

STELLUNGNAHMEN UND BERICHTE

Trial of the Child Soldier: Protecting the Rights of the Accused

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The dilemma of dealing with children who are accused of committing acts of genocide illustrates the complexity of balancing culpability, a community's sense of justice and the 'best interests of the child'.¹

Graca Machel

Introduction

In recent years, the number of children participating in armed conflicts around the world has increased drastically.² They work as cooks, porters, messengers, spies, and increasingly as combatants.³ There are approximately 300,000 child soldiers worldwide⁴, many of whom are the victims of illegal recruitment practices but also the perpetrators of egregious human rights violations. Child rights advocates are divided concerning what should be done with these children, whether or not they should be held criminally responsible for their acts.⁵ In the interests of child soldiers, this paper seeks to move beyond this debate. It will be argued that since it is possible to prosecute child soldiers for war crimes, crimes against hu-

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¹ United Nations, Impact of Armed Conflict on Children, Report of the Expert of the Secretary-General, Graca Machel, UN Doc. A/51/306 (1996), at para. 250.

² Ibid., at para. 34.

³ Diane Marie Amann, Calling Children to Account: The Proposal for a Juvenile Chamber in the Special Court for Sierra Leone, *Pepperdine Law Review* 2001, online: Westlaw, at *171; *ibid.*, at para. 44.

⁴ François Bugnion, Les enfants soldats et le droit international humanitaire, *12 African Journal of International and Comparative Law* 262 (2000), at 265.

⁵ Ilene Cohn, The Protection of Children and the Quest for Truth and Justice in Sierra Leone, *Journal of International Affairs*, Vol. 55, No. 1, at 7.

manity and genocide, those interested in the welfare of these children need to consider how to protect them if they are prosecuted. This paper will critically examine how to use the complementary fields of international human rights and humanitarian law to protect the rights of child soldiers in judicial proceedings. Detention conditions, procedural rights, assessing culpability, defences, sentencing and reintegration of the child into society will be considered. This paper will not examine specific conflicts in detail or aim to resolve all legal issues that concern child soldiers. Rather, a modest attempt will be made to foster an appreciation of the scope and limits of international law in respect of protecting the rights of child soldiers. In canvassing the applicable law, some of the unique challenges that might arise in a child soldier's trial will be identified as well as possible remedies suggested.

The Possibility of Prosecuting a Child Soldier Under International Law

The Convention on the Rights of the Child (CRC) defines a child as a person under the age of 18.⁶ To date, no international criminal tribunal has prosecuted a child. Nevertheless, neither international human rights law nor humanitarian law explicitly prohibit holding children criminally responsible for human rights violations committed during armed conflict. Conventions that do address the participation of children in armed conflict focus on prohibiting their recruitment.⁷ Some argue that the legal emphasis on holding recruiters criminally responsible logically entails a prohibition on the prosecution of child soldiers.⁸ This argument is tenuous for two reasons. First, the culpability of recruiters and child soldiers is not mutually exclusive, especially if a child exercises free will and appreciates the consequences of his or her acts. As Graca Machel pointed out in her report to the United Nations, not all child soldiers are beaten and/or kidnapped prior to becoming soldiers.⁹ Second, international law only prohibits the recruitment of children

⁶ Article 1, Convention on the Rights of the Child, <<http://www.hrweb.org/legal/child.html>> (accessed November 26, 2004). For the purposes of the Fourth Geneva Convention of 1949, childhood ends on a person's fifteenth birthday (i.e. Articles 14, 23, 24, 38 and 50).

⁷ See Articles 2, 3 and 4 of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, <<http://www.unhcr.ch/html/menu2/6/protocolchild.htm>> (accessed November 26, 2004); Article 3(a) of the ILO Convention No. 182 of June 1999 on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, <http://homepages.iprolink.ch/~fitbb/TRADE_UNION_RIGHTS/ILO_Convention_182.html> (accessed November 26, 2004); Article 22(2) of the African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), entered into force November 29, 1999, <<http://www1.umn.edu/humanrts/africa/afchild.htm>> (accessed November 26, 2004); Articles 77 and 4 respectively of Additional Protocols I and II to the Geneva Conventions of 1949, Adam Roberts/Richard Guelff (eds.), Documents on the Laws of War (2nd ed.), Oxford 1989.

⁸ Chen Reis, Trying the Future, Avenging the Past: The Implications for Prosecuting Children for Participation in Internal Armed Conflict, Columbia Human Rights Law Review, Spring 1997, online: Westlaw, at *654.

⁹ *Supra* note 1, at paras. 38-43.

under the age of 15 and the compulsory recruitment of children under the age of 18, pursuant to Article 2 of the Optional Protocol to the Convention on the Rights of the Child. Non-compulsory recruitment of child soldiers aged 15 to 18 years is not illegal.

As evidenced by the existence in the CRC of provisions delineating the rights of children in criminal proceedings, it permits the prosecution of juvenile offenders and preserves the discretion of States to set the minimum age at which children will be held legally responsible for criminal acts. The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules)¹⁰, the United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines)¹¹, and the International Covenant on Civil and Political Rights (ICCPR)¹² also detail the rights of children in penal proceedings and, therefore, do not oppose holding children legally accountable for 'deviant' behaviour. It is likely that the drafters of the CRC and similar legal instruments only contemplated the prosecution of children for domestic crimes. Nothing in the CRC, however, prohibits the prosecution of children for international crimes. Moreover, Article 38(1) of the CRC provides that States shall respect international humanitarian law, which does not set a minimum age for criminal responsibility.

Whereas international human rights law distinguishes between the prosecution of adults and juveniles by affording additional protection to children, international humanitarian law draws no such distinction. It fails to set a minimum age for war crimes prosecutions meaning that technically, the prosecution of child soldiers is not illegal.¹³ The International Military Tribunals for Nuremberg and the Far East, Allied Control Council Law No. 10, the Draft Code of Crimes against the Peace and Security of Mankind (1996), and the statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda are silent on whether children can be prosecuted for war crimes.¹⁴

In 1998, the drafters of the Rome Statute for the establishment of a permanent International Criminal Court (ICC Statute)¹⁵ debated what should be the minimum age of criminal responsibility for war crimes, crimes against humanity and

¹⁰ United Nations Standard Minimum Rules of the Administration of Juvenile Justice ("The Beijing Rules"), GA Res. 40/33 of 29 November 1985, <http://www.unhchr.ch/html/menu3/b/h_comp48.htm> (accessed November 26, 2004).

¹¹ United Nations Guidelines for the Prevention of Juvenile Delinquency ("The Riyadh Guidelines"), GA Res. 45/112, annex, 45 U.N. GAOR Supp. (No. 49A), at 201, U.N. Doc. A/45/49 (1990), <<http://www.ohchr.org/english/law/juvenile.htm>> (accessed November 26, 2004).

¹² International Covenant on Civil and Political Rights of 16 December 1966, entry into force 23 March 1976 ("ICCPR"), GA Res. 2200A (XXI), <http://www.unhchr.ch/html/menu3/b/a_ccpr.htm> (accessed November 26, 2004).

¹³ Amnesty International, *Child Soldiers: Criminals or Victims?*, December 2000, AI Index IOR 50/002/2000, <<http://web.amnesty.org/library/Index/ENGIOR500022000?open&of=ENG-364>> (accessed November 26, 2004).

¹⁴ *Ibid.*, at 6.2.

¹⁵ Rome Statute of the International Criminal Court, <<http://www.un.org/law/icc/statute/romefra/htm>> (accessed November 26, 2004).

genocide. Article 26 of the ICC Statute states that the Court has no jurisdiction to prosecute persons who were under 18 when they allegedly committed a crime. This provision must not be mistaken for a pronouncement of customary international law on the criminal responsibility of minors.¹⁶ Rather, the jurisdiction of the Court represents the absence of an international consensus on this issue and was indicative of a political compromise rather than a legal principle.¹⁷ As one commentator rightly remarks, the ICC Statute does not prohibit the domestic prosecution of international crimes.¹⁸ If a child soldier is prosecuted at the national level, the challenge is to ensure that child rights enshrined in international legal instruments are recognized and respected.

Subsequent to the advent of the ICC Statute, the Statute of the Special Court for Sierra Leone (SCSL Statute) was drafted.¹⁹ Article 7 of the SCSL Statute gives the Court jurisdiction to prosecute children who were between the ages of 15 and 18 at the time an offence was allegedly committed. Children who are tried before the Court shall be treated as follows:

... with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society, and in accordance with international human rights standards, in particular the rights of the child.²⁰

In practice, it is unlikely that the Court will prosecute any children.²¹ The Court is constrained by its mandate to prosecute those with the 'greatest responsibility' and by its budget, which will enable the prosecution of only 20 or so individuals.²² Nevertheless, the SCSL Statute sets a precedent under international law for the permissibility of prosecuting children for war crimes, crimes against humanity and genocide.²³ As such, child rights advocates must begin to consider how international human rights law and humanitarian law can creatively be used to protect the rights of child soldiers in judicial proceedings and be adapted to take account of children's physical and mental immaturity, as well as the circumstances that lead to their participation in an armed conflict.

¹⁶ *Supra* note 5, at 6-7; see also Per S a l a n d, "International Criminal Law Principles" *The International Criminal Court: The Making of the Rome Statute, Issues, Negotiations, Results*. Roy S. L e e (ed.), August 1999, 200-202, cited in: *supra* note 13, at 6.2.

¹⁷ *Supra* note 13, at 6.2.

¹⁸ *Supra* note 3, at *180.

¹⁹ Statute of the Special Court for Sierra Leone, SC Res. 1315(2000), August 14, 2000, <<http://www.sierra-leone.org/specialcourtstatute.html>> (accessed November 26, 2004).

²⁰ *Ibid.*, at Article 7.

²¹ Laura R. H a l l / N a h a l K a z e m i, *Prospects for Justice and Reconciliation in Sierra Leone*, *Harvard International Law Journal*, Winter 2003, online: Westlaw, at *296.

²² Ismene Z a r i f i s, *Sierra Leone's Search for Justice and Accountability of Child Soldiers*, *Human Rights Brief*, Spring 2002, online: Westlaw, at *20; *ibid.*

²³ *Ibid.*; *supra* note 21, at *297.

Detention

Article 37(b) of the CRC states:

No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;²⁴

It might be difficult to secure the release of a child soldier prior to the commencement of his or her trial given the gravity of the crimes charged. Although a primary consideration²⁵, the best interests of a child soldier might be balanced against national security interests and the concerns of victims. Ultimately, pre-trial detention might even protect a child from anxious adult soldiers threatening harm should he or she provide authorities with information about their involvement in a conflict.²⁶ Pre-trial detention in this context would likely satisfy the “measure of last resort” requirement in Article 37(b) of the CRC.

If a child soldier is detained, the CRC states that he or she must be treated with humanity, dignity and in accordance with his or her age.²⁷ A child also has the right to promptly receive the assistance of legal counsel to challenge the legality of his or her detention, which must be promptly determined by a competent, independent and impartial body.²⁸ The Beijing Rules, which contain similar provisions, are not legally binding but are “designed to serve as a convenient standard of reference”.²⁹

The Beijing Rules state that the parents or guardians of an apprehended child must be notified as soon as possible.³⁰ Additionally, they enumerate alternatives to detention pending trial, namely, “... close supervision, intensive care or placement with a family or in an educational setting or home”.³¹ The difficulty with contacting a child soldier’s parents upon apprehension or arranging family placement pending trial is that often, child soldiers do not know how to contact their parents. Family separation is common during armed conflict and efforts need to be made to trace the families of children involved in armed conflict as soon as possible.

The Beijing Rules also list the types of assistance that juveniles shall receive during detention. These include: social, educational, vocational, psychological, medical and physical care.³² Ideally, a State prosecuting a child soldier will possess adequate resources to provide such assistance. In reality, countries that have been ravaged by

²⁴ *Supra* note 6.

²⁵ *Ibid.*, at Article 3.

²⁶ *Supra* note 16 (C o h n article).

²⁷ *Supra* note 6, at Article 37(c).

²⁸ *Ibid.*

²⁹ *Supra* note 10; For greater detail of the conditions for juvenile detention generally endorsed by the United Nations see United Nations rules for the Protection of Juveniles Deprived of their Liberty, GA Res. 45/113, annex, 45 U.N. GAOR Supp. (No. 49A), at 205, U.N. Doc. A/45/49 (1990). These rules are endorsed in Article 13.3 of the Beijing Rules but are not legally binding.

³⁰ *Supra* note 10, at Article 10(1).

³¹ *Ibid.*, at Article 13(2).

³² *Ibid.*, at Article 13(5).

violence lack many of the human and material resources to have fully operational judicial, education and social systems.³³ Since an international rather than domestic court would presumably have greater resources at its disposal, the prosecution of child soldiers at the international level would likely improve a child soldier's pre-trial detention conditions. This is evidenced by the stark contrast in detention conditions of indictees awaiting trial before the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the Hague as compared to those in Rwandan prisons awaiting domestic prosecution.

Article 38(1) of the CRC states that parties to the Convention will respect the rules of international humanitarian law that are relevant to children. Under international criminal law, the protection afforded to persons detained varies according to the individual's status as either a prisoner of war or civilian internee. This classification principally stems from the important distinction drawn during armed conflict between combatants and civilians.³⁴ A child soldier is considered a combatant under international criminal law if he or she falls into one of the following categories:

1. Member of a state's armed forces, including militias and volunteer corps that are part of it³⁵
2. Member of a state's militia or volunteer corps if the organization has a military hierarchy, a distinctive emblem, carries arms openly and respects the laws and customs of war³⁶
3. Member of an armed force that pledges allegiance to an authority that the Detaining Power does not recognize³⁷
4. Inhabitant of a non-occupied territory that spontaneously resists an invasion by enemy forces³⁸

If a child combatant does not fall into one of the above categories, he or she has civilian status.³⁹ If the civilian status of a child soldier can be proven, he or she will be afforded greater protection under international humanitarian law than if he or she is deemed a combatant. As a civilian internee, a child soldier would have the right "... to be reunited with their parents ... to be given physical conditions of internment appropriate to their age and additional food in proportion to their

³³ *Supra* note 1, at para. 252 (Only 20 % of the judiciary survived after the Rwandan genocide).

³⁴ Support staff of armed forces is granted prisoner of war status. See Article 4(A)4 and 4(A)5, 1949 Geneva Convention III Relative to the Treatment of Prisoners of War, in: *Roberts/Guelff* (note 7), at 215.

³⁵ *Ibid.*, at Article 4(A)1; "Armed forces" is defined in Article 43 of Additional Protocol I to the Geneva Conventions, *supra* note 7.

³⁶ *Supra* note 35, at Article 4(A)2.

³⁷ *Ibid.*, at Article 4(A)3.

³⁸ *Ibid.*, at Article 4(A)6.

³⁹ *Supra* note 7, at Article 50 (Additional Protocol I).

physiological needs, to receive education and be able to have physical exercise, etc.”⁴⁰

If a child soldier is a combatant, he or she is protected by prisoner of war status during detention.⁴¹ Although the provisions relating to prisoner of war status do not draw a distinction between children and adults, María Teresa Dutli of the International Red Cross argues that child combatants must be given privileged treatment in accordance with the special protection that international humanitarian law provides for them in Article 77(1) of the first Additional Protocol to the Geneva Conventions:⁴²

Children shall be the object of special respect and shall be protected against any form of indecent assault. The Parties to the conflict shall provide them with the care and aid they require whether because of their age or for any other reason.⁴³

Through this general provision for the protection of children during an international armed conflict, child rights advocates should try to bring in and secure all of the detention conditions for children that are set out in international human rights instruments. Just as important is Article 77(3), which states:

If, in exceptional cases ... children who have not attained the age of fifteen years take a direct part in hostilities and fall into the power of an adverse Party, they shall continue to benefit from the special protection accorded by this Article, whether or not they are prisoners of war.

This provision effectively erases for children under the age of 15 the conventional distinction between combatant and civilian in international armed conflict, meaning that a child soldier detained by an adverse Party must be provided with care and aid in accordance with his or her age. The difficulty with invoking Article 77 is that the customary status of both of the Additional Protocols to the Geneva Conventions is disputed and, therefore, they likely only bind signatories.

Concerns about detained children being morally corrupted by their adult counterparts⁴⁴ has led to stipulations in several international human rights instruments that children must be detained separately from adults⁴⁵ unless non-separation is in a child's best interests.⁴⁶ The ICCPR states that accused persons shall, except in exceptional circumstances, be segregated from convicted persons.⁴⁷ Additional Protocol I to the Geneva Conventions also requires the separation of detained adults and children except to accommodate families.⁴⁸ Two problems arise with respect to

⁴⁰ María Teresa Dutli, *Captured Child Combatants*, 278 *International Review of the Red Cross* 421 (1990), at 428 f. Respectively Articles 82, 85 (paragraph 2), 89 (paragraph 5) and 94 of the Fourth Geneva Convention.

⁴¹ *Ibid.*, at 426.

⁴² *Ibid.*, at 427; see *supra* note 7, at Article 77(1) (Additional Protocol I).

⁴³ *Supra* note 7, at Article 77(1) (Additional Protocol I).

⁴⁴ *Supra* note 10, Commentary to Article 13(4).

⁴⁵ *Supra* note 6, at Article 37(c); *supra* note 10, at Article 13(4); *supra* note 12, at Article 10(2)(b).

⁴⁶ *Supra* note 6, at Article 37(c).

⁴⁷ *Supra* note 12, at Article 10(2)(a).

⁴⁸ *Supra* note 7, at Article 77(4) (Additional Protocol I).

child soldiers. First, in a post-conflict society, it will be difficult for children to provide officials with proof of their age. This problem could be remedied by not requiring documentation and instead, placing a duty on officials to assess an individual's age for detention purposes based on objective criteria and with a presumption in favour of youth. Second, in the context of politically motivated offences, there exists some controversy as to whether separation is in the best interests of children.

Palestinian experts and lawyers argue that children charged with security offences should be detained alongside adults accused of similar offences. They assert that the traditional concerns about physical and moral threats are inapplicable for offences arising from a struggle against occupation.⁴⁹ They further contend that non-separation would permit adults to confer the following benefits on children: education⁵⁰, psychological and material care⁵¹, and the facilitation of better relations between detained children.⁵² Putting aside the difficulty of distinguishing between ordinary and political crimes⁵³, the law requires that the issue of separation be decided on a case-by-case basis by assessing what is in the best interests of the child concerned.⁵⁴ Part of this assessment should include discussing with the child his or her preferences. Informing a child soldier of his or her rights and asking whether he or she wishes to be detained with adult comrades respects a child's autonomy and enriches the 'best interests' analysis.

Procedural Safeguards

International human rights and humanitarian law set out a number of procedural safeguards to protect the rights of the accused in judicial proceedings. International human rights law affords additional protection to juvenile offenders in light of their vulnerability. Article 40 of the CRC states that every child accused of infringing penal law has the right to be treated with dignity, in accordance with human rights and fundamental freedoms. The procedure employed for prosecuting a child must be flexible and adaptable to a child's age. For example, the European Court of Human Rights held that an 11-year old boy could not be expected to participate in an adult courtroom with an intimidating atmosphere and procedures only minimally adapted to his age.⁵⁵ The protections and rights afforded to children under Article 40 include the following: no retroactive application of the law,

⁴⁹ Philip Veerman/Adir Waldman, *When Can Children and Adolescents be Detained Separately from Adults?*, 4 *International Journal of Children's Rights* 147 (1996), at 150.

⁵⁰ *Ibid.*, at 152-3 (Prison is regarded by some children as a university for political activists).

⁵¹ *Ibid.*, at 153-4.

⁵² *Ibid.*, at 155.

⁵³ *Ibid.*, at 150.

⁵⁴ *Ibid.*, at 152 and 159.

⁵⁵ *V v. United Kingdom*, 16 December 1999, European Court of Human Rights, cited in: *supra* note 13, at 6.3.1.

the presumption of innocence, prompt notification of charges, assistance to prepare a defence, to be tried without delay by an impartial body, to have a fair hearing according to law, to remain silent and not testify, to present a case, to cross-examine witnesses, to appeal the decision, to have an interpreter and to have one's privacy protected.

At an international war crimes trial, unique issues arise in guaranteeing a trial by a competent and impartial authority. Although a judge must be impartial in that he or she must not favour one party over the other, a judge who presides over a case involving a child soldier must be sufficiently aware of the cultural context in which the child was raised. Michael Corriero suggests that if it is not possible to select a qualified judge from the country in which the alleged atrocities were committed, it might be useful for a court to employ the assistance of lay advisors or community representatives who can answer a court's questions about local customs, norms and practices as well as provide an unofficial version of the events that transpired during the conflict.⁵⁶ Indeed, this is the practice in South African courts.⁵⁷

Article 7 of the Beijing Rules nearly replicates the procedural safeguards contained in Article 40 of the CRC.⁵⁸ Article 6 states that discretion should be built into all stages of the proceedings so that the "varying special needs of juveniles" can be taken into account. Anticipated threats from adults who fear that a child's testimony will expose him or her to prosecution mean that juveniles who participate in war crimes trials, either as the accused or as witnesses, need protection.⁵⁹ As well, children involved in such proceedings might suffer from post-traumatic stress disorder and so it is extremely important that they are not re-traumatized when they are interviewed at the investigative phase and questioned in court.⁶⁰ Articles 6(3) and 22 emphasize the need for professionalism and training of persons who work with children in the criminal justice system. It is essential that when prosecuting a child soldier, key positions within the legal system be given to persons with expertise in juvenile justice, child rights and child protection.⁶¹

⁵⁶ Michael A. Corriero, *The Involvement and Protection of Children in Truth and Justice-Seeking Processes: The Special Court for Sierra Leone*, *New York Law School Journal of Human Rights*, Summer 2002, online: Westlaw, at *360.

⁵⁷ *Ibid.*

⁵⁸ Article 8 deals with the right to privacy and Article 20 deals with the avoidance of unnecessary delay. Article 14 states that a competent authority shall try a juvenile offender in a manner that accords with the principles of a fair and just trial. Article 14 also states that the proceedings "shall be conducive to the best interests of the juvenile" and allow him or her to participate in the trial process. Article 15 confers a right to legal counsel and the participation of parents or guardians in the proceedings.

⁵⁹ *Supra* note 16 (C o h n) at 28.

⁶⁰ *Ibid.*, at 32.

⁶¹ *Ibid.*, at 28, 31 and 32.

The Four Geneva Conventions of 1949⁶² and two additional Protocols of 1977⁶³ can also be used to safeguard the rights of child soldiers in judicial proceedings. If the conflict is international in character, humanitarian law envisages judicial proceedings being commenced by a Detaining Power against a prisoner of war in a military court. Chapter three of the Third Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention) enumerates the procedural safeguards and rights of the accused in such trials. These include the principle of non-retroactivity⁶⁴, the right to be promptly informed of the charges⁶⁵, assistance by a qualified lawyer to prepare a defence⁶⁶, to be tried without delay by an impartial and independent judicial body⁶⁷, to present a case⁶⁸, to appeal the decision⁶⁹, and to have an interpreter⁷⁰. Unlike Article 40 of the CRC, none of the provisions mention the right to be presumed innocent, to have a fair hearing according to law, the right to remain silent and not testify, the right to cross-examine witnesses, or the right to privacy. The trial is public unless, owing to exceptional State security concerns, the hearing is held *in camera*.⁷¹ In spite of these shortcomings, chapter three contains additional procedural safeguards that are not found in the CRC. The prisoner of war must be provided with assistance from a qualified lawyer, he or she cannot be morally or physically coerced into admitting guilt⁷², documents, including those detailing the charges against the accused must be in a language that he or she understands⁷³, and he or she must be informed immediately after being sentenced of the right to appeal in a language he or she understands⁷⁴. The differences between the rights enumerated in the CRC and the Third Geneva Convention highlight the importance of invoking both international criminal and human rights instruments to safeguard the rights of child soldiers in judicial proceedings.

⁶² 1949 Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Roberts/Guelff (note 7), at 169; 1949 Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Roberts/Guelff (note 7), at 193; 1949 Geneva Convention III Relative to the Treatment of Prisoners of War, Roberts/Guelff (note 7), at 215; 1949 Geneva Convention IV Relative to the Protection of Civilians in Time of War, Roberts/Guelff (note 7), at 271.

⁶³ *Supra* note 7.

⁶⁴ *Supra* note 64 (Geneva Convention III), at Article 99.

⁶⁵ *Ibid.*, at Article 104.

⁶⁶ *Ibid.*, at Article 99 and 105.

⁶⁷ *Ibid.*, at Article 84.

⁶⁸ *Ibid.*, at Article 99 and 105.

⁶⁹ *Ibid.*, at 106.

⁷⁰ *Ibid.*, at Article 105.

⁷¹ *Ibid.*

⁷² *Ibid.*, at Article 99.

⁷³ *Ibid.*, at Article 105.

⁷⁴ *Ibid.*, at Article 107.

The procedural guarantees in judicial proceedings arising from crimes alleged to have occurred as part of a non-international armed conflict are stated in Article 6(2) of the Second Additional Protocol to the Geneva Conventions.⁷⁵ A child soldier against whom a criminal prosecution is commenced must be informed of the charges against him or her without delay, afforded all of the necessary rights during trial and means of defence, presumed innocent until proven guilty according to law, tried in his or her presence, and not be compelled to testify against him or herself or to confess guilt.⁷⁶ The principle of non-retroactivity also applies in this context.⁷⁷

Beyond procedural safeguards, it is essential that child rights lawyers and scholars interrogate the legality of substantive international criminal law against the backdrop of child rights. For example, Sarah Wells challenges the conventional distinction that is drawn between combatants and non-combatants.⁷⁸ She argues that the illegal recruitment of child soldiers amounts to a crime against humanity in some cases and, therefore, it is illogical to treat child soldiers as combatants.⁷⁹ Procedural rights are not enough if the substantive law applied to the acts of child soldiers is inconsistent with international human rights. To exclusively guard against violations of procedural rights would be to adopt an impoverished notion of protecting the best interests of child soldiers. International human rights law has developed enormously since the Second World War. This is evidenced by the fact that the ICTY⁸⁰, the International Criminal Tribunal for Rwanda (ICTR)⁸¹, the ICC⁸² and the SCSL⁸³ all contain as part of their mandates respect for international human rights law. This respect surely extends beyond procedural safeguards to the jurisprudential development of substantive international humanitarian law.

⁷⁵ *Supra* note 7.

⁷⁶ *Ibid.*, at Article 6(2) (Additional Protocol II).

⁷⁷ *Ibid.*, at Article 6(2)(c) (Additional Protocol II).

⁷⁸ Sarah L. Wells, Crimes Against Child Soldiers in Armed Conflict Situations: Application and Limits of International Humanitarian Law, *Tulane Journal of International and Comparative Law*, Spring 2004, online: Lexis-Nexis.

⁷⁹ *Ibid.*

⁸⁰ William A. Schabas, Sentencing By International Tribunals: A Human Rights Approach, *Duke Journal of Comparative and International Law*, Spring 1997, online: Westlaw, at ¶467; Statute of the International Criminal Tribunal for the former Yugoslavia, S.C. Res. 808, U.N. SCOR, 48th Sess., 3217th mtg., Annex, U.N. Doc. S/RES/808 (1993).

⁸¹ *Ibid.*; Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., Annex, U.N. Doc. S/RES/955 (1994).

⁸² *Supra* note 15.

⁸³ *Supra* note 19.

Culpability

Perhaps the greatest legal challenge that must be confronted by judges presiding over a child soldier's trial is assessing culpability. First, however, there is the matter of determining a child soldier's fitness and competence to stand trial. Two types of inquiries would be appropriate at this stage. First, is the minimum age for holding child soldiers criminally responsible reasonable? Article 4 of the Beijing Rules states that the minimum age should not be too low and that States should consider the emotional, mental and intellectual maturity of children.⁸⁴ The Committee on the Rights of the Child cautions that subjective or imprecise criteria including puberty or the child's personality should not be used to assess children's criminal responsibility.⁸⁵ If a minimum age is fixed under international law, national courts presiding over child soldier trials should respect this standard. Not only is this a just practice but it will also reduce fragmentation within international law.

Upon being satisfied that the minimum age of criminal responsibility is reasonable, a judge must satisfy him or herself that the indicted child soldier is physically, emotionally and mentally fit to stand trial. Three problems may arise at this stage. First, a child soldier might be physically unable to spend days seated in a courtroom due to poor health or war injuries. In this case, a court can order that the child receive medical care, that the courtroom be equipped with facilities that meet the child's physical needs and that an appropriate trial schedule be set. Second, an assessment of emotional fitness might reveal that a child soldier suffers from post-traumatic stress disorder and, therefore, a trial could re-traumatize him or her. Here, he or she can receive therapy and commencement of the trial can be postponed. Third, a psychiatric assessment might reveal that a child soldier has an insufficient understanding of right and wrong.

[J]ustice presupposes that the party to be punished has an undiminished capacity to exercise his free will to choose between right and wrong. This, in turn, presupposes that the party to be punished has a fair opportunity to learn and be exposed to accepted standards of behavior and the morality of his culture. ... How do you exact conformity with a specific moral code of a society, when children may be unaware of its existence [?].⁸⁶

For some, childhood is spent surrounded by conflict resulting in stunted mental, physical, emotional, cognitive, social and moral development.⁸⁷ For this reason, the prosecution of child soldiers in a certain context might be altogether inappropriate.

Culpability is assessed when evidence is submitted to prove the *actus reus* and *mens rea* of an offence. For serious crimes, society's condemnation and punishment of the accused is justified in part by establishing that the accused knowingly or intentionally committed the prohibited act, that he or she possessed a guilty

⁸⁴ *Supra* note 10.

⁸⁵ *Supra* note 49, at footnote 245, Committee on the Rights of the Child, U.N. Doc. CRC/C/46, para. 203-38.

⁸⁶ *Supra* note 57, at *351.

⁸⁷ *Supra* note 1, at paras. 41 and 50.

mind. The accused must have intended both the act and its consequences. Some young children have an almost cartoonish understanding of acts and their consequences⁸⁸, meaning that it may be difficult to prove that a child soldier possessed the requisite intent. In particular, the *mens rea* requirements for genocide and crimes against humanity are difficult to prove generally, let alone with respect to child soldiers. To prove that a child soldier committed genocide, the prosecution must prove beyond a reasonable doubt that he or she possessed the specific “intent to destroy [a protected group] in whole or in part”.⁸⁹ Given the mental immaturity of children and the fact that they are generally recruited to advance causes other than their own, it will be difficult to prove that the accused genuinely intended to destroy an entire segment of a population.⁹⁰

For crimes against humanity, there is a general or chapeau *mens rea* requirement as well as a specific *mens rea* requirement for each of the underlying offences such as murder, torture, rape and persecution.⁹¹ First, the prosecution must prove beyond a reasonable doubt that the child soldier possessed knowledge of an attack on a civilian population and his or her role in it.⁹² Knowledge of participation or knowingly taking the risk of participating in the attack will suffice.⁹³ It need not be proven that the child soldier knew the specific details of the attack.⁹⁴ However, given the propensity of young males to defer to rather than challenge authority⁹⁵, a child soldier might not realize that a specific segment of a population is being targeted. Even if this were proven, there are additional *mens rea* requirements for each crime against humanity. For example, persecution on political, racial or religious grounds requires proof of “... the intent to cause, and the resulting infringement of an individual’s enjoyment of a basic or fundamental right”.⁹⁶ A discriminatory intent based on political, racial, or religious grounds must also be proven beyond a reasonable doubt.⁹⁷

Although it will be difficult to prove the mental elements of these crimes, it is not impossible. Indeed, owing to their mental immaturity and fearlessness⁹⁸, many child soldiers are easily seduced by ideologies that use violence to achieve their

⁸⁸ *Supra* note 8, at *644.

⁸⁹ Article 2, Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), December 9, 1948, 78 U.N.T.S. 277. (entered into force January 12, 1951).

⁹⁰ *Supra* note 8, at *645.

⁹¹ Contemporary definitions of crimes against humanity can be found in the statutes for the ICTY, ICTR, ICC and SCSL.

⁹² Guénaél Mettraux, Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the former Yugoslavia and for Rwanda, 43 Harvard International Law Journal 237, online: Westlaw, at *251.

⁹³ *Ibid.*, at *262.

⁹⁴ *Ibid.*

⁹⁵ *Supra* note 8, at *645.

⁹⁶ *Supra* note 92, at *292.

⁹⁷ *Ibid.*

⁹⁸ *Supra* note 1, at para. 47-8.

ends.⁹⁹ One need only consider Palestinian children who are all too eager to die for liberation from Israel.¹⁰⁰ This, combined with young children's underdeveloped understanding of death can lead them to commit some of the worst atrocities in an armed conflict.¹⁰¹ Although many child soldiers are kidnapped or conscripted¹⁰² and the recruitment of child soldiers is prohibited under international humanitarian law, it will nevertheless be possible in some cases to prove that a child soldier committed an international crime with full knowledge of the consequences. If all of the elements of the offence are proven, it is necessary to consider how to raise a defence so that criminal responsibility can be negated.

Defences

Raising a defence for a child soldier who has committed an international crime is an ideal way to help judges, victims and society appreciate the circumstances that lead a child to deviate so drastically from accepted social norms. If States insist on the prosecution of child soldiers, there is a lot of work to be done by child rights advocates to ensure that sufficient scope exists in the jurisprudence on defences to take into account the unique circumstances that lead to children's participation in armed conflict. It is extremely important that the physical and mental immaturity of children is not just considered as a mitigating factor at the sentencing phase. If child rights advocates resign themselves to this position, then child soldiers will be found guilty of acts that in fact they were forced to commit. The better legal approach is to use the vulnerability of children to raise a defence that could result in a verdict of not guilty. Arguing a defence serves an educative function for the society into which the child must reintegrate him or herself¹⁰³ and if successful, would avert the lifetime stigma that attaches to persons found guilty of war crimes. The defences of superior orders, diminished capacity, and duress need to be analyzed to assess how they can be used to capture aspects of a child soldier's personality and life circumstances.

The defence of superior orders was categorically rejected at the Nuremberg trials following the Second World War.¹⁰⁴ It is also rejected in the statutes of the ICTY, ICTR, and SCSL.¹⁰⁵ Nevertheless, the defence has reappeared, with qualifications, in the ICC Statute. Article 33 provides:

⁹⁹ Ibid., at para. 43.

¹⁰⁰ Philip Veerman/Hephzibah Levine, *Protecting Palestinian Intifada Children: Peaceful Demonstrators, Child Soldiers, or Child Martyrs?*, 9 *International Journal of Children's Rights* 71, (2001).

¹⁰¹ *Supra* note 1, at para. 48.

¹⁰² *Supra* note 1, at para. 36.

¹⁰³ *Supra* note 3, at *184.

¹⁰⁴ *Supra* note 80, at *461.

¹⁰⁵ Article 7(4), ICTY Statute; Article 6(4), ICTR Statute; Article 6(4), SCSL Statute; Article 7 ICTY.

1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of the Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:

a) The person was under a legal obligation to obey orders of the Government or the superior in question;

b) The person did not know that the order was unlawful; and

c) The order was not manifestly unlawful.

2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.¹⁰⁶

Even if the argument could be made, therefore, that Article 33 accurately reflects the availability of the superior orders defence at customary law, the first prong of the test at first blush presents a problem. Where child soldiers are illegally recruited, it will be difficult if not impossible to prove that they were under a legal obligation to obey orders of the superior in question. However, the precise circumstances that give rise to this problem, namely, the fact that child soldiers are often illegally recruited, justifies relaxing the first prong of the test. It would be absurd and unjust to bar a child soldier from availing him or herself of the defence of superior orders solely because the first prong of the test is not met by reason of illegal recruitment.

Further, if the presumption that genocide and crimes against humanity are manifestly unlawful acts is applied to child soldiers, the availability of the defence is limited to war crimes. Under the 'manifestly unlawful' prong of the test, it could be argued that, in some circumstances, child soldiers may not be able to differentiate between legal and illegal acts. Further, in cultures where obedience is deeply entrenched, child soldiers feel compelled to obey orders by commanders to commit crimes.¹⁰⁷ In Rwanda, for example, conformity and obedience to authority are important social norms and have been throughout the country's history.¹⁰⁸

Article 31(1)(b) of the ICC Statute states that if the following condition exists at the time a person committed a war crime, crime against humanity or genocide, criminal responsibility is excluded:

The person is in a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court.¹⁰⁹

It is critical that, in cases where child soldiers are forced to take drugs, the defence of diminished capacity is fully exploited. Some military commanders drug

¹⁰⁶ *Supra* note 15, at Article 33.

¹⁰⁷ *Supra* note 8, at *645.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Supra* note 15, at Article 31(1)(b).

child soldiers or force them to take drugs so that they will be “braver” and easier to control.¹¹⁰ One child soldier interviewed by Amnesty International stated:

When I go to battlefields, I smoke enough. That’s why I become unafraid of everything ... When you refuse to take drugs, it’s called technical sabotage and you are killed.¹¹¹

The difficulty with successfully using the defence of diminished capacity in some cases is that if a child “voluntarily” takes drugs to muster the courage to execute orders, then he or she is still legally responsible for the consequences of his or her acts. Again, the diminished capacity defence should account for the fact that a child should never have found him or herself in the midst of a conflict in the first place. If a court applies a strict definition of the defence, counsel for a child soldier should try to introduce intoxication or diminished capacity as a mitigating factor at the sentencing phase.

Several reports confirm that child soldiers are often abducted and forced to become combatants.¹¹² Many are later forced to perpetrate atrocities against strangers and even loved ones.¹¹³ Article 31(1)(d) of the ICC Statute defines the defence of duress as follows:

The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:

- (i) Made by other persons; or
- (ii) Constituted by other circumstances beyond that person’s control.

Thus, the essential elements to the defence of duress are an imminent threat of serious harm to life or limb, a proportionate response to the threat, and proof that the person presenting the defence of duress did not voluntarily bring about the circumstances that gave rise to the coercive act. Though the Appeals Chamber of the ICTY and ICTR considered and ultimately rejected the availability of the defence of duress in the case of *The Prosecutor v. Drazen Erdemovic*¹¹⁴, the inclusion of this defence in the ICC Statute appears to have overturned that decision.¹¹⁵ The availability of this defence for child soldiers is also consistent with the international legal prohibition of their recruitment. The recruitment of child soldiers under the age of 15 for either an international or internal conflict is a war crime in itself.¹¹⁶ In a strong dissenting judgement in the *Erdemovic* case, Judge Antonio Cassese held that the defence of duress is part of customary international law, though he

¹¹⁰ *Supra* note 13, at 2; *supra* note 1, at para. 47; *supra* note 22, at *19.

¹¹¹ *Supra* note 22, at *19.

¹¹² *Supra* note 1, at para. 36.

¹¹³ *Ibid.*, at para. 47-48; *supra* note 22 at *19; *supra* note 12 at 6.

¹¹⁴ *Prosecutor v. Drazen Erdemovic*, Case No.: IT-96-22-A, Judgement, 7 October 1997.

¹¹⁵ William Schabas, General Principles of Criminal Law in the International Criminal Court Statute (Part III), *European Journal of Crime, Criminal Law and Criminal Justice* 6 (1998) 4.

¹¹⁶ *Supra* note 15, at Article 8(2)(b)(xxvi) and Article 8(2)(e)(vii).

admitted that it must be applied strictly when innocent civilians are killed, as the right to life is a fundamental human right.¹¹⁷

Even if duress is available as a complete defence for war crimes, crimes against humanity and genocide, several cautionary remarks are necessary. First, it will be extremely difficult for courts to decide whether to accept the defence because the exercise of weighing the value of one person's life against another's is fundamentally contrary to the universality of human rights. Judge Cassese admits that the weighing of human life is an impossible task.¹¹⁸ In the case of murder or genocide that a threatened child soldier is told will occur irrespective of his or her compliance with an order to shoot, it might be easier for a court to engage in a proportionality analysis. Here, the order is to kill x civilians and if the accused does not comply with the order, x civilians will be killed anyways as well as the accused. This was the scenario that existed in the case of *Erdemovic*.¹¹⁹

Other than the difficulty of balancing the worth of individual lives, the requirements of proportionality, involuntariness and imminence might be difficult to satisfy for child soldiers. The response of a child soldier to a threat issued by a commander might not be proportionate because the child has a distorted perception of the commander's power and/or does not appreciate how to minimize the pain suffered by the victim. Rather than shoot an individual once strategically for example, an inexperienced child soldier might fire several times ineffectually, thereby causing greater suffering than was necessary. In contemplating the availability of this defence, therefore, a court should consider a child's mental immaturity, age and evolving capacities in accordance with the CRC.

In *Erdemovic*, Judge Cassese asserted that if a person joins a military group voluntarily and has or ought to have knowledge of its illegal acts, or remains a member of the group after learning about its criminal practices, he or she does not meet the duress defence requirements.¹²⁰ Children may join a military unit with knowledge of its illegal conduct. In many cases, however, they are forcibly recruited to join such a unit.¹²¹ The defence of duress, however, requires the threat to be imminent. Thus, the circumstances that lead a child to become a combatant might not be legally relevant. Child rights advocates should argue that a child's decision to become a combatant must be a true expression of free will if it may deprive him or her of the chance to raise the defence of duress. Evidence of an unsuccessful attempt at desertion might help to advance this argument. Further, the Optional Protocol to the CRC states criterion that can be used to assess voluntariness,

¹¹⁷ *Prosecutor v. Drazen Erdemovic*, Case No.: IT-96-22-A, Judgement, 7 October 1997, Judge Antonio Cassese's Dissenting Opinion, at para. 44.

¹¹⁸ *Ibid.*, at para. 50.

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*, at para. 17 and 50.

¹²¹ *Supra* note 1, at paras. 36-43.

including the consent of a parent or guardian, informing the child of his or her duties in military service and proof of age.¹²²

A child's decision to become a soldier is almost never voluntary.¹²³ Those who are not abducted or conscripted are forced to fight due to poverty.¹²⁴ It seems unlikely that poverty will be accepted as a legal justification for joining a military unit that commits crimes. Even if it were, it would have to be proven that when the child soldier committed the alleged offence, an imminent threat of serious harm existed. Nevertheless, duress is perhaps the best defence to use for child soldiers who are threatened or beaten into submission. It is also useful because Judge Cassese contends that military rank should be taken into account when considering the defence of duress.¹²⁵ He rightly reasons that the lower the rank of the accused, the greater will be his or her tendency to surrender to compulsion.¹²⁶ This assumption works in favour of child soldiers.

Sentencing and Reintegration into Society

Article 39 of the CRC states:

State Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of ... armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

Article 40(1) reinforces this message by stating that every child who has committed a crime must be treated with dignity and in a manner that takes into account the child "... assuming a constructive role in society". It is at the sentencing phase that these goals can be promoted or undermined. Under international law, no person under the age of 18 can be sentenced to death.¹²⁷ The ICTY¹²⁸, ICTR¹²⁹, ICC¹³⁰ and SCSL¹³¹ statutes comply with this prohibition. The SCSL Statute states that its work may not interfere with a child's rehabilitation and if a child soldier is prosecuted, he or she cannot be sentenced to imprisonment.¹³² Article 7 of the SCSL Statute virtually replicates the language contained in Articles 39 and 40(1) of the CRC. Moreover, in accordance with Article 40(4) of the CRC, which states that

¹²² *Supra* note 7, at Article 3.

¹²³ *Supra* note 1, at paras. 38-39.

¹²⁴ *Ibid.*

¹²⁵ *Supra* note 117, at para. 51.

¹²⁶ *Ibid.*

¹²⁷ *Supra* note 6, at Article 37(a); *supra* note 12, at Article 6(5).

¹²⁸ *Supra* note 80 (ICTY Statute), at Article 24(1).

¹²⁹ *Supra* note 81, at Article 23(1).

¹³⁰ *Supra* note 15, at Article 77.

¹³¹ *Supra* note 19, at Article 19.

¹³² *Ibid.*, at Article 7 and Article 19.

numerous dispositions shall be available in a juvenile justice system, the SCSL Statute lists a variety of dispositions for convicted child soldiers including: "... care guidance and supervision orders, community service orders, counselling, foster care, correctional, educational and vocational training programmes, approved schools and, as appropriate, any programmes of disarmament, demobilization and reintegration or programmes of child protection agencies."¹³³

If a State or international body prosecutes a child soldier and imprisonment is an option available to the sentencing judge, the length of imprisonment shall be commensurate with the circumstances and offence.¹³⁴ Individual circumstances that have traditionally been considered at war crimes trials are age, infirmity, and even cooperation with the prosecutor.¹³⁵ Article 15 of the Beijing Rules states that courts should complete a social inquiry report before sentencing, which describes a child's background and living circumstances.¹³⁶ This type of report can help a court understand how a child's maturity and life circumstances influenced his or her conduct. Obedience to orders may mitigate punishment.¹³⁷ At the sentencing stage, a court should consider defences that were either inadmissible as defences or else unsuccessful.¹³⁸ Whatever the sentence, it cannot be cruel, inhuman or degrading to a child.¹³⁹

With respect to children who have infringed penal law, Article 40(3)(b) of the CRC obliges states to promote "[w]henever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected" [emphasis added].¹⁴⁰ The Second Additional Protocol to the Geneva Conventions, which applies to non-international conflict, states that if possible, participants in armed conflict should not be prosecuted.¹⁴¹ The drafters of this article presumably wanted to promote reconciliation. The goals of the ICTY and the ICTR are deterrence, retribution, truth and collective healing.¹⁴² Given the emphasis in both international human rights and criminal law on diversion, the question arises, when is it appropriate, desirable and possible to not prosecute child soldiers? If it is in a child's best interests to recover and be reintegrated into society¹⁴³, then prosecution is appropriate, desirable and possible if it facilitates these goals. This means that one needs to consider the physical and psychological needs of a child soldier as

¹³³ Ibid., at Article 7(2).

¹³⁴ *Supra* note 6, at Article 40(4).

¹³⁵ *Supra* note 80, at *493.

¹³⁶ *Supra* note 10.

¹³⁷ *Supra* note 80, at *483.

¹³⁸ Ibid., at *490.

¹³⁹ *Supra* note 6, at Article 37(a).

¹⁴⁰ Article 11 of the Beijing Rules echoes this provision.

¹⁴¹ *Supra* note 7, at Article 6(5).

¹⁴² *Supra* note 80, at *499.

¹⁴³ This assumption is drawn from Article 39 of the CRC.

well as the needs of the community into which he or she must be reintegrated. The appropriateness of prosecuting a child soldier will undoubtedly be difficult to assess, as the needs of the child and the demands of the community to which he or she must return might conflict.

In some cases, the society that a child soldier is returning to will be a violent and broken one. There will be some societies that will celebrate the child's violent acts and will, therefore, not demand that the child be prosecuted. Whereas a Palestinian child soldier might be celebrated as a martyr in his or her community, Rwandans argue that children who committed genocide deserve a punishment worse than death.¹⁴⁴ In a society where prosecution is demanded and not forthcoming, vigilante justice might result with the gravest of consequences for child soldiers. The CRC promotes reintegrating children into society but perhaps this presupposes that society is a positive environment for the child and not in need of reform itself. The real challenge in many post-conflict societies will not just be to return a child soldier to society, but also to heal the society itself by shifting citizens' focus from violence and vengeance to peace and forgiveness.

This shift can be facilitated in part by prosecuting a child soldier in a public rather than private forum. If a child soldier's trial is public, it can serve as a heuristic device to educate the citizenry about the physical and mental abuse that many child soldiers endure.¹⁴⁵ In turn, this could facilitate national reconciliation and, therefore, child soldiers' social reintegration. According to Article 40(b)(vii) of the CRC, however, a child must "... have his or her privacy fully respected at all stages of the proceedings". If child soldiers are to be prosecuted and the trial is open to the public, creative means will have to be used to protect the identity of the accused in court and in the media. If the trial is private, then the goals of education and national reconciliation are far more difficult to achieve. The purpose of a private proceeding might be deterrence, retribution and the child's rehabilitation. Deterrence, however, is best achieved by prosecuting the adults who recruit child soldiers.¹⁴⁶ Retribution might be unnecessary as child soldiers are often forced to fight¹⁴⁷ and, therefore, do not possess the requisite culpability for a conviction. As for rehabilitation, there are numerous ways to facilitate a child's recovery and social reintegration without resorting to judicial proceedings.

Demobilization programmes place emphasis on disarming child soldiers, sending them to school, tracing their families and providing them with counselling. Demobilization programmes in El Salvador offered ex-combatants, including children, a choice between scholarships for university, technical training, small business loans, or agricultural training and a parcel of land on credit.¹⁴⁸ Although un-

¹⁴⁴ *Supra* note 100; *supra* note 8, at *655 (see footnote 133).

¹⁴⁵ *Supra* note 3, at *184.

¹⁴⁶ *Supra* note 8, at *654.

¹⁴⁷ *Supra* note 1, at para. 36.

¹⁴⁸ Ilene C o h n, *The Protection of Children in Peacemaking and Peacekeeping Processes*, Harvard Human Rights Journal, Spring 1999, online: Westlaw, at *166-167.

successful, efforts to demobilize ex-combatants in Liberia also focussed on education, training, rehabilitation and reintegration.¹⁴⁹ United Nations education vouchers were ineffective, family tracing was only provided to persons under the age of eighteen at the time of demobilization, and only a few children received care in transit homes.¹⁵⁰ Others received basic staples and were left to their own devices.¹⁵¹ Many children who did demobilize in Liberia are still under the *de facto* control of their military commanders and living on the street.¹⁵² One reason to prosecute child soldiers is to increase their chances of participating in formal demobilization and rehabilitation programmes so that their fate might be different from that of Liberian child soldiers.

Some child soldiers return to communities where church leaders invite them to participate in rituals designed to absolve them of guilt and welcome them back to the community. For example, in many African societies, traditional healers cleanse former child soldiers who are haunted by the spirits of their victims.¹⁵³ Part of facilitating a former child soldier's reintegration means preparing families and communities to receive them.¹⁵⁴ Counselling is needed to help families cope with ex-combatants' attitudes and their lack of discipline.¹⁵⁵ Children returning to communities after taking part in hostilities may feel frustrated by their lack of useful skills and subsequent inability to contribute to society.¹⁵⁶

The establishment of truth commissions is another way of facilitating individual and community healing.¹⁵⁷ Truth commissions in Argentina and South Africa involved the participation of youth.¹⁵⁸ However, individuals working with children need to be properly trained so that testifying before a commission does not spur the onset of a new trauma. Ultimately, how best to reintegrate a former child soldier into society is context specific. In Mozambique, citizens wanted to focus on demobilization and were not interested at all in the creation of a truth commission.¹⁵⁹ Most Rwandans believe that children should be punished like adults and sentenced to the death penalty.¹⁶⁰ They also believe that harsh penalties are necessary to deter children from re-offending, to break the historical cycle of impunity,

¹⁴⁹ *Ibid.*, at *170-1.

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.*

¹⁵² *Ibid.*

¹⁵³ *Supra* note 1, at paras. 55-56.

¹⁵⁴ *Supra* note 148, at *172.

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid.*, at *172-3.

¹⁵⁷ *Ibid.*, at *180 ; *supra* note 1, at paras. 247 and 276.

¹⁵⁸ *Ibid.*, at *175-6.

¹⁵⁹ *Ibid.*, at *178.

¹⁶⁰ *Supra* note 8, at *655 (see footnote 133).

to express empathy for the victims and to spare children from the vengeance that their victims seek to exact.¹⁶¹

Conclusion

As evidenced by the difficulty in assessing a child soldier's culpability and the defences available to him or her, it will and should be difficult to successfully prosecute child soldiers for war crimes, crimes against humanity and genocide. This paper has attempted to demonstrate how international human rights and humanitarian law can be used to protect the rights and best interests of child soldiers in judicial proceedings. A post-conflict society will have numerous objectives in the wake of hostilities. Not all of them will promote the welfare of child soldiers. In balancing the goals of national reconciliation, justice and child soldiers' rehabilitation and reintegration into society, child rights advocates and communities should consider creative alternatives to judicial proceedings. Ultimately, child soldiers are victims more than they are perpetrators.

¹⁶¹ *Supra* note 148, at *187.