

Visions of Justice:

Former Child Soldiers as Victims, Perpetrators, or Both?

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Child soldiering is a violation of international humanitarian law where children are both the victims of war crimes, on account of their status as child soldiers, but can also become perpetrators of war crimes themselves. A number of scholars have pointed out the fact that warlords and other militants often target children for recruitment deliberately, due to their willingness to follow orders and their hesitation to question authority when confronted with unlawful orders; this frequently contributes to situations in which the child soldiers commit numerous war crimes during the course of the conflict, acting under orders from these warlords and the like.¹ Further, in a number of conflicts where child soldiers are present, they are administered drugs, alcohol, or other substances that inhibit and influence their judgment, again increasing the likelihood of incidents of violence.² These combined factors lead to situations in which child soldiers are often not only victims themselves, but active participants in war crimes and crimes against humanity as well.

Children can be held accountable for their actions under domestic or international law through a number of venues. They can be asked to testify in trials and proceedings, either as witnesses or as a special category known as “victim status” used by the International Criminal Court. They can be asked to speak before Truth and Reconciliation commissions or local courts and tribunals. At times, they are conscripted or re-enlisted by the capturing force and told that for now their service is penance for their prior actions, or threatened with prison time if they do not agree to serve. They may be held as prisoners or in detention, generally in national level courts and systems. They can theoretically be held as prisoners of war, though no underage prisoners of war have been registered officially with the International Committee of the Red

¹ Singer, 2006, 2008.

² **Happold citation**

Cross since World War II.³ Child soldiers can even theoretically be tried under international law for war crimes, genocide, and crimes against humanity.

These issues lead to a series of debates in legal communities about whether child soldiers should be prosecuted and held responsible for those crimes which they commit, or whether their unique status and circumstances should exempt them from criminal liability. Some of these debates try to evaluate how much acting under orders or under the influence of narcotics or other, related circumstances can be considered mitigating factors in criminal liability, or if their status as a victim of war crimes themselves should prevent their being held liable as a perpetrator in addition to their status as a victim. In sum, should child soldiers be tried for war crimes and crimes against humanity under international law, given that international law also clearly defines them as victims of child soldiering? Often, these are viewed differently under domestic laws compared to international laws. The general trend to date is that domestic laws are more likely to hold the individuals responsible for their actions, regardless of whether they were under eighteen years of age at the time of their alleged crimes, whereas international law has been much more reluctant to prosecute child soldiers and either offers few concrete guidelines, or maintains a much higher age for criminal responsibility than many domestic laws apply.

This chapter seeks to break down both the legal reasoning and the evolution of laws on the subject of whether child soldiers' experiences as victims impacts their status as alleged perpetrators of war crimes themselves. The chapter first traces the evolution and application of various international legal agreements and conventions to see how child soldiers have been held accountable by international laws. Next, the chapter evaluates those domestic laws and

³ Office of the Special Representative of the Secretary-General for Children and Armed Conflict, "Children and Justice During and in the Aftermath of Armed Conflict", Working Paper no. 3. New York: United Nations, September 2011, p. 30.

situations which have considered child soldiers and other juvenile justice matters. The chapter will then examine specific cases in which trials were debated for child soldiers, and the outcome of those debates and decisions. Finally, the chapter analyzes the agency that child soldiers have, or the lack thereof, in terms of both their service itself, and the biological and social developments of children in traumatic situations and their ability to make decisions in that context, in order to weigh arguments of individual agency with respect to the victims or perpetrators debate.

5.1 - The Status of Child Soldiers under International Law

The status of child soldiers under international law is a bit murky and indistinct, rather than clearly defined. Very few international documents dealing with child soldiers specify a clear and distinct age for which children are considered protected or eligible for prosecution by international courts. There are general guidelines and recommendations, but few hard and fast rules. This leaves questions on whether children should be perceived as perpetrators in addition to victims fairly ambiguous. For example, the United Nations and many non-governmental organizations share the view that “children associated with armed groups should not be detained or prosecuted, but should be primarily treated as victims by virtue of their age and the forced nature of their association”.⁴ However, this is more of a recommendation than a clear rule, and leaves its implementation and execution poorly defined. Overall, it appears as though international courts and conventions are primarily concerned with protecting the rights of

⁴ Office of the Special Representative of the Secretary-General for Children and Armed Conflict, “Children and Justice During and in the Aftermath of Armed Conflict”, Working Paper no. 3. New York: United Nations, September 2011, p. 27.

children as a whole, including with respect to arrests and internments or other punishments.

When children are found to require some degree of punishment for their actions, the overall trend falls in line with what United Nations recommendations of applying the minimal sentence and to keep in mind the welfare and well-being of the under-age persons found responsible.

International humanitarian law allows for the internment and detainment of children under Geneva Convention IV.⁵ Under the guidelines governing international conflict, in Geneva Convention IV, children may be detained or interred, but certain additional criteria are needed. The Conventions require that children may be placed under administrative detention if the security of the Detaining Power makes it absolutely necessary, under Article 42, but that such measures should only be applied in exceptional circumstances. According to the Commentary on the Conventions, the general guidance for the interpretation of Article 42 is under those specific situations where the state has legitimate grounds to believe the child is a member of an organization whose intention is to cause disturbances, or when the children in question may commit espionage or sabotage.⁶ Additionally, Article 43 specifies that any decision to intern a minor under Article 42 must be reviewed as quickly as possible, and additionally re-examined at least twice a year, by an appropriate court or administrative board designated by the holding state for that purpose.⁷ In sum, while the original four Geneva Conventions allow for the prosecution and internment of minors, it is recommended that this only be applied in the most extreme of cases and not as a wide-spread policy.

⁵ *Geneva Convention IV*, Article 42.

⁶ International Committee of the Red Cross, "Commentary on the Fourth Geneva Convention", Article 42, Geneva, Switzerland, 1958, pp. 257-8.

⁷ GC IV, Article 43.

Some arguments concerning the age of criminal liability for child soldiers hold that fifteen should be used as the age of criminal responsibility, just as it is for the voluntary enlistment in state militaries as discussed previously. The justification for using fifteen as a minimum age for liability derives from Article 77(2) of Additional Protocol I of the Geneva Conventions, now widely considered a part of international customary law.⁸ Since fifteen is used as the age of voluntary enlistment for children to serve in armed forces, the argument is that fifteen is also an appropriate age by which to hold individuals accountable for their actions in armed conflict; international law has already established that by this age, a child is old enough to make major decisions with their lives, such as whether to enlist for military service. By the same logic, if a child is considered too young to legally fight in a conflict, then by default they should also be considered too young to be held criminally responsible for serious violations of international humanitarian law. Others, however, disagree with this assertion and highlight the fact that the age of criminal responsibility cannot be inferred from Article 77(2), and that the article itself does not make any direct reference to a minimum age of criminal responsibility of child soldiers.⁹

The Convention on the Rights of the Child does require states to establish a minimum age of criminal responsibility; however, there is no additional guidance within the CRC on what this minimum age should be, nor does the CRC provide a specific and concrete recommendation within the text of the Convention itself.¹⁰ While there were discussions on whether children can be held legally and criminally responsible for their actions if their mental and moral awareness

⁸ Geneva Conventions, AP I, 1977.

⁹ See for example, Happold, Matthew, "The Age of Criminal Responsibility for International Crimes under International Law", in Arts and Popovski, *International Criminal Accountability and the Rights of Children*, The Hague: United Nations University Press, 2006.

¹⁰ CRC, Article 40(3)(a).

could not be clearly established, the CRC elected to overlook including any such language or guidelines in its recommendations. Specifically, the CRC takes the position that it is impractical and confusing to set any sort of criminal liability based on the maturity of the child, and that there is too much variance in this to be predictable. For example, in its 2007 General Comments, the Committee of the CRC expresses the following:

The Committee Wishes to express its concern about the practice of allowing exceptions to a minimum age of criminal responsibility which permit the use of a lower minimum age of criminal responsibility in cases where the child, for example, is accused of committing a serious offense or where the child is considered mature enough to be held criminally responsible.¹¹

Further, far too much is left to the discretion of the various courts and legal systems under any such system. Accordingly they leave the requirement strictly that states must set some sort of age for the criminal liability of children. In terms of strict rules and guidelines, the CRC does not have a clear, minimum age it establishes for criminal liability. Its charter takes a similar position to the United Nations' perspective, allowing for the prosecution but overall recommending that children should be considered as victims more so than perpetrators.

The Paris Principles take the most expansive view on limiting children's legal criminal responsibility for the acts that child soldiers participate in and their legal responsibility with respect to any war crimes or crimes against humanity they may commit while serving as a child soldier. This falls in line with the Paris Principle's encouragement of adopting a straight eighteen principle, as well, and both are far more expansionist than the terms set forth in the CRC or the Rome Convention of the ICC. According to the Paris Principles, "children who are accused of crimes under international law allegedly committed while they were associated with

¹¹ United Nations Committee on the Rights of the Child, General Comment Number 10(2007), paragraph 34.

armed forces or armed groups, should be considered primarily as victims and not as perpetrators”.¹² With respect to sentencing, both the Paris Principles and the CRC recommend that the purpose of any sanction or penalty imposed upon a child should be to promote rehabilitation and reintegration into the community rather than to punish the child for their actions.

With respect to practice by international and hybrid courts and tribunals, the prosecution of child soldiers has been minimal to non-existent to date. The International Criminal Tribunals for Rwanda and the Former Yugoslavia took no formal position on the issue, and did not issue any indictments for persons under the age of eighteen during the course of either conflict, in spite of child soldiers certainly being present in Rwanda in particular.¹³ The Special Panels for Serious Crimes for East Timor (SPSC) formally have jurisdiction over minors as young as thirteen years of age, though again no indictments have been sought for child soldiers by the SPSC.¹⁴ In Sierra Leone, another hybrid tribunal between the United Nations and a host state, the Special Court of Sierra Leone, maintained jurisdiction to prosecute individuals over fifteen years of age, though the statute significantly regulated the prosecution of children between the ages of sixteen and eighteen years of age and recommended rehabilitation over other, more traditional forms of criminal punishment for war crimes and crimes against humanity.¹⁵

¹² United Nations Children’s Fund, *Principles and Guidelines on Children Associated with Armed Forces or Armed Groups*, February 2007.

¹³ Leveau, Fanny, “Liability of Child Soldiers Under International Criminal Law.” *Osgoode Hall Review of Law and Policy* 4:1, 2014, p. 41.

¹⁴ The Special Panels for Serious Crimes (SPSC) in East Timor were established by the United Nations, acting as the transitional authority between the end of the Indonesian occupation in 1999 and the independence of East Timor in 2002. See also the Report of the Investigative Commission of Inquiry on East Timor to the Secretary-General, UN Doc. A/54/726-S/2000/59 (31 January 2000), or David Cohen, ‘Indifference and Accountability: The United Nations and the Politics of International Justice in East Timor’, 2006 East West Centre Special Rep. 9.

¹⁵ *Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone*, signed on January 16, 2002, 2178 UNTS 138. Entered into force on April 12, 2002, available at: <http://www.refworld.org/docid/3fbdda8e4.html> [accessed 28 April 2016].

The first major international criminal tribunal or court to adopt a formal age for criminal responsibility under its purview is the International Criminal Court. The International Criminal Court specifies that it has no jurisdiction over individuals who were under the age of eighteen at the time of the alleged commission of a crime, under Article 26.¹⁶ Unlike the prior conventions and agreements, which generally shied away from implementing a specific age for prosecutions and criminal liability, or offered a guideline based on the CRC, the Rome Convention does establish eighteen as the age for its prosecutions. What makes this noteworthy is that the Rome Convention does not use a straight eighteen principle for military service, as the Paris Principles do. Therefore, while under the Rome Convention a child can enlist voluntarily for military service starting at age fifteen, they are not criminally liable for any war crimes or crimes against humanity they may commit between the ages of fifteen and seventeen. This creates a very murky area of criminal responsibility; since the ICC is specifically chartered to try the most severe war crimes and crimes against humanity, and further that nearly all of their current investigations and prosecutions to date have included the war crime of conscription and enlisting child soldiers, this seems a rather noticeable discrepancy.

One might argue that since the ICC is designed and tasked to pursue only the most senior leaders and decision-makers, the likelihood of criminal liability is unlikely to come up. However, this is not the case. One of the current trials being heard as of this writing concerns Dominic Ongwen, a former child soldier of the Lord's Resistance Army in Uganda who was forcibly conscripted by the LRA at only ten years old.¹⁷ In this case, the specific war crimes and

¹⁶ Rome Convention, Article 26.

¹⁷ International Criminal Court, *The Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15, available at http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200204/related%20cases/ICC-02_04-01_15/Pages/default.aspx.

crimes against humanity for which Ongwen is being prosecuted all took place once he was an adult and met the over-eighteen requirement outlined in Article 26 of the Rome Convention. While the charges against him all concern alleged crimes committed as an adult in his thirties, it does raise the problematic moral issues and debates about how “responsible” an individual can be for violent acts when over half of his or her childhood was spent as a child soldier. Ongwen’s case in specific will be discussed later in this chapter, though the general circumstances of the odd discrepancy of the ICC’s adoption of child soldiering as being under fifteen, yet criminal accountability as being under eighteen, are fairly unique and potentially inconsistent compared to other international laws and accordingly merited discussion as well.

Taken in sum, the main trend under international law and its legal recommendations or requirements for minimum age of criminal liability for children is that there is no clear requirement. While the Paris Principles and the Geneva Conventions provide some general guidance, this guidance is left to be somewhat ambiguous. The International Criminal Court sets its minimum age for prosecutions as eighteen. However, in practice the actual age of criminal responsibility among many countries is much lower, and there does not appear to be any clear consensus on a minimum age for criminal liability among states. Instead, one must look to individual state practices to see how child soldiers are viewed in terms of criminal liability for their actions with an armed force or armed group and the potential crimes they may commit while serving as such.

Regional Trends and Debates in Criminal Responsibility by Age

The age of individual liability for criminal conduct in domestic systems varies significantly around the world, without clear and distinct agreement upon the age at which

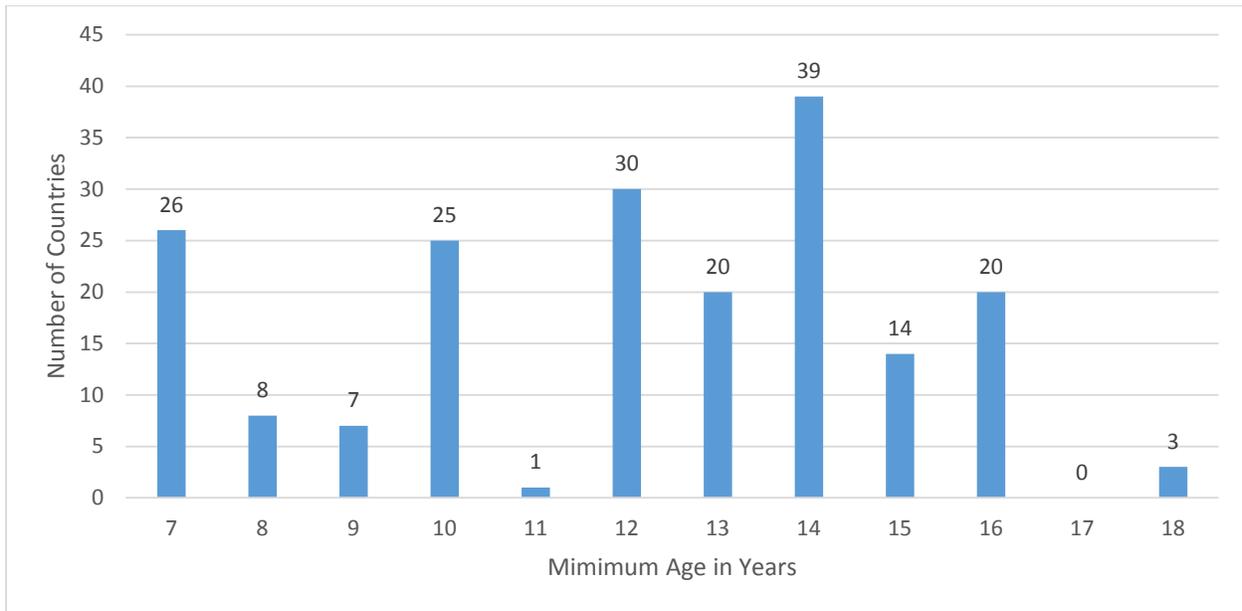
children are legally considered adults in terms of criminal responsibility. Regardless of their role in combat or as a child soldier, children may be held accountable for other violent crimes including assaults, murder, theft, and other felonies. The age at which they may be held legally responsible for their actions and tried as adults varies significantly across legal systems however. The implementation of criminal liability in domestic legal systems is often what governs the liability of child soldiers for their actions in national criminal proceedings.

Domestically, age of criminal liability varies wildly. The youngest age in the world is seven years old for criminal responsibility, and the oldest is eighteen. Many countries have a tiered system, where a young age is applied overall but then there is an age range in which the court must demonstrate that the child understood right from wrong or had some degree of appreciation of the consequences of their actions. The average age of criminal responsibility for children worldwide is fourteen years old.¹⁸ Ages of criminal responsibility do vary even within regions, though there are some clear regional trends. For example, taken as a whole, Central and South America as regions tend to have the highest ages for legal criminal responsibility under their national systems, with many countries in the region falling between fifteen and eighteen for criminal responsibility. The Middle East as a whole has the lowest ages for individual criminal responsibility when taken as a region, with a number of countries using ages as young as seven in the area for criminal responsibility under national legal systems.¹⁹ In the appendix, there is a table which lists each country's age of legal criminal responsibility, in addition to the chart below.

¹⁸ Cipriani, Don. *Children's Rights and the Minimum Age of Criminal Responsibility: A Global Perspective*. Abingdon: Ashgate Press, 2013. See also the Child Rights International Network, "Minimum Ages of Criminal Responsibility around the World", available at <https://www.crin.org/en/home/ages>. (Accessed April 14, 2016).

¹⁹ Child Rights International Network, "Minimum Ages of Criminal Responsibility around the World", available at <https://www.crin.org/en/home/ages>. (Accessed April 14, 2016).

Table 5.1 - Minimum Ages of Criminal Responsibility by Country Worldwide



The main document providing input and recommendations to national legal systems on children’s prosecutions derives from the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, more commonly known as the Beijing Rules.²⁰ The Beijing Rules do not provide a specific age for child criminal liability, only a general guidance that is very vague. Specifically, the text concerning legal accountability for children states, “in those legal systems recognizing the concept of the age of criminal responsibility for juveniles, the beginning of that age shall not be fixed at too low an age level, bearing in mind the facets of emotional, mental, and intellectual maturity.”²¹ Unfortunately, what this means in practice is that the Beijing Rules provide little to no international guidance or input on what is considered an appropriate age of legal maturity for criminal accountability under international law.

²⁰ The United Nations Standard Minimum Rules for the Administration of Juvenile Justice. UNGA Res 40/33, November 29, 1985.

²¹ Beijing Rules, UNGA Res 40/33/1985.

Specific Cases Concerning Former Child Soldiers and Criminal Liability

The Prosecutor v. Dominic Ongwen

The Prosecutor v. Dominic Ongwen is the first trial of an international criminal court to pursue an indictment against an individual who was both a victim of the war crime of child soldiering, but also guilty of committing war crimes himself. While other domestic and hybrid cases have frequently tried individuals for crimes they committed as child soldiers and victims themselves, Ongwen is the first individual to be indicted and prosecuted by the international court system. Ongwen surrendered himself into custody in the Central African Republic in December, 2014 and was turned over to the ICC's custody on January 16, 2015; his trial is being held at the headquarters of the International Criminal Court in The Hague, the Netherlands, and initial proceedings began on January 26, 2015.²²

Ongwen's initial arrest warrant included seven separate counts of criminal responsibility under Article 25(3)(b) of the Statute of the ICC, including three counts of crimes against humanity for murder (Article 7(1)(a)), enslavement (Article 7(1)(c)), and inhumane acts of inflicting serious bodily injury and suffering (Article 7(1)(k)). Further, Ongwen is also being tried under four counts of war crimes, including murder under Article 8(2)(c)(i), the cruel treatment of civilians under Article 8(2)(c)(i), intentionally direction attacks against civilian populations under Article 8(2)(e)(i), and pillaging under Article 8(2)(e)(v).²³ Ongwen has pled

²² International Criminal Court, *The Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15, available at http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200204/related%20cases/ICC-02_04-01_15/Pages/default.aspx.

²³ *Ibid*, also Articles 7 and 8 of the Rome Statute of the International Criminal Court.

not guilty on all counts of his indictment. The opening of the confirmation of charges hearing took place in January 2016.

In the Confirmation of Charges hearing, the Prosecutor filed 70 separate counts of war crimes and crimes against humanity against Ongwen, including the conscription and enlistment of child soldiers, during his actions as a senior commander of the Lord's Resistance Army (LRA) of Uganda. This is a dramatic increase from the initial seven counts, and were based upon findings gathered by the Prosecutor's Office during investigation. The additional charges related to attacks on the Pajule IDP camp, the Odek IDP camp and the Abok IDP camp. The counts brought against Ongwen include attacks against the civilian population, murder, attempted murder, torture, cruel treatment, other inhumane acts, enslavement, outrages upon personal dignity, pillaging, destruction of property, and persecution. Additionally, the expanded list of charges include multiple counts of sexual and gender-based crimes committed from 2002 to 2005 in Sinia Brigade, such as forced marriage, rape, torture, sexual slavery, and enslavement, as well as the conscription and use of children under the age of 15 to participate actively in hostilities from 2002 to 2005, in Sinia Brigade.²⁴ According to observers at the hearing in January 2016, the Prosecutor acknowledged Ongwen's unique status as both a victim and an alleged perpetrator, but also asserted that Ongwen had command and control over troops during the massacres for which he is charged.²⁵ During the period in which the crimes allegedly occurred, Ongwen would have been in his late 20s to 30 at the time and therefore his actions fall within the scope of jurisdiction set forth by the Rome Convention.

²⁴ International Criminal Court, *The Prosecutor v Dominic Ongwen*, ICC-02/04-01/15, December 21, 2015, available at <https://www.icc-cpi.int/iccdocs/doc/doc2185510.pdf> (accessed April 28, 2016).

²⁵ The Enough Project, "The Dominic Ongwen Trial", January 29, 2016, available at <http://www.enoughproject.org/blogs/dominic-ongwen-trial> (accessed April 28, 2016).

However, Ongwen himself was a child soldier, abducted in 1990 and forcibly conscripted by the LRA walking home from school when he was only ten years old.²⁶ According to eyewitness accounts and some of those he abducted himself, Ongwen is a complex and unsettling figure, prone to extreme bouts of violence, including the abduction of children, extensive acts of violence, the taking of war wives and the commission of many crimes against humanity and war crimes. Within LRA defectors, he was known for his cruelty; however, he is also supposedly the only LRA commander who would release his “wives” and child soldiers to return to civilian lives.²⁷ For two thirds of his life, including half his childhood and all of his adult life, Ongwen lived as a rebel commander of the LRA and participated in its acts of violence throughout Uganda, Chad, the Central African Republic, and the Sudan. This case highlights the complex realities of trials that apply criminal responsibility to child soldiers. While Ongwen was clearly an adult at the time he allegedly committed the crimes for which he is being charged at The Hague by the ICC, the vast majority of his life and development were at the hands of war criminals such as Vincent Otti and Joseph Kony. This begets the question of how responsible can an individual be for the commission of acts of violence when they themselves began serving as a child soldier at only ten years old.

Ongwen’s case is worth examination because of the fact it is the first time a victim of war crimes him or herself has been tried by the International Criminal Court. This is a reasonably common occurrence in domestic cases, as discussed previously, but has never occurred under the international legal system until the Ongwen case. As the case evolves, it will clearly create an

²⁶ Cakaj, Ledio, “The Complex Story of a Child Soldier”, *The Washington Post*, January 12, 2015. Available at <https://www.washingtonpost.com/blogs/monkey-cage/wp/2015/01/12/the-complex-story-of-a-child-soldier/>, (accessed April 28, 2016).

²⁷ *Ibid.*

important precedent for the status of former child soldiers as potentially liable for crimes against humanity and war crimes in spite of their status as former victims themselves. While other tribunals have held truth and reconciliation commissions to hear the actions and activities of child soldiers during conflicts in the international arena, international courts have previously avoided trying former child soldiers directly. Ongwen is being tried for acts he committed as an adult, but as stated previously, even the ICC Prosecutor openly acknowledged Ongwen's status and identity as a former child soldier himself. The case will clearly have significance for the future of international trials concerning former child soldiers and their potential for criminal responsibility.

Conclusion

There is no question that child soldiers have participated in some of the most violent crimes against humanity and war crimes perpetrated in conflict-prone areas, including the killing or torturing of civilians. Child soldiers have killed, maimed, and tortured civilians and non-combatants in nearly every conflict theater in which they are found, from Colombia and Mexico, to Sierra Leone, Liberia, Rwanda, Uganda, Chad, and the Democratic Republic of the Congo, to Burma, Sri Lanka, India, Iraq, Afghanistan, and Syria – to name only a few. However, the questions concerning a child's agency and intent are challenging to answer. In the majority of cases where child soldiers are present, they are forcibly conscripted and pressed into military service, frequently by armed non-state actors and militias, but also at times by governmental forces as well – usually captured after serving with a rebel group. Even in cases where child soldiers voluntarily serve, there remain questions about how voluntary this participation is; for

example, does the child live in an environment where they have choices and genuine free will to make the decision to enlist in an armed group, or do they do so out of desperation, lack of opportunity, instability, or basic human needs such as a source of food and security? Further, in some of the most violent of the cases in which children are participating with armed groups, child soldiers were given drugs that increased their threshold for violence as well as compromised their judgment or ability to discern consequences for their actions accurately.²⁸ In cases such as these, which have proliferated throughout the regions in which child soldiers have been used, it becomes exceedingly difficult to clearly demonstrate intent and responsibility for the actions committed by child soldiers.

On the other hand, the proponents of holding child soldiers liable under international criminal law point to similar challenges and debates with adult counterparts. Under this viewpoint, “to do otherwise contributes to the phenomenon of impunity, that is, to those who have perpetrated serious crimes or might consider doing so will be encouraged to commit further atrocities, knowing that the matter will not be investigated, and they will not be held accountable”.²⁹ Further, proponents of holding child soldiers criminally liable for war crimes and crimes against humanity believe that legal accountability serves as a powerful deterrent to other child soldiers or children considering voluntary enlistment. Victims of war crimes and crimes against humanity, or their families, also may feel a sense of injustice if certain perpetrators, including child soldiers, receive impunity for their actions as well. Impunity potentially denies these victims and their families the right to reparations, which may include

²⁸ UN General Assembly, *Impact of armed conflict on children* : note / by the Secretary-General, 26 August 1996, A/51/306, available at: <http://www.refworld.org/docid/3b00f2d30.html> [accessed 28 April 2016].

²⁹ Amnesty International, “Child Soldiers: Victims or Criminals?”, Amnesty International December 2000, AI Index IOR 50/02.00, p. 3.

formal and legal apologies as well as other forms of reparations.³⁰ Even for those who advocate in favor of criminal liability for child soldiers, there is still broad agreement that commanders and recruiters should first and foremost bear the brunt of responsibility for their actions and that these trials should take precedence over that of the prosecution of the child soldiers themselves.

Ultimately, the major guiding principle under whether child soldiers should be prosecuted under international law hinges on *mens rea*, when the criminal acts in question demonstrate intent.³¹ While some studies have demonstrated that younger children are not able to have intention for criminal acts based upon psychological development, the exact age at which an individual can be seen to have intent to commit a criminal act is unclear.³² Further, not all children develop at exactly the same rates; a number of factors contribute to psychological development, and thus the establishment of intent, such as context, environment, education, upbringing, individual factors, and many other variable circumstances that make a clear and single age for child culpability difficult to establish. For example, one neuroscientific study finds that specifically with respect to psychological development among child soldiers, early abuse and neglect can change the structure of children's brains so that they overreact to situations which are threatening and use early lessons of fear to defend themselves.³³ According to this and similar studies, the experiences that child soldiers endure and experience as part of their early development during the traumatic experiences of the child soldiering itself hinders their cognitive ability to process and understand actions in the way that other children develop, and

³⁰ *Ibid*, p. 3.

³¹ *Rome Statute of the International Criminal Court*, Article 30, *Supra* note 1. See also Leveau, Fanny, "Liability of Child Soldiers Under International Criminal Law." *Osgoode Hall Review of Law and Policy* 4:1, 2014, pp. 36-66.

³² See for example Piaget, Jean, *The Moral Judgment of the Child*. London: Routledge, 1932, or Kohlberg, L. *Child Psychology and Childhood Education – A Cognitive Developmental View*. New York: Longman, 1987.

³³ Cahn, Naomi, "Poor Children: Child 'Witches' and Child Soldiers in Sub-Saharan Africa", 3 *Ohio State Journal of Criminal Law*, 413, 2006.

thus legally demonstrating intent with respect to child soldiers' commission of war crimes and crimes against humanity is even further challenging than establishing intent with a child from a more stable and less violent background.