that the two can not work together. Retributive justice is often characterised by a focus on punishing a defendant through an adversarial process conducted by the state as opposed to repairing the harm as envisaged by a restorative approach.[170] However Daly puts forward the proposition that in fact the two approaches are dependent on one another and that retributive censure sometimes needs to occur before reparative gestures can take place to repair the harm.[171] With regards to child soldiers, communities may be unwilling to reintegrate an offender back into the

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[167] Kathleen Daly (2002) "Restorative Justice: The Real Story" in Declan Roche (ed) Restorative Justice (Dartmouth Publishing Company/Ashgate Publishing Limited, England, 2003) 87 ["Restorative Justice: The Real Story"].
[168] Godfrey Musila "Challenges in Establishing the Accountability of Child Soldiers" (2005) 5 African Human Rights Law Journal 321, 325 ["Challenges in Establishing the Accountability of Child Soldiers"].
[169] "Restorative Justice: The Real Story", above n 167, 88.
[170] Ibid.
[171] Ibid, 90.

community or attempt to repair the harm until they have seen some form of censure take place.

After the Rwandan Genocide surveys indicated that communities believed that children were culpable and must be punished to ensure accountability and adherence to the established social order.[172] They also believed that the children had voluntarily committed acts of violence, and that anyone with enough strength to commit the crimes should be treated as an adult. A conference was held to examine the aftermath and decide on a national policy to deal with participants in the massacre. Children were detained in order to address the fears of revenge and the possible reoccurrence of genocide. It was thought that if they were released there was a possibility of families of the victims seeking vigilante justice.[173]

At the conference the idea of a general amnesty for child soldiers was rejected and instead a scheme was recommended which involved the categorizing of crimes according to severity and culpability. This scheme would operate to determine who should be punished and what punishment they should receive, thus distinguishing between the planners of genocide and those who were drawn into it. From this recommendation the traditional *gacaca* court system was adjusted whereby under the Organic law offenders were classified into four categories and punished accordingly with input from the community.[174] The categories ranged from Category 1 being offenders of the most serious crimes to category 4 being those who committed offences against property.[175] Suspects in categories 1 to 3 have the opportunity to confess, and if they do they gain the benefit of a reduced sentence. Punishment of category 4 offenders involves the paying of

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[172] Save the Children Fund *Children, Genocide and Justice* (Save the Children USA, Kigali, 1995) 3.
[173] "Trying the Future, Avenging the Past: The Implications of Prosecuting Children for Participation in Internal Armed Conflict", above n 111, 633.
[174] "Challenges in Establishing the Accountability of Child Soldiers", above n 168, 333. See also Nancy Amoury Combs *Guilty Pleas in International Criminal Law: Constructing a Restorative Justice Approach* (Stanford University Press, California, 2007) 212.
[175] Organic Law No.08/96 (August 30 1996) Organic Law on the Organisation of Prosecution of Offences constituting the Crime of Genocide or Crimes Against Humanity committed since 1 October 1990, arts 2, 5, 6, 8, 9 www.preventgenocide.org (accessed 25 September 2008).

civil damages which must be negotiated with the victims and the community. Community service is also available as a form of punishment for offenders.[176]

This system is a good example of how justice can be achieved through both restorative and retributive elements as proposed by Daly. However punishment based on societal attitudes has been criticized by Reis as amounting to "sheer retribution which makes a mockery of the justice in theory and in practice."[177] In his eyes the system looks a lot like victors justice. However it must be remembered the Reis's view is based upon there being a prohibition against the prosecution of children at international law and his strong view that children are incapable of forming the intent required for the crime of genocide.[178] Whether children are incapable of forming this intent or not is beyond discussion of this paper, but it has already been found that no such prohibition against prosecution exists.

Following from this example it is submitted that an approach encompassing both retributive and restorative elements is essential when dealing with the criminal responsibility of child soldiers. This is because it is the community themselves, civilians as protected persons in times of armed conflict, who are the victims of the atrocities. As will be illustrated below the attitude of the child soldiers, the nature of their crimes and their ability to incite fear often makes it difficult for communities to readily accept them back and forgive them with open arms.

Whilst supporting rehabilitation and reintegration as an alternative form to justice for child soldiers, the flaw with Reis's argument is that he does not give enough weight to the views of the community. Positive community views and input is essential for child soldiers to be rehabilitated and reintegrated back into society. If they are unforgiving as a result of lack of censure then this process will never be successful.

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[176] Ibid, art 14(c).
[177] "Trying the Future, Avenging the Past: The Implications of Prosecuting Children for Participation in Internal Armed Conflict" above n 111, 653.
[178] Ibid, 645.

However with the exception of Rwanda, the practice of the international community so far in dealing with child soldiers post conflict has mainly been to look to restorative elements alone. This is often because pressure from the international community has denied any sort of retributive element in any process, wishing to treat the children as victims and emphasising the need for rehabilitation rather than punishment. For example in regards to the possible prosecution of a child soldier UNICEF has stated:[179]

> UNICEF believes that children alleged to have committed crimes while they were child soldiers should be considered primarily as victims of adults who have broken international law by recruiting and using children... and that these individuals must be provided with assistance for their social integration.

Following from this their stance is that:[180]

> There is a great need to concentrate on rehabilitating child soldiers to prevent them from drifting into a life of further violence, crime and hopelessness...A much more deliberate effort needs to be made to demobilize both adult and child soldiers so as to offer not just to respite but also reconciliation.

In post conflict situations views of organisations such as UNICEF are influential and taken into account as it is them who are out there taking active measures to help with the rehabilitation of child soldiers in war torn communities. They are therefore another stakeholder to take into account along with the victims, offenders and the wider community.

However rehabilitation should not be used to foster a culture of impunity for child soldiers who have been the perpetrators of serious crimes. As argued by Morss instead it can and should be used as a factor in mitigation.[181] It has been used in this respect in both

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[179] UNICEF "Statement by UNICEF Concerning the Case of Omar Khadr" (2 February 2008) Press Release www.unicef.org (accessed 25 September 2008).
[180] Ibid.
[181] "The Status of Child Offenders Under International Criminal Justice: Lessons from Sierra Leone", above n 117, 223.

the ICTR and ICTY. In the case of *Furundzija*[182] the ICTY had his young age taken into account in sentencing. What is surprising however is that Furundzija was 23 when he committed the offences he was charged with. Therefore in the function of sentencing, rehabilitation does not rely on a specific age band, as a mitigating factor it is available to anyone.

In the context of the argument for attributing criminal responsibility to child soldiers, why then should rehabilitation be used as excusing all child soldiers for the crimes they committed? Even if child soldiers were to be dealt with by a criminal process, it is more than likely rehabilitation would underpin all the sanctions available. As will be discussed below the SCSL specifically provided for this in their statute following Article 40(4) of the CRC which states that:[183]

> A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

Attributing criminal responsibility to child soldiers who have been the perpetrators of serious atrocities would therefore not ignore the case for their rehabilitation into society. Both Uganda and Sierra Leone both experienced the problem of how to treat child soldiers post conflict. How they dealt with the situation will be examined below as well as the merits of each approach.

IX INTERNATIONAL APPROACHES SO FAR

A Traditional Justice – Uganda

The conflict in northern Uganda has persisted since 1986. The Lords Resistance Army (LRA) under the command of Joseph Kony, aimed to overthrow Uganda's

[182] *Prosecutor v Furundzija* (Judgment) (10 December 1998) IT-95-17/I-T (Trial Chamber ICTY) upheld on appeal (21 July 2001).
[183] Convention on the Rights of the Child, above n 25, art 40(3).

Government and to rule Uganda according to the 10 commandments. However, although the LRA attacked government forces at times, it primarily targeted the northern Ugandan civilian population whom Kony claimed to be punishing for their sins, particularly of not supporting him. Fighting took place in the Northern districts where the Acholi ethnic group was dominant.[184]

Because Joseph Kony and the LRA lacked a popular base of support they populated their forces through the abduction and forced conscription of children, usually aged between 11 and 15 years. The LRA abducted approximately 20000 children during the 20 year conflict.[185] These children were not only used in combat but also to carry out mutilations on the civilian population to fuel insecurity. Girls were used as sex slaves and allocated to commanders in forced marriages. Other atrocities carried out by the LRA on the civilian population were killings, beatings and sexual violence. Recruitment was also forced upon adults.[186]

In 2005 the ICC prosecutor unsealed arrest warrants for Kony and four other leaders for crimes including rape, murder, slavery, sexual slavery, and the forced enlistment of children.[187] The arrest warrants reportedly rattled the LRA commanders who began to talk of a peace agreement which would grant them immunity from prosecution.[188] The Juba Peace Process began in mid July 2006 between the LRA and the Ugandan Government. The agenda of this peace process includes cessation of hostilities, solution to the conflict, reconciliation and accountability, and a plan for disarmament, demobilization and reintegration. As of this writing a peace deal has not yet been signed.

However, before this process for peace had begun, the Ugandan Government had already attempted to take measures to break the cycle of violence in northern Uganda by encouraging combatants of various rebel groups to leave their armed groups without fear

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[184]Cecily Rose "Truth-telling and Reparations in Northern Uganda" (2008) 28 Boston Third World Law Journal 345, 348["Truth-telling and Reparations in Northern Uganda"].
[185] Ibid.
[186] Ibid.
[187] Jeffrey Gettleman "Uganda Peace Hinges on Amnesty for Brutality" (September 15 2006) New York Times www.nytimes.com (accessed 26 September 2008).
[188] "Truth-telling and Reparations in Northern Uganda", above n 184, 350.

of prosecution. This came in the form of an Amnesty Act. Under this Act, amnesty is available for any Ugandan who has actually participated in combat, collaborated with perpetrators of, committed a crime in furtherance of, or assisted or aided the conduct or prosecution of the war or armed rebellion.[189]

Thus all child soldiers were covered whether they were voluntarily recruited, forcibly abducted or whether they participated directly or indirectly in hostilities. As a result of being granted amnesty, the government will not prosecute or punish such persons if they report to the nearest local or central government authority, renounce and abandon involvement in the war or armed rebellion, and surrender any weapons in their possession.[190] In renouncing their involvement, a person's declaration need not be onerous or specify the crimes for which they seek amnesty.

As at the end of 2006, 21,000 former rebels had received amnesty under the Act, with 6718 of these being children between the ages of 12-18.[191] Furthermore the Amnesty Act establishes a commission whose job it is to help communities reconcile with those who have committed the offences.[192] This has led to the use of a disarmament, demobilization and reintegration (DDR) process for children which has involved support for their social and economic reintegration back into society as well as monitoring and evaluation.

Despite this more formal process for dealing with the reintegration of former combatants, many traditional Acholi leaders have advocated the use of traditional mechanisms for both the reintegration of children and adults back into communities. Many argue that such traditional mechanisms for cleansing, justice, and reconciliation represent important channels for reintegration and reconciliation which can and should be widely adopted.[193] In the context of restorative justice, as mentioned earlier it is

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[189] Amnesty Act 2000 (Ch 294), s 3(1).
[190] Ibid, s 4(1).
[191] UN Disarmament, Demobilisation and Resource Centre Uganda www.unddr.org (accessed 26 September 2008).
[192] Amnesty Act 2000 (Ch 294), s 8.
[193] "Truth-telling and Reparations in Northern Uganda", above n 184, 360.

important for the communities as victims of atrocities to see the perpetrators go through this process so that they can welcome them back more readily.

Such traditional methods include a cleansing ceremony known as *Nyono Tong Gweno*, the stepping on eggs, generally takes place when an individual has returned to a community following a significant time away particularly after they have done something immoral or amoral. The ritual cleanses foreign elements to prevent them from entering the community and bringing misfortune. Because of the rituals importance to the people of northern Uganda the cleansing ceremony itself has become a part of the amnesty process with the ceremony being performed at the local authorities where combatants go to renounce and abandon their involvement in the war.[194]

The *Mato Oput* (drinking of the bitter root) ceremony is also an important mechanism for fostering peace and justice in northern Uganda. It is a sophisticated process involving many rights including a representative from both parties drinking *oput*, bitter root from a calabash. The root represents the bitterness between the clans and drinking it symbolizes washing away the bitterness between them. Killers are accepted back into the community after they have paid compensation, admitted to their misdeeds and shared a meal, usually a roasted goat or sheep, with the relatives of their victim. The goat or sheep is provided by the victim's family symbolizing unity and a willingness to forgive and forget. Both parties also cook and eat the liver of the goat or sheep. This is to show that their blood has been mixed and united and to symbolically wash away the bitterness within the blood of the human liver. The ceremony is not complete until the parties finish all the food prepared for the day, finishing the food symbolizes that no bitterness remains between the parties.[195]

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[194] Ibid, 361. See also Marc Lacey "Victims of Uganda Atrocities Chose a Path of Forgiveness" (18 April 2005) New York Times www.nytimes.com (accessed 26 September 2008); Jeffrey Gettleman "Uganda Peace Hinges on Amnesty for Brutality" (September 15 2006) New York Times www.nytimes.com (accessed 26 September 2008).

[195] Ibid 362. See also Marc Lacey "Victims of Uganda Atrocities Chose a Path of Forgiveness" (18 April 2005) New York Times www.nytimes.com (accessed 26 September 2008); Jeffrey Gettleman "Uganda Peace Hinges on Amnesty for Brutality" (September 15 2006) New York Times www.nytimes.com (accessed 26 September 2008).

These traditional processes appear to address the restorative justice aim of taking into account all stakeholders to a crime. However the granting of amnesty and use of traditional justice mechanisms in Uganda has not escaped its criticism. Rose doubts the traditional *Mato Oput* ceremony's usefulness due to lack of knowledge amongst the Acholi people.[196] Local knowledge of the ceremony is second hand and few elders have performed it. In the case of children, because it is no longer widely practiced they are unable to fully understand it. If the children are unable to understand, it is hard to see how justice can truly be seen to be done. Furthermore non-Acholi's who have been affected by the atrocities committed by the LRA may have little knowledge of Acholi practices and may question their relevance to them. In light of this it is difficult to see how understanding and forgiveness from all stakeholders can be fully achieved in pursuance of the aims of restorative justice.

Rose also suggests that there is an overestimation of Acholi forgiveness. Just because the traditional mechanisms exist does not mean that the Acholi people have a special capacity to forgive.[197] Traditional justice is not unique to Uganda. Healing and forgiveness ceremonies have also taken place in other areas such as Mozambique. News reports have also given much attention to the Acholi forgiveness rights, articles stating comments like:[198]

> Still, remarkably, a number of those who have been hacked by the rebels, who have seen their children carried off by them or who have endured years suffering in their midst say traditional justice must be the linchpin in ending the war.

However there is evidence that not all those who have been victims feel this way. Some victims interviewed have stated that they "did not agree with the prospect of having the LRA leaders forgiven… but instead wanted justice, even retribution."[199] Furthermore children who have returned to their communities find themselves homeless because "they

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[196] Ibid, 369.
[197] Ibid, 366.
[198] Marc Lacey "Victims of Uganda Atrocities Chose a Path of Forgiveness" (18 April 2005) New York Times www.nytimes.com (accessed 26 September 2008).
[199] Human Rights Watch "Uprooted and Forgotten, Impunity and Human Rights Abuses in Northern Uganda" (2005) 17 Human Rights Watch 12(A), 40. www.hrw.org (accessed 26 September 2008).

can not go back to the villages where people recall the night they returned with the rebels and massacred their relatives and neighbours – and sometimes, even, their own parents."[200]

Therefore whilst cleansing and healing ceremony processes may have positive effects it is still important to recognise their limits. Customary healing and cleansing ceremonies are intended to provide a clean break from past atrocities.[201] However it has been said that horrors cannot simply be erased from the collective memory as the customary practices require and "if drawing a line under the past fosters denial and impunity, there is also the risk of facilitating further human rights abuses."[202]

The use of a general amnesty has also been criticized by Rose mainly due to the failure of the Commission setting up a truth-telling process.[203] Under the Amnesty Act, the Commission must consider and promote appropriate reconciliation mechanism in northern Uganda, encourage dialogue and reconciliation within the spirit of the Amnesty Act, and "perform any other function that is associated or connected with the execution of the functions stipulated in [the] Act." [204] According to Rose, although the Commission has supported traditional ceremonies thereby promoting appropriate reconciliation mechanisms, the above provision suggests the Commission can and should adopt a truth telling function or establish formal links with the traditional conflict resolution mechanisms.[205]

Truth telling as an option for reconciliation has a number of benefits that traditional mechanisms do not including ensuring due process is carried out and that the

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[200] Melanie Thernstrom "Charlotte, Grace, Janet and Caroline Come Home" (8 May 2005) New York Times www.nytimes.com (accessed 26 September 2008).
[201] Christina Clark "Juvenile Justice and Child Soldiering: Trends, Challenges, Dilemmas" in Charles Greenbaum, Philip Veerman and Naomi Bacon-Shnoor (eds) *Protection of Children During Armed Conflict: A Multi Disciplinary Perspective*, above n 109, 325.
[202] A Howana "Stealing the Past, Facing the Future: Trauma Healing in Rural Mozambique," in Conciliation Resources (ed) *Accord: The Mozambican Peace Process in Perspective* (Conciliation Resources, London, 1998) 7.
[203] "Truth-telling and Reparations in Northern Uganda", above n 184, 371.
[204] Amnesty Act 2000 (Ch 294), s 8.
[205] "Truth-telling and Reparations in Northern Uganda", above n 184, 359.

needs and vulnerabilities of children are given special attention. However truth telling operated in isolation can also have a downside. It is helpful to understand the nature of truth-telling, its benefits and short falls in the context of post conflict Sierra Leone.

B Truth and Reconciliation – Sierra Leone

The 1990s saw the beginning of an era of internal armed conflict in Sierra Leone. As with Uganda, a significant feature of the conflict was the extensive use of children. The number is not fully known but estimates of child soldiers vary from 5000 - 10000.[206] All sides to the conflict in Sierra Leone used children. Also noteworthy is the atrocities these child soldiers inflicted upon the civilian population. As mentioned earlier these included killing, abduction, amputation, mutilation, extortion, looting and destruction, rape and sexual violence, abduction and forced recruitment, forced displacement, forced detention, assault, torture, beating and forced labour.[207]

The conflict eventually came to an end in 2002 with an entire nation in ruins. Child fighters were left with no families, little to no education, and an unforgiving society was unable to assist them in rebuilding and restarting life.[208] As said by an elder in a community:[209]

> We feared them. They were cruel and hard hearted; even more than the adults. They don't know what is sympathy; what is good and bad. If you beg an older one you may convince him to spare you, but the younger ones, they don't know what is sympathy, what is mercy. Those who have been rebels for so long have never learned it.

The children on the other hand felt like victims:[210]

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[206] *The Final Report of the Truth and Reconciliation Commission of Sierra Leone Volume 3b, Chapter 4: Children and the Armed Conflict in Sierra Leone*, above n 9, para 9.
[207] Ibid, para 228.
[208] David Crane "Strike Terror No More: Prosecuting the Use of Children in Times of Conflict – The West African Extreme" in Karin Arts and Vesselin Popovski (eds) *International Criminal Accountability and the Rights of Children*, above n 13, 122.
[209] Human Rights Watch *Getting Away with Murder, Mutilation and Rape: New Testimony from Sierra Leone* (1999) 11 3(A) Human Rights Watch Report, 54.
[210] *The Final Report of the Truth and Reconciliation Commission of Sierra Leone Volume 3b, Chapter 4: Children and the Armed Conflict in Sierra Leone*, above n 9, para 8.

> ...Concerns amongst us children in Sierra Leone are that the war was targeted at us. A brutal conflict which we did nothing to bring about but suffered and lost everything in it.

In his report on the establishment of the SCSL the Secretary General of the United Nations had to address this moral dilemma of how to deal with children who as the result of psychological and physical abuse had transformed from victims into perpetrators.[211] The Government of Sierra Leone had expressed its wish to see a process of judicial accountability for child combatants. It was said that the people of Sierra Leone would not look kindly upon a court which failed to bring to justice children who committed crimes of that nature and spared them the judicial process of accountability.[212]

Options considered were:[213]

> a) determining a minimum age of 18 and exempting all persons under that age from accountability and individual criminal responsibility;
>
> (b) having children between 15 to 18 years of age, both victims and perpetrators, recount their story before the Truth and Reconciliation Commission or similar mechanisms, none of which is as yet functional; and
>
> (c) having them go through the judicial process of accountability without punishment, in a court of law providing all internationally recognized guarantees of juvenile justice.

As mentioned above non-governmental organisations views are also taken into account when dealing with courses of action in post conflict societies. In deciding the best course of action for Sierra Leone they were particularly influential in their unanimous objection to any kind of judicial accountability for children below 18 years of age in fear that such a process would place at risk the entire rehabilitation programme they had already put in place.[214]

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[211] "Report of the Secretary General on the establishment of a Special Court for Sierra Leone", above n 90 para 32.
[212] Ibid, para 35.
[213] Ibid, para 33.
[214] Ibid, para 35.

In 1998 a DDR process (as used in Uganda) had been initiated involving ex-combatants from all of the armed factions. The overall objective of the process was to disarm and demobilise around 45,000 combatants from the factions and support their reintegration into society. In total, 6,774 children were put through the DDR process and by 2000 the reintegration part of the process had begun.[215]

This process involves children below the age of 15 being sent to interim care centres in the care of UNICEF and their Child Protection Agency partners. These centres then provide children with services such as family tracing, psychosocial counselling, basic health care and, where possible, fostering and or reunification. After reunification with their families or fostering, children are integrated into formal educational projects under the UNICEF-assisted Community Education and Investment Programme.[216]

For those between the ages of 15 and 17 treatment under the DDR process is slightly different. Children are sent to "group homes" or allowed independent living and then provided with skills training under a Training and Employment Programme which can last for up to nine months. Children are also provided with a basic monthly allowance and given training materials. Some children are also put to work in agriculture and community-based initiatives. At the end of their training they are given start-up kits to prepare them for their new life and just as with those below the age of 15, referral and counselling services are also provided.[217]

As is evident from the detail above, the non-governmental organisations were justified in seeking to protect the DDR process they helped put in place. A judicial process of accountability put in place after this had been set up may have had the effect of scaring the children away and deterring them from engaging in the DDR process. With this in mind the best balance of all interests was found in the form of a Truth and Reconciliation Commission (TRC) which would be set up to work alongside the SCSL

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[215] *The Final Report of the Truth and Reconciliation Commission of Sierra Leone Volume 3b, Chapter 4: Children and the Armed Conflict in Sierra Leone*, above n 9, para 393.
[216] Ibid, para 395.
[217] Ibid, para 396.

and have children aged between 15 to 18 years of age, both victims and perpetrators recount their stories. Although the SCSL was given capacity to try 15 to18 year olds the statute indicated that where appropriate, resort should be had instead to the TRC.[218]

TRCs serve as an important tool to build stability in societies where entire populations have been traumatised. They engage communities in accountability processes and are an effective and safe mechanism for children's involvement.[219] The key objectives in Sierra Leone were to create impartial records of human rights violations that occurred during the war, to provide a public forum for accountability, to help initiate the process of healing and reconciliation for victims, witnesses, perpetrators and families, to help restore a sense of justice in the social and political order and to make recommendations to the government to prevent future conflicts.[220]

Sierra Leone created a new precedent for engaging children more systematically than any other TRC process and their views were specifically sought on what policies and procedures should be put in place to best serve their needs. Their involvement in actual truth-telling was entirely voluntary however safeguards were put in place to make the process more appealing to participate in. Child protection agencies were used to provide psychological support and to assist with statement making. But most importantly for the victim-perpetrator child soldier, confidentiality and anonymity in giving statements was guaranteed.[221]

Having children recount their experiences and tell their stories in their own way is a right guaranteed under the CRC.[222] This process is not only beneficial in the sense of providing accountability through a community forum but the educational effect of TRCs

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[218] Statute of the Special Court for Sierra Leone, above n 62, art 15(5).
[219] Saudamini Siegrist "Child Participation in International Criminal Accountability Mechanisms: The Case of the Sierra Leone Truth and Reconciliation Commission" in Karin Arts and Vesselin Popovski (eds) *International Criminal Accountability and the Rights of Children*, above n 13, 58.
[220] Ibid.
[221] Ibid, 60. These guarantees were included amongst eight principles for protection in The Framework for Protection which was a formal agreement between the Sierra Leone Truth and Reconciliation Commission and child protection agencies.
[222] Convention on the Rights of the Child, above n 25, art 12.

is said to help children understand the past and provide a stepping stone for the future.[223] This importance of this education has been highlighted in Sierra Leone through the publication of a child friendly version of the final report of the TRC.

The final report of the TRC itself is comprehensive with the chapter on children seeking to understand the nature of their involvement in the conflict and emphasising their vulnerability in the context of the situation. Although the report also outlines the atrocities the child soldiers committed it acknowledges the 'dual identity' victim-perpetrator dilemma and makes it clear that the children who have come forward have been treated as neutral witnesses in this process.[224]

However is treatment as neutral witnesses enough? In some instances judicial and non judicial methods can operate together to provide an overall accountability mechanism, providing a mechanism through which victims voices can be heard whilst prosecuting those who are deserving of criminal responsibility.[225] Although the TRC did provide useful evidence to prosecute those in the SCSL, the number of those prosecuted as bearing the greatest responsibility has been few.

X POTENTIAL FOR A HYBRID APPROACH – GRAPPLING WITH THE DUEL IDENTITY CHILD SOLDIER IN THE FUTURE

The problem with traditional justice and truth-telling as a mechanism for dealing with child soldiers appears to be that they can not work successfully in isolation. This is because they generally fail to take into account the perpetrator side of the duel identity child soldier. This shortfall was particularly evident in the truth-telling process in Sierra Leone which treated child soldiers as neutral witnesses.

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[223] *International Criminal Justice and Children*, above n 7, 131.
[224] *The Final Report of the Truth and Reconciliation Commission of Sierra Leone Volume 3b, Chapter 4: Children and the Armed Conflict in Sierra Leone*, above n 9, para 225.
[225] *International Criminal Justice and Children*, above n 7, 126.

It is submitted that taking a hybrid approach to justice for child soldiers is the best solution. This would involve a mix of the mechanisms we have seen utilised so far under international law. It has been suggested a more ideal process would operate similarly to the *gacaca* court system in Rwanda discussed earlier where offenders are categorised and punished accordingly with input from the community. The *gacaca* system itself has been criticized for its lack of due process and confidentiality.[226] Children must defend themselves against charges and it is impossible to ensure confidentiality as trials are held in public without recourse to rules of confidentiality. This goes against Article 40 of the CRC which states that children have the right to "have legal or other appropriate assistance in the preparation and presentation of his or her defence," "to have his or her privacy fully respected at all stages of the proceedings" and to:[227]

> ...have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation...

The *gacaca* system does not take into account a child's age or situation and denies a child the right to appropriate assistance. These rights are also contained in the Beijing Rules. Therefore if a similar system were to be set up in the future these guarantees would have to be taken into account and implemented. It is argued that the TRC in Sierra Leone could have operated similarly to the *gacaca* courts, determining the cases involving child soldiers whom in its view ought to face trial before the SCSL whilst protecting fundamental minimum guarantees for children as set out in the CRC.[228]

The SCSL had the mechanisms for this to work. Under Article 7 of the SCSL Statute if a child is prosecuted standards of juvenile justice must be adhered to. Furthermore there is no penalty of imprisonment. Instead the Statute provides for care guidance and supervision orders, community service orders, counselling, foster care,

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[226] Christina Clark "Juvenile Justice and Child Soldiering: Trends, Challenges, Dilemmas" in Charles Greenbaum, Philip Veerman and Naomi Bacon-Shnoor (eds) *Protection of Children During Armed Conflict: A Multi Disciplinary Perspective*, above n 109, 323.
[227] Convention on the Rights of the Child, above n 25, art 40.
[228] "Challenges in Establishing the Accountability of Child Soldiers", above n 68, 333.

correctional, educational and vocational training programmes, approved schools and, as appropriate, any programmes of disarmament, demobilization and reintegration or programmes of child protection agencies.[229] Child soldiers separated out as requiring a higher degree of accountability for their actions would therefore still receive the protections required under international law to cater to their vulnerabilities and rehabilitation into society.

Such an approach may resolve the tension created from the absence of a fixed international minimum age for criminal responsibility.[230] However in this author's view a minimum age would still be required for participation in the truth-telling. From this point onwards age as a factor would bear little significance, rather it would be the nature of culpability for acts committed whilst a child soldier that would determine whether they were to be prosecuted.

In his article regarding the status of child offenders under international criminal justice, Morss goes one step further than this putting forward the argument of criminal prosecution on the basis of the offence per se, with chronological age being admitted only as a potentially mitigating factor in sentencing.[231] The logic behind this being that if both the *actus reus* and *mens rea* can be proven by the prosecution, immunity on the basis of age should not be available to foreclose on the matter of intent. However even he agrees that such an approach would challenge the orthodoxy of the special needs of child and juvenile offenders particularly given the progress that has been made implementing standards of juvenile justice in national jurisdictions.[232] Yet in his view this may be the only way in which the short-comings under international law attributing criminal responsibility may be overcome.

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[229] Statute of the Special Court for Sierra Leone, above n 62, art 7(2).
[230] See Matthew Happold "The Age of Criminal Responsibility for International Crimes Under International Law" in Karin Arts and Vesselin Popovski (eds) *International Criminal Accountability and the Rights of Children*, above n 13, 72.
[231] "The Status of Child Offenders Under International Criminal Justice: Lessons from Sierra Leone" above n 117, 223.
[232] Ibid, 224.

XI CONCLUSION

The victim-perpetrator duel identity of the child soldier creates a moral dilemma with regards to the issue of criminal responsibility. On the one hand attention must be given to the vulnerability of children in the context of war, but on the other it is hard to ignore the atrocities they may commit voluntarily, particularly when these are directed against the civilian population. After an analysis of the current international legal framework it has been found that by placing an emphasis on treating child soldiers as victims, the effect has been to grant all child soldiers with impunity. This includes those who are above the minimum age of recruitment whom in normal circumstances would be found to be criminally responsible for their actions. As observed, in some circumstances these child soldiers should be held accountable for their actions.

It is difficult to justify impunity when the trend in national jurisdictions is to hold children criminally responsible for their actions but within a regime which protects their needs and vulnerabilities. In addition to this, children who commit crimes of murder and manslaughter are treated as adults under these national systems. If these children are capable of facing criminal responsibility for their actions, it is difficult to understand why child soldiers who are committing just as heinous acts and crimes escape this fate when international law through the CRC and other soft law instruments has the mechanisms for them to face the same responsibility. International law also has the experience and practice of states such as Sierra Leone, Uganda and Rwanda from which it can learn from and draw upon. As the paper has shown, what the differing approaches of these states has taught us is that restorative measures through traditional justice and truth-telling can not work in isolation to effectively deal with the child soldier problem. Censure through retributive justice is also needed in order to truly achieve forgiveness and reconciliation.

With child soldiering criminalised under the Rome Statute ideally the use and abuse of children in armed conflict will decline over time. Nevertheless, there are still gaps in how international law deals with attributing responsibility. If similar issues must be dealt with in the future a hybrid approach combining a mix of restorative and

retributive elements should be used to achieve the perfect blend of justice in order to meet the post conflict needs of the duel identity child soldier and the wider community.

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