ACCOUNTABILITY
OF CHILD SOLDIERS IN CONFLICT
SITUATIONS IN SUB SAHARAN AFRICA

by

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ACCOUNTABILITY OF CHILD SOLDIERS IN CONFLICT SITUATIONS
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SUMMARY

Throughout the world, but especially in the African continent, international, cross-border and national conflicts are ongoing. In the majority of these conflicts child soldiers are involved in various ways.

Judicial problems concerning the prosecution of commanders and leaders of armed groups, irrespective of governmental or not are being solved. Thus, underlying concern is left to the issue of accountability of child soldiers.

International, Regional and National protection measures provide for certain judicial standards dealing with children under the age of eighteen.

In order to fully understand the difficulties arising from the existence of universal binding measurement dealing with the accountability of child soldiers, one has to be aware of the international, regional and national legislative frameworks.

In Sub Saharan Africa, especially in Rwanda, Uganda and the Democratic Republic of Congo, governments face various difficulties, such as the implantation process of international protection measures and ongoing conflicts, making it very difficult to examine the status of accountability measures for child soldiers.
States have different minimum ages for accountability for child soldiers. Only a process of international co-operation between governments and non state actors can attempt to deal with the accountability of child soldiers. Not only deterrent, but rather restitution approaches and reintegration programmes should be followed in order to bring justice and achieve results in peace processes.
CHAPTER 1: INTRODUCTION

The following treatise focuses on the accountability of child soldiers\(^1\) in Sub-Saharan Africa, the Democratic Republic of Congo\(^2\), Uganda and Rwanda.

A general definition of a “child soldier” can lead to various misunderstandings. In the context of international humanitarian law the term “child combatant” is often used in the same context, whereas for the purpose of this treatise the word “child soldier” is preferred.

In Rwanda, Uganda and the DRC, children have picked up arms, voluntarily or by force. One of many reasons is a breakdown in society, making

\(^{1}\) The definition of a child soldier varies between countries and cultures. Most authors define “child soldiers” as all humans under the age of 18 who are recruited to a country’s armed forces or to a non-government entity (NGE), even if the country is in a state of peace. (Druba, V., “The Problem of Child Soldiers”, Kluwer Academic Publishers, Netherlands, 2002, p.271.) The term used is heterogeneous and includes all children and young adults whether they legally conscripted, voluntarily enlisted or recruited by force. The question arises, whether to differentiate between the terms “child soldier” and “child combatant”. The implication of this issue is that a child soldier is not only one that has combatant status. The term “child soldier” has a wider protection by proscribing a war crime the situation as children are not only recruited or enlisted to play an active role linked to combat (Mezmur, Benyam, „Children at Both Ends of the Gun: Child Soldiers in Africa“, Ashgate Publishing, Cornwall, 2008,p.202.) but are also being used by letting them participate in services linked to combat such as scouting, spying, sabotage and couriers or as decoys (See Draft Report of Rome Statute 1998). In addition, in regard to the notion of “to enlist”, it is submitted that this comprises both the act of recruiting and the act of conscripting (Dormann, „Elements of War Crime under the Rome Statute of the ICC; Sources and Commentary“, Cambridge University Press, Cambridge, 2003, p. 377.). A child is defined under international human rights law as “every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier” (United Nations Convention on the Rights of the Child of 1989 Article 1.) thereby making eighteen the age at which majority status is acquired internationally (Abrahams and Bell, p. 163).

\(^{2}\) Hereinafter to be referred to as DRC.
children and youngsters even more vulnerable to the abuses of war. This phenomenon of children in combat is not recent, nor is it solely an issue for one continent.

The global community has been forced to address the problems of children in war and conflict situations. It was not until the 1990s that the issue of children in conflict became an international concern. This treatise presents international, regional and national legislative measurements to protect child soldiers. The focus of this treatise is the analysis of the measurements and regulations, not only dealing with the protection, but also the individual accountability of child soldiers.

Children are involved in different types of conflict. In trying to stop their participation, local and international non–governmental organisations as well as the United Nations, publish case studies to raise public awareness and bring international attention to this issue. Nevertheless academic research is still just at its beginning and many questions still remain unanswered, as there is no definitive universal research of all situations and circumstances in which child soldiers are involved.

Problematic are not only the direct risks that child soldiers face as a result of armed attacks; livelihood security, diseases and poverty take their toll at large numbers of children as well. Further, questions arise into what extent the involved acts amount to international crimes or gross violations of human rights. A discussion whether international criminal accountability mechanisms and human

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3 Hereinafter to be referred to as NGO.
4 Hereinafter to be referred to as UN.
5 Such as they are “Human Rights Watch”, “Coalition to Stop the Use of Child Soldiers”, ”Amnesty International” etc.
6 Druba, p. 271.
rights based responses meet the rights and needs of the children involved, either as victims and survivors, or as perpetrators is also undertaken.

1.1 Internal and International Armed Conflicts

For the purpose of this treatise it is not of great importance whether armed conflicts take place within a state territory or are cross boundary conflicts. Conflicts can be seen as international or internal, the size of it is not of importance.\textsuperscript{8}

In terms of human rights and certain international legislation and conventions, the use of the term “armed conflict” has become standard. The question whether a conflict must be an armed conflict shall not be answered at this stage, the standard definition of a conflict as a state of open, often prolonged fighting that could also involve a battle or a war, is internationally accepted and shall be used throughout this treatise.

Further questionable could be the involvement of “war” in this topic. In this treatise this question shall not be of great importance, due to the fact that by differentiating between “war” and “post-war” the general topic and subsequent discussions are not affected.

\textsuperscript{8} Weltreport Kindersoldaten 2008, p. 37.
CHAPTER 2: INTERNATIONAL PROTECTION, PROHIBITION AND ACCOUNTABILITY REGULATIONS

This chapter defines and clarifies the various international protection as well as accountability measures for child soldiers. It describes the existing international legal frameworks that hold child soldiers accountable for committed crimes.

2.1 International Human Rights Resolutions and Statutes

In the past few decades, the international child rights movement has undertaken expansive development of international law, policies and programmes for the protection of children. The areas of law affected are international humanitarian law, international human rights law, international criminal law and international law on child labour. 9

2.1.1 Global Application of Human Rights Law

Human rights are widely considered to be those fundamental moral rights of the person necessary for a life with human dignity. 10 Human rights are the basic rights that every human being is entitles to by virtue of his or her existence. 11 Human rights are furthermore entrenched in both international and regional instruments worldwide, making their applicability universal and subjective. 12

10 Forsythe, Human Rights in International Relations, Cambridge University Press, 2006, p.3.
12 Ibid.
One could argue that the origin of international application of human rights was the Universal Declaration of Human Rights of 1948. Nevertheless this declaration is not strictly binding since it was drafted and enacted by a resolution of the General Assembly.\textsuperscript{13} However it is now being treated as having entered international customary law\textsuperscript{14} and the declaration has found its way into the constitutions of a number of states and even more subsequent into various human rights treaties.\textsuperscript{15} A discussion on the implementation of human rights is undertaken later in this treatise.

2.1.2 Protection of Child Soldiers

Questionable is to what extent certain measurements and international legal framework protect children and to what extent accountability is included for crimes committed by child soldiers.

Several international instruments that protect children\textsuperscript{16} will be discussed.

\begin{flushleft}
\textsuperscript{13} Hereinafter referred to as GA.
\textsuperscript{14} International customary law consists of a vast body of detailed rules that, until the dawn of the 20\textsuperscript{th} century, constituted the chief body of international law. Many of these rules had their origin in the practice of a single state. In order to be recognized as customary law, it must be reasonable in nature and must have been followed continuously, in detail by state practice (Oxford Dictionary of Law, Oxford University Press, England, 2009, p. 150).
\end{flushleft}
a) The four Geneva Conventions and its Additional Protocols

The Geneva Conventions regulate, amongst other things, the legal position of the civilian population who fall into the hands of an enemy. Generally, all Geneva Conventions only apply to armed international conflicts, whereas common Article 3 of the Conventions also regulates the minimum humanitarian rules in non-international armed conflicts. Regarding the protection of the children, the Geneva Conventions provide that for example, as children laying down their arms are entitled to the protection afforded to all non-participants, and children cannot be forced to participate in hostilities against their own country.17

Thus, the Geneva Conventions define children differently between those under the age of fifteen and those who are under eighteen years old.18

Even more, the Geneva Conventions do not give attention to the recruitment of children into armed forces or groups. The issue of participation of children in non-international armed conflicts is dealt with in the two Additional Protocols of the Geneva Conventions of 194919.


19 Above,fn. 16.
Additional Protocol I requires all contracting parties to take all feasible measures to prevent children under the age of 15 from taking a direct part in hostilities.\textsuperscript{20} Any recruitment to armed forces is prohibited.\textsuperscript{21} Problematic is that the vague phrase “take all feasible measures” at the same time causes the issue of a general prohibition to be evaded.\textsuperscript{22} In recruiting young adults between the ages of fifteen and eighteen, rather the elders shall be given priority.\textsuperscript{23} Some authors argue that the problem in the spelling of the Convention stated above is that youth between the ages of fifteen and eighteen are no longer called children and could be understood to be legitimate targets of war.\textsuperscript{24}

One may come to the conclusion that the latter provisions allows for the voluntary recruitment of children as soldiers.\textsuperscript{25} Other authors though emphasise the word “recruitment” in the Additional Protocol. Following their argumentation, “recruitment” only covers voluntary registration, which could mean that official or governmental armed forces or groups are not allowed to enlist children under the age of fifteen.\textsuperscript{26}

By looking at the drafting history of Article 77(2) of the GC AP I, the International Committee of the Red Cross\textsuperscript{27} had originally incorporated the term “voluntary enrolment” into the provision but had deliberately deleted

\textsuperscript{20} Art. 77 (2) GC AP I.
\textsuperscript{21} Ibid.
\textsuperscript{22} Thulin, “Child Soldiers- The Role of the Red Cross and Red Crescent Movement”, \textit{Humanitäres Völkerrecht} 3, 1992, p. 142.
\textsuperscript{23} Art. 77 (2) GC AP I.
\textsuperscript{24} Bennett, p.32.
\textsuperscript{25} Kosonen, p. 57.; Cohn and Goodwill-Gill, “Child Soldiers. The Role of Children in Armed Conflict”, p. 61.
\textsuperscript{26} Dulti, “Captured Child Combatants”, \textit{International Review of the Red Cross} 9, 1990, p. 424.
\textsuperscript{27} Hereinafter to be referred to as ICRC.
it from the final version of the Protocol. This omission has been explained as implying “exclusively compulsory character” of this Article.

At the time of the drafting the state parties could not agree to a strict prohibition concerning juvenile enrolment and enlisting. Not only is the issue of accountability not mentioned in the Additional Protocol I; it can be stated that the AP I does not provide maximum binding protection measurements for child soldiers.

In a conflict involving more than one nongovernmental armed group, common article 3 yields the protection of children in this regard. Additional Protocol II applies to non-international conflicts between a government and armed organised groups. It prohibits all forms of direct and indirect participation of children under the age of fifteen in these conflicts.

This means that AP II provides stronger protection for children in non-international armed conflicts, than AP I provides for children in international armed conflicts.

Nevertheless both Additional Protocols have lacunae, for example, there is no minimum age limit for childhood, no definition of the terms “direct” and “indirect participation” and no application to lesser forms of disorder as riots or isolated acts of violence.

The Geneva Conventions and their Additional Protocols I & II have made steps to codify legal obligations incumbent upon states parties, thus the crux of the matter is that states should observe of what does, and does

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29 Ibid.
30 GC AP II Article 4 (3) (c).
31 Abrahams and Bell, p. 174.
32 Bennett, p. 37.
not, constitute acceptable behaviour, and that a child has special rights within law, by virtue of that child's relative powerlessness, both physical and mental.\textsuperscript{33} Nevertheless these rules are primarily instruments of the nation-state system. The signatory status recognises this as \textit{prima facie}\textsuperscript{34} even though much of the problems stem from the decisions and actions taken by sub-state actors\textsuperscript{35,36}.

\textit{b) The Rome Statute on the International Criminal Court}\textsuperscript{37}

The Rome Statute established the International Criminal Court\textsuperscript{38} which has the power to exercise jurisdiction over any person guilty of committing the crimes enlisted in the statute.\textsuperscript{39} The ICC only has jurisdiction over the core

\begin{itemize}
\item \textsuperscript{33} See the Preamble to the \textit{United Nations Convention on the Rights of the Child}.
\item \textsuperscript{34} \textit{Prima facie} (latein) means "on its first appearance", or "by first instance". It is used in modern legal English to signify that on first examination, a matter appears to be self-evident from the facts. In common law jurisdictions, prima facie denotes evidence that (unless rebutted) would be sufficient to prove a particular proposition or fact.
\item \textsuperscript{35} Besides the heads of governments of a nation, there are other groups and individuals within that nation that influence its international relationships. These domestic actors, called sub-state actors, include particular industries with distinct interests in foreign policy (such as the automobile or tobacco industry) and ethnic constituencies with ties to foreign countries, as well as labour unions, cities, and regions. All of these actors may be affected by international events differently from each other or the country where they operate. These groups can influence a nation’s foreign policy in several ways, such as by lobbying political leaders, donating money to political candidates or parties, or swaying public opinion on certain issues.
\item \textsuperscript{36} Faulkner, „Kindergarten Killers: morality, murder and the child soldier problem“, \textit{Third World Quarterly}, Vol. 22, No 4, 2001, p. 493.
\item \textsuperscript{37} Rome Statute on the International Criminal Court of 17 July 1998 (entry into force 1 July 2002).
\item \textsuperscript{38} Hereinafter to be referred to as ICC.
\item \textsuperscript{39} Rome Statute Article 1.
\end{itemize}
crimes, such as the crime of genocide, crimes against humanity and war crimes.\(^{40}\)

The only *corpus delicti*\(^{41}\) that would be of importance in this context, are war crimes. Following Article 8(2) (b) (xxvi) of the Statute, the conscription and enlistment of children under the age of 15 years into armed forces or using them to participate actively in hostilities is regarded as a war crime in case of an international armed conflict. For non international armed conflicts, Article 8(2) (e) (vii) covers the *corpus delicti*.

Nevertheless, Article 26 regulates that 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.

The Rome Statute can thus be seen as a legal framework prosecuting adult commanders and heads of organised nongovernmental forces for enlisting or conscribing child soldiers, but it does not contain any legal obligations and accountability measurements for children. The personal accountability of child soldiers cannot be penalized by the ICC.

c) *UN Resolutions*

Questionable is if there are any UN measurements, for example resolutions of the General Assembly or resolutions from the Security Council of the United Nations\(^ {42}\) that focus on the protection as well the liability and accountability of child soldiers.\(^ {43}\)

\(^{40}\) Rome Statute Article 5.1 (a-c).

\(^{41}\) the body of facts that constitute an offence.

\(^{42}\) Hereinafter to be referred to as UNSC.

\(^{43}\) The first resolution of the Security Council dealing entirely with children in armed conflict was Resolution 1261 (1999). It repeated the condemnation of targeting of children in armed conflict and the obligation of states to prosecute the violations. This Resolution was followed by several others, such as Resolutions 1314 (2000), 1379 (2001), 1460 (2003), 1539 (2004) and 1612 (2006).
These resolutions do not deal with any accountability issues to hold children responsible and accountable for crimes committed under the age of eighteen.

An exception is found in the UNSC Resolution 1315\textsuperscript{44}, forming the basis for the statute for the Special Court for Sierra Leone.\textsuperscript{45} The Special Court for Sierra Leone marks the first time that children have actively been involved in an international tribunal as witnesses. Furthermore the SCSL for the first time allowed for the prosecution of children who were above the age of fifteen and under the age of eighteen when being in that age frame at the time of alleged commission of the crime. Nevertheless it was decided that children below the age of eighteen would not meet the requirements of the competence to prosecute ‘those who bear the greatest responsibility’ for crimes within the court’s jurisdiction.\textsuperscript{46} This policy is also reflected in the Rome Statute, where international jurisdiction of the ICC is limited to persons over the age of eighteen.\textsuperscript{47}

Therefore, there is no existing UN Resolution, neither from the General Assembly, nor the Security Council that focuses on the issue of accountability of children involved in conflicts.

\textit{d) The United Nations Convention on the Worst Forms of Child Labour}\textsuperscript{48}

The governing body of the International Labour Committee intended to eradicate child labour in its worst forms and thus adopted the Nations

\begin{flushleft}
\textsuperscript{45} Hereinafter to be referred to as SCSL.
\textsuperscript{47} See Article 26, Rome Statute.
\end{flushleft}
Convention on the Worst Forms of Child Labour. In the Convention any person below the age of eighteen is regarded as a child.\textsuperscript{49}

The convention states:

“all forms of slavery or practices similar to slavery such as [...] forced or compulsory labour, including force or compulsory recruitment of children for use in armed conflict.”\textsuperscript{50}

All state parties are obliged to provide for the effective implementation and enforcement of the convention and imposes penal sanctions for breaches and non-compliance thereof.\textsuperscript{51}

The significance of this convention is foremost the strict bond to the age of eighteen. Further, it has sanctions for not complying with the implementation. By implying the latter convention as international law, the recruitment and enlistment of under eighteen year old children in any armed group is prohibited. The penalties apply to superiors and commanders, not the child soldier itself.

\textbf{2.2 The Convention on of the Rights of a Child}

The Convention on the Rights of the Child can be seen as the most comprehensive children’s rights instrument. The CRC has created an opportunity to address the problem of child soldiers. It includes the whole spectrum of children’s rights and is ratified by all states with the exception of the United States and Somalia.\textsuperscript{52}

\textsuperscript{49} Ibid. Article 2.
\textsuperscript{50} Ibid. Article 3 (a).
\textsuperscript{51} Ibid. Article 7(1).
\textsuperscript{52} Druba, p. 273.
2.2.1 History, Principles and Purpose

The CRC was the first legally binding international instrument to address children’s rights comprehensively; however it was not the first human rights instrument dealing with the protection of children’s rights. Since the late 1950s the UN General Assembly has adopted declarations on children’s rights, but it was not until 20 November 1989 that the CRC was adopted by the United Nations General Assembly. The CRC established a Committee that offers guidance to countries that have ratified the Convention through reporting mechanism. This specialised Committee on the Rights of the Child has the purpose to examine the progress made by states achieving the realisation of the CRC’s obligation.

The Committee consists of eighteen members, divided up in child law and policy experts appointed by the state parties and is based at the Office of the High Commissioner for Human Rights in Geneva. In three annual sessions the Committee deals with the submitted state reports. These have to be submitted every five years, whereas during the session state’s delegates present and defend their report in front of the Committee. The Committee is empowered to request additional information, if the state reports fall below the standard required. Additional information is also given during the sessions through Non-governmental Organizations working in the specific country.

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53 Hereinafter to be referred to as UN GA
55 Herein after be referred to as the Committee.
56 See Article 43 CRC.
57 See Article 50 CRC.
58 Herein after to be referred to as the OHCHR.
59 See Article 44 CRC.
60 Such as UNICEF, CARE, OXFAM, UNHCR, AI etc.
Nevertheless the CRC itself does not indicate any consequence or sanction for non-submission of reports\textsuperscript{61} nor do the statutes of the CRC do not provide any enforcement provisions. However the rules of procedure state that non-submission will result in the Committee sending a ‘reminder’ warning letter to the state party and if the state party remains recalcitrant the Committee can report to the General Assembly.\textsuperscript{62}

Problematic issues can arise do to the lack of enforcement through the Committee towards the state parties if reports are submitted wrongly, incomplete and not on time and given the power of state sovereignty it is left to the states to implement the CRC.

The CRC is a comprehensive framework on the rights of children, consisting of 42 separate articles addressing these rights plus Preamble. However, at its core, the CRC is subdivided into four broad categories, namely,

- Survival rights;
- Membership rights;
- Protection rights; and
- Empowerment rights.\textsuperscript{63}

In the following paragraphs, certain provisions of the CRC shall be discussed in detail, questioning the protection and accountability issues on children in general and child soldiers in particular.

a) General Principles of the CRC

A few articles in the CRC provide a clear understanding regarding the principles of the CRC. To understand the CRC, the state parties are expected to provide information not only on these general principles but also, pervasively, in relation to the other specific rights contained in the CRC.

The rights enumerated in Articles 2, 3 and 12 do not provide any specific protection for child soldiers. Children involved in conflict are not assured their fundamental rights such as being granted their best interests, as stated in Article 3.

The rights of Article 12 are being violated, since this article grants a child the right to participate in important decisions concerning his or her life. By looking at the usual procedure of “joining” or enlisting in armed groups, a child soldier is not freely or independently participating in that decision, and even if he or she is, it is objectively not in the best interest of that child.

These general principles do however not impact on the accountability and protection of child soldiers.

b) Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, and Art. 38 CRC

The UN GA adopted two additional protocols to the CRC, one of them being the OPAC.

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64 Article 2, dealing with non-discrimination of the child; Article 3, dealing with best interest of the child; Article 12, dealing with participation rights according to evolving capacities.

65 Buck, p. 58.
The OPAC attempts to lay down a higher standard than the CRC to prevent the direct participation of children under eighteen year old in armed conflict\(^{66}\) and their compulsory recruitment.\(^{67}\) Additionally, the OPAC contains provisions whereby each state party deposits a binding declaration upon ratification to set out the minimum voluntary recruitment age into its governmental or official armed forces.

Article 4 of the Optional Protocol states that armed militias or groups are prohibited from recruiting, or using in hostilities, children under eighteen year old. Member states are encouraged to adopt legal measures including criminalizing such practices,\(^ {68}\) as well as take all measures to ensure effective implementation and enforcement of the Optional Protocol within its own jurisdiction.

The Optional Protocol opens a discussion as to why the age definition is not strictly upheld to the age of eighteen. This leads to a further discussion of Art. 38 CRC, which states:

”...State 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, State Parties shall \textit{endeavour} to give priority to those who are the oldest.”\(^ {69}\)

Accordingly, Article 38 of the CRC provides that state parties undertake to respect and to ensure respect for relevant rules of international humanitarian law. The Convention only speaks of “to endeavour”, not mentioning any strict prohibitory terms. Article 38, read together with

\(^{66}\) See Art. 1 OPAC.
\(^{67}\) See Art. 2 OPAC.
\(^{68}\) See Art. 4 OPAC, whereas the term “should” is problematic, since it does constitute a legal obligation, moreover the states are only being encouraged.
\(^{69}\) Article 38 (3) CRC.
Article 39, focuses on the states parties’ duties to take appropriate measures to promote “physical and psychological recovery and social integration” of a child victim of armed conflicts.\footnote{Buck, p. 74.}

Raising the question whether child soldiers can be held accountable or even responsible for their actions, basic clarifications, such as the different minimum recruitment ages stated in the OPAC and CRC also have to be taken into account.

Another question arises why voluntary recruitment into armed forces is not prohibited under a certain age. According to international law, child soldiers above the age of fifteen, that are enlisted or joined armed forces cannot be held accountable for their actions.

This leads to a further question, why the ‘straight eighteen’ position could not be adopted both in the Convention and the Additional Protocols. The drafting committees faced serious challenges and interventions from strong political influent countries such as the United States of America. Therefore, Art. 38 CRC was the most difficult to draft and the compromise was to draft and adopt the OPAC.\footnote{Mezmur, p.201.}

Some authors argue that the OPAC failed to establish any measures of implementation or supervision to cover compliance with its provisions.\footnote{Ramcharan, “The Role of International Bodies in the Implementation and Enforcement of Humanitarian Law and Human Rights Law in Non-International Bodies”, in American University Law Review, 1983, p. 99.} Further, the requirement of a higher degree of intensity for its application is lacking, such as the OPAC does not apply for riots or to isolated and
sporadic acts of violence that have not yet reached the level of armed conflict.\textsuperscript{73}

Other experts argue that the OPAC has repeated the shortcomings of the Additional Protocol I to the Geneva Conventions by restating the fifteen-years rule.\textsuperscript{74}

This fact is of importance, since most current conflicts involving child soldiers in Africa are internal and below the OPAC threshold.

The mentioning of international humanitarian law in Art. 38 CRC makes it an unusual treaty,\textsuperscript{75} indicating that, at least in relation to children in armed conflict, the two can no longer be seen as distinct bodies of law.\textsuperscript{76} Like many international conventions and rules being in force for a period of time, they became customary law and have found their way into treaty form, such as the Geneva Conventions of 1949.

Leading back to the initial question, whether the CRC or OPAC included any accountability measurements for children under eighteen year old, the regulations of the CRC have to be examined. Firstly, article 40(3) CRC provides that state parties shall seek to establish a minimum age below which children shall be presumed not to have the capacity to infringe the law. However, no minimum age of criminal responsibility is stipulated.\textsuperscript{77} It is left to the states to set up that age. The reference to criminal responsibility is one way of invoking accountability provisions in the CRC. If criminal responsibility regulation for minors can be found under the CRC or the OPAC, this fact will lead to the conclusion of an existing international

\textsuperscript{73} Mezmur, p. 201.
\textsuperscript{74} Druba, p. 273.
\textsuperscript{76} Mezmur, p. 201.
framework dealing not only with protection regulations but also with accountability regulations of children, specifically child soldiers.

Article 40 CRC was drafted with reference to the relevant provisions of the United Nations Standard Minimum Rules on the Administration of Juvenile Justice.\(^7^8\) Although these rules themselves are not binding, they provide an indication of the shared thinking of states on this issue. Regarding the age of criminal responsibility, the Beijing Rules state:

“In those legal systems recognizing the concept of the age of criminal responsibility for juveniles, the beginning at that age shall not be fixed at too low an age limit, bearing in mind the facts of emotional, mental and intellectual maturity.”\(^7^9\)

The commentary to Rule 4 of the Beijing Rules requires even less than the CRC provisions on age.\(^8^0\) It identifies disparities in national minimum ages of criminal responsibility as the product of cultural and historical differences. Criminal responsibility should therefore only be imposed when there is some element of fault. This means that there has to be sufficient mental and moral awareness on the part of the individual committing the prohibited act of the consequences or potential consequences of a child’s action.\(^8^1\) The Commentary ends by stating that efforts should be made to agree on an international standard minimum age of criminal responsibility, but no such agreement has yet been possible.\(^8^2\)

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78 In the following to be referred to as the “Beijing Rules”, UNGA Resolution 40/33, annex; UN Doc. A/40/53 (1985).
79 Rule 4, Beijing Rules.
81 Ibid.
82 Happold, p. 74.
The Committee has considered that criminal responsibility should rather not be determined by reference to subjective factors, such as the “attainment of puberty, the age of discernment or the personality of the child”.\textsuperscript{83} If this was done, it would lead to discrimination.\textsuperscript{84} The Committee found that only objective standards, such as age, should be the appropriate criteria.\textsuperscript{85} The Committee has expressed various concerns on certain states and that their minimum age of responsibility was too low but has not defined the age on what it should be.\textsuperscript{86}

\textit{Conclusion}

It must be noted that there is no international protection measurement or regulation in terms of conventions and treaties that entitle any form of accountability of children under the age of eighteen. Nevertheless the question arises, why the CRC has made a differentiation between the ages up until fifteen years and beyond fifteen to eighteen when dealing with voluntary enrolment to governmental armed forces. This leads to the next question, namely whether an unspoken accountability of those children over fifteen years old could be assumed. Clearly, the Rome Statute gives clear indications on criminal responsibility, but the Beijing Rules do indicate this and therefore it remains an ongoing discussion.

If a child is over fifteen and is capable to enrol for a position in the armed forces, one could expect him to be at a certain maturity level, making him at least to a certain extent responsible. Nevertheless, the latter discussion has shown the position of authors and routes of the international

\textsuperscript{84} Ibid.
\textsuperscript{85} Ibid.
discussion on this topic, whereas it is still ongoing and has not yet been solved nor led to binding international agreements.

One can therefore conclude that there is no international regulation that sets the criminal responsibility to a certain age, although States are obliged to establish a minimum age. This age shall further not be determined on an individual basis. There are a number of laws and regulations in various states and the international trend seems to be to set the minimum age of criminal responsibility somewhere in the mid-teens.87

This trend was followed and the approach was taken by the UN Secretary General when drafting the statute of the Special Court for Sierra Leone. Although the statute for the SCSL is only binding for that special tribunal, it can be seen as a milestone in terms of accountability measurements for adolescents. Whereas the statutes for the ICC, the International Criminal Tribunal for Yugoslavia88 and the International Criminal Tribunal for Rwanda89 strictly upheld the “over eighteen” rule, this approach of the United Nations not only shows the trend but also introduced new flexibility when drafting special statutes for certain regions. Moreover, in both statutes mentioned above, child soldiers did not play a major role, but the raising of awareness through involved organizations has led to an adapted thinking process within the international community. Nevertheless, Article 40 of the SCSL approves for accountability of children but emphasises the purpose of juvenile justice to be rehabilitation.

Other examples for international conventions and legal regulations that could entitle not only protection, but also accountability regulations for children the age of eighteen do not exist.

87 Happold, p. 82.
88 Hereinafter to be referred to as ICTY.
89 Hereinafter to be referred to as ICTR.
CHAPTER 3: REGIONAL AND NATIONAL PROTECTION, PROHIBITION AND ACCOUNTABILITY REGULATIONS

The OPAC stands in opposition to the African Charter on the Rights and the Welfare of the Child\textsuperscript{90}, stating, that it does not only apply to children caught up in international and internal armed conflict, but also to lower the levels of violence described as “tension and strife”.\textsuperscript{91} Questionable therefore are the regional and national protection and prosecution regulations in Sub-Saharan Africa.

3.1 African Charter on the Rights and Welfare of the Child

The ACRWC is the only binding treaty in the world dealing with children’s rights in respect of international humanitarian law.\textsuperscript{92} The Charter was adopted by the African Union\textsuperscript{93} and came into force in 1999. It raises the minimum age for child soldiering and prohibits the recruitment and direct participation of children under the age of eighteen in armed conflicts.\textsuperscript{94} It also provides greater protection to persons below the age of eighteen than the CRC does.\textsuperscript{95} Unlike the CRC, the ACRWC adopted a “straight 18” position, compliant with the overall child definition.\textsuperscript{96} It sends a clear message that the participation of children in conflict is unacceptable and will not be tolerated on the African continent.\textsuperscript{97}

\textsuperscript{90} Hereinafter to be referred to as ACRWC.
\textsuperscript{91} Article 22 (3) ACRWC.
\textsuperscript{92} Bell & Abrahams, p. 177.
\textsuperscript{93} Hereinafter to be referred to as AU.
\textsuperscript{94} Druba, p. 273.
\textsuperscript{95} \textit{Ibid}.
\textsuperscript{96} Article 2 ACRWC.
One could state that this Charter is not only of regional but also of universal importance, recognizing that child soldiers have become a customary international law issue.\footnote{Bell & Abrahams, p. 177.}

Article 22 of the ACRWC is devoted to the situation of children in armed conflicts:

\textit{Article 22: Armed Conflicts}

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.

\textbf{3.2 Differences between the ACRWC and the OPAC}

The ACRWC diverges from the Optional Protocol to the CRC in various points.

Notwithstanding the protection of children under the age of eighteen, the “straight eighteen” position offers advantages in comparison to the CRC.
From a practical point of view, children born in African states, especially in the rural areas, do not possess birth certificates. When being enlisted or drafted into armed group, despite being governmental or non-governmental, it is easy for superiors to pass children off as being older than they really are. With an age limit fixed at eighteen years, the recruitment of very young children could certainly be avoided, as their reduced physical appearance would speak for itself.\textsuperscript{99}

Art. 1 of the OPAC is a result of a compromise, only stipulating “...all feasible measures to ensure that member of the armed forces...do not take part...”. Under the ACRWC, the obligation that a state undertakes is “to take all necessary measures to ensure...” that no child takes direct part in hostilities and to refrain in particular, from recruiting any child\textsuperscript{100}. Thus children, who have non-combatant status but who are in the meantime at risk of losing their lives, survival and development, would not be able to benefit from the protection that is called for.\textsuperscript{101} This accords a better standard for the protection of children and is commendable.\textsuperscript{102}

Regarding the voluntary recruitment into state’s armed forces at a younger age, the Optional Protocol allows for certain exceptions.\textsuperscript{103}

Four safeguards are mandated and require that

- The recruitment is voluntary;
- The recruitment is carried out with the informed consent of the potential recruit’s parents or legal guardians;
- The potential recruit is fully informed of the duties involved in such military service, and

\textsuperscript{99} Mezmur, D., p. 204.
\textsuperscript{100} Article 22(2) ACRWC.
\textsuperscript{101} Van Bueren, p. 335.
\textsuperscript{102} Mezmur, D. p. 205.
\textsuperscript{103} See Article 3 (1) read together with Article 3 (2) OPAC.
The recruit provides reliable proof of age prior acceptance.104

However, the practice of applying the latter provisions in an African context becomes problematic.

In Sub Saharan Africa many child soldiers come from poor families, are often orphans without any social and legal guardians or are internally displaced persons.105

The reliable proof of age leads to further problems and according to a recent UNICEF report, only 45% of the children are registered by their fifth birthday.106

Article 22(2) ACRWC (opposing voluntary enlistment) can be seen as an appropriate humanitarian gesture, although it might collide with the fundamental right of freedom of expression.107

Thus, this argument is not convincing; the argument in favour of protection for the children overpowers the on right of freedom to expression.108

Concerning the voluntary recruitment of children under the age of 18 into armed groups, both the OPAC and the ACRWC take the same position, by prohibiting any enlistment or recruitment of minors. Problematic is, that armed groups will not legally oblige to these documents and from the point of view of the latter, the objectivity of the legal protection measurements, regional as well as international, can be questioned and the application of it undermined by the leaders of the armed groups.

104 See Article 3 (3) OPAC.
105 Mezmur, D. p. 205.
107 Ibid.
3.3 Enforcement of the ACRWC and the OPAC

Concerning the OPAC, the procedure of reporting has problems. As mentioned earlier, several UN-Resolutions have been passed to enhance this matter. UNSC Resolution 1612 called for a series of measures to be taken, including the establishment of a monitoring and reporting systems of violations, a UNSC working group is overseeing this process. UN- led task forces are established in phases, to monitor the conduct of all parties and transmit regular reports to New York.

Some success has already been reported.\textsuperscript{109} Nevertheless, there are some indications that protection mechanisms for child soldiers should better be enforced at a regional level. The African Committee of Experts on the Rights and Welfare of the Child\textsuperscript{110} was established under the ACRWC and can prove itself to address the issues of child soldiers in Africa. The African Court Protocol under Article 5 (1)(e) provides that the Committee has \textit{locus standi} and can bring a case to courts. This is advantageous as the decisions of the latter Committee are binding and final.\textsuperscript{111}

In the absence of robust UN action, stronger efforts by regional organizations like the AU and individual governments are critical.\textsuperscript{112} This also includes developing resolutions that have tangible repercussions for those who continue violating the rights of the child.\textsuperscript{113} The Peace and Security Council of the AU already offers a suitable platform for addressing the problem of child soldiers.

\textsuperscript{109} In the DRC, the Congolese Government has made progress in addressing grave violations against children.

\textsuperscript{110} Hereinafter to be referred to as ACERWC.

\textsuperscript{111} See Article 28(2) of the African Court Protocol.


\textsuperscript{113} \textit{Ibid.}
3.4 National Legislations

The following paragraphs analyze domestic protection, prohibition and accountability measurements for children and especially child soldiers in Rwanda, Uganda and the DRC.

3.4.1 Rwanda

Rwanda’s ratification of the Convention on the Rights of the Child on 19 September 1990 was the first measure which the country adopted to incorporate the provisions of the Convention into national legislation. This was in addition to the fact that the principles set out in international law to which Rwanda subscribes take precedence over Rwandan law. Another important point is that no reservations were attached to Rwanda’s adoption and ratification of the Convention.\(^{114}\)

\textit{a) Legislation in Rwanda concerning children’s rights}

Various measures have recently been taken\(^ {115}\) to implement international ratified conventions and treaties into domestic law, including:

(a) The National Programme for Children;
(b) The law containing the Labour Code, currently being promulgated;
(c) Consultations currently taking place for the establishment of a Children’s Code;
(d) Consultations currently taking place for the creation of a vice squad and a police force for juveniles.\(^ {116}\)

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\(^{114}\) See 2\textsuperscript{nd} Periodic Report of Rwanda to the CRC, CRC/C/70 Add2, 8.10.2003.

\(^{115}\) \textit{Ibid.}

Although having signed the CRC the Rwandan Civil Code states that, a minor is a person of either sex who has not yet attained the age of twenty-one.\textsuperscript{117} A child is a person under the age of eighteen years.\textsuperscript{118}

\textit{b) Voluntary enlistment in the armed forces}

Voluntary enlistment in the armed forces is subject by law to a minimum age of 16. The law that was passed on the rights of the child and protection of children against violence states that military service is prohibited for children under eighteen.\textsuperscript{119}

\textit{c) Criminal liability and accountability}

The Rwandan Penal Code establishes criminal responsibility at the age of fourteen. However, in the best interests of the child, lesser penalties are laid down for offenders under 18. In this connection, article 77 of the Penal Code states:

\begin{quote}
" When the perpetrator or accomplice of a crime or an offence was over fourteen and less than eighteen years of age at the time of the offence, the penalties shall be as follows if he is liable to a criminal sentence:
- If liable to the death sentence or life imprisonment, he shall be sentenced to between fifteen and twenty years’ imprisonment;"
\end{quote}

\textsuperscript{117} Rwanda Civil Code, book 1, art. 360.\textsuperscript{118} \textit{Ibid.}\textsuperscript{119} Article 19 of the Rwandan Penal Code, see also 2\textsuperscript{nd} Periodic Report of Rwanda to the CRC, CRC/C/70Add2, 8.10.2003, 89.
- If liable to imprisonment or a fine, the sentences handed down may not be more than half those which he would have been given if he had been eighteen years of age.”

In essence, article 77, of the Penal Code states that a minor under the age of 14 cannot be imprisoned, since he is not criminally liable.

d) Children affected by armed conflicts

Some children under the age of eighteen were enrolled in the armed forces during the war and genocide of 1994. Immediately after the war, all these children were demobilized and a programme of rehabilitation and school reintegration was implemented with the support of international sponsors, as suggested by the spirit of Convention No. 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, which has been ratified by the Rwandan Government.120

Other children serving with the armed bands of infiltrators from the Democratic Republic of the Congo were often captured by the Rwandan army and sent to solidarity camps for re-education and reintegration into society.

Although Rwanda has implemented various legal mechanisms on the protection of under eighteen year olds, the domestic law concerning accountability of children is problematic.121

In its recommendations to the Rwandan government the Committee remains concerned that the law on the Rights of the Child and Protection of Children against Abuse122 does not apply for the “Local Defence

120 Ratified by the Rwandan Government on 07 June 2000.

121 Concluding remarks of the CRC to Rwanda, CRC/C/15/Add.234, 2004.

122 No. 27/2001.
Forces\textsuperscript{123}. The Committee was further concerned at numerous reports of recruitment of children below the age of fifteen years by armed groups operating in the state party or in the Democratic Republic of the Congo as well as that not all former child soldiers, notably girls, were provided with the means of psychological recovery and social rehabilitation.\textsuperscript{124} There are no reports of child soldier recruitment or use by the Rwandan armed forces.\textsuperscript{125} Nevertheless, the LDF, a governmental-organized militia, still recruits fourteen year old children to patrol home areas.\textsuperscript{126} The LDF has been involved in training with the national defence forces, leading to assumptions that children are still “unofficially” recruited in Rwanda.\textsuperscript{127}

Rwanda is still dealing with the after effects of the Genocide of 1994. Before 2003, 4500 children were detained for involvement in the Genocide.\textsuperscript{128} Through presidential order, “genocide minors” were released in 2003 who had spent the maximum possible sentence in pre-trial detention.\textsuperscript{129} Although the last minors were released in 2007, there are no definite numbers of children under the age of eighteen being detained. Article 74 of the law on crimes against humanity and genocide states that children under the age of fourteen at the time of the crime cannot be held accountable, children between the age of fourteen and eighteen shall receive reduced penalties.

Since Rwanda is a signatory to the CRC and the ACRWC, Rwandan law is not in compliance with these international provisions, since the Rwandan law

\textsuperscript{123} Hereinafter to be referred to as LDF.
\textsuperscript{124} Concluding remarks of the CRC to Rwanda, CRC/C/15/Add.234, 2004.
\textsuperscript{126} Human Rights Watch, Annual Report 2001, 8.
\textsuperscript{127} Ibid.
\textsuperscript{129} Supra, fn 125.
dictates that children above the age of fourteen can be detained and serve severe imprisonments.\textsuperscript{130}

Rwandan armed groups are still involved in cross border activities in the DRC and Uganda. When being involved these conflicts, child soldiers can be held accountable for their committed crimes from the age of fourteen on and be imprisoned according to domestic law. 

Due to the irritating and undefined activities between the various armed groups, prove of a cross border or international conflict is difficult, that could enable international jurisdiction measurements.

Although having ratified the CRC and the OPAC, it is submitted that the Rwandan government is breaching the Convention by recruiting under fifteen year old children in to the LDF.

3.4.2. Democratic Republic of Congo\textsuperscript{131}

\textit{a) Legislation in the DRC concerning children’s rights}

Although the DRC underwent a period of armed conflict and political tension from 1993 to 2000, successive governments nevertheless committed themselves to implementing the Convention on the Rights of the Child. The measures taken essentially involve the establishment, organization and reorganization of bodies whose work contributes to the implementation of the Convention.

The Congo ratified the Convention in 1993, thereby committing itself to the implementation of all its provisions, one of which is the regular submission of progress reports on its implementation.\textsuperscript{132} Thus the DRC has neither signed nor ratified the ACRWC.

\textsuperscript{130} Between the age of 14 and 18 the maximum imprisonment term is half those of adults.

\textsuperscript{131} Hereinafter to be referred to as DRC.

\textsuperscript{132} Initial report DRC to the CRC, CRC/C/COG/1, 10/2/2006.
Child protection in the Congo is assured through the protection of human rights, which include children’s rights, and by means of the treaties that the country has signed. Furthermore, child protection is stated in the country’s basic laws.\footnote{133 such as the various Congolese Constitutions from 1961, 1963, 1969, 1973, 1979, 1990, 1992 and 2002; the laws establishing the Nationality Code, the Labour Code, the Code of Criminal Procedure, the Social Security Code, the Family Code, the Civil Service Statute and the Criminal Code, and the National Charter of Rights and Freedoms; see also Initial report DRC to the CRC, CRC/C/COG/1, 10/2/2006, Para 4.}

Under DRC domestic law, a child is defined as a human being that exists from the moment of conception until the age of majority or adolescence. Thus, “anyone of either sex who has not reached the age of 18 is a minor”.\footnote{134 Article 318 of the Family Code.}

Children were first mentioned in the Congolese Constitution in 1963, when their right to instruction and education was established as an obligation on the family and the State.\footnote{135 Part II, Art. 12 of the Congolese Constitution of 1963.}

\textit{b) Children affected by armed conflicts}

The phenomenon of children affected by armed conflicts in the DRC is fairly recent. Specific legislative measures have not yet been taken in this regard. However, on 1 April 2005, parliament adopted a bill authorizing accession to the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict.

Political unrest in the DRC since 1992 has given rise to the phenomenon of private militias in the service of various leaders, the great majority of whose members are recruited among young people. Hence children of 15
years old were enrolled in private militias and involved in combat between 1993 and 2000. According to UNICEF estimates, nearly 5,000 children have been directly involved in armed conflicts.\textsuperscript{136} The Government has taken measures to redress the situation. These include disbandment of all private militias, disarmament of their members and the reorganization of the Congolese armed forces.\textsuperscript{137}

The Committee is concerned that armed conflict has and continues to negatively impact the effective implementation of the rights of the child enshrined in the Convention.\textsuperscript{138}

The government of the DRC, through its armed forces, bears direct responsibility for violations and the State has failed to protect children and prevent violations of children’s rights by non-state groups.\textsuperscript{139}

c) Juvenile Detention and Accountability

Judicial measures against minors are administered by courts. These measures include:

- a social welfare inquiry to assist the juvenile judge, the juvenile court or the juvenile criminal court in coming to a decision that takes account of the personality, background and age of the minor;\textsuperscript{140}
- issue of warnings;
- release to parent or guardian;
- probation, involving re-education of the minor in his or her family environment;

\textsuperscript{136} Supra, fn. 132, Para. 418; The CNR (Conseil national de résistance, Resistance Rebel Group) still had child soldiers in 2007 enlisted for the duty of patrols.

\textsuperscript{137} Initial report DRC to the CRC, CRC/C/COG/1, 10/2/2006, 420.

\textsuperscript{138} Concluding Observations Congo Report CRC, CRC/C/COD/CO/2, 01/2009.

\textsuperscript{139} Ibid, 67.

\textsuperscript{140} Ibid, 426.
• educational placement which includes an observation or re-education centre, a centre for listening to and stabilizing minors, refugee centres, a detention centre with a special block for minors).\textsuperscript{141}

Thus, a minor under thirteen years of age can be found guilty for criminal offences. He or she can only be given a formal warning, and released to his or her parents, or placed on probation or in a suitable educational or professional training establishment, or any public or private institution providing care for children, or in an appropriate boarding school for offenders of school age.\textsuperscript{142}

A minor under the age of thirteen can only be held in a remand institution by reasoned order of the juvenile judge and for the purpose of preventing the commission of a crime. In such cases, the minor is held in a special block, or special premises.\textsuperscript{143} A minor the age of thirteen can be sentenced to a correctional penalty, which will be half of that which would have been handed down had the offence been committed by a major. He or she can also be subjected to a combination of one or another of these solutions together with probation until reaching the age of majority.\textsuperscript{144}

The juvenile court cannot set aside the mitigating circumstance of minority for crimes committed by minors under the age of sixteen years, since it is imposed by law.\textsuperscript{145} If an adult were to receive the death penalty or a life sentence of hard labour, the minor would be sentenced to ten, but not more than twenty years.

\textsuperscript{141} Ibid.
\textsuperscript{142} Ibid, 428.
\textsuperscript{143} Ibid.
\textsuperscript{144} Ibid, 430.
\textsuperscript{145} DRC Code of Criminal Procedure, Art. 707.
A minor aged between sixteen and eighteen years who has been convicted of a crime can benefit from the protection measures applicable to all minors. He or she can also be given the same sentence as a person of full age committing the offence and in that cause the mitigating circumstance of minority is not taken into account.

An analysis of the implementation of the Convention on the Rights of the Child shows that the majority of the legal texts on children in the Congo reflect the concerns of that Convention. However, certain provisions of the Convention, including article 10 on family reunification, article 34 on the protection of children against sexual exploitation and sexual abuse, and article 38 on the involvement of children in armed conflicts, are not in line with the internal legal order.146

The legislation provides that minors perpetrating serious offences shall not escape punishment. In view of their age, they are spared ordinary judicial procedures. Owing to a lack of specialized institutions, the minors are sometimes detained directly in detention centres that do not have sufficient special cells or a block for minors. In some circumstances they are detained with adults who are the perpetrators of extremely serious offences, despite the Code of Criminal Procedure providing that an offender under the age of twenty-one years must be held in a separate cell.147

It is problematic that the current justice system for juveniles in the DRC is experiencing a number of difficulties in terms of functioning, including a lack of adequate facilities to house children in conflict with the law, the absence of systematic judicial assistance and the slow pace at which cases of juvenile offenders are treated.

147 Ibid, 487.
Although the Child Protection Code of the DRC sets the minimum age for criminal responsibility at fourteen, the Code has not been implemented yet.\textsuperscript{148} Children below fourteen years are being charged and children between sixteen and eighteen often do not benefit from special measures for juveniles provided in the legislation, despite that the age of full criminal responsibility was reduced from eighteen to sixteen years in application of the Ordinance of 4 July 1978.\textsuperscript{149} Children are often held in pre-trial detention for long periods of time, without trial, and are often detained with adults.

3.4.3 Uganda

\textit{a) Implementation of Children’s Rights}

The age of majority in Uganda is eighteen years. The Children Statute 1996 dispelled any ambiguity and all other statutes accordingly recognize the child as any person below the age of eighteen years.\textsuperscript{150}

In compliance with the Convention on the Rights of the Child, the Children’s Act 2000 provided for the care, protection and maintenance of children. The juvenile justice system in Uganda is “child friendly” if effectively implemented. Consideration is given to the child’s dignity and human rights, especially in the family and children’s court.\textsuperscript{151}

\footnotesize{\textsuperscript{148} As at June 2010. \\
\textsuperscript{149} Ibid, 90. \\
\textsuperscript{150} CRC Second Periodic Report Uganda, CRC/C/65/Add. 3, Nov.2004, 83. \\
\textsuperscript{151} See Children Act 2000, especially s 89 (I), which states: “where a child is arrested, the police shall, under justifiable circumstances caution and release the child” and s 91 (8) which states: “no child shall be detained with an adult person” .}
b) *Criminal Responsibility and Accountability*

The criminal responsibility of a child is set at twelve years of age. The Uganda Prisons Service has taken action to implement the provision of the Children’s Statute that requires children to be kept separately from adults. According to a report from the prisons headquarters, all persons admitted on remand found to be below 18 years are sent back to court to decide where the offender should be kept. Thus, there are still some cases of unnecessary detention, as well as juvenile offenders being remanded with adults, especially in the rural areas.

The problem Uganda faces with regard to criminal responsibility of the child is linked to the insufficient monitoring and reporting system. Children are mainly charged with minor offences. Juvenile offenders are handled in a number of different ways. These include being released on bond, sent to administrative prisons, set free and monitored in the community by probation staff, tried in courts of law if charged with adults, committed to remand homes, released and handed over to parents or sent to the National Rehabilitation Centre.

Uganda has signed and ratified all international conventions, but the implementation of the international standards reveals severe problems. While recognizing the efforts made in this domain, including through the adoption of legislation, the Committee remains concerned at the limited progress achieved in establishing a functioning juvenile justice system.

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152 “*Child Soldiers Global Report 2008-Uganda*”, Coalition to Stop the Use of Child Soldiers, p. 3.
throughout the country. In particular, the Committee is concerned with the lack of magistrates, remand homes for children in conflict with the law and the conditions in such institutions.\footnote{Recommendation CRC to the 2nd Periodic CRC Report Uganda, CRC/C/UGA/CO/2, Nov. 2005.}

There are two key issues Uganda faces in implementing the provisions in The Children Act, specifically Section 16.

Firstly, Uganda does not have the institutions or financial resources to fully implement the provisions in the Children's Act and secondly, customary law is a powerful force in Uganda and at times it conflicts with certain provisions of the CRC. The extended family acts as a support network and the emphasis on village resolution through the Local Councils\footnote{Under the Children Act, Local Councils (LCs) are responsible for child protection. (§ 10 of the Act) If these local government councils cannot resolve a child protection case, it is brought before the family and children court.} are two common elements of customary law in Uganda. Both of these factors could prohibit particularly complex or difficult cases being referred to the family and children court, instead of being resolved by the LC's.

c) Children affected by armed conflict

Children continue to be victims of armed conflict in the country. Many people have been forced to leave their home villages and stay somewhere else as displaced persons, as a result of armed conflict. Statistics on the number of refugees and internally displaced persons are not readily available, because of the difficulties involved in registering them.
The Committee noted with appreciation that the new Uganda People’s Defence Forces Act of 2005\textsuperscript{159} sets eighteen years as the minimum age for recruitment of persons into the Ugandan Peoples Defence Force and that regulations for recruitment are very strict, with the goal of preventing the enlistment of children. Concern can be raised about the possible gaps within the recruitment process due to, \textit{inter alia}, a lack of birth registration. The Committee is also very concerned at reports that children are being recruited by the Local Defence Units and that the rigorous procedure established for the Ugandan Peoples Defence Force may not be applied strictly.\textsuperscript{160}

With regard to the recruitment of non-governmental forces, the government in 2008 declared that the Lord’s Resistance Army\textsuperscript{161} has lost its operational base in the country. It remains problematic that continued abductions and forced recruitment of children living in border regions by the LRA to be used as child soldiers, sex slaves, spies and to carry goods and weapons are ongoing.

The Amnesty Act of 2000\textsuperscript{162} has contributed to the return, demobilization and reintegration of thousands of children forcefully recruited by the LRA. However, the criteria for granting amnesties are not in compliance with the international legal obligations such as the Rome Statute of the International Criminal Court.

\subsection*{3.5 Comparison of Domestic Laws of Uganda, Rwanda and the DRC}

\footnotesize{\textsuperscript{159} Section 52(2).}

\footnotesize{\textsuperscript{160} Concluding Observations of CRC to Uganda initial OPAC Report, CRC/C/OPAC/UGA/CO/1, October 2008,16.}

\footnotesize{\textsuperscript{161} Hereinafter to be referred to as the LRA.}

\footnotesize{\textsuperscript{162} The Government and the LRA ( Lord Resistance Army) signed an Agreement on Accountability and Reconciliation on 29 June 2007.
All three states have ratified the various international legal protection treaties,\(^{163}\) but there are differences with regard to the implementation of these treaties. All state parties are bound by the rules of international humanitarian law, especially article 3 common to the Geneva Conventions and AP II which legally binds all parties in non-international armed conflicts. This section analyses the differences between the domestic laws.

The CRC provisions stipulate that fifteen is regarded as the earliest age for recruitment or direct participation in conflicts.\(^{164}\) Problematic is, that the protection for children is granted, who are not yet combatants, but not for those already being enrolled.\(^{165}\) The OPAC prohibits children under the age of fifteen to participate in non-international armed conflicts, whereas the CRC prohibits direct participation in international armed conflicts.

In an international armed conflict child soldiers that are captured by the enemy should be afforded the rights and status of prisoners of war.\(^{166}\) In a non-international armed conflict, a detained child soldier will benefit from Common Article 3 to the Geneva Conventions and AP II.\(^{167}\)

3.5.1 National legal systems concerning Prosecution of Child Soldiers

Uganda, Rwanda, and DRC have similar problems of ongoing armed conflicts, whereas the area where the hostilities take place are difficult to regard as an international armed conflict as opposed to an internal armed conflict. In Uganda and DRC, the lack of an independent and reliable

\(^{163}\) Including GCs and APs.
\(^{164}\) Art. 38(3) CRC.
\(^{165}\) Bell & Abrahams, p.171.
\(^{166}\) See Third Geneva Convention and AP I and AP II.
\(^{167}\) Bell & Abrahams, p. 179.
monitoring apparatus leads to controversial information on whether the armed groups operate only on domestic grounds. Most international or non-governmental organisations report from cross-border hostilities.

The domestic laws of all three countries do not comply in their procedure of dealing with under eighteen year old minors, whether it is an international or a non-international armed conflict.

3.5.2 Individual Criminal Responsibility and Accountability

With regard to the minimum age for accountability of under eighteen year olds, all three countries have different approaches. In Rwanda, under fourteen year old children are not held criminally liable, thus from the age of fourteen onwards, sentences up to twenty years of imprisonment can be spoken out. Although Rwanda implemented the Child Act, the act does not apply for child soldiers enrolled in non-governmental armed groups such as the Local Defence Forces. The juvenile soldiers are subject only to the military code, which entails the death penalty.

In the DRC, reports show that despite of the children’s protection mechanisms, child soldiers have been subjected to the death penalty.168

Uganda is making the greatest progress in terms of protection measures for child offenders. Uganda’s law reform can be seen as a pioneering law reform initiative. The Children’s Statute of Uganda169 covers both child social welfare and juvenile justice, the upper limit of the juvenile justice system is 18 years, as

168 Weltreport Kindersoldaten, p.9.
169 Children’s Statute of Uganda, Act No 8 of 1996.
provided for in the CRC and ACRWC. Problematic is only the minimum age of criminal responsibility.\textsuperscript{170}

Here, Uganda falls short in complying to this provision. Uganda’s programmes follow the principle of diversion. Diversion refers to programmes and practices which are employed for young people who have initial contact with the police, but are diverted from the traditional juvenile justice processes before children’s court adjudication.\textsuperscript{171} This is the system enhanced by the CRC.\textsuperscript{172} The aim of the Ugandan approach is to channel child offenders away from the formal criminal justice system. Children are taken to village courts or community panels, allowing them to stay in their communities. The aim of this system is to provide for alternative sentences.\textsuperscript{173}

Notwithstanding the achievements made in Uganda, efforts still have to be made in training programmes for professionals such as court judges, probation officers and the police. Despite the training, funding is a major issue, budgeting all at levels has to be increased to ensure the maintenance of the minimum standards.

Conclusion

The responsibility on maintaining and increasing the efforts to uphold the minimum standards does not only apply to governments, but also to the governmental armed forces, militias and armed groups supported by them.

\textsuperscript{170} Odongo, p. 149.
\textsuperscript{171} Ibid. p. 152.
\textsuperscript{172} If the juvenile justice system includes safeguards guaranteed in Article 40 (2) (vii) of the CRC.
\textsuperscript{173} Ibid. p. 155.
When captured, child soldiers that are affiliated to non-governmental armed groups are being treated as enemies, not as child offenders.\textsuperscript{174} This is a breach of the principle to treat child soldiers as prisoners of war. In the DRC international protection measures for children under 18 are ignored by all parties.\textsuperscript{175} When captured, child soldiers in the DRC are often accused of high treason and sentences to death.\textsuperscript{176}

The underlying concern is with armed groups. In Uganda, the LRA is ignoring international requests to release child soldiers, although peace talks are being held with the government.\textsuperscript{177}

\textsuperscript{174} Weltreport Kindersoldaten, p. 10.  
\textsuperscript{175} Ibid.  
\textsuperscript{176} Ibid.  
\textsuperscript{177} Ibid. p. 16.
CHAPTER 4: ACCOUNTABILITY OF CHILD SOLDIERS

4.1 Accountability from an international law perspective

Notwithstanding the fact that criminal responsibility is one of many aspects of accountability, one must also keep in mind the accountability from a moral and ethical perspective. An analysis of all aspects and angles of accountability is not the purpose of the next paragraphs. Rather, the focus is on the judicial perspective of accountability.

For a defendant of any age to be criminally responsible and accountable, the first prerequisite is proof which, in many common law systems, is beyond reasonable doubt) that she or he committed the crime with what she or he is charged.\textsuperscript{178} This will usually require evidence that the perpetrator carried out the relevant criminal act together with the mental attitude or fault element.\textsuperscript{179} Another element is that the defendant must have “criminal capacity”. In other words he or she must have an understanding of the criminal act in context and of its immediate and wider consequences.\textsuperscript{180}

A fundamental principle of international law is that no one may be held accountable for actions he or she has not committed, or in the commission of which he or she has in some way not participated, or for an omission that cannot be attributed to him or her.\textsuperscript{181}

\textsuperscript{179} Ibid.
\textsuperscript{180} Ibid.
\textsuperscript{181} Prosecutor v Tadic, Case Number IT -94-1-A, 15 July 1999, para 186.
Child soldiers have traditionally featured in international law as victims rather than as criminals. The recruiting and enlistment of children below fifteen is a war crime, and the OPAC gives special protection to children under eighteen in armed conflicts. International law does not prohibit the prosecution of child soldiers, although the Optional Protocol places limits on the sentences that can be imposed on them:

“No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age.”182

Under customary international law individuals are only liable for participating in the commission of international crimes in a variety of ways, including ordering or inciting a third party to commit a crime under international law, joint commission, and abetting a third party in the commission of an international crime.183

Despite the legal framework article above, child soldiers involved in armed conflicts have committed some of the worst atrocities. Although most of them have been abducted or being forced to commit these crimes under the influence of drugs, questions arise whether they have to be held accountable.

International law has not directly addressed the question of accountability. The OPAC does not have any specific provisions concerning the prosecution of child soldiers nor the age of criminal responsibility. Only the ICC Statute exempts under eighteen year old children from prosecution. The UN Security Council agreed that child soldiers under the age of eighteen years

182 Article 37 (a)
could be prosecuted, thus it set legal standards that make these trials almost impossible.\textsuperscript{184}

The SCSL statute only recommended a “Truth and Reconciliation Commission” to deal with child soldiers.\textsuperscript{185}

The prosecutor is left with the decision whether or not to prosecute minors, but in the event of prosecution, the children would not be subject to imprisonment but rather rehabilitation programmes.\textsuperscript{186}

The CRC provides for prosecution of children but that all matters concerning children, their best interest must be a priority.\textsuperscript{187}

When dealing with accountability, a distinction has to be made between children that voluntarily joined and those that committed crimes under pressure, fear and the influence of drugs.

For child soldiers that committed crimes under the influence of drugs, alcohol or under duress, there may be a defence of duress or it might be taken into account in the mitigation of punishment.\textsuperscript{188}

Child soldiers that voluntarily joined up and committed the atrocities without any kind of force or threat ought to be held accountable for their actions.\textsuperscript{189}

Nevertheless, prosecution depends on a number of factors, including wrongfulness of their actions and whether they acted in accordance of that appreciation.\textsuperscript{190}

\textsuperscript{185} See SCSL Statute Art. 7(1,2)
\textsuperscript{186} \textit{Ibid}.
\textsuperscript{187} See Art. 37 (b) CRC.
\textsuperscript{189} \textit{Ibid}.
\textsuperscript{190} \textit{Ibid}.
There are domestic cases where child soldiers that were aware of their actions have been prosecuted. As Lumina points out, these perpetrators must be held accountable for their actions, but the criminal proceedings should be in compliance with international regulations. Following his arguments, only those recruiting child soldiers should be held individually responsible for the atrocities committed by the children under their control and directions.¹⁹¹

According to Amnesty International¹⁹², in deciding to prosecute a child soldier, assessments have to be made on an individual basis as to its awareness, by taking in account the child’s vulnerability and limited understanding.

Davidson¹⁹³ argues that child soldiers are solely victims and consequently only those who forcibly recruit children must face prosecution.

Amnesty International disagrees with this opinion. They argue that the culture of impunity towards perpetrators has to end as well as on the right to a remedy for victims.¹⁹⁴

The latter argument is enforced by Reis,¹⁹⁵ who believes that child soldiers should be held accountable for their participation in atrocities. The question of accountability is of great importance when trying to aid the children back into society and respite from grief for the victims.¹⁹⁶

¹⁹¹ Lumina, p. 100.
¹⁹⁶ Ibid.
Hence, Mezmur\textsuperscript{197} emphasises that if prosecution is considered an option for child soldiers, it must be of great importance to international and domestic courts to uphold minimum standards.

The legal position of the treatment of children that have committed war crimes is clear. The CRC states that children in conflict with the law must be treated appropriately according to their age. Protection is afforded to children that were engaged in hostilities while being under the age of eighteen in terms of the prohibition of the death penalty for war crimes committed by him or her.\textsuperscript{198} But as mentioned above, the international measurements are not always followed. There is report that a fourteen year old child soldier has been executed in the DRC.\textsuperscript{199}

It can further be argued that were there is no fixed age of criminal responsibility at all or the age is fixed too low, the notion of responsibility for child soldiers would become meaningless.\textsuperscript{200}

During any trial, child soldiers must be treated with dignity and a sense of worth, taking into account the age and desirability of promoting rehabilitation.\textsuperscript{201} From a social point of view, it must be stated that detention and custodial sentences do not serve the children’s best interest and therefore harm society.\textsuperscript{202}

Nevertheless accountability mechanisms can take various forms that mostly lead to rehabilitation.

\begin{flushright}
\textsuperscript{197} Mezmur, p. 212. \\
\textsuperscript{198} CRC OPAC Art. 77(5). \\
\textsuperscript{199} McConnan & Uppard, p. 195. \\
\textsuperscript{200} Mezmur, p.212. \\
\textsuperscript{201} SCSL Statute, Art. 7. \\
\textsuperscript{202} Lumina,p 99. \\
\end{flushright}
4.2 Accountability from a domestic law perspective

It is generally accepted that perpetrators of war crimes, crimes against humanity and genocide are subject to universal jurisdiction. This means that any state into what hands the perpetrators fall may prosecute and punish them.

Problematic is, when children are involved as perpetrators. In cases like this, it would appear proper for a state to trial those perpetrators under their own domestic law and regarding their own minimum age of criminal responsibility. This means that although the Rome Statute has a minimum age of eighteen years for prosecution, when crimes against humanity are committed, notwithstanding a declaration of a non-international or international armed conflict, child soldiers actively involved in crimes against humanity will be prosecuted under domestic law. This can lead to arbitrariness and unfairness. The problem is that child soldiers in this case might be prosecuted for an international crime, only depending on the minimum age for criminal responsibility in that particular state.

The alternative is that a child soldier might be under the age of criminal responsibility of the state where he committed the crimes in, but by fleeing

204 Happold, p. 83.
205 In the DRC children can be prosecuted and detained from the age of thirteen, in Rwanda from the age of fourteen and Uganda from the age of twelve on. One child soldier out of an armed group on the border of Uganda might be picked up by Ugandan forces and prosecuted, whereas his comrades, being arrested by DRC national forces might not be prosecuted at all, although all comrades committed the same crimes together.
to another country with a lower minimum age might open himself to criminal prosecution.\textsuperscript{206}

States have not shown themselves eager to prosecute child soldiers falling into their hands. One could argue therefore, that the latter approach and the description of scenarios are purely theoretical.

Recently the development has shown that some states become more open to prosecute foreign offenders of international crimes, even though not being their own citizens.\textsuperscript{207}

Article 1 F (a) of the 1951 Convention Relating to the Status of Refugees\textsuperscript{208} indicates, that states are obliged to refuse any refugee status to persons accused of having committed core crimes. Former child soldiers have been excluded from refugee status by the application of Article 1 F.\textsuperscript{209}

Conclusion

An agreement has to be sought on a minimum age of criminal accountability in an international binding agreement.

Arguments will still have to be sorted out, on the one hand children are said to have the capacity to do good things, such as participating meaningfully in drafting a child-friendly version of the report of the Truth

\textsuperscript{206} Ibid.
\textsuperscript{207} Ibid.
and Reconciliation Commission for Sierra Leone,\textsuperscript{210} on the other hand it is argued that these children are too immature to be held responsible for the bad things they did during the civil war in Sierra Leone.\textsuperscript{211}

From a domestic perspective it becomes clear that states have their specific criminal responsibility age and although signatories to the CRC, still oblige their national law.

The discussion leaves various problems unsolved and unanswered. One can only come to the assumption that there is no universal or international agreement that binds its members on accountability of children and especially child soldiers. This does not only affect settings of minimum ages, but procedures and measurements on how to determine the various regional and domestic approaches to deal with accountability. Moreover, the governments that have to deal with the matter of child soldier accountability are often involved in either international or non-international conflicts themselves and cannot be regarded as stable. Despite signing and ratifying various international treaties on child protection, the main concern regarding the latter discussed legislations lays on the implementation process and arguably, the resources.

\textsuperscript{210} Ibid.

CHAPTER 5: ALTERNATIVES TO CRIMINAL JUSTICE

Despite certain authors opinions that child soldiers, irrespective of their age involved in atrocities should not only be held accountable but also trailed and punished.212
This chapter focuses on the challenges of rehabilitation and reintegration of child soldiers.

5.1 Restorative and Transitional Justice

The current model of criminal justice in international and most domestic laws is largely based on the notion of retribution. It focuses on the criminal responsibility of the perpetrator as opposed to the rights of the victim.213
The structure of the international justice system is therefore ill-suited for a child perpetrator.214
International tribunals since 1945 have only prosecuted adults accused to have the largest responsibilities.215 As mentioned above the SCSL was the first tribunal to change this approach, by setting up hybrid tribunals, combining domestic and international legislation.

Restorative justice takes into account the interests of all parties, the state, offenders, victims, domestic- and international laws.216 Through the restorative justice approach all parties concerns are addressed, including as

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212 See Reis.
214 Ibid. p. 324.
215 Art. 16 Nuremberg Charter; Art. 20 ICTR Statute.
216 Musila, p. 325.
restitution and compensation. The primary goal of this approach is to repair the harm and healing of the victim and the community, where all parties shall be included in the determination of the outcome of the crime.

At the SCCL the general aim is to bring to justice those child soldiers holding positions of authority within the armed groups and those who distinguished themselves in the commission of gross violations. Following Musila’s approach, prosecution of children should be guided by the imperative that the child rehabilitation programmes are not placed at risk.

In the case of the SCCL most child soldiers will not face prosecution, due to the fact that they were bound in junior positions within the armed groups.

5.1.1 Gacaca Courts as a model

A model fitting to the three countries discussed is the Rwandan model of Gacacas tribunals. The community-based Gacaca courts and national conventional courts continued to try individuals for crimes committed during the 1994 genocide.

Gacaca courts were expected to close in June 2009, but the National Service of Gacaca Jurisdictions unexpectedly began gathering new allegations in parts of the country and extended the deadline to December 2009. While some Rwandans feel the Gacaca process has helped

218 Musila, p. 326.
220 Ibid.
reconciliation, others point to corruption and argue that the accused receive sentences that are too lenient, or are convicted on flimsy evidence.

5.1.2 Gacaca Jurisdictions

The Gacaca courts are regulated by governing law.²²¹ Offenders are categorised in four groups, namely the serious offenders such as planners and organisers; the persons whose criminal acts place them as perpetrators for homicide or serious assault on a human causing his death; the persons whose criminal act place them as perpetrators of serious assaults against a human, and the persons who committed crimes against property.²²²

All groups except for the first can make confessions and benefit from reduced sentences, and there are possibilities to pay civil damages according to the negotiations with the victims as well as the option of community service.²²³ Although in Rwanda the Gacacas do not try children under thirteen years, the general system of a community court must be considered as serious option to the formal courts when dealing with children’s accountability, taking into account the restorative and rehabilitation theories. A system following the Gacaca’s philosophy combined with the approach from the Statute of the SCSL could solve impunity.

It is of importance that all perpetrators stand trial in one way or the other.

²²¹ The Rwandan Organic Law on the Organization of Prosecutions for Offences constituting the Crime of Genocide or Crimes against Humanity Committed since 1 October 1990.
²²² Art. 5,6,8,9 Ibid.
²²³ Art. 14 (c) Ibid.
Reports\textsuperscript{224} show that a failure of bringing individuals to justice leads to impunity and further to a denial of justice to the victims.\textsuperscript{225} The latter approach incorporated justice for both the victim and the child soldier.

5.2 Conflict with Economic and Cultural Systems in Africa

Despite international and domestic legal approaches to accountability, when looking at reasonable grounds on the accountability of child soldiers in Africa, one has to bear in mind the cultural and economic situation in Sub-Saharan Africa, before submitting conclusions and proposing recommendations for governments. The economic and social role of minors in Africa differs from those in other regions of the world.

Generally Sub-Saharan African children perform economic roles by directly being involved in production from a very early age.\textsuperscript{226}

In rural areas, both boys and girls are enrolled in essential housework activities. These activities may include the collection of firewood and water. The activities carried out by young children do not only consist of “helping out” but are rather comparable with a full adult’s work scheme. In some areas boys are sent to the homes of important political leaders to work there during which time these children are expected to acquire skills and contacts.\textsuperscript{227} In Uganda some young boys are even sent to the

\textsuperscript{225} Musila, p. 333.
\textsuperscript{227} Ibid, p. 90.
community’s chief for military training in order to bring honour to their family, followed by the hope of wealth.\(^{228}\)

In summary, one could argue, that children play a key role in the economy of the affected states, whereas their participation does not exist. When assessing the accountability of child soldiers under the age of eighteen, one must bear in mind the leisure and educational measures implemented in the international law, as well as the latter factors.

Children in Sub-Saharan Africa are not exposed to the benefits that other children enjoy. They grow up and despite any personal interest have take responsibility at a very young age. In the countryside families often endure from starvation and malnutrition. Diseases such as HIV play another important role in the change of responsibility from the parents to the children. The reasons can lead to a voluntary enlistment or joining of an armed group by a child.

This argument can be upheld against various authors demanding prosecution of voluntarily enrolled child soldiers.

The fact, that children in this region are early introduced to responsibilities and decision-making at an early when caring for their siblings and family, one could argue that the child’s might be more developed than those of children not having to face the these situations.

Another argument may be that although having responsibilities and a hard work scheme, children are not included in essential family decisions, for example a family affected by draughts, poverty or diseases would have rather the elders of the community or adult relatives making decisions, not letting the children participate.

Human Rights activists, advisors, experts and members of the relevant drafting committees should keep in mind these cultural diversities when drafting domestic and international legislation on minimum ages of accountability for children.

\(^{228}\) *Ibid.*
5.3 Disarmament, Demobilisation and Rehabilitation Programmes

In the last few decades Disarmament, Demobilization and Rehabilitation\textsuperscript{229} programmes have been implemented throughout crisis regions on an increasing scale. Most of these DDR programmes were implemented in Sub-Saharan Africa with the assistance of peacekeeping missions by the UN.

The demobilisation during a conflict is the prime challenge. Although UN agencies and NGOs intensively work on this issue, there are hardly any results of demobilisation before the end of a conflict.\textsuperscript{230} Difficulties in access to conflict regions and security issues are major barriers in achieving results. There are repeated reports of UN and NGO workers being murdered while trying to assist.\textsuperscript{231} The first step is usually an agreement between the UN agencies and the NGOs with the governmental or non-governmental armed forces to release a certain amount of child soldiers, yet, the reality and practice shows otherwise. Government as well as non-governmental forces usually only agree on demobilization due to budget reason, in detail, when they do not need the child soldiers any longer.\textsuperscript{232}

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\textsuperscript{229} Hereinafter to be referred to as DDR.; Disarmament, Demobilization and Reintegration (DDR) is strategy for executing peacekeeping operations. Disarmament entails the physical removal of the means of combat from ex-belligerents (weapons, ammunition, etc.); demobilization entails the disbanding of armed groups; while reintegration describes the process of reintegrating former combatants into civil society, ensuring against the possibility of a resurgence of armed conflict.

\textsuperscript{230} Weltreport, p.21.

\textsuperscript{231} Weltreport, p.22.

\textsuperscript{232} Weltreport, p.22.
In the DRC, non-governmental armed groups had unacceptable conditions in order to demobilize their child soldiers, such as a demand for total amnesty of all combatants of that particular group.\textsuperscript{233}

Female child soldiers are not inbound to the formal DDR processes. Female child soldiers are often culturally seen as wives of commanders or being withheld because of their fulfilment of housework, especially in the DRC Uganda and Rwanda.\textsuperscript{234} A further issue is that female child soldiers often do not want to assert themselves as such, as being involved in sexual activities within the armed group disgraces their family and community.

Another concern is that many child soldiers do not want to formally register at the DDR programmes, so as, not to stigmatize themselves.\textsuperscript{235}

The experience has shown that DDR programmes yield the best results, when being set up and bound into local communities.\textsuperscript{236} Budgetary issues also influence DDR programmes. Long-term programmes show sufficient reintegration and therefore the international community and donors lose interest after a short period of time. Incapacity and the lack of interest of certain governments however lead to cases where DDR programmes do not include child soldiers.

The reintegration must be a long-term process that introduces former child soldiers to alternative systems and enables them with access to education and the ability to be reintegrated in their community.\textsuperscript{237}

\textsuperscript{233} \textit{Ibid.}
\textsuperscript{234} \textit{Ibid.} p. 23.
\textsuperscript{235} \textit{Ibid.} p. 24.
\textsuperscript{236} \textit{Ibid.}
\textsuperscript{237} Weltreport, p. 25.
CHAPTER 6: RECOMMENDATIONS

International law related to children’s rights has developed significantly in the last decades due to the growing awareness by the international community. The recruitment and use of children by armed forces and armed groups has been the focus of attention. Children are encouraged by their families and communities to participate in armed conflict, despite the danger and harm that this involves. Despite their experiences, such children are resilient and can contribute constructively to reconstruction and reconciliation efforts if given appropriate help, support and encouragement.238

Various steps have been taken different non-governmental and governmental institutions and organisations to oppose and challenge the status quo.

6.1 The Paris Principles as an approach of Non Governmental Actors

In 1997 UNICEF and the NGO Working Group on the Convention on the Rights on the Child adopted the Cape Town Principles and Best Practices on the Prevention of Recruitment of Children into the Armed Forces and on Demobilization and Social Reintegration of Child Soldiers in Africa. The reason was to develop strategies for preventing recruitment of children, demobilizing child soldiers and helping them to reintegrate into society. The Cape Town Principles have obtained international recognition and became a key instrument to inform the development of international norms as well as shifts in policy at the national, regional and international

238 See “Paris Principles” (The Principles and Guidelines on Children Associated with Armed Forces or Armed Groups), p.4.
levels. These principles were reviewed in 2007, resulting in the adoption of the "Paris Principles".

The aim of the Paris Principles was to summarize the ongoing discussions and arguments on various topics relating to children’s rights. Thus the principles do not form a binding convention nor a treaty. It merely reflects

239 Ibid, p.5.
240 Hereinafter to be referred to as Paris Principles.

Excerpts of the “Paris Principles”:

Treatment of children accused of crimes under international law
3.6 Children who are accused of crimes under international law allegedly committed while they were associated with armed forces or armed groups should be considered primarily as victims of offences against international law; not only as perpetrators. They must be treated in accordance with international law in a framework of restorative justice and social rehabilitation, consistent with international law which offers children special protection through numerous agreements and principles.
3.7 Wherever possible, alternatives to judicial proceedings must be sought, in line with the Convention on the Rights of the Child and other international standards for juvenile justice.
3.8 Where truth-seeking and reconciliation mechanisms are established, children’s involvement should be promoted and supported and their rights protected throughout the process. Their participation must be voluntary and by informed consent by both the child and her or his parent or guardian where appropriate and possible. Special procedures should be permitted to minimize greater susceptibility to distress.

The treatment of children within justice mechanisms
8.6 The Rome Statute of the International Criminal Court states that the Court shall have no jurisdiction over any person who was under 18 at the time of the alleged commission of a crime. Children should not be prosecuted by an international court or tribunal.
8.7 Children who have been associated with armed forces or armed groups should not be prosecuted or punished or threatened with prosecution or punishment solely for their membership of those forces or groups.
8.8 Children accused of crimes under international or national law allegedly committed while associated with armed forces or armed groups are entitled to be treated in accordance with international standards for juvenile justice.
8.9 All relevant international laws and standards must be respected, with due consideration to the defendants’ status as children; moreover:
8.9.0 Alternatives to judicial proceedings should be sought for children at the national level;
8.9.1 If national judicial proceedings take place, children are entitled to the highest standards of safeguards available according to international law and standards and every effort should be made to seek alternatives to placing the child in institutions.
8.10 Where large numbers of people are facing criminal proceedings as a result of armed conflict, the processing the cases of children and of mothers who have children with them in detention should take priority.
8.11 Children associated with armed forces or armed groups who return to communities without undergoing any judicial or other proceedings should be closely monitored to ensure that they are not treated as scapegoats or subjected to any processes or mechanisms that contravene their rights.
the experience of involved organisations and universal knowledge and are intended to support and promote good practice, to guide interventions and affect the behaviour of various actors such as governments, UN organisations and non-governmental actors. By following these aims the relevant authorities should be reminded and encouraged to prevent unlawful recruitment of children, release enlisted children and ensure the implementation of the international standards for accountability of children.

6.2 The Monitoring and Reporting Mechanism of the UN

In July 2005, UN Security Council Resolution 1612 requested an immediate implementation of a Monitoring and Reporting Mechanism\(^\text{241}\) to keep under review six categories of grave violations of children’s rights in armed conflict.\(^\text{242}\)

The report itself does not include any information on the legal status of accountability measures for child soldiers, but has various impacts on implementation.\(^\text{243}\)

This mechanism monitors parties to conflict in situations listed in the annex of the Secretary-General’s most recent report on Children and Armed Conflict.\(^\text{244}\) The monitoring is carried mainly by UNICEF, assisted by various non-governmental organisations. The first outcome of the MRM is that the monitoring data can be used to recommend targeted measures, such as

\(^{241}\) Hereinafter to be referred to as MRM.

\(^{242}\) The six violations the MRM covers are: killing or maiming of children, recruiting or using child soldiers, attacks against schools or hospitals, rape or other grave sexual violence against children, abduction of children and denial of humanitarian access for children.


\(^{244}\) *Ibid.*
sanctions against perpetrators. The second outcome of the MRM process is the increased public awareness of child soldiers in armed conflict. Nevertheless the recommendations and conclusions drawn from the process do not automatically constitute any legal obligations or binding effects on the accused parties. It has changed the positions of certain armed groups towards enlistment of child soldiers. Governments like Uganda are increasing their efforts setting up measurements for child protection.

The MRM process has been a groundbreaking step by the Security Council and has played a significant part in promoting and progressing the Children and armed conflict agenda.

The MRM needs further development in assorted fields, such as the improvement of child participation in the process, an improvement in the provisions of consistent and appropriate responses as well as improvement in the field of transition to national protection systems.

These recommendations have an impact on child soldiers. Recommendations of human rights activists and bodies linked to the accountability debate do not only rely on trustworthy data provided for in the MRM Reports, but can use this data to insist on an progressive discussion. Through the MRM working group and the Security Council, international condemnation and the threat of sanctions could have an impact on state parties.

245 Ibid.
246 Ibid, p. 10.
247 For example in the Ivory Coast.
249 Ibid. p. 20.
Despite the outcome, the UN has implemented a system, marking a new starting point in the debate on children’s rights, especially through the direct involvement of the Security Council.

6.3 General Recommendations of non state actors

The international and domestic legislations and mechanisms have brought consensus in that armed conflicts and rebel groups are not appropriate for children to be involved in. Since non-governmental armed groups are not party to any consensus, new policies and strategies have to be developed to effectively approach the symptoms. The international protection mechanisms and measurements related to the protection of the rights of the child have to be brought in compliance and taken as an international binding standard for minimum protection. All parties must be included in the implementation process, including non-governmental armed groups. The economic, political and social factors leading to national and international conflicts have made it impossible to successfully enforce international binding legislative initiatives on children’s rights. Furthermore, all national and non-national government actors have to efficiently work together and coordinate their actions on all levels.

It is submitted that it is almost impossible to achieve it from an African perspective, as armed groups are often funded by opposing governments and all follow individual goals and ideologies.

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250 Weltreport, p. 18.
CHAPTER 7: CONCLUSION

Environmental disparities, poverty and inequality influence the recruitment and (voluntary) enlistment in armed forces and groups.\(^{251}\)

National education also plays a major role in this topic; the lack of skilled education, the number of drop outs and high unemployment rates can force children to enlist.

International law has developed significantly to reflect the ongoing concerns of the international community with the increase of crimes against children. As demonstrated, various international and regional conventions and treaties have been signed and ratified by the majority of states. Throughout the last decade, reports of mass murders, rapes, torture and other inhuman acts against children have compellingly called for action.

The issue of a universal binding agreement on the minimum age of accountability of children is not solved. International law is a slow working instrument. In protection measurements the ICC, on the one hand, has established minimum age for criminal accountability for children as eighteen. On the other hand, the SCSL has a mandate to prosecute offenders from the age of fifteen onwards.

As discussed earlier, arguments can be raised for both approaches. Despite regional disparities, it is a contradiction to include children from the age of twelve years in reconciliation processes\(^{252}\), make them fully capable participants, yet raise concerns on their criminal accountability.

\(^{251}\) In states such as Uganda and the DRC, the number of enlistments and recruitments of child soldiers increased just before peace talks were held (Weltreport 2008, p. 19).

\(^{252}\) See Truth and Reconciliation Process in Sierra Leone.
The international legal framework does not provide for prosecution of minors. Efforts to hold child soldiers accountable for crimes committed should be dealt with on a domestic level. Notwithstanding budget and funding issues, the international tribunals have limited times and money and should only deal with the most serious crimes, holding accountable the most responsible perpetrators.

Community based tribunals like the Gacacas in Rwanda have proven to be a serious alternative following the idea of restorative justice. Accountability must not automatically include punishment or detention.

It is submitted that the focus should be on personal and individual accountability, leaving it up to the domestic legal systems to set their requirements on minimum accountability ages. Nations have to account for their individual, cultural and economic factors that differ regionally.

It is of great importance that this process is monitored by an independent system, perhaps guided by UN bodies. The MRM seems to be a good start, needing further adjustments in the future. Accountability has to go hand in hand with reconciliation and rehabilitation processes.

Some victims can be satisfied when the truth is revealed, or by listening to the confessions of perpetrators allowing them to reintegrate into society, others might demand a fair judicial process leading to a proper sentence.

Of underlying importance is the fact that whatever system is followed, it must be child-related and child-friendly.

As history has shown, there can be no peace, without justice.
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