



**SEEKING TO DISSUADE: DOES THE INTERNATIONAL LEGAL
FRAMEWORK OFFER ENOUGH PROTECTION TO CHILD
SOLDIERS?**

By

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Summary

The thesis primarily deals with the gaps in existing international legal system on issue of Minimum Age of Criminal Responsibility (MACR) which leaves child soldiers vulnerable to prosecution. This problem on surface seems to be theoretical but some of the examples of prosecution of child soldiers in Africa and recently by United States of America in its so called War on Terror have proven otherwise. Vulnerability of child soldiers is further compounded due to lack of binding minimum standards on juvenile justice and the fact that the crimes they are accused of committing are subjected to universal jurisdiction. This thesis examines the existing legal conditions which are prevailing over the above-mentioned situations and the existing protection mechanisms to protect the child soldiers. As part of methodology primary and secondary data including scholarly works, texts of international legal instruments and example of case law have been studied and analyzed.

The first chapter defines the basic definitions and history which sets the context for this thesis. The chapter debates if the child soldiers should be treated as ‘victims’ or ‘perpetrators’. One of the important conclusions that emerged is that the ‘voluntary’ aspect used to justify prosecution of child soldiers should be disregarded as it is highly superficial and contentious; rather they should be primarily treated as victims of war.

The second chapter focuses on the critical assessment of the international legal standards.

It firsts familiarize the readers with the basic concept of criminal responsibility and the relationship between criminal responsibility and age. It looks in detail at the relevant global instruments, regional instruments and the case law with regards to MACR. The analysis proves that MACR is a controversial issue and reflects the compromises in the text of international treaties on the same.

The third chapter looks at the emergence of new challenges with regard to prosecution of child soldiers due to the phenomena of global terrorism and the resultant global war on terror.

This chapter deals with the case of a Canadian National Omar Khadr, who was captured at the age of 15 and since then have been detained at Guantanamo Bay. This chapter highlights the plight of child soldiers with the help of case study of Omar Khadr, especially in the grey realm of global war on terror. However, the insufficient data on treatment and number of child soldiers in detention facilities like Guantanamo Bay, Baghram and Abu Gharib, clearly indicates the need for further research on this particular subject.

In the end, the thesis provides some suggestions which could be helpful in seeking more protection for child soldiers. Unarguably war crimes and other heinous crimes like terrorism should not go unpunished and the victims have the right to justice. But child soldiers should be treated in the light of established legal principle of the due process of law, while taking into account their lack of mental capacity as juveniles and their special circumstances. This calls for international legal binding principles on juvenile justice. Most importantly there is a need to develop international consensus on straight 18 as the minimum age of criminal responsibility and conscription.

Abbreviations

AIDS - Acquired Immuno Deficiency Syndrome

AP I - Additional Protocol I to the Geneva Conventions

AP II - Additional Protocol II to the Geneva Conventions

CRC - Committee on the Rights of the Child

DRC - Democratic Republic of Congo

ECHR - European Convention on Human Rights

ECtHR - European Court of Human Rights

FARC - Revolutionary Armed Forces of Columbia

GC IV - Geneva Convention IV

HRW - Human Rights Watch

ICCPR - International Covenant on Civil and Political Rights

IHL - International Humanitarian Law

ILO - International Labor Organisation

LRA - Lord's Resistance Army

LTTE - Liberation Tigers of Tamil Elam

MACR - Minimum Age of Criminal Responsibility

RUF - Revolutionary United Front

SCSL - Special Court of Sierra Leone

UN - United Nations

UNCRC - United Nations Convention on the Rights of the Child

US - United States of America

Introduction

According to the *Coalition to Stop the Use of Child Soldiers* it is hard to ascertain the exact number of child soldiers as they serve in various armed groups across the world. Children were used in armed conflict in state and/or non-state armed groups in 19 countries and some of these countries are Afghanistan, Burundi, Central African Republic, Chad, Colombia, India, Sudan and Uganda from 2004 to 2007.¹ Some of the prominent non-state armed groups using children are Revolutionary Armed Forces of Columbia (FARC), Lord's Resistance Army (LRA) in Uganda, Liberation Tigers of Tamil Elam (LTTE), and Maoists also popularly known as 'Naxalites' in India, amongst others. Furthermore, the problem of child soldiers becomes more complex as it is not only that children are used in hostilities and conflicts but most of the demobilization and reintegration programmes are very challenging and can fail with lack of long-term political and financial support. This further exacerbates the situation of former child soldiers and leaves them vulnerable to re-recruitment. Apart from having such an exacerbated situation, some of the rehabilitation programmes do not even include children, which was the case in Indonesia and further in some countries like India, no programmes whatsoever exist to demobilize children from non-state armed groups.² The purpose of this thesis is to examine the claim that there is a need for special protection of child soldiers in the international legal system as they are vulnerable to prosecution due to existing gaps in the International Law on issues of Minimum Age of Criminal Responsibility (MACR), and lack of binding minimum standards on juvenile justice.³ The other way to look at this claim would be to argue that the existing legal framework does not provide relevant protection to child soldiers especially as there is a lack of consensus in international law on

¹ Coalition to Stop the Use of Child Soldiers, "Child Soldiers Global Report 2008", 2008

² Ibid

³ Konge P., "International Crimes & Child Soldiers", "Southwestern Journal of International Law", "Southwestern Journal of International Law", Volume 16, Number 1, 2010, pp. 41-43

the Minimum Age of Criminal Responsibility (MACR).

An extract from the Child Soldiers Global Report 2008 spells out how children are vulnerable to arbitrary prosecution and treatment in various countries.

In a number of countries children suspected of involvement in armed groups have been arbitrarily detained and some were reported to have been subjected to ill-treatment or torture. In Burundi, scores of children, some as young as nine years old have been detained for alleged links to the National Liberation Forces (FNL) for prolonged periods and some were severely beaten. In India, there was evidence that in areas of armed conflict children were detained, often in violation of national legislation designed to protect children. In the Philippines, detailed policies on the treatment of children captured, surrendered or escaped from armed groups have been ignored by the military and children held beyond officially sanctioned time-limits and in some cases ill-treated. In the USA, a detainee facing trial before a military commission, who was captured in Afghanistan in 2002 when he was 15-years old, alleged that he was ill-treated in US custody both in Afghanistan and in the US Naval Base in Guantánamo Bay. In the Democratic Republic of Congo and Myanmar child soldiers have been sentenced to terms of imprisonment for desertion from the armed forces. In the DRC several children convicted of military offences remained in prison under sentence of death.⁴

This clearly reflects occasions when governments have tried to prosecute child soldiers and in some cases successfully done so. For example, a fourteen year old child soldier was executed by the Congolese government in 2000, while in 2002 the Ugandan authorities pressed charges against two boys aged fourteen and sixteen years.⁵ In 2001, Democratic Republic of Congo imposed death sentence on four child soldiers, the four were convicted and sentenced by the Court of Military Order.⁶

The issue of MACR rests with the national jurisdiction and varies widely. It varies from seven years to eighteen years in different countries. For Example- “Australia - 10 years;

⁴ Coalition to Stop the Use of Child Soldiers, Facts and Figures, <http://www.childsoldiersglobalreport.org/content/facts-and-figures-child-soldiers> , accessed on 13 December 2011

⁵ Human Rights Watch press release, “Congo: Don’t Execute Child Soldiers: Four Children to be Put to Death”, 2 May 2001 and Human Rights Watch press release, “Uganda: Drop Treason Charges Against Child Abductees”, 4 March 2003

⁶ Human Rights Watch, “Letter to Foreign Minister of Democratic Republic of Congo”, 2 May 2001. (Human Rights Watch intervened and the execution was not carried out.)

Sierra Leone - 10 years; Canada - 12 years; Denmark - 15 years; the United Kingdom - 10 years; France - 13 years; Ireland - 7 years; New Zealand - 10 years; Norway - 15 years; Scotland - 8 years.”⁷ This suggests that there is a likelihood of arbitrariness, when it will come to prosecution of children, especially child soldiers as reflected in the decisions of Congolese and Ugandan Government. However, Happold suggests that since states had hardly shown willingness to prosecute child soldiers in the past and they might continue to do so, this makes the prosecution of child soldiers a theoretical possibility.⁸ But, this still does not change the fact that child soldiers are vulnerable to prosecution by states. Further, the risk of prosecution becomes graver as most of these child soldiers participate in hostilities and commit international war crimes including grave breaches of the Geneva Convention hence coming under the universal jurisdiction, where any country can prosecute them depending on the MACR it follows.⁹

This leads us to an important question around the current scenario with regards to MACR in international law, which this thesis shall inquire into:

✚ What are the international legal standards with regards to minimum age of criminal responsibility as reflected in the treaties?

This thesis is divided into three chapters. In the first chapter, I will lay out definitions which are crucial in setting the context for this thesis. Further, this chapter will look at the history and emergence of child soldiers and will briefly look into the context of this problem while laying emphasis on the unique situation of child soldiers in armed conflict. This will include literature review and will focus on the debate of what kind of treatment should be accorded to child soldiers, should they be looked upon as victims or should they be treated as criminals

⁷ Konge P., “International Crimes & Child Soldiers”, “Southwestern Journal of International Law”, Volume 16, Number 1, 2010, p. 47

⁸ Happold M., “The Age of Criminal Responsibility in International Criminal Law”, in “International Criminal Accountability and the Rights of Children”, Ed (s) Arts Karin and Popovski Vesselin, The Hague, Hague Academic Press, 2006, p.83

⁹ Ibid

and therefore should be prosecuted for their actions.

The second chapter will address the question of minimum age of criminal responsibility. In this chapter I will do a critical analysis of the international legal standards with regards to minimum age of criminal responsibility as reflected in the treaties, while considering the larger question of whether they offer sufficient protection to child soldiers.

The third chapter looks at the new challenges that have emerged due to increase in incidents of global terrorism and counter terrorism. The fight against terrorism has produced new vulnerabilities for child soldiers, which could not have been imagined a decade back.

Methodology

In the first stage a comprehensive literature review will be carried out focusing on the problem of child soldiers especially in the context of whether they should be looked upon as ‘perpetrators’ or ‘victims’. The thesis will rely primarily on qualitative research method. It is conceived of as critical analysis of international legal instruments like United Nations Convention on the Rights of the Child (UNCRC), Optional Protocol to the UNCRC 2000, Geneva Convention 1949 and other relevant instruments including regional conventions and case law (based on availability). Overall this thesis will be based on a review of primary and secondary sources.

1. Definitions, History and Context

1.1 Definitions

1.1.1 Child

It is critical to define the term ‘Child’ in order to understand the underlying problem that this thesis is presenting, i.e. the existing gaps in international law with regards to MACR, which makes child soldiers vulnerable to prosecution.

There are different ways to define ‘child’ and one of these is through developing an understanding of the different conceptions of ‘childhood’. According to David Archard, there is a need to differentiate between ‘concept of childhood’ and ‘conception of childhood’. While the former refers to recognising children as distinct from adults with regards to their attributes, the latter refers to what such distinct attributes are.¹⁰ He further suggests that childhood is a relational concept as children are understood in relation to what an adult is.¹¹

This relational aspect is further complicated as it is dependent on various local and cultural contexts in which adults might view a child differently. The very notion of ‘child’ is contentious and debated. As per the Universalist approach, the definition of a ‘child’ should be based on age and thus anyone below the age of 18 should be considered a child. However, the understanding of ‘child’ differs and conflicts with the various local conceptions and cultural notions based around ‘childhood’. For instance, in many cultures, a child is considered an adult once he/she attains puberty or starts working.¹² According to some authors the very reason why we object to children being used as soldiers is because the prevalent view of childhood of the ‘West/North’ prevails over other views.¹³ This view can

¹⁰ Archard D., “Children: Rights and Childhood”, Routledge, London, 1993, pp. 15- 22

¹¹ Ibid, p. 24

¹² Happold M., “Child Soldiers in International Law”, Manchester University Press, Manchester, 2005, pp. 22 to 27

¹³ Pupavac V., “The Infantilization of the South and the UN Convention on the Rights of the Child”, “Human Rights Law Review”, at 3, March 1998, p. 5

be further exploited negatively by some to justify recruitment and use of child soldiers on grounds of traditions and customs. According to Happold, such arguments should not be discarded but be considered as very important to influence changes in people's behaviours.

Happold also points out that the same debate and subsequent compromise are reflected in Article 1 of UNCRC, which states, "For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier."¹⁴ Although Article 1 of the UNCRC has been written in a way to prevent incompatibility with domestic law with regards to the age of majority, the state parties are required to provide information for minimum legal age on matters of conscription in armed forces amongst other things as per the General Guidelines on reporting by Committee on the Rights of the Child (CRC).¹⁵

For the purpose of this thesis, we need to see how the "Child" has been defined in international human rights law. Taking cue from the General Comment 17 (1989) on Article 24 (Rights of the Child) of the ICCPR by the Human Rights Committee¹⁶ and from the popular ratification of UNCRC, I will consider child as everyone below the age of 18 years.

¹⁴ Happold M., "Child Soldiers in International Law", Manchester University Press, Manchester, 2005, pp. 24, 26-27

¹⁵ Breen C., "When Is a Child Not a Child? Child Soldiers in International Law", "Human Rights Review", Volume 8, Number 2, January-March 2007, pp. 81-82

¹⁶ "The right to special measures of protection belongs to every child because of his status as a minor. Nevertheless, the Covenant does not indicate the age at which he attains his majority. This is to be determined by each State party in the light of the relevant social and cultural conditions. In this respect, States should indicate in their reports the age at which the child attains his majority in civil matters and assumes criminal responsibility. States should also indicate the age at which a child is legally entitled to work and the age at which he is treated as an adult under labour law. States should further indicate the age at which a child is considered adult for the purposes of article 10, paragraphs 2 and 3. However, the Committee notes that the age for the above purposes should not be set unreasonably low and that in any case a State party cannot absolve itself from its obligations under the Covenant regarding persons under the age of 18, notwithstanding that they have reached the age of majority under domestic law." Paragraph 4 of the General Comment 17 ICCPR, Human Rights Committee, 1989

1.1.2 Child Soldier

In the most basic sense, any children below the age of 18 being recruited for the intent and purpose of serving as soldiers would be referred to as child soldiers. But for the purpose of this thesis, I will use the definition of Child Soldiers given in Cape Town Principles:

Child Associated with an Armed Force or Group or CAAFAG, is any person under 18 years of age who is part of any kind of regular or irregular armed force or armed group who is used in any capacity, including but not limited to those who bear arms / combatants as well as cooks, porters, messengers, spies and anyone accompanying such groups. It includes girls recruited for sexual purposes and for forced marriage. It also includes any child who is considered or treated as a deserter for choosing to leave the armed force or group.¹⁷

However, there are other important definitions of child soldiers such as the one provided by the Palermo Protocol (2000)¹⁸ which defines trafficking and treats recruitment of children for the purpose of conflict and sexual exploitation under the crime of “trafficking in persons”¹⁹.

Similarly, child soldiers also come under the purview of the ILO Convention on Worst Forms of Child Labor 182, which considers using children as soldiers being “one of the worst forms of child labor”.²⁰

1.2 History

Child soldiers can hardly be called a recent phenomenon and based on the use of children in, ‘Children’s Crusade’ of 1212, use of young boys in Napoleon’s army, use of children by Nazis in World War II, establishment of ‘Small Boy Units’ by the British in its colonies including Sierra Leone are some of the glaring examples of use of children in war

¹⁷ Cape Town Principles and Best Practices on the Recruitment of Children into the Armed Forces and on Demobilization and Social Reintegration of Child Soldiers in Africa, Cape Town, 27-30 April 1997

¹⁸ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, 15 November 2000

¹⁹ Ibid, Article 3 (a)

²⁰ Convention 182, Convention Concerning The Prohibition And Immediate Action For The Elimination Of The Worst Forms Of Child Labour, Adopted By The Conference At Its Eighty-Seventh Session, Geneva, 17 June 1999, Article 3 (a)

historically.²¹ In 1950s, the British established ‘Small Boy Units’ in Sierra Leone and recruited children. In the 1990s, these very children, who were now military leaders in Sierra Leone, recruited children.²²

During the Post Cold War, there was an increase in use of children in national armies and non-national armed groups across the world, especially in countries like Iran, Cambodia and Columbia. Iran claimed that 150,000 children volunteered to fight for the Iranian army, which was 60 percent of its total recruits.²³ The 1990s saw the proliferation of conflicts in different parts of the world and with it a rapid increase in the use of child soldiers. According to the UN Special Representative on Children in Armed Conflict, around 300,000 children were serving as soldiers in different parts of the world in 1999.²⁴

At present, there has been a decrease in the number of child soldiers according to the Global Report 2008 and one of the main reasons for this is the decrease in the number of armed conflicts around the world. This decrease can also be attributed to the demobilization of thousands of children. In spite of this decrease, the problem remains and the extent of prevalence is not known as it is very difficult to estimate.²⁵

1.3 Context

The issue of child soldiers first drew attention of the international community when Graca Machel did a report on ‘Impact of Armed Conflict on Children’, hereinafter referred to as the Machel Report.²⁶ In this report, Machel discusses the impact of conflict on children and talks specifically about child soldiers describing the extent of the issue. She says, “Children are

²¹ Webster T., “Babes with Arms: International Law and Child Soldiers”, “George Washington International Law Review”, Volume 39, 2007, p. 229

²² Schabas, William A., “Conjoined Twins of Transitional Justice? The Sierra Leone Truth and Reconciliation Committee and the Special Court”, “Journal of International Criminal Justice”, 2, Number 4, 2004, p. 1087

²³ Kent G., “Children in the International Political Economy”, St. Martin's Press, New York, 1995, p. 85

²⁴ UNSC Press Release SC/6642, “Plight of Civilians in Armed Conflict as Core of Security Council’s Mandate, Canada’s Foreign Minister Tells Council”, 12 February 1999, p. 4

²⁵ Coalition to Stop the Use of Child Soldiers, “Child Soldiers Global Report 2008”, 2008, p. 12

²⁶ Promotion and Protection of the Rights of Children: Impact of Armed Conflict on Children, U.N. Doc. A/51/306, 26 August 1996

slaughtered, raped, and maimed; a space in which children are exploited as soldiers; a space in which children are starved and exposed to extreme brutality.”²⁷

A recent review of the Machel Report known as “Machel Study 10-Year Strategic Review: Children and Conflict in A Changing World” published in April 2009, discusses in detail the grave violations against children, highlighting the plight of children in conflict situations.²⁸

1.3.1 Reasons for Increase in Use of Child Soldiers

Children are either forcibly recruited or voluntarily enlisted in armed forces and groups. I will address the question of ‘voluntary recruitment’ later on in this chapter, however as established by Graca Machel, most of the voluntary recruitments are strongly influenced by factors such as family background, peers, school and community amongst many other hidden forms of coercion.²⁹

Happold explores this phenomenon of forced recruitment and voluntary recruitments while differentiating between compulsory recruitment, forced recruitment and volunteering. He defines compulsory recruitment as a condition wherein states impose a legal obligation to perform military services. Forced recruitment takes place when children are forcefully recruited or abducted and volunteering refers to children consensually joining the armed forces and groups.³⁰

Susan Tiefenbrun presents a very interesting picture of the increase in use of child soldiers when she suggests that there has been a change in family and society at large leading to devaluation of children. This means that children are no longer considered the hope for the future, making them dispensable and less worthy as compared to the emerging and

²⁷ Ibid, p. 5

²⁸ Machel Study 10-Year Strategic Review Children and Conflict in A Changing World; Co-Convened by UNICEF & the Office of the Special Representative of the Secretary-General for Children and Armed Conflict, April 2009, pp. 21 to 29

²⁹ Promotion and Protection of the Rights of Children: Impact of Armed Conflict on Children, U.N. Doc. A/51/306, 26 August 1996. pp. 11-12

³⁰ Happold M., “Child Soldiers in International Law”, Manchester University Press, Manchester, 2005, p. 8

overwhelming ideas of martyrdom.³¹ For example, status attached to a suicide bomber dying for the cause of god, land, and ethnicity is more than that of a child, and hence parents consider it of greater value that their child dies for a cause. This is an interesting reason; however, it needs to be empirically tested in my opinion.

Singer in his remarkable book ‘Children at War,’ suggests that globalization is also responsible for the increase in use of child soldiers. Not only do socio-economic problems related to globalization increase children’s vulnerability and marginalization but globalization also leads to increase in trafficking of weapons, humans and drugs with each of these having an intimate and complex relationship with conflicts and use of children.³² He also attributes this increase to the spread in AIDS, which has left many children orphaned, thus leaving them vulnerable to recruitment in unstable societies.³³

Another important development which can be directly attributed to the increase in use of child soldiers is the increase in proliferation and use of small arms or small personal weapons. Whilst small arms account for only less than 2 percent of the global arms trade, these are most often causing 90 percent of casualties in conflicts.³⁴ Children’s participation and ability have increased as well due to technological and efficiency advances in these small arms. It overcomes the problem of strength and force that children lack compared to adults, thereby increasing their efficiency as fighters.³⁵

According to Cohn and Goodwin- Gill, manpower shortages and class discrimination are the primary reasons for forced recruitment of children, even when conscription limits are imposed. Children can be hired from ethnic minorities as part of discrimination tactics used

³¹ Tiefenbrun S., “Child Soldiers, Slavery, and the Trafficking of Children”, “Thomas Jefferson School of Law Legal Studies Research Paper No. 1020341”, October 2007. p. 13-14

³² Singer, Peter W., “Children at War”, University of California Press, California, 2006, pp. 38-39

³³ Ibid, p. 45

³⁴ Smith D. and Stohl R., “Small Arms in Failed States: A Deadly Combination”, Paper written for “Failed States and International Security” Conference at Purdue University, April 8-11, 1999

³⁵ Wessells M., “Child Soldiers: The Destruction of Innocence”, “Global Dialogue”, Volume 1, Number 2, Autumn 1999, Weapons and War, para. 13

by some of the governments.³⁶ Happold makes another interesting point in the debate of recruitment of children by governments. He suggests that in many under-developed countries, systems to record and track ages are weak, therefore the whole system of conscription fails and recruitment of children can take place even without the use of force.³⁷

Motives of recruitment by armed forces are different, even though they can also undertake forced recruitment in order to cover manpower shortages. However, Brett and McCallin suggest that children are recruited by armed groups because they can easily be manipulated and persuaded to commit atrocities as compared to adults.³⁸ Children are used as guinea pigs and are used in minefields as well as forming the front lines, while the militia leaders stay behind.³⁹

The above discussion refers mainly to forced recruitment and compulsory recruitment and leads us to our big question on ‘volunteering’ or ‘why do children voluntarily join armed forces and groups’. This is an important question because it is used by advocates who are in favor of prosecuting child soldiers to assert their claim that as children willingly participate in committing atrocities, they should be held criminally liable for such acts. It further leads us to the debate of whether child soldiers should be treated as ‘victims’ or ‘perpetrators’.

1.3.2 Are they ‘Victims’ or ‘Perpetrators’?

I will try to look at this question on the basis of two elements which I believe are essential in ascertaining whether child soldiers should be treated as ‘victims’ in armed conflict or ‘perpetrators’. These two elements are looking at the “effects of soldiering in armed forces

³⁶ Cohn Ilene & Gill-Goodwin S. Guy, “Child Soldiers: the Role of Children in Armed Conflicts”, A Study on Behalf of the Henry Dunant Institute, Oxford University Press, Oxford, 1994, pp. 24-30

³⁷ Happold M., “Child Soldiers in International Law”, Manchester University Press, Manchester, 2005, p. 9

³⁸ Brett R. and McCallin M., “Children: The Invisible Soldiers”, Radda Barnen (Save the Children Sweden), Stockholm, Rev. Edition 1998, p. 25

³⁹ Akhavan P., “The Lord’s Resistance Army Case: Uganda’s Submission of First State Referral to International Criminal Court”, “The American Journal International Law”, Volume 99, Number 2, April 2005, p. 408

and groups on children themselves”⁴⁰ and a deeper analysis of the notion of ‘volunteering’ in armed forces and groups.

I will first discuss the ‘effects of soldiering in armed forces and groups on children themselves’. In order to understand the effects of soldiering in armed forces and groups on children, it is important to first look at the overall impact of conflicts on children. According to the UNICEF’s report, *State of the World’s Children 2006*, armed conflict seriously jeopardizes the very existence of children by having serious detrimental effects on their potential and also steps up the risk of exclusion:

Armed conflict causes children to miss out on their childhood in a multitude of ways. Children recruited as soldiers are denied education and protection, and are often unable to access essential health-care services. Those who are displaced, refugees or separated from their families face similar deprivations. Conflict heightens the risk of children being exposed to abuse, violence and exploitation with sexual violence often employed as a weapon of war. Even those children who are able to remain with their families, in their own homes, may face a greater risk of exclusion because of the destruction of physical infrastructure, strains on health care and education systems, workers and supplies, and increasing personal insecurity caused by the conflict or its remnants such as landmines and unexploded ordnance..... Most of the countries where 1 in 5 children die before five have experienced major armed conflict since 1999.⁴¹

Apart from the civilian and children deaths caused by direct violence as a result of armed conflict, it is worth noting and evidenced that poverty, spread of diseases and malnutrition, destruction of livelihoods, and collapse of traditional and community-based structures of protection lead to increase in deaths of children.⁴² As per UNICEF, *Humanitarian Action Report 2005*,

During emergencies, children are especially vulnerable to disease, malnutrition and violence. In the last decade, more than 2 million

⁴⁰ Happold M., “Child Soldiers in International Law”, Manchester University Press, Manchester, 2005, p. 15

⁴¹ UNICEF, “State of the World’s Children 2006: Excluded and Invisible”, New York, UNICEF, 2006, p. 14-15

⁴² Machel Study 10-Year Strategic Review Children and Conflict in A Changing World; Co-Convened by UNICEF & the Office of the Special Representative of the Secretary-General for Children and Armed Conflict, April 2009, p. 21 to 29

children have died as a direct result of armed conflict, and more than three times that number have been permanently disabled or seriously injured. An estimated 20 million children have been forced to flee their homes, and more than 1 million have been orphaned or separated from their families. Some 300,000 child soldiers – boys and girls under the age of 18 – are involved in more than 30 conflicts worldwide. UNICEF focuses on these children and their families – on the essential interventions required for protection, to save lives and to ensure the rights of all children, everywhere.⁴³

Seeing the above impact on the overall situation of children due to armed conflict, it is important to see the effects on children soldiering in armed forces and armed groups. Armed forces and groups usually accord the same treatment to children as adult counterparts. Thus no special treatment is given to children on the basis of their age.⁴⁴ For example, child soldiers in Sierra Leone were beaten up, punished, forced to carry heavy arms and ammunitions and were made to kill and serve in front lines.⁴⁵ Many armed groups consider children as ‘dispensable’ or ‘expendable,’ and therefore use them for dangerous missions.⁴⁶

Child soldiers are also abused by their adult commanders and treated like slaves; new recruits are sometimes required to do killings and other cruel acts as part of their initiation. Most of the armed forces and groups practice sexual slavery; girls are abducted and forcefully recruited to fulfil sexual needs in armed forces and groups. For example, in the RUF in Sierra Leone, a girl belonged to the one who had kidnapped her and in Angola, girls were required to entertain and fulfil all demands of the troops.⁴⁷

According to Human Rights Watch, new recruits of the LRA in Uganda are severely beaten up in order to harden them and beatings are regular modes of punishment in order to ensure

⁴³ UNICEF, “Humanitarian Action Report 2005”, UNICEF, New York, 2005, p. VII

⁴⁴ Muscroft S. ed., “Children’s Rights: Reality or Rhetoric? The UN Convention on the Rights of the Child: The First Ten Years”, The International Save the Children Alliance, London, 2000, p. 49-50

⁴⁵ Ibid, p. 50

⁴⁶ Bald H. Stephanie, “Searching for a Lost Childhood: Will the Special Court of Sierra Leone find Justice for Its Children”, “American University International Law Review 18”, Number 2, 2002, p. 553

⁴⁷ Happold M., “Child Soldiers in International Law”, Manchester University Press, Manchester, 2005, p. 16

strict obedience.⁴⁸ Harsh military training, assertion of discipline and an overall abusive life impact children physically and psychologically. Children not only face the constant risk of death or injury but also execution if they try to escape from armed forces and groups.⁴⁹

Happold lists the following problems that child soldiers face as a consequence of their serving in armed forces and armed groups – physical injury, psychological strain, loss of education and stigmatization. Child soldiers suffer bad treatment both from the enemy side as well as within their own groups. They are prone to injuries, wounds, loss of vital body parts due to mining and disabilities. They suffer from post-traumatic stress disorders and other psychological disorders such as depression, fear or guilt due to what they experience and witness as part of armed forces and groups. Even after demobilization they remain stigmatized for life due to their past connection and membership in armed forces and groups. It further affects their reintegration in their communities. Happold highlights that girl child soldiers face more difficulties and unique consequences compared to others since they are likely to suffer from sexually transmitted diseases, abortions and ostracization from their communities upon return. There may also be a change in their situation as they might return with children, apart from the above-mentioned factors.⁵⁰

The second element of the ‘victim’ or ‘perpetrator’ debate is the notion of ‘volunteering’; it is an important aspect with regards to child soldiers. As claimed, ‘volunteering’ refers to children joining armed forces or groups on their own volition. There is a push and pull between treating them as victims or criminals and it raises the question of prosecution of child soldiers. There are conflicting opinions on the prosecution of child soldiers.⁵¹ Most of the demands for prosecution of children are centered on the notion of volunteerism. The

⁴⁸ Human Rights Watch, “Stolen Children: Abduction and Recruitment in Northern Uganda”, New York: HRW 2003, pp. 8-9

⁴⁹ Happold M., “Child Soldiers in International Law”, Manchester University Press, 2005, Manchester, p. 16-17

⁵⁰ Ibid, pp. 17-18

⁵¹ Konge P., “International Crimes & Child Soldiers”, “Southwestern Journal of International Law”, Volume 16, Number 1, 2010, pp. 62-67

proponents of prosecuting child soldiers argue that as children join armed groups voluntarily, they should be held criminally responsible for their acts.

These conflicting schools of thought prominently emerged in Sierra Leone as the government and the citizens demanded punishment of child combatants and the Special Court's statute aimed at rehabilitation without punishment.⁵² The issue of prosecution of child combatants was debated at length amongst various stakeholders including government, legal experts, the UN and civil society organizations.⁵³ Justice Robertson of the Special Court of Sierra Leone (SCSL) responded to this argument:

I accept that "voluntary" enlistment is not as benign as it sounds. Children who "volunteer" may do so from poverty (so as to obtain army pay) or out of fear - to obtain some protection in a raging conflict. They may do so as the result of psychological or ideological inducement or indoctrination to fight for a particular cult or cause, or to achieve posthumous glory as a "martyr." Any organization which affords the opportunity to wield an AK47 will have a certain allure to the young.⁵⁴

I will argue that the element of 'volunteering' if demystified, presents pressures and coercion that children face in societies to join armed forces and armed groups. First of all, volunteerism of children in armed groups is questionable as most children lack knowledge and do not understand the consequences of their actions.⁵⁵ Machel concludes that, it might seem that children choose freely, however they may be driven by many factors including cultural, social, economic or political pressures.⁵⁶ However the report does state that children can also volunteer if they identify with the ideology and believe in the cause taken up by the

⁵² Romero, Joshua A., "The Special Court for Sierra Leone and the Juvenile Soldier Dilemma", "Northwestern University Journal Of International Human Rights", Volume 2, April 2004, Para 19-20

⁵³ Annan K., Report of the Secretary General on the establishment of a Special Court for Sierra Leone, S/2000/915, 04/10/2000, p. 10

⁵⁴ Prosecutor v. Sam Hinga Norman, Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), Case No. SCSL-2004-14-AR72(E), 1, 9, Special Court for Sierra Leone, 31 May 2004

⁵⁵ Silva R. Jennifer, "Child Soldiers: A Call To The International Community To Protect Children From War", "Suffolk Transnational Law Review", Summer 2008, p. 686

⁵⁶ Promotion and Protection of the Rights of Children: Impact of Armed Conflict on Children, U.N. Doc. A/51/306, 26 Aug 1996, para. 38

armed groups.⁵⁷ Peer and family pressure and glorification attached to the status of fighters are other important reasons.⁵⁸ Silva also argues that by the very virtue of the fact of children's evolving capacities and age they become vulnerable to recruitment as they make into obedient combatants, who do not understand the exact consequences of their actions.⁵⁹

Happold quotes Rachel Brett and Irma Specht, who lay out five factors regarding adolescent volunteering in armed forces and groups – war, poverty, education, employment and family.⁶⁰

War reaches society where children live, not vice versa, and disrupts normal life leading to insecurities, breakdown of family system, education, lack of employment, poverty, thus leaving children no option but to join armed forces and groups.⁶¹ Happold also considers the important factor of Societal Attitude and Propaganda, which refers to the popular propaganda prevalent in society in times of conflict and advocated by family elders, community leaders and peers thus creating a pressure atmosphere, where the child sees, joining armed forces and groups as the only solution to problems.⁶²

In the chaotic environment during armed conflicts, children seek stability and food in order to survive; they may do so by choosing to volunteer for armed forces and groups. In this whole struggle of survival, wherein the countries' law and order systems have broken down, children can seek security and safety against reprisals and abductions by voluntarily joining armed forces and groups.⁶³

Another interesting argument is the development of a child's capacity, which raises the question: does the child understand the repercussions of his or her actions while taking a life

⁵⁷ Ibid, para. 43

⁵⁸ Silva R. Jennifer, "Child Soldiers: A Call To The International Community To Protect Children From War", "Suffolk Transnational Law Review", Summer 2008, p. 686

⁵⁹ Ibid, p. 688

⁶⁰ Happold M., "Child Soldiers in International Law", Manchester University Press, Manchester, 2005, pp. 12-14. (Young Soldiers: Why They Choose To Fight by Rachel Brett and Irma Specht)

⁶¹ Ibid

⁶² Mathew Happold, "Child Soldiers in International Law", Manchester University Press, Manchester, 2005, pp. 13-14

⁶³ Udombana J. Nsongurua, "War is not child's play! International law and the Prohibition of Children's Involvement in Armed Conflicts", "Temple International & Comparative Law Journal", Volume 20, Number 1, 2006, pp. 63-64

changing decision such as joining an armed force or group. According to the American Medical Association (AMA) “adolescent brains are not fully developed in the prefrontal regions, and adolescents are less able than adults to control their impulses and should not be held fully accountable for the immaturity of their neural anatomy.”⁶⁴ Therefore, the decision by a child to join an armed force or group on his/her own free should take into account the fact that the child is still immature and that his reasoning capacities are not fully developed.

On the basis of the above mentioned arguments it can be clearly deduced that when the element of ‘volunteering’ is deconstructed, we find that the decision of a child to join an armed force or group is not arrived at in a vacuum. There are many pressures and factors that operate at large and influence such decisions.

There is one more argument on prosecuting child soldiers that uses the UNCRC as the base of holding children soldiers responsible for their actions. This argument focuses on the evolving capacities of some children and their potential to make informed choices on the basis of their age and maturity.⁶⁵ To support her argument, Davison uses Article 12 of the United Nations Convention on Rights of the Child,

State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, [with] the views of the child being given due weight in accordance with the age and maturity of the child.⁶⁶

However, as given in Article 31 (1) of Vienna Convention on Law of Treaties (1969), Article 12 of UNCRC should be read in ordinary meaning and not against the purpose and object of the treaty. In the case of the UNCRC, the purpose and object is to offer protection to children and respect their opinions in decisions regarding their life. Therefore, in my opinion this argument is completely baseless and should be disregarded.

⁶⁴ Tiefenbrun S., “Child Soldiers, Slavery, and the Trafficking of Children”, “Thomas Jefferson School of Law Legal Studies Research Paper No. 1020341”, October 2007, pp. 48 & 51

⁶⁵ Ann D., “Child Soldiers: No Longer a Minor Incident”, “*Williamette Journal of International Law & Dispute Resolution* 12”, 124, 2004, p. 133

⁶⁶ UNCRC Article 12

It is a well-established fact that regardless of the method of recruitment, children are abused in armed groups and their participation in wars scars them forever, which has a negative effect on their overall personality.⁶⁷ Thus, a rehabilitative approach should be promoted over criminal prosecution. According to Grossman,

In case of children, the world community should choose rehabilitation and reintegration over criminal prosecution because of children's unique psychological and moral development, the Convention on the Rights of the Child's emphasis on promoting the best interests of the child, and the damaging psychological effects that trials may have on children forced to recount violence done to them and other.⁶⁸

Based on the above discussion and whilst looking at the causes of recruitment of children for soldiering, the negative effects bear lifelong repercussions that call for appropriate treatment and special protection. The discussion on volunteering in armed forces or groups also points out that children who might have made decisions to volunteer did not do so of their free will.

1.4 Conclusion

My argument is that the international community should consider voluntary enlistment as a meaningless phenomenon because most voluntary acts are children's ways of coping to survive the innumerable odds that they face during a conflict situation. Consent given by a child in conflict situations should not be treated as legal but as a desperate attempt to survive. Therefore, this element of 'volunteering' is superficial in the context of children during armed conflicts and hence evidently tilts the debate in favor of treating them as 'victim' rather than as a 'perpetrator'; and as victims, they deserve to be accorded legal protection. Based on the foregoing discussions, we can therefore conclude that child soldiers should not be treated as criminals without taking into account the fact that they are primarily victims.

⁶⁷ Silva R. Jennifer , "Child Soldiers: A Call To The International Community To Protect Children From War", "Suffolk Transnational Law Review", Summer 2008, p. 688-690

⁶⁸ Grossman N., "Rehabilitation or Revenge: Prosecuting Child Soldiers for Human Rights Violations", "Georgetown Journal of International Law", Volume 38, 2007, pp. 323-324

2. What are the International legal standards with regards to minimum age of criminal responsibility?

In the previous chapter, I argued that child soldiers are victims of armed conflict and circumstances that prevail during armed conflicts and break down of general law and order situation and hence they should be accorded special protection. The second, important factor which puts child soldiers in a precarious situation with regards to their protection and legal treatment is the Minimum Age of Criminal Responsibility (MACR). Due to lack of consensus in international law on MACR, child soldiers are very vulnerable to prosecution.

2.1 Criminal Responsibility

To start with, it is important to understand the concept of Criminal Responsibility. What exactly does the term ‘criminal responsibility’ entail? For anyone to be held criminally responsible, certain prerequisites are essential. The first and foremost prerequisite is ‘proof’, which in most common law systems means a requirement of evidence that the physical act which has been deemed criminal, has been carried out by the accused. Second prerequisite is that of evidence of ‘mental element’, which can be understood as the intention to commit a particular criminalized act. The third and one of the most important prerequisites is that of ‘mental capacity’. It means that the accused must have an understanding of the nature and immediate and wider consequences of the criminal act committed.⁶⁹ In cases of adults, mostly these abilities are assumed but as far as children are concerned, specific and thorough investigation of the following are required:

- Has the child developed the cognitive abilities to control his/her actions?

⁶⁹ McDiarmid C., “What Do They Know? Child Defendants and the Age of Criminal Responsibility: A National Law Perspective”, in “International Criminal Accountability and the Rights of Children”, Ed (s) Arts Karin and Popovski Vesselin, The Hague, Hague Academic Press, 2006, pp. 90-91

- Does the child understand the distinction between right and wrong, both in the legal and moral sense, as well as the degree of wrongdoing?
- Does the child fully understand all the possible effects of the wrongful action committed?
- Does the child fully understand that the wrongful act committed is a criminal act and thus has legal consequences and can lead to prosecution?
- Does the child have the mental ability to explain his/her actions as well as an overall developmental ability which can be deemed as appropriate mental element?⁷⁰

The crucial point here is that ascertaining criminal capacity of a child is a complex and multilayered matter and scrutiny of the above-mentioned elements can certainly prove to be a difficult task in the court proceedings. Moreover, it has been medically proven that the adolescent brain is not fully developed as compared to an adult brain⁷¹ and thus children most likely lack mental element and mental capacity, two crucial criteria's for ascertaining criminal responsibility.

2.2 Criminal Responsibility and Age

Taking forward the above discussion, it is worthwhile to see how age is linked with criminal responsibility. To start with, if we take examples from various national legal systems, it reveals no consensus amongst states at all; in fact setting of age with regards to criminal responsibility comes across as an arbitrary state decision. MACR in Scotland is eight years, in Sweden fifteen years, in Portugal sixteen years, in Netherland twelve years, in England and Wales ten years, in Australia ten years, in Sierra Leone ten years, in Canada twelve years, in Denmark fifteen years, in France thirteen years, in Ireland seven years, in New Zealand ten

⁷⁰ Ibid, pp. 91-92

⁷¹ Tiefenbrun S., "Child Soldiers, Slavery, and the Trafficking of Children", "Thomas Jefferson School of Law Legal Studies Research Paper No. 1020341", October 2007, pp. 48 & 51

years, and in Norway fifteen years.⁷² Such wide variation definitely does not present the point at which these systems assume the age of child's maturity. Besides, this wide variation cannot be attributed to cultural differences as well.

Another interesting element in creating distinction between children and adults is the age limit fixed by different countries in relation to consumption of alcohol, the ability to drive, legal marriage age, right to vote, etc.; age limit fixed for some of these cases is higher than the age of criminal responsibility. To take the example of England, the minimum age for getting a drivers license is seventeen years while the age of criminal responsibility is ten years.

The commentary on the age of criminal responsibility in the Beijing Rules gives some interesting input in this regard:

The minimum age of criminal responsibility differs widely owing to history and culture. The modern approach would be to consider whether a child can live up to the moral and psychological components of criminal responsibility; that is, whether a child, by virtue of her or his individual discernment and understanding, can be held responsible for essentially antisocial behavior. If the age of criminal responsibility is fixed too low or if there is no lower age limit at all, the notion of responsibility would become meaningless. In general, there is a close relationship between the notion of responsibility for delinquent or criminal behavior and other social rights and responsibilities (such as marital status, civil majority, etc.).

Efforts should therefore be made to agree on a reasonable lowest age limit that is applicable internationally.⁷³

Here it needs to be pointed out that neither the commentary nor the Beijing Rules are binding on member states. However, it would indeed be better if states could use these as guiding principles while reviewing or deciding the MACR in their respective national laws. Moreover, since the age of criminal responsibility is put in the legal system to protect

⁷² Konge P., "International Crimes & Child Soldiers", "Southwestern Journal of International Law", Volume 16, Number 1, 2010, p. 47

⁷³ United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), General Assembly resolution 40/33, 29 November 1985, p. 3

children who are deemed to lack mental capacity, it should thus be decided keeping in mind the best interest of the child and not go against its purpose.

2.3 The International Legal Framework and Age of a Child

As discussed in the preceding chapter, there are serious problems with the definition of ‘child’. I have taken the age of a child as below eighteen years for the purposes of this thesis. Still it is critical to see how different international legal instruments define the term ‘child’. Do they provide a universal definition or are they creating more confusion? This is important in order to see if the balance is tilted more towards the eighteen years bench mark or does it set different standards, which leaves it open for the state to exercise its discretion, making child soldiers vulnerable to prosecution. While probing the age issue, I will also examine the protection offered by internal legal instruments to children with regards to recruitment in armed forces and armed groups during armed conflict.

2.3.1 International Humanitarian Law Instruments

The most significant and important legal instruments which are applicable in armed conflict are the four Geneva Conventions (1949) and the three Additional Protocols (1977 & 2005). The main convention which concerns the present study is GC IV and the two APs. In general, they do not provide specific definition of a ‘child’ but rather deal with six different age categories, in the context of various entitlements of children, in the course of an armed conflict.⁷⁴ The general threshold set by the Geneva Conventions is fifteen years, below which children enjoy some special protection, but some articles also set a higher threshold.⁷⁵ For example, Article 51 of GC IV lays out 18 years as the minimum age for compulsion to work

⁷⁴ Kuper J., “Treaty Law of Armed Conflict and Related Instruments Specifically Regarding Child Civilians”, in “International Law Concerning Child Civilians in Armed Conflict”, Clarendon Press, Oxford, 1997, p. 78

⁷⁵ Udombana J. Nsongurua, “War is not child’s play! International law and the Prohibition of Children’s Involvement in Armed Conflicts”, “Temple International & Comparative Law Journal”, Volume 20, Number 1, 2006, p. 73

in occupied territories while Article 24 sets out 15 years for the protection of orphans and separated children.

Another important issue concerning child soldiers is that of participation in hostilities. There is a general lack of clarity on issues determining direct and indirect participation in hostilities, not just for children but for civilians overall. As per ICRC commentaries, taking ‘direct part in hostilities’ means engagement in acts which can cause harm to personnel and equipment of enemy armed forces.⁷⁶ Hence, even children engaged in such harmful acts will be deemed as taking direct part in hostilities.

Additional Protocol II entitles children to special treatment.⁷⁷ It offers increased protection to children and asks parties to refrain from recruiting children below 15 years even if they wish to volunteer.⁷⁸ No exceptions are allowed to this article; it even extends to non-state armed groups. Further, with regards to death penalty, Article 6 (4) of Additional Protocol II sets a higher standard compared to Additional Protocol I, as it states that death sentence should not be ‘pronounced’ on children under 18 years. While in Additional Protocol I, the term used is ‘executed’.⁷⁹ The interesting fact is that on the one hand it allows children from the age of 15 to risk death by participating in armed conflict but on the other forbids their execution for certain offences while participating in armed conflict.

With regards to the legal force of Additional Protocol II, the Appeals Chamber of Special Court of Sierra Leone held in *Prosecutor v. Norman* that many provisions and guarantees provided in AP II are widely accepted as customary international law.⁸⁰

⁷⁶ Udombana J. Nsongurua, “War is not child’s play! International law and the Prohibition of Children’s Involvement in Armed Conflicts”, *Temple International & Comparative Law Journal*, Volume 20, Number 1, 2006, p. 77

⁷⁷ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non- International Armed Conflicts (Protocol II), 8 June 1977, Article 4 (3)

⁷⁸ *Ibid*, Article 4 (3) (c)

⁷⁹ Kuper J., “Treaty Law of Armed Conflict and Related Instruments Specifically Regarding Child Civilians”, in “International Law Concerning Child Civilians in Armed Conflict”, Clarendon Press, Oxford, 1997, p. 97

⁸⁰ *Prosecutor v. Sam Hinga Norman*, Case No. SCSL-2004-14-AR72(E), 1, 9, Special Court for Sierra Leone, 31 May, 2004

2.3.2 International Human Rights Instruments

2.3.2.1 United Nations Convention on the Rights of the Child (1989)

The UNCRC is the most ratified human rights instrument in history. Hence, to date it is the most accepted international human rights treaty in the world. Some commentators take this widespread ratification as a sign of acceptance by almost all states, thus giving UNCRC the status of international customary law when it came into force.⁸¹ However, other commentators feel that widespread ratification does not imply automatic enhancement to the status of international customary law as these ratifications are rendered meaningless because of sweeping reservations.⁸²

Article 1 and Article 38 of UNCRC are relevant to the present research.⁸³

Article 1

For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

Article 38

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

⁸¹ Udombana J. Nsongurua, "War is not child's play! International law and the Prohibition of Children's Involvement in Armed Conflicts", "Temple International & Comparative Law Journal", Volume 20, Number 1, 2006, pp. 57-58

⁸² Kuper J., "Monitoring, Implementation and Enforcement of International Law Concerning Child Civilians", in "International Law Concerning Child Civilians in Armed Conflict", Clarendon Press, Oxford, 1997, p. 132

⁸³ Convention on the Rights of the Child, Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, Entry into force 2 September 1990, Article 1 and Article 38

shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.

These two articles are important because they deal with the issue of ‘who is a child’ and children in armed conflict. These articles also present an anomaly within UNCRC. On the one hand, Article 1 defines the age of a child as below 18 years, while on the other, Article 38 sets 15 years as a threshold for taking direct part in hostilities, thus restricting the scope of protection of children in armed conflict. Article 38 of UNCRC comes across as a disappointment as it provides protection to children below the age of 15 rather than providing protection to all children. Another important element when we look at the text of Article 1 in detail is that it provides ample scope to state parties to manipulate as 18 years serves only as an upper limit.

Although, Article 38 of UNCRC confirms the blanket ban on recruitment of children below the age of 15 years like Article 4 (3) (c) of AP II, it is still weaker as the AP II also covers internal armed conflict.⁸⁴ The UNCRC is technically applicable in armed conflicts and does not seem to be of any particular importance as it applies to state parties only and not to non-state armed groups. Further, several state parties made declarations on Article 38 of the UNCRC, saying they will apply their own national laws rather than principles laid down in this Article.⁸⁵

The reporting mechanism established under the UNCRC and led by the CRC Committee is also problem-ridden as it has not proved to be a useful instrument during emergencies. It does not have judicial powers and cannot entertain individual complaints.⁸⁶ Further, the CRC Committee has also faced many criticisms because of its apparent failure to question state

⁸⁴ Happold Mathew, “Child Soldiers in International Law”, Manchester University Press, Manchester, 2005, p. 72

⁸⁵ Ibid, p. 74

⁸⁶ Hamilton C., “Child Protection in Complex Emergencies”, in “Protection of Children during Armed Political Conflict : a Multidisciplinary Perspective”, ed. (s) Charles W. Greenbaum et al, Intersentia, Oxford, 2006, p. 273

party representatives on adherence to international law during armed conflicts. In spite of these criticisms, the Committee is applauded for initiating various sustained efforts to increase its scrutiny on serious violations. Also, the UNCRC does provide the most comprehensive implementation and monitoring framework for children in armed conflict.⁸⁷

2.3.2.2 African Charter on the Welfare and Rights of the Child (1990)⁸⁸

The African Charter on the Welfare and Rights of the Child (hereafter referred as African Charter on Child) is the first and only potentially binding regional human rights treaty specifically on children's rights. It also remains the only regional human rights treaty dealing with children in armed conflict. For example, the Preamble states

the situation of most African children, remains critical due to the unique factors of their socio-economic, cultural, traditional and developmental circumstances, natural disasters, armed conflicts, exploitation and hunger, and on account of the child's physical and mental immaturity he/she needs special safeguards and care.⁸⁹

The African Charter on Child is a unique regional instrument which was drafted mainly on the tracks of UNCRC but is actually superior in terms of protection accorded to children as compared to UNCRC.⁹⁰

To start with, the African Charter on Child defines a 'child' more uniformly as compared to UNCRC.⁹¹ More importantly, it offers more protection to children as Article 22 of the African Charter on Child is stronger than Article 38 of UNCRC. Article 22 of the African Charter on Child states

Article 22: Armed Conflicts

⁸⁷ Kuper J., "Monitoring, Implementation and Enforcement of International Law Concerning Child Civilians", in "International Law Concerning Child Civilians in Armed Conflict", Clarendon Press, Oxford, 1997, pp. 137-138

⁸⁸ African Charter on the Welfare and Rights of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), entered into force 29 November 1999

⁸⁹ Ibid, Preamble Para 4

⁹⁰ Happold M., "Child Soldiers in International Law", Manchester University Press, Manchester, 2005, p. 84

⁹¹ African Charter on the Welfare and Rights of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), entered into force Nov. 29, 1999, Article 2

1. States Parties to this Charter shall undertake to respect and ensure respect for rules of international humanitarian law applicable in armed conflicts which affect the child.
2. States Parties to the present Charter shall take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain in particular, from recruiting any child.
3. States Parties to the present Charter shall, in accordance with their obligations under international humanitarian law, protect the civilian population in armed conflicts and shall take all feasible measures to ensure the protection and care of children who are affected by armed conflicts. Such rules shall also apply to children in situations of internal armed conflicts, tension and strife.⁹²

If we read Article 22 in conjunction with Article 2, then we can see that the provisions of the African Charter on Child applies to every individual below the age of 18 years, while in UNCRC the age limit given is 15 years.⁹³ Further Article 22 (3) of The African Charter on Child covers situation of ‘tension and strife’, which is not only a missing area in UNCRC but also in IHL (considering the fact that none of the global humanitarian and human rights instruments cover tensions and strife).⁹⁴

Further Article 44 (1) of The African Charter on Child provides

Article 44: Communications

1. The Committee may receive communication, from any person, group or nongovernmental organization recognized by the Organization of African Unity, by a Member State, or the United Nations relating to any matter covered by this Charter.⁹⁵

This is a broader provision and provides an opportunity to individuals and groups to file direct complaints to the implementing committee which is not the case in UNCRC where only governments and non-governmental organisations can submit individual reports. The African Charter on Child is a progressive instrument and while addressing regional concerns provides opportunities to raise international standards.

⁹² Ibid, Article 22

⁹³ Happold M., “Child Soldiers in International Law”, Manchester University Press, Manchester, 2005, p. 84

⁹⁴ Ibid, pp. 84-85

⁹⁵ African Charter on the Welfare and Rights of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), entered into force 29 November, 1999, Article 44 (1)

2.3.2.3 International Labour Organization Convention No. 182 on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour⁹⁶

The ILO Convention 182 was adopted in June 1999 and came into force in November 2000. The Convention does not deal with the issue of child soldiers in detail but just touches upon them. Article 1 state that all member states which ratify it “shall take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labor as a matter of urgency.”⁹⁷

Article 3 (a) of the Convention defines worst forms of child labor, “all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict.”⁹⁸ Though ILO Convention 182 lists recruitment of children in armed conflicts as a crime, its scope is limited compared to the African Charter on Child, for it does not cover the voluntary aspect. Moreover, it does not impose a blanket ban on recruitment below a particular age as in the case of UNCRC.

However, it does provide protection to all children below the age of 18 as the definition of child in Article 2 covers all persons below that age.⁹⁹ This aspect is on the lines of African Charter on Child and more progressive than UNCRC which leaves the ambit to define the term ‘child’ in the hands of state parties.

⁹⁶ Convention 182, Convention Concerning The Prohibition And Immediate Action For The Elimination Of The Worst Forms Of Child Labour, Adopted By The Conference At Its Eighty-Seventh Session, Geneva, 17 June 1999

⁹⁷ Ibid, Article 1

⁹⁸ Ibid, Article 3

⁹⁹ Ibid, Article 2

2.3.2.4 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (2000)¹⁰⁰

One of the major reasons for the development of OP to the UNCRC was dissatisfaction with Article 38 of UNCRC. The CRC Committee made a proposal to develop an Optional Protocol in 1992 with the aim of further restricting participation of children in hostilities.¹⁰¹ Also, the African Charter on Child and ILO Convention 182 formed the basis for advocating an increase in the minimum age of recruitment and participation in hostilities from 15 years to 18 years.¹⁰² By adopting the OP to the UNCRC, the international community recognized that the previous standard of 15 years did not offer adequate protection to children.¹⁰³

The main articles of OP to the UNCRC that concern this research are Article 1, 2 and 3. Article 1 provides, “States 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.”¹⁰⁴ Although the main aim of the OP to the UNCRC was to set new global standards, it failed to do so as the language fell short of absolute prohibition. It is a limiting article as it prohibits participation to ‘direct part in hostilities’ unlike Article 4 (3) (c) of AP II which prohibits all kinds of participation in hostilities.¹⁰⁵ This means that child soldiers can be employed in different roles which can put their lives in danger.

¹⁰⁰ Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, Adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000, entry into force 12 February 2002

¹⁰¹ Happold M., “Child Soldiers in International Law”, Manchester University Press, Manchester, 2005, p. 74

¹⁰² Popovski V., “Children in Armed Conflict: Law and Practice of the United Nations”, in “International Criminal Accountability and The Rights of Children”, Ed (s) Arts Karin and Popovski Vesselin, The Hague, Hague Academic Press, 2006, pp. 37-53

¹⁰³ Udombana J. Nsongurua, “War is not child’s play! International law and the Prohibition of Children’s Involvement in Armed Conflicts”, “Temple International & Comparative Law Journal”, Volume 20, Number 1, 2006, pp. 91-94

¹⁰⁴ Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000, entry into force 12 February 2002, Article 1

¹⁰⁵ Udombana J. Nsongurua, “War is not child’s play! International law and the Prohibition of Children’s Involvement in Armed Conflicts”, “Temple International & Comparative Law Journal”, Volume 20, Number 1, 2006, p. 94

Another weakness in the language of Article 1 of the OP to the UNCRC is reflected in the use of words ‘feasible measures’, which weakens state obligations and provides them an opportunity to enter declarations. UK’s declaration on Article 1 of the OP to the UNCRC points to this very fear.

The United Kingdom understands that Article 1 of the Optional Protocol would not exclude the deployment of members of its armed forces under the age of 18 to take a direct part in hostilities where:

- (a) there is a genuine military need to deploy their unit or ship to an area in which hostilities are taking place; and
- (b) by reason of the nature and urgency of the situation:
 - (i) it is not practicable to withdraw such persons before deployment; or
 - (ii) to do so would undermine the operational effectiveness or their ship or unit, and thereby put at risk the successful completion of the military mission and/or the safety of the other personnel.¹⁰⁶

Such declarations allows UK to not only recruit but also to deploy under-18s wherever it deems necessary and hence further weakens the protection under Article 1 of OP to the UNCRC.

The very fact that the OP to the UNCRC does not impose 18 years as the minimum age of recruitment on state parties renders the OP to the UNCRC useless as states will continue to hire under-18s, making them vulnerable to situations of armed conflict.¹⁰⁷ Even if the under-18s do not take part in direct hostilities, they can always come under attack, as in many cases, enemy forces will not be able to distinguish between under-18s and adult soldiers.¹⁰⁸

Article 2 of OP to the UNCRC also does not provide any relief in terms of absolute prohibition. It states: “States Parties shall ensure that persons who have not attained the age

¹⁰⁶ Harvey Rachel, “The NGO report to the Committee on the Rights of the Child: The Children and Armed Conflict Unit's submission”, *childRIGHT*, June 2002, Issue 187

¹⁰⁷ Happold M., “Child Soldiers in International Law”, Manchester University Press, Manchester, 2005, p. 77

¹⁰⁸ Ibid

of 18 years are not compulsorily recruited into their armed forces.”¹⁰⁹ The language of Article 2 also reflects a compromise and still leaves space for recruitment drive for under-18s by state parties, which can be packaged as voluntary joining by under-18s.

Article 3 of the OP to the UNCRC presents the most complex provisions of the whole protocol and definitely comes across as a compromise between different state parties.¹¹⁰

Article 3 provides

1. States Parties shall raise the minimum age for the voluntary recruitment of persons into their national armed forces from that set out in article 38, paragraph 3, of the Convention on the Rights of the Child, taking account of the principles contained in that article and recognizing that under the Convention persons under 18 are entitled to special protection.
2. Each State Party shall deposit a binding declaration upon ratification of or accession to this Protocol that sets forth the minimum age at which it will permit voluntary recruitment into its national armed forces and a description of the safeguards that it has adopted to ensure that such recruitment is not forced or coerced.
3. States Parties that permit voluntary recruitment into their national armed forces under the age of 18 shall maintain safeguards to ensure, as a minimum, that:
 - (a) Such recruitment is genuinely voluntary;
 - (b) Such recruitment is done 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.
4. Each State Party may strengthen its declaration at any time by notification to that effect addressed to the Secretary-General of the United Nations, who shall inform all States Parties. Such notification shall take effect on the date on which it is received by the Secretary-General.
- 5.....¹¹¹

On the face of it Article 3 (1) comes across as a demanding provision asking the state parties to raise the age of voluntary recruitment from the one mentioned in Article 38 of UNCRC,

¹⁰⁹ Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, Adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000, entry into force 12 February 2002, Article 2

¹¹⁰ Happold M., “Child Soldiers in International Law”, Manchester University Press, Manchester, 2005, p. 78

¹¹¹ Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, Adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000, entry into force 12 February 2002, Article 3

which was 15 years. However, it is unclear when we read the text as to what exactly is the raise in recruitment age that the state parties are required to undertake. This article only sets out a vague criterion which the state parties are required to take into account as opposed to strong obligation.¹¹²

Article 3 (2) read in conjunction with Article 3 (4) has a binding value. So once the state party has ratified the OP to the UNCRC, it is required to submit a declaration stating the minimum age of voluntary recruitment it has decided. Moreover, as per Article 3 (4) if a state has decided to change the age declared before, it can only raise the age but cannot lower the same.¹¹³ Article 3 (3) entails interesting provisions which aim to create transparency in the voluntary recruitment process and introduces safeguards to check if it is truly genuine.

The OP to the UNCRC also entails a double standard in itself; this is found in the provisions under Article 4, which provides

1. Armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years.
2. States Parties shall take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalize such practices.
- 3....¹¹⁴

This article distinguishes between government armed forces and non-government armed forces. On the one hand, governments are allowed to recruit under-18s though they cannot deploy them in hostilities while on the other, non-government armed forces are strictly prohibited from recruiting under-18s, regardless of their use in direct or indirect hostilities. Article 4 (2) obliges the state parties to take measures in ensuring that no non-state armed group recruits under-18s. The question here is that since non-state armed groups are not party

¹¹² Happold M., “Child Soldiers in International Law”, Manchester University Press, Manchester, 2005, p. 78

¹¹³ Ibid, pp. 78-79

¹¹⁴ Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, Adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000, entry into force 12 February 2002, Article 4

to the OP to the UNCRC, how can this provision be implemented. In most cases, non-state enemy armed groups are not under government influence and hence, governments cannot do anything to stop them from recruiting under-18s. The only hope provided by this Article is that government can be held responsible if their affiliated or allied armed groups recruit under-18s.¹¹⁵

The OP to the UNCRC does not provide for an individual or inter-state complaint mechanism. It also does not strengthen the power of CRC Committee, which is the responsible monitoring body of this protocol.¹¹⁶ Besides, it does not demand any great change in state behavior on the issue of under-18 recruitment and neither does it offer any significant protection to child soldiers from the effects of armed conflict. As members of state armed forces, child soldiers always remain lawful targets and are also vulnerable to arrest and detention.¹¹⁷

2.3.3 The Statute of the Special Court for Sierra Leone

Special Court for Sierra Leone was the first international tribunal confronted with the issue of child soldiers. Article 7 (1) of the Statute of SCSL established that the Court does not have any jurisdiction over perpetrators who were below the age of 15 when the alleged crime was committed. Further, it established special procedures for children between the age of 15 and 18 taking into account their young age: “Should any person who was at the time of the [...] 15 and 18 years of age come before the Court, he or she shall be treated with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society,

¹¹⁵ Happold M., “Child Soldiers in International Law”, Manchester University Press, Manchester, 2005, pp. 79-80

¹¹⁶ Udombana J. Nsongurua, “War is not child’s play! International law and the Prohibition of Children’s Involvement in Armed Conflicts”, “Temple International & Comparative Law Journal”, Volume 20, Number 1, 2006, pp. 99

¹¹⁷ Happold M., “Child Soldiers in International Law”, Manchester University Press, Manchester, 2005, pp. 81

[...]rights of the child.”¹¹⁸ It also provides provisions of care, community service, counseling, etc. for juvenile offenders.¹¹⁹ The Statute also gave powers to the SCSL to prosecute persons who are responsible for conscription and enlistment of children under the age of 15, for serious violations of humanitarian law.¹²⁰

2.3.4 The Rome Statute of the International Criminal Court¹²¹

The Rome Statute is particular important not only for this research but also to the whole international legal system. The protection accorded to child soldiers in the Rome Statute is crucial to any future development of case law dealing with them.

Article 6 (e) provides a crucial element of protection to children during armed conflicts and states that genocide includes forcible transfer of children from one group to another group.¹²²

Article 8 (2) (b) (xxvi) states: “Conscripting or enlisting children under the age of 15 years into the national armed forces or using them to participate actively in hostilities” is violation laws and customs applicable in international armed conflict.¹²³ If we look at the language of this clause we can see that the use of words ‘using’ and ‘participate’ covers both aspects- direct participation in hostilities as well as use of children below the age of 15 to support any kind of work during armed conflict. Moreover, this provision makes sure that the consent of a child cannot be used to justify enlistment or conscription.¹²⁴

Some of the important cases being heard in relevant chambers of ICC on the count of recruitment of child soldiers are *The Prosecutor v. Joseph Kony, Vincent Otti, Okot*

¹¹⁸ The Statute of the Special Court for Sierra Leone, Having been established by an Agreement between the United Nations and the Government of Sierra Leone pursuant to Security Council resolution 1315 (2000) of 14 August 2000, Article 7 (1)

¹¹⁹ Ibid, Article 7(2)

¹²⁰ Ibid, Article 4

¹²¹ Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, Statute entered into force on 1 July 2002

¹²² Ibid. Article 6 (e)

¹²³ Ibid, Article 8 (2) (b) (xxvi)

¹²⁴ Udombana J. Nsongurua, “War is not child’s play! International law and the Prohibition of Children’s Involvement in Armed Conflicts”, “Temple International & Comparative Law Journal”, Volume 20, Number 1, 2006, pp. 85-87

Odhiambo and Dominic Ongwen; The Prosecutor v. Thomas Lubanaga Dyilo and The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui. The ICC has also issued arrest warrants against LRA members and some people including Thomas Lubanaga Dyilo and Germain Katanga are currently in ICC custody.¹²⁵

Another important provision is in Article 26 “The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime.”¹²⁶

This provision excludes jurisdiction of the Court over any person who was below the age of 18 at the time of the alleged crime. This Article is a classic example of lack of consensus amongst states on the minimum age of criminal responsibility. As the states were not able to agree on MACR at the Rome Diplomatic Conference, they choose not to answer this difficult question and agree on the above text. This article simply leaves the question of MACR at the discretion of individual states and within the purview of national law.¹²⁷

2.3.5 Case Law

Child soldiers have never been tried for alleged war crimes by any of the international tribunals, special courts or any regional courts. However, the European Court of Human Rights (ECtHR) did consider the issue of minimum age of criminal responsibility in cases of children accused of serious crimes.

2.3.5.1 T v. United Kingdom and V v. United Kingdom¹²⁸

The applicants were both British citizens who were convicted of the abduction and murder of a two-year-old boy. Both T and V were 10 years old at the time of the crime. At the age of 11, they were tried for the crime in an UK court, were found guilty and sentenced to an indefinite period of detention. The applicants approached the ECtHR claiming violation of

¹²⁵ <http://www.icc-cpi.int/Menus/ICC/Situations+and+cases>, accessed on 07-12-2011

¹²⁶ Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, Statute entered into force on 1 July 2002. Article 26

¹²⁷ Amnesty International, “International Criminal Court: Timor-Leste Justice in Shadow”, 2010, p. 24

¹²⁸ *T v. United Kingdom*, No. 24724/94 and *V v. United Kingdom*, No. 24888/94, 30 EHRLR 121, 2000

Article 3 of European Convention on Human Rights (ECHR) as their trial was conducted in public in an adult court, amounting to inhuman treatment.¹²⁹ The applicants also claimed that the minimum age of criminal responsibility was very low in England and Wales as compared to other European Countries. The applicants also argued that even the CRC Committee recommended to UK (UN Doc. CRC/C/15/add.34) “that serious considerations be given to raising the age of criminal responsibility throughout the areas of UK.”¹³⁰

The ECtHR held that there is no common standard on minimum age of criminal responsibility in member states of the Council of Europe. While considering the relevant international texts the ECtHR found that relevant international texts and instruments do not provide any clear signs on MACR. The ECtHR held that Rule 4 of the Beijing Rules do not specify any MACR for the states rather it only asks them not to fix criminal responsibility at a very low age. Similarly, after studying Article 40 (3) (a) of UNCRC the ECtHR held that it only asks state to fix MACR but contains no guidance or provision on what that age should be.¹³¹ Therefore, the ECtHR held that the attribution of criminal responsibility to the applicants in itself does not violate Article 3 of ECHR. However, while examining the claim under Article 6 (Fair Trial Rights), the ECtHR did find a violation of fair trial rights as the applicants were unable to participate effectively in the proceedings within the adult trial setup.¹³²

For the purposes of this research the partly dissenting opinion of Judges Pastor Ridruejo, Ress, Makarczyk, Tulkens and Butkevych is of value. The minority held that the trial procedure and sentencing combined with age of criminal responsibility constituted a violation of Article 3 of ECHR.¹³³ They disagreed with the majority’s assessment on the MACR and

¹²⁹ Article 3-Prohibition of torture or inhuman and degrading treatment or punishment (ECHR)

¹³⁰ *T v. United Kingdom*, No. 24724/94 and *V v. United Kingdom*, No. 24888/94, 30 EHRLR 121, 2000, Para 61-62

¹³¹ *Ibid*, Para 71

¹³² *Ibid*, Para 88-89

¹³³ *Ibid*, Introduction to Dissent Opinion Para 1

stated that since only 4 out of the 41 states in the Council of Europe has MACR at par or lower than England and Wales, it means that there is a definite general standard among member states on MACR and also on special court procedures for juveniles. Further, the minority held that even though Rule 4 of Beijing Rules does not give any clear indications, it does not mean that the warning given therein should not be respected. The warning in it clearly indicates that both age and maturity are inter related and the view that this maturity is not present in children below the age of 13 or 14 prevails in the majority of member states.¹³⁴

The minority stated that

(i) treating children of ten years of age as criminally responsible, (ii) prosecuting them at the age of eleven in an adult court, and (iii) subjecting them to an indeterminate sentence, reached a substantial level of mental and physical suffering. Bringing the whole weight of the adult criminal processes to bear on children as young as eleven is, in our view, a relic of times where the effect of the trial process and sentencing on a child's physical and psychological condition and development as a human being was scarcely considered, if at all.¹³⁵

The dissenting opinion is critical to us because there is acceptance on existing general standard on MACR in member states of Council of Europe. Also, the reasoning of the minority is in line with the principle of best interest of the child, where the minority has done narrow reading of the Beijing Rules. Accordingly, it concluded that states should not take opportunity to fix low age of criminal responsibility because there is nothing given in Beijing rules.

2.4 Conclusion

The analysis of global legal instruments, regional instruments and an example of case law proves that MACR is a controversial issue in the international legal discourse. It clearly reflects the compromises in the text of international treaties on the issue of MACR and conscription of children. The development of international standards on protection of

¹³⁴ Ibid, Look at the dissent, Para 1

¹³⁵ Ibid, Introduction to Dissent Opinion Para 1

children's rights reflects that over a period of time there has been a growing concern in the international community over issues such as MACR, minimum age of conscription and use of children in armed conflicts. In spite of lack of consensus, over a period of time, standards and safeguards on MACR and on age of conscription have been incorporated in treaties. It is difficult to capture all the developments with regard to child soldiers including various declarations, efforts of UN and other child rights organizations as they are outside the purview of this thesis. But, nonetheless there has been an ongoing effort on the part of the civil society and the UN to increase the legal protection for not just child soldiers but to all children affected by armed conflict. But, still to remind my readers, I would like to assert once again that the situation is grave and requires concentrated efforts so as to raise the MACR to 18 years globally. In the next chapter, I will discuss the new challenges that have emerged in the era of global terrorism which again require urgent action on the issue of protection of under-18s (child soldiers).

3. The Era of Global Terrorism – Counter Terrorism and Child Soldiers

Use of children by terrorist organizations or militant organizations or separatist organizations is not a new phenomenon.¹³⁶ Palestinian armed groups have used child suicide bombers and children to attack Israeli military targets, especially during the Second Intifada.¹³⁷ Coalition to Stop the Use of Child Soldiers in its 2004 report documented 9 suicide attacks involving Palestinian children between 2000 and 2004.¹³⁸ LTTE was notorious for its use of child soldiers in attacks on military and civilian targets. Most recently the Maoists in India have been on an extensive drive to recruit children in their armed forces.¹³⁹

However, in contemporary times, the whole notion of terrorism and the resultant global war on terror has brought forward a different side of counter terrorism. The US National Security Strategy (September 2002) described the war on terrorism as a “struggle against global terror ... different from any other war in our history. It will be fought on many fronts against a particularly elusive enemy over an extended period of time ... progress will come through the persistent accumulation of success - some seen, some unseen.”¹⁴⁰ As mentioned in the strategy paper, this war is supposedly being fought at many fronts including Afghanistan, Iraq, North West Frontier Province in Pakistan, Yemen to name few places.

The present study is not concerned with the question of legality and other complex issues regarding the global war on terror. However, it is concerned with the infamous military detention facilities that mushroomed all over the globe as a result of the global war on

¹³⁶ You can use any term depending on which side of the coin you are looking from, I am not going to discuss this as this is outside the purview of this research.

¹³⁷ Human Rights Watch, “Occupied Territories: Stop Use of Children in Suicide Bombings”, 1 December 2004

¹³⁸ Coalition to Stop the Use of Child Soldiers, “Child Soldiers Global Report 2004”, p. 292

¹³⁹ Samantaray Buddha Maitreya, “Changing Maoist strategy in India: Need to prioritise threat perceptions”, 30/06/2008, <http://www.newstrackindia.com/newsdetails/4497>, accessed on 08 December 2011

¹⁴⁰ Overseas Development Institute, “Humanitarian action and the ‘global war on terror’: a review of trends and issues”, HPG Report 14, July 2003, p. 4

terror.¹⁴¹ As contested by many legal experts and international human rights organisations, these facilities are illegal and the prisoners held in these facilities live in extremely harsh conditions. On many occasions, the prisoners face torture and other inhuman and degrading treatment at the hand of their captors. These facilities are also used to keep alleged children terrorist or child soldiers captured in Iraq and Afghanistan.¹⁴²

A recent report published by the Office of the Special Representative of the Secretary General for Children and Armed Conflict highlights the extent of the problem of administrative detention of children in Afghanistan and Iraq.¹⁴³ According to this report, since 2001, unknown number of children has been arrested by the International Military Forces and Afghan Security Forces. The report raises the concern that though the National Directorate of Security is supposed to treat child suspects in accordance with the Afghan Juvenile Code of 2005, it is not doing so. For instance, children should be produced in front of the prosecutor maximum within 48 hours but in practice they are holding children for extended periods. The MACR in Afghanistan is only 13 years.¹⁴⁴ The UN only has limited access to detention facilities and cannot monitor cases of child suspects.

In Iraq, approximately 1500 children were held in detention; the youngest among them was only 10 years old (at the time of the Special Representatives visit in 2008). The report notes that the legal basis for detention of children was ambiguous and vague. Moreover, there were no child friendly procedures and children were denied the right to counsel of their choice, access to charges and evidence against them.¹⁴⁵

¹⁴¹ Some of the more known and notorious ones are Abu Gharib, Guantanamo Bay and detention facility at Baghram air base. There are many more in Iraq, Afghanistan and even in Europe.

¹⁴² Please refer to websites and reports of Human Rights Watch and Amnesty International on status of prisoners in illegal detention facilities.

¹⁴³ Office of the Special Representative of the Secretary General for Children and Armed Conflict, "Children and Justice During and in the Aftermath of Armed Conflict", Working Paper No. 3

¹⁴⁴ Ibid, p. 32

¹⁴⁵ Ibid, p. 33

Amnesty International reported on 7 November 2007 that at least 17 children were being held at Guantanamo Bay facility. The report said that these children were held in “indefinite virtually incommunicado detention without charge or trial. Some have been subjected to torture or other cruel, inhuman and degrading treatment”.¹⁴⁶ According to the same report, a detainee named, Yassar al-Zahrani (was 17 at the time of detention), died in Guantánamo in June 2006, after apparently hanging himself.¹⁴⁷ The most notorious example of treatment of children in illegal detention facilities is that of Omar Khadr.

3.1 Omar Khadr Case

Omar Khadr, a Canadian national, was captured in a firefight in Afghanistan in July 2002. He was transferred to Guantanamo Bay in November 2007. At the time of his capture he was just 15 years old. He was accused and later on charged for murder, violation of laws of war and other counts of war crimes by the US. In spite of his young age at the time of his capture, US refused to apply, universally recognized standards of juvenile justice or even to acknowledge him as a juvenile. He was imprisoned with adults and allegedly subjected to abuse and torture. He was given access to an attorney after more than two years of detention.¹⁴⁸

Omar, in the evidence produced by his lawyer in the Canadian Supreme Court, described how he was tortured and interrogated at Bagram and Guantanamo detention facility. He claimed that his head was covered with a bag while dogs barked at his face; he was threatened with rape, forced to stand for hours while shackled, exposed to extreme temperatures and subjected to banned sleep deprivation techniques.¹⁴⁹ Later on, he was tried in a military tribunal, where he accepted a plea deal. As per the deal, he was sentenced to serve eight years

¹⁴⁶ Amnesty International, “Guantánamo: pain and distress for thousands of children”, 7 November 2007

¹⁴⁷ Ibid

¹⁴⁸ Human Rights Watch, Omar Ahmed Khadr, 2 November 2010, Available at <http://www.hrw.org/news/2010/11/02/omar-ahmed-khadr>, accessed on 08 December 2011

¹⁴⁹ Woo Grace Li Xiu, “The Omar Khadr Case: How the Supreme Court of Canada Undermined the Convention on the Rights of the Child”, Lawyers’ Rights Watch Canada, p. 3

in custody, one in Guantanamo Bay and the remainder in Canada.¹⁵⁰ After his plea deal, Amnesty International appealed to the US authorities to address all human rights violations committed against Omar Khadr in Guantanamo Bay. It contended that although Omar pleaded guilty, the US is still obliged to investigate human rights violations committed against him in custody. They further said that the military trial doesn't satisfy the international fair trial standards and a plea deal cannot change that fact.¹⁵¹

Right from the start, the US mishandled the case of Omar Khadr. It should have acknowledged him as a juvenile and kept him in a juvenile facility. He should have been given access to an attorney and his case should have been processed as quickly as possible. Moreover, he should not have been subjected to torture or interrogation. Besides, he should have been tried in a juvenile court, keeping all international safeguards in mind.¹⁵²

3.2 Conclusion

The principle question is does imprisoning, torturing and prosecuting Omar Khadr or any child soldier bring justice to the victims or the accused. In doing this, will the US and its allies on global war against terror be able to deter other child soldiers from joining armed groups and taking part in hostilities. No matter what acts a child commits, the international community should view them as victims rather than as perpetrators. This was also accepted by many countries and civil society organizations in Paris Commitments 2007 (paragraph 11).¹⁵³ This area requires more research as there is a clear lack of data available on number of child soldiers in different detention facilities and the treatment that has been accorded to them.

¹⁵⁰ Human Rights Watch, Omar Ahmed Khadr, 2 November 2010, Available at <http://www.hrw.org/news/2010/11/02/omar-ahmed-khadr>, accessed on 08 December 2011

¹⁵¹ Amnesty International, "USA must address Omar Khadr rights violations following plea deal", 25 December 2011. Available at <http://www.amnesty.org/en/news-and-updates/usa-must-address-omar-khadr-rights-violations-following-plea-deal-2010-10-25>, accessed on 08 December 2011

¹⁵² As per the standards given in ICCPR, UNCRC, GC IV, AP I & II and OP to the UNCRC

¹⁵³ Paris Commitments are follow up of main points of The Paris Principles, "Principles and Guidelines on Children Associated With Armed Forces or Armed Groups", February 2007

Conclusion

It can be concluded that states are obliged under international law to establish a minimum age of criminal responsibility. However, international law does not answer what that age should be. Instead it offers advice through guidelines, for instance, MACR should not be too low. Other guidelines are on international standards of juvenile justice and the differential treatment of children above the age of criminal responsibility. My argument throughout the present study is that vagueness of international law on the issue of minimum age of criminal responsibility, combined with the non-binding nature of the guidelines, makes the position of child soldiers precarious and vulnerable. This is compounded by the fact that states maintain the discretion to fix minimum age of criminal responsibility and the nature of crimes child soldiers are involved in (war crimes) are subjected to universal jurisdiction. Further, the changing nature of terrorism and counter terrorism just add on to the legal complexities on treatment of child soldiers. Until now, the general trend has been the reluctance of states to prosecute child soldiers. However, some states such as DRC and Uganda have done that. But, lately things are changing for the worse as states are more willing to prosecute child soldiers and more so in states like US which have a strong emphasis on juvenile justice. Unfortunately, the US is not just willing to prosecute child soldiers but has even started doing so.

The classic example of different treatments accorded by different states and the arbitrary nature of decisions on prosecution of child soldiers is the case of Ishmael Beah and Omar Khadr. While Beah was accused of killing many Sierra Leonean civilians, Omar Khadr has been accused of killing one American soldier. However, there is a difference between the two

child soldiers; Beah is a more of a TV personality now, sharing his experiences while Omar Khadr has been languishing in Guantanamo Bay for almost a decade.¹⁵⁴

My first and foremost recommendation is that child soldiers should be viewed as victims and not as perpetrators. The very fact that in recent years international courts have held adults responsible for recruiting child soldiers represents an acceptance by the international community that child soldiers suffer grave injustice as a result of their recruitment. Hence, adults should be held responsible and prosecuted while child soldiers should be viewed only as victims, in line with the Paris Commitments, 2007.

Secondly, perpetrators also have the right to justice. However, this does not mean that heinous crimes should go unpunished but rather that child soldiers should be viewed humanely in the light of the fact that they are primarily victims. Hence, all international juvenile justice standards should be followed and they should be tried through special juvenile courts. Also, the punishment meted out should not be punitive but reintegrative in nature.

Thirdly and most importantly, the international child rights caucus should strive for raising the standard i.e. building consensus on 18 as MACR as well as on minimum age of conscription and participation. Of course, it's a challenging task and more easily said than done but if this can be achieved within the child rights caucus, then advocacy campaign can be undertaken by the caucus around this issue. It is extremely important that experiences on negotiations of MACR and age of recruitment during UNCRC, OP to the UNCRC and Rome Statute are taken into account. This will help in understanding state positions, political reasons and other technical issues and will provide solid background to initiate an advocacy campaign.

¹⁵⁴ Konge P., "International Crimes & Child Soldiers", "Southwestern Journal of International Law", "Southwestern Journal of International Law", Volume 16, Number 1, 2010, p. 69

The present thesis can serve as a starting point to the international advocacy campaign asking for a binding law on minimum age of criminal responsibility, building straight 18 consensus and laying down of procedures on treatment of child soldiers by national courts by detailing out minimum guarantees and safeguards. It would also be pertinent to demand General Comment from the Committee on the Rights of the Child on the issue of child soldiers especially with regards to new developments in the phenomena of terrorism and anti-terrorism.

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