

Child Soldiers - Victims or Perpetrators: An Analysis

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ABSTRACT

This article examines the unique status, experience and legal responsibility of those known as 'child soldiers'. There are an estimated 300,000 children in the world today who are actively engaged in hostilities, either through government forces or rebel groups. 'Child soldier' 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, spies or for sexual purposes'. In general, international law views these child soldiers as victims, yet the plethora of issues surrounding child soldiers complicates such a view. The horrific circumstances created by conflict, both national and international, that lead to the enlistment, conscription and use of children are a growing concern, not only morally but legally. These soldiers, recruited from as young as five years old, are subjected (among other things) to violence, rape, and murder, but then they themselves become perpetrators of the aforementioned crimes. How ought the international legal community to deal with this? Should they be protected as victims or punished as perpetrators? This article will explore this issue in international law and the unique status of the child soldier with the aim of determining whether it is best to protect these individuals as victims or punish them as perpetrators, or whether the child soldier comprises an 'exceptional' status.

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INTRODUCTION: CURRENT SCENARIO IN INTERNATIONAL LAW

Most of the current international law regarding child soldiers focuses on those individuals who commit war crimes by recruiting children. This is indicative of the widespread view that child soldiers are victims rather than perpetrators of all the crimes surrounding them. Whilst 18 is considered the universal age of adulthood pursuant to Article 1 of the Convention of the Rights of the Child (CRC),¹ most international law only specifies the illegality of recruiting, enlisting, or conscripting children under the age of 15. The use of child soldiers under 15 years-old is prohibited as a war crime under the International Criminal Court (ICC) Statute, and the Special Court for Sierra Leone (SCSL) Statute. Prior to these statutes, conscripting children for use in armed conflicts was already a well-established prohibition, and the SCSL held that this provision later recognized in the SCSL Statute Article 4(c) was already

customary international law. Further to these sources of law, in 2000 the Optional Protocol to the Convention on the Rights of the Child (OP) raised the age limit to 18 for child soldiers. However, this age limit is currently only treaty law, not customary law, and certainly not customary criminal law. It is notable nevertheless that the ICC has no jurisdiction over persons who were under the age of 18 at the time of the alleged crime. There is an anomaly in this: that the restriction on recruiting children is less than 15 years, yet there is apparently no criminal jurisdiction for those who are aged 15 - 17 that take part in hostilities.² This could have the adverse effect of

¹<http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>

² Steven Freeland, 'Child Soldiers and International Crimes - How Should International Law be Applied?' (2005) 3 New Zealand Journal of Public and International Law 303, 324, <http://www.victoria.ac.nz/law/centres/nzcpl/publications/nz-journal-of-public-and-international-law/previous->

encouraging the recruitment of children between the ages of 15 and 17. For the children who are recruited and then commit crimes, there is currently no applicable international age of criminal responsibility. The age of criminal responsibility varies widely in each nation; in Australia, for example, children under 10 cannot be charged with a criminal offence. Between the ages of 10 - 14, the principle of *doli incapax* exists; a (rebuttable) presumption of *no mens rea*, and it is only upon achieving the age of 18 that a person may be tried in an adult court.

ISSUES IN INTERNATIONAL CRIMINAL JUSTICE

Most recently, in a landmark case for child soldiers, Congolese warlord Thomas Lubanga Dyilo was convicted of a war crime under Article 8(2)(e)(vii) of the ICC Statute for recruiting, enlisting and conscripting children under 15 years of age for use in a national armed conflict.³ This is significant as it is the first international case focusing solely on child soldiers, and the successful verdict against Lubanga is a precedent for punishing those who use children in armed conflict.

VICTIMS OR PERPETRATORS?

As aforementioned, most rhetoric focuses on child soldiers as victims, evidenced by the fact that international law does not really recognize child soldiers as perpetrators – there are very few laws applicable to child soldiers' own conduct. The CRC, the OP and the African Charter on the Rights and Welfare of the Child seem to provide that children have a right to not be recruited in breach of international law, and that those who are illegally recruited have thus had their rights violated, and are victims. This is in part due to the presumption that children under 15 lack the mental capacity to be able to judge sufficiently what becoming involved in military service truly involves. For children of 15 - 17 years, voluntary enrolment into national armed forces is seen to be within their capacity to choose.

A corollary issue is that for these child soldiers, the previously mentioned 'impunity gap' exists; they will not be held accountable under international law until they reach the age of 18, and then only if they continue to commit crimes under international criminal law.

Reasons for the current widespread use of children in war have been attributed to the fact that they are

issues/volume-32,-november-2005/freeland.pdf (Last accessed on 10 February, 2019)

³ The Prosecutor v Lubanga (Judgment), Trial Chamber I, 14 March 2012, Case No ICC-01/04-01/06.

'more easily guided and suggestible than adults', and can be easily abducted and then 'molded'.⁴ Small weapons are easy for children to wield, and the expendability of an abducted child is desirable for those wanting to fill ranks. In the history of international criminal law, children have not traditionally been held accountable for crimes they committed as child soldiers. For child soldiers to be held accountable, the *mens rea* as well as the *actus reus* ought to be shown, and for this reason most tribunals have not pursued prosecution of child soldiers. As the ICC has no jurisdiction over children, they are unlikely to be prosecuted in an international setting, although a few cases of children being prosecuted as victims have occurred. Although the SCSL was the first international source of law that allowed for prosecution of children charged with international crimes, the Court's mandate that it would prosecute only those who 'bore the greatest responsibility for crimes committed in Sierra Leone' did not extend to child soldiers, and in fact the Prosecutor stated that he would not pursue child soldiers for crimes they had committed. Instead, there was a rather successful rehabilitation program. The question of the *mens rea* in child soldiers raises the question of whether children so young are capable of committing evil and knowing the difference between right and wrong, especially when subjected to such harsh conditions and what many have described as brainwashing.

A UNIQUE STATUS

As can be seen from conflicts around the world, it is evident that child soldiers are victims, yet also perpetrators of crimes. As such, they may be described as an 'exception' in the realm of international criminal law.

The case of Dominic Ongwen

Of considerable interest is the case of Dominic Ongwen, who was only 10-years-old when he was abducted by the Lord's Resistance Army (LRA) in Uganda, yet excelled in his new life as a child soldier, ultimately becoming one of the LRA's key leaders. He has since been indicted by the ICC for crimes against humanity and war crimes.⁵ If brought before the ICC, he would be the first person to be charged with crimes that were initially committed against him. Although the ICC does not have jurisdiction over

⁴ Supra Note 2

⁵ Cecile Aptel, 'Children and Accountability for International Crimes: the Contribution of International Criminal Courts', (2010) 20 *Innocenti Working Paper*, http://www.unicef-irc.org/publications/pdf/iwp_2010_20.pdf (Last accessed on 1 February, 2019)

persons for crimes they committed when less than 18 years old, the ICC can prosecute these individuals the moment they turn 18 and continue to commit those crimes. Again, the question of guilt and knowledge of right and wrong arises – if Dominic Ongwen was only 10 when abducted, and then consequently brainwashed and taught a new way of life, what is the difference between prosecuting him now, or if he was captured when he was only 17?

International criminal law suggests that although he did not have the mens rea while committing crimes as a child soldier, somehow he grew into legal capacity as he aged. How much responsibility should Dominic Ongwen hold for his crimes, when he was indoctrinated as a mere 10-year-old child to live in such a manner? As a result of child soldiers' age and trauma they are unable to distinguish between right and wrong, how are they to then gain such a distinction without being removed from the said trauma? Dominic Ongwen; otherwise, growing up as a child in such conditions, how was he to discriminate between right and wrong? Of course, it is hardly surprising that the ICC desires to render justice, particularly to those bearing the greatest responsibility for the worst crimes (pursuant to which Dominic Ongwen came to be within the LRA); yet the distinction between the indictment of Dominic Ongwen and the ICC's refusal to prosecute child soldiers under 18 seems lacking, remaining an anomaly in international criminal law. It seems that if Ongwen comes to trial before the ICC, the burden of proof to find the requisite mens rea for the crimes he has committed may be difficult to discharge, particularly as he was indoctrinated from such a young age.

The Case of Omar Khadr

Omar Khadr is a Canadian citizen who was born in 1986. It is alleged that his father “was a high-ranking member of Egyptian Islamic Jihad, a senior Al-Qaeda operative and a close associate of Osama bin Laden.”⁶ It is also alleged that from 1996 until 2001, Khadr: travelled throughout Afghanistan with his father meeting senior Al-Qaeda members and visiting Al-Qaeda training camps and guest houses. In the summer of 2002, he received personal training in the use of arms and explosives and, on completion of his training, joined a team of Al-Qaeda operatives constructing and planting landmines targeted against U.S. and coalition forces.⁷ Khadr is accused by U.S. officials to have murdered the U.S. sergeant Christopher Speer by throwing a grenade at him

⁶ Matthew Happold, “Child Soldiers, Victims or Perpetrators?” (2008)

⁷ Ibid

during a firefight between U.S. Special Forces and a group of Al-Qaeda operatives. Following his arrest and transfer to Guantanamo Bay, Khadr was charged under the newly created system of Guantanamo Military Commissions with “conspiracy, murder by an unprivileged belligerent, [and] attempted murder by an unprivileged belligerent.”⁸

However, these commissions were later struck down as being unconstitutional.⁹ Instead, new charges were brought against Khadr after the Military Commission Act was signed. These include “Murder in Violation of the Law of War, Attempted Murder in Violation of the Law of War, Conspiracy, [and] Providing Material Support for Terrorism and Spying.” In October 2011, he entered a guilty plea.⁹ According to the plea agreement, Khadr pled guilty “in exchange for an eight-year sentence, with a likely transfer to a Canadian prison after one year.”¹⁰

Khadr's case is controversial in many aspects and his prosecution has been widely criticized. Commentators such as David Crane, the first Prosecutor at the SCSL, have argued that child soldiers, including Omar Khadr, should not be prosecuted. They are primarily seen as victims who do not have the choice but to kill and therefore lack the mens rea to commit war crimes.

Countries that have ratified the Rome Statute are under the obligation to prosecute individuals accused of international crimes. This obligation implies that when these countries have a functioning juvenile justice system, they are under the obligation to prosecute child soldiers when appropriate. However, due to states' overlapping obligations between the Rome Statute and other international treaties, states are also under the legal obligation to respect standards imposed by other international instruments. If domestic systems must prosecute child soldiers, respecting international standards, why would international criminal justice be different?

THE FUTURE

So how should the international legal community approach this complex issue of child soldiers? The

⁸ United States of America v. Omar Ahmed Khadr, <http://www.internationalcrimesdatabase.org/Case/968/Khadr/> (Last accessed on 4 February, 2019)

⁹ Hamdam v Rumsfeld, [2006] 548 US 557. It was held in this case that the military commissions lack “the power to proceed because its structures and procedures violate both the Uniform Code of Military Justice and the four Geneva Conventions signed in 1949.”

¹⁰ Amnesty International, <http://www.hrw.org/en/news/2010/11/05/khadrs-plea-agreement-and-sentencing> (Last accessed on 7 February, 2019)

real solution to this issue lies in the ‘abatement of armed conflict’¹¹ on a broad scale, however despite the desirability of this solution, it seems highly unlikely. Given the complexity of child soldiers’ situations, which reveals a lacuna in international criminal law, the answer will not be easy. Although perpetrators of terrible crimes, child soldiers are firstly and primarily victims and hence ought to be protected. Punishment should lie in the form of rehabilitation. International law ought to work alongside anthropologists and psychologists to better understand child soldiers. Undoubtedly victims, of not only the horrendous war crime of being recruited, enlisted, conscripted and used, but also of numerous other crimes including rape, torture, and being forced to kill, child soldiers are brainwashed and coerced through fear, indoctrination and threat. While it is not impossible for children to do evil of their own accord, the reality is that most child soldiers do not exist because of their own desire to perpetrate crimes, but rather have been coerced or forced into such a situation, either by abduction or by the lack of a better choice- even the claim that some children ‘volunteer’ is a ‘complete misnomer’.¹²

It is only in the gravest of situations that a child voluntarily joins such a group. Consequently, the defence of ‘superior orders’ ought to indemnify them, were they ever to be brought to trial.

There are indeed considerations that support prosecuting child soldiers, such as justice for victims who suffered at the hands of child soldiers and the fact that it is not necessarily in a child’s best interest to be completely absolved of responsibility for the crimes he/she committed. However, even if it remains an option, prosecution should not be given priority. To date, the best alternative to prosecution of child soldiers was that undertaken in Sierra Leone at the end of its civil war: a Truth and Reconciliation Commission (TRC), during which children were protected and their statements were confidential.

Through this medium, children were able to be open about their experiences, while still experiencing protection. The Paris Principles also provide that any children involved in such a mechanism are to be treated equally as victims or witnesses.¹³ While the SCSL was given jurisdiction to try children between the ages of 15 and 18 at the time of the alleged crime,

these children were to be tried as ‘juvenile offenders’, and given the presumption of rehabilitation and reintegration into society, while immunized from imprisonment. However, due to the SCSL’s mandate to only prosecute those most responsible for the worst crimes, there was no prosecution of child soldiers. As for the success of rehabilitation, research shows that former child soldiers who are provided rehabilitative services and accepted back into their communities are able to become responsible adults. A research study of former child soldiers in Mozambique over a period of 16 years found that while none of the child soldiers were entirely free from the psychological effects of their past, most of them became ‘productive, capable and caring adults’ as a result of rehabilitation.

CONCLUSION

Child soldiers are sui generis in the realm of international criminal law, and ought to be treated as such. International criminal law should focus on the leaders who instigate these situations and abduct children to be child soldiers; for this reason the guilty verdict of Thomas Lubanga Dyilo is laudable. Consideration under international criminal law ought to be given for those individuals (such as Ongwen) who begin as involuntary child soldiers yet then become significant leaders and perpetrators of war crimes and crimes against humanity, carrying out against others the very crimes that were first carried out against them. Child soldiers are complex political individuals who can be considered both victims and perpetrators. If—contrary to calls from most children’s rights organizations, child soldiers who committed crimes are to be treated primarily as perpetrators—one should make sure that a child is indeed legally capable of committing crimes. The main issue when trying to answer the difficult question of child criminal liability is the mens rea requirement. Can a child have the intention to commit an international crime? No minimum age for criminal liability is determined by international law for the reason that no consensus can be reached. This age depends on the conception each state has of childhood and therefore, it widely differs from one country to another. Arguments in favour of the prosecution of child soldiers find support in the theories of punishment, in international human rights law and in domestic practices. Moreover, international criminal law provides some openings towards this option. Arguments given against the prosecution of child soldiers are grounded in the idea that the best interests of the child should be respected. In addition to this, in the event prosecutions occur, children would benefit from defences provided by international criminal law. Based on the above considerations, child soldiers should never be prosecuted under the age of fifteen.

¹¹ Supra Note 2

¹² Ibid

¹³ *The Paris Principles. Principles and Guidelines on Children Associated With Armed Forces or Armed Groups*, UN Children’s Fund (UNICEF), February 2007, <http://www.unicef.org/emerg/files/ParisPrinciples310107English.pdf> (Last accessed on 4 February, 2019)

However, prosecution of children between fifteen and eighteen is not necessarily the best way to implement the right to reintegration promoted by the CRC. This is the reason why children between fifteen and

eighteen could be held accountable in ways other than criminal prosecutions, for instance by using mechanisms of transitional justice other than criminal.

