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Exonerating Child Soldiers Charged With Grave Conflict-related International Crimes

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This book is dedicated with great respect and love to the memory of my parents Gina and David Gazan and that of my brother Albert all of whom championed the cause of universal human rights in their own way. It is also dedicated to all victims of genocidal forcible transfer in whatever form and especially to the child victims. This work is but a small contribution made in the hope that child victims of genocidal forcible transfer (such as child soldiers recruited to armed groups or forces perpetrating mass atrocities and/or genocide and the children born of mass wartime rape) will be acknowledged as such, that the survivors receive fair reparations from the State and that the international community implement effective ongoing strategies to prevent all forms of genocide and other grave international crimes.

Preface

The current inquiry challenges the demonization of and backlash against a certain segment of the child soldier population which seeks to frame these children as culpable for atrocities they committed as child members of non-State armed groups or State national forces committing systematic mass atrocity and/or genocide. It is argued that these children are the victims of genocidal forcible transfer to these armed groups or forces regardless the manner of their so-called initial 'recruitment.' Various judicial and extra-judicial modes of accountability for these children are assessed from this perspective and found to be irrelevant and inapplicable to the factual circumstances of such cases.

In Chapter 1, State obligations under international law relating to the special protected status of children during armed conflict are addressed as are children's participation rights balanced against their protection rights. A view of child soldier members of armed groups or forces that consistently commit grave violations of IHL as holding the legal status under IHL of civilian 'noncombatants' is discussed. The participation of these children in mass atrocities and/or genocide as members of armed groups or forces systematically using such tactics is considered as a quintessential example of (to use the international labor organization terminology) the 'worst forms of child labor'.[1] The State's burden to protect children from this horrendous worst form of child labor is considered.

Chapter 2 includes an examination of the legal implications of the failure to set a universal minimum age of criminal culpability for, for instance, the issue of fair prosecutorial treatment of child soldiers charged with grave conflict-related international crimes. Also discussed is the lack of International Criminal Court (ICC) jurisdiction over child soldiers (persons under age 18 at the time of their alleged commission of war crimes, genocide and/or crimes against humanity) as 'substantive law' rather than just a jurisdictional matter. It is argued that the Rome Statute sets out a standard for the humane treatment of child soldiers accused of conflict-related atrocity who are the victims of genocidal forcible transfer to

[1] International Labor Organization (2011).

a murderous State force or non-State rebel armed group. In addition, a challenge is advanced to the presumptions (currently being promulgated by some social scientists and even certain legal scholars) that: (1) child soldiers who commit conflict-related atrocities as part of an armed group or force committing systematic mass atrocities and/or genocide had, in some if not most instances, the alleged option to exercise 'tactical agency' and resist committing these international crimes and/or that (2) IHL requires that these children offer such resistance despite the coercive circumstances in which they were situated as victims of genocidal forcible transfer to these armed groups or forces.

Chapter 3 includes an examination of case examples of armed forces or groups that are committing systematic mass atrocities and/or genocide and their so-called 'recruitment' of children for the purpose of the children's active participation (directly or indirectly) in these atrocities. It is argued that 'recruitment' under the aforementioned circumstances amounts to 'forcible transfer to another group' (where 'forcible transfer' is not restricted to the use of physical force but can include transfer based on exploitation of coercive circumstances and/or the use of threats of violence to the child or his or her family and other forms of intimidation) in violation of Article 2(e) of the Genocide Convention. Prevalent narrow, arbitrarily restricted interpretations of the Genocide Convention Article 2(e) are shown to reflect an underestimation of: (1) the status of children as autonomous rights bearers, and of (2) the adverse impact of the forcible transfer of children from their group to an armed group or force committing mass atrocities and/or genocide on the persistence/survival, vitality and mental and physical integrity of the children's group of origin (at least as originally constituted) and of the child group transferred.

Chapter 4 examines the role of high profile international human rights gate keepers of human rights claims and academic scholars in promoting the notion that child soldiers who have committed conflict-related atrocities (as part of a murderous non-State armed group or State national force) are best characterized in a legal and practical sense not simply as victims but as 'perpetrators' or, at best, 'victim-perpetrators'. The latter attempt to characterize these children as criminally culpable is shown to be contrary to the facts pointing to their being the victims of genocidal forcible transfer to armed groups or forces engaged in mass atrocities and/or genocide. Parallels are drawn with the situation of children born of war time rape who also have not been adequately recognized under IHL and international human rights law as an independent separate category of persons who have suffered grave human rights violations as victims of genocidal forcible transfer. The special plight of girl child soldiers and their experience as victims of genocidal forcible transfer to the armed group or force committing mass atrocities and/or genocide is also discussed. The case of child soldier Omar Khadr as a victim of genocidal forcible transfer to the Afghan Al Qaeda-linked Taliban is considered and his prosecution for international crimes by the US analyzed from this perspective. ICC cases involving persons who were, on the analysis here, the child victims of genocidal forcible transfer to armed groups committing heinous mass atrocities are discussed (i.e. Dominic Ongwen and Thomas Kwoyelo; both child abductees of the LRA who rose in the ranks to senior positions and committed conflict-related

atrocities both as child and as adult members of the LRA). The issue is raised as to whether these ICC defendants' history as child abductees of the LRA ought be considered as a mitigating factor at a minimum in the sentencing phase of an ICC trial (if they are convicted in regards to the grave international crimes they allegedly committed as adult members of the LRA).

Chapter 5 examines Truth and Reconciliation processes in Sierra Leone and Liberia in raising the issue of whether such mechanisms are a suitable alternative to criminal prosecutions for holding child soldiers accountable for conflict-related grave international crimes allegedly committed as children (as is claimed by most of those who hold these children are culpable and had 'tactical agency' to resist committing conflict-related atrocities as members of armed groups or forces engaged in perpetrating systematic mass atrocities and/or genocide). The proposition that: (1) child soldiers are culpable who have engaged in conflict-related atrocities as child members of armed groups or national forces that use such tactics against civilians as a matter of course and that (2) these individuals should provide a narration of their alleged offenses before a Truth and Reconciliation Commission are both challenged. The latter propositions are found to be inconsistent with the proper administration of justice. The fact that Truth and Reconciliation mechanisms are often times non-therapeutic and even counter-productive for the ex child soldier population accused of conflict-related atrocities and for the local communities involved is discussed.

Chapter 6 presents concluding remarks regarding: (1) the ongoing occurrence in various conflict-affected regions of genocidal forcible transfer of children to armed groups or forces committing systematic mass atrocities and/or genocide and (2) the failure of the international community to recognize the phenomenon of children's 'recruitment' into armed groups committing systematic atrocities as a war tactic as a form of genocidal forcible transfer of children to another group. The point is made that justice demands that: (1) children who have suffered this form of genocide be regarded as the victims they are; and (2) it be acknowledged that the conflict-related atrocities they may have committed as children were carried out under coercive circumstances which preclude their criminal liability or responsibility on any account. Rather, it is argued, the State and the international community must bear the full burden of responsibility for these child-perpetrated conflict-related atrocities as a result of their failure to protect this most vulnerable population from genocidal forcible transfer.

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Contents

Chapter 1
Children's Rights Participation Rhetoric: Distorting the Plight of the Child Soldier

> The child soldier defies our desire for. . .“decaffeinated war”, or “war without warfare” that is, as much war as we want, but without the ugly side effects. What is disturbing about the child soldier is its ability to reveal the Real of modern warfare.[1]

1.1 The Child's Right to Survival *Versus* the Child's Participation Rights

It has been suggested by some scholars that a children's rights perspective inexorably leads to endorsement of so-called voluntary child soldier recruitment; at least in respect of older children:

> . . .applying ideas of children's rights to child [soldier] recruitment is by no means unproblematic. Indeed, it has been argued that, at least with older children, it [the children's rights perspective] should lead to the conclusion that although forced and compulsory recruitment should be prohibited, voluntary recruitment should be permitted.[2]

At the same time, these same academics suggest that the prohibition against the recruitment and use of *under* 15s in hostilities in various international law is not based primarily on a regard for children's basic rights but on concerns over 'public order' should these younger children be recruited:

> With regard to younger children . . . [and the prohibition against recruiting the under 15s] . . .it might be said that the issue is as much about public order as it is about children's rights. . ..Indeed, one argument for such [international humanitarian] standards [prohibiting the recruitment and use of children under 15 in hostilities] . . .stresses not the children's but others' interests. *Young children are too immature to be counted upon to comply with international humanitarian law*, as all combatants are required, under threat of incurring individual criminal responsibility, to do. *Their lack of inhibitions and suggestibility means*

[1] Monforte (2007), p. 195.

[2] Happold (2005), p. 22.

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> *they are less disciplined and more likely to commit atrocities. . .Accordingly, young children are banned from the battlefield for the protection of others, as well as for their own benefit* (emphasis added).[3]

However, there is no empirical evidence that the commission of atrocity during hostilities is a function of age of the belligerent; or more specifically, that younger children are more likely to commit atrocity than are older; or that children are more likely to commit atrocity than are adults under the same circumstances. Indeed, across the centuries most mass atrocity has been committed not by children but by adults whose inhibitory neurological functions are presumed generally to be fully developed. In the context of armed groups committing systematic mass murder and mayhem, situational factors are likely to be a better predictor of the behavior of the child soldier rather than is his or her specific age insofar as the likelihood of the child violating international humanitarian law. In this regard note that, at least in regards to international conflicts, the States Parties (to Additional Protocol I to the Geneva Conventions) were quite prepared to have under 15s participate in hostilities if they purportedly volunteered[4] notwithstanding any alleged higher risk of younger children violating international humanitarian law (the rules of war). The States Parties to Protocol I thus: (1) rejected the proposed ICRC terminology for Article 77(2) Protocol 1 which would have required States to "take all necessary measures" rather than simply "all feasible measures" in order that "children who have not attained the age of 15 years do not take a direct part in hostilities. . ." and (2) inserted the word "direct" in the Article 77(2) provision thus delimiting the form of participation in hostilities explicitly prohibited (i.e. The ICRC lists "gathering and transmission of military information, transportation of arms and munitions, provision of supplies" as some examples of indirect participation in hostilities).[5]

It is here argued that from a children's human rights perspective all recruitment of children for the purpose of their direct or indirect involvement in hostilities as children should be prohibited based on: (a) the primacy of the child's right to survival and good development over his or her participation rights[6] and (b) the State duty to protect children as vulnerable members of society (vulnerable due their to psychological immaturity, comparatively weak economic and political status, disenfranchisement in most States etc.). Let us then consider in more detail children's participation rights balanced against their protection rights.

Children's participation rights are articulated in the Convention on the Rights of the Child (CRC) at Article 12 as follows:

> Article 12 (CRC)
> 1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

[3] Happold (2005), pp. 32–33.

[4] ICRC Commentary (Article 77, Protocol I Additional to the Geneva Conventions).

[5] ICRC Commentary (Article 77, Protocol I Additional to the Geneva Conventions).

[6] Etzioni (2010).

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.[7]

These participation rights (that recognize children's right, in accord with their age and maturity level to be heard on, and participate in decision making that profoundly affects their lives), however, cannot be dissected from: (1) children's fundamental protection rights generally, and (2) the primacy of their most fundamental rights; namely children's inherent right to life, and right to good development articulated at CRC Article 6:

Article 6 (CRC)
1. States Parties recognize that every child has the inherent right to life.
2. States Parties shall ensure to the maximum extent possible the survival and development of the child.[8]

The children's right to survival and good mental and physical development is, of course, put in great jeopardy by their direct or indirect participation in armed hostilities between warring factions. This is especially the case when their so-called 'recruitment' is into a brutal armed group (State or non-State) that has a modus operandi that involves grave violations of international humanitarian and human rights law. Arguably just being recruited into such an armed group is a form of violence against and exploitation of the child since armed groups that as a pattern intentionally violate the laws of war to spread terror amongst civilians also routinely brutalize child recruits in their own group. (It should be understood that the definition of what in fact constitutes 'indirect' involvement in hostilities is somewhat contentious and that many so-called indirect forms of involvement may also, in actuality, put the child at high risk of mental and/or physical injury or even death).

It is significant that Article 19(1) of the CRC (as interpreted by the U.N. Committee on the Rights of the Child) prohibits *all forms* of violence against the child and places an obligation on the State to protect children from violence by a caretaker *or any person who has physical custody of the child* whether a formally and legitimately entrusted legal caretaker or not:

Article 19 (CRC)
1. *States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence*, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child (emphasis added).[9]

[7] CRC (1990), Article 12.
[8] CRC (1990), Article 6.
[9] CRC (1990), Article 19(1).

> **Committee on the Rights of the Child: General Comment 13 on CRC Article 19:** 33. **Children without obvious primary or proxy caregivers**: Article 19 also applies to children without a primary or proxy caregiver or another person who is entrusted with the protection and well-being of the child [i.e. commanders of armed groups violating international humanitarian law must be prevented by the State (as de facto caregiver) from recruiting and brutalizing child recruits and/or inflicting mental violence on them by having them commit atrocities etc.]. . .[10]

The Committee on the Rights of the Child in its General Comment 13 regarding the proper interpretation of the meaning and scope of CRC Article 19 (articulating a prohibition of all forms of violence against the child) stresses that one of the objectives of its General Comment on CRC Article 19 is to:

> promote a holistic approach to implementing Article 19 based on the Convention's overall perspective on securing children's rights to survival, dignity, wellbeing, health, development, participation and non-discrimination – the fulfilment of which are threatened by violence[11];

Thus, one legal implication of Article 19 of the CRC in the context of armed conflict is, this author contends, that even where the child is held to have allegedly volunteered for child soldiering at age 15 or older (as well as in regard to child soldiers under age 15), the State's obligation remains to: (1) protect the child by all means feasible from direct participation in hostilities (as it is per OP-CRC-AC)[12] and presumably also (2) by all means necessary from being forced or induced in any way to commit conflict-related atrocities as part of a systemic campaign of terror perpetrated against civilians by the armed group of which the child is a member.

It should be noted that in its General Comment on CRC Article 19; the Committee on the Rights of the Child (which monitors State Party compliance with the CRC and its optional protocols) states that:

> Article 19 [of the CRC] is one of many provisions in the Convention directly relating to violence. ***The Committee also recognises the direct relevance [of CRC Article 19] to . . .the Optional Protocol on the involvement of children in armed conflict*** (emphasis added).[13]

The Optional Protocol on the involvement of children in armed conflict (OP-CRC-AC) contains a prohibition on the direct use of children in armed hostilities by national armed forces which reads as follows:

> **Article 1: OP-CRC-AC**
> States Parties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities.[14]

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[10] Committee on the Rights of the Child and General Comment No. 13 (2011).

[11] Committee on the Rights of the Child and General Comment No. 13 (2011).

[12] OP-CRC-AC (2002), Article 1.

[13] Committee on the Rights of the Child and General Comment No. 13 (2011).

[14] OP-CRC-AC (2002), Article 1.

Hence, it is clear (given the U.N. Committee on the Rights of the Child General Comment 13 on the relevance of Article 19 of the CRC to the OP-CRC-AC) that one of the forms of violence referred to in CRC Article 19 is the violence to children' physical and mental health and the risk to life that flows from children's direct participation in armed hostilities (recognition of which fact provides the underlying rationale for Article 1 of the OP-CRC-AC). Further, OP-CRC-AC prohibits the recruitment and use of child soldiers by non-State armed forces under all circumstances:

Article 4: OP-CRC-AC

1. Armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years.
2. States Parties shall take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalize such practices.
3. The application of the present article shall not affect the legal status of any party to an armed conflict.[15]

It is precisely such non-State armed rebel groups that are most often (though not exclusively) responsible, through direct and indirect measures, for forcing children to commit conflict-related atrocities. Whether any significant number of child soldiers, by chance or even design (in the latter case their being willing to take the chance of retaliation and death), ever successfully evade committing atrocity as members of armed groups perpetrating grave violations of the Geneva Conventions is an open question. Even if some child soldiers do, for whatever reason, manage to escape committing atrocity this does not by implication automatically assign criminal responsibility to those child soldiers who do commit conflict-related grave international crimes as members of brutal armed groups that are intent, as a military tactic, on consistently violating international humanitarian law.

Note that the U.N. Committee on the Rights of the Child's General Comment 13 on Article 19 of the CRC (which article prohibits all forms of violence against the child) stresses the obligation of States Parties to protect children from various forms of violence in the first instance by "all appropriate measures" (as opposed to intervening only after-the-fact). That is, the burden for protecting children against violence in any situation (including an armed conflict situation) is *not* erroneously shifted by the Committee on the Rights of the Child (in General Comment 13 on CRC Article 19) to the children themselves (in contrast to the implication of commentary by some scholars in regards to a certain segment of child soldier 'recruits' as will be discussed in a later chapter):

Objectives: The present general comment seeks to:

- *guide States Parties in understanding* ***their obligations*** under Article 19 of the Convention ***to prohibit, prevent and respond to all forms of physical or mental violence,*** injury or abuse, neglect or negligent treatment, maltreatment or exploitation of children,

[15] OP-CRC-AC (2002), Article 4.

> including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child, including State actors. . .(emphasis added).[16]
>
> **IV. Legal analysis of Article 19**
>
> Paragraph 1 of Article 19
>
> 35. "**Shall take**": "Shall take" is a term which leaves no leeway for the discretion of States Parties. ***Accordingly, States Parties are under strict obligation to undertake "all appropriate measures" to fully implement this right*** *[the right to be protected from all forms of violence] for all children* (emphasis added).[17]

There would appear to be then some inconsistency between Article 19 of the CRC (as per the interpretation of that article by the UN Committee on the Rights of the Child) on the one hand; and Article 38 of the CRC as well as the OP-CRC-AC on the other. This is the case in that Article 19 of the CRC[18] requires the State Parties to take all appropriate measures to prevent all forms of violence against the child and leaves no discretion in this regard while, for instance: (1) Article 38 (2) of the CRC requires only that "States Parties shall *take all feasible measures* to ensure that persons who have not attained the age of 15 years do not take a *direct* part in hostilities"; (2) OP-CRC-AC,[19] for instance, at Article 1 stipulates only that "States Parties shall take *all feasible measures* to ensure that members of their armed forces who have not attained the age of 18 years do not take a *direct* part in hostilities." (Note that, in contrast, at Article 2 of the OP-CRC-AC there is no maneuvering room as the stipulation is that "States Parties *shall ensure* that persons who have not attained the age of 18 years are not compulsorily recruited into their armed forces"; not the lesser standard that the State "take all feasible measures" to attain that result where what is 'feasible' is a matter of judgment; sometimes arguably a biased judgment); (3) the OP-CRC-AC at Article 4 requires only that States parties "take *all feasible measures*" to prevent "armed groups that are distinct from the armed forces of a State . . . under any circumstances, recruit[ing] or us[ing] in hostilities persons under the age of 18" (as opposed to requiring the State Parties to ensure recruitment and use of child soldiers in hostilities by non-State armed groups does not occur and (4) neither the CRC nor the OP-CRC-AC prohibit voluntary recruitment at age 16 or older of children into State armed forces even though the latter puts children at potential high risk of harm consequent to direct or indirect participation in hostilities should the State deem such participation to be a military necessity. The CRC set age 15 as the minimum age for voluntary recruitment into a State armed force while the OP-CRC-AC requires a minimum age older than 15 for such recruitment while stressing at the same time that all children under age 18 are entitled to special protection under international law such as the CRC and its protocols:

[16] Committee on the Rights of the Child and General Comment No. 13 (2011).

[17] Committee on the Rights of the Child and General Comment No. 13 (2011).

[18] CRC (1990).

[19] OP-CRC-AC (2002).

Article 3: OP-CRC-AC

1. States Parties shall raise the minimum age for the voluntary recruitment of persons into their national armed forces from that set out in article 38, paragraph 3, of the Convention on the Rights of the Child, taking account of the principles contained in that article and recognizing that under the Convention persons under 18 are entitled to special protection.[20]

Yet, those who argue for child soldier accountability (through judicial or non-judicial mechanisms) for conflict-related grave international crimes (committed by these children as part of an armed group perpetrating mass atrocities and/or genocide) essentially do *in effect* shift the burden for protection of children against violence through child soldiering to the children themselves; at least in regards to the older children (as opposed to viewing this as being an essential *and entirely* State responsibility in the first instance and an ongoing one). This the backlash proponents do, in part, by suggesting, directly and more indirectly, that if the children want to be protected against the risks of direct participation in armed conflict; including being expected by the armed group to commit atrocities, then the children had better do their supposed part not to allow themselves to be recruited (*allegedly* voluntarily) even if this is the only feasible means of survival for any period. Only then, according to the backlash proponents, can the children more certainly avoid potential criminal culpability for the conflict-related international crimes they may have committed as child soldiers. Hence, the survival issue is turned on its head. Instead of the child soldier joining up with an armed group that is bent on terrorizing the civilian population being viewed as having adopted an immediate strategy for survival at least in the short-term *as an indicia of duress*; the 'recruitment' is characterized by backlash proponents as supposedly 'voluntary' in some alleged meaningful sense. That characterization of the 'recruitment' as allegedly voluntary then comes with all the attendant alleged responsibility both for the recruitment and what ensues thereafter falling squarely and improperly on the shoulders of the child and not the State (which was obligated to protect the child against all forms of violence in the first instance):

> . . .is the child's membership in an armed force or group ever in his or her best interests? . . .leaving aside the issue of whether it is in his or her best interests, should we not respect the child's decision anyway?[21]
>
> In Africa . . .*where there is no state to protect you*. . .I'd join a guerrilla force or a government militia –whatever it took [to survive for me and my relatives](emphasis added).[22]
>
> . . .objective factors-poverty, lack of security, absence of educational or employment opportunities-[combined with the fact that the country is engulfed in a civil war where mass atrocity is taking place] –also weigh heavily on children's decision to *volunteer*. . ..We may not agree with their [the children's] decision or consider the conditions under which it was made ideal for making a considered choice, ***but we do not see such enlistments as coerced or constituting a violation of these individual's [the children's] rights*** (emphasis added).[23]

[20] OP-CRC-AC (2002), Article 3).

[21] Happold (2005), p. 31.

[22] Ryle (1999).

[23] Happold (2005), pp. 31–32.

Respectfully, this illogic is similar in a key aspect to that long since abandoned 'blaming the victim' approach applied to rape victims in North America both by the courts and society in general. Rape victims were previously not uncommonly erroneously and unjustly faulted for being in the wrong place at the wrong time allegedly due to their own actions. The victim's behavior, according to such a since discredited analysis, purportedly clouded the potential culpability of the perpetrator to a degree and whether or not the victim was an unwilling participant in his or her victimization. Those same North American courts have now come instead generally to respect the human dignity of the rape victim and his or her absolute right to have been protected by the State against violence committed by a perpetrator irrespective of anything the victim may or may not have done which in effect facilitated him or her becoming a victim (i.e. being a prostitute being one such factor which under the 'blame the victim' approach improperly largely shifted responsibility for the harms inflicted away from the perpetrator onto the rape victim and, hence, supposedly greatly alleviated the State's liability for the failure to meet its duty to protect all within its' jurisdiction). With regard to child soldier members of armed State or non-State groups that attack civilians and commit atrocities as a military tactic; the State also has a fundamental *a priori* obligation to prevent these groups victimizing children (as these armed groups do by recruiting and brutalizing the children as part of their military training' and initiation and ultimately using these children as vehicles for the group's unlawful conflict-related activities such as committing mass atrocities). That State obligation to prevent the 'recruitment' and use of children (over or under age 15) in hostilities by armed groups that violate IHL as a standard military tactic exists independent of anything the child may or may not have allegedly done to facilitate so-called recruitment by these armed groups. The assigning by backlash proponents of alleged responsibility to older children for their own alleged 'voluntary' recruitment (where this is said to have occurred) into armed groups committing mass atrocities and/or genocide and for any of its outcomes is an attempt to deflect attention away from: (a) the child's highly coercive circumstances exploited by the armed group's recruiters and (b) the State's role in putting the child in that circumstance in the first place by not providing a safe haven for children in the midst of armed conflict and mass atrocity (i.e. the failure of the State to protect children from all forms of conflict-related violence for example via: (1) evacuation to safer locales, and (2) armed protection for the children such that they would be provided with the basic necessities of life and thus be protected from unlawful recruitment by armed groups that commit mass atrocity as a matter of course and hence have no legitimacy under international law whether they are a break-away State or non-State armed group. (Recall the attacks on Hutu refugee camps in Zaire to which Hutu fled after the mainly Tutsi-Rwandan Patriotic Front gained control and from which camps Hutu refugees including children were abducted by the AFDL ('Alliance des forces democratique du Congo-Zaire') and slaughtered in the tens of thousands).[24]

[24] Amnesty International (1999), p. 33.

Some legal scholars such as Marc Drumbl even suggest, by implication, that children can properly be expected under international law to take steps, *where possible*, to elude abduction in order to avoid being forced to commit conflict-related atrocity as part of an armed group not adhering to IHL. This being the implication given the propositions advanced by Drumbl that: (1) accountability does accrue to children who commit conflict-related atrocities in instances where exercise of alleged 'tactical agency' could *theoretically* have resulted in avoidance of forced recruitment and (2) alleged evidence of such tactical agency (at least while not yet a member of the armed group) *in the particular case* can be inferred (erroneously on the analysis here) from the fact that *some* children do manage to avoid abduction into armed groups committing mass atrocity and/or genocide (i.e. the child 'night commuters' of Northern Uganda).[25]

Clearly, governments have not always regarded as victims the child soldier members of armed groups committing conflict-related mass atrocities. This is reflected in the fact that governments have many times not taken every precaution feasible during armed hostilities to protect children's survival even in cases where the children in question were known to be likely abductees as in the case of LRA child soldier recruits (This despite the knowledge that the LRA regularly and to this day abducts children for the purpose of active direct and indirect participation in hostilities):

> For its part, the government often acted inconsistently and sometimes heavy-handedly in its approach to the struggle with the LRA. One horrible example occurred in 1995, when Joseph Kony [head of the LRA] sent a group of rebels into Kitgum from northern Uganda to abduct 180 boys. Encountering UPDF forces, the LRA groups lost three hundred through escapes during clashes. The following day another one hundred got away. As the commander marched the remaining kids back to Sudan, a government helicopter spotted the retreating column from the air. Rebels shot at the Russian-made aircraft, which opened fire with its machine turrets. Of the 56 bodies recovered, 38 were children whose hands were bound behind their backs.[26]

In the above instance, the new child abductees ought to have been considered as 'human shields' (victims) given knowledge that LRA child abductees had escaped in significant numbers from that particular retreating column in days prior. A *blanket* assault on that LRA group from the air should have been avoided based on humanitarian considerations given the high possibility that significant child casualties would result (though, under IHL, the legal responsibility for the child casualties in this instance is assigned to the LRA in using the children as human shields). Note that no rescue effort for the LRA child abductees in contrast was attempted by the government but rather only indiscriminate bombing pursuant to surveilling the retreating LRA group and returning fire.

It is here argued, however, that there is simply no legally supportable argument for shifting the burden of responsibility for child soldiering as part of armed groups

[25] Drumbl (2009).

[26] Briggs (2005), p. 123.

that are perpetrating mass atrocity and/or genocide *from* the State (which failed to protect the children) and the armed group that did the recruiting (in whatever manner) *to* the child soldiers themselves. Participation of children in armed hostilities in the aforementioned circumstances is not simply a violation of the child's best interests in terms of protecting his or her right to survival and physical, psychological, and moral integrity; it is also a violation of *jus cogens* norms concerning humane treatment of civilians in times of armed conflict (i.e. the so-called 'child soldier' here is in actuality a civilian member of an unlawful armed group or force not of a 'combatant force' as the latter term is understood under IHL and as is explained in more detail in what follows).

1.2 Child Soldiers as Civilians with Special Protected Status and No Unconditional Right to Participate in Hostilities

Additional Protocol I (AP I) and Additional Protocol II (AP II) to the 1949 Geneva Conventions (which most legal scholars agree have attained the status of customary law) clearly set out the obligation under IHL of State parties to those Protocols, when engaged in armed conflict, to provide special protection to children of all ages caught up in the conflict as a protected class in and of themselves. Note that AP II in fact legally binds not just the States Parties that ratified or acceded to it but also armed groups that oppose those governments.[27] Notwithstanding that fact:

> The difficulty here, however, is that the involved parties, States and opposition groups, may not declare acceptance of the Protocols. As such, they may not feel compelled to abide by the obligations imposed by the Protocols.[28]

The child protection rights of the Additional Protocols afford special protection to children that creates a higher and broader duty of care than does the general right of protection for all civilians or, for example, the specific protections under Geneva Convention III (GC III)[29] should the children be captured:

> **Additional Protocol I**
> **Article 77**
> 1. Children [no age specified] ***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* (emphasis added).[30]

[27] Karanja (2008), p. 10.
[28] Karanja (2008), p. 10.
[29] GC III (1929).
[30] Protocol I Additional to the Geneva Conventions (Article 77(1)(1977).

> This article [Article 77, Protocol I] is not subject to any restrictions as regards its scope of application; *it therefore applies to* ***all children*** *who are in the territory of States at war* [i.e. including, on the analysis of the current author, child soldiers conscripted or alleged volunteers], whether or not they are affected by the conflict (emphasis added).[31]

Those in the backlash movement, this author respectfully contends, have failed to fully appreciate the full range of potential implications of Article 77(1) AP I and the parallel article in AP II (as will be explained here shortly). For instance, referring to Article 77(1) AP I, Happold provides, on the view here, an under-inclusive interpretation of Article 77(1) stating simply:

> "Special respect.' This is a very general obligation. *It appears to mean* simply that children should be treated with particular consideration in all circumstances (emphasis added).[32]

A similar provision regarding the special protection and aid due children is included in Protocol II Additional to the 1949 Geneva Conventions and, in each case (AP I and AP II), no specific upper age limit or age range is specified regarding which children *as children* are entitled to this special protection, care and aid.

> **Additional Protocol II: Part II. Humane Treatment**
> **Art 4 Fundamental guarantees**
> 3. *Children* [no age range specified for 'child'] ***shall*** *be provided with the care and aid they require*. . . (emphasis added).[33]

The ICRC commentary regarding Article 77; paragraph one of Protocol I Additional to the Geneva Conventions explains that this provision (Article 77) setting out the fundamental principle that children have a special privileged protected status (over and above any other existing privileges) intentionally did not provide a definition of 'child' or an age range at Article 77(1) which sets out the general protection and care obligation:

> The word "children" is not clarified in any way, and this omission is intentional. It should also be noted that the Committee decided not to place specific age limits in paragraphs 1 and 4 and that there is no precise definition of the term "children". [34]

Similar ICRC comments were made in regards to Article 4(3) Protocol II Additional to the 1949 Geneva Conventions regarding the special protected status of children caught up in armed conflict and its general applicability to all children who find themselves in the territory where the conflict is taking place and/or in the control and custody of one of the belligerent parties:

> The Conference intentionally did not give a precise definition of the term "child".[35]

[31] ICRC Commentary on AP I, Article 77 (2005a).

[32] Happold (2005), p. 104.

[33] Protocol II Additional to the Geneva Conventions (Article 4) (1977).

[34] ICRC Commentary on AP I (Article 77) (2005a).

[35] Protocol II Additional to the Geneva Conventions (Article 4) (1977).

Thus, there is, it is here argued, *already* built into Protocol 1 and II Additional to the 1949 Geneva Conventions; a fundamental and very general obligation to protect and aid children during armed conflict (both those under 15 and 15 and over) as a specific identifiable group given their vulnerability. This obligation, *if taken seriously*, would, by implication, at the very least, preclude children participating directly or indirectly in hostilities *regardless of their age* (under 15 or 15 and over but under 18) even if recruited (i.e. recall that Article 77(1) AP I and Article 4 (3) AP II specify no upper age limit regarding the absolute requirement and first order principle (reflected also in the word "shall" used in these articles) to afford children the protection and aid they need in times of armed conflict). This potential shield against children's recruitment and participation in combat is incorporated into the Additional Protocols while at the same time, and in contradictory fashion, AP I and II do not use language that explicitly and absolutely bars the recruitment and use of child soldiers aged 15 and over in hostilities (though neither does AP I or AP II endorse such conduct). This lack of clarity presumably reflects the unresolved tension between: (1) the ICRC position that all children's participation in combat (whether direct or indirect) is 'inhumane' (regardless the age of the child under 18) on the one hand, and (2) the various States' concern that they be able to tap into at least some supply of children for their armed forces if required or if advantageous militarily and/or politically in any way in a particular conflict situation. Indeed, the International Committee of the Red Cross in its commentary on Article 77 Protocol I Additional to the 1949 Geneva Conventions explains that:

> [Article 77 was crafted in recognition that] ***Participation of children and adolescents in combat is an inhumane practice and the ICRC considered that it should come to an end.*** When it presented the draft article . . .the ICRC's specific purpose was to . . .prohibit the participation [direct and indirect] of children [no age specified] in armed conflict (emphasis added). [36]

Indeed, one can reasonably argue (based on the ICRC perspective in drafting AP I) that the reference in Article 77(1) AP I[37] to the obligation of the Parties to the conflict to protect children from *any form* of indecent assault can be interpreted to include also protection from assault arising out of being placed in the midst of armed hostilities as a child soldier (i.e. where attack by the enemy or even one's own compatriots itself amounts to 'inhumane and degrading treatment (a form of indecent assault) insofar as child targets/victims are concerned). Such a view is tacitly reflected in the ICRC report on the customary rules of international humanitarian law prepared in consultation with a broad range of experts on IHL. Customary IHL requires, according to that ICRC report, that civilians be treated humanely both in an international and non-international armed conflict situation: "Civilians and persons hors de combat must be treated humanely"[38] and provides that children be considered a

[36] ICRC Commentary on AP I (Article 77) (2005a).

[37] AP I (Article 77(1) (1977).

[38] Henckaerts and Doswald-Beck (2005).

special protected class of civilians entitled to a high duty of care in that regard. Consistent with the ICRC position that the involvement of children in combat is to be regarded as an 'inhumane practice' (i.e. inhuman and degrading) under international customary humanitarian law; the group of IHL experts who were convened by the ICRC (and representing various geographical regions and legal systems) to set out a list of clear essential IHL rules stipulated that: (1) the recruitment of children into the armed forces; whether in the context of an international or non-international conflict; is contrary to customary IHL (Rule 136: "Children [no age specified] must not be recruited into armed forces or armed groups")[39] and that (2) the participation of children [no age specified] in hostilities is a breach of fundamental customary IHL (Rule 137: "Children must not be allowed to take part in hostilities").[40] It follows then from the aforementioned rules that children who have been subjected to such inhumane treatment in the form of involvement in hostilities as child soldier members of armed groups committing mass atrocities and/or genocide (regardless the mode of recruitment) cannot properly be held to account for what they have done in these circumstances where: (1) their lives and well being were under continuing, unpredictable and imminent threat (both from the adversarial armed group and their own armed group) and (2) their most basic rights as civilians under *jus cogens* norms to be protected from inhumane treatment were infringed (Children here according to the ICRC referring to persons under 18).

It is noteworthy that the special protections afforded children during international armed conflict under AP I (which would include also protections for *so-called* child soldiers as they are not listed as exempted) are all listed in Article 77 under the heading "Part IV: Civilian population Section III – Treatment of persons in the power of a party to the conflict Chapter II – Measures in favour of women and children."[41] This formulation is consistent with the view (endorsed by the current author) that child soldiers are in fact exploited child civilians. As such, they are entitled under IHL to a broad range of protections as a special protected class of civilians and not properly to be treated as 'combatants' or 'soldiers' with very limited protections despite their recruitment into the armed forces by whatever means and their engagement in international or internal armed hostilities.

Under Article 77 (3), if an adversarial party has captured a so-called 'child soldier', and regardless whether or not that party regards the child as a 'prisoner of war' (implying combatant status available based on certain criteria only in an international conflict situation); the child still benefits from the 'special protections' that are afforded child civilians under Article 77. States Parties to the Geneva Conventions (GC) (and some others not a party) have commonly adopted the view then that children are entitled to 'special protections' *as children* even if engaged in hostilities (these protections being those that attach to child civilians and

[39] Henckaerts and Doswald-Beck (2005).
[40] Henckaerts and Doswald-Beck (2005).
[41] AP I (Article 77) (1977).

are extended to 'child soldiers' who are in the custody of the enemy and who benefit from further additional specific safeguards as a result of their special protected status as children). This understanding of IHL is reflected, for instance, in the 2004 UK Manual on the Law of Armed Conflict in the section that reads:

> ***If captured, under-aged members of the armed forces are entitled [also] to . . .the special protection afforded to children*** (emphasis added).[42]

The most parsimonious and correct reading, it is here argued, of AP I Article 77 and AP II Article 4 is that children involved in armed conflict, regardless whether internal or international conflict, retain their civilian status and attendant special protections (though the child soldiers may be lawfully attacked by lawful belligerents who adhere to IHL during their (the children's) direct engagement in hostilities using a proportionate response *if* (1) the child soldiers are posing an imminent threat to their lawful opponents and (2) where there is no alternative but to defend against them but not once the children are *hors de combat*):

The special protections under AP I and AP II to the 1949 Geneva Conventions accorded to children engaged directly in hostilities are generally held to apply both to younger and older children. Consider in this regard Article 77 (2)(3):

> **Additional Protocol I (Article 77)**
>
> 2. The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, the Parties to the conflict shall endeavour to give priority to those who are oldest.
>
> 3. If, in exceptional cases, despite the provisions of paragraph 2, 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*** (emphasis added).[43]

So significant is this special protection afforded *all* children as children (all persons under age 18 which involves a duty of care beyond that accorded to regular prisoners of war); that there is a general consensus in the international humanitarian community that Article 77(3) is simply included as an extra precaution (i.e. to ensure that under 15s receive special protection as children even though their participation in hostilities is considered exceptional and may be classed as unlawful by the adversary):

> The better way to read Article 77(3) is to see it as attempting to ensure that children who have participated in hostilities despite the prohibitions in Article 77(2) [AP I] are not penalized for doing so. **The provision is *ex abundanta cautionae. It is not meant to imply that other, older children do not partake of the same special protection*** (emphasis added).[44]

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[42] UK Manual on the Law of Armed Conflict (2004).

[43] AP I (Article 77(2)(3) (1977).

[44] Happold (2005), p. 104.

States Parties to the Additional Protocols to the 1949 Geneva Conventions, *in practice*, not uncommonly treat child soldiers as civilians entitled to be regarded as such once *hors de combat* or if for any other reason not posing an imminent threat. This is reflected, for instance, in the commentary to the New Zealand Defense Force Law of Armed Conflict Manual rules regarding NZ forces engagement with child soldiers when correctly identified as children (where child soldiers are characterized/defined in the manual as persons under age 18 taking a direct part in hostilities who are members of State armed forces or a non-State armed group):

> . . .NZ [New Zealand] recognizes that the circumstances under which children are recruited and employed as soldiers [as members of national armed forces or non-State armed groups] renders them victims of armed conflict *regardless of their own actions*. *Where child soldiers* [whether considered lawful belligerents or unlawful] *are identified as such,* [*as children*], *and pose no direct threat to NZ forces, combat action against them is to be avoided* (emphasis added).[45]

To recap then; it can be properly concluded, based on the aforementioned ICRC commentary regarding AP I, that the ICRC regards the systematic use of children in armed conflict (i.e. their direct or indirect active participation in armed hostilities whether internal or international) as a form of 'inhuman and degrading' treatment of a civilian group entitled to 'special protection' as children (irrespective of any other protected status the children may or may not hold under any international treaty or customary law such as 'prisoner of war' status). The failure to protect children of all ages from this 'inhumane practice' that threatens their very survival (participation in hostilities) would, according to IHL on such practices, generally be considered a violation of a *jus cogen* norm from which there can be no derogation. This view is tacitly incorporated in more contemporary times to a much greater degree in the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (OP-CRC-AC)[46] (an international human rights instrument). The OP-CRC-AC provides protections for children up to age 18 against direct participation in armed conflict in contrast to the more limited protections in this regard provided to children in the Additional Protocols to the 1949 Geneva Conventions.[47]

The OP-CRC-AC then places the burden squarely on the State to: (1) take all feasible measures that children do not take direct part in hostilities; (2) ensure that children (persons under 18) are not compulsorily recruited into State armed forces.[48]; and (3) take all feasible measures to ensure that children (persons under 18) are not

[45] Cited at Happold (2005), p. 102.

[46] OP-CRC-AC (2002).

[47] OP-CRC-AC (2002), Article 1.

[48] OP-CRC-AC (2002), Article 2.

recruited in any manner by non-State armed groups or used directly or indirectly by such non-State groups in armed hostilities[49](the most common circumstance in recent history in which child soldiers are in fact engaged in armed conflict and involved in committing atrocities).

Thus, the OP-CRC-AC[50] properly places the full legal responsibility for children's recruitment and direct participation in armed hostilities as members of non-State armed groups on: (1) those armed groups that recruit and use children in hostilities (often to perpetrate atrocities as part of the armed group's sustained attack on civilians) and (2) on the States that fail to protect children from these rebel groups and not on the child recruits themselves. Unfortunately, the Optional Protocol still leaves some gray area with respect to the alleged voluntary recruitment of older children into the State armed forces as to where the responsibility for child soldier recruitment lies in that case should the government force be engaged in committing mass atrocities and/or genocide. It would seem that the State should be held *fully* liable for recruiting children into a national force in that circumstance even if the children were 16 and over and alleged voluntary recruits at the relevant time. In such a case the child's right to special protection under IHL would certainly be violated by their recruitment into such a national armed force intent on committing grave IHL violations (and especially since that force would, in all likelihood, use the children also for participation –direct and/or indirect- in its campaign of terror against civilians). Indeed, the failure to protect children from recruitment (whether forced or allegedly voluntary notwithstanding the highly coercive circumstances of the child's existence such as being in the midst of prolonged civil war) into State or non-State armed groups/ forces committing mass atrocities and/or genocide can be viewed as a denial of humanitarian aid to the child in violation of Article 38 of the CRC:

Article 38: Convention on the Rights of the Child (CRC)

4. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.[51]

The child's specific basic right to access humanitarian aid (which would, it is here contended, include being shielded from recruitment by armed groups or forces committing grave international crimes) is articulated also at Article 22 of the CRC dealing with child refugees (as are so many demobilized child soldiers and children at risk of recruitment into child soldiering i.e. over 100,000 unaccompanied children fled as refugees into neighboring countries during the Rwandan genocide)[52]:

Article 22: Convention on the Rights of the Child

1. *States Parties shall take appropriate measures to ensure that a child* who is seeking

[49] OP-CRC-AC (2002), Article 4.

[50] OP-CRC-AC (2002).

[51] CRC (1990).

[52] Amnesty International (1999), p. 69.

> refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, *receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties* (emphasis added).[53]

The suggestion here is that Article 22 of the CRC (considered in the context of the whole of the CRC, its integrated interdependent rights and its objective of furthering the best interests of the child and his or her survival and good development) can be interpreted as setting out the general principle that *any children* in need of humanitarian assistance (not just those seeking refugee status or those who are refugees) are entitled to it from the State (and from the international community as well if need be). Children's right to humanitarian assistance (i.e. protection from recruitment by armed groups or forces committing mass atrocities and/or genocide etc.) is directly linked to their most fundamental super-ordinate rights upon which all other rights depend (i.e. the right to life, and to the maximum extent possible survival and development articulated at Article 6 of the CRC:

> **Article 6: Convention on the Rights of the Child**
> 1. States Parties recognize that every child has the inherent right to life.
> 2. States Parties shall ensure to the maximum extent possible the survival and development of the child.[54]

Recall that the State is not normally prohibited under the OP-CRC-AC[55] from voluntary recruitment of children aged 16 and over into its armed forces but rather simply required only to abide by certain constraints (i.e. as to the age of children allowed to 'volunteer' and meeting requirements for verifying alleged voluntariness; age of the so-called voluntary recruit and the existence of informed parental consent to the children's recruitment etc.). The presumption in the OP-CRC-AC provision allowing voluntary recruitment of children aged 16 and over into a State armed force, however, must be that the national armed force abide by IHL which sadly is too often not the reality in many contemporary conflicts (Recall in considering so-called voluntary recruitment of older children into national armed forces that the OP-CRC-AC[56] requires only that States take all feasible measures to ensure that these older child recruits do not participate in hostilities but incorporates no absolute ban on such participation).

Both Western and many non-Western States have signed onto and/or ratified and/or acceded to the OP-CRC-AC as was also the case for the Convention on the Rights of the Child[57] (though the rates for ratification of the OP-CRC-AC are less

[53] CRC (1990), Article 22.
[54] CRC (1990, Article 6.
[55] OP-CRC-AC (2002).
[56] OP-CRC-AC (2002), Article 1).
[57] CRC (1990).

for Africa and the Asia –Pacific region than for other parts of the globe unlike the situation for the CRC itself).[58] It can thus rightfully be inferred that the view that recruiting children (persons under age 18) for the purpose of their direct engagement in hostilities is an 'inhumane practice' (whether carried out by the State or a non-State armed group) is a consensus view shared by most States; including both those with a colonial past and those that have been the victims of colonization. In this regard, recall that the 'African Charter on the Rights and Welfare of the Child' at Article 22 sets out a very strong prohibition against recruitment and direct use of children in hostilities by State or non-State forces (where child is defined as person under age 18). Article 22 does so by requiring that the State "take all necessary measures" (as opposed to only all feasible measures) to implement these prohibitions:

African Charter on the Rights and Welfare of the Child Article 22: Armed Conflicts

1. States Parties to this Charter shall undertake to respect and ensure respect for rules of international humanitarian law applicable in armed conflicts which affect the child.
2. States Parties to the present Charter shall take *all necessary measures* to ensure that no child shall take a direct part in hostilities and refrain in particular, from recruiting any child.
3. States Parties to the present Charter shall, in accordance with their obligations under international humanitarian law, protect the civilian population in armed conflicts and shall take all feasible measures to ensure the protection and care of children who are affected by armed conflicts. Such rules shall also apply to children in situations of internal armed conflicts, tension and strife (emphasis added).[59]

On the analysis here then children who are participating directly or indirectly in hostilities have been exploited in violation of their *jus cogen* right to survival and to protection against inhuman and degrading treatment. That child soldiering (involvement in armed hostilities) is a violation of *jus cogens* norms suggests that the existing restrictions and/or prohibitions against the use of child soldiers in hostilities in the Conventions on the Rights of the Child, the OP-CRC-AC and other international human rights and humanitarian law are fundamentally grounded on basic universal international human rights norms applicable across cultures [60] and *not* simplistically on Western idealized visions of childhood (contrary to the claims of some academics).[61] Prohibitions or constraints on recruitment of children of a certain age may then be regarded as an effort to avoid the risk and propensity of State and non-State armed forces or groups to use these child recruits in combat where available and useful in furthering their respective military and political interests.

The international community recognizes that the burden to prevent the so-called voluntary recruitment of children into non-State armed groups falls heavily on the

[58] Arts (2010).

[59] African Charter on the Rights and Welfare of the Child (1999).

[60] Grover (2007).

[61] Pupavac (1998).

State as well as on the armed groups in question. This tacitly reflects the view of the international community that alleged 'voluntary' recruitment (at least in the case of non-State armed groups) does not obviate the State's responsibility to provide children the protection to which they are entitled (protection of their right to survive and thrive; right to be protected from exploitation etc.) Thus, the aforementioned Article 4 of the OP-CRC-AC[62] prioritizes the child's right to life and mental and physical integrity over any theoretical child's right to allegedly voluntarily participate in armed conflict with non-State armed groups (Note that no child participation right exists in this regard in any case where the non-State armed group is engaged in perpetrating mass atrocities and/or genocide notwithstanding whether it has labeled itself as a liberation force or in some other self-righteous fashion).

Recall that voluntary recruitment into State armed forces of child recruits at a certain minimum age is not explicitly prohibited in the OP-CRC-AC.[63] However, there is, as previously mentioned, acknowledgement at Article 3(1) of that Protocol of the fact that children (all persons under age 18) are entitled to "special protection" under IHL implying that: (1) the direct or indirect participation of children of any age in armed conflict, even if supposedly voluntarily recruited into national armed forces, is not in the children's best interests and that (2) from a IHL perspective; the most desirable situation would be to raise the minimum age of voluntary recruitment into State national armed forces to 18:

Article 3: OP-CRC-AC

1. States Parties *shall raise in years the minimum age for the voluntary recruitment of persons into their national armed forces* from that set out in article 38, paragraph 3, of the Convention on the Rights of the Child [currently set at 15], taking account of the principles contained in that article and *recognizing that under the Convention persons under the age of 18 years are entitled to special protection* (emphasis added).[64]

Note the reference in the text of Article 3 of the OP-CRC-AC (which concerns the requirement to raise the minimum age of voluntary recruitment into national armed forces above age 15 years) to ". . .taking account of the principles contained in that article [Article 38 of the CRC]." Those principles referred to relate to the State obligation under international humanitarian law to protect the *civilian population* and in particular to "take all feasible measures *to ensure* protection and care of children who are affected by an armed conflict":

Article 38: Convention on the Rights of the Child (CRC)

4. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.[65]

[62] OP-CRC-AC (2002).

[63] OP-CRC-AC (2002).

[64] OP-CRC-AC (2002).

[65] CRC (1990), Article 38.

That the OP-CRC-AC at Article 3[66] refers (via the reference to the principles set out at Article 38 of the CRC), in the context of discussing restricting child soldier voluntary recruitment to national forces to those above age 16, to protecting civilian populations, and, in particular, the special protections owed by the State to child civilian populations, implicitly acknowledges that child soldiers are in fact exploited child civilians notwithstanding the commonly used misleading nomenclature namely; 'child soldier.'

Thus, the OP-CRC-AC[67] (Article 1) tacitly accords with the ICRC view of the direct participation of children (persons under age 18) in armed conflict as being: (1) inconsistent with the IHL obligations of the State to afford children (persons under age 18) 'special protections' during armed conflict beyond that normally afforded adult civilians and being (2) an inhumane practice (to whit the Protocol also absolutely bans recruitment of children by non-State armed forces and, in effect, discourages the State's recruitment of all children (even those aged 15 and older) into the national armed forces). However, at the same time, the provision at Article I of the OP-CRC-AC[68] is quite weak in referring only to a prohibition on children's direct participation in hostilities and not requiring States to take *all necessary and feasible measures* to end *all manner* of child participation in hostilities as members of State or non-State armed forces or groups.

1.3 The Privileged Status of Children During Armed Conflict and the Inadequacies of the 'Best Interests of the Child Principle' Rationale

There has been an evolution in the thinking of State governments since the formulation of AP I and AP II to the 1949 Geneva Conventions which coincides more so with the ICRC's position that: (1) children are entitled to a special privileged status during armed conflict as a highly vulnerable group on account of age and also, at times, on account of the child being part of a marginalized segment of the population and that (2) the State has the obligation to ensure that these special protections are realized. This evolution in thinking in the international community which is moving closer to the ICRC position (regarding children's participation in armed conflict as an 'inhumane practice') is reflected in the preamble to the OP-CRC-AC which includes amongst others the following declarations:

> **Preamble: OP-CRC-AC**
> Reaffirming that *the rights of children require special protection*, and calling for continuous improvement of the situation of children. . .

[66] OP-CRC-AC (2002, Article 3.
[67] OP-CRC-AC (2002).
[68] OP-CRC-AC (2002).

> Considering therefore that to strengthen further the implementation of rights recognized in the Convention on the Rights of the Child *there is a need to increase the protection of children from involvement in armed conflict,*
>
> Noting that the twenty-sixth International Conference of the Red Cross and Red Crescent in December 1995 recommended, inter alia, *that parties to conflict take every feasible step to ensure that children below the age of 18 years do not take part in* hostilities,
>
> Recognizing the special needs of those children who are particularly vulnerable to recruitment or use in hostilities contrary to the present Protocol owing to their economic or social status or gender... (emphasis added)[69]

Hopefully; there will be further significant evolution in the international community's assessment of the issue of child soldiering acknowledging the privileged status of children during armed conflict. This will occur, it is here contended, when State Parties are prepared to fully acknowledge that children's direct or indirect participation in hostilities, whether as part of a national armed force or non-State armed group, constitutes a violation of a *jus cogens* norm (and no more so than when the non-State armed group or national force is involved in perpetrating mass atrocities and/or genocide). At present, the OP-CRC-AC rationale for improving the protections accorded children in times of armed conflict is weakly grounded on a 'best interests of the child' principle. Under international law the 'best interests of the child' principle is treated as but one amongst other primary legitimate considerations for the State (i.e. see the excerpt from the preamble to the OP-CRC-AC below) where these other factors may or may not conflict with the interests of the child (i.e. alleged national security interests of the State in using children aged over 15 for 'voluntary' direct participation in armed conflict to defend the State against perceived threats is considered lawful notwithstanding the children's right to life and the State's obligation to ensure to the maximum extent possible the children's survival and development as per Article 6 of the Convention on the Rights of the Child[70]):

> **Preamble: OP-CRC-AC**
>
> Convinced that an optional protocol to the Convention that raises the age of possible recruitment of persons into armed forces and their participation in hostilities will *contribute effectively to the implementation of the principle that* ***the best interests of the child*** *are to be* ***a*** *primary consideration in all actions concerning children* (emphasis added).[71]

It should be understood furthermore that the 'best interests of the child principle' is vulnerable to conceptual permutations that are sometimes, in practice, actually tremendously *disadvantageou*s to children's well-being. The best interests of the child principle is often co-opted by persons who hold diametrically opposing views on what in fact constitutes 'best interests of the child' in a particular circumstance. For example, Happold holds the view (as this author understands his position; one diametrically opposed to that of the current author) that ultimately it would

[69] OP-CRC-AC (2002) (Preamble).

[70] CRC (1990), Article 6.

[71] OP-CRC-AC (2002) (Preamble).

allegedly *not* be in the 'best interests' of children *as a group* **not** to be lawful targets of attack as child soldiers by the opposing force on the same basis as applies to adult enemy soldiers becoming lawful targets. Note that adult soldiers (combatants) are considered lawful targets *at all times* except when *hors de combat*; that is except: (1) when having clearly signaled an intention to surrender; (2) when in the power of the adverse party i.e. as a prisoner of war etc. or (3) when incapacitated in some way such as to render him or her unable to defend him or herself.[72] That being a lawful target on the same basis as adult soldiers is in the best interest of children as a group Happold claims is the case since allegedly:

> the main beneficiaries [of such a rule of war making child soldiers an *unlawful* target for attack] would be those who recruit child soldiers. Their troops would be able to operate with impunity. Indeed, the existence of such a rule might only serve to fuel the recruitment of children, as the advantages of doing so became apparent [the child's ability generally to carry out hostile acts for their armed group without interference] (emphasis added).[73]

The current author, in contrast, holds that *so-called* child soldiers should *not* be considered lawful targets for attack when *not* posing an imminent deadly threat. That is, they should not be considered lawful targets on the same basis as are adult enemy soldiers; the latter being subject to attack at all times when not *hors de combat*. That child soldiers must be differentiated in terms of what constitutes their lawful targeting is due to the fact that: (1) they are as children entitled to a special protected status under IHL and (2) they are in fact child civilians if members of armed groups or forces that are systematically committing grave violations of IHL (the latter given that such armed units are unlawful and their recruitment of children is therefore unlawful under any scenario; that is, such unlawful non-State armed groups or State national forces *cannot* transform children's status from 'civilian' to (child) 'soldier' in any legal sense as per IHL definitions by virtue of the fact that the unlawful group or force recruited that child and trained him or her militarily or used him or her in some direct or indirect capacity in the hostilities). The latter position is akin, for instance, to the tact reflected in the UK manual on armed conflict[74] discussed previously. That manual, it will be recalled, stipulates that so-called child soldiers (unlike the case for enemy adult soldiers still considered engaged in combat) are *not* to be considered generally as lawful targets but only where they pose an imminent deadly threat. To do otherwise, it is here contended: (1) undermines the responsibility of all in a position to protect children during armed conflict to do so wherever feasible and (2) creates a false perception that there is no *jus cogens* nature to that obligation from which there can be no derogation (i.e. the obligation to provide children special protection and aid during armed conflict in respect of the necessity of preserving their right to life first and foremost). It can be argued that IHL by affirming the notion of the child's right to

[72] Henderson (2009), pp. 83–84.

[73] Happold (2005), p. 102.

[74] UK Manual on the Law of Armed Conflict (2004).

special protection and humanitarian assistance during armed conflict: (1) incorporates fundamental human rights principles in respect of children; including child soldiers, and that (2) these human rights principles cannot be superseded on the basis simply of military advantage where feasible alternatives are available which would preserve the rights and interests of the children involved.

Arguably an arbitrary, legally insupportable deprivation of life during armed conflict in the case of children would involve the direct use of children in hostilities leading to their deaths since: (1) clearly wars can generally be waged without there being a necessity for the involvement of child soldiers and (2) children, as discussed, have a special protected status under IHL. There is then a contradiction in IHL between the entitlement of children to special protection and the State's ability to lawfully recruit and use children of age 15 or over for participation in hostilities (a contradiction addressed and resolved in part in international human rights law via the OP-CRC-AC via the stipulation that States Parties take all feasible measures to prevent the direct involvement of children (persons under age 18) in armed hostilities.[75]

Note that civilians can be targeted only during that time that they are directly involved in combat and posing a threat.[76] The issue becomes complicated, however, when civilians engage directly in the armed hostilities and then return to civilian life and repeat this cycle at regular intervals. Some scholars on the laws of war suggest that in such an instance the civilian remains a lawful target even during the relatively brief rest periods between his or her direct engagement in hostilities as the individual has no intention of opting out of the hostilities and the rest periods are but preparation for the next round of participation in hostilities (i.e. the individual's direct involvement in hostilities can be considered to be 'continuous' making him or her a lawful target at all times as long as he or she is not *hors de combat* (i.e. not incapacitated or in the control of his or her adversary etc.).[77] The current author would suggest, however, that even if the latter analysis is correct (an issue which is beyond the scope of this book), this approach could *not* be applied in the case of so-called child soldiers. This in that child soldiers as children are entitled to special protection and assistance under both IHL and international human rights law. The legal implication of the latter fact under international law is that the rest period between the child's direct or indirect engagement in hostilities at any one time and their next involvement in hostilities must be utilized by the State, to the extent feasible, as an opportunity: (1) to disarm and demobilize the child and (2) to provide the child with the humanitarian assistance he or she requires as opposed to being utilized as a chance for targeting of the child for elimination as an alleged enemy combatant or even unlawful participant in hostilities. The 'principle of distinction' then (the distinction between 'combatants' on the one hand and 'civilians' (and in

[75] Op-CRC-AC (2002), Article 1.

[76] Henderson (2009), p. 92.

[77] Henderson (2009), pp. 96–97.

addition noncombatants such as army chaplains, medics etc.) on the other which at all times must be made in armed conflict and in the application of the rules of military targeting which is so fundamental to IHL[78] (and is part of customary law) is confounded with the requirement to provide children with special protection (also part of customary law). That is, on the view here, according to IHL, children engaged in armed conflict (whether as official members of a national armed force or a member of a non-State armed group or militia) are to be treated by the adversary as civilians as opposed to being regarded as lawful targets when they do not pose an imminent deadly threat.

It is ironic that AP I and AP II to the 1949 Geneva Conventions absolutely prohibit the imposition of the death penalty on any child soldier or other child captured by the adversary (person under age 18). Thus, the obligation to preserve the life of children involved in armed conflict (including child soldiers) was recognized in the Additional Protocols in various ways (i.e. also by the prohibition on under 15s participating directly in hostilities etc.). Yet, as has been noted, the Additional Protocols did not provide complete protection guarantees for all children affected by armed conflict by, for instance: (1) absolutely prohibiting recruitment of all children (persons under 18); (2) prohibiting the direct or indirect use in armed hostilities of under 18s in recognition of children's basic right to life and by (3) setting out a State's obligation to take all *necessary and feasible measures* to ensure children's survival and good development even in the midst of conflict.

The current author would argue that those parts of various international treaties are invalid which conflict with the *jus cogens* human rights norm that the lives of children (persons under age 18) affected by armed conflict are to be protected by parties to the conflict at all times to the extent necessary and feasible as implied by: (1) the 'special protections' to be accorded to children at all times during periods of armed conflict according to customary international law; and (2) given that the participation, direct or indirect, of children (persons under age 18) in hostilities is an 'inhumane practice.'[79] Thus, the implied IHL provision that States may voluntarily recruit and even potentially use children of a certain minimum treaty-stipulated age for direct participation in hostilities where the State deems this militarily necessary and unavoidable is superseded by the *jus cogens* rule regarding the special protection owed to children in preserving their right to life. Recall that the 'Vienna Convention on the Law of Treaties (VCLT)'at Article 53 sets out this principle regarding the implication of *jus cogens* norms:

> **Vienna Convention on the Law of Treaties (VCLT): Article 53**
> **Treaties conflicting with a peremptory norm of general international law ("jus cogens")**
> *A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law*. For the purposes of the present Convention, a peremptory norm

[78] Henderson (2009), p. 568.

[79] ICRC Commentary ICRC Commentary (Article 77, Protocol I Additional to the Geneva Conventions).

> of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.[80]

A *jus cogens* rule such as described in IHL according children (persons under age 18) special protected status in times of armed conflict is then:

> . . .a sort of international law that, once ensconced, cannot be displaced by states, either in their treaties or in their practice. . . *Jus Cogens* therefore functions like a natural law that is so fundamental that states, at least for the time being, cannot avoid its force.[81]

Consider then the provisions of the OP-CRC-AC[82] with respect to the issue of the *jus cogens* obligation to protect the lives of children affected by armed conflict. The acknowledgement and fulfillment of that obligation is seriously undermined, for instance, by the following aspects of the OP-CRC-AC:

1. The ability of States to lawfully use children for so-called indirect participation in hostilities which participation conceivably may also place the children in harm's way (Article 1);
2. The ability of States to lawfully recruit into their national armed forces children of a certain minimum age above 15 who allegedly volunteer to be child soldiers (Article 3);
3. The failure to raise the minimum age of voluntary recruitment into the national armed forces to age 18 (Article 3);
4. The stipulation in the Convention at various points that States "take all feasible measures" (i.e. to prohibit the direct participation of children in hostilities (Article 1), or prevent the recruitment and use in hostilities of children by non-State parties (Article 4)). This leaves the State a large margin of appreciation to decide what is/was in fact feasible from the State's point of view in a particular situation thus undermining the burden on the State to effectively protect all children during armed conflict.

It would appear that the robustness of the OP-CRC-AC[83] as a human rights instrument suffers, to a degree, from the incursion of international humanitarian norms. The latter norms are rather flexible on the issue of meeting *jus cogens* human rights obligations (i.e. the child's right to life) when such flexibility serves State military strategic interests. Thus, certain human rights principles are derogated from under IHL but yet are deemed lawful given limiting justifying principles such as 'military necessity' and 'proportionality'. Thus, for instance, it is deemed by the State to be in the State interest to allow for so-called volunteer child soldiers of a certain specified minimum age (with the informed consent of their

[80] VCLT (1969).
[81] Janis (1988).
[82] OP-CRC-AC (2002).
[83] OP-CRC-AC (2002).

parents or other legal guardian) to participate directly and indirectly in hostilities when there is purported military necessity. This is not entirely prohibited in IHL nor in international human rights law such as the OP-CRC-AC given that the State is not required to take all necessary measures to prevent such an occurrence. This is the case despite the *jus cogens* nature of the State's obligation to preserve the child's right to survival to the extent possible in times of armed conflict as in times of peace. Smith has written eloquently and clearly on the complex topic of the uneasy intermingling of international human rights and international humanitarian law and the potential consequences of allying the two:

> Under the tutelage of humanitarian law, human rights may grow accustomed to military norms governing the use of force as well, narrowing the ideals of human rights to fit the *pragmatics and apologetics of war law* (emphasis added) [as the current author suggests has occurred in some respects with the OP-CRC-AC].[84]
>
> . . .humanitarian law is "of" war in the sense that the norms that regulate the conduct of hostilities are designed to be compatible with the pursuit of military ends.[85]
>
> The comparative advantage of human rights is not necessarily to do a better job of applying the laws of war, or to hold belligerents to ever more rigorous readings of the Geneva Conventions. What human rights does uniquely well [or potentially could] is to address the broad-based effects of conflict [i.e. the adverse effects of recruiting and using child soldiers in hostilities on the children and on society in general] and to develop alternatives to war itself.[86]

As Smith rightly puts it "The utilitarianism of humanitarian law sets it apart from the 'absoluteness' of human rights."[87] The current author would add in that regard that, in the context of children and armed conflict, IHL allows for the limited use of child soldiers in armed conflict as discussed. However, a genuine regard for *jus cogens* human rights norms governing the treatment of children affected by armed conflict; and for the dignity of the child under international human rights law, would require: (1) an absolute prohibition on the direct or indirect use of children in hostilities by State or non-State parties to a conflict and (2) an absolute prohibition on all manner of recruitment of children for the purpose of deploying the child recruits in combat as soon as training is complete.

It is apparent, the current author suggests, that children (persons under age 18) will be adequately protected in times of armed conflict (with the Parties to the conflict using all necessary and feasible means to prevent children's engagement directly or indirectly in hostilities and refraining from the recruitment of children), only if children's special privileged status during armed conflict is seen to be based on *jus cogens* obligations grounded in notions of fundamental human rights and not simply on a 'best interests of the child' principle. The 'best interests of the child principle, as has been discussed, can be too easily manipulated to serve the interests

[84] Smith (2010), p. 25.
[85] Smith (2010), p. 26.
[86] Smith (2010), p. 25.
[87] Smith (2010), p. 25.

of warring belligerents rather than that of the children caught up in an armed conflict situation.

The *jus cogens* nature of the State's obligation to shield children from direct or indirect involvement in hostilities (based on (1) the child's fundamental right to life; to survival to the maximum extent possible; to physical and psychological integrity and (2) the notion of children's involvement in hostilities as an 'inhumane and degrading practice') is, it is here maintained, based on natural law principles and exists independent of any particular legislative scheme. Acknowledgement of this *jus cogens* principle (the prohibition on children's involvement in armed hostilities) as a general principle of international law that is universal and from which there can be no derogation is reflected in, amongst other things:

1. The ever broadening of protections for children against involvement in child soldiering under international law i.e. OP-CRC-AC which prohibits the direct involvement of children under age 18 in hostilities and restricts recruitment practices in various ways etc. (as of 2 April, 2011, the Optional Protocol had been ratified by 139 States with 128 signatories). (It should be noted in this regard that as the U.S. court in the *Filartiga* torture case noted: "...the courts must interpret international law not as it was...but as it has evolved and exists among the nations of the world today."[88]) and
2. The reluctance of international criminal courts and tribunals (i.e. the SCSL, the ICTY, ICTR and the ICC to: (a) prosecute children for their involvement in international or internal armed hostilities (even where such involvement is considered to be in violation of IHL) or to (b) prosecute children (that is, so called child soldiers) for their commission of conflict-related atrocities where the children have in fact perpetrated war crimes, crimes against humanity and/or participated in genocidal acts. This reluctance reflects, it is here argued, the international criminal system's unease with prosecuting children for what are, in large part, foreseeable outcomes arising from the violation of the children's *jus cogens* right to be shielded as a highly vulnerable group from involvement in armed conflicts as child soldiers (many of which conflicts, in contemporary times, are internal; some with internationalized aspects, and marked by State and/or non-State armed groups perpetrating heinous international crimes).

Note that even the most common interpretation of the VCLT Article 53 is that it is not necessary that all States agree with a principle such as the right of children (persons under age 18) to be protected from any direct or indirect involvement in armed hostilities before it can be considered to have a *jus cogens* status:

> ...the norm is established where there is acceptance and recognition by a "large majority" of states, *even if over dissent by "a very small number of states"* ...In other words, the norm describes such a bare minimum of acceptable behavior that no Nation State may derogate from it.[89]

[88] *Filartiga v PenIrala*, 630 F.2d 876 (2nd. Cir.1980).

[89] UN Doc. A/Conf. 39/11 (1968) at 471–472.

With respect, it is debatable whether an interpretation of *jus cogens* as entirely a function of agreements amongst the majority of States is conceptually flawed. This being the case since the persistence of the norm would then depend on "continued state acquiescence"[90] as well as on the precise but arbitrary estimation of how many states are required to constitute what is considered a broad enough consensus to establish and uphold the *jus cogens* norm. However, the nature of the heinous and deeply offensive behavior (such as torture or inhumane and degrading treatment) which gives rise to the *jus cogens* prohibition has not changed whether some or many states are prepared to tolerate it at any point under any circumstance or not and our perceived common humanity is diminished, as always, through its occurrence.

Note that the commentary of the Law Commission on the draft articles of the Vienna Convention on the Law of Treaties acknowledged that "treaties that violate human rights . . .might conflict with preemptory norms."[91] It has here been argued in essence that to the extent that AP I and AP II to the 1949 Geneva Conventions and the OP-CRC-AC, for instance, permit children of any treaty-stipulated minimum age or younger to involve themselves directly or indirectly in armed conflict (by not absolutely prohibiting the recruitment and direct or indirect use of children in armed hostilities and not requiring the State to take all necessary and feasible measures to implement these prohibitions), these treaty provisions and omissions: (1) violate the children's basic right to survival which is ultimately often times dependent on State protection in times of armed conflict where the child may not have any other vehicle for protection (i.e. it is almost universally recognized that the State may intervene to protect children where families are unable to do so) and, therefore, (2) these treaties, by certain of their provisions and the implications of those provisions, and by obvious omissions, conflict with the *jus cogens* norm requiring children to be protected from exploitation and direct or indirect use for participation in armed hostilities.

1.4 What the Historical Record on IHL Teaches About *Jus Cogens* Norms and Children Affected by Armed Conflict

1.4.1 The Origin and Basis of the Special Protections Accorded to Children During Armed Conflict

It should be recognized that the *jus cogens* customary norm requiring special protection of children during armed conflict (though frequently violated in practice through the centuries) has a very long history that precedes modern day conceptions

[90] Klein (1988).

[91] *Filartiga v PenIrala*, 630 F.2d 876 (2nd. Cir.1980). Cited in Stephens (2004), p. 253.

of children's inherent universal fundamental human rights (i.e. political, civil, social and economic rights):

> Concern for children within humanitarian law or the laws of war in general has a long history, and is not a late twentieth century development. As such, it precedes any notions of child rights *per se*. which is a more recent development. There is in fact a viable tradition of the special consideration for and protection of children during periods of war going as far back as Grotius, as well as Plutarch, Seneca, Sallust and others. . .the norm as a guiding and practiced principle has been circulating for a very long time.[92]

At the same time: "The terms child and child soldiers are not defined under the international humanitarian law corpus."[93] As a consequence: (1) the specific age range of the children afforded special protections vary under different international and domestic legal instruments and (2) understandings amongst legal scholars and practitioners about what special protections, if any, are due child soldiers as children vary.

IHL and international human rights law both have significant protection gaps for children caught up in an armed conflict situation. In particular; confusion persists as to the proper status to be assigned to armed children participating in international or non-international armed conflicts which uncertainty echoes back at least to the time of the Romans:

> Even the present problem of whether to consider armed minors as legitimate targets is not solved by Grotius,[94] for although he is quite clear that *children are not to be killed* [at the same time] he stresses that "they who have taken arms should be punished in battle. . . (emphasis added)"[95]

Certain contemporary scholars of international law (some whose views contribute to the backlash movement) suggest that children designated as 'lawful combatants' in an international armed conflict may be subjected to lethal force using legal means and methods whether posing an imminent threat or not as long as not *hors de combat* due to wounding, being disarmed etc.

> *. . .when participating in hostilities children are no more privileged that [sic] any other combatant*. There are no additional rules restricting what the forces of an adverse power may do to them. They may be shot, shelled, bombed or bayoneted just as may any other combatant. . .*In general, lawful combatants may be attacked at any time, regardless whether they are participating in hostilities or not*, providing the methods and means of warfare used to do so are legal. *There is no reason for thinking that this is not the legal position in regards child soldiers* (emphasis added).[96]

It would appear, however, contrary to the claims of backlash proponents, that the accepted and preferred customary practice is for adult belligerents to give special

[92] Fox (2005), p. 31.

[93] Karanja (2008), p. 12.

[94] Grotius (1853) transl. by Whewell at pp. 374–375.

[95] Fox (2005), p. 46, FN 10.

[96] Happold (2005), p. 101.

consideration to armed children even in the midst of hostilities; and to protect the children's lives and well-being, to the extent feasible, without risking their own lives or physical integrity (This historical position is reflected in contemporary times, for instance, in the New Zealand manual on armed conflict).[97]

Recall that in fact "the concept of child soldier or child-combatant does not exist within international law, with the exception of provisions made for the captured, armed minors.[98] Thus, IHL mentions children engaged in conflict only in terms of certain special protections owed them as children and not in terms of lawful targeting of these children (as for instance at Article 77 of AP I):

> **Article 77: Additional Protocol I to the 1949 Geneva Conventions**
> 3. If, in exceptional cases, despite the provisions of paragraph 2, 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.
> 4. If arrested, detained or interned for reasons related to the armed conflict, children shall be held in quarters separate from the quarters of adults, except where families are accommodated as family units . . ..
> 5. The death penalty for an offence related to the armed conflict shall not be executed on persons who had not attained the age of eighteen years at the time the offence was committed (emphasis added).[99]

The adversary holding the child who has directly engaged in hostilities may arbitrarily designate the child as a 'lawful combatant' in the context of an international conflict and grant the child POW status. Conversely, the detaining power may classify the child's status as 'unlawful belligerent' in an international armed conflict (or an internal one). However, the child as child is owed certain special protections under IHL (treaty and customary law) whether considered an unlawful or lawful belligerent. Thus the child properly should suffer no significant adverse protection consequences as a captive for being considered an unlawful belligerent.

Children engaged directly or indirectly in hostilities if captured have had to rely largely on the humanitarian instincts, if any, of their adversaries and on *jus cogens* traditions allowing children special protections as children on the battlefield and should they be captured. The *jus cogens* practice regarding special protections owed children who have directly participated in hostilities is reflected, as has been mentioned here previously, in the failure of international criminal courts and tribunals to prosecute children for grave conflict-related international crimes. This being the case even though it is arguably a *jus cogens* rule that war crimes and crimes against humanity (as well as genocide) must be prosecuted and thus there exists universal jurisdiction in this regard where the circumstances require (i.e. the Geneva Conventions ". . .provide for prosecution and punishment of individuals

[97] Happold (2005), p. 102.
[98] Fox (2005), p. 30.
[99] AP 1 (1977, Article 77).

who commit criminal offences prohibited under humanitarian law)."[100] In this regard, consider the remarks of the U.N. Special Representative on children and armed conflict:

> Although a State's failure not [sic] to prosecute a child soldier who has committed such a violation [i.e. war crime] *may* be a breach of international law in itself [i.e. the Geneva Conventions], the specific needs and best interests of the child should always be key to this decision.[101]

It is here contended that the failure of international courts and tribunals to criminally prosecute so-called 'child soldiers' (for war crimes, for conflict -related crimes against humanity as well as for genocidal acts) does *not* in fact violate international humanitarian law where the children have been 'recruited' into murderous armed groups or State national forces or other State armed units terrorizing the civilian population. This is the case as children are not culpable under customary humanitarian law for international crimes they may have perpetrated as armed participants in hostilities pursuant to the State's failure, in the first instance, to meet its *jus cogens* obligation to protect these children (persons under age 18) from forcible genocidal transfer to armed groups or national forces committing mass atrocities and/or genocide (more specifically, where the State has failed to provide 'special protections' for children against such genocidal forcible transfer). This latter proposition will be analyzed in some detail in Chap. 3.

Furthermore, individual criminal culpability does not attach to child soldiers (persons under age 18 at the time of the alleged international crimes) in the situation described in that children who commit conflict-related atrocities as part of an armed group or force perpetrating mass atrocities and/or genocide are operating under duress as victims of genocidal forcible transfer to another group (as opposed to being so-called 'child soldier recruits' who at times have tactical agency that they are purportedly expected under IHL to exercise if they are to escape culpability for the commission of conflict-related atrocity).

Note that the Committee on the Rights of the Child in the recent months prior to May 2011 reported on extra-judicial killings of children (child soldiers), the prosecution of child soldiers before military courts and the use of children as spies and military shields all of which violate the provisions of the OP-CRC-AC.[102] Clearly children are but pawns in adult- crafted armed hostilities involving the commission of systematic international crimes. Yet, at the domestic level at least, child soldiers continue in some regions to be held to account for atrocities committed as members of armed groups or national forces committing mass atrocity and/or genocide; often without due process and are being subjected to the ultimate sanction.[103]

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[100] Karanja (2008), p. 22.

[101] Coomaraswamy (2010), p. 544.

[102] OP-CRC-AC (2002).

[103] Meehan (2011).

The current author argues that the special protection clauses in API and AP II in respect of children have profound legal implications and do not simply allude to a delimited set of rights when the child is in the power of an adversary such as the right to schooling, to medical and psychological assistance, protection from indecent assault (in contrast to the view of Happold).[104] That the death penalty cannot under API to the 1949 Geneva Conventions be imposed on children who have been convicted of grave conflict-related international crimes is a reflection of the acknowledgement by the international community of the child's right to special protections. That under API the death penalty could yet be *pronounced* on children for conflict-related grave crimes was an accommodation to those States Parties that wished to communicate: (1) an unwillingness to grant immunity based on young age (but an age at or older than the minimum age of criminal responsibility set out in domestic legislation) and (2) a tough stance against impunity for the alleged criminally culpable perpetrator who had reached the age of criminal responsibility. In practice, in more recent times, however: (1) international courts and tribunals have not sought criminal prosecution of children for their role in perpetrating conflict-related atrocities (grave international crimes) in an internal or international armed conflict (even where there was jurisdiction to do so), and (2) the State governments are turning to non-judicial Truth and Reconciliation and/or local healing mechanisms in dealing with 'child soldiers' accused of conflict-related international crimes (even though the child in an internal conflict could potentially be "prosecuted [under national law] for treason for taking up arms against their government or for murder for the killing of government soldiers.")[105]

The latter approaches reflect the fact that there has been progress in accepting that the State's failure to provide the children with the special protection during armed conflict to which they are entitled *from the outset* (i.e. including protection from 'recruitment' to an armed group or force committing mass atrocities and/or genocide) seriously mitigates; if not negates; the assignment of criminal culpability to the accused 'child soldiers.'

Note that peace agreements, however, while on occasion acknowledging the existence of child soldiers amongst the ranks of one or more of the warring parties and stipulating an understanding regarding the implementation of disarmament, demobilization and re-integration programs for the child soldiers often do not address issues of justice and impunity.[106] That is, peace agreements generally do not address how perpetrators of various international crimes (including unlawful child soldier recruitment and the unlawful use of children in hostilities) will be dealt with in the post-conflict period.[107] An exception is, for instance, the 2007 Agreement on Accountability and Reconciliation between the government of the

[104] Happold (2005), pp. 103–104.
[105] Happold (2005), p. 108.
[106] Karanja (2008).
[107] Karanja (2008), p. 7.

Republic of Uganda and the Lord's Resistance Army (LRA) which stipulated that accountability and reconciliation matters would be handled at the local level via formal and informal mechanisms though in the latter case also, there was no specific mention of child soldiers[108] or their status as victims and/or alleged perpetrators.

Most commonly and importantly, in addition, these peace agreements often include no statement as to: (1) what status 'child soldiers' who have committed conflict-related atrocities hold (i.e. culpable perpetrators or non-culpable victims of genocidal forcible transfer to another group; one committing mass atrocities and/or genocide) and (2) whether these children will be criminally prosecuted or otherwise held accountable for atrocities they committed as child soldier members of armed groups or national forces engaged in systematic mass atrocity and/or genocide. The latter fact does nothing to quell the hostility of the local population against ex child soldiers who have participated in atrocity. This omission in peace agreements then works to detract from the potential success of DDR programs for child soldiers who are often not viewed as primarily or purely victims (especially where they are known to have or are suspected of having participated in atrocities against their own and/or other communities) as the State has done little to frame them in that light.

The *jus cogens* obligation to protect children from direct or indirect engagement in armed hostilities (especially where such engagement is to involve children participating directly in a systematic campaign of atrocity against civilians including other children) derives from the belief that children's participation in armed conflict offends the conscience of humanity. We will consider these issues in a later chapter in the context of specific cases concerning child soldiers facing prosecution for alleged grave conflict-related international crimes. However, at this point let us consider this *jus cogens* obligation to protect children from armed conflict in the first instance in the light of Geneva Convention IV (GC IV) which incorporates this customary norm into IHL. The provisions of GC (IV) listed below specifically refer to the State Parties' obligation to protect children who find themselves in the midst of armed conflict:

Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949[109]

Art. 14. . . .after the outbreak of hostilities, the Parties thereto, may establish in their own territory and, if the need arises, in occupied areas, hospital and *safety zones and localities so organized as to protect from the effects of war,* wounded, sick and aged persons, *children under fifteen*, expectant mothers and mothers of children under seven.

Art. 17. The Parties to the conflict shall endeavour to conclude local agreements for the *removal from besieged or encircled areas*, of wounded, sick, infirm, and aged persons, *children* [**age unspecified**] and maternity cases, . . .

Art. 23. Each High Contracting Party . . .shall likewise permit the free passage of all consignments of essential foodstuffs, clothing and tonics *intended for children under fifteen*, expectant mothers and maternity cases.

[108] Karanja (2008), p. 7.

[109] GV IV (1949).

> Art.24. The Parties to the conflict shall take the necessary measures to ensure that *children under fifteen*, who are orphaned or are separated from their families as a result of the war, are not left to their own resources, and that their maintenance, the exercise of their religion and their education are facilitated in all circumstances. Their education shall, as far as possible, be entrusted to persons of a similar cultural tradition.
>
> The Parties to the conflict shall facilitate the reception of such children in a neutral country for the duration of the conflict with the consent of the Protecting Power, if any, and under due safeguards for the observance of the principles stated in the first paragraph.
>
> They shall, furthermore, endeavour to arrange for all *children under twelve* to be identified by the wearing of identity discs, or by some other means.
>
> Art. 38. With the exception of special measures authorized by the present Convention. . . the situation of protected persons shall continue to be regulated, in principle, by the provisions concerning aliens in time of peace. In any case, the following rights shall be granted to them:
>
> (5) *children under fifteen years*, pregnant women and mothers of children under seven years shall benefit by any preferential treatment to the same extent as the nationals of the State concerned.
>
> Art. 50. The Occupying Power shall, with the cooperation of the national and local authorities, facilitate the proper working of all institutions devoted to the care and education of children.
>
> Art. 89. Daily food rations for internees shall be sufficient in quantity, quality and variety to keep internees in a good state of health and prevent the development of nutritional deficiencies. . .Expectant and nursing mothers and *children under fifteen* years of age, shall be given additional food, in proportion to their physiological needs.
>
> Art. 94. The Detaining Power shall encourage intellectual, educational and recreational pursuits, sports and games amongst internees, whilst leaving them free to take part in them or not. It shall take all practicable measures to ensure the exercise thereof, in particular by providing suitable premises.
>
> All possible facilities shall be granted to internees to continue their studies or to take up new subjects. *The education of children and young people* [ages unspecified] *shall be ensured*; they shall be allowed to attend schools either within the place of internment or outside.
>
> Internees shall be given opportunities for physical exercise, sports and outdoor games. For this purpose, sufficient open spaces shall be set aside in all places of internment. *Special playgrounds shall be reserved for children and young people.*
>
> Art. 132. Each interned person shall be released by the Detaining Power as soon as the reasons which necessitated his internment no longer exist.
>
> *The Parties to the conflict shall, moreover, endeavour during the course of hostilities, to conclude agreements for the release, the repatriation, the return to places of residence or the accommodation in a neutral country of certain classes of internees, in particular children* [**age unspecified**]**,** *pregnant women and mothers with infants and young children,* wounded and sick, and internees who have been detained for a long time (emphasis added).[110]

The claim has been made by some scholars that while "GCIV viewed children essentially as civilians and non-combatants, it did not envisage the protection of child soldiers."[111] The point has been made here, however, that children 'recruited' into armed groups or national forces committing mass atrocities and/or genocide

[110] GC IV (1949).

[111] Karanja (2008), p. 10.

remain civilians as they are the victims of genocidal forcible transfer. The GC IV protections, on the view here, then obligate the State to prevent children becoming the victims of such genocidal transfer and to provide special protections to those children who were so victimized and rescued (that is to child soldier members of armed groups or forces committing systematic atrocities and/or genocide against civilians whether or not those children have themselves committed conflict-related atrocities as child soldiers). The current author further, in contrast to the view of Karanga,[112] contends that GC IV was in part intended also: (1) to protect children from child soldiering generally (hence the reference, for instance, to 'safe zones' for the protection of children under age 15 from "the effects of war" which surely includes the risk of children being recruited and used in armed hostilities (Article 14) and to removal of children (no age specified) from besieged areas (Article 17)) and intended (2) to protect children from unlawful recruitment generally (hence Article 24, for instance, provides special protection to under 15s [such as assistance regarding family reunification and support for orphaned children under 15 such that these groups of children are not left to their own resources] likely intended to reduce the risk of these children being unlawfully recruited into child soldiering [where the unlawfulness of the recruitment is due at least in part to their being below the minimum age under IHL for so-called voluntary recruitment into an armed group or force]). The coming into force of the OP-CRC-AC[113] with its requirements that States take all feasible measures, for instance, (1) to prevent children (persons under age 18) from direct participation in hostilities and (2) to prevent non-State armed groups from any form of child soldier recruitment or manner of use of children (persons under age 18) in hostilities reflects an evolving more inclusive conception of the State's *jus cogens* obligation to treat children as a special class of protected civilians entitled to a high duty of care, protection and assistance in times of armed conflict and in the post-conflict period.

To threaten the lives of children who are one's own nationals by engaging them as active direct participants in armed conflict is in fact a rather recent phenomenon only in terms of the scale on which this is occurring. There is also an increase in the use by non-State groups of children largely and specifically for the purpose of perpetrating atrocity against civilians:

> Although some writers have pointed out that minors have taken part, both directly and indirectly, in hostilities historically, the instances they point out are few and far between, and bear little resemblance to the rapid global rise of child soldiers in the late twentieth century… The commonly quoted figure of an estimated 300,000 minors to be active militarily at any one time may well seem extreme to some, and insignificant to others. However, the meaningfulness is not so much a matter of numbers as it is the distribution, excesses, and rising frequency, which together suggest the birthing of a new and monstrous conflict norm…*The plain facts are that, at any one time, approximately 300,000 young*

[112] Karanja (2008), p. 10.

[113] OP-CRC-AC (2002).

> *people under the age of 18 are reported to be actively taking part in combat situations in more than 100 countries around the world* (emphasis added).[114]

This phenomenon, it is here contended, has not been fully addressed by the ICC nor by international criminal tribunals such as the SCSL. For instance, prosecutions regarding the recruitment and use of child soldiers to actively participate in hostilities have concerned only those perpetrators that victimized children under age 15 in this way (i.e. *Prosecutor v. Samuel Hinga Norman*, a judgment of the Appeal Chambers of the Special Court of Sierra Leone stands for the proposition that an international customary rule existed prior to 1996 prohibiting children under age 15 from actively participating in armed hostilities under any circumstances (whether coerced to do so or alleged volunteers).[115] However the case will be made here in Chap. 3 that 'recruitment' and use of children *over or under age 15* for direct or indirect participation in *hostilities by groups committing genocide or mass atrocity* (where the atrocities are carried out systematically and with intention with or without a plan rather that occurring in isolated instances) or both, amount not simply to "serious violations of the laws and customs applicable in international [or non-international] armed conflict' (to use the words of the Rome Statute, Article 8 dealing with war crimes[116]), but rather constitute a particular mode of genocide as defined under the 1951 Genocide Convention at Article 2(e) concerning genocidal forcible transfer of children to another group.[117] Under the latter legal analysis then all children (all persons under age 18) are entitled to: (1) protection under IHL treaty and customary law against so-called 'recruitment' (by any mode or means; including alleged voluntary recruitment) by armed groups or forces systematically committing conflict-related mass atrocities and/or genocide (with recruitment of child soldiers by any means or mode into such armed groups or forces being considered 'genocidal forcible transfer') and to (2) protection against any form of participation with these armed groups or national forces (whether by providing indirect or direct support to their operations or by participating directly or indirectly in the armed hostilities). Such an approach (which it is here contended is grounded on well-established treaty and customary international law) fills in certain key protection gaps for children at risk of child soldiering as members of armed groups or national forces perpetrating heinous grave conflict-related international crimes. For instance, recall that the OP-CRC-AC[118] has significant gaps in protection of children in respect of their so-called recruitment and use in hostilities. That Optional Protocol to the CRC requires only that States Parties take all *feasible* measures (rather than all feasible and necessary measures) to prevent the *direct* participation (rather than direct and indirect participation) of children (persons

[114] Fox (2005), p. 28.

[115] Prosecutor v. Samuel Hinga Norman The Appeals Chamber SCSL (May 2004).

[116] Rome Statute.

[117] Genocide Convention (1951, Article 2 (e)).

[118] OP-CRC-AC (2002).

under age 18) in armed hostilities, and did not prohibit so-called voluntary recruitment at some age over 15 into State armed forces. As has been pointed out: "the distinction between compulsory and voluntary enlistment is artificial and may lead to abuse"[119] (i.e. the safeguards set out in the OP-CRC-AC for allegedly ensuring that any child soldier recruitment is voluntary are not failsafe as, for instance, parents can be coerced into providing alleged voluntary informed consent for their child's recruitment into a murderous armed group or national force etc.). Likewise IHL also, as discussed, contains serious protection gaps for children in respect of child soldiering i.e. AP II to the 1949 Geneva Conventions requires States Parties to take feasible measures to prevent only the recruitment and use in hostilities of children under age 15.[120]

The special protection of children's fundamental human rights and their entitlement to humane treatment also during armed conflict is an international customary law norm explicitly expressed/codified both in regional instruments (such as the African Charter on the Rights and Welfare of the Child[121]) and in international law instruments (such as the CRC[122] and OP-CRC-AC,[123] AP I[124] and AP II[125] to the 1949 Geneva Conventions requiring that children be afforded special care and respect in times of armed conflict (no age specified)). It is here contended that so-called 'recruitment' (by any means) of children *of any age* under 18 into non-State armed groups or State national forces *committing systematic mass atrocities and/or genocide* and /or the use of these children by these armed groups or forces in any fashion [(1) for direct or indirect participation in the hostilities (as child soldiers); or (2) in support of the armed group or force in some other way] so significantly undermines children's welfare and chances for survival and humane treatment that the aforementioned conduct constitutes a violation of customary international humanitarian law to which individual criminal culpability attaches for the adult perpetrator of such recruitment and use of child soldiers. The latter is, in addition, implied by the special protections provided to children under treaty humanitarian law and international human rights law. Yet, IHL and international human rights treaty law by their express terms or provisions, as discussed, place certain constraints on the protection of children against child soldiering. Those constraints however, it is here argued, do not apply to the protection of children against recruitment to and use by non-State armed groups or State national forces committing mass atrocities and/or genocide. Note in this regard in any case that as the Appeal Chamber of the SCSL held in the Norman case: "a norm *need not be*

[119] Karanja (2008), p. 39.

[120] AP II to the 1949 Geneva Conventions (1977).

[121] African Charter on the Rights and Welfare of the Child (1999).

[122] CRC (1990).

[123] OP-CRC-AC (2002).

[124] AP I to 1949 Geneva Conventions (1977).

[125] AP II to 1949 Geneva Conventions (1977).

expressly stated in an international convention for it to crystallize as a crime under customary international law (emphasis added)."[126] It is here contended then that, for the reasons discussed, 'recruitment' to and use of children by armed groups or forces committing mass atrocities and/or genocide is a crime under customary international law regardless the age of the child or the mode and manner of recruitment.

Note that the current author adopts in large part the view of the SCSL in *Prosecutor v Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa* (the CDF case) on the issue of the definition of (child soldier) 'active participation' in hostilities as follows:

> Any labour or support that gives effect to, or helps maintain operations in a conflict constitute active participation. Hence carrying loads for the fighting faction, finding and/or acquiring food, ammunition or equipment, acting as decoys carrying messages, making trails or finding routes, manning checkpoints or acting as human shields are some examples of active participation as much as actual fighting and combat. [The current author would add to these diverse examples of 'active participation' in hostilities also being a recruiter of additional children to the armed group or force committing mass atrocities and/or genocide, being a female child soldier so- called 'bush wife' to an army commander as well as performing other duties such as being a bodyguard to a commander etc.][127]

1.4.2 The Uneven Development of Child Protection Guarantees in IHL and International Human Rights Law

The legal contradictions and gaps in IHL and international human rights instruments in regards to the protection of children affected by armed conflict arise in part since these bodies of law did not evolve in a context in which child soldiering was a focus or central concern:

> Because both branches of law historically speaking were unprepared for the emergence and growth of the child soldier phenomenon, they evolved as patchwork developments, resulting in some of the inconsistencies, contradictions, legal gaps, and lack of clarity which beset the phenomenon even today [i.e. the instruments do not clarify whether children can be lawful targets as combatants in no way different from adult combatants, there are contradictions between various IHL and human rights instruments regarding whether all persons under age 18 are entitled to protection from direct and/or indirect participation in armed hostilities etc.][128]

Let us then consider next just some of these gaps, contradictions as well as unclear concepts in IHL and international human rights law concerning children affected by armed conflict.

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[126] Prosecutor v. Samuel Hinga Norman The Appeals Chamber of the SCSL (May 2004).

[127] Prosecutor v Samuel Hinga Norman et al. case. Cited at Karanja (2008), p. 27.

[128] Fox (2005), p. 27.

In commenting on Additional Protocol II to the Geneva Conventions in regards to Article 4(3) the ICRC states that:

> The prohibition against using children [under age 15] in military operations is a fundamental element of their protection.[129]

Presumably then such a prohibition is a fundamental element of the protection for older children as well. However, the ICRC was reluctantly forced to make compromises regarding the formulation of the Additional Protocols to the 1949 Geneva Conventions and the scope of the privilege these instruments offered children. This in order that the ICRC could secure certain additional protection privileges for children affected by armed conflict under these particular instruments compared to previous IHL. Consider in this regard that the original ICRC draft of what became, in revised form, Article 77 of Protocol I Additional to the 1949 Geneva Conventions in fact made specific reference to the privileged status of children:

> **Original ICRC draft of the Article Concerning Children in AP I: Protection of children**:
>
> 1. ***Children shall be the object of privileged treatment***. *The Parties to the conflict shall provide them with the care and aid their age and situation require*. Children shall be protected against ***any form*** of indecent assault.
> 2. The Parties to the conflict shall take ***all necessary measures*** in order that children aged under fifteen years shall not take part in hostilities and, in particular, they *shall refrain from recruiting them in their armed forces* ***or accepting their voluntary enrolment***.
> 3. The death penalty for an offence related to a situation referred to in Article 2 common to the Conventions ***shall not be pronounced*** on persons who were under eighteen years at the time the offence was committed (emphasis added)[130]

Thus, the ICRC had to make significant concessions on the scope of the privileges to be accorded children in a conflict situation per the Additional Protocols I and II to the 1949 Geneva Conventions in order to have the States Parties reach a consensus (these ICRC compromises are discussed in further detail at Sect. 1.4.3). Indeed, the relevant article concerning the "Protection of children" AP I in its revised version no longer made reference to the children's entitlement to "privileged treatment." The omission of those words ("Children shall be the object of privileged treatment") from the final version of Article 77 AP I is telling. It helps create the illusion that the States Parties have more discretion in respect of the scope of protections owed children than is in fact consistent with the notion of the special protected status for such a vulnerable group (under 18s); one highly susceptible to exploitation and abuse especially during desperate times such as in an armed conflict situation. The fact remains, however, that children are considered to have special protections as children in an armed conflict situation. That is, international humanitarian law requires that their age be taken into consideration in respect of

[129] ICRC Commentary on AP II (Article 4).

[130] ICRC Commentary on AP I (Article 77), FN 1.

issues regarding recruitment of children; their potential use in hostilities; their treatment if captured and the imposition of penalties for conflict-related offenses. It is here argued then that the protection benefits that persons under age 18 enjoy should they participate in armed conflict is as a protected class of persons (children) and not due to any presumed unqualified right they are erroneously held to have to participate in hostilities.

Recall the blanket proposition of certain international law scholars that child soldiers are allegedly no more privileged than are adult fighters when actively engaged in hostilities and not *hors de combat*.[131] The latter is a view that the current author disputes as being oversimplified. Rather, with respect, the correct interpretation of IHL on this point, it is here contended, is that child soldiers engaged in hostilities must be spared from attack to the extent possible and provided humanitarian assistance as required according to *jus cogens* customary humanitarian norms (those norms stipulating that special protections are owed *all children* also in times of armed conflict). The same is true after capture of a child who has actively engaged in armed hostilities. Thus, for instance, AP I Article 77(3) makes it clear that even if a child under age 15 is an 'unlawful belligerent' (hence not entitled to POW status if captured); he or she is still entitled to *special protection* as a child:

> 2. If, in exceptional cases, despite the provisions of paragraph 2, 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.[132]

It is here contended then that special protection for children applies on account of children's age (persons under age 18) and vulnerability and is therefore to be accorded also: (1) to the extent feasible while the child is engaged in hostilities and (2) ensured after capture. Thus, for instance, AP I (Article 77(1)) (1) does not exempt child soldiers from the special protections owed children generally (persons under age 18) in times of armed conflict and (2) does *not* delimit certain of these special protections owed to children to be applicable to child solders only after capture (i.e. the obligation to show special respect and provide humanitarian care):

> **Additional Protocol I**
> **Article 77**
>
> 1. Children [no age specified] ***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* (emphasis added).[133]

[131] Happold (2005), p. 101.

[132] AP I to the 1949 Geneva Conventions (1977, Article 77(3)).

[133] Protocol I Additional to the Geneva Conventions (Article 77(1)(1977).

According to the backlash proponents however: (1) child soldiers too may be attacked at any time if they are designated as lawful combatants (or lawful belligerents) and are not *hors de combat* (that is, child soldiers on this account under the latter circumstances have no special privileges based on age that would preclude them from being targeted for attack during hostilities); and (2) if not lawful participants in the conflict, child soldiers, as with adults holding the unlawful belligerent status, may be attacked only when engaged actively in the hostilities at the time of the attack (and once hors de combat; they are to be treated as civilians who engaged in hostilities but yet have the right to humane treatment under international humanitarian law). Note that Happold seems to suggest that even *under 15's* may be the target of attack at any time if not *hors de combat* should they be considered 'lawful belligerents' (that is, should they be considered to be persons who were, for instance, allowed to volunteer for recruitment into the armed forces of the State and permitted to actively participate in internal or international armed hostilities) rather than being designated "unprivileged belligerents":

> Children *under 15* who participate in hostilities are *not necessarily* 'unprivileged belligerents' [that is, for instance, if in the context of an international conflict they are not necessarily 'unlawful combatants' *according to Happold*]. *Their status is determined not by their age* but by the same criteria as determine whether any other persons are entitled to participate directly in hostilities or not. (emphasis added).[134]

Given the various constraints on the State and non-State parties in recruiting and using children in hostilities and the explicit protections afforded children under various international treaties and conventions (i.e. AP I and AP II to the 1949 Geneva Conventions as well as OP-CRC-AC), the current author contends that it is clearly *not* the case that children's "status" in respect of entitlement or lack of entitlement to privileges or protections *when engaged in hostilities* "is determined not by their age" but by the same criteria as determine whether any other persons are entitled. That is, it is here contended that IL stipulates that children (persons under age 18) are entitled to special protections at all times and during actual combat to the extent feasible (a position adopted by Western military such as the New Zealand and UK military as previously discussed).

Furthermore, after capture, and whether considered a lawful or unlawful belligerent, children are still entitled to additional special protections on account of their age:

> *all children* [persons under age 18 except where otherwise specified]. . .can rely on the provisions of Article 77, ***even if they are prisoners of war*** **[lawful combatants]** ***or protected persons*** **[civilians]*under the fourth Convention*** [who had no right to participate in the hostilities; indicating that these special protections to be accorded children: (i) go beyond the protections afforded to civilians in general *or* to prisoners of war under IHL; (ii) are protections related to young age; namely being under 18 years of age and (iii) are not a function of the child being a lawful or so-called 'unlawful belligerent' (the latter term

[134] Happold (2005), p. 101.

being one which in fact does not exist under IHL and should properly be replaced by the term 'civilian'].[135]

Whether actively engaged in hostilities or not, and regardless the status assigned to a child (i.e. POW versus civilian detainee who had no lawful right to participate in hostilities), the child (over or under age 15) under Article 77(1) AP I and Article 4(3) AP II retains his or her entitlement to special care and assistance.

3. If, in exceptional cases, despite the provisions of paragraph 2, 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 [Article 77 AP 1],* ***whether or not they are prisoners of war***.[136]

AP I Article 77 reveals that under IHL children involved in armed conflict (whether on a lawful or unlawful basis) are essentially regarded as 'victims' with a certain unique privileged status and an entitlement to special protections.

The first step in the Happold argument, however, is to suggest, relying on AP I Article 43, that children, if members of State armed forces, are *ipso facto* lawful combatants in an international conflict entitled to participate in hostilities and not entitled to any more protection than is the case for adult lawful combatants who "may be attacked at any time" when not *hors de combat*[137]:

As Article 43 of AP I states, members of the armed forces of a party to the conflict are combatants; they are entitled to participate directly in hostilities.[138]

However, the definition of 'armed forces' in Article 43(1) requires that the force comply with international humanitarian law as an organized body under a definable command structure:

Article 43: Armed Forces (Protocol I)

1. The armed forces of a Party to a conflict consist of all *organized* armed forces, groups and units which are *under a command responsible to that Party for the conduct of its subordinates*, even if that Party is represented by a government or an authority not recognized by an adverse Party. *Such armed forces shall be subject to an internal disciplinary system which, ' inter alia ',* ***shall enforce compliance with the rules of international law applicable in armed conflict*** (emphasis added).[139]

Clearly, those State armed forces that would indiscriminately recruit children (whether through force, conscription or supposed voluntary enlistment) and use them directly in hostilities, and/or to commit atrocities are not complying with international humanitarian law and are for that reason at least not a lawful combatant force (i.e. IHL sets constraints on the recruitment and use of children in hostilities such as recruitment and use of under 15s for direct participation in

[135] ICRC Commentary on AP I (Article 77).

[136] AP 1 (Article 77).

[137] Happold (2005), p. 101.

[138] Happold (2005), p. 100.

[139] AP I to the 1949 Geneva Conventions (1977, Article 43).

international conflicts only as a last resort (AP I), no recruitment of under 15s by any State or non-State armed force in non-international conflict and no participation of under 15s directly or indirectly in the internal armed conflict (AP II); no use in an international conflict of younger children where older children are available and then their use only as a last resort (AP I) etc. It is here argued then that to the degree that State armed forces do not adhere to these customary rules of law as per AP I, they do not qualify as (lawful) belligerents (combatants) and children who are members are thus also not conferred this status (i.e. they are civilians though engaged in hostilities as part of an unlawful State armed force). Children thus do *not* have an unqualified right to participate in hostilities as child soldiers as part of such a State armed force and their recruitment by such a force is itself unlawful. Hence, in determining the status of so-called child soldiers in international conflicts; it is necessary to consider Article 43 of AP I in relation to Article 77 AP I (similarly, children have no unqualified right to participate in an internal conflict as part of an unlawful rebel group such as the Columbian rebel group FARC which is recruiting indigenous children as young as 12 to reportedly transport anti-personnel mines and supplies).[140]

Children then under IHL hold a privileged status which entitles them to: (1) special protection on account of their age regarding their potential recruitment and use in hostilities (the specifics being set out, for instance, in AP I[141] and AP II[142] to the 1949 Geneva Conventions in respect of various prohibitions and limitations with broader protections specified under international human rights law such as OP-CRC-AC),[143] (2) special protection on account of age while engaged in conflict in respect of being targeted as a military objective in that IHL requires efforts be made to spare the child if possible in the context of the exigencies and practicalities of the situation, and (3) additional protections on account of age should they be captured by an adverse party. The current author has argued elsewhere that children do *not* have an unqualified right to participate in hostilities in contrast to lawful adult belligerents and cannot therefore properly be considered to be combatants (in the context of an international conflict); nor soldiers in any sense in an internal conflict as opposed to being classed as civilians[144] Recall that the concept of 'child soldier' does not exist under IHL though IHL sets out special protections for children who for whatever reason are captured or detained by the adversary during or at the conclusion of hostilities[145] presumably, in some instances, after the children's active involvement in hostilities.

[140] Children's Rights Information Network ((2011).
[141] AP I to the 1949 Geneva Conventions (1977).
[142] AP II to the 1949 Geneva Conventions (1977).
[143] OP-CRC-AC (2002).
[144] Grover (2008).
[145] Fox (2005), p. 30.

Those protections under IHL constitute one dimension of the special protections owed children in times of armed conflict.

The involvement of children in armed conflict in any capacity as members of a State national force is considered under IHL to be something which the State ought to avoid as reflected in the Additional Protocols to the 1949 Geneva Conventions and various international human rights instruments (while the State is obligated also under IHL and international human rights law to take all feasible measures to prevent the recruitment and use of children in hostilities by non-State groups). Thus, from an IHL perspective, where children over or under 15 participate in armed hostilities as members of a national armed force (with the State's knowledge of the children's actual age and its acquiescence), they do so strictly at the State's considered discretion notwithstanding the State's obligations to children under IHL to provide them special protections (rather than as a matter of routine or pursuant to an unqualified right of children either under IHL or as members of a national armed force to participate in armed hostilities). Note, for instance, that national armed forces such as the British armed forces allow recruitment at age 16 (despite the age of legal majority in Britain being 18):

> The UK is one of a handful of states – fewer than 20 – which still recruit 16 year olds into their armed forces. The UK is isolated amongst its traditional military allies in this practice – no other country in the European Union and no other UN Security Council permanent member state recruits from this age. The few other states which do recruit at 16 include Iran, North Korea and Zimbabwe. *Internationally, more than 130 states have set their minimum armed forces recruitment age at 18 or above, in line with the recommendations of expert international human rights bodies*(emphasis added).[146]

Since ratifying the OP-CRC-AC[147]; Britain does not normally officially permit deployment of 'child soldiers' for participation in hostilities (though this has occurred ostensibly inadvertently on occasion i.e. 15 children were deployed to Iraq between 2003 and 2005).[148] Yet, Britain filed a declaration to the OP-CRC-AC[149] upon its ratification of that instrument reserving the right (at its discretion) to deploy under 18s where it determined this justifiable in the particular circumstances.[150] The reluctance of the vast majority of States that maintain they abide by IHL to recruit children into the armed forces and/or use them in armed hostilities as a matter of course is reflective of the international community's growing willingness to affirm that: (1) children's participation in armed hostilities is not consistent with customary IHL norms notwithstanding the children being a part of the national armed force; and that (2) there is an absence of any unqualified right of children to participate in armed hostilities in any capacity. Under customary or treaty IHL then there is no recognized obligation in any circumstance (i.e. as

[146] Coalition to Stop the Use of Child Soldiers (2011a, b), p. 1.

[147] OP-CRC-AC (2002).

[148] Coalition to Stop the Use of Child Soldiers (2011a, b), p. 1.

[149] OP-CRC-AC (2002).

[150] Coalition to Stop the Use of Child Soldiers (2011a, b), p. 5.

members of a national armed force) that children purportedly owe to the State to participate in armed hostilities. Note, for instance, that the Soviets used child soldiers to clear landmines as they liberated each area from the Nazis in WW II resulting in high casualty rates for the children.[151] The Soviet government as opposed to lionizing these child soldiers who swept landmines as heroes for the State; ordered documentation of these facts destroyed in the 1960s[152] and these child soldiers were not legally recognized as child-veterans until the mid-1990s[153]an indication of the tacit recognition that: (1) the State had failed to meet its obligation to provide these children with the special protections to which they were entitled under IHL and that (2) the children had no obligation to the State to risk their lives in this way and ought to have been protected from that risk by the State preventing their conscripted or voluntary participation in any respect in the armed hostilities (their participation was an anomaly under IHL). Participation of children in armed hostilities as members of government armed forces or other security forces has certainly occurred (i.e. the participation of Soviet child soldiers in WW II,[154] the participation of British child soldiers in WW I[155] etc.) and continues to occur (i.e. the government in Afghanistan has only in January 2011 signed a UN action plan to try and weed out child recruits from the Afghan national security forces)[156] notwithstanding the fact that children are owed special protections under IHL.

At the time of writing, legislative measures are to be introduced in the UK that would grant child members of the British armed forces an ongoing right of discharge from the armed forces any time before age 18 (at present, any attempt to leave before their contract is up after the first 6 months of training and before age 22 without the discretionary permission of the forces being granted results in court martial or imprisonment even though children under 18 in Britain are in fact legally incompetent to enter into a contract).[157] This move is in response to urgent calls by the UN Committee on the Rights of the Child that Britain implement additional measures to protect children from recruitment and participation in hostilities (consistent with its IHL obligations to children) and the Committee's persistent calls that Britain raise the age of recruitment to 18.

It is here contended then that Article 43 of AP I to the 1949 Geneva Conventions[158] (concerning international conflicts) in making reference to members of the armed forces having an unqualified right to engage in hostilities

[151] Kucherenko (2011), p. 2.
[152] Kucherenko (2011), p. 2.
[153] Kucherenko (2011), p. 5.
[154] Kucherenko (2011).
[155] Van Emden (2005).
[156] Graham-Harrison (2011).
[157] Coalition to Stop the Use of Child Soldiers News (2011a, b).
[158] AP I to the 1949 Geneva Conventions (1977).

(*and thus simultaneously losing the protected status of civilians*) did *not* contemplate child soldiers being members of such a force (such an unqualified right to participate in hostilities also not existing for child soldiers as members of armed forces in internal conflicts). Though there is no outright or absolute explicit prohibition on children of any age being recruited or participating in hostilities in either AP I or AP II; the special care and respect owed children stipulated in both Additional Protocols extends to all children (age unspecified in the Protocols but interpreted by the ICRC as including all persons under age 18).

Note that the legal category under IHL of 'combatants' as opposed to 'civilians' under AP I does not generally contemplate or permit special protections but only very basic protections associated with POW status and those articulated at Article 75 of AP I independent of age with the exception of the treatment to be accorded to women and children in the custody of the adversary. Women are protected against sex assaults and prostitution both of which could result in a forced pregnancy or alternatively interfere with a women's reproductive capacity due to resultant injury or disease as well as interfering with the women's eligibility for marriage according to local custom and hence indirectly with her ability to have and raise children. Females being held by the adversary also enjoy other special protections that insofar as the formulation of AP I is concerned are importantly a function of women's relation to children:

> **Article 76 Protection of women (AP I to the 1949 Geneva Conventions)**
> 1. Women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault.
> 2. *Pregnant women and mothers* having dependent infants who are arrested, detained or interned for reasons related to the armed conflict, shall have their cases considered with the utmost priority.
> 3. To the maximum extent feasible, the Parties to the conflict shall endeavour to *avoid the pronouncement of the death penalty on pregnant women or mothers having dependent infants*, for an offence related to the armed conflict. *The death penalty for such offences shall not be executed on such women* (emphasis added).[159]

Children under 15 who directly participate in armed hostilities as child soldier members of State forces cannot be penalized simply for participating since: (1) children are not a party to IHL treaties and (2) it is the State's responsibility under AP I to prevent such children directly participating in hostilities.

> . . .a child cannot be penalized [under international law] simply for having borne arms in an international conflict [as a member of a national force regardless of the fact that AP I does not endorse the direct use of children under 15 in hostilities].[160]

In contrast to Happold[161] then this author contends that, in the final analysis: (1) children (persons under age 18) have no unqualified right to participate in

[159] Additional Protocol I to the 1949 Geneva Conventions (1977, Article 76).
[160] Happold (2005), p. 101.
[161] Happold (2005), p. 100.

internal or international hostilities directly or indirectly but do so as an exceptional matter at the discretion of the State if recruited to a national armed force (unlike adult members of the national armed force) and (2) therefore 'child soldiers' are still entitled to special protections as children at every turn and in every instance. That is, (1) children remain civilians even while engaged in hostilities (though they may be attacked where there is imminent compelling military necessity relating, for instance, to saving lives regardless their civilian status at the precise time of their direct involvement in armed hostilities)[162] and (2) children, including those colloquially referred to as so-called soldiers, are entitled to special protections.

1.4.3 More on the Preparatory Work for AP I and the Position of the ICRC

The ICRC (International Committee of the Red Cross) states, in respect of Article 77 (Protocol I), that it ran into opposition from the Diplomatic Conference on the issue of non-recruitment of children and that, as a result, certain compromises had to be made to reach any resolution; even in regards to non-recruitment of under 15s:

> Nevertheless, the ICRC proposals encountered some opposition, as on this point *governments did not wish to undertake unconditional obligations* [regarding non-recruitment of under 15s]. In fact, the ICRC had suggested that the Parties to the conflict should "take all necessary measures", which became in the final text, "take all feasible measures"... Although the obligation to refrain from recruiting children under fifteen remains, *the one of refusing their voluntary enrolment is no longer explicitly mentioned.* In fact, according to the Rapporteur, Committee III noted that sometimes, especially in occupied territories and in wars of national liberation, it would not be realistic to totally prohibit voluntary participation of children under fifteen (emphasis added).[163]

Further, the ICRC had to settle for 15 as the age of recruitment rather than 18 for both AP I an AP II though the ICRC wished to prohibit the recruitment of young people also between ages 15 and 18 and some government delegations (a minority) shared the ICRC view on this matter:

> The second sentence of the paragraph [in Article 77 Protocol I] is the result of a compromise; in fact, in an amendment one delegation had proposed that the limit on non-recruitment should be raised from fifteen to eighteen years. The majority was opposed to extending the prohibition of recruitment beyond fifteen years, but in order to take this proposal into account it was provided that in the case of recruitment of persons between fifteen and eighteen, priority should be given to the oldest.[164]
>
> The setting of an age-limit gave rise to lengthy discussion; a number of delegations considered that the age of fifteen was too low, and would have preferred eighteen. The great divergence of national legislations on this question did not make it possible to arrive at a

[162] Grover (2008).

[163] ICRC Commentary on AP I (Article 77) (2005).

[164] ICRC Commentary on AP I (Article 77) (2005).

> unanimous decision... *To enhance the chances of this proposal being accepted the ICRC had followed the age limit laid down in the fourth Convention to ensure that children enjoy privileged treatment* (emphasis added).[165]

Thus, in the final draft of Article 77 Additional Protocol I (AP I), recruitment of children 15 and over was permitted. As to under 15s, the State was required to take all *'feasible'* measures to prevent their *direct* involvement in hostilities (rather than all 'necessary' measures to prevent their 'direct' or 'indirect' involvement in hostilities in contrast to the provisions in the original ICRC draft of Article 77 AP I). Further, there was no longer any specific mention of prohibiting the so-called voluntary enlistment of under 15s as had been present in the ICRC original draft even though "...there is no law on military organization anywhere that provides for the recruitment of persons under fifteen..."[166] This was not the case in regards to Protocol II Additional to the 1949 Geneva Conventions concerning internal conflict where all forms of recruitment of children under 15 (whether allegedly voluntary or compulsory or forced) are prohibited as are both direct and indirect participation in hostilities of children in this age group. Hence, it would appear that since the State considered that it might need child soldiers to replenish its ranks due to heavy casualties (which might occur in an international conflict) voluntary enlistment of and using under 15s for direct participation in hostilities was not strictly prohibited in AP I.

The ICRC, charged with interpreting the Geneva Conventions, maintains that children are entitled to a privileged status *as children* and that this privileged status protects them from engagement in hostilities if under 15 without qualification under Protocol II Additional to the Geneva Convention and to a lesser degree in the context of an international conflict (as per Additional Protocol I to the Geneva Conventions), and continues even if they are involved in armed conflict and should be captured (one example of such child privilege if captured is that under 18s captured during hostilities are not subject to the death penalty for any alleged conflict-related offense as per both Protocol I and II Additional to the Geneva Conventions; and under Geneva Convention III (Article 16)).[167] Further, the use of under 15s in hostilities is considered undesirable given their privileged status as is the use of children in hostilities generally by implication given that Protocol I requires using older children first if children between the ages of 15 to 18 are recruited and engaged in the hostilities. Additionally, Protocol I and II both incorporate provisions requiring States to provide children special protections that reduce the risk of their being recruited or taking part in armed hostilities.

Note that the ICRC original draft of Article 77 AP I (then listed as Article 65) clearly stated that children were to be the object of 'privileged treatment' (the final draft adopted referred instead to children being entitled to 'special respect', 'aid'

[165] ICRC Commentary on AP II (Article 4) (2005).

[166] ICRC Commentary on AP I (Article 77) (2005).

[167] Convention III relative to the Treatment of Prisoners of War.

and 'care' which is subtly vaguer in terms of children holding a *distinct* protected or privileged legal status under AP I than was the original formulation:

> **AP I draft of what is now Article 77 (AP I to the 1949 Geneva Conventions):**
> Article 65 – Protection of children
> 1. Children shall be the object of privileged treatment[168]

The same point can be made in reference to Article 4 (3) of AP II to the 1949 Geneva Conventions which reads: "Children shall be provided with the care and aid they require…" which the ICRC interprets as referring to a privileged status for children but, in practice, is not always so interpreted by States:

> **Article 4 (AP II to the 1949 Geneva Conventions):**
> ***The principle of aid and protection for children***: Children are particularly vulnerable; *they require privileged treatment* in comparison with the rest of the civilian population. *This is why they enjoy specific legal protection* (emphasis added).[169]

The ICRC also poignantly argues for the need to identify minors as such who, despite the State's alleged best efforts, still directly engaged in combat so as to ensure they receive the privileged treatment to which, under IHL, they are entitled as children:

> Similarly, even though the authorities may not succeed in preventing young persons from taking part in hostilities, they should at least provide them with uniforms, identity tags indicating their status as minors…[170]

Similarly, the ICRC has argued that children in captivity as POWs are yet entitled to special regard and care as children:

> … according to Article 16 of the Third Convention, age is a factor which justifies privileged treatment. On many occasions the ICRC has intervened in favour of very young prisoners of war, requesting privileged treatment for them during captivity and priority during repatriation.[171]

The ICRC, in negotiating the text of the Protocols Additional to the 1949 Geneva Conventions, as evidenced from the ICRC commentaries on the process as it occurred, thus tried to finesse compromises such that State interests were more properly balanced against the inherent right of the child to survival and development and the State obligation to protect children. Too often, however, to a large extent, State interests overrode the children's right to protection as to recruitment and direct or indirect participation in armed conflict despite the ICRC's best efforts. It is clear that the struggle to have children adequately protected under international human rights and humanitarian law during armed conflict is not successfully concluded i.e. the OP-CRC-AC,[172] too, as has been discussed, has its weaknesses

[168] ICRC Commentary on AP I (1977, Article 77) (2005).
[169] ICRC Commentary on AP II (1977, Article 4(3) (2005).
[170] ICRC Commentary on AP II (1977, Article 4(3) (2005).
[171] ICRC Commentary on AP II (1977, Article 4) (2005).
[172] OP-CRC-AC (2002).

in fully protecting children from involvement in armed conflict. Added to this is the further complication of a contemporary backlash movement that wishes to hold children accountable for the foreseeable outcome when they are not protected from engagement in hostilities as members of non-State armed groups or State national forces intent on committing mass atrocity and/or genocide. Whether that accountability is to be accomplished via (1) domestic or international criminal courts or tribunals or (2) non-judicial, Truth or Reconciliation forums and/or (3) local customary practices, such an approach indirectly and erroneously confers legitimacy on children's direct involvement in hostilities in the first place; at least as alleged volunteers. Where the view is that: (1) the direct or indirect involvement in armed hostilities of under 18s (children) is illegitimate regardless of the mode of recruitment (i.e. it is conceived as a violation of a *jus cogens* norm), and (2) such involvement is considered as an indicator of the State's failure of the duty to protect, prosecution of children through a judicial or a non-judicial forum becomes *less* 'politically correct' (if it is so perceived at all). It is these opposing perspectives that we inquire into further in what follows.

1.5 The Inapplicability of Participation Rights Rhetoric to 'Child Soldiering' in an Armed Group/Force Committing Mass Atrocities and/or Genocide

> The use of children in armed conflict is a worst form of child labour... ILO Convention No.182 defines forced or compulsory recruitment of children for use in armed conflict as a worst form of child labour...[173]

It is commonly accepted amongst scholars from various social science disciplines and human rights practitioners that have firsthand field knowledge of the child soldier phenomenon that children are 'recruited' by a non-State armed group committing mass atrocities and/or genocide largely because of the role they are expected to play in perpetrating atrocity. Children are the preferred recruits in this regard for a variety of key reasons (including the fact that children who commit such atrocities are unlikely subsequently to be readily accepted back by their community if at all and, having grown up in the rebel armed group, are thus likely to have continuing loyalty to that group). In a sense then the child soldier's expected *labor duties*, from the perspective of the armed group committing mass atrocity and/or genocide, largely involve the commission of atrocities against civilians. Note that certain scholars have linked child soldiering in Africa to "a longer history of child labor in colonial and postcolonial African economies"[174] and pointed out

[173] ILO (2011).

[174] Jezequel, Jean-Herve (2006). Cited in Parmar (2010) at p. 394.

that child soldiering is on a continuum with other categories of violence against children and not simply an aberration in that sense.[175]

Child soldiers are indictable by national courts and under certain international tribunal statutes for international crimes committed as members of State or non-State armed forces committing mass atrocities and/or genocide This is the case even though this is labor they are required to perform under duress by the murderous armed groups/forces of which they may be a part (though the ICTY, ICTR and SCSL for instance chose not to prosecute children despite having the jurisdiction to do so).

Statutes of the international tribunals and the ICC do not list as a separate war crime the alleged voluntary or coerced recruitment of children aged 15 to 18 and their direct or indirect use in hostilities even when the recruitment and use is in relation to an armed group (State or non-State) committing mass atrocities and/or genocide (while the recruitment and use in hostilities of under 15s is considered a war crime). This creates the illusion that the children and youth are themselves responsible in these instances for becoming members of the State armed force or non-State armed group committing mass atrocities and/or genocide and for what ensues in terms of the children's conduct as members of these armed groups or forces. It is here argued (as will be developed in Chap. 3) that in fact these children –whether under and over 15-as: (1) they have been 'recruited' (based on an exploitation of their coercive circumstances and/or the use of force) in large part for the purpose of committing atrocity and (2) because their ties to their home communities are broken due to the conflict-related atrocities they have committed; are the victims of genocidal forcible transfer to another group as defined in the 1951 Genocide Convention.[176] It is here contended then that child soldier members of genocidal State or non-State armed units or such units committing mass atrocity are operating under duress and are in fact in a position of slavery or slave- like conditions as victims of genocidal forcible transfer to the murderous armed non-State group or State armed force. To charge these children (including youth) for any conflict-related international crimes they may have committed (as child soldier members of these armed groups/forces that adopt grave IHL violations as war strategy) is to prosecute the child for doing the 'labor' (a worst form of child labor according to the International Labor Organization)[177] from which they were entitled under international law to have been protected by the State and the international community in the first instance.

It should be noted in regard to labor and armed groups committing systematic atrocities against civilians also that children are typically used by these various armed groups to perform a variety of hazardous labor in addition to the labor of combat and the commission of atrocities (both of which are harmful to the child's physical, psychological, educational, spiritual and moral development). For

[175] Parmar (2010), p. 394.

[176] Genocide Convention (1951, Article 2(e)).

[177] ILO Convention No. 182 (Article 3(a))(1999).

instance, in the Sierra Leonean conflict, children were exploited by various warring factions to mine diamonds (i.e. the Truth and Reconciliation Commission of Sierra Leone found that the numbers of children working in the diamond mines, some of these children being as young as ten, increased *during* and after the war).[178] Further, some families allegedly 'volunteered' their children who were already working in the diamond mines to the RUF.[179]

> In the context of the Sierra Leone conflict, diamonds were highly coveted because they yielded tremendous revenues, which would enable the armed factions to procure additional weapons and ammunition. Possession of weapons conferred power upon the armed parties, as they could capture large areas of territory, which could in turn be exploited for economic purposes. The desire to expand "control areas" into parts of the country ripe for economic exploitation gradually became the main motivating factor for all the armed groups and many local commanders, thus triggering further conflict.[180]
>
> . . .it is likely that officials of the Sierra Leonean state have been doing business in diamonds with people in Liberia, including Charles Taylor, while he supported the pillage and plunder of Sierra Leone [and recruited children into his murderous armed group].[181]

Many former child soldiers in particular have continued with the high risk labor of diamond mining trying, for instance, to provide for themselves, and frequently also for their siblings left as they often are without parents. This is often the only option given: (1) the children's lack of the education necessary to secure a decent job and the discrimination against them due to their ex child soldier status[182, 183] and (2) given the ineffectiveness of demobilization, disarmament and reintegration programs in providing adequate economic support for these children.

If child soldiers are to be held culpable for conflict-related international crimes committed under highly coercive circumstances (i.e. for doing the 'labor' set out by the murderous armed group/force of which they are now a part in a conflict zone and generally cannot escape); then on this 'illogic' any child engaged in any other form of 'worst child labor' (to use ILO terminology) is also at risk of prosecution. For instance, one could then rationalize prosecuting sex trafficked children for prostitution or for recruiting/luring other children into the sex trafficking network at the behest of their adult 'keepers'.

On the analysis here then child *participation* rights rhetoric is inapplicable and irrelevant in considering the legalities under international law concerning situations where children are the victims of genocidal forcible transfer to non-State armed groups or State forces committing mass atrocities and/or genocide (as are, on the analysis here all children recruited in any manner into armed groups committing mass atrocities and/or genocide). However, children's participation rights rhetoric

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[178] Parmar (2010), p. 377.

[179] Restoy (2006), p. 6.

[180] Sierra Leone Truth and Reconciliation Report (2004), Vol . 3(b), p. 4.

[181] Sierra Leone Truth and Reconciliation Report (2004), Vol . 3(b), p. 15.

[182] Parmar (2010), pp. 375–376.

[183] Parmar (2010), p. 376.

has been applied to the situation of child soldiers in conflict-affected developing countries without consideration of whether these children are part of a non-State or State armed force functioning inside or outside IHL:

> Article 38 of the CRC deals with children affected by armed conflict as well as those who are recruited into active combat. The convention [Convention on the Rights of the Child] stipulates 15 as the lower age limit for conscription, and in the case of children between 15 and 18, there is an obligation to recruit older conscripts first. *This article is particularly poignant in light of the fact many children, particularly in parts of Africa, are recruited and trained by guerrilla armies in particular, and in many instances are ordered or encouraged to perform horrific and brutal acts. The participation by children in armed conflict has the consequence of blighting the possibility of their returning to normal civilian life,* [a prime indicia, according to the current author, of genocidal transfer of a child to another group as will be explained in a later chapter] *which is what makes this particular 'children's right'* [set out in Article 38 of the CRC] *all the more urgent.*
>
> *However, this also looks like an impossible right to universalise*. Some argue that 15 is too low a limit to set, given that armed combat almost certainly implies killing, while in many countries the limit is set at 18 or higher. *Yet the presence of children in many armies (official and otherwise) would seem to indicate that children are perfectly capable of acting as soldiers, and discharging their duties as competently as their adult* counterparts. *Whether or not this is desirable is a matter of context and impossible to set as a global standard*. (emphasis added).[184]

The above quote from Bentley's influential paper "Can there be any children's universal rights' published in the *International Journal of Human Rights*, respectfully, on the view here, erroneously confounds 'soldiering' with the labor so-called child soldiers perform as a part of an armed group strategically and consistently committing mass atrocities and /or genocide as a war tactic. *The child labor involved in the latter groups, however, it is here argued, cannot be categorized as 'soldiering' as understood under IHL*. There is then no conceptual difficulty in prohibiting, it is here argued, as a matter of a universal human right and IHL principle: (1) the recruitment (by whatever method) and/or (2) use of children (persons under age 18) for direct or indirect participation in armed hostilities by State or non-State armed groups/forces perpetrating conflict-related mass atrocity and/or genocide (though there would be implementation difficulties as there are for all the articles of the Convention on the Right of the Child,[185] the OP-CRC-AC,[186] ILO convention on the worst forms of child labor[187] and like instruments of international law directed to protecting children's fundamental human rights).

Bentley argues that the restriction on children's autonomy in respect of participation in child soldiering found in the CRC[188] and OP-CRC-AC [189] perhaps should

[184] Bentley (2005), pp. 111–112.

[185] CRC (1990).

[186] OP-CRC-AC (2002).

[187] ILO Convention on the Worst Forms of Child Labor (1999).

[188] CRC (1990).

[189] OP-CRC-Ac (2002).

not apply to all children in all circumstances; that the relevant age for such participation could vary depending on the socio-cultural and political context. She suggests that in certain circumstances; children's autonomy to (allegedly) voluntarily participate in combat perhaps ought not be curtailed in the manner in which it is now; especially since, according to her, older children are not in a substantially different position than are adults with regard to forced recruitment:

> The problem is that it is by no means clear that this autonomous ability [developmental ability to make participation choices] is one which is general, but rather that different children in different circumstances may attain this at different times, or never at all. Furthermore, it seems like an arbitrary distinction to make when in many cases, even after the age of 18 there is effectively no liberty to choose whether or not to engage in a *certain type of labour*, ***or*** combat, as 'adults' may be just as vulnerable to coercion. While it is almost certainly the case that some sort of normative restriction on the employment of children in these ways should be in place, what I think is genuinely open to debate is just what that should be.[190]

Bentley (as reflected in the above quote), on the analysis here, confounds or conflates the categories of 'soldiering' (as that concept is understood under IHL which requires the armed group or force abide by IHL) with the labor expected and demanded by armed groups committing mass atrocity and/or genocide (which is not 'soldiering' but rather criminal activity marked by perpetrating atrocity constituting international crimes that may also be recognized grave offences in the national law). Neither adults nor children have an autonomous right to volunteer for such unlawful non-State groups or State forces that systematically violate IHL as a 'war tactic' (applied in an internal armed conflict or international conflict) or to participate in any way in hostilities on their behalf. It is here argued (as will be explained in detail in Chap. 3) that children and youth recruited and used by such armed groups or forces are in fact not volunteers, but rather the victims of genocide (genocidal forcible transfer of children to another group) due to the exploitation of the coercive circumstances in which the children find themselves in the midst of conflict or in a transitional period or due to more direct coercion (i.e. abduction and recruitment by force).

In an earlier section of her paper, Bentley does make reference to the laws of war and, by implication, the State obligation to protect children from the conflict:

> A concerted application of the jus in bello of the Geneva and Hague Conventions (which are so widely accepted as to be part of Customary International Law) would contribute to ensuring that children are not even in a position to be recruited into or volunteer for armed service, official or otherwise.[191][Recall that the current author has discussed some of the weaknesses of IHL and international human rights law in protecting children (persons under age 18) from recruitment and participation in hostilities on behalf of armed groups or forces committing systematic international crimes].

[190] Bentley (2005), p. 113.

[191] Bentley (2005), p. 112.

However, at the same time, Bentley questions whether international law is correctly applied to preventing children under age 16 exercising their purported right of autonomy to allegedly volunteer for and directly engage in armed hostilities (even apparently as members of armed groups/forces that are systematically committing grave violations of IHL such as also did the LURD of Liberia; the Liberians United for Reconciliation and Development):

> How are we to universalise the standard for children who place themselves in combat positions? Can we really say that a person of 15 who is living in life-threatening conditions is incompetent to make this decision? In Liberia, children as young as 12 are respected and ranking members of the anti-government rebel movement Liberians United for Reconciliation and Democracy (LURD), and in cases such as this the line between passive childhood and active 'adult' participation becomes extremely blurred. [*Note that LURD also committed war crimes such as "summary executions of alleged government collaborators, rape, and the forced recruitment of civilians, including child soldiers*.][192]
>
> Again, I do not suggest that this is a good or desirable state of affairs. What I am questioning is how to universalise the lower limit of 16 on children in armed combat, when so many children in reality find themselves in a position where the choice is to either fight or fall victim themselves. In what sense can there be a universal standard laid down protecting them from conscription under those circumstances, and who is responsible for honouring the resulting duties? Consider also circumstances in which children are seen to have a duty to fight, and the related problem of who is to count as a combatant (emphasis added).[193]

What is suggested here, in contrast, is that universal IHL and international human rights law standards obligating States to take all feasible and necessary measures to protect children (persons under age 18) from recruitment or enlistment and direct or indirect participation in armed internal or international armed conflict are required. In particular, children must be protected against recruitment or enlistment by non-State groups or State forces that are committing mass atrocity and/or genocide and from participation in armed hostilities on their behalf. Children who are so recruited and used are, on the view here:

1. The victims of genocidal forcible transfer of children to another group; a practice that is already absolutely prohibited under Article 2(e) of the Genocide Convention[194];
2. Engaged in unlawful labor (perpetrating conflict-related atrocities as part of the overall conflict strategy of the armed group of which they are a part) as opposed to 'soldiering' as the activity is understood under international law, and
3. The victims of the failure of the international community to institute and vigorously implement absolute prohibitions on children's recruitment by any means and at any age under 18 or their participation in armed groups (State or non-State) that consistently commit grave violations of IHL.

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[192] Human Rights Watch (2002).

[193] Bentley (2005), p. 115.

[194] Genocide Convention (1951, Article 2(e)).

In fact, it is here contended that those most responsible for: (1) recruitment of children of any age (persons under 18) by any method into armed State or non-State forces committing mass atrocities and/or genocide and/or (2) the children's direct or indirect participation in armed hostilities on behalf of such armed groups/forces have committed: (1) a separable distinct war crime that should be recognized as such in international law such as the Rome Statute as well as (2) genocidal forcible transfer of children (as will be explained in some detail in Chap. 3).

It is here argued that honoring IHL in respect of children's protection *and* autonomy rights requires, in the first instance, implementation of an absolute prohibition on both children's genocidal forcible transfer to armed groups committing mass atrocities and/or genocide and the children's participation in hostilities as part of such armed groups/forces. The fact of the occurrence of genocidal transfer to armed groups/forces committing mass atrocities and/or genocide should not be obfuscated by the false cloak of a conceptual frame that uses any or all the following notions that in fact do not apply or are irrelevant in such a circumstance: (1)'recruitment' into armed forces, (2)'soldiering' (as that term is normally understood in IHL); (3) 'child soldier' (a concept that does not exist under IHL) or 'child combatant' (as the term 'combatant' is understood in IHL meaning a person lawfully engaged in 'soldiering'); and (4) so-called political action or liberation struggle (note in respect of the latter in any case that Bentley does not acknowledge children as political actors (Bentley states:" I do not want to suggest that everyone should have a vote from birth, or that children should be treated as political actors."[195]). The right of children to be protected from genocidal forcible transfer to another group (as is here contended occurs also when children are 'recruited' so-called into an armed group to perform the labor of perpetrating mass atrocities and/or genocide) is at once both a special protection right of children given that they are a specific target of such transfer and a fundamental human right which is non-derogable. Further, it is here argued that child soldiers are entitled to redress from the State in the form of reparations as victims of genocidal transfer to an armed group or force perpetrating mass atrocities and/or genocide.

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Chapter 2
The Fallacious Demonization of Child Soldiers

2.1 Analyzing Backlash Arguments Favoring the Prosecution of Child Soldiers

2.1.1 Examining the Failure to Establish a Universal Minimum Age of Criminal Culpability for International Crimes

The contemporary movement to hold child soldiers accountable for international crimes (whether this accountability is to be via judicial or non-judicial mechanisms) is confronted with particular fundamental practical and conceptual hurdles. A prime practical difficulty is generally held by most legal scholars to be the lack of a universal minimum age of criminal responsibility for international crimes under international law (as well as the lack of a universal age of criminal culpability for international crimes when codified as offenses under domestic law):

> . . .with regard to the criminal responsibility of children *for international crimes*, a particular problem exists. *It is unclear what the minimum age of responsibility in respect of international crimes actually is. Indeed, it is unclear whether international law fixes a minimum age of criminal responsibility at all*. Although it is clear that too low a national minimum age of criminal responsibility will breach international law, [presumably because *mens rea* would be lacking] where the line is to be drawn has not been specified (emphasis added).[1]

The view articulated here, however, is that the Rome Statute in fact does set a minimum age for criminal accountability for the international crimes of genocide, war crimes and crimes against humanity that could serve as the universal standard in this regard. That minimum age standard is 18 years given that the International Criminal Court's (ICC) enabling statute specifies an exclusion of jurisdiction over persons who were under 18 years at the time of the commission of the crime which

[1] Happold (2006), p. 72.

S.C. Grover, *Child Soldier Victims of Genocidal Forcible Transfer*,
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would otherwise fall under the court's jurisdiction. (We will consider shortly the debate over whether this ICC age-based jurisdictional exclusion is simply 'procedural' or instead represents 'substantive law'). This age-based exclusion of jurisdiction of the ICC is particularly striking given that some children in certain armed conflicts have committed heinous atrocities both as foot soldiers and, on relatively rare occasions, as commanders of small bands of child soldiers as have certain of their adult compatriots.

Note that there is also a minority in the legal academic community who maintain that the Rome Statute, in principle at least, sets not 18 but rather 15 years as the minimum age of criminal responsibility for international crimes falling under ICC jurisdiction (though on the latter view the ICC has chosen as a prosecutorial strategy not to pursue prosecution of children 15 and over as they are not considered among those most responsible for perpetrating conflict-related international crimes having not done the planning for the systematic atrocities to be carried out or ordered the plan to be implemented). This latter presumption is based on the fact that the Rome Statue contemplates lawful recruitment of children 15 years to just under 18 years (as well contemplating their direct and indirect participation in the fighting though other wording of relevant provisions in the Statute clearly suggests that this should be a last resort). The Rome Statute thus implicitly contemplates that there will be the possibility in some armed conflict situation of children 15 years and over committing atrocities in the course of their engaging directly in the conflict.

Those who argue that the Rome Statute sets 15 years as the ICC minimum age of criminal responsibility for international crimes (and as a useful potential universal standard for minimum age of criminal responsibility for international crimes when prosecuting children for the same in the national courts) suggest that a child old enough for lawful recruitment and participation in the armed hostilities (as per the Rome Statute) must be considered old enough to bear the responsibility for his or her conduct as a so-called child soldier. It is here argued, in contrast, that in not setting 15 as the age at which those who have committed international crimes might, in practice, come under the ICC jurisdiction (instead having an age-based exclusionary clause in the Rome Statute relating to persons under age 18 at the time of the commission of the crime); the Rome Statute assigns accountability for the potential consequences of child soldiering (i.e. child-perpetrated atrocities) to the adults most responsible for the children's recruitment and use in hostilities in the first instance rather than to the children themselves.

Others have argued that the provisions which refer to age 15 as the minimum age for lawful recruitment and use of child soldiers in hostilities in Additional Protocols I and II to the 1949 Geneva Conventions (and arguably then also the similar provisions in the Rome Statute) do *not* in fact bear on the issue of child soldier alleged criminal culpability. According to the latter view, this is the case as these provisions make no reference at all to the matter of any alleged criminal liability of minors who commit international crimes (i.e. the provisions simply strictly deal with lawful age of recruitment and participation in hostilities as per the Rome Statute and Additional Protocols to the 1949 Geneva Conventions and nothing

more; setting out State child protection obligations in this regard).[2] At the same time, Rome Statute Article 26 titled: 'Exclusion of jurisdiction over persons under eighteen' excludes children from prosecution under the Rome Statute and states: "The Court [the ICC] shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime."[3]

It is noteworthy that the Special Court of Sierra Leone declined to prosecute children of age 15 years and over but under age 18 for grave international crimes despite the fact that the latter court's enabling statute allowed for the prosecution of children aged 15 and over (but under 18) for crimes under the court's jurisdiction.[4] The latter evidence also, it is here argued, points to a new contemporary international law standard for the humane treatment of child soldiers; including for those children who have committed conflict-related atrocities. That standard sets age 18 years as the minimum age of criminal culpability for war crimes, crimes against humanity and genocide.

It is noteworthy also that though the statute of the SCSL contained a statement that the court had jurisdiction over those 'most responsible' for committing the international crimes articulated in that court's enabling statute, the statute at the same time, nevertheless, set the minimum age of criminal culpability at 15 years. This minimum age of 15 for criminal culpability then was included in the statute of the SCSL though children are generally not considered to have been among those most responsible for the occurrence of the mass atrocities. That is, children did not plan or order the systematic atrocity in Sierra Leone which the SCSL was mandated to prosecute. Hence, the argument that the ICC included an age-based exclusion (from ICC prosecution) provision based on the fact that children (persons under age 18) were not among those most responsible does not seem a strong explanation for the exclusion provision (given the formulation of the SCSL statute on the relevant points as described). Rather, the explanation for the age-based exclusion provision in the Rome Statute (Article 26) appears (as will be argued in more detail here shortly) to be one related to the presumption of lack of criminal culpability of persons who were under age 18 years at the time of the commission of the international crimes.

The age-based exclusion provision of the Rome Statute (Article 26) sets, on the view here, an intentional ideal guidepost regarding the issue of *precluding* child soldiers from prosecution for international crimes. However, that standard set by the drafters of the Rome Statute has, to date at least, not been regarded by nation States as having any necessary and automatic practical implications on domestic approaches to the question of the potential criminal liability of children aged 15 and over but under 18 years for conflict-related international crimes (though this author would, of course, argue that it should).

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[2] Happold (2006), p. 73.

[3] Rome Statute (2002), Article 26.

[4] Schabas (2010), p. 443.

It is an essential point that Article 26 (the age-based exclusion provision) of the Rome Statute appears in Part 3 of the statute ('General Principles of Criminal Law') rather than in Part 2 dealing with procedural matters (Part 2 of the Rome Statute is titled 'Jurisdiction, Admissibility and Admissible Law'). Note that: "a general principle of law. . . [is] a rule of international law."[5] Thus, Article 26 of the Rome Statue is (wrongly on the view here) generally held to be a provision dealing with jurisdiction only as a procedural matter rather than one that articulates a substantive, fundamental rule of international law.

Further, note that it is Part 2 which does *not* include Article 26 concerning the exclusion from ICC prosecution of persons who were under 18 at the time of the commission of the international crime (rather than Part 3 of the Rome Statute which includes Article 26) which sets out Article 10. Article 10 states: "Nothing *in this Part* [that is Part 2] shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute."[6] Hence, one can justifiably infer that Article 26 of the Rome Statute (the age-based exclusion of jurisdiction), appearing as it does in Part 3, was and is in fact intended to influence "developing rules of international law". That is, Article 26 of the Rome Statute can be properly interpreted as an intended potential influence on developing rules of international law (and as also a possible resource providing guidance to domestic judicial systems in dealing with international crimes under national law) in regards to proper judicial criminal law practice in the treatment of children (i.e. child soldiers) who have committed conflict-related international crimes.

Recall that the Working Group at the Diplomatic Conference that established the Rome Statute had argued that Article 26 should be included in Part 2 of the Rome Statute concerned with jurisdictional questions but that the "Drafting Committee apparently felt otherwise and it [Article 26] remains in Part 3" (i.e. under "General Principles of Criminal Law").[7] Hence, the inclusion of Article 26 of the Rome Statute in Part 3 was purposeful and thoughtful and, it is here contended, meant to send a message concerning 'general principles of criminal law' as pertains to child soldiers and other children who have committed conflict-related international crimes. That general principle of criminal law augurs well for the exclusion of children from criminal prosecution for conflict-related international crimes. Thus, it is of special import that Article 26 of the Rome Statute appears in Part 3 of the Statute titled "General Principles of Criminal Law" rather than in Part 2 concerned with jurisdictional issues strictly as procedural concerns. The latter fact then emphasizes that the exclusion of children from prosecution under the Rome Statute is *not* simply a jurisdictional/procedural matter. Rather, it reflects a "general principle of criminal law" relating to the court's determination and acceptance *a*

[5] Happold (2006), p. 73.

[6] Rome Statute (2002), Article 10.

[7] Schabas (2010), p. 444.

priori of the lack of criminal culpability of persons who were under age 18 years at the time of their committing the conflict-related international crime(s). Also there is, as discussed, no qualifier in Article 26 stating that it is not intended to potentially impact the approach taken by a State or other international court, tribunal or other forum in the handling of the issue of child soldier alleged criminal culpability or lack thereof for conflict-related international crimes. That 'general principle of law' as a rule of international law (namely the exclusion of children (persons under age 18 at the time of the commission of the crime) from criminal prosecution as child soldiers for conflict-related international crimes) then can rightfully be expected to properly provide potential guidance to domestic and other international courts.

In sum, it can be properly concluded based on: (1) textual analysis of the Rome Statute, (2) the drafting and procedural history of Article 26 of the Rome Statute as well as (3) international court/tribunal practice following the ICC lead despite having procedural jurisdiction over child perpetrators of international crimes, that the Rome Statute sets 18 as the ICC minimum age of criminal culpability for the commission of war crimes, crimes against humanity and genocide as a substantive law matter (that is, reflecting a 'general principle of criminal law') and does not exclude persons who committed these crimes as children (under age 18) from ICC prosecution simply on a procedural jurisdictional basis.

The view of the Rome Statute age-based exclusion of 'children' (persons under age 18 years when they committed the international crime) from prosecution as a provision that sets a new international standard is in direct opposition to the view articulated by a Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY). The latter Chamber in a 2006 judgment maintained that "there is no rule in convention or customary international law against criminal liability for a war crime committed by an individual below the age of 18."[8] It can be argued, however, that the Rome Statute Article 26 codifies customary practice by international tribunals and courts at least since WW II with respect to the issue of excluding children from criminal prosecution for conflict-related international crimes (notwithstanding the fact that the tribunal or court's enabling statute may have allowed for such prosecution). Note that the ICTY statute in any case did not specify a minimum age of criminal culpability for international crimes under its jurisdiction and the ICTY, consistent with contemporary international court practice,[9] did *not* indict anyone under age 18.[10] Likewise, the ICTR did not investigate or prosecute children for international crimes despite the fact that 4,500 children (persons under age 18) had been detained on suspicion of involvement in the Rwandan genocide (later released) and despite the Tribunal having jurisdiction over alleged child perpetrators.[11]

[8] Schabas (2010), pp. 444–445; analysis of ICTY case *Oric* (IT-03-68-T), Judgment, 30 June 2006, para. 400, fn. 1177.

[9] Aptel (2010), pp. 21–22.

[10] Happold (2006), p. 76.

[11] Aptel (2010), p. 22, fn 114.

Criminal liability for children who commit war crimes, crimes against humanity or genocide, it is here argued; of logical and legal necessity (since these are crimes not just against individual States but against the international community as a whole) requires, as a prerequisite, the setting of a *universal* minimum age of criminal responsibility *below* age 18 for such international crimes (which universal minimum age currently does not exist). That age, whatever it may be, would be based in large part on a presumption that a child of that set age has the requisite *mens rea* to be held accountable for committing such grave international crimes. Such a universal standard for minimum age of criminal culpability for the commission of international crimes may or may not be possible for the national courts. The latter would depend on the willingness of the State to reject the ICC's lead on the issue (in setting age 18 as the minimum age of criminal responsibility); something that may be heavily influenced by domestic public opinion; and instead having the domestic courts retain jurisdiction over children who were at or above the statutory minimum age for criminal liability (an age *below* 18) at the time the crime was committed.

The same minimum age standard with respect to responsibility for international crimes would, for the sake of fairness and logic as well as moral and legal consistency, also have to be used for non-judicial mechanisms of accountability (i.e. Truth and Reconciliation Commissions and traditional cleansing or healing/reconciliation ceremonies). The latter, however, pose a special difficulty in that traditional healing/reconciliation practices (which may in part also be incorporated into more formal Truth and Reconciliation Commission practice) may conflict with any set universal minimum age regarding accountability for international crimes under international law. However, the traditional practices are more likely to hold sway where there is such a conflict (i.e. children younger than the set minimum age of criminal culpability under international law may be held accountable in non-judicial forums such as a Truth and Reconciliation Commission) since non-judicial accountability practices are typically rooted in part or in whole in local custom. In some cultural contexts it is thought that children (persons under age 18 of a certain age) cannot possibly adequately meet the *mens rea* required for any or all international crimes (i.e. fully understanding that the intent was to eliminate part or all of an ethnic group – a requirement for establishing *mens rea* in relation to a charge of genocide); especially in respect of the younger child.[12] In contrast, others in a different cultural context hold that children of a certain age can indeed meet the *mens rea* requirements for prosecutability in respect of the commission of all manner of international crimes including genocide.

Happold argues, furthermore, that unlike genocide; other international crimes such as 'crimes against humanity' and 'war crimes' do *not* require a specific intent component; but rather only knowledge of certain contextual elements (i.e. knowledge that the crimes were part of a systematic attack against civilians in the case of

[12] Happold (2006), p. 71.

'crimes against humanity' and in the case of 'war crimes'; knowledge that the crime such as, for instance, murder of an unarmed combatant who wished to surrender, was committed as a war-related (conflict-related) crime.[13] He holds therefore that:

> there is no principled difference between the issues arising from attempts to hold children responsible for complex domestic and complex international crimes. . .In each case the difficulties will be the same and, as a result, the argument cannot be used to distinguish children's legal responsibility for international crimes from their criminal responsibility in domestic law.[14]

With respect, it is here argued, in contrast to Happold's position, that the child's legal (criminal) responsibility for complex domestic crimes can indeed generally be distinguished from any such responsibility for international crimes (crimes that rise to the level of crimes against humanity, war crimes or genocide). 'Complex domestic crimes' (as the term is used by Happold in the quote immediately above) do not commonly trigger universal jurisdiction to prosecute the crime and, hence, the age-related criteria for legal responsibility have traditionally been regarded as an internal State matter. The situation is quite the opposite for international crimes (crimes against humanity, war crimes or genocide) where universal jurisdiction is legally supportable (though not all States have incorporated legislative reforms that would allow for the same) *thus providing the basis for suggesting that there is a compelling need for a universal minimum age of criminal culpability for international crimes*.

It can be said that complex domestic crimes are an offense against the individual State while international crimes of the sort discussed here are crimes against all of humanity thus justifying: (1) universal jurisdiction and (2) a universal minimum age of criminal culpability. Thus, while rationales for a universal age of criminal culpability for *national crimes* can certainly be reasonably advanced in terms of: (1) the need for equity in the administration of justice irrespective of where the crime was committed; (2) *mens rea* concerns relating to childhood that in important respects cut across cultures and (3) consideration of the universal rights of the child to special care and protection and due process (i.e. as articulated for instance in the U.N. Convention on the Rights of the Child.[15]), these arguments do not generally relate in any way to an issue of potential *universal jurisdiction* for the prosecution of children who have committed complex domestic crimes or the feasibility of its implementation (in contrast to the situation of children committing international crimes where the question of the need for a universal minimum age of criminal culpability for international crimes arises in connection with the issue of universal jurisdiction of States to prosecute these crimes and as well as in connection with the legal supportability or lack thereof of the practice of international courts and tribunals in handling child perpetrator cases).

[13] Happold (2006), pp. 71–72.

[14] Happold (2006), p. 72.

[15] Convention on the Rights of the Child (1990).

At the same time, however, there are emerging situations where arguably what is normally considered complex domestic crime crosses over into complex international crime involving both adult and child perpetrators and offending the conscience of the international community. For instance, Mexican drug cartels as a pattern and practice have begun systematically abducting and using children to commit multiple gruesome homicides to intimidate civilians and law enforcement. Children in these circumstances are in a situation similar to that of the child soldier. The crimes committed by the adult drug king pins who put children in this circumstance may be considered, in some instances, given the widespread carnage, to amount to 'crimes against humanity' in peacetime involving both systemic attacks on civilians and the use of children to commit multiple atrocities. Universal jurisdiction over such adult perpetrators as commit these grave international crimes on behalf of the Mexican drug cartels may be justified. In contrast, the perpetrators who committed these heinous crimes (i.e. torture, and murders) as children (under age 18) at the behest of the adult members of these drug gangs would not be criminally culpable if the rationale underlying the ICC minimum age criminal culpability standard for international crimes such as crimes against humanity were adopted.

The fact that there is to date no universal minimum age of criminal responsibility for international crimes under international law (as reflected also in particular domestic law where the latter allows for prosecution of war crimes, crimes against humanity and genocide) is of special import. This fact has a significance unrelated in large part to the nonexistence of a universal minimum age of criminal responsibility for those domestic crimes which do not also fall under the category comprised of grave international human rights violations or international crimes as set out in international conventions and/or international criminal law statutes. The lack of a universal minimum age of criminal responsibility for international crimes under international law is currently combined with: (1) an unwillingness to date by the overwhelming majority of States in the international community to investigate and prosecute persons who were under age 18 years at the time of the commission of the international crime(s) (i.e. war crimes, crimes against humanity and/or genocide) or to (2) implement universal jurisdiction in regards to child soldiers who have committed atrocities (a perspective or approach with which this author agrees for the reasons set out in this book). That is, the lack of a universal minimum age of criminal liability for international crimes is, it is here argued, a deliberate purposeful move and not simply a default position due to lack of consensus on what that specific universal minimum age should be.

The reluctance to hold child soldiers criminally accountable for the commission of international crimes is reflected, for instance, in the failure to prosecute in situations where the enabling statute of the international tribunal or court would have enabled prosecution of 'children' aged 15 and over. In this regard, note that no such broadly based reluctance to prosecute children of a certain age range under age 18 years exists in regards to domestic crimes that do not involve violations of international law (though the minimum age under 18 at which criminal liability attaches varies from State to State thus raising issues of equity in the administration

of justice). The general reluctance internationally to prosecute persons who were under age 18 at the time of the commission of the international crimes cannot then simply be reduced to the lack of a universal minimum age of criminal culpability for such crimes (and to the complications resulting from variations among States in the culturally defined aspects of the notion of 'childhood' and in conceptions of children's competence or lack of competence at various ages to formulate the necessary *mens rea* for committing international crimes which would result in criminal liability). *The lack of a universal minimum age of criminal liability for international crimes, it is here argued, is a by-product and not the cause of the reluctance to prosecute child soldiers for the commission of international crimes*. Yet, the argument that is commonly set forth for the failure to prosecute child soldiers for international crimes is framed (erroneously on the view here) in terms of the absence of a universal minimum age of criminal responsibility for international crimes set at some age *below* 18 years as the supposed major practical barrier.

Note also that States generally have not sought to prosecute children under domestic law for international crimes with the minimum age of criminal liability for the international crime varying according to the State (in contrast to the situation for domestic crimes prosecuted through the national law where minimum age of criminal culpability varies according to the State). Nor have States reached a consensus on a universal minimum age of criminal culpability for international crimes in an effort to allow for prosecution of children for atrocity (either through international or hybrid criminal courts or domestic courts in States that would have adopted that international minimum age standard for criminal culpability for international crimes). This despite the fact that all States have a vested interest in prosecuting international crimes in their effort to uphold international *jus cogens* norms and maintain international peace and stability. All of this reflects the unease of the international community, for the most part, in pursuing prosecutions of persons for international crimes they committed as children (i.e. as persons under age 18). That unease, it is here speculated, may derive in large part from an acknowledgement of the massive failure of the international community, despite its vast resources, to protect children (a group recognized under international humanitarian and human rights law as needing special care and protection) from child soldiering and war in the first instance. Put differently, the context of conflict-related international crimes committed by children – child soldiering and war-is so far outside what the international community recognizes as the situational birthright of every child (namely an environment with options and a modicum of peace and security conducive to healthy development) that those children caught up in the conflict have until recently generally been considered by the international legal and human rights community not to be responsible for the outcome of finding themselves in such horrendous circumstances. (This book addresses the contemporary backlash which seeks to quash any reluctance to hold accountable child soldiers who have committed atrocity).

Formulating a universal minimum age of criminal culpability for international crimes would seem an absolute prerequisite if States wish to prosecute persons who were under age 18 at the time they committed an international crime (i.e. war crime,

crime against humanity or genocide) in a manner that is legally supportable in terms of equity. The absence of such a universal minimum age is then an absolute bar, *in principle* at least, to the prosecution of children for international crimes. This is the case since the aforementioned international crimes "transcend national boundaries and are of concern to the international community."[16] Therefore, there is, if justice is to be done, no room for capricious, and/or discretionary elements in the decision-making regarding prosecution of these crimes as a function of the State territory in which the prosecution takes place. The failure then of the international community of States to set a *universal* minimum age below 18 of criminal culpability for international crimes signals: (1) a rejection of any initiative to prosecute children for international crimes (war crimes, crimes against humanity or genocide), and (2) a construction of the child who was under 18 at the time the international crime was committed as non-culpable under international criminal law.

Universality is integral to the notion of 'international crime' itself; crime for which the perpetrator is accountable to all of humanity. That universality is made manifest, for instance, via the establishment of the ICC but also as a result of universal jurisdiction which in turn demands a universal minimum age of criminal culpability for international crimes (the latter if there is to be due regard to the fair and proper administration of justice).

Happold contends that when States prosecute international crimes (war crimes, crimes against humanity or genocide) under domestic law; they are "acting not only on their own behalf but also as agents of the international community."[17] However, it is here contended, that to the extent that the minimum age of criminal culpability for international crimes varies from State to State; the State is arguably *not* acting as an agent of the international community in prosecuting child soldiers for conflict-related international crimes. This is the case since the prosecutability or lack of prosecutability of particular alleged child perpetrators of war crimes, crimes against humanity or genocide as a function of: (1) the specific age under 18 of the alleged child perpetrator at the time of the crime(s) in conjunction with (2) the particular State pursuing the prosecution; adds an element of State discretion that is not logically possible for crimes which are an offense not just against the particular State in which the crime took place; but against the international community as a whole. Hence, if child soldiers are culpable for conflict-related international crimes committed as children then they are accountable to the entire international community which would necessarily require, as a precondition, consensus on a rationally and factually-based, legally supportable universal minimum age of criminal culpability for such conflict-related international crimes. The lack of consensus among States on a universal minimum age of criminal responsibility for international crimes, in the final analysis, reflects disagreement regarding child soldier culpability, if any, at particular ages under age 18 (i.e. a lack of consensus on whether

[16] Happold (2006), pp. 70–71.

[17] Happold (2006), p. 71.

children of any particular age or age range, by their conduct *and* state of mind, have fulfilled all the elements of the international crime(s) required to be properly considered criminally culpable). Article 26 of the Rome Statute, it has here been argued, promulgates the view that child perpetrators of international crimes are *not* criminally responsible and rejects any childhood age (i.e. age 15, the age of lawful child soldier recruitment and potential direct or indirect participation in hostilities set out in the Rome Statute) as the universal minimum age of criminal culpability for international crimes (i.e. the Rome Statute at Article 26 excludes ICC jurisdiction over all persons who were under age 18 at the time of the commission of the international crimes thus setting the minimum age of criminal responsibility at adulthood (according to the default age of 18 set out for adulthood, for instance, at Article one of the Convention on the Rights of the Child[18]).

In regards to the issue of the potential criminal culpability of child soldiers for international crimes; note further that accountability for international crimes rests importantly (in part) on a presumption of the child, at some certain age, having the *mens rea* to: (1) formulate the intent necessary to commit the crime and/or (2) to acquire the knowledge of and understand certain relevant circumstances in relation to the context of the international crime (i.e. knowledge of the occurrence of systemic attacks on civilians). Thus, if there is no universal minimum age of criminal culpability for international crimes (resulting from a lack of consensus regarding whether children of a certain age have the requisite *mens rea* at that point to attribute culpability); logically neither does the child fulfill the required mental elements of the crime to be held accountable in non-judicial forums such as before a Truth and Reconciliation Commission or via a customary accountability practice.

The declining by international criminal courts and tribunals to prosecute (even where there is jurisdiction to do so) persons who were under 18 at the time they committed international crimes (implying, it is here argued, that these children are not, in any simple sense at least, fully or most legally responsible for these crimes; if at all) coincides with the reality that children lack full civil and political rights in most States (age of majority for voting in most States is at present 18 and voting is arguably one of the most important markers of full citizenship). This suggests that the conceptual and legal status of 'minor' or 'child' is, in important respects, correlated with assumptions about the child's alleged lack of competence to make informed voluntary choices; whether in peacetime or during armed conflict.

It is certainly the case that issues of the mental competence of children (i.e. to formulate the required criminal intent to commit a conflict-related international crime or to understand the circumstances of the international crime) arise and importantly impact on the question of whether children should be held accountable for atrocity. However, the focus in this inquiry is rather on children's legal right under international law to: (a) special protection from engagement in armed hostilities in the first instance, and (b) exclusion from prosecution for international

[18] Convention on the Rights of the Child (1990), Article 1.

crimes (genocide, war crimes and crimes against humanity) committed as a child (person under age 18) during an armed conflict that *they* did not initiate or contribute in important ways to shaping given their lack of political and economic power. The international community is obligated to protect every child from the atrocity of being in a position where he or she is expected to commit atrocity as a child soldier member of an armed State or non-State force committing mass atrocities and/or genocide. It is here argued thus that children cannot be held accountable for their own brutalization via genocidal forcible transfer to an armed force committing mass atrocities and/or genocide (generally referred to in IHL instruments and international court and tribunal statutes in sanitized terms as 'recruitment' and 'active' or 'direct' participation in armed hostilities). (As mentioned, the facts supporting the characterization of so-called recruitment of children (persons under age 18) into an armed group or force committing mass atrocities and/or genocide as genocidal forcible transfer of children to another group will be examined in Chap. 3)

Those who argue for criminal liability of children for international crimes typically argue for a universal minimum age of criminal responsibility; and most commonly an age somewhere between 13 and 15 years.[19] The burden of such a universal minimum age of criminal responsibility for international crimes would fall disproportionately, it should be recognized, on marginalized highly vulnerable children who are most at risk of being recruited into non-State armed groups or State forces committing mass atrocities and/or genocide (i.e. those children in the developing world who have most often suffered through numerous years of civil war that is ongoing continuously or intermittently, and who are dealing with the all too common ramifications of ongoing armed conflict such as extreme poverty, being internally displaced, inadequate State development and lack or absence of vital services, rampant HIV/AIDS; loss of parents; and various other extraordinary hardship such as hunger and disease).[20] Thus, any universal minimum age of criminal liability for international crimes when set at an age under 18 years would, in practice, mean that some of the neediest war-affected children, most often in the developing world, would likely not receive the rehabilitative support they require. To avoid this outcome; proponents of accountability for child soldiers who have committed conflict-related international crimes argue that: (1) criminal prosecution of children for conflict-related international crimes can be oriented in the sentencing phase toward rehabilitation (as is the approach specified in the statute of the Special Court of Sierra Leone (SCSL) for instance) or (2) the children can be held accountable via non-judicial mechanisms.

As mentioned previously, the Special Court of Sierra Leone chose not to indict persons for crimes falling under the Court's jurisdiction that were committed by the perpetrators as children (when the perpetrator was under age 18) as has been the

[19] Happold (2006), p. 82.

[20] Compare Singer (2005), p. 62.

case generally with international criminal courts and tribunals. In all likelihood the international courts have been reluctant to investigate and prosecute children for international crimes in no insignificant part due to: (1) the fear that these children (some of whom would have reached adulthood by the post-conflict period) would be highly stigmatized by a criminal prosecution and, thereafter, have great difficulty in practice accessing effective community rehabilitative services and support and re-integrating into their communities if they did so at all and (2) the State's failure to protect these children from recruitment into armed groups or forces committing systematic grave international crimes. Thus, the SCSL chose not to indict and prosecute persons who were children (aged under 18 at the time of the commission of the crime) though the Court had jurisdiction over children aged 15–18 and despite the fact that the statute of the SCSL stipulated rehabilitation mechanisms as the outcome of choice for children convicted of international crimes under the statute:

Statute of the Special Court of Sierra Leone

Article 7

Jurisdiction over persons of 15 years of age

1. The Special Court shall have no jurisdiction over any person who was under the age of 15 at the time of the alleged commission of the crime. *Should any person who was at the time of the alleged commission of the crime between 15 and 18 years of age come before the Court, he or she shall be treated 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.***

2. In the disposition of a case against a juvenile offender, the Special Court shall order any of the following: 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 (emphasis added).[21]

The issue arises then that a rehabilitative approach at the disposition/sentencing phase of a criminal case (involving children who have committed international crimes) decided by a national or international/hybrid court is likely, often as not, to be challenged by the general public in the society where the judicial proceedings occur. Indeed, it has often been noted that many in Sierra Leone were not in favor of the rehabilitative stance that was incorporated into the statute of the SCSL in dealing with juvenile perpetrators of conflict-related atrocity. A rehabilitative rather than punitive approach with children who have committed international crimes is difficult for many in the general populace to accept given the fact that the child soldiers would have been prosecuted for the same heinous crimes as the adult perpetrators *without* young age being viewed as an absolute *a priori* defense (that is, conceptually tied to issues regarding lack of *mens rea* and the presence of duress and manipulation by the adults who recruited and provided the children with military training). This problem the Rome Statute avoids via Article 26 as a general

[21] Statute of the SCSL (2002), Article 7.

principle of criminal law which precludes prosecution of persons who were under 18 at the time of the commission of the international crimes. The same problem then arises in respect of Truth and Reconciliation forums. That is, segments of the general public will be highly distressed that children who have committed international crimes and are considered culpable by authorities are not being subjected to harsh penal sanctions in consideration of the gravity of the atrocities they have allegedly committed. Note that although reference is here made at times to child soldiers allegedly having 'committed' or 'perpetrated' conflict-related international crimes; this is simply an ease of expression and not intended to imply that the children in question have in fact fulfilled all of the elements of the crime or are criminally culpable or cannot be precluded from prosecution based on defenses such as duress notwithstanding the fact that they may have committed atrocities in the context of the armed conflict. That is, the term 'perpetrator' is used in a neutral fashion by the current author at times in reference to child soldiers who have committed conflict-related atrocities. A similar practice is set out in the Rome Statute Elements of the Crime:

> *As used in the Elements of Crimes, the term 'perpetrator' is neutral as to guilt or innocence*. The elements, including the appropriate mental elements, apply, *mutatis mutandis*, to all those whose criminal responsibility may fall under articles 25 and 28 of the Statute (emphasis added).[22]

In the case of child soldiers, the very logic which leads to a rationale for an entirely rehabilitative non-punitive approach in sentencing provisions (i.e. no incarceration but instead educational and vocational training; counseling etc.) as in the SCSL statute undermines the logic for prosecution in the first instance. This is the case in that prosecution for the alleged commission of international crimes is highly stigmatizing and traumatizing (especially for children) and hence extremely punitive in and of itself regardless the sentencing provisions. Hence, the 'illogic' of accountability mechanisms for child soldiers coupled with a wholly rehabilitative sentencing strategy or remedy is that the system (whether judicial or non-judicial accountability mechanism): (1) inflicts additional humiliation and considerable psychological damage on the child by exposing the details of his or her involvement in atrocity before a panel (thus adding to the suffering the child has already experienced as a child soldier member of an armed force that brutalized the child and involved the child in its strategy of perpetrating mass atrocity and/or genocide) and then (2) creates the *illusion* that the institutional mechanism in question prioritizes the child's mental and general welfare over any punitive objective. (The non-therapeutic aspect of narrating for public consumption one's involvement in atrocity will be discussed in detail in Chap. 5).

The attempt to set a universal minimum age at some age below age 18 for criminal culpability of *children* for conflict-related international crimes to date has

[22] Rome Statute Elements of the Crime (2002) General Introduction, point 8.

failed both in terms of there being any international law formulation in this regard and in terms of customary legal practice. The lack of consensus on a minimum age of criminal culpability for international crimes set at some age below age 18 is not, it is here suggested, primarily a question of variations in cultural perspective (though this is often surmised to be the case). Rather, the lack of consensus on a minimum childhood age for prosecution of international crimes is tied to matters such as: (1) the unreasonableness of prosecuting those of young age (children) who were entitled to special protection in times of armed conflict in the first instance; especially against recruitment into a murderous armed group or force and (2) who are entitled to meaningful rehabilitation in the judicial context directed to their early reintegration into society which is anathema to the long sentences that would normally be imposed for perpetrating grave international crimes. In short, the child soldier has not lost his or her entitlement to 'special protection' as a child under international law (IHL and international human rights law) and that protection, in this context, extends to not blaming the child (the victim) for the 'original sins of the father' so-to-speak (i.e. the latter being the recruitment of children to participate actively in hostilities and the demand by adult commanders that atrocities be committed also by the child soldiers as part of an overall military strategy which involves the intentional and planned commission of mass atrocities and/or genocide).

Those advocating for accountability of child soldiers for conflict-related atrocity have often resorted to promoting the alleged benefits of Truth and Reconciliation Commissions and local cultural healing practices in dealing with child soldier cases.[23] This is likely due, in large part, to the fact that Truth and Reconciliation Commissions and local healing ceremonies/practices do not involve criminal prosecution or incarceration, and thus there is either: (a) no age prerequisite for who falls under the jurisdiction of the Truth and Reconciliation Commission (a child soldier normally comes before the Commission allegedly voluntarily in any case) and/or (b) less reluctance to hold children accountable (at least those of a certain age below age 18 years) via these non-judicial or quasi-judicial proceedings. This author thus questions whether the motivation in relying on transitional justice mechanisms in holding children accountable for conflict-related atrocity is in fact one of the 'best interests of the child' as some claim[24] as opposed to the difficulty in formulating a legally supportable argument for criminal prosecutions through the courts given the absence of a universal minimum age of criminal culpability for international crimes.

[23] Drumbl (2009).

[24] Happold (2006), p. 84.

2.1.2 *Challenging the Categorization of the Age Exclusion of the Rome Statute as 'Procedural' Rather than 'Substantive' Law*

It is here contended that the characterization of the Rome Statute jurisdictional age exclusion (of persons who were under age 18 at the time they committed the international crime) as 'procedural' rather than 'substantive law' is in large part motivated by the attempt to hold child soldiers accountable. For instance, Happold states the following on this point:

> Both the language of the article and its drafting history show that the provision is procedural rather than substantive in nature. It is simply the jurisdiction of the International Criminal Court that is excluded, **leaving the treatment of *child war criminals*** to national courts. Indeed, it appears that one of the reasons for this exclusion of jurisdiction was to avoid arguments as to what the minimum age of responsibility for international crimes should be (emphasis added).[25]

Happold assumes then, it would appear, that: (1) child soldiers who allegedly committed conflict-related international crimes; *prima facie* engaged in conduct that generally suggests that all the mental and behavioral elements of the crime were met and that (2) these children are properly designated therefore as accused "child war criminals" (to use Happold's terminology) such that they can properly be tried by national courts for international crimes. This, however, is not at all clear. For instance, whether children have 'tactical agency'(as some anthropologists[26] and legal scholars[27] claim); a degree of volitional power to resist committing international crimes as child soldiers when part of an adult force engaged in mass atrocity and/or genocide, as will be explained, is highly dubious. The issue of duress is ever present in child soldier cases (where the child is accused of having committed grave conflict-related international crimes) even if one assumes that allegedly the child 'voluntarily' joined the armed group or force committing mass atrocities and/or genocide. This given the brutal consequences should a child defy, or be found out to have defied, a direct or implied command to commit atrocities or attempt to escape:

> . . .whether they have joined a state military or a rebel group, *the entire process of their indoctrination and then training typically uses fear, brutality, and psychological manipulation to achieve high levels of obedience*[28] . . .harsh discipline and *the threat of death* continue to underscore the training programs of almost all child soldier groups (emphasis added).[29]

Those who advocate for child soldier accountability tend to simultaneously hold that Article 26 (the age-based jurisdictional exclusion) of the Rome Statute is but

[25] Happold (2006), p. 77.
[26] Honwana (2006).
[27] Drumbl (2009).
[28] Singer (2005), p. 71.
[29] Singer (2005), p. 79.

'procedural'. In contrast, one would expect that those who argue for a universal minimum age of criminal responsibility for international crimes of 18 (particular children's human rights NGOs and certain U.N. bodies such as UNICEF) would maintain that Article 26 of the Rome Statute represents 'substantive' law.[30] Strangely, however, in at least one high profile report written under the auspices of UNICEF, it is held that though Article 26 represents '*substantive law*', Article 26 allegedly does not set the age of 18 years as the international standard for the minimum age of criminal responsibility for the international crimes of genocide, crimes against humanity and war crimes:

> The exclusion of children from the jurisdiction of international courts does not mean that the age of criminal responsibility is fixed at 18; rather, it means that children fall outside the scope of the limited personal jurisdiction of the ICC. This position is consonant with the fact that other international or mixed jurisdictions, some established after the drafting of the ICC, were given competence to try children. . .[31]

While it is the case that: (1) various international criminal tribunals or hybrid courts (such as the SCSL) had jurisdiction to prosecute children (persons who were under age 18 at the time they perpetrated the international crime) though significantly they chose not to do so, and (2) that these latter courts or tribunals were established after the drafting of the Rome Statute; this does *not*, on the view here, lead to the conclusion that Article 26 of the Rome Statute does not set 18 years as the proposed model for a universal minimum age of criminal responsibility for international crimes (contrary to the suggestion in the quote immediately above).

That Rome Statute Article 26 *does* set 18 as the preferred universal minimum age of criminal responsibility for international crimes (war crimes, genocide and crimes against humanity) is evidenced, for instance, by the fact that the drafters of the Rome Statute did *not* include the following proviso as part of the Article 26 age-based ICC exclusion of jurisdiction: 'No provision in this Statute [i.e. Article 26] relating to [lack of] individual criminal responsibility [on account of the perpetrator being under 18 at the time of the crime] shall affect the responsibility of States under international law.' (Note that the statement "No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law" *is* part of Article 25 concerning those persons over whom the ICC *does* exercise jurisdiction and who *are* deemed to have individual criminal responsibility). Thus, Article 26 does *not* imply a continuing positive responsibility or duty of States (as part of the general State duty to prosecute perpetrators set out in the preamble of the Rome Statute) to prosecute child perpetrators of international crimes (genocide, crimes against humanity and war crimes) notwithstanding the ICC no prosecution approach to child perpetrators such as child soldiers who commit conflict-related atrocities. This is the case as Rome Statute Article 26 itself speaks to the *absence* of an ICC duty to prosecute

[30] Aptel (2010), p. 22.
[31] Aptel (2010), p. 24.

child perpetrators and, by implication, the nullification of any such duty or continuing duty also at the State level. In contrast, the Article 25 proviso (Article 25 being the article dealing with those bearing individual criminal responsibility under the Rome Statute) *does* impose a continuing duty on the State to prosecute those who were 18 and over at the time of the commission of the international crimes *or* if unable to do so; then a duty to extradite or surrender the defendant to the ICC or a State that is competent and willing to prosecute.

Article 26 regarding *lack* of individual criminal responsibility under the ICC statute for children (persons who were under age 18 at the time of the commission of the international crimes that normally fall under the jurisdiction of the ICC) then highlights that "the responsibility of States under international law" should be considered in light of the ICC approach to the issue of child perpetrators of international crimes (which is *exclusion* of child perpetrators from prosecution).

In contrast, the proviso at Article 25 (4) of the Rome Statute suggests that *States* may have responsibilities under international law that remain despite the ICC prosecution of those individuals most responsible for Rome Statute enumerated international crimes[32] (which may include certain persons who had great power and authority and who acted as agents of the particular State in question and/or other of the State's nationals who may have perpetrated international crimes). These continuing *State* responsibilities (not alleviated by ICC prosecution of particular individuals who acted as agents of the State or of other nationals of the State) may involve, for instance: (1) providing victims of such international crimes reparations for the State's failure to protect them from international crimes and/or for the State's actual complicity in arranging for and implementing mass atrocities and/or genocide against civilians, (2) prosecuting those in lesser or greater positions of authority who perpetrated or otherwise contributed to international crimes on behalf of the State but who were not prosecuted by the ICC, investigating outstanding international crime cases etc.). In regards to the latter, recall once more that the preamble to the Rome Statute affirms such a State responsibility: "... it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes."[33]

It has in fact been suggested here that the ICC, via Article 26, set out a model universal standard regarding minimum age of criminal responsibility for genocide, war crimes and crimes against humanity that, while not legally binding on States, serves as the quintessential preferred approach set out by the world's only permanent ICC. Note that the jurisprudence of the ICC and its pronouncements on 'general principles of criminal law' (Article 26 articulates such a general principle) serves as somewhat of the gold standard in international criminal law and a useful guidepost for individual States in addressing international crime under domestic law.

[32] Schabas (2010), pp. 440–441.

[33] Rome Statute (2002), preamble.

Hence, Article 26 of the Rome Statute as a 'general principle of criminal law' (included as such in Part 3 of the Rome Statute), rather than a jurisdictional matter (covered in Part 2 of the statute), serves, in effect, to preclude criminalization of the conduct of persons who were under 18 at the time of the conduct (i.e. children) as a matter of substantive law. Further, given the *absence* of the aforementioned proviso as part of Article 26; the Rome Statute, in fact, sets up an expectation that children will not be criminally prosecuted by individual States for conflict-related international crimes but rather be the subject of rehabilitation and reintegration efforts. That is, Rome Statute Article 26 is, it is here argued, intended to lead to decriminalization of children who have committed acts which, if perpetrated by an adult, would normally lead to criminal culpability given rebuttable presumptions regarding the presence of the requisite mens rea and lack of duress in respect of the adult perpetrator.

2.1.3 International Practice in Cases Concerning Child Soldiers Accused of Conflict-Related International Crimes

The fact that none of the international courts or tribunals (i.e. SCSL, ICTY, ICTR) competent under their jurisdiction to try children for genocide, war crimes and crimes against humanity did so is typically attributed simply to "prosecutorial strategies":

> In accordance with their limited mandates and resources, international criminal prosecutors concentrate on those bearing the greatest responsibility, commonly seen as those who planned or orchestrated widespread criminal activity. In so doing, they have not pursued the offenses committed by children, who do not usually occupy positions of authority and responsibility. *Yet the exclusion of children, which underlines that international or mixed courts are not appropriate fora to prosecute them, does not preclude other competent national courts from trying them* (emphasis added).[34]

The logic reflected in the quote immediately above, with respect, seems suspect. This in that there would seem to be no reason to assume that if "international or mixed courts are not appropriate fora to prosecute them" [child soldiers and other children who commit conflict-related international crimes]; that such prosecution should be more properly pursued by the national courts (even if the latter are not formally precluded from doing so). This is the case in that the national courts in prosecuting children for the international crimes of genocide, war crimes and crimes against humanity would be, in actuality, acting also on behalf of the international community. Consequently, the distinction is blurred between the mandate of the national and the international courts in this particular context. Hence, if the "international or mixed courts are not appropriate fora to prosecute

[34] Aptel (2010), p. 24.

them" [child soldiers], then the same would apply to the national courts. Recall also the suggestion made here that Article 26 of the Rome Statute in fact sets out a model standard for the preferred approach regarding children who allegedly committed conflict-related international crimes by setting the minimum age of criminal culpability for genocide, crimes against humanity and war crimes at 18 years.

It is here contended further that one cannot rely on the admittedly limited resources of the international courts or tribunals as an explanation for the lack of prosecution of children (persons who were under 18 at the time of the commission of the international crime) even where the international court had jurisdiction as did the SCSL. If limited resources were the overriding issue for international or mixed judicial forums that failed to prosecute child soldiers for alleged international crimes; then the SCSL statute would have excluded children from its jurisdiction as a jurisdictional principle as well as in its actual practice. This would have been the case since such limited court resources were entirely foreseeable. Further, the SCSL, the ICTY and the ICTR all had jurisdiction over children (i.e. the SCSL over children aged 15 to 18) through their enabling statutes; while the ICC did not though arguably all of these international or mixed courts or tribunals had extremely limited resources. Thus, the failure of international judicial fora to prosecute child soldiers cannot be reduced to factors relating to limited resources; nor conversely can national courts be held to properly have jurisdiction over so-called 'child soldiers' who allegedly committed conflict-related international crimes based on domestic courts purportedly having more resources. Rather, it is here contended that international criminal courts and tribunals (notwithstanding the particulars of the jurisdiction over persons set out in their enabling statutes and, in this regard, any age-based exclusion on individual criminal responsibility) have been reluctant to prosecute child soldiers for conflict-related international crimes (committed as part of an armed group or force committing systematic IHL violations) based on substantive criminal law and IHL considerations rather than based on an attempt to conserve resources.

It would seem contradictory, furthermore, to argue that the international law standard for minimum age of criminal culpability for genocide, crimes against humanity and war crimes is not set at age 18 years (at least tacitly) while, at the same time, acknowledging that the international and mixed international courts (either as per their statutes containing an age-based exclusion clause as does the Rome Statute), or by their practice alone (i.e. SCSL, ICTY, ICTR) do not investigate or prosecute persons who were under age 18 when they perpetrated the international crime(s) in question. To suggest that children are not prosecuted simply because they are not among those most responsible for systematic widespread atrocity or the policy planning does not explain why the Rome Statute would explicitly contain an *age-based* exclusion clause as opposed, for instance, to one concerning those not most responsible for mass atrocities. It is here argued that the attempt is to set a universal standard of 18 as the minimum age of criminal responsibility for international crimes through international court statute (i.e. Article 26 of the Rome Statute) and /or prosecutorial practice (i.e. SCSL etc.). However, there is a need, on the view here, to set out explicitly the universal minimum age of

18 for criminal responsibility for the international crimes of genocide, crimes against humanity and war crimes; perhaps in a separate binding international convention.

One may further reasonably surmise that the statute of the SCSL, as it was the enabling statute of a mixed or hybrid court, was drafted in a manner intended, in part at least, to appease those domestically calling for criminal liability for child soldiers who allegedly perpetrated atrocities. In contrast, the Rome Statute was the enabling statute of a permanent international court which had no particular State constituency to placate. That there were vehement calls for child soldier accountability in Sierra Leone is reflected in the following statement from the UN Secretary-General:

> The question of child prosecution was discussed at length with the Government of Sierra Leone both in New York and in Freetown. . ..The Government of Sierra Leone and representatives of Sierra Leone civil society clearly wish to see a process of judicial accountability for child combatants presumed responsible for the crimes falling within the jurisdiction of the Court. It is said that the people of Sierra Leone would not look kindly upon a court which failed to bring to justice children who committed crimes of that nature and spared them the judicial process of accountability.[35]

Clearly, Sierra Leonean public opinion as to the alleged imperative need for, and justifiability of prosecution of child soldiers likely weighed heavily on the minds of drafters of the enabling statute of the SCSL (as reflected then in the statute provision providing jurisdiction over persons who were at least 15 years of age at the time of the commission of the international crimes over which the court had jurisdiction). The ICC, not being a hybrid court but rather purely an international court, could politically afford to incorporate an age-based exclusion of jurisdiction clause in its enabling statute. That exclusion clause, as discussed, precludes prosecution of child soldiers who allegedly had committed crimes under ICC jurisdiction. Thus, the current author argues that domestic courts would in fact be operating in a manner *inconsistent* with both international criminal law principle and practice in prosecuting child soldiers criminally for international crimes. (This then contrasts with the view of those who suggest that: (1) there is an expectation by the international community that domestic courts handle such cases and that (2) domestic courts are the appropriate fora should child soldiers be criminally prosecuted).[36] Indeed, variability across States in minimum age of criminal culpability for international crimes (which would impact significantly on judicial practice should domestic courts seek to prosecute child soldiers) undermines the very notion of such crimes as offenses against the international community as discussed.

Further, the issue is not one of "sparing them [child] soldiers the judicial process of accountability"[37] by relying on Truth and Reconciliation Commissions and other non-judicial accountability mechanisms as some sort of discretionary

[35] UN Secretary-General (2000).

[36] Aptel (2010), p. 24.

[37] UN Secretary-General (2000).

compassionate move by adults. Rather, the issue is first and foremost one of whether there is any supportable legal and moral basis for assuming, upon the child reaching a certain designated minimum age; child soldier criminal responsibility for international crimes *committed as a member of an armed group or force engaged in perpetrating mass atrocities and/or genocide*. After all, States have no difficulty prosecuting children of a certain minimum age for serious domestic crimes and imposing some sort of restriction on liberty of the child or fashioning some other remedy or combination of remedies.

Recall, however, that international law requires that special protections be accorded to children in the context of internal or international armed conflict which, for instance, requires the State to remove children from immediate conflict zones where possible and imposes restrictions on the recruitment of children (voluntary or compelled) into armed groups or forces (and certainly prohibits children's recruitment at any age into armed groups or forces that use systematic violations of IHL as a war tactic). Indeed, the Convention on the Rights of the Child Optional Protocol regarding children involved in armed conflict[38] prohibits the child's (person's under age 18 years) direct involvement in hostilities. It is these special protection provisions which mean that the proximate cause of, and therefore responsibility for the children's conduct is a function of the adults' failure to protect in the first instance in violation of the requirements of international humanitarian and human rights law. Furthermore, atrocities are committed as part of an adult overall strategy to terrorize the civilian population; a conflict tactic over which the child soldier (now as a captive member of an armed group or force regardless how voluntary initial recruitment may allegedly have been) has no control or input. For this reason also the criminal culpability of the child soldier who has committed conflict-related international crimes is, on the view here, undermined if not entirely negated.

In contrast, it has been suggested by certain scholars that: (1) the *children themselves* can sometimes take steps to protect themselves (and thereby avoid recruitment, or escape from an armed group that compels the commission of atrocities and, hence, (2) are obligated to do so such that where this does not occur the children are to be held accountable (whether in a judicial or non-judicial forum) for their commission of conflict-related atrocities (international crimes) as child soldiers.[39] For instance, Drumbl references, as an alleged case in point, the thousands of children in Northern Uganda who travel long distances to towns from rural villages and internal displacement camps in an attempt to escape abduction by the LRA rebels and forced child soldiering which soldiering for the LRA inevitably involves the commission of grave international crimes.[40] Of course, many children do not successfully escape the LRA via these night commutes for instance despite

[38] OPCRC-AC (2002).
[39] Drumbl (2009).
[40] Drumbl (2009).

their attempts and others perish on the long journey or at the destination. International law, however, it must be emphasized, does *not* place a requirement on children at the risk of their own lives to effect their own escape from armed groups or forces committing mass atrocities and/or genocide in order to evade criminal responsibility for the commission of international crimes as a child soldier. Rather, the responsibility under international law in an armed conflict situation rests entirely with adults, where they are in a position to do so, to provide a special higher order of protection to children which would prevent their recruitment by armed groups committing mass atrocities and/or genocide. Thus, those children who do manage to escape recruitment into child soldiering (as do some of the Northern Ugandan child 'night commuters' for varying periods of time) are certainly worthy of our great admiration. However, their conduct cannot be used to then infer criminal culpability of either: (1) those children who did not try to escape either before or after recruitment by the LRA and went on to perpetrate atrocities as part of these armed groups or forces (which is what appears to be the intended but somewhat obfuscated implication of Drumbl's[41] line of reasoning) or (2) of those children who were not successful in their attempted escape or who were recaptured as so many LRA escapees are and who then went on to commit atrocities.

The contention of some social science and legal scholars is that child soldiers allegedly, in a certain set of cases, have legal responsibility for their own victimization by armed groups committing mass atrocities and/or genocide which involve these children in perpetrating conflict-related atrocities (i.e. because the children did not try to escape or resist committing atrocity when they purportedly were obligated to do so under international law given the alleged opportunity). This characterization of the child soldier situation can, in some ways, be analogized to the situation of other child victims erroneously held culpable under domestic law i.e. teen prostitutes prosecuted for illicit criminal sexual activity rather than being precluded from prosecution based on their status as exploited victims (i.e. some may have been abducted, trafficked and/or deceived and forced into prostitution, others may have engaged in prostitution as a means of economic survival for themselves alone or also for their families given their absolute destitution). The international community has generally come to see child prostitutes as victims regardless the specific surrounding circumstances of their involvement in this conduct. This is the case given the breakdown in the State and international community's effective implementation of their international law responsibility to protect children from involvement in this multi-billion dollar international organized criminal enterprise (child prostitution) which strips children of their sense of human dignity, well-being and often as not their future.

It is certainly the case that: "All persons [in principle] have a duty to comply with international humanitarian law."[42] However, under international law, that duty

[41] Drumbl (2009).

[42] Happold (2006), p. 70.

must, at the same time, be within the power of the individual to exercise. In the case of child soldiers: (1) *mens rea* issues arise that complicate the particular child's possibility to comply with IHL as a member of an armed group or force perpetrating mass atrocities and/or genocide as a matter of course (i.e. the child in question may not have the requisite intent and/or knowledge of the circumstances of the international crime to understand the gravity or criminal nature of genocide, crimes against humanity or war crimes given that their adult military commanders having established the perpetrating of such atrocity as an acceptable norm during armed conflict and/or the child's developmental immaturity may have made him or her highly vulnerable to suggestion and/or the child may have been manipulated, given his or her mental and developmental immaturity, by propaganda allegedly justifying the commission of atrocity in violation of IHL etc.) and (2) the presence of duress (known to derive from the modus operandi of armed groups or forces committing mass atrocities and/or genocide in their treatment of child soldiers members of their own armed group or force) undermines the child's ability to exercise the duty so-called child soldiers have to comply with IHL (i.e. duress arises due to the imminent risk of death or serious bodily injury for an attempted escape from the armed unit committing mass atrocities and/or genocide or for the child's direct or indirect refusal to obey orders to commit atrocities etc.). The aforementioned factors then negate the possibility under international or domestic law of legitimate penal or other sanctions for the failure of 'child soldiers' to carry out their duty to abide by international humanitarian law regardless the circumstances of their original 'recruitment.'

This author then rejects the notion that child soldiers (who, according to some scholars of international law, may have some degree of so-called 'tactical agency') are in fact, in at least some cases, legitimately held criminally culpable under IHL and/or domestic law for the commission of conflict-related atrocities *as members of armed non-State groups or State forces committing mass atrocities and/or genocide in the context of an internal or international conflict*. (Whether such child soldiers would be culpable for atrocities as members of armed groups or forces that abide by IHL, do not apply duress in their treatment of child soldiers and have not committed the act of genocidal forcible transfer of children to serve as child soldiers in their armed group or force is a matter beyond the scope of this inquiry). It is in large part on the basis that armed non-State groups or State forces committing mass atrocities and/or genocide have committed genocidal forcible transfer of the child soldiers in their ranks (and all that that implies) that this author argues against: (1) criminal sanctions and (2) against holding child soldiers accountable for conflict-related IHL violations through non-judicial forums such as Truth and Reconciliation mechanisms (as will be discussed in Chap. 5).

Though the argument here against criminal sanctions for child soldiers who commit international crimes *as part of an armed group or force committing mass atrocities and/or genocide* (or accountability via non-judicial mechanisms for the same) is *not* based first and foremost on a 'best interests of the child' rationale; this author would contend that precluding children from such accountability mechanisms is ultimately in fact in the children's *and their community's* best

interest (as will be discussed in more detail in the chapter on non-judicial approaches to accountability for child soldiers). Happold however, remarks that:

> . . .children's rights campaigners have often resisted the criminal prosecution of children on the grounds that it is not in children's best interests. This has led to comments that such a position is an attempt to have one's cake and eat it. On the one hand, children are said to have the capacity to do good things, such as participating meaningfully in drafting a child-friendly version of the report of the Truth and Reconciliation Commission for Sierra Leone. . .On the other hand, it is argued that they are too immature to be held responsible for the bad things they do, such as committing atrocities during civil war in that country.[43]

The argument advanced here *against* criminal liability (or resort to non-judicial accountability mechanisms) in respect of child soldiers who have allegedly committed international crimes *as part of an armed group or force committing mass atrocities and/or genocide* has *not* been framed in the first instance in terms of a 'best interests of the child' rationale. This though the argument *is* informed by regard for children's fundamental human rights as articulated under both treaty IHL and international human rights law as well as established in customary humanitarian law (thus contradicting Happold's supposition[44] regarding the tendency to rely primarily on the 'best interests of the child principle' in arguments intended to advance the rights of children affected by armed conflict; including child soldiers who are accused of perpetrating conflict-related international crimes). Rather, the argument against criminal prosecution of child soldiers has been advanced here with reference to the proximate cause of the child's commission of conflict-related atrocity as part of an armed group or force committing mass atrocities and/or genocide. That proximate cause is: the failure of adults (and the State) to meet their international humanitarian law obligations to protect children from direct involvement in armed hostilities as members of unlawful armed groups or forces as are any such armed groups or forces that have adopted a tactic of systematic grave violations of IHL. Children of any age (all persons below age 18) are entitled under IHL to special protection during armed conflict and in the transitional post-conflict phase (including those children of lawful recruitment age as specified under the Rome Statute; namely 15–18 year olds) from recruitment or use in hostilities by such murderous armed groups or forces. There is then *no* inconsistency in saying that: (1) an individual child may have the capacity at a certain level of developmental maturity to make, or at least participate in, certain decisions that affect his or her life (as recognized in Article 12 of the Convention on the Rights of the Child[45] concerning the participation rights of the child) and (2) at the same time holding that child soldiers are *not* culpable for complying with explicit or implied continuing orders to commit atrocity in conflict situations where they are under imminent threat of death or grievous bodily harm if they attempt to resist such

[43] Happold (2006), p. 84.

[44] Happold (2006), p. 84.

[45] Convention on the Rights of the Child (1990), Article 12.

orders or escape from their armed unit which is engaged in perpetrating systematic grave IHL violations.

It is those who on the one hand: (1) argue for a view of child soldiers as culpable for alleged conflict-related international crimes *committed as members of an armed group or force perpetrating mass atrocities and/or genocide*, and on the other (2) advocate for a non-criminal, accountability mechanism, who wish to 'have their cake and eat it too.' That is, on the one hand those taking the latter position wish to treat these accused *alleged* child war criminals as fully culpable (i.e. in terms of these child soldiers allegedly having the cognitive requisites for the commission of the crime, having malice of forethought, acting with volition etc.) and *ignore* the international law special protections owed them (which would have prevented their participating in an adult military agenda involving the systematic commission of conflict-related atrocities in the first instance). On the other hand; they wish ostensibly to consider the child soldier's status as 'child' and the right of child soldiers to special consideration as members of a vulnerable population (children); a perspective reflected in their designating non-judicial accountability mechanisms as opposed to a criminal law forum as the preferred option for handling most if not all cases involving child soldiers accused of grave violations of IHL.

2.1.4 The Issue of Duress and Child Soldier Alleged Criminal Culpability for Conflict-Related International Crimes

Let us continue then with a consideration of questions of children's potential criminal culpability in relation specifically to Article 26 of the Rome Statute. This author argues that Article 26 is 'substantive law' in that it is grounded on the notion that *mens rea* and volition is in doubt when it comes to children as alleged perpetrators of the international crimes articulated in the Rome Statute. Even *if* the child soldier was able to form the requisite intent and had knowledge and understanding of the wrongfulness of the atrocity he or she was about to commit and of the larger contextual circumstances surrounding the crime (which arguably is not generally the case); child soldiers yet surely escape criminal responsibility in the situations that are the focus of the current inquiry. This based on the fact that they as child soldier members of an armed group or force engaged in perpetrating mass atrocities and/or genocide acted under a reasonably based belief that they were under imminent threat of death or a continuing or imminent threat of serious bodily harm themselves or against another (i.e. a family member) should they fail to commit atrocities on behalf of the armed group or force in question. The child soldier situation is quintessentially then one meeting the Rome Statute description of duress:

Rome Statute: Article 31
Grounds for *excluding* criminal responsibility

. . .

d) 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 (emphasis added).[46]

Hence, the age-based exclusion in the Rome Statute, it is here argued, is based on an evaluation of issues regarding the elements of the crime and potential defenses. That assessment, however, is already built into the statute *a priori* in reference to an *age-defined group* (as opposed to being an analysis on a case-by-case basis as when an *individual* is found to be excluded from criminal responsibility based on the particular facts of a specific case actually heard by the Court). Thus, the Rome Statute, in effect, itself formulates its own culturally defined conception of the war-affected child (i.e. in particular the child soldier who was younger than age 18 at the time of the commission of the crime) which ipso facto precludes the culpability of 'children' under the ICC general principles of criminal law. This then is accomplished via the special provision in regards to children (Article 26 of the Rome Statute) which obviates the necessity for each individual child defendant making out a case for his or her lack of culpability under Article 31 of the Rome Statute (concerning the defense of duress or in regards to the issue of the mental element of the crime). The latter fact highlights the point that the drafters of the Rome Statute did not wish to leave the outcome (whether or not a particular individual who perpetrated the international crime(s) when he or she was under age 18 would be found to have mounted a successful defense under Article 31 of the Rome Statute) to the vagaries of judicial process and the particularities of who constituted the judicial panel at each stage of the proceedings. Article 26 eliminated that concern by incorporating an age-based exclusion of ICC jurisdiction based in substantive principles of criminal law.

The current author argues, further, that prosecuting child soldiers (persons who were under age 18 at the time of the alleged commission of the international crime) *in effect* constitutes a disregard for the defense of duress. The defense of duress is arguably applicable in all cases of child soldiering in the context of an armed group or force committing systematic grave IHL violations given: (1) the power differential between murderous adult combat unit members and commander versus child soldier and (2) the proclivity for brutal reprisal against members of their own armed units for non-compliance which commonly characterizes rebel groups such as the LRA and other State and non-State forces that use grave IHL violations as a routine

[46] Rome Statute (Article 31(1)(d)).

war tactic. The vulnerability of child soldier members of State and non-State armed forces that commit systematic grave IHL violations is manifest daily in the severely harsh treatment that these child soldiers endure during training and once engaged in the hostilities by their own side as documented in innumerable reports by social science researchers in the field; humanitarian workers and human rights advocates and NGOs and in interviews with both ex adult and child soldiers who had been engaged in the hostilities.[47] Recall also that child soldiers belonging to armed groups or forces that systematically carry out atrocity are, in actual fact, members of illegal groups or forces such that the child's recruitment (whether allegedly voluntary or forced) can be considered exploitive and a violation of their basic special protection rights under international human rights and humanitarian law. Hence, the alleged 'informed' consent of the child in joining such an unlawful armed group or force is irrelevant and the child soldier can properly be considered in such an instance to have been the victim of genocidal forcible transfer (i.e. a specific category of the crime of genocide listed at Article 6(e) of the Rome Statute) as will be explained in detail in a later chapter as mentioned.

It can reasonably be contended that criminally prosecuting child soldier members *of armed groups or forces that perpetrate systematic grave IHL violations* (i.e. mass atrocities and/or genocide); whether the prosecution occurs during or after the conflict, and whether before a military or civilian court; at the domestic or international level, constitutes persecution in that: (1) it is prosecution despite the lack of *mens rea* of this age-defined group of defendants and/or the presence of duress as a marked feature in such cases, and (2) considering the fact that such criminal prosecution adds considerably to the already severe psychological suffering of the war-affected traumatized child. It makes as much legal sense to criminally prosecute so-called child soldier members *of armed groups or forces perpetrating mass atrocities and/or genocide* for alleged conflict-related international crimes as it does to prosecute any other civilian detainees (hostages) of these groups or forces for international crimes the hostages committed under duress; which is no sense at all. Note that: (1) child soldiers in this instance are also civilians, as previously explained (as members of an armed group or force that does not abide by IHL); and (2) as they are not free to leave the armed group or force engaged in mass atrocity and/or genocide they may be considered as hostages from an IHL perspective regardless the manner of their initial recruitment. Indeed, it is here argued (as will be explained in detail in Chap. 5) that child soldiers, at least once recruited, are captives and that they are, more specifically, the victims of genocide under Article 6(e) "Forcibly transferring children of the group to another group."[48] Often the child soldier is abducted from a neighboring State or an IDP camp or a less protected area within the home territory. He or she may be 'recruited'

[47] Singer (2005).

[48] Rome Statute (2002), Article 6(e).

from the same or a different cultural, ethnic, national or other-defined group as compared to the armed unit into which the child is 'recruited.'

Rebel armed groups (and sometimes government troops as well) are, in the cases which are the focus of this inquiry; committing systemic atrocity against civilians (that is, against moderates in their own group however defined (i.e. in terms of ethnicity, nationality, religion etc.) as well as against any members of other targeted civilian groups distinguished along some dimension from the armed group or force in question. Child soldier membership in such armed groups or forces is yet another form of oppression of the larger targeted civilian population. It is an oppressive tactic that qualifies as a form of 'genocide' incorporating the intent, for instance, to eliminate those segments of the same or alternate ethnic group that offer any resistance. This by abducting or otherwise recruiting their children into soldiering thereby: (1) destroying cultural communities and much of the hope for the future and (2) seriously risking the children's chance for survival. Often these children are so damaged and stigmatized that even if they do survive the armed conflict; they are unable to return and/or integrate successfully into their home communities once more.[49] Child soldiering, when it includes participation in hostilities and especially the commission of atrocities is, after all, itself a form of extreme violence against children with foreseeable devastating adverse effects on children's psychological and/or physical well-being. Those effects are often long-lasting and without the ex child soldier accessing considerable support (psychologically, educationally, financially and in other needed respects); these effects may significantly damage or even destroy the child's opportunity for a good quality of life and his or her ability to contribute meaningfully to the advancement of his or her community.

Encouraging children (ex child soldiers who have participated with armed groups or forces that perpetrated mass atrocities and/or genocide) to go through non-judicial accountability mechanisms may be considered unjust for the same reasons as apply to criminal prosecution of such children. Such accountability mechanisms as applied to the ex child soldier in these cases would seem to have more to do with a symbolic public flogging than healing. This is the case since transitional justice mechanisms applied to ex child soldier former members of armed groups or forces committing mass atrocities and/or genocide are still premised on the notion of the ex child soldier as accountable; that is, as morally and legally responsible for atrocities he /she committed (presumably less so if abducted; more so if an alleged volunteer recruit to the armed group or force). However, on the view here, both types of 'recruits' are, in the final analysis, victims of genocidal forcible transfer to armed groups or forces committing mass atrocities and/or genocide. As discussed, the legal presumption that these child soldiers bear legal responsibility for having committed atrocities (as members of an armed group or force committing mass atrocities and/or genocide that recruited the children in large part to carry out atrocities) is flawed given the element of duress inherent in being a

[49] Coalition to Stop the Use of Child Soldiers (2009).

child soldier among adults engaged in widespread systematic war crimes and other international crimes. We will consider in the next section of this chapter the attempt of the backlash proponents to overcome the defense of duress (in regards to child soldiers perpetrating conflict-related international crimes) through their suggestion that the child soldier allegedly often possesses a degree of volition in the circumstance made manifest through the expression of 'tactical agency.'

It is here argued that State Parties to the Rome Statute are encouraged to adopt 18 as the universal standard of criminal culpability for international crimes (exclusion from prosecution of persons who were under 18 at the time they committed the international crime) as has in fact been the practice in international and hybrid international courts. This being the case since the Rome Statute does in fact set out who ought be prosecuted for genocide, war crimes and crimes against humanity and who escapes criminal liability (i.e. culpability attaching to persons 18 and over who have engaged in conduct that meets all the elements of the crime; who were *not* suffering from some mental defect or disease or operating under threat of imminent death if they did not comply, or under other forms of extreme duress, nor operating in a proportionate manner to defend themselves or others etc. and whose crimes meet all other jurisdictional requirements such as being crimes that occurred after entry into force of the Rome Statute etc.).[50]

Note that Article 21(3) of the Rome Statute stipulates that the Rome Statute must be applied and interpreted in a manner consistent with international human rights principles such that the law not be distorted by discrimination on any ground including age and an adverse distinction made on that basis:

> **Rome Statute: Article 21 (3)**
> The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds *such as* gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth ***or other status*** (emphasis added).[51]

It is apparent in considering Article 21(3) of the Rome Statute in relation to Article 26 (the age-based exclusion of jurisdiction) that the drafters of the Rome Statute properly did *not* regard Article 26 as creating an adverse distinction unfairly based on age (namely a distinction creating unfairly: (1) a disadvantage for persons who were aged 18 and over at the time they perpetrated the international crime and (2) an advantage for persons who were under 18 at the time they committed the crime since only the former group can be held by the ICC to bear criminal responsibility for their conduct). On the contrary, the age-based exclusion in the Rome Statute is intended to eliminate an application or interpretation of the Statute which would create an unacceptable adverse distinction based on children's status as child soldier war-affected children (i.e. a distinction between child soldiers and

[50] Rome Statute (2002), Articles 22–33.

[51] Rome Statute (2002), Article 21(3).

other child civilians affected by war that would allow child soldiers to be prosecuted for outcomes that foreseeably flowed from their being victims of genocidal forcible transfer to an armed group or force perpetrating grave IHL violations). That is, Article 26 seeks to avoid the prosecution of persons who were under age 18 at the time of the commission of the conflict-related international crime as this would not accord with fundamental principles of international law for the reasons here previously discussed (i.e. the children's right under IHL and international human rights treaty law to have been protected in the first instance from genocidal forcible transfer to an armed group or force committing mass atrocities and/or genocide; the high duty of care owed to children under IHL during armed conflict, and the children's lack of mens rea as well as the presence of an element of extreme duress in these cases). Further, Article 26 of the Rome Statute is consistent with customary humanitarian law guarantees intended to provide additional protections to war-affected children; even those who engaged in hostilities. The Rome Statute takes this a step further in regards to the issue of precluding from prosecution persons who were children at the time they committed the international crimes under the court's jurisdiction.[52]

2.1.5 The Flawed Presumption of Child Soldier Alleged 'Tactical Agency' as a Basis for Assigning Culpability

Interviews with child soldiers recruited into murderous armed groups or forces perpetrating systematic grave international crimes have been conducted by social scientists among others (hereafter in this section all references to child soldiers are to child members of armed groups or forces perpetrating mass atrocities and/or genocide). Honwana's interviews with child soldiers confirm that the children are generally well aware of the grave consequences, which often as not included death, should the children try to resist their commanding officer:

> Narratives of former boy soldiers are suffused with expressions of their feelings. . .Fear was the most pervasive of these feelings. Child soldiers expressed fear of being taken to the battlefield to fight, fear of being killed, and fear of their commanders. The relationship between boy soldiers and older commanders was founded in terror. *Any wrong move, however slight, could result in death, possible not only in combat but also in the camps where soldiers were kept under constant surveillance* (emphasis added).[53]

Honwana, despite outlining in beautiful prose the context of terror within which child soldiers attempt to survive as part of an adult armed unit, nevertheless suggests that child soldiers at times have 'tactical agency.' Tactical agency purportedly allows child soldiers on occasion the opportunity for clandestine or

[52] Protocols I and II Additional to the Geneva Conventions.

[53] Honwana (2006), p. 64.

disguised resistance i.e. resistance to going out on combat missions, to committing atrocity etc. The notion of 'tactical agency', however, requires that the individual genuinely 'has room to maneuver.' Indeed the quote from Honwana directly above comes from a section of her book which section is titled: "Spaces for maneuver within the Terrain of Warfare."[54] However, it is here contended that these children are not in fact 'maneuvering' in any meaningful sense. They are instead taking a risk with their lives under conditions of extreme duress with complete uncertainty regarding the outcome. If they succeed, it may be appealing and inspiring to label their actions as an expression of 'tactical agency', however such a characterization is but an illusion. If they do not succeed, and instead end up tortured or dead or both; it becomes ever so clear that this was not about expressing 'tactical agency' at all or 'manoeuvring the [alleged] spaces [available to child soldiers] within the terrain of warfare' but about taking a horrendous risk with one's life. The alleged 'spaces for maneuver' for a child soldier are but fictional-on one day feigning illness may relieve a child soldier from his duties; the next time the same move may result in the child's point blank execution as it all depends on the capricious on-the-spot decision-making of the commander or other adult compatriot. The child who succeeds in avoiding combat by feigning illness one day is then not taking tactical advantage of an opportunity for resistance with a reasonably foreseeable positive outcome. Rather, he or she is simply rolling the dice and hoping for the best. Actual 'tactical agency' exercised by a child soldier, however, would require taking advantage of a real opportunity that *would* in fact allow for reasonably foreseeable successful resistance to the commands of the unit leader whenever that opportunity presented itself. Only then would it be accurate to claim that there were actual 'spaces for maneuver' for the child caught up in the 'terrain of warfare' (to use Honwana's terminology) as part of an armed group or force committing mass atrocities and/or genocide. Where there is no success in a particular instance (resistance which results in dire consequence for the child soldier involved), only then does it become painfully obvious that there was in actuality no space for maneuver; but rather only a risk to be taken with uncertain outcome. It is hardly an expression of tactical agency that results in one's death. Taking such risks is not then an expression of tactical agency but a willingness to play what amounts to 'Russian Roulette' given one's terrifying circumstances and what one wishes to avoid (i.e. the high chance one will die in combat; commit an atrocity on order perhaps even against one's immediate family or other kin etc.).

Child soldier members of an armed group or force committing mass atrocities and/or genocide are thus simply not in a position to craft, to any meaningful degree, their own terms of engagement in the armed conflict situation by the use of 'tactical agency'. Notwithstanding the foregoing, however, particular child soldiers may, at times, have taken a gamble with their lives (which cannot be characterized as an

[54] Honwana (2006), p. 63.

expression of tactical agency) and offered resistance not knowing what would be the outcome:

> When they asked you to do something really bad and you didn't want to do it, you had to pretend that you didn't understand very well what they wanted, or you had to do it the wrong way. . .*But that was very risky because if the chief was vicious you could be severely punished for it*. ***It was a gamble*** (emphasis added).[55]

The point here is that given the almost unfathomable level of duress for the child caught up in an armed group or force bent on perpetrating mass atrocities and/or genocide, both the child soldier who takes a gamble with his or her life to resist in any way, and the child soldier who complies are entirely victims. Yet, Honwana and those who share her perspective on child soldiers suggest (erroneously on the view here) that child soldiers have genuine tactical agency. The latter, however, as explained, requires knowing in advance or in the moment when an actual space for maneuver exists; that is one which will likely allow for success in resisting commands or in realizing an escape. Knowing this at the outset is highly improbable given the fluidity of situations of armed conflict and the unpredictability of commanders engaged in systematic and widespread murderous campaigns. Yet, Honwana and other backlash proponents suggest that child soldiers do have genuine tactical agency in certain circumstances by which they mean the ability to take advantage of an opportunity they know in advance or in the moment will in all likelihood allow for successful resistance. On the basis of child soldier alleged 'tactical agency'; certain backlash proponents argue that at least some child soldiers are indeed culpable criminally for the conflict-related atrocities they have committed (though these proponents of child soldier accountability, as discussed, argue this need not imply actual prosecution through the courts as the best remedy).[56] Honwana addresses the victim issue thus:

> This book makes four main arguments . . .(2) children affected by conflict –both girls and boys-*do* ***not*** *constitute a homogenous group of helpless victims but exercise an agency of their own* which is shaped by their particular experiences and circumstances (emphasis added).[57]
>
> As boys are transformed into child soldiers, they exercise agency of their own, a *tactical agency* or agency of the weak, which is sporadic and mobile and seizes opportunities . . .***Tactics are complex actions that involve the calculation of advantage***. . .they are able to manoeuvre on the field of battle and seize opportunities [to resist](emphasis added).[58]

In contrast, it is here argued that the child soldier members of armed groups or forces committing mass atrocities and/or genocide who do try to resist committing conflict-related atrocity are simply 'rolling the dice' so-to-speak and hoping for the best. Such a strategy cannot properly be characterized as a manifestation of genuine

[55] Honwana (2006), p. 68.

[56] Drumbl (2009).

[57] Honwana (2006), p. 4.

[58] Honwana (2006), p. 73.

'tactical agency'. The backlash view then, on the analysis here, sets out a fallacious basis for child soldiers' alleged culpability as 'war criminals' to be addressed in the forum '*de jure*' which, for the backlash proponents, is apparently most often a local customary accountability mechanism or, alternatively, a Western-type truth and reconciliation mechanism as opposed to a war crimes criminal judicial proceeding.

The notion of 'tactical agency' as applied to child soldier members of armed groups or forces committing mass atrocities and/or genocide would seem designed to attempt to defeat the presumption (one grounded in reality) that this child soldier group is operating under duress and, hence, cannot be held responsible for their conflict-related international crimes where these occur. The principle of duress as set out in international criminal law, it is here argued, is much broader in conceptual scope than what is implied by backlash proponents through their use of the contrasting notion of 'tactical agency.' The application of the notion of 'tactical agency' to the child soldier situation essentially implies that duress is to be considered present only where the child soldier does not even have a chance to gamble with his or her life and attempt to escape or resist. However, duress according to the Rome Statute Article 31(d) is determined to be present on a much lower threshold; namely where there is "... 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."[59] Certainly, the child of rebel forces such as the LRA or other forces engaged in genocide or other mass atrocities is under continuing imminent threat of bodily harm or death from his own commander or unit colleagues for any multitude of perceived or real infractions (such as attempting to avoid committing ordered atrocity) or simply as the victim of his compatriots' own perverted 'blood sport'. Thus, the child soldier situation is one of continuing duress in these instances.

The child soldier members of an armed group or force committing mass atrocities and/or genocide, furthermore, are not in the same psychological or physically powerful position to organize an individual or group resistance as would be an adult 'soldier' member. Most of these children have been 'groomed' from a very young age by the murderous armed group or force to be compliant and, through brutalization as a form of training, have been induced to experience a 'learned helplessness'. That learned helplessness is, in view of the circumstances, sadly, in many ways, often the most realistic coping strategy for survival (i.e. either stay under the commander's radar so-to-speak or excel in carrying out all assigned orders and duties).

International criminal law recognizes duress as a valid defense to the charge of having committed international crimes (namely war crimes, crimes against humanity or genocide). This defense would appear to be an eminently justifiable one insofar as child soldier members of murderous armed groups or forces that violate IHL as a war tactic are concerned. This given the children's unbelievably brutal

[59] Rome Statute (2002).

treatment at the hands of both commanders and other adult members of their armed group or force (as has been well documented by researchers in the field). Recognition of this fact, it is here contended, is one key element underlying the age-based exclusion of jurisdiction articulated at Article 26 of the Rome Statute.[60]

The notion of 'tactical agency' as applied to child soldier members of armed groups or forces committing mass atrocities and/or genocide, and the consequent alleged criminal responsibility assigned to child soldiers for perpetrating atrocity in this context is, on the view here, but a sanitized 'politically correct' version of 'blaming the victim'. The same 'blaming the victim' strategy as applied, for instance, to women or children trafficked into the sex trade (whether by force or with the willingness of the victim achieved in any number of ways) suggesting that the trafficked women or children are allegedly to blame for being unable to resist their own victimization is not countenanced, at the very least, by the vast majority of the international academic legal and social science community. Yet, somehow, such a 'blame the victim' perspective seems increasingly palatable to a segment of the social science and legal community researching and publishing on the topic of child soldiers even where the children have been abducted and forcibly recruited into an armed group or force committing systematic grave IHL violations and certainly if they were alleged voluntary recruits.

We would not point to those children who manage to elude the sex traffickers and suggest on this basis that trafficked children who fail to escape or those who do not try to escape and participate in the sex trade and perhaps even, on order, lure other children into the sex trade, are to be held blameworthy as they did not manifest a supposed 'tactical agency' seizing opportunities allegedly at their disposal to resist such conduct and their situation. Yet, the notion of 'tactical agency' as akin to a degree of free choice (as opposed to simple high risk-taking under extreme duress with uncertain consequences for the individual), if accepted as valid in the child soldiering context, must logically be generalized to other situations where an individual is entirely controlled by a powerful individual or group such as in a sex trafficking situation. Yet, such unpleasant generalizations are not made by the backlash proponents. They are loath to reach such conclusions about whether opportunities presented themselves in the latter instances for the child victims to exercise an alleged tactical agency and resist their own victimization. Yet, as explained, 'tactical agency' is a popular concept as applied to child soldiers and gaining in social science currency.

Deciding whether opportunities for an alleged tactical agency (expression of resistance) in fact existed for any particular child soldier at any particular point in time is a highly speculative matter if it can be achieved at all. As discussed, in actuality, resistance of the child soldier member of an armed group or force committing mass atrocities and/or genocide is very much bound up with the willingness of the victim to take uncertain risks and gamble with his or her life as

[60] Rome Statute (2002).

opposed to being a matter of tactical agency based on calculated risks with a foreseeable good chance of a successful outcome. The psychology of the victim, for instance, the degree of learned helplessness that has been engendered as the result of the traumatic circumstances in which he or she operates and the knowledge of the extreme power that is held over him or her all come into play. It is simply impossible to determine whether child soldiers experienced 'chance offerings'[61] of genuine opportunities for using tactics to resist (i.e. whether objectively speaking such opportunities in fact existed and equally importantly in respect of *mens rea* issues; whether the child subjectively experienced them as such in any particular case). Many child soldiers may be victim to the 'Stockholm Syndrome' wherein over time they learn to identify with those who wield absolute power over their life or death as do the commanders of the armed units to which the children belong. Yet, the backlash proponents suggest that: (1) such alleged 'chance offerings' for resistance (i.e. to committing conflict-related atrocities) do present themselves on a not infrequent basis and that (2) child soldiers who do not take advantage of them are declining to exercise their 'tactical agency' in the circumstance and must be held culpable as a result (the erroneous implication being that children in such a situation are expected under IHL to risk their lives to resist). Such unfounded presumptions thus serve simply to unjustifiably demonize and stereotype child soldiers who have committed atrocity as fully culpable and as purportedly acting, to a degree, out of an evil and knowing intent without an available duress defense.

2.1.6 *Rome Statute Article 26 and State Prosecution of Child Soldier Perpetrators of Conflict-Related International Crimes*

The view (erroneous on the analysis here) that Article 26 of the Rome Statute is simply a procedurally-based jurisdictional exclusion incorrectly suggests that the drafters considered that whether or not a child is prosecuted at the State level as a 'war criminal' (i.e. is considered to have had the requisite *mens rea* to be able to fulfill all the elements of the international crime despite his or her young age at the time the crime was committed, is held to have acted on an informed voluntary basis etc.) is *properly* impacted by *variable* specific State statutory stipulations regarding minimum age of criminal responsibility for international crimes[62] That is, those who hold that Article 26 is but procedural law maintain that it was specifically included in the Rome Statute so as to leave prosecution of child soldiers to the domestic courts *notwithstanding the variation in minimum age of criminal responsibility for international crimes from State to State*. Children are properly, on this

[61] Honwana (2006), p. 71.

[62] Cf. Aptel (2010), p. 24.

erroneous view, prosecuted under domestic statutes for conflict-related international crimes in particular States but excluded from prosecution for the same international crimes in certain other States based on child perpetrator age when the international crimes were committed. Such a discretionary prosecution as a function of domestic law stipulations regarding the minimum age of legal responsibility for international crimes would seem inconsistent, however, with the fundamental principle that international crimes (specifically war crimes, crimes against humanity and genocide) are an affront to the conscience of the international community as a whole. One would expect then some consensus regarding when such a crime had occurred and when criminal culpability attached. (It has here been argued, it will be recalled, that Rome Statute Article 26 sets 18 as the implicitly recommended *universal* standard for minimum age of legal responsibility for international crimes through the ICC's own age-based exclusion rule).

The notion of an international community conscience concerned that there be humane treatment of, for instance, civilians, POWs (should it be an international conflict) and other detainees of an adversary etc. and that women and children are treated with special respect and care during armed conflict is reflected in part in the universal jurisdiction that States may exercise in prosecuting war crimes, crimes against humanity and genocide when international crimes are codified under domestic statute. The concept of universal criminal jurisdiction is in turn importantly premised on the assumption that there generally will be consensus on whether an international crime has been committed and when the perpetrator should be held individually criminally liable either through international or hybrid courts or State courts. Further, *any* State (subject to various types of ICC jurisdictional constraints) may potentially seek prosecution of individuals through the ICC where the State jurisdiction in which the international crimes occurred is unable or unwilling to prosecute these accused individuals through the domestic courts for crimes falling under ICC jurisdiction. At the same time, there is, nevertheless, great inconsistency across States in applying the criteria for designating a minor as a 'war criminal'(that is, holding that all the *mens rea* and *actus reus* elements of the crime are present). This is reflected in the variation in State legislative specifications regarding minimum age of criminal culpability for international crimes. That inconsistency would seem, in practice, to undermine effective implementation of the principle of universal jurisdiction. That is, the lack of a universal minimum age of criminal culpability for international crimes stipulated by the various States members of the international community under their respective State legislative schemes likely deters States from considering that they have a legally supportable mandate to exercise universal jurisdiction in respect of child alleged war criminals.

Further, *at the State level* there will be variation in the ability of the defendant child soldier to raise the defense of 'duress' for: (1) international crimes involving intentional murder; or (2) international crimes involving grievous bodily harm causing death (whether or not the death was intentional as long as it was a foreseeable likely possibility due to the grievous injury). The ability to raise the defense of duress for such international crimes depends on the State's legal system:

> The defence of duress is not the same in all [domestic] legal systems. Whereas, in general, duress can constitute a complete defence to all criminal charges in civil law systems, in almost all common law legal systems it is not a defence to charges of murder. . .*it may be that [the common] law does require that we all be heroes and refuse to save our own lives at the expense of those of others* (emphasis added).[63]

Recall that duress is a major issue in child soldier cases where the child is accused of conflict-related international crime and hence inconsistency in the application of the defense (i.e. based on the State legal system) is highly problematic. For instance, Happold gives the hypothetical example of two child soldiers (both of age according to their State's minimum age of criminal culpability) whose ability to raise the duress defense differs under a common law legal system:

> It transpires that they were each required by their commanders, under threat of imminent execution, to cut off a person's hands. In both cases, the intention was not to kill the person, but merely to inflict grievous bodily harm so that the victims would serve as living examples of the armed group's ruthlessness towards its opponents. However, the person mutilated by Child A dies of his wounds, while the person mutilated by Child B does not. Child A could be convicted of murder (as an intention to inflict grievous bodily harm is sufficient to provide the *mens rea* for the crime of murder) and could *not* rely on the defence of duress [given the State legal system], but Child B, charged with inflicting grievous bodily harm could.[64]

In contrast, given Article 31(d) of the Rome Statute which allows for 'duress' as a basis for *excluding* individual criminal responsibility for crimes normally under ICC jurisdiction: "It is difficult to argue that international law prohibits the permitting of a defense of duress to charges of war crimes and crimes against humanity involving killing."[65] Arguably the ICC provides a guidepost regarding advisable State practice in regards to consideration of duress also in child soldier cases involving loss of life in particular, and on the issue, in the first instance, of prosecution of persons who were under 18 at the time the international crimes were perpetrated:

> . . .perhaps more convincingly, one might see the Rome Statute as, if not crystallising, at least providing the *fons et origo* of a new rule [on the issue of the duress defence to international crime]. As with previous 'law making' conventions . . .the Rome Statute might serve as a focus for concordant state practice. National courts, in particular, might be thought likely to refer to the statute to determine what international criminal law requires, while national legislatures are already incorporating its [the Rome Statute] provisions into their domestic law. Already the ICTY has held that to a large extent the rules set out in the Rome Statute represent the expression of the *opinio juris* of the vast majority of states.[66]

Yet, despite this international law ICC guidepost on the issue of duress; backlash proponents (who argue for child soldier alleged criminal culpability to be addressed

[63] Happold (2005), p. 156.
[64] Happold (2005), pp. 155–156.
[65] Happold (2005), pp. 157–158.
[66] Happold (2005), p. 158.

through the national courts and/or accountability of sorts to be meted out through domestic non-judicial forums for the various defendants) are essentially adopting the common law standard in cases, for instance, where the child's conflict-related atrocities involved murder or grievous bodily harm resulting in death of the victim (i.e. rejecting duress as an absolute defense in such cases). That is, these backlash proponents hold that: (1) duress in respect of the accused child soldier war criminal is not consistently an available defense given the child's *alleged* common ability and sufficient opportunity to manifest 'tactical agency' and resist committing the atrocity (for instance, resist perpetrating a murder or inflicting grievous bodily harm causing death on a civilian during the armed conflict); and that (2) even if duress was present, on the backlash *common law perspective*, the child soldier was expected to be heroic and resist committing the atrocity despite the imminent threat in doing so to his or her own life or bodily integrity or that of others he or she was protecting. (Consider that such an explicit or implied continuing imminent threat to the child soldier is a prominent feature of most if not all armed groups or forces committing mass atrocities and/or genocide that are comprised in part of child soldiers). Were the aforementioned not the backlash perspective, then the backlash proponents could not be arguing that child soldiers generally bear full legal responsibility (culpability) for the conflict-related international crimes they have committed.

It is here contended that the drafters of Rome Statute Article 26 (the age-based exclusion) and Article 31(d) (dealing with duress) would have viewed these Articles (rules) as important guidance for State practice in domestic courts (which rules would be, of course, binding on the State courts of particular States were the Rome Statute domesticated in those particular States). The categorization of these articles in the Rome Statute as setting out general principles of [international][criminal law rather than just procedural matters heightens their relevance as models of judicial practice internationally. Article 26, in combination with Article 31 of the Rome Statute, while rules of the ICC, on the view here then, set an international standard for States regarding the permissibility of duress as a defense (for instance to atrocities that resulted in death) and the need to preclude from prosecution defendants who were children (under age 18) at the time of the commission of the international crime(s). The drafters of the Rome Statute then likely did *not* contemplate or endorse leaving the issue of duress as a defense and its application or non-application to child soldier cases to the peculiarities of the particular State legal system *without any guidance from the ICC* as to any broadly accepted international rule on the issue. The inconsistency, at present, on the viability of a duress defense in child soldier cases as a function of the particular State legal system involved undermines the fair and equitable administration of justice at the State level in respect of child soldiers charged with international crimes; particularly those crimes involving killing or grievous bodily harm resulting in death.

Further, note that the failure of States to implement a universal minimum age of criminal culpability for international crimes under State legislation would not seem to work to facilitate an equitable administration of justice. As Happold explains:

". . .from the perspective of the potential [child] defendant, it would seem wrong for an individual's liability under international law to depend upon place of prosecution."[67] In addition consider that:

> Permitting states to decide their own age of criminal responsibility [for the international crimes defined in the Rome Statute] would allow them to determine the scope of their international obligations [in prosecuting, and arguably therefore ultimately in some ways also in preventing the crimes of genocide, war crimes and crimes against humanity].[68]

Yet, despite the aforementioned issues that arise due to the variability across various States of the minimum age of criminal responsibility for international crimes, some have inexplicably argued that this variability, when applied to the issue of the prosecution of child soldiers for grave international crimes, poses no problem in terms of judicial fairness (presumably then also no ethical or conceptual problems as well):

> *In cases involving child soldiers, at present it would appear* ***perfectly proper*** *for states to apply their own domestic law to the minimum age of criminal responsibility* providing such law falls within [certain] broad limits [i.e. the child was allegedly old enough to comprehend the nature of his or her act and its wrongfulness such that the minimum age of criminal responsibility was not set so obviously low as to cast suspicions on the latter propositions] (emphasis added).[69]

It is here argued, in contrast, that the variability in domestic criminal law from State to State in terms of: (1) the minimum age of criminal responsibility for international crimes, and in (2) the availability of the duress defense (respecting particular crimes) as a function of the particular legal system is highly problematic in terms of the potential impact on the possibility, at the State level, for the fair and proper administration of justice for child soldiers accused of war crimes, crimes against humanity and/or genocide. Further, it is here contended that the Rome Statute Article 26 is a general principle of international criminal law which can and should be used for the guidance of the States in facilitating their setting age 18 as the minimum age of criminal culpability for international crimes. It is here suggested that: (1) a presumption of lack of *mens rea*; (2) recognition of the presence of extreme duress in child soldier situations involving children 'recruited' into armed groups or forces committing systematic mass atrocities and/or genocide and (3) acknowledgement of the special protections owed children under IHL in times of armed conflict are combined factors contributing to the rationale underlying Rome Statute Article 26.

The contention has here been advanced that Rome Statute Article 26 *excludes* persons from individual criminal responsibility who were under 18 at the time of their commission of international crimes as a substantive 'general principle of criminal law' (arguably even a customary rule of international law), and not as

[67] Happold (2006), p. 71.
[68] Happold (2006), p. 71.
[69] Happold (2006), pp. 82–83.

an ICC jurisdictional/procedural matter (rather these persons are considered non-culpable as a matter of substantive law). It is precisely for *that* reason that the age-based exclusion provision in the Rome Statute is considered: (1) *not* to undermine the *jus cogens* nature of the prohibition against the crimes of genocide, crimes against humanity and war crimes by allegedly fostering impunity for those purportedly criminally culpable for such crimes (i.e. accused child soldiers) *nor* (2) a provision which weakens the international rule which makes prosecution of those culpable for these international crimes a universal obligation regardless of the State jurisdiction in which the crimes occurred. In regards to the latter point, it is, with respect, erroneous to suggest that Article 26 of the Rome Statute simply defers jurisdiction over child soldier prosecution for international crimes to the States. Consider in regard to this issue that the 'Principle of Complementarity' (which is adopted by the ICC and incorporated in the Rome Statute at Article 17) sets out the Court's deferral to the State where the State is willing and able to genuinely investigate and prosecute those culpable for the heinous international crimes normally falling under ICC jurisdiction. Note that Article 17 is incorporated into the Rome Statute under Part II concerning matters of jurisdiction, admissibility and applicable law (procedural law) and not under Part III concerning general principles of criminal law (substantive law):

> **Preamble (paragraph 10)**
> *Emphasizing* that the International Criminal Court established under this Statute shall be *complementary to national criminal jurisdictions* (emphasis added).
>
> **PART 1. ESTABLISHMENT OF THE COURT**
> **Article 1**
> **The Court**
> An International Criminal Court ("the Court") is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and *shall be complementary to national criminal jurisdictions*. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute (emphasis added).
>
> **PART 2. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW**
> **Article 17**
> **Issues of admissibility**
> 1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:
>
> (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, *unless* the State is unwilling or unable genuinely to carry out the investigation or prosecution. . . (emphasis added).[70]

Hence, if the age-based exclusion of individual criminal responsibility incorporated into the Rome Statute was a provision included simply for the purpose of deferring to the States on the matter of the prosecution of child perpetrators then

[70] Rome Statute (2002), preamble, Article 1, Article 17.

that provision (now Article 26 in Part III) would have been included in Part II; Article 17 as a specific category of cases involving the application of the Complementarity Principle (deferral to national criminal jurisdiction). However, the Rome Statute age-based exclusion of individual criminal responsibility is *not* a jurisdictional or admissibility matter (and is properly included in Part III of the Rome Statute concerning general principles of criminal law). This is evidenced also by the fact that the ICC will *not* (contrary to its endorsement of the Principle of Complementarity dealing with the question of ICC versus State prosecution of cases) assume jurisdiction over child perpetrator cases even when: (1) the State is unwilling to genuinely investigate or prosecute the cases and thus meet its usual duty to prosecute (a duty articulated in the Rome Statute preamble)[71] or is unable to do so; and (2) regardless whether the child is among those with significant responsibility for the crimes (i.e. as child commander of an armed unit of mostly other young people under age 18 such as reportedly was Dominic Ongwen who was abducted by the LRA at age 10 and became a commander by age 13 or 14[72] heading particular military maneuvers in Northern Uganda involving child abductions, carrying out indoctrinations and leading raids on villages among other crimes).

Were it the case that the ICC in fact considered child solders potentially criminally culpable for any conflict-related international crimes they commit, it would have been imperative for the Court to allow for their prosecution *where necessary* before the ICC (rather than implement in its judicial practice and incorporate as statutory principle an absolute age-based exclusion of ICC jurisdiction regarding child perpetrators). This in that given: (1) the absence of a universal minimum age of criminal culpability for international crimes at the State level, (2) non-functional civil institutions such as courts in some States still in the midst of conflict, (3) a lack of State political will to prosecute child soldier alleged perpetrators etc.; the potential for prosecution in any particular State would be unreliable and would vary, as it currently does, according to the State territory in which the crimes occurred. Hence, the view that the variability in State minimum age of criminal culpability for international crimes is the explanation for why the Rome Statute includes an age-based exclusion provision (as is the explanation according to many of those who claim that Article 26 is but procedural law and that the ICC intentionally left the matter of prosecution of child soldiers to State legislative discretion) is discredited. The lack of a universal minimum age of criminal responsibility in domestic statutes would have in fact *precluded* an absolute age-based exclusion of jurisdiction in the Rome statute for the reasons here explained. It is clear then, on the analysis here, that: (1) the Rome Statute *a priori* excludes child soldiers as a group from criminal responsibility for international crimes and assumes the lack of criminal culpability for each individual of that age-defined group and that (2) Article 26 of the Rome Statute is intended to be a rule of

[71] Schabas (2010), p. 340–347.

[72] African Transitional Justice Research Network Field (2008).

substantive law (and emergent customary law accepted by the majority of States) setting age 18 as the minimum age of criminal responsibility for war crimes, crimes against humanity and genocide (i.e. the perpetrator would have had to have been at least 18 at the time he or she perpetrated the crime to be held criminally culpable).

The current author would maintain that those who wish to hold child soldiers culpable for apparent violations of international law were foreseeably bound to argue that the Rome Statute exclusion of jurisdiction over persons aged under 18 at the time of the commission of the international crime is merely procedural rather than substantive law. To do otherwise would seriously undermine their position given that ICC jurisprudence is an important guidepost in international criminal law for other courts (i.e. State courts) dealing with international crime (and arguably also a guide, in principle, for Truth and Reconciliation Commissions).However, certain reports sponsored by UNICEF (which as an organization advocates for a universal minimum age of criminal responsibility of 18), in contrast to some high profile members of the international legal academic community, state that Article 26 is substantive law:

> . . .notwithstanding *the absence* of provisions limiting their respective jurisdiction to persons 18 and older and despite evidence showing the involvement of children, the *practice of the ICTY and the ICTR also has been not to investigate or prosecute children.*
>
> *The establishment of the ICC in 1998 translated this practice into* ***substantive international criminal law***. The ICC cannot prosecute children; its statute states that "the Court shall have no jurisdiction over any person who was under the age of eighteen at the time of the alleged commission of a crime." (emphasis added).[73]

At the same time, however, UNICEF (erroneously on the analysis here) still does not consider that: (1) the ICC age-based exclusion sets 18 as the minimum age of criminal responsibility for international crimes or that (2) Article 26, therefore, has important implications for preferable State practice on the issue of prosecution or lack of prosecution of child perpetrators of conflict-related international crimes:

> The exclusion of children from the jurisdiction of international courts does not mean that the age of criminal responsibility is fixed at 18; rather, it means that children fall outside the scope of the limited personal jurisdiction of the ICC.[74]

That view of Article 26 of the Rome Statute as but setting the limitations of the ICC scope of personal jurisdiction was contradicted in detailed argument previously here set out. Clearly Article 26 of the Rome Statute is not a procedural solution to the current reality of State variability in minimum age of criminal responsibility for international crimes codified in domestic law. This is further evidenced by the fact that the provisions of the Rome Statute regarding lawful recruitment and use of child soldiers aged 15 and over[75] stipulates this specific age parameter notwithstanding the variability among States in the legal age of majority

[73] Aptel (2010), p. 22.

[74] Aptel (2010), p. 24.

[75] Rome Statute Article 8(b)(xxvi) and (e)(vii).

in various domains including soldiering, and difficulty in definitively determining the exact biological age of the child. Thus, the Rome Statute formulation was not constrained by consideration of variation in State legal definitions of 'child' (age parameter for minority status and lawful recruitment). Similarly, there was no constraint in drafting the Rome Statute Article 26 due to the lack of consensus among States as to minimum age of criminal responsibility for international crimes. Rather, Article 26 set out the ICC formulation of the appropriate minimum age of criminal responsibility for international crimes notwithstanding the lack of consensus among States on the issue.

The provisions of the Rome Statute[76] which designate recruitment and use of children under 15 in hostilities (whether involving international or non-international conflicts) as 'war crimes' are modeled on Additional Protocol I to the Geneva Conventions, Article 77(2) which reads as follows:

> The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of 15 years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among those persons who have attained the age of 15 years but who have not attained the age of 18 years the Parties to the conflict shall endeavour to give priority to those who are oldest.[77]

A key conceptual challenge to holding child soldiers of any age accountable is determining whether or not children of a certain age (below 18 years) have the necessary *mens rea* to properly be held responsible for having committed conflict related atrocities.[78] The latter issue refers to the question of *whether* children (persons under age 18) can be held criminally responsible for international crimes defined under the Rome Statute, and if so, *when* children can properly be held to have sufficient cognitive appreciation of: (1) the gravity of the international crime and its wrongfulness (legally and morally), (2) the objective of the crime as part of genocide or systematic war crimes or widespread crimes against humanity other than genocide and/or have (3) knowledge of the larger context of the crime (combined at times with an intent to commit the international crime(s) in question). Clearly, Article 26 of the Rome Statute discounts the possibility of adequate *mens rea* for children (i.e. child soldiers) who commit conflict-related international crimes normally under ICC jurisdiction. This due to the individuals' young age as well as lack of *mens rea* due to duress and also very often due to intoxication (armed rebel groups such as the LRA, we know from field interviews with ex child soldiers and others, regularly use drugs as an element of their initiation of the child soldiers into the commission of atrocity (force-feeding the children the drugs in most instances). Further, there is a continuing expectation by the LRA and other such armed groups that the child will do whatever it takes to continue perpetrating

[76] Rome Statute (2002), Articles 2(b) (xxvi) and 2(e)(vii)).

[77] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 http://www.icrc.org/ihl.nsf/INTRO/470 (accessed 19 January, 2011).

[78] Happold (2006), p. 71.

atrocities on behalf of the armed group such as taking mind numbing drugs if that is what is necessary.

The Rome Statute at Article 31(1)(b) addresses the implication of intoxication on *mens rea* as an element of the crime:

> **Article 31**
> **Grounds for excluding criminal responsibility**
>
> . . .
>
> (b) 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* (emphasis added).[79]

Note that under the Rome Statute the intoxication defense to having committed international crimes individually or in concert with others (or attempting to commit; or having conspired to commit or having incited international crimes etc.) is only viable if the person (who was 18 or over at the time) did not voluntarily become intoxicated knowing the risk that he or she might likely engage in the impugned conduct due to the intoxication. However, this Rome Statute limitation on the intoxication defense does not apply to child perpetrators of international crimes who are, in the first instance, excluded from the jurisdiction of the ICC. It is here suggested that: (1) the intoxication defense to criminal culpability of individual child soldiers for international crimes is already included amongst the numerous defenses suggesting lack of *mens rea* which contribute to the underlying logic of Article 26 and that (2) the drafters did not therefore regard it material whether or not *the child* took the drugs voluntarily at some point (whatever 'voluntary' can mean in the terrifying circumstance in which a child soldier finds him or herself 'recruited' into an armed group or force committing mass atrocities and/o genocide). Thus, Article 26 of the Rome Statute must be considered *in combination* with Article 31 and for that reason, as explained, this author is disagreed with Happold that under international law rules:

> . . .*a child* who was coerced into drinking or taking drugs before going into battle could rely on the defense [of lack of mens rea due to intoxication], but a child who drunk or drugged himself so as to make it easier or blot out what he was going to do could not.[80]

Note that individual criminal liability for international crimes (genocide, war crimes and crimes against humanity) under the Rome Statute (excluding persons who were children-under 18- at the time of the commission of the crime) accrues where the individual directly or indirectly facilitates the commission or attempted commission of the crime by intentionally engaging in conduct for whatever reason knowing that the conduct will facilitate the commission or attempted commission

[79] Rome Statute (2002), Article 31(1)(b).

[80] Happold (2005), p. 159.

of the crime (whether or not the perpetrator in question him or herself in fact desired to further the intention of the group whose aim it is/was to commit international crimes) (Article 25 (3)(d)(ii) Rome Statute).[81] Such an approach broadens considerably the scope of potential culpability for international crimes.

Arguably, older child soldiers may, at least in some instances, be aware of the intent of the armed group of which they are a part to commit systemic widespread atrocities (crimes against humanity) and/or war crimes. Perhaps, in some cases, they are even aware of the intent of their adult commanding officers (i.e. genocidal intent) when they (the children) themselves participate in perpetrating the atrocities even if that intent is not also their own. Note also that in some exceptional rare instances the commanding officer of a small armed unit may even be a person under age 18 years. Yet, Article 26 of the Rome Statute finds substantive grounds to *exclude* from individual criminal responsibility child perpetrators of international crimes specified by the statute even in the aforementioned cases. This due likely to acknowledgement of extreme duress (which characterizes the child soldier situation) and/or factors that undermine *mens rea* for the child soldier as well as the failed State duty to have protected the child from recruitment into armed groups or forces committing mass atrocities and/or genocide.

2.1.7 *Re-Victimizing Child Soldiers: Setting the Stage for the Alleged Criminal Liability of Child Soldiers for Conflict-related International Crimes*

One of the prime hurdles that those who wish to hold child soldiers accountable for atrocity must overcome is that such an approach would appear to re-victimize vulnerable children. That is, prosecuting child soldiers for perpetrating conflict-related international crimes has, heretofore, traditionally been viewed as inconsistent with State obligations to protect children (including child soldiers) who have arguably been perceived under customary law (i.e. as reflected in the Additional Protocols to the Geneva Conventions which themselves have attained the status according to some scholars as customary law) as having been exploited through their use in child soldiering in the first instance (i.e. the use of child soldiers is not considered normal practice under the rules of war). Such a view was held by the Special Prosecutor for the Special Court of Sierra Leone as reflected in his November 2002 press release which stated in part:

> The children of Sierra Leone have suffered enough both as victims and perpetrators. I am not interested in prosecuting children. I want to prosecute the people who forced thousands of children to commit unspeakable crimes (emphasis added).[82]

[81] Rome Statute (2002), Article 25 (3(d)(ii)).

[82] Press Release of the Prosecutor for the Special Court for Sierra Leone (2002).

It would appear that a certain segment of the social science and legal scholarly community is currently working hard to reverse the historical trend which led to a vision of child soldiers as being, in the final analysis, 'victims' regardless the particulars of their recruitment and conduct during the conflict. This contemporary scholarly movement (perhaps unintentionally) renders the demonization of child soldiers 'politically correct' as relates to those child soldiers who commit atrocities. In order to accomplish that task, the focus of that backlash academic movement has been on *undermining:* (1) the notion of the child soldiers as lacking in free and voluntary intent or being subjected to duress directly and concurrently relevant to their committing particular conflict-related atrocities as members of an armed group or force perpetrating mass atrocities and/or genocide, and (2) the notion of child soldiers being easily subjected to manipulation given their age-related (developmental) incompetence to defend against such manipulation. In this regard, the influential concept of 'tactical agency' has been promulgated by Honwana, an anthropologist who has researched and written about child soldiers in Africa.[83] The concept of 'tactical agency', as was previously discussed, suggests that the powerless still often have room to maneuver to some extent and to outwit, to a degree, those who wield power over them so as to offer resistance in various forms. In regard to child soldiers that alleged ability to exercise 'tactical agency' is held by Honwana, and by others, including high profile legal scholars such as Mark Drumbl[84] who endorse the notion, to allow child soldiers at times to resist recruitment and even to elude the command order or incentives to commit atrocities in the context of armed conflict. Some representative quotes from the aforementioned authors regarding the alleged 'tactical agency' of child soldiers include the following:

> Many former [child] soldiers *claim* that they "had no choice." [i.e. to become involved in soldiering or to commit atrocities in the context of the conflict]. Yet, recognition of the constraints under which they acted need not mean…the dissolution of agency as such…*This view of agency and power makes these young combatants agents in their own right because they can, at certain moments, mobilize resources to alter the activities of others, and thereby, of themselves*. They can pretend to be ill to avoid certain tasks; they can plan to escape; they can deliberately fail to perform their duties properly [i.e. those duties including maiming, murdering and committing other forms of atrocity]. This interplay constitutes… the … "dialectic of control (emphasis added)."[85]
>
> *These young combatants exercised 'tactical agency' to cope with the concrete, immediate conditions of their lives in order to maximize the circumstances created by their violent military environment*…(emphasis added).[86]

The implication of what Honwana is suggesting in the above quotes is that child soldiers have a moral obligation to resist committing international crimes because

[83] Honwana (2006), p. 71.

[84] Drumbl (2009)Child soldiers, justice and the international legal imagination, Yale Law School podcast, 29 October 2009.

[85] Honwana (2006), p. 70.

[86] Honwana (2006), p. 71.

they allegedly not uncommonly have a certain material degree of freedom despite the duress they are under (that alleged freedom being referred to as 'tactical agency'). In considering the viability of such a view, the point could be made that it is the case that "all persons have a duty to comply with international humanitarian law"[87] *to the degree reasonably possible*. However, at the same time, it is not unreasonable to suggest, based on field studies and other research concerning child soldier members of armed groups or forces engaged in systematic grave violations of IHL, that these child participants in the armed conflict are viewed as being particularly expendable and this has significant implications for an assessment of their potential culpability or lack of culpability for atrocity. Children, after all, are considered easily available for child soldiering through abduction, easily manipulated and generally unpaid for their contributions to the armed conflict; readily put into combat with little if any military training or regard by the adult commanders for the children's safety, all this rendering the existing child soldier contingent particularly expendable; likely much more so than the adult soldier:

> . . .children [in practice often] no longer enjoy any of the traditional protections stemming from their underage status. Instead, children are increasingly recruited because of the very fact that they are young. *Groups that use child soldiers view minors simply as malleable expendable assets, whose loss is bearable to the overall cause and quite easily replaced*. Or, as one analyst notes, "They are cheaper than adults, and they can be drugged or conditioned more easily into violence and committing atrocities."[88]

Thus, the child soldier is operating under extraordinary duress; especially once in theater; even if allegedly a voluntary recruit. While some children manage to execute a plan of resistance, are we then to expect all children to do so and risk their lives? Are they to be expected, as children, to have the cunning and courage, in every instance, if and when a small window of opportunity presents itself, to resist a maniacal commander intent on committing systemic and widespread acts of terror and violence; perhaps even genocide? The latter would seem to be the conclusion Honwana (as others in the backlash movement against viewing child soldiers consistently as non-culpable victims) draws from the notion of child soldier alleged 'tactical agency.' This ironically despite the notion of 'tactical agency' itself referencing the relative powerlessness of the individual attempting to negotiate a risky set of personal circumstances via minute to minute weighing of the odds in potential risk-taking; for example calculating the risk of death or injury in deviating from the behavioral script the child soldier is expected by his superiors to meticulously adhere to (i.e. the risk of being killed for trying to escape) against the short and long-term risk of adhering to the script (i.e. being killed in a combat situation):

[87] Happold (2006), p. 70.

[88] Singer (2005), p. 55.

> They [child soldiers in theatre] acted from a position of weakness. They had no power base, no locus . . . from which to act within the confines of this militarized territory.[89]

Honwana transitions in her interpretation of the constructed concept of 'tactical agency' from its meaning: (a) indirect maneuvering by members of a highly subjugated group (child soldiers) who, at times at least, purportedly have the ability to exercise highly restricted tactical agency in the sense of taking a chance with their lives and risking immediate death by execution or grievous bodily injury at the hands of their own commander/compatriots to: (b) a view of tactical agency as an outward behavioral expression of resistance (attempts to escape or to resist committing atrocity etc.) occurring at opportune moments with a better than chance likelihood of success which child soldiers are obligated morally and under international law to seize. The manifestation of that resistance supposedly reflects an expected standard of behavior for child soldiers wherever tactical agency is allegedly feasible (i.e. adherence to Common Article 3 of the Geneva Conventions) consistent with international humanitarian law. That is, on the backlash view: (1) no matter how dire the child soldiers' oppressive life situation in being part of an armed group or force intent on committing mass atrocities and/or genocide or (2) the continuing threat of death to the child soldiers at the hand of one of their own compatriots as well as that of the adversary, the child soldier is expected to exercise theorized 'tactical agency' and resist when the alleged opportunity presents itself. The notion of tactical agency is thus bedrock for rationalizing the attribution of culpability to individual child soldiers for committing conflict-related atrocity (international crimes) implying as it does the possibility for intentional volitional behavior; an alleged choice by the child soldier not to deploy tactical agency to avoid committing conflict-related atrocity:

> *As boys are transformed into child soldiers, they exercise agency of their own.* A tactical agency or an agency of the weak, which is sporadic and mobile and seizes opportunities that allows them to cope with the constraints imposed upon them. Tactics are complex actions that involve calculation of advantage but arise from vulnerability. . ..*Despite being deprived of a locus of power, they navigate within a multiplicity of simultaneous spaces and states of being: children and adults, victims and perpetrators, civilians and soldiers* (emphasis added).[90]

With respect, the above quote from Honwana, on the analysis here, improperly reassigns new statuses to child soldiers that are *not* grounded on a legally or empirically supportable rationale. Honwana merges the notion of 'spaces' (i.e. which might be interpreted as *domains of activity*; in this case, for instance committing atrocities; engaging in combat etc.) with that of actual alleged 'states of being' i.e. being an 'adult', 'perpetrator' and 'soldier.' However, having committed an atrocity is not sufficient to assign culpability to a child as 'perpetrator' (for the reasons discussed), nor does engagement in hostilities make the child a

[89] Honwana (2006), p. 71.

[90] Honwana (2006), pp. 73–74.

'soldier' or 'combatant' as opposed to a civilian under international law (i.e. members of non-State armed groups involved in an internal conflict are not soldiers/combatants in any case and fighters (government or non-government) who, as a regular expected pattern, do not adhere to the customary rules of war – whether in an internal or international conflict-are not recognized as lawful belligerents though they are still entitled to the protections afforded by Common Article 3 of the Geneva Conventions); nor does engagement in hostilities transform the child to an adult state of being. Recruitment by armed rebel groups – whether forced or allegedly voluntary-does then not transform the child from 'civilian; to 'soldier' in anything but a colloquial sense (as opposed to the legal sense under international law).[91] From presumptions about the child soldier allegedly inhabiting 'states of being' as 'adult', 'perpetrator' and 'soldier'; it is but a short step to holding that the assignment of individual criminal liability to persons who were under the age of 18 at the time they committed the international crimes is purportedly justified. In actuality, however, so-called child soldier members of rebel groups that commit atrocity as a pattern and practice of the group are civilian children who, for reasons of lack of mens rea and/or duress, do not qualify as legally responsible for the atrocities committed and in that technical sense do not fully qualify as 'perpetrators.' (For ease of the present discussion, so-called child soldiers are here referred to as perpetrators in the limited sense that they did carry out acts of atrocity (where this occurs) that are prohibited under international law even though all of the elements of the crime i.e. *mens rea* are not present and certain absolute defenses are available in the circumstance i.e. duress. Also for ease of discussion, the term 'child soldier' is used in a non-legal colloquial sense to refer to civilian children who have/are engaged in hostilities as members of non-State or State armed groups or forces).

Those in the backlash movement in contradictory fashion: (1) advocate local healing ceremonies or quasi-judicial Truth and Reconciliation forums (as opposed to war crimes tribunals or courts) for holding accountable child soldiers who have committed atrocities though at the same time they (2) maintain that the child soldiers who committed atrocities are very often fully culpable perpetrators (having mens rea etc.):

> . . .should we consider these *child combatants* victims, helpless boys who were coerced into violent actions? Or should we consider them perpetrators, fully culpable and accountable for their actions? The extenuating circumstances and internal emotional states of children vary from case to case. *Here we are not concerned with a war crimes tribunal or a trial for crimes against humanity, and so such matters need not be adjudicated in individual cases* (emphasis added).[92]

Honwana uses the term 'child combatants' in the above quote in describing child fighters who have committed atrocities as part of rebel armed groups. Note,

[91] Grover (2008).

[92] Honwana (2006), p. 69.

however, with respect, that the term 'child combatants' (that is 'child soldier') is correct in such an instance only as a colloquialism to refer to children who engaged in the armed hostilities. Children who engage in armed hostilities as members of State or non-State armed groups or forces *that systematically commit atrocities* do *not* qualify as 'combatants' under international law. The term combatant is used in IHL to refer to *lawful belligerents* in an international conflict who adhere to the customary rules of war set out in international humanitarian law (i.e. the Geneva Conventions) such as distinguishing themselves from civilians, affording civilians and non-civilian detainees humane treatment etc. The term 'combatant' is not a status that exists under IHL in the context of internal conflicts in any case. It is noteworthy in this regard then that most children recruited to fight in armed hostilities in contemporary times and accused of committing conflict-related international crimes are/were involved in internal conflicts.

The term 'child' is not precisely defined in IHL.[93] Further, the concept of 'child combatant' or 'child soldier' as a separate category of combatant or soldier is not explicitly referred to or precisely defined under IHL. However, the fact that children not uncommonly do engage in armed hostilities and are often captured as part of the adversary armed group or force; as so-called child soldiers (despite the various international law restrictions on State recruitment and use of children in hostilities i.e. prohibition of under 15 s participating in internal conflicts under Additional Protocol II[94] etc.) is acknowledged under IHL insofar as these children are entitled to special protections under IHL as children (preferential treatment while interned etc.)

There is no age limit stipulated in IHL on the conferral of POW status (a status available only in the international conflict context).[95] Yet, treatment of the child captive ostensibly as a POW, it is here contended, does not necessarily imply that the child in fact has the legal status of (lawful) combatant i.e. the child may be a member of a State armed force engaged in committing systematic atrocities or may be participating in hostilities though under 15 as a conscripted recruit of the national force. Children, hence, in the latter situation, on the view here, are being treated simply as *de facto* (lawful) combatants to ensure privileged treatment:

> *Although the participation of children in hostilities is prohibited, it was nonetheless necessary to ensure that they are protected if captured.* There is for that matter no age limit for entitlement to prisoner-of-war status; age may simply- be a factor justifying privileged treatment (emphasis added).[96]

It would appear that Honwana and others in the backlash movement do, *in effect*, advocate strongly for 'child soldier' full accountability as alleged 'perpetrators' in at least some if not many instances where these children have allegedly committed

[93] Dutli (1990) report for the ICRC.

[94] Additional Protocol II to the 1949 Geneva Conventions (1977).

[95] Dutli (1990) report for the ICRC.

[96] Dutli (1990) report for the ICRC.

conflict-related atrocities *as members of armed groups or forces committing mass atrocities and/or genocide*. This is the case despite these backlash proponents' acknowledgement of the children also having been severely victimized by these murderous State or non-State armed forces or groups into which they were 'recruited.' The success of the backlash proponents in promoting the public perception of the ex child soldiers as 'perpetrators' is largely accomplished by their successful lobbying for the use of local healing ceremonies and/or Truth and Reconciliation forums. It is in the context of these non-judicial forums where, among others, child soldiers, ostensibly testifying voluntarily: (1) 'out' themselves in their local communities through their 'confessions' before, for instance, the Truth and Reconciliation Commission panel or panel of local elders and (2) are held accountable for the commission of alleged conflict-related atrocities by a community that typically is less than empathetic toward these children (the specific remedy is then decided upon by the Truth and Reconciliation Commission and/or local tribal elders for instance).

Those children who 'confess' in these non-judicial forums to having committed conflict-related atrocities ensure, in the process, that: (1) they are, figuratively speaking, painted with the stigmatizing scarlet letter 'S' signifying 'child soldier/perpetrator' and (2) thus not uncommonly hindered in any attempts to successfully re-integrate into normal community life in the post-conflict period. In the final analysis then these non-judicial accountability processes often importantly contribute to the demonization of these accused ex child soldiers. This they do by suggesting (i.e. through questioning in the Truth and Reconciliation hearing and in Commission reports, and through local ceremonial rituals etc.) that, often as not, these child soldiers are fully culpable as they allegedly had 'tactical agency' which would have allowed them to spare certain of the victims targeted for annihilation or some form of grievous bodily harm or some other outrage by the armed group or force to which the ex child soldier belonged. Backlash proponents, to the extent that they are successful in promoting the notion that: "The extenuating circumstances and [individual variation in] internal emotional states of children"[97] (child soldiers) at the time they committed the atrocities are of no concern since the accountability mechanism is a non-judicial forum further contribute to the ease of characterizing the accused ex child soldier as a fully culpable cold-blooded 'perpetrator'. The latter approach then (reliance on non-judicial mechanisms where due process may be lacking to some extent and where certain key issues may not be fully explored if explored at all) leads to a failure to adequately consider factors such as duress and lack of mens rea (due to young age, lack of knowledge of the wrongfulness of the conduct, intoxication, lack of intent etc.) and leads to a characterization of the child civilians in the public consciousness as perpetrators in the fullest legal sense.

[97] See Honwana (2006), p. 69.

2.1.7.1 Child Soldier Victims

The current author, in contrast to the backlash proponents, contends that: (1) from a developmental and an international criminal and humanitarian law perspective; ex child soldiers accused of alleged atrocities *cannot* be regarded as having entered into an 'adult' or 'perpetrator' 'state of being' or status in any sense or to any degree[98] as members of armed groups or forces committing mass atrocities and/or genocide (in fact it will be argued in Chap. 3 in some detail that these children are, in actuality, the victims of genocidal forcible transfer to another group) and that (2) these accused ex child soldiers cannot thus be properly held accountable for conflict-related international crimes as opposed to maintaining their lack of accountability as victimized children who do *not* meet the legal requirements for the designation of war criminal (more specifically that they are persons who do *not* meet the requisite *mens rea* and *actus rea* prima facie requirements for criminal culpability under international criminal law or under domestic criminal law that incorporates provisions for prosecuting war criminals).

The international criminal law characterization of child soldiers as victims (it is here contended implicitly reflected in Article 26 of the Rome Statute and in the declining of international criminal courts or tribunals to investigate or prosecute child-perpetrated international crimes) surely is also grounded, in part at least, on the assumption that *but for* the State's failure to protect these children, as is its obligation; the children would not have been in the position of committing conflict-related atrocities as members of armed groups or forces that systematically perpetrate conflict-related international crimes. Thus, even provisions which, by implication, allow for the lawful recruitment of children 15 and over (as in the Rome Statute) do *not* contemplate or hold legal under international law, it is here contended, the recruitment of children into what amounts to terror groups that as a pattern and practice commit international crimes (genocide, crimes against humanity and/or war crimes). Such armed groups or forces are not lawful belligerents in the first instance and, hence, their recruitment (i.e. of children) whether allegedly voluntary or not cannot be considered lawful. This, too, works to negate the criminal culpability of children who commit conflict-related atrocities and is consistent with the notion that from an international criminal law perspective such children are in fact the victims of forcible transfer as a form of genocide.

Further, recall that the Additional Protocols to the 1949 Geneva Conventions (which are generally regarded as having the status of customary law) confirm that children are a special protected class of persons deserving of special respect and protection during armed conflict. By implication then, under international humanitarian law, child civilians in particular are to be safeguarded from recruitment into unlawful armed groups committing atrocities whether these child recruits are under or over the age of 15:

[98] Contrast Honwana (2006), pp. 73–74.

(International Conflicts)
Additional Protocol I: Art 77. Protection of children

1. 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* [no age range for 'child' specified] *with the care and aid they require, whether because of their age or for any other reason*. . .(emphasis added).[99]

(Internal Conflicts)
Additional Protocol II: Part II. Humane Treatment
Art 4 Fundamental guarantees

3. *Children* [no age range specified for 'child'] *shall be provided with the care and aid they require*. . .(emphasis added).[100]

The approach in international humanitarian and criminal law then is that of placing the burden of responsibility for the children's conduct in committing conflict-related atrocity on: (1) the State and on the individual adults who, in the first instance, could have, but failed, to protect the children from recruitment into unlawful belligerent armed groups or forces perpetrating systematic grave IHL violations and (2) on those most responsible for perpetrating atrocity and terror and for their recruitment of children into hostilities for the purpose, in large part, of having the children commit atrocities in furthering the agenda of the armed group or force.

It is adults who create the potential for children at risk becoming the victims of 'recruitment' by armed groups committing mass atrocities and/or genocide. This by creating hopelessness and desperation in the population through extreme poverty, many years of civil war, etc. and by inciting and perpetrating violence such as through the systematic persecution of civilian populations. It is most often children living in highly marginalized circumstances such as children orphaned due to their parents contracting HIV/AIDS or as casualties of the war or some other cause, children disconnected from their parents for various other reasons, children of the street etc. who are unprotected and therefore most vulnerable to recruitment by whatever means as a child soldier:

> Homeless or street children are at particular risk [of child soldier recruitment], as they are most vulnerable to sweeps aimed at them, which prompt less public outcry. In Sudan, for instance, the government set up camps for street children, and then rounded up children to fill them in a purported attempt to 'clean up' Khartoum. *These camps, however, served as reservoirs for army conscription*. . .Other groups that are at frequent danger [of child soldier recruitment] are refugee and IDP [internally displaced populations]. In many instances, families on the run become disconnected. *Armed groups then target unaccompanied, and thus more vulnerable minors.*
>
> The international community can even become unintentionally complicit in the recruitment of children [for child soldiering]. . .For example, in the Sudanese civil war, unaccompanied minors living in UNHCR refugee camps were housed in separate areas from the rest

[99] Additional Protocol to the Geneva Conventions (Protocol I).
[100] Additional Protocol to the Geneva Conventions (Protocol II).

> of the refugee populations. *As the camps had no security*, the SPLA easily targeted the boys [for forced abduction and child soldiering](emphasis added)[101]

The 'child soldier' then, for many reasons, is properly considered to be a 'social construction' or phenomenon attributable to the failure of individual adults (and of the State) to meet their respective duty to protect this highly vulnerable group. This makes it difficult for many backlash proponents (those who advocate that accused child soldier perpetrators be held accountable for war crimes, crimes against humanity and/or genocide) to argue that these children be tried by the criminal courts (international or domestic) for the commission of conflict-related atrocities. The majority of backlash proponents, however, argue that they advocate ex child soldiers be held accountable via local traditional healing ceremonies or Truth and Reconciliation forums for the reason that they consider the latter to be a better means for achieving the re-integration of these children back into the community (as opposed to the result should the children be tried by the courts as war criminals). To date, however, it is still an open empirical question as to whether in any particular community a transitional justice approach will be effective in re-integrating these children back into the community:

> Research into community attitudes towards returnees [child soldiers] in several countries shows them to be complex and subject to change over time. . .The extent to which returning children contribute economically can also be a factor [in whether successful re-integration occurs]. . .. *Some studies also indicate negativity and hostility by communities to returnee children is influenced by their real or presumed role as perpetrators of human rights abuses and other forms of violence*. ***International principles state that children who commit crimes while associated with armed forces or groups should be treated primarily as victims***. *However, convincing receiving communities (which in some cases will have been victims of the alleged crimes) that this should be the case is not always possible*. [For instance] Community consultations carried out by the Coalition in northern Uganda . . .found high levels of mistrust of underage LRA returnees who were considered as negative influences on other children in the community and capable of violence (emphasis added).[102]

It is apparent from field research then that there is often stigma attached to and resentment toward ex child soldiers (many of whom have confirmed via anonymous testimonials before i.e. Truth and Reconciliation Commissions their having committed conflict-related atrocities). Re-integration into the community is thus often an extremely difficult process at best if it is possible at all in any particular situation.

[101] Singer (2005), p. 59.

[102] Coalition to Stop the Use of Child Soldiers (2009), pp. 9–10.

2.1.8 *On the Issue of Prosecuting 'Those Most Responsible': What then of Child Soldiers?*

It has here previously been pointed out that, according to some legal scholars, the international criminal courts and tribunals have: "not prosecuted children [for international crimes] because they [persons who were children at the time the offense was committed] are deemed *not* to be among those bearing the greatest responsibility for the worst crimes (emphasis added)."[103] Rather, it is adults who are considered to be: (1) the architects of genocidal policy and practice and responsible for orchestrating the commission of systematic war crimes and crimes against humanity and (2) responsible for child soldier recruitment and their use in hostilities in anticipation that these children will, at the behest of the armed group or force commanders, commit acts of atrocity. Note, however, that the UN Secretary General argued that the designation of those 'most responsible' for international crimes as stipulated in the Statute of the Special Court of Sierra Leone should include "not only the political and military leadership but also others responsible for particular grave or serious crimes."[104] That is, the UN Secretary General argued that those who actually carried out the atrocities should also be considered to be among 'those most responsible'. This then potentially would include also children as allegedly among those 'most responsible' for perpetrating atrocities in particular conflict situations (referring here to children aged 15–18 who were within the SCSL jurisdiction). The latter approach was, in terms of the SCSL prosecutorial practice, ultimately *not* adopted. Further, the reference to certain leaders being among those most responsible was left in the statute at Article 1:

> **Article 1**
> Competence of the Special Court
> 1. The Special Court shall, except as provided in subparagraph (2), have the power to prosecute persons *who bear the greatest responsibility* for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, *including those leaders* who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone (emphasis added).[105]

The focus then for the SCSL was always on the military and political leadership such that "it was always unlikely that any juvenile offenders would be tried before the Special Court."[106] The issue is what constitutes *responsibility* in the first instance when: (1) a child is no doubt the 'perpetrator' of the act (conflict-related atrocity) in a colloquial (non-legal) sense but (2) has *not* fulfilled all the mental and behavioral elements of the crime required to be held criminally culpable and duress

[103] Aptel (2010), p. v.
[104] Happold (2006), p. 81.
[105] Statute of the SCSL (2002, Article 1)
[106] Happold (2006), p. 81.

is furthermore a crucial element. It has here been argued that *child soldier members of armed groups or forces committing mass atrocities and/or genocide*, for the reasons explained; do *not* bear criminal responsibility for conflict-related international crimes. Criminal culpability, according to H.L.A. Hart's well accepted notion involves:

> *Both a cognitive and volitional element*: a person must both understand the nature of her [or his] actions, knowing the relevant circumstances and being aware of the possible consequences, and have a *genuine opportunity* to do otherwise than she[he] does-to exercise control over her[his] actions, by means of choice (emphasis added)[107]

Clearly, the backlash proponents seek to expand the criminal law conception of 'volition' as a component of the concept of 'criminal responsibility' in such a way that it includes the notion of 'tactical agency' established retrospectively based on subjective speculation. The result is then that under this expanded definition of 'volition'; child soldiers are required (in order to escape criminal responsibility for conflict-related atrocities) to demonstrate heroic efforts on a hunch that a theoretical opportunity has presented itself at a particular moment where they could potentially have a good chance of escaping their murderous compatriots in their armed unit and/or to defy orders to commit atrocity and still survive and escape grievous bodily injury. That standard, it is here argued, is unjust and unrealistic and not one that these same social science and legal scholars likely would apply to their own children were it the latter who were tragically caught up in a conflict situation as child soldier members of an armed group or force committing mass atrocities and/or genocide.

In order to fairly assess criminal responsibility for conflict-related atrocity and where it lies; we must consider, among other things, the realities of wartime and the brutality of those rebel forces and terror groups (and sometimes even government forces) which not infrequently recruit child soldiers and systematically engage them in perpetrating international crimes. Further, we must, for the sake of equity in the administration of justice; and out of respect for international law, and universal human rights, also consider skeptically the backlash proponents' endorsement of cultural relativism as purportedly legally and morally justifiable in the context of assigning accountability for international crimes. This in no small part since the age of criminal responsibility is so extremely variable on the domestic level.[108]

Interestingly, like those who articulate the more recent pleas for holding child soldiers who have allegedly committed international crimes accountable, the UN Secretary General drafted an article for the Statute of the Special Court of Sierra Leone that *precluded* imprisoning child soldiers (that is, children 15–18 under the jurisdiction of the SCSL). That provision was dropped with the result that children of at least 15 could have been imprisoned by the SCSL had in fact there been

[107] Lacey (1988), p. 63.

[108] McDiarmid (2006), pp. 92–93.

prosecutions of child soldiers by the prosecutor for that Court[109] of which there were ultimately none. At the same time, the final draft of the statute of the SCSL at Article 7 focused on the need to rehabilitate and re-integrate into the community youngsters who had committed atrocities. This latter provision was based on the presumption that ex child soldiers' re-integration into the community could best be accomplished without incarceration or prosecution before the Court.[110]

Under international judicial practice then there has been a recognition also that older child soldiers (those aged 15 and over) accused of committing international crimes also have a special status which requires that their cases be handled differently from those of similarly situated adults. What then is that special status based on? Some might say that it centers on the need to rehabilitate the child and re-integrate the child into society. However, surely rehabilitation is a valuable goal wherever this is possible in the case of adults as well though, admittedly, a child has a lifetime ahead in which potentially to be rehabilitated and make positive societal contributions. Perhaps the argument is that children are more amenable to rehabilitation given their psychological developmentally-related vulnerability. However, if that is the case, then there is an admission that children may also be more susceptible to manipulation and exploitation as child soldiers thus inadvertently undermining the presumption that these children have fulfilled the *mens rea* requirement and lack of duress stipulation that allows for individual culpability for the commission of conflict-related international crimes.

Those who argue for mechanisms of accountability for child soldier perpetrators of conflict-related atrocities (acts the children committed as members of armed groups or forces perpetrating systematic grave violations of IHL) maintain, as discussed, that: (1) child soldiers very often do have the requisite *mens rea* to be held culpable for conflict-related atrocities and that (2) these children should receive rehabilitation focused programming as opposed to incarceration. In this regard, recall that genocidal intent requires that one intended to destroy an identifiable group in whole or in part. Crimes against humanity require that the perpetrator was aware that his or her acts contributed to a widespread or systematic attack on civilians; while war crimes require knowledge that the atrocity is an intentional attack on civilians or POWs and/or is intended to cause disproportionate harm and/or unnecessary suffering as part of the wider military effort. Happold and others suggest that each category of international crime requires a certain level of knowledge and/or intent and that the same difficulties in setting out the proof applies in the case of the child charged with complex domestic crimes as with the child charged with complex international crimes:

> In most cases, the problem would seem to be one of proof rather than of principle [in holding child soldiers criminally liable for international crimes]. Indeed, one might go further and say that there is no principled difference between the issues arising from attempts to hold children responsible for complex domestic and complex international

[109] Happold (2006), p. 82.

[110] Statute of the SCSL (2002) Article 7.

> crimes. . ..*In each case the difficulties will be the same and, as a result, the argument cannot be used to distinguish children's legal responsibility for international crimes from their criminal responsibility in domestic law* (emphasis added).[111]

It is here argued, in contrast, that given the fact that children are powerless in a command unit of adults, the question of *mens rea* (intent to commit or contribute to the commission of an international crime and requisite knowledge and criminal capacity) and the role of continuing duress (directly or indirectly applied to the child) remains a stumbling bloc for those who wish to assign individual criminal liability to the child soldier. To the extent that particular 'complex domestic crimes', to use Happold's phraseology, also involve the child in a situation where the choice is 'kill or be killed'; culpability is also questionable (i.e. for example the use by Mexican drug gangs of children to commit multiple murders of civilians for the intimidation effect as a message to law enforcement that the drug cartel is allegedly in charge).

There is reflected in the international law a general consensus that children are powerless victims when pitted against ruthless commanders who commit atrocity as a means of control. Nevertheless, as mentioned, some scholars have argued for the theoretical presumption that the child soldier has 'tactical agency' at his or her disposal when dealing with commanders of armed units engaged in grave systematic IHL violations. The notion of 'tactical agency', as discussed, however, does not appear to be well-grounded in legal, moral or empirical terms insofar as its application to the situation of child members of armed groups or forces committing mass atrocities and/or genocide.

Furthermore, the proposition that, in many cases, child soldiers fulfill the *mens rea* requirement simply does not square with the desire of most backlash proponents to avoid criminal prosecution of these children who allegedly have committed conflict-related international crimes. That position belies the weakness in the arguments in favor of individual accountability for child soldiers in whatever form (criminal prosecution; or local healing ceremony or other truth and reconciliation mechanism) and speaks to a vision of the child as non-culpable victim.

A major weakness of the backlash argument is further the fact that the child soldier phenomenon (recruitment of children into armed groups or forces committing mass atrocities and/or genocide for use in the armed hostilities) is a symptom of the breakdown of society. It is a failure of the State to protect children from one of the worst forms of child labor and to ensure to a reasonable and meaningful level their survival and good development. To hold child soldiers responsible before a truth and reconciliation commission, or customary non-judicial body for conflict-related atrocity is essentially to divert attention away from the fact that the State allowed (did not prevent and/ or was complicit in) the systematic use of child civilians as weapons of war by an armed group or force intent on committing widespread atrocity. This is the case whether the child is under aged 15 or 15 or over.

[111] Happold (2006), p. 72.

In both instances the State has the positive duty under IHL to protect these children from threats to their survival and well-being such as arise from their participation in armed hostilities; especially as a member of an armed group committing conflict-related international crimes. Somehow, despite any protestations by State representatives to the contrary, the States where ex child soldier alleged perpetrators have been expected to participate in non-judicial accountability mechanisms apparently seek, in large part, to absolve the State of responsibility for the children's recruitment and use in armed hostilities (as is the case also in States that seek criminal prosecution of persons who committed conflict-related international crimes as child members of armed groups or forces that engaged in mass atrocities and/or genocide). This is accomplished through holding child soldiers individually accountable for the 'sins of the father' so-to-speak (here the 'father' being the State and its responsible agents holding relevant authority who had the duty to protect this vulnerable group during armed conflict but failed to do so).

There is no escaping the compelling fact that the State has a duty, in the first instance, to protect its child population from participation in hostilities as so-called 'child soldiers' with an armed group or force engaging in grave systematic violations of international humanitarian law. Tacit recognition of this fact has led to some paradoxical situations such as with the SCSL having jurisdiction over minors 15 and over but declining to exercise that jurisdiction.

Note that the alleged justification for implementing transitional justice mechanisms (those that do not involve criminal prosecution) in order to allow for individual accountability of ex child soldiers (i.e. those children accused of conflict-related atrocities) is often couched misleadingly in terms of protection rationales i.e. the presumption being advanced that such accountability is in 'the best interest of the child' (here the ex child soldier). However, as will be discussed in Chap. 5, truth and reconciliation commissions and other non-judicial accountability mechanisms often place ex child soldiers at considerable risk in a variety of ways.

Another twist on the alleged protection/'best interests of the child' rationale for holding child soldiers individually accountable (this time via criminal prosecution) ironically was offered by the UN Special Representative for Children and Armed Conflict at the time of the drafting of the statute of the SCSL:

> Unexpectedly, the United Nations Special Representative for Children and Armed Conflict at the time had commented positively on the possibility for the SCSL to [criminally] prosecute children aged 15–18. He believed that this would ensure that "a lacuna would not exist whereby children could be recruited at fifteen but could not be prosecuted for the crimes they committed between the age of 15 and 18 years [. . .] allowing such a lacuna [it was held] would set a dangerous precedent and encourage the recruitment and use of children in this age bracket."[112]

Of course, it is rather unrealistic at best to assume that warlords and militia commanders would be deterred from using child soldiers because the children

[112] Aptel (2010), p. 2.

would be subject to criminal prosecution for international crimes. Yet, such a 'best interests of the child' rationale for criminal prosecution of child soldiers is easier to market to the international community; especially when coming from a U.N. official whose mandate it is to advocate for the interests and rights of children affected by war. Ultimately of course the SCSL did retain jurisdiction over 15 to 18 year olds but did not prosecute minors.

2.1.9 On 'Blaming the Victim'

Child soldiers participating in hostilities as members of State or non-State armed groups or forces committing mass atrocities and/or genocide are thereby not accorded the protected status as children to which they are entitled under IHL. The armed groups or forces in question which have engaged these children in committing atrocities have no interest in having these children gain in civil or political rights or in advancing the children's basic human rights or general welfare. The children's deployment in hostilities as child soldiers by such armed groups or forces is thus entirely exploitive even where their recruitment is allegedly 'voluntary' and part of a self-proclaimed alleged liberation struggle. Child soldier members of armed groups or forces committing mass atrocities and/or genocide therefore are not in fact 'participants' in conflict but rather mere expendable tools of war at the disposal of adults.

The evidence further points to the fact that child soldier members of armed groups committing systematic grave IHL violations are commonly drugged to make them more amenable to committing atrocity and threatened with imminent death should they openly defy orders to commit atrocities. Further, for a variety of reasons escape is not feasible even if we are to accept that some children initially joined 'voluntarily' (whatever that may mean in a situation of utter chaos in which children are trying to survive as best they can and not to risk their families' lives when the 'recruiters' come for the children in the family):

> . . .the very processes of recruitment and indoctrination are deigned to bind the children to the group and if this is not successful prevent escape . . .Even if they want to leave, many have no home to return to or feel they will not be welcomed back because of the violent acts they have committed. The physical tags, such as cropped hair, tattoos, or even scarring and branding, also make escapees easier to identify and recapture. . .Some grow physically and psychologically addicted to the drugs their adult leaders supply . . .many of the children are orphans, meaning that their [military] unit becomes their new family[113]

These children operating as they are in a situation filled with terror; both on the battlefield in confronting the adversary and within their own armed unit, are likely operating on base pure survival instinct. Identifying with their captors and feeling

[113] Singer (2005), pp. 88–89.

as though they are authentic loyal group members, in many ways, may well be highly adaptive under the circumstances:

> After a period . . .the . . . dark processes [of recruitment and indoctrination] win out and the children's own self-concept becomes entwined with their captors.[114]

The order by rebel groups, for instance, to kill civilians is essentially a standing order. Hence, even if a child at some point commits a murder or other atrocity not specifically explicitly ordered, one cannot separate this act from the general fearsome conditions and continuing imminent threat of grave personal harm or death for disobedience under which the child is operating:

> Harsh discipline and the threat of death continue to underscore the training programs of almost all child soldier groups. In the LRA, for instance, recruits' physical fitness is assessed and then built up by having them run around the camp's perimeters while carrying stones on their shoulders. Those who spill the stones or collapse are killed.[115]

Children and youth are arguably more susceptible (compared to adult recruits) to threats, intimidation, physical and psychological brutalization and drugging given their general lack of physical and psychological power compared to the adults. Indeed, the ease of manipulation of children is one of the key factors that make children such a desirable target for recruitment into the armed group committing conflict-related atrocity. The fact that some children may, on occasion, elude the order to commit atrocity through subterfuge is not a legal or logical basis for a standard of behavior to be set out by the international community requiring resistance in this population when in fact they are under imminent threat of death from their own on a constant basis. That is, children discovered directly or indirectly trying to evade orders are commonly killed or alternatively, tortured and then killed by the armed groups in question to make out an example for the rest of the child soldiers in the group: "These actions [feigning stupidity to avoid being sent out on a mission etc.] were almost always indirect, taken behind commanders' backs; direct refusals to kill, were, they knew, potentially fatal."[116]

An analogy (in some respects only) to make the point that child soldiers cannot properly be held to be morally or legally obligated to resist their own victimization might be to the battered woman or man. Because some individuals escape extremely abusive domestic partners, we cannot conclude that those who do not escape or resist in some way have freely and willingly made being victimized a personal life style choice. Rather, in contemporary times, an increasing number of States have come to acknowledge their responsibility to intervene to protect these persons abused by partners even when the victims do not actively seek help for whatever reason. That is, the law recognizes as victims owed a State duty of care also the individuals who stay with their abusing domestic partner often even when

[114] Singer (2005), p. 89.
[115] Singer (2005), p. 79.
[116] Honwana (2006), p. 71.

the abusers pose a threat to the very life of the victim. The latter victims then are viewed by the authorities as unable to resist the abuser in practice rather than as fully autonomous persons able to adequately exercise their free will in the particular circumstance.

International law practice and certain legal regimes such as the Rome Statute (which purposefully excludes jurisdiction over persons who were under 18 at the time of their commission of the international crimes) tacitly affirm the victim status of the child soldier who commits atrocities as a member of an armed group or force engaged in systematic grave IHL violations. Children are owed a high duty of care precisely because of their relatively powerless political, economic and socio-cultural status. It is adults who, in exploiting children for use in one of the worst forms of child labor; namely participation in armed hostilities, damage children morally and psychologically and threaten their survival (especially where the children are members of armed groups or forces committing mass atrocity and/or genocide). Yet, backlash proponents present inconsistent arguments; on the one hand acknowledging children's powerlessness to resist the command to commit international crimes as child soldiers; on the other suggesting that the children are not infrequently legally and morally responsible for these crimes having declined to exercise 'tactical agency' to avoid committing conflict-related atrocity. An example of this inconsistency in the argument is found in the following passage from Honwana's influential book 'Child soldiers in Africa.'[117] The first paragraph leads the reader to view the child soldiers as powerless in the circumstance; unable to exercise control over actions that were demanded by the commanders who were engaged in systematic campaigns of terror against civilians and on whom the children now depended for their own survival. However, in the next paragraph, Honwana claims that, to a material degree, the child soldiers acted as free agents and *were* powerful in their circumstance (as members of an armed group or force committing mass atrocities and/or genocide). These contradictions are indicated below with notations by the current author in brackets:

> [Child soldier as powerless victims]: *The initiation of young men into violence is a carefully orchestrated process* of identity configuration aimed at cutting links with society and *transforming boys into merciless killers* (emphasis added).[118]
>
> [Child soldier as 'perpetrators' with alleged individual criminal liability who were powerful, exercising alleged agency over choices in soldiering that included the commission of grave international crimes]: Despite the fact that the majority of these boys had been forced to enter the military, *they were not empty vessels into whom violence was poured or from whom violent behavior was coerced*. We might say that, having started out as victims, many of them were converted into perpetrators of the most violent and atrocious acts.[119]

[117] Honwana (2006).

[118] Honwana (2006), p. 73.

[119] Honwana (2006), p. 73.

The word 'perpetrator' as used in the passage above does not simply refer to the objective fact that the child soldiers committed conflict-related atrocities; but rather is used by Honwana, it would seem, to designate children to whom individual criminal culpability supposedly attaches.

Backlash proponents acknowledge that it is itself a form of gross victimization of child soldiers to be: (1) conditioned to murder innocent civilians in the context of an armed conflict as a child member of an armed group systematically committing grave IHL violations and where one's own chances for survival are tenuous at best and (2) where horrifically; being led to kill one's own immediate family and clan members is commonly used as an initiation into child soldiering with the armed group of the type described. However, this acknowledgement is *not* enough apparently to give these academics pause in assigning to the child who has committed such acts of atrocity the status of perpetrator fully accountable for his or her acts:

> *Some boy soldiers were most victimized in the very act of murdering others; the more closely connected they were with their victims, the more intense and complete was their own victimization*. But their identification with those whom they mercilessly killed was not redemptive; rather, it wed them more irrevocably to the identity of soldier (emphasis added).[120]

Contrary to the implication in the quote above, it is here contended that it is the international community that must offer redemption to these child soldiers after-the-fact during the post-conflict period and not the children themselves operating in the midst of the conflict. This is the case since child soldiers cannot normally, without pain of death, extract themselves from the killing fields or end once and for all their personal contribution to the atrocities while the conflict rages on and they are still ensconced in an armed group perpetrating mass killings and like atrocities and/or genocide. Yet, redemption granted by the international and local community is considerably *less* likely should the backlash movement succeed in its objective to assign full culpability to those children who, though purportedly having had tactical agency to resist, committed atrocities as child soldiers. This is the case notwithstanding the backlash movement's endorsement of local healing rituals and Truth and Reconciliation forums as opposed to criminal prosecution of accused child war criminals as will be discussed in Chap. 5.

Consider the aforementioned line from Honwana's book on child soldiers in Africa[121]: "But their [child soldiers'] identification with those whom they mercilessly killed was not redemptive; rather, it wed them more irrevocably to the identity of soldier."[122] That line suggests that when child solders murdered victims to whom they were emotionally connected; this did *not* save the child from committing further atrocity (i.e. it was not 'redemptive'; in fact it solidified the child soldier identity and increased the chances the child soldiers would commit

[120] Honwana (2006), p. 73.
[121] Honwana (2006).
[122] Honwana (2006), p. 73.

further atrocities). This, it is here contended, is not unexpected when considered from a psychological perspective. That is, forcing the children, as a central aspect of the initiation rite, to kill certain persons to whom they are highly emotionally connected serves to: (1) reinforce the child soldiers' perception that the murderous armed group of which they are now members has absolute power over the child soldier participants; (2) communicates to the child soldiers that the armed group or force of which they are a part is unfathomly ruthless and consequently that the child soldiers' lives depend on strict adherence to their commander's demands and (3) creates cognitive and emotional dissonance between the children's recollections or sense of their former identity and values and their new reality (committing atrocities even against their own loved ones) which dissonance, under duress, is resolved in favor of shifting that identity in such a way as to maximize the chances for personal survival (complying with the demands of their commander).

The line following the aforementioned extract, respectfully, on the view here, erroneously creates the impression that the child soldier, as part of an armed group perpetrating systematic atrocities, was yet in a position to exercise 'tactical agency' and stop (at some point post-recruitment) his or her participation in the mass murder of civilians and other international crimes (for instance, once recognizing the horror he or she was committing as presumably would occur in killing a family member or someone else significant in the child's life).

The next immediate lines after the aforementioned extract include the following:

> As boys are transformed into child soldiers, they exercise agency of their own, a tactical agency or agency of the weak, which is sporadic and mobile and seizes opportunities . . .they are able to manoeuvre on the field of battle and seize opportunities at the moments they arise.[123]

Adding to the questionable image of the child soldier as cold blooded killer who purportedly declines to resist despite the *genuine* availability *and* the child's perception of the availability of 'tactical agency' (a degree of actual and perceived choice or freedom of action), Honwana turns to a fictional description (extracted from a novel) that is ostensibly presented to give the reader supposed insight into the child soldier's mental state:

> My name is Birahima. I could have been a boy like any other. . .A dirty boy; neither better nor worse than all the other dirty boys of the world. . .*With my Kalashnikov (machine gun), I killed lots of people. It is easy*. You press and its goes tra-la-la. I am not sure that I enjoyed it. I know that I suffered a lot because many of my fellow child soldiers have died.[124] (Extract from Ahmadou Kourouma 2002 *novel Allah n'est pas obligé*, giving the words of the fictional main character; a child soldier of about 10 or 12 years old and cited in Honwana's *Child Soldiers in Africa*).

It is here contended that for the child soldier member of an armed group or force committing systematic atrocities, the shock of having to kill (especially if someone

[123] Honwana (2006), p. 71.

[124] Honwana (2006), p. 71.

to whom the child is closely related in some way) is so dissonant with the child's normal conception of self as child and as harmless decent person that it must be attributed by the child to the new role of child soldier. The latter identity is separate and apart from what and who the child is authentically under normal circumstances and the acquisition of this new identity in the circumstance is linked to the basic human drive to survive.

The notion of child soldiers having 'tactical agency', it is here contended with respect, is an elitist academic conceptual construction as it is in fact divorced from the realities of child soldiering *as part of an armed group or force committing systematic grave IHL violations*. The notion of tactical agency' is, on the view here, erroneously being used to construct a fictional image of child soldier (that is child soldier members of armed groups or forces committing mass atrocities and/or genocide) as 'perpetrator' in its most fulsome sense i.e. someone who is criminally liable for the commission of atrocities and who purportedly acted with volition despite a restricted arena of free choice amidst the violent chaos in his or her immediate surround. That is, the notion of 'tactical agency' as a basis for accountability of the child soldier member *of an armed group or force perpetrating mass atrocities and/or genocide* is fatally flawed to the extent that it is surgically dissected from the fact that the child soldier offering any direct *or indirect* resistance would face a certain high probability of death or grievous injury at the hands of agents of the armed group or force of which he or she is a member.

Honwana herself concedes the implications of direct resistance by child soldier members *of an armed group or force perpetrating mass atrocities and/or genocide*: "...direct refusals to kill, were, they knew, potentially fatal" (emphasis added).[125] However, she seems to suggest, at the same time, that there are opportunities for resistance that can be taken by the child soldier in a more clandestine or indirect way through the exercise of significant tactical agency that these child soldier are *alleged* to possess even in the most dire of circumstances. It is respectfully suggested that Honwana, in this regard, demonstrates a failure to acknowledge that duress also results from the continuing threat of imminent grievous bodily harm and/or death such as is suffered by the child soldier members of an armed group or force perpetrating mass atrocities and/or genocide. That extreme duress greatly mitigates or negates any hypothetical tactical agency that purportedly exists for these child soldiers. The legally insupportable implication that is left by Honwana's depiction of these child soldier members of armed groups or forces committing mass atrocities and/or genocide is, however, that the children were obligated legally and morally to take these *alleged* tactical opportunities to, by indirect means, resist perpetrating atrocities. That erroneous implication is the logical derivative of Honwana's argument that child soldiers "do not constitute a homogenous group of helpless victims..."[126]

[125] Honwana (2006), p. 71.

[126] Honwana (2006), p. 5.

To reiterate; the point here is *not* to suggest that it is an impossibility in all cases for a child soldier member of an armed group or force perpetrating mass atrocities and/or genocide to, by some means, fortuitously resist committing grave international crimes. Rather, the contention here is that the continuing threat of death or grievous bodily harm for offering any resistance in any form to the demand to commit atrocities as a child member of an armed group or force perpetrating mass atrocities and/or genocide: (1) allows for duress as a viable defence to the charge of having perpetrated grave conflict-related international crimes; (2) renders non-viable a blanket assumption that such child soldiers have effective tactical agency to resist by indirect means and (3) renders as legally insupportable any notion of the child having been obligated to comply with IHL under said conditions of duress.

Honwana paints an almost idyllic scene of child soldiers at certain points in her discussion of child soldiers in Africa:

> Child soldiers managed to create a little world of their own within the political violence and terror in which they had to operate. They seized spaces for secret conversations about home and their loved ones. They found time for play, music and laughter. Equally important, *they managed to modify the military actions in which they were expected to engage*. They deceived their superiors with false identities, escape plans and feigned illness. They pretended to be stupid in order to avoid being deployed on dangerous missions. *These actions were almost always indirect, taken behind commanders' backs; direct refusals to kill were, they knew, potentially fatal* (emphasis added).[127]

The above description sounds almost idyllic insofar as the child soldier camaraderie and the "little world of their own" these youngsters were alleged to have constructed. While it is true that children and adults may show remarkable resilience in the worst of circumstances and show glimpses of positive emotions, and certainly crave companionship, it would appear that Honwana exaggerates the degree of autonomy that these children could realistically exercise given the always present threat of the most violent and horrific forms of retribution from commanders for *direct or indirect* displays resistance.

Honwana's description of the child soldier members of an armed group or force perpetrating mass atrocities and/or genocide exercising *alleged* tactical agency makes it seem as if making use of resistance tactics was: (1) a relatively benign exercise with a reasonable chance for success and (2) feasible to some degree in most circumstances during the armed conflict. The implication of such an analysis then is that we should question the moral fortitude of those child soldiers who failed to exercise their alleged tactical agency in an effort to avoid committing atrocity.

The notion of tactical agency (a power of the weak) is similar to Foucault's conception of some forms of power:

> What does it mean to exercise power? It does not mean picking up this take (sic) tape recorder and throwing it on the ground. I have the capacity to do so – materially, physically, sportively. But I would not be exercising power if I did that. However, if I take this tape recorder and throw it on the ground in order to make you mad, or so that you can't repeat

[127] Honwana (2006), p. 71.

> what I've said, or to put pressure on so that you'll behave in such and such a way, or to intimidate you – well, what I've done, by shaping your behaviour through certain means, *that* is power. . . . I'm not forcing you at all and I'm leaving you completely free – that's when I begin to exercise power. It's clear that power should not be defined as a constraining force of violence that represses individuals, forcing them to do something or preventing them from doing some other thing. But it takes place when there is a relation between two free subjects, and this relation is unbalanced, so that one can act upon the other, and the other is acted upon, or allows himself to be acted upon. ***Therefore, power is not always repressive***. It can take a certain number of forms. And it is possible to have relations of power that are open (emphasis added).[128]

It has here been argued that so-called "tactical agency *or agency of the weak*"(emphasis added),[129] which if present is, by definition, coexistent with extreme duress, must not, for the reasons outlined, be used to 'blame the child victim' (i.e. namely here to erroneously assign legal and moral responsibility to child soldiers who fail to comply with IHL (i.e. commit atrocities as members of armed groups or forces committing grave conflict-related international crimes). Even if Foucault's conception of power[130] (suggesting some room for maneuvering by the powerless) is applicable in some situations, it is certainly not readily applicable, if at all, to the child soldier situation where: (1) children have been recruited into armed groups committing mass atrocities and/or genocide and the commander's power *is* most certainly repressive and all encompassing and (2) the consequence of a child's direct or indirect defiance when discovered is sure and, most often, deadly.

2.1.10 A Note on Child Soldiers' Entitlement Under IHL and International Human Rights Law to Special Protections

To recognize the civilian status of so-called child soldiers recruited into unlawful armed non-State groups or into national State forces that, by perpetrating grave IHL violations, have lost their combatant legal status, emphasizes that the State has in such instances failed to provide these children the special protections as child civilians that may have saved them from the fate of child soldiering (and in particular soldiering with armed entities that perpetrate mass atrocity and/or genocide). The international law has always viewed the participation of children in armed conflict as undesirable as reflected, for instance, in the fact that the Additional Protocols to the 1949 Geneva Conventions (which arguably have attained the status of customary law) stipulate that if children aged 15–18 are to be used in hostilities by the State, the preference should be for using the older children first.

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[128] Foucault (1980), pp. 11–13.

[129] Honwana (2006) p. 71.

[130] Foucault (1980), pp. 11–13.

The latter Protocols set out the requirement that children caught up in armed conflict be treated with respect and due regard for their age; and the vulnerability that that age implies such that they are provided with the care and support they need. These various stipulations of the Additional Protocols to the 1949 Geneva Conventions thus imply that children be spared the extremely hazardous labor of soldiering even if 15 or older wherever feasible; while the OP-CRC-AC has specifically set out the requirement that the State do everything feasible to prevent direct participation of persons under 18 in hostilities.[131]

Thus, children have never been viewed under international humanitarian law as having an unqualified right or duty to participate in armed conflict.[132] It follows then that the burden of responsibility for such participation and for its adverse consequences for society and the children involved does *not* properly lie with the children victimized in this manner. Rather, the burden should properly rest upon those who did the recruitment and the State that failed to offer the children the protection they so desperately needed at each stage and were legally entitled to. Yet, that perspective is, it is here contended, being systematically and unjustifiably eroded by those in the backlash movement. The latter (on the view here) demand child soldiers be held accountable who have committed acts that constitute the *actus reus* of various grave international crimes even, in practice, in the absence of the child having had the required *mens rea* (i.e. due to duress in the form of commanders utilizing threats, intimidation, mental and physical torture etc. as a means to exact the child's compliance once 'recruited' by whatever means etc.).

2.1.11 Child Soldier Narratives

The theme that runs through attempts by many social scientists and some legal scholars to assign accountability to child soldiers for conflict-related atrocity is one that refers to the child's purported agency as child soldier member of an armed group committing mass atrocity and/or genocide. (It will, in contrast, be argued here in a later chapter that children 'recruited 'into an armed group – whether State or non-State – committing mass atrocities or genocide (perpetrated against moderates and other groups targeted for destruction in whole or in part based on certain of their defining characteristics) are in fact the victims of genocide (namely the 'forcible transfer of the child to another group'). Indeed, some scholars in the backlash have suggested that the failure to assign accountability to child soldiers for atrocity is a reflection of "arrested decolonization"[133] (evident allegedly also in the literature describing the child soldier experience):

[131] OP-CRC-AC (2002), Article 1.

[132] Grover (2008).

[133] Coundouriotis (2010), pp. 191–192.

> Child soldier narratives are symptomatic of an arrested historicization [a reflection of arrested decolonization] in part because they become trapped in a rhetorical effort to restore the childhood innocence of their narrator and, as a result, produce a metaphor of African childhood that is politically limiting as a characterization of the historical agency of the continent's peoples.[134]

In essence, the claim being made by these academics is that child soldiers are being *wrongly* characterized from a Western colonial perspective (so-called "first-world" perspective) as lacking in agency; as children who are to be considered only as passive victims:

> *Thus the autobiographical narratives of child soldiers are framed as victim narratives* where responsibility for the committing of atrocity by the child soldier is largely disclaimed as either abuse the child has suffered, or the result of drug addiction [imposed by rebel commanders] from which the child must be rehabilitated. The recovery narrative allows for the problem of responsibility in the war to be shifted onto the task of recovery itself.[135]

It has been suggested by some scholars that NGOs and organizations such as UNICEF running demobilization and reintegration camps for ex child soldiers actually misguidedly give these children the language of 'victimhood' and help them frame themselves as victims in the context of psychotherapy/counseling settings. These critics hold that the children are allegedly both victim and 'perpetrator'; the latter in the fullest sense (meaning allegedly meeting both the criteria for *mens rea* and *actus reus* in committing conflict-related atrocity).[136]

> Framed as a human rights literature, the child soldier narrative is too often sentimentalized and co-opted by ideas of the self that serve its accommodation with a largely *firstworld*, distant reader (emphasis added).[137]

One immediately wonders why such academics as Coundouriotis would by implication or explicitly: (1) argue on the one hand that child soldiers when faced with the threat of recruitment into an armed group committing mass atrocity and/or genocide are generally able to exercise agency (i.e. to resist recruitment or resist the committing of atrocity should they be forcibly recruited), while (2) on the other hand suggesting that the ex child soldiers easily succumb to the reframing of their identity by Western therapists after a bit of initial resistance if any (allegedly a reframing from the actual identity of 'perpetrator' to the inauthentic identity of 'victim' coerced into committing atrocity). Afterall, in the first circumstance mentioned; the child's very physical survival most frequently depends on compliance with the armed group commander's demands while no such duress is present in the therapy setting where the child is free (i.e. there are no threats or intimidation employed to achieve compliance) to exercise his or her agency to construct his or her own view of self uncontaminated by the therapist's input. In any case, ex child

[134] Coundouriotis (2010), p. 192.
[135] Coundouriotis (2010), p. 192.
[136] Coundouriotis (2010), p. 193.
[137] Coundouriotis (2010), p. 203.

soldiers likely are well aware in most instances that their community is, as the field research suggests, not uncommonly reluctant to accept them as victims.

This author has argued elsewhere that "there can be no more profound way to 'infantilise the South' than to remove the State obligation to protect the rights of children in the developing world."[138] Yet this is precisely what is accomplished when rather than the State; it is child soldiers (specifically those recruited into armed groups committing systematic grave IHL violations) who are made to shoulder the burden of responsibility for certain child-perpetrated atrocities (that is, the children are held accountable through judicial processes or Truth and Reconciliation and similar non-judicial forums despite the children's lack of *mens rea* as child soldiers relating to: (1) the operation of coercive circumstances generally given the context of the armed conflict and (2) the coercive circumstances within the armed group or force for children recruited where the intent of the armed group or force is specifically that these children participate in perpetrating atrocity and/or genocide.

To characterize these child soldiers 'recruited' into perpetrator armed groups or forces as victims is not Western sentimentalism about childhood (i.e. modeled on Western notions of the carefree; well cared for and privileged child as some have suggested),[139,140] but instead consistent with the facts. Those facts include the children's recruitment' into an armed group or force that: (1) terrorizes and brutalizes the child recruits and the civilian population at large; (2) targets children in particular for recruitment or various forms of atrocity (i.e. killing and mutilations); and (3) forces the child soldier recruits to commit horrific acts of atrocity against their own and other communities under continuing imminent threat of grievous personal bodily harm or even death (or similar threats against the child soldier's family members). *All of this can rightly be considered a form of 'child – specific persecution'*[141] *amounting to a crime against humanity as well as a war crime*. Yet, ex child soldiers are often denied asylum based on their having committed atrocities as members of armed groups that systematically committed grave violations of IHL[142] without due regard to the duress defense and their entitlement under IHL to special assistance as children and especially children from a highly vulnerable marginalized group (ex child soldiers).[143]

Children who have given interviews to Western researchers have, in effect, unwittingly and without their consent often had their stories interpreted so as to assign the child subjects perpetrator status implying full agency and the requisite evil mind (*mens rea*) as an element of an international crime. This despite the fact

[138] Grover (2010) cited in Arts (2010), p. 13.
[139] Bentley (2005).
[140] See Grover (2007).
[141] Morris (2008), p. 295.
[142] Grover (2008).
[143] Morris (2008).

that those assigning child soldiers this status are in no position to superciliously discount the element of duress inherent in the situation of child soldier members of armed groups or forces committing mass atrocities and/or genocide. This author is in accord with the view that in speaking about or for victims or ostensible victims; there is "a responsibility to the story" [its intended meaning] and also a duty to consider the political implications of the interpretation of that story and the representation promulgated of the story-teller (such as the re-representation of the victim as instead 'perpetrator' or 'victim-perpetrator' that is crafted by the researcher/interpreter usually without the knowledge or consent of the original story-teller).[144] Scholars who recast ex child soldiers as perpetrators or victim-perpetrators hold that, at a minimum, the ex child soldier who has committed atrocity should in the transitional or post-conflict phase be held accountable through Truth and Reconciliation mechanisms or the like both in the interests of justice and because, they claim, this approach is allegedly therapeutic for the child and his or her community alike. We will examine that claim in a later chapter.

Various critical questions arise in regards to the representation by academics of marginalized vulnerable groups such as child soldiers and children who have been disarmed and demobilized (ex child soldiers):

> Is the discursive practice of speaking for others ever a legitimate practice, and if so, what is the criterion for its validity? In particular, is it ever valid to speak for others who are unlike me, or who are less privileged than me?[145]
>
> What are the ethico-political implications of our representations for the Third World, and especially for the subaltern groups that preoccupy a good part of our work? *To what extent do our depictions and actions marginalise or silence these groups and mask our own complicities? What social and institutional power relationships do these representations, even those aimed at 'empowerment', set up or neglect?*[146]

The current author holds that it is valid to speak on behalf of victims of human rights abuses where: (1) that speech is human rights advocacy intended to improve the legal protections and/or practical situation of the direct or indirect victims at present or in future and these victims cannot readily speak for themselves (as is the case often with children who have been child soldiers who have committed conflict – related atrocities and are marginalized in their community, frequently also orphaned etc.); and (2) where steps have been taken to protect any identified individual victim who may require protection as a result of these human rights advocacy efforts. (For instance, there is a risk that NGO interventions targeting ex child soldiers exclusively may, at times, trigger hostilities and jealousies among other members of the community who sometimes feel that the ex child soldier is unworthy of aid or a competitor for limited humanitarian assistance needed by the community as a whole; including children who for whatever reason were not

[144] Compare Madlingozi (2010), p. 210.

[145] Alcoff (1991) Cited in Madlingozi (2010), p. 210.

[146] Kapoor (2004) Cited in Madlingozi (2010), p. 210.

recruited into the armed force/group).[147] It is here contended then that it is implicit in the research situation involving child soldier participants who tell their story (about committing conflict-related atrocity as part of an armed group of adults perpetrating mass atrocity and/or genocide) that those research participants expect that their human rights situation will improve or at least not deteriorate as a result of their taking part in the research. It is here argued, however, that researchers who portray these child soldiers as 'perpetrators' as understood under international criminal law (i.e. as persons allegedly possessing the requisite *mens rea* not negated by duress or diminished capacity to be culpable of war crimes or crimes against humanity) or depict them, at a minimum, as culpable 'victim-perpetrators', in fact, potentially do great damage to these children's human rights situation. That is, such analyses, on the view here, are likely to: (1) stimulate further marginalization of the children in their community and in the perceptions of the international community at large; (2) unjustifiably encourage criminal prosecutions at least domestically; or directly or indirectly force these children into Truth and Reconciliation processes where they must publicly 'own' the assigned 'perpetrator or 'victim-perpetrator' identity.[148] It is held here, however, that these children *are* the victims of armed adults exploiting the highly coercive circumstances that these very adults have created (mass atrocities in the context of internal armed conflict, intimidation of civilians including demands that families turn over their children to be child soldiers in the perpetrators' group with refusal resulting in death or grave bodily harm, unsuccessful attempts of children to escape recruitment met with death or serious bodily harm etc.). Recall in this regard that the Rome Statute considers that duress occurs also where persons are manipulated into taking certain actions that they would not normally take when perpetrators take advantage of the victim's highly coercive circumstances such as the aforementioned.[149]

It is here suggested then that those Western and non-Western scholarly and even NGO representations of child soldiers who have committed conflict-related atrocity as 'non-victims' or but 'partial victims' who still carry the burden of culpability for their acts in fact:(1) "*marginalise or silence these groups*" [child soldier and ex child soldier groups erroneously portrayed as perpetrators in the fullest sense or as criminally culpable victim-perpetrators such that the children's telling of duress is acknowledged in a cursory fashion but then, in the final analysis, largely or completely discounted as a negation of *mens rea*] and (2) serve to "*mask our own complicities*" to borrow Kapoor's phraseology.[150] (i.e. the failure of the domestic State and the international community to have enforcement mechanisms to effectively prevent the recruitment and direct or indirect use of children in armed hostilities and especially in the case of their recruitment into unlawful armed groups/forces (State or non-State) committing mass atrocity and/or genocide).

[147] UNESCO (2006), p. 5.

[148] Parmar et al. (2010).

[149] Rome Statute (2002), Article 31(d).

[150] Compare Kapoor (2004) Cited in Madlingozi (2010), p. 210.

Such representations of the child soldier as 'perpetrator' or 'victim-perpetrator' can and have impacted on legal analysis of various child soldier cases (i.e. asylum cases, criminal cases such as that of the child soldier Omar Khadr detained at Guantanamo Bay to be discussed in a later chapter etc.).

The current author has long taken the position that the research data provided by research participants belongs to the latter and not to the institution or the researcher.[151] This implies that the research participants should be able to withdraw their data if justifiably or unjustifiably unhappy with the way in which that data is being used to portray them or the population to which they belong. Nowhere is this principle more important than in regards to research with vulnerable populations such as ex child soldiers. Yet, these children are most often not in a position to be aware of or object to their increasingly more frequent *erroneous* portrayal (on the analysis here) in social science and other scholarly works, including some academic legal works, as *criminally culpable* 'perpetrators' of atrocity (or 'victim-perpetrators').Victims of human rights abuses not uncommonly feel, justifiably so, that *their* stories have been misappropriated and distorted and that they have suffered additional human rights abuses and insult to their human dignity as a result.[152] That risk is certainly present, and often materialized, it is here suggested, when ex child soldiers' stories are re-represented in the social science, literary and legal academic literature in such a way as to downplay the extreme coercive circumstances and breakdown in State protections that set the stage for child soldier participation in armed groups committing mass atrocities and/or genocide. The reality is that:

> Former child soldiers are among those most supremely victimized by terrorism. Throughout their tenure as the forced foot-soldiers of terror, their innate rights as children were threatened or unceremoniously stripped from them: their lives, their names, their nationalities, and their parental care, as well as their right to be heard and to enjoy freedom of expression, conscience and privacy.[153]

Ironically and tragically, child soldier members of armed groups or forces perpetrating mass atrocities and/or genocide are increasingly and conveniently (from the State point of view) erroneously portrayed in scholarly works; and in NGO and Truth and Reconciliation Commission reports as ultimately the originators of their own purported culpability under international criminal law for the commission of atrocity. To add insult to injury; this misrepresentation is then inappropriately and misleadingly touted as a recognition of the child's capacity for agency as an autonomous person in his or her own right. The latter is a children's rights perspective that has been *misappropriated* in this context. Considering the realities of child soldiering *as a member of an armed group committing mass atrocity and/or genocide*, it is clear, on the analysis here, that the child soldiers in

[151] Grover (2003).

[152] Pittaway et al. (2010).

[153] Morris (2008), p. 298.

such a circumstance cannot be presumed to have effective tactical agency to resist committing international conflict related crimes and thus to comply with IHL.

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Chapter 3
Recruitment and Use of 'Child Soldiers' in Hostilities by Armed Groups/Forces Committing Mass Atrocity and/or Genocide as Itself a Form of Genocide

He who possesses the youth, possesses the future. (Nazi slogan)[1]

3.1 Introduction to the Convention on the Punishment and Prevention of the Crime of Genocide

The Convention on the Punishment and Prevention of the Crime of Genocide (hereafter the 'Genocide Convention')[2] stipulates at Article 2 (e) that the forcible transfer of children of one group to another with intent to destroy, in whole or in part, a national, ethnical, racial or religious group is a form of genocide:

> Convention on the Punishment and Prevention of the Crime of Genocide
> Article 2: In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
> (a) Killing members of the group;
> (b) Causing serious bodily or mental harm to members of the group;
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) Imposing measures intended to prevent births within the group;
> (e) **Forcibly transferring children of the group to another group** (emphasis added).

We will in this chapter: (1) examine each term in Article 2(e) of the Genocide Convention (duplicated verbatim in the statutes of the ICTY, ICTR and in the Rome Statute) and its interpretation and (2) how the facts of child soldier recruitment and use in hostilities by armed groups or forces committing mass atrocities and/or various forms of genocide meet the criteria set out in that provision. Note that:

[1] Cited at Nicholas (2005), p. 97.

[2] Genocide Convention (1951), Article 2(e).

S.C. Grover, *Child Soldier Victims of Genocidal Forcible Transfer*,
DOI 10.1007/978-3-642-23614-3_3,

> While no international or mixed tribunal has litigated this [child-specific] crime [that is, genocide by means of the forcible transfer of children of the group to another group], an indirect reference can be found in the judgment of the Nuremberg Tribunal, although it did not have competence over the crime of genocide. Heinrich Himmler is cited as having declared in October 1943:*What the nations can offer in the way of good blood of our type , we will take. If necessary, by kidnapping their children and raising them here with us…* (emphasis added).[3]

The fact that genocide by means of the forcible transfer of children of the group to another group has not to date been litigated in an international criminal forum, however, must not be allowed to erroneously signal that this child-specific crime is not in fact occurring in contemporary times with some regularity as opposed to simply not being addressed as such by the international community. Compare this *neglect to prosecute* the crime of the genocidal transfer of children of the group to another group with the initial reluctance to prosecute the crime of mass war time rape as sometimes a genocidal act (mass rape directed to the destruction in whole or in part of a particular ethnic, racial, national or religious group). The International Military Tribunal of Nuremburg and the International Military Tribunal of the Far East both did not prosecute for mass rape as genocide given, in part, various constraints in their respective Charters despite the fact arguably that such *genocidal* mass rapes occurred. In the 1998 case of *Akayesu,* however, for the first time, there was an acknowledgement by an international court that mass rape can be a vehicle for genocide where the intent is the destruction in part or in whole of one of a protected group:

> With regard, particularly, to the acts described in paragraphs 12(A) and 12(B) of the Indictment, that is, rape and sexual violence, the Chamber wishes to underscore the fact that in its opinion, *they constitute genocide* in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such. Indeed, rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are even, according to the Chamber, one of the worst ways of inflicting harm on the victim as he or she suffers both bodily and mental harm… Sexual violence was a step in the process of destruction of the Tutsi group - destruction of the spirit, of the will to live, and of life itself.[4]

We will examine in what is to come how recruitment and use of children in hostilities *by armed groups or forces committing mass atrocities and /or genocide* likewise constitutes genocide (i.e. how recruitment and use of child soldiers in hostilities in these instances also meet the specific intent element of genocide) and therefore should be prosecuted not only as war crimes but also as genocidal transfer of children of a 'protected group' (as per the Genocide Convention[5]) to another.

The contention here is then that in fact children 'recruited' to serve as child soldiers *in armed groups or forces committing mass atrocities and/or genocide* are the victims of precisely the crime of genocidal forcible transfer to another group as

[3] The Trial of German Major War Criminals Judgment, Cited in Aptel (2010), p. 13.

[4] Prosecutor v Akayesu (Appeal Judgment, paras 731–732).

[5] Genocide Convention (1951).

will be set out in what follows. Hence, the failure to list, in the Rome Statute for instance, the recruitment and use of child soldiers by *armed groups or forces committing mass atrocities and/or genocide* as a grave breach of customary international law (as opposed to a 'serious violation' of the rules and customs of war to which an absolute obligation to prosecute does not attach to the State) results in the child soldier victims of genocidal transfer not being able to fully access justice. Note that mass rape on the other hand has been recognized in the Rome Statute as being a grave breach of the Geneva Conventions where, for instance, certain specific genocidal intent is present while this is not the case in regards to recruitment and use of child soldiers in hostilities, even those under 15, by armed groups or forces committing a variety of conflict-related atrocities against the civilian population. This is the case though, just as with the Nazi Lebensborn initiative, children 'recruited' into armed groups or forces committing systematic grave IHL violations and used in the hostilities are expected to become the lifeblood of the genocidal group that perpetrated the transfer of the children. At the same time, the group of origin of the children is destroyed in part or in whole as a consequence of losing these children. In both cases then the transferred children are viewed, in some sense, as 'reinforcements' for the genocidal group.

Let us begin the analysis here with a brief overview of the central proposition advanced in this chapter; namely that child soldier 'recruitment' and use in hostilities by an armed group or force committing systematic grave IHL violations constitutes genocidal forcible transfer of children to another group. The argument is made here that: (1) a proper interpretation of the Genocide Convention, and in particular Article 2(e), provides legal support for the notion that the recruitment (whether forced, conscripted or allegedly voluntary) of child soldiers (persons under age 18) for the express purpose of their use (direct or indirect) in hostilities *by an armed force (whether State or non-State) committing mass atrocities and/or attempting or committing any form of genocide against a targeted population* is a form of genocide in itself (specifically by the means set out in Article 2(e) of the Genocide Convention) and thus (2) 'recruitment' of child soldiers in such a case (i.e. of persons under age 18): (i) violates a non-derogable *jus cogens* rule of international humanitarian and criminal law regarding the protection of child civilians in times of armed conflict and (ii) establishes that the State in such an instance has failed to meet its obligation to take *all necessary and feasible* means to prevent such a genocidal forcible transfer of children.

It is further contended that the child soldier victims of this genocidal forcible transfer to another group (children who are under the custody and control of those armed groups or forces committing mass atrocities and/ or various forms of genocide) are properly considered to be under duress without having to adduce any further evidence to this effect. Thus, once it is established that the children are in fact child soldier members of an armed group or force committing systematic mass atrocity and/or various forms of genocide, it can be concluded as a legal fact that: (1) they are under the absolute custody and control of the murderous armed State or non-State group or force and (2) under extreme duress as a consequence. There is an abundance of empirical evidence to substantiate this latter proposition

including: (1) evidence of the brutalization of these children by their own commanders and armed adult compatriots as standard practice in such armed groups or forces and (2) evidence of the fact that there is no degree of tolerance by the commanders of these armed groups or forces for any level of resistance from the children. Any resistance from the children to their participating in the hostilities and committing atrocities is met with grievous bodily harm or death to the child soldiers in question. The child soldiers can thus be considered to be captive to the armed group regardless the mode of initial recruitment.

Note that it is not a necessary element under Article 6(e) of the Rome Statute[6] (duplicating Article 2(e) of the Genocide Convention) regarding the genocidal crime of the forcible transfer of children from one group to another that the children ultimately be killed (though of course many child soldier members of these groups are killed during their brutal training to set an example and as a result of the physical hardship and torture they endure as part of their initiation and training):

> Contrary to popular belief, the crime of genocide does not imply the actual extermination of the group in its entirety, but is understood as such once any one of the acts mentioned in Article 2(2)(a) through 2(2)(e) is committed with the specific intent to destroy "in whole or in part" a national, ethnical, racial or religious group.[7]

It is here contended that genocidal forcible transfer of children of the group to another group (an armed group committing mass atrocities and/or genocide) in fact causes the genocidal destruction of two groups; namely: (1) the child population of the community/region/state involved as a separable distinct age-based group (the impact at each level; local community/region/state being a function of how massive was the transfer of children); and (2) the children's larger group of origin (the distinct community characterized along i.e. ethnic, religious, racial and/or national grounds from which the children were transferred which group of origin is comprised of persons of varied ages). Some scholars of genocide might object holding that the genocidal transfer of children of the group to another group cannot involve also the destruction of the child population *per se* as the intended separable targeted group "*as such*" since the Genocide Convention specifies that the intent must be to destroy, in whole or in part, a national, ethnical, racial or religious group. However, the current author concurs with the ICTR in *Akayesu* that: (1) the drafters of the Genocide Convention did *not* intend to restrict the protected groups to the four enumerated relatively stable groups mentioned in the Convention and that (2) other groups that one is born into (on the analysis here, including an age-based group; namely children; a group marked by certain set biological developmental characteristics such as bone growth falling within certain parameters, particular neurological development characteristics that belong to children; persons being below age 18 etc.) are also protected from genocidal targeting (the issue of whether

[6] Rome Statute (2002), Article 6(e).

[7] Prosecutor v Akayesu (1998), para 497.

any other groups not here yet mentioned are also protected under the Genocide Convention is addressed in a later section):

> membership in such groups [groups protected under Article 2 of the Genocide Convention] would seem to be normally not challengeable by its members, who belong to it automatically, by birth, in a continuous and often irremediable manner[8]
>
> Moreover, the Chamber considered whether the groups protected by the Genocide Convention, echoed in Article 2 of the Statute, should be limited to only the four groups expressly mentioned and whether they should not also include *any group which is stable and permanent like the said four groups*. In other words, the question that arises is whether it would be impossible to punish the physical destruction of a group as such under the Genocide Convention, if the said group, although stable and membership is by birth, does not meet the definition of any one of the four groups expressly protected by the Genocide Convention. *In the opinion of the Chamber, it is particularly important to respect the intention of the drafters of the Genocide Convention, which according to the travaux préparatoires, was patently to ensure the protection of* ***any*** *stable and permanent group* (emphasis added).[9]

Indeed, it is here contended that children constitute a separable identifiable group *per se* protected under the Genocide Convention as such and comprise a group easier to distinguish from all others (non-children) than is the case, for instance, with respect to some ethnic groups targeted for genocide (such as, for instance, the Hutu and Tutsi of Rwanda who, in fact, were not considered separate and identifiable 'ethnic groups' until Belgian colonialists imposed such a distinction on the population) as well as in regards to ambiguous so-called racial groups:

> Prior to and during colonial rule. . .Rwanda then, admittedly, had some eighteen clans defined primarily along lines of kinship. ***The terms Hutu and Tutsi were already in use but referred to individuals rather than to groups. In those days, the distinction between the Hutu and Tutsi was based on lineage rather than ethnicity***. Indeed, the demarcation line was blurred: one could move from one status to another, as one became rich or poor, or even through marriage (emphasis added).[10]

The children are thus targeted for genocidal forcible transfer from the child population in the community to another group (the armed group committing mass atrocities and/or genocide) on two accounts: (1) as members of the child population; the latter being the *group* targeted as such (category one group) and (2) as members of a particular distinct ethnic, religious, racial or national community for instance (category two group); the latter two categories of group(s) being separately targeted as such but in parallel. It must always be kept in mind, however, that in regards to the latter basis of genocidal targeting; the children are involuntarily defined by the adults in a society according to national, ethnic, religious and racial dimensions (including according, at times, to genocidal perpetrator perceptions of such differential group characteristics that, objectively speaking, may or may not exist from an anthropological, historical, scientific and/ or legal perspective).

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[8] Prosecutor v Akayesu (1998), para 511.

[9] Prosecutor v Akayesu (1998), para 516.

[10] Prosecutor v Akayesu (1998), paras 80–81.

The children then are being targeted for forcible transfer to the armed group or force perpetrating grave IHL violations in the first instance *not* because of who they are as individuals but largely simply because they are members of the child group or population. The genocidal transfer of children from their communities into the armed group or force attempting to reshape the society through mass atrocity and / or genocide serves to destroy in whole or in part: (1) *the general child population* of the area by virtue of their living under continuing threat of themselves also being torn from their families and communities, and as a consequence of the tremendous trauma of losing child siblings from the family as well as childhood friends from the community and (2) *the larger group of origin comprised of mixed ages* (and defined along various dimensions such as ethnic dimensions) who have lost reproductive and labor capacity as well as the talents that the children transferred could have brought to the distinctive ethnic, religious, national and/or racial group to vitalize and sustain its growth and development.

It is the case that 'children' as a group are easier to manipulate and control as fighters; less likely to be able to offer any resistance and viewed as expendable and, in many countries, easy to replace given the abundance of young people (i.e. in many developing countries) such that their destruction during combat is not considered problematic. However, the latter facts should not mask the fact that a (1) genocidal transfer of children has occurred where such is the case (i.e. where children are recruited into an armed group or force committing systematic grave IHL violations) and that (2) the transferred children are subsequently significantly alienated from their groups of origin (their ethnic, religious, racial and/or national community) including also from the general child population. That is: (1) neither the fighting between two or more factions in an internal or international armed conflict situation nor alleged military necessity can account for or justify *genocidal targeting* of children and (2) neither should or could such factors legitimately be allowed to mask the existence of any form of genocide as set out in Article 2 of the Genocide Convention. Genocidal forcible transfer of children into the armed group or force committing mass atrocities/genocide includes ensuring the child soldiers commit atrocities against their own community as well as against others. The intent of the child soldiers' armed commanders in so doing is that these children become enduringly loyal to and *a lifetime member of the armed group or force committing the systematic grave IHL violations* while being permanently alienated from: (1) their group of origin/ community and (2) from the general child population outside the armed group. This latter aspect sets these armed groups or forces apart from armed groups or forces that do generally abide by IHL even those who would potentially use older child soldiers in emergency, for instance, in defense of the country (though this is not at all here to condone the use of child soldiers in any circumstance). A similar point was made in *Akayesu* by the ICTR in regards to the fact of conflict and its correlates not being allowed to hide the presence of genocide:

> ... Note is also taken of the testimony of witness KK which is in the same vein. This witness told the Chamber that while she and the children were taken away, an RAF soldier allegedly told persons who were persecuting her that "*instead of going* to confront the Inkotanyi [RPF] at the war front, you are killing children, although children know nothing;

> they have never done politics". The Chamber's opinion is that the genocide was organized and planned not only by members of the RAF [Rwandan Armed Forces] , but also by the political forces who were behind the "Hutu-power", that it was executed essentially by civilians including the armed militia and even ordinary citizens, and above all, that the majority of the Tutsi victims were non-combatants, including thousands of women and children, even foetuses. *The fact that the genocide took place while the RAF was in conflict with the RPF, can in no way be considered as an extenuating circumstance for it [i.e. as a denial or excuse or justification of genocide having occurred in Rwanda in 1994*](emphasis added).[11]

That in the Rwandan genocide of 1994 'children' *as a group as such* (both Hutu and Tutsi children), were targeted in genocidal fashion is evidenced by the fact that, for instance, in raids on villages: "[Hutu] Children [of the village] were used to pick out Tutsis and were expected to join in the killings"[12] causing these Hutu and Tutsi children unfathomable mental suffering and meeting the criteria for genocide under Article 2 (b) of the Genocide Convention "Causing serious . . . mental harm to members of the group"[13]with the intention to destroy in whole or in part the child group *as it was originally constituted* (both Hutu and Tutsi children as members of a *child population* that by and large coexisted peacefully and had strong ties to family and community). These Hutu children then became fearful for their lives as refugees when the RPF pushed out the Hutu government forces (RAF) and rightfully so as evidenced by the fact that the very young were a prime killing target, for instance, in the AFDL incursions into Hutu refugee camps[14] in what is now the DRC (Democratic Republic of Congo). Further, the murder of Tutsi children and aborting of fetuses whose parentage was Tutsi (on either the maternal or paternal side or both) meets the criteria for genocide under Article 2(a) of the Genocide Convention "Killing members of the group".[15]

The point here is that, on closer inspection, during the 1994 Rwandan genocide *children as a group as such* were targeted for genocide *regardless their alleged ethnicity* though at various points in the melee they were respectively victims of genocide by different means. For instance, a certain segment of Hutu children (persons under age 18) became child soldiers in the early 1990s for the Hutu government forces that perpetrated the 1994 genocide[16] and thus were the victims of genocidal forcible transfer to another group (as will be explained in even greater detail momentarily) and Rwandan society, including in particular its general child population comprised of multiple alleged ethnic groups, was in part destroyed as a result. Note that it is *not* an element of the crime of genocide that it be perpetrated against one protected group only (in the case of Rwanda, there is debate in any case

[11] Prosecutor v Akayesu (1998), para 128.

[12] Amnesty International (1999), p. 33.

[13] Genocide Convention (1951), Article 2(b).

[14] Amnesty International (1999), p. 33.

[15] Genocide Convention (1951), Article 2(a).

[16] Dallaire (2010).

as to whether the Tutsi and Hutu are one ethnic group and what role perceptions of i.e. ethnicity should play if any in analyzing cases of genocide).

There is an awareness then by the 'recruiters' of murderous armed groups or forces perpetrating mass atrocity and/or genocide that the children transferred to these armed groups or forces, through their participation not only in the hostilities, but also in the commission of atrocities, will never be the same; but rather will be alienated from their former selves and from their community of origin defined in terms of ethnic, racial, national and/or religious identity. The ex child soldiers' (those lucky enough to escape or be rescued) well-documented common extreme difficulty or inability to reintegrate with their original communities inflicts genocidal consequences on the group of origin and on the child population of the society generally. This aspect also fits the criteria for genocide:

> Coming close to the heart of the matter, the International Law Commission explained that under the Genocide Convention, "*the intention must be to destroy the group 'as such'*" and not merely some individuals because of their membership in a particular group [or there must be knowledge that this will be the result].[17]

Article 2(e) of the Genocide Convention concerning forcible transfer of children of the group to another, by definition, involves, in part, as explained, *children as a group* being a targeted for genocide "as such" (as a group in themselves) though this aspect, to this author's knowledge, has not been previously discussed in the legal literature. Thus, children are a group *as such* being victimized by this genocidal act as a child group *independent of other group* dimensions such as ethnicity etc. and not just as part of the larger ethnic, racial, national or religious group of origin of the children. That genocidal transfer will inevitably serve, however, to destroy, in part, the larger group characterized by a certain nationality, ethnicity, race or religion from which the children originate whether the children were targeted as children *and* simultaneously also on the basis of nationality, race, ethnicity or religion of their larger community group or on some other basis (i.e. the political aspect of their community group). Hence, the intent element of the crime of genocide is made out whenever: (1) children are targeted in their capacity as members of the *collective* 'children' (the 'child population'; the latter being a group 'as such') rather than as individuals and (2) these children are *transferred* from their various local communities to an armed group or force for participation in mass atrocity and/or genocide with the *specific intent* that these children will *no longer be considered to be valued members of their community of origin or of the general child population in the society* (where group of origin is defined along religious, ethnic, racial or national dimensions or perhaps even along others depending on how expansive the legal reading of Article 2 of the Genocide Convention). The term 'transferring' in Article 2(e) of the Genocide Convention[18] then goes beyond the meaning of 'recruited', for instance, where we are considering transfer into an armed group

[17] MacKinnon (2006), p. 224.

[18] Genocide Convention (1951), Article 2(e).

or force committing mass atrocities and/or genocide. The term 'genocidal forcible transfer' in this context subsumes the notion of a permanent (or a perpetrator hoped for permanent) break in relations between the children transferred to the armed group or force committing systematic grave IHL violations and the groups of which they were constituent members formerly (i.e. the general non-soldier child population in their local community and the larger society in question including the group of origin defined in terms of ethnicity and the other dimensions listed in the Genocide Convention). The latter break in relations with the group of origin and the general child population is unlikely when child soldiers are 'recruited' into armed groups or forces that abide by IHL. (Note that the term 'recruitment' is used here for ease of expression and in deference to common usage when referring to the child soldier context. However, when the 'recruitment' of children is by armed groups or forces committing mass atrocities or genocide; the term 'recruitment' as used here (in reference to child soldiers) is considered equivalent in meaning to the 'genocidal forcible transfer of children').

It has here been argued then that the recruitment for use as child soldiers of children from: (1) the general child group (or child population) in the local community and from (2) the ethnic, religious, national and/or racial group of origin of the children in the local community (for the purpose of destroying in whole or in part these two originating groups 'as such') constitutes 'genocidal forcible transfer of children 'of the group to another' (here the transfer is to an armed State or non-State group committing mass atrocities and/or genocide). The armed group or force carrying out the genocidal forcible transfer constitutes 'another group' as set out in Article 2(e) of the Genocide Convention.[19] That armed group or force may or may not differ from the children's group of origin along ethnic, religious, racial or national dimensions. Thus, sometimes children are recruited from groups such as national groups that *differ* from the group of origin of the recruiters i.e. different nationality; as when, for instance, children are abducted from neighboring States for use in hostilities and to perpetrate atrocity. At other times, the recruiters and the children may share the same *perceived* ethnicity as in the Rwandan genocide. *In any case, however, the armed group committing systematic grave IHL violations is set apart as a distinct group from the rest of the society in question such that the general society perceives the group as being culturally different given its aberrant traditions and mores*. No clearer example exists of such a separate culture of the armed group or force committing mass atrocities and/or genocide which alienates it even from the mainstream local society (despite shared ethnicity) than the normative culture of the LRA:

> The Lord's Resistance Army has *not* published an understandable political program, beyond calling for Uganda to be ruled according to the biblical Ten Commandments. But its edicts paint a picture of medieval ferocity, where riding a bicycle is punished by amputation and habitation near roads is prohibited, as is keeping pigs.[20]

[19] Genocide Convention (1951), Article 2(e).

[20] Amnesty International (1999), p. 39.

The LRA has endured and fought a civil war for well over 20 years against the government of Uganda all the while with its fighters living and operating outside the margins of mainstream society. Some non-State armed groups systematically committing grave IHL violations over many years such as the LRA are relatively stable save for the new 'recruits'. (The UN reports that 90% of the LRA is comprised of child soldiers; some 30,000 since 1986 (most abducted).[21] That is, though most LRA members were not born into the group; none are permitted to leave and attempted escape results in execution (though there has been the occasional exceptional case with the LRA where the release of child soldiers has been negotiated by State NGOs or bodies such as UNICEF).[22]

Recruitment into armed groups such as the LRA has genocidal consequences for the children's group of origin and the particular society at large just as surely as if the children had been transferred to a different ethnic, racial, national or religious group for the purpose of destroying in part or in whole the group from which the child had been transferred. Recall in respect of this point that according to the ICTR in *Akayesu*: (1) the drafters of the Genocide Convention intended that the Convention protect any stable group where one's membership is in fact involuntary from such genocidal consequences and, hence, that (2) *a highly restrictive reading on the issue of the definition of groups in Article 2 of the Convention would not be consistent with the drafters' intent*.[23] While the ICTR was referring in the latter respect to the need not to overly restrict the definition of 'protected groups' under the Genocide Convention; it is here contended that the same stipulation applies to the definition of 'another group' under Article 2(e) of the Genocide Convention.[24] That is, the latter definition must not be so restrictive as to preclude addressing instances of genuine genocidal forcible transfer of children of the group to 'another group' (i.e. an example of such a genuine genocidal transfer of children being, it is here contended, children appropriated ('recruited') by State or non-State armed groups or forces committing mass atrocities and/or genocide for use in hostilities and in perpetrating grave conflict-related international crimes). One can rightfully speak of these children as having been 'appropriated' by State or non-State armed groups or forces committing mass atrocities and/or genocide as the children cannot challenge their membership in these groups or forces just as surely as they normally cannot challenge the 'protected groups' into which they are born and which are enumerated in the Genocide Convention.

[21] United Nations (Ten stories the world should hear more about (n.d.)).

[22] Hyun (2007).

[23] Prosecutor v Akayesu (1998), para 516.

[24] Genocide Convention (1951), Article 2(e).

3.2 Children and Women as 'Protected Groups' Under the Genocide Convention

The analysis here of the genocidal forcible transfer of children in the context of the recruitment and the use of child soldiers in combat by armed groups or forces committing mass atrocities and/or genocide bears some important similarity to that of MacKinnon's framing of sexual crimes against women as a weapon of war *and ultimately a means to genocide:*

> *Consider that sexual atrocities . . .destroy women as such, both as individuals and as a group*. Sexual atrocities on this analysis are inherently collective crimes, directed against the group through violating its members, meaningless without the social meaning of being a woman that they destroy (and in destroying in part create). *This . . .then becomes one avenue to destruction of groups on the basis of ethnicity, race, religion, and nationality* (emphasis added).[25]

Now consider the Mackinnon quote transformed to apply to the issue of the 'genocidal forcible transfer of children' to armed groups to participate in hostilities and in the commission of mass atrocities and/or genocidal acts:

> Consider that the recruitment of children into an armed force or group committing mass atrocities and/or genocide and their use to commit atrocity . . .destroys children as such, *both as individuals and as a group*. The forcible transfer of children into such an armed group or force on this analysis is an inherently *collective crime*, directed against the child group through violating its members, meaningless without the social meaning of being a child that they destroy (and in destroying in part create)[with a new identity of child soldier and the new allegiances of the transferred child]. This . . .then becomes one avenue to destruction of groups on the basis of ethnicity, race, religion, and nationality.[26]

Note that Article 2(d) and 2(e) of the Genocide Convention specifically refer to 'women' and 'children' or children alone respectively:

> (d) Imposing measures intended to prevent births within the group [thus referring to women and yet unborn children];
> (e) Forcibly transferring children of the group to another group [referring explicitly to children][27]

It is here contended that women and children are in fact prime genocide-targeted *groups* in themselves (that is, targeted groups 'as such') and, hence, 'protected groups' under the Genocide Convention on this and other criteria. Though not explicitly enumerated as 'protected groups' in the Genocide Convention; the formulation of Article 2, it is here argued, clearly implies that women and children are entitled to and must receive 'special protections' as 'protected groups' under the Genocide Convention. This as the victimization of these two groups by way of genocide would clearly destroy the larger ethnic, racial, national or religious group

[25] MacKinnon (2006), p. 225.
[26] Compare to MacKinnon (2006), p. 225.
[27] Genocide Convention (1951), Articles 2(d) and 2(e).

of which they are members as well. Recall once more, in any case, the discussion of the ICTR on the proper interpretation of Article 2 of the Genocide Convention in which the ICTR held that the drafters' intention was not to restrict the number of potential protected groups but to allow for protection of any stable or permanent group whose members cannot challenge their membership and who are threatened with genocide.[28] (Note that the current author holds that certain non-stable groups such as political groups potentially are also 'protected groups' under the Genocide Convention; a topic that is here addressed in a later section).

These two biological groups; 'women' and 'children' are of course, groups into which persons are born and the groups are relatively stable (though biological identity and gender identity of the self for a small segment of the population does not always coincide and may lead to steps taken to change one's recognized gender). In addition, each group (women and children) represents a central (to use MacKinnon's phraseology) "avenue to destruction of groups on the basis of ethnicity, race, religion, and nationality" (i.e. the wartime rape of women of a particular ethnicity may for many women reduce their reproductive capacity through the mechanism of mental and/or physical injury etc.)

'Women' and 'children' are respectively then, on the analysis here, separable distinct 'protected groups' under the Genocide Convention (GC). These two aforementioned protected groups are distinguishable from the larger mixed gender and mixed age groups that constitute the local community. The women and child GC protected groups are properly considered then per Article 2 of the Genocide Convention as: (1) *specific group targets of genocidal acts in and of themselves*; that is, as 'women' and 'child' groups respectively symbolizing the society's larger women and child populations independent of the national, racial, ethnic or religious dimensions of the women or child group or any other incidental dimension of the group that may have been present and as (2) *specific group targets of genocidal acts as a means of perpetrating genocide on a specific national, racial, ethnic or religious group*.

> Families reproduce groups—so, in studying the destruction of 'national, ethnical, racial, and religious' groups as such, we are studying families by default.[29]

To attack children (killing them, or *removing them from their group of origin and transferring them to a genocidal armed group* etc.), or to systemically rape the women of the group and/ or commit acts of torture that destroy the woman or girl's reproductive capacity; to appropriate the pregnant women and babies of another group etc. are all acts that serve to eliminate or reduce the reproductive capacity of the larger targeted group (i.e. the ethnic, national or other well-defined distinct group). It is to destroy, to a significant degree, the future of that larger group as well as the identity of the individual children and women targeted in their capacity as: (1) members of the general child and female population in the particular society

[28] Prosecutor v Akayesu (1998), para 516.

[29] Von Joeden-Forgey (2010), p. 8.

respectively and (2) as members of a particular national, ethnic, racial, and/or religious group. On this perspective, it is not surprising to find that mass rape and the forcible removal of children to murderous armed groups or forces are not uncommon features of armed conflicts marked by one or more parties having a genocidal objective. Note then that: "The presence of specific acts of violence directed at *families* can . . .serve to alert us to the dangerous presence of genocidal logic in conflict situations (emphasis added)."[30] Von Joeden-Forgey aptly refers to *the attack on family as a means to genocide* as "life force assaults"[31] (emphasis added).While Von Joeden-Forgey focuses mostly on 'life force assaults' that involve killings, clearly the forcible transfer of children of the group to another group (i.e. to an armed group or force perpetrating grave international crimes against civilians) can, in certain cases, also be a 'life force assault'; part of a genocidal enterprise. When children are recruited by armed groups or forces committing mass atrocities and/or genocide to serve as child soldiers in murderous military campaigns; it destroys the family and the larger community. Recruitment of children by such armed groups or forces committing systematic grave IHL violations thus constitutes:

> a . . .pattern of violence that targets the life force of a group by destroying. . .its most basic institutions of reproduction, . . . the family unit. . . inflict[ing] maximum damage to the spiritual core of those *generative and foundational units we call families* (emphasis added).[32]

Children have long been a particular genocidal target; that is children not as particular individuals; but children *qua* children; children in their capacity as symbols of the next generation's possibilities and, hence, of the hope for survival of the group of origin. For instance, during the Holocaust:

> Children, as a rule, were not allowed to stay alive in German camps (except ghettos) because, among other reasons, *they [children] symbolized the renewal and continuation of the Jewish people*, a future which the Germans sought to obliterate emotionally and in deed (emphasis added).[33]

Those intent on genocide commonly wish to remove children as vital symbols of hope from the targeted group or community and so also to reduce the reproductive capacity of the targeted group. A reduction in the protected group's reproductive capacity is accomplished then through any variety of means such as, for instance, extermination, sterilization, forced abortions etc. and/or genocidal forcible transfer of a segment of the child population to the genocidal group (i.e. recruitment to an armed group committing mass atrocities and/or genocide to serve in that group as expendable weapons of war committing atrocities against their own and other communities in the hope that the children will become relatively permanently

[30] Von Joeden-Forgey (2010), p. 3.
[31] Von Joeden-Forgey (2010), p. 3.
[32] Von Joeden-Forgey (2010), p. 2.
[33] Von Joeden-Forgey (2010), p. 4.

alienated from their group of origin). Retention of the transferred children by the new group is a prime indicator of genocidal intent:

> **[WW II Example of Genocidal Forcible Transfer of Children]:**
> The children removed in several prominent forcible child transfer schemes—including *those in the Swiss and Nazi programs*—***were prevented from returning home at any age.*** When conducted in this manner, forcible child transfers mirror Article 2(d), which prohibits "imposing measures intended to prevent births within the group." In these cases, the age of removal is irrelevant; the removal of older children is just as harmful to the group as the removal of young children—both are stripped from the group, affecting its ability to reproduce. Finally, the Genocide Convention does not require forcible child transfers to be conducted for re-acculturation purposes, only that they are conducted with intent to destroy the group.[34]

> **Example of Genocidal Transfer of Children to the Burmese army**:
> From their first day at the Su Saun Yay recruit holding camps the recruits [child soldiers] are pushed to forget their identity and their humanity. Deliberately cut off from contact with their families, they are treated brutally by their superiors and often prevented from fraternizing even among themselves.[35]
>
> Many . . . who had been forced into the Burma army expressed similar regrets about the loss of their education, *mixed with even stronger regrets over the total loss of their family lives. Most of those interviewed had not been able to contact their families since the day they were taken by the army, which in some cases was seven to ten years ago. . .**Even after having deserted the army, most do not dare try to contact their families for fear of retaliation by the authorities***. Some felt that their families must now believe them dead. Myo Chit, who was taken from his family at age twelve and is now fifteen, said "I keep it out of my mind. I don't want my parents to know I'm alive, because maybe they'll worry about me. Now they've already missed me for a long time, so maybe they don't think about me any more" (emphasis added).[36]

Armed groups or forces engaged in systematic grave IHL violations are extraordinarily reluctant then to release child soldiers as is characteristic of genocidal forcible transfer programs generally.

3.2.1 Life Force Assaults as Genocidal Acts: Applications of the Concept

Mass rape in recent years has, as previously explained, come to be better understood as a potential indicator of genocidal intent[37] in many instances (and as conduct that arguably could be interpreted as a genocidal act on women as a group in themselves; a 'life force assault').[38] What is of special note for the purposes of the

[34] Mundorff (2009), p. 92.
[35] Human Rights Watch (2002), p. 94.
[36] Human Rights Watch (2002), pp. 160–161.
[37] Von Joeden-Forgey (2010), p. 3.
[38] MacKinnon (2006), p. 232.

present inquiry is that the same acknowledgement of genocidal intent has *not* been forthcoming with respect to the forcible transfer of children from one group to another in ethnic cleansing, or in recruitment into a genocidal armed group or force with the intent of destroying the vitality of the larger group (the group of origin defined in terms of ethnicity, nationality, religion or race) from which the children were taken. Nor has the destruction of the children as a distinctive group as such (a child group) through forcible transfer been acknowledged as an act of genocide (under Article 2(e) of the Genocide Convention) on the latter group itself (that is, the child group).

Consider also that the perpetrators of mass wartime rape not uncommonly apply a genocidal logic regarding any offspring who might result from such rape viewing these offspring (born and unborn) as no longer integral members of their group of origin according to various scenarios:

> [Referring to the mass rape by Serbs of Bosnian Muslim and Croat women during the civil war with Serbia]. . .in this particular ethnic rape, which has no racial markers, the children are regarded as magically clean and purified, as their fathers' babies, Serbian babies. . .*The Serbian idea seems to be, to create a fifth column within the Croatian and Muslim society, children . . .who will rise up and join their fathers* [in committing genocide and crimes against humanity against the targeted other ethnic or religious group](emphasis added).[39]

So, too, the transfer of children to serve as child soldiers in an armed group committing mass atrocities and/or genocide is a form of genocide in which: (1) the perpetrators hope to retain the transferred children (those who survive the fighting as child soldiers) as loyalists to the genocidal armed group under all circumstances and (2) reduce the reproductive capacity and vitality of the targeted protected group. That targeted group may be, for instance, a specific perceived ethnic group (i.e. in Rwanda the Tutsi as well as Hutu political moderates were *perceived* as indistinguishable and constituting one targeted ethnic group. That is, the moderate Hutus were assigned *de facto* membership in the targeted group (the Tutsis) from the point of view of the perpetrators based on the moderate Hutus' alleged allegiances). In deciding what constitutes a protected group under the Genocide Convention some international tribunal decisions have in fact permitted such a determination based on perpetrator perceptions:

> *Jelisic is also important for the court's discussion of whether a protected group must objectively exist, or if it is enough if the group subjectively exists in the mind of the perpetrator*. ***The court adopted a purely subjective approach, holding that courts should judge the existence of a national or ethnic group from the perspective of the criminal actors***. Thus, even if a national group does not exist in objective reality, if the group exists in the mind of the perpetrator, the Genocide Convention will still protect that group. Various cases from the ICTR adopt some form of this subjective approach (emphasis added).[40]

[39] MacKinnon (2006), p. 38.

[40] Schneider (2010), p. 323.

Thus, while the international jurisprudence has reflected a consensus to *exclude* political groups from designation as protected under the Genocide Convention, it is here contended that *in the perceptions of the perpetrator of genocide*, political groups, in some armed conflict contexts, are perceived to be indistinguishable from the targeted national, ethnic, or religious group. That is, the members of the political group being targeted are perceived as being constituent members of the targeted national, racial, ethnic, or religious group even where there is no basis in reality for such a perception. On the latter ground then it is here argued that political groups targeted for annihilation are protected groups under the Genocide Convention in such a circumstance (i.e. where the perpetrator of the genocide views annihilation of the targeted political group as equivalent to; or part and parcel of the elimination in whole or in part of a targeted ethnic, racial, religious or national group).

3.3 More on Determining 'Protected Groups' Under the Genocide Convention

This author is in accord with the view that the Genocide Convention does not capture the essence of Lemkin's views on genocide and raises serious doubt about whether the enumerated list of groups at Article 2 of the Convention should be considered definitive:

> **The U.N. definition is beset with conceptual shortcomings**. . .Insofar as *they have neglected to identify features the possession of which makes a group vulnerable to the harms peculiar to genocide*, the authors of the convention have failed to articulate satisfactory reasons for thinking that 'national, ethnical, racial or religious groups' can be the victims of genocide whereas gay men, lesbians, political parties, and the class of people who enjoy karaoke cannot. . .***In the absence of the necessary identity conditions, the choice of groups listed in the convention seems arbitrary. It's also important to note that no available definition of any of these groups is unproblematic, and for the overall definition to be adequate, each if its constituent parts must also be clearly defined***. (emphasis added).[41]

It is here contended that when armed groups (State or non-State) implement a specific program or practice for the recruitment of children specifically to participate in conflict-related mass atrocity and/or genocide (though Article 2(e) would apply also were this transfer to occur during peacetime rather than in the context of a civil war or an international armed conflict); children may be considered as the group as such targeted for genocide along with the group of origin. Such targeting of individual children for recruitment in the genocidal acts as child soldiers threatens all children (children as a group) who find themselves in that particular context (armed conflict situation occurring within a certain territory) who might be

[41] Abed (2006), p. 310.

considered able-bodied enough to carry out the 'functions' assigned and are targeted as children (that is precisely because they are children):

> The victim of the act is therefore a member of a group, chosen as such, which, hence, means that the victim of the crime of genocide is the group itself and not only the individual.[42]

In considering which groups can be considered to have been targeted for genocide (i.e. via forcible transfer of their children away from the group of origin or by any other means) the focus must be, as Abed suggests (given the apparent arbitrariness of the specific enumerated list of groups incorporated in the Genocide Convention) on the unique and lasting harms that genocide inflicts on the targeted groups that serve to mark the groups themselves as the victim of genocide and not just individual members (i.e. as has been done here in reference to the destruction of childhood and children's identity and affiliation with their community that results when children are transferred away from their group to participate as child soldiers in mass atrocity including against segments of their own group of origin).[43]

The arguments that follow pertaining to *genocide* do *not* apply to the recruitment and use of child soldiers in hostilities by an armed State or non-State force *not* engaged in atrocity as a systematic pattern (though the exploitation of children in the latter case is, on the analysis here, also properly considered to be an infringement of *jus cogens* State obligations to protect children in times of armed conflict). Children recruited as child soldiers and used in hostilities by a self-proclaimed liberation group or a national force that is *not* engaged in systematic atrocity still generally have the potential to re-integrate successfully into their group of origin (local communities) at the cessation of hostilities. The child soldiers in such instances then have not been the victims of genocidal forcible transfer to another group. Instead recruitment of children under 15 and their use in hostilities is a serious violation of customary IHL (as per AP I[44] and AP II[45] to the 1949 Geneva Conventions and the Rome Statute[46]) while the OP-CRC-AC[47] sets out that the use of children under 18 in hostilities should be prevented by the State using all feasible measures. In contrast, the recruitment of children (persons under age 18) into an armed group (State or non-State) that is committing mass atrocity and/or genocide (whether in the context of an international or internal conflict), it is here contended, is a grave international crime amounting to genocide under Article 2(e) of the Genocide Convention concerning the forcible transfer of children of the group to another group.

To make out the argument that the recruitment (whether forced, conscripted or allegedly voluntary) of child soldiers (persons under age 18) for the express purpose

[42] Prosecutor v Akayesu, ICTR (1998), para 521.

[43] Abed (2006), p. 310.

[44] Protocol I Additional to the 1949 Geneva Conventions (1977).

[45] Protocol II Additional to the 1949 Geneva Conventions (1977).

[46] Rome Statute (2002).

[47] OP-CRC-AC (2002).

of their use (direct or indirect) in hostilities[48] *by an armed force (whether State or non-State) committing mass atrocities* and/or genocide is itself a form of genocide requires: (a) an analysis and interpretation of the key terms in Article 2(e) of the Genocide Convention and (b) consideration of the meaning of the provision in the context of the Genocide Convention (GC) as a whole and the overall purpose of the GC all of which follows.

3.3.1 Analysis of the Terms in Article 2(e) of the Genocide Convention

As mentioned previously, the terms of Article 2(e) of the Genocide Convention[49] dealing with the genocidal forcible transfer of children of the group to another group are mirrored in Article 6(e) of the Rome Statute.[50] Let us consider then the terms of Article 2(e) of the Genocide Convention and what light they shed on recruitment and use of children in armed hostilities as the genocidal forcible transfer of children where the armed group or force involved is engaged in perpetrating mass atrocities and/or genocide:

(i) 'Children'

The term 'children' in the Genocide Convention (hereafter GC) is not defined at Article 2(e) in terms of an age range but scholarly opinion[51] is that the term is to be taken as referring to persons under age 18. This based on a growing consensus since the entry into force of the Convention on the Rights of the Child that the term 'children' in international treaties refers to persons under age 18 where no other age range is specified (i.e. the Convention on the Rights of the Child[52] regards children as a term referring to persons under age 18 unless otherwise stipulated in various domains of national law). Mundorff points out that:

> Despite this growing consensus [on the meaning of the term 'children' in Article 2(e) of the Genocide Convention (GC)], some have asserted that Article 2(e) [of the GC] was actually intended to protect against the practice of transferring children for the purposes of re-acculturation and that therefore older teens should not be protected because they are not as susceptible to such influences.[53]

Attempts to restrict the application of Article 2(e) of the GC to younger children would have excluded recruitment and use in hostilities of child soldiers aged 15 and

[48] This includes also those recruited for use in non-combat support roles such as cooks, porters, spies etc. as well as children used for sexual purposes who accompany the armed unit.

[49] Genocide Convention (1951).

[50] Rome Statue (2002).

[51] Mundorff (2009), p. 92.

[52] Convention on the Rights of the Child (1990), Article 1.

[53] Mundorff (2009), p. 92.

over as constituting, in certain circumstances, an act of genocide under Article 2(e) of the GC or Article 6(e) of the Rome Statute. In this regard it is telling that during the ratification debates concerning Rome Statute Article 6(e) on the forcible transfer of children as a prosecutable act of genocide, "proposed age range designations ranged from fifteen [as the upper limit for the definition of children whose transfer to another national, ethnical, racial or religious group would constitute genocide; a highly significant age given that war crimes related to recruitment and use of children for active participation in hostilities in the Rome Statute under Article 8 pertain to children *under* age 15] to twenty-one years of age, and the delegates finally compromised on eighteen [as reflected in the Elements of the Crime for the Rome Statute regarding Article 6(e)]"[54]:

Rome Statute: Article 6 (e)
Genocide by forcibly transferring children
Elements of the Crime

1. The perpetrator forcibly transferred one or more persons [we will consider shortly the fact that 'forcible transfer' is not a term restricted to the use of physical force]
2. Such person or persons belonged to a particular national, ethnical, racial or religious group.
3. The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.
4. The transfer was from that group to another group.
5. The person or persons were under the age of 18 years.
6. The perpetrator knew, or should have known, that the person or persons were under the age of 18 years.
7. The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction (emphasis added).[55]

Thus, recruitment and use in hostilities of child soldiers aged 15–18 or those younger for the purpose of contributing to a campaign of mass atrocity and/or genocide is, on the analysis here, a war crime and potentially a genocidal act as well. It is an act of genocide where the intent is the destruction in whole or in part of the protected group. The same conduct constitutes a war crime in that: (1) the lawfulness of the recruitment and use in hostilities of child soldiers 15 and over in international treaty law is conditional on the armed group or force involved adhering to IHL which is not the case in the situations at issue (otherwise the treaty would be authorizing the use of child soldiers 15–18 by unlawful armed groups or forces) and (2) the recruitment and use of children under 15 in hostilities is prohibited under both customary and treaty IHL with varying levels of State obligation in this regard depending on whether the conflict is internal or international (more stringent State obligations to prevent recruitment and use of children under 15 in hostilities apply in the internal conflict situation whereas the State is

[54] Mundorff (2009), p. 92, fn 187.

[55] Preparatory Commission for the ICC (2000, Elements of the Crime Re Article 6(e)).

only required to take all feasible measures to prevent such occurrences in the international conflict situation).

Article 2 of the Genocide Convention, it should be noted, has no vague or broad "purposes restrictions."[56] Instead, the provision specifies only that the acts listed therein (i.e. transfer of children of the group to another group); to be considered genocidal; must be directed to the destruction of the protected group in whole or in part as such.[57] We will consider this point shortly in the context of the difference between 'motive' and 'intent' and the implications of the distinction for the argument that child recruitment and use in armed hostilities (i.e. where the child soldier is part of an armed group committing genocide or mass atrocities with the intent to commit genocide) constitutes a form of genocide. Further, note that there is nothing in the Rome Statute which precludes the recruitment and use of children in armed hostilities insofar as children under 15 are concerned from being both a 'war crime' under Article 8 of the Rome Statute *and* an act of genocide under Article 6(e) of the same statute (Article 6(e) dealing with the genocidal transfer of children to a new group). This being the case since under the Rome Statute rules regarding the Elements of the Crime "A particular conduct may constitute one or more crimes."[58] Further, since the Rome Statute (elements of the genocidal crime of forcibly transferring children from one group to another) covers 'children' (defined as persons under age 18), the recruitment and use in hostilities of children aged 15 and over (as well as under 15s) by armed groups perpetrating mass atrocities with the intent to commit genocide and/or engaged in genocide, it is here contended, constitutes genocide under Article 6(e) of the Rome Statute.

(ii) 'Forcibly Transferring'

The Rome Statute 'Elements of the Crime' stipulations make it clear that the term 'forcible transfer' at Article 6(e) ("Forcibly transferring children of the group to another group [where group means a national, ethnical, racial or religious group]") does not by definition always need to involve transfer by physical force:

> ***The term forcibly is not restricted to physical force, but may include threat of force or coercion***, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, ***or by taking advantage of a coercive environment*** (emphasis added).[59]

This point is especially relevant in considering the situation of children allegedly voluntarily recruited into armed groups (State or non-State) engaged in committing mass atrocity with the intent to perpetrate genocide or engaged in genocide. It is here argued that such recruitment is in fact a 'forcible transfer' of the child from his or her family and community with its distinctive national, ethnic, racial and/or religious characteristics to the armed group based on physical force and/or the

[56] Mundorff (2009), p. 92.

[57] Genocide Convention (1951), Article 2.

[58] Rome Statute Elements of the Crime (Rule 9).

[59] Rome Statute Elements of the Crime (Article 6(e), FN 5).

threat of violence or coercion and/or the general coercive environment. Certainly an armed force on a murderous rampage creates a coercive environment that might lead children to 'volunteer' for participation with that group (as might the very conditions of civil war and all the factors that militate against the child's survival should they decline to join). Consider in regard to the issue of coercive environments the participation of Hutu village children in the Rwandan genocide of the Tutsi:

> Throughout the slaughter, Hutus were urged to kill anyone who was Tutsi, *or anyone opposing the slaughter*. The extremist radio station Radio Mille Collines broadcast genocidal messages throughout the killing. No-one was spared, least of all Tutsi children. The militia deliberately involved entire communities in the slaughter. ***Children were used to pick out Tutsi and were expected to join in the killings*. By 1997, 2,000 children were detained on suspicion of acts of genocide** (emphasis added).[60]

Referring then to the example of the Rwandan genocide, it is here contended that (1) the Hutu child soldiers and (2) Hutu children in the villages who engaged in the murder of Tutsi at the incitement of and on order of Hutu commanders (as described in the excerpt above) and functioning as *de facto* child soldiers both were 'forcibly transferred' to the genocidal Hutu armed force by virtue of the coercive environment in which these children found themselves (a situational context filled with mass murder and the imminent threat of violence to one's own person or one's immediate family should he or she offer up any resistance to the demand to kill Tutsi). Not surprising then that:

> . . .when the mainly -Tutsi Rwandan Patriotic Front gradually gained the upper hand and pushed out the Hutu government forces, Hutu children joined the exodus.[61]

On the analysis here, it would be incorrect from a precise legal perspective to say that these Hutu children had in fact committed acts of genocide. This is the case given that the situation of duress undermines the claim that the children had the requisite evil intent (*mens rea* for genocide) as opposed to simply having acted to save themselves and their kin by following the demands of Hutu armed commanders. Once having been recruited (given the coercive circumstances) by the Hutu armed force to participate in the killing of Tutsi there was no turning back. That is, the Hutu children involved in these atrocities were no longer regarded as innocents. This was the situation despite the child perpetrators' lack of *mens rea* to perpetrate genocide and their participating instead due to duress. Participation in the atrocities meant that they had *in effect* been 'forcibly transferred' to the Hutu armed group as child soldiers for the group regardless whether they were actually part of the ranks or simply village children who had been ordered to point out Tutsis' and then participate in the killing. These Hutu children were being used in part as propaganda tools to symbolize the subservience of the Hutu and Tutsi population to the dictates of the Hutu armed force.

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[60] Amnesty International (1999), pp. 32–33.

[61] Amnesty International (1999), p. 33.

That the children who participated in the murder of Tutsi were the victims of a coercive environment is quite apparent given the following statistics based on surveys by UNICEF[62] conducted with 3,030 young people aged 8–19 in refugee centers and in their communities:

Exposure to war-related violence among Rwandan children and adolescents

Traumatic Event	% of children
Witnessed violence	95.5
Experienced death in the family	79.6
Witnessed someone being injured or killed	69.5
Were threatened with death	61.5
Believed they would die	90.6
Witnessed killings or injuries with 'pangas'(machetes)	57.7
Witnessed rape or sexual assault	31.4
Saw dead bodies or parts of bodies	87.5
Witnessed massacre	51.9
Hid for protection	80.2

That some children managed to escape participation in the killing of Tutsi does *not* at all cast guilt on those who unluckily did not escape 'forcible transfer' to the Hutu armed force however that transfer occurred (via physical force or simply pursuant to the coercive environment and threats of violence given directly or latent in the whole circumstance). Consider in this regard that some of those who escaped the forcible transfer might have resorted to hiding under corpses as did one in six survivors.

(iii) 'Forcibly Transferring children of the group to another group'

In the post-conflict period Hutu children who participated in the mass slaughter of Tutsi and of moderate Hutu generally had great difficulty reconnecting with their communities (i.e. especially where these were among the same communities they had terrorized during the conflict). The same is true for RPF ex child soldiers who committed multiple atrocities. This, as previously here explained, is the outcome the architects of the genocide anticipated and planned for in ensuring these victimized children participated in the genocide. Even with demobilization and re-integration programs operated by NGOs as well as customary and other non-judicial accountability mechanisms in place,[63] successful reconciliation and reintegration of child soldiers in various post-conflict situations globally has been difficult and inconsistently achieved (and, if so, then to an arguably less than hoped for degree) where these child soldiers have engaged in atrocities as part of an armed group or force perpetrating systematic atrocities. (Note that there is very

[62] UNICEF (1996).

[63] Ingelaere (2009).

little research on ex child soldiers' perceptions of the effectiveness of reintegration programs and what could be improved).[64]

That re-integration efforts have often stumbled is not surprising given that DDR programs are relatively brief and these highly traumatized children (ex child soldiers) often require much longer term intensive support than NGOs can organize:

> Children will generally spend 2 weeks to 6 months in ICCs [interim care centres] and will receive a wide range of services that will vary according to the needs of the children and the means of the NGOs.[65]

The stays in the NGO-run ICCs are short in part as the goal is to reunify the children with their family but often the parents have been killed or if they have survived may not be willing to reunite with the ex child soldier who has committed atrocities (often against his or her own particular local community) given the stigma the child carries according to the community's perception:

> Because child soldiers are often at the forefront of armed battles taking place in villages – destroying crops, livelihoods and causing massive displacements– local communities can have difficulty understanding the extent to which some child soldiers were themselves brutalized and forced to commit heinous acts of violence and human rights abuses [thus contributing to shunning of these children or even violence directed at them].[66]

Given the stigma under which the ex child soldier labors who has participated in conflict-related systematic atrocities, community sensitization programs appear to be essential to any level of success of the DDR program. However, these community sensitization programs are often too brief to be of lasting benefit (such programs typically teach about children's rights, and attempt to sensitize the community to the types of brutalization the child soldier has endured and what the child's needs are which if met would facilitate successful reintegration into the community).[67]

Even interim care centers for the re-integration of ex child soldiers have come under criticism for allegedly creating dependence and jealousy:

> *Furthermore, by identifying these children as ex-soldiers and by offering much needed services to only one fragment of the local population, ICCs can inadvertently create dangerous social tensions*. Indeed, one of the main problems identified in the literature is the overwhelming amount of attention and support given to child soldiers to the detriment of other children who have also suffered throughout the conflict . . ..Many of these children struggling to survive in a post-conflict setting are in need of the same services offered to child soldiers: health, family tracing (as a result of displacement), access to education and vocational training, and psycho-social support. Labelling child soldiers and supporting them in isolation from the other children in a setting where the majority of children are in need of the same services can lead not only to stigmatization and jealously, which are counterproductive to reintegration, but can also lead to an increase in the recruitment of

[64] Rivard (2010).

[65] Rivard (2010).

[66] Rivard (2010).

[67] Rivard (2010).

> child soldiers as more children seek to have access to the services offered by the DDR programs (emphasis added).[68]

In sum, reintegration efforts on behalf of ex child soldiers who have participated in conflict-related atrocity have met with varied and often limited success depending on a variety of factors. *This too is a marker of successful genocidal transfer of the children to the new group in the perception of the community even after DDR efforts in the post-conflict period (the community not uncommonly in practice adopts the view; 'once a child soldier perpetrator; always a child soldier perpetrator).*

Note that Hutu child refugees that fled Rwanda after the fall of the Hutu government were often targeted and some did lose their lives. Most Hutu refugees fled to the DRC where they ended up in six refugee camps controlled by the Hutu armed group that demanded continued loyalty from the children and others in the camps all of whom were under constant threat both from the Hutu armed commanders and the attacking adversary:

> Witnesses said 140 refugees were killed by the AFDL at nearby Wenji. AFDL soldiers reportedly held [Hutu] children by the legs and smashed heads against the ground or trees.[69]

The question arises as to whether it can be considered a genocidal forcible transfer of children from one group to another where the children transferred to the Hutu armed forces engaged in genocide were also Hutu (of course many armed groups are involved in the forcible transfer of children from other ethnic groups into their own sometimes even abducting children from nearby States). In order to answer that question (whether Hutu forces recruiting Hutu children to commit atrocity against Tutsi constitutes forcible transfer from one group to another as per the Genocide Convention), we must consider the overall purpose or objective of the Genocide Convention. That objective has been described as *preventing* the elimination of diversity in "national, ethnical, racial or religious" groups which diversity enriches humanity. (It has been noted that: (1) 'cultural' and 'political' groups were not explicitly listed in the Convention as identifiable groups to be protected under the Genocide Convention although there had been vigorous debate and disagreement on the issue during the drafting of the Convention and (2) it is arguably the case that the concept of "ethnical groups" subsumes the notion of cultural group).

It should be understood that those most responsible for the recruitment and use of child soldiers to participate in hostilities with armed groups or forces that are engaged in mass atrocity or genocide have in fact destroyed, at least in part, the child's original protected group (the latter defined in national/ethnic/racial and/or religious terms). This is accomplished by intentionally creating alienation of the community from the surviving children and vice versa by having the children participate in mass atrocities and by the long periods of physical separation of the

[68] Rivard (2010).

[69] Amnesty International (1999), p. 37.

child soldiers from family and community while the children are engaged in so-called 'soldiering' activity (if the children return at all). In Rwanda then the alienation of child soldiers who had participated in mass atrocity or other grave IHL violations was from the national group (alienation from the Hutu and remaining Tutsi population and the other minority making up the general population (the Twa) as well as from the Hutu group in particular; the latter *perceived* as a separable ethnic group (Recall in this regard that "The court [ICTR] adopted a purely subjective approach, holding that courts should judge the existence of a national or ethnic group from the perspective of the criminal actors" and that approach is adopted here.)[70]

This partial destruction of the protected group then is reflected in the fact that the children (ex child soldier members of armed groups or forces that have engaged in genocide or other grave IHL violations) are not uncommonly no longer accepted into their communities. This after the children have committed conflict-related atrocities against their own people and sometimes, as part of their brutal training as a child soldier, even against their own family members and clan. Thus, the armed group or force has engaged the children in partially destroying the group of origin by genocidal acts and other acts of terror directed against the civilian population. In doing so, these armed groups or forces have effectively transferred the children away from their group of origin to a new marginalized group perceived as different from the rest of society (namely the armed force committing genocide or mass atrocities). The latter constitutes a form of genocide as set out in Article 2(e) of the Genocide Convention.[71]

In addition, the recruitment of these children, by whatever means, and their participation in mass atrocity against their own ethnic group (i.e. moderate Hutu during the Rwandan genocide) as well as against perceived 'others' (i.e. Tutsi) results in enormous mental and physical suffering to their communities and to the child soldiers involved (a further mode of partial destruction of the protected group listed at Article 2(b) of the Genocide Convention) (that is, destruction of an ethnic and national group). The forcible transfer of the children (i.e. Hutu children to the genocidal Hutu armed groups) is generally part of a broader pattern of genocidal acts or grave violations of IHL.

The child soldier recruited into participating in mass atrocity essentially has no identity beyond that of being a highly expendable convenient weapon of war for the armed group of which he or she is now captive (a trivial cog in the war machine). Any sense of national pride or identification with one's own ethnic, so-called racial, national or religious group is but empty rhetoric when one has been forced to kill one's own or face imminent destruction oneself. The child soldier engaged in mass atrocity as a member of an armed group intent on committing systematic genocidal acts, and/or crimes against humanity and/or war crimes lives in the moment with his

[70] Schneider (2010), p. 323.

[71] Genocide Convention (1951), Article 2(e).

or her only ties being to the armed group or force which has the most immediate and certain control over his or her ultimate fate. This is a natural survival coping mechanism. These children then have been removed from the group not just physically but psychologically; both from the children's and the community's perspective. Such forcible transfer of children away from the group to the armed group is then a destruction of group members (and hence of the group itself in part from whence the children originally come); analogous in some ways to killing members. That is, the child who has been part of an armed group that has committed mass atrocity and/or genocide *exists no more* on a psychological plane as a child group member of his or her original community (the latter being a group defined along 'national, ethnical, racial or religious' or even additionally cultural or political dimensions). In many if not most instances, the child is shunned and is also not permitted to live among his or her original local community members.

(iv) 'Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such. . ..'

It might be argued that the forcible transfer of children from one group to another is not always intended to destroy the original national, ethnical, racial or religious group of which the children are members. Yet, it is the case that forcible transfer of children out of a group is normally associated with a new cultural identity (here the identity of child soldier) which supersedes and hence weakens the original identity derived from and associated with the original group:

> For Lemkin [the originator of the legal concept of genocide], genocide was not a crime committed against individuals because they belonged to a certain group; it was a crime committed against the group itself.[72]

Applied to the issue of child soldiers then, the forcible transfer of children *from* the group ('group' defined as per the Genocide Convention criteria) *to* the new group (i.e. armed force committing mass atrocity and/or genocide) constitutes a form of genocide as set out in Article 2(e) of the Genocide Convention.[73] The murderous armed group or force objective is to subjugate the targeted group (the original larger group of which the children were members) to the will of the armed force engaged in grave international crimes. This objective is met by destroying, in part, the group of origin's cohesiveness, resilience and hope for the future by removing a segment of its child population. The result will thus be the destruction of a part of the group (defined in terms of national, ethnic, racial or religious criteria) whether the transfer is to an armed group with the same or a different national, ethnic, racial or religious make-up.

The more typical situation involving the genocidal forcible transfer of children to a new group is one in which the children are transferred to a different national, ethnic, racial or religious group compared to their original group. This was the case,

[72] Mundorff (2009), p. 74.

[73] Genocide Convention (1951), Article 2(e).

for instance, with Himmler's maniacal Lebensborn project. In the latter case, so-called Aryan looking children, some fathered by German Nazi soldiers, were transferred to Germany in anticipation that this would supposedly strengthen Germany's future and create a reservoir of loyal future adult Nazis citizens.[74] There is evidence furthermore that "the Nazis had removed perhaps hundreds of thousands of children from Eastern Europe" who were considered to be "racially valuable."[75] In the case *United States versus Griefelt* several defendants were convicted for transferring Polish children away from their families to Germany where they were to be raised as Germans either in German orphanages or with German families.[76]

In each case of genocidal transfer of children 'of the group' (whether in the context of Himmler's Lebensborn project or in regards to the transfer of children directly to an armed group committing mass atrocity and/or genocide where the armed group is of the same or different nationality, ethnicity, religions and/or race as the children), the diversity of human groups and respect for the diversity of humanity is intentionally diminished by the removal of children away from their original group. The essential aspect of the transferring is the severing of the children's bond with their original group and the interference/aborting of the possibility of these children developing further a shared history with their original group. The *intent* then is to destroy in part or in whole the original national, ethnical, racial or religious group. The *motives* for wanting to destroy the children's original group in this way may differ in each case or overlap to some degree (racism, the need to reduce the possibility that child soldiers will escape or try to escape from the armed group committing mass atrocity, the desire to suppress opposition to policies and practices of the political or military group in power etc.). However, in each case the goal is to eliminate the original group as viable by destroying it in part or in whole by transferring many of its children out of the group. This is reflected in Himmler's statement:

> We cannot take the responsibility of leaving this blood on the other side, enabling our enemies to have great leaders capable of leading them.[77]

Note that the Elements of the Crime set out for Article 6 of the Rome Statute concerning genocide includes the following proviso intended, the current author suggests, to reduce the likelihood that acts of genocide would go unpunished and not categorized as such due to an unreasonable test for proving genocidal intent:

> **Genocide**
> **Introduction**
> Notwithstanding the normal requirement for a mental element provided for in article 30, and recognizing that knowledge of the circumstances will usually be addressed in proving

[74] Grover (2011a).

[75] Mundorff (2009), p. 79.

[76] Mundorff (2009), p. 80.

[77] Cited at Mundorff (2009), p. 81.

> genocidal intent, *the appropriate requirement, if any, for a mental element regarding this circumstance will need to be decided by the Court on a case-by-case basis* (emphasis added).[78]

Recall that the circumstances of recruitment of children into armed groups or forces committing genocide and/or mass atrocities often involve abduction, and always exploitation of the child's coercive situation (i.e. the child is most often dependent on the armed group either for food and/or shelter and/or immediate protection of sorts from the killing). Further, the nature of the training of child soldiers by armed groups engaged in mass atrocity and/or genocide, as discussed, typically involves being forced to kill family members and/or other community members; being forced to take drugs that inevitably change the child's temperament and personality etc. The aforementioned factors are such as to lead to the reasonable inference that the intent of the murderous armed group or force is that: (a) the transferred children will lose all sense of identity as rights bearing individual human beings; and (b) lose the sense of belonging to the protected group out of which they have been transferred. As a result of the foregoing psychological processes, the children (as intended by the armed group or force implementing the genocidal transfer of the children) generally come to identify only with and to owe allegiance exclusively to the new group (the armed group) into which they have been transferred and upon whom they are dependent for their survival. This is the end result regardless the initial mode of 'recruitment'; whether by abduction or alleged voluntary recruitment notwithstanding the exploitation of the children's coercive circumstances as children caught up in a hot conflict zone and often years of civil war. That allegiance to the armed group is fundamentally grounded on fear rather than any affinity to any particular national, ethnic, racial or religious dimensions of the armed group. The Lord's Resistance Army (the LRA) of Northern Uganda provides, on the analysis here, an example of an armed group committing the genocidal act of transferring children of the group to another:

> Children living in the Gulu and Kitgum districts of northern Uganda have been targeted since 1994 by soldiers belonging to the Lord's Resistance Army (the LRA), a self-styled rebel group fighting the Uganda government. Up to 8,000 children have been systematically abducted and forced to join the LRA. Most of them have been between 13 and 16 years old. . .Children are beaten, murdered and forced to fight well-armed government troops. ***They [the transferred children] are chattels 'owned' by the LRA leadership***. Girls are raped and used as sexual slaves. The forced marriage of girls is the cornerstone of the LRA's incentive structure. . .Those [children] abducted are forced to abuse others, both inside and outside the LRA. The LRA terrorizes villagers. . .the killers and rapists themselves are often abused children [transferred into the LRA]. ***This is deliberate. The children are often traumatized by what they have done and feel they are outcasts They become more closely bound to the LRA*** (emphasis added).[79]

[78] Preparatory Commission for the ICC (2000).

[79] Amnesty International (Amnesty 1999), pp. 38–39.

The taking by the LRA of girl child soldier brides ('bush wives') *and their forced pregnancies further highlight the genocidal transfer aspects of such situations where these occur*. These girls and their offspring forever belong to the armed group in the perception of not only that group; but of the children's group of origin. The scenarios involved in the genocidal transfer of children to an armed group or force committing mass atrocities and/or genocide thus are qualitatively different in key respects from what is involved in recruitment of children for the purpose of serving as reinforcements in hostilities as members of armed groups or forces that adhere to IHL.

As child soldier members of an armed group committing genocide and/or mass atrocities; the children run a *routine* high risk of being killed or suffering grievous physical and mental injury *both from sources within their armed group* and from those outside of it. The latter fact also contributes to the destruction, in part or in whole, of the group from which the children originally came and causes that group great mental suffering. As the child soldiers, in many instances, will not return even if they survive the conflict, the group of origin (national, ethnic etc.) has lost reproductive capacity. Understand also that the group of origin out of which the children were transferred is perceived by the community as separate and distinct from the armed group engaged in genocide and/or mass atrocities. The latter is viewed as an *inauthentic representation* of any protected group in the mainstream society (be it ethnic, religious, racial and/or the national group itself).

Note that the girl child soldiers who have been liberated from the armed group or force committing grave IHL violations as a systematic practice most often have been sexually abused and impregnated by members of that armed unit. They are, as a consequence of being so brutalized, generally too traumatized and alienated to return to their home communities even if rescued by an NGO. In any case, these girl child soldiers are likely to have great difficulty being accepted and re-integrating should they return to their home communities. (Certainly there is a consensus in the international humanitarian community that much more needs to be done to support these girls effectively in the longer term to facilitate their successful re-integration).[80] Consequently the girl soldiers often stay as (child) 'bush wives' who may often also have dual roles such that they also contribute in some direct ways to the armed conflict. The latter fact also then leads to a reduction in the children's original group's reproductive capacity. Recruitment and use by an armed group engaged in genocide and/or mass atrocity of children as child soldiers then, on the analysis here, is a special case of genocide comprised of transferring of children of the group to another.

For the reasons just outlined, the requisite 'special intent' (or *dolus specialis*) for the grave international crime of genocidal forcible transfer of children of the group to another group is present in cases where the armed group recruiting and using child soldiers is one engaged in mass atrocities and/or genocide (i.e. the children's

[80] Rivard (2010).

participation in the armed group's campaign of terror is part and parcel of effecting the intended and knowing destruction, in part or in whole, of the original group from which the children were transferred). Clearly, these armed groups, at the very least, are aware that such conduct (forcibly transferring children out of their home communities and involving them in perpetrating mass atrocities and/or genocide *also against their home communities, kin and others*) will destroy the child's original group in part or in whole. (Note that the current author concurs with those who hold that genocidal intent is demonstrated in either of two ways or both; by (1)"the perpetrator acting with a group-destroying purpose" and/or (2) the perpetrator acting in the knowledge "that his or her actions are certain to destroy a group."[81] The latter standard was applied in the ICTR case of *Akayesu*).[82]

Transferring children out of their communities where they have a cultural life and a distinct perceived ethnic, religious, national and racial identity is not simply a violation of the basic rights of the individual children recruited by whatever means into the armed force committing atrocity and/or genocide. Rather, it is a violation also of the fundamental rights of the child's group of origin as an entity in itself for whatever motive with the intent to destroy the group in part or in whole. In this regard, note that the drafting committee for the Genocide Convention (GC)[83] originally had listed the forcible transfer of children of the group to another (Article 2(e) of the GC) under the category of 'cultural genocide'; a term that later was excluded from the Convention:

> The separation of children from their parents results in forcing upon the former at an impressionable and receptive age a culture and a mentality different from their parents. This process tends to bring about the disappearance of the group as a cultural unit in a relatively short time.[84]

Certainly when it comes to recruitment and use in armed hostilities of children by armed groups or forces committing mass atrocity and/or genocide, the 'culture' so-to-speak of that armed group is defined by its commission of mass atrocities and all else pales insofar as any other characteristics the armed group or force may have. It is then this 'culture' of killing and torture in which the transferred children become immersed as child soldiers such that the children's cultural/ethnic past and identity is essentially obliterated in the children's psychology.

Later in the drafting process of the Genocide Convention it was recognized that the transfer of children from one group to another could have a biological dimension leading to the destruction of a part or all of the group from whence the children originally came. By removing at least some of the next generation through forcible transfer out of the group there would be a reduction in the reproductive capacity and vitality of the group of origin just as surely as would be the case via preventing

[81] Mundorff (2009), p. 99.

[82] *Prosecutor v Akayesu* (1998).

[83] Genocide Convention (1951).

[84] Van Krieken (2004), p. 135.

births in the group by other means (i.e. via forced sterilization etc) or creating conditions of life that would result in the elimination of part or all of the targeted identifiable group (Note that the latter two modes are listed in the Genocide Convention).[85] Thus, one must concur with Van Krieken, that the inclusion of the 'forcible transfer of children of the group to another group' as a form of genocide is not as enigmatic as some may claim.[86]

It is argued here that not including in the broad category of 'genocidal forcible transfer of children' the recruitment of children and their use in hostilities by an armed group or force engaged in committing mass atrocities and /or genocide is an unreasonable interpretation of Article 6(e) of the Rome Statute. According to the Vienna Convention on the Law of Treaties (Article 32); the interpretation of treaties ought not to lead "to a result which is manifestly absurd or unreasonable."[87] In the present context, excluding the recruitment and use of children by armed groups or forces committing systematic mass grave IHL violations from the category 'genocidal forcible transfer of children' is 'manifestly absurd and unreasonable' since: (1) children recruited and used in combat by armed groups directing genocidal acts or mass atrocities at targeted civilian identifiable groups are at high risk of torture and death themselves by both sides of the conflict and (2) these transferred children cannot easily return to their originating groups if at all for the reasons here previously explained thus destroying that group in part or in whole as a consequence. (In contrast, some of the Lebensborn who were transferred to Germany as infants in violation of international law in a clearly genocidal act may have been treated well there).

It is not a reasonable interpretation then of Article 6(e) of the Rome Statute[88] (parallel to Article 2(e) of the Genocide Convention)[89] that the children transferred to a genocidal armed group or one perpetrating mass atrocities and facing, in many instances, physical torture and annihilation by that group or the group's adversary, should not be considered to be victims of genocide by means of the transfer since: (1) the children transferred risk physical destruction (being murdered by one of their compatriots in their own armed group or those in the opposing force) due to the transfer and (2) their original community (defined in terms of nationality, ethnicity, race or religion) has been in part or in whole destroyed due to the children's transfer. Thus, the latter instance of forcible transfer of children of the group to another also meets the definition of genocide in that it infringes "the right of protected groups to their continued existence."[90]

[85] Van Krieken (2004), p. 136.

[86] Van Krieken (2004), pp. 135–136.

[87] Vienna Convention on the Law of Treaties (1980), Article 32.

[88] Rome Statute (2002), Article 6(e).

[89] Genocide Convention (1951).

[90] Mundorff (2009), p. 78.

It is here contended further that the transfer of children to an armed force or group committing mass atrocity and/or genocide is intended by the perpetrators also as an attack on children as a group *per se* (the child group as such) and is not just an attack on the larger national, ethnic religious or racial collective to which the children belong. It is also the 'culture of childhood' (whether viewed through a Western or non-Western lens) that is destroyed in part when: (1) children are forcibly transferred away from their families and communities and used in hostilities by armed groups or forces engaged in various grave violations of IHL and (2) the children in the circumstance must participate in perpetrating the atrocities as resistance is on pain of death.

Despite the fact that some children over generations have been exploited as child soldiers by armed groups and forces committing grave IHL violations in some developing States (particularly but certainly not exclusively in Africa); it is to disregard the children's fundamental universal right to life, security of the person and good development to claim that somehow participating in mass atrocity *is* a natural aspect of childhood in certain so-called developing States. There is nothing natural about such 'child soldiering'. It is rather contrived by those with the specific intent and opportunity to commit genocide by: (1) transferring the children from their home communities to an armed group or force operating on the fringe of society thus destroying the children's original group in whole or in part and (2) appropriating the children as if property to do with as they may without regard for the children's humanity and dignity as persons in their own right. The time is long overdue, it is here argued, that the international community ought to have addressed such 'recruitment' and use of children in hostilities to participate in genocide and/or the commission of mass atrocities as the genocidal conduct that it is (as described in Article 2(e) of the Genocide Convention).[91] To the extent that cultural relativist positions block such a move they, on the analysis here, are counterproductive and inconsistent with the individual State duty and the international community obligation owed to children in terms of special protection during armed conflict. On that basis (along with several others) the current author would dispute the view that a rights-based approach is irrelevant in working with children at risk in the developing world:

> It is essential to recognize that the vision of childhood manifest in the CRC may have only limited relevance for children who lack the social, economic, and political wherewithal to actualize this vision. Instead, they are faced with a set of realities that humanitarians, working in narrow accordance with a "rights-based approach", are currently ill-equipped to comprehend, let alone address.[92]

Rather, the current author would argue that a universal 'rights-based approach' is essential to prevent the genocidal forcible transfer of children to armed groups or forces committing mass atrocities and/or genocide rationalized as simply the local

[91] Genocide Convention (1951), Article 2(e).

[92] Hart (2006), p. 223.

or societal cultural norm. While this author is agreed that extreme poverty and various social and other contextual conditions that foster armed conflict must be addressed, these at the same time cannot be dissected from fundamental human rights matters if the children of the 'developing world' are not to be considered but second class global citizens.

3.4 Children as Autonomous Rights Bearers

With the entry into force of the Convention on the Rights of the Child,[93] the international community of States has come, in large part, to accept that: (1) children are autonomous rights bearers (as persons in their own right); and that (2) children's basic human rights are not just a derivative of the rights that adults in their community hold; existing only as long as the children are part of that community. In this regard, consider the Martens clause which is an applicable principle of international humanitarian law essentially incorporated at Article 21 of the Rome Statute. That article allows the ICC to consider not just the Rome Statute but also customary law which is based on minimum standards of civilized behavior during armed conflict:

> **Rome Statute: Article 21**
> **Applicable law**
> 1. The Court shall apply:
> (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
> (b) *In the second place, where appropriate*, applicable treaties and the *principles and rules of international law, including the established principles of the international law of armed* conflict [customary law]. . ..(emphasis added)[94]

The Martens clause dictates then, for example, that where certain essential protections to groups and individuals during armed conflict are not allegedly afforded under a particular treaty (i.e. there is no explicit reference to the entitlement in the treaty), they are to be 'read into' the treaty on the basis of:

> the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience'[95]

Thus, "the Martens Clause prevents the assumption that anything which is not explicitly prohibited by the relevant treaties is therefore permissible."[96] Therefore, it can properly be argued with reference to the Martens Clause that the prohibition

[93] Convention on the Rights of the Child (1990).
[94] Rome Statute (2002), Article 21 (b).
[95] ICRC (Martens Clause, 1997).
[96] ICRC (Martens Clause, 1997).

during armed conflict against the genocidal act of the forcible transfer of children of the group to another group (under Article 2(e) of the Genocide Convention)[97] applies to the situation (among others) in which children would be used in armed hostilities to perpetrate grave IHL violations including the commission of mass atrocity and/or genocide. This is the case though the Rome Statute on the one hand categorizes the forcible transfer of children of the group to another at Article 6(e) as a form of genocide; but refers to children's participation in armed conflict only in terms of it being a war crime to recruit or use in armed hostilities child soldiers under age 15 (whether in an international or internal armed conflict). The current author contends that in fact Article 26 of the Rome Statute (which sets out an age-based exclusion of prosecution of persons who were children (under 18) at the time of the commission of the genocidal act, war crime or crime against humanity) allows for child soldiers who committed grave conflict-related international crimes to be properly considered as victims of genocidal forcible transfer to the armed group or force committing genocide or mass atrocity and therefore not legally responsible.

The Genocide Convention has traditionally been interpreted to accord protection to the group of children transferred only as a by-product of the protection of the original group's right to existence (i.e. the ethnic, national, religious or racial group from which the children were transferred). However, it is here argued, in contrast, that such forcible transfer of masses of children offends the 'conscience of humanity' regardless the characteristics of the original group targeted in part or in whole for genocide. As a consequence, the 'child group' has an independent right to exist (i.e. to be protected from genocidal acts) separate and apart from the collective right of the originating group (the child's community characterized in terms of nationality, ethnicity, religion and/or race) to persist and to be protected from genocidal destruction though the removal of its children.

It is here argued that Article 2(e) of the Genocide Convention (GC) (concerning the forcible transfer of some or all of the children of the targeted national, ethnic, racial or religious group to another group) concerns also the 'child group' with its *own* rights and standing as an identifiable highly vulnerable group with protection rights under the GC that are *not s*imply a function of the rights of the larger collective community to which the child 'belongs'. The prohibition on prevention, with genocidal intent, of births listed at Article 2(d) of the Genocide Convention[98] (i.e. a provision concerning forced sterilization; forced abortions or any other means of preventing births to accomplish genocide such as the murder of pregnant women of the group targeted etc.) is also a reference to a separable distinct group (i.e. categorized as unborn 'children' *or* fetuses; depending on one's philosophical stance); separable as a group from the larger national, ethnic, racial or religious targeted collective as a whole. The point here is that though the 'child group' is part

[97] Genocide Convention (1951).

[98] Genocide Convention (1951).

of the larger group of origin; the transfer of the children away from the original group is a genocidal act against *two* groups: (1) the original larger group of which the children were members; and (2) the 'child group' as a group in and of itself with it own protection rights. Normally, the transfer of children will be only one of several genocidal acts directed against the original larger group.

It is *erroneous* then to presume that the Genocide Convention[99] (GC) protects children (from transfer away from their original group to another group) *only* as a means of preserving the original larger group of which the children were members (in terms of the group of origin's nationality, religion, race or ethnicity). That mistaken inference is the result of conflating Article 2(e) with Articles 2(a) to (c) of the Genocide Convention[100] which latter provisions do *not* involve a protected separable child group *per se* (as such) unlike Article 2(d) and 2(e). Consider in this regard then a hypothetical; namely stateless children living in a particular jurisdiction who are of *mixed* ethnicity, race and religion due to intermarriage who, if targeted for genocide *simply on the basis of being stateless children* would be unprotected on the traditional GC Article 2 analysis (this despite these children being among the most vulnerable among us). Put differently, the children in the hypothetical case would be unprotected by Article 2(d) and (e) of the GC in particular where their group of origin (the larger collective) could not be defined in terms of a nationality or any one or more groups targeted based on ethnicity, religion, or race. Clearly, the hypothetical points out flaws in the traditional analysis of the Genocide Convention's supposed treatment of children at Article 2 as purportedly being regarded only as a means to preserving human group diversity. *Rather, it is the case that the GC also protects children in their own right as valuable to humanity and not simply as a means to preservation of the diversity of national, ethnic, racial or religious mixed age collectives that include adults.*

Article 2(e) of the Genocide Convention[101] on the 'forcible transfer of children' then refers; it is here contended, also to an attack on 'childhood' itself. Put somewhat differently, the forcible transfer of children of the group to another is an attack on 'children' *as a group* (as well as on the children as individuals). The children *as a group* hold basic human rights to physical, mental and spiritual integrity that are *not* simply derivative of the group rights of the group from whence the children were transferred (an original group defined, for instance, by nationality, ethnicity, race or religion, to use the terminology of the Genocide Convention,[102] and consisting of persons of varied ages including adults). Rather, the children hold basic rights *individually and collectively* based on their *own* humanity and status as natural 'persons' with human dignity (i.e. the right to be protected from the act of genocide through forcible transfer away from their national, ethnic, religious or

[99] Genocide Convention (1951).
[100] Genocide Convention (1951).
[101] Genocide Convention (1951).
[102] Genocide Convention (1951).

racial community group). These rights are separate and apart from the rights of the adult members of the original group entitled to be protected from any form of genocide.

On the latter analysis then Argentina's so-called 'disappeared children' qualify as being victims of genocide under Article 2(e) of the Genocide Convention.[103] The 'disappeared children' of Argentina were the victims of a program run by Argentina's military junta from 1976–1983 in which the junta "held pregnant dissidents until they gave birth before killing the mothers and then dispersing the children to childless military functionaries."[104] The children were thus appropriated by the junta supporters to become members of this new group recalling in some respects Himmler's Lebensborn project.

Mundorff states that the latter child group (Argentina's so-called 'disappeared children' child group) is *not* considered by the majority of scholars on genocide as one victimized by genocide under Article 2(e) of the Genocide Convention (GC)[105]given that: (1) the 'disappeared children' were targeted due to their being the children of the adult members of a political group that opposed the Argentinean military junta of that period and (2) 'political groups' are *not* listed as among the groups protected under the GC. The contention here, in contrast, is that the Argentinean 'disappeared child group' was in fact the victim of genocide under Article 2(e) of the Genocide Convention[106] (children of this group were forcibly transferred to another group; one perpetrating atrocity as its own cultural norm). That these "Argentinean disappeared children" were the victims of genocide is the case as children individually and collectively are autonomous rights bearers whose right not to be victimized by *genocidal* forcible transfer out of their larger collective group cannot simply be reduced to being a derivative of the protection rights of the larger group of origin. Hence, it is irrelevant whether the children's parents were dissidents or not but only relevant whether they were targeted for genocide by means of removal of their children (as well as perhaps by other means). Consider in this regard again a hypothetical. Suppose that the military junta was mistaken in certain instances to think that particular parents were dissidents but transferred their children nonetheless to childless junta military functionaries. Objectively speaking then the children would *not* have been transferred based on their *actually* being the children of adults belonging to a certain political group (a dissident group). Would scholars still consider these children *not* to be victims of genocide as defined in Article 2(e) now based on the *misperceptions* of the perpetrators regarding the *alleged* political group membership of the parents? If so, then the protection rights of children under the GC Article 2(e) are tenuous indeed. Children's right under GC Article 2(e) to be protected from *genocidal* forcible transfer away from their group of origin is, however, it is here argued, robust and independent of the characteristics

[103] Genocide Convention (1951).

[104] Mundorff (2009), pp. 88–89, FN 163.

[105] Genocide Convention (1951).

[106] Genocide Convention (1951), Article 2(e).

of the targeted larger collective of which they are members. This is the case since: (1) children themselves have an independent inherent right to family and community as the parents have their own autonomous right to rear their biological children (as well as those non-biological children whom the community recognizes as properly and lawfully in the charge of those particular adult caretakers)[107] and (2) removing the children from their family and community is to obliterate the child's authentic self identity (which for most children would not be tied up with the political dimensions of the parent group in any case):

> **Convention on the Rights of the Child: Article 7**
> 1. *The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and.* ***as far as possible, the right to know and be cared for by his or her parents.*** 2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless (emphasis added).[108]

Consider also in this regard that the Martens Clause predates the aforementioned events in Argentina (during the period 1976–1983 regarding the forced transfer of children of the political opposition) and also predates the Genocide Convention and is itself incorporated as part of customary law.[109] The Martens Clause requires that: (a) *acts that offend the public conscience be prohibited*; and that (b) the customary laws of war be adhered to. It is here contended that based on the evolving international codified law on children as a vulnerable group with independent rights as a group during armed conflict and as individuals (for instance, as set out in the Additional Protocols to the Geneva Conventions(1977)[110] and, more contemporarily, in the Convention on the Rights of the Child (1990)[111] and the OP-CRC-AC (2002)[112]) as well as customary law including the Martens Clause, these Argentinean child victims of forcible transfer should have been, and should be considered to have been the victims of genocide under Article 2(e) of the Genocide Convention.[113] Their removal left deep unhealed scars on their communities of origin and destroyed the children's authentic sense of identity:

> When a child is forcibly removed from its legitimate family to be put in another, . . .then this constitutes a perfidious usurpation of duty. The repressors who took the disappeared children from their homes, or who seized mothers on the point of giving birth, were making decisions about people's lives in the same cold-blooded way that booty is distributed in war. *Deprived of their identity and taken away from their parents, the disappeared children*

[107] Compare Dwyer (2006).
[108] Convention on the Rights of the Child (1990), Article 7.
[109] ICRC (Ticehurst 1997).
[110] Protocols I and II Additional to the Geneva Conventions (1977).
[111] Convention on the Rights of the Child (1990).
[112] OP-CRC-AC (2002).
[113] Genocide Convention (1951), Article 2(e).

constitute, and will continue to constitute, a deep blemish on our society (emphasis added). – *Nunca Más*[114]

Such a destruction of the child's original identity and the mental suffering caused the parents' and the community of origin are key hallmarks of the international crime of genocidal transfer of children of the group to another group.

3.4.1 Preserving Children's Authentic Identity in Times of Armed Conflict

That special protection is a State obligation owed to children during armed conflict is a well-established principle in international law that dates back to antiquity.[115] Forcible transfer of children away from their larger original collective group is then inconsistent with the requirements of the customary rules of war. Treaty IHL requires further that: (1) safe haven be given to children wherever possible in times of war; (2) that if the children are to be evacuated they be returned to their families as soon as feasible and that the evacuation be with the consent of parents or other lawful caretaker where these can be located [to eliminate the evacuation being a smokescreen for genocidal forcible transfer] and that (3) *children retain their identity* during the period of their evacuation (i.e. their upbringing in terms of moral and religious education be as the parents wish and there be continuity with their cultural past). In this regard, consider, for instance Article 78 of Protocol I Additional to the Geneva Conventions and the stringent measures it stipulates to help ensure war-affected children retain their original identity and ties to their group of origin:

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.
Part IV: Civilian population #Section III – Treatment of persons in the power of a party to the conflict #Chapter II – Measures in favour of women and children
Article 78 – Evacuation of children

1. No Party to the conflict shall arrange for the evacuation of children, *other than its own national*s, to a foreign country except for a temporary evacuation where compelling reasons of the health or medical treatment of the children or, except in occupied territory, their safety, so require. *Where the parents or legal guardians can be found, their written consent to such evacuation is required. If these persons cannot be found, the written consent to such evacuation of the persons who by law or custom are primarily responsible for the care of the children is require*d. Any such evacuation shall be supervised by the Protecting Power in agreement with the Parties concerned, namely, the Party arranging for the evacuation, the Party receiving the children and any Parties whose nationals are being evacuated. In each case, all Parties to the conflict shall take all feasible precautions to avoid endangering the evacuation.

[114] UNICEF (Innocenti Research Centre 2010, p. 4).
[115] Fox (2005).

2. Whenever an evacuation occurs pursuant to paragraph 1, *each child's education, including his religious and moral education as his parents desire, shall be provided while he is away with the greatest possible continuity*.
3. *With a view to facilitating the return to their families and country of children evacuated* pursuant to this Article, the authorities of the Party arranging for the evacuation and, as appropriate, the authorities of the receiving country shall establish for each child a card with photographs, which they shall send to the Central Tracing Agency of the International Committee of the Red Cross. Each card shall bear, whenever possible, and whenever it involves no risk of harm to the child, the following information:

(a) surname(s) of the child;
(b) the child's first name(s);
(c) the child's sex;
(d) the place and date of birth (or, if that date is not known, the approximate age);
(e) the father's full name;
(f) the mother's full name and her maiden name;
(g) the child's next-of-kin;
(h) the child's nationality;
(i) the child's native language, and any other languages he speaks;
(j) the address of the child's family;
(k) any identification number for the child;
(l) the child's state of health;
(m) the child's blood group;
(n) any distinguishing features;
(o) the date on which and the place where the child was found;
(p) the date on which and the place from which the child left the country;
(q) the child's religion, if any;
(r) the child's present address in the receiving country;
(s) should the child die before his return, the date, place and circumstances of death and place of interment (emphasis added).[116]

Similarly Protocol II Additional to the Geneva Conventions contains the following provisions to facilitate children retaining their ethnic/cultural identity and family ties:

3. Children shall be provided with the care and aid they require, and in particular:

(a) they shall receive an education, including religious and moral education, *in keeping with the wishes of their parents, or in the absence of parents, of those responsible for their care;*
(b) all appropriate steps shall be taken to *facilitate the reunion of families* temporarily separated;
(c) children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities;
(d) the special protection provided by this Article to children who have not attained the age of fifteen years shall remain applicable to them if they take a direct part in hostilities despite the provisions of subparagraph (c) and are captured;
(e) *measures shall be taken, if necessary, and whenever possible with the consent of their parents* or persons who by law or custom are primarily responsible for their care, to remove children temporarily from the area in which hostilities are taking place to

[116] Protocol I Additional to the 1949 Geneva Conventions (1977).

> a safer area within the country and ensure that they are accompanied by persons responsible for their safety and well-being.[117]

The above measures in Additional Protocols I and II are an attempt then to prevent the forcible transfer of children by, for instance, foreign nationals or others to another group with the intent of destroying the children' group of origin in whole or in part.

3.5 More on Controversies in Applying Article 2 of the Genocide Convention

It is relevant to note that the four designated groups mentioned as protected by the Genocide Convention (GC)[118] are those in which membership is *allegedly* hereditary and involuntary. Legal scholars in the area of genocide have noted, however, that three of the four groups listed in the Convention; namely national groups, ethnic groups and religious groups "seem to be neither stable nor permanent."[119] This then seriously undermines the rationale for: (1) excluding, for instance, political groups (whose members are so often targeted for annihilation) from the list of protected groups in the Genocide Convention[120]; (2) not making it clear that the list of protected groups enumerated in the GC is of necessity non-exhaustive; and (3) not articulating that whether a group is protected under the Genocide Convention[121] depends on all the circumstances. It is generally held that 'political groups' were excluded from the Genocide Convention's list of protected groups since membership in a political group is generally voluntary and the inclusion of such groups in the GC, it was feared by the drafters, might make the Convention over- inclusive in terms of the potential groups that might be covered.[122] What constitutes proper application of Article 2 of the Genocide Convention has thus, at times, been highly contentious:

> . . .the International Criminal Tribunal for Rwanda (the "ICTR") had difficulties to apply Article II since it was unable to label the Tutsi's as a national, ethnical, racial or religious group. Tutsi's most closely resembled an ethnical group, but their language and culture is in most cases not distinguishable from the majority of Hutu's. In fact the only meaningful way to distinguish between Hutu's and Tutsi' was to check identity cards. . . The ICTR therefore rather sweepingly held in *Akayesu* that the crime of genocide applies to all "stable and permanent groups". . .This . . .is also problematic because most groups protected under Article II are not permanent and stable, religious groups being the most obvious

[117] Protocol II Additional to the 1949 Geneva Conventions (1977).

[118] Genocide Convention (1951).

[119] Schabas (1999), p. 382.

[120] Genocide Convention (1951).

[121] Genocide Convention (1951).

[122] Mundorff (2009), p. 89.

> example. . ..[Further] whether one belongs to a national, ethnical, racial or religious group is primarily determined by the perpetrator of genocide and thus inherently subjective.[123]

The ICTR, for instance, in view of the aforementioned difficulties in classifying the Tutsi according to one of the enumerated groups in the GC, simply sidestepped the issue altogether and problematically held that genocide is a crime that is perpetrated against any "stable and permanent group."[124]

The current author holds in opposition to the view that the list of protected groups in the Genocide Convention (GC)[125] is a definitive list; that the Martens Clause will, in certain circumstances, require a more expansive interpretation of 'protected group' under the GC. Putting that issue aside, however, consider that, in any case, children transferred away from their original group in the midst of coercive conditions (i.e. as are present during armed conflict) and/ or by physical force are being transferred away from a group of origin *which they have not chosen* but with which they were affiliated/were a part through their parents or were born into. In the case, for instance, of the Argentinean 'disappeared children'; the children were targeted because of their parents' political group affiliations; a 'political group' to which the children too were perceived by the junta to be *de facto* members through their parent's alleged affiliation with the dissident group. Hence, when it comes to Article 2(e) of the Genocide Convention; the children transferred are involuntary members of the targeted larger collective regardless whether the parents themselves chose to be members (as with political groups) or were involuntary members (i.e. the children had not joined the political group of dissidents opposing the junta in Argentina but were automatically perceived as such given their parent's affiliations and hence targeted for genocidal forcible transfer away from their families and communities).

Children are to be protected during armed conflict based on *jus cogens* customary rules of war which prevent the specific targeting of children for the infliction of physical and mental injury (as occurs, for instance, as a result of the genocidal forcible transfer of children out of their group of origin thus breaking family and community ties). These rules have, over the years, become better codified in international treaties; though certain significant gaps in children's protection during armed conflict sadly yet persist under current IHL and international human rights treaty law.

Mundorff in discussing the genocidal forcible transfer of children from one group to another refers to Article 2(e) of the Genocide Convention[126] as one concerning, in a sense, "child custody" and the impact of the transfer on the original group. In the present analysis, in contrast, the impact on *children as a group entity in and of itself* is also considered i.e. that is, the destruction of the *children's* identity

[123] Wouters and Verhoeven (2010), pp. 7–8.

[124] Prosecutor v Akayesu, (1998), para 702.

[125] Genocide Convention (1951).

[126] Genocide Convention (1951), Article 2(e).

(the breaking of family and cultural bonds, the destruction of the image of self as child with childlike pursuits and responsibilities which most certainly do not involve committing atrocities etc) is categorized as a violation of the children's fundamental rights and a genocidal act *per se* separate and apart from the destructive impact on the group of which the children were originally a part (although the latter impact of the transfer also sets the conduct out as being genocidal). Note that even where those with genocidal intent forcibly transfer children away from their original group and claim to have benevolent motives, they are still committing a genocidal act also insofar as the 'child group' is concerned in that the children's identity is being destroyed and remade.[127]

The current author holds then that the transfer of children out of their group (for the purpose of destroying the latter in whole or in part which qualifies as genocide) involves not only the destructive impact of the loss of a segment of the child population of the original group (i.e. the loss of the group's reproductive capacity in part), but also the destruction of the identity of the children as a targeted group in and of itself (the impact on the child group in and of itself as a separable group entity). It is here argued then that Article 2(e) of the Genocide Convention[128] cannot be properly interpreted simply and exclusively as "assuring the group's right to custody of the children" as one key vehicle for providing "robust group protection" of the child's original community group which included persons of all ages including adults [the latter group defined in terms of national, racial, ethnic and/or religious characteristics as per the Genocide Convention requirements].[129] Article 2(e) is as much about the children's right to *their* family and community as it is the about the family and community rights to their children.

The groups protected under the Genocide Convention, according to the consensus of scholars of genocide, are groups that propagate through means other than recruitment.[130] Of course the 'child group' (regardless the racial, ethnic, religious or national characteristics of the children) increases in numbers through birth (i.e. means other than 'recruitment') as opposed to, for instance, 'political groups' which increase through the recruitment of new members. Hence rightly, by implication, the child group falls under the protected groups of the Genocide Convention on the above debatable criterion just as surely as do other groups held to propagate through involuntary mechanisms.

It is further here argued that the children targeted for forcible transfer to another group (based on their parent's affiliations with a certain group targeted for destruction in whole or in part as a group) are to be considered victims of genocide under Article 2(e) of the Genocide Convention[131] *even if the parent's group is not*

[127] Mundorff (2009), p. 93.

[128] Genocide Convention (1951), Article 2(e).

[129] Mundorff (2009), pp. 92–93.

[130] Mundorff (2009), p. 90.

[131] Genocide Convention (1951), Article 2(e).

explicitly listed in the Genocide Convention as a protected group. This is the case, it is here contended, as: (1) the children have no control generally over their parent's affiliations or group membership and (2) the children have a right to be protected against genocidal forcible transfer in their own right and not simply as a derivative of parental rights. The latter right of the 'child group' in its own right to be protected against genocidal acts is then: (1) independent of the right of the parent's group to be protected and persist and (2) exists regardless the dimensions of that original group to which the parents are affiliated or of which they are members which became the focus of genocidal attacks (i.e. whether the latter group is defined as a religious group, political group etc.) The (transferred) 'child group' is not just a previous part of the original group but also a group in its own right with inherent rights under IHL which is a function of the members being children and regardless of any other defining characteristics of the particular child group transferred.

The prohibition in the Genocide Convention[132] against the transfer of children from the original group by perpetrators intent on destroying in part or in whole the original group by this means and others, and making that group subservient or eliminating it altogether is thus a right that belongs not only to the original group *per se* as an entity but also to the children themselves individually and collectively as children. On this latter analysis, it does not matter what the nature of the original group is insofar as Article 2(e) is concerned. The original targeted group comprised of persons of various ages, for instance, might be political or defined socio-culturally or could include groups defined by their non-mainstream sexual orientation etc. The list of protected groups in the Genocide Convention at Article 2 then is properly considered as non-exhaustive.

The argument here has been then that Article 2(e) is also intended to protect the 'child group' within the larger targeted population group against such a transfer as a group entity in and of itself and is not just directed to the protection of the integrity of the original larger collective as originally constituted (though there is no doubt that "childrearing is the quintessential process that racial, ethnic, religious or national groups perform as these groups perpetuate themselves primarily through childrearing"[133]). Were this not the correct interpretation, then the reading of Article 2(e) of the Genocide Convention would lead to the unreasonable conclusion that a transferred child group has no value to humanity in and of itself and cannot be the victim of genocide as a group unless: (1) the transferred child group was part of a larger group including adults and (2) these adults were targeted based on, and only on, their religious, national, ethnic or racial characteristics (recall the Argentinean 'disappeared children' case). Were this the situation, then the children's protection against a transfer away from their group of origin to another group would not be their inherent right as a 'child group' (children) and as persons, but would rather derive and be totally a function of the right of the adults (the parents and other

[132] Genocide Convention (1951), Article 2(e).

[133] Mundorff (2009), p. 125.

adults) in their original group to exist regardless their nationality, ethnicity, religion or race. This latter perspective is in fact that which underlies the erroneous assumption that the 'disappeared children' of Argentina do not qualify as victims of genocide (forcible transfer away from one group to another) given the group-defining characteristic of the adults from whom they were taken (namely the latter being members of the political opposition to the military junta in Argentina during the relevant period 1976–1983).

This author holds further that, as with the case for a 'child group'; so too 'the elderly', 'the disabled', 'women' etc. as distinct groups *in and of themselves* can be the victims of genocide *separate and apart* from the genocide perpetrated on the larger group of which they were a part (that is, the larger targeted group being a group with mixed ages, a gender mix and disabled and non-disabled persons of a particular nationality and a certain ethnic, racial or religious heritage). This view can be contrasted with that expressed, for instance, by the ICTY in *Prosecutor v Karadic and Mladic* in which the Court considered systematic rape during armed conflict as but a 'surrounding circumstance' proving genocidal intent directed to the larger mixed gender group of which the women were a part.[134] The mass rape of women in particular to force impregnation has customarily been viewed as a genocidal act against a targeted larger group:

> The Convention can also be used to charge that acts of rape to force impregnation in the Former Yugoslavia were potentially acts of genocide. As noted by Tadeusz Maziowicki, rape of women to forcibly impregnate the victims was one of the most notorious features of the civil war. *Women were raped with the aim of impregnating them with children of the perpetrators' ethnicity*. It is generally accepted that rape to force impregnation can be, and historically has been, used as a tool for genocide (emphasis added).[135]

It is here contended that since the non-Serbian women who were raped during the civil war in the Former Yugoslavia were most frequently unable then to marry within their own community and suffered great mental harms[136]; the act of genocide was also directed against the women as a group in and of itself and not just against the larger ethnic group that was targeted which had lost reproductive capacity as a result of the consequences of the mass rape of many of its women. In addition, the children resulting from these rapes can be considered to have been a group in and of itself targeted for genocide as the children were, due to the aforementioned circumstances, essentially transferred to the perpetrator group insofar as they allegedly ethnically 'belonged to' (in the perception of the women's original community) the ethnic group of the perpetrators (and most often in fact were also physically transferred to the ethnic group of the perpetrators) in violation of Article 2(e) of the Genocide Convention.[137] The women had no means under the

[134] Mundorff (2009), p. 102.
[135] Oh (2003), para 12.
[136] Oh (2003), paras 13–14.
[137] Genocide Convention (1951).

coercive circumstances to insist on the integration of these children (who were the product of rape) into the ethnic group of the mother and both mother and child (child born of wartime rape) suffered severe mental harms as a result. Thus, family and intergenerational ties were broken down. Note that family is essential to the survival of the group:

> Measures that weaken family structures weaken the group, making it more susceptible to outside aggression. *Similarly removing children also weakens families, weaken groups, and makes them vulnerable to outside aggression*. . .Forcible child transfer, like forced deportation, selective killing, and mass rape is a physical act that often operates to destroy the group culturally. It does so biologically, by preventing [the transferred] children from reproducing within the group, and physically, by discouraging children from returning to their group (emphasis added).[138]

It is here argued further that the forcible transfer of children to an armed group for the purpose of their engagement in child soldiering with a group committing mass atrocity is one in which the specific intent requirements for genocide are met. That is, the perpetrators are well aware that genocide will occur for those children as group and in part for their group of origin as well (i.e. the destruction of the children's mental well being and identity, broken family and community ties and often loss of the children's lives during grueling military training or combat) with, in addition, the lingering threat of the forcible transfer for all the remaining children at risk of 'recruitment'. Consider in this regard the specifications regarding the intent requirements for genocide under the Rome Statute at Article 30 which reads in part:

> **Rome Statute: Article 30**
> **Mental element**
> 1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
> 2. For the purposes of this article, a person has intent where:
> (a) In relation to conduct, that person means to engage in the conduct;
> (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
> 3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.[139]

Further, the children *as a separable group* suffer their *own* personal collective 'social death'[140] unable to reintegrate into their original communities/groups (however defined; in ethnic terms, national terms etc.) if they survive the transfer and are returned just as surely is so often the case for women who are the victims of mass rape as a tool of war ("...sexual atrocities can reasonably produce revulsion to the

[138] Mundorff (2009), p. 116.
[139] Rome Statute (2002), Article 30.
[140] Abed (2006), p. 310.

identity that marked the person for the intimate violation. . .")[141]. This often results in intergenerational trauma where the victims of these atrocities tacitly and unintentionally convey their tragic history to their children.

Resultant intended 'social death' and not necessarily also physical death, Abed argues, is the hallmark consequence of genocidal acts.[142] On the analysis here, that social death (genocide) then applies not just to the larger group defined as a particular religious, ethnic, racial or national group (or on some other criterion); but also to the children or women as groups in and of themselves targeted for genocide "*as such*" (as women or children). One could argue, for instance, that the fundamentalist Taliban during their rule in Afghanistan targeted the women and girls of that country for genocide despite their shared ethnicity, religion, nationality and race; destroying the psyche of the women and girls as females their socio-cultural potential for self-actualization of their gifts as individuals and as a gendered group. This analysis differs then from that of MacKinnon and certain others who view mass rape and the various other form of the brutalization of women as but a means to target the larger group for genocide:

> [Referring to the mass rape of non-Serbian women during the Yugoslavia civil war; Mackinnon states] Genocidal rape *did to ethnicity, religion and nationality* [referring to the alleged only genocide- targeted group in the circumstance] what rape *outside genocide* does to sex. When and to what degree that it works, *rape destroys national and ethnic groups*[groups that are listed as protected under the Genocide Convention] *in genocides* as it destroys women as a **group *under sexual inequality*** (emphasis added).[143]

MacKinnon posits the following: "Once sexual abuse in genocide is brought more fully into the open, its function faced, the legal definition of genocide-including its group grounds (should sex be added?). . .can be revisited in a more realistic factual and theoretical context."[144] On the analysis presented here, the answer to MacKinnon's question ('should sex be added?' [as a group ground under the Genocide Convention]) is answered in this way: Gendered groups in and of themselves can and often have been the victims of genocide *as such* suffering a destruction of identity and a social death in the eyes of their community. So, too, it has here been argued that children as a distinct group in their own right are the victims of genocide (forcible transfer out of their group of origin and destruction of their original identity) as a consequence of their recruitment and use in hostilities by an armed group using mass atrocity and /or genocide as a weapon of war. The failure to acknowledge this fact: (1) contributes to children's inadequate protection against genocide by this mode; namely due to a transfer of children of the group to another as described (where the term 'children' is defined as persons under age 18 as per Article 6(e) of the Rome Statute dealing with genocide and the transfer of

[141] MacKinnon (2006), p. 229.
[142] Abed (2006), p. 310.
[143] MacKinnon (2006), p. 232.
[144] MacKinnon (2006), p. 232.

children) and (2) undermines State compliance with UN resolution R2P "Responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity."[145] Let us consider in this regard then how the international criminal courts and tribunals have failed to acknowledge that the transfer of children into an armed group (State or non-State) that is committing mass atrocities with the intent to destroy in part or in whole a targeted population is itself genocide.

3.6 ICTR: A Case Example in Which the Transfer of Children as Child Soldiers to an Armed Group Attempting to Destroy a Targeted Population Ought to Have Been Classified as Itself a Form of Genocide

It is the case that no military or other person who was individually, or in combination with others, responsible for recruiting and using children as child soldiers to commit atrocity as part of an armed group intending genocide against the Tutsi was ever charged by the ICTR with genocide under Article 2(e) of the Statute of the ICTR.[146] Article 2(e) of the Statute of the ICTR duplicates the provision regarding genocide by means of forcibly transferring children of the group to another incorporated at Article 2(e) into the Genocide Convention[147] and at Article 6(e) in the Rome Statute[148]:

Statute of the ICTR
Article 2: Genocide
2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
. . .
(e) Forcibly transferring children of the group to another group
3. The following acts shall be punishable:
(a) Genocide;
(b) Conspiracy to commit genocide;
(c) Direct and public incitement to commit genocide;
(d) Attempt to commit genocide;
(e) Complicity in genocide.[149]

Let us consider then the case of Joseph Kanyabashi filed with the ICTR as an example in relation to the potential to have been indicted also for the genocidal forcible transfer of children to another group.

[145] UN Doc. A/RES/60/1 (2005).
[146] Statute of the ICTR (1994).
[147] Genocide Convention (1951), Article 2(e).
[148] Rome Statute (2002), Article 6(e).
[149] Statute of the ICTR (1994).

3.6.1 Case of Joseph Kanyabashi ICTR-9-15

Consider the ICTR case of Joseph Kanyabashi ICTR-9-15. Kanyabashi whose case is still in progress is charged with, among other crimes, (including crimes against humanity and serious violations of Article 3 common to the Geneva Conventions and Additional Protocol II) killing and causing serious bodily or mental harm as an act of genocide carried out by various modes of action listed under ICTR Statute Article 2(3):

1. Killing and causing serious bodily or mental harm to members of the Tutsi population in violation of the ICTR statute genocide provision at Article 2(a);
2. Conspiracy to commit genocide in violation of ICTR Statute Article 2(3)(b);
3. Direct and public incitement to commit genocide in violation of ICTR Statute Article 2(3)(c).

3.6.2 Background to the Ethnic Conflict in Rwanda in Brief

The ICTR Trial Chamber in *Kanyabashi* outlines relevant historical background to the genocide of the Tutsi in 1994 by Hutu extremists.

Prior to 1959 there had been a Tutsi monarchy in the country. With the revolution of 1959 overthrowing that monarchy; ethnic clashes between the Hutu and Tutsi reoccurred at intermittent periods. In 1961, the Hutu gained political power with the election of the dominant party, the MDR- PARMEHUTU (Movement Democratique Republicain-Parti du Movement d'Emancipation Hutu). There followed violence in which Tutsi and their affiliates were murdered, driven to various regions of the country or forced to flee from the country. The 1973 clashes between Hutu and Tutsi saw power move from civilian political control to military control centralized in the Northern Hutu prefectures of Gisenyi and Ruhengeri. In 1975, President Habyarimana established a single party; the MRND (Mouvement Revolutionnaire National pour le Developpement) of which he was self-proclaimed chairman. From 1973–1994, the Hutu government came increasingly to implement discriminatory policies and practices against the Tutsi in education and employment. The result was that by the late 1980s the most important positions in the political, military, economic and administrative domains in Rwanda were held almost exclusively by Hutu from the Northern prefectures of Gisenyi and Ruhengeri who endorsed an extremist philosophy in support of the privileged status of Hutus as an ethnic group. On October 1, 1990 the RPF (Rwandan Patriotic Front) comprised in the largest part by Tutsi refugees attacked Rwanda. The government responded with thousands of arrests of RPF members and even of Hutu opponents to the MRND in an attempt to quell all political and armed opposition to the ruling party. With internal pressure from the opposition and from the international community the president did establish multiple political parties in 1991 and introduced a new constitution. The President renamed his party the Mouvement Revolutionnaire National pour la

Democratie et le Developpement (MRND) but few opposition members joined. The MRND, however, maintained control over the local administration in the Northern prefectures though it was a minority party. Accords were signed in 1993 with the RPF which provided for shared power between the military and civilian authority and between the RPF, the Hutu opposition to the MRND and the MRND. President Habyarimana and his colleagues however were reluctant to share power and from 1990 on worked to incite genocidal hatred against the Tutsi minority "as a way of building solidarity among the Hutu and keeping themselves in power. . .They [the MRND members and supporters] targeted and labelled as RPF accomplices the entire Tutsi population, and also Hutu opposed to their [MRND] domination particularly those from regions other than northwestern Rwanda."[150] The incitement to ethnic hatred finally culminated in the massacre of Tutsi in 1994.

3.6.3 *Unjustified Failure to Charge Genocide Under Article 2(e) of the Statute of the ICTR:* Kanyabashi *as a Case in Point*

Joseph Kanyabashi is *not* charged with genocide by way of forcible transfer of children to the armed group intent on destroying the Tutsi population in whole or in part. It is here contended that arguably the following evidence supports such a charge under Article 2(e) of the Statute of the ICTR (though his innocence or guilt on any of the charges is, of course, yet to be determined by the ICTR):

> In addition to the incitement to ethnic violence and the extermination of the Tutsi and their 'accomplices,' was the organization and military training of the youth wings of the political parties, notably, the Interahamwe (youth wing of the MRND), the preparation of lists of people to be eliminated, the distribution of weapons to civilians, the assassination of certain political opponents and the massacre of many Tutsi in various parts of Rwanda between October 1990 and April 1994. . .*These youth organizations, which were affiliated to the political parties . . .were soon manipulated as part of the anti-Tutsi campaign. Some of the members of these [youth] organizations, notably the Interahamwe (MRND) were organized into militia groups, which were financed, trained and led by prominent civilians and military figures from the President of the Republic's entourage*. They were issued weapons, with the complicity of certain military and civilian authorities. The [youth] militia units were transported to training sites, including certain military camps, in public administration vehicles or vehicles belonging to companies controlled by the President's circle.[151]

The children in the youth wings; especially those in the *Interahamwe* (MRND), had been forcibly transferred from their communities (where they had simply been civilian participants in a political party) to now being a part of a State armed group trained to participate in genocide upon the Tutsi (forcibly transferred in that any opposition to participation in the genocide would have meant in all likelihood

[150] Prosecutor v Joseph Kanyabashi ICTR-9-15 (2000), para 1.13, p. 5.

[151] Prosecutor v Joseph Kanyabashi ICTR-9-15 (2000), para 1.17, p. 7.

becoming one of the victims oneself). The children trained for genocide in these newly formed youth militias thus lost their identity as Rwandans not ethnically different from the Tutsi. They became mindless reapers of mass atrocity as the coercive circumstances demanded of them if they were to survive the conflict themselves. Yet, Kanyabashi was not charged with forcible transfer of children from one group to another under Article 2(e) pertaining to genocide in the Statute of the ICTR.[152] Rather, he was charged with various other acts of genocide pertaining to the mass atrocities inflicted on the Tutsi. This despite the fact that Kanyabashi was in a position of authority, and according to the other charges in the indictment, allegedly acted with others in "the planning, preparation or execution of a common scheme, strategy or plan to commit the atrocities"[153] set forth in the indictment. Clearly, the conversion of youth wings of the dominant Hutu political factions to militia trained to participate in genocide of the Tutsi was a part of that common scheme, strategy or plan to commit the mass atrocities set forth in the indictment including the massacre of several hundred thousand victims mostly Tutsi.

It is here contended that the transfer of Hutu youth to youth militias and their training to commit genocide as well as their actual participation is a form of genocide upon the Rwandan people –Hutu and Tutsi both (as both, as has been mentioned, are in fact of the same ethnic group). It, furthermore, was a genocidal attack on the children themselves as a separable group as it translated into their own loss of identity and 'social death.' It meant often that after the conflict these children of the youth militia wings could no longer integrate into their communities as they had murdered not only Tutsi but also Hutu opponents of the extremist regime. As a consequence local communities were fractured and the cohesiveness of Rwandan society severely undermined. To fail to charge genocide under Article 2(e) of the ICTR Statute is to fail to acknowledge: (1) the specific targeting and calculated coercive pressures brought to bear on youth to participate in the massacres and (2) the implications for the young people as a group and the society at large of the involvement in particular of these youth in the genocide. Armed groups such as the Hutu *Interahamwe* targeting Hutu children and youth to participate in mass atrocities as child soldiers constituted a 'life force assault' just as surely as did victimizing the children of Hutu moderates and of Tutsi by their killings and mutilations though arguably an assault on a different order:

> If we look at the details of the atrocities committed by the Hutu Interahamwe against young children, for example, the focused assault on several different aspects of the life force become clear: children as physical proof of the community's future, parental love and protectiveness as the bond that promotes family and communal unity, and sexual organs as the biological conduits of life-giving powers.[154]

[152] Statute of the ICTR (1994), Article 2(e).

[153] Prosecutor v Joseph Kanyabashi ICTR-9-15 (2000), para 6.66, p. 40.

[154] Von Joeden-Forgey (2010), p. 5.

Children's transfer as child soldiers to a genocidal armed group destroys the family and hence the 'life force' of the group of origin in part by, for instance: (1) drastically reducing the reproductive capacity of the group of origin (one set apart from the genocidal armed group); (2) disrupting the transmission of cultural knowledge, religious education, the passing on of language and custom to the next generation; (3) destroying the hopes and spiritual vitality of the group of origin; and (4) disrupting the bonds between family members (especially if the child is then ordered to commit atrocities against his or her own family and/or community).[155] These effects are common to the elimination, with genocidal intent, of children from the group of origin by whatever means.

3.7 SCSL: *Prosecutor v Charles Ghankay Taylor*

The civil war in Sierra Leone that started in 1991 between the government and the rebel Revolutionary United Front (RUF) was almost ten years in duration ending in 1999 with the signing of the Lome Peace Accords between the two aforementioned parties to the conflict.[156] Arguably, the RUF was primarily motivated by the desire to gain control over the diamond mines and other resources of Sierra Leone rather than by any political agenda or ideology per se. The civil war in Sierra Leone left some 6,000 civilians (a protected class under IHL) dead and thousands of civilians more gravely injured.[157] In 2000, the United Nations jointly with the Government of Sierra Leone established the Special Court of Sierra Leone with the purpose of holding to account those most responsible for grave human rights violations committed in Sierra Leone since 1996 during the long civil war in violation of both IHL and Sierra Leonean law (including those leaders who had been involved in some way with the atrocities and who threatened the peace process in Sierra Leone). The Statute of the SCSL provides that child soldiers (persons under age 18 and aged at least 15 years) will not be incarcerated but rather face a Truth and Reconciliation forum (theoretically on a voluntary basis); narrate the details of their crimes (with their identity protected) and be ordered into some sort of rehabilitation program that might include education, counseling, employment training etc. or a combination of these and other programs (the SCSL has no jurisdiction over children who were under age 15 at the time of the commission of the crime that would otherwise fall under the Court's jurisdiction). The objective is to create an accurate historical record and promote 'healing'.[158]

[155] Compare Von Joeden-Forgey (2010), p. 6.
[156] Zarifis (2002).
[157] Romero (2004), p. 5.
[158] Romero (2004), p. 10.

This Truth and Reconciliation approach has not met with approval from every segment of the legal academic community such as, for instance, those who view at least some of the children in Sierra Leone who participated in the conflict as alleged volunteer child soldiers and so-called willing participants in atrocity:

> The Court's current policy towards juvenile punishment makes impossible the attainment of just results and neglects to effectuate fundamental notions of deterrence and retribution. The current rehabilitative approach is laudable, but from a real politik perspective, the Sierra Leoneans' demand for retributive punishment highlights the dire need for satisfactory sanctions vis-à-vis culpable combatants. In the absence of such punishments, Sierra Leone will remain unstable and the rule of law illusory … Punishment must be rendered upon juvenile combatants who willingly desecrated human rights in Sierra Leone …The conclusion is that in order to resolve the civil unrest in Sierra Leone, the Court must permit discretionary imprisonment of the most culpable juvenile combatants, while remaining cognizant of mitigating factors such as age and immaturity. ….[159]

Some scholars then advocate criminal liability for alleged child soldier volunteers who committed atrocity during the Sierra Leonean conflict (or other conflict situations) claiming that only the compelled child soldiers should escape punishment in the form of incarceration for some period.

The contrary view espoused here, however, is that no meaningful distinction from an international law perspective can be made between children who were allegedly voluntarily recruited into the RUF (those who purportedly 'joined 'on their own free initiative) versus those who were forcibly recruited. This is the case since children are not expected to fend for themselves in dire situations where their survival is at grave risk. Thus, joining the RUF may have been necessary for the children in the situation to access food, to avoid being slaughtered in an all too frequent RUF murderous rampage on a village etc. (this being the case notwithstanding the fact that, at the same time, these child recruits may or may not have expressed a desire for revenge on government troops in response to RUF propaganda campaigns). Given the aforementioned context; the children's recruitment into the RUF cannot be considered voluntary. The RUF took advantage of the coercive circumstances of the long civil war to recruit child soldiers and the child recruits hence responded under duress. Furthermore, in regards to the latter point (duress and its role in facilitating RUF child soldier recruitment), it is an essential fact that the RUF was engaged in mass atrocity and, even more importantly in the context of this discussion, that this rebel force was specifically targeting children for participation in atrocity. There would have been no requirement under IHL for the children to risk death to resist or attempt to evade recruitment into the RUF. Thus, (1) the coercive circumstances of the civil war; (2) the children's highly vulnerable status qua children, and as a group specifically targeted by the RUF for victimization as child soldiers for use in the fighting and in perpetrating atrocity (with any resistance resulting in the almost certain prospect of oneself succumbing as a victim of atrocity), then leads to an *exclusion* from individual culpability for the

[159] Romero (2004), p. 3.

children who committed atrocity under the command of the RUF. The legal principle of duress underlying this conclusion is well explained in Article 31(1)(d) of the Rome Statute (though children do not of course fall under the ICC jurisdiction in any case):

> **Rome Statute: Article 31**
> **Grounds for excluding criminal responsibility**
>
> 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 thre*at, 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.[160]

Let us then properly acknowledge the fact that children during the Sierra Leonean conflict were the victims of 'forcible transfer' away from their group of origin to another in the context of the RUF recruitment. This qualifies as genocide under Article 2(e) of the Genocide Convention[161] though the Statute of SCSL does not allude to genocide (Recall that according to the ICC genocidal forcible transfer of children to another group does not require the use of physical force but can occur also by means of exploitation of the children's coercive circumstances and hence this would apply to so called RUF child 'volunteers').[162] The children's fate subsequent to their RUF recruitment was that of either physical death at the hands of the adversary or their own armed unit, or; if fortunate enough to survive the hostilities, 'social death' i.e. complete or significant alienation from the group of origin; that is; from the family and the local community from whence the children came (and against whom the RUF perpetrated atrocities as well to quell any opposition to its master plan involving the commission of mass atrocities on civilians). Both the children transferred (recruited) into this armed group and the children's group of origin did endure and continue to endure significant mental suffering that has greatly adversely impacted the resilience and hopefulness of the society. Hence, both the group of origin of the children (with its national, ethnic, religious and other distinguishing characteristics), and the transferred child group itself were undermined in terms of group vitality and reproductive capacity due to the children's recruitment by the RUF and its impact on survival and more generally on the children's physical and mental well-being.

Charles Taylor, the former Liberian President, is being tried by the SCSL. His bid for immunity based on his being a former head of State failed. Charles Taylor was Head of the National Patriotic Front of Liberia (an armed group) from the late 1980's and he was President of the Republic of Liberia from 2 August 1997 to

[160] Rome Statute (2002), Article 31(1)(d).

[161] Genocide Convention (1951), Article 2(e).

[162] Rome Statute Elements of the Crime (Article 6(e), FN 5).

11 August, 2003. He is charged, among other violations of international law (namely various crimes against humanity and war crimes), with the recruitment and use of child soldiers under age 15:

> between 30 November 1996 and 18 January, 2002 throughout the Republic of Sierra Leone, members of the RUF, AFRC and AFRC/RUF junta or alliance and/or Liberian fighters, assisted and encouraged by, acting in concert with, under the direction and/or control of, and /or subordinate to the accused [Charles Taylor], *routinely conscripted, enlisted and/or used boys and girls under the age of 15 to participate in active hostilities. Many of these children were first abducted, then trained in AFRC and/or RUF camps in various locations throughout the country, and therafter used as fighters* (emphasis added).[163]

The recruitment and use of children under 15 for active participation in hostilities was classified by the SCSL under the category 'Other serious violations of international humanitarian law' a violation of Article 4(c) of the Statute of the SCSL in the Taylor case.[164] Note that the prohibition on recruitment of children under 15 as child soldiers was considered by the SCSL to be a rule of customary international law.[165] However, the jurisdiction of the SCSL did not, as mentioned previously, extend to genocide; presumably as genocide was not considered to have occurred during the conflict. This, on the analysis here, is a reflection of the failure to properly categorize the transfer of children to a group committing mass atrocity and /or genocide as an instance of a grave violation of Article 2(e) of the Genocide Convention which fact should have been reflected in the formulation of the statute of the SCSL and the crimes falling under that court's jurisdiction.[166]

The RUF and affiliate's recruitment and use of children under 15 in the Sierra Leonean conflict meant then the children's involvement in mass murder and mutilation of civilian victims as a systemic practice of the RUF rebel group:

> RUF forces—*comprised of thirty percent juvenile soldiers*—implemented a brutal war operation referred to by RUF commanders as "Operation No Living Thing," where rebel forces ripped through Freetown, raping thousands of women, killing innocent civilians, and destroying the capital city. This and numerous other brutal operations conferred upon juvenile soldiers the reputation as the cruelest combatants of the war (emphasis added).[167]

It is estimated that between 5,000 and 10,000 child soldiers were involved at any one time in the long Sierra Leone civil war and that some were as young as eight years old.[168] It is quite clear that in the circumstance the children realistically perceived that their 'choice' was to kill or be killed as members of the RUF and, further, estimated correctly that the chances for evading recruitment were slim and fraught with life threatening perils as well. This horrendous reality, however, seems

[163] Prosecutor v Taylor SCSL 03-01-PT (2007), Para 22 at p. 7.

[164] Statute of the SCSL (2002).

[165] Fox (2005), p. 41.

[166] Genocide Convention (1951, Article 2(e)).

[167] Romero (2004), p. 5.

[168] Fox (2005), p. 41.

largely lost on those scholars, regardless their field (anthropology, law, sociology, psychology etc.) who, from their comfortable, privileged, and safe position, reasonably secure in the knowledge that their own children will never face the hell of mass atrocity and have to make such life and death 'choices', suggest that: (1) the children involved with the RUF ought to have resisted RUF forced 'recruitment' or abduction by escaping[169] (as did the so-called child 'night commuters' of Northern Uganda try to resist abduction by the LRA; though not all of these children were successful in the attempt)[170] and/or (2) the children involved with the RUF ought to have resisted so-called voluntary recruitment by not responding to RUF targeting of children for recruitment[171] as village after village was decimated.[172]

The involvement of children in mass atrocity as child soldiers such as occurred in Sierra Leone occurs with the *intent* to destroy the children's identity and break the children's bonds with and participation in their protected group of origin to the great detriment of the latter and hence constitutes a genocidal forcible transfer of children. Thus, even if the overriding *motive* of the RUF perpetrators of mass atrocity in the Sierra Leone conflict was to exterminate political opponents and their supporters; the perpetrators (a group essentially outside the margins of the rest of society and holding the latter hostage) were well aware that the removal of the children from the children's family and community groups for participation in mass atrocity would seriously disrupt social cohesiveness and hence destroy, at least in part, the continuity between the generations and the normal patterns of life and traditions in the society. Such awareness or knowledge is sufficient to meet the special intent requirements for genocide as explained in the introduction to the elements of the crime of genocide in the Rome Statute ("knowledge of the circumstances will usually be addressed in proving genocidal intent").[173] These patterns of life- sustaining cultural life and tradition in the children's communities were instead replaced for the Sierra Leone child soldier recruits with the brutal practices, and destructive amoral patterns of conduct of the RUF which the child soldier recruits were expected to immerse themselves in and identify with. This is certainly consistent with Lemkin's concept of genocide:

> Genocide has two phases; one the destruction of the national pattern of the oppressed group, the other, the imposition of the national pattern of the oppressor [i.e. the RUF]. . ..This imposition . . .may be made upon the oppressed population [subjected to mass atrocities] which is allowed to remain [the remaining families],. . .or upon the territory after removal of the population [the removed population here being the thousands of children recruited to the RUF to engage in its strategy of atrocity]. . .[174]

[169] Drumbl (2009).

[170] UNICEF (2005).

[171] Honwana (2006).

[172] Romero (2004), p. 3.

[173] Elements of the Crime of Genocide, Introduction (Rome Statute, 2002).

[174] Lemkin (1944), p. 79.

Thus, it is here argued, the case for regarding RUF recruitment (by whatever means) of child soldiers for participation in mass atrocity as genocide under Article 2(e) of the Genocide Convention is made out (i.e. recall that the standard in making out the specific intent requirement as an element of the crime in genocide is, according to the Rome Statute at Article 6(e) Elements of the Crime, satisfied also where there is knowledge of the genocidal consequences of the transfer of children from one group to another for the group of origin. That standard is applied to this analysis).

The contention here is then that the recruitment and use of children (persons under age 18) to participate in mass atrocity as did child soldiers in Sierra Leone with the specific intent that the children would never return to their home communities and families should have been considered as the genocidal forcible transfer of children away from their protected group. On this analysis then the Statute of the SCSL was flawed in not incorporating jurisdiction over the crime of genocide involving the forcible transfer of children of the group to another given that there was knowledge certain by the RUF that the children's transfer (in the form of RUF recruitment) would: (1) destroy, in part, the targeted population from whence the children came; (2) irreversibly damage the child group transferred itself and (3) cause mental suffering to all children in Sierra Leone old enough to understand that they too were at imminent risk of transfer away from their families and communities for active engagement in the hostilities and for direct or indirect involvement in the commission of atrocities.

3.8 Ethnic Cleansing as Genocide: The Forcible Transfer of Children as a Case in Point

3.8.1 Introduction

It is noteworthy that the forcible transfer of adults of the group to another group as a particular form of genocide is not covered in particular under Article 2(e) of the Genocide Convention.[175] This will become relevant in our consideration shortly of 'ethnic cleansing' in the Former Yugoslavia and whether it constitutes genocide in the form of forcible transfer away from one's group (Note that it is often held that under customary law 'deportation' occurs across borders while 'forcible transfer' occurs within borders. The later proposition seems arguable, however, when one considers cases such as the Lebensborn children forcibly transferred with genocidal intent to Nazi families and special child institutions in Germany from various European States during WWII).[176] The fact that Article 2(e) of the Genocide

[175] Genocide Convention (1951), Article 2(e).

[176] *The Prosecutor v. Slobodan Milosevic* (decision; motion for acquittal) (2004).

Convention[177] concerning the transfer of children of the group to another group does not cover adults signifies that children are a special case in this regard. Their forcible transfer, it is here argued, constitutes genocide by definition wherever there is the specific intent to destroy the children's group in itself and/or the larger group from whence the children come or knowledge that this will be the consequence (where destroy means either the elimination of the targeted group in part or in whole through extermination or the destruction of the group as a viable entity through the infliction of mental suffering related to the transfer, disruption of family and of community bonds etc.).

The current author endorses the view that the forcible transfer of children to another group as set out under Article 2(e) of the Genocide Convention[178] does *not* require that the children be integrated into the group into which they were transferred. Rather, forcible transfer has occurred wherever the children are under the custody and control for some period (indefinite or limited) of those perpetrating the transfer with genocidal intent as is the case when children are forcibly transferred and under the custody and control of the perpetrators of ethnic cleansing. That integration into the new group is not an element of the genocidal crime of forcible transfer as set out in the Genocide Convention[179] is evidenced by the fact that there is no time duration specified in Article 2(e) of the GC and, of course, the shorter the time since the transfer; the less likely the children are yet fully integrated into the new group:

> *. . .Article 2(e) 's requirement that children be transferred "to another group" should be considered satisfied when the children are in the other group's control*. It would be absurd to allow a perpetrator to defeat a charge of genocide by keeping children in an orphanage, away from their group of origin but also not integrated into another group (emphasis added).[180]

Recall that in the previous examples discussed here involving the forcible transfer of children away from their group by way of their recruitment and use in hostilities to participate in mass atrocities, the children were most commonly well integrated into the armed unit after a time and identified with their unit and murderous commanders. However, this is often not the case in the context of ethnic cleansing (as in the conflict in the Former Yugoslavia) where there is no effort to integrate the children into the new group and the children may in fact even be under the constant threat of being killed in a massacre. In both categories of cases (children victimized via ethnic cleansing and those forcibly transferred instead as child soldiers to participate in mass atrocity); the children are first and foremost the victims of genocide involving forcible transfer to another group and their conduct as children thereafter must be adjudged in full acknowledgement of that context

[177] Genocide Convention (1951), Article 2(e).

[178] Genocide Convention (1951), Article 2(e).

[179] Genocide Convention (1951), Article 2(e).

[180] Mundorff (2009), p. 91.

(i.e. the child soldiers participation in atrocities). In ethnic cleansing, the children (often with the women) are not uncommonly separated from the men and boys as was the case for instance in the Srebrenica massacre. The children, therefore, have been removed from their larger group of origin (i.e. those not yet removed from the territory and often also from segments of their own local community such as from the men and boys in the community)[181] Further, if some of the children are returned to their original group (i.e. in the post-conflict period); it would appear unjust, as well as legally and logically insupportable, to suggest that they were, on that basis, not forcibly transferred children as defined under Article 2(e) of the Genocide Convention.[182]

There has been debate about whether 'ethnic cleansing' is in fact an act of genocide under any provision of Article 2 the Genocide Convention. To date ethnic cleansing in itself has been prosecuted as a 'crime against humanity' or a 'war crime'.[183] A convincing legal case can be made, however, for the view that ethnic cleansing is a form of genocide:

> Since the 1990's, a new obstacle to calling genocide by its proper name has been the distinction between genocide and "ethnic cleansing," a term originally invented as a euphemism for genocide in the Balkans. *Genocide and "ethnic cleansing" are sometimes portrayed as mutually exclusive crimes, but they are not*. Prof. Schabas, for example, says that the intent of "ethnic cleansing" is expulsion of a group, whereas the intent of "genocide" is its destruction, in whole or in part. He illustrates with a simplistic distinction: in "ethnic cleansing," borders are left open and a group is driven out; in "genocide," borders are closed and a group is killed The fallacy of the distinction is evident in Darfur, where the intent of the Sudanese government and their Janjaweed militias is to drive Fur, Massaleit, and Zaghawa black African farmers off of their ancestral lands (ethnic cleansing) using terror caused by systematic acts of genocide, including mass murder, mass rape, mass starvation, and concentration camps run by Janjaweed and Sudanese army guards, where murder and rape are standing orders. Both ethnic cleansing and genocide are underway in Darfur.[184]

Certainly ethnic cleansing as part of a systematic and varied attack on civilians has been accepted as a circumstance pointing to genocidal intent by some genocide scholars.[185] Further, while ethnic cleansing is regarded as a crime against humanity in the Rome Statute under Article 7(1)(d) referring to deportation and forcible transfer of the population as crimes against humanity[186]; there is nothing to bar consideration on a case-by-case basis of the same conduct as both a crime against humanity and an act of genocide where the intent was to destroy the targeted group in whole or in part or where the knowledge that this would ensue was present. It is significant that Article 7(1)(d) of the Rome Statute refers to forcible transfer of the

[181] Grover (2011a).

[182] Genocide Convention (151, Article 2(e)).

[183] Abed (2006), p. 309.

[184] Stanton (2005).

[185] Singleterry (2010).

[186] Rome Statute (2002), Article 7(1)(d).

entire population and not children in particular since in the latter case the genocidal intent is clearly linked to reducing the reproductive capacity of the targeted group of origin of the transferred children. Note also in regards to Schabas' contention that in genocide borders are closed that this is not necessarily the case in regards to the genocidal forcible transfer of children of the group across borders to another group.

It is here contended that the forcible transfer of children to another group in the context of 'ethnic cleansing' *is itself* an act of genocide falling under Article 2(e) of the Genocide Convention[187] and not merely a circumstance indicating genocidal intent directed at some larger population. This is the case, it is here argued, notwithstanding whether ethnic cleansing of the targeted population as a whole is itself to be considered an act of genocide where adults and children are transferred into the custody of another group as part of a so-called 'purification' scheme (though the current author would argue that it is so, at the very least, under Article 2(b): "Causing serious bodily or mental harm to members of the group" and, depending on the specific factual circumstances, a genocidal act also under Article 2 (a) concerning mass murder and Article 2(c) of the Genocide Convention concerning deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part). It is here held then that ethnic cleansing pertaining to child victims must be considered separately from ethnic cleansing of the larger ethnic collective to which the children belong. This is the case since the provision dealing with the forcible transfer of children as a potential form of genocide incorporated into the Genocide Convention (and duplicated in the statute of the ICTY at Article 4(e))[188] deals with children exclusively. This in recognition of the fact that the transfer of children to another group when linked to genocidal intent is an act of genocide:

Statute of the ICTY: Article 4
Genocide

1. The International Tribunal shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article.
2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

. . .

(e) forcibly transferring children of the group to another group.[189]

Yet, in the cases regarding the conflict and ethnic cleansing in the Former Yugoslavia since 1991, the forcible transfer of children into Serb custody was not classified as genocide under the ICTY Statute Article 4(2)(e). We examine next an ICTY case involving: (1) the forcible transfer of children to another group (labeled as ethnic cleansing by the ICTY) and (2) the failure of the ICTY Trial Chamber to classify this forcible transfer of the children as genocide under Article 4(2)(e) of the

[187] Genocide Convention (1951), Article 2(e).

[188] Updated Statute of the ICTY (2009).

[189] Updated Statute of the ICTY (2009), Article 4(2)(e).

ICTY Statute. We will consider also the implications for the special protections due children under IHL of such a downgrading of the gravity of the crime perpetrated against children in the context of ethnic cleansing and for the notion of children as persons who are rights bearers in their own right.

3.8.2 An Analysis of Bosnia and Herzegovina v. Serbia and Montenegro[190] *(Application of the Convention on the Prevention and Punishment of the Crime of Genocide)*

3.8.2.1 Excerpts from the International Court of Justice Judgement 26 February, 2007 Concerning the Forcible Transfer of Children to Another Group

Excerpted Para 362–362

Article II *(e)*: Forcibly transferring children of the protected group to another group

362. The Applicant claims that rape was used "as a way of affecting the demographic balance by impregnating Muslim women with the sperm of Serb males" or, in other words, as "procreative rape". *The Applicant argues that children born as a result of these "forced pregnancies" would not be considered to be part of the protected group and considers that the intent of the perpetrators was to transfer the unborn children to the group of Bosnian Serbs.*

363. As evidence for this claim, the Applicant referred to a number of sources including the following. In the indictment in the *Gagović et al*. case, the Prosecutor alleged that one of the witnesses was raped by two Bosnian Serb soldiers and that "both perpetrators told her that she would now give birth to Serb babies" (*Gagović et al*., IT-96-23-I, Initial Indictment, 26 June 1996, para. 9.3). However, as in paragraph 356 above, the Court notes that an indictment cannot constitute persuasive evidence for the purposes of the case now before it and that the *Gagović* case did not proceed to trial. The Applicant further referred to the Report of the Commission of Experts which stated that one woman had been detained and raped daily by three or four soldiers and that "she was told that she would give birth to a chetnik boy" (Report of the Commission of Experts, Vol. I, p. 59, para. 248).Current Author Commentary on para 362–363) (emphasis added).

Commentary on Para 362–363:

Mass rape as a weapon of armed conflict as occurred in the Former Yugoslavia inevitably results in intended innumerable forced pregnancies. Whether the statements from Serb perpetrators to the effect that the children resulting from these wartime rapes would belong to the perpetrator ethnic/religious group were or were not admissible before the ICTY is irrelevant. The ICJ could have taken judicial notice of the fact that children born to fathers who have oppressed and terrorized a targeted protected group with mass killings and other brutalities are generally not well integrated into the mother's group of origin if at all. This

[190] *Bosnia and Herzegovina v. Serbia and Montenegro* , (ICJ, 26 February, 2007).

was the case with the Lebensborn children[191] and is a common phenomenon globally with mass wartime rape carried out with genocidal intent. Thus, mass wartime rapes effectuate the forcible transfer of the children born of rape to the perpetrator group consistent with the genocidal intent underlying the conduct in the first instance.

Excepted Para 364–367

> 364. The Applicant also cited the Review of the Indictment in the *Karadžić and Mladić* cases in which the Trial Chamber stated that "some camps were specially devoted to rape, with the aim of forcing the birth of Serbian offspring, the women often being interned until it was too late to undergo an abortion" and that "it would seem that the aim of many rapes was enforced impregnation" (*Karadžić and Mladić*, IT-95-5-R61 and IT-95-18-R61, Review of the Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence, 11 July 1996, para. 64). However, the Court notes that this finding of the Trial Chamber was based only on the testimony of one *amicus curiae* and on the above-mentioned incident reported by the Commission of Experts (*ibid*., para. 64, footnote 154).
>
> 365. Finally, the Applicant noted that in the *Kunarac* case, the ICTY Trial Chamber found that, after raping one of the witnesses, the accused had told her that "she would now carry a Serb baby and would not know who the father would be" (*Kunarac et al* cases, Nos. IT-96-23-T and IT-96-23/1-T, Judgment, 22 February 2001, para. 583).
>
> 366. *The Respondent points out that Muslim women who had been raped gave birth to their babies in Muslim territory and consequently the babies would have been brought up not by Serbs but, on the contrary, by Muslims. Therefore, in its view, it cannot be claimed that the children were transferred from one group to the other*.
>
> 367. *The Court, on the basis of the foregoing elements, finds that the evidence placed before it by the Applicant does not establish that there was any form of policy of forced pregnancy, nor that there was any aim to transfer children of the protected group to another group within the meaning of Article II (e) of the Convention* (emphasis added).

Commentary on Para 364–367:

The attack on family (which often includes a direct attack on children born and unborn) is quintessentially a genocidal act. This is the case in that it denies the protected group hope for a next strong and healthy generation and threatens the survival of the group of origin itself even more effectively perhaps than does the random massacre of adult members of the protected group. Hence, the particular preoccupation with children born and unborn is a standard preoccupation of genocidal perpetrators. Consider the following then in respect of the conflict in the Former Yugoslavia:

> While the majority of Bosniaks killed were "battle age" men, and the majority of Bosniaks raped and expelled were women and children, the atrocities that accompanied this gendered division struck at the very heart of what ties men and women together, the family. Thus, fathers were forced to watch their daughters raped, husbands to watch their pregnant wives' bellies eviscerated, mothers had sons wrenched from their arms to be killed. The importance that the Serbs placed on the male role in reproduction seems in fact to have led to a particular frequency of sexual torture of men, including brutal castrations and coerced father–son rapes. According to one Croatian psychiatrist and survivor of a Serb

[191] Grover (2011a).

> concentration camp, men were beaten on the genitals while being told "You are never going to give birth to any more little Croats [or Muslims].
>
> The Bosnian case shows how important it is that we look beyond gender and ethnicity when assessing the nature of political violence and consider the victims' families and reproductive status. . .In all genocides it appears that pregnant women have faced immediate death by evisceration, and their unborn children and infants have been killed in unimaginably brutal ways, often being smashed against the ground or rocks or used for target practice. This is frequently done in front of the restrained husbands and fathers.[192]

Clearly, the Serbs sought to prevent live births in the targeted protected group by killing pregnant women or otherwise appropriating the children born to Serb perpetrators; most often killing these children born consequent to the Serb pattern and practice of mass rape. The evidence of mass rape during the conflict in the Former Yugoslavia is not contested by the ICJ. Nonetheless, the ICJ unfortunately failed to acknowledge that mass rape as a weapon of war is intricately connected to the objective of 'forced impregnation'. In any case, the raped women if they survived would have a reduced or absent reproductive capacity due to mental and physical damage consequent to the repeated rape and also often various forms of sexual torture. All this, is fundamentally but part of a patterned assault on the next generation which included then the mass killing of children, the removal of foetuses from the mother's womb; the mutilation of the sex organs of both male and females and other atrocities designed to reduce the reproductive capacity of the targeted group. Often as not then the Serb fathers conceptualized the children born of the wartime rape of Muslim women as being dehumanized objects; in part 'of the mother's group of origin' and, for that reason, allegedly legitimately transferred to Serb custody and control for destruction at the hands of Serb perpetrators.

Should any children born of rapes perpetrated by Serbs manage to be born in Muslim territory and escape murder and physical transfer to Serb territory; their chances for successful integration into the mother's group of origin, as mentioned, were slight. Hence, the children were transferred to the Serb ethnic group for all intents and purposes in any case according to the *perceptions* of the Muslim Bosniak or Croat communities in question. The ICJ then, on the view here, failed to understand or acknowledge that the children of mass wartime rape were in fact transferred to the perpetrator group even if born on Muslim territory (especially since the identity of the children in these societies is tied to the identity of the father and particularly so where the father is part of the oppressor group) (*see* para 366–367 of the ICJ judgment *Bosnia and Herzegovina v. Serbia and Montenegro* erroneously denying the genocidal forcible transfer of children born of Serb perpetrated rapes of Muslim women).[193]

What the ICJ failed to recognize was that such attacks; targeting pregnant women (i.e. eviscerating them such that their babies cannot survive), the killing of children, and/or the *mass rape of girls and women and forced impregnation*,

[192] Von Joeden-Forgey (2010), p. 7.

[193] *Bosnia and Herzegovina v. Serbia and Montenegro* (2007), paras 366–367.

and/or the forced transfer of children out of their home territories as here described *are* part of a concerted effort to carry out a genocidal plan. These acts are planned and characteristic of the intent to destroy the protected group in whole or in part and are not just a part of the brutality of armed conflict where IHL is ignored and mass rapes occur as alleged opportunist international crimes in the chaos. These specific acts, for the reasons here already explained, constitute genocide by means of transfer of children to the perpetrator group to do with them as it wills (though the same acts also constitute other international crimes such as but not limited to persecution, murder, inhuman and degrading treatment etc. in violation of international criminal and humanitarian law).

3.8.3 Genocidal Attacks on Family

Von Joeden-Forgey is quite correct that the family is a special target in genocidal assaults on the civilian population and that in fact every member of the family, regardless of age and gender, may be targeted for that reason so as to undermine the vitality and reproductive capacity of the family:

> Because the family plays such an important role in the genocidal process, we risk missing one of the most agonizing aspects of victims' experiences of genocide when we categorize victims individually, solely based on sex, age, profession, or ethnicity rather than familial status. We also risk overlooking key markers of genocidal violence.[194]

Yet, at the same time, attacks on children are specifically recognized in the Genocide Convention under Article 2(e). Thus, while it is necessary to consider the 'family' as one of the prime group targets in genocide, it is also necessary to focus on age-based genocidal acts; that is children as a specific targeted group. It has here been argued that forced transfer of children from their group of origin to another group with genocidal intent involves the genocidal perpetrators having custody and control of the child. The perpetrator either: (1) appropriates the children to the perpetrator group to live as one with that group as in recruitment to an armed group such as the RUF committing mass atrocity or the Lebensborn case (or if the child born of the rape is left with the mother's group; the child is generally perceived as belonging to the perpetrator group in any case given the stigma attached to rape and the often patrilineal nature of the societies involved wherein the child's identity derives from the father) and/or (2) 'disposes' of the children in some horrific torturous manner as the perpetrator sees fit as, for instance, in the brutal massacres and mutilation of children by the RUF and the murderous torture and killing of children and babies by the Janjaweed militias in Darfur:

> The Janjaweed militias. . .take kids and throw them in the air and catch them on bayonets. They smash little kids' faces in. They will take the children from the mothers and throw

[194] Von Joeden-Forgey (2010), p. 8.

> them into the huts while they're burning so that [the mothers] can hear the children screaming. There have been stories of women who have been pregnant and have been cut open and had the babies taken out[195]

In both instances, the children are removed from their group of origin which drastically reduces the vitality and reproductive capacity of the latter as was intended by the perpetrators of these genocidal acts.

The forced transfer of children (by whatever varied means) with genocidal intent causes the targeted protected group untold mental suffering as well as a loss in reproductive capacity. For these reasons, forced transfer of children to another group is an act that often qualifies; depending on the specific facts (along with certain others) as the hallmark of genocide and quite typically occurs as part of the genocidal plan. It is not surprising then from this perspective that the mass atrocities committed against women in terms of forced impregnation, and against babies, children and the unborn are strikingly similar[196] across contexts internationally in which genocide has or is occurring. The current author disagrees thus with the view of Schabas that the mass atrocities occurring in Darfur, for instance, can best be described as 'crimes against humanity' rather than 'genocide'[197] given the concerted systematic attack in Darfur on family; and on children in particular in the manner described (all directed to stripping the protected group of its reproductive capacity and of hope itself).

Schabas in criticizing the Albright-Cohen report on the situation in Darfur states in part:

> So, in fact, what the Albright-Cohen Report is talking about is "crimes against humanity," not "genocide." Why not simply title the report Preventing Crimes Against Humanity? The explanation is the "unmatched rhetorical power" of the "G-word." . . . What the task force has done is really a form of deception: the report uses one term, whose definition is well recognized and well accepted in international law, to replace another. . . .Not every form of sexual harassment will qualify as rape; all homicide is not murder; not every fizzy drink should be described as champagne; and all meat is not filet mignon. Words matter.[198]

The contention here, in contrast, is that: (1) the concept of 'forced transfer' of children to another group and its special role and importance in implementing genocidal objectives; as well as (2) the multitude of ways in which genocidal forced transfer of children to another group can, for all intents and purposes, be accomplished is not always fully appreciated in the legal academic community. This is reflected, in the current author's respectful view, in the above quote from Schabas wherein he challenges the use of the word 'genocide' to describe the horror in Darfur (thus disregarding the significance of, for instance, the Janjaweed militias' treatment of babies, children and pregnant women for making a determination as to whether genocide is occurring in Darfur). Schabas summarily discounts the use of

[195] Von Joeden-Forgey (2010), p. 8.

[196] Von Joeden-Forgey (2010), p. 8.

[197] Schabas (2009), p. 179.

[198] Schabas (2009), p. 179.

the word 'genocide' to apply to the Darfur situation as mere rhetoric, erroneously, on the analysis here, given the evidence of the systematic attack on family in the Darfur situation.

Some may take offense at the mocking tone implicit in Schabas' use of the term "G-word" and the lines: "Not every form of sexual harassment will qualify as rape; all homicide is not murder; not every fizzy drink should be described as champagne; and all meat is not filet mignon" in his challenging the use of the word "genocide" (as opposed to 'crimes against humanity' and 'war crimes' to describe the occurrences in Darfur. Indeed, "words [do] matter." Those who use the word "genocide" to describe what occurred in Darfur may point in part to the Arab Janjaweed militia's: (1) systematic decimation of family (supported by the Omar al-Bashir government in the view of the ICC which has issued a warrant for Bashir's arrest on the charges of genocide, war crimes and crimes against humanity)[199] and (2) the focused attack on murdering children and pregnant women, and mass rape as quintessential markers of genocide (in this case directed at so-called black Africans; the Fur, Masalit and Zaghawa groups, *perceived* by the perpetrators as ethnically and racially different from the Arab inhabitants of the region). Note also that hundreds of thousands of civilians belonging to the Fur, Masalit and Zaghawa groups were subjected to "forcible transfer" according to the Al Bashir second ICC arrest warrant.[200]

3.8.4 The ICC Charge of Genocide Against Omar Hassan Ahmed al-Bashir

The ICC charged Al Bashir with the various counts of genocide (along with other international crimes falling under ICC jurisdiction) as follows:

> . . . Omar Al Bashir is criminally responsible as an indirect perpetrator, or as an indirect co-perpetrator, under article 25(3)(a) of the Statute, for:
> i. Genocide by killing, within the meaning of article 6(a) of the Statute;
> ii. Genocide by causing serious bodily or mental harm, within the meaning of article 6(b) of the Statute; and
> iii. Genocide by deliberately inflicting conditions of life calculated to bring about physical destruction, within the meaning of article 6(c) of the Statute. . .[201]

It is here argued that given: (1) the mass rapes; (2) the systematic attacks on pregnant women and their evisceration; (3) the killing of children as well as (4) the forced transfer of children out of their communities with parts of their larger collective group of origin massacred; a charge of genocide under Article 6(e) of

[199] ICC Second Warrant of Arrest for Omar Hassan Ahmed al-Bashir (12 July, 2010).

[200] ICC Second Warrant of Arrest for Omar Hassan Ahmed al-Bashir (12 July, 2010 at p. 6).

[201] ICC Second Warrant of Arrest for Omar Hassan Ahmed al-Bashir (12 July, 2010 at p. 8).

the Rome Statute concerning genocide via the forcible transfer of children of the group to another is also well supported legally on the facts in the Darfur situation. That is, all of the aforementioned criminal conduct involves taking control and custody of children (unborn and born) to reduce the reproductive capacity and vitality of the targeted perceived distinct ethnic and racial groups thus accomplishing a genocidal objective to eliminate, at least in part, the targeted groups of origin of the children so victimized.

It is relevant to note then in the context of this discussion that Schabas suggests that Article 2(e) of the Genocide Convention (GC) (incorporated also in the Rome Statute) is 'enigmatic' and that he holds that this provision was added as an afterthought to the GC with little debate.[202] While the notion that there was little debate on the matter by the drafters of the GC is arguable, it is incontestable that the forcible transfer of children to another group is an effective component in a genocidal strategy crafted with the intent to destroy the targeted group of origin of the children in whole or in part by reducing its reproductive capacity and vitality. Article 2(e) of the Genocide Convention[203] was formulated, as Mundorff points out, in the aftermath of WWII and with fresh "memories of Himmler's campaign to steal children for the Reich"[204] and hence was a well-considered addition to the GC.

The force of the 'term 'genocide' then as applied to Darfur in particular does not derive from empty rhetorical power. Rather, the power of the word derives in significant part from the factual evidence of for instance: (1) the atrocities committed against children in Darfur as specific prized victim targets and from (2) the destruction of children as a component of the genocidal strategy directed at destroying in whole or in part the reproductive capacity of the children's perceived ethnic and racial groups of origin.

It has been argued here that: (1) the child group itself, furthermore, is a protected group and not just the larger group of origin of the children and that (2) genocide occurs also where there is a transfer of the children for the purpose of remaking the children's identity *and* of destroying, in part or in whole, in some way the children's group of origin regardless the defining characteristics of that group of origin. This author then is in accord with the International Commission of Inquiry on Darfur (ICID) which stated that: "the principle of interpretation of international rules whereby one should give such rules their maximum effect. . .suggests that the rules on genocide should be considered in such a manner as to give them their maximum legal effects."[205] Thus, the protected group in the current analysis of genocide is any group that has been distinguished from others in practice and targeted for genocidal acts (though it is arguable as to whether one's affiliation or membership in the targeted group must not be by choice). Compare the dissenting

[202] See Mundorff (2009), p. 79 FN 105–106.

[203] Genocide Convention (1951).

[204] Mundorff (2009), p. 79.

[205] ICID (2005) para 494.

opinion of ICJ Judge Mahiou in *Bosnia and Herzegovina v. Serbia and Montenegro* which is in accord on this point:

> 73. *The Convention seeks to protect groups of the most extensive kind possible, provided they present "the essential element of stability*" . . . The Convention does not supply a precise definition of the terms "national, ethnical, racial or religious", which is not really a shortcoming since w*hat is important is not so much the objective determination of the characteristic features of each [targeted victim] group as the fact that "measures have been taken in practice to distinguish them*"...This was the case of the Tutsis, whose identity cards showed their ethnic affiliation. This is also the case of the Serbs, Croats and Muslims, defined as such in the Constitution of the SFRY, then that of Bosnia and Herzegovina. . .. *The important consideration is the discriminatory choice of the victims on the basis of an affiliation or non-affiliation [with the targeted group] judged subjectively by the criminals* (emphasis added).[206]

Further, Justice Mahiou in his dissenting opinion explains with reference to an ICTY case that the transfer of a population (and this author would say especially the transfer of children to another group) can mediate the physical destruction of the group:

> 89. On the basis of the opinion of Judge Shahabuddeen in the [ICTY] *Krstic´* Judgment, and after analysing the texts and the situation, the [ICTY] Chamber considered that "**the term 'destroy' in the genocide definition can encompass the forcible transfer of a population"** . . . and that:
>
> 'the physical or biological destruction of a group is not necessarily the death of the group members. ***While killing large numbers of a group may be the most direct means of destroying a group, other acts or series of acts, can also lead to the destruction of the group***. *A group is comprised of its individuals, but also of its history, traditions, the relationship between its members, the relationship with other groups, the relationship with the land*. ***The Trial Chamber finds that the physical or biological destruction of the group is the likely outcome of a forcible transfer of the population when this transfer is conducted in such a way that the group can no longer reconstitute itself — particularly when it involves the separation of its members*** [***for instance the separation of children from the rest of the group***]. **In such cases the Trial Chamber finds that the forcible transfer of individuals could lead to the material destruction of the group, since the group ceases to exist as a group, or at least as the group it was.** The Trial Chamber emphasizes that its reasoning and conclusion are not an argument for the recognition of cultural genocide, but rather an attempt to clarify the meaning of physical or biological destruction.(Para. 666 (emphasis added).

The argument of the current author has been that the forcible transfer of children to the hands of perpetrators of mass atrocity and/or genocide; whether as child soldiers or as children to be absorbed into the new group in some other capacity; or massacred as yet unborn victims, effectively prevents the group of origin from effectively reconstituting itself as it was and, hence, fulfills intended genocidal objectives or creates genocidal consequences which the perpetrators were well aware would eventuate as a result of the transfer of these children. It is, for instance, the systematic pattern of atrocities directed toward non-Serbs (Bosnian Muslims

[206] Dissenting opinion ICJ Justice Mahiou in *Bosnia and Herzegovina v. Serbia and Montenegro* (2007).

and Croats) and the specific nature of the acts (such as the forcible transfer of children by forced impregnation of Muslim women etc.) that marks the Serb conduct as genocidal and intended to destroy the targeted group.[207]

3.8.5 The Case of Prosecutor v Momir Nikolic

It is here contended then that 'ethnic cleansing' insofar as children are concerned is in and of itself a genocidal act and not simply a circumstance in combination with other atrocities heralding impending genocide. A specific example, on the view here, of forcible transfer of children amounting in itself to genocide (rather than just as a warning signal of impending genocide) and involving an individual Serb perpetrator is found in the ICTY case of *Prosecutor v Momir Nikolic*. The ICTY trial judgment of 2 December, 2003 in that case reads in part:

> Potocari, women, *children* and the elderly *were separated* from the able-bodied men. While the men were detained, their wives and *children were placed on buses and forcibly transferred to Muslim-held territory*. This forcible transfer was accompanied by acts of terror, humiliation and utter cruelty.
>
> The detained men were moved out of Potocari for execution. Similarly, the men who had escaped from Srebrenica in "the column" were captured and detained, pending execution. . .
>
> He [Momir Nikolic] did not raise any objections to what he was told was the plan: to deport Muslim women and children to Muslim held territory, and to separate, detain, and ultimately kill the Muslim men. . .
>
> On 12 July 1995, Momir Nikolic was in Potocari – he saw with his own eyes the separation of men from their families; *he heard the cries of children as they saw their fathers taken away*; he saw the fear in the eyes of the women pushed on to buses as they knew that the fate of their fathers, husbands and sons was beyond their control. He has described himself as the co-ordinator of various units operating in Potocari, but he did nothing to stop the beatings, the humiliation, the separations or the killings. . ..
>
> Further, in the months subsequent to the executions, Momir Nikolic co-ordinated the exhumation and re-burial of Muslim bodies. This ongoing support proved valuable in that crucial evidence was destroyed – and has prevented many families knowing the whereabouts of their missing family members. . ..
>
> The Trial Chamber takes particular note of the vulnerability of the victims, who included women, *children* and the elderly, as well as captured men. They were all in a position of helplessness and were subject to cruel treatment at the hands of their captors. In this situation, the Trial Chamber finds this to be an aggravating factor in the commission of the criminal acts.[208]

The above ICTY Trial Court summary of the facts in *Nikolic* relating to the forcible transfer of Muslim children makes it clear that the intention was to permanently separate the children from their fathers and to destroy the family unit which involved also the execution of the fathers and boy children. This conduct

[207] See ICJ Dissenting opinion Justice Mahiou (2007), para 90.

[208] Prosecutor v Momir Nikolic (ICTY Trial Judgment, 2003).

then, on the analysis here, falls under Article 2(e) of the Genocide Convention incorporated also in the ICTY statute at Article 2(e). Yet, as is generally the case in the ICTY jurisprudence, this conduct in respect of children in the context of ethnic cleansing was not classified as an instance of genocide in and of itself comprised of the forcible transfer of children to another group. In the next chapter, we will explore the factors relating to such de-legitimization of forcible transfer of children to another group as an act of genocide in and of itself (as originally set out in the Genocide Convention at Article 2(e)) where there is an intent to destroy, in whole or in part, the children's perceived distinct group of origin; or an awareness at least that this will be the consequence of the transfer.

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Chapter 4
Challenging the Attempt to De-legitimize the Human Rights Claims of Child Soldier Victims of Genocidal Forcible Transfer

4.1 Human Rights Gatekeepers and Their Approach to Child Soldiers

There is, in this author's estimation, among segments of the contemporary academic legal and social science community, NGOs such as Amnesty International and certain others in the field working on human rights/humanitarian relief efforts; a growing tendency toward attempting to de-legitimize to an extent the human rights claims of children who have (in violation of Article 2(e) of the Genocide Convention)[1] been forcibly transferred to armed groups committing mass atrocities and/or genocide. This is implicit in the attribution of: (1) volition and (2) criminal liability (regardless the recommendation of judicial or non-judicial accountability mechanisms for these children) to certain of these child soldiers for their commission of conflict-related atrocities perpetrated as part of armed groups committing mass atrocities and/or genocide. This trend has, on the view here, reached a point where it has erroneously become considered more politically correct, more *au current* academically; more astute and informed; as well as more objective and dispassionately empirically informed to maintain that child soldiers who perpetrated atrocities are, in some instances at least, fully culpable from an international criminal law perspective. For instance consider the following statement from Amnesty International and its problematic nature:

> 6. Amnesty International's position on the prosecutions of child soldiers.
>
> Amnesty International supports the prosecution of any person who is responsible for serious crimes such as genocide, crimes against humanity and war crimes, as long as any trial takes place with all the appropriate fair trial standards in place, and without the possibility of the death penalty or other cruel, inhuman or degrading treatment or punishment being imposed. . .
>
> *. . . it is vitally important that in those cases where persons under 18 acted entirely voluntarily, and were in control of their actions, they should be held to account for their*

[1] Genocide Convention (1951), Article 2(e).

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> *actions in an appropriate setting. Due weight should be given to their age and other mitigating factors, for example, if they were abducted and brutalised by their recruiters.* The assessment of a child's awareness of the choices open to him or her, whether to join the armed groups or to commit atrocities, should be undertaken critically, with due consideration to a child's vulnerability and limited understanding. Such an assessment should contribute to mitigation of the child's responsibility.
>
> Alongside the more complex cases, there may be examples of young commanders of units who committed mass atrocities, including murder and rapes, who were clearly willing and acted without coercion, and who may have forced other children to commit such acts. Where an individual can be held responsible for their actions, failure to bring them to justice will support impunity and lead to a denial of justice to their victims. It may even encourage the use of children to commit atrocities.[2]
>
> *Amnesty International would not oppose such prosecutions of children between 15 and 18, as long as the court concerned implements fair trial guidelines for children in full, particularly, excluding the possibility of imposing the death penalty or life imprisonment without possibility of release*. Any court in which children take part in proceedings must take into account the special needs of persons under 18 who may participate in the trial in any way, as defendants or as witnesses (emphasis added).[3]

Consider in the above quote from Amnesty International (setting out its position as an organization on the issue of the prosecution of child soldiers for international crimes); the problematic nature of establishing, for the purpose of assessing culpability, the child soldier's alleged voluntary recruitment and/or voluntary participation in atrocities. Amnesty's statement on assessment of the child's alleged degree of voluntariness as to recruitment and as to the commission of atrocity belies the fact that no such objective and accurate assessment can be assured:

> The assessment of a child's awareness of the choices open to him or her, whether to join the armed groups or to commit atrocities, should be undertaken critically, with due consideration to a child's vulnerability and limited understanding. Such an assessment should contribute to mitigation of the child's responsibility.[4]

Retrospective accounts of the child's supposed awareness *at the time* of "[alleged] choices open to him or her" are highly unreliable and hence suspect. Take for example the situation of children in Uganda where some 30,000 children have been abducted by the LRA (Lord's Resistance Army); some as young as eight[5] for participation as child soldiers in hostilities; many of them perpetrating atrocity as members of the LRA which armed group has long adopted a pattern and practice of mass atrocity. The brutality of the LRA is well documented and reflected in the 2005 ICC indictment of LRA head Joseph Kony[6] (who is still at large) for a multitude of crimes against humanity and war crimes. Precisely what 'choices' were realistically available to these children that they were obligated to take under threat of death at the hands of the LRA? What are the alleged 'choice points'

[2] Amnesty International (n.d., pp. 6-7).

[3] Amnesty International (n.d., p. 9).

[4] Amnesty International (n.d., p. 9).

[5] World Vision.

[6] ICC Warrant for Arrest of Joseph Kony (2005).

leading to child soldiering and the commission of atrocity that the assessor of the child's degree, if any, of culpability should properly consider? Does the fact that a particular child ends up as a commander of an armed unit, one perhaps comprised of other youngsters; a unit perpetrating atrocities indicate that the child commander is ipso facto acting without coercion as Amnesty International seems to suggest may be a strong likelihood; at least in some instances? What evidence would count as proof of lack of coercion on the child commander in the midst of mass atrocity that included also moderates as victims and a training regime for the child soldier that generally incorporated killing family members and/or others close to the child?

> there may be examples of young commanders of units who committed mass atrocities, including murder and rapes, who were clearly willing and acted without coercion, and who may have forced other children to commit such acts.[7]

Should the children in Northern Uganda all have been expected to have been 'night commuters' attempting to elude the LRA by leaving their rural villages at night and how are we to determine whether any particular child had a feasible chance to escape the LRA at any particular point in time? What of children who attempted to escape or elude the LRA but failed? Are the latter children to be held culpable for the ineffectiveness of their plan?

The current author would suggest that even in the case of youngsters commanding an LRA unit, there are clearly highly coercive elements at play. Any armed group that would commit grave violations of IHL and use children to participate in mass atrocities and/or genocidal activities clearly views the children as expendable pawns. Given that children are in ready supply in these conflict-torn countries; especially in the developing world, and that time and again in conflicts worldwide armed groups have shown that they have no hesitation in eliminating these child soldiers in response to any resistance on the children's part, for sport or to set an example of the children's powerlessness even where the child victims offer up no resistance; it is evident that duress pervades the situation:

> The Lord's Resistance Army was not comprised of disgruntled political opponents returning from exile or secessionists hoping for autonomy. The bulk of foot soldiers exacting Joseph Kony's apocalyptic vision were children. . .Children taken by Joseph Kony faced one of four fates: they became foot soldiers in his personal insurgency; they became porters who carried supplies or farming equipment; they were sold to neighbouring Sudanese for arms and supplies; or they were murdered as an example, to toughen up other abductees.[8]

Yet, Amnesty International; a highly respected longstanding international human rights NGO, suggests that even where the children have been abducted and brutalized at a certain point; this fact may only be a mitigating factor (thus leaving open the question as to whether it would simply serve to mitigate the sentence to some degree or absolve the child of culpability altogether in any

[7] Amnesty International (n.d., p. 9).

[8] Briggs (2005), pp. 108–109.

particular case). Certainly, those States that have opted for criminal prosecution of child soldiers in the national courts have not always shown leniency based on a consideration of the child having acted under duress in perpetrating atrocity. For instance, consider the case of François Minani of Rwanda who at age 16 unwillingly became part of the Hutu genocide of the Tutsi. François was ordered by another teen; Uwimana (the latter leading a band of Hutu youth fighters; members of the Hutu militia called the Interhamwe) in May 1994 to come with his four nephews (the children of his eldest sister) and mother to a hill where there was a shallow pit already dug. François was ordered by Uwimana to murder his four young child nephews with a hoe and was initially beaten into submission then given narcotics to help sedate him while he performed the murders which he was told would be carried out one way or another in any case. The backdrop to all this at that time was ongoing Hutu-perpetrated mass murder, mutilations and/or systematic rape of Tutsi and moderate Hutu. The Hutu rebels had already murdered François' sister and her fiancé who was a Tutsi.[9]

At the end of hostilities and with the ascendancy of a Tutsi government, François Minani was incarcerated for his role in the genocide; one of five thousand youth under age 18 sentenced to serve prison time for participating in various ways in the genocide.[10] Many children under 14 were also imprisoned for their role in the atrocities despite this being a violation of Rwandan law; as were various serious violations of due process such as denial for many of the child inmates for extended periods of access to counsel.[11]The Rwandan cases mark "the first time juveniles anywhere have faced charges for genocide- and François Minani is believed to have been the first juvenile in the world to be tried for such crimes."[12] Francois was convicted as a participant but not a planner of the genocide and since: (1) duress was recognized as a factor in his case and (2) he had already spent 3 years in detention prior to his trial; he was not required to serve the last 2 years of his 5 year sentence.[13] Note that youngsters under age 18 took various roles in the Rwandan genocide as: (1) members of the militia (the Interhamwe); or (2) informants assigned to identify members of the targeted victim group (Tutsi) as well as those Hutu who opposed the genocide who were consequently also targeted and hiding from the Interhamwe; or (3) as perpetrators of looting and stealing personal property as well as destroying houses of the targeted persons or (4) as associates of the Hutu militia serving as bodyguards or servants (but unlike child soldiers not engaged more directly in the genocide; nor informants nor involved in the looting and destruction of victim property).[14] Children 14–18, according to Rwandan law,

[9] Briggs (2005), pp. 1–2.
[10] Briggs (2005), p. 20.
[11] Briggs (2005), p. 20.
[12] Briggs (2005), p. 22.
[13] Briggs (2005), pp. 23–24.
[14] Briggs (2005), p. 18.

were eligible for a maximum of a 20 year sentence depending on their particular role in the genocide and the aggravating and/or mitigating factors if any.[15]

The fact that neither Tutsi nor moderate Hutu could trust all of the children; any one of whom might potentially be Interhamwe unbeknownst to their community and/or immediate family, would have done much to undermine further the cohesiveness and mutual trust of the families in the community and often even the bond between members of the same family. As Amnesty International has pointed out:

> *. . .once children start becoming involved* [*in armed conflict; especially mass atrocity and/or genocide*]*, it puts all children in the conflict zone at risk of recruitment or suspicion of involvement, exposing them to other* [*human rights*] *violations*. The involvement of children [in armed conflict], particularly when combined with the brutalisation and abusive practices [so often] associated with their recruitment, has implications for the way the conflicts are fought-and may indeed be a factor in prolonging them or increasing post-conflict violence and instability (emphasis added).[16]

Children are a separable distinct social group in a society (not just a biological group)[17]to whom the group of origin transmits its cultural identity, ethnic traditions, language thus creating continuity and persistence of the children's group of origin. This former protected group identity of children is, however, destroyed, at least in part, due to the children' participation in mass atrocity and/or genocide and the suspicion from the group of origin directed against all children in the territory (from about age 7 and up) regarding such potential involvement. This then serves to alienate children from the rest of society in the conflict zone and makes reintegration of ex child soldiers in the post-conflict period an uncertain possibility at best where these children have participated in atrocity. The depth of the corrosive consequences on the local communities and society as a whole of recruitment of children into a genocidal armed group such as the Interhamwe is immeasurable. It surely contributed to the destruction in part of the Rwandan society (that is Rwandan society with its Hutu and Tutsi populations combined which groups are technically and from an objective standpoint in fact not different ethnic groups as they share the same language and cultural traditions). As has been commented here previously; genocide undermines the integrity of community for the survivors in a myriad of ways and so too was this the case in Rwanda: "All Rwandans lost people, values, materials, goods, national unity."[18]

UNICEF worked with the government of Rwanda in the post-conflict era and admittedly did some very valuable humanitarian work. For instance, UNICEF encouraged the building of separate wings in the prison system for children who were incarcerated as participants in the genocide and this came to fruition.[19] (Note that the Convention on the Rights of the Child at Article 37(c) requires that States

[15] Briggs (2005), p. 24.

[16] Amnesty International (1999), p. 68.

[17] Jézéquel (2006), p. 6.

[18] Cited in Briggs (2005), p. 19.

[19] Briggs (2005), pp. 21–22.

house child inmates separately from adults unless to do otherwise is in the child's best interests).[20] Prior to these separate wings of detention facilities being established, the children had often been raped or otherwise physically abused by adult prisoners who had easy access to the children in prison.[21] UNICEF also helped establish a center for the 're-education' (de-programming essentially) of children under age 14 who technically, according to Rwandan law, were not eligible to be tried or incarcerated for their role in the genocide though many were as has been mentioned.[22] This center then served as an alternative to incarceration for the children under age 14 or, in some cases, presumably as an adjunct to it where the children had been imprisoned notwithstanding Rwandan law on the incarceration of minors of this age. UNICEF, however, did not advance the idea that the children who participated in the Rwandan genocide (as child soldiers in some capacity, or those who otherwise associated themselves with the Hutu militia group) were in fact the victims of genocidal forcible transfer to the Interhamwe (which armed group took advantage of the coercive circumstances of the ongoing genocide at that time and its correlates to recruit these children and then brutalized them during 'military training') and that therefore the children should not be criminally prosecuted.

It is to be emphasized that the recruitment of children into the genocidal Hutu armed group (regardless whether the children were over or under age 15) was unlawful given that the group itself was illegal as a fighting force that had adopted as a concerted war plan the commission of grave violations of IHL. Thus, the onus from an international law perspective was on the unlawful Hutu armed group (given the special protections owed children during armed conflict under IHL as discussed previously) not to accept child recruits of any age and whether or not allegedly child voluntary recruits or of age (i.e. 15 or over) (and on the State to prevent the same).

4.2 The Failure to Acknowledge the Genocidal Forcible Transfer of Child Soldiers: A Parallel Case in Children Born of War-Time Rape

The international community to date has consistently failed to contemplate (let alone embrace) the notion that children 'recruited' and used in hostilities by armed groups or forces (State or non-State) committing mass atrocity and/or genocide have been 'forcibly transferred' to another group (where 'forcible transfer' refers to the concept as set out in the Genocide Convention at Article 2(e)[23]

[20] Convention on the Rights of the Child (2002), Article 37.

[21] Briggs (2005).

[22] Briggs (2005), pp. 21–22.

[23] Genocide Convention (1951), Article 2(e).

referring to such a transfer as a genocidal act). This, it is here suggested, is part of a pattern of: (1) refusal to acknowledge the occurrence of such forcible transfer of children as a separable protected group to another group in a variety of conflict-related circumstances and (2) a staunch reluctance of the international community to naming the forcible transfer as a genocidal act directed against both children as a separable group and against the children's group of origin or a subgroup thereof defined along national, ethnic, religious, and/or racial and/or other relevant dimensions.

In fact, it is misleading to refer to 'recruitment', whether via alleged voluntary enlistment or by conscription or physical force in referring to child soldier members of a group committing mass atrocity and/or genocide. In the latter case, the child soldier has, in all respects, been appropriated by the armed group or force (as if he or she were property) such that the child's former identity and psychological and cultural self is intentionally stripped from him or her (the child having been 'forcibly transferred to another group' as that term is understood in the Genocide Convention Article 2(e)[24]). These child soldiers are then not simply additional reinforcements to the task of soldiering who maintain the integrity of their former selves and can readily return to their families and communities at the close of hostilities. Rather, these children now 'belong', in the fullest sense of the word, to the armed group or force perpetrating systematic grave IHL violations. In the perception of both the armed group or force involved and the group of origin, the children, now child soldiers engaged also in atrocity, have made a complete and rather permanent transfer to the murderous armed group or force The stripping of the transferred children's former identities (i.e. through brutalization and having the children engage in atrocity including against their own) is intended, it is here suggested, to reinforce the perception that the former self no longer exists and not simply to induce the children's compliance to orders.

The forcible transfer of children to an armed group or force committing mass atrocities and/or genocide is a genocidal act *par excellence*. This is the case as such forcible transfer of children out of their protected group inevitably destroys the group of origin in part or in whole and thus meets the specific intent requirement for genocide as set out in international criminal law. That is, the children's group of origin can no longer easily accept these children if at all (namely those children who survive and attempt to return to their communities) and the group of origin therefore has lost significant reproductive capacity even after the conflict ceases. For these reasons the protected group (the group of origin) has lost its ability to reconstitute itself as it was before the conflict.

Such genocidal forcible transfer is by definition *not* an act to which the victim (the child) can legally consent under any scenario. This is the case since international law does not recognize alleged consent of a child as a defense to such a fundamental violation of the rights of children as persons and no person can waive

[24] Genocide Convention (1951), Article 2(e).

their fundamental rights as human beings. This would appear to go some way to answering the question of the meaning, if any, of 'consent' to child soldiering in the context described; namely in the context of children recruited into an armed group or force committing systematic grave IHL violations as a conflict strategy.

Further, note that while it is the case that: "International law recognizes the existence of both voluntary and involuntary recruitment . . .[it] has little to say on what children's consent might mean. . .".[25] It is here argued, however, that international law does *not* contemplate the legitimacy of any concept of consent of a child to being the victim of genocidal forcible transfer to an armed group or force committing mass atrocities and/or genocide. Therefore, the concept of voluntary recruitment in this context is inapplicable in any case (i.e. where the recruitment into child soldiering is by an armed group or force committing genocide and/or mass atrocities).

On the analysis here, recruitment of children into armed groups (State or non-State) committing mass atrocity and/or genocide (for the purpose of the children's active participation in the hostilities) meets the definition of genocide based in part on the element of *creating great mental and physical suffering* (see Article 2(b) (GC)[26] for: (1) the children recruited (where the children are considered to be a protected group); (2) those children left behind but living with the ever-present threat of 'recruitment' (more precisely often the threat of abduction and forced child soldiering), and for (3) the children's group of origin; the armed commanders instituting the practice of the transfer being fully aware of these multiple highly adverse consequences. Further, as explained, the genocidal transfer of these children into these armed groups or forces perpetrating systematic grave IHL violations is intended to reduce the reproductive capacity of the children's group of origin and by this means also to bring about its destruction in whole or in part (see Article 2 (d) (GC).[27] Recall that 'destruction' of the protected group in genocide need not be a physical destruction but can involve rather the inability of the group of origin to reconstitute itself or do so in its original form due to, for instance, the forcible transfer of part or all of its child population:

> ***The Trial Chamber finds that the physical or biological destruction of the group is the likely outcome of a forcible transfer*** . . .when this transfer is conducted in such a way that the group can no longer reconstitute itself — ***particularly when it involves the separation of its members*** [for instance the separation of children from the rest of the group]. ***In such cases the Trial Chamber finds that the forcible transfer of individuals [i.e. children] could lead to the material destruction of the group, since the group ceases to exist as a group, or at least as the group it was*** **(emphasis added)**[28]

[25] Thomas (2010), p. 94.

[26] Genocide Convention (1951), Article 2(b).

[27] Genocide Convention (1951), Article 2(d).

[28] Dissenting opinion ICJ Justice Mahiou in *Bosnia and Herzegovina v. Serbia and Montenegro* (2007) at para 89.

The forcible transfer of children of the group to another (as when children are recruited by an armed group perpetrating grave IHL violations) is 'a separation of its [the protected group's] members then that causes 'the material destruction of the group [of origin].' The transfer is to another group (the armed group or force committing the mass atrocities and/or genocide) which is distinguishable from the rest of society in the perceptions of the perpetrators and those of the group(s) targeted in whole or in part for destruction.

4.2.1 'Children of the Enemy': Parallel Cases of the Genocidal Forcible Transfer of Children

There has been a gross failure of the international community to acknowledge as a separable human rights issue the plight of children born of mass wartime rape. Children born of mass wartime rape (which is generally associated with intentional forced impregnation), it is here contended, for reasons to be discussed shortly, are also the victims of genocidal forcible transfer to the perpetrator group. Due to pressure from various quarters (i.e. some women's rights groups), UNICEF came to consider that this child group's human rights needs would be better addressed under UNICEF's programs dealing with gender violence (rather than mainly through programming dealing with these children's needs in particular as a specific distinct vulnerable child group in need of protection).[29] There was a consensus at a meeting in 2005 among representatives of UNICEF then "not to define children born of wartime sexual violence as a specific category around which to press specific human rights claims. . ."[30] In the case of ex child soldiers, in contrast, there have been programs specifically dedicated for this vulnerable child group (i.e. NGO demobilization and reintegration programs) premised on a view of the children primarily as victims. However, at the same time, there is, as we have been considering, a movement to hold the ex child soldier accountable for any atrocities he or she may have committed during the conflict (i.e. accountability through Truth and Reconciliation fora and/or local traditional mechanisms which we will discuss in Chap. 5). Such accountability processes in effect further seriously undercut the ex child soldier's perceived victim status in communities that are already reluctant to accept these children.

Note before we continue considering the plight of children born of wartime rape that nothing in what follows is to be interpreted as suggesting that the adult women raped are not deserving of the highest order of international assistance and quality care or that supporting mothers will not benefit their children greatly. Rather, what is suggested is that the children born of wartime rape are entitled under international

[29] Carpenter (2009), pp. 14–29.

[30] Carpenter (2009), p. 15.

human rights and humanitarian law to be regarded as: (1) a special victims group in their own right with the members having unique needs as children[31] and (2) as children who have been forcibly transferred out of their group of origin to another as an act of genocide; perceived by their original communities (group of origin members) as 'children of the enemy' as was the intended result of the mass wartime rapes and forced impregnation in the first instance:

> Such children, it was clear to humanitarian practitioners, were at particular risk of human rights abuses because of community perceptions about their origins as "*children of the enemy* (emphasis added)."[32]

Thus, just as children who served as child soldiers with an armed unit that committed mass atrocities and/or genocide against moderates in their own group and against another distinct group are regarded most often by their communities as alien and not to be trusted; so too is this the case with children born of wartime rape. Both groups of children are, but for different reasons, regarded as 'children of the enemy' to borrow a phrase. That is, both groups of children are perceived by their communities as persons associated in one way or another with the perpetrators of mass atrocity that have destroyed the society at least in part and thus the children have difficulty re-integrating into their communities in the post-conflict period. Both groups of children (ex child soldier members of armed groups or units that committed grave IHL violations and the children born of wartime rape during the conflict) are considered by their home communities as untrustworthy and a potential 'fifth column' element in the home society due to their perceived connection to the perpetrator group. The children in both these groups then are still *in effect* forcibly transferred to the perpetrator group even in the post conflict period given the perceptions of the home community members identifying these children as 'of the enemy'.

Just as ex child soldiers who were recruited into the ranks of armed perpetrators of mass atrocity and/or genocide are forever tainted with the reviled identity of that armed group or force; so too is it the case that the children born of wartime rape become unwilling symbols of a sort for the tragedies that their communities have suffered and the children are often subjected to abuse as a result:

> Case evidence from Bosnia, Rwanda, East Timor, and most recently Darfur has increasingly shown that such children [children born of wartime rape] are subject to stigma, discrimination, and even infanticide in post-conflict settings. ..children born of [wartime] rape and sexual exploitation 'become the symbol of the trauma the nation as a whole went through, and society prefers not to acknowledge their needs.'[33]

In Rwanda the several thousand children born of the quarter of a million women and girls raped or sexually exploited were often referred to as 'enfants mauvais

[31] Compare Carpenter (2009).
[32] Carpenter (2009), p. 14.
[33] Carpenter (2009), p. 14.

souvenirs' ('the children of bad memories') and even their mothers often had great difficulty accepting them.[34]

On the analysis here then both groups of children (the children born of mass wartime rape; and the children who were 'soldiering' or participating in some fashion with an armed group or force systematically attacking civilians and causing them untold physical and mental suffering and destruction) are the victims *in effect* of genocidal forcible transfer. The indicia of that forcible transfer in the post-conflict period include: (1) the stigma these children are subjected to due to their symbolic and tangible link to the armed group or force that perpetrated the mass atrocity and/or genocide and (2) their being unable to properly integrate into their own communities in the post-conflict period their being perceived in one way or the other as 'children of the enemy'. (Note then that genocidal forcible transfer can be accomplished without the children being in the physical custody of the perpetrator as in the case of the children born of wartime rape and ex child soldier returnees who are still perceived as children of the enemy by their home communities). There are then striking parallels between these two child victim groups in their both being forcibly transferred to a perpetrator group as an act of genocide intended to destroy the group of origin in whole or in part. This parallel will come into even clearer focus as we examine the plight of girl child soldiers; a topic we will consider shortly.

4.2.2 Additional Commentary on Defining What Is Meant by 'Group' in the Context of Genocide

Before considering the forcible transfer of girls to armed groups committing mass atrocity and/or genocide as itself a form of genocide, it is necessary to emphasize some essential points regarding what is meant by the term 'group' at Article 2 of the Genocide Convention where it states: "In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such."[35] May points out that there is currently a debate among scholars of the international law of genocide as to:

> whether groups should be defined objectively, on the basis of criteria that anyone can apply, or subjectively, in which [case] only the perpetrators decide who is a member of a group and even what are the relevant groups.[36]

Some legal scholars suggest that there is no hard and fast distinction that can be made between objective and subjective criteria for identifying groups[37] [groups in

[34] Briggs (2005), p. 14.

[35] Genocide Convention (1951), Article 2.

[36] May (2010), p. 91.

[37] May (2010), p. 92.

the context of genocide] and the current author is in accord with that view. For instance, strictly speaking the Tutsi and Hutu are not different ethnic groups. However, the peoples in the region themselves perceived certain distinctions based on various historical factors (occupation and regional territory occupied). Belgian colonialists early on via identity cards, as discussed previously, formalized constructed artificial distinctions between the one group and the other (Hutu versus Tutsi) that came to be interpreted over time in terms of alleged ethnic differences. The same issue of whether or not there were distinct *ethnic* groups in a particular region arises in relation to Darfur; this allegedly being a critical step in deciding whether a genocide can be said to have occurred in the region (i.e. with the one ethnic group intentionally trying destroy in whole or in part another through a multitude of sustained systematic and varied attacks on civilians of the targeted group):

> [In Darfur there is the problem of] how to characterize tribes . . .that were the object of attacks and killings in the Darfur region of the Sudan. The problem is that these tribes "speak the same language (Arabic) and embrace the same religion (Islam)" as do the tribes that were attacking them. Because of intermarriage, the groups have become blurred in social and economic terms.[38]
>
> The tribes in Darfur, as well as the [purported different] ethnic groups in Rwanda pose an especially difficult problem for courts that are mandated to determine if genocide, involving the intentional destruction of a group, has occurred.[39]

Not only is 'ethnicity' often a contentious concept when applied in a particular circumstance as it was in analyzing the Rwandan massacres of the Tutsi (i.e. deciding whether a people in a particular region is comprised of one or different ethnic groups); but the concept of 'race' listed in the Genocide Convention, in particular, is generally regarded as scientifically unsound:

> The concept of race is rejected in contemporary biological studies. . .. The eugenicist research programme has been abandoned for decades and subsequent attempts to preserve a biological treatment of the concept of race are incompatible with contemporary conceptual frameworks in genetics. [i.e. The notion of dividing humanity along alleged racial dimensions has been discredited]. . .With regards to definitions of genocide, these developments have important consequences. If the concept of race does not refer to a biological or genetic reality, its possible uses are considerably limited. . .[in] law. The only way it can still be understood . . .is as a means to refer to a political category used by perpetrators to define their enemy, or by a group to define the way they perceive their collective identity. *Therefore, it shall be considered a category of perception used by political groups for political purposes*. The consequence of this gestalt switch is that the perpetuation of an unreflective concept of race in texts of law or social sciences is perpetuating and reifying categories of victims used by perpetrators of mass murders.[40]

All this points to: (1) the need for a more contemporary interpretation of the concept of 'group' as used in the Genocide Convention based on new scientific and

[38] May (2010), p. 94.
[39] May (2010), p. 96.
[40] Dufour (2001), p. 14.

sociological understandings and (2) the need not to treat the group categories listed in the Convention as exhaustive or necessarily objectively real. Consider, then the importance of victim and perpetrator perceptions:

> What matters is not necessarily the ontological question of the real existence of the Hutu or the Tutsi as a real racial group, but the fact that they perceived themselves as such, or that they are perceived as such by others in a given situation. The identity of the victims and the perpetrators, in short, should never be taken as given.[41]

The issue of what constitutes a group in the context of genocide is relevant also to our consideration of child recruitment into an armed group committing mass atrocity and/or genocide as itself a form of genocide (i.e. forcible transfer of children of the group to another group). This as armed groups or forces perpetrating genocide are often of the same national, religious, ethnic and racial make-up as the group of origin of the children recruited into their ranks (though these armed groups also not uncommonly cross borders into neighboring States to abduct children to serve as child soldiers who differ in nationality and sometimes also along other dimensions such as ethnicity from the adult and certain other child members of the perpetrator armed group or force). As has been mentioned, the current author holds that the groups at issue in a genocide determination are: (1) those *perceived* to exist by the perpetrators (and often also by the victims) or, at a minimum, (2) the victim-perpetrator categories (groups) themselves regardless their specific other group characteristics where the victim group is targeted by one or more of the various means set out at Article 2 of the Genocide Convention[42] for destruction in whole or in part.

4.2.2.1 Lessons on the Definition of Group: The Darfur Situation

The International Commission of Inquiry on Darfur was established by the United Nations 25 January, 2005 to investigate whether the mass murders, rapes, and sexual violence, torture, pillaging, enforced disappearances, and forced displacement, all targeting civilians, that had been occurring and were continuing in Darfur, constituted genocide.[43] Meanwhile, the government of Darfur maintained (on the view here) the pretence that all of their armed activity was strictly aimed at counter-insurgency rather than involving intentional and systematic attacks on civilians.[44] The UN Commission of Inquiry on Darfur concluded that the separable distinct group identities of the various tribes in Darfur had become "crystallized"; transformed from the purely subjective to the objective realm and constituted

[41] Dufour (2001), p. 16.

[42] Genocide Convention (1951), Article 2.

[43] International Commission of Inquiry on Darfur (2005), p. 3.

[44] International Commission of Inquiry on Darfur (2005), p. 3.

therefore (protected) groups under the legal definition in international law.[45] The Commission concluded (outrageously on the view here) that genocide was not occurring in Darfur as the intent requirement on the part of the government was allegedly absent (a conclusion based, it is here contended, on an overly restrictive interpretation of intent as opposed to the more expansive conception of intent used by the ICC and incorporated in the Rome Statute; i.e. the government of Darfur would have known presumably that its armed forces were engaging in conduct on a massive scale and systematically that would inevitably amount to genocide). Notwithstanding the aforementioned inquiry report, the ICC has now indicted Al-Bashir for genocide along with other grave international crimes as mentioned.

For our purposes, however, it is the conception of group that the UN 2005 Darfur Commission of Inquiry uses that is of interest. The Commission's notion of crystallized in-group and out-groups can be applied to the issue of the recruitment of child soldiers into armed groups or forces committing mass atrocity and/or genocide. The perpetrator armed group or force is clearly an 'out-group' (distinguishable from the rest of the mainstream society and its constituents) engaged in aberrant conduct on a massive scale that breaks normal civilized social convention and includes barbarous acts as a matter of routine. The children recruited into that genocidal armed 'out-group' come from the regional mainstream society despite often being poor and even perhaps living somewhat on the fringes of that society in some ways. Thus, there is an 'out-group' (the perpetrators) and 'in-group' (the victims targeted for atrocity and/or genocide) in this situation despite the fact that the children recruited and the armed recruiters may or may not differ in ethnicity, nationality, religion or race. Genocide occurring between such an 'in-group' and 'out-group' within the same ethnic population occurred in Cambodia, for instance; the mass atrocity there often being referred to as an 'auto-genocide' "because it was perpetrated by members of one group against members of the same group."[46]

Some international law scholars such as Schabas[47] object to designating as 'protected groups' any other than the four categories of groups listed in the Genocide Convention. However, as we have seen, debates as to the reality, in an alleged objective sense, already occur with respect to the four group categories currently listed as protected groups in the Genocide Convention (especially when applied to particular cases being assessed as to the possible occurrence of genocide as, for instance, with respect to the mass atrocities in Darfur). It is here argued, in contrast, that: (1) children (persons under age 18) are a protected group in and of themselves as is their larger group of origin however the latter is defined, and that (2) the recruitment of children by whatever means into an armed group or force committing mass atrocity and/or genocide and their use in hostilities constitutes genocidal forcible transfer of the children to another group. The latter is the result

[45] May (2010), pp. 94–95.
[46] May (2010), p. 99.
[47] Schabas (2000), p. 110.

which the perpetrators intend or, at a minimum, had knowledge would be the result (i.e. the ex child soldier will continue to be perceived as 'of the enemy' by their group of origin making their societal re-integration difficult if not impossible even in a post-conflict period). Most of these armed groups or forces perpetrating the genocidal forcible transfer of children to be used as child soldiers, as would be expected, are highly reluctant to release the children during the conflict and most often even in the post-conflict period especially with respect to the girls though there has been some limited success of NGOs in negotiating the release of some child soldiers.

This author then is in accord with May that:

> It is not at all clear that the four categories of groups (national, racial, ethnic or religious) [listed in the Genocide Convention] can be clearly distinguished from gender groups or political groups [or, on the analysis of the current author, whether the four groups listed in the Genocide Convention should be distinguished from children as a distinct vulnerable protected group in and of itself] in terms of anything approximating "objective existence."[48]

In the case of children as a protected group under the Genocide Convention,[49] however, there is in fact an objective age-based criterion for defining the group (persons under age 18) which is well accepted in international law (i.e. as reflected, for instance, in Article 26 of the Rome Statute). In addition, there is an implicit reference to the child group via Article 2(e) of the Convention concerning the forcible transfer of some or all of the designated child population to another group as a genocidal act. Clearly, humanity is greatly diminished when a child group ('belonging' to any larger ethnic, racial, national or religious or other collective) is lost in part or in whole through the destruction of the children's identities by way of genocidal forcible transfer or by any other mode of genocide. It is the special value of children to society and humanity in general that is acknowledged via the separate article concerning the forcible transfer of children to another group classified as an act of genocide. Thus, the current author argues that the Genocide Convention provides an ample legal basis for the 'reading in' of children as a protected group in itself under the Convention. In any case, if ever there were an international instrument that ought to be subject to the Marten's Clause to close any gaps in protection (i.e. for highly vulnerable groups); it is the Genocide Convention which provides legal protection from the 'crime of crimes'. Treating the Genocide Convention[50] as atrophied and non-amenable to a broader interpretation as to what constitutes a 'protected group' is to place political compromises (as to which alleged groups would be explicitly listed in the Convention) above what is legally and morally supportable given the purpose of the Convention and its importance to all humanity.

[48] May (2010), p. 100.

[49] Genocide Convention (1951).

[50] Genocide Convention (1951).

4.2.3 Gendered Sexual Violence and the Forcible Transfer of Children to Another Group

4.2.3.1 Girl Child Soldiers and Forcible Transfer

It has been noted that the international human rights community was late in acknowledging the existence of girl child soldiers and has to date not fully adequately addressed their specific human rights claims and protection needs.[51]

> The use of girl children soldiers is an issue unsolved yet by the international law –neither from its human rights perspective, nor the humanitarian law perspective.[52]

Further, girl child soldiers are little discussed in feminist literature. Thus this potential source of rights advocacy for this particularly vulnerable child population is most often less available than one would have hoped:

> There is some common experience among women and girls in terms of gendered treatment once they are within state or non-state armed groups, but *the abuses that are perpetrated against girls belong in a category of their own, not just because they are often so extreme but also because they are abuses against children. Unfortunately, the analysis or even mention of girl children as participants in conflict situations is rarely found in feminist literature*, sometimes being overlooked even when girls have been present (emphasis added).[53]

This comparatively lesser level of rights advocacy on behalf of girl child soldiers occurs despite the fact that girl child soldiers are estimated to make up between one-tenth and one-third of all child soldiers and are present in the ranks of virtually all non-State armed groups.[54] For instance, it has been estimated that as many as 10,000 girl child soldiers took part in the decades-long Angolan conflict.[55] Girl child soldiers fulfill a multitude of roles including often direct participation in the hostilities, spying, cooking etc. Further, "Girls are often expected to fight even when pregnant or if they have small children."[56] They are most often the victims also of sexual violence and not uncommonly are forced into so-called wife status with a member of the armed unit of which they are part as was, for instance, the common practice of the LRA.[57] Often rebel groups are resistant to releasing girls at the cessation of hostilities and girls are in fact less likely to be released from the armed unit than are boy child soldiers.[58]

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[51] Costache (2010), p. 1.
[52] Costache (2010), p. 2.
[53] Fox (2004), p. 470.
[54] Costache (2010), p. 1.
[55] Morse (2008).
[56] Price (2004).
[57] Briggs (2005), p. 117.
[58] UN New Centre (2010).

> "Used as combatants, labour and sex slaves, victims of months-long violence and rape, girls are all too rarely freed by the armed forces and groups," UNICEF said in a news release in Goma, eastern DRC, marking the International Day against the use of Child Soldiers, noting that only 20 per cent of freed children under the agency's care were girls.[59]

Girl child soldiers are most difficult to re-integrate with their home communities; in some cases arguably even more so than is the case for male child soldiers. This is the case in that girl child soldiers, in addition to having been recruited and perhaps having engaged directly in hostilities; most often have also been sexually violated by the perpetrators of atrocity:

> Evidence from several conflicts suggests that stigma against girls and women is so great that many who are eligible to go through DDR still choose not to go through formal or even informal (e.g. NGO arranged) reintegration programmes, hoping to avoid further marginalization. Yet, young women and girls who return from armed groups with children face stigmatization and marginalization from communities, whether they go through reintegration programmes or return independently. . .. Young mothers are often viewed by the community as having violated community norms by having children outside the recognized societal marriage norms. . .They are frequently labelled as sexually promiscuous and can be regarded as 'spiritually polluted'. . . In addition, these young mothers have often developed attitudes or habits during their time in the armed groups that are considered culturally inappropriate.[60]

If the girl child soldier has had offspring with perpetrators of mass atrocity (i.e. as a result of rape, forced pregnancy or sexual violation in the context of forced marriage); the offspring also is most often treated as an outcast by the mother's group of origin.[61]

> The children are often rejected and physically abused (including the withholding of food and medicines) by extended family members and community members.[62]

This then creates a kind of inter-generational 'forcible transfer' of children, on the analysis here, representing distinct acts of genocide wherein children of two generations are essentially lost to the group of origin.

Forced pregnancy is a common feature of conflict situations where perpetrators are committing mass atrocity and/or genocide:

> Forced pregnancy is defined as the unlawful confinement of a woman to forcibly make her pregnant. During the wars in former Yugoslavia girls were confined, raped and held captive until the possibility of abortion was no longer a viable option for the victim. Girls abducted by rebel forces in Northern Uganda have also been subjected to forced pregnancy, with those who try to prevent pregnancy being beaten or killed.[63]

These armed groups or forces are attempting to create a situation of forcible transfer of children in this way as the 'children of the enemy' are, as explained,

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[59] UN New Centre (2010).

[60] Worthen et al. (2010), p. 55.

[61] Costache (2010), p. 3

[62] Mazurana and Carlson (2006), p. 11.

[63] Mazurana and Carlson (2006), p. 6.

most often shunned by the mother's group of origin as are the mothers themselves (many of whom are children themselves). The more forced pregnancies thus, the more divisive and the greater the potential adverse impact on the victims' group of origin whether these non-soldier mothers (if they survive the conflict and their ordeal) stay away or if they attempt to return (should they be released or rescued at the end of hostilities). So too is this the case with girl child soldiers and their children (the product of rape and forced pregnancy). They are typically not well accepted in the home community and hence commonly not re-integrated or poorly re-integrated. Further, many of the children raped or exposed to other forms of sexual violence while serving as child soldiers contract HIV/AIDS thus further exacerbating their problems regarding re-integration into their communities should they survive the hostilities and return:

> . . . military personnel. . .often have HIV/AIDS infection rates three to four times higher than civilian populations [and this] often means that girls within war affected communities are at greater risk of exposure to the disease than they were previously.[64]

Thus, mass rape as a tool of war as with forced pregnancy – in as much as these acts, in effect, create a circumstance of forcible transfer of the children raped and of any offspring of such rapes and forced pregnancies – are at once, on the view here, 'crimes against humanity' (i.e. under Article 7(1)(g) of the Rome Statute, war crimes (i.e. 'unlawful confinement' under Article 8(2)(vii)) of the Rome Statute and acts of genocide under Article 6(e) of the Rome Statute ('forcible transfer of children to another group').[65]

It is relevant to note that the ICTR in *Prosecutor v. Jean-Paul Akayesu* recognized mass rape and other forms of sexual violence generally as a genocidal act when systematically directed against a particular targeted group (ethnic, racial, religious or national group) with the intent to destroy that group in whole or in part.

> 51. *With regard to count one on genocide, the Chamber having regard, particularly, to the acts described in paragraphs 12(A) and 12(B) of the Indictment, that is, rape and sexual violence, the Chamber wishes to underscore the fact that in its opinion, they constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such.* Indeed, *rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims* . . .and are even, according to the Chamber, one of the worst ways of inflicting harm on the victim as he or she suffers both bodily and mental harm. In light of all the evidence before it, *the Chamber is satisfied that the acts of rape and sexual violence described above, were committed solely against Tutsi women*, many of whom were subjected to the worst public humiliation, mutilated, and raped several times, often in public, in the Bureau Communal premises or in other public places, and often by more than one assailant. *These rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities. Sexual violence was an integral part of the process of*

[64] Mazurana and Carlson (2006), p. 11 at para 45.

[65] Rome Statute (2002).

destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole (emphasis added).[66]

While the ICTR in *Prosecutor v. Jean-Paul Akayesu* made a legal finding that the mass rape of the Tutsi women in Rwanda during the Hutu genocide of the Tutsi between 1 January 1994 and 31 December 1994 was itself genocidal; it did so solely with reference to the element of the crime of genocide relating to the infliction of mental and physical harm (as set out in the ICTR statute Article 2 (b)[67] which duplicated in that respect the 1951 Genocide Convention[68] definition of the crime of genocide and its articulation of the elements of that international crime). That is, there was no reference by the ICTR in *Prosecutor v. Jean-Paul Akayesu* to the connection of mass rape and other systematic conflict-related sexual violence to the 'forcible transfer of children' to another group (the surviving raped girls and the offspring of raped women and girls being considered by their local communities as *de facto* members of the perpetrator group and hence rejected by the rape victim's group of origin). Consider, however, that the rape of female women and children in an armed conflict situation by an armed group committing mass atrocity is a way of claiming those persons for the perpetrator group- symbolically transferring them forever more to that perpetrator group and not just for the period of their captivity (as the rejection by the group of origin of the rape survivors and any offspring of the rapes attests). As the raped children have been defiled in the eyes of their home community; not just by the rape but also by the fact that the child is now associated with the perpetrators of atrocity in this way, the structural integrity of the society is weakened and the group of origin is destroyed in part.

Similar to the analysis of the ICTR in the Akayesu case, the International Commission of Inquiry on Darfur did not link the mass rape and systematic other sexual violence against girls in particular (mostly by government armed forces and Janjaweed) to the forcible transfer of children to another group (a genocidal act in the context of the widespread persecution of civilians including children that was occurring perpetrated by the aforementioned armed group and affiliates). Rather, the Commission classified the abduction and rape and other sexual violence against civilian girl children as possibly amounting to rape as a crime against humanity and concluded also that sexual slavery may also have been occurring on a widespread basis as crime against humanity.[69] Once again, the unique violations that are perpetrated when children are the victims in a genocidal context (Darfur now being recognized by the ICC as such) were not considered or carefully assessed (this time by an international commission of inquiry established by the UN to study the Darfur situation with respect in particular to incidents occurring between February 2003 and mid-January 2005).

[66] Prosecutor v Akayesu (1998), Summary of Judgment para 51.

[67] Statute of the ICTR (1995).

[68] Genocide Convention (1951).

[69] International Commission of Inquiry on Darfur (2005), p. 95 para 360.

In armed conflicts globally the forced marriage of female children, mass rape and other systematic sexual violence generally are more frequently being used as 'weapons of war' so-to-speak (whether the conflict is an internal one or international), and children are among those specifically targeted:

> As part of efforts to destabilize and terrorize communities, armed opposition groups and paramilitaries abduct and rape girls as young as 5 years old, as reported in Colombia.[70]

Where children are among those specifically and systematically targeted for rape and other forms of sexual violence as are, for instance, girl child soldiers and children generally caught up in the midst of mass atrocity and genocide, it is here argued that the children are, for the reasons explained, the victims of forcible transfer to another group (a genocidal act).

Girl child soldiers themselves typically suffering grievous human rights abuses in the context of their soldiering are not infrequently also among those child soldiers who have committed atrocity:

> Girls abducted by fighting forces are often subjected to a number of rights violations, including being forced to kill (sometimes family or community members), or participate in other taboo violations *as a means to break their link with their community* and hence lessen their desire to escape and return. *Girls who try to escape or who refuse orders are severely beaten, tortured or killed, often by other captive children forced to commit these atrocities*. Depending on their roles and gender, children have different experiences during captivity. Girls may be subjected to sexual violations and given to male fighters or commanders as forced wives (see Forced Marriage) (emphasis added).[71]

Whether these girl child soldiers were abducted or allegedly voluntarily joined the armed group or force that was committing mass atrocity (i.e. to seek security for their parents and siblings etc.), the fact is that they do so in the midst of some of the most heinous atrocities being specifically directed against women and girls as was the case, for instance, in Rwanda.[72] The latter then creates a general circumstance of duress and undercuts the case for prosecution of the child soldier whether or not any particular girl child soldier has been sexually violated or not (of course male child soldiers are also subject to sexual violation by members of their armed unit but this is not commonly used as a wartime general tactic or at least not frequently reported on by NGOs). (For instance, the UN has only recently signed an agreement with Afghanistan which acknowledges for the first time the ritual sexual abuse of boys occurring in some official forces (the practice of bacha bazi or "boy play" in which young boys are dressed as girls and used as sex slaves). The agreement requires the State take steps to ensure Afghan police forces and military stop recruiting children and end the practice of sexual abuse of boy children by military and police commanders and others in their ranks.[73]

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[70] Mazurana and Carlson (2006), pp. 8–9.

[71] Mazurana and Carlson (2006), p. 8

[72] Briggs (2005), pp. 13–14.

[73] Nordlund (2011).

It is here contended that we must not let attempts to hold child soldiers accountable for any conflict-related international crimes they may have committed based on their alleged culpability distract us from placing the burden of responsibility where it ought to lie:

> The existence of child soldiers at large and the additional mistreatment suffered by girl soldiers in particular represent the very antithesis of the protection and upholding of human rights that states are expected to provide.[74]
>
> At this point in time... the continued existence of girl soldiers still represents a double insecurity crisis: a failure of the state to protect them from abductions in the first place and a failure of the state and the international community to recognize them as needing reintegration assistance once they are released from their armed groups.[75]

Arguably there has been some improvement in attempts to re-integrate girl child soldiers but the task is in some ways even more difficult than re-integrating ex boy child soldiers. This is the case since the breaking of societal norms when girls are involved with armed groups that have committed mass atrocities against their own ethnic group and other groups is perhaps even more shocking (i.e. given the female's traditional nurturance role in society as devoted family member, mother, daughter, wife etc.) and due to the taint of sexual violation that is more often associated with girls' soldiering involvement).

On the analysis here then child soldiers (boys and girls) recruited into an armed group or force committing mass atrocity and/or genocide are children forcibly transferred to another group as the meaning is set out in the Genocide Convention[76] per Article 2(e) irrespective of whether they were abducted or allegedly volunteered to join. In the same way that the alleged consent of the child victims is irrelevant legally to a determination of whether a group of children were victims of human trafficking[77] so too it is irrelevant to a determination of the occurrence of the forcible transfer of a child group as an act of genocide. Hence, on the analysis here, the prosecution (via judicial or non-judicial accountability mechanisms) of these child soldier victims of genocidal forcible transfer for any international crimes they may have committed while in the custody and control of the armed group or force perpetrating mass atrocities and/or genocide is legally and morally insupportable.

[74] Fox (2004), p. 476.

[75] Fox (2004), p. 476.

[76] Genocide Convention (1951).

[77] Protocol to Prevent, Suppress and Punish Trafficking in Persons (2000), Article 3 (a)(c)(d).

4.3 Gaps in Protection Under International Law Against Child Soldiering

4.3.1 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (OP-CRC-AC)

Under the Optional Protocol to the Convention on the Rights of the Child concerning child soldiers involvement in armed conflict (OP-CRC-AC) (which was not in effect at the time of the Rwandan genocide); non-State groups are not permitted to recruit by any means or mode children of any age or use them directly or indirectly in hostilities. Under the same Protocol, however, children age 15 and over are not protected from so-called 'voluntary' recruitment into the State national forces or from so-called *indirect* involvement in hostilities in that role:

> **Article 1**
> States Parties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a *direct* part in hostilities.[78]

Article 1 of the OP-CRC-AC then is a watered down version of what the Red Cross recommended and which recommendation was referred to in the preamble to the Protocol as follows: "Noting that the twenty-sixth International Conference of the Red Cross and Red Crescent in December 1995 recommended, inter alia, that parties to conflict take every feasible step to ensure that children below the age of 18 years do not take part in hostilities."[79] The Red Cross recommendation then was to prohibit under international law children's direct or indirect involvement in hostilities as part of a State or non-State armed force.

The Protocol on child soldiers does not explicitly stipulate that there is a requirement that those national forces that do recruit children who are allegedly of age must adhere to all IHL in order to be considered eligible to recruit adolescent 'volunteers' into their ranks in the first instance and use them to indirectly participate in hostilities (i.e. aiding and abetting a genocide perhaps by performing scouting activities, informant activities or some other role might be deemed to be indirect participation in hostilities). We cannot assume, however, that a national force that recruits children aged 16 and over to its ranks has legitimate reasons for engaging in hostilities or that it will comply with all applicable IHL. Certainly, mass atrocities are not the sole prerogative of rebel groups. Consider, for instance, the Burmese national armed force which has the largest number of child recruits in

[78] OP-CRC-AC (2002), Article 1.

[79] OP-CRC-AC (2002), Preamble.

the world; some as young as eleven and whose number of child recruits is ever growing.[80]

> Human Rights Watch noted that there is no way to precisely estimate the number of children in Burma's army, but it appears that the vast majority of new recruits are forcibly conscripted, and there may be as many as 70,000 soldiers under the age of 18 [2002 estimate].[81]

These children are routinely forced to commit grave human rights abuses against civilians which no doubt the Burmese army would deny as it would deny the fact that its mode of so-called 'recruitment' of children is generally by means of abduction and force; if it admits child recruitment at all.[82] While such forced recruitment violates the OP-CRC-AC as does the age of recruitment in many instances in the Burmese case, the fact remains that there is no explicit and specific provision in the OP-CRC-AC itself requiring that the national force doing the child recruiting adhere to IHL in its use of child soldiers deemed of age in terms of refraining from targeted attacks on civilians and in all other respects (though the preamble which is *not* legally binding incorporates the line "Recalling the obligation of each party to an armed conflict to abide by the provisions of international humanitarian law").[83] Contrast this with the Convention on the Rights of the Child (CRC) which does contain such an explicit reference to the obligation of States to comply with IHL in all matters affecting children (which would include then also the issue of child soldiering):

> **Convention on the Rights of the Child: Article 38**
> 1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.[84]

Hence, mention of the obligation to comply with IHL during armed conflict; IHL relevant to children, has moved from the legally binding portion of an international law instrument (the CRC) to the non-legally binding segment (the preamble) in another (the OP-CRC-AC). While this State obligation to comply with IHL during armed conflict should be understood as implicit in the Protocol given the customary rules of war; one could argue that the OP-CRC-AC is an ambiguous instrument in this and some other ways. Thus, the IHL and international human rights protections for children aged 15 and over in times of armed conflict under the OP-CRC-AC[85] are weak in certain respects: (1) allowing for so-called voluntary recruitment of children of age (i.e. how does one ensure informed voluntary consent and should parents have the authority to put their children at potential grave risk by providing

[80] Human Rights Watch (2002).
[81] Human Rights Watch News (2002).
[82] Human Rights Watch (2002).
[83] OP-CRC-AC (2002), Preamble.
[84] Convention on the Rights of the Child (1990), Article 38.
[85] OP-CRC-AC (2002).

such consent?) and (2) permitting indirect involvement in hostilities for children of age (the latter without offering a definition of the limits or nature of such 'indirect' involvement).

It should be noted that Article 5 of the OP-CRC-AC stipulates that "Nothing in the present Protocol shall be construed as precluding provisions in the law of a State Party or in international instruments and international humanitarian law that are more conducive to the realization of the rights of the child."[86] (a type of Martens Clause if you will). It has here been argued, for the reasons previously explained, that Article 2(e) of the Genocide Convention,[87] properly interpreted, would prohibit recruitment of persons under age 18 by whatever means into a State or non-State armed group or force engaged in mass atrocity and/or genocide as itself a genocidal act (forcible transfer of children into another group). Thus, there ought to be, at the very least, a stipulation in the OP-CRC-AC prohibiting the recruitment of children of age (or those below that age) or their use in any fashion in hostilities by State or non-State armed groups or forces that do not comply with IHL. This would be consistent with the spirit of Article 5 of the OP-CRC-AC.[88] (This author endorses the ICRC position in any case that persons under age 18 ought not be involved directly or indirectly in armed hostilities).

Note also that the OP-CRC-AC does not make specific mention of girl child soldiers nor their varied experience during armed conflict which routinely includes being the victims of rape and other forms of sexual violence, forced pregnancy and forced marriage as well having to perform combat duties and being compelled to commit atrocities or be killed oneself at the hands of one's own unit nor does the OP-CRC-AC include a legal definition of child soldier.[89]

> This is a classic issue in the human rights movement. In shaping the parameters of an issue, human rights proponents can create a "hot issue" at a high cost. The issue becomes over-simplified and subgroups are marginalized. The downside of this approach is highly visible through examining the situation of girl child soldiers in Uganda: the great success of the campaign against child soldiers in shaping international law has further marginalized girls who are victimized behind the front lines of conflict. Existing international laws addressing child soldiers had already failed to address the complexities of the girl soldier experience; new laws created in response to the campaign against child soldiers further exacerbated this gender imbalance.[90]

Considering the multiple layers of extreme duress experienced by girl child soldiers, it is evident that it is presumptuous at best to assume that culpability for conflict-related international crimes can be attributed to these girl child soldiers.

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[86] OP-CRC-Ac (2002), Article 5.

[87] Genocide Convention (1951), Article 2(e).

[88] OP-CRC-AC (2002).

[89] Leibig (2005), p. 10.

[90] Leibig (2005), p. 2.

4.3.2 *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*

The Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography also fails to adequately protect children especially girl child soldiers. Article 10 of the aforementioned optional protocol states that:

> States parties shall take all necessary steps to strengthen international cooperation by multilateral, regional and bilateral arrangements for the prevention, detection, investigation, prosecution and punishment of those responsible for acts involving sale of children, child prostitution, child pornography and child sex tourism.[91]

As Leibig points out, however, Article 10 does not apply to child soldiers who are sexually abused in various ways:

> Child soldiers do not fit into the categories laid out here: in most cases they are not sold, but abducted; they are not prostitutes because they don't receive any material goods in exchange for their sexual servitude; child pornography and sex tourism are not applicable to child soldiers either. This is yet another example of the failure of the international community to create a body of law to protect female child soldiers. In order for girl child soldiers to be fully protected by international law, their plight must be addressed clearly and specifically in the text of the document.[92]

4.3.3 *Weaknesses in the CRC and the Rome Statute Protection for Girls in the Context of Armed Conflict*

The Convention on the Rights of the Child[93] protects against sexual abuse and exploitation of children through a general provision at Article 34 and from abduction and sexual trafficking at Article 35. However, it does not specifically address the plight of girl child soldiers victimized not only through their recruitment and use in hostilities, but also due to sexual violence perpetrated against them by members of their own armed units.[94] Note also that the Rome Statute[95] which prohibits the recruitment and use for active participation in hostilities of children under age 15, lists rape and other forms of sexual violence as a war crime but not also as a means to transfer children to another group in contexts where there is an intent to destroy

[91] Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography.

[92] Leibig (2005), p. 11.

[93] Convention on the Rights of the Child (1990).

[94] Leibig (2005), p. 9.

[95] Rome Statute (2002).

the group of origin of the children in whole or in part. It is a glaring weakness in girls' protection under international law that no international legally binding instrument affecting children's basic human rights includes a definition of child soldier broad enough to encompass the girl child soldier (whether or not she is exclusively used in hostilities, partially so or instead exclusively used by an armed group as a sexual slave or in some sort of logistical support role). That is, the expansive definition of child soldier which was incorporated into the Cape Town Principles (definition quoted below) and covers girl child soldiers is not to date explicitly adopted under any international law treaty or Convention:

> 'Child soldier' in this document is any person under 18 years of age who is part of any kind of regular or irregular armed force or armed group in any capacity, including but not limited to cooks, porters, messengers and anyone accompanying such groups, other than family members. The definition includes girls recruited for sexual purposes and for forced marriage. It does not, therefore, only refer to a child who is carrying or has carried arms.[96]

4.4 The Thomas Lubanga Dyilo ICC Case and Girl Child Soldiers

The case of Thomas Lubanga is the first case of the ICC and began in January 2008. The defendant is charged with war crimes comprised of conscripting, enlisting and using children under age 15 in hostilities while he headed the Union of Congolese Patriots (UPC) rebel group and its military wing (FPLC) during the conflict in the Democratic Republic of the Congo Ituri district 2002–2003. Though the child soldiers were allegedly ordered to kill members of the Lendu ethnic group – whether civilian or military – Lubanga is not charged with genocide.

The representatives of the victim group (which under ICC rules can participate in the trial when the court finds this is in the interests of justice), after the trial had already commenced, petitioned the court on behalf of the 27 victim participants for a legal 're-characterization of the facts' to reflect also the international crimes of sexual slavery and cruel or inhuman treatment. Former child soldiers as witnesses for the prosecution testified that girl child soldiers of the UPC were abducted and forced into child soldiering and routinely raped by commanders of the FPLC.[97]

> [The commanders] took girls and would get them pregnant, and then these girls had to leave the camp and go [back] to the village,' . . .'The recruits weren't considered human beings, so if someone – a girl – was taken by a commander . . . this had to be accepted.
>
> They [the pregnant child soldiers] took traditional medicines. . . . They had abortions themselves. [The witness said he saw one 14 year old girl die from complications].[98]

[96] Cape Town Principles (1997).

[97] ICC Commentary Trial Reports (5 October 2010).

[98] Gambone (2009).

While the trial court in *Lubanga* approved the requested modification to the characterization of the facts to reflect also 'sexual slavery' and 'cruel or inhuman treatment', this trial judgment was reversed on appeal. The Appeal Chamber held that to let the trial judgment stand would mean that the trial chamber would, on its own motion, allegedly be extending the scope of the trial to facts and circumstances not alleged by the Prosecutor (not simply re-characterizing the same facts to include new crimes) and thus would be acting beyond the trial chamber's jurisdiction. Clearly, it is highly problematic both that the Prosecutor did not charge sex crimes inflicted on girl child soldiers in the indictment of Lubanga in the first instance given the witness testimony and that this flaw in the indictment could not later be corrected at some point either by the Prosecutor or the Court on its own motion. It may be that the Prosecutor wished to simplify the case so as to increase the chances for success in the first-ever case at the international level concerning the international crime of the recruitment and use of children under age 15 in hostilities. Consider in this regard that even the definition of child soldier and what constitutes child soldiering was a contentious matter in the Lubanga trial with the UN Secretary-General's Special Representative for Children and Armed Conflict arguing that children serving behind the frontlines in various support roles for armed groups (State or non-State) are also soldiering:

> Ms. Coomaraswamy [UN Secretary-General's Special Representative for Children and Armed Conflict] told the judges that it was important that their ruling did not ignore what girls did when they were in armed groups regardless of whether or not they took part in direct combat in armed conflict. She said girl child soldiers played multiple roles such as combat, scouting, portering, and sexual slavery.[99]

Note that the co-occurrence of child soldiering with other forms of horrendous child labor is very apparent in regards to the duties of girls 'recruited 'for child soldiering:

> Girls are also abducted and trafficked to perform labor for the armed forces and groups within conflict zones. Girls are abducted and taken to service the fighting forces through cooking, cleaning, maintaining the camps and providing forced sexual services. In addition to providing labor to support fighting forces, *girls are forced to provide labor in illicit commercial operations, including mineral mines, rubber plantations, and logging operations, where they cut down valuable timber, or act as human 'mules' carrying weapons, gems, drugs, timber and other goods* (emphasis added).[100]

The question arises as to where the legal responsibility properly should lie for children's commission of atrocities in the context of child soldiering with an armed group or force committing mass atrocities and/or genocide. If the attempt which we have here been examining to attribute culpability to the child soldier in this context succeeds (despite the State's failure to protect these children from genocidal forcible transfer to such armed groups or forces) then it would seem that the burden

[99] ICC Commentary Trial Reports (2010).

[100] Mazurana and Carlson (2006), p. 9.

of legal responsibility must be shifted to children also with respect to their engagement with other 'worst forms of child labor' (i.e. other immoral and/or extremely hazardous labor). We will examine that question and its implications in the conclusion to this inquiry.

4.5 Improving the Bar to Impunity for the Recruitment and Use of Children by Armed Groups to Perpetrate Atrocity and/or Genocide

Recognition that recruitment of children into armed forces or groups committing mass atrocity and/or genocide constitutes 'forcible transfer to another group' (an act of genocide committed with the intent that the children be permanently removed from their home communities/group of origin) would hopefully allow for better enforcement of international law protections for children around child soldiering in many instances. This is essential given that despite certain advances in international law protections with respect to the recruitment and use of children in hostilities; the numbers of children involved in child soldiering internationally continues to grow especially as members of non-State armed groups.[101]

The Genocide Convention sets out the responsibilities of all State Parties to the Convention to prosecute genocidal acts (such as the forcible transfer of children to another group with the intent to destroy, in whole or in part, the original group from which the children were removed). Such international crimes then are not to be regarded as political crimes which would be of concern only to the particular State involved but rather as crimes that trigger universal jurisdiction:

> **Article IV:** Persons committing genocide or any of the other acts enumerated in article III *shall* be punished, whether they are constitutionally responsible rulers, public officials *or private individuals* [members of rebel groups, militias or national forces that do not adhere to IHL as a matter of routine are in fact legally noncombatants; civilians acting in a manner that violates international law].[102]
>
> **Article VII:** Genocide and the other acts enumerated in article III shall not be considered as political crimes for the purpose of extradition.[103]

Thus, any act of genocide (such as forcible transfer with genocidal intent of children to another group) perpetrated by State or non-State armed groups potentially triggers: (1) universal jurisdiction regarding prosecuting perpetrators i.e. should the government in the territory where the international crimes are occurring be unwilling or unable to prosecute the perpetrators (which perpetrators in some cases might include government armed forces) and another State Party have

[101] Leibig (2005), p. 9.

[102] Genocide Convention (1951), Article 4.

[103] Genocide Convention (1951), Article 7.

national legislation setting out universal jurisdiction of certain international crimes or (2) potentially ICC jurisdiction if the territory where the atrocities are occurring is a State Party to the Rome Statute, *or* the victims or perpetrators are nationals of a State Party to the Rome Statute *or* the matter resulted in an ICC case pursuant to a referral to the Prosecutor of the situation by the UN Security Council (and all other ICC jurisdictional requirements are also met). The fact that the ICC may potentially have jurisdiction over genocide, war crimes and crimes against humanity where there is a referral by the UN Security Council regardless whether the State in which the genocide is occurring is a party to the Rome Statute or accepts the jurisdiction of the ICC develops further the bar to impunity for grave international crimes such as genocide and other mass atrocity committed against civilians (compare Article VI of the Genocide Convention's more limited protections should the State be unable or unwilling to prosecute):

> Article VI: Persons charged with genocide or any of the other acts enumerated in article III *shall* be tried by a competent tribunal of the State in the territory of which the act was committed, or *by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction* (emphasis added).[104] [under the Genocide Convention the State Parties could also ask the UN to take relevant action to prevent genocide or punish perpetrators of genocide and set up the relevant international criminal or hybrid tribunal].

Whether prosecution of those who would recruit children into armed groups to participate in mass atrocity and/or genocide as itself an act of genocide (forcible transfer with genocidal intent of children of the group to another) would help prevent such recruitment and use of children unfortunately remains an open empirical question.

4.6 The Omar Khadr Child Soldier Case

To this author's knowledge no high profile human rights gatekeeper organization has considered that Omar Khadr recruited into the Taliban/Al Qaeda terror network and others like him are the victims of the forcible transfer of children of the group to another as defined under the Genocide Convention at Article 2(e)[105] as is the contention here. Amnesty International (AI) has not taken a stand, for instance, on the high profile case of Omar Khadr[106] held at Guantanamo Bay detention center by the U.S. as to the issue of his degree of culpability, if any, as a child soldier for war crimes he allegedly perpetrated as a 15-year-old in Afghanistan against the U.S. (although AI has criticized the lack of due process accorded Khadr by the U.S. and the abuse that Khadr suffered while in detention by the U.S. in the earlier period of

[104] Genocide Convention (1951), Article 6.
[105] Genocide Convention (1951), Article 2(e).
[106] Grover (2011).

his detention). Khadr has now been convicted by a US Military Commission for his alleged war crimes in Afghanistan committed as an alleged child member of the Taliban/Al Qaeda and is serving the remainder of his sentence which was worked out in a plea deal. It remains to be seen whether Canada will, with the agreement of the U.S., repatriate Khadr after an additional year he spends at Guantanamo as has been rumored.

Such high profile international rights claims gatekeepers as Amnesty International (along with scholars in the backlash seeking to hold child soldiers accountable) have contributed to the erroneous perception that child soldiers who commit atrocities cannot legitimately claim victim status and complete lack of culpability based on the fact that they were recruits into an armed force committing systematic grave violations of IHL (though various factors such as the child having been abducted and recruited into the armed group may be taken into account as mitigators to a degree). Without the endorsement of high profile human rights gatekeepers of the child soldiers' claim to victimhood; these children's human rights claims are de-legitimized.[107] The latter improperly so given that recruitment of children into armed groups or forces perpetrating mass atrocities and/or genocide, on the analysis here, constitutes the genocidal forcible transfer of children for the reasons previously discussed.

Further, international criminal tribunals and courts have to date failed to convict perpetrators of genocide for the forcible transfer with genocidal intent of children of the group to another group in various conflict situations. Thus there has been a serious undermining of the special and separate recognition given in the Genocide Convention to the act of forcible transfer of children of the group to another group as a distinct act of genocide where the specific intent requirements are met. Rather this conduct has typically been classified as a 'crime against humanity' (i.e. under Article 7(1)(d) of the Rome Statute) or a 'war crime' (Article 8(2)(e)(viii) or 8(2)(a)(vii)(i.e. subsumed under deportation or forcible transfer of an entire population; or of larger collective of mixed ages). In such cases then the children are not being regarded as a separable protected group in their own right against whom perpetrating forcible transfer with genocidal intent (directed against the child group and the children's original larger group of origin) constitutes a genocidal act in itself (i.e. in the ICTY case Vidoje Blagojevic, the Trial Chamber found that the defendant was guilty of forcibly transferring women and children and the elderly from the then mostly Muslim enclave of Srebrenica of Bosnia Herzegovina in 1995 during the civil war in the Former Yugoslavia as a crime against humanity (other inhumane acts as per the ICTY statute Article 5(i)),[108] but not of the genocidal transfer of children per se (despite the fact that children were transferred to the custody and control of the perpetrator, moved out of their home jurisdiction and separated from the men and older boys in the community).

[107] Bob (2009), pp. 1–15.

[108] ICTY Prosecutor v Blagojevic, Appeals Court (2007).

The contention here is then that the recruitment of children to serve as child soldiers in an armed group or force committing mass atrocity and/or genocide constitutes the crime of the genocidal forcible transfer of children to another group as these situations involve genocidal intent as explained previously. Likewise, the so-called act of 'ethnic cleansing,' particularly where it involves children being separated from all or some of the significant others in their group of origin, also constitutes genocidal forcible transfer as well as other international crimes based on the same facts (i.e. in the Srebrenica genocide the children were separated from fathers and adolescent brothers as males from the age of 16 to 60 or 70 were taken from their families[109] and murdered). In both of the aforementioned instances the children are in the custody and control of a perpetrator with genocidal intent committing mass atrocities. The unity and integrity of the original communities/groups of origin victimized is undermined in each case due to the removal and often elimination of group members. There is an enormous and continuing adverse impact on the identity of the group of origin as well as on individual members subjected to this forcible transfer.

The term 'forcibly transferred' as used here in regards to child soldiers recruited for participation in hostilities and use in perpetrating conflict-related mass atrocity refers to children who became part of the armed group or force by virtue of the perpetrator's genocidal intent and are recruited by any means (i.e. (a) conscription, *or* (b) abduction and the use of force in compelling children to participate in child soldiering and the commission of atrocity *or* (c) so-called 'voluntary' recruitment (enlistment) where the armed group has taken advantage of the children's dire circumstances caused by the armed conflict or other factors (circumstances such as hunger, destitution, abandonment, loss of parents murdered by one or other party to the conflict, trauma and the like). Irrespective of the mode of recruitment; the children are expected to participate in perpetrating atrocities and cannot refuse and are not free to leave the armed group or force such that their only option is to attempt to escape or evade carrying out certain commands at the risk of death. In other words, all child soldiers recruited into State or non-State armed groups (including at times also national armed forces) that are committing mass atrocities and/or genocide are, based on the aforementioned criteria, the victims of the 'genocidal forcible transfer' from their group of origin to another group (the armed group or force distinguishable from the rest of society as the perpetrator group or one of the perpetrator groups). There is a lasting devastating impact on the group of origin and its ability to reconstitute itself in the same manner with the same vitality as a result of the removal of these children. Such a forcible transfer of children to an armed group or force committing mass atrocity and/or genocide constitutes a violation of Article 2(e) of the Genocide Convention[110] as the 'recruiters' are well aware that the group of origin (with its distinctive national,

[109] ICTY Trial Chamber in Prosecutor v Blagojevic, para 168; p. 63.

[110] Genocide Convention (1951), Article 2(e).

ethnic, religious and/or racial characteristics), due to the transfer of its children out of the group, has been destroyed in whole or in part. Thus, on the present analysis, children recruited into armed groups or forces whether of their own or another nationality, ethnic, religious and/or so-called racial group committing mass atrocity and/or genocide are properly considered to be the victims of forcible transfer in violation of Article 2(e) of the Genocide Convention. The child soldier recruits are as a result of the transfer perceived as having acquired a new identity; namely that of the armed group or force committing mass atrocity and/or genocide. The child soldiers then are perceived as allegedly posing a continuing potential threat even in the post-conflict period to those members of their own group of origin who worked or were alleged to have worked in the resistance to the armed group or force perpetrating grave IHL violations and to others for a variety of additional reasons. In the eyes of the home community then the returnee child soldiers, if any, are perceived as a 'fifth column' that cannot be genuinely re-integrated into the group.

While on the one hand children's right to be protected from forcible transfer to another group with the intent to destroy in part or in whole the group of origin is, in principle, recognized under IHL (i.e. the Genocide Convention[111]at Article 2(e) and the Rome Statute[112] at Article 6(e)); on the other; particular cases of the forcible transfer of children are, in practice, erroneously not recognized as a violation Article 2(e) of the Genocide Convention. Such is the case with regards to child soldier recruitment into an armed group or force for the purpose of: (1) their participation in mass atrocities and/or genocide and (2) the remaking of the children's identity at the expense of the children's group of origin from which the children are not only separated but, as a result of the military training and brutalization, alienated. On the contrary, members of this latter transferred child group (child soldier recruits participating in an armed group or force perpetrating mass atrocities and/or genocide) have increasingly been vilified and attributions of an 'evil mind' made to them as individuals (the latter being an essential component of the *mens rea* required for culpability regarding the commission of the grave conflict-related international crimes they are alleged to have committed).

To date, those who recruited children under age 15 for participation in mass atrocity and/or genocide are generally charged by the ICC with war crimes in regards such recruitment and use of children and not also with genocide under Article 6(e) of the Rome Statute. This is the case though the children forcibly transferred away from their group of origin/home community as child soldier recruits who participated in atrocity are as dead to their community as if they were killed in the armed conflict (that is they can either no longer come back at all, or if they are permitted to return, often cannot integrate in any meaningful way as a regular member of the community notwithstanding NGO demobilization and re-integration programs). On the analysis here such forcible transfer of children *under*

[111] Genocide Convention (1951), Article 2(e).

[112] Rome Statute (2002), Article 6(e).

eighteen as child soldiers recruits to armed groups or forces committing mass atrocity and/or genocide involves genocidal intent and constitutes a violation of Article 6(e) of the Rome Statute referring to a specific act of genocide (and may also meet the elements required for other crimes depending on the specific facts in the particular case).

Let us consider then in more detail the recent high profile case of Omar Khadr; Guantanamo inmate. The case illustrates a refusal to acknowledge the forcible transfer of a child, Omar Khadr, for soldiering with an armed group bent on mass atrocity and genocide of the so-called 'infidels'. The perpetrators identify their targeted victims according to their perceived religious group (Christian or Jewish) and broadly based on nationality (namely U.S., Canadian, British, Spanish and other North American and European nationals as well as Israelis with a focus on those who are members of Western coalition forces in Afghanistan and Iraq but not exclusively so). The armed group in question was, as mentioned, the extremist element of the Taliban affiliated with Al Qaeda. The latter armed network's recruitment of children over or under age 15 is unlawful under IHL regardless the mode of recruitment (as reflected for instance at Article 4(1) of the OP-CRC-AC).[113] Further, the retention of children unlawfully recruited into an armed group (which groups are prohibited in all circumstances from recruitment and use of child soldiers in hostilities under the OP-CRC-AC) constitutes a 'continuing crime.[114] It should be understood in this regard that:

> the requirement that illegally recruited child soldiers be treated as victims. . .[is] well enshrined in international treaty law . . .and supported by sufficient state practice and *opinio juris* that [it] should be recognized as part of international customary law. . .[115]

Children such as Omar Khadr recruited by non-State groups perpetrating atrocity are, furthermore, considered under international human rights law (the OP-CRC-AC)[116] to have been recruited not only illegally but also involuntarily (where children in that case refers to persons under age 18).[117]

It is to be stressed that the Taliban are increasingly using children to participate in hostilities with the intent that these children perpetrate atrocities i.e. as suicide bombers etc. and that Khadr's case is thus not an isolated one:

> . . .on December 14, [2009] a 13-year-old boy was used as a suicide bomber against British troops in Afghanistan's southern Helmand province, killing himself and three soldiers.
>
> The Secretary-General's recent report on Children and Armed Conflict in Afghanistan in November confirmed that the Taliban continue to train and use children as suicide bombers as well as indiscriminately target children in the conflict areas of Afghanistan.[118]

[113] OP-CRC-AC (2002).

[114] Paoletti (2008), p. 9.

[115] Paoletti (2008), p. 3.

[116] OP-CRC-AC (2002).

[117] Paoletti (2008), p. 7.

[118] UN News Centre (2009).

Khadr was born in Ottawa, Canada 19 September, 1986 and is a Canadian citizen.[119] He was captured after a fierce firefight between U.S. troops and Taliban at the village of Ayub Khey in Afghanistan on 27 July, 2002.[120]

> When Omar was taken captive by the U.S. Forces, he had two gaping holes in his chest, which were caused by being shot twice in the back, shrapnel wounds to several areas of his body – including his left eye. Unconscious, he was airlifted and initially detained at Bagram Air Base, where he received medical attention. He was interrogated approximately a week later, when he regained consciousness and remained stretcher bound for several weeks. Omar remained at Bagram for 3 months during which time he was forced to perform extensive labour by American soldiers. Around October 29 or 30, 2002, he was transferred to Guantanamo Bay, although Canadian officials were not notified as promised. *Since Omar had turned 16 years old, while at Bagram, he was now being treated as an adult prisoner at Guantanamo Bay* (emphasis added).[121]

Had Omar Khadr been designated by U.S. officials as a child soldier recruited into a genocidal terror group and hence 'forcibly transferred' to another group as per the definition under the Genocide Convention (as he ought to have been considered on the view here), he would most likely have been treated as a 'child' at age 16: (1) holding the status of genocide victim (Article 2(e) of the Genocide Convention is interpreted as covering persons up to age 18) and (2) entitled to special care and protection rather than as an alleged culpable (of age) soldier perpetrator of war crimes. (Recall however that the Additional Protocols to the Geneva Convention in any case do not specify an age range in regards to children being entitled to special care and protection during armed conflict). Further, it is relevant to note that the preparatory discussions regarding Article 26 of the Rome Statute (which excludes persons under 18 at the time of the commission of the offense from criminal responsibility for war crimes, crimes against humanity and genocide) assigned criminal culpability starting at age 18 since noone under age 18 had been charged with a crime by any of the Nuremburg Courts.[122]

At the time of writing, Khadr is serving his sentence after being convicted of alleged war crimes by a U.S. Military Commission. He was charged (now convicted) with: (1) murder for the killing of a US medic by allegedly throwing a grenade during a firefight; (2) attempted murder in respect of another U.S. soldier injured by the same grenade (as he had no lawful status as a combatant given that he was a member of the Taliban-Al Qaeda terror network which does not meet the criteria for combatant force such as distinguishing itself from civilians, adhering to the rules of war etc. and hence had no legal right to participate in combat), (3) aiding the enemy and (4) conspiracy with Osama Bin Laden, and others in the Taliban-Al Qaeda terror network.[123] Omar Khadr is the only person in

[119] Lawyers Rights Watch Canada (2008), p. 1.

[120] Lawyers Rights Watch Canada (2008), p. 1.

[121] Lawyers Rights Watch Canada (2008), pp. 2–3.

[122] Triffterer (1999), p. 494.

[123] Compare Lawyers Rights Watch Canada (2008), p. 2.

contemporary times ever to be tried by a military commission for international crimes allegedly committed as a child.[124] He is also the youngest person still held in Guantanamo.[125] The only implicit and contradictory recognition by the U.S. of Omar Khadr as a child soldier (at the time of the commission of the alleged war crimes) is the fact that the U.S. did not seek the death penalty for his alleged war crimes. This being the case as the Geneva Conventions prohibit the imposition of the death penalty on children convicted of conflict-related offenses that might result in a death sentence for an adult:

> The Fourth Geneva Convention provides that "the death penalty may not be pronounced against a protected person who was under eighteen years of age at the time of the offence". Additional Protocol I provides that "the death penalty for an offence related to the armed conflict shall not be executed on persons who had not attained the age of eighteen years at the time the offence was committed". Additional Protocol II prohibits the pronouncing of the death penalty on children under 18 years of age at the time of the offence. These rules are also set forth in a number of military manuals.[126]

While several NGOs and academic legal groups have filed briefs on his behalf arguing that Khadr joined the Taliban under duress and that as a child soldier he should not be punished but rehabilitated; US military and government lawyers have taken the opposite position and have found no resistance from Canada in that approach. In fact, to date, Canada has not asked for Khadr's repatriation to serve his remaining sentence in Canada or at least any such request is not public knowledge. This despite the fact that the Supreme Court of Canada found that Canada had violated Khadr's Canadian Charter rights by complicity with the US in sharing the results of their (Canada's) intelligence interrogations of Khadr at Guantanamo with U.S. officials despite knowing that: (1) Khadr had been denied due process (i.e. held basically incommunicado and in solitary without access to family or others for a very extended period and denied access to counsel until November 2004[127] and without charges for 3 years etc.)[128] and that (2) he had been subjected to maltreatment involving at least significant sleep deprivation at Guantanamo intended to make him more vulnerable in an interrogation (such as that conducted by Canada security officials at Guantanamo subsequent to that sleep deprivation) and (3) knowing that the results of the Canadian interrogation conducted with Khadr; a child soldier who was suffering the effects of his maltreatment at Guantanamo, would be used by the U.S. at Khadr's criminal trial before a Military Commission. Khadr thus has become somewhat of a symbol (at least as far as the Canadian and US government appear to consider him so) for the proposition that child soldiers considered culpable of participation in international terror networks should be held criminally liable. Both Canada and the U.S. then failed

[124] Lawyers Rights Watch Canada (2008), p. 1.
[125] Lawyers Rights Watch Canada (2008), p. 1.
[126] International Committee of the Red Cross.
[127] Lawyers Rights Watch Canada (2008), p. 3.
[128] Lawyers Rights Watch Canada (2008), p. 6.

to provide Omar Khadr the special respect and protection owed children involved in armed conflict under IHL (Khadr was a child at the time of the alleged offenses). This despite the fact that Canada ratified the OP-CRC-AC in 2000 and the U.S. did so in 2002.[129]

There has been in the voluminous material written by lawyers and journalists about the Khadr case no discussion as to whether Khadr can be considered to have been the victim of genocidal forcible transfer to the Taliban/Al Qaeda armed terror network as a child. (in violation of the Genocide Convention Article 2(e)). Recall that the Taliban/Al Qaeda network's genocidal intention is to destroy in part Americans and their affiliates (including Canadians given that Canada has had a significant combat role in Afghanistan) as perceived so-called 'Christian infidels'. Children who have participated in such a terror network and have committed atrocities forever retain the Al Qaeda terror identity. They thus tend to continue to be perceived as a potential threat by their own community; as a kind of 'fifth column' making their re-integration into their home communities difficult if not impossible in many cases. There is then, in effect, an ongoing forcible transfer to the terror group even after the child is no longer physically with the terror group or in actual fact associated with the group in any objective sense. In Omar Khadr's case, the Canadian Federal Government's failure to make any effort to repatriate Khadr even after the Supreme Court of Canada held that: (1) Canada was complicit in continuing fundamental human rights/Canadian Charter violations against him (complicit in his continued unlawful detention at Guantanamo which was not pursuant to a fair hearing etc.) and (2) must therefore provide a remedy[130] is a clear message that this Canadian citizen is being treated something akin to 'persona non grata' for all practical purposes. Canada's proposed remedy for its complicity in abusing Khadr's basic human rights was simply to ask the US not to use the results of Canada's Guantanamo interrogations of Khadr at his military commission trial; which request the US summarily rejected.

Consider the following commentary from General Dallaire on the Omar Khadr case [Dallaire is the Canadian general who served in Rwanda and had, at the time, to no avail, pleaded with the UN for further assistance to prevent the impending genocide]. General Dallaire's comments were made May 13, 2008 in an appearance before a Canadian parliamentary foreign affairs committee on international human rights:

> *Canada is heading down a slippery slope by failing to obey the United Nations conventions on child soldiers to which it is a signatory*, he said. "The minute you start playing with human rights, with conventions, with civil liberties in order to say you are doing it to protect yourself . . . you are no better than the guy who doesn't believe in them at all," he said. "We are slipping down the slope of going down that same route (emphasis added)."[131]

[129] Lawyers Rights Watch Canada (2008), p. 7.

[130] Grover (2011).

[131] Cited in Lawyers Rights Watch Canada (2008), p. 14.

Omar Khadr then as a child soldier at the time of the alleged war crimes and as a member of a genocidal terror group is someone whom the home community (Canada) has labeled as a threat. So much so in fact that he has been abandoned to a foreign country's harsh detention system at Guantanamo and a request for his repatriation when still a child never made (nor has such a request been made to date or if made shared with the Canadian public). This abandonment by Canada of Khadr as a child is precisely the marker of the predictable after-effects of the forcible transfer of a child to an armed group such as the Taliban/Al Qaeda terror network intent on mass atrocity and genocide. Note that Omar Khadr's father had been grooming his son for life with Al Qaeda and its terror organization affiliates from an early age bringing him, for instance, to Al Qaeda training camps in Afghanistan when he was around age ten or eleven and:

> . . .by 2002 Ahmed had arranged for then-15 year old Omar to assist an al-Qaeda allied cell involved in making IED's who were in need of an Arabic/Pashto translator, in the Afghan village of Khost.[132]

Now alone in Afghanistan with the terrorist insurgents, Omar Khadr would have had no option but to 'go along with the terrorist program' so-to-speak.

The refusal of the Canadian federal government to request Omar Khadr's repatriation is a reflection of his *de facto* symbolic ouster from Canadian society.[133] It parallels the failure or great difficulty in re-integrating ex child soldiers who participated in hostilities and atrocities in a variety of contexts even where there is no dispute that the children were abducted and treated brutally as part of their combat training (i.e. even being forced to kill family and other community members as an initiation rite to reinforce the fact that the child's former identity and loyalties were no more and that the child had no choice in that regard). In effect then the murderous armed groups that recruited these children were successful in appropriating these children ostensibly to their cause; but equally disturbingly, as persons forever considered members of the perpetrator group responsible for mass atrocities and not uncommonly also genocide.

However, note that under the Rome Statute[134] (and statutes that parallel the Rome Statute in terms of their description of war crimes), illegal recruitment of children into child soldiering is a war crime only in respect of the recruitment of children under age 15 and their use for active participation in hostilities. Thus, in regards to the issue of the continuing nature of the war crime of recruitment and use of child soldiers in hostilities the ICC has stated the following:

> . . .the Chamber considers that the crime of enlisting and conscripting is an offence of a continuing nature-referred to by some courts as a "continuous crime". . .The crime of enlisting or conscripting children under the age of fifteen years continues to be committed

[132] Neve (2010), p. 4

[133] Grover (2009).

[134] Rome Statute (2002).

> as long as the children remain in the armed groups or forces and consequently ceases to be committed when these children leave the groups or reach fifteen.[135]

However, on the analysis here, the recruitment of children (persons under age 18) into an armed group or force (State or non-State) committing mass atrocities and/or genocide constitutes 'forcible transfer' to another group (a genocidal act in itself) and, hence, is most often a 'continuing crime' of indefinite time duration. That is, though the child may escape or be rescued from the armed group committing mass atrocity or genocide or be released subsequent to negotiations with NGOs or under some other circumstance leave the group, the child cannot relinquish his or her perceived identification with that armed group or force in the eyes of some, more frequently most, of his or her group of origin.

It is here suggested that where a violent armed group or force has *genocidal intent* (i.e. inferred from mass rape, ethnic cleansing, systemic atrocities committed against politically moderate or minority members of the civilian population etc.) and 'recruits' children; that group or force can be considered to be subject to international law and not simply domestic law. This is the case as that armed group or force, for the reasons explained, has 'forcibly transferred the children of a group to another group' (a specific act of genocide). In that specific context then the problem of holding violent groups to account for 'war crimes' under IHL blocked by problems in meeting the criteria for: (1) "armed group" (i.e. lack of a centralized command structure of the perpetrator group or lack of ability of that group to carry out sustained attacks etc.)[136] and for (2) "armed conflict" are avoided:

> The existence of an internal armed conflict and the existence of domestic armed groups as subjects of international law are preconditions of each other. International law does not deal with recruitment to armed bands taking part in internal disturbances that do not amount to an armed conflict. Young accomplices to violent groups are dealt with under domestic criminal law.[137]

That is, the elements of the crime stipulated in the Rome Statute at Article 6(e)[138] to establish the genocidal forcible transfer of children do *not* include requirements regarding either what constitutes an armed conflict situation or the nature of the group perpetrating the forcible transfer (not surpassingly as this form of genocide can occur in peacetime as well).

Note that the Cape Town Principles' definition of child soldier (unlike IHL) does cover children up to age 18 associated "in any capacity" with "any kind of regular or irregular armed force or group" and irrespective of any alleged consent to recruitment.[139] However, that instrument is not a legally binding treaty but rather

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[135] Prosecutor v Thomas Lubanga Dyilo (Confirmation of charges, 29 January, 2007).

[136] Thomas (2010), p. 101.

[137] Thomas (2010), p. 101.

[138] Elements of the Crime Rome Statute, (2002).

[139] Cape Town Principles (1997), Definition of child soldier.

a set of guidelines for abiding by humanitarian principles that better protect children from soldiering and certain other adverse impacts of armed conflict.

It is here argued then that where children have been forcibly transferred to armed groups or forces acting with genocidal intent, those groups or forces may be considered subject to international law given the genocidal context. Further, in such a genocidal context (the perpetrating of genocidal forcible transfer of children out of their group/home communities for integration into the armed group or force perpetrating grave international crimes), the issue of the alleged consent of the child to 'recruitment' is not only irrelevant but inapplicable (i.e. the child cannot under IHL give consent to become the victim of genocide by any means). Hence, universal jurisdiction and the intervention of the ICC or some hybrid international criminal court or tribunal would be applicable if the State is unable or unwilling to: (1) prosecute those most responsible for the armed group or force perpetrating violence against civilians amounting to genocide including the forcible transfer of children to that armed group or force; (2) take all necessary and feasible measures to prevent such recruitment of children (that is, forcible transfer of the children) to the armed group or force committing mass atrocities and/or genocide and (3) rescue those children still within the grip of that armed group or force and provide them rehabilitation and other required services.

4.6.1 Children as Propaganda Tools in Conflict and Post-Conflict Contexts

It was here previously mentioned that Omar Khadr had been indoctrinated by his father (and the Al Qaeda operatives and affiliates to whom he was introduced as a very young child) into the jihadist world view. That world view, as has here been pointed out, incorporates a genocidal intent. As Khadr was a young child at the time of his initial indoctrination, and but 15 when captured and charged with alleged war crimes, his being subjected to such propaganda was a violation of his basic human right to be educated for tolerance[140] and to learn respect for human rights and peace as set out in the Convention on the Rights of the Child:

Article 29

1. States Parties agree that the education of the child shall be directed to:

   (a). The development of the child's personality, talents and mental and physical abilities to their fullest potential;
   (b). *The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations*;
   (c). The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is

[140] Grover (2007).

> living, the country from which he or she may originate, *and for civilizations different from his or her own;*
>
> (d). *The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin*. . .(emphasis added)[141]

The responsibility for and consequences of a child's victimization by the substitution of genocidal propaganda for education clearly must not be made to fall on the child him or herself (as has, on the view here, in fact occurred in the case of Omar Khadr). Indoctrination by an armed group or force of a child into genocidal thinking is part and parcel of the forcible transfer of the child into that group or force (as a genocidal act in itself) along with the actual physical transfer and should be recognized as such. Consider then also the case of Dominic Ongwen discussed next and the difficult moral questions it poses.

4.7 The Case of Prosecutor v Joseph Kony, Vincet Otti, Okut Odhiambo and Dominic Ongwen

For the purposes of this inquiry regarding child soldiers and their status under international criminal law and in the perception of the international community, the focus in this discussion is on Dominic Ongwen rather than on the other named defendants in the above titled case. It is Ongwen who is known to have been abducted at age 10 by the Lord's Resistance Army (LRA); a rebel group fighting the Ugandan government and the Ugandan army (known as the Uganda People's Defence Force ("UPDF") as well as local defense units since 1987. A warrant for Dominic Ongwen's arrest has been issued by the ICC but he is currently at large. The ICC Prosecutor alleges that:

> in pursuing its goals, the LRA has engaged in a cycle of violence and established a pattern of "brutalization of civilians" by acts including murder, abduction, sexual enslavement, mutilation, as well as mass burnings of houses and looting of camp settlements; that abducted civilians, including children, are said to have been forcibly "recruited" as fighters, porters and sex slaves to serve the LRA and to contribute to attacks against the Ugandan army and civilian communities.[142]

The ICC Pre-Trial Chamber II found that there were sufficient multiple sources of independent verification of the above allegations, including from the United Nations, to confirm the need to prosecute these LRA defendants. The Pre-Trial Chamber also made a legal finding that the LRA operates as an army under its Chair and Commander-in Chief Joseph Kony. The allegation is that Dominic Ongwen was one of four brigade commanders of the LRA and hence a key core leader

[141] Convention on the Rights of the Child (1990), Article 29.

[142] Warrant of Arrest for Dominic Ongwen (2005), para 5.

"responsible for devising and implementing LRA strategy, including standing orders to attack and brutalise civilian populations."[143] As commander of the Sinia Brigade, Dominic Ongwen is alleged to have ordered the commission of multiple crimes falling under the jurisdiction of the ICC including the abduction of children to serve in the ranks of the LRA ("Mr. Ongwen is the first person to be charged with the same war crimes that were committed against him" in regard to abduction of children for the purpose of child soldiering).[144]

Dominic Ongwen is charged in the indictment to have acted (along with certain named others) in ordering war crimes and crimes against humanity against civilians housed in a particular IDP camp which crimes fall under the jurisdiction of the ICC. The warrant lists the following specific international crimes with which Ongwen is charged:

> Murder at REDACTED IDP Camp Constituting Crimes Against Humanity
> Enslavement at REDACTED IDP Camp Constituting Crimes Against Humanity
> Inhumane Acts at REDACTED IDP Camp Constituting Crimes Against Humanity
> Murder at REDACTED IDP Camp Constituting War Crimes
> Cruel Treatment at REDACTED IDP Camp Constituting War Crimes
> Attack Against the Civilian Population at REDACTED IDP Camp Constituting War Crime
> Pillaging at REDACTED IDP Camp Constituting War Crimes.[145]

The question arises as to what consideration, if any, in the prosecution of Dominic Ongwen should be given to the fact that he was an abducted child soldier at age 10, and brutalized to accept LRA atrocities and participate in them under duress and has since an extremely young age been in the grip of the LRA as essentially a substitute 'family' so-to-speak.[146] Ongwen is one of an estimated 25,000–38,000 children abducted by the LRA since 1986.[147] Aside from constant beatings and being forced to commit atrocities as a child, Ongwen as other child abductees was forced to listen to a barrage of constant LRA propaganda:

> . . .[The children] are told of the grievances of the Acholi, who oppose Mr. Museveni's government because they have been systematically excluded from the progress seen in other parts of Uganda. The children are told that the government and its international allies are deliberately exterminating their people and the LRA is fighting to free them.[148]

One can rightfully ask: 'where was the international community when thousands of children were being abducted into the LRA ranks with foreseeable horrendous consequences to the abductees and their own subsequent victims?' It seems self-righteous at best to simplify the Ongwen case and suggest that he is

[143] Warrant of Arrest for Dominic Ongwen (2005), para 9.
[144] Nolen and Baines (2008).
[145] Warrant of Arrest for Dominic Ongwen (2005), para 5.
[146] Baines (2009), p. 163.
[147] Asimakopoulos (2010) p. 28.
[148] Nolen and Baines (2008).

straightforwardly fully culpable for crimes he committed after age 18 and that, at most, the fact that he was a child soldier possibly should be considered as a mitigating factor that would reduce his sentence to some extent if at all:

> There are fighters in conflicts across Africa who were born into rebel movements or abducted when very young [just as was Ongwen]. The principle that such children can't be prosecuted for what they do, even if no one forces them to kill or loot, is enshrined in several international agreements, including the one that created the ICC.
>
> Yet no provision is made for those like Mr. Ongwen who grow up in the image of their oppressors: As the law stands, if they carry out the same crimes after their 18th birthdays that they did the day before, they are no longer victims, but criminals.
>
> What is justice for these fighters? How much can they be held responsible for, having grown up in environments of extreme brutality?[149]

It is here suggested that the severity of the brutality and all encompassing nature of the LRA indoctrination process for child soldier abductees and the severe psychological and lasting damage done to the child's identity and psyche amount to the forcible transfer of the child to another group (a genocidal act) being a 'continuing crime'. These children had no contact with persons who had anything resembling a balanced normal view of the world and were trained for years to kill and commit other atrocities against civilians (simplistic comparisons to other situations of non-conflict related more usual forms of child abuse are for the most part not applicable). The behavior of the child 'recruits' in perpetrating atrocity becomes normative as a child member of the LRA and was committed all the while knowing that the choice was to 'kill or be killed'. Can Ongwen then, as an adult, be considered to be a victim who psychologically was too damaged to contemplate escape from the armed group having identified with his own oppressor after spending decades with the group from a young age? Consider that Ongwen, having as an adult played a senior leadership role in the LRA; would likely be unable to re-integrate into his original community even if this was his wish:

> Social and spiritual problems are attributed to the presence of former combatants, and so the community copes by marking their presence through marginalisation, exclusion, and purification or cleansing. [Given Ongwen's prominent role in the LRA and particularly his ordering the abduction of children to serve in LRA ranks, and also quite horrific other atrocities causing unfathomable suffering; the community likely would not be willing to have him undergo a purification ritual but rather shun him indefinitely].[150]

If Ongwen did escape the LRA or leave openly he might not survive inevitable retaliatory attempts by the LRA if not the Ugandan army. This then also likely worked against his incentive to leave the group. There were additional factors as well likely keeping him in the LRA ranks such as the fact that he was in all probability closely guarded as were all highly valued LRA members. Note also that the LRA not uncommonly perpetrated mass killings on villages in retaliation for an LRA commander's escape:

[149] Nolen and Baines (2008).

[150] Baines (2009), p. 166.

> . . . he either never tried or was never able to escape in the confusion of battle, as thousands of other young rebels have done. *As a skilled fighter, he was under heavy "protection" – actually guards and spies to keep watch on him – and his wives and children were kept close to Mr. Kony* [**Interview with Commander of the LRA**] *as an additional deterrent* (emphasis added).[151]
>
> I heard about some mass killings after a senior commander escaped. I think this definitely influences the decision of other commanders to escape because you do not want be the reason for mass killings in your village. The LRA will come and revenge on your community and they [the commanders] know that [**Interview with mother of a former child abductee].**[152]

The ICC position on the Ongwen case is that as a senior leader giving the orders for some of the most unspeakable atrocities in the war, he must be prosecuted:

> "Our mandate is to go after those most responsible for the most serious crimes," says Beatrice Le Fraper Du Hellen, who is the court's Director of Jurisdiction, Complementarity and Co-operation. Mr. Ongwen's rank in the LRA, she says, "gave him a very high responsibility for very serious crimes . . . too much of a responsibility to exclude him from liability." *His status as a former abducted child himself could certainly form part of his defence at trial*, she says. *But the ICC cannot use it as a reason to look the other way* (emphasis added).[153]

A key extraordinarily difficult legal issue in the case is: can it, in fact, properly be maintained that Mr. Ongwen was "most responsible for the most serious crimes" implying his having had the requisite *mens rea*? Or instead, do the interests of justice demand that he be considered to have committed atrocities both before and after his 18th birthday due to a combination of diminished mental capacity and duress resulting from his long years in LRA captivity and inculcation of the LRA deranged world view through mental and physical torture thus precluding his criminal responsibility? One thing is for sure, the child soldier turned adult member of groups or forces committing mass atrocities and/or genocide are the entirely foreseeable but inexcusable legacy of the international community's ineffective mechanisms for preventing child soldier recruitment by such murderous groups or forces and for rescuing those already recruited. For instance, the OP-CRC-AC prohibits the recruitment and use of children by non-State armed groups however such non-State groups are not a party to the Optional Protocol on children and armed conflict and would likely not honor the agreement if they were. Further, UN mechanisms to date have made an attempt to monitor and report to the UN child soldier recruitment but, notwithstanding the reporting of this grave violation of IHL, such recruitment continues relatively unabated (i.e. Security Council Resolution 1612 established the mechanism for the monitoring and reporting of child soldier recruitment on the rationale that ultimately such recruitment is a serious threat to the possibility for enduring peace in those regions where this is occurring

[151] Nolen and Baines (2008).

[152] Asimakopoulos (2010), p. 38.

[153] Nolen and Baines (2008).

even in supposed post-conflict periods).[154] It has been noted in regard to this monitoring and reporting mechanism that:

> Although agencies [i.e. UNICEF, UNHCR etc.] have benefited from the range of information and level of analysis deriving from the monitoring and reporting work, an excessive focus on monitoring and reporting can lead to a diversion of resources away from other key areas of work. *For instance, it may affect work related to humanitarian action which was intended to ensure the very survival of an affected population* (emphasis added).[155]

Apparently at one point after the ICC warrant was issued; Ongwen considered leaving the bush and asking for amnesty from the government as had been offered to certain other of the LRA rebels. However, he gave up the idea when he came to understand through various sources that the ICC warrant would not be rescinded and he would remain an internationally wanted man for whom amnesty would not be an option.[156]

Ongwen and the many tens of thousands of former child soldiers like him in Northern Uganda and elsewhere are not in fact part of the polity:

> Entire groupings of African youth in conflict-affected countries remain uninitiated into the polity; their citizenship belongs to no state but rather to deterritorialised military forces.[157]

This is part of the reason why it is so misguided to suggest as some have done (even surprisingly the author of the quote immediately above[158]) that child soldier recruits into armed groups that consistently violate IHL are exercising any sort of political agency. Statements such as that below, in the current author's respectful view, are misguided:

> The seeming 'chaos' of war – amputations, abduction, enslavement, forced pregnancy, forced marriage – is not singular acts of aimless, apolitical criminals. Rather, violence is the language of the complex political perpetrator, a means of searching for entry into the political conversation.[159]

Such statements are, on the view here, based on: (1) an erroneous attribution of agency to persons who (regardless of means of recruitment) became captives as children of armed groups or forces committing mass atrocities and whose continued commitment to child soldiering was secured through force and threat and on (2) an incorrect characterization of grave violations of IHL as political action of a sort and the perpetrator therefore as a "complex political perpetrator". The current author would, in contrast, argue that mass atrocity and/or genocide are fundamentally 'apolitical' in that they are directed against *all* of humanity though operationalized in a concrete way against only a specific targeted population rationalized on various

[154] Nylund and Hyllested (2010), pp. 77–78.
[155] Nylund and Hyllested (2010), p. 81.
[156] Nolen and Baines (2008).
[157] Baines (2009), p. 164.
[158] Baines (2009), p. 180.
[159] Baines (2009), p. 180.

illusionary grounds. This is not to say that certain economic and other grievances may not exist but rather to stress that such cannot legitimize or explain in any way the tactic of mass atrocity and/or genocide. In fact, these children recruited into armed groups that as a tactic systematically commit grave IHL violations become ever more disenfranchised and distanced from politics (the life of the society), powerless to have any decent quality of life and marginalized indefinitely in many cases in every significant way from the rest of society even in the post-conflict period.

Many well intentioned scholars writing on the issue of child soldiers who have committed conflict-related atrocities have latched onto what is, on the analysis here, with respect, the rather non-fruitful constructed concept of 'victim-perpetrator' as a means of supposedly finessing the issue of accountability of these children:

> Ongwen, a child raised in the bush, may exercise free will, crossing into the realm of perpetrator; however, it is dangerous to 'collapse the distinctions among contrasting kinds of agency that are associated with contrasting kinds of power' ... Even as persons like Ongwen embrace the role of mass murderer, rapist or slave master, they do so against the background of everyday violence, and here recognising the context in which their choices are made is of paramount importance to the development of justice alternatives.[160]

The question is here asked, though blunt yet in all sincerity and respectfully, 'are elite academics in the comfort of their safe existence in any position to ascribe "free will, [in] crossing into the realm of perpetrator" to a child raised in the bush by the likes of the LRA? Consider then in light of that question Baine's statement that follows which in fact reflects something of a mantra adopted by the backlash movement pushing for child soldier accountability:

> Clearly Ongwen is a perpetrator and, by virtue of his rank and position in the LRA high command, bears great responsibility. He made certain choices to commit crimes against humanity – choices others did not make (by escaping, by refusal to kill, by melting into the background, by choosing death)[161]

The labeling of Ongwen's conduct in committing atrocities as a "choice" at any level when he was under threat of death to resist LRA demands since early childhood is highly questionable as is characterizing him as a "complex political perpetrator" who also has victim status (see above quote).[162] To attribute choice to persons recruited into the LRA as children is essentially to deny the defense of duress which denial has *no* factual grounding in respect of child LRA recruits (abductees) grown to be adult within the context of that murderous vicious armed group. Further, as previously here argued, acts of mass atrocity and/or genocide are in fact apolitical and the perpetrators *not* thereby engaged in political expression contrary to the suggestion of some scholars that armed groups such as the LRA are using violence as "political expression" (i.e. see Baine's statement: "I introduce the

[160] Baines (2009), p. 181.
[161] Baines (2009), p. 182.
[162] Baines (2009), pp. 182–183.

concept of complex political perpetrators to describe youth who occupy extremely marginal spaces in settings of chronic crisis, and who use violence as an expression of political agency.")[163]

It is here suggested that the social science concept of 'victim-perpetrator' which has gained popular use in the context of the issue of child soldiers who have committed conflict-related atrocity as members of a murderous armed group is, from a legal perspective, as devoid of meaning as would be the concept of a 'civilian–combatant' under IHL. One is either a civilian or a combatant under IHL; not both simultaneously. Similarly under IHL one is either a 'perpetrator' who has committed atrocities (that is, someone with *some degree* of culpability) or a 'victim' who: (1) has committed atrocities but has no accountability given factors that preclude criminal responsibility or (2) a victim who managed to escape committing atrocity and has no criminal accountability on that account. Children (persons under age 18) are to be regarded as non-culpable victims according to the actual practice of all international criminal courts and tribunals; essentially in effect not losing their protected civilian status though having participated in the conflict and in some cases having violated IHL.

The current author contends that assigning Ongwen to the 'perpetrator' or 'perpetrator-victim' category (whatever the latter means, if anything, from an international criminal law perspective) based on his command position in the LRA and his giving of certain orders in that role is over-simplistic. The concept of 'victim-perpetrator' simply sidesteps the issue of accountability by assigning it on the one hand and removing it entirely on the other, and is therefore not viable as a legal concept (unless what is meant by the term is perpetrator who is culpable but for whom there are mitigating factors reducing culpability though not eliminating it in which case the individual is still perpetrator). Whether someone such as Ongwen can be considered non-culpable 'victim' or culpable 'perpetrator' once reaching 18 after years with an armed group such as the LRA or a murderous national armed force and his continued involvement as an adult committing grave international crimes, should be considered, on the view here, in terms of: (1) whether the genocidal act of transferring a child to such a group or force which commits mass atrocities is considered a 'continuing crime' and (2) whether Ongwen is to be regarded as a 'continuing victim' *without* the requisite *mens rea* for guilt despite his participation in grave international crimes as both child and adult member of the unlawful armed group in question (this given his years of brutalization by LRA commanders and being subjected to duress and propaganda for decades as an LRA child soldier and then adult fighter). If the latter be the case, then Ongwen ironically cannot, from a legal perspective, be considered among the most responsible for the horrendous crimes he himself ordered on behalf of the LRA commander-in-chief Kony. Rather, he must then be characterized as a victim of genocidal forcible transfer to a murderous armed group who was conditioned to suppress all sense

[163] Baines (2009), p. 163.

of his former identity, competency for moral impulses or compassion and to commit horrific violent attacks on civilians as a matter of course (perhaps even rationalized by some twisted logic and reliance on LRA propaganda) and as a means to his own survival. As one LRA abductee put it:

> You are forced to commit so many crimes, and if you do not do it, you will be killed yourself. It will get stuck in your mind. At one point there was so much anger in me, it needed to get out and you just stop thinking about what you do and whether it is good or bad.'**[(2 April, 2010 interview with a man abducted by the LRA at age eight who was with the armed group for 14 years and became sergeant]**.[164]

4.8 The Case of Thomas Kwoyelo

Thomas Kwoyelo is another LRA abductee who rose through the ranks of the LRA and spent most of his life with the armed group. He was abducted at age 15 in 1987 and was captured by the UPDF (Ugandan People's Defence Force) in 2009 at which time he had reached the rank of Colonel in the LRA. He is to be tried by the War Crimes Division of the Gulu High Court for war crimes and crimes against humanity. As of May, 2011 it is expected that the trial will go forward soon now that the ICC has been domesticated in Uganda.[165] This would be the first case in which an ICC situation country has tried its own alleged war criminal.[166]Kwoyelo explained some of his situation in the LRA from his perspective describing his fear that any escape attempt would lead to his own death and that of his family members (as a young boy he had witnessed the killing of an attempted LRA escapee):

> My situation in the bush was like that of a dog and his master. When you tell a dog to do something, it will act as instructed 'My master was Kony and everything I did came from Kony; the attacks, the ambushes, the abductions. When he tells you, 'ambush a car there and come back with twenty five new recruits', you do it because otherwise he will kill you.'
>
> 'Just as I was, many abductees are very afraid for the revenge they [the LRA] take on your family when you escape. They keep records of all the abductees and their clans and go back to your community to kill for example your father as a punishment.'[Note that the latter claim is verified by NGO and other independent reports][167]

Kwoyelo relates that at the beginning he was moved around frequently by the LRA and did not know his location or that of his family and this also worked against any attempted escape as did his being guarded closely even as a commander. He related also that Kony spread the false information to all commanders that every LRA commander was on the ICC list of wanted persons and that the UPDF killed

[164] Asimakopoulos (2010), p. 38.

[165] Oketch (2011).

[166] Oketch (2010), p. 8.

[167] Asimakopoulos (2010), pp. 49–50.

any LRA commander that came into their custody.[168] Before being captured by the UPDF, Kwoyelo says he was imprisoned by Kony as an alleged supporter of peace talks with the Ugandan government.

Note that the 'Agreement on Accountability and Reconciliation (AAR)' between the Government of Uganda and the LRA in part stipulates the following:

> the choice of forum [i.e. criminal trial for war crimes and crimes against humanity versus transitional justice mechanisms] for the adjudication of any particular case shall depend, amongst other considerations, on the nature and gravity of the offending conduct and the role of the alleged perpetrator in that conduct.[169]

The problem is that assessing the "role of the alleged perpetrator in that conduct" [grave violations of IHL] requires also an assessment of *mens rea*. However, assessing *mens rea* is quite complex in the situation of a person who was since childhood a member of the LRA operating him or herself under continuing extreme imminent threat of death or grave bodily harm should he or she offer any resistance to carrying out Kony's orders to commit mass atrocity. Like the ICC, the High Courts in Northern Uganda seek to prosecute criminally the higher ranking LRA members in charge of implementing various brutal attacks on civilians. Cases such as that of Ongwen and Kwoyelo present a legal and moral dilemma. When asked what would be the approach of the War Crimes Division (WCD) prosecution unit of the Gulu High Court in respect of a child who was abducted into the LRA and captured as an adult holding high rank in the LRA, the head of the WCD prosecution unit at the time answered as follows:

> The DPP will consider issues such as the extent to which a person willingly continued in the LRA, instigated most of the atrocities, and developed mentally from a child onwards in the LRA. Information obtained through investigations should provide clarification about these issues.[170]

The Prosecutor of the WCD went on to say that it is difficult to assess such subjective matters as alleged willingness of the defendant to continue with the LRA and to commit atrocities etc. and accepted that it is difficult to escape from the LRA.[171] However, the Prosecution's position is that notwithstanding that problem; no commanders should be exonerated in advance. Rather, the fact of being with the LRA since early childhood would be considered by the WCD as a mitigating factor to some degree.[172] Note however that the Prosecution Unit of the Gulu High Court WCD claims that Kwoyelo joined the LRA 'voluntarily' (whatever that means for a child caught up in the surround of mass atrocity and trying to survive as best he can).

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[168] Asimakopoulos (2010), p. 50.

[169] Agreement on Accountability and Reconciliation (2007).

[170] Asimakopoulos (2010), p. 57.

[171] Asimakopoulos (2010), pp. 57–58.

[172] Asimakopoulos (2010), p. 57.

The legal question that is posed here in regards to cases such as that of Ongwen and Kwoyelo is whether an adult can be considered to have been forcibly committing atrocity as part of an armed group or force subsequent to forcible transfer (with genocidal intent) of that individual as a child to that armed group or force (specifically transfer via 'recruitment' to an armed group or force committing mass atrocity and/or genocide and use as a child soldier). That genocidal forcible transfer is characterized by, for instance: (1) the inability of the child to leave the armed group or force, (2) extreme abuse of the child by the commanders of the group or force, (3) indoctrination of the child; (4) destruction of the child's former identity (regardless whether the child was abducted into the armed group or force or allegedly volunteered to join); (5) concerted efforts to alienate the child from the community of origin and (6) attempts to keep the child permanently removed from the community of origin to the great detriment of that targeted community's survival. If such adult 'complex perpetrators', as some have named them, are considered to be the victims of a continuing genocidal crime (transfer to another group from which they cannot reasonably have been expected to escape), then they are, it is here contended, entitled to exoneration for atrocities committed (unless they are offered a way out such as amnesty and choose instead to continue with the group and perpetrate additional grave international crimes). Such exoneration *in effect* is currently provided to child members of armed groups such as the LRA who are captured while still under age eighteen such that all of their conflict-related grave international crimes were committed as children (as reflected in the fact that the international criminal courts and tribunals have declined to prosecute this group of individuals).

According to Asimakopoulos, there may be political factors working toward handling the Kwoyelo case via the criminal courts rather than the established alternative justice system:

> . . . the GoU [Government of Uganda] wants to show to the international community, and in particular to the ICC, that it is able to try LRA combatants itself. In that sense, the Kwoyelo case is a very important first case because the eyes of the international community, especially those of the ICC, will be focussed on Uganda. If the DPP wins, a precedent can be set that can enable the DPP to start many more cases against captured senior LRA commanders.[173]

Such cases, however, must not be used to send symbolic messages to the international community but must be prosecuted based only on a sound legal rationale. Cases such as that of Ongwen and Kwoyelo also raise important questions about what role emotion is playing in the law. Should and does the fact that the atrocities committed by such individuals as Ongwen and Kwoyelo are an offense to the international conscience and are disgusting in their brutality play a role in the legal assessment of the *mens rea* requirement? Nussbaum argues that disgust

[173] Asimakopoulos (2010), p. 58.

"should not. . .play either an aggravating or mitigating role in the criminal law where it currently does so."[174] One may properly ask then whether the horrendous nature of the atrocities committed both during their childhood and as adults by some persons recruited as children into armed groups such as the LRA or into State forces committing grave IHL violations has improperly led, without due consideration, to a negation or at least an undermining of factors relating to duress and diminished mental capacity.

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Chapter 5
Truth and Reconciliation Mechanisms: A Re-victimization of Child Victims of Genocidal Forcible Transfer?

5.1 On Whether Truth and Reconciliation Mechanisms Deliver Justice to Ex Child Soldiers and Their Community

It has here been argued that children who have been the victims of forcible transfer to an armed group (State or non-State) perpetrating mass atrocities and/or genocide are not accountable for atrocities they may commit as child soldiers Rather, it is contended, these children are the non-culpable victims of a genocidal act as per Article 2(e) of the Genocide Convention (where forcible transfer to another group, it will recalled, does not require physical force and can include i.e. recruitment via exploitation of the child's highly coercive circumstances during the armed conflict making them extremely vulnerable to various forms of recruitment into the armed group or force). To this author's knowledge such a view has not been espoused previously while ironically child soldiers themselves have been, incorrectly on the view here, charged with genocide (i.e. Rwandan youth between the ages of 14–18 allegedly involved in the fighting in the 1994 genocide were charged with genocide regardless the mode of their 'recruitment' into the Hutu perpetrator armed group; though certain numbers were later released upon surrender of their weapons and confession to the atrocities they had committed).[1]

This chapter explores: (1) whether Truth and Reconciliation processes provide a viable alternate means to justice and historical truth for the child soldier and for the local community and State in regards to the issue of the child soldiers' involvement in the conflict; and (2) whether Truth and Reconciliation mechanisms are in actuality an appropriate vehicle for fostering effective social re-integration of ex child soldiers into their families and communities. It should be recognized that alleged "truth" in the context of Truth and Reconciliation forums has various shades:

[1] Briggs (2005, pp. 20–25).

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> [There is] . . .the "factual or forensic truth" of the conflict [i.e. how many civilians lost their lives, how the conflict started, how children were recruited into armed rebel groups and government forces etc.. [and the]"personal or narrative truths", namely the truth as understood or related by individual participants, victims and witnesses. [In addition] there is] the "social truth" or that truth that is generally accepted by large segments of the population.[2]

We will consider these various 'truths' as well as: (1) how the facts concerning child soldiering for armed groups committing mass atrocities and/or genocide fit with the notion of the genocidal forcible transfer of children to another group and (2) the implications for understanding the legal standing of ex child soldiers who have committed conflict-related atrocities.

Proponents of Truth and Reconciliation (T&R) mechanisms generally suggest that these mechanisms properly hold also children accountable for atrocities committed as child soldiers while, at the same time, and paradoxically, purportedly facilitate the children's societal re-integration. We will examine shortly whether or not such a claim is likely accurate given some of the available empirical evidence on the effectiveness of re-integration of ex child soldiers globally through, in part, T&R processes.

It is to be emphasized that accountability as referred to here with respect to the child soldier testifying before a Truth and Reconciliation panel often involves: (1) acceptance not just that the child caused enormous suffering to others but that, to some degree at least, the child *allegedly* had some degree of tactical agency (was not entirely a victim him or herself of circumstance; hence the basis for some degree of alleged culpability that must be acknowledged by the ex child soldier). The child soldier thus in testifying (whether anonymously or not) is asking for community forgiveness. At the same time:

> Because restorative justice recognizes that crime "is a violation of people and relationships", it is not primarily concerned with what laws were broken and what punishment is appropriate. Instead it focuses on the harm caused by crime to those involved and their relations, and on how those harms can be repaired.[3]
>
> *From a restorative justice perspective, harms create obligations; an essential link is drawn between restoration and accountability* (emphasis added).[4]

Accountability is thus central to the restorative justice process as the alleged perpetrator is expected under this mechanism to repair the harms done to the victim and the community.[5] However, this author has disputed the claim that child soldiers committing atrocity as child members of an armed group committing mass atrocity and/or genocide have the *mens rea* to be considered culpable given the justifiable availability of a duress defense in such cases and will not further belabor the point here. Rather, the objective in this first section is to demonstrate how Truth and Reconciliation processes can often serve to distort the truth of the child soldier

[2] Sierra Leone Truth and Reconciliation Commission (2004), p. 26.

[3] Stovel and Melinas (2010), p. 5.

[4] Stovel and Melinas (2010), p. 5.

[5] Stovel and Melinas (2010), p. 5.

experience. That is, these processes transform the child in the public consciousness from their authentic status as victim of genocidal forcible transfer to another group to the *inauthentic* status of perpetrator who acted with malice of aforethought and some level of freedom of choice (even in the case of child abductees forced to become child soldiers). In employing such T&R processes then the State ostensibly meets its dual international law obligation to: (1) hold accountable those who are allegedly criminally culpable with respect to grave international crimes (war crimes, crimes against humanity and/or genocide) as are purportedly some child soldiers who have committed conflict-related grave international crimes as members of an armed group or force perpetrating mass atrocity and/or genocide and (2) to provide children affected by armed conflict the special protection and assistance required under IHL (i.e. by using a mechanism that is supposedly rehabilitation focused and allegedly non-punitive).

Note that the UN Committee on the Rights of the Child endorses the use of restorative justice mechanisms (i.e. Truth and Reconciliation mechanisms) that preclude incarceration where feasible:

> This [CRC compliant] juvenile justice, which should promote, inter alia, the use of alternative measures such as diversion and restorative justice, will provide States parties with possibilities to respond to children in conflict with the law in an effective manner serving not only the best interests of those children, but also the short- and long term interests of the society at large.[6]

Truth and Reconciliation mechanisms are, however, often flawed in certain respects. These transitional justice mechanisms in post-conflict periods as applied to ex child soldiers are, in practice, on the view here, often something of a cross between a false prosecution in a non-judicial forum with questionable procedural safeguards, if any, amounting to a symbolic public flogging and ritual purification and exorcism of alleged evil. Some have referred to so-called 're-integrative shaming' of the alleged perpetrator by the community as an essential element of restorative processes.[7] On the analysis here, however, it is not at all clear that: (1) ex child soldiers who committed atrocities ought be shamed as an element implicit or explicit in their participation in restorative or local healing processes where the child provides a narrative about his or her crimes and takes alleged responsibility for the same or (2) that the shaming involved is in fact a facilitator of re-integration into the community even where the focus is ostensibly on the act itself more so than on the child perpetrator in any holistic sense. As to the issue of procedural safeguards some, especially those operating from a religious or indigenous healing perspective, argue that procedural safeguards with Truth and Reconciliation processes are not required. This since the focus is on reconciliation between offender,

[6] General Comment of the Committee on the Rights of the Child (2007).

[7] Stovel and Melinas (2010), p. 5.

the community and individual victims.[8] It has been commented, and this author concurs, that "Such ideological standpoints may cloud judgement with regards to the potential for coerciveness [i.e. forcing ex child soldiers to testify etc.] and unfairness in restorative justice."[9]

Further, it is the case that the retelling of one's story for public consumption (as is expected of ex child soldiers testifying before a Truth and Reconciliation panel) can amount psychologically to a reliving of the trauma and is not inherently or always therapeutic.[10] Further, these narratives concerning atrocities committed by the children as a child soldiers may serve to stigmatize all ex child soldiers in the community and assign guilt to these children in the perception of the local and wider community where in fact legally none properly exists:

> *Such spoken narratives* [regarding the commission of atrocities] *may be inherently reminiscent of confessions [implying guilt],* whether performed in religious [other non-judicial fora] or law enforcement contexts (emphasis added).[11]

As a result of the child's sharing in the T&R forum a narrative account of his or her involvement in perpetrating atrocity; there is a high likelihood of community attributions to the ex child soldier of legal and moral responsibility for the international crimes he or she committed as a child soldier member of an armed group or force perpetrating systematic grave IHL violations. This is especially the case for ex child soldiers whose victimhood is frequently largely denied by the local community (thus disregarding the fact that the child was soldiering in the context of a brutal armed group or force intent on committing mass atrocity). This view of T&R processes is then contrary to that promulgated by advocates of transitional justice mechanisms that involve Truth and Reconciliation non-judicial processes (sometimes mixed with and at other times separate from traditional purification healing customs). The advocates of T&R processes suggest that such mechanisms in the context of post-conflict situations are: (1) inherently 'healing'; (2) in the 'best interests of the child' and the community; (3) conducive to reducing the risk of further violence and (4) effective in facilitating the child's re-integration into the community all of which claims have *not* been consistently or particularly well supported. The view that child soldiers experience some or much healing by providing a narration before a T&R body about the conflict-related atrocities they committed is, on the analysis here, a perspective that unjustifiably pathologizes and assigns culpability to these children whose actions were in fact importantly conditioned by the drive to survive and duress as previously here explained in some detail. Note further that advocates of T&R mechanisms as an alternative

[8] General Comment of the Committee on the Rights of the Child (2007) Cited in Lynch (2010), p. 175.

[9] General Comment of the Committee on the Rights of the Child (2007) Cited in Lynch (2010), p. 175.

[10] Pittaway et al. (2010).

[11] Harris (2010), pp. 341–342.

justice vehicle for ex child soldiers who have committed atrocity generally adopt the presumption that regarding these children as non-culpable is simply grounded on Western colonialist naïve conceptions of children and childhood:

> Thus caught up in advancing a legalist worldview originating from the Global North that incorporates both childhood innocence – at least as defined in legal terms – and the inviolable role of punishment in abuse prevention, humanitarian workers too commonly assume that the remedy needed by children entangled in soldiering is an assurance of blamelessness.[12]

The analysis here instead characterizes these children as victims of genocidal forcible transfer who acted as they did under continuing duress and threat of death for disobedience. Hence, ex child soldiers who have committed atrocities ought not be expected to express guilt but rather remorse for the suffering caused due to the coercive context in which the children found themselves. The claim of childhood innocence in respect of conflict-related international crimes committed by the child is not in fact a Western conception. Rather, it is based on the recognition that but for the failure of the State to protect the child (as required under IHL) from genocidal forcible transfer to an armed group committing mass atrocities and/or genocide; the child would not have engaged in perpetrating international crimes.

On the view here, furthermore, it is particularly damaging to a correct legal and moral analysis of the situation of child soldiers who have committed atrocities *as part of a murderous armed group* to advance the *erroneous* notion that to deny the blameworthiness of these children is to deny their agency as autonomous persons. For instance, consider the following quote from a mental health practitioner who is among those who promote the alleged need to hold child soldiers culpable and accountable. He suggests that any communication of lack of blame to these child soldiers who have committed atrocities is in essence an insult to their personhood:

> The staff, as if chanting a mantra handed down from their superiors, time and again would remind the recently demobilized youths that their actions had not been their fault, as they had been children when engaging in violence and atrocity. At one point Beah [Ishmael Beah former child soldier in Sierra Leone] as narrator acknowledges frankly to the reader how much he despised being told that he was not to blame for his actions. Without seeming to comprehend in that childhood moment the depth of his anger over this unintended slight, he could at least observe his reaction to it in enough detail to include it years later among the vivid memories brought to life in his book.[13]

In fact, communicating to these children that they are not to blame for atrocities committed as a child soldiers is simply to acknowledge the particular horrendous coercive circumstance in which the children operated *as members of an armed group or force committing mass atrocities and/or genocide* (i.e. it is to acknowledge their genocidal forcible transfer to the armed group or force; a transfer implemented using as a tactic the brutalization of the child soldiers through i.e. hundreds of beatings of the new child 'recruits'; murdering those child recruits who could not

[12] Harris (2010), p. 338.

[13] Harris (2010), p. 337.

keep up with the grueling physical regime of the armed group, forcing the child soldiers to commit atrocities often against their own family or community etc.). In this regard, consider the Sierra Leone T&R Commission findings that:

> . . .children were violated and abused by all of the armed factions involved in the Sierra Leonean conflict. They suffered abductions, forced recruitment, sexual slavery and rape, amputations, mutilations, displacement, drugging and torture. Children were also forced to become perpetrators and were compelled to violate the rights of others. Thousands of children were killed during the conflict in Sierra Leone. In addition, the Ministry of Social Welfare, Gender and Children Affairs (MSWGCA) estimates that more than 15,000 children suffered separation from their families and communities during the eleven-year war. This resulted in their becoming refugees in countries like Liberia, Guinea, Gambia, Côte d'Ivoire and Nigeria. In addition, many became internally displaced persons. Children were used as fighters and forced labour by the armed groups. Although the RUF was the first to abduct and forcibly enlist children as soldiers and porters, all the armed factions recruited children and deployed them to such ends.[14]

In sum then it is incorrect to attribute criminal or moral culpability to child victims of genocidal forcible transfer as are the children recruited and used in hostilities by armed groups or forces perpetrating systematic grave IHL violations as a military tactic.

While it is correct to say that disillusioned youth who protested the successive Sierra Leonean government and ruling elite corruption prior to the conflict in 1991 were an important part of the rebel movement[15] it is, at the same time, factually accurate that these youth's coercive circumstances were exploited via propaganda that promised political change and a better future while still other youth were subjected to abduction and forced recruitment.[16] The Sierra Leonean youth had not bargained for becoming hostage to the adult commanders of the RUF (the Revolutionary United Front) and the NPFL (National Patriotic Front of Liberia led by Charles Taylor) or other faction as but expendable cogs in the rebel group armament. These youth were treated by the armed commanders just as disposable to those armed groups of which they were members as the civilians subjected to mass mutilation and slaughter and other atrocity. It cannot be forgotten also that youth were a major target for the infliction of atrocity as well and some may have 'joined' armed group under these coercive conditions in an effort (often fruitless) to save their families and themselves. The youth recruited (by whatever means) into these various armed factions committing mass atrocity then also were the victims of a premeditated strategic genocidal transfer of youngsters to another group. Forcing these youth 'recruits' to commit atrocity against their own people involved drugging and exposing these 'child soldiers' to brutal initiation rites which the rebel groups perceived as critical to accomplishing a successful genocidal transfer (as it largely turned out to be):

[14] Sierra Leone Truth and Reconciliation Commission (2004), p. 15.
[15] Sierra Leone Truth and Reconciliation Commission (2004), p. 27.
[16] Sierra Leone Truth and Reconciliation Commission (2004), p. 17.

> Sierra Leonean youths were recruited (either by force or by persuasion) from Liberia, Ivory Coast and parts of Sierra Leone for the rebellion in 1991…In both cases [whether by 'voluntary' recruitment of youths or forced recruitment], the conflict had a marginalising effect, as *youths were alienated from their communities when forced to commit atrocities against their own people*. The conflict further compounded their prior plight and has had negative consequences on their overall development, in particular vis-à-vis educational opportunities. A whole generation lost its childhood and youth. *Many young people have lost all stabilising ties and emotional support due to the death of, or rejection by, their families* (emphasis added).[17]

The recruitment of youth is one aspect of the targeting of children by those who wished to overthrow the Sierra Leone regime in a conflict that, for the most part, pitted Sierra Leonean rebels against their own people:

> Understanding the violations committed during the war requires an understanding of those who perpetrated them. Those affiliated to the Revolutionary United Front (RUF) carried out the majority of violations and abuses over the conflict as a whole. *The RUF pioneered the concept of forced recruitment, including the enlistment of child combatants.* It also bears overwhelming responsibility for the widespread use of drugs by its members, which precipitated spates of crazed violence and compounded the prevailing general sense of oppression and hopelessness.[18] [Note that various other of the warring factions also committed grave human rights violations; the Armed Forces Revolutionary Council (AFRC) perpetrated atrocity and in 1998–1999 especially amputations while the CDF (Civil Defence Forces of Sierra Leone linked to the RUF) used torture in its initiation rites and the Kamajors (a part of the CDF) employed forced cannibalism].[19]

The child soldier (youth or younger child) sharing the details of the conflict-related atrocities he or she has committed seems not uncommonly to dehumanize rather than humanize the story teller in the perception of the community. Often as not expressions of remorse from the ex child soldier – no matter how genuine – are not nearly adequate enough to overcome the dehumanization of the child in the perception of the community consequent to the child's public detailing of the horrific atrocities he or she may have committed as a member of an armed group committing grave human rights abuses amounting to international crimes:

> Sierra Leone's TRC, like South Africa's, valorized a particular kind of memory practice: "truth telling," the public recounting of memories of violence. This valorization, however, is based on problematic assumptions about the purportedly universal benefits of verbally remembering violence… In northern Sierra Leone, social forgetting is a cornerstone of established processes of reintegration and healing for child and adult ex-combatants ***Speaking of the war in public often undermines these processes, and many believe it encourages violence***. *In Sierra Leone's TRC, however, sensitization materials and commissioners' speeches promoted the* [*alleged*]*healing and reconciliatory powers of verbal remembering, often explicitly discounting local understandings of healing and reconciliation in terms of social forgetting* (emphasis added).[20]

[17] Sierra Leone Truth and Reconciliation Commission (2004), p. 17.

[18] Sierra Leone Truth and Reconciliation Commission (2004), p. 11.

[19] Sierra Leone Truth and Reconciliation Commission (2004), p. 11.

[20] Shaw (2005).

Further, girl child soldiers telling also of their sexual victimization before a Truth and Reconciliation Commission knowing that these details will be shared at some point in a public forum may not necessarily be conducive to healing even where the particular child's identity is concealed. Further, there are also circumstances in which local custom involves an aversion to recounting memories of violence and 'social forgetting' is therefore the preferred method of coping.[21]

Such a characterization of the Truth and Reconciliation process as this author has given above is far from the depiction of an alleged entirely benign mechanism typically described in much of the academic legal and social science literature on the topic.

5.2 Children and the Truth and Reconciliation Process: Co-opting Children's Rights Participation Rhetoric

5.2.1 The Sierra Leone Truth and Reconciliation Commission

Sierra Leone's Truth and Reconciliation Commission published a child-friendly version of its report that was to give children an opportunity to participate actively in the Truth and Reconciliation process. The child friendly report is considered to be "an official account of the Commission's findings"[22] that reflects Sierra Leone giving due regard to the children's basic human right to participate in decision-making and processes that affect their lives (a right set out in Article 12 of the Convention on the Rights of the Child ratified by Sierra Leone 18 June, 1990).[23] That such a report was produced is significant in that: (1) many thousands of children were targeted by the Revolutionary United Front rebels in the 10 year Sierra Leone conflict that began in 1991 and through the child-friendly Commission report children are rightfully being addressed as an interested party; (2) representatives of child groups participated in the drafting discussions regarding the report content[24] as did over 100 children; 15 of whom worked very closely with the Commission in the drafting process; and (3) the Sierra Leone child-friendly version of the Commission findings is the first such child oriented document produced by a Truth and Reconciliation Commission.[25] It is important to understand, however, that:

[21] Mazurana and Carlson (2010), p. 22.

[22] Sierra Leone Truth and Reconciliation Report (child friendly version) (2003), p. vi.

[23] Ratification status of the CRC (2011).

[24] Sierra Leone Truth and Reconciliation Report (child friendly version) (2003).

[25] Sierra Leone Truth and Reconciliation Report (child friendly version) (2003).

> The child-friendly report was *not* written by children and does not attempt to speak for all the children of Sierra Leone but instead tells the story of the war from the children's point of view [at least in part] (emphasis added).[26]

The data which formed the basis for the child-friendly report included, among other things: (1) "hundreds of statements given by children to the Commission"; (2) testimony that children gave to the Commission in closed hearings; (3) "presentations made during the thematic hearings on children conducted on 16–17 June 2003, on the occasion of the 'Day of the African Child'"; (4) submissions by various child protection agencies in Sierra Leone especially the Children's Forum Network and (5) submissions made to the Commission by children and others for the National Vision for Sierra Leone project.[27] In addition, selected artwork created by children on the occasion of a visit of the UN Special Representative to the Secretary-General on Children and Armed Conflict (Sierra Leone) in February 2003 was included in the child-friendly Commission report. The Sierra Leone Truth and Reconciliation Commission notes regarding the contribution of children to the Truth and Reconciliation process in Sierra Leone and the child-friendly report in particular (quoting from the child friendly report itself):

> Over the last 30 years, there have been more than 25 truth commissions in different countries around the world. Each truth commission has recorded the misery and sorrow of oppression and war. The Commission in Sierra Leone has added a new dimension to these efforts. Never before have children played such an important role in the truth and reconciliation process One reason that children have been so involved is that they were deliberately targeted and suffered so much during the war.
>
> *According to submissions to the Commission, some 7,000 children were forced to join armed groups or forces, and thousands more were targeted for abduction, rape, murder and mutilation*. Schools and hospitals were destroyed. Villages and homes were burned.
>
> Children witnessed these atrocities.
>
> That is why the Commission has made a special effort to speak with children and make sure their stories become a part of this report [the child-friendly version of the Commission findings](emphasis added).[28]

However, it must be recalled that the child -friendly Sierra Leone Truth and Reconciliation Commission report, in the final analysis, was written by adults (though with some child input):

> Although the methodology page of this document asserts the claim that "the child-friendly report [child-friendly version of the Sierra Leone Truth and Reconciliation Commission report] was not written by children and does not attempt to speak for all the children of Sierra Leone but instead tells a story of the war from the children's point of view," it proceeds, written in a childish font and illustrated with pictures, to speak in the first person, narrating "our experience as children in the war." *One gets the sense that this performance is more about creating a story for the adult than the child. Explaining the children's experience of war to children who have been fighting for years is like explaining sex in*

[26] Sierra Leone Truth and Reconciliation Report (child friendly version) (2003), p. vi.

[27] Sierra Leone Truth and Reconciliation Report (child friendly version) (2003), p. vi.

[28] Sierra Leone Truth and Reconciliation Report (child friendly version) (2003), p. 8.

> *terms of 'the birds and the bees' to a teenage mother*. ***It is unclear who the author, or the addressee, of this report really is*** (emphasis added).[29]

The current author concurs with the above quote and suggests further that the child-friendly Sierra Leone T&R Commission report contains certain statements that can reasonably be considered to be contradictory or arguably even intended to sidestep certain key issues and meet adult political agendas. For instance, though the report refers to children being forced to join armed groups or forces, at the same time, it leaves open the question of children's (child soldier) culpability rather than ruling it out i.e. the report does not explain the rationale for the SCSL Prosecutor declining to prosecute minors (persons under age 18) for war crimes and states simply that the Truth and Reconciliation process is not about determining individual innocence or guilt:

> Although the Special Court has the authority to prosecute anyone over 15 years of age, the Head Prosecutor of the Special Court decided very early that children under 18 years of age would not be prosecuted by the Special Court.
>
> The Truth and Reconciliation Commission does not judge the innocence or guilt of anyone. It does not give out punishment.[30]

While the Truth and Reconciliation Commission for Sierra Leone purports to take an impartial stance on issues and function only as an impartial recorder of historical truth and witness testimony,[31] this is, it is here contended, not entirely the case in regards to children. The Commission claims it treated *all* children as both witness and victim to the war[32] and formulated the following as purportedly one of it guiding principles:

> Equal treatment of all children before the TRC: Children should not be categorized as victims, witnesses or perpetrators; rather, for the purposes of the TRC, all children participating in its work, irrespective of their particular experience, are witnesses providing information for the TRC. The Commissions decision that all children who gave statements would be considered victims and witnesses of grave violations recognized that children who participated in hostilities were primarily victims of the war.[33]

However, the child-friendly report at one point clearly refers to child victims ***or*** child perpetrators and refers to only the former category of persons having been violated (please see the quote below from the child-friendly version of the Commission report). Cleverly, but unfortunately on the view here, the same quote turns then to considering Sierra Leonean children as a group with the statement: "We are the victim, the perpetrator and the witness, all at once." (Rather than clearly stating that individual child soldiers who committed atrocities were also entirely child victims). This amounts, in this author's respectful view, to some semantic sleight of

[29] Monforte (2007), p. 170.

[30] Sierra Leone Truth and Reconciliation Report (child friendly version) (2003), p. 10.

[31] Sierra Leone Truth and Reconciliation Report (child friendly version) (2003), p. 10.

[32] Siegrist (2010), pp. 22–23.

[33] Cook and Heykoop (2010), p. 168.

hand so-to-speak. The Commission in fact does takes a very definite stand purporting to make a conceptual distinction between 'child perpetrator' and 'child victim' and thus makes an implicit legal analysis that, on the view here, is morally and legally insupportable:

> Everyone talks about "the impact of war on children." But how do you measure the impact of war? ***Who suffers the greater horror, the child who is violated, or the child who is forced to become a perpetrator?*** *We* [the children of Sierra Leone] are the victim, the perpetrator and the witness, all at once [here suggesting that as a collective group, the child population of Sierra Leone includes victims, perpetrators and witnesses of atrocity] (emphasis added).[34]

On the analysis in the current inquiry, in contrast, the child who perpetrates atrocities as a child soldier member of an armed group such as the RUF that utilizes the persecution of civilians as a war strategy is him or herself a victim of transfer to another group such that his or her former identity is destroyed (a genocidal act in itself that destroys in part or in whole the group of origin from which the children – including youth – were 'recruited'). Thus, it is here contended that child soldiers who have committed conflict-related atrocities as young people under age 18 fit the Sierra Leone Truth and Reconciliation Commission definition of victim and should be eligible for reparations along with other victim groups. The Commission's definition of 'victim' eligible for reparations is consistent with international law notions of the same and was as follows:

> A person is a 'victim' where as a result of acts or omissions that constitute a violation of international human rights and humanitarian law norms, that person, individually or collectively, suffered harm, including physical or mental injury, emotional suffering, economic loss, or impairment of that person's fundamental legal rights. A 'victim' may also be a dependant or a member of the immediate family or household of the direct victim as well as a person who, in intervening to assist a victim or prevent the occurrence of further violations, has suffered physical, mental or economic harm.[35]

Certainly the child soldiers of any age under 18 of Sierra Leone who committed conflict-related atrocities were, as a result, alienated from their communities (most on an ongoing basis) and suffered great psychological and physical harms and lack of education as members of the rebel forces compelled to commit atrocities by continuing threat of death for resistance and other coercive circumstances. Hence, they would appear to meet the definition of victim set out above. Indeed, the Commission report states the following:

> . . . the Commission is. . .convinced that some specific reparations measures need to be taken in respect of those categories of children that suffered during the war or that still suffer from the consequences of the war such as *abducted children*, *forcibly conscripted children*, *and orphans*. The Commission places particular focus on restoring lost educational opportunities for children (emphasis added).[36]

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[34] Sierra Leone Truth and Reconciliation Report (child friendly version) (2003), p. 14.

[35] Sierra Leone Truth and Reconciliation Report (child friendly version) (2003), p. 234.

[36] Sierra Leone Truth and Reconciliation Report (2004), p. 243.

On the view here; since children (which includes youth) recruited by any means into an armed group committing mass atrocity (as in the Sierra Leonean conflict) are victims of genocidal transfer; the notion of 'recruitment' and the distinction between forced and voluntary recruitment is inapplicable in this context. Hence, all child members of the rebel groups committing atrocities in Sierra Leone ought to have been entitled to reparations as victims of grave violations of IHL and the State's failure to meet its obligation to protect these children (persons under age 18) from such transfer to an armed group and from the enduring adverse consequences for the child's quality of life and future opportunity.

The child-friendly commission report for Sierra Leone emphasizes the role that children played in contributing to the content of the report; to the truth and reconciliation process and the importance of their participation rights in general:

> The war has taught us the meaning of injustice, and we know that the children of Sierra Leone have rights. It is our right to speak up, to try and find the words to tell our story.[37]
>
> It is our responsibility to speak and bear witness. Because we are the ones who survived, we are the voice of our sisters and brothers who were murdered in the war. It is our burden and our blessing to speak for them. But the story we have to tell is not a story for children. It is not 'child-friendly.[38]

One important and valuable aspect of the report is its acknowledgement of the State's failure to protect the children in war-affected Sierra Leone:

> Article 38 of the Convention obligates States Parties to "take all feasible measures to ensure protection and care of children who are affected by an armed conflict."
>
> *But we were not protected. We witnessed the destruction of our lives and the lives of everyone around us –our country, our communities and our families* (emphasis added).[39]

The child-friendly report does discuss the plight of the child soldier and his or her victimization in being abducted into an armed force committing mass atrocities:

> According to submissions to the Commission, the estimated number of children who were abducted and forced to fight in the war numbered up to 10,000. The children fought on all sides, with the RUF, the AFRC, the CDF and the RSLAF (the Sierra Leonean army).
>
> An equal number of children were abducted for sexual slavery and forced labour. ***Why were we targeted? Because we were powerless and easy to manipulate. . .because we were children; and because they didn't care if we lived or died*** (emphasis added).[40]

However, the child-friendly Truth and Reconciliation Commission report does not explicitly suggest that all the child soldiers were non-culpable for any conflict-related atrocities they may have committed during the conflict (i.e. as they were the victims of genocidal forcible transfer to the armed groups or forces in question (recruitment being accomplished through abduction in the case of the rebel groups,

[37] Sierra Leone Truth and Reconciliation Report (child friendly version) (2003), p. 14.

[38] Sierra Leone Truth and Reconciliation Report (child friendly version) (2003), p. 14.

[39] Sierra Leone Truth and Reconciliation Report (child friendly version) (2003), p. 14.

[40] Sierra Leone Truth and Reconciliation Report (child friendly version). (Truth and Reconciliation Commission Report for the children of Sierra Leone 2003), p. 15.

conscription in the case of the SL army and, in other cases exploitation of the children's highly coercive circumstances leading to *purported* voluntary recruitment resulting from the child's attempt to survive and hopefully take some control over his or her life (the latter of which, of course, was far from the actual outcome)).

The current author would thus challenge the view that the SL child-friendly commission report in fact treats the Sierra Leone child soldiers as a group as entirely non-culpable victims or even primarily as victims contrary to the report's claims at points such as reflected in the lines that immediately follow:

> It was also noted that all children –under 18 – involved in the TRC process would be recognized ***primarily*** as victims of the war that targeted them and exploited their vulnerability (emphasis added).[41]

Note that in the case of Sierra Leone; the decision, in practice, not to prosecute child soldiers who had committed international crimes is generally attributed by the government to the child soldiers' lack of authority and rank as children in the armed group or force in question rather than to their lack of alleged culpability. *Hence, the Sierra Leone government did not declare that child soldiers would be excluded from amnesty as they were non-culpable and therefore did not need amnesty.*

The TRC of Sierra Leone by what it did not explicitly state in regards to the issue of child soldier culpability (to any extent) for international crimes; or complete lack thereof in fact implies State attributions of culpability to some degree of the child soldier who participated in conflict-related atrocities. Yet, at the same time; children recruited into fighting forces were offered reparations in Sierra Leone[42] which this author takes to be a tacit admission of the State's failure to meet its duty to protect (at the same time in inconsistent fashion children were not eligible for reparations who had been abducted into the armed force and used in a position of servitude for instance). Unfortunately ex child soldier enrolment in DDR programs, educational and counseling services where some of these children no doubt had committed conflict-related atrocities was resented many times by other victim groups:

> Most of the victims who appeared before the Commission expressed a widely held perception that the state had taken better care of the ex-combatants *rather than the victims of the conflict*. This perception has the potential to *hinder reconciliation between victims and perpetrators* (emphasis added).[43]

Note that in the above lines from the Sierra Leone Commission report; a distinction is drawn between the child soldiers and 'the other' and child soldiers are, erroneously on the view here, not classified as victims in the context of that paragraph.

The view that ex child soldiers were in fact non-culpable perpetrators (i.e. given the factors here discussed; that is victims) is undermined by generalized statements

[41] Siegrist for UNICEF Innocenti Centre, p. 195.

[42] Mazurana and Carlson (2010), p. 12.

[43] Sierra Leone Truth and Reconciliation Report (2004), p. 236.

such as the following in the Sierra Leone Truth and Reconciliation Commission report. Statements such as the following draw a supposed distinction between so-called perpetrators and victims and makes no reference to the special protections owed children and youth, the targeting of this group by the rebel armed groups for recruitment and forced atrocities and their vulnerability to recruitment by various means as well as their brutalization as members of the armed groups:

> The implementation of a reparations programme will respond to the concerns expressed by the victims. It allows the Government to acknowledge the plight of victims and their suffering. This will reduce the perception that perpetrators are better cared for than victims.[44]

Even where children are entitled to reparations who were actively engaged in the fighting, they may face many barriers in accessing their rights i.e. not knowing how to file the required documents or not having the necessary evidentiary material or be lacking the ability to file since they have no adult assistance and have no legal autonomy[45] (the lack of legal autonomy to initiate various civil actions then can, in many and varied instances, amount to a more general denial of access to justice).[46] Furthermore:

> Children who are perceived as perpetrators; those who were part of fighting forces and groups; those forcibly married, enslaved or prostituted during the conflict; those who were sexually violated; children born of rape; or children now heading households may rightly fear stigma and *possible reprisals for coming forward to voice the harms committed against them and **try** to claim reparation* [wherever the State offers reparations to victims who have suffered harms falling into these categories](emphasis added).[47]

This is not to imply that some children may not overcome these hurdles and access reparations which may include financial compensation and access to services such as education and heath services and the like.[48] However, it should be understood that most children end up *not* receiving reparations for harms suffered during armed conflict even where eligible under the rules and whether viewed as pure victim (abducted child soldier) or tainted victim (child soldier who allegedly volunteered to be a 'recruit' to the armed group or force committing mass atrocities).[49]

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[44] Sierra Leone Truth and Reconciliation Report (2004), p. 237.

[45] Mazurana and Carlson (2010), p. 16.

[46] Grover (2008).

[47] Mazurana and Carlson (2010), p. 16.

[48] Mazurana and Carlson (2010), p. 16.

[49] Mazurana and Carlson (2010), p. 24.

5.2.2 *On 'Socially Constructed' Ex Child Soldier Perceived Identities*

The question then can legitimately be posed as to: (1) whether children's testimony before a body that presumes child soldier culpability to some degree for atrocities (or, at a minimum, does not explicitly affirm the children's complete lack of culpability as with the TRC of Sierra Leone), and (2) before which the ex child soldier recounts the details of atrocities he or she may have committed, is in fact in 'the best interests of the children' involved as is claimed by TRC proponents. Such processes may in fact *reinforce* the child soldier *perceived* culpable perpetrator identity rather than allowing the child and the community to move past that negative identity (one that was constructed by a murderous armed group which forcibly transferred the child to its ranks, either by abduction or some other form of recruitment, and then would not allow the child to leave and rejoin his or her own community of origin and live peaceably). Such a view is contrary then to those who argue that a truth and reconciliation mechanism (as opposed to a criminal prosecution process) to deal with child soldiers who perpetrated atrocities may in fact lead to the 'legal erasure' of the (culpable) child soldier category of war-affected children.[50]

The importance of the *socially constructed* identity of the ex child soldier is poignantly referenced in the following description of a post-conflict local cultural healing ritual for child soldiers who have committed conflict-related atrocities:

> Mazurana and McKay sought to understand methods developed by war-affected communities [in Mozambique] to heal and reintegrate children who had been abducted and forced to serve with fighting forces during the war. Village elders and local healers (curandeiros) explained how they adapted traditional rituals to deal with previously unknown levels of violence against children. *Where the child had both experienced and participated in such violence, a ritual for the dead was adapted, in which the "old" child was declared dead and a "new" balanced and harmonious child was reborn. While the child retained his or her place in the family, he or she received a new name, which everyone used from that point on, emphasizing the new* [socially accepted] *identity* (emphasis added).[51]

It would appear that the above mentioned village elders understood well that a prime goal of the armed group that abducted the children and forced them to commit atrocities as child soldiers was to change the children's identity forever. That is, the objective was to change the children's identity such that the children 'belonged' never again to their home community but rather to the armed group (no matter even that the ex child soldiers may have physically rejoined their community of origin during the post-conflict period). The latter then amounts to the genocidal act of forcible transfer of children to another group. The village elders, however, through the adapted cultural ritual described, reclaimed the children as the

[50] Compare Monforte (2007), p. 178.

[51] Mazurana and Carlson (2010), p. 25.

community's own. By collectively reconstructing and re-assigning to the child a positive new identity (declaring dead through ritual the child soldier/perpetrator *identity* in the eyes of the community); the community is able to restore mutual trust between the community and the ex child soldier. Recall that the armed group perpetrating mass atrocity and/or genocide, in contrast, has as its goal to create a 'fifth column' of its child soldier recruits who will maintain their loyalty to the armed group in all circumstances. Whether ex child soldier returnees to their home communities in the post-conflict period are in fact a 'fifth column 'or not; they are perceived so by the community unless concerted steps are taken to alter that perception; steps that may or may not be successful.

5.2.3 The Liberian Truth and Reconciliation Commission

Liberia's civil conflict raged for 25 years and child soldiers were a prominent feature in the conflict. As in Sierra Leone; these children were mostly abducted and forced to fight with the rebels. Liberia's approach to dealing with ex child soldiers who had committed atrocities is something we consider next (i.e. children who fought with Charles Taylor; the latter now on trial by the Special Court of Sierra Leone for war crimes, crimes against humanity and serious violations of IHL with the trial being held in the facilities of the ICC in The Hague).

It has been reported that 11,780 children in Liberia had been disarmed and demobilized by 2004 though the number of children recruited had been much higher and girl child soldiers were notably missing from the DDR process.[52] The focus of the accountability approach in Liberia with ex child soldiers who allegedly participated in perpetrating atrocity has been on rehabilitation as was the case also in Sierra Leone. However, unlike the situation in Sierra Leone with the Sierra Leone TRC, ex child soldiers in Liberia initially had reason to fear the possibility of prosecution by the courts should they testify before the TRC as: (1) that testimony could potentially be used against them in further proceedings in court and (2) according to the Liberian T&R mandate; that body could make recommendations for criminal prosecution in particular cases:

> The Liberian TRC (20025–2009) . . .was mandated to recommend 'prosecutions in particular cases as the TRC deems appropriate.' [while this was not the case for the Sierra Leone TRC] *This created concern among some children in Liberia who feared that the TRC would call for the prosecution of children* [ex child soldiers who participated with the rebels] (emphasis added).[53]

The Liberian TRC, however, decided that children would be *excluded* from TRC recommendations for prosecution in that the child soldiers, in the view of the

[52] Sowa (2010), p. 195.

[53] Siegrist (2010), p. 23.

Liberian TRC, had operated under duress to become the "virtual killing machines" of the various parties that recruited them (while those who were adults and as adults recruited children into the armed groups/forces would be recommended for prosecution).[54] At the same time, Liberia decided it would *not* grant amnesty to ex child soldiers based on the proffered rationale that: (1) amnesty implies guilt in the first instance and that (2) the children who participated in international crimes as child soldiers were non-culpable victims i.e. acting as members under duress of Taylor's armed force which force was engaged in the systematic attacks and the brutalization of civilians.[55] (Contrast this with the situation in Uganda where LRA child soldiers over age 12 were offered amnesty if they surrendered their weapons and renounced rebellion against the government (those under 12 were presumably considered too young to meet the *mens rea* requirements for culpability in any case)).[56] Thus, it seems that the Liberian TRC was, in certain respects much clearer on the issue of the complete lack of culpability of child soldiers who had committed atrocities than is the case for the TRC of Sierra Leone. In this regard the Liberian T&R Commission noted the following:

> Children suffered some of the most horrific crimes committed during the Liberian Civil War including LURD and MODEL insurrections. They were forced to kill friends and family members including their parents, rape and be raped, serve as sexual slaves and prostitutes, labor, take drugs, engage in cannibalism, torture and pillage communities. Many were forced to be 'juju' controllers, ammunition carriers, spies, armed guards, ambushers and so on.[57]

The Commission decided that its special child processes would apply only to those who were under age 18 *at the time of the Commission's work*; thus leaving out from those child processes, for instance, persons who were recruited into the armed groups as children but who were 18 or over at the time of the Commission hearings: "Ultimately, the experiences of children in earlier phases of the conflict (1979–1996) were not included in the child-focused work of the TRC."[58] It is noteworthy in this connection that the T&R Act allowed for release of the children's statements to the Commission (originally given in camera) into the public domain only after 20 years (at which time there might still be a concern that identifying information would be released inadvertently putting the individual who had given testimony as a child at risk at that point).[59]

Whether or not children benefited from their participation in the Liberian T&R process in the short or long-term (and in other similar mechanisms) is an open question. While it is clear that the government benefits by doing the 'politically

[54] Liberia Truth and Reconciliation Final Report, Vol. 2 at p. 69.

[55] Siegrist (2010), p. 24.

[56] Acirokop (2010), p. 275.

[57] Liberia Truth and Reconciliation Final Report, Vol. 1 at p. 44.

[58] Sowa (2010), p. 198.

[59] Liberian Truth and Reconciliation Act (2005).

correct' thing (i.e. having children participate, being seen to be promoting children's rights and community re-integration, being perceived as inclusive in the implementation of the T&R process including the most vulnerable in society etc.), the benefits to the child, if any, are not always apparent:

> The TRC derived many advantages from the participation of children. Yet the benefits for children must be substantial to validate and respect their efforts –recalling painful memories, travelling long distances to workshops and hearings and finding the courage to express their views. . .[60]

5.3 Children's Experiences in Testifying Before a Truth and Reconciliation Commission: The Sierra Leone Example

It would seem that expecting children to tell their stories to a Truth and Reconciliation Commission (TRC), including the stories from child soldiers regarding their commission of atrocity, sets up an obligation for the Commission to provide a certain consistent larger relevant context for then disseminating such children's narratives about their war experiences. While the child-friendly Sierra Leone Truth and Reconciliation Commission report does so to some extent by explaining the oppressive circumstances that existed during the conflict, there is an inconsistency between: (1) on the one hand describing child soldier recruits as powerless and (2) on the other failing to explain that the Prosecutor of the SCSL views children who committed conflict-related international crimes as non-culpable and why and relating that thus the SCSL Prosecutor declined to prosecute persons who were children at the time they perpetrated the atrocity. One can speculate that perhaps this inconsistency in the Commission report was intended to avoid inflaming the passions of some in the community who viewed the child soldier perpetrators of atrocity no differently than the adult perpetrators. In this respect then the Sierra Leone TRC report might be considered somewhat disingenuous and not in all respects necessarily in the children's best interests. By telling their stories under the aforementioned circumstances ex child soldiers may have in fact put children in their group at risk of retaliation and /or rejection by the community should their identity become known (though the Sierra Leone Truth and Reconciliation Commission took pains to try and hold confidential the identity of child soldier witnesses and did so also in any case where parent and/ or child requested the child's identity be concealed). In fact, parents and children (ex child soldiers) were initially concerned that testifying before the Truth and Reconciliation Commission might mean that the children would have to testify in the SCSL or may even be prosecuted by that Court.[61] Ostensibly these fears were quelled when the Prosecutor of the

[60] Sowa (2010), p. 230.

[61] Siegrist for UNICEF Innocenti Centre (n.d.), p. 202.

SCSL announced that persons under age 18 would not be prosecuted as they were not considered among those most responsible for the international crimes committed[62] and were exploited victims.

While testifying was ostensibly voluntary, one wonders what coercive factors (intentional or not) may have been operative and what procedural safeguards were effectively in place in each case to protect the child's physical and psychological integrity. Consider the following findings and children's statements regarding children's misunderstandings of the purpose and consequences of their testifying before the Sierra Leone TRC:

> Children had some understanding of the purpose of the TRC and why their statement was important. But in some districts, children were not well informed. *Some children thought that the TRC could provide financial support and send them to school* (emphasis added).[63]
>
> *After giving a statement I thought they were going to pay us. . .I thought they would help me find my parents. They never did.* [Boy who made a statement to the TRC](emphasis added).[64]
>
> *I gave testimony because I lost my family. I thought if I said something, some assistance would come. . .I wouldn't do it again because it didn't hep me*. [interview with a girl who gave testimony to the TRC without the involvement of a child protection agency](emphasis added).[65]

Despite rhetoric about children's participation rights and the protections that were in place to ensure that children testified 'voluntarily', it seems that many children felt pressure to testify before the Sierra Leone TRC (i.e. being told that their testimony would help bring peace to Sierra Leone and thus feeling obligated to testify or testifying in the hopes of receiving critical urgently needed assistance which in fact never materialized). This raises the issue of whether: (1) the children were indeed unfairly treated (intentionally or unintentionally manipulated) in some ways to testify before the Truth and Reconciliation Commission at least in some instances and whether (2) given the desperation of the children involved (their deeply impoverished situation, children who had often lost their parents in the conflict etc.); the Truth and Reconciliation process was inherently exploitive as it was not focused on improving the material, physical and psychological well being of the children as individuals as opposed to simply fulfilling the bureaucratic need to produce an outcome document (one which included, arguably for effect, some heart wrenching stories of suffering culled in part from hundreds of hours of child testimony). It appears that at least a proportion of children who had been involved in the fighting as child soldiers appeared to have testified in a fearful state (concerned about punitive actions the State might take) that fear lasting some months after their testimony was given if not longer:

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[62] Siegrist for UNICEF Innocenti Centre, p. 202.

[63] Siegrist for UNICEF Innocenti Centre p. 202.

[64] Cook And Heykoop (2010), p. 180.

[65] Cook And Heykoop (2010), p. 180.

> . . .the statement takers came in and encouraged us and made us feel okay. . .They told us everything would remain in secret. They also said that if we gave statements it would help bring peace to Sierra Leone. We were all afraid, but the TRC gave us confidence to talk. After talking it took several months to feel good. *We thought the TRC were going to take action and take us to court. We thought the TRC would come back but they didn't* (emphasis added).[66]

It is not clear then just how much choice the families felt they had in each case to decline to have their child testify before the Sierra Leone Truth and Reconciliation Commission.

5.4 On Whether Truth and Reconciliation Mechanisms Foster Effective Community Re-integration of the Ex Child Soldier

The Cape Town Principles set out that 'family re-unification' is the prime vehicle for social reintegration of the child soldier.

> **32. Family reunification is the principal factor in effective social reintegration.**
>
> a. For family reunification to be successful, special attention must be paid to re-establishing the emotional link between the child and the family prior to and following return;
> b. Where children have not been reunited with their family, their need to establish and maintain stable emotional relationships must be recognized;
> c. Institutionalization should only be used as a last resort, for the shortest possible time, and efforts to find family-based solutions should continue.[67]

However, the push among those in the backlash movement for 'accountability' of child soldiers for alleged war crimes; crimes against humanity and potentially even genocidal acts potentially poses an obstacle to family re-unification and full re-integration into the community for these individuals. Confessions and apologies from the ex child soldier may not be enough when the child soldier returnee (so-called culpable perpetrator) is unable to provide meaningful financial and other reparations to the direct and indirect victims of his or her acts of atrocity. Further, there may in fact be:

> *Pressure to forget* . . .reflect[ing] civilians' fear that fighting will continue/resume as well as the fears of ex-combatants, collaborators and beneficiaries that they or their loved ones will be held accountable for their actions (emphasis added).[68]

It is an open question whether: (1) the more formalistic non-judicial Truth and Reconciliation Commission Processes (or a combination of T&R and traditional ceremonies) are in the best interests of any particular ex child soldier or whether

[66] Cook And Heykoop (2010), p. 179.
[67] Cape Town Principles (1997), Article 32.
[68] Stovel and Melinas (2010), p. 30.

instead (2) "social forgetting" in regards to children's contribution to the atrocities is more beneficial (therapeutic) in general or in any particular case or indeed reliance strictly more traditional rituals and healing ceremonies. The answer to that question, however, must not be based on political considerations regarding, for instance, the need of the government, in order to curry public approval, to demonstrate to the community that it is holding all involved in the atrocities, including children, accountable in some fashion while still protecting their security.

The Truth and Reconciliation mechanism in Sierra Leone has been criticized by some scholars for allegedly focusing more on documenting IHL violations and collecting stories of suffering for posterity than on actually promoting integration and healing.[69] Some community members in Sierra Leone (and likely elsewhere as well in post-conflict situations after mass atrocities) felt strongly that reconciliation must be grounded on accountability as a first step at least for those most responsible for the atrocities while others held that 'social forgetting' was essential to promote peace.[70] There is then a great division in most local post-conflict communities on how to move forward to rebuild the community and in particular how to deal with ex child soldiers who have committed conflict-related atrocities.

The Truth and Reconciliation process to the extent that it involves individuals (ex child soldiers returned from the bush or from national forces as children or now adults aged 18 or over) narrating about their experiences in committing and witnessing conflict-related atrocities may in fact solidify the image of the child soldier as so-called (criminally culpable) perpetrator. This as the horror of the details of the atrocities committed and recounted may override the listeners' willingness to consider issues of the child perpetrator's *mens rea* and duress.

It has here been argued that children's involvement in committing conflict-related atrocities as child soldier members of armed groups perpetrating mass atrocity and/or genocide is part of the strategy employed by these groups or forces to effect a genocidal transfer of the children to that group or force (hence breaking the mutual bond between the children and their home communities/groups of origin and reassigning them the identity of the marginalized armed group living outside the parameters of normal society). The home community and international community's characterization of these children then as 'recruited' child soldiers: (1) belies the genocidal nature of the children's forcible transfer from their home communities and families to the armed group or force perpetrating systematic grave IHL violations and (2) implicitly creates an unfair burden on the child soldier to raise a affirmative defense of some sort for the atrocities he or she may have committed as a victim of genocidal forcible transfer to such an armed group or force. Consider in this regard then the claim by some scholars in the backlash movement that the rule of law requires child soldiers be held accountable regardless of: (1) the illegality of the child soldier recruitment and/or (2) the coercive

[69] Cook And Heykoop (2010), p. 183.

[70] Cook And Heykoop (2010), p. 183.

circumstances surrounding the child's commission of atrocity (as part of an armed group or force perpetrating grave IHL violations):

> The issue of child soldiers raises the question not only of accountability of those who recruit or use children, but also that of accountability for crimes allegedly committed by child soldiers. ***Because the illegality of the recruitment doesn't extinguish any potential liability for criminal acts committed by those illegally recruited any more than it extinguishes their status as a combatant***. We all know very well that children are used to commit atrocities during a conflict and we have all heard harrowing stories about how efficient, how ruthless and how brutal children can be when forced into that position. *The key here is that they are used: they are rarely, if ever, the "rational actors", in the sense that they follow orders, they do not give them and they certainly do not devise them. But does it really serve the objective of peace and the rule of law if they are not required to account for what they have done? Or does that send a message to a whole generation that for some people, there is impunity*?(emphasis added)[71]

In fact, the current author argues that genocidal forcible transfer of children to an armed group committing mass atrocities and/or genocide for use as so-called child soldiers does in fact "extinguish any potential liability [of the children] for criminal acts". The children's commission of atrocity is an integral planned component intended by the adult commanders of the murderous armed group or force to effect a genocidal forcible transfer of the children (i.e. simply recruiting children into an armed group or force to engage in normal soldiering activity that complies with IHL would, in comparison, not be an effective strategy for breaking the children's bond with their families and communities nor would this in fact be the intent in such a scenario). Thus the actual perpetrators of those atrocities physically carried out by the transferred children are the commanders who create the operational framework for the children transferred to the armed group to commit such acts (i.e. not the children who are conditioned to follow through on commander expectations subsequent to a variety of manipulative techniques). *This then is* ***not*** *at all a question of impunity for child so-called perpetrators. Rather, it is a matter of placing of the criminal culpability where it should be; on those responsible for the genocidal forcible transfer of children to armed groups or forces committing systematic grave violations of IHL with all that such a transfer routinely entails (children committing atrocities intended by the adult leaders of their armed group or force to make it impossible for the children to return to their families and communities).*

Note that transferred children hold no legal status under IHL as 'combatants' since: (1) the armed group or force itself is illegal as it routinely uses as a tactic of war the violation of the rules of war; (2) the genocidal forcible transfer of the children to the armed group or force committing mass atrocities and/or genocide is itself illegal under international law and (3) the systematic brutalization of civilians is not 'soldiering' activity. The children thus are forcibly transferred child civilians and remain thus. *The genocidal forcible transfer of these children then cannot be*

[71] Smith (2005), pp. 19–20.

reduced to or conceptualized as a 'recruitment' of child soldiers (whether conceived of as recruitment through conscription, enlistment or abduction). Further, as explained, accountability does not accrue to the child victim of such a genocidal forcible transfer for his or her commission of atrocities that are in fact prime indicia of that very transfer to an armed group or force that is engaged in a persistent pattern of grave violations of IHL.

The genocidal forcible transfer of children to an armed group or force committing mass atrocities and/or genocide is a 'continuing crime' even should some of the child soldiers manage to return to their home communities. This is the case given that the ex child soldier members of these murderous armed groups or forces will continue in most if not all instances to carry the stigma of the incorrectly applied moniker of 'culpable perpetrator' as well as the identity of the armed group or force to which he or she was transferred at least to some degree:

> The breakdown in family and community structures and the loss of social values have affected children materially and psycho-socially. *These effects are enduring and far-reaching*. A number of ex-combatant children are still bearing the brunt of their forced participation in the war. *Their families and communities have in many cases rejected them because of their former affiliations. Girls especially have experienced both derision and rejection because they were forced to become 'bush wives' or sexual slaves* (emphasis added)[72]

Just as to date there seems to have been little if any recognition of child soldier members of armed groups committing mass atrocities and/or genocide as victims of genocidal forcible transfer; the same is true, as previously discussed, in regards to the children born of wartime rape. For instance, in the same paper interestingly where the quote immediately above regarding the potential culpability of child soldiers who have violated IHL was extracted is the following statement regarding children born of wartime rape:

> . . . although rape has always been a feature of war, those who make the decisions on how to conduct warfare are increasingly targeting women as a means to demoralise societies and for other reasons. That these women are victims is quite clear, but *one question that has been raised recently is whether children born of wartime rape should also be considered to be victims and whether they should, for example, have a claim for reparations.* From the legal perspective, it seems that these children may have a claim as a family member of the victim, namely the woman who was raped. *A direct claim is much more difficult, because the child had not been born before the crime took place, so it is difficult to see how they could be considered to be a victim of that crime* (emphasis added).[73]

In fact, children born of wartime rape are another reality that serves to "demoralize societies." This in that: (1) communities often do not accept the children; (2) the mothers may be left single and unable to adequately support themselves or their children; or (3) the mothers may be so traumatized that they are unable to properly care for their child; and (4) the children are most frequently stigmatized

[72] Sierra Leone Truth and Reconciliation Commission (2004), p. 16.

[73] Smith (2005), pp. 20–21.

and mistrusted by the community etc. In stating that a direct claim for reparations by a child born of wartime rape is difficult legally because "the child had not been born before the crime took place" is, with respect, to ignore the genocidal forcible transfer of children born of wartime rape. The ongoing stigmatization of the child born of wartime rape and identification by community members of the child with the terrorist armed group constitutes a 'continuing crime' that victimizes both mother and child for a prolonged if not indefinite period. Note also that such stigmatization may result in the mother not being able to access proper prenatal care and other needed services such that ultimately the health of her baby is significantly adversely affected. Further, some women may choose to abort or be forced to do so under the weight of community rejection of the anticipated birth of a child whose father was a perpetrator of conflict-related atrocity.

Here follows in the next chapter a few concluding remarks concerning the legally and morally insupportable view that child victims of genocidal forcible transfer into an armed group or force perpetrating mass atrocity and/or genocide (child soldier members of such armed groups or forces) are allegedly culpable perpetrators for conflict-related atrocity and should be held accountable by some means.

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Chapter 6
Concluding Remarks

> 'You were born to die for Germany'. [Enormous banner flying over a Hitler Youth summer camp (1934) observed and reported on by Dorothy Thompson, journalist].[1]

As the quote above suggests, genocidal forcible transfer of children to armed groups or forces committing mass atrocity and/or genocide was a feature of the Nazi practice during WWII. The Hitler Youth had been subjected to a complex system of indoctrination through special camps, schools and military training opportunities.[2] It has been documented that:

> The treatment of German child soldiers [upon capture]was not always ... gentle. The revelation of the truth about Hitler and the regime to which they had dedicated their lives...was especially devastating to those members of the HJ and BDM [Nazi Youth organizations] who had taken their [Nazi] indoctrination to heart. American forces captured a group of boys aged ten to fourteen [Nazi youth] who had been ordered to defend a barricade across the Maximilian Bridge. When American tanks came into view, the boys had been too scared to fire and had been captured. The next day the terrified young prisoners were taken to Dachau....[to witness the survivors still there and gain a glimpse of evidence of the various atrocities that had taken place there][3]...Young people under age eighteen who were in the mainstream German combat units were treated as regular prisoners of war...[4][Two surviving members aged 16 and 17 of a teenage Nazi unit mobilized and trained by the SS managed to hide out until June 1945 and upon capture were executed as spies].[5]

Among the latest examples of the genocidal forcible transfer of children to an armed group intent on committing mass atrocities against both armed opposition and civilians is "the recruitment and use of children by ...the Taliban and its various factions, Haqqani network, Hizb-e-Islami of Gulbuddin Hekmatyar, the

[1] Nicholas (2005), pp. 105–106.
[2] Nicholas (2005), pp. 68–128.
[3] Nicholas (2005), pp. 524–525.
[4] Nicholas (2005), p. 527.
[5] Nicholas (2005), p. 526.

S.C. Grover, *Child Soldier Victims of Genocidal Forcible Transfer*,
DOI 10.1007/978-3-642-23614-3_6,

Tora Bora Front, Latif Mansur Network and Jamat Sunat al-Dawa Salafia. . .- Children were used by them [during the 2010 UN observation period] to carry out suicide attacks, plant explosives and transport munitions."[6]

> There have been continued reports of cross-border recruitment and use of children by armed opposition groups, including the Taliban, from both Pakistan and Afghanistan. Many have been forced to carry explosives across the Pakistan-Afghanistan border, often without their knowledge, while others have received more advanced training in weapons. One boy, aged 15 years, recounted that he was kidnapped by the Taliban at the age of 13 and taken to Pakistan, near the Turham border, where he was kept in captivity, among other Afghan children, for almost two years and received training in the use of weaponry. The boy was told that anyone who tried to escape would be killed. He was forced to join a Taliban fighting group and participated in armed clashes in Khyber, Kharkhano and other locations before escaping during an attack. He managed to find his way to Kabul, where he was arrested by the Afghan National Security Forces. *He is currently serving a prison sentence in Kabul Juvenile Rehabilitation Centre for threatening national security* (emphasis added).[7]
>
> Sixty-six incidents of detention of children for crimes relating to national security and alleged association with armed groups were verified and documented. Children were often detained with adults in police custody and some reported abuse and mistreatment. The Afghan National Security Forces detained 62 children, while 3 children were arrested and detained by the international military forces. According to ISAF, there are an additional 300 detainees between the ages of 16 and 18 held in the detention facility in Parwan (formerly known as Bagram). This has yet to be verified and followed up by the country task forces on monitoring and reporting. A request has been made to ISAF for access to these children.[8]

Other contemporary examples of 'recruitment' of child soldiers include the recruitment of children into both anti-government and government forces in Somalia:

> There has been growing evidence regarding the widespread and systematic recruitment of children in central and southern Somalia. . .especially within Al-Shabaab, including the newly merged Hizbul Islam. Partners on the ground consistently reported on the extensive forced recruitment of children by Al-Shabaab, especially in the schools. According to military sources, an estimated 2,000 children were abducted by Al-Shabaab in 2010 for military training in different camps in southern Somalia. An increasingly large number of these children are reportedly used by the insurgent groups to fight against the Government and troops of the African Union Mission in Somalia (AMISOM) in Mogadishu, and, as a result, many of these children are killed, injured or captured by the armed forces or other armed groups.[9]
>
> There were reported cases of children captured by the Government/AMISOM forces on the front line, as well as children who defected, many of whom were recruited from areas other than Mogadishu to fight for the armed insurgent groups. Upon defecting or self-demobilizing, these children find themselves alone in Mogadishu without any family or clan support and exposed to retaliation and re-recruitment.[10]

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[6] Report of the Secretary General on children and armed conflict (2011), p. 12.

[7] Report of the Secretary General on children and armed conflict (2011), pp. 12–13.

[8] Report of the Secretary General on children and armed conflict (2011), p. 13.

[9] Report of the Secretary General on children and armed conflict (2011), p. 30.

[10] Report of the Secretary General on children and armed conflict (2011), p. 31.

Meanwhile armed groups with a well-established history of 'child recruitment' and mass atrocities continued their almost unfettered absorption of children into their ranks:

> LRA continued to commit violations against children outside Uganda, in the Sudan, the Democratic Republic of Congo and the Central African Republic. Despite repeated calls by the international community to LRA to unconditionally release children in its ranks, no progress has been made to date towards such release.[11]

It is here suggested that the failure to recognize the so-called 'recruitment' (by whatever means) of children (persons under age 18) into an armed group or force (non-State or State) committing mass atrocities and/or genocide as genocidal forcible transfer of children to another group has led to a confused international agenda in this regard. It is here contended that to treat children as culpable who participated in atrocity as a result of their genocidal forcible transfer to such armed groups or forces as described is to deny them access to humanitarian assistance. It is to deny the children's civilian status since there can be no lawful recruitment of children into an unlawful armed group that adopts grave violations of IHL as a war tactic (committing mass atrocities against civilians, failing to distinguish themselves from non-member civilians etc). These children however are, in effect, being treated as if they were in fact culpable for their own genocidal forcible transfer to armed groups or forces perpetrating systematic grave IHL violations (given that they are being held to account via Truth and Reconciliation Commissions with or without traditional healing practices mixed in, and/or by national penal systems depending on the jurisdiction involved). (Recall that the "genocidal forcible transfer' of children out of their home communities/group may be imposed by direct force and/or through fear of violence, duress, detention, psychological oppression or other methods of coercion"[12] all of which are surely present when an armed group or force engaged in an internal or international conflict or mixed conflict is committing mass atrocities and/or genocide).

At least a segment of those who advocate for accountability of child soldiers (at least in respect of older children) who have committed conflict-related atrocities favor proceedings against these children in international criminal forums or in national criminal forums. Let us consider then whether or not such accountability of so-called child soldiers makes sense when these children are viewed (as they truly are) as victims of genocidal forcible transfer to an armed group or force perpetrating mass atrocities and/or genocide. First let us consider, however, several factors *improperly* working against viewing a segment of the child soldier population as victims of 'genocidal forcible transfer':

1. The conflation of 'recruitment' of children into an armed force that abides by IHL with the situation of children forcibly transferred into an armed group or

[11] Report of the Secretary General on children and armed conflict (2011), p. 44.

[12] Genocide Watch (n.d.).

force committing mass atrocities or genocide; the latter constituting genocidal forcible transfer of the children;
2. A failure to recognize that mass forcible child transfer as an act of genocide can be the 'work' of State or non-State groups;
3. The view that forcible transfer of children to another group involves only cultural genocide which is supposedly excluded from consideration from the Genocide Convention when in fact this transfer causes also grave physical and psychological harms both to the group of origin and to the children transferred (i.e. the group of origin has reduced reproductive capacity as a result of losing children to the genocidal forcible transfer to another group, family members grieve the loss of their children and suffer severe mental and physical harms due to this grief; the children transferred are often physically brutalized as part of the military training and suffer tremendously due to the separation and alienation from their family and home community; etc.)
4. An erroneous conflation of the notion of children's free association and participation rights and agency as persons with the phenomenon of genocidal forcible transfer of children (especially where the child soldier recruit allegedly 'volunteered' for soldiering in armed groups or forces committing mass atrocities and/or genocide but were in fact impelled by the group or force exploiting the child's coercive circumstances);
5. Reducing all genocidal forcible transfer of children to "racial or ethnic purification" objectives when in fact such transfer can also occur *within* ethnic, national, and so-called racial groups as well as when children are forcibly transferred to genocidal armed groups (i.e. Hutu children from moderate Hutu families transferred to the genocidal Hutu armed group during the Rwandan genocide);
6. An implicit denial to a large degree, *in effect,* of: (1) children's entitlement (including older children's right) under international law to 'special protection' during armed conflict (and of the State obligation to ensure such protection) and of (2) the children's independent right to family and community both of which entitlements are negated by the children's genocidal forcible transfer to an armed group or force committing systematic grave IHL violations and for which the State then is legally responsible (including in respect of the conduct the children engaged in as child soldier victims of such a genocidal forcible transfer).

Mundorff notes that Article 2(e) of the Genocide Convention regarding forcible transfer of children to another group "lay dormant for nearly fifty years and was generally regarded as a legal anachronism" until the publication of the Australian Human Rights and Equality Opportunity Commission report of 1997 *Bringing Them Home* (on the forcible removal of indigenous Australian children to other groups which the aforementioned Australian Commission classified as a genocidal forcible transfer).[13] This author concurs with Mundorff's assessment that despite the interest in Article 2(e) of the Genocide Convention that was generated

[13] Mundorff (2007), p. 8.

internationally as a result of the Australian Commission's report generally outside of Australia "…the legal implications of genocidal child transfers have yet to be taken seriously" and that this "scholarly neglect is striking given the apparent pervasiveness of forcible child transfer programs."[14] *The argument of the current author has been that mass transfer of children to armed groups or forces committing mass atrocities and/or genocide is a prime instance of such genocidal forcible transfer of children that sadly has been disregarded as such by the international scholarly and human rights community*. While this author is in accord with Mundorff that genocide need not involve killing; and can involve other acts rendering a protected group non-viable (such as the transfer of its children)[15]; the focus in the current inquiry has not been exclusively on the viability of the children's group of origin. It has here been argued that the destruction in whole or in part of the child group in and of itself also fits the Genocide Convention[16] requirements regarding specific intent to commit the crime of genocide. Children as a group who are the victims of genocidal forcible transfer by armed groups or forces committing mass grave IHL violations (and to an extent other children; such as the siblings of the transferred children and other children left behind) suffer irreparable mental harms as a result and have their sense of self and place in the world inexorably and negatively altered. There is then trauma and resulting alienation from family and the larger community group that was supposed to offer protection to the children; especially from such grave harms as correlated with genocidal forcible transfer of any of their number to an armed group or force committing mass atrocities and/or genocide.

The United Nations stated in UN General Assembly Resolution 96(1) that "genocide is the denial of the rights of existence of entire human groups…such denial of the right of existence shocks the conscience of mankind."[17] It is here contended that the genocidal forcible transfer of children to an armed group or force committing mass grave IHL violations is a denial of the right of child groups to exist except as according to the discretion of the armed group. Such genocidal forcible transfer relegates these child groups to the status of but expendable weapons of war and results in the death, injury and brutalization of large numbers of the members of these child groups at the hands of their own armed group or force and the armed opposition. At the same time such genocidal forcible transfer of children destroys the group of origin in whole or in part:

> Like forced deportation, selective killing and systematic rape, *forcible child transfer* is a *physical act that operates culturally to destroy the group biologically, by preventing children from reproducing within the group, and physically, by discouraging children from returning to their group* [18] [note that armed groups or forces committing atrocities

[14] Mundorff (2007), p. 2.

[15] Mundorff (2007), pp. 8–9.

[16] Genocide Convention (1951), Article 2.

[17] UN General Assembly Resolution 96(1).

[18] Mundorff (2007), p. 97.

> and/or genocide often engage in mass rape and forced marriage and pregnancy of abducted female children which is further evidence of their desire to destroy the group of origin as a perceived cultural *and socio-biological entity* perceived as distinct from the armed group; the latter having its separable identity, allegiances and aberrant norms notwithstanding its shared or different i.e. ethnic , national and cultural origins with the group from which the children were transferred].

Note that the second draft of the Genocide Convention[19] listed the forcible transfer of children to another group as a form of cultural genocide while in the final draft this act is listed along with other means of physical or biological destruction of the group of origin (as it should be given that genocidal forcible transfer of children reduces the reproductive potential for the group of origin and is therefore a means to both a cultural and biological genocide of the originating group).

Mundorff has done an admirable job of addressing whether the forcible transfer of indigenous children to new ethnic groups with the intention of re-acculturating them to the new group constitutes genocide under the Genocide Convention[20] properly interpreted. The current author, however, does not address those particular cases which are beyond the scope of this present work. Rather the current inquiry has focused on the genocidal forcible transfer of children to armed groups or forces perpetrating mass atrocity and/or genocide as: (1) the adopted intentional tactic of such armed groups or forces to ensure the viability of the armed group or force and its military/political objectives as well as quelling any opposition and (2) as a means of destroying, in part or in whole, the children's group of origin and the transferred child group itself (i.e. reducing the reproductive capacity of the group of origin through the removal of the transferred children; destroying the children's former identity and values and alienating the community from the children and vice versa by having the children commit atrocities against their own family and communities and by a host of other unbelievably brutal tactics etc.).

An earlier example of genocidal forcible transfer is the Himmler Nazi program during WW11 which involved in part taking children from occupied Eastern territories and shipping them to Germany to be adopted by Nazi officials or to be placed in Hitler youth group homes.[21] The goal underlying these genocidal mass forcible transfers of children was not only to make sure there were ample future reinforcements of the armed force in question but to ". . .render the targeted group [of origin] politically impotent as the group would have no natural leaders to oppose Nazi rule."[22] (Thus the genocidal forcible transfer of children generally targets the children's group of origin based on multiple defining characteristics of the latter such as perpetrator- perceived ethnicity, nationality, political status etc. of the

[19] Genocide Convention (1948), Second Daft.

[20] Genocide Convention (1951).

[21] Mundorff (2007), p. 2.

[22] Mundorff (2007), p. 4.

targeted victim group).This is reminiscent of the situation, for instance, with the LRA where the youngest recruits were sometimes placed with LRA commander families until able to withstand the rigors of LRA training (recall the situation of Dominic Ongwen who was abducted at aged 10 and initially placed with an LRA commander family until physically strong enough to undergo the LRA rigorous and brutal military training. Recall, however, that in the case of the LRA many children were simply executed if they could not manage the grueling military training due to their physical weakness).

Mundorff suggests that some may have difficulty thinking of the forcible transfer of children to another group as a genocidal act given that the transfer may not always be for the purpose of killing the children[23] and genocidal acts generally conjure up images of mass killings. Yet, the Genocide Convention includes genocidal acts also other than killings (i.e. causing grave physical or mental harms to a targeted group). In the case of children forcibly transferred to armed groups or forces as a genocidal act to be used as child soldiers perpetrating atrocity there is, however, clearly a regard for the children's survival by these groups or forces *only* insofar as the children might be useful in hostilities and not as a matter of a basic human right. Should the child become injured or sick and no longer be of use in military operations, they are most often killed by their compatriots.

The current work has *not* been an argument in favor of impunity for child soldiers who have committed conflict-related atrocities; the latter implying, in the first instance, the alleged culpability and legal responsibility of these children for international crimes committed as child soldiers. Rather, this has been an argument for the exoneration of child civilians victimized by their forcible transfer to armed groups or forces committing mass atrocities and/or genocide; such transfer itself constituting an act of genocide. These children would not have committed these conflict-related atrocities *but for* the international community's failure to meet its obligation to war-affected children to protect them from such genocidal forcible transfer. It is here contended then that children who are the victims of genocidal forcible transfer to armed groups or forces committing mass atrocities and/or genocide are *not* akin to children 'recruited' to regular armed groups or forces (national or non-State) that abide by IHL (a topic beyond the scope of this work). Rather, the key claims here are that: (1) children who are the victims of genocidal forcible transfer to an armed group or force committing mass atrocities and/or genocide are non-culpable for the acts they commit as children in these coercive circumstances and that (2) the drafters of the Rome Statute got it right when they set out in Article 26 *as a principle of substantive law* (and not merely a jurisdictional matter) that children who commit genocide and/ or systematic and widespread war crimes and/or crimes against humanity are non-prosecutable under the ICC (the latter crimes being an indicia of the child's involvement in an armed group or force using grave international crimes as a war tactic). It is the contention advanced here

[23] Mundorff (2007), p. 6.

that the latter ICC principle ought be regarded as a guideline for other international criminal courts and tribunals as well as by national courts. (This author would argue further that persons such as Dominic Ongwen abducted by the LRA at age 10 and charged with those international crimes he committed as an adult should have the fact that he grew up as a child soldier member of a murderous armed group perpetrating international crimes considered as a significant mitigating factor in the sentencing phase at a minimum. In fact, arguably Ongwen should have been considered for amnesty in the first instance given his history of involvement with the LRA from childhood).

Note that the Genocide Convention unlike other human rights treaties has no monitoring system though there is a Special Advisor to the UN on genocide. It is here contended that the obligation of all States to protect children in times of armed conflict; and especially from acts such as genocidal forcible transfer, dictates the urgent need for such a monitoring system as a precursor to UN intervention to protect children from such transfer where necessary. The current UN monitoring system covers recruitment of child soldiers and involves reports to the Security Council for potential intervention of some sort. That monitoring system should be expanded to include identification not just of instances of child soldier recruitment and the use of child soldiers in combat by forces that generally abide by IHL but also the genocidal transfer of children to armed groups or forces systematically engaged in mass atrocities and/or genocide. Such identification of the genocidal forcible transfer of children to armed groups or forces should help to put pressure on the international community to take action to end these practices wherever they are occurring. Cultural relativist arguments about child soldiering and arguments relating to State sovereignty do not carry weight in the face of the realities of genocide by means of the forcible transfer of children to murderous armed groups or forces. Hopefully an acknowledgement that much of what is now labeled by the relatively sanitized term ‘child soldier recruitment’ is in fact genocidal forcible transfer of children will bring the international community a ways closer to preventing such occurrences and prosecuting the perpetrators of this subcategory of the heinous ‘crime of crimes’.

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Index

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