PUBLIC ANNEX A

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.

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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).

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[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 environmen*t…(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.

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[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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