



## **Child Soldiers: Victims or War Criminals?**

**-criminal responsibility and prosecution of child soldiers under international  
criminal law-**

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## 1. Introduction

Although the world has not seen a war of global magnitude in 70 years, in the post-Cold War era the number of armed conflicts has only increased more on local and regional level. Sadly enough, the proliferation of armed conflicts around the world has produced an increase in the number of children who are at threat by these hostilities. The wars peril the most basic of human rights and children, both boys and girls, are in danger of being exploited by armed forces and groups, and their very lives are at risk. There have been projects on prevention of recruitment of children and on returning already recruited children back to safety, such as the Coalition to Stop the Use of Child Soldiers, several of the UN Sustainable Development Goals (SDG) can be also put into indirect connection with prevention of children being recruited by armed groups, which would therefore reduce the risk of children losing their lives in the process. However, armed conflicts still represent one of the factors that are greatly affecting lives of children, and according to some of the estimates there is currently about 250.000-300.000 child soldiers in the world.<sup>1</sup> Nevertheless, efforts are being made so that more reliable information can be collected, but certainly, this is not the definite number and the dark figure in this area could be the same number as the one given by the estimates or even bigger. Since these children are the future of the world we know, action should be taken so that these children can have their childhoods back and continue to develop in a normal and secure environment. Additionally, prevention measures should be taken as well - education and of children, proceeding people responsible for recruiting children and adopting an adequate penal policy. Still, the road to achieving these goals is not an easy one, there are many moral, social, economic and legal issues that ought to be dealt with, and eventually making a decision on what would the most optimal approach to solving the issue of child soldiers be. One of the problems on the road to ending recruitment and use of child soldiers is the question of criminal responsibility of child soldiers and their prosecution and if it is possible to view enforcement of justice against child soldiers as part of their personal recovery. Therefore, further in the paper the author will deal with defining child soldiers, the inexistence of universal minimum age required for their criminal responsibility and trials against child soldiers

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<sup>1</sup> Figures used for the purpose of this research paper are from the official website of UNICEF (<http://www.unicef.org/emerg/files/childsoldiers.pdf>) and War Child official website (<https://www.warchild.org.uk/issues/child-soldiers>), though we emphasize that most of the organizations simply claim that it is not possible to establish with absolute certainty the exact number of child soldiers in the world.

who are still minors and former child soldiers who are adults at the time of the proceedings. Finally, the position of the International Criminal Court (ICC) and *ad hoc* tribunals will be analyzed, with a turn to the role of the UN as an organization that hovers over both the ICC and international tribunals it has established.

## **2. Defining "child" and "child soldier"**

Before we are able to analyze criminal responsibility of child soldiers, we need to firstly determine what definitions of "child" and "child soldier" are. According to the Convention on the Rights of the Child, a child is "every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier".<sup>2</sup> Taking into consideration that this treaty is the single most ratified human rights treaty in the world, we shall take this definition as the operative for the use of this paper. However, definitions of child soldiers have varied and could have been deduced only indirectly from international conventions, treaties or national legislation.

Although there are differences in the initial age threshold for taking part in hostilities and being recruited by the armed forces, all of the international instruments are generally leaning toward the age limit of 18, some explicitly while others advise the same practice. The operative definition of child soldier that the UNICEF is using, and that is based on the Cape Town Principles from 1997, is that "a 'child soldier' is any child – boy or girl – under 18 years of age, who is part of any kind of regular or irregular armed force or armed group in any capacity, including, but not limited to: cooks, porters, messengers, and anyone accompanying such groups other than family members".<sup>3</sup> The Paris Principles from 2007 state that "A child associated with an armed force or armed group" refers to any person below 18 years of age who is or who has been recruited or used by an armed force or armed group in any capacity, including but not limited to children, boys and girls, used as fighters, cooks, porters, messengers, spies or for sexual purposes. It does not only refer to a child who is taking or has taken a direct part in hostilities".<sup>4</sup> As we can see, the Paris Principles have changed the phrase "child soldier" to "a

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<sup>2</sup> Convention on the Rights of the Child 1989 s 1 (1)

<sup>3</sup> Cape Town Principles 1997 Definitions

<sup>4</sup> Paris Principles 2007 Definitions

child associated with an armed force or armed group", but the essence of the definition is the same. However, though we find both of the definitions to be correct, for the purpose of this research we will keep on using the term "child soldier" because further in the paper criminal liability of children who have taken active participation in hostilities will be discussed.

### **3. Can child soldiers be considered war criminals?**

Recruitment and use of children is beneficial for the armed forces and groups because the children are small and susceptible to manipulation, while they can also handle the easily accessible light arms from the youngest of age. There are three ways in which children are recruited - they are either forcibly recruited or voluntarily join armies, or they are being educated, i.e. radicalized from their birth to serve armed groups. Forced recruitment is kidnapping children from their homes, schools or on streets, but in reality, can the other two types of recruitment be called anything but forced and manipulated? They are actually more astute ways of recruiting children for purposes of armed forces and armed groups that are set in motion by several factors, such as poverty, discrimination and lack of education, and the more armed conflicts deteriorate political, economic and social conditions, the possibility of more children being recruited is growing higher. It is easy to imagine a child left alone, whose family has been killed or is missing, and it is entirely realistic that such a child would try to survive even in those conditions by joining armed forces or an armed group that would provide it with the most basic necessities. This is a typical example of veiled voluntary recruitment that is in fact an act out of need due to the lack of a stable economic and social system. Once they are recruited, children are used for a variety of roles - from being trained for combat or part of preparations for the same, spying, being human shields and sent to clear minefields, messengers or porters to being cooks, cleaners or simply servants that have multiple tasks. During their stay with the armed forces or groups, children are subjected to extreme brutality, they are beaten, starved, drugged and in some cases as initiation they are forced to kill their relatives as a way of parting with their "previous lives". Children, especially girls, are used for sexual purposes as well.

Do the factors previously mentioned not represent a hefty amount of extenuating circumstances? We conclude that these children are obviously victims to what has been standardized by international treaties and customary international humanitarian law as an international crime.

However, a percentage of these children take active participation in hostilities committing brutal acts, perhaps without actually realizing their meaning or consequences. Still, in the light of the most recent events, where IS (Islamic State) child soldiers, who do not seem to be older than 12 years old, publicly executed 25 Syrian soldiers in the amphitheatre of the ancient city Palmyra, we can once more pose the question of these children's responsibility and whether the increasing use of child soldiers, particularly by the IS, should be comprehended as indicator that the international criminal should take more decisive steps in this regard.

### **3.1. Child soldiers prosecuted as minors**

Looking into international documents, none of them state that children should not be prosecuted, but simply prohibit recruitment and use of children in armed forces or armed groups, in most cases, below the age of 15. Cleverly, the international criminal law has distanced itself from prosecuting children and left this option to national legislatures, in which age threshold for criminal responsibility goes from as young as six years old.<sup>5</sup> In the sea of different legislations and different cultures, it is hard to contend that everything should be left in the hands of national authorities, especially in respect to international crimes committed in an armed conflict.

With more or less of an unanimity, the international regulation has been clear when stating that children below the age of 15 cannot be recruited. Additional Protocol I from 1977 provides:

"the Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, the Parties to the conflict shall endeavour to give priority to those who are oldest."<sup>6</sup>

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<sup>5</sup>Special Protections: Progress & Disparity' (UNICEF official website) <<http://www.unicef.org/pon97/p56a.htm>> in Fanny Leveau, 'Liability of Child Soldiers Under International Criminal Law' (2013) Vol.4 No.1 Osgoode Hall Review of Law and Policy 39

<sup>6</sup> Protocol Additional to the Geneva Conventions 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) 1977 s 3 (77)(2)

Additional Protocol II from 1977 prescribes:

"children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities."<sup>7</sup>

In 1989, the Convention on the Rights of the Child practically reiterated in its Article 38, second and third paragraph, what has already been provided by the Additional Protocol I. Under the Rome Statute conscripting or enlisting children under the age of fifteen years into armed forces or groups constitutes a war crime in both international and non-international armed conflicts.<sup>8</sup> Under the Statute of the Special Court for Sierra Leone one of the serious violations of international humanitarian law for which a person can be prosecuted is conscripting or enlisting children under the age of 15 years into armed forces or groups.<sup>9</sup>

From such provisions, we may conclude that children below the age of 15 are absolutely protected, but since the definition of a child soldier spans over children below the age of 18, it can be deduced that children between the age of 15 and 18 can be held criminally responsible as there are no prescriptions stating the opposite. However, with consideration for all of the factors of their recruitment and training, can criminal responsibility of child soldiers even be discussed? For an international crime to be prosecuted, a certain person ought to have both committed an international crime, i.e. did the physical act of the crime (*actus reus*) and had the mental intent to commit that crime (*mens rea*). Surely, proving that a child had fulfilled the physical act of a crime is not problematic in itself, but proving the existence of *mens rea* can be particularly difficult in case of children. Still, we find in psychological studies analyzing the psychological development of children and their subsequent ability to commit crimes that it is indeed possible to talk about criminal liability of children to a certain extent.<sup>10</sup> These studies show that children are not able to fully understand their actions or their consequences until reaching a certain age,

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<sup>7</sup> Protocol Additional to the Geneva Conventions 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) 1977 s 2 (4)(3)(c)

<sup>8</sup> Statute of the International Criminal Court 1998 s 2 (8)(2)(b)(xxvi) and (e)(vii)

<sup>9</sup> Statute of the Special Court for Sierra Leone 2002 s (4)

<sup>10</sup> Jean Piaget, *The Moral Judgement of the Child* (Routledge & Kegan Paul, London 1932); Lawrence Kohlberg, *Child Psychology and Childhood Education - A Cognitive Developmental View* (Longman, New York 1987) in Fanny Leveau, 'Liability of Child Soldiers Under International Criminal Law' (2013) Vol.4 No.1 Osgoode Hall Review of Law and Policy 38

but the studies do not provide us with any clear delimitation in age.<sup>11</sup> The neuroscientific research refers to early age abuse and neglect as factors that alter their perception so adolescents actually overreact to situations that are threatening to them and therefore their brains do not see difference between delinquent behaviour and self-defence.<sup>12</sup> Although the neuroscientific research does not give minimum age for criminal responsibility either, it can be deduced that it is actually talking about trauma from pre-adolescent stage, which confirms that at adolescent age, children can be held responsible. Calling on the basic principles of international humanitarian law, namely the principle of distinction that states that non-fighters lose their protected status once they start actively participating in hostilities, then children above the prescribed age threshold (15) that took active participation in operations of armed forces or non-state groups could be, in theory, held responsible for committing serious violations of international humanitarian law, since they have the right to the status of prisoner of war which equals to them previously being legitimate targets. Moreover, there is minimal guidance on how to determine what the minimum age is in the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules):

"in those legal systems recognizing the concept of the age of criminal responsibility for juveniles, the beginning of that age shall not be fixed at too low an age limit, bearing in mind the facts of emotional, mental and intellectual maturity."<sup>13</sup>

The Committee on the Rights of the Child has stated "that a minimum age of criminal responsibility below the age of 12 years is considered by the Committee not to be internationally acceptable."<sup>14</sup> Yet this Committee also believes that criminal responsibility should be based on objective factors (age) instead of subjective factors (the attainment of puberty, the age of

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<sup>11</sup> *ibidem*

<sup>12</sup> Naomi Cahn, 'Poor Children: Child "Witches" and Child Soldiers in Sub-Saharan Africa' (2006) 3 Ohio St J Crim L 413, 429, in Fanny Leveau, 'Liability of Child Soldiers Under International Criminal Law' (2013) Vol.4 No.1 Osgoode Hall Review of Law and Policy 38

<sup>13</sup> United Nations Standard Minimum Rules for the Administration of Juvenile Justice 1985 s (4)

<sup>14</sup> Committee on the Rights of the Child, General Comment No. 10 (2007): Children's rights in juvenile justice 2007, para. 32, in Magne Frostad, 'Child Soldiers: Recruitment, Use and Punishment' (2013) Vol. 1 International Family Law, Policy and Practice 86



discernment or the personality of the child).<sup>15</sup> Nevertheless, bearing in mind the above mentioned Committee's suggestion of the minimum age of criminal responsibility and relevant instruments that prohibit recruitment and use of children who are under 15 years old, we are of the opinion that child soldiers between the age of 15 and 18 should be prosecuted for committing international crimes in times of warfare, but only those who have taken active participation in hostilities.

Prosecuting child soldiers for serious violations of international humanitarian law and international human rights law can be seen as part of the retribution and deterrence principle, especially in cases where the child has acted consciously and of their own free will, meaning in cases when they were not under the influence of narcotics, alcohol or differently coerced into committing serious crimes. However, most of the children commit crimes because they were ordered to do so, in addition to being drugged most of the time, so the principle of retribution and deterrence cannot be entirely implemented in this specific case. Secondly, prosecution of child soldiers can also have for its aim a better rehabilitation of those very children, and this opinion has been supported by the Coalition to Stop the Use of Child Soldiers:

"it is reasonable to ask whether absolving children of responsibility for crimes they have committed is necessarily in the best interests of the child. In at least some cases, where the individual was clearly in control of their actions, and not coerced, drugged, or forced into committing atrocities, acknowledgement and atonement, including in some instances prosecution, might be an important part of personal recovery. It may also contribute to their acceptance by families, communities and society at large."<sup>16</sup>

Amnesty International and Human Rights Watch have also stated that child soldiers should be prosecuted:

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<sup>15</sup> Committee on the Rights of the Child, Report on the 10th Session 1995, in Fanny Leveau, 'Liability of Child Soldiers Under International Criminal Law' (2013) Vol.4 No.1 Osgoode Hall Review of Law and Policy 41

<sup>16</sup> 'Coalition to Stop the Use of Child Soldiers, Global Report 2008' (Child Soldiers International official website) <[http://www.child-soldiers.org/global\\_report\\_reader.php?id=97](http://www.child-soldiers.org/global_report_reader.php?id=97)> accessed 20 September 2015

"...in some cases, child soldiers must be held accountable for their actions, but any criminal action against them must respect international fair trial standards."<sup>17</sup>

"[Ibrahim] is both a perpetrator and a victim. He should face criminal charges, but with all the protections provided to children implicated in crimes who have suffered the trauma and indoctrination of being a child soldier. That includes being offered the possibility of rehabilitation and reintegration into society."<sup>18</sup>

Taking into consideration principles of international law, specifically international criminal law, one of its aims is bringing justice to victims. This was how the prosecution of child soldiers began in Rwanda after the genocide in 1994 - victims had called upon the state to find and prosecute children who partook in committing genocide, which led to many children being detained and tried.<sup>19</sup> However, these proceedings were not the first to be conducted against child soldiers. After the World War II, there was the *Bommer* case in France in 1947 when three girls were proceeded for the war crime of theft and receiving stolen goods, and in which two girls between the ages of 16 and 18 were sentenced, while the third one who was under 16 years old was acquitted of responsibility due to her age.<sup>20</sup> There have been more cases of child soldiers standing in trial for war crimes, but then again only on a national level. Such trials were in Democratic Republic of Congo (DRC) in 2000, but the outcomes of these trials were far more harsher - a 14 year old child soldier was executed,<sup>21</sup> eight child soldiers were sentenced to death and a number of children was exonerated.<sup>22</sup> In 2001, there were more trials against child soldiers

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<sup>17</sup>'Child Soldiers: Criminals or Victims?' (Amnesty International official website) <<http://www.amnesty.org/en/library/asset/IOR50/002/2000/en/dom-IOR500022000en.html>> accessed 20 September 2015

<sup>18</sup> 'Witness Child Soldier's Darfur Confession - I shot her. She is Dead' (Human Rights Watch official website) <<https://www.hrw.org/news/2015/09/09/witness-child-soldiers-darfur-confession-i-shot-her-she-dead>> accessed 9 September 2015

<sup>19</sup> Chen Reis, 'Trying the Future, Avenging the Past: The Implications of Prosecuting Children for Participation in Internal Armed Conflict' (1997) Vol. 28 Colum HRL 629, in Fanny Leveau, 'Liability of Child Soldiers Under International Criminal Law' (2013) Vol.4 No.1 Osgoode Hall Review of Law and Policy 49

<sup>20</sup> 'Law Reports of Trials of War Criminals' Vol. XI 62, in Joseph Rikhof, 'Child Soldiers: Should They Be Punished?' (2009) CBA National Military Law Section Newsletter 1

<sup>21</sup> Matthew Happold, *Child Soldiers in International Law* (Manchester University Press, 2005) 142, in Joseph Rikhof, 'Child Soldiers: Should They Be Punished?' (2009) CBA National Military Law Section Newsletter 4

<sup>22</sup> Katherine Fallah, 'Perpetrators and Victims: Prosecuting Children for the Commission of International Crimes' African Journal of International and Comparative Law, Vol. 14, No. 1, 98-99, in Joseph Rikhof, 'Child Soldiers: Should They Be Punished?' (2009) CBA National Military Law Section Newsletter 4

in the DRC, but this time the Human Rights Watch (HRW) intervened because four boys of age between 14 and 16 were sentenced to death, and were not executed thanks to this intervention.<sup>23</sup> In 2002, two former child soldiers, age 14 and 16, who were members of the Lord's Resistance Army, were accused of treason in Uganda, but once again HRW intervened, after what the Ugandan authorities withdrew their charges and the children were able to apply for amnesties in 2003.<sup>24</sup> There are also some reports on children being sentenced to death by a special court in Darfur, Sudan.<sup>25</sup>

As we were able to see from several proceedings against child soldiers in different countries, national instruments have shown different age threshold for criminal responsibility, and while this does not raise as much red flags, penal policy of the mentioned countries does. Although some children were spared of capital punishment with the help of HRW, there have been many others who have not shared their luck.

If criminal responsibility of child soldiers can be addressed, then penal policy should be treated as a matter of great importance, especially considering the extenuating circumstances and internationally acknowledged minimum standards of juvenile justice. In accordance with international treaties, particularly with the Convention on the Rights of the Child, there can be no capital punishment.<sup>26</sup> When it comes to life imprisonment, the Convention provides that it can be adjudicated with the existence of periodic reviews that presuppose the possibility of release,<sup>27</sup> but in 2007 Committee on the Rights of the Child strongly recommended abolishment of all forms of life imprisonment for children under the age of 18.<sup>28</sup> In juvenile justice, institutionalization is seen as the last resort and if decided upon, it should be for the minimum necessary period of

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<sup>23</sup> Katherine Fallah, 'Perpetrators and Victims: Prosecuting Children for the Commission of International Crimes', *African Journal of International and Comparative Law* Vol. 14 No. 1 141-142, in Joseph Rikhof, 'Child Soldiers: Should They Be Punished?' (2009) CBA National Military Law Section Newsletter 4; can be also found at 'Congo: Don't Execute Child Soldiers' (HRW official website) <<https://www.hrw.org/news/2001/05/02/congo-dont-execute-child-soldiers>>

<sup>24</sup> Matthew Happold, *Child Soldiers in International Law* (Manchester University Press, 2005) 141, in Joseph Rikhof, 'Child Soldiers: Should They Be Punished?' (2009) CBA National Military Law Section Newsletter 4

<sup>25</sup> Katherine Fallah, "Perpetrators and Victims: Prosecuting Children for the Commission of International Crimes", *African Journal of International and Comparative Law* Vol. 14 No. 1 99, in Joseph Rikhof, 'Child Soldiers: Should They Be Punished?' (2009) CBA National Military Law Section Newsletter 4

<sup>26</sup> Convention on the Rights of the Child 1989 s 1 (37)(a); Beijing Rules 1985 s (17)(2)

<sup>27</sup> *ibidem*

<sup>28</sup> Committee on the rights of the child, General Comment No. 10: Children's rights in juvenile justice 2007, para. 77, in Magne Frostad, 'Child Soldiers: Recruitment, Use and Punishment' (2013) Vol. 1 *International Family Law, Policy and Practice* 87

time.<sup>29</sup> This indicates that there is a tendency toward alternative measures, which has been confirmed by international standards for juvenile justice.<sup>30</sup> Restorative justice and social rehabilitation of former child soldiers is in the best interest of a child, what is the core principle of juvenile justice. However, alternative means of justice also imply a case-by-case practice of courts since each sanction should then be modified according to individual's personality, gender and circumstances of one's service in armed forces or groups, i.e. active participation in hostilities. Many factors ought to be taken into consideration, and first and foremost is the fact that these children are victims to international crimes, which cannot be discarded. Therefore, an expert's opinion on a child's psyche, preferably of an expert who has had experience in juvenile criminology would be significant in court's deliberation. A high level of tactfulness is necessary in treating former child soldiers given that they come from an area of warfare, minding the way they were recruited, their age and their gender. Though per international standards of juvenile justice high level of discretion and respect for child's right to privacy is a must, alternative sanctions lessen the possibility for a former child soldier to be labelled, discriminated or judged by the society by including it in the child's rehabilitation and reintegration process. The Beijing Rules provide a variety of disposition measures such as care, guidance and supervision, probation, community service, intermediate treatment or other treatments, group counselling and similar activities, or other relevant orders, while also stating that all the while a child should be under parental supervision, partly or entirely, unless the circumstances are such that it is in child's best interest not to be under such supervision.<sup>31</sup> All of the mentioned measures have for their primary goal reintegration of children and their return to society as productive members who will not be prone to criminal behaviour. We believe that this solution is actually the best possible even in cases of child soldiers who committed international crimes because they are primarily victims and should be treated as such largely, but not exclusively. Certain measures should be taken against them because they play an essential role in their personal recovery.

### **3.2. Child soldiers prosecuted as adults**

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<sup>29</sup> Beijing Rules 1985 s (19)(1)

<sup>30</sup> Paris Principles 2007 s (3)(6) and s (8)(9)

<sup>31</sup> Beijing Rules 1985 s (18)

Another scenario would be to have brought before a court an adult person who has committed serious violations of international humanitarian law but who has also been recruited as child. There are no issues over the age threshold in this case, and it is only up to court to establish the existence of *actus reus* and *mens rea* as two compulsory parts of an international crime. Once again, the physical act of the crime can be easily proven, while *mens rea* is still rising issues even in trials against adult perpetrators due to the specificity of serious violations of international humanitarian law and international human rights law. However, the fact that an accused adult was recruited as a child can be of significance for the final outcome of the trial, i.e. the final sentence. Certainly the fact that a person began as a child soldier is a very specific extenuating circumstance, but not in the direction of absolute exoneration. According to Art. 77(1) of the Rome Statute, the applicable punishment are imprisonment up to 30 years or life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.<sup>32</sup> However, it is very difficult to say which would be the most appropriate for such cases, though it seems that the first option could be more applicable in cases of former child soldier who are tried as adults. Looking into the three defences defined by the Rome Statute<sup>33</sup>, in case of adult persons recruited as child soldiers they can be applied to a certain extent, or rather to a certain age. Besides mental illnesses or defects as a ground for excluding criminal responsibility, it is hardly believable that an adult who has committed serious international crimes would be under any other influence that could absolve them of full responsibility. Still, in such cases, the court should still tread with caution when estimating the existence of extenuating circumstances, and take into consideration other factors, such as age, admission of guilt, etc.

Current case that is led at the ICC is the case of *Dominic Ongwen*, who is accused of allegedly having ordered commission of crimes against humanity and war crimes in the Lukodi IDP camp in Gulu, Uganda in May 2004. His case is specific because he was abducted as a child in Northern Uganda while walking to school in 1990, and according to some sources he was

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<sup>32</sup> Rome Statute 2002 s 7 (77)(1)

<sup>33</sup> Rome Statute 2002 s 3 (31)

brought directly to leader of the LRA, who later trained him for fighting.<sup>34</sup> Because of the circumstance that he was recruited as a child (though it is not certain whether he was 10 or 15 years old at the time), opened a discussion on what kind of effect this fact would have on his defence and the outcome of the trial. Since the crimes he has been indicted for were committed at the time when he was about 29 years old<sup>35</sup> and bearing in mind that what he had done as a child cannot be taken into consideration when deciding on what he has done as an adult, it is hard to say at this point whether the fact that was abducted and conscripted as a child would have any effect at all. However, this could be a part of his defence, not in respect of complete acquittal, but perhaps in Court's deliberation on the sentence, should he be convicted. Many things are still unknown that shall be revealed during the course of the trial, and all of them need to be taken into consideration when coming to a final decision.

#### **4. UN, ICC and UN International Criminal Tribunals**

##### **4.1. United Nations on topic of child soldiers**

The United Nations (UN) have shown great initiative in the field of international humanitarian law and international human rights law by adopting many treaties over the years since its inception. For the subject of child soldiers the Conventions on the Rights of the Child and the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict are key documents brought by the UN. However, the UN Security Council (SC) has also passed a series of resolutions from 1999 up to this date - resolutions 1261 (1999), 1314 (2000), 1379 (2001), 1460 (2003), 1539 (2004) and 1612 (2005), 1882 (2009) and 1998 (2011). These resolutions' focus is condemnation of recruitment and use of children in hostilities, and hence the SC Resolution 1379 called upon the UN Secretary-General to list parties that recruit and use children in armed conflicts (the parties are listed in annexes to annual reports on children and armed conflict), after what the SC Resolution 1460 required that the

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<sup>34</sup> 'The Complex Story of a Child Soldier' (Washington Post official website) <<https://www.washingtonpost.com/blogs/monkey-cage/wp/2015/01/12/the-complex-story-of-a-child-soldier/>> accessed 27 August 2015

<sup>35</sup> Based on his birth information given to the ICC, available at <<https://www.icc-cpi.int/iccdocs/PIDS/publications/OngwenEng.pdf>>

listed parties enter talks with the UN on making action plans to end child recruitment and use.<sup>36</sup> The SC Resolution 1612 established the monitoring and reporting mechanism (MRM) on grave violations against children in armed conflicts and the Security Council Working Group on Children and Armed Conflict.<sup>37</sup> The MRM has been established for the purpose of gather precise and objective information on child recruitment, among other violations against children in armed conflicts, while the Working Group poses a kind of an intermediary that reviews reports of the UN Secretary-General and makes recommendations based on those reports. Besides parties to conflict and governments, the Working Group also cooperates with the Special Representative of the Secretary-General for Children and Armed Conflict, which was first established by the UN General Assembly in 1996, on protection of children in armed conflicts. The number of resolutions passed by the SC and establishment of special bodies whose aim is protection of children in areas of warfare are proof that the problem of child recruitment and use has been comprehended as an international problem of great scales and the UN have tried to practically gain control over the events in regions caught by warfare by getting information and using diplomatic routes to end bad practices of parties to conflicts. Still, the resolutions above do not deal with the issue of possible criminal liability of child soldiers, but only their protection and reintegration into society.

Nevertheless, the UN have shown interest in regulating juvenile justice by passing the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), and United Nations Guidelines for the Prevention of Juvenile Delinquency ("The Riyadh Guidelines") U.N. Doc. A/45/49 (1990). These standards and guidelines most definitely represent rules that are applicable especially in case of child soldiers, because such children need the biggest guarantees in respect of their human rights. However, we have seen earlier in the papers that for the most part not even the minimum of recommended standards is provided in justice systems that recognize criminal responsibility of child soldiers.

On a more recent level, the newly passed Sustainable Development Goals (SDG) do not regard the topic of child soldiers directly either, but several SDGs can be linked indirectly with

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<sup>36</sup> 'International Standards' (Child Soldier International official website) <[http://www.child-soldiers.org/international\\_standards.php](http://www.child-soldiers.org/international_standards.php)> accessed 21 August 2015

<sup>37</sup> *ibidem*

prevention of child recruitment and use by armed forces and groups. Ending poverty in all its forms, ensuring inclusive and equitable quality education, achieving gender equality and empowering all women and girls, promoting sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all, making cities and human settlements inclusive, safe, resilient and sustainable, promoting peaceful and inclusive societies for sustainable development, providing access to justice for all and build effective, accountable and inclusive institutions at all levels - these SDGs actually return us to the basics by setting for their aim implementation of basic human rights principles, such as principle of non-discrimination, and human rights such as the right to education, right to work and right to a standard of living adequate for the health and well-being of oneself and of one's family. It is the disrespect of these right and their non-existence what push children into the clutches of armed forces or groups, so achieving SDGs can be seen as a prevention of conflicts, and therefore prevention of child recruitment and use.

#### **4.2. The ICC and UN International Criminal Tribunals on topic of child soldiers**

Chronologically speaking, International Criminal Tribunal for former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) do not mention prosecution of children. On the other hand the Special Court of Sierra Leone (SCSL) does have jurisdiction to prosecute children from age 15 and strictly regulates prosecution of minors between the age of 15 and 18.<sup>38</sup> The prosecution of children prescribed in the Statute of the SCSL arose questions, but the UN Secretary-General stated at the time that:

"Within the meaning attributed to it in the present Statute, the term "most responsible" would not necessarily exclude children between 15 and 18 years of age. [...] the gravity and seriousness of the crimes they have allegedly committed would allow for their inclusion within the jurisdiction of the Court."<sup>39</sup>

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<sup>38</sup> Statute of the Special Court for Sierra Leone 2002 s (4)(c)

<sup>39</sup> Report of the Secretary-General on the establishment of a Special Court for Sierra Leone 2000, para. 30



However, here it is also important to denote that the SCSL has never prosecuted a child, whereby the Chief Prosecutor, David Crane, has stated that he would not prosecute children.<sup>40</sup>

The ICC has distanced itself from prosecuting child soldiers in Article 26 of the Rome Statute:

"The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime."<sup>41</sup>

However, the 1996 Report of the Preparatory Commission for the Establishment of an International Criminal Court indicated an idea of establishing an age limit at which an individual does not have the requisite *mens rea*, and this idea remained in the final Report of the Preparatory Committee on the Establishment of an International Criminal in 1998, upon which the Rome Conference was based, but there was no consensus on the age limit that varied from 12 to 18 years old in the final Report.<sup>42</sup> Taking into consideration that the difference between 12 and 18 years is not negligible and that it is difficult to decide on an international age threshold with such diverse solutions in national legislations, the solution that entered as the Article 26 to the Rome Statute was found to be most optimal under such circumstances. Still, this provision has caused two conclusions among authors - one is that the provision in itself is more procedural than substantive,<sup>43</sup> and the other is that this seems that the ICC avoided including children under its jurisdiction as to evade the issue of establishing what the age threshold for criminal responsibility should be under international criminal law.<sup>44</sup>

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<sup>40</sup> See IRIN, 'Sierra Leone: Special Court will not indict Children' at <<http://www.irinnews.org/printreport.aspx?reportid=35524>>; Public Affairs Office, 'Special Court Prosecutor Says He Will Not Prosecute Children' 2002 at <http://www.scs-sl.org/LinkClick.aspx?fileticket=XRwCUe%2baVhw%3d&tabid=196>

<sup>41</sup> Rome Statute 2002 s (26)

<sup>42</sup> A/51/22, page 45, paragraph 201 (<http://www.iccnw.org/?mod=prepcommittee>); A/CONF.183/2/Add.1, 14 April 1998, Addendum, Part One, Draft Statute for the International Criminal Court, Article 26 "Age of responsibility", in Joseph Rikhof, 'Child Soldiers: Should They Be Punished?' (2009) CBA National Military Law Section Newsletter 2

<sup>43</sup> Happold, 'Child Soldiers' 79, in Fanny Leveau, 'Liability of Child Soldiers Under International Criminal Law' (2013) Vol.4 No.1 Osgoode Hall Review of Law and Policy

<sup>44</sup> Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court* (CH Beck, Munich 2008) 775, in Fanny Leveau, 'Liability of Child Soldiers Under International Criminal Law' (2013) Vol.4 No.1 Osgoode Hall Review of Law and Policy

Taking into consideration the obvious inefficiency and inability of international criminal law to give a precise and definite answer to the issue of criminal responsibility of child soldiers, everything is left to national courts.

Still, the ICC is not entirely segregated on the issue of child soldiers, and Article 8 of the Rome Statute provides that conscripting or enlisting children under the age of 15 years into armed forces or groups is a war crime.<sup>45</sup> This provision though enables the ICC to take a preventive role, in line with the principle of retribution and deterrence, by prosecuting those responsible for recruiting children into armed forces or groups. However, in the light of recent cases, especially case *Lubanga*<sup>46</sup>, supporters of the opinion that the ICC is unjustifiably targeting Africa got yet another chance to criticize the Court's practice. Truthfully, relationship between the ICC and Africa has always been very delicate, precisely because all of the accused to this date have been African, but arguments in favour of ICC are strong enough to resist such attempts on its reputation. The ICC is still a young institution that has yet to address many issues, which would help its process of maturing as an independent and impartial institution, as every other judicial institution should be. That process is slow and needs time, especially since the Court was established by a political organization, but ought to stay on the path of diverging itself from politics in order to keep its international credibility. The Court has shown that it is open to cooperation with States Parties to the Rome Statute, and in case of Africa, we were able to see this in action after the African Union brought a Decision on Africa's Relationship with the ICC,<sup>47</sup> after what the ICC made certain changes to the Rules of Procedure and Evidence (RPE),<sup>48</sup> which showed the Court's willingness to proactively shape the RPE, especially in matters that have certain diplomatic implications. Secondly, the ICC can only take a case if a State Party refers to

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<sup>45</sup> Rome Statute 2002 s 2 (8)(2)(b)(xxvi)(e)(vii),

<sup>46</sup> More about case *Lubanga* available at <[https://www.iccpi.int/en\\_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200106/Pages/democratic%20republic%20of%20the%20congo.aspx](https://www.iccpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200106/Pages/democratic%20republic%20of%20the%20congo.aspx)>

<sup>47</sup> 'Decision on Africa's Relationship with The international Criminal Court (ICC)' <[http://www.au.int/en/sites/default/files/Ext%20Assembly%20AU%20Dec%20&%20Decl%20\\_E.pdf](http://www.au.int/en/sites/default/files/Ext%20Assembly%20AU%20Dec%20&%20Decl%20_E.pdf)>, in Steven Arrigg Koh, 'Presence and Politics at the International Criminal Court' (2015) Vol. 19 No. 11 ASIL <<https://www.asil.org/insights/volume/19/issue/11/presence-and-politics-international-criminal-court>> accessed 21 August 2015

<sup>48</sup> 'Special Segment as Requested by the African Union: "Indictment of Sitting Heads of State and Government and its Consequences on Peace and Stability and Reconciliation"' <[http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP12/ICC-ASP-12-61-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-61-ENG.pdf)>, in Steven Arrigg Koh, 'Presence and Politics at the International Criminal Court' (2015) Vol. 19 No. 11 ASIL <<https://www.asil.org/insights/volume/19/issue/11/presence-and-politics-international-criminal-court>> accessed 21 August 2015

the Prosecutor in a situation where one or more crimes within the Court's jurisdiction have been committed, if the Security Council refers such a situation to the Court in accordance with Chapter VII of the UN Charter, or if the Prosecutor initiates an investigation in respect of such a crime.<sup>49</sup> There have been 21 cases in eight situations brought before the Court - situations in Democratic Republic of Congo (DRC), Northern Uganda, the Central African Republic and Mali were referred by a State Party,<sup>50</sup> which comprises half of the situations that were brought before the Court. This shows that even though there have been complaints about the Court's impartiality in choosing cases, States Parties cooperated with the ICC and entrusted it with further investigating events that have occurred on territories of the above mentioned countries. Finally, the ICC's involvement in case *Lubanga*, during the armed conflict in the DRC, had a positive deterring effect on the practice of recruiting child soldiers contrary to the rules of international law.<sup>51</sup>

## 5. Conclusion

The issue of child soldiers began to rise after the end of World War II, with the increase in armed conflicts that are not of an international character, where more and more armed groups started conscripting and enlisting children for the purposes of war. However, the international community has addressed this issue only in the 1970's and continued this practice in the 1990's with a burst in the number of children used by armed forces or groups. Nevertheless, many issues remained unsolved while the world focused on preventing recruitment of child soldiers and demobilization and reintegration of former child soldiers. Taking into consideration that not all of the children were forcibly recruited and that some of the most important international instruments practically allow recruitment of children of age 15 and above, it most definitely

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<sup>49</sup> Rome Statute 2002 s 2 (3)

<sup>50</sup> 'Situations and Cases', International Criminal Court <[http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx)>, in Steven Arrigg Koh, 'Presence and Politics at the International Criminal Court' (2015) Vol. 19 No. 11 ASIL <<https://www.asil.org/insights/volume/19/issue/11/presence-and-politics-international-criminal-court>> accessed 21 August 2015

<sup>51</sup> 'The RtoP and ICC - Complementary in prevention, assistance and response' (ICRtoP official website) <<http://www.responsibilitytoprotect.org/index.php/component/content/article/35-r2pcs-topics/4036-icrtop-blog-post-the-rtop-and-the-icc-complementary-in-prevention-assistance-and-response>>; <<https://responsibilitytoprotectblog.files.wordpress.com/2012/03/nkunda-irri.pdf>> accessed 21 August 2015

necessary to address the question of their criminal responsibility for committing international crimes in armed conflicts. This issue has been long avoided, but it is of utmost importance for the international criminal law to take proactive role in forming at least basic rules to prosecuting child soldiers between the age 15 and 18 who have violated rules of international humanitarian law and international human rights law, starting with the age threshold for the criminal liability, that we suggest to be the age 15, in accordance with the previously mentioned arguments in favour of setting this age as minimum for criminal responsibility of child soldiers. Though the Paris Principles and the Beijing Rules give a certain amount of definition to rules of procedure for juvenile justice, not many countries have implemented these principles and rules into their national legislature, which is worrisome since there have been proceedings against child soldiers in national courts, but lacking in providing the minimum of rights to the accused and applying a penal policy that is directly opposite to the basic principles of human rights. On this matter, we suggest more action should be taken in regard to implementation of adequate regulation for trying child soldiers, for what once again unity of international community is pertinent. Finally, although the ICC plays a preventive and deterring role in conscription and enlistment of child soldiers, it does not have personal jurisdiction over child soldiers, but as the only permanent international criminal court it should not evade the issue of child soldiers' criminal liability, it should give its expert opinion on this issue, whether it decides in the future to change its personal jurisdiction in this regard or not.

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