

## Child Soldiers in International Law



Masters of Social Sciences in International Security and Law

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Signs: 156,425

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**Abstract**

This Master Thesis analyzes the place of the child soldiers in International Law. Starting with the historical development of the child soldiering phenomenon, the thesis explains the various images attributed to child soldiers and their impact on international law. The document then provides an in-depth analysis of existing laws and cases, with a special focus on jurisdictional issues. However, the findings show that international law treats child soldiers as victims, thus emphasizing the need to protect them and condemn their recruiters. The question of jurisdiction over child recruiters and over child soldiers is completed through a parallel analysis of the cases in international and domestic courts. Whereas most of the current debates on Dominic Ongwen surrounds his victimicy as a former child soldier, this paper argues that specifically his case proves that child soldiers could qualify for the ‘most responsible’ criteria and therefore should be tried in a domestic court, according to the juvenile justice system of the country and in accordance with the complementary principles of international laws. The thesis does not negate the double role of victim/perpetrator the child soldier embodies, but it argues that even among child soldiers there are those ‘most responsible’ who must be brought to justice, and while international courts idle in this regard, domestic courts should take the lead in making child soldiers responsible for their actions and decisions.

## Introduction

The 21<sup>st</sup> century we are living in now is continuously and speedily changing. New views, norms, and values put at doubt even the most reliable historical sources. The media, freedom of speech and non-governmental organizations set up new platforms for debates and critiques, pushing and creating new laws and standards. The topic discussed in this paper will represent the highly controversial topic of child soldieries in International Law.

The problem of child soldiers is one of the most debatable topics in modern war terms. It is mostly so, due to the double nature of the victim and the perpetrator, that the child soldiers combine. This thesis will illustrate that the problem of child soldiering is a worldwide phenomenon, which has been living from ancient times and exists today in one of its worst forms in the context of new wars. The main issue discussed in this paper is the place of the child soldiers in international law. Therefore, the main question governing this work is *how does international law treat child soldiers?* As this analysis took a rational approach to the problem, it analyzed both perspectives of child soldiers as victims and as perpetrators in accordance with existing international law. The finding showed that much of the international law view child soldiers as victims, as a result, the current international law is directed at their protection. For the same reason, international criminal law is reluctant to prosecute child soldiers and focus more on the prosecution of their recruiters. The paper also presented the few existing attempts to prosecute child soldiers for international crimes, at the international and national levels. The analysis showed that the national courts are also unjustifiable and severe, and more determined in opening cases against child soldiers than international courts.

As currently, the media is overflowing with the news and debates on Dominic Ongwen (a former child soldier) case to the ICC, it was appropriate to analyze the problem of child soldiers from Ongwen's case. The second question guiding the analysis is *how does the Ongwen case influence the perception of child soldiers?* Whilst most of the media and literature focus on the image of the victim Ongwen 'was,' this paper insists on Ongwen's nature of a perpetrator as a child soldier commander and as an adult commander. Therefore, by Ongwen's example, the work tries to prove that some child soldiers, those in leadership positions, possess agency, rationality, and malice to commit major crimes. Accordingly, they must be prosecuted.

Before getting to the main research questions and findings, the first chapter of the paper will introduce the main aspects of the child soldiers' topic. First of all, will be introduced the definitions of child soldiers. Which will widen the reader's understanding of different roles and tasks child soldiers might have. Then, will be analyzed the historical traces of the child soldiering phenomenon. Which aims to show the different contexts under which child soldiers appeared. The next subchapter will prove the importance of the topic, by finding the contemporary offspring of the child soldiers in the world. Further on, will be introduced the different images the child soldiers possess(ed), and the question of agency and rationality of child soldiers. This will be crucial for further understanding of the law development in this regard.

The second chapter will discuss the different forms of recruitment of child soldiers and their lawfulness. Moreover, it will deepen the understanding of the law's stance and limitations on child conscription in the second subchapter. This subchapter intends to prove that most of the existing international laws victimize the child soldiers and try to protect children in all kinds of conflicts and wars. Next, the chapter will present how the international law prosecutes child recruiters, as a mean of protection of child soldiers. The chapter will exemplify national and international cases over child recruiters and will make remarks on their achievements so far.

The third chapter focuses mainly on child soldiers as perpetrators and discusses the different possibilities of jurisdiction over child soldiers. It proves that the international courts are less interested in prosecuting child soldiers, while domestic courts are too inexperienced and unjustifiable towards them. Further, the chapter analyzes the peculiarity of Dominic Ongwen's case and establish that his experience proves that child soldiers in leadership positions are rational agents of war, distinguishing between good and bad, fully aware of their deeds and capable of making decisions. Therefore, the paper will argue in favor of judicial proceedings against child soldiers in leadership positions and will elaborate on the possibility of Uganda's national court to try Ongwen for the crimes he committed as a child soldier commander. Moreover, the chapter will introduce other non-prosecutorial forms of justice and will comment on Ongwen's accessibility and applicability to these methods.



## Chapter I

### 1.1 Defining Child Soldiers

Before getting to the topic it is worth to analyze first the definition of the Child Soldier. Despite growing conscience about the child soldier phenomenon, the concept of a child in itself is still highly contestable. The western and eastern perceptions of a child diverge on several occasions as the experiences these two sides encounter differ substantially from one culture to another. It is commonly known that in the east children bear more obligations and responsibilities to the family and household, while in the west it is slightly different due to the higher income of parents and better educational opportunities.<sup>1</sup>

Thereof, while the states still contest the term of child and childhood, the international community succeeded in a way or another by admitting the definition of a child in the Convention on the Rights of the Child (CRC, 1989). The definition says: “a child means every human being below the age of eighteen years unless, under the law applicable to the child, the majority is attained earlier.”<sup>2</sup> Moreover, the CRC takes a step ahead in its Article 38 by arguing: “States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavor to give priority to those who are oldest.” Therefore, it settles the minimum acceptable age of recruitment into the state’s armed forces as 15 years old. Even though Article 38 of the CRC replicate an earlier version of Article 77.2 of the Additional Protocol I to the Geneva Conventions relating to the Protection of Victims of International Armed Conflicts,<sup>3</sup> and Article 4.3.c of the Additional Protocol II to the

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<sup>1</sup> United Nations, Department of Economic and Social Affairs, Population Division, *World Marriage Data 2015*(POP/DB/Marr/Rev2015),<http://www.un.org/en/development/desa/population/theme/marriage-unions/WMD2015.asp>.

<sup>2</sup> UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 2, Article 1, <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>.

<sup>3</sup> International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3, Article 77(2), <https://ihl.databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=8F7D6B2DEE119FBAC12563CD0051E0A2>.

Geneva Conventions relating to the Protection of Victims of Non-International Armed Conflicts,<sup>4</sup> the CRC is much more favored in the literature on the topic of children's rights. This is mainly due to the fact that the additional protocols are less popular among the member states themselves, and only 174 states are parties to the Additional Protocol I, and 168 to the Additional Protocol II.<sup>5</sup> With 140 signatories and 196 parties (excluding the United States of America), the CRC is one of the most widely accepted agreements on relevant international law.<sup>6</sup>

The Optional Protocol, then solves the unclarity regarding those children caught up between 15 and 18 years old, for the United Nations Convention on the Rights of the Child (OHCHR) on the involvement of children in armed conflict. Article 2 of the Optional Protocol clearly settles that those under the age of 18 should not be "compulsorily recruited" into the state armed forces. Article 3 of the Optional Protocol, on the other hand, permits the voluntary recruitment of those under the age of 18 into national armed forces under four conditions listed in the Article. Then, Article 4 of the same Protocol argues that "Armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years," not even on a voluntary basis. The foreword to the Protocol then specifies once again the minimum age of 15, arguing that otherwise "... the inclusion therein as a war crime, of conscripting or enlisting children under the age of 15 years or using them to participate actively in hostilities in both international and non-international armed conflict."<sup>7</sup> The same argument and classification can be found in the Statute of the International Criminal Court and will be analyzed in the next chapter.

In 1997, the Cape Town Principles proposed a new definition to the child soldiers that expands beyond the single criteria of the age and form of recruitment and refers to the roles of the children in an armed group. The newly proposed definition described child soldiers as: "... Any

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<sup>4</sup> International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 UNTS 609, Article 4(3)(c), <https://ihldatabases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=F9CBD575D47CA6C8C12563CD0051E783>.

<sup>5</sup> UN General Assembly, "Additional Protocols to Geneva Convention Vital for Promoting International Humanitarian Law, Sixth Committee Speakers Stress," United Nations, GA/L/3576, 17 October 2018, <https://www.un.org/press/en/2018/gal3576.doc.htm>

<sup>6</sup> UN General Assembly, *Convention on the Rights of the Child*, *supra* note 2, Chapter IV.

<sup>7</sup> UN General Assembly, *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, 25 May 2000, <https://www.ohchr.org/en/professionalinterest/pages/opaccrc.aspx>.

person under 18 years of age who is part of any kind of regular or irregular armed force or armed group in any capacity, including but not limited to cooks, porters, messengers, and those accompanying such groups, other than purely as family members. It includes girls recruited for sexual purposes and forced marriage. It does not, therefore, only refer to a child who is carrying or has carried arms.”<sup>8</sup>

The most recent internationally recognized definition of a child soldier was settled in 2007 at the Paris Principles on the Involvement of Children in Armed Conflict. The definition states the following: “A child associated with an armed force or armed group” refers to any person below 18 years of age who is or who has been recruited or used by an armed force or armed group in any capacity, including but not limited to children, boys and girls, used as fighters, cooks, porters, messengers, spies or for sexual purposes. It does not only refer to a child who is taking or has taken a direct part in hostilities.<sup>9</sup> This definition offers a wider understanding of who are considered child soldiers and encompass a larger group of children, which will fall under protection and rehabilitation procedure. This constitutes an equilibrate and fair attitude towards all children conscripted into an armed force and deprived of their natural rights.

Even though the literature on child soldiers is quite rich, and there are many scholars, authors, and NGOs who provide data, analysis, and theories on the topic, all of them refer to at least one definition introduced above.

## 1.2 Historical Traces of Child Soldiers

Despite the recent popularity of the child soldier topic, the phenomenon is not new at all. If considering the contemporary age limit of 18 years old, then most historical events engaged with child soldiers at some point or another. It is worth to go back as far as Ancient times to see that child soldiers were a common fact. Taking, for example, Ancient Greece, where children under 18 were enlisted into the Spartan army and sometimes into the Athenian army. In Sparta, the situation

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<sup>8</sup> Cape Town Principles, “South Africa: Adopted at the Symposium on the Prevention of Recruitment of children into the Armed Forces and On Demobilisation and Social Reintegration of Child Soldiers in Africa,” Cape Town, 1997, p. 1, <https://view.officeapps.live.com/op/view.aspx?src=https://www.unicef.org/pathtraining/Documents/Session%20%20International%20Human%20Rights%20Law/Participant%20Manual/2.2%20The%20Capetown%20Principles.doc>.

<sup>9</sup> UN Children's Fund (UNICEF), *The Paris Principles. Principles and Guidelines on Children Associated With Armed Forces or Armed Groups*, February 2007, p. 7, <https://www.unicef.org/emerg/files/ParisPrinciples310107English.pdf>.

was more severe than in Athens and boys at 7 years old were trained to become soldiers. As Philip Chrysopoulos argues, “Children were children of the state more than of their parents. They were raised to be soldiers, loyal to the state, strong and self-disciplined.”<sup>10</sup>

Children were not only controlled and conducted by adults, but they also had the will and determination to struggle for their beliefs. The 1212 Children’s Crusade is one such remarkable example, which displays the capacity of children to lead independently an organized campaign to the Holy Land to remove the Muslims from Jerusalem.<sup>11</sup>

In 1807-1814, children between 10 and 12 years old were serving on the vessels of the Danish and Norwegian forces. Those were identified amidst Danish-Norwegian prisoners of war detained by the British troops. Even though their role on the vessels was not evident at the beginning, they still were held as prisoners of war among other adult soldiers. However, many of them were set free after the problems they faced in captivity.<sup>12</sup>

Considering the multiple roles a child plays in armed conflict as the Paris Principles explain, it is worth to mention the drummer boys of Napoleon. The historical evidence marks a heroic drummer boy aged as old as 12 to take part in the battle of Waterloo.<sup>13</sup>

Child soldiers were also documented in the American Civil War. There were numerous cases when those young boys came to the army following their fathers, brothers, neighbors, and friends and gradually attained combat roles. Some were recruited even from school and got specially adapted weapons for younger soldiers. Not rarely young boys lied about their age just to enlist into the army and fought for ideology or for the sake of their family, by substituting the older siblings whose work was crucial for the family survival.<sup>14</sup>

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<sup>10</sup> Philip Chrysopoulos, “Ancient Greece: Growing up in Athens and Sparta,” Greece: Greek Reporter, 30 September 2018, <https://greece.greekreporter.com/2018/09/30/ancient-greece-growing-up-in-athens-and-sparta/>.

<sup>11</sup> Erin Blakemore, “The Disastrous Time Tens of Thousands of Children Tried to Start a Crusade,” *History*, 18 October 2017, <https://www.history.com/news/the-disastrous-time-tens-of-thousands-of-children-tried-to-start-a-crusade>.

<sup>12</sup> Magne Frostad, “Child Soldiers: Recruitment, Use and Punishment,” *International Family Law: Policy and Practice*, Vol. 1, nr. 1, 2013, pp.71-72.

<sup>13</sup> Andrew Swanston, “Bravery at Waterloo: the button seller and the drummer boy,” *HistoryExtra*, 28 March 2017, <https://www.historyextra.com/period/georgian/bravery-at-waterloo-the-button-seller-and-the-drummer-boy/>.

<sup>14</sup> David Rosen, *Child Soldiers in the Western Imagination*, New Brunswick, New Jersey, and London: Rutgers University Press, 2015, pp. 2-13.

Many authors claim that in the twentieth century the situation with child soldiers' recruitment increased dramatically. As David Rosen argues in one of his books, "The reality is that until the beginning of the twentieth century, youngsters were a regular part of armed conflict. ... They were never the majority, but their presence was an ordinary, and sometimes extraordinary, part of military life."<sup>15</sup>

At the beginning of the First World War, in the United Kingdom, the underage volunteers in the army represented between 10 and 15 percent of recruits. Despite the fact that the national appeal abolished the institutional motive for enrolling children into the army, and there was an army regulation prohibiting young people from entering the national forces, there was no serious method of age determination for recruits. Many boys lied about their age and so, many young boys aged 14 to 18 enlisted into the British army. Around 250,000 British soldiers were underage in the First World War, of whom, about 55 percent were killed or wounded during the war. Rosen, then argues, "Thus in World War I, Great Britain alone recruited as many child soldiers as are estimated to exist in the world today."<sup>16</sup>

In Germany for example, around the German youth was centered the entire society as the main element of vitality and strength of the future German nation. Practically all German youth was recruited into Hitler Jugend also known as Hitler Youth. According to Rosen, it was not Wehrmacht, the regular German armed forces, who recruited children; rather it was the Waffen SS, which primarily conscripted child soldiers. After the Stalingrad defeat where three-quarters of a million German soldiers were killed, the Waffen SS started its wide youth recruitment from the Hitler Youth. By 1945, children as young as 14 were recruited into the SS. In some parts of Germany between 80 and 92 percent of youngsters were enlisted into Nazi forces, even the Wehrmacht started to recruit children as Germany's last chance to save the Nazi regime.<sup>17</sup>

While for Hitler, the German Youth and child soldiers were separate units, for the Soviets the participation of child soldiers in the war was a part of the total mobilization of the civil population. Many of the Soviet child soldiers were volunteers who lied about their age to get on the frontline. Even though some children fought on different fronts along with adults, most of them

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<sup>15</sup> *Idem.*, p. 31.

<sup>16</sup> *Idem.*, pp. 63-64.

<sup>17</sup> *Idem.*, pp. 77-79.

were conscripted into the partisan groups. As Olga Kucherenko points out, around 300,000 children were spread on all fronts in partisan detachments.<sup>18</sup>

For the Jewish child soldiers, the Second World War was more dramatic than to anyone else. During the Jewish genocide, there was no safe place as the Holocaust made no discrimination between adults and children. As a Jewish underground newspaper, *Neged Hazarem* wrote, “We the children aged 13 to 18, will be the ones to lead the Jewish masses to a different future, a better future.”<sup>19</sup> For the Jewish child soldiers, to go to war was not a matter of volunteering or forced conscription, it was a matter of survival. The Holocaust left them no choice than to fight.

After the Second World War, the situation on child soldier conscription changed. It changed along with the entire concept of conflict and war. Those ‘New Wars’ as Mary Kaldor calls them, become more violent, indiscriminate and privatized. Armed groups emerged in different parts of the globe and expanded internationally, influencing world politics even today. For them, the terror became - the weapon, warfare - the strategy, and child soldiers - the means. Along with this development, there was more and more attention given to peace, human rights, and child’s rights. Children’s rights got a different turn and a new dimension. A dimension in which the age limits of 15 and 18 halted the young revolutionaries and jeopardized the freedom of adult recruiters who opted for child conscription. Yet, the new-armed groups were not the ones to follow international law, especially in the absence of an enforcement mechanism. Therefore, while the states, NGOs and the international community fought for the rights of the child soldiers, those groups continue to use them for their political and economic games.

### 1.3 Contemporary Offsprings of Child Soldiering

Along with the process of decolonization and due to the lack of young people in the post-colonial years, the phenomenon of child soldiers has gained new value. This was particularly visible on the African continent where the decades-lasting conflicts witnessed and lead to the maturing of child soldiers within the armed forces that once subjugated them. Even today, child soldiering in Africa represents the most general practice of child recruitment and practice. Children

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<sup>18</sup> Olga Kucherenko, *Little Soldiers: How Soviet Children Went to War, 1941–1945*, New York: Oxford University Press, 2011, p. 2.

<sup>19</sup> David Rosen, *Armies of the Young: Child Soldiers in War and Terrorism*, New Brunswick, New Jersey, and London: Rutgers University Press, 2005, pp. 19-22.

were involved in conflicts all over the continent, in Zimbabwe, Burundi, Mozambique, Rwanda, Uganda, Sierra Leone, Angola, Democratic Republic of Congo, Sudan, Chad, Somalia, Central African Republic, Nigeria, and Cote d'Ivoire.<sup>20</sup> However, recruiters vary in different countries, situations, and conflicts. For example in DRC, Somalia, South Sudan, and Sudan, the main recruiters according to the UN Secretary-General's 2015 Report on Children in Armed Conflict, were the government forces. In addition, in DRC, different rebel groups conscripted children from South Sudan, Sudan, and Mali. Terrorist, Islamist and Jihadist groups, like Boko Haram in Nigeria, or Al-Shabaab in Somalia also do not hesitate to use child soldiers in their scopes.<sup>21</sup>

In the Middle East, amidst the Iran-Iraq War, the administrations of both sides allegedly denied the presence of under-18s in their government forces, the Child Soldiers Global Report of 2001 on Iran, proved otherwise. The report found evidence of boys as young as nine being used in human wave attacks and landmine clearance. While by the law, compulsory recruitment was settled at 18 years old, volunteers could range from 14 years old, which is less than apparently claimed by the government or permitted by Iran law. Moreover, the leadership of Iran considered volunteering in the military a religious obligation, for which the parental permission was not necessary. Many government-allied groups like Hezbollah organization considered the age 'unimportant,' and openly stated so in their recruitment campaign. For Hezbollah leaders, what really mattered was the "belief in God." An auxiliary military unit of the Revolutionary Guards known as Basij, was a mobilization army of volunteers who were younger than 18 and older than 45, therefore not matching for the regular conscription. Altogether, child recruitment proved to be propagated among different armed groups, and the results of this were fatal for 9 out of 10 Iranian child soldiers.<sup>22</sup>

Asia is not an exception in this regard. The Liberation Tigers of Tamil Eelam, mostly known as the Tamil Tigers in Sri Lanka, widely relied on child soldiering. The Tamil Tigers was

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<sup>20</sup> Kirsten Fisher, *Transitional Justice for Child Soldiers: Accountability and Social Reconstruction in Post-Conflict Contexts*, New York: Palgrave Macmillan, 2013, p. 24.

<sup>21</sup> Shirley de Villiers, "Factsheet: How many child soldiers are there in Africa?," *Africa Check*, 26 August 2015, <https://africacheck.org/factsheets/factsheet-how-many-child-soldiers-are-there-in-africa/>. See also: United Nations, General Assembly, *Children and armed conflict, Report of the Secretary-General*, Security Council, A/69/926 - S/2015/409, [http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s\\_2015\\_409.pdf](http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2015_409.pdf).

<sup>22</sup> Child Soldiers International, *Child Soldiers Global Report 2001 - Iran*, 2001, <https://www.refworld.org/docid/498805f02d.html>.

regarded as one of the most disciplined, organized, brutal and effective terrorist groups in the world, as will argue Fisher. From the very beginning, this group consisted of mainly young students, and afterward used child soldiers to “make up for the heavy shortfall in [adult] male combatants killed in battle.”<sup>23</sup>

Latin America struggles even today with child soldiers. The extensive use of child soldiers in drug trafficking and drug wars between cartels has been a big issue as the Child Soldiers Global Report from 2004 proved. Brazil was one of the most sinful in this respect, as the 2004 Report established “In Rio de Janeiro, an estimated 5,000 armed children were involved in organized violence.”<sup>24</sup> However, drug wars are not the only danger. In Colombia, the protracted armed conflict led to the extensive use of children in the paramilitary groups, which in a later development involved in activities that were not generally accepted during the conduct of the war. According to the 2004 Report, the army-backed paramilitaries and armed opposition groups conscripted around 14,000 children.<sup>25</sup>

Although the situation in Europe seems to look better, there are still, some issues in place. As the Child Soldiers Global Report from 2004 sustains, children between 14 and 18 years old, were involved in the armed conflict of the Chechen Republic of the Russian Federation. Child soldiers were enlisted into the armed groups opposing the Russian forces. Some were even recruited to be suicide bombers.<sup>26</sup> The situation in Eastern Europe changed over the years and the minimum enlistment age went up to 18 years old for the vast majority of countries.<sup>27</sup> There is only one European country left that still recruit 16 years old teenagers into the armed forces. While during the First World War the British Army regulations permitted voluntary enlistment only at the age of 18, and abroad deployment only at the age of 19,<sup>28</sup> today, the minimum enlistment age in the United Kingdom is 16 years old,<sup>29</sup> along with such countries as Pakistan, El Salvador, and Zambia.<sup>30</sup> According to the Child Soldiers Global Report 2008 in the United Kingdom, in

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<sup>23</sup> Fisher, *supra* note 20, pp. 23-24.

<sup>24</sup> “Child Soldiers: Global Report 2004,” *Coalition to Stop the Use of Child Soldiers*, London, 2004, p. 114.

<sup>25</sup> *Idem.*, p. 113.

<sup>26</sup> *Idem.*, p. 217.

<sup>27</sup> Child Soldiers International, *Child Soldiers World Index*, 2017, <https://childsoldiersworldindex.org/opac-status>.

<sup>28</sup> Rosen, *supra* note 14, p. 63.

<sup>29</sup> Child Soldiers International, *supra* note 27.

<sup>30</sup> Child Soldiers International, United Kingdom, 2018, <https://www.child-soldiers.org/uk>.



2006/2007 around 30% of the army was composed of those under-18 years.<sup>31</sup> The main problem in this situation, however, is the fact that those child soldiers are allowed to be deployed to conflict areas, as the UK reserved the right to use those minors in “urgent situations.” The UK government then affirmed in 2007 that they deployed minors in the Afghanistan War and in Iraq.<sup>32</sup>

North America has its own issues regarding child soldiers. The most known and scandalous case was the case of US-detained child soldier Omar Ahmed Khadr, who was a 15-years old Canadian national, abused at the Guantanamo Bay, along with other 828 suspected child soldiers held at Camp Cropper, where the children were as young as 11.<sup>33</sup> While the US detention of child soldiers is still quite a shock for the international community, they also have a problem with child deployment. Although the minimum enlistment age in the US is 17 years old, the 2008 Global Report showed that they did not only enlisted child soldiers into the national force, but also deployed around 60 underage child soldiers in Iraq and Afghanistan in 2003-2004.<sup>34</sup>

All these examples show that the problem of child soldiers is continuous, widespread and dissimilar in different countries. While the most emphasis is put on the African continent as the main region of child soldiering, this chapter will explain why there is such a misconception and will prove that it is not actually the case. As some NGOs and UN bodies assume it,<sup>35</sup> there are about 300,000 child soldiers involved in hostilities today. Most academics like David Rosen,<sup>36</sup> Sonja Grover,<sup>37</sup> Kirsten Fisher,<sup>38</sup> Kendra Dupuy, and Krijn Peters<sup>39</sup> also refer to exactly this

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<sup>31</sup> UN Documents, *Initial periodic report of the UK to the UN Committee on the Rights of the Child on implementation of the Optional Protocol*, UN Doc. CRC/C/OPAC/GBR/1, 3 September 2007, Article 18.

<sup>32</sup> Child Soldiers International, *Child Soldiers Global Report 2008 - United Kingdom*, 20 May 2008, <https://www.refworld.org/docid/486cb13b28.html>.

<sup>33</sup> Child Soldiers International, *Child Soldiers Global Report 2008 - United States of America*, 20 May 2008, <https://www.refworld.org/docid/486cb13cc.html>.

<sup>34</sup> *Ibidem*.

<sup>35</sup> UN Special Representative for Children and Armed Conflict, “4 out of 10 child soldiers are girls,” 12 February 2015, <https://www.un.org/youthenvoy/2015/02/4-10-child-soldiers-girls/>.

<sup>36</sup> Rosen, *supra* note 14, p. 134.

<sup>37</sup> Sonja Grover, *Child Soldier Victims of Genocidal Forcible Transfer*, Springer: Verlag Berlin Heidelberg, 2012, p.35.

<sup>38</sup> Fisher, *supra* note 20, p. 16.

<sup>39</sup> Kendra Dupuy, and Krijn Peters, *War and Children: A Reference Handbook*, Praeger Security International: Contemporary Military, Strategic, and Security Issues, 2010, p. 69.

number when addressing the issue of contemporary child soldiering. Mark Drumbl, however, believes that this number is not sufficiently justified.<sup>40</sup>

Despite the alleged controversy of the number, there is rather a more disturbing issue raising from the phenomenon itself. The growing tendency to recruit children, guide us to the pathological development of a new conflict norm, the spread of which can have disastrous results and lead to inevitable consequences. The child soldier-related issues have already proved to be disputable, and hard to manage or remediate. The issues discussed further include the attributed images of the child soldier, the problem of recruitment, the question of agency, the reintegration matter and the challenge of justice under international and national law.

#### **1.4 Images of the Child Soldier in the Past**

Mass media is one of the most powerful tools to get the attention of the international community today. The problem of child soldiers is not an exception. Most of the times the media presents the image of a child with a huge Kalashnikov machine gun. Nevertheless, over the last years, emerged several skeptically oriented scholars who raised many questions on the brutality, savagery, and agency of the child soldiers. It is important to note that in each case there are exceptions from the general picture, which could be identified only on a case-by-case accurate examination.

As the paper started with a distant historical judgment, it is worth to look at how did the child soldier image changed over time to the one that we have today. Notably however is the fact that the concept of war itself has changed. This shift is particularly visible during the course of the Second World War. From ancient times until the Second World War, there was a general tendency to go to war due to honor and duty. The war was traditionally a place of manhood and maturity. Yet, women were not always excluded from participation in the war, as would be proved later. The battlefield was far from the civil population and there was a general unwritten rule not to touch the children, women and elderly. The war was between the states and respectively state armies, where the soldiers shared the common feeling of obligation to protect their state and family. At the end of their military service or especially war, they were viewed as heroes by both, state and

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<sup>40</sup> Mark Drumbl, *Reimagining child soldiers in international law and policy*, Oxford: Oxford University Press, 2012, p.26.

community. Child soldiers respectively wore uniforms, shared the general moral and legal obligation to the state and family, and were viewed as heroes.

The war was a place of heroism, sacrifice, and manliness, however not exclusively for men. Women also went to war and some had even cross-dressed to get into the army as the young female child soldier Joan of Arc did in France or the widely known female child warrior Hua Mulan did in China. Other girl war agents who maintained their roles and femininity can be the Princess Pingyang in China and Pocahontas in America. The French Joan of Arc at only 16 years old was not only a soldier but also a leader of an army, which Charles granted at her request for the conquest of Orléans in 1429. She succeeded in her assaults against the Anglo-Burgundians in the siege at Orléans and forced their retreat on the other side of the Loire River.<sup>41</sup> This peasant girl from Medieval France remained in the history of Europe as one of the bravest female warriors. Despite the fact that she was executed for suspected heresy, she was declared innocent after 24 years after her death, and canonized in 1920 as a saint.<sup>42</sup>

Another famous warrior girl is Hua Mulan, who had to wear men's clothes and pretend to be a man in order to serve in the army, instead of her father. Her existence is mystified but she is pretty much known around the world due to the screening of the Disney classic movie. In some history books, she is mentioned as the hero of the Chinese Ballad of the Six Dynasties from 450 to 589.<sup>43</sup> The Chinese legend about Mulan was passed orally and has not been officially documented anywhere,<sup>44</sup> however, there were registered numerous cases of female cross-dressing for official serving in the third and fifth centuries.<sup>45</sup> Nevertheless, the bravery of a teenage girl who took the place of her father and joined the army along with other men took the fame of the young warrior until the twenty-first century.

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<sup>41</sup> "Joan of Arc," *History*, 15 April 2019, <https://www.history.com/topics/middle-ages/saint-joan-of-arc>.

<sup>42</sup> "Canonization of Jeanne d'Arc," *Catholic Encyclopedia*, <https://www.jeanne-darc.info/biography/canonization/>.

<sup>43</sup> Bonnie G. Smith, *The Oxford Encyclopedia of Women in World History*, Oxford: Oxford University Press, Volume 1, 2008, pp. 109-110.

<sup>44</sup> Gina Dimuro, "Meet Hua Mulan — The Legendary Warrior Behind The Disney Classic," *All That is Interesting*, 30 July 2018, <https://allthatsinteresting.com/hua-mulan>.

<sup>45</sup> Another Chinese girl soldier was the Princess Pingyang, a more realistic female character found in Chinese history. She got the loyalty of hundreds of men and the sympathy of several rebel leaders to join her at the age of 17, in the seventh century where women were restricted in their actions. She then combined forces and captured the capital of Huxian county. As the daughter of the Emperor, she became a marchal and received an army under her command which was known as the Army of the Lady. From: [http://www.newworldencyclopedia.org/entry/Princess\\_Pingyang](http://www.newworldencyclopedia.org/entry/Princess_Pingyang).

In another part of the world is another girl, which at the age of 11<sup>46</sup> met the colonists in America in 1607. Again, a famous character known from the Disney famous cartoons, Pocahontas is a girl involved in the conflict of the colonists and the Native Americans.<sup>47</sup> She is an American Indian Princess, the daughter of the ruler of the tribes in Virginia.<sup>48</sup> She is not a warrior, rather a war agent that discusses and barter for both parties. In a current definition, she would classify as a child soldier who conducted other important roles at the beginning of the colonial wars in America.

The American Revolution's most famous child soldier Andrew Jackson, later the seventh president of the United States, was only 13 years old when the American Revolution was at the hand of the British forces in North and south Carolina. At this age, Jackson got the first taste of the brutality of war as the witness of the Battle of Waxhaus. Not long after this episode in his life, he joins the cavalry unit and become a messenger with a pistol. Because of deceit and betrayal, he and his brother will happen to become prisoners of war to the British forces, where he only incited his determination to fight. Soon after his escape, his brother and mother died, Jackson becoming a fifteen-years-old orphan of the American Revolution. In the election race, Jackson used particularly this moment of service and capture of a thirteen-years-old-self. As we shall see, later his presidential campaign was a success, and Jackson was arguably the first democratically elected president of the United States. Besides being a war hero of the American Revolution and the War of 1812, he was also a child soldier.<sup>49</sup>

However, Jackson was not the only child soldier and hero of the American Revolution, as the revolutionary leaders were young and many of their recruiters were underage, this led to the appearance of youth culture in America.<sup>50</sup> The after-coming American Civil War also called by some historians "the boys' war," because of the enormous numbers of child soldiers voluntarily

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<sup>46</sup> "Pocahontas Facts," *Native American Indian Facts*, <https://native-american-indian-facts.com/Famous-Native-American-Facts/Interesting-Pocahontas-Facts.shtml>.

<sup>47</sup> "Pocahontas," *History*, 21 August 2018, <https://www.history.com/topics/native-american-history/pocahontas>.

<sup>48</sup> Jackie Mansky, "The True Story of Pocahontas," *Smithsonian*, 23 March 2017, <https://www.smithsonianmag.com/history/true-story-pocahontas-180962649/>.

<sup>49</sup> Rosen, *supra* note 14, pp. 1-6.

<sup>50</sup> *Idem.*, p. 10.

enlisted in the Union and Confederate armies. Consequently, many of them after the war became national heroes<sup>51</sup>

During the First World War, in Great Britain, the most famous child soldier was John “Jack” Travers Cornwell who was glorified for his devotion and patriotism to the country. At only sixteen, he was already a first class seaman in the Royal Navy. He was awarded the Victoria Cross posthumously after he was fatally wounded at the Battle of Jutland. In spite of the fact that his entire gun team was killed and he himself was severely injured, he had never abandoned his post or gun and waited until the last moments for the gun sighting orders. Cornwell became a star and a legend, his image was on cigarette cards, his wax model can be found at Madame Tussaud in London, his portrait made famous the painter Frank Salisbury, he was an inspiration to the Cornwell Award for Courage, and was given special tribute in the Renshaw’s poem *Beatty’s Boy Hero*.<sup>52</sup> The young soldier showed the devotion and fearlessness the British nation needed at a time of national disaster and despair. He embodied the image of the accomplished patriot and became a national hero.

The Second World War had its own child soldiers worldwide with their own merits and accomplishments. In Eastern Europe, the role of the heroine for which Soviet people will go to war and fight was Zoya Kasmodemyanskaya, an underage young girl whose death terrified an entire nation. Zoya was a partisan as many child soldiers in Eastern Europe. She was captured and tortured by the German soldiers and was publicly executed in front of the occupied village. A Soviet journalist investigated and made public the execution of Zoya in the Soviet newspaper Pravda, where he also added shocking photographs of Zoya’s mutilated body. Soon after the publication of the article, this young girl became a national obsession and a hero of Soviet resistance against German fascism. For Stalin, Zoya’s story was of substantial value for the overall propaganda. The poem *Zoya*, written in 1943 was awarded the Stalin Prize, theaters used the poem

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<sup>51</sup> David Baily Freeman known as “Little Dave” enlisted in the Confederate army at 11, or Avery Brown, known as the “Drummer Boy of the Cumberland” lied to be 12 and enlisted at age 8 into the Ohio Volunteer Infantry. From: Rosen, *supra* note 19, p. 5.

The most popular among them was John Lincoln Clem, known as the “Drummer Boy of Chickamauga,” who was enlisted at age ten into the Twenty-Second Michigan Infantry. After the Battle of Chickamauga in 1863, at twelve years old, he was promoted to sergeant, therefore becoming the “youngest noncommissioned officer ever to have served in the U.S. Army.” He served in the army all his life until he retired at the beginning of the First World War as a major general and the last Civil War veteran on active duty. From: Rosen, *supra* note 14, p. 13.

<sup>52</sup> Rosen, *supra* note 14, pp. 27-30.

in their plays *Tale of Truth*, and then operas adapted the general rapture of Zoya's heroism to the melodious interpretation. Moreover, by 1944 there was a movie about Zoya, shown to twenty-two million Soviet people.<sup>53</sup>

With the end of the Second World War and the beginning of the Cold War, the glory of war was replaced by the general will for peace. In the mostly universal turn for humanitarianism, the child soldiers lost their heroic roles and were transferred to the weak protected group. From heroes and volunteers inspired by duty, honor, and patriotism, they turned into manipulated puppets, victims for some, uncontrollable beasts, and killers for others.

### **1.5 The New Images of the Child Soldiers**

The world had to face the emergence of new forms of conflicts, which mostly developed within states. And along with entire nations, children within those states caught up in conflict fell within the disgraceful, immoral, and interminable realms of the new wars, where soldiering were less of a choice and more a necessity. Modern child soldiers have adapted to the new rules of the new wars, where non-state groups did not feel any responsibility or obligation to follow international or humanitarian law. The general pulse of disorder pushed the young soldiers to ruthless actions, for which they would be endlessly criticized. The modern child soldier got new images and attitudes.

#### **1.5.1 The Victim Image**

The image that child soldiers receive in the international community greatly influences the assessment of accountability and the development of a law on the distribution of responsibility. Since the development of humanitarian law is relatively new, the image of the child soldier so far, followed along with the temporal trend of child victimization and condemnation of the war in general. Because by the end of the twentieth century, special attention was given to humanitarian issues, the image of child soldiers changed dramatically from heroes to victims.

Most of the contemporary writers and scholars concerned with the child soldier phenomenon, emphasize the word 'child' as coming before the word 'soldier.' In most of the literature done for and cited in this paper, the child was viewed, portrayed as a victim of the adult

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<sup>53</sup> *Idem.*, pp. 91-94.

irresponsibility, and careless. An inspiration to most supporters of the victim image was the 1996 Graca Machel report on “The Impact of the Armed Conflict on Children.”

The Report requested by the Secretary-General in 1994 and supported by the United Nations Center for Human Rights and the United Nations Children’s Fund, was presented at the fifty-first session of the 1996 General Assembly.<sup>54</sup> Its immediate success led to the adoption of the General Assembly Resolution 51/77, on ‘The rights of the child’ in 1997,<sup>55</sup> and is highly influential even today. However, the Report is extensively using the word victim in relation to children. From the very beginning, the Report asserts that millions of children are victims of cynical exploitation.<sup>56</sup> The Report is even addressing the subject of child soldiers in an entire sub-chapter, where the topic is analyzed broadly from the recruitment stage to reintegration and prevention.<sup>57</sup> Machel refers in her report to those under 18,<sup>58</sup> which as defined by international law are considered children. It is worth to mention, however, that a 10-year-old and a 17-year-old are two different levels of maturity and understanding. Also, a child caught up in the conflict that decides to live in his village under the fear of raid from all sides of the conflict and one that decides to voluntarily join the armed group to avoid famine and get the protection of one of the sides, are two different kinds of victims. The report, however, generalizes the victim image of the children.

When addressing the voluntary enlistment in the armed group, Machel still maintains that children do so, not under their free will to join, but under “cultural, social, economic or political pressures,”<sup>59</sup> and that the so-called voluntary participation is “always a misnomer.”<sup>60</sup> However, even in the harshest situations of poverty, hunger, and war, there are those (children) who choose not to join the armed groups and those who choose otherwise, there are those who run from their forced recruitment and those who stay. We cannot judge any of them, they are still victims, but of

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<sup>54</sup> United Nations, Department for Policy Coordination and Sustainable Development (DPCSD), *Promotion and Protection of the Rights of Children, Impact of armed conflict on children, Note by the Secretary-General*, A/51/306, 26 August 1996, [https://www.unicef.org/graca/a51-306\\_en.pdf](https://www.unicef.org/graca/a51-306_en.pdf).

<sup>55</sup> United Nations, General Assembly, *The rights of the child*, A/RES/51/77, 20 February 1997, <https://www.un.org/documents/ga/res/51/ares51-77.htm>.

<sup>56</sup> United Nations, *supra* note 54, para. 1.

<sup>57</sup> *Idem.*, paras. 33-62.

<sup>58</sup> *Idem.*, para. 36.

<sup>59</sup> *Idem.*, para. 38.

<sup>60</sup> Leonie Steinl, *Child Soldiers as Agents of War and Peace*, T.M.C. Asser Press: International Criminal Justice Series, Volume 14, 2017, p. 10.

different senses, where one implies absolute innocence, and other a weakened morality followed by liability.

The Machel's position of child-soldier victim image is widely supported by NGOs and humanitarian organizations like Child Soldiers International, ICRC, UNICEF, UNHCR, Invisible Children and many others. This tendency can also be found in existing international humanitarian law where children are offered 'special protection' and in international criminal law, where children are mostly excluded from the jurisdiction over international crimes. The Report undoubtedly expresses the brutal reality of the position of the child in the war, but how real the recommendations are, is hard to say. They are excessively general, ineffective as proved by now, without a strong and trustworthy monitoring procedure and without an enforcement mechanism. The main issue within the victim image stands for the exclusion of these 'victims' from the jurisdiction over the crimes they committed.

Drumbl, Fisher, and Steinl agree on the fact that children who commit international crimes are no different from those who commit crimes under domestic law.<sup>61</sup> Under domestic jurisdiction, children who committed grave crimes can be punished according to the system of juvenile justice. As Drumbl argues, "This juxtaposition does not align with international law's perception of extraordinary crimes under international law as being of greater gravity than ordinary common crimes."<sup>62</sup> Furthermore, Fisher and Drumbl state that age should not exclude the children who committed grave international crimes from accountability, even if the crimes they did were under pressure and manipulation.<sup>63</sup> As Drumbl will put it, "Many adults are compulsorily conscripted, as well, yet this does not *ab initio* absolve them from the consequences of their conduct. Many adult soldiers are little older than eighteen and live strikingly similar situations to child soldiers. They are thus contemporaries. Can so much differentiation realistically hinge upon a simple matter of chronological age?"<sup>64</sup> This should be taken into account when investigating the case, and depending on the age, it can alleviate the sentence, but should not exempt from liability. Yes, 18-straight is already an introduced age sign of maturity, but there is no biological, psychological or scientific proof that some unconditional change comes with the 18<sup>th</sup> birthday.

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<sup>61</sup> Fisher, *supra* note 20, p. 72. See also: Drumbl, *supra* note 40, p. 128; Steinl, *supra* note 60, p. 11.

<sup>62</sup> Drumbl, *supra* note 40, p.128.

<sup>63</sup> Fisher, *supra* note 20, p. 72. See also: Drumbl, *supra* note 40, p.128.

<sup>64</sup> Drumbl, *supra* note 40, p.23.



Nevertheless, the victim image was predominant until recently and got around it some more criticism. As Steinl, and Drumbl argue, the victim image was and is still used for financial support and funding of humanitarian mandates.<sup>65</sup> Steinl further criticizes this victim image as being constructed by western humanitarian organizations, for the western public. By constructing it, they ignore the mere idea of agency and voluntary involvement of children in conflict, to satisfy the innocence and vulnerability of the modern concept of childhood. Only such a picture will get the sympathy and sponsoring of the western ‘viewers.’<sup>66</sup> Mark Drumbl on the same account criticize this victim image of the child soldier as “a helpless object manipulated locally by adult malevolence, yet at the same time to be rescued transnationally by adult humanitarianism.”<sup>67</sup> In addition, by analyzing the Machel recommendations and the existing humanitarian and human rights law, this is exactly the image child soldiers got, as oppressed by the immoral leader and waiting for their salvation by the western heroes.

### 1.5.2 The Evil Image of the Child Soldier

As mentioned above the modern image of the child soldier goes to one of the extremes, either as an innocent victim or as a dangerous demon. While the victim image is portrayed so because of the alleged helplessness and immaturity, the evil image is fueled by the rebellious and adventurous nature of the teenagers.

Steinl argues that particularly the demon image given to the child soldier is given to those involved in terrorist activities.<sup>68</sup> Denov on the other side, brings a wider analysis and example of child soldier demonization. She claims that the evil image of the child soldier is given to show the community what consequences erode out of the horrors of war. She notes that the press is contesting the child soldier image, by spreading loud denominations like “chillingly efficient killings machines,” “Drug crazed child soldiers kill like unfeeling robots,” “Ugandan Child soldiers have been warped by war,”<sup>69</sup> etc. Other authors like Honwana, Rosen, and Macmillan, also noted the new tendency of claiming child soldiers ‘bandits,’ ‘barbarians,’ and ‘monsters’

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<sup>65</sup> Steinl, *supra* note 60, pp. 9-10; See also: Drumbl, *supra* note 40, p. 36.

<sup>66</sup> *Idem.*, p. 10.

<sup>67</sup> Drumbl, *supra* note 40, p. 6.

<sup>68</sup> Steinl, *supra* note 60, p. 12.

<sup>69</sup> Myriam Denov, *Child Soldiers, Sierra Leone's Revolutionary United Front*, Cambridge: Cambridge University Press, 2010, p. 6.

conscious of their actions and consequences. Moreover, many authors believe that reintegration of such children is impossible, as they are “lost in a cycle of unrelenting violence, irrationality, and iniquity.”<sup>70</sup> As the Newsweek argued, those children are “fluent in the language of violence but ignorant to the rudiments of living in civil society ... it’s often too late to salvage their lives.”<sup>71</sup> The New York Times also emphasized the reintegration issue of those children, “When they do return to civilian life, they are walking ghosts - damaged, uneducated pariahs.”<sup>72</sup>

Particularly important is when state representatives make statements of this kind, as Madeleine Albright, the US Ambassador to the UN did in 1996. She addressed the child soldiers of Liberia, stating that they were “toting automatic weapons, slaughtering innocent civilians, and ignoring the rule of law.”<sup>73</sup> However, it is not new for the US to be so sharp in its allegations. Comparing to the later development of the US policies and mandates on child soldiers, Albright’s declaration was nothing more than a precaution. As would be later discussed, in its War on Terror, the US made no difference between children and adults, for them terrorists had no age, gender, nationality, nor even human rights. Several under-age soldiers were detained in US torture camps, including the scandalous Guantanamo Bay. Moreover, a more recent incident happened in 2007, at a conference on children and armed conflict, where a French foreign minister allegedly stated that child soldiers “are a time bomb that threatens stability and growth.”<sup>74</sup>

If talking about real examples, there is no better one than the famous twins from Myanmar. Johnny and Luther Htoo, 12-years-old twin brothers, became known worldwide in 2001 as the youngest child leaders of the rebel group named God’s Army. They were named by the press ‘Terror twins’<sup>75</sup> and ‘Little lords of the jungle.’ These real child soldiers gained leadership positions in the group. Moreover, they even got in the surroundings of Prime Minister Chuan Leekpai and a dozen of Thailand’s top generals. Not only for the local community but also for the entire world, these two 12-years-old boys, were demons in human skin. <sup>76</sup>

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<sup>70</sup> *Ibidem.*

<sup>71</sup> *Ibidem.*

<sup>72</sup> “Armies of Children,” *The New York Times* (Editorial), New York, 12 October 2006, <https://www.nytimes.com/2006/10/12/opinion/12thu3.html>.

<sup>73</sup> Denov, *supra* note 69, p. 7.

<sup>74</sup> *Ibidem.*

<sup>75</sup> *Ibidem.*

<sup>76</sup> Robert Horn, “Little Lords Of The Jungle,” *Times*, 29 January 2001, <http://content.time.com/time/magazine/article/0,9171,999088,00.html>.

The demon image, however, is attributed to dozens of child criminals worldwide, and not only to child soldiers. Sometimes, the children's malice knows no limits, and then a serious crime is committed. A similar example of child demonization due to child culpability could be attributed to the underage school shooters in the US. In 1998, Andrew Golden, aged 11 and Mitchell Johnson, aged 13, shot 15 people at the Westside Middle School Playground. In 2005 Jeffrey Weisse, aged 16, killed nine people in the so-called Red Lake massacre. In 2014, a well-liked student Jaylen Fryberg, aged 15, shot five students at Marysville High School. 2018, still there, Dimitrios Pagourtzis, aged 17, opened fire at Santa Fe High School and killed 10 while injuring at least 13 more students. Moreover, later, there was found undetonated explosive devices in the vicinity.<sup>77</sup>

Demonization happens in regard to everyone who commits serious crimes that are out of any acceptance and beyond someone's understanding. Some actions just prove the children's capability to brutal and inexcusable acts, which must be condemned by the international community. However, the demonization of child soldiers, in general, is not the best practice. Anger may bring back only anger, and naming and shaming is not a solution either. When it comes to children, there should be taken into account many factors, and an innovative justice procedure should be aligned to the international criminal law.

### 1.6 The Question of Agency

Regardless of the image imposed on child soldiers, the main challenge of image attribution is the matter of agency. Rosen argues that "Neither demons nor victims are rational actors."<sup>78</sup> He is true in a way, but the main discussion on child soldiers still surrounds the lack of agency for victims and the existence of agency for demonized child soldiers.

As it was presented above, there are plenty of historical examples, which prove that children were joining the war on their own behalf. They were revolutionaries, soldiers, and heroes. For hundreds of years, underage children joined the military forces voluntary and nobody questioned their agency. The twentieth century, as had been presented, changed the entire perspective of the war, but did it really changed the consciousness of the deeds? It changed in a

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<sup>77</sup> Mark Follman, Gavin Aronsen, and Deanna Pan, "US Mass Shootings, 1982-2019: Data From Mother Jones' Investigation," *Mother Jones: Crime and Justice*, 15 February 2019, <https://www.motherjones.com/politics/2012/12/mass-shootings-mother-jones-full-data/>.

<sup>78</sup> Rosen, *supra* note 19, p. 134.

better direction the inadmissibility and intolerability of war as destructive and needless. The war was replaced by diplomacy, politics, and international law. Humanitarian concerns became the main political direction. Those under the age of 18 were classified as children and attributed to those in need of ‘special protection.’ Along with this arrangement, those who were underage were considered not only immature but also irrational, innocent and with no agency.

On the turn of the twenty-first century, scholars started to doubt the fast-taken assumption, and as Rosen argues, “Modern studies of children begin with the premise that it is no longer appropriate to see children solely as underdeveloped or incomplete adults.”<sup>79</sup> Myriam Denov shares the same position as Rosen, and argues in her analysis that “... children involved in armed conflict are possessed with agency and frequently act with deliberation and awareness of the meaning and consequences of their actions.”<sup>80</sup> Kendra Dupuy also emphasizes “... the children in difficult circumstances themselves are the experts and are often surprisingly capable of reflecting on their situation and suggesting solutions.”<sup>81</sup> Denov and Rosen bring up the argument that many studies of the child soldiers could prove that children have the capacity for rational choices and agency. Rosen even comments on Ishmael Beah’s (a former child soldier) memoir *A Long Way Gone*, arguing “He is quite aware of his complicity in the war crimes he willingly committed and of his personal culpability for murder.”<sup>82</sup>

Analyzing Beah’s words and stories, he seems to really have an understanding of his actions “We had been fighting for over two years, and killing had become a daily activity. I felt no pity for anyone,”<sup>83</sup> “We went to work, killing everyone in sight. We did not waste a single bullet. We had all gotten better at shooting, and our size gave us an advantage because we could hide under the tiniest bushes and kill men who wondered where the bullets were coming from.”<sup>84</sup> In his memoir, he maintains an easy-going manner of telling his actions and his thoughts. He portrays himself as a child caught up in conflict and going with the flow. When in chapter 15-16 he tells about being back to the civil life under UNICEF supervision and support, he expresses a feeling of anger and betrayal for being sent there by his commander. He even confesses that the UNICEF

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<sup>79</sup> *Idem.*, p. 133.

<sup>80</sup> Denov, *supra* note 69, p. 40.

<sup>81</sup> Dupuy, and Peters, *supra* note 39, Preface: xi.

<sup>82</sup> Rosen, *supra* note 14, p. 8.

<sup>83</sup> Ishmael Beah, *A Long Way Gone, Memoirs of a Boy Soldier*, New York: Farrar, Straus and Giroux, 2007, Chapter 15.

<sup>84</sup> *Idem.*, Chapter 16.

and other staff members made him believe that he was the victim in any case “None of these things is your fault,” she would always say sternly at the end of every conversation. Even though I had heard that phrase from every staff member-and frankly I had always hated it-I began that day to believe it.”<sup>85</sup>

However, not only the humanitarian workers impose and suggest this idea to the child soldiers. Alpaslan Özerdem and Sukanya Podder, who had directly interacted with child soldiers in Sierra Leone and Liberia argue that child soldier themselves make use and dramatize their situation to get more attention and support. As authors argued in their common analysis, “It is also no surprise that children in front of aid donors pretend to be as innocent as possible to get whatever possible advantages in their fragile post-combatant lives.”<sup>86</sup> Therefore, some child soldiers exploit the victim image they are conferred for their own advantage. In such a case, self-victimization is also an expression of agency.

Therefore, the question of the agency of child soldiers is very much dependent on who you ask. Those who try to make child soldiers victims, deny the existence of child soldier agency. Those who try to impose the evil image on them, assume that everything those kids do is rational and unconditioned. The reality, however, is different. Child soldiers embody both paradigms, the victims and the perpetrators. To assess the degree of their compliance and malice to the crimes they committed is a hard work that needs to be done on a case-by-case basis, avoiding generalization.

The latest development of child soldier issue is to prove their agency. As both camps, the pro-victims and pro-evil propagators center on the core idea of child consciousness and rationality, why those scholars ignore the child from an ordinary environment? In their arguments, they tried to put the child soldier into either the victim or demon category, both camps arguing that they are so due to the environment of war, which pushes them to cruelty and violence. Nevertheless, the atmosphere of war did not influence the school shooters (previously mentioned) who were raised in regular conditions. Still, they committed grave crimes. In their cases, we cannot deny a child’s rationality, as their actions were deliberate and purposeful. They had to find the guns themselves,

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<sup>85</sup> *Idem.*, Chapter 17.

<sup>86</sup> Alpaslan Özerdem, and Sukanya Podder, *Child Soldiers: From Recruitment to Reintegration*, New York: Palgrave Macmillan, 2011, p. 218.

to plan the location and address their anger to a certain group. Moreover, domestic courts admit child's rationality in child-custody decisions, juvenile witness's testimonies in criminal justice proceeding, and many other. There is no explanation why on other occasions like child soldiering, this rationality could be denied. Just like under domestic law, the child's rationality should be assessed on a case-by-case basis to assume the full functioning of international criminal law.

In the case of the child soldiers, we can assume that a 10-year-old and a 15-year-old have different levels of understanding and rationality, but either of them could have or have not the agency. The Terror Twins from Burma were only 12 years old, but they had agency, power, and will to become leaders and control a group of rebels. Ugandan and Sudanese child 'night commuters' who walked dozens of kilometers to escape and find safe havens have different rationality of survival than for example Dominic Ongwen, who was a child soldier and then an abductor himself in the same country. Child soldiers, just like any other child can be moved by anger, revenge, selfishness, ignorance or fear, despair, and self-preservation. In any case, the agency cannot be completely denied or disclaimed. Therefore, each child soldier needs a special approach and assertion.

### **1.7 Final Remarks**

As this chapter proved, the child soldier phenomenon is neither new nor outdated. Child soldiers were recruited all over the world and still represent a concern for humanity in the dimension of the new wars. While in the past child soldiers were viewed as heroes, today they are merely portrayed to the extremes of passive victims or uncontrollable demons. The war, in general, lost its greatness and glory, with the emergence of non-state armed forces and terrorist groups. Nevertheless, the victim image that many authors, scholars, and NGOs confer to the child soldiers influenced existing international law, in excluding the under-18s from the ICC jurisdiction over international crimes. Yet, this chapter argued that children might have agency and are rational actors in both, peace and war, as exemplified. Therefore, the victim image needs to be revised with respect to international criminal law.

## Chapter II

### 2.1 Recruitment of Child Soldiers

Much of the child soldiers' agency dispute relates to the way they were conscripted. Notably, modern child soldiers are believed to be recruited by force, from which derives their victim image. However, the reality proves that child soldiers join the armed forces in multiple ways and for various reasons.

#### 2.1.1 Forced Recruitment

Primarily forced conscription is highly condemned today by all scholars, NGOs, national governments, international law and the international community in general. Yet, none of the existing laws prohibiting (coercive) recruitment of children explain what forced recruitment means. The literature, on the other hand, offers a wide range of explanations and classification of forms of recruitment.

Kendra Dupuy refers to forced recruitment as "... conscription into an armed faction against one's will or choice, with the use of threats, force, or violence."<sup>87</sup> While many authors try to explain and refer to different methods of forced enrollment, only Dupuy and Peters offer a classification of methods. They argue that forced recruitment happens through a variety of forms. One such form is through *quota systems*, which in their vision "... are sometimes put in place by militias, rebels or governments and require each family or community to present a certain number of recruits."<sup>88</sup> Ozerdem and Podders also refer to such a form of recruitment as forced, due to the lack of alternatives. Even if those within the household decide themselves who will be enlisted, their decision is still considered forced.<sup>89</sup>

Another method is through *abduction*, which implies "... the kidnapping of children who are then forced - sometimes under gunpoint - to join."<sup>90</sup> Myriam Denov's analysis of Sierra Leone's Revolutionary United Front (RUF) also recognizes abduction as a well-known strategy of forced recruitment. Immediately after the abduction, the new recruits were drugged, to become

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<sup>87</sup> Dupuy, and Peters, *supra* note 39, p. 63.

<sup>88</sup> *Ibidem*.

<sup>89</sup> Özerdem, and Podder, *supra* note 86, p. 36.

<sup>90</sup> Dupuy, and Peters, *supra* note 39, p. 63.

more obedient and controllable.<sup>91</sup> Sierra Leone was not the only example where children were abducted, in Uganda's Lord Resistance Army, abduction was the most notorious and widespread form of forcible recruitment of fighters, porters and sex slaves.<sup>92</sup>

The last mode, according to Dupuy and Peters, is forced enlistment through *press-ganging*, which they explain as "... the raiding by government soldiers or rebels of places where many potential recruits are (such as in school), who are then rounded up and conscripted."<sup>93</sup> Kirsten Fisher also brings up the example of the school setting, as a place where the rebels could easily find new recruits for forcible recruitment.<sup>94</sup> Indeed, school is a place of young forces. At school, they are unaccompanied and respectively unprotected. Their presence in an educational facility signifies their immaturity and incompetence, therefore, they are more malleable and easy to manipulate through fear or bribery.

### 2.1.2 Coerced Conscription

Another form of recruitment is *coercive conscription*. Authors like Denov, Ozerdem, Fisher, and Rosen communicate about propaganda and indoctrination role in the recruitment process, but it is neither exclusive nor exhaustive, it became a politicized recruitment method. However, only Dupuy and Peters classify coercive conscription as a separate method of the forced recruitment procedure. They define coercive conscription as a way of "... joining an armed faction as a result of pressure to do so mainly by family, relatives, religious leaders, etc." Furthermore, the scholars argue, "Propaganda and indoctrination can be used as means for coercive conscription."<sup>95</sup> Coercive conscription differs from compulsory military service, which belongs to national forces throughout history, and means immediate admission to the army in the mandatory order. It also differs from the forced recruitment which refers mostly to the non-state armed groups, and which resort to desperate measures to strengthen their army. Coercive conscription would rather belong to the moral pressure of the society on the young and capable generations.

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<sup>91</sup> Denov, *supra* note 69, p. 97.

<sup>92</sup> Peter Eichstaedt, *First kill your family: child soldiers of Uganda and the Lord's Resistance Army*, Chicago: Chicago Review Press, 2009, p. 9.

<sup>93</sup> Dupuy, and Peters, *supra* note 39, p. 63.

<sup>94</sup> Fisher, *supra* note 20, p. 172.

<sup>95</sup> Dupuy, and Peters, *supra* note 39, p. 63.



The best historical example of coerced conscription is the WWI movement of the White Feather Girls. The main idea of the movement was to dishonor the young men who did not go to war. Groups of young girls went through the cities of England and offered white feathers to men who wore civilian clothes as a symbol of shame and cowardness. This White Feather was a humiliating symbol, which imposed an immense social pressure on men to join the army. The peculiarity of this innocent and 'immodest' movement is that it worked. However, as later testimonies showed, it left a stain on the honor of those men until their old age.<sup>96</sup> Despite its effectiveness in the past, today, the war is not a place of honor and duty anymore. The war is a place of disgrace and villainy. The societal pressure is more rough and violent. Most of the children are lost in the lust for survival, and the careless societies only push them closer to soldiering. In addition, coercive conscription drove by brutal societal pressure only traumatize the young child soldiers, who are not able to cope with the stress and tension of the conflict. Those child soldiers are harder to reintegrate into the societies which once betrayed them, denied their youthfulness and send them to fight.

### 2.1.3 Voluntary Recruitment

While the international community convicts forced recruitment, voluntary recruitment is constantly put at doubt. Dupuy and Peters, like in other cases tried to offer a definition to voluntary conscription, arguing that it assumes "... joining an armed faction (government army, militia, or rebel faction) out of one's own and free choice, without the explicit use of force or coercion by the armed faction."<sup>97</sup> A rather interesting question arose from the analysis of the overall environment under which this free choice emerged.

There is no doubt that in the past, before the twentieth century, voluntary recruitment was exercised out of the free will of the under-18s to join the armed forces. The battlefields were outside of the civilian areas and therefore children have not suffered any pressure from the environment to join the war as a way of survival. As previously exemplified, most of the child volunteers lied about their age just to enlist into the army. With the emergence of the new wars, where the civilian zones became the main battlefields, the state of war became natural surroundings

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<sup>96</sup> Nicoletta F. Gullace, "The 'White Feather Girls': women's militarism in the UK," *Open Democracy*, 30 June 2014, <https://www.opendemocracy.net/en/5050/white-feather-girls-womens-militarism-in-uk/>.

<sup>97</sup> Dupuy, and Peters, *supra* note 39, p. 63.

for many regions caught up in conflict. Therefore, the ordinary environment in these regions changed significantly. Still, they cannot be considered ‘normal environments,’ therefore the circumstances for volunteering compromise the ‘free will.’

Machel Report is amongst the most prominent documents which spoke about child soldiering and which challenged the ‘voluntary’ character of conscription. In paragraph 38 Machel asserts, “While young people may appear to choose military service, the choice is not exercised freely. They may be driven by any of several forces, including cultural, social, economic or political pressures.”<sup>98</sup> The same factors may influence also adult or children even in peaceful societies to commit common crimes. Despite the environment, there is also a choice that people make for their own benefit. In conflict environments, there are fewer choices, but these choices are made according to people’s own priorities. They can choose to work, to immigrate or to commit crimes.

In respect to the previous argument, it is worth to give a modern example of voluntary recruitment. The United Kingdom of Great Britain and Northern Ireland, a European country, still allows voluntary recruitment of under-18s. Moreover, in its Declaration on the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, made in 2000, the UK did not only allow voluntary recruitment of children but also admit their deployment. As the Declaration confirms “... article 1 of the Optional Protocol would not exclude the deployment of members of its armed forces under the age of 18 to take a direct part in hostilities.”<sup>99</sup> Furthermore, as the Child Soldiers, Global Report on the United Kingdom proved in 2008, “The government reported in June 2007 that 18 personnel aged under 18 had been deployed into “areas where they may be exposed to hostilities” ... [they] had been deployed to Iraq between 2003 and 2005.”<sup>100</sup> Similar findings can be done upon research on the USA voluntary recruitment and deployment of under-18s.<sup>101</sup> Both those western states are considered highly developed with good social, educational and economic conditions. Still, underage children voluntarily enlist into the army. Moreover, they accept to be deployed in conflict zones. Therefore, it can be argued that

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<sup>98</sup> United Nations, *supra* note 54, para. 38.

<sup>99</sup> United Nations, Treaty Series, *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict*, Human Rights: Chapter IV, New York, vol. 2173, 25 May 2000, [https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg\\_no=iv-11-b&chapter=4&lang=en#EndDec](https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg_no=iv-11-b&chapter=4&lang=en#EndDec).

<sup>100</sup> Child Soldiers International, UK, *supra* note 32.

<sup>101</sup> Child Soldiers International, USA, *supra* note 33.

voluntary recruitment is not always constrained by the environment. We must admit that children, at least adolescents are personalities with own thought, opinion, and will, able to make decisions and assume responsibility for their actions.

## 2.2 Law on Child Conscription (Child Soldiers as Victims)

From the very beginning of the humanitarian law creation, children became an integral part of the ‘weak’ group, which demanded ‘special protection.’ Starting with the 1949 four Geneva Conventions, which inscribed the laws of war in relation to civilians, the sick and wounded, and the prisoners of war, the warfare theoretically acquired a new level of humanism. People around the world started at least in theory to show a little concern to the effects of the war. New Treaties and Conventions covered more aspects and facilities. Into the sight came everything starting with humans and ending with cultural heritage. Nevertheless, the children got more attention and respect in those legal doctrines, as an eternal symbol of humanity and future.

The Fourth Geneva Convention from August 1949, relative to the Protection of Civilian Persons in Time of War, is the earliest document that indirectly refers to the child soldiers’ protection. In Article 50, dedicated for Children, the Convention settle the later-applied “children under fifteen years,” as amongst the most vulnerable and in need for special “protection against the effects of war.” In the same Article, there is also a note to the “Occupying Power” on the prohibition of child conscription. As it is stated in the Article “The Occupying Power shall take all necessary steps to facilitate the identification of children ... It may not, in any case, change their personal status, nor enlist them in formations or organizations subordinate to it.”<sup>102</sup>

In 1977, two Additional Protocols to the Geneva Conventions were the first legal instruments to address specifically child soldiers and not children in general. As it was mention in the first chapter of this paper, those two Protocols specified age-related limitations for conscription. Additional Protocol I refers in Article 77(2) to the “Parties to the conflict,” arguing that they “... shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces.”<sup>103</sup> Then in Article 4(3)(c) of Additional Protocol II

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<sup>102</sup> International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287, Article 50.

<sup>103</sup> International Committee of the Red Cross (ICRC), Protocol I, *supra* note 3, Article 77(2).

reaffirms on child recruitment the following “Children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities.”<sup>104</sup>

The more popular 1989 Convention on the Rights of the Child provided in Article 38(3) that namely “*States Parties* shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces.”<sup>105</sup> Moreover, Article 38(2) refers to the same ‘State Parties’ as responsible or in charge of taking “... all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.”<sup>106</sup>

In the regional arrangement of 1990, the African Charter on the Rights and Welfare of the Child refers to child recruitment in Article 22(2), which established that “State Parties ... shall take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain in particular, from recruiting any child.”<sup>107</sup> Additionally, Article 29 prohibits “the abduction, sale of, or trafficking children for any purpose or in any form, by any person including parents or legal guardians of the child.”<sup>108</sup>

The 1998 Rome Statute of the International Criminal Court, classifies the “Conscription or enlistment children under the age of fifteen years ... or using them to participate actively in hostilities” as a War Crime according to Article 8(2). Conscription is criticized into both “the national armed forces,” Article 8(2)(b)(xxvi)<sup>109</sup>, and “armed forces or groups,” in conflicts of non-international nature, Article 8(2)(e)(vii).<sup>110</sup> Moreover, these Articles are further supplemented in the Elements of Crimes.<sup>111</sup> The latest version of the Elements of Crimes was complemented at the 2010 session in Kampala. The War Crime of using, conscripting or enlisting children, in both international and non-international armed conflict, contains the same elements. The first element is that “The perpetrator conscripted or enlisted one or more persons into the national armed forces

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<sup>104</sup> International Committee of the Red Cross (ICRC), Protocol II, *supra* note 4, Article 4(3)(c).

<sup>105</sup> UN General Assembly, *Convention on the Rights of the Child*, *supra* note 6, Article 38(3).

<sup>106</sup> *Idem.*, Article 38(2).

<sup>107</sup> Organization of African Unity (OAU), *African Charter on the Rights and Welfare of the Child*, 11 July 1990, CAB/LEG/24.9/49 (1990), Article 22(2).

<sup>108</sup> *Idem.*, Article 29.

<sup>109</sup> UN General Assembly, *Rome Statute of the International Criminal Court* (last amended 2010), 17 July 1998, ISBN No. 92-9227-227-6, Article 8(2)(b)(xxvi).

<sup>110</sup> *Idem.*, Article 8(2)(e)(vii).

<sup>111</sup> Which were reproduced initially from the Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10 September 2002.

or used one or more persons to participate actively in hostilities.” Second, “Such person or persons were under the age of 15 years.” Third, “The perpetrator knew or should have known that such person or persons were under the age of 15 years.” Fourth, “The conduct took place in the context of and was associated with international armed conflict,” or “with an armed conflict not of an international character,” accordingly. Fifth, “The perpetrator was aware of factual circumstances that established the existence of armed conflict.”<sup>112</sup>

The 1999 Convention on the Worst Forms of Child Labor, condemns in Article 3 “... forced or compulsory labor, including forced or compulsory recruitment of children for use in armed conflict,”<sup>113</sup> as the worst forms of child labor. Previously, in Article 1 it is stipulated that member states “... shall take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labor as a matter of urgency.”<sup>114</sup> Noteworthy is the fact that the Convention explained in Article 2 that when applying the term child it refers to “all persons under the age of 18.”<sup>115</sup>

The most comprehensive and elaborate law on child conscription is the 2000 Optional Protocol on the Involvement of Children in Armed Conflict. With only 168 ratifications, the Optional Protocol is the result of the successfully adopted resolution of the General Assembly A/RES/54/263. Article 2 of the Optional Protocol established the minimum age of 18 for compulsory recruitment into the national military forces of the State Parties.<sup>116</sup> For the voluntary recruitment into the national armed forces, as stipulated by Article 3(3), the State Parties should satisfy four criteria, namely that the recruitment is “genuinely voluntary,” “is carried out with the informed consent of the person’s parents or legal guardians,” that “persons are fully informed of the duties involved in such military service,” and that “persons provide reliable proof of age prior to acceptance into national military service.”<sup>117</sup> On the topic of armed groups that are not

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<sup>112</sup> International Criminal Court (ICC), *Elements of Crimes*, 2011, ISBN No. 92-9227-232-2, Article 8(2)(b)(xxvi) and Article 8(2)(e)(vii).

<sup>113</sup> International Labour Organization (ILO), *Worst Forms of Child Labour Convention*, C182, 17 June 1999, C182, Article 3.

<sup>114</sup> *Idem.*, Article 1.

<sup>115</sup> *Idem.*, Article 2.

<sup>116</sup> UN, *Optional Protocol ...supra* note 99, Article 1.

<sup>117</sup> *Idem.*, Article 3(3).

associated with the state military forces, child recruitment and use are prohibited in all its forms, be it forced or voluntary.<sup>118</sup>

In 2002, the Statute of the Special Court for Sierra Leone addressed the topic of child recruitment in Article 4. The Court reserved the right to prosecute grave violations of international humanitarian law, which according to Article 4(c) include “Conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities.”<sup>119</sup>

A recent agreement, the 2009 African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, again refer to child recruitment problem. Article 9 relating the Obligations of the State Parties, section 1(d) includes among others, the “... recruitment of children and their use in hostilities, forced labor, and human trafficking,”<sup>120</sup> as a matter of concern and immediate action from the State Parties.

The United Nations organs like the UN Security Council, the UN General Assembly, and the UN Commission on Human Rights, adopted numerous resolutions condemning the recruitment of child soldiers and their involvement in armed conflicts. Amongst the most known and influential is the already mentioned General Assembly’s Resolution 51/77. The resolution led to the creation of the mandate and “recommended that the Secretary-General appoint for a period of three years a Special Representative on the impact of armed conflict on children and ensure that the necessary support is made available.”<sup>121</sup> As assumed by the resolution, the Special Representative must produce annual reports for the UN General Assembly and Human Rights Council, on the situation of children caught up in conflicts around the world.<sup>122</sup> Nevertheless, the main responsibility pertains to the States parties and the international community as a whole.

The 1999 Security Council Resolution 1261 was the first ever resolution of the Council on children uses in armed conflict. It also placed the problem of children affected by the war on the

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<sup>118</sup> UN, *Optional Protocol ...supra* note 99, Article 4(1).

<sup>119</sup> UN Security Council, *Statute of the Special Court for Sierra Leone*, 16 January 2002, Article 4(c).

<sup>120</sup> African Union, *African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa ("Kampala Convention")*, 23 October 2009, Article 9(1)(d).

<sup>121</sup> UN General Assembly Resolution 51/77, *The rights of the child*, A/RES/51/77, <https://www.un.org/documents/ga/res/51/ares51-77.htm>.

<sup>122</sup> *Ibidem*.

Security Council agenda. The resolution requested the “Secretary-General to include in his reports, recommendations”<sup>123</sup> on children, and especially on “forced or compulsory recruitment of children for use in armed conflict.”<sup>124</sup> The 2000 Security Council Resolution 1314, reaffirmed the “strong condemnation of the deliberate targeting of children in situations of armed conflict, cross-border recruitment, and abduction of children and the harmful and widespread impact of armed conflict on children,”<sup>125</sup> and argued that it has long-term consequences for durable peace, security, and development. Therefore, the resolution amplified the importance of compliance with international laws and norms and specifies that the “Special Representative of the Secretary-General for Children and Armed Conflict as well as relevant United Nations bodies to ensure the protection of children in situations of armed conflict.”<sup>126</sup> Also in early 2000, the UN General Assembly adopted the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, which entered into force only in 2002, and which was presented and analyzed above.

Notable is also the 2001 Security Council Resolution 1379, which requested the Secretary-General to investigate and make a list of parties to armed conflict that conscript or use children in violation of the international laws and norms. Some particularly grave situations, which may threaten the international peace and security that are not on the Security Council’s agenda may be brought to the attention of the Council by the Secretary-General, in conformity with Article 99 of the Charter of the United Nations.<sup>127</sup>

Progressive in this subject was the 2003 Security Council Resolution 1460, which became more focused on individual cases and situations. As the resolution established, the Secretary-General has to include a distinct section on country-specific situations on the protection of children from recruitment into armed groups in his report to the Security Council.<sup>128</sup> Moreover, the 2004

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<sup>123</sup> UN Security Council Resolution 1261, *The Children and armed conflict*, S/RES/1261, 30 August 1999, <https://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/CAC%20SRES%201261.pdf>.

<sup>124</sup> *Ibidem*.

<sup>125</sup> UN Security Council Resolution 1314, *The Children and armed conflict*, S/RES/1314, 11 August 2000, <http://unscr.com/en/resolutions/1314>.

<sup>126</sup> *Ibidem*.

<sup>127</sup> UN Security Council Resolution 1379, *Children and armed conflict*, S/RES/1379, 20 November 2001, <http://unscr.com/en/resolutions/1379>.

<sup>128</sup> UN Security Council Resolution 1460, *Children and armed conflict*, S/RES/1460, 30 January 2003, <http://unscr.com/en/resolutions/1460>.

Security Council Resolution 1539, supplement the Secretary-General's role to elaborate on "an action plan for systematic and comprehensive monitoring and reporting mechanism ... on child recruitment."<sup>129</sup> This change means "to provide timely, objective, accurate and reliable information on the recruitment and use of child soldiers in violation of applicable international law and on other violations and abuses committed against children affected by armed conflict,"<sup>130</sup> for further action to be taken. The 2005 Security Council Resolution 1612, amplify the previously mentioned resolution by creating a "working group of the Security Council consisting of all members of the Council to review the reports of the mechanism,"<sup>131</sup> to enhance the protection of children affected by armed conflict, and to address the problem of child recruitment and in particular cross-border recruitment and abduction of children, in an timely and accurate manner.<sup>132</sup>

The 2012 Security Council Resolution 2068, encompass the 2009 Security Council Resolution 1882 and the 2011 Security Council Resolution 1998. The final 2012 version of all resolutions "Strongly condemns all violations of applicable international law involving the recruitment and use of children by parties to armed conflict as well as their re-recruitment, killing and maiming, rape and other sexual violence, abductions, attacks on schools and/or hospitals as well as denial of humanitarian access by parties to armed conflict."<sup>133</sup>

The 2014 Security Council Resolution 2143, endorsed the campaign *Children, Not Soldiers*, proposed by the Special Representative of the Secretary-General for Children and Armed Conflict, UNICEF and other UN partners, in order to end and prevent child recruitment by the state forces.<sup>134</sup> Moreover, it once more requested the "State parties to set a minimum age of 18 for compulsory recruitment and participation in hostilities and to raise the minimum age for voluntary recruitment ... and 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."<sup>135</sup>

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<sup>129</sup> UN Security Council Resolution 1539, *Children and armed conflict*, S/RES/1539, 22 April 2004, <http://unscr.com/en/resolutions/1539>.

<sup>130</sup> *Ibidem*.

<sup>131</sup> UN Security Council Resolution 1612, *Children and armed conflict*, S/RES/1612, 26 July 2005, <http://unscr.com/en/resolutions/1612>.

<sup>132</sup> *Ibidem*.

<sup>133</sup> UN Security Council Resolution 2068, *Children and armed conflict*, S/RES/2068, 19 September 2012, <http://unscr.com/en/resolutions/2068>.

<sup>134</sup> UN Security Council Resolution 2143, *Children and armed conflict*, S/RES/2143, 7 March 2014, <http://unscr.com/en/resolutions/2143>.

<sup>135</sup> *Ibidem*.



The 2015 Security Council resolution 2225, stressed once again that states should bear the responsibility for grave violations of applicable international law against children, including the recruitment and use, which may amount to war crimes or crimes against humanity. Therefore, the Resolution is “calling on all Member States to hold perpetrators of abductions accountable.”<sup>136</sup> Then the 2018 Security Council resolution 2427, specifically underlines the need to strengthen national accountability mechanism, for all violations and abuses against children in armed conflicts, especially for child recruitment. The resolution insists upon states’ actions on “building investigative and prosecutorial capacities, ensuring that those responsible for violations and abuses against children are brought to justice and held accountable without undue delay, including through timely and systematic investigation and prosecution.”<sup>137</sup> Besides resolution’s emphasis for national jurisdiction over the child recruitment, it also stresses upon the ‘access to justice,’ and public results of the national court’s findings.<sup>138</sup>

Most of those international laws were not only acknowledged by States but also adjusted to the national laws and military manuals on recruitment. The greatest success achieved by the international community is the universal prohibition of under-15-years-old compulsory recruitment into the national armed forces and the general condemnation of underage recruitment into non-state armed groups. According to the 2018 Child Soldier World Index, from 197 UN Member States, only the United States of America has not ratified the Convention on the Rights of the Child. Moreover, from 197 States, 109 countries maintain a straight-18 age policy, prohibiting the military recruitment and deployment of those under-18.<sup>139</sup> At least 46 countries worldwide still conscript under-18s into the national armed forces, the minimum age, however, is not younger than 16. Since 2016, around 85 states criminalize the underage conscription into the national forces and non-state armed groups.<sup>140</sup> However, jurisdiction over recruitment of under-

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<sup>136</sup> UN Security Council Resolution 2225, Children and armed conflict, S/RES/2225, 18 June 2015, <http://unscr.com/en/resolutions/2225>.

<sup>137</sup> UN Security Council Resolution 2427, *Children and armed conflict*, S/RES/2427, 9 July 2018, <http://unscr.com/en/resolutions/2427>.

<sup>138</sup> *Ibidem*.

<sup>139</sup> Child Soldiers International, *supra* note 27.

<sup>140</sup> “Child Soldiers World Index reveals shocking scale of child recruitment around the world,” *Child Soldiers International*, New York, 21 February 2018, <https://www.child-soldiers.org/news/child-soldiers-world-index-reveals-shocking-scale-of-child-recruitment-around-the-world>.

18s extends beyond those 85 states, who have criminalized the underage conscription. The question of jurisdiction over child recruitment will be analyzed further.

### 2.3 Jurisdiction over Child Conscription

Unlike the common child protection law, the law on child recruitment is much poorer and new to the international community. In contradistinction to the general child protection law, which pertains more to the domestic law assimilation and jurisdiction, the child recruitment law is mostly interpreted in an international realm. There are several reasons for this. Firstly, even if most of the treaties and conventions on the topic referred to the ‘child recruitment’ issue, as an obligation of the ‘State Parties,’ less than a half of the States worldwide, criminalized child conscription.<sup>141</sup> Secondly, child recruitment is viewed as a problem of war-affected, third-world countries and therefore, is an alien problem to peaceful countries, who still enlist underage teens into their national forces. Thirdly, in the few examples on conviction of child recruiters, we have seen so far prevailed the international(ized) jurisdiction over the child conscription. Therefore, it can be argued that jurisdiction over child conscription is mostly and wrongly attributed to the international courts.

In the Article 1 of the Rome Statute, it is established that the International Criminal Court will have “... the power to exercise its jurisdiction over persons for the most serious crimes of international concern,”<sup>142</sup> those being the crime of genocide; crimes against humanity; war crimes (which include child conscription and enlistment); and the crime of aggression.<sup>143</sup> However, in the Rome Statute, it is also affirmed: “... it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.”<sup>144</sup> Overall, the ICC established under the Rome Statute that the Statute “... shall be complementary to national criminal jurisdictions.”<sup>145</sup> Next, in Article 17 on Issues of admissibility, it is argued, “The case is being investigated or prosecuted by a State which has jurisdiction over it unless the State is unwilling or unable genuinely to carry out the investigation or prosecution.”<sup>146</sup> The criteria set out in this article are rather doubtful, as it is

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<sup>141</sup> *Ibidem.*

<sup>142</sup> Rome Statute, *supra* note 109, Article 1.

<sup>143</sup> *Idem.*, Article 5.

<sup>144</sup> *Idem.*, Preamble.

<sup>145</sup> *Idem.*, Article 1.

<sup>146</sup> *Idem.*, Article 17.

hard to determine how could be measured or identified the ‘unwillingness’ and ‘unableness.’ This will depend on the state’s openness to let the ICC rule over its case.

The ICC exercises jurisdiction over international crimes on three occasions: when it is referred to the Prosecutor by a State Party to the Rome Statute, by the Security Council under the provisions of Chapter VII of the Charter of the United Nations, or by the Prosecutor’s own initiative.<sup>147</sup> There are three main preconditions to the exercise of jurisdiction by the Court. First, “A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court.”<sup>148</sup> Second, “the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court.”<sup>149</sup> This condition is pertinent in the case of Article 13 paragraph (a) or (c) and is satisfied in either of the two cases determined by Article 12. In one case, it raised the question of territory and territoriality where the crime was committed, is it the territory of the State or on board of a vessel or aircraft of a State Party. In another case, is raised the question of the nationality of the perpetrator, and conditional is the adherence of the State, whose citizen allegedly committed the crime, to the Statute. Third, “If the acceptance of a State which is not a Party to this Statute is required ... that State may ... accept the exercise of jurisdiction by the Court with respect to the crime in question.”<sup>150</sup> Cooperation with the Court is indisputable, with no exception or delay. Nevertheless, the situation today is that only 122 countries are States Parties to the Rome Statute of the International Criminal Court.<sup>151</sup> The non-state parties are a matter of concern, as they represent many countries with poor human rights record and alarming practices of international crimes, which are hard to monitor and document. It can be argued then, that the jurisdiction over the international crimes, including the war crime of child recruitment, is limited. To hope for the countries’ cooperation and adoption of the idea of universal jurisdiction is the least that can be done by now.

When considering the criminal responsibility for the crimes under the jurisdiction of the Court, the Court takes into account a complex set of conditions and elements. As provided by Article 28 the Court offers a significant consideration to the commanders and superiors, who by

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<sup>147</sup> *Idem.*, Article 13.

<sup>148</sup> *Idem.*, Article 12.

<sup>149</sup> *Ibidem.*

<sup>150</sup> *Ibidem.*

<sup>151</sup> International Criminal Court, *Assembly of States Parties: The States Parties to the Rome Statute*, [https://asp.icc-cpi.int/en\\_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx](https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx).

their effective control and authority bear the responsibility for the crimes committed under their supervision and instruction.<sup>152</sup> Their status and position impose a greater responsibility, as their post indicates their commitment, knowledge, and rationality, which then complies the Mental Element<sup>153</sup> if the intent is also proved. Relying alone on the ICC is equal to letting others decide for you and your country. States must prove to their citizens that even if they failed to protect them at some point, they are able to bring them justice. This is mainly the message beyond the principle of complementarity. The states must prosecute criminals for the crimes committed if they cannot—they transfer this power to the ICC, for the only scope of letting know criminals that they cannot escape justice.

### 2.3.1 Cases of National Jurisdictions over the Crime of Child Recruitment

An interesting illustration of national jurisdiction over international war crimes, and specifically over the crime of child recruitment and their involvement in the war, is the case of Ignace Murwanashyaka and Straton Musoni. Murwanashyaka and Musoni, both Rwandans by nationality, who resided in Germany since the late 1980s, were leaders of the Democratic Liberation Forces of Rwanda. The group committed numerous crimes under international criminal law, including the recruitment of child soldiers to carry on crimes against humanity and war crimes. The Democratic Forces for the Liberation of Rwanda was known for its exclusive Hutu membership, compounded by the ex-perpetrators of the Rwandan genocide from 1994. Moreover, the group went over the Rwandan borders to the Democratic Republic of Congo where they continued their activity. In 2005, when the United Nations Security Council issued sanctions against the Congolese militia leaders and the leaders of the Hutu rebels, Murwanashyaka and Musoni fell within these sanctions. They have presumptively controlled and influenced the strategies of the group while they resided in Germany, together with another individual, Calixte M. who resided in France. Germany refused to extradite the Rwandan nationals to their home country due to the lack of fair trial guarantees. Therefore, in November 2009 both of them were arrested under the warrant of the German Federal Court of Justice.<sup>154</sup>

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<sup>152</sup> Rome Statute, *supra* note 109, Article 28.

<sup>153</sup> *Idem.*, Article 30.

<sup>154</sup> Ignace Murwanashyaka, *Trial International*, 20 December 2018, <https://trialinternational.org/latest-post/ignace-murwanashyaka/>.

In December 2010, the German Federal Prosecutor charged the Rwandan nationals for international crimes under the German Code on Crimes Violating International Law, adopted in 2002. The trial on Murwanashyaka and Musoni started in May 2011 before the Higher Regional Court in Stuttgart and finished in September 2015. The war crime of recruitment of child soldiers was dropped due to the lack of evidence. In 2015, Murwanashyaka was sentenced to 13 years of prison by the Higher Regional Court of Stuttgart, for aiding and complicity of war crimes on five counts and for leading a foreign terrorist organization. He filed an appeal, and in December 2018, the German Federal Court overturned his conviction. The Federal Court sent the case to retrial as it was found that the decision on instances was controversial.<sup>155</sup> Musoni's case had a similar development. In 2015, the Higher Regional Court of Stuttgart for leadership in a foreign terrorist organization convicted him to 8 years in prison. The charges of war crimes and crimes against humanity were dropped due to the lack of evidence and direct involvement. The German Federal Court also rejected Musoni's appeal in December 2018.<sup>156</sup>

As both cases proved, the investigators could not prove the involvement of either of the defendants to the war crime of the recruitment of child soldiers, as they coordinated the violent acts of the armed group from abroad. A German Court tried them as they committed the crimes from the German soil where they were residing. The legal basis for the German's Court jurisdiction over international crimes committed in another country by foreign nationals is built upon the principle of universal jurisdiction.<sup>157</sup> Moreover, the creation of the German Code on Crimes Violating International Law only reinforced the German jurisdiction over international crimes.

In the few cases on the crime of child conscription filed by national Courts, there are the cases of Kyungu Mutanga and Thomas Kwoyelo. Kyungu Mutanga, a citizen of the Democratic Republic of Congo, was also a member of a self-appointed militia group, which undertook the law enforcement in Katanga without the legal authority. He then became the leader of this vigilante militia group, which was formed from combatants of the Mai-Mai resistance movement. Between 2003 and 2006, Kyungu Mutanga committed severe crimes against civilians in the southeastern region of the DRC. In their rebellious motions and aggressive confrontation with the government

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<sup>155</sup> *Ibidem*.

<sup>156</sup> Straton Musoni, *Trial International*, 20 December 2018, <https://trialinternational.org/latest-post/straton-musoni/>.

<sup>157</sup> Ignace Murwanashyaka, *supra* note 154.

forces, the Mai Mai leaders, including Kyungu Mutanga resorted to violent crimes against the civilian population and local communities. In 2006, when the United Nations peacekeepers arrived under the mandate of the United Nations mission in Congo (MONUC), established in cooperation with the government forces, the Mai Mai warriors tried to cooperate with the mission. On 12 May 2006, according to the UN records, Kyungu Mutanga surrendered to peacekeepers in Mitwaba, which located in Katanga province. He was accompanied by 150 Mai Mai fighters, of which 76 were child soldiers. Mutanga expressed his desire to assist the MONUC officials, by urging the Mai Mai warriors under his command to surrender. He requested to participate in the disarmament, demobilization, and reintegration. In a couple of days after his surrender, MONUC handed him over to the Armed Forces of the Democratic Republic of Congo. Mutanga was held by the military authorities since May 2006 and was charged by the Military Tribunal in Katanga in 2007.<sup>158</sup>

According to the special report issued on Kyungu Mutanga, the former commander of the Mai Mai armed group had a defamatory reputation in the region of Katanga. Amongst the numerous charges against Mutanga were listed crimes like rape, looting, torture, summary executions, the recruitment of children into the Mai Mai forces, and acts of cannibalism as part of the general terrorization of civilians. Mutanga heard the verdict of the Military Tribunal on 6 March 2009. He was sentenced to death for the terrorism, war crimes, crimes against humanity and insurgency.<sup>159</sup> Nevertheless, in 2011 Kyungu Mutanga escaped from prison and formed another insurgent group known as Bakata Katanga, which continued serious human rights violations in the countryside of Katanga region. On 1 January 2018, Mutanga was listed by the UN Security Council Committee on its sanctions list, for presenting a “threat to the peace, stability, and security of DRC.”<sup>160</sup>

Despite the state’s subsequent failure in Mutanga’s case, the DRC government did not leave its hope for peace and justice for its citizens. Since 2005, when the government initiated its’ military operation to disarm the local and foreign armed groups present in the country, the DRC leaders intensely cooperated with the international bodies. Besides UN support and involvement

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<sup>158</sup> Kyungu Mutanga, *Trial International*, 13 June 2016, <https://trialinternational.org/latest-post/kyungu-mutanga/>.

<sup>159</sup> *Ibidem*.

<sup>160</sup> United Nations, Security Council, Sanctions against Gedeon Kyungu Mutanga, 1 February 2018, <https://www.un.org/securitycouncil/sanctions/1533/materials/summaries/individual/g%C3%A9d%C3%A9on-kyungu-mutanga-wa-bafunkwa-kanonga>.

through MONUC peacekeeping operation, the then DRC president Joseph Kabila referred to the help of the ICC in 2005. Joseph Kabila asked the Prosecutor of the ICC to investigate all cases of crimes committed on the territory of the DRC since the entry into force of the Rome Statute. In this regard, ICC successfully examined and indicted five criminals for the crimes under the ICC jurisdiction, carried on the territory of the DRC. One such case of Thomas Lubanga Dyilo, who was the first person tried by the ICC.<sup>161</sup>

Thomas Kwoyelo, a Ugandan national, is another perpetrator who committed major international crimes and who will be tried by a national court. Interesting is the fact that Kwoyelo himself was abducted as a child soldier in 1987, by the Lord's Resistance Army (LRA). Since his abduction, he remained within the armed group and later grow to the rank of colonel. Nevertheless, the recruitment of child soldiers is one amongst the 93 counts of charges for which he will be assessed. Only in 2009, Kwoyelo was taken into custody, after he was wounded and hospitalized as a result of an armed conflict between the Ugandan army and his LRA unit. In June 2009, he was accused of committing crimes under Uganda's penal code. He was also indicted for serious violations of the Fourth Geneva Convention, which are as well pursuant to Art.147 of Uganda's 1964 Geneva Conventions Act from August 2010.<sup>162</sup>

In 2000, Uganda's government passed the Amnesty Act to provide impunity for rebels who left the armed group and condemned rebellion. Kwoyelo applied for the amnesty under this Act but the Director of Public Prosecutions (DPP), as well as the Amnesty Commission, had no reaction to his request. On 11 July 2011, Kwoyelo's case advanced to Uganda's International Crimes Division (ICD), a branch of Uganda's High Court. However, by October 2011, the Constitutional Court of Uganda canceled Kwoyelo's trial due to the incompetency of the DPP and the Amnesty Commission to proceed on Kwoyelo's appeal. Only in 2012, the DPP denied Kwoyelo's application, after in 2011 he filed a complaint to the Ugandan High Court, asking for amnesty.<sup>163</sup>

In 2015, the Supreme Court resumed Kwoyelo's case, determining that Kwoyelo should be "properly indicted and charged before the International Crimes Division of the High Court".

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<sup>161</sup> Kyungu Mutanga, *supra* note 158.

<sup>162</sup> Thomas Kwoyelo, *Trial International*, 7 July 2017, <https://trialinternational.org/latest-post/thomas-kwoyelo/>.

<sup>163</sup> *Ibidem*.

On 24 September 2018, the ‘main trial’ in the case of Thomas Kwoyelo was opened by Uganda’s International Crimes Division (ICD) court. The trial of Thomas Kwoyelo is unique in its kind as it is the first domestic case in Uganda that rule over war crimes and the first LRA prosecution.<sup>164</sup> Moreover, this case will exhibit the first confrontation between the conflicting Lord’s Resistance Army (LRA) and the government of Uganda, in a trial before a Ugandan court. ICD has to function according to the international standards for international crimes. This corresponds with the principle of complementarity - which allows and encourage the State Parties to the Rome Statute to deal with cases of genocide, war crimes, and crimes against humanity.<sup>165</sup>

This case is also exceptional due to the fact that a former child soldier will be tried in a domestic court for international crimes. It will raise the question of victimicy and malice, of child vulnerabilities and traumas, and adult immorality and cognition.

### 2.3.2 Cases of International Jurisdictions over the Crime of Child Recruitment

While so far the ICC and the Special Court for Sierra Leone exercised the international jurisdiction over the war crime of child recruitment, the International Court of Justice established that the Court is not excluded from adjudicating on Uganda’s violation of international law.<sup>166</sup> In the case regarding the armed activities on the territory of Congo, between the Democratic Republic of the Congo and the Republic of Uganda, the two States accepted the jurisdiction of the International Court of Justice. As Article 36(1) of the Statute of the International Court of Justice, “The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.”<sup>167</sup> Moreover, in part 2 of Article 36, it is stipulated that the jurisdiction of the Court extends to “... b) any question of international law; c) the existence of any fact which, if established, would constitute a breach of an international obligation.”<sup>168</sup> One such legal matter in the case of the Democratic Republic of Congo vs. Uganda was the recruitment and training of child soldiers. First,

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<sup>164</sup> *Ibidem*.

<sup>165</sup> Romain Ravet, “Thomas Kwoyelo in Uganda: Victims’ Participation Brings Hope and Challenges,” *International Justice Monitor*, 17 October 2018, <https://www.ijmonitor.org/2018/10/thomas-kwoyelo-in-uganda-victims-participation-brings-hope-and-challenges/U>.

<sup>166</sup> *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), Judgment, International Court of Justice, 19 December 2005, para. 246.

<sup>167</sup> United Nations, *Statute of the International Court of Justice*, 18 April 1946, Article 36(1).

<sup>168</sup> *Idem.*, Article 36(2).



the Court found that the conduct of the Uganda People's Defense Force (UPDF) and its soldiers is attributable to Uganda.<sup>169</sup> Second, the Court "... finds that there is convincing evidence of the training in UPDF training camps of child soldiers and of the UPDF's failure to prevent the recruitment of child soldiers in areas under its control."<sup>170</sup> Moreover, as the Court argues, the Fifth Report of the Secretary-General on MONUC (doc. S/2000/1156 of 6 December 2000, para. 75), confirmed that Congolese children were recruited by UPDF and were deported to Ugandan training camps. The Eleventh Report of the Secretary-General on MONUC (doc. S/2002/621 of 5 June 2002, para. 47) determined that the UPDF authorities "have failed to prevent the fresh recruitment or re-recruitment of children" as child soldiers.<sup>171</sup> The MONUC special report from January 2002-December 2003 (doc. S/2004/573 of 16 July 2004, para. 148), recognized several episodes of Congolese children being abducted and transferred to UPDF training camps for military training.<sup>172</sup> Further, in Article 210 the Court concluded that "it has credible evidence sufficient to conclude that the UPDF troops ... was involved in the training of child soldiers, and did not take measures to ensure respect for human rights and international humanitarian law in the occupied territories."<sup>173</sup> By this, the Court, by six votes to one "Finds that the Republic of Uganda, by the conduct of its armed forces, which ... trained child soldiers ... violated its obligations under international human rights law and international humanitarian law."<sup>174</sup>

The Special Court for Sierra Leone also known as the Sierra Leone Tribunal represents one of the most successful judicial bodies, which exercised jurisdiction over the war crime of child recruitment. As established by the Statute of the Special Court for Sierra Leone, the Special Court was formed as a result of the agreement between the United Nations and the Government of Sierra Leone in accordance with the Security Council resolution 1315 (2000).<sup>175</sup> Article 4 of the Statute of the Special Court indicates that the Court "shall have the power to prosecute persons who committed the following serious violations of international humanitarian law: ... c. Conscripting

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<sup>169</sup> *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), Judgment, International Court of Justice, 19 December 2005, from "Violations of international human rights law and international humanitarian law: findings of the Court."

<sup>170</sup> *Armed Activities on the Territory of the Congo*, *supra* note 166, para. 210.

<sup>171</sup> *Ibidem.*

<sup>172</sup> *Ibidem.*

<sup>173</sup> *Idem.*, para. 211.

<sup>174</sup> *Idem.*, The Court findings (3).

<sup>175</sup> UN Security Council, *Statute of the Special Court for Sierra Leone*, *supra* note 119.

or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities.”<sup>176</sup>

Charles Ghankay Taylor, a Liberian national, is one of the convicts of the Special Court for Sierra Leone. Taylor had allegedly supported and financed Foday Sankoh’s Revolutionary United Front (RUF), by providing weapons, material, personnel, and military training. RUF was known for its cruelty and civilian targeting. Among the most hideous crimes committed by the armed group was the forced abduction and enrollment of children into the RUF ranks, which were ordered by Taylor, or of which he was aware. In March 2003, Taylor was indicted by the SCSL on 11 counts of war crimes and crimes against humanity.<sup>177</sup> On count 9, Taylor was indicted for Crimes Relating to Child Soldiers, as determined by Article 4(c) of the Statute.<sup>178</sup> In 2006, Taylor was arrested at the border of Cameroon, after a failed attempt to escape from Nigeria. Immediately after his arrest on March 2006, he was transferred to the SCSL in Freetown. In June 2006, Taylor was transferred to trial in Hague, as a security measure authorized by the UN Security Council.<sup>179</sup>

In the judgment, on the factual and legal finding of the alleged crimes, on count relating to child soldiers, it is stated that “The Prosecution argues that the evidence procured from former child soldiers, former members of the rebel forces, experts, victims and bystanders in addition to ample documentary evidence prove beyond reasonable doubt the Accused’s guilt in respect of Count 9.”<sup>180</sup> In April 2012, Taylor was found guilty of crimes against humanity and war crimes, including for the enrolment and conscription of children under 15 years using them to participate actively in hostilities. In May 2012, the Special Court sentenced him for a term of 50 years in prison. As a result of an agreement made with the SCSL, Taylor had to serve his sentence in Great Britain. His appeal process started at the beginning of 2013, and by the end of 2013, his initial verdict was upheld. He is the first ex-Head of State since the end of the Second World War, sentenced by an International Tribunal. Following the verdict of the appeal chamber, he was transferred to the Frankland prison in Durham, the United Kingdom in 2013. Taylor pleaded to be transferred to a prison in Rwanda to serve his sentence, nevertheless, in 2015; the Trial Chamber

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<sup>176</sup> UN Security Council, *Statute of the Special Court for Sierra Leone*, *supra* note 119, Article 4(c).

<sup>177</sup> Charles Taylor, *Trial International*, 22 May 2018, <https://trialinternational.org/latest-post/charles-taylor/>.

<sup>178</sup> *Prosecutor v. Charles Ghankay Taylor*, Judgement, Trial Chamber II, Special Court for Sierra Leone, 18 May 2012, para. 438.

<sup>179</sup> Charles Taylor, *supra* note 177.

<sup>180</sup> *Prosecutor v. Charles Ghankay Taylor*, *supra* note 178, para. 1356.

of the SCSL rejected his request for transfer. The Chamber affirmed that Taylor's presence in the region would destabilize the peace and security of the entire West African sub-region.<sup>181</sup>

Besides Charles Taylor, the SCSL exercised its jurisdiction over the crime of child conscription in relation to Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu, Issa Sesay, Augustine Gbao, and many others.<sup>182</sup> The Special Court proved highly effective and successful in bringing justice and exercising jurisdiction over international crimes. Compared to other international judicial bodies, the SCSL judgments were a fair trade for the crimes that were committed. Unfortunately, its territorial jurisdiction and scope were limited to only one region.

When it comes to international jurisdiction over the war crime of child recruitment, there is no doubt that the International Criminal Court is among the most powerful and reliable institutions. Mixed judicial and quasi-judicial bodies like the Special Court for Sierra Leone or the United Nations Transitional Administration in East Timor on the organization of Courts in East Timor,<sup>183</sup> exercised jurisdiction over serious crimes including the war crimes of child recruitment. Still, so far, the ICC proved its professionalism in dealing with such cases and its willingness to assist the State Parties in prosecuting most hideous criminal leaders. One of the most well-known child recruiters tried by the ICC is Thomas Lubanga Dyilo.

Thomas Lubanga Dyilo, a Congolese national was one of the first convicts of the ICC. His case to the international criminal court was the result of the 2005 referral of the Congolese president Joseph Kabila to the Prosecutor of the ICC. Lubanga entered the Congolese politics in 1999 and was elected into the Ituri district parliament. At the beginning of the 2000s, he held numerous leadership positions and interacted actively with the youth in the region. He was the founder of the "Union des Patriotes Congolais" (UPC) and established the military section called "Forces Patriotiques pour la Liberation du Congo" (FPLC) in September 2000. In 2001, he was nominated as the National Deputy Secretary for Youth and Sport of the "Front for the Liberation of Congo" (FLC). At the same time, he took the position of the Military Commander of the Rally for Congolese Democracy-Liberation Movement (RCD-ML), an insurgent group that was known for its close ties with Uganda. In 2002, the UPC was renamed into "Union des Patriotes

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<sup>181</sup> Charles Taylor, *supra* note 177.

<sup>182</sup> Lansana Gberie, "The Special Court for Sierra Leone rests – for good," *Africa Renewal*, <https://www.un.org/africarenewal/magazine/april-2014/special-court-sierra-leone-rests-%E2%80%93-good>.

<sup>183</sup> United Nations, *United Nations Transitional Administration in East Timor*, Regulation 2000/11, 6 March 2000.

Congolais/Reconciliation et Paix” (UPC/RP). Thomas Lubanga continued to preside the UPC while assuming the position of Commander-in-Chief of the FPLC.<sup>184</sup>

Both UPS and FPLC were well-known for their active recruitment and military training of children under 15 years. Young recruits were forced to participate in hostilities and to safeguard the high-ranking officers in the FPLC. As the leader of both groups, Lubanga was familiar with the practice of child recruitment and use and supported such custom especially through the conflict in Ituri. Besides child recruitment, the groups involved in the indiscriminate killings and enforced displacement of civilians. Moreover, Lubanga ruled that every family living in the areas under his control were obligated to contribute to military activity by donating money, domestic animals or even children, for military strength. In March 2005, Lubanga was arrested and imprisoned in Kinshasa.<sup>185</sup>

The Pre-Trial Chamber of the ICC found that there were reasonable grounds to believe in the criminal culpability over the war crimes of Thomas Lubanga. Namely, the war crime of recruiting children under the age of 15, and their direct use in hostilities delivered the arrest warrant against Lubanga in February 2006. In March 2006, Lubanga was transferred and detained by the Court in Scheveningen, the Netherlands. After 6 years of trial, 204 days of hearings, 275 written decisions and orders, and 347 oral decisions, on 14 March 2012, the ICC delivered its verdict. Thomas Lubanga Dyilo was found guilty for committing war crimes consisting of “Thomas Lubanga was the President of the UPC/FPLC, and the evidence demonstrates that he was simultaneously the Commander-in-Chief of the army and its political leader. ... he encouraged children including those under the age of 15 years ... he personally used children below the age of 15 amongst his bodyguards and he regularly saw guards of other UPC/FPLC staff members who were below the age of 15.”<sup>186</sup>

In July 2012, Trial Chamber I sentenced Lubanga to a total of 14 years of imprisonment. In 2014, the Appeals Chamber confirmed the verdict and the sentence by concluding the following

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<sup>184</sup> Thomas Lubanga Dyilo, *Trial International*, 7 June 2016, <https://trialinternational.org/latest-post/thomas-lubanga-dyilo/>.

<sup>185</sup> *Ibidem*.

<sup>186</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Case Information Sheet, International Criminal Court, Situation in the Democratic Republic of the Congo, 15 December 2017, <https://www.icc-cpi.int/CaseInformationSheets/LubangaEng.pdf>.

“Enlisting and conscripting of children under the age of 15 years into the ... FPLC and using them to participate actively in hostilities in the context of an armed conflict not of an international character from 1 September 2002 to 13 August 2003 (punishable under article 8(2)(e)(vii) of the Rome Statute).”<sup>187</sup> On 19 December 2015, Lubanga was transferred from the Netherlands to a DRC' prison, to serve his sentence.<sup>188</sup> The Trial Chamber II dealt with the programmatic framework applied for reparations to victims to the case. In December 2017, the Trial Chamber II established “... the amount of Thomas Lubanga Dyilo’s liability for collective reparations at USD 10,000,000.”<sup>189</sup>

Thomas Lubanga case is important and unique for several reasons. Firstly, His case was the first case on which ICC exercised its jurisdiction. Secondly, Lubanga’s trial was the first ICC case, which ruled exclusively over the crime of child recruitment and use. Thirdly, unlike the Special Court for Sierra Leone, the International Criminal Tribunals for Rwanda and for the former Yugoslavia, Lubanga’s hearing allowed victims to participate in the case proceedings from the very early stages of the investigation. For the very first time, the victims of international crimes were allowed to speak and explain their situation to the Court, and to defend their interest. Moreover, the Trial Chamber II extended the understanding of justice by addressing the question of reparations to victims of international crimes. For the first time, the ICC settled the “necessary minimum elements required of a reparation order and established the general principles governing the reparations for victims.”<sup>190</sup>

Apart from Lubanga, the ICC successfully ruled over the war crime of child recruitment in several other occasions including the case of Bosco Ntaganda,<sup>191</sup> Germain Katanga<sup>192</sup> and Mathieu Ngudjolo Chui.<sup>193</sup> Moreover, the ICC also indicted and issued warrants of arrest for a few more individuals for the same crime of child abduction and use; among those are Joseph Kony,<sup>194</sup>

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<sup>187</sup> *Ibidem*.

<sup>188</sup> *Ibidem*.

<sup>189</sup> *Ibidem*.

<sup>190</sup> Thomas Lubanga Dyilo, *supra* note 184.

<sup>191</sup> Bosco Ntaganda, *Trial International*, 19 June 2017, <https://trialinternational.org/latest-post/bosco-ntaganda/>.

<sup>192</sup> Germain Katanga, *Trial International*, 20 April 2017, <https://trialinternational.org/latest-post/germain-katanga/>.

<sup>193</sup> Mathieu Ngudjolo Chui, *Trial International*, 27 September 2016, <https://trialinternational.org/latest-post/mathieu-ngudjolo-chui/>.

<sup>194</sup> *The Prosecutor v. Joseph Kony and Vincent Oti*, Decision, Pre-Trial Chamber II, International Criminal Court (Warrant of Arrest for Joseph Kony issued on 8th July 2005 as amended on 27th September 2005), 28 September 2005, <https://www.icc-cpi.int/pages/record.aspx?uri=97185>.

Vincent Otti,<sup>195</sup> Okot Odhiambo,<sup>196</sup> Raska Lukwiya,<sup>197</sup> and Dominic Ongwen. From all of them, only Dominic Ongwen is currently facing the ICC trial, while others are fugitives or are already dead.<sup>198</sup>

Recently, the case of Dominic Ongwen is greatly mediatized and discussed. Ongwen's case to the ICC is the first case of a former child soldier tried by an international court. He is allegedly one of the Commanders of the Lord's Resistance Army. In 2005, the warrant of arrest was issued on Ongwen's name, and currently, he is in the Court's custody. Even though initially the warrant of arrest included only seven counts of crimes, in 2015, the Prosecutor charged Dominic Ongwen with seventy counts of crimes committed. Among the new charges there is also the war crime of "conscripting and use of children under the age of 15 to participate actively in hostilities from 2002 to 2005, in Sinia Brigade."<sup>199</sup> Therefore, it brings up an interesting topic for debate, on how a former child soldier grows up and conscripts other child soldiers. It also raises some ethical issue of how could the international community, which failed to protect a child from conscription, charge this child for the crimes he committed while abducted. Moreover, it also questions the age dimension, as for many it is unclear when a child becomes rational, or when he is mature enough to make rational decisions. Moreover, Ongwen's example also brings up the question of reverse justice and child liability for international crimes. The particularity of Ongwen's case will be analyzed in the next chapter.

## 2.4 Final Remarks

This chapter aimed to prove that the international community does not only acknowledge the problem of child soldiering and use, but makes big steps into preventing and criminalizing it. Therefore, this chapter partially answered the first research question on how does international law treat child soldiers. As exemplified in the chapter, international law tries to protect children from becoming soldiers in all kind of conflicts or military forces, by rendering this activity into an international criminal offense, categorized as a war crime and made illegal worldwide.

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<sup>195</sup> *Ibidem.*

<sup>196</sup> *Ibidem.*

<sup>197</sup> *Ibidem.*

<sup>198</sup> Joseph Kony et. al., *Coalition for the International Criminal Court*, <http://www.coalitionfortheicc.org/cases/joseph-kony-et-al>.

<sup>199</sup> *The Prosecutor v. Dominic Ongwen*, Alleged crimes (non-exhaustive list), International Criminal Court, <https://www.icc-cpi.int/uganda/ongwen/pages/alleged-crimes.aspx>.

Furthermore, there is a shared jurisdiction at the national and international level over this war crime. In addition, with every new Resolution of the Security Council, the states are reminded on their primary responsibility to end such practices on their territory and to investigate and prosecute those individuals who are responsible for such war crimes against children.

## Chapter III

### 3.1 Jurisdiction over Child Soldiers

The child soldier phenomenon is much more complicated than it seems. It involves not only the adults who conscript, abduct and use children into their armed forces but also the children themselves as agents of war. The first chapter already discussed the issue of agency of children, and as this paper intends, it proved that children have agency and are rational actors of society. Due to the state of war and conflict, the choices of child soldiers are limited, but this must not excuse their crimes, neither exclude them from the judicial system. Similarly to the adult criminals system proposed by the ICC, this must be applied to those children ‘most responsible’ for the crimes committed in a conflict or war, meaning those holding leadership positions within their forces. This chapter will focus on the issue of criminal liability of child soldiers who committed international crimes.

#### 3.1.1 International Jurisdiction over Child Soldiers

First and foremost, it is essential to clarify that the International Criminal Court excluded children from its jurisdiction. Article 26 of the Rome Statute affirms, “The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime.”<sup>200</sup> Consequently, the ICC cannot try children who committed serious crimes and violated the international criminal and humanitarian law, and who by their actions endangered international peace and security. However, the ICC does not exclude children from testifying before the court.<sup>201</sup> The 2016 Policy on Children released by the Office of the Prosecutor of the ICC, established in paragraph 89 that “The Office recognizes that certain child witnesses may want to testify in support of judicial proceedings, and may regard testimony as a component of their own recovery

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<sup>200</sup> Rome Statute, *supra* note 109, Article 26.

<sup>201</sup> *Idem.*, Article 68(2).

process.”<sup>202</sup> Which indicates the Court’s admissibility of children, as trustworthy and reliable witnesses. In turn, children’s decision to participate in the court’s proceeding denotes their ability to differentiate between good and bad. It also proves children’s rationality and maturity. Lastly, it brings indirectly to the idea of admissibility of children’s agency and liability for the decisions and actions they took as underage soldiers.

Despite the Rome Statute’s reluctance to prosecute children, other international judicial bodies and tribunals do not exclude children from their jurisdiction. The Statute of the Special Court for Sierra Leone specifies in Article 7 that the Court has Jurisdiction over persons of 15 years of age.<sup>203</sup> Even though the court had jurisdiction over the child soldiers, it did not prosecute any of them. Sonja Grover and Fanny Leveau analyzed the SCSL intention to charge child soldiers and found the reasons for the Court’s reluctance to actually accuse children of grave international crimes. Sonja Grover accentuated that the Special Court, reserved in its Statute the right to prosecute only those ‘most responsible’ for the crimes committed. Therefore, as Grover argued, “children did not plan or order the systematic atrocity in Sierra Leone which the SCSL was mandated to prosecute.”<sup>204</sup> Fanny Leveau, on the other hand, argued that the Special Court, even in its Statute, “privileges rehabilitation as opposed to other traditional aims of punishment.”<sup>205</sup> However, the Special Court in Sierra Leone left enough space for children to realize that they might be prosecuted for the crimes they did. The fact that children were not excluded from the jurisdiction over international crimes was the first step forward.

The United Nations Transitional Administration in East Timor on the organization of Courts in East Timor established that “A minor between 12 and 16 years of age may be prosecuted for criminal offenses ... under the provisions of the present regulation for any offense.”<sup>206</sup> Yet, unlike its contemporary SCSL, the 2002 Special Panels for Serious Crimes in East Timor indicted a minor for international crimes and human rights violations. In this delicate case, the identity of the accused was not revealed to the public with due respect to the age and privacy of the child,

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<sup>202</sup> “Policy on Children,” The Office of the Prosecutor, International Criminal Court, November 2016, para. 89, [https://www.icc-cpi.int/iccdocs/otp/20161115\\_otp\\_icc\\_policy-on-children\\_eng.pdf](https://www.icc-cpi.int/iccdocs/otp/20161115_otp_icc_policy-on-children_eng.pdf).

<sup>203</sup> UN Security Council, *Statute of the Special Court for Sierra Leone*, *supra* note 119, Article 7.

<sup>204</sup> Grover, *supra* note 37, p.63

<sup>205</sup> Fanny Leveau, “Liability of Child Soldiers Under International Criminal Law,” *Osgoode Hall Review of Law and Policy*, Volume 4, Number 1, (2014), p. 41.

<sup>206</sup> UN, *United Nations Transitional Administration in East Timor*, Regulation 2001/25, 14 September 2001, Section X Juvenile Jurisdiction, para. 45(1).



therefore in the case, the defendant was referred to as 'X.'<sup>207</sup> In the case of Prosecutor v. X, the defendant was found to be 14 years old at the time he committed serious crimes, as a member of the Sakunar militia group. Initially, the Prosecutor accused X with extermination as a crime against humanity, which constitutes a grave international crime. Later on, the Prosecutor charged X for murder, which was a crime under the Indonesian Penal Code. Due to the fact that the accused pleaded guilty, the accused had no previous record of criminal activity, and that he followed superior orders, he was sentenced to 12 months of imprisonment. The 11 months and 21 days in pre-trial detention were deducted from the sentence and the remaining days were suspended, on the condition of good behavior for at least one year.<sup>208</sup>

The young age, subordination to adult's orders, and guilty plea of the defendant was undoubtedly a mitigating factor for the case. However, the brutality and cruelty of the crimes must have been punished by the court. This case like any other that involves children is controversial. On one hand - he was underage, had no rank within the group, was only following orders, had no previous record of criminal activity and did not deny his guilt, on the other - the crime was committed against defenseless victims with unimaginable barbarity. The fact that this specific child among many other child soldiers came into the vision of the prosecutors, means that there was evidence of his inherent cruelty. Regardless of the criticism of the case, the trial at least attempted to prove that age does not exclude from justice. It is especially important for international crimes, which by their gravity, scale, and ferocity, threatens international peace and security, and have long-lasting consequences for their communities. This particular case represents a breakthrough for international criminal law in what regards child soldiers. Some could argue that the sentence was too soft on someone who took part in the extermination of a group of people, which constitutes a crime against humanity. However, for the first mover, the Court in East Timor has already reached more than other international(ized) courts.

Unfortunately, the cases on international jurisdiction over child soldiers end on such poor examples, and the situation, at least at the international level seems not to change soon. The most reasonable argument that should be made in this regard is not the age linked to the lack of agency,

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<sup>207</sup> "The Case of X: A Child Prosecuted for Crimes Against Humanity," *Judicial System Monitoring Programme*, January 2005, p. 4.

<sup>208</sup> The Prosecutor v. X, *International Crimes Database*, <http://www.internationalcrimesdatabase.org/Case/801/X/>.

influence or rationality, as a mitigating factor, but the fact that for international crimes should be charged only those who are ‘most responsible.’ The reality is that child soldiers rarely possess superior ranks and only occasionally command military units. But particularly the child soldiers who were promoted and ordered the commitment of crimes should face trial, as they were advanced as a result of their devotion, malice, and influence they exercised on others. As the international jurisdiction over them is poor or inexistent, a solution may be the domestic judicial systems.

### 3.1.2 Domestic Jurisdiction over Child Soldiers

While the international courts may be less effective in relation to child soldiers as perpetrators, domestic courts may prove to be more confident in bringing children to justice. However, it does not mean that they are more successful. However, this paper encourages domestic courts to investigate cases of child soldiers as perpetrators, pushing away from the bad experiences of the previous attempts and cases.

So far, the legal cases concerning child soldiers as victims of adult recruiters or child soldiers as perpetrators themselves associate mostly with trials in Sierra Leone, Uganda and the Democratic Republic of Congo. While in Sierra Leone the main focus was on the adults who conscripted and used child soldiers, and even the Special Court found among those ‘most responsible’ for international crimes only adult military leaders, the domestic courts in Uganda and the Democratic Republic of Congo had no hesitation in going further. In 2002, the government of Uganda, for the first time, issued treason charges against two child soldiers. Both child soldiers, one 14 years old and another 16 years old, were members of the LRA. Due to the high political pressure from humanitarian and human rights organizations like the Human Rights Watch, the charges against those two underage boys were dropped. However, later on, in 2009 the Ugandan domestic court charged another 15 years old child soldier for the same crime of treason. The Allied Democratic Front allegedly abducted the later, at age nine.<sup>209</sup>

Even though treason does not constitute an international crime, and pertains to the domestic jurisdiction, those cases proved that the domestic court in Uganda could also indict child soldiers. Moreover, as Uganda has a special division of the High Court known as the International Crimes

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<sup>209</sup> Rosen, *supra* note 14, p. 162.

Division, and as the minimum age of criminal responsibility in Ugandan Penal Code is 12 years old,<sup>210</sup> child soldiers fall under the jurisdiction of their national court for international crimes committed. So far, the focus still remains on the leaders of the armed groups and adult perpetrators. Moreover, as the Amnesty Act tried to reduce the numbers of rebels, many child soldiers were exempted or discharged “from criminal prosecution or any other form of punishment by the State.”<sup>211</sup> Ugandan state put more emphasis on rehabilitation and reintegration of child soldiers than their punishment. One of the reasons could be that it has already too many adult criminals they have to deal with. Those criminals represent a much bigger danger for society, peace, and security in the country than child soldiers do. Another reason could be the fact that reintegration and rehabilitation of child soldiers might be much cheaper for a state ravaged by conflicts. International pressure might as well be a reason for exclusion of child soldiers from prosecution.

The Democratic Republic of Congo is another country, which adjudicated on child soldiers in its domestic court. In 2001, six child soldiers were sentenced to death for the crime of conspiracy against President Kabila. The high pressure from international organizations led to the change of the sentence first to life imprisonment, and then to 5 years of imprisonment for five child soldiers. The sixth child soldier, Babuya Oleko, died in prison before his sentence was changed. The 2001 UN special rapporteur on the DRC revealed that many former child soldiers were either put on trial by the Military Court, either detained for the same crime of conspiracy. The 2001 report also accentuated that around 29 child soldiers, most of whom were between 14 and 15 years old, and some as young as 11, faced possible death penalties, while those imprisoned were tortured. The outcomes of the cases involving child soldiers are not known. As the Coalition to Stop Child Soldiers claim, “The DRC’s Military Court offers no right to appeal and has been known to try suspects without representation. Children are imprisoned together with adults and not treated according to international standards of juvenile justice.”<sup>212</sup> However, this example shows that even if domestic courts take measures to bring child soldiers to justice, there is little justice for the children themselves. Each child soldier deserves a fair investigation and trial, a proper

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<sup>210</sup> Legal Education with Purpose, “The Law of Children, Uganda,” *LawSchoolNerdsBlog*, 24th March 2012, <http://lawschoolnerds.blogspot.com/2012/03/law-of-children-uganda.html>.

<sup>211</sup> *Amnesty Act*, Chapter 294, Uganda Legal Information Institute, (Commencement) 21 January 2001, Article 1, <https://ulii.org/node/23788>.

<sup>212</sup> “Action appeal: Child soldiers on trial in the DRC,” *Coalition to Stop the Use of Child Soldiers*, 31 Mar 2002, <https://reliefweb.int/report/democratic-republic-congo/action-appeal-child-soldiers-trial-drc>.

representation, all the mitigating factors taken into account and all the international standards for child treatment respected. The DRC practice for charging child soldiers is not worth to be taken into consideration, only its desire to indiscriminately bring to justice any perpetrator may be an impulse for further consideration of equity for all.

Another example can be seen in Iraq and Kurdistan Region, where their respective governments are detaining around 1,500 child soldiers for supposed involvement and support of the ISIS terrorist organization. Most of them claimed to be tortured and abused by the investigators. Those who confessed for alleged relations with the terrorist organization affirm they admitted it because they were told so or because they suffered from ill-treatment. Human Rights Watch is one of the most active organizations concerned with the topic of child soldiers' prosecutions. They interviewed many children involved in armed conflict, but their mistreatment in Iraq, especially due to the numbers, is considered unprecedented. HRW also accentuates on the fact that prosecuting children for affiliation with ISIS is contrary to the understanding of justice. Though interesting is the fact that even if the HRW most often portrays the victim image of child soldiers, they admit that there are cases when they commit serious international crimes "to feel brave and powerful,"<sup>213</sup> as one of their child soldier interviewees said. In this situation, HRW argues that "they [child soldiers] can be prosecuted under international law, taking their age into account and adhering to international standards."<sup>214</sup> Still, HRW emphasizes that this refer only to those child soldiers who already committed terrible crimes during armed conflict, and not only affiliated or sympathized with one of the parties.

The United States of America is another example worth to be mentioned in regard to child soldiers prosecution. U.S. domestic criminal law has always demonstrated an impartial treatment of minors, especially with regard to child soldiers, who were not only treated as adults in the courts but also often subjected to violence and torture. It is assumed that from 2002 until 2008, the US held captured approximately twenty-five hundred child soldiers. Most of them were held in Iraq, at the Bagram Theater Internment Facility in Afghanistan and Guantanamo Bay in Cuba.

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<sup>213</sup> Jo Becker, "Some Child Soldiers Get Rehabilitation, Others Get Prison," *Human Rights Watch*, 4 March 2019, <https://www.hrw.org/news/2019/03/04/some-child-soldiers-get-rehabilitation-others-get-prison>.

<sup>214</sup> *Ibidem*.

Mohamed Jawad and Omar Khadr were two underage child soldiers who were held at the Guantanamo Bay for trial under the US Military Commissions Act of 2006.<sup>215</sup>

Yet, the most (un)famous example of a child soldier trial is the case of Omar Khadr. Omar Khadr was a 15 years old Canadian citizen captured by the US troops in a firefight in Afghanistan. Khadr's father, Ahmed Said Khadr, emigrated from Egypt to Canada where he established and formed a family, and where Khadr was born. However, even in Canada, he continued to support al-Qaeda and when he became an al-Qaeda commander he even took his son to Pakistan. Al-Qaeda mentioned him not only in the "Book of 120 Martyrs in Afghanistan," but also on one of its websites, praising him for "tossing his little child [Omar] in the furnace of the battle."<sup>216</sup> This linked the 15-years old boy to the terrorist organization. Omar Khadr was charged with the murder of one of the US soldiers, and a couple more criminal counts. The case was constructed on his confession, obtained involuntarily after torture and mistreatment at Guantanamo Bay. In the trial session a former Army combat medic, who was an eyewitness of Omar's cruel and inhumane treatment, testified that "he found Khadr chained by the arms to the door of a five-square-foot cage at a U.S. lockup in Afghanistan, hooded and weeping. Khadr's wrists were chained just above eye level with just enough slack to allow his feet to touch the floor."<sup>217</sup> Despite the numerous testimonies and evidence presented, the military judge ruled that Khadr's confession was not connected with the torture he had gone through.<sup>218</sup>

In October 2010, Omar Khadr obtained a plea bargain from the military prosecutors. Rosen found that the plea bargain was important not only for the Omar but also for the United States. He argues that even the US understood that by detaining a child soldier at Guantanamo Bay, it violated its treaty obligations under the Optional Protocol. The United Nations also applied pressure on the US for its failure to respect its treaty obligations. Radhika Coomaraswamy, the Special Representative of the Secretary-General for children in armed conflict, criticized the US Military Commission for charging a child soldier. She argued that "the actions of Khadr's father were central to the abuse and harm done to him."<sup>219</sup> Moreover, much pressure came from the US

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<sup>215</sup> Rosen, *supra* note 14, p. 163.

<sup>216</sup> *Idem.*, p. 169.

<sup>217</sup> *Idem.*, p. 170.

<sup>218</sup> *Idem.*, pp. 168-170.

<sup>219</sup> *Idem.*, p. 171.

neighbor, Canada, which sought to take Omar to his home country. In 2009, the Canadian Supreme Court, “ruled that Khadr had been illegally detained at Guantanamo Bay, that he had been tortured and deprived of legal counsel, and that the government of Canada should seek his repatriation to Canada.”<sup>220</sup>

In the 2010 plea bargain, Khadr admitted the commitment of the crimes he was charged with, including murder, spying, war crimes, conspiracy, and support to commit terrorism, in exchange for a sentence reduction from 40 to 8 years of imprisonment. In September 2012, Omar Khadr had been transferred to a maximum-security prison in Canada, to serve the rest of his sentence.<sup>221</sup> At the end of March 2019, an Alberta judge ruled that Omar’s sentence for war crimes has expired.<sup>222</sup> The case of Omar Khadr still raises many questions and concerns and appears in almost any literature on the topic of child soldiers. Most interesting arguments pertain to Fisher and Drumbl.

Fisher points to the US’ discrimination practice in relation to the child soldiers, which are treated as adults and are denied the special protection status given to them by international law. Fisher argues that “The US demonstrates acute contradiction by applying juvenile justice to most perpetrators of crimes under the age of 18 within the US while applying very different standards to persons outside the American borders.”<sup>223</sup> Mark Drumbl shares the same view and argues that it is not the US alone with this approach, but many western countries do the same. He argues that child soldiers are viewed as victims only in the context when they do not aim against a direct western interest. Drumbl explains that “... perceptions of the victim status of child soldiers remain somewhat contingent upon the nationality of those persons injured by their conduct. Child soldiers who commit violence – for example, terrorist attacks – against western targets are seen less like deluded children and more like menacing adults.”<sup>224</sup> Even though Fisher and Drumbl are right in their arguments and the US violated many laws in relation to child soldiers’ detainments and prosecution, none of them paid attention to the consequences of the US actions. Moreover, none

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<sup>220</sup> *Ibidem*.

<sup>221</sup> “The United States of America v. Omar Ahmed Khadr,” *International Crimes Database*, <http://www.internationalcrimesdatabase.org/Case/968/Khadr/>.

<sup>222</sup> Bob Weber, “Judge rules Omar Khadr’s sentence has expired,” *The Canadian Press*, 25 March 2019, <https://www.ctvnews.ca/canada/judge-rules-omar-khadr-s-sentence-has-expired-1.4350209>.

<sup>223</sup> Fisher, *supra* note 20, p. 56-57.

<sup>224</sup> Drumbl, *supra* note 40, p. 3.

of the authors criticizing the US did observe the establishing tendency. By detaining child soldiers, the US extended the notion of ‘universal jurisdiction’ over them. It is worth expecting that the US’ partners will resort to the same practice in relation to child soldiers when it will be convenient.

All these domestic cases and examples showed that even if the domestic courts are more open to prosecute child soldiers, they prove to be too severe, unjustifiable and inappropriate. Those cases raise many debates, questions, and unclarities. The uneven interest in child soldier prosecution at the international vs. domestic level is backed by the different images those children are offered at the international level - where they are seen as victims of child recruiters and at home -where they are seen as perpetrators. Respectively, most of the international attention is given to the law and trial of child recruiters, while the domestic courts should decide on their own how to charge child soldiers. All of those domestic cases against child soldiers are criticized; most are denounced for the pure fact that they are not preceded by western ‘civilized’ examples. Therefore, the judicial innovations of the global south against child soldiers might not be accepted or practiced in the west. Yet, this in no case denies the right of the countries to prosecute its citizens for grave international and domestic crimes, even if they are child soldiers or if the crimes were committed while they were underage.

### 3.2 The Peculiarity of Dominic Ongwen Case

Mainly the charges against a former child soldier, whom the international community failed to protect from abduction raise many debates on Dominic Ongwen trial. Dominic Ongwen is a former child soldier, who was abducted by the LRA forces just like some other 30,000 children.<sup>225</sup> Despite the huge numbers of child soldiers within the LRA ranks, namely Ongwen who was abducted at the age of 10, became a commander by the age of 14.<sup>226</sup> As a military leader, he conducted several military maneuvers in the region of Northern Uganda including forced recruitment of children and their indoctrination. Besides, he organized and conducted brutal raids on villages among other crimes, continuing the violent LRA practice of terrorizing civilian population in Uganda.<sup>227</sup> Due to the fact that ICC does not have jurisdiction over crimes committed

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<sup>225</sup> “Dominic Ongwen,” *Coalition for the International Criminal Court*, <http://www.coalitionfortheicc.org/cases/dominic-ongwen>.

<sup>226</sup> Grover, *supra* note 37, p.102

<sup>227</sup> *Ibidem*.

before the entry into force of the Rome Statute<sup>228</sup> and over the crimes committed by children under 18, ICC charges Ongwen only for crimes committed by him as an adult, from 2002 onwards.<sup>229</sup> One of the counts includes the war crime of child recruitment and use in hostilities, mentioned in the previous chapter.

Ongwen's case might have a different turn than other child abductors already tried by the ICC and other international(ized) courts, due to his child soldiering past. Primarily this fact will influence Ongwen's trial and verdict. This is evidenced by the extensive mediatisation of the process and emphasis on Ongwen's past as a child soldier. Unlike other child recruiters tried by the ICC and mentioned in the previous chapter, Ongwen's case will have a different development for a couple of reasons. The defense, from the very beginning, tried to portray Ongwen as a victim, due to his early abduction into the LRA. Undoubtedly, the defense will rely and insist on the element of duress combined with childhood trauma and fear. Nevertheless, it is unlikely that he would have been entrusted the leadership position if he really were a frightened and disadvantaged child. However, not only the defense will insist on the image of the victim. International humanitarian organizations, which in principle insist on the childish innocence of all the child soldiers, will also take the side of the defense. This cannot only help to reduce his sentence but in principle lead to an acquittal. Regardless of the line of defense and the humanitarian goals of some of the organizations, Ongwen represents a classic example of a former abductee transforming into an abductor himself. The past failure of the international community to protect Ongwen from abduction must not put at risk new lives. To exonerate or acquit a criminal for a crime he once was a victim himself would discredit the very understanding of the law, justice, and order. If we get robbed, we are not going to rob in return, if we are beaten, we are not going to beat in response, otherwise, there would be anarchy. The law is created for the general order and protection of civilians, and it works only when the criminals who have transgressed the law are punished. Maybe Ongwen did not receive justice in regard to his own abductors, but he should not have done the same with other children. His abduction and injustice is no excuse for the crimes he committed. This paper argues that Ongwen must be punished for the crimes he committed. Given the fact that

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<sup>228</sup> *Uganda: Situation referred to the ICC by the Government of Uganda*, Investigation, International Criminal Court, January 2004, <https://www.icc-cpi.int/uganda>.

<sup>229</sup> "Dominic Ongwen," *supra* note 225.



he will be tried only for several crimes committed as an adult commander of LRA, from the entry into force of the Rome Statute, his childhood traumas might be insufficient to prove his innocence.

Nevertheless, this chapter focuses on the liability of child soldiers themselves, and not on their abductors. In addition, as Ongwen incorporates both, child and adult commander, further on will be discussed Ongwen's accountability for the crimes he committed as a child soldier. In this context, the ICC is automatically disregarded, as it tries neither child soldiers under 18, neither crimes committed as a child.

Dominic Ongwen was not an ordinary child soldier. At a very young age, he became an LRA commander. Under his leadership, other children were forcibly recruited, villages were looted and many other crimes committed. It is clear-cut, that for those crimes committed as a child soldier commander the ICC will not try him. However, this does not mean that the crimes he committed as a child commander will not be brought before the law. It is not excluded that after the ICC trial and/or sentence, the government of Uganda could bring charges against Ongwen. In such a case, he might respond not only for crimes committed before the entry into force of the Roma Statute (which are excluded from the ICC jurisdiction) but also for crimes committed as a child. Considering that the minimum age of criminal responsibility in Uganda is 12 years old<sup>230</sup> and that the High Court of Uganda has a special Division dedicated to International Crimes, Ongwen could be tried by the domestic court for the (international) crimes he committed as a child soldier.

This paper argues that particularly Ongwen case shows that child soldiers must be prosecuted for international crimes committed. Considering that he became a commander at only 14 years old proves that child soldiers, even those forcibly recruited might have agency and are rational actors. It is hard to imagine that LRA advanced an irrational and immature child to command one of its subdivisions. Ongwen must have proved his manhood, power to command and devotion to the LRA motives. As a leader, he continued to use the LRA's cruel means and methods. Moreover, he continued this practice for decades until he became one of the most important leaders within the armed group and one of the most wanted international criminals.

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<sup>230</sup> *The Children Act*, Uganda, 1989, Chapter 59, Article 88.

This paper argues that unlike other child soldiers, namely, Ongwen had the choice not to be an LRA leader. It is not argued that he could have become another ‘desert child’ or ‘lost boy’ who would risk the life of dying in the desert to escape recruitment, but that he could be an ordinary child soldier following orders and not giving them. When Ongwen took up the role of a commander, he proved his confidence, maturity, and rationality to make strategies and take decisions on behalf of LRA. If he were an ordinary child, as many international humanitarian organizations try to portray him, then the LRA superiors would not have entrusted him the commandment of its people. Moreover, if he were an ordinary child, other child soldiers would not have listened and followed him. It is wrong to trust the perpetual image of the innocent child. The research and analysis made previously proved that in every society and state there are children who possess malice and who are able to commit major crimes. Therefore, in particular cases, it can be proved that children have agency. What else can confirm this theory, if not the juvenile justice system, persistent in each country? It is interesting though that while separately each state acknowledges that children possess agency and rationality, and must be accountable before the law, as a whole, the international community denies the agency and rationality of child soldiers, and labels them as victims of adult perpetrators. Much more emphasis is put on the adult leaders and commanders, who are believed to be the ‘most responsible.’

However, among child soldiers, Ongwen who had been given a high rank could satisfy the criteria of ‘most responsible.’ He was rational, possessed agency and committed serious crimes- which proved his devotion to the LRA brutal control of the population and for which he had been promoted. Was there really no other choice than to commit crimes? He could have chosen another strategy to satisfy the LRA leadership while being more humane. However, for Ongwen, this was a matter of choice. Moreover, he continued the LRA atrocities for decades before he was arrested and taken into custody. Yet, previously, he applied for the Uganda Amnesty Act in an attempt to escape justice. However, he applied years after the Act was initiated, and only when he felt exposed to being captured. Nevertheless, his application to the Amnesty Act and voluntary surrender to the arrest might hinder a future domestic trial on Ongwen.

Despite the initially identified miscalculations of the 2000’s Amnesty Act, which could have endangered the domestic jurisdiction over ‘most responsible’ criminals, the Ugandan law is continuously developing in this regard. Not only the establishment of the International Crimes

Division helped in this regard, but also the new amnesty law<sup>231</sup> on former LRA leaders settled a new step forward in bringing justice at home. This was already put in practice in the case of Thomas Kwoyelo, a former Colonel of the LRA forces. Kwoyelo's application for amnesty was challenged by the Constitutional Court when the state denied him amnesty.<sup>232</sup> Still, the Constitutional Appeal No. 01 of 2012 led the International Crimes Division to exercise jurisdiction over international crimes on the principle of complementarity as established by the Rome Statute. Consequently, the Supreme Court of Uganda ruled that the International Crimes Division of the High Court of Uganda should resume the trial of Thomas Kwoyelo.<sup>233</sup> By the time the ICC trial on Dominic Ongwen will end, the Ugandan law will be developed even more and would allow for Ongwen's domestic trial, for the crimes not charged by the ICC (due to the time and age limitations). Interesting is the fact that Kwoyelo also was a former child soldier. The development of those two trials against former child soldiers, one at the international and one at the domestic level, would install a new practice of jurisdiction over former child soldiers. This, in turn, might contribute to the general extension of jurisdiction over child soldiers. Both LRA commanders, who were forcibly recruited as child soldiers, transcended their roles within their divisions and became leaders. It was a matter of choice for both of them, to be so cruel, ominous and dedicated to the LRA, as to be promoted within the high ranks of the LRA. Their age might be considered as a mitigating factor, but their age might not be an excuse for the crimes committed.

### 3.3 Non-Prosecutorial Forms of Justice

Even though this paper favors judicial justice, it is worth to mention what other options and opportunities exist for child soldiers. As already explained, the main international image of the child soldier is the victim image. Therefore, most of the non-prosecutorial options for justice center on the amelioration, reconciliation, forgiveness, and acceptance. However, Steidl identifies three main stakeholders with three different repercussions, "Perpetrators need to be held

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<sup>231</sup> Pierre Hazan, "Uganda's Amnesty Law and the Peace/Justice Dilemma," *JusticeInfo*, 10 July 2017, <https://www.justiceinfo.net/en/tribunals/national-tribunals/33820-uganda-s-amnesty-law-and-the-peace-justice-dilemma.html>.

<sup>232</sup> Luke Moffett, "Dominic Ongwen and the slow-grinding wheels of the International Criminal Court," *Open Democracy*, 14 January 2015, <https://www.opendemocracy.net/en/opensecurity/dominic-ongwen-and-slowgrinding-wheels-of-international-criminal-court/>.

<sup>233</sup> Sharon Nakandha, "Supreme Court of Uganda Rules on the Application of the Amnesty Act," *International Justice Monitor*, 16 April 2015, <https://www.ijmonitor.org/2015/04/supreme-court-of-uganda-rules-on-the-application-of-the-amnesty-act/>.

accountable, victims require justice, and the society needs reconciliation.”<sup>234</sup> Further, the author argues that victims can obtain justice through different manners and forms. However, the child soldiers incorporate both the victims and the perpetrators. For this reason, transitional justice encompasses a wide range of processes and mechanisms aiming to “pursue accountability, recognize victims’ rights, promote civic trust, and furthers the democratic rule of law.”<sup>235</sup> Most common and practiced activities will be presented further.

### 3.3.1 Truth Commissions

Even though there is no generally accepted definition of the truth commission, this paper will use the one offered by Priscilla Hayner. The definition establishes that “A truth commission (1) is focused on past, rather than ongoing, events; (2) investigates a pattern of events that took place over a period of time; (3) engages directly and broadly with the affected population, gathering information on their experiences; (4) is a temporary body, with the aim of concluding with a final report; and (5) is officially empowered by the state under review.”<sup>236</sup>

There are three highly known Truth and Reconciliation Commissions (TRC), those of South Africa, Sierra Leone, and Liberia. In South Africa, the TRC did not take statements from underage children, as a form of protection from re-traumatizing. Therefore, the Truth Commission missed the opportunity to fully investigate and understand the role of child soldiers and agents and perpetrators.<sup>237</sup> The victim image, in this case, damaged not only the justice but also the truth.

Sierra Leone’s TRC acknowledged the presence of children as perpetrators but decided not to categorize them as victims/witnesses, and perpetrators, for the purpose of better re-integration and reconciliation. Moreover, the final report sympathized with child soldiers who committed serious crimes, as victims of adult coercion. It also ignored the possibility of children volunteering, arguing that they had no capacity to ‘volunteer,’ and that they had ‘no choice.’<sup>238</sup> Therefore, the overall victim image of child soldiers dominated among the commissioners of Sierra Leone’s TRC.

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<sup>234</sup> Steinl, *supra* note 60, p. 47.

<sup>235</sup> *Ibidem*.

<sup>236</sup> *Idem.*, p. 51.

<sup>237</sup> *Idem.*, p. 51-52.

<sup>238</sup> *Idem.*, p. 54-57.

Liberian TRC was much more open and rational in this regard. Not only they admitted children taking the roles of perpetrators during the armed conflict, but also elaborated on the possibilities of “Accountability for Child Perpetrators,” in one of the chapters of the final report. Still, the report favored the alternative accountability measures, which ought to promote forgiveness and re-integration, instead of criminal prosecution of child soldiers.<sup>239</sup> Nevertheless, just like other truth commissions, the Liberian TRC highly focused on victimization of the child soldiers.

Steinl criticized the passive victim narrative embraced by the Truth Commissions. He argues that due to such exclusion, the “children’s positive and negative agency during armed conflict remains largely unexplored.”<sup>240</sup> Moreover, Drumbl also condemns such a victim image by arguing that the passive victimhood of children “inadvertently pathologize entire social structures presenting children as needing to be saved from their communities, from their cultures, and from their families.”<sup>241</sup> Therefore, it is worth to say that even though the Truth Commission might be a viable option for non-prosecutorial transitional justice in the future, it still needs to improve its mechanisms and attitudes. What people really do not need after the conflict is selected truth and justice. The feeling of victimhood and impunity would not benefit the child perpetrators. They have to understand not only the fact that they are victims, but also that what they did was wrong, that it brings to consequences and accountability before the law.

The results and implications of truth commissions for the population are questionable. It is unlikely that truth brings justice, it only leads to justice. Giving the case of Dominic Ongwen for example, it is doubtful that civilians who suffered from the LRA atrocities would feel a sense of justice if Ongwen will tell the truth of all he did. The truth commissions have a place to be in the transitional justice system, but not in the form it exists today, and most probably would only be successful when complemented with other forms of justice. Truth should not be selective if justice is really wanted.

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<sup>239</sup> *Idem.*, p. 65-66.

<sup>240</sup> *Idem.*, p. 67.

<sup>241</sup> Drumbl, *supra* note 40, p.10.

### 3.3.2 Traditional Processes

Traditional justice processes refer mostly to old, popular folk traditions, which existed and were practiced for centuries. In the absence of other transitional justice mechanisms, some countries resorted to traditional measures. Among those are Rwanda, Uganda, Angola, Mozambique, and Sierra Leone. In Malawi, Bangladesh and Sierra Leone, more than half of the conflicts are processed through the customary law. Usually, all the traditional justice measures are peaceful, depend on the decision of the leader (of mostly patriarchal communities), and relate to compensations, reconciliations, and of course forgiveness. Some grave crimes might have special ceremonies of cleansing.<sup>242</sup>

In Uganda, child soldiers who returned to their communities use such cleansing ceremonies. One such ceremony consists of stepping on an egg - as a welcoming ritual, the slaughter of a goat - as a symbol of cleansing from distress and evil spirits, and washing of tears - as a sign of health.<sup>243</sup> In Mozambique and Angola, former child soldiers have to wash their bodies with water, with the herbal mixture or with animal blood as a symbol of spiritual cleansing, of the child's polluted soul. In Sierra Leone, the former child soldiers have to restore their relationship with God as a cleansing ceremony.<sup>244</sup> Unlike other crimes and cleansing ceremonies, the return of the child soldiers carries more a symbolic role, with non-verbal exteriorization. The adults in these communities believe that verbal revelations might only remind and inflict pain and shame on the child. However, traditional transitional justice might not be universally applicable even within the same community. Taking, for example, Ongwen's case, there is hardly imaginable what cleansing ceremony would wash away the memories and hardships he inflicted on the civilians. Moreover, these cleansing ceremonies seem to be more a form of justice for the child soldiers, but not for their victims.

### 3.3.3 Reparations

Reparations represent another important mechanism for transitional justice. Reparations for victims indicate not only the acknowledgment of the crime committed and harm done but also the intent of the perpetrators to rehabilitate in the face of their victims and pay for what they have

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<sup>242</sup> *Sinclair Dinnen*

<sup>243</sup> Steinl, *supra* note 60, p. 80.

<sup>244</sup> *Idem.*, p. 82-84.

done. The reparations might have both, a material or a symbolic form. In what it regards child soldiers, the transitional justice made child soldiers beneficiaries of reparations, as the international community classifies them mostly as victims.<sup>245</sup> The failure to admit the double role those child soldiers have, highly influences the civil society.

It is ignored in the literature, practice, and lawmaking, but the reparations offered to child soldiers might actually divide the society they are living in. The previously mentioned Myriam Denov described in her book that child soldiers were given much more attention and resources as part of their rehabilitation, than ordinary children. The trial against child recruiters first and foremost required reparations for the children they recruited, while the children and ordinary population, which suffered from their brutality, remain in the shadow. Child soldiers are more victimized and the humanitarian workers repeatedly contributed to the creation of the victim image. This division between child soldiers and ordinary children undoubtedly leave a mark of injustice in the conscience of the ordinary population, who suffered from these child soldiers who are now privileged. When it comes to reparations offered by child soldiers to their victims, then transitional justice might achieve its purpose. Nevertheless, there are former child soldiers like Dominic Ongwen for whom no such amount exist so he could be forgiven. Reparations in his case would represent only the admission of his guilt and justice for the population, but it might not bring to his reconciliation and reintegration.

### 3.4 Final Remarks

Even though the phenomenon of the child soldier is not new, the jurisdiction over child soldiers is only developing. This chapter presented the parallel development of international and national jurisdictions over child soldiers. Yet, as the examples proved, neither the international nor the national courts achieved great success in this regard for a variety of different reasons. Moreover, this chapter elaborated on the particularity of Ongwen's case who even as a child soldier incorporated the image of the perpetrator, qualifying for the 'most responsible' criteria due to his rank from a very young age. Lastly, this chapter presented other mechanisms for justice and argued why they would not work in Ongwen's situation.

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<sup>245</sup> *Idem.*, p. 106.

## Conclusion

The history changes, but its components remain the same. As this paper illustrated in the first chapter, child soldiers existed from ancient times and still exist today. For centuries, underage children were a regular part of the army. However, in the modern context, child soldiers are restricted from participation in wars and conflicts, due to the changing nature of war itself. The war lost its greatness and heroes and transformed its participants into perpetrators and victims. This is especially visible in the context of child soldiers. The image attribution of child soldiers, as either perpetrators or victims, is highly influenced by modern debates on juvenile agency and rationality. The dispute takes the extremes and while some completely deny child agency, others generalize this fact. Again, neither of the approaches is the right one in this case. Child soldiers represent a complex combination of victim and perpetrator. The agency in their case should be carefully evaluated along with their confusing environment and limited opportunities, but should never be denied. It is highly important as conferred images guide further, the international law on child soldiering.

While the first chapter is introductory to the terms, norms, and realities of the child soldiering phenomenon, the second and third chapter present and review the existing international law on the topic, since the research question is specifically about the law. The second and the third chapters share the answer to the first research question on *how does International law treat child soldiers*. The paper clarifies that today's prevailing victim image of child soldiers, promoted by NGOs, humanitarian organizations and scholars influenced the existing International Law on child soldiering. All of the existing international humanitarian law on child soldiers centers on their protection, while international criminal law focuses on the punishment of adult recruiters. From nation states to international organizations, the community is increasingly involved in the ban and punishment for child conscription and use. Thus, through the cases presented in the second and third chapter, the paper demonstrated that the predominant image of victimity excluded child soldiers from international jurisdiction over international crimes, and put all the blame on adult recruiters. Nevertheless, this paper insists on the double role of the victim as well as perpetrator, of the child soldier.



The second chapter also found that international courts and tribunals are more popular than domestic courts in judging against criminals who conscript and use children. Domestic courts also proved less effective in the execution of the sentences in such cases. Even those few internal cases involving the recruitment of children are somehow internationalized by various means and measures. This demonstrates the current tendency of transferring the responsibility for war crimes on child recruitment to the international community. Fortunately, international courts and tribunals have claimed responsibility for the war crime of recruiting and using children, and successfully brought those responsible to justice. Regardless of which body started the process against those criminals, what really matters is the result. Leaders of the armed groups and military forces of any kind will answer before the law for their crimes.

Due to high mediatization and continuous debates on Dominic Ongwen case to the ICC, the inclusion of his situation into the overall analysis of child soldiers was necessary. Yet, while most controversies focus on his victimicy as a former child soldier, abducted by LRA forces, this paper finds something different in answering the second research question on *How does the Ongwen case influence the perception of child soldiers?* In the third chapter, the paper affirms that child soldiers holding leadership positions lose the balance between their victimicy and culpability, and transform into rational agents of war. By the position they were given they proved their rationality, devotion, and power. By giving orders, they proved their authority and maturity to take decisions not only for themselves but also for the unit entrusted to them. Therefore, those child soldier commanders must take the guilt and responsibility for the crimes committed under their commandment as those ‘most responsible.’

Further, the paper examined the future possibilities and limitations of child soldier prosecutions. Based on the previous experiences of international and national courts, the paper established that while international courts are more reluctant and dependent upon the international reaction, the national courts either lack the resources to prosecute child soldiers, either ignore the international laws and standards in what regards juvenile justice. Just like any other law in development, the child soldier prosecution must be given all the respect and time it needs to achieve the balance between justice for child soldiers and justice for their victims. Nevertheless, the paper assumed that international courts would not engage with child soldier prosecution, at least not soon, while national courts will attempt to prosecute juvenile soldiers or adults who have

committed crimes in childhood. This could be done in accordance with national juvenile justice laws, which does not exclude child agency and rationality in what concerns ordinary crimes. Again, this scenario was considered in the possible development of Ongwen's case, along with other viable non-prosecutorial forms of justice. Nonetheless, the paper determined that Ongwen represents the juvenile delinquent holding a leadership position, abducting, training and controlling other child soldiers, first as a child and later as an adult. By his actions and decisions, he proved his agency and rationality; therefore, he must be punished. As ICC charges him only with crimes committed as an adult from the entry into force of the Rome Statute, for the crimes committed earlier in his life he will not be even investigated. However, Uganda's national court could prosecute Ongwen for the crimes he committed previously, including the crimes he committed as a child soldier commander. Undoubtedly, this will raise a lot of criticism from the western community, which view child soldiers as victims. But from a rational point of view, it is not merely for the westerners to decide the fate of certainly guilty child soldiers. The local authorities and communities should have a word to say and decide themselves upon the fate of their once juvenile offenders.

This paper does not dispute the fact that child soldiers suffer, and that children are forced to become soldiers to survive. But war is still war, and victims are everyone in a larger or smaller scale. What is actually disputed by this paper is that even the victims should be responsible for their actions, regardless of the fact that they were victims themselves. "An eye for an eye" and "a tooth for a tooth" is not an argument to commit crimes. Neither is the victimization of the perpetrator is a reasonable defense from international crimes. The victim image must not be universally attributed to all child soldiers. There are different cases and circumstances.

This paper does not deny the victimicy of child soldiers, it just argues, that in special circumstances, when child soldiers hold leadership positions, the child soldiers must be justly investigated and prosecuted. Still, their age, environment, and form of recruitment might be taken into consideration as mitigating factors. Child soldier commanders should be liable for the gravest crimes they committed. Their age and assumed universalized victimhood should not be an argument to avoid punishment. War is cruel in its essence in relation to all, combatants, civilians, men, women, children, elderly, animal, and even nature. This is why we need to develop international law, to bring a sense of justice to the world.

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