

Does and Should International Law Prohibit the Prosecution of Children for War Crimes?

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Introduction

The debate on whether alleged war criminals should face justice after a conflict revolves around the restorative and retributive approaches to post-conflict justice. The tendency is to accept that a combination of the two is ideal to not only punish and deter crimes but also give society a chance to move on whilst remembering and learning from the past. In this context children are assumed to be victims, rather than perpetrators, of crimes. The suggestion that they should be prosecuted for grave breaches of the Geneva Conventions (GCs)¹ and Additional Protocol I (AP I)² or for war crimes³ in international and non-international armed conflict,⁴ is frowned upon by a number of non-governmental organizations (NGOs) and UN bodies. Children are essentially viewed as innocent, victims of the armed conflict, who should thus be treated as such.⁵

However, the reality reveals that children, defined as individuals under the age of 18 years old,⁶ take part in the hostilities and are involved in a range of acts such as fighting,⁷ guarding, gathering information, portering, providing medical assistance,

¹ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 1949, 75 UNTS 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea 1949, 75 UNTS 85; Geneva Convention relative to the Treatment of Prisoners of War 1949, 75 UNTS 135; Geneva Convention relative to the Protection of Civilian Persons in Time of War 1949, 75 UNTS 287.

² Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts 1977, 1125 UNTS 3.

³ Rule 158 of the Study on Customary International Humanitarian Law of the International Committee of the Red Cross available at https://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter44_rule158 (last visited 30 January 2016). This rule is established in both international and non-international armed conflict.

⁴ For a thorough discussion on the definition of grave breaches and war crimes, see Divac Öberg, 'The Absorption of Grave Breaches in to War Crimes Law', 91 *International Review of the Red Cross (IRRC)* (2009) 163. It must be noted that as the notion of 'war crimes' covers both grave breaches (which trigger a mandatory enforcement mechanism under the GCs and AP I) and non-grave breach war crimes, this article uses the term 'war crimes'.

⁵ For an interesting discussion on the presumption of victimhood, see Sinha, 'Child Soldiers as Super-Privileged Combatants', 17 *International Journal of Human Rights* (2013) 584, at 587-589.

⁶ Art. 1, United Nations Convention on the Rights of the Child 1989, 1577 UNTS 3.

⁷ Judgment, *Lubanga*, ICC-01/04-01/06, Trial Chamber I, 14 March 2012, §§ 489, 788, 809, 821-834, 835-837, 878-882; Judgment, *Taylor*, SCSL-03-01-T, Trial Chamber II, 18 May 2012, §§ 1458, 1477, 1479, 1522, 1546. A. Veale, *From Child Soldier to Ex-Fighter: Female Fighters, Demobilisation and*

carrying out domestic chores, taking care of younger children, running errands for breastfeeding mothers, carrying supplies, undertaking food-finding missions, helping to loot villages, and taking part in abducting and training other children. As some children take a direct part in the hostilities⁸ they are likely to be involved, either directly or indirectly, in the commission of war crimes.⁹ Dominic Ongwen, who is now to be tried before the International Criminal Court,¹⁰ is an illustrious example of the complexity of the issue: abducted as a child and forcibly recruited into the Lord's Resistance Army in Uganda he rose through the ranks by committing a wide range of war crimes.¹¹ There are also more recent and similarly gruesome examples of children with ISIS, shooting or guarding prisoners to be later beheaded.¹²

Yet, there is a growing tendency on the international plane to view children almost exclusively as victims of armed conflict¹³ and consider them as unable to understand their own actions in the context of the conflict. It is claimed that their immaturity does not allow them to distinguish right from wrong¹⁴ or to fully comprehend

Reintegration in Ethiopia (2002); Faulkner, 'Kindergarten Killers: Morality, Murder and the Child Soldier Problem', 22 *Third World Quarterly* (2001) 494; Save the Children, *Forgotten Casualties of War: Girls in Armed Conflict* (2005) at 11.

⁸ Whether children fall within the definition of direct participants in hostilities depends on the types of activities they carry out. *Lubanga*, *supra* note 7, § 628. See discussion that predates the decision in Quénivet, 'Girl Soldiers and Participation in Hostilities', 16 *African Journal of International and Comparative Law* (2008) 219-225. For a definition of direct participation, see Y. Sandoz, C. Swinarski and B. Zimmermann (eds), *Commentary on the Additional Protocols to the Geneva Conventions* (1987), at para. 1944; Nils Melzer, *Interpretive Guide on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* (2009), available at <http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf> (last visited 30 January 2016).

⁹ Lafayette, 'The Prosecution of Child Soldiers: Balancing Accountability with Justice', 63 *Syracuse Law Review* (2012-2013) 297, at 298.

¹⁰ Warrant of Arrest for Dominic Ongwen, ICC-02/04, 8 July 2005.

¹¹ Cakaj, 'The Complex Story of a Child Soldier', *Monkey Cage*, 12 January 2015; *Complicating Victims and Perpetrators in Uganda: On Dominic Ongwen*, 7 JRP Field Note 1 (July 2008), available at http://justiceandreconciliation.com/wp-content/uploads/2008/07/JRP_FN7_Dominic-Ongwen.pdf (last visited 30 January 2016); Drumbl, 'A Former Child Soldier Prosecuted at the International Criminal Court', 26 September 2016, OUP Blog, available at <http://blog.oup.com/2016/09/child-soldier-prosecuted-icc-law> (last visited 27 September 2016).

¹² See eg Lichfield, 'Isis Child Militant: Boy Seen "Shooting Israeli-Arab Spy" in Execution Video Recognised by Schoolmates in Toulouse', *The Independent*, 14 March 2015; 'Children Take Eight Isis Captives to Be Beheaded in Latest Propaganda Video', *The Independent*, 29 March 2015; Bloom, 'Why ISIS Is Increasingly Using Kids As "Cubs Of The Caliphate"', *The Huffington Post*, 24 March 2015.

¹³ UN Secretary General, Report on the Establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, 4 October 2000, § 7 (UNSG Report).

¹⁴ Reis, 'Trying the Future, Avenging the Past: The Implications of Prosecuting Children for Participation in Internal Armed Conflict', 28 *Columbia Human Rights Law Review* (1997) 629, at 644; Happold, 'Child Soldiers: Victims or Perpetrators?', 29 *University of La Verne Law Review* (2008) 56, at 62.

the consequences of their acts;¹⁵ they are pawns in the adult game of war.¹⁶ Consequently, it is argued that children are not culpable and thus should not be prosecuted. For example, during the negotiations relating to the establishment of the Special Court for Sierra Leone, NGOs pleaded against the prosecution of children as they believed such trials to stigmatize children and compromise their rehabilitation into the local community.¹⁷ United Nations bodies ascertain that ‘children associated with armed groups should not be detained or prosecuted, but should be *primarily* treated as victims by virtue of their age and forced nature of their association’.¹⁸ In similar terms, though expressly referring to children as perpetrators, the non-legally binding Paris Principles encourage States to consider children ‘*primarily* as victims of violations against international law and *not only* as alleged perpetrators’.¹⁹ As aptly summarised by Drumbl, ‘criminally prosecuting child soldiers ... [is] increasingly... viewed as inappropriate and undesirable’²⁰ under the *lex desiderata* created by the global civil society and UN agencies.²¹

Yet, as Ryan explains ‘[w]hile international law gives preference to the rehabilitation and reintegration of child soldiers, it does not expressly prohibit the prosecution of children for violations of the laws of war’.²² So, what is the *lex lata*? To answer this question, two bodies of law must be analysed: international humanitarian law

¹⁵ Amnesty International, *Child Soldiers. Criminals or Victims?* (2000) 6-7; Schmidt, ‘Volunteer Child Soldiers as Reality: A Development Issue for Africa’, 2 *New School Economic Review* (2007) 60.

¹⁶ See eg Integrated Disarmament, Demobilization and Reintegration Standards (Aug. 1 2006), module 5.30, at 9, available at <http://www.unddr.org/iddrs.aspx> (last visited 30 January 2016), (IDDR Standards).

¹⁷ UNSG Report, *supra* note 13, at § 35. See discussion in Custer, ‘Punishing Child Soldiers: The Special Court for Sierra Leone and the Lessons to Be Learned from the United States’ Juvenile Justice System’, 19 *Temple International and Comparative Law Journal* (2005) 458.

¹⁸ UN Special Representative of the Secretary-General for Children and Armed Conflict, Children and Justice during and in the Aftermath of Armed Conflict, September 2011, 27 (UNSR Children and Justice); see also Committee on the Rights of the Child, Consideration of Reports Submitted by States Parties under Article 44 of the Convention. Concluding Observations: Democratic Republic of Congo, UN Doc. CRC/C/COD/CO/2, 10 February 2009, § 72 (UNCRC DRC). See discussion in Manirakiza, ‘Les enfants face au système international de justice: à la recherche d’un modèle de justice pénale internationale pour les délinquants mineurs’, 34 *Queen’s Law Journal* (2008-2009) 719, at 722.

¹⁹ ICRC, The Paris Commitments Consolidated Version: The Paris Commitments to Protect Children from Unlawful Recruitment or Use by Armed Forces or Armed Groups, § 11 (2007), available at <http://www.icrc.org/eng/assets/files/other/the-paris-commitments.pdf> (italics added) (last visited 30 January 2016)

²⁰ M Drumbl, *Reimagining Child Soldiers in International Law and Policy* (OUP 2012) at 103.

²¹ See discussion in Drumbl, *supra* note 20, at 102-103

²² Ryan, ‘International Law and the Laws of War and International Criminal Law’, 33 *Suffolk Transnational Law Review* (2010) 175, at 177.

(IHL) and international human rights law (IHRL).²³ Whilst treaty law in IHL and IHRL allow for the prosecution of children for grave breaches and war crimes²⁴ they have also set limits on the prosecution. What about customary law?²⁵ This is less clear and thus the question is: have States made use of this permissive, though constrained, international law framework or have they preferred to follow the approach of certain United Nations organs, thereby supporting the creation of a new customary norm prohibiting the prosecution of children for war crimes?

After arguing that no emerging customary norm preventing States from prosecuting children for war crimes can be discerned, this article contends that international law should retain States' ability to try children for war crimes, should the circumstances warrant doing this, though some requirements for the prosecution as well as a minimum age of criminal responsibility should be agreed upon.²⁶ The article also showcases the interplay between a post conflict restorative and a juvenile rehabilitative system of justice.

1. International Legal Framework Governing Prosecution on the National Level

State action regarding the prosecution of children who are suspected to have committed war crimes is constrained by IHL and IHRL norms,²⁷ both legal regimes applying in times of armed conflict.²⁸

²³ Ntuda Ebode, 'Les enfants soldats dans les crises africaines: Entre logique militaire et stratégies politiques', 2 *Guerres mondiales et conflits contemporains* (2006) 111, at 113.

²⁴ Park, 'Constituting Omar Khadr: Cultural Racism, Childhood, and Citizenship', 8 *International Political Sociology* (2010) 43, at 49.

²⁵ Customary law is comprised of two components that must be conjunctly fulfilled: a pattern of practice or behaviour and the acceptance of such practice/behaviour as a legal obligation. Art. 38, Statute of the International Court of Justice, 59 Stat. 1055, 1060 (1945). As the International Court of Justice explained, '[n]ot only must the acts concerned amount to a settled practice but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.' *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark and Federal Republic of Germany v. The Netherlands)*, Judgment, 20 February 1969, ICJ Reports (1969) 3, § 77.

²⁶ This article does not examine issues such as the trial itself or the sentencing if the child is found guilty but focuses on whether prosecution is lawful and, if so, suitable.

²⁷ To some extent international criminal law also imposes duties upon the State but to a lesser extent. Therefore international criminal law will be used in this article as a tool to establish customary international law, rather than as the legal framework governing prosecution on the national level.

A. International Humanitarian Law

International humanitarian law regulates conduct in armed conflict. The GCs and AP I which apply in situations of international armed conflict provide for a mandatory enforcement mechanism for state parties to investigate and prosecute individuals having committed acts listed in respectively Articles 50 GC I, 51 GC II, 130 GC III, 147 GC IV and 85 AP I. As a result States are obliged to search and prosecute individuals, be they members of the armed forces (under the principle of State responsibility) or private actors (under the principle of due diligence),²⁹ for grave breaches. In contrast, there is no similar treaty obligation in non-international armed conflicts. Further, there are war crimes that are not listed in the grave breaches provisions. Rule 158 of the ICRC Study on Customary International Humanitarian Law covers these situations as it specifies that ‘States must investigate *war crimes* allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects’, irrespective of the nature of the armed conflict.³⁰ It can thus be argued that States have the duty to investigate alleged war crimes and, if appropriate, prosecute the suspects and these could include child soldiers. Nonetheless, IHL does not create a criminal system to prosecute those who violate it. As the ‘grave breaches provisions in the Geneva Conventions are ... insufficiently detailed to work on their own as a criminal code’³¹ it is left to the States to implement national legislation.

²⁸ The interaction between IHL and IHRL is the subject of much wrangling, ranging from the application of the *lex specialis* to a system of complementarity. See further discussions in R. Arnold and N. Quéniwet (eds), *International Humanitarian Law and Human Rights Law. Towards a New Merger in International Law* (2008); R. Kolb and G. Gaggioli, *Research Handbook on Human Rights and Humanitarian Law* (2013), O. Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law* (2011).

²⁹ Sassòli, ‘State Responsibility for Violations of International Humanitarian Law’, 87 *IRRC* (2002) 401, at 411-412.

³⁰ (emphasis added) See also discussions in Schmitt, ‘Investigating Violations of International Law in Armed Conflict’ 2 *Harvard National Security Journal* (2011) 31, at 44-48, Roht-Arriaza, ‘State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law’, 78 *California Law Review* (1990) 451, at 465-467; also Manirakiza, *supra* note 18, at 736. Further the Statutes and the case-law of international criminal tribunals such as the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), the Special Court for Sierra Leone (SCSL) and the International Criminal Court (ICC) have jurisdiction over crimes perpetrated in international and/or non-international armed conflicts.

³¹ Öberg, *supra* note 4, at 166.

Does it mean that IHL has nothing to say with regard to children? There are no specific provisions that exclude children from the prosecution for war crimes in treaty law. During the negotiations of Additional Protocol I and Additional Protocol II, Brazil proposed to insert a provision with the aim to set criminal responsibility at the age of 16.³² Although it was supported by a number of States, it was eventually decided that this issue should be left to national regulation.³³ Faced in *Orić* with the submission that there was no criminal liability for a war crime perpetrated by an individual below the age of 18, the International Criminal Tribunal for the Former Yugoslavia (ICTY) bluntly stated that ‘no such rule exists in conventional or customary international law’.³⁴

International humanitarian law treaties do not provide for a single age specification; rather the relevant age of a child in each case is cast in the light of the interest protected,³⁵ ranging from infants to children under 18 years of age.³⁶ Other provisions relating to children only protect those under 15 as there seemed to be a consensus during the drafting of the Geneva Conventions that children attain a certain maturity at that age.³⁷ In similar vein the drafters of the Additional Protocols set the age of recruitment and participation in hostilities at 15.³⁸ It seems to indicate a belief that a child below such age ‘does not have the requisite mental, physical, or moral development to make a logical decision regarding his or her participation in the conflict’³⁹ which in turns means that they cannot be held responsible for crimes committed whilst engaged in

³² Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (1974-1977), Volume XV, at 66, §§ 11-12 (amendments CDDH/III/325 for AP I and CDDH/III/328 for AP II) (Official Records of the Diplomatic Conference).

³³ Official Records of the Diplomatic Conference, *supra* note 32, Volume XV, at 466, § 65.

³⁴ Judgment, *Orić*, IT-06-68-T, Trial Chamber II, 30 June 2006, §400.

³⁵ Helle, ‘Optional Protocol on the Involvement of Children in Armed Conflict to the Convention on the Rights of the Child’, 839 *IRRC* (2000) 797. *See also* J. Pictet, Commentary on the Geneva Conventions of 12 August 1949: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1958) 285.

³⁶ Office of the United Nations High Commissioner for Human Rights, Legislative History of the Convention on the Rights of the Child, Volume II, Comment by the International Committee of the Red Cross, 784 (2007), at 784 (UNHCHR).

³⁷ Sandoz, Swinarski and Zimmermann (eds), *supra* note 8, para. 3179; Fontana, ‘Child Soldiers and International Law’, 6(3) *African Security Review* (1997) 51, at 52-53.

³⁸ Art. 77 AP I and Art. 4(3) Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) 1977, 1125 UNTS 609 (AP II).

³⁹ Lafayette, *supra* note 9, at 303. Happold, *supra* note 14, at 70-71.

operations.⁴⁰ Moreover, provisions relating to the participation of children in armed conflict imply that children can be prosecuted, for they clearly spell out in article 77 AP I and 6(4) AP II that the death penalty cannot be imposed on children under the age of 18 found guilty of offences related to the armed conflict.⁴¹

Some legal scholars contend that as the Optional Protocol to the United Nations Convention on the Rights of the Child (Optional Protocol)⁴² precludes children under the age of 18 years of age from taking part in hostilities such children should be shielded from legal responsibility too.⁴³ This however does not seem to be entrenched in law yet, notably because the Optional Protocol still allows for children above the age of 16 to be at least recruited, though not deployed, thereby giving the impression that States consider that children are not so immature as to not realize what becoming a member of the armed forces entails. As Happold indicates ‘[t]his view of children’s evolving mental capacities has obvious relevance as to whether they should be held criminally responsible for their actions’.⁴⁴

Under IHL children above 15 years of age can be held criminally responsible for serious violations of IHL.⁴⁵ States are left to make use of this permissive rule within their own national legal system.

B. International Human Rights Law

Human rights law instruments such as the International Covenant on Civil and Political Rights⁴⁶ or the more specific United Nations Conventions on the Right of the Child (UNCRC) do not ban the prosecution of children. In fact they detail the rights of children facing justice, thereby acknowledging that children can be held legally

⁴⁰ See discussion in Manirakiza, *supra* note 18, at 742.

⁴¹ Jenks, ‘No Child’s Play: Revisiting the Law of Child Soldiers’, *Jurist* (13 April 2010).

⁴² Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict and on the Sale of Children, Child Prostitution and Child Pornography, GA Res. 54/263, UN Doc. A/54/RES/263, 16 March 2001 (Optional Protocol).

⁴³ Grossman, ‘Rehabilitation or Revenge: Prosecuting Child Soldiers for Human Rights Violations’, 38 *Georgetown Journal of International Law* (2007) 323, at 342.

⁴⁴ Happold, *supra* note 14, at 71.

⁴⁵ UNSR Children and Justice, *supra* note 18, at 34; Grossman, *supra* note 43, at 341-342.

⁴⁶ International Covenant on Civil and Political Rights 1966, 999 UNTS 171.

accountable.⁴⁷ For example, Article 40 UNCRC offers a legal framework requiring that when children are tried the process be fair and take into account their specific needs and vulnerabilities whilst the non-binding Beijing Rules, which spell out standard minimum rules for the administration of juvenile justice, provide for a more elaborate set of norms applicable to trials of juvenile offenders.⁴⁸

None of the international instruments dealing with the prosecution of children/juveniles set an age for criminal responsibility in national courts though.⁴⁹

Whilst it is recognized that the ‘determination of “child” or “adult” is a social construction that may be difficult to define ... in order to define specific rights ... the age for childhood and adulthood requires certainty.’⁵⁰ An assessment on a case-by-case basis would be difficult as it would require ascertaining the intellectual development of children at the time they committed the crime, bearing in mind that all children mature at different rates.⁵¹ As the Committee on the Rights of the Child explained, the assessment of a children’s criminal responsibility should not be based on ‘criteria of subjective or arbitrary nature (such as with regard to the attainment of puberty, the age of discernment or the personality of the child).’⁵² Thus, along with Article 40(2) UNCRC that requires States to establish ‘a minimum age below which children shall be presumed not to have the capacity to infringe penal laws’, the General Comment No. 10 of the Committee of the Rights of the Child specifies that age should be the only criterion.⁵³ This threshold of

⁴⁷ Grover, ‘Trial of the Child Soldier: Protecting the Rights of the Accused’, 65 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2005) 217, at 219.

⁴⁸ GA Res. 44/33: United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), 29 November 1985, (Beijing Rules).

⁴⁹ Nagle, ‘Child Soldiers and the Duty of Nations to Protect Children from Participation in Armed Conflict’, 19 *Cardozo Journal of International and Comparative Law* (2011) 35.

⁵⁰ Hackenberg, ‘Can the Optional Protocol for the Convention on the Rights of the Child Protect the Ugandan Child Soldier?’, 10 *Indiana International and Comparative Law Review* (2000) 454. See also discussion in UNSR Children and Justice, *supra* note 18, at 36 and McDiarmid, ‘What Do they Know? Child-Defendants and the Age of Criminal Responsibility: A National Law Perspective’, in K. Arts and V. Popovski (eds), *International Criminal Accountability and the Rights of the Children* (2006) 85, at 86 and 89-90.

⁵¹ McDiarmid, *supra* note 50, at 94. This was however done in English law. See *infra* note 105.

⁵² Committee on the Rights of the Child, Report on the Tenth Session, UN Doc. CRC/C/46, 18 December 1995, § 218.

⁵³ Committee on the Rights of the Child, General Comment No. 10, UN Doc. CRC/C/GC/10, 25 April 2007, § 30, (General Comment No. 10). This is however challenged by psychological research. See Veale, ‘The Criminal Responsibility of Former Child Soldiers: Contributions from Psychology’, in Arts and Popovski eds, *supra* note 50, 97, at 105 and discussion in Bradley, ‘The Age of Criminal Responsibility Revisited’, 1-2 *Deakin Law Review (Deakin L. R.)* (2003) 73, at 87-88.

age fixed by law will determine when the judicial authorities are allowed to intervene and judge the perpetrator of an act qualified as an offence.⁵⁴

Rule 4.1 of the Beijing Rules stresses that this ‘age shall not be fixed at too low a level, bearing in mind the facts of emotional, mental and intellectual maturity.’ The commentary clarifies that to determine the age of criminal liability a State’s decision must be informed by the fact that a person must understand the moral and psychological components of criminal responsibility in order to be prosecuted and have enough individual discernment and understanding that s/he engaged in criminal behaviour.⁵⁵

General Comment No. 10 of the UNCRC stipulates that the age of 12 should be the absolute minimum age.⁵⁶ Therefore the margin of appreciation left to States to decide upon the age of criminal responsibility is broad and ‘the age of criminal responsibility varies considerably from State to State.’⁵⁷ The margin of discretion allows States to frame the age of criminal responsibility in a cultural context; the commentary to Rule 4.1. of the Beijing Rules adds that often such an age is linked to other social rights and responsibilities such as marital status and civil majority. Article 1 UNCRC acknowledges that childhood is a sociologically and culturally constructed concept,⁵⁸ allowing States to set an age for majority that is in line with cultural and social norms. It is in this vein that the setting of an age for criminal responsibility must be understood.

Obviously IHRL does not consider children as innocent *per se*; they are responsible for their acts once they have reached the minimum age of criminal liability. As the UNCRC makes no specific references to crimes perpetrated in armed conflict it

⁵⁴ Ottenhof, ‘General Report: Criminal Responsibility of Minors in National and International Legal Order’, (1-2) *International Review of Penal Law* (2004) 51, at 58.

⁵⁵ Beijing Rules, *supra* note 48, Commentary to 4.1. See also Lafayette, *supra* note 9, at 301.

⁵⁶ General Comment No. 10, *supra* note 53, at § 32.

⁵⁷ UNSR Children and Justice, *supra* note 18, at 35. General Comment No. 10, *supra* note 53, at § 30. See also Morss, ‘The Status of Child Offenders under International Criminal Justice: Lessons from Sierra Leone’, 9(1) *Deakin L. R.* (2004) 215.

⁵⁸ ‘[C]hildhood, adolescence and adulthood are ... socially defined statuses which include social expectations that differ across cultures.’ E. Cairns, *Children and Political Violence* (1996), at 166. See also Fox, ‘Child Soldiers and International Law: Patchwork Gains and Conceptual Debates’, 7 *Human Rights Review* (2007) 27, at 43; Wessells, ‘Psychosocial Issues in Reintegrating Child Soldiers,’ 37 *Cornell International Law Journal* (Cornell Int’l L.J.) (2004) 513; C. Aptel, *Children and Accountability for International Crimes: The Contribution of International Criminal Court* (2010) 21; Rosen, ‘Child Soldiers, International Humanitarian Law, and the Globalization of Childhood’, 109 *American Anthropologist* (2007) 296, at 297.

lends support to the argument that children can be tried for such crimes too⁵⁹ all the more as Article 38(1) UNCRC specifies that States shall respect IHL.

This conveys the impression that the Convention takes a judicial approach to juvenile justice. It does, though it is tempered by one of the most important articles of the Convention: article 3 specifies that in all decisions regarding the welfare of a child the best interests of the child should be a primary consideration. This is reflected in concrete terms in Article 40(3)(b) which stipulates that States shall seek 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.' The terminology used is cautious; States are required to promote and take into consideration a variety of elements. In more forceful terms, General Comment No. 10 underlines that 'the traditional objectives of criminal justice, such as repression/retribution, must give way to rehabilitation and restorative justice objectives in dealing with child offenders'.⁶⁰ Further, Article 17(1)(d) of the Beijing Rules asserts that '[t]he well-being of the juvenile shall be the guiding factor in the consideration of his or her case'. Consequently, even though it is lawful to try a child who has allegedly committed crimes in the context of an armed conflict, it must be assessed whether it is in the child's best interests to stand trial. The criminal process may appear to be inappropriate for alleged young offenders, for it 'may threaten the child's psychological healing by making him or her re-live trauma, delaying the return of any semblance of normalcy, and making it more difficult to him or her to reintegrate into society, particularly if the trial is public.'⁶¹ The Beijing rules and the UNCRC promote a restorative⁶² model of juvenile justice, encouraging States to minimize the need for judicial intervention.⁶³

In the specific context of armed conflicts, Article 39 UNCRC declares that States must 'take all appropriate measures to promote physical and psychological recovery and

⁵⁹ Grover, *supra* note 47, at 219.

⁶⁰ General Comment No. 10, *supra* note 53, at § 10.

⁶¹ Grossman, *supra* note 43, at 351. See also Aptel, *supra* note 58, at 29 and Nagle, *supra* note 49, at 41.

⁶² For a definition of restorative justice programme and restorative process, see ECOSOC Res. 2000/14: Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters, UN Doc. E/2000/INF/2/Add.2, 24 July 2002.

⁶³ See Beijing Rules, *supra* note 48, Commentary to Rule 1. See discussion in Manirakiza, *supra* note 18, at 731.

social reintegration of a child victim of armed conflict.’ The article refers to children ‘victims’ of armed conflict for, it aims to protect children who have suffered violence and exploitation.⁶⁴ There is no reference to the fact that such children might have been members of armed forces or groups and actively involved in the commission of crimes. Article 6(3) of the Optional Protocol refers to children unlawfully recruited or used in hostilities⁶⁵ and requires States to accord such children ‘appropriate assistance for their physical and psychological recovery and their social reintegration’.⁶⁶ States are also encouraged to cooperate with a view to rehabilitating such individuals.⁶⁷ Yet, again, there are no references to the possible prosecution of children in the Optional Protocol. The Guidelines regarding initial reports to be submitted pursuant to the Optional Protocol nonetheless require States to impart information on ‘whether and how many children have been charged for war crimes committed while recruited or used in hostilities’.⁶⁸ The Committee has so far not commented on the issue.

Thus, IHRL allows for the prosecution of children for war crimes but encourages States to promote their rehabilitation and reintegration in society, including after an armed conflict.⁶⁹ Both IHL and IHRL allow for the prosecution of children above the age of 15 years old though IHRL prefers children to be rehabilitated and reintegrated despite not imposing such an obligation on States.

In the past decade the UN Special Representative for Children and Armed Conflict has called on States to consider alternatives to prosecution of children alleged to have taken part in international crimes,⁷⁰ one of her key advocacy messages being to ‘[c]onsider excluding children under 18 from criminal responsibility for crimes

⁶⁴ See discussions in UNHCHR, *supra* note 36, at 800-804.

⁶⁵ The formulation in Article 6(3) of the Optional Protocol (‘persons within their jurisdiction recruited or used in hostilities contrary to this Protocol’) also covers individuals who were children at the time of their recruitment or use but are adults at the time of the demobilization process. Optional Protocol, *supra* note 42.

⁶⁶ GA Res. 54/263, 16 March 2001, Annex I.

⁶⁷ Art. 7 Optional Protocol.

⁶⁸ Committee on the Rights of the Child, Revised Guidelines regarding Initial Reports to Be Submitted by States Parties under Article 8, Paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflict, UN Doc. CRC/C/OPAC/2, 19 October 2007, § 8(c).

⁶⁹ See also Drumbl, *supra* note 20, at 106.

⁷⁰ Human Rights Council, Annual Report of the Special Representative of the Secretary-General for Children and Armed Conflict, Leila Zerrougui, UN Doc. A/HRC/28/54, 29 December 2014, § 72. See also

committed when associated with armed forces or armed groups’.⁷¹ This prompts the question: is the permissive rule becoming a prohibitive rule?

2. States’ Approaches to the Prosecution of Children for War Crimes

To ascertain whether the permissive rule is transforming into a customary norm prohibiting the prosecution of such children the practice and *opinio juris* of States must be examined. Have States used the permissive rule or have they followed the call of certain United Nations bodies (and NGOs) not to try children for war crimes (State practice)? If so, have they not prosecuted children because they believe this would be against the law or because it is more expedient not to do so (*opinio juris*)? Both elements will be scrutinized in the States’ national practice and in States’ establishment of international and hybrid criminal tribunals.

A. Prosecution at National Level

Few children have been prosecuted in national courts.⁷² In 2000 the Democratic Republic of Congo (DRC) prosecuted child soldiers and executed one.⁷³ In 2001 four more children were sentenced to death though the sentences were not carried out.⁷⁴ Three years later the Minister for Human Rights stated that the government favoured reintegration over prosecution.⁷⁵ Yet, it later ‘arrested, detained and tried [children] in military courts for military offences and other crimes allegedly committed while they were in armed forces or groups’.⁷⁶ Whilst Burundi arrested children involved in the

⁷¹ UNSR Children and Justice, *supra* note 18, at 36.

⁷² See the numerous examples in Happold, ‘The Age of Criminal Responsibility in International Criminal Law’, in Arts and Popovski eds, *supra* note 50, 1, at 1. Although these cases stem from African States they are indicative of the use of the permissive rule as, sadly, a number of children are involved in armed conflicts on the African continent. Information on prosecution in other States was difficult to locate.

⁷³ Amnesty International, *Democratic Republic of Congo: Massive Violations Kill Human Decency* (2000) 1; UNSR Children and Justice, *supra* note 18, at 40.

⁷⁴ Happold, *supra* note 14, at 71.

⁷⁵ Friedrich-Ebert-Stiftung, *Verlorene Kindheit – Kindersoldaten in der Demokratischen Republik Kongo. Völkerrechtliche und politische Strategien zur Beendigung des Einsatzes von Kindern als Soldaten* (2003) 36.

⁷⁶ UNCRC DRC, *supra* note 18, at § 72.

conflict in 2007, it released them without putting them on trial.⁷⁷ Rwanda arrested and prosecuted children in connection to the genocide.⁷⁸ Uganda had initially brought charges in 2002 against two children who had taken part in hostilities but later withdrew such charges.⁷⁹ The International Crimes Division of the High Court of Uganda, established to deal with crimes committed during the conflict, has charged and prosecuted adults only.⁸⁰

The reasons for States' reluctance to prosecute children are manifold. In many States there is no explicit piece of legislation or provision giving courts the power to try individuals for war crimes⁸¹ and national courts must first ascertain jurisdiction over such crimes. Further, there is little inclination to prosecute alleged war criminals as the emphasis is on reconstruction and reconciliation.⁸² If prosecutions are carried out then the focus is likely to be upon those who have committed the gravest violations or who have been most responsible for such acts.⁸³ Further, a State emerging from an armed conflict usually lacks the judicial system and infrastructures required to run an effective and fair judicial system⁸⁴ or such system and infrastructures are unlikely to be able to cope with the sheer number of potential cases.⁸⁵ The State may also view such prosecution as inefficient for the reason that 'individual punishment ... would likely not deter a child

⁷⁷ UN, Government Committed to Child Protection, Press Release, New York/Bujumbura, 13 March 2007.

⁷⁸ Human Rights Watch, *Lasting Wounds: Consequences of Genocide and War for Rwanda's Children* (2003) 18-19.

⁷⁹ Happold, *supra* note 14, at 71.

⁸⁰ See at http://www.judicature.go.ug/data/smenu/18/International_Crimes_Division.html.

⁸¹ See eg lack of provision in the Penal Code of Uganda relating to recruitment of persons under the age of 18 in the armed forces. Committee on the Rights of the Child, Consideration of Reports Submitted by State Parties under Article 8 of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict. Concluding Observations: Uganda, UN Doc. CRC/C/OPAC/UGA/CO/1, 17 October 2008, § 27.

⁸² For example, Uganda passed a law granting amnesty to fighters from the Lord's Resistance Army. The Amnesty Act (Declaration of Lapse), S.I. 2012, No. 34, (2012) (Uganda) (as cited in Yarbrough, 'Amnesty or Accountability: The Fate of High-Ranking Child Soldiers in Uganda's Lord's Resistance Army', 47 *Vanderbilt Journal of Transnational Law* (Vand. J. Transnat'l L.) (2014) 531, at 533 footnote 8).

⁸³ See for example the prosecution policy in Sierra Leone with the Special Court for Sierra Leone dealing with those bearing the greatest responsibility for crimes committed during the conflict and the Truth and Reconciliation Commission dealing with other perpetrators. See Schabas, 'A Synergistic Relationship: The Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone', 15 *Criminal Law Forum* (2004) 3.

⁸⁴ Nagle, *supra* note 49, at 37.

⁸⁵ Lafayette, *supra* note 9, at 310.

soldier from committing a crime in the here and now of collective violence'.⁸⁶ In addition, States might also consider potential reputational damage.⁸⁷

Such factors influence the decision on whether to prosecute children. Yet, the key question is whether States are and feel obliged to deal with children via rehabilitation programmes that are part of a disarmament, demobilization and reintegration (DDR) process⁸⁸ (that is usually held in the context of a post-conflict restorative model of justice). Undoubtedly, the establishment of post-conflict restorative programmes, supported by UN bodies, the ICRC and NGOs,⁸⁹ contributes to States' reluctance to prosecute child soldiers all the more as such bodies are also pushing for a rehabilitative model of juvenile justice. For example, action plans⁹⁰ negotiated between States and the UN Special Representative for Children in Armed Conflict insist that parties to a conflict not only demobilize and release children but also offer them rehabilitative options. However, such action plans are tailored to the legal obligations of the parties⁹¹ which, in turn, means that they cannot impose obligations on a State without its express consent. States are therefore free to refuse to include a rehabilitative model of juvenile justice within such action plans. In other words, State might accept the assistance of various UN institutions and NGOs for financial, political⁹² or reputational reasons.

⁸⁶ M Drumbl, *Reimagining Child Soldiers in International Law and Policy* (OUP 2012) at 179.

⁸⁷ In the aforementioned cases brought against children in the DRC and Uganda the pressure by the NGOs led to the State dropping the charges or not carrying out the death sentences. Happold, *supra* note 14, at 71.

⁸⁸ For the DDR framework, see IDDR Standards, *supra* note 16. Module 5.3 applies to children associated with armed forces and groups.

⁸⁹ See eg Committee on the Rights of the Child, Consideration of Reports Submitted by States Parties under Article 44 of the Convention. Concluding Observations: Liberia, UN Doc. CRC/C/15/Add.236, 1 July 2004, § 59(c) (UNCRC Liberia).

⁹⁰ Action plans which featured for the first time in UN Security Council Resolution 1460 (SC Res. 1460, 30 January 2003) are a tool to assist the parties that recruit and use children in hostilities to find paths to observe their legal obligations.

⁹¹ SC Res. 1539, 22 April 2004.

⁹² Eg. in its report to the UN Committee on the Rights of the Child Congo explains that the DDR programme was created to address the situation of widespread insecurity. Committee on the Rights of the Child, Consideration of Reports Submitted by States Parties under Article 44 of the Convention. Combined Second, Third and Fourth Periodic Reports of States Parties due in 2010. Congo, UN Doc. CRC/C/COG/2-4, 18 September 2012, §§ 716-718. Rwanda also explains that the Demobilization and Reintegration Commission was established 'to meet the pressing need to demobilize and reintegrate into civilian life soldiers *in general*'. Committee on the Rights of the Child, Consideration of Reports Submitted by States Parties under Article 44 of the Convention. Consolidated Third and Fourth Periodic Reports of States Parties due in 2008, Rwanda, UN Doc CRC/C/RWA/3-4, 24 February 2012, § 3110 (emphasis added)

As in the aforementioned cases the post-conflict restorative model of justice is superimposed onto a rehabilitative model of juvenile justice it becomes difficult to discern the real reasons for the lack of prosecution. This can be remedied by studying the prosecution of children outside a post-conflict restorative context. Omar Khadr,⁹³ aged 15 at the commission of the crime,⁹⁴ was prosecuted before the US military commission for the murder of an American soldier in Afghanistan.⁹⁵ None of the aforementioned factors were present in relation to the prosecution of Khadr: the US had a fully functioning judicial system, there were laws that could be used to prosecute individuals for war crimes, the number of persons to prosecute was not overwhelming, the financial and political focus was not on reconstruction and rehabilitation, etc. Given that Khadr was prosecuted it appears that such factors are indeed relevant in influencing the State's decision to prosecute children for war crimes. If that is true then the decision is one based on political and financial considerations rather than on the belief of a legal obligation that States are not allowed to prosecute children for war crimes.

It must be remembered that in the wake of the conflict in Afghanistan a number of children were apprehended by the American armed forces, 20 of which were detained in Guantanamo Bay and then in Camp Iguana, a special camp created for detainees between the age of 13 and 15.⁹⁶ They were quickly released to UNICEF in Afghanistan for rehabilitation.⁹⁷ Khadr was not the only child to be kept in Guantanamo Bay; two other boys, Mohamed Jawad and Mohammad El Gharani, both aged 16 were treated as, and

⁹³ As stated by Park, Khadr is 'simultaneously cast as an object of sympathy and suspicion, reflecting the dyadic social construction of children as both innocent and evil'. Park, *Constituting Omar Khadr*, *supra* note 24, at 44.

⁹⁴ See discussions in Sniderman, 'The Melancholy Truth' and Equitable Justice for Omar Khadr, 23 *Dalhousie Journal of Legal Studies* (2014) 172.

⁹⁵ *United States v. Khadr [Ruling on Defense Motion for Dismissal Due to Lack of Jurisdiction under Military Commission Act in regard to Juvenile Crimes of a Child Soldier]*, D-022, Military Commission, 30 April 2008.

⁹⁶ Becker, *The War on Teen Terror*, Salon (June 24, 2008), available at http://www.salon.com/2008/06/24/juveniles_at_gitmo/ (last visited 30 January 2016). See also Happold, *supra* note 14, at 60. Under 16 years old children were treated differently. US Department of Defense, Transfer of Juvenile Detainees Completed, News Release, No. 057-04, 2 January 2004.

⁹⁷ Becker, *supra* note 96. The last juveniles under the age of 16 years of age were released on 29 January 2004. US Department of Defense, *supra* note 96. In February 2004 UNICEF had established a DDR programme in Afghanistan (Coalition to Stop the Use of Child Soldiers, Child Soldiers Global Report 2004, 163 (2004), available at http://www.child-soldiers.org/user_uploads/pdf/globalreporttextweb7361911.pdf (last visited 30 January 2016).

detained with, adults in the main camp;⁹⁸ Khadr⁹⁹ and Jawad¹⁰⁰ were charged and prosecuted. This means that the permissive rule is kept and used.

State practice at national level shows that the permissive rule is used and thus does not support the view that there is a practice relating to the prohibition of prosecution of children for war crimes. That being said it seems that in a post-conflict restorative context on the African continent there is a trend towards the prohibition of prosecution. Yet, even in this very specific context, no *opinio juris* supporting the emergence of a customary norm can be established with certainty.

B. Prosecution at International Level

Another way to determine the position of States in relation to the prosecution of children who have committed war crimes is to survey the statutes of various international criminal tribunals as they were drafted by States. The Statutes of neither the ICTY nor the International Criminal Tribunal for Rwanda (ICTR) specify a minimum age for prosecution, a lack that might be due to the fact that few children were involved in the hostilities in Yugoslavia and that the involvement of children in the conflict in Rwanda was less known. Moreover, the ICTR Prosecutor decided not to prosecute children¹⁰¹. The ICTY and ICTR statutes apply to ‘persons responsible for serious violations of international humanitarian law’¹⁰² and could theoretically be used to prosecute children. They have however not been used to this end, the youngest individuals to be prosecuted by the ICTY being Furundzija¹⁰³ and Erdemovic,¹⁰⁴ both 23 years old at the time of the commission of the crimes.

In contrast, the Statute of the International Criminal Court (ICC) clearly spells out that ‘the Court shall have no jurisdiction over any person who was under the age of 18 at

⁹⁸ Becker, *supra* note 96. In relation to Khadr, *see also* Park, *Constituting Omar Khadr*, *supra* note 24, at 46.

⁹⁹ *See* discussion in Dore, ‘What to Do with Omar Khadr? Putting a Child Soldier on Trial: Questions of International Law, Juvenile Justice and Moral Culpability’, 41 *John Marshall Law Review* (2007-2008) 1281, at 1287-1292 and accompanying footnotes.

¹⁰⁰ Charge Sheet of Mohammed Jawad, available at <http://doc.wrlc.org/handle/2041/86665> (last visited 30 January 2016).

¹⁰¹ UNICEF, *Children and Truth Commissions* (2010) 17.

¹⁰² Art. 1 ICTY Statute and Art. 1 ICTR Statute.

¹⁰³ Judgment, *Furundzija*, IT-95-17/1-T, Trial Chamber, 10 December 1998, § 284.

¹⁰⁴ Sentencing Judgment, *Erdemovic*, IT-96-22-T, Trial Chamber, 29 November 1996, § 111.

the time of the alleged commission of the crime.¹⁰⁵ A report gathering State views on the criminal prosecution of children generally praised the ICC Statute for fixing the age at this level whilst acknowledging that it is not rare for children to commit such crimes.¹⁰⁶ It must be stressed that the decision not to prosecute individuals under the age of 18 was taken as a matter of policy rather than law. Indeed the ICC should only focus on the worst instances¹⁰⁷ and when such crimes are committed on a mass scale.¹⁰⁸ The combination of these provisions means that it would be difficult to mount a prosecution against a child before the ICC. The *travaux préparatoires* confirm such policy based decision. The drafters discussed two proposals relating to the age of criminal responsibility. The first option, which was adopted, excluded all those under 18 at the time the crime was committed from the jurisdiction of the Court. The second option established a presumption of exclusion for such individuals but would have allowed in exceptional circumstances for their prosecution provided they were older than 16 and the Court had ‘determined that the person was capable of understanding the unlawfulness of his or her conduct at the time the crime was committed.’¹⁰⁹ The main bone of contention in this formulation was that it introduced a subjective criterion i.e. whether the child was able to understand that it behaved in an unlawful manner.¹¹⁰ In the end ‘[e]xclusion of children from the ICC jurisdiction avoided an argument between States on the minimum age for international crimes.’¹¹¹ In fact such a jurisdictional bar ‘represents the absence of an international consensus on th[e] issue and was indicative of a political compromise rather

¹⁰⁵ Art. 26 Rome Statute.

¹⁰⁶ Ottenhof, *supra* note 54, at 72-73.

¹⁰⁷ ‘The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole.’ Art 5(1) Rome Statute.

¹⁰⁸ ‘The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.’ Art. 8(1) Rome Statute.

¹⁰⁹ Preparatory Committee on the Establishment of an International Criminal Court, Report of the Intersessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands, UN Doc. A/AC.249/1998/L.13 (1998), footnote 234 relating to Art. 68[A].

¹¹⁰ It should be noted that on the national level the *doli incapax* rule works in the same way. See eg the pre-1998 English legal system as explained in Millet, ‘The Age of Criminal Responsibility in an Era of Violence: Has Great Britain Set a New International Standard?’, 28 *Vand. J. Transnat’l L.* (1995) 295, at 306-316; Bradley, *supra* note 53, at 84-86 and Bandalli, ‘Abolition of the Presumption of *Doli Incapax* and the Criminalisation of Children’, 37(2) *Howard Journal* (1998) 114.

¹¹¹ Clark and Triffterer, ‘Article 26: Exclusion of Jurisdiction over Persons under Eighteen’, in O. Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (1999) at 499; Happold, *supra* note 14, at 71.

than a legal principle.’¹¹² In *Orić* the ICTY opined that ‘[r]eference to Article 26 of the ... Statute [of the ICC] is of no relevance as the age limit mentioned therein is only for jurisdictional purposes.’¹¹³

The situation is different for hybrid tribunals as they are usually the result of negotiations between the State, where the crimes were perpetrated, and the United Nations. The national susceptibilities need to be accommodated and thus most tribunals do provide for the prosecution of minors. In other words, States have kept the permissive rule in hybrid tribunals. The United Nations Secretary-General, understanding the need to prosecute children whilst at the same time acknowledging the importance of affording them specific protection, initially proposed a Juvenile Chamber within the Special Court for Sierra Leone, a suggestion rejected by the United Nations Security Council.¹¹⁴ In its final version the Statute envisages in Article 7 the prosecution of children who were fifteen when they allegedly committed crimes falling within its purview. Yet, this provision is limited by Article 1(1) which explains that the Court has the ‘power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law’. It is doubtful that a child soldier would fall within the category of individuals bearing ‘the greatest responsibility’,¹¹⁵ a view supported by the first Prosecutor to the Court who issued a statement to the effect that he would not prosecute children.¹¹⁶

Similarly the War Crimes Chamber in the Court of Bosnia-Herzegovina¹¹⁷ and the Special Panels for Serious Crimes in East Timor allow for the prosecution of individuals

¹¹² Grover, *supra* note 47, at 220. See also Amnesty International, *Child Soldiers*, *supra* note 15, Point 6.2; Ryan, *supra* note 22, at 180; Manirakiza, *supra* note 18, at 744.

¹¹³ Orić, *supra* note 341, footnote 1177. See a contrario discussion in Drumbl, *supra* note 20, at 119-122.

¹¹⁴ See discussion in Amann, ‘Calling Children to Account: The Proposal for a Juvenile Chamber in the Special Court for Sierra Leone’, 29 *Pepperdine Law Review* (2011-2002) 167.

¹¹⁵ Amann, *supra* note 122, at 173.

¹¹⁶ Special Court for Sierra Leone, Public Affairs Office, Press release, Special Court Prosecutor Says he Will not Prosecute Children, 2 November 2002. See also Crane, ‘Prosecuting Children in Times of Conflict: The West African Experience’, 15 *Human Rights Brief* (2008) 11, at 15; Ryan, *supra* note 22, at 181.

¹¹⁷ See Criminal Code of Bosnia Herzegovina, Art. 1(8), available at http://www.sudbih.gov.ba/files/docs/zakoni/en/krivici_zakon_3_03_-_eng.pdf (last visited 30 January 2016).

over fourteen¹¹⁸ and twelve years old of age¹¹⁹ respectively.¹²⁰ Yet, despite such a low age limit prosecution is almost non-existent.¹²¹

This review of the international and hybrid tribunals and courts demonstrate that States have kept the permissive rule or when they have not it was for political, rather than legal reasons. The prosecutors of tribunals or courts whose statute is either silent or allows for children to be indicted have chosen not to do so. Whilst a few instances of State practice on the prohibition of the prosecution of children for war crimes can be discerned with regard to statutes of international tribunals and courts, the *opinio juris* seems lacking. This is probably as far as the *lex ferenda* goes.

Soft law documents such as the Paris Principles, endorsed by 105 States,¹²² support the previous conclusions. First, the Paris Principles allow States to prosecute children on the national level after having considered alternatives to judicial proceedings.¹²³ Second, they preclude international criminal trials against children.¹²⁴ That being said, when declaring that ‘children should not be prosecuted by an international court or tribunal’, it uses the ‘should not’ rather than the ‘must not’ phrase. Likewise the language of Article 17(1)(d) of the Beijing Rules refers to ‘shall not’ and ‘shall be’. Although such documents might be viewed as carrying little normative power, for they are not legally binding, it is particularly telling that States have refrained from using more forceful language with the aim of later converting such statements into customary law.

¹¹⁸ Article 8 of the Criminal Code of Bosnia and Herzegovina as cited in Aptel, *supra* note 58, at 22 footnote 117.

¹¹⁹ UNTAET, Regulation 2001/25 on the Amendment of UNTAET Regulation No. 2000/11: On the Organization of Courts in East Timor and UNTAET Regulation No. 2000/30: On the Transitional Rules of Criminal Procedure, UNTAET/REG/2001/25, 14 September 2001, Section 45.1.

¹²⁰ Neither the Statute of the Extraordinary Chambers in the Courts of Cambodia nor the Statute of the Special Tribunal for Lebanon make any reference to the age of the alleged perpetrator.

¹²¹ To the best knowledge of the author, the only case is that of X, a child initially charged with crimes against humanity who pleaded guilty to murder under national law. (Judicial System Monitoring Programme, The Case of X: A Child Prosecuted for Crimes against Humanity, Dili, Timor Leste, January 2005, available at https://www.essex.ac.uk/armagedon/story_id/000386.pdf (last visited 30 January 2016)) This single instance is not helpful for this research because (1) it does not relate to war crimes (though it is likely that States will adopt similar approaches to international crimes) and (2) the guilty plea means that the Court was not given an opportunity to discuss crimes committed by children.

¹²² List of States at <https://childrenandarmedconflict.un.org/our-work/paris-principles/>.

¹²³ Paris Principles, *supra* note 19, principle 8.9.

¹²⁴ Paris Principles, *supra* note 19, principle 8.6.

3. Keeping the Permissive Rule

Whilst children are rarely, if ever, prosecuted for war crimes, States' decision to not prosecute children on the national and international level is policy-based. States that emerge from an armed conflict often receive assistance from the international community that insists on carrying out a DDR process whereby children, alike adults, are rehabilitated.¹²⁵ States needing such help are happy to oblige all the more as their priority is to restore peace and security in the country and use wisely the few resources they have. Yet, given the opportunity to raise their voices, independently of immediate financial and political considerations, notably via the drafting of international(ized) criminal court/tribunal statutes, States are keen to keep the permissive rule, allowing them to prosecute children. Whilst practice seems to point towards an emerging customary rule of prohibition of prosecution of children for war crimes it is more difficult to establish that decisions are made as a matter of legal obligation. This rules out the formation of a customary rule. As the International Court of Justice stressed '[t]he States concerned must ... feel that they are conforming to what amounts to a legal obligation'.¹²⁶

A. The Post-Conflict Context

It appears that the key element in the States' decision not to prosecute children for war crimes relates to the post-conflict context rather than the age of the alleged offender. Despite States' obligation to investigate and, if appropriate, prosecute all alleged war criminals it is recognized that following an armed conflict that has ravaged the indigenous community it is most suitable to disarm, demobilize and reintegrate former combatants.¹²⁷ As a result, children enjoy the same immunity as adults, and only the most responsible or those who have committed the most egregious crimes (should) face justice.

¹²⁵ The United Nations views child recruitment into armed forces or groups as illegal and has therefore spelled out that 'child demobilization (or 'release') and reintegration is a human rights issue and is not contingent on any other political negotiation'. IDDR Standards, *supra* note 16, module 5.30, at 3.

¹²⁶ *North Sea Continental Shelf Cases*, *supra* note 25, at § 77.

¹²⁷ 'The disarmament, demobilization and reintegration (DDR) of former combatants and those associated with armed groups is a prerequisite for post-conflict stability and recovery.' Foreword by Kofi Annan to the IDDR Standards, *supra* note 16, at ii.

In such circumstances, the post-conflict restorative model of justice trumps the juvenile rehabilitative model of justice based on the best interests of the child.

The indigenous community,¹²⁸ which for the purpose of holding individuals accountable finds its legal expression in the State, has mainly two options. The first one is that no action is taken towards children. The premise is that reintegration into the community ‘may provide children with guidance on values and attitudes and constraints on behaviour.’¹²⁹ For example, Liberia chose not to prosecute an estimated 20,000 children who had taken part in the hostilities in the beginning of the 1990s.¹³⁰ A second option, which chimes well with Article 40(3)(b) UNCRC, is to have recourse to post-conflict restorative accountability mechanisms (eg truth-telling, restorative justice measures and traditional healing ceremonies) viewed as alternatives to criminal courts. Such mechanisms not only serve the best interests of the children — all the more as they are participatory, giving them the opportunity to express themselves¹³¹ — but also ‘the short- and long-term interest of the society at large’.¹³² After all, the ‘restorative justice ... involves the child offender understanding and taking responsibility for his/her actions and it also aims to achieve reconciliation among the offender, the victim and the wider community through reparations.’¹³³ As the Special Representative explains ‘[c]hildren must be made to understand the consequences of their actions, and victims of their violence must feel that justice has been done.’¹³⁴ Acceptance into the community tends to

¹²⁸ A community is defined as a social system that holds a ‘shared denotation of togetherness, united by common history or goal, sharing and participation in activities, culture and ideology’. See Ayalon, ‘Community Healing for Children Traumatized by War’, 10 *International Review of Psychiatry* (1998) 224, at 228. Communities are usually viewed as ‘traditional organic, non-statutory forms of organisation’. Zack-Williams, ‘Child Soldiers in Sierra Leone and the Problem of Demobilisation, Rehabilitation and Reintegration into Society: Some Lessons for Social Workers in War-torn Societies’, 25 *Social Work Education* (2006) 119, at 120.

¹²⁹ Boyden, ‘The Moral Development of Child Soldiers: What Do Adults Have to Fear?’, 9 *Peace and Conflict: Journal of Peace Psychology* (2003) 343, at 354.

¹³⁰ See Reis, *supra* note 14, at 650-651.

¹³¹ See eg UNCRC Liberia, *supra* note 88, at § 29. In a more general context, Winter argues that ‘through a participatory process, the child offender will be encouraged to take responsibility for what he or she has done and encouraged to fully participate in the process of redemption and amendment’. Renate Winter, *Restorative Juvenile Justice – The Challenges – The Rewards*, 4, available at <http://www.unicef.org/tdad/1renatewinter.pdf> (last visited 30 January 2016).

¹³² See General Comment No. 10, *supra* note 53, at § 3.

¹³³ IDDR Standards, *supra* note 16, module 5.30, at 9.

¹³⁴ See the website of the United Nations Special Representative of the Secretary-General for Children and Armed Conflict <https://childrenandarmedconflict.un.org/effects-of-conflict/children-in-detention/> (last visited 30 January 2016).

be conditional on the child being remorseful and agreeing to undergo a specific process.¹³⁵ In Mozambique, the reintegration involved some sort of rite.¹³⁶ In Sierra Leone and in Liberia the truth and reconciliation commissions gave voices to the children,¹³⁷ helping the community to understand the complex roles children play in armed conflict. As Wessels maintains, we should be more positive towards the reintegration of these children into the society: '[t]he majority of former child soldiers are resilient, not damaged, and able to reintegrate into civilian life with varying degrees of success. It is a disservice to these young people to suggest otherwise.'¹³⁸ The great majority of them do reintegrate back into their communities and families.¹³⁹

That being said, where reconciliation in the community is prioritized, '[i]t is difficult, if not impossible, to achieve reconciliation without justice'.¹⁴⁰ The retributive element of justice cannot be easily dismissed in the aftermath of a conflict,¹⁴¹ especially as it assists victims to come to terms with the crimes they have endured.¹⁴² Thus States should keep the permissive rule; it must ensure that a certain, though legally constrained, sense of justice within the community is satisfied so as to sow the seeds of peace.

B. Limiting the Use of the Permissive Rule

If the permissive rule is to stay, then the next question is whether its use can be limited, bearing in mind the very purpose of prosecution. In the specific context of post-

¹³⁵ Boyden, *supra* note 129, at 355.

¹³⁶ Reis, *supra* note 14, at 652.

¹³⁷ UNICEF, *supra* note 101.

¹³⁸ Wessels, 'Psychosocial Issues in Reintegrating Child Soldiers', 37 *Cornell Int'l L.J.* (2004) 513, at 515.

¹³⁹ See eg Grothe, 'Trauma, Kultur und Familie Erfahrungen aus Norduganda', 2 *Forum für Kinder- und Jugendpsychiatrie, Psychosomatik und Psychotherapie* (2008) 40, at 51.

¹⁴⁰ Expert of UN Secretary-General, Impact of Armed Conflict on Children, UN Doc. A/51/306, 26 August 1996, § 248.

¹⁴¹ See discussion in Quénivet, 'Transitional and Generational Justice: Children Involved in Armed Conflict', in N. Szablewska and S.-D. Bachmann eds., *Current Issues in Transitional Justice* (2014) at 55 and Manirakiza, *supra* note 18, at 735.

¹⁴² For example, Rwandans claimed that 'severe punishment could demonstrate empathy with the survivors and serve the ends of justice while simultaneously protecting the perpetrators from their victims' vengeance.' Save the Children Federation – USA, Children, Genocide, and Justice: Rwandan Perspectives on Culpability and Punishment for Children Convicted of Crimes Associated with Genocide, Final Report of a Pilot Project on Children, Genocide, and Justice, 1995, cited in Cohn, 'The Protection of Children and the Quest for Truth and Justice in Sierra Leone', 55 *Journal of International Affairs* (2001) 7, at 14. For the victims it does not matter whether the crimes were perpetrated by children or by adults. Manirakiza, *supra* note 18, at 735.

conflict justice, the ICTY explained that its mandate and duty was ‘to deter such crimes and to combat impunity. It is not only right that *punitur quia peccatur* (the individual must be punished because he broke the law) but also *punitur ne peccatur* (he must be punished so that he and others will no longer break the law). The Trial Chamber accept[ed] that two important functions of the punishment [were] retribution and deterrence.’¹⁴³ Such aims can be reached both by prosecution and alternative methods of accountability.

In this light, prosecution is primarily viewed and used as a tool of deterrence. In its report to the Security Council on the establishment of the SCSL Kofi Annan referred to ‘weighting in the moral-education message to the present and next generation of children’.¹⁴⁴ First, prosecution could be used as a deterrent for further crimes former child soldiers may commit as adults, the underpinning idea being that young offenders, used to a life of crime, are likely to follow a criminal path.¹⁴⁵ Whilst some are able to adjust to their new life, others are not and return to their life with the armed forces or groups. In her well-researched study, Boyden shows that child soldiers are not totally devoid of moral reasoning and are not insensitive;¹⁴⁶ they tend to experience a sense of culpability¹⁴⁷ though some do struggle to ‘reconcile their sense of personal responsibility for atrocities they have committed’.¹⁴⁸ Those who are not remorseful should be made to understand the reprehensible nature of their crimes. Prosecution might in this instance be a useful tool, especially if such children refuse to take part in other forms of accountability mechanisms, be they based on a post conflict restorative or a juvenile rehabilitative model.

Second, the prosecution could also be used to warn other individuals of the criminal nature of such acts. Yet, it is doubtful that such prosecutions would have a deterrent impact on the future generations of children as any ‘criminal sanction as a deterrent presupposes instrumentalist actors who will ‘rationally’ choose to commit or

¹⁴³ *Furundzija*, *supra* note 103, § 288.

¹⁴⁴ UNSG Report, *supra* note 13, § 38.

¹⁴⁵ For example Ayalon explains that ‘[c]hildren who had engaged in military activities beyond their years, ... may grow up to be truant and resentful’. Ayalon, *supra* note 128, at 227. Also a number of former child soldiers might readily take up arms again.

¹⁴⁶ Boyden, *supra* note 129, at 349-358.

¹⁴⁷ See anecdotal evidence in eg Grothe, *supra* note 139, at 41-42.

¹⁴⁸ Boyden, *supra* note 129, at 354.

not, while weighing the threat of sanction’,¹⁴⁹ a position that cannot be readily applied in the cases of children in armed groups. Prosecution will not assist in the more general project of eradicating the child soldier phenomenon and, hence, curtailing the future incidence of war crimes child soldiers may commit. This is even more so as Park argues that there is ‘a gap between, on the one hand, the contexts in which [children] make their choices and, on the other hand, legal debates and enforcement debates that are silent on children’s own decisions’.¹⁵⁰

It is submitted that a system of triage could be used to determine which method of accountability is best suited. In light of the previous findings two situations must be distinguished, that of a post-conflict community which often tries to heal back, and other situations.

In a post-conflict context where the focus is restoring peace and (re)building the community, the default position should be the use of alternative methods of post-conflict accountability. Indeed, ‘given the need to return former child combatants to their families and communities, forgiveness [is] a *sine qua non* for acceptance’.¹⁵¹ With this view former child soldiers should be given the opportunity to show remorse either whilst they are processed in interim care centres linked to the DDR process¹⁵² and/or when appearing before truth and reconciliation mechanisms. If children refuse to take part in such mechanisms *and* they are ‘most responsible’ or have committed the ‘most serious crimes’, then they should be prosecuted. For those individuals who have not committed such serious crimes or are not most responsible, yet are not showing signs of remorse or understanding the nature and consequences of their crimes, alternative mechanisms of accountability within the juvenile rehabilitative model of justice should be sought. In this

¹⁴⁹ Park, ““Other Inhumane Acts”: Forced Marriage, Girl Soldiers and the Special Court for Sierra Leone”, 15 *Social and Legal Studies* (2006) 330.

¹⁵⁰ Park, ‘Child Soldiers and Distributive Justice: Addressing the Limits of Law?’, 53 *Crime, Law and Social Change* (2010) 329, at 339. As Smith notes, ‘Western audiences might then have been less surprised to learn that over half of the child soldiers joined a fighting force under no direct threat of violence. Some of the young population engaged in informal warfare, as others entered the informal economy – for lack of a better alternative’. Smith, ‘Youth in Africa: Rebels without a Cause but not without Effect’, XXXI *SAIS Review* (2011) 97, at 100.

¹⁵¹ Zack-Williams, *supra* note 128, at 126.

¹⁵² Besides offering family tracing medical care, counselling and skills training, such centres could offer opportunities for children to talk about their past experience. This could be done via narrative exposure therapies that are culturally sensitive, *see eg* Grothe, *supra* note 139, at 52-54.

case, as explained earlier, prosecution would be seen as last resort and the primary focus would be on the best interests of the child.

Absent such a post-conflict mechanism the twin aims of deterring future crimes and punishing former crimes are unlikely to be met and the community might feel that justice has not been done. In such a case alternative mechanisms of accountability within the juvenile rehabilitative model of justice must be used.

The central feature of this system is that the justice response is embedded into the community's needs and interests.¹⁵³ The collective aspects of the child's reintegration into a community ravaged by war should be not overlooked. At the same time it must be borne in mind that poor acceptance in the community increases the likelihood of child soldiers showing negative social behaviour and their levels of emotional distress.¹⁵⁴ Therefore it is also in the child's best interests to return to the community. It is not a paternalistic approach denying the child's agency but a communal response that is likewise suited for adult offenders in this specific context. Yet, the communal response must be guided by international law which clearly demands that the best interests of the child be taken into consideration.

In other situations (eg 1. international armed conflicts, 2. cases where children are removed from combat zones, transferred to another country where their crimes are being investigated, 3. Children refugees, etc.), where a post-conflict restorative model of justice is not used or not suitable, States ought to be able to decide on whether to prosecute children, this time heed being paid to their best interests (rehabilitative juvenile justice) since the need to take into account the collective and restorative aspects of post-conflict justice have, albeit not entirely, dissipated.

This brings it back to contending that the prosecution is directed at educating children or at making them understand that they acted wrongfully. Prosecution is thus

¹⁵³ For example, counsellors involved in DDR programmes have stressed 'the need for long-term programs that focus on community rehabilitation'. Human Rights Watch, *How to Fight, How to Kill: Child Soldiers in Liberia* (2004) 38. Family and community are places where children can find some direction and purpose. Ayalon, *supra* note 128, at 226-229. Yet, research also demonstrates that family and community acceptance alone are not the only elements that lead to a successful adjustment to the post-war situation. See Betancourt et al., 'Past Horrors, Present Struggles: The Role of Stigma in the Association between War Experiences and Psychosocial Adjustment among Former Child Soldiers in Sierra Leone', 70 *Social Science and Medicine* (2010) 17, at 25.

¹⁵⁴ See study mentioned in Betancourt et al., *supra* note 153, at 19.

particularly suited in two cases: when the child is unwilling to take part in a restorative justice mechanism and/or when the child is one of the ‘most responsible’ individuals or has committed the ‘most serious crimes’. The application of such thresholds permits the prosecution by national and international judicial authorities of children who have risen in the ranks of the armed group/forces.¹⁵⁵ Such thresholds work well: they work for the community - restoring a sense of justice - and for the children - sending a message that the behaviour they have embraced¹⁵⁶ is reprehensible. The aim of prosecuting children is to make them understand that their acts are morally and legally reprehensible¹⁵⁷ and that they should not continue on this path.

If we acknowledge that children can and should be prosecuted for war crimes then, as war crimes are universal in nature, a universal age of criminal responsibility should be set. We should not leave it to the State or indigenous community to decide on who is a child.¹⁵⁸ After all ‘in prosecuting international crimes States are acting not only on their own behalf but also as agents of the international community’.¹⁵⁹ Further the age of criminal responsibility for war crimes should not depend on where the individual is prosecuted, for war crimes are international crimes that warrant an universal stance.¹⁶⁰ The age should be set at 16 for mainly two reasons. First the Optional Protocol allows States to permit voluntary recruitment in the armed forces, provided they raise their minimum age from that set out in Article 38(3) UNCRC, ie set it at 16 years of age as a minimum. As 159 States are parties and 14 signatories to the Optional Protocol it imposes a clear standard.¹⁶¹ Second the proposal under the ICC Statute was 16, again raising the threshold that was set by the Special Court for Sierra Leone at 15. The

¹⁵⁵ UNSG Report, *supra* note 13, § 31: ‘While it is inconceivable that children could be in a political or military leadership position (although in Sierra Leone the rank of “Brigadier” was often granted to children as young as 11 years), the gravity and seriousness of the crimes they have allegedly committed would allow for their inclusion within the jurisdiction of the Court.’

¹⁵⁶ On children agency, see Honwana, ‘Innocents et coupables: Les enfants-soldats comme acteurs tactiques’, 80 *Politique Africaine* (2000) 58, at 59; Manirakiza, *supra* note 18, at 738-739; Park, *Child Soldiers*, *supra* note 150, at 332; Quénivet, *Transitional and Generational Justice*, *supra* note 141, at 62.

¹⁵⁷ Manirakiza, *supra* note 18, at 766-767.

¹⁵⁸ Happold, *supra* note 14, at 73.

¹⁵⁹ Happold, *supra* note 14, at 73.

¹⁶⁰ See also Happold, *supra* note 14, at 73.

¹⁶¹ State parties must deposit a declaration at the time of the ratification, setting the age. Some States have chosen 16 (eg UK, Brazil, Canada, India), others 17 (eg US, Australia, France, China) and others 18 (eg Nigeria, Argentina, DRC, Mali, Uganda, Rwanda, Burundi, Indonesia, Japan).

division of views discussed during the ICC negotiations was whether 16 or 18 years should be the age of criminal liability. Given that 18 is not universally accepted, agreeing on 16 years of age appears to be a solution susceptible to be widely accepted.

Conclusion

Much has been written about the plight of child soldiers. But in people's mind the 'classical' abducted child soldier is as a boy with an AK47 embroiled in an African conflict which he does not comprehend (eg Ishmael Beah).¹⁶² The child is a victim and very few would challenge that. Yet, child soldiers are also the Omar Khadr of this world, who have received little, if any, compassion from the international community. Despite the similarities in their international crimes they have been treated differently.

The former are unlikely to be prosecuted, namely because the community where such crimes have been committed is attempting to restore peace and find a way to live again together. The general post-conflict restorative justice chimes well with the restorative juvenile justice model in human rights law.

'Restorative justice is very often the only way of bringing reconciliation to victims and offenders alike in a war-torn society where victims of offences suffer as do child offenders, having been forced to commit offences. Without such reconciliation the reintegration of child soldiers in their communities is not possible, much to the detriment of the then ostracised child as well as the community bereft of workforce and under threat of criminal behaviour of the excluded child.'¹⁶³

In this context very few prosecutions are mounted because it is in the best interests of the society to deal with these children (and adults alike) via a restorative justice mechanism. The best interests of the child often meet the best interests of the society. The only children likely to see their day in court are those who either refuse to take part in the process or who are most responsible or those who have committed the most egregious

¹⁶² Ishmael Beah wrote a best-selling memoir *A Long Way Gone: Memoirs of a Boy Soldier* where he recounts his days as a child soldier in the conflict in Sierra Leone.

¹⁶³ Lima Declaration on Restorative Juvenile Justice, 4-7 November 2009, available at [http://www.unicef.org/tdad/limadeclarationenglish\(1\).doc](http://www.unicef.org/tdad/limadeclarationenglish(1).doc) (last visited 30 January 2016).

crimes. These are the children who need to fully understand that their acts were reprehensible and be prosecuted.

The latter children are more likely to be prosecuted, unless alternative mechanisms are devised – especially for those who have not committed the most egregious crimes or are most responsible for such crimes but yet show no sign of remorse or understanding – because the society does not act as a buffer between the child and a strict, almost mechanical, application of criminal law.

In particular, outside a post-conflict justice model where the community tries to come to terms with past atrocities this buffer does not exist at all. There is no ‘understanding’ of the acts perpetrated by child soldiers and no willingness to understand either. There is little doubt that the children shown on ISIS videos, should they return back to their States of nationality or residency, will be prosecuted (though not necessarily for war crimes). But this should not be a case of automaticity. In this context the States need to pay heed to the best interests of the child and their actions should be solely guided by this core principle of international child law.

As Michael Newton has been quoted to say ‘more and more child soldiers are being recruited, and they are committing heinous crimes. This is an issue the international community is going to have to confront’.¹⁶⁴ Whilst there is no customary norm prohibiting the prosecution of children who have committed war crimes, States’ discretion should be limited. First, prosecution should be limited to extreme cases only:¹⁶⁵ (1) those who refuse to take part in a post-conflict restorative accountability mechanism and thus refuse to acknowledge their crimes and (2) those who are ‘most responsible’ or have committed the ‘most serious crimes’. The aim is educational, making them understand that what they have done is wrong and that such behaviour cannot be tolerated, thereby ensuring that in the future they will not follow a criminal path on the basis that such behaviour is tolerated. Second, no one should be prosecuted for war crimes committed under the age of 16.

¹⁶⁴ Glaberson, ‘A Legal Debate in Guantanamo on Boy Fighters’, *The New York Times*, 3 June 2007.

¹⁶⁵ Manirakiza, *supra* note 18, at 757.