

**INTERNATIONAL CRIMINAL LAW AND THE AFRICAN GIRL CHILD SOLDIER: DOES THE  
INTERNATIONAL CRIMINAL LAW FRAMEWORK PROVIDE ADEQUATE PROTECTION TO THE  
AFRICAN GIRL CHILD SOLDIER?**

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Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the degree of Masters in International Law (LLM) in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

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**UNIVERSITY OF CAPE TOWN, 12 MARCH 2017**

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Special thanks go to my family and friends for their unfailing support. Thank you for the inspiration and always challenging me to go one step further.

*Gratia et Scientia*

## CHAPTER 1: INTRODUCTION

### 1. Introduction

The African girl child soldier finds herself in a precarious legal situation as this dissertation shall show. She is used as both a soldier in hostilities, as well as, a victim of sexual and domestic abuse. This dissertation will look at the law governing child soldiers and conduct a gender analysis to identify the specific needs of the African girl child soldier. My motivation for choosing this topic for my dissertation is that I sensed that international criminal law has yet responded effectively to the intersecting identities of the girl child soldier.

### 2. Research Background and Questions

This dissertation aims to answer the question: does the international criminal law framework provide adequate protection to the African girl child soldier? The motivation for the choice of this question came about in my final year of LLB. I conducted research on crimes against humanity committed by Boko Haram, and found a lot of research had been conducted on the use of children in war. I became particularly interested in the use of girl child soldiers because of the disparity between them and their male counterparts - how they were used during conflicts and the definitions of child soldier in international statutes. The constant reference in international treaties of child soldiers as those who take part in 'direct hostilities', I felt excluded girl child soldiers from protection as girl child soldiers are often used as base-camp soldiers, spies and often times sexually, physically and emotionally abused.

### 3. Research methods

The methodology of this dissertation is desk based. The first step is textual research of the experiences of girl child soldiers from the following African conflicts: Sierra Leone, Northern Uganda, Mozambique and Congo. These particular States were chosen because they are African conflict States and they also had data available on the position of girl child soldiers. An analysis of the activities of child soldiers in these regions will be in order to find out which set activities are common to girl child soldiers. The second step taken in the dissertation will consist of textual analysis of treaty law and definitions of the term 'child soldier'. The third and final step will be to look at the international criminal law framework – analysing cases that have come before the International Criminal Court (hereafter 'ICC') and other international criminal law tribunals. The question that will be used to test the adequateness of the treaty law is: whether treaty law and the way it has been interpreted by the courts directly addresses the experiences of girl child soldiers?

#### 3.1 Gender Analysis

In a paper by Abigail Leibig, it is reported that 20 to 30 per cent of child soldiers abducted from Northern Uganda are girls.<sup>1</sup> The experiences of these girls are vastly different from those of their male counterparts. Leibig characterizes the role of girl child soldiers in hostilities as one that infuses both military elements and sexual abuse.<sup>2</sup> When the girls turn 14 or 15, Leibig states that they are then treated as 'wives' often referred to as 'ting tings' and they are often sexually abused or given to specific soldiers as wives.<sup>3</sup>

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<sup>1</sup> A Leibig 'Girl Child Soldiers in Northern Uganda: Do Current Legal Frameworks Offer Sufficient Protection' (2005) 6 *Northwestern Journal of International Human Rights* 1.

<sup>2</sup> Leibig at p8.

<sup>3</sup> *Ibid* at p7.

Rosen reports that child soldiers are frequently used to commit war crimes and crimes against humanity, particularly because commanders find it easier to manipulate children to commit more audacious crimes than it is to convince adults.<sup>3</sup> There has been a rise in the participation of girl child soldiers in African conflicts of a margin of approximately 30 to 40 per cent.<sup>4</sup> Here is a brief look at the experiences of girl child soldiers from different conflicts within the African continent:

Between 1998 and 2003, the Democratic Republic of Congo (hereafter 'DRC') experienced its second civil war (the first being between 1996-1997).<sup>5</sup> The pattern of using of child soldiers which had been established in the first civil war was also followed in the second, with different armed groups (including the national army) recruiting thousands of children.<sup>6</sup> The child soldiers were conscripted in order to serve as 'soldiers, porters and sex slaves'.<sup>7</sup> It was reported that girls were 'primary targets' for abduction and were often recruited for activities including use as sexual and domestic slaves.<sup>8</sup> Quénivet further reports that girls were often sent to be prostitutes in order to obtain information from enemy groups.<sup>10</sup>

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<sup>3</sup> David M. Rosen *Armies of the Young: Child Soldiers in War and Terrorism* (2005) at p9.

<sup>4</sup> N Quénivet, 'Girl Soldiers and Participation in Hostilities' (2008) *African Journal of international and Comparative Law* 219 at p219.

<sup>5</sup> Sarah Kenyon Lischer 'Chapter 9: War, Displacement, and the Recruitment of Child Soldiers in the Democratic Republic of Congo' in Scott Gates et al *Child Soldiers in the Age of Fractured States (The Security Continuum)* (2009) at p152.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*

<sup>8</sup> S McKay & D Mazurana *Where are the Girls? Girls in Fighting Forces in Northern Uganda, Sierra Leone and Mozambique: Their Lives During and After War* (2003) at p107. <sup>10</sup> Quénivet at p222.

In Mozambique, civil war started in the late 1970s and ended in 1992.<sup>9</sup> It was between the Frente de Libertação de Moçambique (hereafter 'FRELIMO') and the Resistência Nacional Moçambicana (hereafter 'RENAMO') and because of the guerrilla war for independence in neighbouring Zimbabwe, the conflict had regional elements.<sup>10</sup> Howana argues that the crisis in employment as well as the displacement of people caused by years of war left many young people eager to voluntarily join an armed group.<sup>11</sup> In particular, some girls voluntarily joined armed groups under the impression that they would obtain power of some sort.<sup>12</sup> Once part of the armed group, in addition to being trained to fight, girls often took part in domestic duties such as cooking and cleaning.<sup>13</sup> Girls were often "married off" to members of the armed group as payment for that member's good service.<sup>14</sup>

In Sierra Leone, between 1992 and 1996 (a period which Mazurana characterizes as having the fiercest fighting), it is reported that the 'majority of the camp members of the rebel Revolutionary United Front/ Armed Forces Revolutionary Council...were captive girls'.<sup>15</sup> Approximately 80 per cent of the rebel forces were children between 7 and 14 years of age and 30 per cent of these were girl soldiers.<sup>18</sup> Park stresses that the position of the girl child soldier was one where the

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<sup>9</sup> A Honwana *Child Soldiers in Africa* (2007) at p 7.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid* at p9.

<sup>12</sup> Quénivet at p223. This is not a trend specific to the conflict in Mozambique, but was seen in other African conflicts: Sierra Leone, Uganda, Angola and Liberia.

<sup>13</sup> Quénivet at p233.

<sup>14</sup> *Ibid.*

<sup>15</sup> Mazurana at p107.

soldier was not only a victim of sexual abuse but also was the perpetrator of many war crimes themselves.<sup>16</sup> Quénivet agrees with this analysis stating that ‘girl soldiers not only fought, mined for diamonds and fulfilled other duties for the armed groups, such as spying – as the boys did – but also cooked, cleaned and performed sexual services.’<sup>17</sup> Qualitative research conducted in Sierra Leone found that the ‘wives’ in the Sierra Leonean conflict were girls between the ages of 9 and 19.<sup>18</sup>

Sexual violence is not a problem that only girl child soldiers face, some boys who are child soldiers often face sexual abuse. The problem of sexual violence, however, is more prominent within the group of girl child soldiers. This is illustrated by the characterization that Mazurana gives the situation in Uganda: ‘although most girls experienced sexual violence and the majority of boys

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<sup>16</sup> A. S. J Park ‘ ‘Other Inhumane Acts’: Forced Marriage, Girl Soldiers and the Special Court for Sierra Leone’ (2006) 15 *Social and Legal Studies* 3.

<sup>17</sup> Quénivet at p219.

<sup>18</sup> Park at p322.

*Ibid.*

are used as fighters, some boys were forced into sexual servitude whereas some girls were frontline fighters.’<sup>19</sup>

Park criticizes contemporary scholars for using the broad term child soldiers’ because it assumes that the experiences of boys and girls in combat are the same.<sup>20</sup> The scholar expands on the experiences noted by Leibig, and states that one of the consequences of forced marriages of girl child soldiers is the pregnancies and child rearing.<sup>21</sup> According to the qualitative research the ‘wives’ in the Sierra Leonean conflict were girls between the ages of 9 and 19.<sup>25</sup> Park goes on to say that as a result of these pregnancies practices such as unauthorised abortions, infanticide, deaths due to birth complications and gynaecological abnormalities due to pre-mature pregnancies, are on the rise.<sup>22</sup> Park highlights the public health problems that girl child soldiers faced which are particular to them in contrast to boys.<sup>27</sup>

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<sup>19</sup> Mazurana at p109.

<sup>20</sup> Park at p321.

<sup>21</sup> *Ibid* at p322.

<sup>25</sup> *Ibid*.

<sup>22</sup> Park at p321.

It is due to the dual identities of girl child soldiers as fighters, perpetrators of crimes, as well as, victims of sexual and gender based violence, that this dissertation will adopt the term 'dichotomous identity' to describe their experiences.

### Schedule of Work

The dissertation will be divided into 6 chapters:

Chapter 1 Introduction

Chapter 2 International Legal Framework: Definitions and Terms

Chapter 3 Problems with Definitions of Child Soldier

Chapter 4 International Criminal Law Framework – Procedural Issues

Chapter 5 International Criminal Law Framework – Substantive Issues Chapter

6 Final Analysis and Conclusions

## CHAPTER 2: INTERNATIONAL LEGAL FRAMEWORK: DEFINITIONS AND TERMS

### 1. Introduction

This chapter will briefly give an account of the governing international law on the topic of child soldiers. It will give an outline of treaty law definitions of child soldier. The aim of this chapter is to serve as background that will constantly be referred to during the course of this dissertation.

### 2. Definition of Child Soldier

Article 1 of the Convention on the Rights of the Child (hereafter 'Convention') defines 'child' as anyone under the age of 18.<sup>23</sup> However, this is not an international standard that is adhered to when it comes to recruitment. Arguments can be put up for the age of 15 instead. According to Article 38(3) of the Convention any person under the age of 15 cannot be conscripted as they are considered a child.<sup>24</sup> This minimum age requirement was re-iterated in the Article 4 (c) of the draft Statute of the Special Court of Sierra Leone which states that 'the conscription or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities'.<sup>25</sup>

The Optional Protocol on the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (hereafter 'Optional Protocol'), echoes the age of 18 as the age of childhood and states that no one under the age of 18 shall take part in direct hostilities.<sup>26</sup>Article

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<sup>23</sup> Convention on the Rights of the Child 1989 1577 UNTS 3.

<sup>24</sup> *Ibid.*

<sup>25</sup> Statute of the Special Court for Sierra Leone 2002 2178 UNTS 145.

<sup>26</sup> Optional Protocol on the Rights of the Child on the involvement of children in armed conflict 2002 UNTS 27531 at Article 1. <sup>32</sup>*Ibid.*

3 of Optional Protocol places an obligation on State parties to raise the age of voluntary recruitment to 18.<sup>32</sup> Article 6(1) further states that State parties ‘shall take all necessary legal, administrative and other measures to ensure the effective implementation and enforcement of the provisions of the present Protocol within its jurisdiction’.<sup>27</sup> Article 8 of the Optional Protocol creates a efficiency framework requiring that each State party provide a report within two years of entry into the Protocol: ‘providing comprehensive information on the measures it has taken to implement the provisions of the Protocol, including the measures taken to implement the provisions on participation and recruitment’.<sup>28</sup> After the initial report ‘each State Party shall include in the reports it submits to the Committee on the Rights of the Child...any further information with respect to the implementation of the Protocol. Other States Parties to the Protocol shall submit a report every five years.’<sup>29</sup> The Optional Protocol has 163 signatories and of that number only 14 State parties have not ratified the Protocol.<sup>30</sup> From the reading of Article 1 of the Convention read with the provisions of the Optional Protocol, one would gather that a child is anyone under the age of 18, that there can be no recruitment of children under the age of 18 (whether compulsory or voluntary) and that States are obligated to ensure that these provisions are adhered to.

The Optional Protocol could provide adequate protection for girl child soldiers as it has the higher age cap of 18 years old, it places a duty on States to provide periodic reports and it has an inbuilt monitoring system.<sup>31</sup> The only problem is that of the 163 signatories only 14 have ratified<sup>38</sup> the treaty which does not provide global coverage. In addition to this problem, it does not give assurance that the ones responsible for the crimes of recruiting children will be held individually accountable.

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<sup>27</sup> Optional Protocol.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid* at Article 8(2).

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*

*Ibid.*

Like the Convention, but unlike the Optional Protocol, international humanitarian law imposes the age of 15 years as the minimum age for recruitment. Article 77 of the Additional Protocol to the Geneva Conventions Relating to the Protection of Victims of International Armed Conflicts (hereafter 'Protocol I') states that parties shall take 'feasible measures' to ensure that children under the age of 15 do not take part in direct hostilities and that where children are between the ages of 15 and 18 parties to the conflict shall 'endeavour to give priority to the oldest'.<sup>32</sup> Protocol I relates to international conflicts. Its language is mirrored by the Convention. The Additional Protocol to the Geneva Conventions Relating to the Protection of Victims of Non-International Armed Conflicts (hereafter 'Protocol II') to the Geneva Convention which applies to non-international conflicts, extends protection of children stating that children who have not reached the age of 15 'shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities'.<sup>33</sup> Protocol II extends the protection to include recruitment of children (language which is neither found in the Convention, nor in Protocol I).<sup>34</sup> These Additional Protocols of the Geneva Convention are especially important when deciding what is considered to be a war crime. The Rome Statute of the International Criminal Court (hereafter 'Rome Statute') defines war crime as breaches of the Geneva Conventions.<sup>35</sup> The differences in the wording mean that there is a different standard between children recruited in a conflict seen as international versus one that is seen as internal, as in the internal conflicts as Protocol II extends protection to recruitment and not only to use.

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<sup>32</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts 1977 1125 UNTS 3.

<sup>33</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts 1977 1125 UNTS 609, at Article 4(3)(c).

<sup>34</sup> *Ibid.*

<sup>35</sup> Rome Statute of the International Criminal Court 1998 2187 UNTS 90/37 at Article 8.

<sup>43</sup> The Convention.

The Convention creates a framework that ensures that there is no compulsory conscription of children between the ages of 15 and 18.<sup>43</sup> The tacit implication in this treaty being that voluntary conscription is allowed. This is problematic. The Convention is universally considered a success as it is highly subscribed to.<sup>36</sup> The Convention echoes language of Protocol I. The practical issue that is often faced is that child soldiers join hostilities in a number of ways: some children are abducted and force into joining hostilities, however, others join voluntarily.<sup>37</sup> Where children have joined voluntarily, especially if they are between the ages of 15 and 18 a complicated legal situation is caused in relation to Article 2 of the Convention – they are no longer protected as they have violated the ‘compulsory’ proviso in the Convention. Happold discusses the tension between the child’s autonomy interests and the need to protect children from participating in hostilities, citing that such participation is detrimental to the emotional, educational and social development of children.<sup>38</sup> Happold argues that children under the age of 15 lack sufficient capacity to decide to participate in hostilities.<sup>39</sup> A criticism of Happold is that he does not offer a reason for this assertion. However, it can be extrapolated from the context of his text that what was meant was that the age of 15 has become the minimum age for the capacity to take part in hostilities according to international customary law.

Happold does not explicitly proffer a reason why a child of 15 years old has the capacity to decide to volunteer to join armed forces legally, instead of having the benchmark at 18 years old – the Convention’s benchmark for childhood. Perhaps the answer can be found in international customary law. International customary law is constructed by a combination of State practice which is ‘virtually uniform’ and *opinio juris* (the belief that one is bound by a rule).<sup>40</sup> International

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<sup>36</sup> Leibig at p4.

<sup>37</sup> *Ibid* at p25.

<sup>38</sup> M Happold ‘Child Soldiers: Victims or Perpetrators?’ (2008) 29 *La Verne Law Review* 56.

<sup>39</sup> *Ibid* at p71.

<sup>40</sup> *North Sea Continental Shelf Cases (Federal Republic of Germany v Netherlands)* 1969 ICJ Rep 3.  
*Ibid.*

customary law is binding on all States unless the State is a persistent objector of the particular rule.<sup>41</sup> For a rule to become a part of international customary law, the first question is does State practice virtually uniform?<sup>42</sup> And the second question to be asked is whether States believe their bound by the rule?<sup>51</sup> The Convention and the sheer number of signatories and ratifications indicate that State practice is virtually uniform on this score. These actions by States is evidence that States believe that they are bound. There are 196 State parties to the Convention, of this only 2 have not ratified the Convention.<sup>43</sup> The age of 15 can thus be argued to be the age after which children can voluntarily enter armed forces according to international customary law, as evidenced by the Convention.

This argument can, nonetheless be contested. In a United Nations report written by Graça Machel (hereafter 'the Machel Report'), she outlined the capacity argument and states that often children (under the age of 18) lack the capacity to understand the acts that are entailed when participating in hostilities and as such comes to the conclusion that there is no such thing as a child willingly participating in war.<sup>53</sup> This is re-iterated by Rosen: children are often recruited because of their vulnerability and as a result are easily manipulated.<sup>44</sup> Rosen then goes on to describe practices required for the recruitment of soldier to illustrate this: new recruits are forced to undertake acts of terror against family and friends including killing them – this is done in order

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<sup>41</sup> *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)* 1986 ICJ Rep 14.

<sup>42</sup> *North Sea Continental Shelf Cases*.

<sup>43</sup> The United States of America and Somalia have not ratified. Somalia cannot ratify at the moment because it currently does not have a recognized government. See The Convention. <sup>53</sup> G. Machel 'Impact of Armed Conflict upon Children' (1996) A/51/306/.

<sup>44</sup> D. M Rosen 'Child Soldiers, International Humanitarian Law and the Globalization of Childhood' (2007) 109 *American Anthropologist New Series* 2.

to alienate them.<sup>45</sup> These views echo those of the Secretary General in the draft Statute of Sierra Leone who advocated that children under the age of 18 engaged in hostilities should be considered as victims of war by the Special Court of Sierra Leone.<sup>46</sup> This when read with the provisions of the Optional Protocol requiring that children be 18 years old<sup>57</sup>, provides a solid argument for the age of 18 to be the age where children are seen to possess the requisite capacity to decide to enter the armed forces. The tenuous position of child soldiers between the ages of 15 and 18 is still an issue that has yet to be resolved in international law.

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<sup>45</sup> Rosen (2007) at p299.

<sup>46</sup> Draft Statute for the Special Court of Sierra Leone. Available from: <<http://www.specialcourt.org/document/s>>. Accessed on 7 April 2016. <sup>57</sup> Optional Protocol at Article 3.

*ibid.*

A critique of this position is that the law does not create a framework for how to deal with child soldiers who have been part of hostilities for a long time, for children who joined the armed conflict while under the age of 15 but have continued to be part of hostilities past the age of 15 to 18. Are those child soldiers seen as culpable for any atrocities committed between the ages of 15 and 18? The law is still unsettled in this area. The Sierra Leone Special Court did, however, circumvent this issue by stating that the purpose of international criminal law specifically was to prosecute the gravest offences and offenders.<sup>47</sup> Article 26 of the Rome Statute excludes persons 'under the age of 18 at the time of the alleged commission of the crime' from being prosecuted by the International Criminal Court.<sup>48</sup> However, child soldiers between the ages of 15 and 18 would, nevertheless, not be immune to domestic prosecution.

### 3. The Convention and the African girl child soldier

This Convention has been described as one of the widest subscribed human rights instrument.<sup>49</sup> The only 2 States that have yet signed the Convention are Somalia and the United States of America.<sup>50</sup>

Article 38(3) deals specifically with child soldiers; it states:

'States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest.'<sup>62</sup>

In addition to Article 38(3) which seeks to protect the child soldier, the Convention also has other provisions which could be engaged in the protection of the girl child soldier in particular. More

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<sup>47</sup> Statute of the Special Court for Sierra Leone at Article 1.

<sup>48</sup> Rome Statute.

<sup>49</sup> Leibig at p6.

<sup>50</sup> The Convention.

<sup>62</sup>*ibid.*

general provisions can be used to protect girl child soldiers: Article 2 of the Convention states that there may be no discrimination on the basis of gender, Article 16 disallows arbitrary or unlawful attacks on children's honour or reputation, Article 32 prohibits economic exploitation of children, Article 34 further prohibits sexual exploitation and abuse of children and Article 35 prohibits the abduction and trafficking of children.<sup>51</sup> The meaning of the word 'child' under these more general provisions is to be interpreted using Article 1 which states that anyone under the age of 18 is to be considered a child for the purposes of the Convention.<sup>52</sup> Therefore in using these provisions one side steps the 15 versus 18 year old debate, and a uniform standard of 18 years old can be applied.

Article 19 of the Convention places an obligation on State parties to protect children from mental, sexual abuse and create mechanisms to ensure such protection.<sup>53</sup> Even though this provision can be praised for creating a duty for States to create a structural framework through which children can be protected (legislative, administrative, social and educational), it does not, however, protect children who have already been exposed to the abuse from the reactions of their communities.<sup>54</sup> It could be argued that Article 27 cures the Convention of this shortcoming as it obliges State parties to recognize that a child has the right to a standard of living adequate for his/her moral and social development. Article 27(3) also places an obligation on State parties to take measures to help parents and guardians to achieve this; these measures include educational programmes.<sup>67</sup> The strength of Article 27 is that it could be used to address the specific needs of girl child soldiers returning home and the problems they have assimilating back into their communities. State parties could, for example run workshops to educate local communities

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<sup>51</sup> The Convention.

<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*

<sup>67</sup> *Ibid.*

affected by atrocities on how ideas of sexual purity may be detrimental to the wellbeing of a girl child returning from hostilities. The weakness of Article 27, nevertheless, overshadows this utopian view of how it could be implemented. The obligation placed on State parties according to Article 27 is the proviso that this is to be done 'with national conditions and within their means'.<sup>55</sup> The 'conditions' portion of the proviso could be used to argue the patriarchal character of a State party.

An important shortcoming of these general gender provisions is that they disregard the fundamental problem that the girl child soldier presents to the legal system: her dichotomous identity as both victim of gender-orientated crime but also as trained fighters in conflicts and at times a perpetrator of gross crimes herself.

Article 39 states that:

'States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.'<sup>56</sup>

As one can see, Article 39 presents an answer to the problems that were mentioned with the use of Article 27(3). Article 39 places a direct obligation on State parties that does not have a proviso attached; it is couched in peremptory language such as 'shall'.<sup>70</sup> It focuses on re-integration of children into their communities and this is welcomed as mentioned in the sociological case studies, girl child soldiers are often shunned from their communities. It is still important to consider how international criminal framework deals with the problem that girl child soldiers present.

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<sup>55</sup> The Convention at Article 27(3).

<sup>56</sup> *Ibid.*

<sup>70</sup> *Ibid.*

#### 4. International Crimes

In as much as re-integration of child soldiers is important, the focus of this paper is to look at how international law in particular is offering solutions to the problem of girl child soldiers. International Criminal Law can be used a pre-emptory measure as opposed to the reactory solutions that Article 39 of the Convention provides. As put in the Machel Report, children under the age of 18 years old are recruited for their vulnerability and how easily they can be manipulated.<sup>57</sup> It is therefore important that the International Criminal Court and other international tribunals guard against the impunity of those in charge of recruiting and using child soldiers. It is the point of view of this paper that increased effective prosecutions of those responsible for the practice of recruitment and use of child soldiers could result in other potential recruiters being deterred from the practice.

The Rome Statute of the International Criminal Court (hereafter 'Rome Statute') establishes the International Criminal Court (hereafter 'ICC') and states that the ICC has jurisdiction over international crimes.<sup>58</sup> Article 5 lists these crimes as: genocide, crimes against humanity, war crimes and the crime of aggression.<sup>59</sup> Genocide, crimes against humanity and war crimes are the core international crimes.<sup>60</sup> Article 6 defines genocide as:

'means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

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<sup>57</sup> Machel Report.

<sup>58</sup> Rome Statute at Article 5.

<sup>59</sup> *Ibid.*

<sup>60</sup> T.W Bennett & J Strug *Introduction to International Law* (2013) at p379-390.

<sup>75</sup> Rome Statute.

(d)Imposing measures intended to prevent births within the group; (e)Forcibly transferring children of the group to another group.’<sup>75</sup> Article 7 defines crimes against humanity as:

‘means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a)Murder;
- (b)Extermination;
- (c)Enslavement;
- (d)Deportation or forcible transfer of population;
- (e)Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f)Torture;
- (g)Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h)Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i)Enforced disappearance of persons;
- (j)The crime of apartheid;
- (k)Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.’<sup>61</sup>

Article 8 defines war crimes as grave breaches of the Geneva Conventions.<sup>62</sup> Article 8(e)(iv) goes on to list the conscription or enlisting of children under the age of 15 years as a war crime.<sup>63</sup> Article 8(e)(iii) states that ‘committing rape, sexual slavery, enforced prostitution, forced pregnancy’ also constitutes war crimes.<sup>79</sup> This particular international crime is important as it has the potential to capture all facets of the girl child soldier’s dichotomous identity. It is therefore important to look at the ICC and other international criminal law tribunals have dealt with the experiences encapsulated by the dichotomous identity.

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<sup>61</sup> Rome Statute.

<sup>62</sup> *Ibid.*

<sup>63</sup> *Ibid.*

<sup>79</sup>*Ibid.*

#### 4.1 Case Law from the ICC

The following is a summary of how the ICC has responded to the question of child soldiers and how it could potentially respond to the question of girl child soldiers.

In the case of *Prosecutor v Lubanga Dyilo*, the ICC decided that the recruitment of children under the age of 15 is to be considered as a war crime and therefore fell within the jurisdiction of the ICC to adjudicate.<sup>64</sup> The facts of this case were briefly as follows: Lubanga Dyilo was the head of the Union of Congolese Patriots (known as 'UPC') and the commander of the organization's military wing *Forces patriotiques pour la libération du Congo* (known as 'FPLC').<sup>65</sup> Between 2002 and 2003, FPLC took control of a town called Bunia and parts of Ituri.<sup>66</sup> It was alleged that there was forced conscription of children (some under the age of 15).<sup>67</sup> The children were taken to various training camps.<sup>68</sup> The defences advanced were that Lubanga Dyilo did not recruit child soldiers himself (there was evidence to rebut this claim) and that some of the children under the age of 15 "voluntarily" joined the FPLC.<sup>69</sup> The Prosecutor in his opening statement underlines the dichotomous identity of the girl child soldier stating that girls were trained to fight, used as spies as well as raped and used to perform domestic duties.<sup>70</sup> The court found that because Lubanga Dyilo as president of UPC and commander of FPLC had effective control over operations in that area and therefore is found culpable for the war crime of conscription and recruitment of children under the age of 15.<sup>71</sup>

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<sup>64</sup> *Prosecutor v Thomas Lubanga Dyilo* 2012 ICC-01/04-01/06.

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid.*

<sup>69</sup> *Ibid.*

<sup>70</sup> *Ibid.*

<sup>71</sup> *Ibid.*

Even though the ruling in the *Prosecutor v Dyilo* case dealt with child soldiers as a whole, the *ratio decidum* of that case specifically excluded the experiences of girl child soldiers.<sup>72</sup> The court has, nevertheless, dealt with gender related cases are useful in the potential plea of girl child soldiers.

In the case of *Prosecutor v Akayesu* the trial chamber of the International Criminal Tribunal on Rwanda (hereafter 'ICTR') stated that instances of systematic rape are considered to be genocide and therefore an international crime.<sup>73</sup> A brief summary of the facts is as follows: Akayesu was a former school teacher in and mayor of Taba commune.<sup>74</sup> During the Rwandan genocide he was accused of allowing for systematic rapes and executions of Tutsi people and allegations were made that he provided the Hutu militia with death lists.<sup>75</sup> The court in its examination of the facts especially pertaining to systematic rape found that Akayesu allowed for the rapes to take place and also in some cases facilitated them taking place.<sup>76</sup>

The case of *Prosecutor v Brima, Kamara and Kanu*, the Special Court of Sierra Leone found that forced marriage was akin to sexual slavery and is to be considered to be a crime against humanity.<sup>77</sup> The findings of the Special Court hit closer to home in terms of the experiences of former girl child soldiers trying to re-integrate into society. As stated in the previously, it is common practice for returning girl child soldiers to be forced to go back to their 'husbands' which is a forced marriage in essence.<sup>78</sup>

Finally, the case of *Prosecutor v Bemba* extended the liability for the crime of rape, to include the theory of 'command responsibility' whereby the commander can be found guilty for the crimes

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<sup>72</sup> *Prosecutor v Thomas Lubanga Dyilo* 2012 ICC-01/04-01/06.

<sup>73</sup> *Prosecutor v Jean Paul Akayesu* 1998 ICTR-96-4-T.

<sup>74</sup> *Ibid.*

<sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid* at para 693.

<sup>77</sup> *Prosecutor v Brima, Kamara and Kanu* 2007 SCSL-04-16-T.

<sup>78</sup> Leibig at p13.

(in this circumstance rape) committed by his troops during hostilities.<sup>79</sup> These cases handed down by the ICC and ICTR are examples of universal ideals of human rights and international crimes being implemented and enforced in an African context. It could be argued that the reading of all of these cases in conjunction would provide adequate protection for the African girl child soldier as when read together they cover the intersecting traumas of participating in hostilities and the sexual abuse associated with of being a girl child soldier. The benefits and shortcomings of such a reading will be discussed and further analysed in the later part of this dissertation.

## 5. Concluding remarks

The issues identified in this chapter are: firstly, that there are differing legal opinions for the voluntary and compulsory recruitment of children. This issue is compounded by the differing frameworks presented by the Geneva Conventions, and the way in which they have differing standards are applied for child soldiers in internal and international conflict. The second issue is the uncertainty that exists for children under the age of 15 to 18 years old. It is unclear if they are protected as child soldiers under the law. The final issue is the dichotomous identity of girl child soldiers as both victims and perpetrators of crimes.

The African girl child soldier finds herself susceptible to being victim of an array of international crimes – as seen in case law the perpetrators of systematic rape and forced marriages could be found guilty, and as demonstrated in treaty law her conscription if she is under the age of 15 could lead to her recruiter being tried for war crimes. At first glance, it would seem that this could form adequate protection. The question, however, then becomes whether in practice the reading of all these different sources could lead to seamless protection of the girl child soldier. The following Chapter will critique the current definition of child soldier in international law. The

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<sup>79</sup> *The Prosecutor v Jean-Pierre Bemba Gombo* 2016 ICC-01/05-01/08.

problems with the definition will reveal the patches that international criminal law will have to cover in order to provide adequate protection to girl child soldiers.

## CHAPTER 3: PROBLEMS WITH THE DEFINITION OF CHILD SOLDIERS

### 1. Introduction

The use of child soldiers has grown increasingly through the ages.<sup>80</sup> It has been reported that this is because of children's relatively diminished psychological and emotional development which makes them vulnerable to manipulation.<sup>81</sup> This part of the dissertation will look at definitions of a child soldier. It will do this by looking at the legal definitions of the term: child soldier. An analysis of the weaknesses of these definitions when applied to the girl child soldier will be undertaken. The concluding remarks of this chapter will underline why International Criminal Law is the ideal platform to challenge and broaden the definition of child soldier.

### 2. Legal Definition of Child Soldier

Park is wary of the use of the broad term child soldiers' because it assumes that the experiences of boys and girls in combat are the same.<sup>82</sup> From the brief look of sociological studies conducted within the above mentioned conflict zones, one can see a trend in the use of girl child soldiers – they are often used as sexual and domestic slaves, as well as in a myriad of direct and indirect combat (as spies).<sup>83</sup> This will be referred to as a dichotomous identity.

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<sup>80</sup> Rosen (2005) at p9.

<sup>81</sup> *Ibid* at p3-9.

<sup>82</sup> Park at p321.

<sup>83</sup> Quénivet at p219.

The Cape Town Principles and Best Practices (hereafter ‘Cape Town Principles’) are a result of a symposium held between experts, the NGO Working Group on the Convention on the Rights of the Child and UNICEF.<sup>84</sup> It was held with the aim of proposing solutions to prevent the recruitment of children in armed conflicts, demobilization and re-integration of affected children in Africa.<sup>85</sup> The Cape Town Principles define child soldier as:

‘any person under 18 years of age who is part of any kind of regular or irregular armed force 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 marriages. It does not, therefore, only refer to a child who is carrying or has carried arms.’<sup>86</sup>

This is an all-inclusive definition that covers the military activities that both girls and boys are connected with.<sup>87</sup> The definition specifically references gender specific roles that are attributed to girl child soldiers such as acting as cooks, messengers, often used for sexual purposes and forced marriages. It also, importantly, protects adolescent children who have yet reached the age of 18 which reflects the realities of child soldiers on the ground. According to the Machel Report child soldiers comprise mainly of ‘adolescents, although many are 10 years of age or younger.’<sup>88</sup> The majority are boys, but a significant proportion overall are girls’.<sup>105</sup>

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<sup>84</sup> UNICEF, ‘Cape Town Principles and Best Practices’ (1997). Available from: [https://www.unicef.org/emerg/files/Cape\\_Town\\_Principles\(1\).pdf](https://www.unicef.org/emerg/files/Cape_Town_Principles(1).pdf). Accessed on 12 May 2016 at p1.

<sup>85</sup> UNICEF 1997 at p1.

<sup>86</sup> UNICEF 1997 at p1.

<sup>87</sup> Mazurana at p100.

<sup>88</sup> Machel Report.<sup>105</sup>

*Ibid* at p14.

The Cape Town Principles were followed by the Paris Principles in 2007 which re-iterate the same inclusive definition of child soldiers.<sup>89</sup> However, the problem with both sets of principles is that, even though they are recommendations made by experts in the field of child law, they have very little impact within international law. Binding international law is created through consensus between States, either through international customary law or treaties.<sup>90</sup> These principles are thus persuasive, but non-binding. The definition that the two sets of principles recommend to be international law differ from what binding law actually is. These principles are important for the courts in particular as they offer persuasive legal opinions which could be used to justify the court's decision.<sup>91</sup>

Treaties are agreements between States and when signed and ratified become binding international law.<sup>92</sup> The following are various treaties which contain definitions of child soldier. Article 8 (e)(vii) of the Rome Statute states that a war crime includes 'conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities'.<sup>93</sup> This particular age requirement is reflected in other international law instruments, such as the Convention and the Geneva Conventions.

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<sup>89</sup> UNICEF, 'The Paris Principles: Principles and Guidelines on Children Associated with Armed Forces or Armed Groups' (2007). Available from: < <https://www.unicef.org/emerg/files/ParisPrinciples310107English.pdf> >. Accessed on 12 May 2016 at p7.

<sup>90</sup> Bennett at p14-16.

<sup>91</sup> *Ibid.*

<sup>92</sup> *Ibid.*

<sup>93</sup> Rome Statute.

Article 77 of the Geneva Additional Protocol on the Protection of Victims of International Armed Conflict (hereafter 'Protocol I') places a duty on parties to 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 endeavour to give priority to the oldest in situations where the children are between the ages of 15 and 18.<sup>94</sup>

Article 4(3) of the Geneva Convention on Non-International Conflicts (hereafter 'Protocol II'), places a broader definition on the activities of child soldiers and states that 'children who have not attained the age of fifteen years shall neither be recruited in the armed forces...nor be allowed to take part in hostilities'.<sup>95</sup> This definition protects children under the age of fifteen from being recruited in addition to 'directly taking part in hostilities' which is mentioned in Protocol I.

Article 38 of the Convention re-iterates the wording of Protocol I, stating that no child under the age of fifteen shall directly take part in hostilities.<sup>96</sup> It is important to note that there is tension between this provision and Article 1 of the Convention which defines a child as any person under the age of 18.<sup>114</sup> The repercussions of this tension will be discussed as a weakness to the definition of child soldiers.

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<sup>94</sup> Protocol I.

<sup>95</sup> Protocol II.

<sup>96</sup> The Convention. <sup>114</sup>

*Ibid* at Article 1.

Article 1 of the Optional Protocol stipulates 'State parties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities'.<sup>97</sup> Article 2 states that 'State parties shall ensure that persons who have not attained the age of 18 years do not take a direct part in hostilities.'<sup>98</sup> This places an obligation on States to make sure that there is no recruitment of children (for the purposes of taking part in direct hostilities) into national armies.<sup>99</sup> Article 3(1) puts it to States to raise the minimum age of recruitment above the standard imposed by the Rome Statute, the Geneva Protocols and the Convention as it states that voluntary recruitment into armed forces should be raised to the age of eighteen.<sup>100</sup> Article 3(3) goes on to provide minimum safeguards to be applied for voluntary recruitment for children under the age of 18:

- '(a) Such recruitment is genuinely voluntary;
- (b) Such recruitment is carried out with the informed consent of the person's parents or legal guardians;
- (c) Such persons are fully informed of the duties involved in such military service;
- (d) Such persons provide reliable proof of age prior to acceptance into national military service.'<sup>119</sup>

The Optional Protocol, nevertheless, stands alone in stating definitively that 18 years is the threshold for childhood and therefore recruiting of any person under this age is illegal. It is also unique in that it places specific restrictions on voluntary recruitment. However, the fact that the

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<sup>97</sup> Optional Protocol.

<sup>98</sup> *Ibid.*

<sup>99</sup> W Seneviratne, 'International Legal Standards Applicable to Child Soldiers' (2003) 15 *Sri Lanka Journal of International Law* 39 at p43.

<sup>100</sup> Optional Protocol.

<sup>119</sup> *Ibid.*

other international treaties so emphatically have provisions to the contrary not only causes confusion in the definition of child soldier<sup>101</sup>, but also begs the question of what the international customary rule on the matter is.

International customary law is created where there is State practice that is ‘virtually uniform’ combined with *opinio juris* (the belief of the State that it is bound).<sup>102</sup> State practice can be gauged by the treaties that States sign up to and ratify. International customary law is binding on all States unless the State is a persistent objector of the particular rule.<sup>103</sup> The first question is does State practice virtually uniform? The Optional Protocol came to force in 2002 and has 165 State parties that have ratified.<sup>104</sup> The Convention is one of the most widely adhered to treaties with 196 State parties to the Convention, of this only 2 have not ratified the Convention.<sup>105</sup> The provisions of the Geneva Protocols form international humanitarian law and are widely recognized as the rules of practice during war time.<sup>106</sup> This trend could be described as behaviour that is virtually uniform by States. In addition, the fact that States generally recognize the Geneva Protocols (in particular) as the standard that they must act within during war time suggests the belief that they are bound by law<sup>126</sup> – thus *opinio juris* is present. The prevailing international

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<sup>101</sup> Quénivet at p222-233.

<sup>102</sup> *North Sea Continental Shelf Cases*.

<sup>103</sup> *Nicaragua Merits Case*.

<sup>104</sup> Optional Protocol.

<sup>105</sup> The United States of America and Somalia have not ratified. Somalia cannot ratify at the moment because it currently does not have a recognized government. See Convention.

<sup>106</sup> Quénivet at 223.

<sup>126</sup> *Ibid* at 223.

customary law rule would thus be the one reflected in the Convention and the Geneva Protocols which set the minimum age of recruitment at 15.

African regional agreements set the age of 18 as the minimum age for recruitment. Article 2 of the African Charter on the Rights and Welfare of the Child (hereafter 'African Children's Charter') states that a child is any person under the age of 18.<sup>107</sup> Article 22(2) references child soldiers in particular by obliging State parties to 'take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain, in particular, from recruiting any child'.<sup>108</sup> Article 22(2)'s reference to 'any child' with no specification of any age can (when taken within the context of the entire treaty) suggest that any person under the age of 18 shall not be recruited. This can be contrasted with Article 38 of the Convention which makes a specification for the age of 15, indicating that that section should be treated differently from the rest of the treaty which defines a child as anyone under the age of 18 years. The African Children's Charter does, nevertheless, have the same reference to children taking a 'direct part in hostilities'<sup>109</sup> and does not give more information on what 'direct part' entails. On the face of it such language has the potential to exclude girl child soldiers entirely or with a looser interpretation include their combat and spying activities and exclude their experiences as sexual and domestic slaves.

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<sup>107</sup> African Charter in the Rights and Welfare of the Child 1990 CAB/LEG/24.9/49.

<sup>108</sup> *Ibid.*

<sup>109</sup> African Children's Charter at Article 22(2).

### 3. Weaknesses in the definition

This part of the dissertation will consider the weaknesses of the definition of 'child soldier', under the subheadings: Compromised Wording of Treaty Law, Treaty Reference to Direct Participation and Focus on National Armies.

#### 3.1 Compromised wording of treaty law

Ann Sheppard points out that the first key weakness of Protocol I and Protocol II is within the wording of the Protocols.<sup>110</sup> She states that the state of modern warfare is such that conflicts are 'predominantly internal' in nature, meaning that Protocol I is seldom used.<sup>111</sup> Taking for example the conflict zones referred in Chapter 2 – all of them (with the exception of Mozambique which had a regional element<sup>112</sup>) were civil conflicts therefore Protocol I would not apply to them.

Sheppard goes on to criticize Protocol II because of the added constrictions that it places on itself - by virtue of Article 1(1) which sets out conditions to be satisfied before the provisions of the Protocol are engaged.<sup>113</sup> These conditions include that the conflict must be within the territory of a signatory State, the State's armed forces must be involved, the other forces must be under

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<sup>110</sup> A Sheppard, 'Child Soldiers: Is the Optional Protocol Evidence of an Emerging "Straight-18" Consensus?' (2000) 8 *International Journal of Children's Rights* 37 at p40.

<sup>111</sup> *Ibid* at p41.

<sup>112</sup> Mazurana at p17.

<sup>113</sup> Sheppard at p41-42.

<sup>134</sup> Protocol II.

‘responsible command’ as well as being capable of or exercising territorial control.<sup>134</sup> The conditions mean that provisions of Protocol II only apply to State parties and rebel groups of a particular size and influence – this potentially leaves out smaller rebel groups who may be involved in recruiting children.

The Convention is not immune to the trend of using compromised language which leads to incongruence within the text. This compromised wording is evident in the age range debate. Sheppard describes the drafting process of the Convention and how it involved the compromise between State sovereignty in the form of ‘military feasibility’ and humanity.<sup>114</sup> It was noted that States found the age of eighteen would be difficult during times of conflict and thus opted for the compromise of the age of fifteen we see in the text.<sup>115</sup> Sheppard asserts that Article 38 contains ‘compromised wording’<sup>116</sup>, which she uses as an opportunity for a broader interpretation. Article 38 states:

‘States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest.’<sup>138</sup>

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<sup>114</sup> Sheppard at p46.

<sup>115</sup> Legislative History of the Convention on the Rights of the Child, Part II (2007). UN Doc. E/CN.4/1989/48. Available from: <<http://www.ohchr.org/Documents/Publications/LegislativeHistorycrc2en.pdf>>. Accessed on 15 May 2016.

<sup>116</sup> Sheppard at p47.

<sup>138</sup> The Convention.

Sheppard argues that a liberal interpretation which protects children under the age of 18 is possible, especially when read with the provisions of the Optional Protocol.<sup>117</sup> However, this is a tenuous argument. Even if the argument can be made that all children under the age of 18 are protected from being recruited, the clear wording of the Convention would suggest that adolescents between the ages of 15 and 18 are afforded significantly less protection than those under the age of 15.

Sereviente severely criticizes the wording of the Convention stating that it is illogical for children between the ages of 15 and 18, who would be considered children for all intents and purposes under the Convention are allowed to be recruited and participate in armed conflict.<sup>118</sup> The instability between the minimum ages of 15 and 18 have led to the practice of some States of trying to get parental consent in order to recruit children between the ages of 15 and 18.<sup>119</sup> Sheppard states that such consent does not erase the underlying legal problem that motivates the minimum age requirements to begin with, in that it still goes against the best interests of the child.<sup>120</sup> A parent's perception of the best interests of the child, according to Sheppard can be marred by several factors, including (but not limited to) the child joining an army to ease the entire family's financial constraints.<sup>121</sup> This illustrates some of the practical consequences that the compromised wording of the Convention has caused.

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<sup>117</sup> Sheppard at p47.

<sup>118</sup> Seneviratne at p41.

<sup>119</sup> Sheppard at p49-50.

<sup>120</sup> *Ibid* at p50.

<sup>121</sup> *Ibid*.

### 3.2 Treaty References to direct participation

Sheppard recognizes the weakness of the specific reference to direct participation found in the international agreements.<sup>122</sup> Protocol I sanctions that children ‘do not take a direct part in hostilities’.<sup>123</sup> Protocol II states that children should ‘neither be recruited nor allowed to take part in hostilities’.<sup>124</sup> The Optional Protocol repeats the language that children ‘shall not take a direct part in hostilities’.<sup>125</sup> The International Committee of the Red Cross (hereafter ‘ICRC’) states ‘direct participation’ suggests that has three criteria:

- ‘(1) A threshold regarding the harm likely to result from the act,
- (2) a relationship of direct causation between the act and the expected harm, and
- (3) a belligerent nexus between the act and the hostilities conducted between the parties to an armed conflict.’<sup>126</sup>

Sheppard correctly takes requirement (2) which requires that there be a direct causal link between the act and the harm as implicitly excluding other activities associated with warfare which include spying and transporting of arms.<sup>127</sup> Sheppard cites the Machel report which emphatically stresses that even children put in non-combative roles are at risk as well and are in

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<sup>122</sup> Sheppard at p51.

<sup>123</sup> Protocol I at Article 77.

<sup>124</sup> Protocol II at Article 4(3).

<sup>125</sup> Optional Protocol at Article 1.

<sup>126</sup> International Committee of the Red Cross, ‘Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law’ (2009). Available from:

<<https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>>. Accessed on 10 July 2016 at p46.

<sup>127</sup> Sheppard at p51.

need of the same protection afforded to combatants.<sup>128</sup> This is more so pertinent in the case of girl child soldiers who are often subject to non-combative roles.

The Optional Protocol offers very little relief to this problem as Seneviratne points out Article 1(1) refers to direct hostilities which leaves room for children to participate in indirect hostilities.<sup>129</sup>

This is an accurate critique of the Optional Protocol.

### 3.3 Voluntary Recruitment

The third weakness of the definition is the debate between voluntary and compulsory recruitment. Article 50 of the Geneva IV conventions states that States may not enlist children 'in formations or organizations subordinate to it'.<sup>130</sup> This has raised the question of whether children can themselves voluntarily join without being enlisted by the State. The Convention and the Geneva Protocols state that priority should be given to the eldest when recruiting children between the ages of 15 and 18<sup>131</sup> – which leaves room for voluntary recruitment of these children.

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<sup>128</sup> Sheppard at p51.

<sup>129</sup> Seneviratne at p43.

<sup>130</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) 1949, 75 UNTS 287.

<sup>131</sup> The Convention at Article 38.

The Optional Protocol also creates the problem of compulsory versus voluntary recruitment of children under the age of 18. Article 2 of the Optional Protocol puts an age cap on State recruitment of children stating that there will be no compulsory recruitment of children under the age of 18.<sup>132</sup> Article 3 when read in its entirety creates a system where it is feasible for children under the age of 18 to voluntarily join armed forces.<sup>133</sup> Some States (as reported by Sheppard), have thus argued that voluntary recruitment is within the limits of international law.<sup>134</sup>

An argument against voluntary recruitment of children will be made on two fronts. The first is based on the Machel report. Machel states that children under the age of 18 are easily manipulated and cannot be taken as having the capacity to voluntarily join the armed sources.<sup>135</sup> From a capacity perspective – children cannot volunteer to join armed forces because they lack capacity.

The second front is related to the Machel report, in that I will look at children's rights theory on autonomy. Sarah Kenyon Lischer outlines recruitment patterns or 'causal paths' of child recruitment in Congo.<sup>136</sup> She begins by stating that displacement is one of the products of violent

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<sup>132</sup> Optional Protocol.

<sup>133</sup> *Ibid.*

<sup>134</sup> Sheppard at 51-52.

<sup>135</sup> Machel Report at p12.

<sup>136</sup> Lischer at p143.

conflict.<sup>137</sup> There are three different pathways: the militarization path whereby there is the presence of militants amongst displaced communities and those militants recruit children.<sup>138</sup> The second pathway is the insecurity path whereby there is an attack on displaced community camps and there is either abduction of children by attackers not allied with refugees or ‘defensive mobilization of refugees’ which leads to child recruitment.<sup>139</sup> The third pathway is the insecurity over time pathway where the cycle starts with either an insecure camp which leaves for an ‘opportunity for non-civilian activities in camps’ which leads to voluntary child recruitment, or protracted displacements leads to frustration amongst young people which leads to voluntary child recruitment.<sup>162</sup>

Lischer doubts whether recruitment of child soldiers could ever be considered voluntary as circumstances cause the children to join armed groups.<sup>140</sup> Piñero agrees with this deduction from a legal perspective stating that that child soldiers being considered as ‘consenting participants’ is *contradictio in terminis*.<sup>141</sup> Piñero starts off by stating that consent comprises of three elements: competence, voluntariness and understanding.<sup>142</sup> Competence speaks to when a child is seen to have entered the age of majority and have full legal capacity.<sup>143</sup> Piñero looks at treaties including the Convention as well as the African Children’s Charter and comes to the conclusion that there

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<sup>137</sup> *Ibid.*

<sup>138</sup> *Ibid* at p145.

<sup>139</sup> *Ibid.*

<sup>162</sup> *Ibid.*

<sup>140</sup> Lischer at p145-147.

<sup>141</sup> V Piñero, ‘Challenges with Reconciliation of Child Soldiers as Perpetrators’ (2004) 1 *Eyes on the ICC* 30.

<sup>142</sup> Piñero at p32.

<sup>143</sup> *Ibid* at p33.

seems to be a general consensus that a child is any person under the age of 18.<sup>144</sup> Therefore any person under the age of 18 lacks competence to voluntarily enter such an arrangement. In terms of the second element of voluntariness, Piñero reasons that the concept is rooted in the freedom to choose one of several options.<sup>145</sup> The circumstances surrounding child recruitment, Piñero asserts, makes children often see joining armed groups as the 'only real available choice'.<sup>146</sup> Piñero cites surrounding circumstances which lead to 'voluntary' recruitment; and these include displacement, homelessness, the children are victims of unpredictable attacks and sometimes the children are orphans.<sup>147</sup> The 'voluntary choice' to join armed forces is therefore a nonconsensual resolution.<sup>171</sup> The final element of understanding is said to need the individual to have sufficient information and evidence from conflicts suggest that children often do not have this information before making the decision to join armed groups.<sup>148</sup> This underlying reason is also used in the Machel report to revoke the idea of voluntary recruitment.<sup>149</sup> It is therefore the opinion of this dissertation that a child under the age of 18 cannot volunteer to be part of an armed group.

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<sup>144</sup> *Ibid* at p34.

<sup>145</sup> *Ibid* at p35.

<sup>146</sup> *Ibid* at p36.

<sup>147</sup> *Ibid* at p35.

<sup>171</sup> *Ibid* at p36.

<sup>148</sup> Piñero at p35.

<sup>149</sup> Machel Report at p12.

### 3.4 Focus on national armed forces

An additional weakness of the Convention that Seneviratne points out is that it only applies to State parties and non-State parties are not bound by these provisions.<sup>150</sup> This is true of the other international agreements that have been considered thus far. The African Children's Charter places the obligation on State Parties to take 'necessary measures to ensure' that there is no recruitment of children.<sup>151</sup> The Optional Protocol does the same as it predominantly regulates activities of national armed forces and not those of dissident groups which is where we see a proliferation of the use of child soldiers.<sup>152</sup> This is illustrated by Article 2 which states: 'States Parties shall ensure that persons who have not attained the age of 18 years are not compulsorily recruited into their armed forces.'<sup>153</sup> The problem with this is that as seen in the synopses of different African conflicts, often it is dissident groups that are involved in the recruitment of child soldiers.

Protocol II could perhaps be looked towards to solve this issue as its focus is primarily non-international conflicts. However, Article 1(1) of Protocol II sets conditions for the application of the provisions of the treaty and these include that the conflict is between a State party's armed forces 'and dissident armed forces or other organized armed groups which, under responsible

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<sup>150</sup> Seneviratne at p46.

<sup>151</sup> African Children's Charter at Article 22(2).

<sup>152</sup> Optional Protocol.

<sup>153</sup> *Ibid.*

command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations'.<sup>154</sup> This has the potential of excluding smaller armed groups that do not have the required control over territory – leaving some recruited children outside the periphery of Protocol II. In terms of the conflicts considered in this dissertation, the Mozambican and Sierra Leonean conflicts would be excluded. This uneven protection of children is the reason why international criminal law must be considered as a way to remedy the weaknesses of international treaty law.

#### 4. How can International Criminal Law can provide adequate protection for girl child soldiers?

The focus of most treaties is on State responsibility does not effectively curb the recruitment of child soldiers. As seen in the various examples of African conflicts, the recruitment child soldiers is often undertaken by rebel militia who may not necessarily be associated with the State. Placing duties and liabilities on States, though useful, does not truly address the perpetrators of these practices. International Criminal Law aims to curb this problem by placing criminal responsibilities in the individual themselves – meaning that the leaders of rebel groups responsible for the recruitment and abuse of children in armed groups can be called upon to adhere to international law or face liability for failing to.

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<sup>154</sup> Protocol II.

Other options are available, but they are nevertheless, flawed. Seneviratne proposes that the key way to preventing the recruitment of child soldiers is for more States to sign up and ratify the Optional Protocol and other such instruments which make the minimum age for recruitment 18.<sup>155</sup> In the case of non-State actors and groups, Seneviratne proposes that they are dealt with at a domestic level.<sup>156</sup> The problem with relying on domestic courts alone is illustrated by the way in which the issue of child soldiers was dealt with in Sierra Leone. During the peace process there was a push from the government and civil society in Sierra Leone for child soldiers who were responsible for committing atrocities to be held accountable for the crimes.<sup>157</sup> Children between the ages of 15 and 18 were especially vulnerable to criminal prosecution themselves.<sup>182</sup> The injustice of this is in the underlying rationale. A hypothetical example of a girl child soldier will be used to illustrate. As seen in the case of the DRC, many girls are victims of abduction.<sup>158</sup> If a girl under the age of 15 is abducted, trained as a soldier and commits atrocities as they have been trained to do; should they be held solely accountable as perpetrators of war crimes after they turn 15 years old (taking into account that younger children may lack the requisite capacity to fully understand their actions<sup>184</sup>)? From a capacity perspective the answer would be no – surely the orchestrator of the crimes who fully understood or was capable of understanding the purpose

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<sup>155</sup> Seneviratne at p47.

<sup>156</sup> *Ibid.*

<sup>157</sup> Report of the Secretary General on the establishment of the Special Court for Sierra Leone S/2000/915. Available from: <<http://www.rscsl.org/Documents/Establishment/S-2000-915.pdf>>. Accessed on 15 May 2016. <sup>182</sup> Report of Secretary General at p7.

<sup>158</sup> Mazurana at p107.

<sup>184</sup> Piñero at p36.

of recruiting the child soldiers within the conflict should be the one liable for war crimes. The use of the Rome Statute could prove useful because, unlike the Optional Protocol and other treaties, the crimes listed attach to individuals meaning that the responsibility is not just on State parties and is meant to bring to prosecute the gravest offences and offenders.<sup>159</sup> In addition to this, Article 26 of the Rome Statute states that no person under the age of 18 years shall be prosecuted for international crimes.<sup>160</sup> This would yield a more effective result as commanders of war are then deterred from using child soldiers as instruments of war.

Webster accurately concedes that the Rome Statute re-enforces some of the inherent problems with treaty language through its reference to active participation and repeating the Geneva Protocols' and Convention's language that 'conscripting or enlisting children under the age of fifteen' is considered to be against the law.<sup>161</sup> In this regard, the negotiated nature of the Rome Statute is one of its weaknesses. However, the Preparatory Committee of the Rome Statute spell out the difference between 'use' and 'participation' by stating that:

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

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<sup>159</sup> The Special Court of Sierra Leone at Article 1.

<sup>160</sup> Rome Statute.

<sup>161</sup> T Webster 'Babes with Arms: International Law and Child Soldiers' (2007) *Case Western Reserve University Faculty Publications* 556 at p241.

bearers to take supplies to the front line, or activities at the front line itself, would be included in the terminology.<sup>162</sup>

The definition of this terminology is part of the *travaux préparatoires* and therefore have a persuasive legal power attached to them.<sup>163</sup> The explanation of why the Rome Statute used ‘participation’, and departing from the language already seen in the Convention and the Additional Geneva Protocols I and II, is more suited to the experiences of war that girl child soldiers face. As mentioned at the beginning of this chapter, the experiences of girl child soldiers differ from that of boy child soldiers as they not only take a direct part in hostilities, but are often used to take part indirectly in hostilities as spies and protectors of base camps.<sup>164</sup> This stretch in the terminology used is therefore welcomed.

However, it does not encapsulate entirely the issues girl child soldier faces – in particular being used as sex and domestic slaves. There are two potential resolutions to this problem. The first is using multiple provisions of the Rome Statute to try and cover all the experiences of girl child soldiers. The provisions of the Rome Statute could potentially cover the multi-faceted problem that the girl child soldier presents international law. Article 8(2)(e)(vi) states that war crime includes:

‘Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also

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<sup>162</sup> Hermann von Hebel & Darryl Robinson, ‘Crimes Within the Jurisdiction of the Court’, in Roy S. Lee (ed) *The International Criminal Court: The Making of the Rome Statute – Issues, Negotiations, Results* (1999).

<sup>163</sup> Webster at p241.

<sup>164</sup> Mazurana at p105.

<sup>191</sup> Rome Statute.

constituting a serious violation of article 3 common to the four Geneva Conventions'<sup>191</sup>  
This provision when read with Article 8(2)(e)(v) which prohibits the conscription of children into armed forces, the experiences of the girl child soldier would be justiciable.<sup>165</sup>

The second and more preferred approach would be for the ICC to interpret the 'use' of child soldiers to include the rape, sexual and domestic violence that girls are privy to. This second approach would be preferred as girls would be included and their experiences validated as those of child soldiers. They would not have to rely on a patchwork of different provisions to try and explain in legal language what they truly are. Webster underscores that a key advantage to the Rome Statute which is the creation of the ICC which has the power to interpret the law and also has been an active organisation in terms of the criminalization of those responsible for the recruitment of child soldiers.<sup>166</sup> It is for this reason that I conclude that the ICC is ideally placed to deal with the nuances attached to recruitment of the girl child soldier in particular. The test that is to be applied is whether the current treaty and customary law rules, as they have been applied protect the realities faced by girl child soldiers?

## 5. Concluding Remarks

This chapter has identified the main problems with the definition of child soldier. Many of these weaknesses are entrenched in treaty law and they include the compromised language of treaties

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<sup>165</sup> Rome Statute.

<sup>166</sup> Webster at p241.

which leads to an imprecise age rule. It is still unclear whether only children under the age of 15 are to be considered child soldiers or if the rule could extend to those under the age of 18. This issue directly affects the second weakness of voluntary recruitment. As shown in the argument made in this chapter, voluntary recruitment cannot be said to have taken place due to a lack of capacity and understanding often surrounding the recruitment of child soldiers.<sup>167</sup>

The realities associated with child soldiers is vastly different from what the treaties subscribe. Firstly, the recurring reference to 'direct participation'<sup>168</sup> in many treaties is incongruent with the experiences and activities of girl child soldiers. Secondly the nature of treaty law which primarily focuses on the duties of States is out of touch with the civil and rebel nature of African conflicts. The mechanism created by the Rome Statute has the potential to cure these treaty ills. The Rome Statute places emphasis on 'participation' over 'use' which could encompass the activities of girl child soldiers as spies and guards of the base camps. The Rome Statute's system of prosecution allows for the individual criminal liability of those most responsible for the crimes. Finally, the mechanism of the ICC allows for the interpretation of treaty law that is in line with the realities faced by child soldiers. A closer look into the international criminal law framework is needed to find out if it has any problems that could hinder the recognition of girl child soldiers' dichotomous identity, or if it is flexible enough to provide adequate protection.

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<sup>167</sup> Machel Report.

<sup>168</sup> The Convention at Article 38.

## CHAPTER 4: INTERNATIONAL CRIMINAL LAW FRAMEWORK – PROCEDURAL ISSUES

### 1. Introduction

International Criminal law is a relatively new advent of international law. Its key characteristic is that it attaches liability for the crime onto the individuals and not the State; as put in the *Charles Taylor* case the aim to bring to justice the highest ranking officials.<sup>169</sup>

International criminal law cases can be heard in different tribunals, as well as, (more commonly) the ICC. The ICC has jurisdiction to hear cases involving the crimes of crimes against humanity, genocide, war crimes and crimes of aggression.<sup>170</sup> In assessing the whether this mechanism of international criminal law adequately protects girl child soldiers, this Chapter will look at procedural rules of the criminal law tribunals. The key procedural rules and interpretation that will be examined will be the victims' right to participate, their right to protective measures and the balance of victims' rights with those of the accused.

### 2. Definition of victim

The court process usually begins after the conflict, or logically after the recruitment of child soldiers. One major way in which the girl child soldiers can participate in proceedings and make their experiences known and adjudicated on, is through being witnesses and victims for the case. Sociological studies conducted by Mazurana found that former girl child soldiers suffer from stigmatization from their communities when they return to their homes.<sup>171</sup> The study conducted

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<sup>169</sup> *Prosecutor v Charles Ghankay Taylor* 2012 SCSL-03-01-T.

<sup>170</sup> Rome Statute at Article 5.

<sup>171</sup> Mazurana at p36.

in Northern Uganda, Sierra Leone and Mozambique found that girl child soldiers were less likely to participate in re-integration programmes.<sup>172</sup> This renders provisions such as Article 39 of the

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<sup>172</sup> Mazurana at p36.

Convention (which calls for ‘the social re-integration of child victims’<sup>173</sup>) potentially ineffective. The reality is many girls are ostracized after escaping from rebel groups – a reality which boy child soldiers do not face to such a large extent.

As mentioned in the Introduction, girl child soldiers are often victims of rape, sexual assault and forced marriages to their commanders or other soldiers.<sup>174</sup> In Mozambique, it was found that not only did girls constitute 40 per cent of the child soldier forces, but also that when the girls were reunited with their families, their families would often send them back to their ‘husbands’ or they were sent away from their communities.<sup>175</sup> The same pattern was repeated in Sierra Leone.<sup>176</sup> In Sierra Leone the additional problem that was discovered during the re-integration and rehabilitation process, was that the former girl child soldiers would sneak back into their villages, in an attempt not to suffer any associated discrimination.<sup>177</sup> The core issue in all these cases was that girls who were seen as having lost their ‘sexual purity’ were heavily criticized and stigmatized.<sup>178</sup> Many of the girls had been prematurely pregnant and had suffered early child birth, abortions and exposure to sexually transmitted diseases including HIV/Aids.<sup>179</sup> This has resulted in former girl child soldiers having increased psycho-social problems.<sup>207</sup> It is with this background in mind that one begins to assess the adequacy of the protection that the International Criminal Law system provides.

The system that the ICC has in place has the potential to lower stigmatization of girls in society. One way in which girl child soldiers access criminal court system is as witnesses and as victims. Rule 85 of the Rules of Procedure and Evidence of the International Criminal Court (hereafter

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<sup>173</sup> The Convention at Article 39.

<sup>174</sup> Mazurana at p36.

<sup>175</sup> *Ibid.*

<sup>176</sup> *Ibid.*

<sup>177</sup> *Ibid.*

<sup>178</sup> *Ibid.*

<sup>179</sup> *Ibid.*

*Ibid.*

'Rules of Procedure') defines victim as 'natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court'.<sup>180</sup> The ICC in a dissenting judgment by Judge Blattman added detail to this definition by stating 'a victim is someone who experienced personal harm, individually or collectively with others, directly **or indirectly**, in a variety of different ways such as physical or mental injury, emotional suffering or economic loss.'<sup>181</sup> This definition was used in the *Prosecutor v Lubanga Dyilo* in deciding who was a victim and who was not.<sup>182</sup> When the definition given by Judge Blattman is read together with the Rules of Procedure, one sees that 'victim' can be interpreted widely. Girl child soldiers could easily fall into this category as those who have suffered harm directly. Garkawe has pointed out that the use of the word 'harm' in the definition is one that could possibly include 'not only 'primary' victims (those directly harmed by the criminal act), but also 'secondary' victims (those psychologically or financially dependent on the primary victim)'.<sup>183</sup> For our given legal issue, this would mean that girl child soldiers, together with their families and communities would be considered to be victims and thus could all be included in the court process. This would help alleviate levels of secrecy and stigma associated with girl child soldiers returning home – as all members of the society, and not just the girls as individuals, are seen as being affected by the use of girl child soldiers. The different perspective taken would further aid in rehabilitation after the conflict; rehabilitation would not

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<sup>180</sup> Rules of Procedure and Evidence of the Rome Statute of the International Criminal Court, 2002. Available from: <<https://www.icc-cpi.int/iccdocs/pids/legal-texts/rulesprocedureevidenceeng.pdf>>. Accessed on 13 January 2017.

<sup>181</sup> *Prosecutor v Thomas Lubanga Dyilo*(Decision on Victims' Participation) 2008 01/06/06-1119 , Judge Blattman Separate and Dissenting.

<sup>182</sup> *Prosecutor v Dyilo* (2012) at para 16.

<sup>183</sup> S Garkawe, 'Victims and the International Criminal Court: Three Major Issues' (2003) 3 *International Criminal Law Review*, at p346. <sup>212</sup> Mazurana at p36.

solely be focused on the girl (which has the unintended effect of creating stigma and discrimination against her<sup>212</sup>) but it would be focused on the community as a whole.

### 3. Overview: Victims' Right to Participate

The definition of victim is indeed wide, however, the Rome Statute does put a limit on which victims are afforded which rights. An example of this is participation rights which are only afforded to some victims. Article 68(3) of the Rome Statute states that:

'Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.'<sup>184</sup>

This provision has the capacity to place victims at centre stage, giving them the right to participate in proceedings. Nevertheless, one must note the change in language from the use of the wider term 'harm' as seen in the Rules of Procedure, to the narrower qualifier requiring that 'personal interests' to be affected first before victims can participate. This shift in the wording of the Rome Statute against that in the Rules of Procedure, leaves it to the court to decide how victims are to be incorporated into the judicial process and which rights they are to be afforded. This could lead to uncertainty before the case is brought to court on who is to be considered a victim with participatory rights and who is not.

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<sup>184</sup> Rome Statute.

*Ibid.*

The ICC has been afforded the power by the Rome Statute to decide on grey areas in this part of the law.<sup>185</sup> Therefore looking at how they have decided to interpret this provision in their case law would help alleviate some of the uncertainty. As seen in the paragraph above, Article 68(3) allows for victims with ‘personal interest’ in the matter to have their concerns heard, but with the proviso that the court decides whether this would be prejudicial to the rights of the accused.<sup>215</sup> To avoid confusion as to when the hearing would be prejudicial to the accused and when it would not, the court has within their case history issued guidelines set by Judge Blattman.

These guidelines have been re-used and relied upon in cases such as the *Prosecutor v Dyilo* case<sup>186</sup>; these include that there should be proof of identity which is to be obtained through a variety of sources including official and non-official documents.<sup>187</sup> The participation of victims is to be in line with Rule 89(1) of the Rules of Procedure which provides that victims are to make a written application and such application is to be submitted to the Registrar who is to direct the application to the appropriate Chamber, as well as make a copy the submission to the Prosecutor and the defence.<sup>188</sup> The Chamber is then to make a decision on who responds to the application within what time frame.<sup>189</sup> This is a key guideline which led the court in the *Prosecutor v Dyilo* case to dismiss victims reports of girl child soldiers.<sup>190</sup> The victim’s written applications and evidence was submitted in the later part of the trial and the court decided that even though the evidence was pertinent, admitting it into court would potentially violate the rights of accused.<sup>191</sup> The court uses the power that Article 68(3) bestows on it to determining at what stages victim’s statements can be considered without prejudice to the accused’s rights.<sup>192</sup> However, one of the

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<sup>185</sup> Rome Statute at Article 68(3).

<sup>186</sup> Decision on Participation of Victims (2008) at para 112-126.

<sup>187</sup> *Ibid.*

<sup>188</sup> Rules of Procedure.

<sup>189</sup> *Ibid* at Rule 89(1).

<sup>190</sup> Decision on Participation of Victims (2008) at para 112-126.

<sup>191</sup> *Ibid.*

<sup>192</sup> Rome Statute.

guidelines set out by the Judge Blattman (which the court stated that they would follow) is that: 'Participation is to be decided on the basis of the evidence or issues under consideration at **any particular stage** in the proceedings and victims wishing to participate should set out in a discrete written application the nature and the detail of the proposed intervention'.<sup>193</sup> By choosing to take a strict interpretation to Article 68(3) by deciding a cut-off time for victim submissions, the court implicitly sets aside this guideline put forward by Judge Blattman. The problem with the manner in which the court looked over this guideline is that it did not provide critical analysis as to why it chose a strict Article 68(3) reading over the guideline. It provides no reason why the other guidelines are to be followed, and why 'at any particular stage' is severed from its balance of rights.<sup>224</sup>

It can be assumed that the balance towards the rights of the accused is what swayed this decision. Nevertheless, it is this lack of clear explanation of why this guideline is abandoned that it is to be asserted that the court took a superficial approach when assessing the question of girl child soldiers. The problem of how best to balance the victims' rights with those of the accused is one that is to be considered in a later part of the discussion. Nevertheless, for now it is important to note how the rights to participation of the victim are not absolute and the court can choose which stage acts as a cut-off point for the admission. The court's reasoning was in view of fairness to the accused, but the consequence of this decision is that the plight of girl child soldiers in this case was discounted.

### 3.1 Uncertainty over the standard of proof victims have to adhere to

Other guidelines and their interpretation also have the potential to have a negative effect on girl child soldiers. Judge Blattman continues the list by stating that those applying to be identified as

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<sup>193</sup> Decision on Participation of Victims (2008) at para 112-126.

<sup>224</sup> *Prosecutor v Dyilo* (2012) at p16.

*Ibid.*

victims need to show a link between the harm suffered and the crimes that the accused is charged with through a written application.<sup>194</sup>

As a separate guideline states that in accordance with Article 68(3) victims have to show that 'their personal interests have been affected' in a manner that does not prejudice the rights of the accused to receive fair and impartial trial.<sup>226</sup> Here we see a resurgence of the terms 'personal interests' and 'harm' again. In this instance it is in the context of evidentiary burdens. It can be argued that the easier evidentiary threshold for victims to overcome would be to prove a link between harm they suffered and the crime that the accused is charge with. In this context families and communities affected could be a part of the proceedings as victims. The more difficult evidentiary burden to prove would be that the personal interests have been affected. Due to the fact the guideline and Article 68(3) both mention the 'personal interests' would give more force to this interpretation being adopted by the court. However, this is a question that the ICC has yet answered, meaning that there is still a level of uncertainty on who is considered a victim and who has the right to participate in proceedings.

The uncertainty in the definition of a victim and the debate between the terminology of 'harm' and 'personal interests' affects the how the rights of the victims are interpreted. Examples of this are Rule 131(2) of the Rules of Procedure which provides that victims' participation rights include the right to consult the record of proceedings ('subject to any restrictions concerning confidentiality and the protection of national security information') and 'in principle' victims have 'right to access and receive notification of all public filings and those confidential filings which concern them (**as identified by the parties**), insofar as this does not breach any protective

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<sup>194</sup> Decision on Participation of Victims (2008) at para 112-126.

measures that are in place'.<sup>195</sup> Rule 56 gives victims the right to call for reparations.<sup>196</sup> Guidelines also provide that victims have rights to be granted protected measures. It is therefore imperative that the court decides on an interpretation of the definition of 'victim': is it to be taken as a person who suffers 'harm', or a person with 'personal interests'? As it affects how we decide who has participatory rights as well as other rights conferred during the trial.

#### 4. Victims' Protective Measures

Rule 96 of the International Criminal Tribunal of Rwanda (hereafter 'ICTR Rules') ensures special protection for those victims of rape and other sexual crimes.<sup>197</sup> It states that no corroboration of the victim's testimony is to be required, and consent shall not be used as a defence if the victim has either 'been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression' or it is 'reasonably believed that if the victim did not submit another might be so subjected, threatened or put in fear.'<sup>230</sup> Further the provision

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<sup>195</sup> Rules of Procedure.

<sup>196</sup> *Ibid.*

<sup>197</sup> International Criminal Tribunal of Rwanda Rules of Procedure and Evidence (2013). Available from: <[http://unictl.unmict.org/sites/unictl.org/files/legal-library/130410-rpe-en-fr\\_0.pdf](http://unictl.unmict.org/sites/unictl.org/files/legal-library/130410-rpe-en-fr_0.pdf)>. Accessed on 14 June 2016.

<sup>230</sup> ICTR Rules.

*Ibid.*

explicitly states that prior sexual conduct of the victim shall not be admitted as evidence or defence.<sup>198</sup>

The ICTR Rules provided protective measures which have been mirrored in the Rome Statute. In order to provide adequate protection, there need to be procedural elements in place that ensure that former girl child soldiers can approach tribunals and have their rights to privacy and dignity protected so as to prevent secondary victimisation. Article 68(1) of the Rome Statute tries to bring this aim to fruition stating:

‘The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.’<sup>199</sup>

On the surface, this provision seems to provide protection for the case of the girl child soldier. Analysis of the protective procedural measures offered to victims by Bedont praises Article 68 for adding provisions to ensure gender protections.<sup>200</sup> Bedont recounts how prior to such provisions in the Rome Statute, the ‘lack of explicit mention of sexual violence crimes as grave breaches failed to give due recognition to the seriousness of the crimes.’<sup>201</sup> Article 68 (1) recognizes the importance of protection of victims’ safety both physically and psychologically.<sup>235</sup>

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<sup>198</sup> ICTR Rules.

<sup>199</sup> Rome Statute.

<sup>200</sup> B Bedont & K Hall-Martinez, ‘Ending Impunity for Gender Crimes Under the International Criminal Court’ (1999) 6 *The Brown Journal of World Affairs* 1, p78.

<sup>201</sup> *Ibid* at p71.

<sup>235</sup> *Ibid* at p78.

The Prosecutor is also under the obligation to ensure that measures are taken to ensure such protection.<sup>202</sup> It is important to note that this provision has the capacity to ensure the protection of girl child soldiers when they are part of court proceedings as victims and witnesses. However, this provision does have a downside which Bedont can be criticised for not mentioning: it is subject to the proviso that these measures of privacy and protection do not interfere with the balance of rights of the accused to a fair and impartial trial.

In practice, in the *Prosecutor v Dyilo* case victims were granted protective measures especially if they were in a vulnerable position; the ongoing conflict in the area meant that these protections were especially important.<sup>203</sup> Out of 129 victims only 23 identities were disclosed.<sup>204</sup> The court noted that ‘while the safety and security of victims is a central responsibility of the Court, their participation in the proceedings cannot be allowed to undermine the fundamental guarantee of a fair trial.’<sup>205</sup> This statement by the court mirrors Article 68(1) – it allows protections but tries to balance the rights of the accused. Other measures taken which tried to provide protective measures and balance these with the accused’s rights were: testimonies were often heard in private sessions, and allowing for redactions of sensitive information.<sup>206</sup> The court would review what should be redacted and some of the redactions were lifted during the trial.<sup>207</sup> In an attempt to grant the accused the right to question their accuser the court engaged Articles 64(7) and 67(1) of the Rome Statute which states that parties and participants are encouraged to thoroughly go through the transcripts of the closed-session testimonies.<sup>208</sup> The protective measures are therefore not absolute, they are (like the participation rights) limited by the rights of the accused.

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<sup>202</sup> Bedont at p78.

<sup>203</sup> *Prosecutor v Dyilo* (2012) at para 107-109.

<sup>204</sup> *Ibid.*

<sup>205</sup> *Ibid.*

<sup>206</sup> *Ibid* at para 117.

<sup>207</sup> *Ibid.*

<sup>208</sup> *Ibid* at para 115-116.

There is a 'tax' that the court imposed for some of the protective measures it granted to the victims - the greater the extent and the significance of the proposed participation, the more likely it will be that the court will require the victim to identify himself or herself.<sup>209</sup> The court tried to mitigate the blow of this statement by mentioning that 'accordingly, when resolving a request for anonymity by a victim who has applied to participate, the Chamber will scrutinise carefully the precise circumstances and the potential prejudice to the parties and other participants'.<sup>210</sup> It is clear that this is an attempt to ensure that accused's right to be able to face their accuser is at play in this decision of how to weight anonymous evidence, however, the cost of this balance is unfairly paid by the victims. The use of closed sessions would have achieved the same or comparative balance of rights.

The interpretation of the balance of rights by the court here, is very different to the approach of Rule 96 of the ICTR Rules which viewed evidence given with little information on the identity of the victims with the same level of severity. The question is then, does the way in which the court grants lesser significance to testimony given by those granted the protective measure of secrecy of identity, undermine the provisions of Article 68(1) of the Rome Statute? The simple answer to this would be yes. As mentioned above, girl child soldiers are often victims of war as well as rape and sexual violence – crimes which are often considered taboo in their communities and lead to their being ostracized.<sup>211</sup> Rule 96 of the ICTR Rules clearly states that its intent is to protect victims of sexual violence. However, a balance so heavily inclined to the rights of accused mean that girl child soldier victims are less likely to participate for fear of their identity being found out, or in the alternative risk their testimonies not being weighed with the intensity that they may deserve if they choose to engage their rights to protective measures. This heavy compromise was

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<sup>209</sup> *Prosecutor v Dyilo* (2012) at para 18.

<sup>210</sup> *Ibid.*

<sup>211</sup> Mazurana at p21.

not necessary, stated in the recent Habré decision, victims' testimonies must be dealt with dignity and all measures must be taken to avoid re-victimisation during the court process.<sup>212</sup>

##### 5. Balance between Rights of the Accused and Victims' Rights

Rule 96 of the ICTR Rules recognised that often the when sexual crimes are being prosecuted, the defence of consent is engaged. Rule 96 states that:

'Before evidence of the victim's consent is admitted, the accused shall satisfy the Trial Chamber in camera that the evidence is relevant and credible'

Provisions such as this can be praised for trying to cure the long-standing tradition of revictimisation of victims using the consent defence, nevertheless, it does put an additional burden of proof on the accused. McAsey argues that the ICC can be accused of taking a victim-centric approach too, which severely impedes on the accused's right to a fair and impartial trial.<sup>213</sup> However as seen in the discussion of protective measures and how they have been interpreted by the court, this is not necessarily the case.

Article 22 of the International Criminal Tribunal of Former Yugoslavia Statute (hereafter 'ICTY Statute') states that the tribunal is to provide protective measures for victims and witnesses which shall include 'the conduct of *in camera* proceedings and the protection of the victim's identity'.<sup>214</sup> During the *Prosecutor v Tadic* case, the court offered total anonymity to four of the witnesses on the reasoning that the witnesses fears reprisals.<sup>249</sup> As a result the accused and his lawyers were not allowed to know the identities of these witnesses.<sup>250</sup> There were guidelines

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<sup>212</sup> *Prosecutor c. Habré* Chambre Africaine Extraordinaire D'Assise 2016. Available from:

<[http://www.chambresafricaines.org/pdf/Jugement\\_complet.pdf](http://www.chambresafricaines.org/pdf/Jugement_complet.pdf)>. Accessed on 11 March 2017.

<sup>213</sup> B McAsey, 'Victim Participation at the International Criminal Court and its Impact on Procedural Fairness' (2011) 5 *Australian International Law Journal* at p116.

<sup>214</sup> International Criminal Tribunal of Former Yugoslavia Statute (2009). Available from:

<[http://www.icty.org/x/file/Legal%20Library/Statute/statute\\_sept09\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf)>. Accessed on 14 June 2016.

<sup>249</sup> *Prosecutor v Tadic* (Decision On the Prosecutor's Motion Requesting Protective Measures For Victims And Witnesses) 1995 IT-94-I-T. <sup>250</sup> *Ibid* at p30.

including that the judges were allowed to observe the demeanour of the witnesses to test their reliability and they must be aware of their identity for the same reason.<sup>215</sup> The defence was also allowed to submit any questions that it wanted to ask the witnesses.<sup>216</sup> The majority of the court stated that there are five factors that the prosecution must prove in order for an order for total anonymity to be granted. These five factors are: presence of ‘real fear for safety of the witness’ or their family, the testimony of that particular witness must be important to the case, no ‘*prima facie*’ evidence that witness untrustworthy, lack of ‘an effective witness protection program, and the measures must be strictly necessary – where a less restrictive measure is available the latter should be applied.’<sup>217</sup>

In terms of the Rome Statute, Article 67 provides that the accused has the right to a public hearing, as well as the right to examine and question testimony against him or her.<sup>218</sup> As seen in Article 68 measures already discussed, the Statute mentions that protective measures are not to be ‘prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial’.<sup>219</sup> The exception to this, is provided in incidences of crimes involving sexual violence victims or child victims.<sup>220</sup> Article 68(2) states that ‘as an exception to the principle of public hearings’ the court may take protective measures including *in camera* proceedings, in particular ‘in the case of a victim of sexual violence or a child who is a victim’.<sup>221</sup> Rule 87(1) of the Rules of Procedure gives more information on the how the court is to do this. The Prosecution is to enter a motion for protective measures which is to be considered by the court after consultation with the Victims and Witnesses Unit.<sup>222</sup> Unlike in the ICTY trials, total anonymity is not listed as measures that the

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<sup>215</sup> *Prosecutor v Tadic* at p37.

<sup>216</sup> *Ibid.*

<sup>217</sup> *Ibid.*, majority judgment of Judges McDonald and Vohrah at p62-66.

<sup>218</sup> Rome Statute.

<sup>219</sup> *Ibid* at Article 68(1).

<sup>220</sup> *Ibid* at Article 68(2).

<sup>221</sup> *Ibid* at Article 68(2).

<sup>222</sup> Rules on Procedure and Evidence.

<sup>259</sup> Garkawe at p355.

court can take.<sup>259</sup> However, the name of the victim and any other identification can be expunged from public record, any participant to the proceedings can be prohibited from disclosing information to any third party, and the proceedings can be presented by electronic and other means.<sup>223</sup> Garkawe argues that the framework of the Rome Statute read with the Rules of Procedure provide an adequate balance between the rights of the accused person and protective measures of the victims.<sup>224</sup>

However, it is the argument of this dissertation that the balance between the rights of the victims and those of the accused is yet to be reached. This can be seen in the way in which the court deals with the issue of girl child soldiers in the *Prosecutor v Dyilo*<sup>225</sup> case. Of the 129 child soldiers identified as victims in the case, 95 were boys and 34 were girls.<sup>226</sup> Almost a third of child soldiers in this case were girls, nevertheless, the court focused on the testimony on one victim (hereafter 'P-0010') as the lynch-pin for the experiences of all the girl child soldiers identified as victims.

P-0010 testified that she was born in 1989, but was unaware of the month she was born and did not obtain a birth certificate.<sup>227</sup> There were discrepancies with this testimony as the defence argued that P-0010's birth certificate indicated that she was born in 1988 and electoral card gives the date 1986.<sup>228</sup> To her defence, she explained that she had lied about her year of birth to the authorities in order to obtain the electoral card.<sup>229</sup> P-0010 did not finish school as she was enlisted in UPC armed force.<sup>230</sup> She was abducted when she was 13 years old.<sup>231</sup> Other soldiers

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<sup>223</sup> Rules on Procedure and Evidence at Rule 87(3).

<sup>224</sup> Garkawe at p355.

<sup>225</sup> *Prosecutor v Dyilo* (2012).

<sup>226</sup> *Ibid* at para 50.

<sup>227</sup> *Ibid* at para 248.

<sup>228</sup> *Ibid*.

<sup>229</sup> *Ibid* at para 248-268.

<sup>230</sup> *Ibid*.

<sup>231</sup> *Ibid*.

(D-0005 and D-0006) say that P-0010 was born in 1985.<sup>232</sup> The Chamber concluded that P-0010 was an unreliable witness.<sup>233</sup> Here we see the court grappling with issues of fair trial and

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<sup>232</sup> *Prosecutor v Dyilo* (2012) at para 248-268.

<sup>233</sup> *Ibid.*

protective measures. Even though the name of the victim is not released, her age is contested heavily in court, allowing for the accused to put up a defence on the issue.

Nevertheless, this balance leans more towards the accused's rights. As illustrated through the testimony of P-0010 an important problem is determination the ages of child. The court in the *Prosecutor v Dyilo* case tried to identify the ages of the victims at the time of their recruitment using objective and subjective evidence.<sup>234</sup> Subjective evidence were provided by the testimonies of the child soldiers, and the objective evidence was provided by civil status documents from the communities from which the children were born, doctor's examinations and expert reports on the X-rays of the children's bones and teeth.<sup>235</sup> The court recognized that the objective evidence through X-rays and doctor's examinations has been scientifically proven to not be accurate to the degree of accuracy required in this circumstance.<sup>236</sup> The court was therefore forced to look primarily at civil status documents and look at the medical examinations as corroborative evidence as opposed to determinative.<sup>237</sup>

Civil status documents, however, did not provide definitive proof of age. Evidence given by witness P-0046 in the *Prosecutor v Dyilo* case illustrates this. P-0046 was an expert witness who had conducted extensive research in the affected area and he or she testified that 'identity cards and documents in the Congo are not very common. Very few people have official papers, in particular, children. P-0046 stated,

"In fact, I never saw a child with an identity card in Ituri, so carrying out such a verification on the basis of administrative documents is not possible. So when you say independent verification, well, other than the information that the children gave regarding their

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<sup>234</sup> *Prosecutor v Dyilo* (2012) at para 171.

<sup>235</sup> *Ibid* at para 176.

<sup>236</sup> *Ibid*.

<sup>237</sup> *Ibid*.

*Ibid*

schooling, that was one way we had to have an idea and to perhaps reinforce the information stated by children".<sup>238</sup>

Investigations into the ages of children at different schools by examining the schools' registries only revealed the age ranges of the children. This testimony is in line with P-0010's, however, the court failed to point this out in its analysis.

In addition to this the Prosecution put forward and the court took into account the psychological impact of the war on the children could have led to inconsistencies in the children's testimonies.<sup>239</sup> Even though the court stated that it would take into account, in its analysis of P0010's testimony it did not consider that the psychological trauma of the war may have led to the mismatch of dates. It did not recognize the complexities of obtaining an identification document in Congo at the time. Instead, the court focused on getting precise information from a former girl child soldier, without considering the effects of psychological trauma. Other factors of her testimony such as the activities of girl child soldiers which other witnesses and evidence deemed to be true was not analysed to the great extent that age was. Given this information by the court it could be argued that that the court was too quick to dismiss the testimony of P-0010, especially given the pertinence of her testimony. The court leaned more towards the protection of the rights of the accused and as a result ignored key considerations when weighing up the testimony of a girl child soldier.

## 6. Prosecution and the Problem of Voluntary Recruitment

The problem of voluntary recruitment has been canvassed in previous chapters. However, the ICC has given clarification of how it deals with two issues: the 15 versus 18-year-old age limit debate, and the voluntary recruitment debate. Article 38(3) of the Convention states that 'State parties shall refrain from recruiting any person who has not attained the age of fifteen years into

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<sup>238</sup>*Prosecutor v Dyilo* (2012) at para 649.

<sup>239</sup>*Ibid* at para 479.

*Ibid*

their armed forces.’<sup>240</sup> It, nevertheless, leaves the door open for the recruitment of children between the ages of 15 and 18.<sup>241</sup> Article 77 of Protocol I which relates to international conflicts places a duty on States to take ‘all feasible measures in order to that children who have not attained the age of fifteen years do not take a direct part in hostilities’.<sup>242</sup> It also leaves the door open for children between the ages of 15 and 18 to take a ‘direct part in hostilities’, but States are to give priority to the oldest.<sup>243</sup> Article 4(3)(c) of Protocol II which relates to armed conflict of a non-international character states that ‘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>244</sup> Here one sees the different treaties imposing different wording for what children under the age of 15 are not allowed to do whether it be: ‘recruited’<sup>245</sup> and ‘take a direct part in hostilities’<sup>246</sup>. The repetition of the 15 years-old age limit and leaving the age group of 15 to 18 years old open has led to the interpretation that voluntary recruitment is possible for children who are between the ages of 15 to 18 years of age.<sup>247</sup>

Article 8 of the Rome Statute takes a completely alternate approach and has worded war crime to include ‘conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to actively participate in hostilities’.<sup>248</sup> The language of the Rome Statute veers away from the language used in other treaties and the reason why was revealed in the PreTrial and Trial Chambers of the *Prosecutor v Dyllo* case. In the Pre-trial Chamber I decision the court stated that ‘conscripting is to be defined as forcible recruitment, whereas enlistment covers

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<sup>240</sup> The Convention.

<sup>241</sup> *Ibid* at Article 38(3).

<sup>242</sup> Protocol I.

<sup>243</sup> *Ibid*.

<sup>244</sup> Protocol II.

<sup>245</sup> The Convention at Article 38(3).

<sup>246</sup> Protocol I.

<sup>247</sup> Sheppard at p41-44.

<sup>248</sup> Rome Statute at Article 8(2)(e)(vi).

*Ibid*

voluntary recruitment (although the child's consent is not a valid defence).<sup>249</sup> This distinction is to be made on a case-by-case basis taking into account surrounding circumstances.<sup>250</sup> The Trial Chamber accepted the adoption of this interpretation of the Rome Statute, and proceeded to prosecute the accused with help from this definition.<sup>288</sup> The court endorsed the points of view of expert witnesses that 'it will frequently be the case that girls and boys under the age of 15 will be unable to give genuine and informed consent when enlisting in an armed group or force'.<sup>251</sup>

In this respect, we see the ICC steering away from debates on whether voluntary recruitment is possible and taking the perspective put forward in the Machel Report as it concludes that 'attributing voluntary enlistment in the armed forces to a child under the age of 15 years...is of questionable merit'.<sup>252</sup> Therefore in terms of the ICC it is clear that voluntary enlistment or recruitment of children under the age of 15 is included as a war crime. What is left unanalysed by the court is what is to happen to children between the ages of 15 and 18. The court has also left unanalysed the question of why the age limit for child soldiers is 15 and not 18, given that the consensus in the Convention, the Optional Convention and other regional treaties such as the African Children's Charter define a child as any person under the age of 18 years old.<sup>253</sup>

Article 2 of the Optional Protocol states that there shall be no compulsory recruitment of children under the age of 18.<sup>254</sup> For the voluntary recruitment of children between the ages of 15 and 18 we are left with Article 3(3) of the Optional Protocol as it provides minimum safeguards to be applied for voluntary recruitment and this includes:

(a) Such recruitment is genuinely voluntary;

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<sup>249</sup> Decision on Victims' Participation (2008).

<sup>250</sup> *Prosecutor v Dyilo* (2012) at para 592.

<sup>288</sup> *Ibid* at para 607.

<sup>251</sup> *Ibid* at para 613.

<sup>252</sup> *Ibid* quoting *Prosecutor v Fofana and Kondewa* 2008 SCL-04-14-A-829.

<sup>253</sup> The Convention at Article 1.

<sup>254</sup> Optional Protocol.

*Ibid*

- (b) Such recruitment is carried out with informed consent of the person's parents or legal guardians;
- (c) Such persons are fully informed of the duties involved in such military service;
- (d) Such persons provide reliable proof of age prior to acceptance into national military service.<sup>255</sup>

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<sup>255</sup> Optional Protocol at Article 3(3).

*Ibid*

This provision provides greater protection to children between 15 and 18. The Convention and the Geneva Conventions requires that the State place priority on recruitment older children<sup>256</sup>, but does not require States to take the precautions that the Optional Protocol. The Optional Protocol does have a fatal flaw as it imposes these obligations on States and even makes mention of ‘national military service’<sup>257</sup>. The past African conflicts that have been canvassed in the Literature Review, often involve the recruitment of child soldiers by rebel groups. These provisions put forward by the Optional Protocol would be useful in the DRC conflict where it was reported that the national army was also charged with the recruitment of child soldiers.<sup>258</sup> It would, however, not have been useful in the conflicts of Mozambique, Sierra Leone and Northern Uganda as rebel groups were the primary recruiters of child soldiers.<sup>259</sup> Thus there is a need to ensure the imputing of individual criminal responsibility to ensure that all military groups – (whether of national armies or rebel forces) adhere to the rules of not recruiting children into their armies. Hence the importance of the ICC as a body in interpreting the law and enforcing it.

The question of children between the ages of 15 and 18 being voluntarily recruited has yet been tested by the court. It is yet to be seen what the court’s response to this will be, and how it will interpret the different legal sources on the issue of voluntary recruitment. For the case of *Prosecutor v Dyilo* the court did spend a great deal of time trying to assess the different ages of the victims and ensuring that they were under the age of 15 at the time they were recruited.<sup>260</sup> This suggests that age did play a role in the decision of the court, however the court has yet been called to task on voluntary recruitment of children between the ages of 15 and 18.

Even though the Rome Statute is silent about the problem of voluntary recruitment of children between the ages of 15 and 18 and the ICC has yet been called to test the issue, the Rome Statute

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<sup>256</sup> Optional Protocol at Article 3(3).

<sup>257</sup> *Ibid.*

<sup>258</sup> Lischer at p152.

<sup>259</sup> Mazurana at p107.

<sup>260</sup> *Prosecutor v Dyilo* (2012) at para 176.

does avoid the potential problem identified by the Special Court of Sierra Leone of prosecution of children under the age of 18 for liability for international crimes.<sup>261</sup> Article 26 states that no person under of the age of 18 shall be prosecuted for crimes under the Rome Statute.<sup>262</sup>

## 7. Bringing the Case to the ICC

Of the 123 nations who have ratified the Rome Statute, Africa constitutes 34 parties to the treaty.<sup>263</sup> In 2016, South Africa began the process of withdrawal from the ICC.<sup>264</sup> A recent domestic case has since stopped this withdrawal.<sup>265</sup> However, the desire to withdraw was not isolated as countries such as Burundi have expressed the desire to withdraw from the Statute.<sup>266</sup> The move to withdraw from the ICC comes at a time where the African Union (hereafter 'AU') has severely criticised the court, citing the court's history of prosecuting 'only Africans'.<sup>267</sup> The merits and demerits of the AU's argument are not relevant to this dissertation, however, the problem posed by the mass withdrawal of African countries from the Rome Statute will make it difficult for jurisdiction to be founded for a case on girl child soldiers to be heard.

Article 25 of the Rome Statute states that 'a person who commits a crime within the jurisdiction of the court shall be individually responsible and liable for punishment'.<sup>268</sup> Article 12 conditions jurisdiction of the court on the crime taking place in the territory of the State party, the crime is a national of the State party and the territorial or national State has accepted the jurisdiction of

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<sup>261</sup> Report of the Secretary General on the Establishment of the Special Court of Sierra Leone S/2000/915.

<sup>262</sup> Rome Statute.

<sup>263</sup> *Ibid.*

<sup>264</sup> J. J. Vilmer, 'The African Union and the International Criminal Court: Counteracting the Crisis' (2016) 92 *International Affairs* 6, at p1319.

<sup>265</sup> 'South Africa Revokes Withdrawal from ICC After Court Ruling' (2017). Available from: <http://www.bbc.com/news/world-africa-39204035> . Accessed on 11 March 2017.

<sup>266</sup> Vilmer at p1319.

<sup>267</sup> *Ibid* at p1321. This is a direct quote of Jean Ping, Chairperson of the African Union Commission.

<sup>268</sup> Rome Statute.

the ICC.<sup>269</sup> These are the more common ways of founding jurisdiction. However, it should be noted that the Rome Statute does make provision for the prosecution of individuals from Non-State Parties where the crime was committed in the territory of a State part or in ‘a situation in which one or more of the crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations’.<sup>270</sup> In the event of a mass withdrawal of African nations from the Rome Statute the Article 13 would have to be engaged over the easier Article 12. This means that founding jurisdiction for these crimes will become increasingly difficult.

## 8. Concluding Remarks

Who has the right to participate in proceedings directly causes some issues that the court has to tackle. An example of this is the determination of age by the court. In the situation such as the one in Congo during the *Prosecutor v Dyilo* case, where it is difficult to ascertain civil documents proving the ages of children, and neither medical nor schooling records are of much assistance<sup>271</sup>, it is imperative that the community is part of the judicial process. In such a situation it is the local community and immediate family members who would be aware of the accurate ages of the victims.

The engagement of the community is nevertheless, impeded by the unanswered question of who is a victim – a person who suffers ‘harm’ or a person with ‘personal interest’? This critical question affects which rights are conferred on whom, procedural issues of who should file an application as a victim, as well as, what the evidentiary burden on the victim is – to prove a link with harm or with personal interest.

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<sup>269</sup> Rome Statute.

<sup>270</sup> *Ibid* at Article 13.

<sup>271</sup> *Prosecutor v Dyilo* (2012) at para 176.

The balancing of the rights of the accused and those of the victims is often a complicated one in courts worldwide, however, how the court has interpreted it in the case of protective measures in the ICC is problematic especially for girl child soldiers. The court's assertion that the revelation of identity may affect the impetus with which the court view testimonies is one that is problematic as it undermines the protective measures and their *raison d'être* of providing important safeguards for victims of crimes involving sexual violence or children. These two issues of uncertainty of who can participate and the problematic balancing of protective measures rights by the court provide major hurdles for girl child soldiers and their communities trying to access the international judicial system. It is important to go on and assess whether any substantive hurdles exist as well.

## CHAPTER 5: INTERNATIONAL CRIMINAL LAW FRAMEWORK – SUBSTANTIVE ISSUES

### 1. Introduction

The attachment of international crimes to specific individuals, as opposed to States is an innovation in international law and is sanctioned by Article 25 of the Rome Statute which states that ‘the court shall have jurisdiction over natural persons’ and is empowered to find the person ‘criminally responsible and liable for punishment for a crime within the jurisdiction of the court’.<sup>272</sup>

In looking at whether the court offers appropriate protection for girl child soldiers, one must look at the treaty law as provided for the Rome Statute and also how the ICC has interpreted the rules set out by the provisions of the Statute. The core crimes recognized in international criminal law are: crimes against humanity, genocide and war crimes.<sup>273</sup> These will be looked in turn. In order to decide whether the protection afforded is appropriate, this question will be answered: does the international criminal law case law’s interpretation of treaty law directly address the experiences of girl child soldiers?

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<sup>272</sup> Rome Statute.

<sup>273</sup> Bennett at p379-390.

<sup>312</sup> *Ibid.*

## 2. The causation issue

Article 25(3) lists what needs to be done in order for a person to be considered criminally liable.<sup>312</sup> The list includes that the person has either: committed the crime (whether individually or jointly), orders the commission of the crime, 'facilitating the commission of such a crime', contributes to the commission of the crime with 'a group of persons acting with a common purpose, or 'in respect of the crime of genocide, directly and publicly incites others to commit genocide'.<sup>274</sup> This provision has been hailed for its broad nature which is able to facilitate for the prosecution of those liable for international crimes.<sup>275</sup> It extends its reach to those who incite crimes and not necessarily commit them, as well as those who contribute to those crimes.<sup>276</sup> This provision is an evolution of Article 6(c) of the Charter of the International Military Tribunal (hereafter 'Nuremberg Tribunal') which stated that the 'leaders, organizers, instigators and accomplices' who were a part of the planning and execution of the crime should be held criminally responsible.<sup>277</sup> The broadness of this provision is a positive for girl child soldiers because (as were the circumstances in the DRC during the *Prosecutor v Dyilo* case), the person being prosecuted for the international crime may not necessarily be the one who personally recruited the girls or the person who subjected them to domestic slavery and sexual abuse, however such a person may be responsible for the mechanism which allowed for these illegal activities to take place on a wide scale. Welcome though this provision may be, it is often the first line of defence that is put up by the accused. It is the first substantive hurdle that any complainants (in this case the girl child soldiers) will have to overcome: they have to prove that the accused can be held criminally responsible in accordance with Article 25.

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<sup>274</sup> Bennett at p379-390.

<sup>275</sup> V Militello, 'The Personal Nature of Individual Criminal Responsibility and the ICC Statute' (2007) 5 *Journal of International Criminal Justice* 941 at p944.

<sup>276</sup> Militello at p946.

<sup>277</sup> The Trial of German Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg Germany, Nuremberg Tribunal (1946) Available from: [https://www.loc.gov/rr/frd/Military\\_Law/pdf/NT\\_Vol-I.pdf](https://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-I.pdf) > . Accessed on 30 September 2016, at p449.

In the case of *Prosecutor v Dyilo* the defence argued that, firstly Lubanga Dyilo neither knew nor should have known that there were children under the age of 15 in the FPLC.<sup>278</sup> Secondly, the accused 'implemented measures prohibiting the recruitment of child soldiers and ensuring demobilisation'.<sup>318</sup> Thirdly, that Mr Dyilo 'de jure Commander-in-Chief of the FPLC' and this does not mean that he had control over the recruitment of children, and therefore cannot be prosecuted under Article 25(3)(a).<sup>279</sup> This defence put forward in a case primarily about the use of child soldiers, is a good example of the key arguments against individual criminal responsibility that can be put up. Commonly in any criminal trial the underlying elements of a crime that must always be present in order for liability to be attached are *actus reus* (the act of committing the crime) *mens rea* (the intention to commit the crime).<sup>280</sup> However, Article 25 has expanded the ordinary meaning of these terms. The court came up with a formula to interpret the attachment of individual criminal responsibility for an international crime is to be judged. Criminal responsibility attaches to those who are found to have 'control over the crime'.<sup>281</sup> There are 3 different elements: the objective, the subjective and the 'control over the crime' element.<sup>282</sup>

According to the Pre-Trial Chamber in the Decision on the Confirmation of Charges, the objective element entails 'the existence of an agreement or common plan between two or more persons...and the plan must include an element of criminality, although it does not need to be specifically directed at the commission of the crime', as well as, 'a co-ordinated essential contribution by each co-perpetrator resulting in the realisation of the objective elements of the

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<sup>278</sup> *Prosecutor v Dyilo* (2012) at p32-33.

<sup>318</sup> *Ibid.*

<sup>279</sup> *Prosecutor v Dyilo* (2012) at p32-33.

<sup>280</sup> G Werle, 'Individual Criminal Responsibility in Article 25 ICC Statute' (2007) 5 *Journal for International Criminal Justice* 953, at p955.

<sup>281</sup> *Prosecutor v Dyilo* (2006) at para 326-330.

<sup>282</sup> *Ibid.*

crime’ (only those who ‘have the power to frustrate the commission of the crime by not performing their tasks – can be said to have joint control over the crime’).<sup>283</sup>

For the subjective element the court states that one must look specifically at Article 30 Rome Statute which relates to the mental element; the court stated that intent and knowledge need to be present.<sup>324</sup> Article 30(2) states that intent is to be construed as present where in relation to the conduct the ‘person means to engage’ in the illegal conduct, or ‘in relation to the consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.’<sup>284</sup> If intent is addressed in a cumulative fashion then there needs to exist a ‘volitional element’ (which encompasses three situations of *dolus directus*, *dolus indirectus* and *dolus eventualis*).<sup>285</sup> Article 86 of the Protocol I has a more stringent test - ‘the negligence must be so serious that it is tantamount to malicious intent’.<sup>286</sup> This strict test could potentially cause additional problems when looking at the crime of genocide. Genocide is characterised by a special mental element known as *dolus specialis* where the accused must be proved to possess ‘intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such’.<sup>287</sup>

The third and final element is control over the crime and this, according to the court is not limited to physically carrying out objective element.<sup>288</sup> For this the court asks two key questions: does the accused have control over whether and how the offence is to be committed?<sup>289</sup> Did the accused provide an essential contribution to the plan?<sup>290</sup>

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<sup>283</sup> *Prosecutor v Dyilo* (2006) at para 326-330

<sup>284</sup> Rome Statute.

<sup>285</sup> *Prosecutor v Dyilo* (2006) at para 351-352.

<sup>286</sup> Protocol I.

<sup>287</sup> *Prosecutor v Akayesu* at para 517.

<sup>288</sup> *Prosecutor v Dyilo* (2012) at para 1003.

<sup>289</sup> *Ibid.*

<sup>290</sup> *Ibid.*

These elements provide a useful guide in deciphering who bears criminal responsibility. Due to the fact that international crimes are usually committed by a group or groups of people, it is difficult to prove the causation link between one individual and the crime. The elements that the Chamber offered in the *Prosecutor v Dyilo*<sup>291</sup> Pre-Trial case are wide enough to infer a causation link. However, one lesson that can be learnt from the way in which this case was pleaded is that it would have been easier for the Prosecution to have used Article 28, instead of Article 25, in pleading criminal responsibility.<sup>292</sup>

As previously mentioned Article 25 attaches criminal responsibility to natural persons.<sup>293</sup> Article 28(a) attaches criminal responsibility to the ‘military commander or person effectively acting as a military commander’.<sup>294</sup> Criminal responsibility is present where such a person knew or ‘should have known that the forces were committing or about to commit such crimes’, or in the alternative where the person ‘failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation.’<sup>295</sup> This measure works hand-in-hand with the Protocol I which places a duty on commanders to ‘prevent and, where necessary, suppress...breaches of the Conventions and [the] Protocol’.<sup>296</sup> In addition to this duty, commanders are required to ‘ensure that members of the armed forces under their command are aware of their obligations under the Conventions’.<sup>338</sup>

Article 28(a) of the Rome Statute, when read with Article 87 of the Protocol I provides a crucial preventative measure, by placing duties on military commanders to adhere to the Geneva

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<sup>291</sup> *Prosecutor v Dyilo* (2006).

<sup>292</sup> *Prosecutor v Dyilo* (2012) at p32-33.

<sup>293</sup> Rome Statute.

<sup>294</sup> *Ibid*.

<sup>295</sup> *Ibid* at Article 28(a).

<sup>296</sup> Protocol I at Article 87(1).

<sup>338</sup> *Ibid* at Article 87(2).

Conventions and international humanitarian law as a whole. From this point of view, military criminal responsibility overcomes the causation problem. All the prosecution needs to prove is that the accused had military command of the forces that recruited girl child soldiers, for the duties stated in these treaties to apply. The onus then shifts to the accused to prove that he or she was not in command, or as put in Article 28 of the Rome Statute, had effective control over the forces.

There is, nevertheless, a weakness within the duties prescribed by Protocol I. Article 87(2) sees that commanders ensure that members under their charge are aware of various rules of war that they must follow, but this duty is to be exercised 'commensurate with [the commander's] level of responsibility'.<sup>297</sup> This limitation could easily be used as a credible defence and could be a portal for impunity when translated in international criminal law. It also, gives a hint to the pitfalls of the legal landscape – the less military power, a commander or the accused has, the less the responsibility and potential liability he or she will suffer. Vetter believes that this weakness has caused there to be a distinct difference in the way the ICC interpret military command responsibility and command responsibility of civilian superiors.<sup>298</sup> A good example of a civilian superior is found in the case of *Prosecutor v Akayesu*.<sup>299</sup> Akayesu, the accused, was the mayor of the Taba commune.<sup>300</sup> He had exclusive power over the police, 'was responsible for the execution of laws and regulations...also subject only to the prefect's authority.'<sup>301</sup> The accused was charged with and convicted with incitement to commit genocide.<sup>302</sup> In particular the court had to decide whether systematic rape of Tutsi women was to be considered to be part of the definition of genocide.<sup>303</sup> In terms of the *dolus specialis* of genocidal intent, the court looked at the 'acts and

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<sup>297</sup> Protocol I.

<sup>298</sup> G Vetter, 'Command Responsibility of Non-Military Superiors in the International Criminal Court' (2005) 25 *Yale Journal of International Law* 89 at p104.

<sup>299</sup> *Prosecutor v Akayesu* at para 1- 10.

<sup>300</sup> *Ibid* at para 3.

<sup>301</sup> *Ibid* at para 4.

<sup>302</sup> *Ibid* at para 710.

<sup>303</sup> *Ibid* at para 731.

utterances' of Akayesu.<sup>304</sup> Instead of relying on the accused's extensive executive capacities to create the causation link between the accused and the crime, the court sought actual evidence of 'acts and utterances' to show causation.<sup>305</sup>

Vetter illustrates the differences in the way courts have a different standard for military commanders and civilians.<sup>306</sup> Protocol I requires that the commander either knew, should have known or should have reasonably known under the circumstances.<sup>307</sup> Article 28(a) of the Rome Statute repeats this language in relation to military superiors.<sup>350</sup> However, in Article 28(b) a different standard is applied to superiors of a non-military nature, stating that what is required is that:

'the superior knew or consciously disregarded information which clearly indicated that the subordinates were committing or about to commit such crimes'.<sup>308</sup>

One must note that the requirement when it comes to civilian *mens rea* changes to from the strict 'should have reasonably known'<sup>309</sup> to a less stringent test that requires actual knowledge or 'conscious disregard'<sup>310</sup>. This distinction is important because, as illustrated in the *Prosecutor v Akayesu*<sup>311</sup>, the type of evidence proffered by the Prosecution in order to prove *mens rea* and later causation would necessarily have to be stronger in the case of a non-military accused person. In *Prosecutor v Akayesu* the court focused on the actual words of the accused to prove the presence of this mental element.<sup>312</sup> The weakness with this differing standard is that other elements of the accused's circumstances are not considered with the appropriate severity. For example, the court chose not to rely on the extensive executive powers that Akayesu had when

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<sup>304</sup> *Prosecutor v Akayesu* at para 728.

<sup>305</sup> *Ibid.*

<sup>306</sup> Vetter at p123.

<sup>307</sup> Protocol I at Article 87.

<sup>350</sup> Rome Statute.

<sup>308</sup> Rome Statute.

<sup>309</sup> Protocol I at Article 87.

<sup>310</sup> Rome Statute at Article 28(b).

<sup>311</sup> *Prosecutor v Akayesu* at para 710-733.

<sup>312</sup> *Ibid.*

considering whether he was liable for the crime of genocide, opting to look instead at evidence of what he had said and done.<sup>313</sup>

This has a direct impact on the protection that could potentially be offered to girl child soldiers. In cases where the person being tried by the ICC is a military commander all that needs to be asked is whether the person reasonably should have known about the crimes, and in addition did they educate their subordinates on international crimes. The responsibilities are less with nonmilitary superiors, regardless of their political power. As a result, advocates for the defence in cases such as *Prosecutor v Dyilo*, argue that the accused did not have effective military control of the forces regardless of the political control that they did have.<sup>314</sup> This argument that, if successful, could undermine the very purpose of international criminal law which seeks to prevent the impunity of the 'leaders, organizers, instigators and accomplices' of perpetrators of international crimes and not necessarily only the military commanders.<sup>315</sup> Political leaders must be held to the same standards as military leaders, as in cases such as *Prosecutor v Akayesu* they can be revealed as being responsible for the crime and indeed inciting it.<sup>316</sup>

All these elements need to be proved beyond a reasonable doubt.<sup>317</sup> It is important to note that this is a difficult evidentiary burden to bear, however, in the interests of balancing the rights of the accused with those of the victims, witnesses and overall prosecution. By laying out with great precision what is expected of the prosecution to prove in order to be successful in their claim.

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<sup>313</sup> *Prosecutor v Akayesu* at para 728.

<sup>314</sup> *Prosecutor v Dyilo* (2012) at p32-33.

<sup>315</sup> Nuremberg Charter at Article 6(c).

<sup>316</sup> *Prosecutor v Akayesu* at para 733.

<sup>317</sup> *Prosecutor v Dyilo* (2012) at para 1357.

It is important to note that Article 26 excludes persons who were ‘under the age of 18 at the time of the alleged commission of a crime’.<sup>318</sup> This means that child soldiers are automatically excluded from the jurisdiction of the court.

### 3. One Side of Dichotomous Identity: Prosecution for Sexual Violence Crimes

Article 6 defines genocide as ‘acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group’ and including ‘causing serious bodily or mental harm to members of the group’.<sup>319</sup>

The definition of this crime includes elements of sexual violence crimes which could apply to girl child soldiers. The court in *Prosecutor v Akayesu* inadvertently created a nexus between the crime of mass systematic rape and death of the victims.<sup>320</sup> The court in *obiter dictum* of the case does note that the systematic rape of Tutsi women causes ‘serious bodily and mental harm’ and was often accompanied with the intent to destroy the Tutsi as an ethnic group.<sup>321</sup> However, the court in its reasoning leading to the conviction of Akayesu cites the evidence that Akayesu was witnessed saying “tomorrow they will be killed” following a gang rape of Tutsi women, and the women were killed shortly after this incident.<sup>322</sup> It can be conceded that it was in the nature of the particular conflict for those victims of rape to be subjected to death soon after – as stated in the evidence ‘many rapes were perpetrated near mass graves’.<sup>323</sup> This suggesting the practice of raping and killing. The Rome Statute came about after the findings of this case. Now, Article 6 of the Rome Statute finds that the systematic rape or sexual violence geared towards a group of people is considered to be an act of genocide. This evolution in the definition of the crime of genocide, though admirable in taking into consideration sexual violence crimes, does not

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<sup>318</sup> Rome Statute.

<sup>319</sup> *Ibid.*

<sup>320</sup> *Prosecutor v Akayesu* at para 733.

<sup>321</sup> *Prosecutor v Akayesu* at para 734.

<sup>322</sup> *Ibid* at para 733.

<sup>323</sup> *Ibid.*

appropriately address the issue of girl child soldiers. In contrast to the facts in the *Prosecutor v Akayesu*, the girls are raped, molested and are victims of sexual violence, as well as kept as captives and militarised. Therein is the key issue that the ICC presents for girl child soldiers – their dual identity as militarised personnel and victims of various gender crimes.

Another core international crime is crimes against humanity.<sup>324</sup> Article 7 defines crimes against humanity as acts that ‘when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack’ and these include enslavement, deprivation of liberty, ‘rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization’, ‘enforced disappearance’, as well as ‘other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.’<sup>368</sup> Girl child soldiers are subject to enslavement, imprisonment, ‘rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization’, as well as, ‘other inhumane acts’.<sup>325</sup> The definition of crimes against humanity fits more experiences of girl child soldiers than the crime of genocide did (as shown above). In a the fairly recent case of *Prosecutor v Bemba Gombo*, the court confirmed that rape is considered as part of crimes against humanity and liability can be attached to one who had effective control over the forces that conducted mass rape and pillaging.<sup>326</sup> What the court did in this case was confirm that one need not be the one physically raping and pillaging in order to be held liable under international criminal law. According to the court, the accused not only ‘had direct knowledge of crimes’ that the forces, but also failed to investigate and prosecute the crimes committed by his troops.<sup>327</sup> The court took a hard-line approach to the accused. Even though there was some evidence that the accused did react to the accusations that his troops had engaged in mass rape in ‘general [and] public warnings to his

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<sup>324</sup> Bennett at p378.

<sup>368</sup> Rome Statute.

<sup>325</sup> Rome Statute at Article 7.

<sup>326</sup> *Prosecutor v Bemba Gombo* at para 708.

<sup>327</sup> *Ibid* at para 708-710.

troops' the court found that this was not enough to satisfy the international standard.<sup>328</sup> In the court's words:

'The inadequacy of the minimal measures Mr Bemba took is aggravated by indications, as set out above, that they were not genuine, the manner in which such measures were executed, and the fact that only public allegations of crimes by MLC soldiers prompted any reaction, and then only to limited extent.'<sup>329</sup>

This hard-line approach by the court enabled the court to find Bemba guilty of crimes against humanity including the mass rape of women by troops under his charge.<sup>374</sup> This decision is welcome and could potentially lead to other generals enforcing disciplinary rules when and if soldiers conduct mass crimes. In this manner this case could provide a useful precedent. However, there are two main flaws with girl child soldiers relying on this plea. The first is that this case happened within the context of troops within a national army conducting atrocities. As mentioned in the previous section titled 'The Causation Problem', the Geneva Protocols place stricter guidelines on commanders of national militaries. Article 87(2) of Protocol I places a duty on the commander to ensure that troops in their charge are aware of the rules of conduct in a war and must take steps to enforce these rules.<sup>330</sup> To a large extent, for the ICC, imputing criminal responsibility was possible because international law had already placed command responsibility duty on the accused. It is, however, yet to be seen if the same level of command responsibility will be interpreted to be required where rebel forces are involved. The recruitment of child soldier often happens with rebel militia as shown in the case of the Lord's Resistance Army (hereafter 'LRA') in Uganda.<sup>331</sup> A test case is needed to find out if the same level of command responsibility will be required of a rebel leader. As illustrated above in the previous section, stronger evidentiary burdens would be required, if the status of the accused is not military (national) or is civilian in nature.<sup>377</sup>

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<sup>328</sup> *Prosecutor v Bemba Gombo* at para 726.

<sup>329</sup> *Ibid* at para 727.

<sup>374</sup> *Ibid*.

<sup>330</sup> Protocol I.

<sup>331</sup> Mazurana at p36.

<sup>377</sup> Vetter at p123.

The second problem is that which was presented when looking at how genocide may help the plea of the girl child soldier. Akin to other pleas based on sexual violence, arguing that the use of girl child soldiers violates Article 7 of the Rome as it involves the rape and enslavement of girls, ignores the dichotomous identity of the girl child soldiers and only provides them with partial protection.

#### 4. Dichotomous Identity: War Crimes and the Importance of Prosecuting under the Appropriate International Crime

Article 8 gives a list of the activities which are considered to be war crimes, and these include:

‘(vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy...enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;

[as well as] (vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities’.<sup>332</sup>

Girl child soldiers could potentially plead either one of these two activities which constitute war crimes. The first potential plea (Article 8(vi)) is the easier option for the girl child soldier to use. It is well documented that girls in military camps are usually used as sexual slaves and are raped.<sup>333</sup> In Uganda, the LRA has been recruiting child soldiers since 1991.<sup>380</sup> UNICEF and the Ugandan government keep a registry of the children abducted, and it is documented that 20% of the abducted children were girls.<sup>334</sup> These girls are used as servants and sex slaves.<sup>335</sup> They are

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<sup>332</sup> Rome Statute

<sup>333</sup> P Akhavan, ‘The Lord’s Resistance Army Case: Uganda’s Submission of the First State Referral to the International Criminal Court’ (2005) 99 *The American Journal of International Law* 2 at p404. <sup>380</sup> Akhavan at p407.

<sup>334</sup> *Ibid* at p407-408.

<sup>335</sup> *Ibid*.

susceptible to forced pregnancies and many have been infected with HIV.<sup>336</sup> In 2000 the LRA released over a hundred ‘child mothers’ and their children .<sup>337</sup> The leader of the LRA, Koney, is said to have sixty wives (which include some of the abducted girls).<sup>338</sup> The criminal responsibility of the LRA leader is well documented and there is extensive evidence that rape, forced pregnancies and sexual slavery are a practice of the LRA and this fits in with Article 8(vi) definition of war crime.

Even though it is good that the girl child soldiers do have a case that they can plead successfully under Article 8(vi) of the Rome Statute, the provision does not entirely solve the complexity of problems that a girl child soldier poses to the law. As mentioned in previous chapters, girl child soldiers are trained as soldiers and often used as such in conjunction with being abused.<sup>339</sup> Girl child soldiers also form a substantial part of the armed forces – in Uganda girls formed 20% of those abducted, in the Democratic Republic of Congo of the 129 victims identified in the *Prosecutor v Dyllo* case 34 were girls and 95 were boys.<sup>340</sup> These case studies illustrate that girls constitute a significant percentage of child soldier armies. For these two reasons, it is imperative that girl child soldiers are included.

The key question when it comes to girl child soldiers is whether their activities are considered to be ‘active participation’. The Convention, the Geneva Protocols and the Optional Protocol refer to ‘direct participation’.<sup>341</sup> A welcome change by the Rome Statute is replaces this phrase and states instead that armed groups are prohibited from ‘using [children under the age of 15 years] to participate actively in hostilities’.<sup>342</sup> Also welcome was the court’s decision to engage in what

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<sup>336</sup> Akhavan at p407-408.

<sup>337</sup> *Ibid.*

<sup>338</sup> *Ibid.*

<sup>339</sup> *Ibid.*

<sup>340</sup> *Prosecutor v Dyllo* (2012) at para 15.

<sup>341</sup> The Convention at Article 38(3).

<sup>342</sup> Rome Statute at Article 8.

is meant by 'participate actively' from the Statute.<sup>343</sup> The victims argued that active participation is to include related activities such as 'scouting, spying, sabotage and the use of children as decoys, couriers or at military checkpoints, or to transport ammunition'.<sup>344</sup> The Special Court of Sierra Leone case of *Prosecutor v Brima, Kamara and Kanu* which found that to 'participate actively in the hostilities encompasses putting their lives directly at risk in combat....any labour or support that gives effect to, or helps maintain, operations in a conflict constitutes active participation'.<sup>345</sup> This interpretation of 'participate actively' has the possibility of encompassing all the dichotomous identity experiences of girl child soldiers – it includes not only their military work, but also the labour that they provide for the camp.

It is therefore unfortunate that the ICC in *Prosecutor v Dyilo* did not go further in looking at the question of sexual violence in the context of child soldiers, in order to provide complete and adequate protection to girl child soldiers. The court stated:

'[i]t is not necessary [...] for the Chamber to engage in the critical question that otherwise arises in this application as to whether the 'use' of children for sexual purposes alone, and including forced marriage, can be regarded as conscription or enlistment into an armed force, or the use of that person to participate actively in the hostilities, in accordance with Article 8(2)(b)(xxvi) and Article 8(2)(e)(vii) of the Rome Statute. As just set out, the applicant has presented enough evidence to conclude, prima facie, that she was abducted in the broad context of the systematic conscription of children under the age of 15 into the military forces of the UPC'.<sup>346</sup>

The girl child soldier was afforded a lower evidentiary burden here as she did not have to prove sexual violence, however the court did miss out on an opportunity to comment on whether sexual violence could be included the definition of child soldier. This decision to veer from commenting on the issue, may have been a deliberate one as it had been contested during the trial. In the Pre-trial Chamber I decision, the court 'excluded activities which are "manifestly without connection to the hostilities"', for instance by making deliveries or providing domestic

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<sup>343</sup> *Prosecutor v Dyilo* (2012) at para 590-593.

<sup>344</sup> *Ibid* at para 593.

<sup>345</sup> *Ibid* at para 594.

<sup>346</sup> *Prosecutor v Dyilo* (2012) at para 599.

help at the married officers' quarters'.<sup>347</sup> The Prosecution critiqued this finding by the Pre-trial Chamber citing that the court should:

'deliberately include any sexual acts perpetrated in particular against girls, within its understanding of "using"[children in hostilities] crime [and] that during war, the use of girl children in particular includes sexual violence'.<sup>348</sup>

The key question in relation to the use of child soldiers becomes whether use is direct or indirect. Pre-Trial Chamber came to the conclusion that indirect use of child soldiers was to be excluded from the definition; which has the practical effect of excluding girl child soldiers.<sup>349</sup> The Trial Chamber acknowledged that children engage in a range of different roles, but stated that it can only be decided whether these roles constitute 'active participation' only on a case-by-case basis.<sup>350</sup> The court can be criticised for taking only a superficial response to the questions of sexual violence which were raised by the prosecution. The court dismissed the issue of sexual violence and enslavement citing that the prosecution failed to file these allegations at the 'relevant procedural stages... [and that considering these allegations] would cause unfairness to the accused if he was tried and convicted on this basis'.<sup>351</sup> As canvassed before sexual violence and enslavement unfortunately is a common factor in the experiences of girl child soldiers. In failing to address all the experiences and dichotomous experiences of girl child soldiers, the ICC, has thus far, failed in providing them adequate protection.

## 5. Concluding remarks

As can be seen from above, the experiences of girl child soldiers can be encompassed by calling on different crimes. This is an option that the girl soldiers could employ. However, the key issue

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<sup>347</sup> *Prosecutor v Dyilo* (2006) at para 19.

<sup>348</sup> *Prosecutor v Dyilo* (2012) at para 598.

<sup>349</sup> *Prosecutor v Dyilo* (2006) at para 19

<sup>350</sup> *Prosecutor v Dyilo* (2012) at para 628.

<sup>351</sup> *Prosecutor v Dyilo* (2012) at para 629.

<sup>399</sup> Mazurana at p36.

is treating girl child soldiers not only as victims of war crimes or crimes against humanity, but making sure that they are included in the legal definition of a child soldier. Girls make up a significant part of armed forces, therefore their experiences should also be considered under the umbrella of child soldiers. According to scholars, girls are used as military personnel, undergo military training and are used frequently used as spies.<sup>399</sup> Their experiences (though similar) are very different to those of rape and slavery victims.

The way in which the crime is pleaded and framed has a direct impact on the rehabilitation orders that the court can suggest. This is why it is so important that the legal definition of child soldiers reflects the experiences of all children involved and not just the experiences of boys.

## CHAPTER 6: FINAL ANALYSIS AND CONCLUSIONS

### 1. Analysis

The question that this dissertation aimed to answer is: does the international criminal law framework provided adequate protection to the African girl child soldier? The test that was applied throughout the paper was whether the international criminal law framework directly addresses the experiences of the girl child soldier. The answer to this is, no it does not yet address the experiences of the girl child soldier and therefore does not yet provide adequate protection. It does, nevertheless, retain the potential to do so.

The reasons for this answer can be traced back to the methodology taken in this dissertation. Firstly, the experiences of girl child soldiers who were a part of different African conflicts were discussed to find out if there were common experiences that existed for all of them. There were. As discussed in the earlier chapters, girl child soldiers were often trained militarily and used as spies, protectors of the base camp and at times as fighters themselves.<sup>352</sup> However, a key difference between them and boy child soldiers is that the girls were predominantly the victims of sexual and domestic abuses – often being given to commanders as wives.<sup>353</sup> The dual nature of these experiences led to the term ‘dichotomous identity’ being used throughout this paper to try and encapsulate the duality that the problem of girl child soldiers presents.

After the discussion to find the common denominators and the discovery of their dichotomous identity, the dissertation went on to interrogate the definition of a child soldier according to numerous international law sources. It was found that treaties such as the Convention and the

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<sup>352</sup> Mazurana at p36.

<sup>353</sup> *Ibid.*

Geneva Protocols defined child soldier as ‘any person under the age fifteen’<sup>354</sup>, despite defining a child as ‘any person under the age of eighteen’<sup>355</sup>. Through the treaty analysis other key issues were identified that negatively affect the protection of girl child soldiers. The first issue identified was the compromised wording of treaty law which led to the Convention’s setting of a different age for recruitment.<sup>356</sup> The second issue was the treaty references to ‘direct participation’ which when interpreted strictly would exclude the experiences of girl child soldiers who often take part indirectly during armed conflict. The third being the logical difficulties with the concept of voluntary recruitment and finally the focus on national militaries.

Some of these problems are fixed by the Rome Statute and international criminal law. An overarching problem with the treaty system and international customary law is that it requires consensus from State.<sup>357</sup> The focus then naturally becomes on imposing duties on States and national military commanders to not break rules of international law. In an African conflict context, it was found that placing obligations solely on the State could lead to inadequate protection as several of the conflicts mentioned were non-international – between rebel groups which were not necessarily affiliated with the State<sup>358</sup>. The solution which international criminal law provides is that it places individual criminal responsibility on those considered to be most responsible for the crimes, regardless of their place (or lack thereof) in the State.<sup>359</sup> The establishment of the ICC also has the benefit of interpreting international law in keeping with the realities of warfare; the use of girl child soldiers being one such reality that could gain from interpretation from the court.

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<sup>354</sup> The Convention at Article 38.

<sup>355</sup> The Convention at Article 1.

<sup>356</sup> Sheppard at p46.

<sup>357</sup> Bennett at p14-16.

<sup>358</sup> Mazurana at p36-40.

<sup>359</sup> Nuremberg Charter at Article 6(c).

A close interrogation of the Rules of Procedure, the Rome Statute and decisions of the ICC found that the international criminal law framework is not without its flaws. The Rules of Procedure and how they are applied provide an ambiguous landscape for victims to navigate through. It is unclear which victims are afforded rights of participation and of protection as the court has neglected to clarify whether it is 'harm' or 'personal interests' that one has to prove. The nature of the court is also such that it answers questions on a case-by-case basis<sup>360</sup> therefore issues such as that of voluntary recruitment of children between the ages of 15 and 18 are still left unanswered. And finally, the proposed mass withdrawal of African States from the Rome Statute threatens to make the bringing of a claim to the ICC even more difficult.

Substantively, the ICC's definition of the core crimes has the capacity to tackle most of the experiences of the girl child soldier. All three core crimes are defined to include sexual violence crimes.<sup>361</sup> However, the problem is that these crimes deal in part with the girl child's dichotomous identity, and leave out a key part – she is a child soldier. Article 8 of the Rome Statute provides a simple solution to this. Its wording varies from previous treaties as it references active participation, rather than 'direct participation'.<sup>362</sup> The ICC, however veered away from the problem of girl child soldiers when the question was posed to the court, even though there was evidence to support the claim of girl child soldiers.<sup>363</sup> This approach has left us with two possible interpretations which have not been confirmed at Trial Chamber level: *Prosecutor v Brima, Kamara and Kanu* perspective which defines active participation based on the risk involved in the child's activities and includes gender specific work which could fulfil the dichotomous identity, and a more stringent Pre-Trial Chamber interpretation which explicitly excludes sexual violence of girls from the definition of child soldier.<sup>364</sup> The court in the *Prosecutor v Dyilo* case did not engage with the question of which approach to take.<sup>413</sup> It is therefore yet to

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<sup>360</sup> *Prosecutor v Dyilo* (2012) at para 16.

<sup>361</sup> See Rome Statute at Article 7,8,9.

<sup>362</sup> Rome Statute at Article 8.

<sup>363</sup> *Prosecutor v Dyilo* (2012) at para 76.

<sup>364</sup> *Ibid.* Also see *Prosecutor v Brima, Kamara and Kanu* at para 736-737.

<sup>413</sup> *Ibid* at para 599.

be seen whether the interpretation of the court will lead to greater protection of girl child soldiers.

## 2. Conclusion

In conclusion, the ICC and the International Criminal Law framework does provide opportunity for cases such as that of the African girl child soldier to be heard and interpreted into criminal law. It does have the potential to include the dichotomous identity and experiences of girl child soldiers into the definition of girl child soldier. However, as of yet the ICC has steered away from this challenge. The only confirmed interpretations of the Rome Statute by the ICC involve sexual violence as international crimes and would only speak to some and not all of the experiences of the girl child soldier. There have been interpretations of child soldier in tribunals<sup>365</sup> and within persuasive international documents<sup>366</sup> which would include looking at the risk the child is placed in, and include activities such as spying. These interpretations could help provide adequate protection. However, the ICC has veered away from these interpretations and from addressing the dichotomous identity of girl child soldiers.<sup>367</sup> It is important to correctly classify the girl child soldier as what she is – a child soldier; and with her activities and experiences not being recognised as being those of a child soldier, she is in danger of remaining in the fringes of the law. As such the International Criminal Law framework does not provide adequate protection of the African girl child soldier.

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<sup>365</sup> *Prosecutor v Brima, Kamara and Kanu* at para 736-737.

<sup>366</sup> Cape Town Principles at p2-3.

<sup>367</sup> *Prosecutor v Dyilo* (2012) at para 599.

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