

CHILD SOLDIERS AND INTERNATIONAL CRIMINAL LAW: IS THE EXISTING LEGAL FRAMEWORK ADEQUATE TO PROHIBIT THE USE OF CHILDREN IN CONFLICT?

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Child soldiers are a prevalent international issue. It is projected that 250 000 – 500 000 children are engaged in armed conflict universally. The primary goal of this research paper is to examine existing international criminal legislation governing the prevention of recruitment, enlistment, conscription and the use of child soldiers. To this end, the case study of Sierra Leone will be used to assess the effectiveness of current international law standards. It will be demonstrated that as the development of international law vis-à-vis child soldiers gains headway on paper, progress on the ground falls behind. It is vital that the international system take steps to bridge this gap in order to ensure that international law is proportionate with practical application in the international system. The argument is therefore made that existing legal standards are insufficient by themselves and concurrently the international community needs to improve enforcement to meet these insufficient standards. Until this happens, there will not be adequate deterrence to ensure the prohibition of the use of children in conflict, and consequently these children will remain largely unprotected within the international criminal law framework.

'When they came to my village, they asked my older brother whether he was ready to join the militia. He was just 17 and he said no; they shot him in the head. Then they asked me if I was ready to sign, so what could I do – I didn't want to die.'

- A 13-year-old former child soldier from the Democratic Republic of the Congo

I INTRODUCTION

On 10 July 2012, Congolese warlord, Thomas Lubanga was found guilty by the International Criminal Court (ICC) of abducting children under the age of 15 and forcing them to fight in the Democratic Republic of the Congo's eastern Ituri region.² Since Lubanga's conviction, the phenomenon of child soldiers has attracted increased atten-

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¹ Karen Allen, *Bleak Future for Congo's Child Soldiers* (25 July 2006) BBC <<http://news.bbc.co.uk/2/hi/africa/5213996.stm>>.

² Fanny Leveau, 'Liability of Child Soldiers Under International Criminal Law' (2013) 4(1) *Osgoode Hall Review of Law and Policy* 36, 36.

tion from the international community. While the international criminal law framework is firm in governing crimes perpetrated by adults, there appears to be a gap when applied to crimes committed by minors. This has led to an increase in the recruitment, enlistment, and use of minors who participate actively in times of conflict. Today, it is estimated that 250 000 – 500 000 children are engaged in armed conflict internationally.³ Around 300 000 of those children are believed to be actively engaged in combat and of those 300 000, approximately 120 000 are thought to be operating within Africa.⁴

The primary goal of this research paper is to examine existing international criminal legislation governing the prevention of recruitment, enlistment, conscription and the use of child soldiers. In this regard, the case study of Sierra Leone will be used to assess the effectiveness of current international law standards. It will be demonstrated that as development of international law vis-à-vis child soldiers gains headway on paper, progress on the ground falls behind. Consequently, a gap is created between the advancement in the law and the application of this law on the ground. It is vital that the international system take steps to bridge this gap to ensure that international law is proportionate with practical application within the international system. The argument is therefore made that existing legal standards are insufficient by themselves and concurrently, that the international community must improve enforcement in order to meet these insufficient standards. Until this happens, there will not be adequate deterrence to ensure the prohibition of the use of children in conflict and, consequently, children will remain largely unprotected within the international criminal law framework.

II DEFINING AND CONCEPTUALISING CHILD SOLDIERS

To fully comprehend and appreciate the complexities surrounding the recruitment of child soldiers; it is important to elaborate on the phenomenon of child soldiers and in doing so address a few crucial issues.

A *Defining a ‘Child’*

Defining the concept of a ‘child’ for international law is a relatively arduous task.⁵ The failure to provide a precise definition of ‘the child’ in the field of international law resonated particularly strongly in the field of international human rights law.⁶ Together, the main United Nations human rights treaties as well as the leading regional human rights agreements encompass allusions to ‘the child,’ ‘young persons,’ ‘juveniles’ or ‘minors.’⁷ This language may be indicative of the developing recognition of the child,

³ Timothy Webster, ‘Babes with Arms: International Law and Child Soldiers’ (2007) 39(2) *The George Washington International Law Review* 227, 227.

⁴ *Ibid* 231.

⁵ Claire Breen, ‘When is a Child not a Child? Child Soldiers in International Law’ (2007) 8(2) *Human Rights Review* 71, 71.

⁶ *Ibid* 76.

⁷ *Ibid* 81.

acknowledging the additional advancement of the child from being afforded distinct measures of protection to being afforded complete independence and the corresponding rights and responsibilities that come with such recognition.⁸ In paragraph 4 of its General Comment on article 24 of the *International Covenant on Civil and Political Rights (ICCPR)*, the United Nations Human Rights Committee made the following comments with regard to the protective safeguards to be bestowed on a child:

The right to special measures of protection belongs to every child because of his status as a minor. Nevertheless, the Covenant does not indicate the age at which he attains his majority. This is to be determined by each State party in the light of the relevant social and cultural conditions.⁹

Consequently, it provides that states should denote in their state reports the time at which the child gains their particular age of majority and age of criminal responsibility.¹⁰ Importantly, the Committee emphasises that the age for the enumerated purposes cannot be fixed irrationally low and that under no circumstances should a state party liberate itself from its duties under the Covenant.¹¹ Acknowledgement of the necessity for flexibility in outlining the concept of ‘the child’ is further demonstrated in the drafting of article 1 of the *United Nations Convention on the Rights of the Child (CRC)*:

[F]or the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.¹²

Similarly, the general standards for periodic reports require state parties ‘to provide relevant information with respect to article 1 of the Convention, including any differences between national legislation and the Convention on the definition of the child.’¹³

States are therefore requested to record data on the minimum legal age established by municipal law for instances involving, ‘inter alia, voluntary enlistment, and conscription into the armed forces.’¹⁴ Though it could be disputed that the requirements of article 1 considerably weaken the definition of ‘the child’ within international law, such flexibility is not harmful to a case advocating for the proscription on child soldiers below the age of 18 years.¹⁵ Claire Breen argues that the bearing of the age of majority standard must also be measured together with clearer doctrines of international human rights law,

⁸ Ibid 81.

⁹ Human Rights Committee, *General Comment No 17: Article 24 (Rights of the Child)*, 35th sess, UN Doc CCPR/C/GC/17 (7 April 1989) [4]

¹⁰ Ibid.

¹¹ Ibid.

¹² *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 1.

¹³ Committee on the Rights of the Child, *General Guidelines Regarding the Form and Content of Periodic Reports to be Submitted by States Parties under Article 44, Paragraph 1(b) of the Convention*, 13th sess, 343rd mtg, CRC/C/58 (20 November 1996, adopted 11 October 1996) [24].

¹⁴ Ibid.

¹⁵ Breen, above n 5, 81.

specifically the prohibition of imposing the death penalty on children below the age of 18 by such treaties as the ICCPR,¹⁶ the CRC,¹⁷ and, most recently, *the Statute of the International Criminal Court (Rome Statute)*.¹⁸ The majority standard is established at the age of 18, with no allowance being made for municipal legal provisions established on the age of majority. Whilst the provisions in article 1 of the Convention suggests a degree of flexibility to attract the maximum number of states, the condition necessitating the providing of information on numerous legal minimum ages nevertheless demonstrates that a range of ages is pertinent for the incremental achievement of autonomy.¹⁹ The innate flexibility of such provisions, which have to be contemplated in view of the Human Rights Committee's remarks, allows for the upward manipulation of the age of majority in order to restrict the age of soldiers to those above 18 years. Contemporary issues such as the prevalence of recruitment of child soldiers within international law despite these restrictions expose the determinations of some individuals within the international system to continue manipulating the law to their advantage.

B *Child Soldiers*

1 *Defining a Child Soldier*

A child soldier is defined as:

[A]ny person under eighteen years of age who is part of any kind of regular or irregular force or armed group in any capacity including, but not limited to cooks, porters, messengers and anyone accompanying such groups, other than family members.²⁰

This definition extends to any individual below the age of 18 who is an active participant in, or is associated with, armed forces or groups.²¹

2 *The Recruitment of Child Soldiers*

An assortment of factors contributes to the significant number of children in combat. This section analyses the issue from two standpoints. First, from the standpoint of a recruiter, concentrating on why children are preferred during armed conflict. Secondly, from the standpoint of children. More specifically, an examination of the reasons behind why youths join armed forces and their suitability for combat will be undertaken.

¹⁶ *International Convention on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), art 6, ('*ICCPR*').

¹⁷ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), art 37, ('*CRC*').

¹⁸ *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 01 July 2002), art 26.

¹⁹ Breen, above n 5, 81.

²⁰ David J Francis, "Paper Protection" Mechanisms: Child Soldiers and the International Protection of Children in Africa's Conflict Zones' (2007) 45(2) *The Journal of Modern Africa Studies* 207, 210.

²¹ *Ibid* 211.

(a) Recruiter's Perspective

Traditionally, international conflicts blur the lines between non-combatants and combatants, and minors are increasingly discovering themselves in war zones and entering directly into armed conflict.²² Military recruiters in war-torn regions employ various tactics in order to obtain child soldiers. Traditionally, force is the tool of choice. Any choice that a child may have regarding armed conflict is eliminated when they are involuntarily recruited. Military units will habitually snatch children right off the street, or anywhere they can be found.²³ A prominent aspect in the conscription stems from their plentitude. Decades, if not centuries, of warfare in states such as Iraq, Somalia, and Sierra Leone have reduced the available pool of adult combatants.²⁴ Faced with shortages of 'manpower', militias and state armed forces turn to children to fill the ranks. Additionally, recruiters may prefer children for more sinister reasons. Primarily, their innocence entices individuals who seek to mould susceptible minds, and teach them to commit horrific acts.²⁵ Furthermore, armed forces prefer youths as their physical qualities can be advantageously manipulated on the battlefields. As a former soldier of the Mozambican National Resistance stated, youths both 'have more stamina' and 'are better at surviving in the bush' than adults.²⁶ Additionally, their size, weight, and agility make them better suited to certain activities. Youths have been employed in typical infantry duties, as spies, couriers, saboteurs, and marksmen, in explosives and mine detonation, suicide missions, and as human shields.²⁷

(b) Child's Perspective

While a majority of children are forced into military service, some enter voluntarily.²⁸ However, it is debatable how any child in these situations could make a 'voluntary' choice.²⁹ Scholars cite a panoply of reasons that children join the armed forces. Often, countries devastated by warfare have seen the basic functions of society broken down. As a result, Ilene Cohn argues that child soldiers enlist 'to survive, to seek vengeance, to protect their families, to emulate their peers, to forge their identities as warriors or heroes, to overcome feelings of helplessness, or for lack of a better alternative.'³⁰ Consequently, an extreme level of anxiety underwrites their motivation to enlist.³¹ Additional-

²² Crystal E Lara, 'Child Soldier Testimony Used in Prosecuting War Crimes in the International Criminal Court: Preventing Further Victimization' (2011) 17(2) *Southwestern Journal of International Law* 309, 313.

²³ Justin Coleman, 'Showing its Teeth: The International Criminal Court takes on Child Conscription in the Congo, but is its bark worse than its bite?' (2008) 26(3) *Penn State International Law Review* 765, 766.

²⁴ Webster, above n 3, 234.

²⁵ *Ibid.*

²⁶ Lisa Hughes, 'Can International Law Protect Child Soldiers?' (2000) 12(3) *Peace Review* 399, 402.

²⁷ Jay Williams, 'The International Campaign to Prohibit Child Soldiers: A Critical Evaluation' (2010) 15(7) *The International Journal of Human Rights* 1072, 1075.

²⁸ Coleman, above n 23, 769.

²⁹ *Ibid.*

³⁰ Ilene Cohn, 'The Protection of Children and the Quest for Truth and Justice in Sierra Leone' (2001) 55(1) *Journal of International Affairs* 35, 55.

³¹ Coleman, above n 23, 769.

ly, most child soldiers lack a basic understanding of the conflict they expect to join and are therefore incapable of formulating a rational judgment with regard to the combat. In this regard, international legal standards need to be revised to ensure protections are afforded to these minors and that the use of children in conflicts is prohibited.

III CURRENT INTERNATIONAL MECHANISMS FOR THE PROTECTION OF CHILDREN IN CONFLICT

The state of children in armed conflict, and in particular child soldiers, has paved the way for the adoption of various international legal mechanisms aimed at the protection of children.

A *International Humanitarian Law*

Traditionally, a child's function in combat was that of 'innocent bystander'.³² However, in the aftermath of the Second World War, the nature of armed conflict underwent a tremendous shift. Intrastate conflicts of insurgence, often taking the form of guerrilla warfare, were commonly being conducted against colonial, authoritarian or totalitarian regimes.³³ Adolescents partook in these conflicts in growing numbers and, as a result, two Additional Protocols to the Geneva Conventions (**AP I** and **AP II**), adopted in 1977, recognised children as potential combatants for the first time in international law.

1 *The Additional Protocols to the Geneva Conventions*

Initial condemnations of the practice of child soldiers can be found in both AP I and AP II. While the original Geneva Conventions regarded children as individuals needing special protection,³⁴ the ensuing Additional Protocols considerably transformed, or conceivably restructured, the concept of a child's needs. Article 77(2) of AP I holds:

The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, the Parties to the conflict shall endeavor to give priority to those who are oldest.³⁵

While article 77 intends to provide protection for children, the question of whether it offers sufficient protection must be raised. First, the specified minimum age for con-

³² Hughes, above n 26, 400.

³³ Ibid.

³⁴ *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, opened for signature 12 December 1977, 1125 UNTS 3 (entered into force 7 December 1978), art 77 (2), ('*Protocol I*').

³⁵ Ibid.

scription is 15 and not 18 regardless that preference is to be given to the oldest child when recruiting. Another impediment is that children are only safeguarded when 'feasible'. To this end, often, most children fall under the cracks and are left unprotected by the legal system. Moreover, the protection of children only applies when they are non-combatants and are consequently not involved in the conflict. As such, the API fails to contemplate the likelihood of children below the age of 15 taking part in the battle without being used as direct participants;³⁶ a custom commonplace in numerous states.

Article 4(3) of AP II, which only applies to conflicts of a non-international nature, defines safeguards for children in conflict. Under article 4(3)(c), 'children [under 15] shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities.'³⁷ Further, it holds:

[t]he special protection provided by this Article to children [under 15] shall remain applicable to them if they take direct part in hostilities despite the provisions of subparagraph (c) and are captured.³⁸

Once more there is a failure to increase the age threshold to 18. Nevertheless, in one regard, the interpretation in AP II is preferable to article 77 in AP I; the '*feasibility*' provision is omitted. As such, all forms of participation, whether directly or indirectly, by children below the age of 15 in non-international conflicts is forbidden by this provision, unlike in AP I.

B *International Human Rights Law*

Human rights are the essential rights individuals should be afforded in relation to state authorities. As will be demonstrated in this section, the proscription of child soldiers is evident in the practices of international human rights law and equally in universal agreements and regional inter-state agreements. However, some murkiness still exists within existing legal frameworks that allow for manipulation and the continued trend of child soldiers.

1 *Convention on the Rights of the Child*

The CRC firmly opposes the recruitment of child soldiers. The quickest and most widespread ratification of a treaty in history,³⁹ it took less than a year to enter into force and won virtually universal recognition within a decade.⁴⁰ Given the apparent universality of the CRC, it would be acceptable to assume that the

³⁶ Ibid.

³⁷ *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protections of Victims of Non-International Armed Conflicts*, opened for signature 12 December 1977, 1125 UNTS 609 (entered into force 7 December 1978, art 4(3) ('*Protocol II*').

³⁸ Protocol II, art 4(3)(d).

³⁹ Peter Warren Stringer, *Children at War* (University of California Press, 2006), 141.

⁴⁰ Webster, above n 3, 238.

age of majority it recognised – 18 years – has achieved global status and that anyone under 18 qualifies as a child.⁴¹ The CRC, nonetheless, espouses a more flexible methodology to age with regards to child soldiery.

Article 38(2) of the CRC holds that all ratifying states must take ‘*all feasible measures*’⁴² to ensure that youths below the age of 15 do not take direct part in armed conflicts.⁴³ The language is similar to that of AP I to the Geneva Convention but the CRC takes the additional step of requiring all ratifying states to do everything feasible to deter children from partaking in armed conflicts. Under article 38(3), states are additionally forbidden from drafting children below the age of 15 and, as in AP I, necessitates states to preference the enlistment of older children when choosing between 15 to 18 year olds.⁴⁴ While the level of commitment in the CRC largely echoes AP I, the provisions guarding child soldiers in the CRC were the fruit of protracted negotiations by its drafters. Even the basic definitional material of in article 38(1) was strongly contested. For instance, the United States (US) representative objected to the inclusion of ‘to them’ after the word ‘applicable’ as the US did not want to be bound by conventions to which it was not a party.⁴⁵

2 African Charter on the Rights and Welfare of the Child

The 1990 *African Charter on the Rights and Welfare of the Child* (ACRWC)⁴⁶ is the only regional mechanism that addresses the issue of child soldiers.⁴⁷ Under article 22, ratifying states are required to ‘...take all necessary measures to ensure that no child takes a direct part in hostilities and refrain...from recruiting any child.’⁴⁸ Indeed, the wording of the ACRWC is clearer than that in the CRC as it requires ratifying states to ‘take all necessary measures’ and additionally establishes a higher age threshold for enlistment and involvement, at the age of 18. Yet, as was the case with other legal instruments, the ACRWC fails in shielding the children who are already part of armed forces but not actively involved in hostilities. Moreover, the ACRWC displays another shortcoming in that it is not applicable to intrastate rebel and insurgent units, which are the groups liable for the majority of the use of child soldiers.⁴⁹

C International Criminal Law

⁴¹ Ibid.

⁴² CRC, art 38(2).

⁴³ Ibid.

⁴⁴ Jordan A. Gilbertson, ‘Little Girls Lost: Can the International Community Protect Child Soldiers’ (2008) 29(1) *University of La Verne Law Review* 219, 229.

⁴⁵ Sharon Detrick, *A Commentary on the United Nations Convention on the Rights of the Child* (BRILL, 1999) 650.

⁴⁶ *African Charter on the Rights and Welfare of the Child*, opened for signature 1 July 1990, CAB/LEG 24.9/49 (entered into force 29 November 1999) [hereinafter ACRWC].

⁴⁷ Steven Freeland, ‘Child Soldiers and International Crimes – Should International Law Be Applied?’ (2005) 3(2) *New Zealand Journal of Public and International Criminal Law* 303, 308.

⁴⁸ ACRWC, art 22.

⁴⁹ Gilbertson n 43, 238.

1 *Rome Statute*

For the most part, the Rome Statute establishing the ICC signified progress in the international legal protection of children. The treaty introduced important protective measures for children in armed conflict, including: labelling intentional attacks on educational institutions as war crimes, affording special provisions for children as victims and witnesses, and excusing children below the age of 18 from prosecution by the court.⁵⁰ Most prominently, the recruitment of youths under the age of 15 into armed units or national armed forces is recognised as a war crime.⁵¹ The Rome Statute prohibits both ‘conscripting or enlisting children under the age of fifteen’⁵² and ‘using them to participate actively in hostilities.’⁵³ While this wording is drawn mainly from the CRC and AP I,⁵⁴ the Rome Statute nonetheless improves the protections afforded to children in one important respect. The inclusion of the expression ‘conscripting or enlisting’ implies that both actively recruiting children and passively allowing them to enlist are prohibited.⁵⁵

Despite these improvements to the legal framework, critics still assert that the Rome Statute did not go far enough. Various non-governmental organisations such as Human Rights Watch have voiced displeasure that the age limit was established at 15 and not 18 as suggested.⁵⁶ Critics have additionally voiced discontent with the ambiguity of the phrase ‘participating actively in hostilities.’⁵⁷ Confusion arose surrounding the expression’s applicability to purely direct participation as well as activities associated with combat developed. As such, an argument can be made that the Rome Statute should have been more precise in its prohibition of actions to ensure adequate protection for children in armed conflict.

IV INTERNATIONAL CRIMINAL LAW AND STATE PRACTICE: IDENTIFYING THE GAP

It has been established that, under customary international law, the recruitment and use of children in armed conflict is a war crime.⁵⁸ This is significant for two reasons. First, it conveys a symbolic message that could serve as a warning to anyone in violation of these customary international laws that they will be indicted and imprisoned.⁵⁹

⁵⁰ Human Rights Watch, *Promises Broken: An Assessment of Children’s Rights on the 10th Anniversary of the Convention on the Rights of the Child* (1999) Human Rights Watch <<https://www.hrw.org/legacy/press/1999/nov/children.htm>>.

⁵¹ *Ibid.*

⁵² *Rome Statute*, art 8(2)(b).

⁵³ *Ibid* art 8(2)(e).

⁵⁴ William Schabas, *An Introduction to the International Criminal Court* (Cambridge, 3rd ed, 2007) 50.

⁵⁵ *Ibid.*

⁵⁶ Human Rights Watch, *Child Soldiers* (1999) Human Rights Watch <<https://www.hrw.org/legacy/wr2k/Issues-02.htm>>.

⁵⁷ *Ibid.*

⁵⁸ Francis, above n 19, 224.

⁵⁹ *Ibid.*

Secondly, it encourages an end to ‘the culture of impunity of recruitment and use of child soldiers.’⁶⁰

However, in order to guarantee that all children embroiled in conflict are equally protected, international legal mechanisms must have consistent definitions and provisions. At present, it is evident that this is not the case. Most statutes, conventions and treaties encompass their own individual definitions of child soldiers with regard to age parameters and the duties a child has to execute in order to be shielded under the relevant ‘child’ provisions. Consequently, a uniform definition of ‘child soldier’ is vital to provide equal protection to children in armed conflict.

The ACRWC contributes to the prohibition of the use of children in armed conflict as it explicitly protects children involved in armed conflicts.⁶¹ While only regional, it is important for several reasons. First, it recognises that the rights and welfare of the child are more important than the form of conflict in which the child participates.⁶² Next, the way in which a child is defined is not significant. The Charter establishes a child as anyone under the age of 18 consequently advancing existing international criminal protections for youths.⁶³ Finally, the ACRWC asserts that ‘parties to the present Charter shall take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain in particular from recruiting a child.’⁶⁴ The ACRWC is broader than the CRC and, while acting as a supplement to the CRC, also tries to remedy some of the flaws within the CRC. Notwithstanding all its advantages there remain limitations. The ACRWC has only just become binding on the African states, that have signed and ratified it. In addition, while the states that did sign it may be bound, numerous others that have not signed nor ratified it remain unaffected. Moreover, article 1(3) states that ‘any custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the present Charter shall to the extent of such inconsistency be null and void.’⁶⁵ Therefore, cultural and religious inconsistencies with the African Charter significantly raises the likelihood for non-compliance with the ACRWC. Within Africa, different regions vary significantly in their religious beliefs, social systems, and economic organisation. These factors make it impossible for states, and even communities within a single state, to have a common conception and understanding of the normative prescriptions set out by ACRWC.⁶⁶ Until this is rectified, murkiness remains in the current existing legal system ensuring inadequate protections vis-à-vis children in armed conflict.

⁶⁰ Ibid.

⁶¹ Bhavani Fonseka, ‘The Protection of Child Soldiers in International Law’ (2001) 2(2) *Asia-Pacific Journal on Human Rights and Law* 83, 83.

⁶² ACRWC, Article 22(3).

⁶³ Ibid art 2.

⁶⁴ Ibid art 22(2).

⁶⁵ Ibid art 1(3).

⁶⁶ Thoko Kaime, ‘The Foundations of Rights in the African Charter on the Rights and Welfare of the Child: A Historical and Philosophical Account’ (2009) 3(1) *African Journal of Legal Studies* 120, 133.

To that end, another shortcoming relating to the protection of child soldiers is that most states in Africa, where the majority of the child soldiering occurs,⁶⁷ find it difficult to integrate international treaties into their municipal legislation. It is traditionally expected that when states ratify international agreements, they consent to maintain certain ‘fundamental rights and protection of children.’⁶⁸ However, the enforcement of these mechanisms has not led to implementation within state jurisdiction.⁶⁹ This fosters a contentious debate on the correlation between international and domestic law.⁷⁰ This debate raises numerous supplementary trepidations; for instance, effectiveness of international customary law in willing states to indict international crimes. To that end, several treaties provide grounds for jurisdiction over international crimes.⁷¹ It is also recognised that every state has jurisdiction in international law to indict war crimes.⁷² The main issue is the unwillingness of states to utilise that influence. As a result, despite numerous treaties which recognise states’ jurisdiction and indeed responsibility to prosecute war crimes, few states have in fact prosecuted individuals for the recruitment or employment of child soldiers.

Antonio Cassese proposes four reasons as to why states have shied away from prosecuting international war crimes. First, many states have not successfully passed the laws required to enforce appropriately sanctioned international treaties.⁷³ Secondly, several nations enter reservations when ratifying certain international treaties. As a result of these reservations the ratified international treaty holds no concrete legal efficacy.⁷⁴ Thirdly, certain states have shirked their international responsibilities by implementing laws that limit or reduce the extent of jurisdiction delineated in international treaties.⁷⁵ Lastly, ‘national courts have developed in their judicial practice a restrictive tendency to limit as much as possible the impact of international rules or the exercise of jurisdiction by national courts over international crimes.’⁷⁶

V INTERNATIONAL CRIMINAL LAW IN PRACTICE: THE CASE OF SIERRA LEONE

Important as these mechanisms might be, until they are enforced, not much can be done practically. Therefore, establishing state practice through temporary courts, such as the Special Court for Sierra Leone (SCSL), hold the answer to ensuring the prohibition of children in armed conflicts.

⁶⁷ Ibid.

⁶⁸ Francis, above n 20, 223.

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² Ibid.

⁷³ Antonio Cassese, *International Criminal Law* (Oxford University Press, 2003) 301.

⁷⁴ Ibid 305.

⁷⁵ Ibid.

⁷⁶ Ibid 306.

A *The Conflict in Sierra Leone*

The Revolutionary United Front (**RUF**) was one of several armed rebel factions that fought the decade-long civil war in Sierra Leone. Notorious for the capture and use of child soldiers, the SCSL issued an indictment against the high-ranking officials of the RUF. This section analyses the development of the growing child soldier jurisprudence in Sierra Leone and plots the impact of the RUF trial towards international criminal law jurisprudence governing the prohibition of the use of children in armed conflict.

B *Child Soldiers in Sierra Leone*

The civil war in Sierra Leone saw the conscription of 10 000 children into the state's three armed forces.⁷⁷ Thousands more were kidnapped and forced into sexual slavery, unwanted marriages, and domestic servitude.⁷⁸ Innumerable children in Sierra Leone were slaughtered; many who survived withstood brutal conditions and have been gravely traumatised by their experiences.⁷⁹ The recruitment of children is regularly accompanied by other grave domestic and international crimes, such as kidnapping, sexual assault, and slavery.⁸⁰ However, the rampant practice has only recently been criticised. In resolution 1315, adopted by the UN Security Council in August 2000, the Security Council was deeply concerned with the egregious crimes being committed in Sierra Leone and requested the Secretary General to negotiate with the government of Sierra Leone to establish an independent Special Court.⁸¹ The SCSL was founded cooperatively by the UN and the government of Sierra Leone.⁸² It was mandated to try those 'bearing the greatest responsibility' for crimes committed in Sierra Leone following 30 November 1996.⁸³ In 2003, the Prosecutor of the SCSL issued 13 indictments, of which two have been withdrawn due to the deaths of the defendants.⁸⁴ Trials of two former leaders of Civil Defense Forces (**CDF**) and of three former Armed Revolutionary Forces leaders (**AFRC**) have been concluded (counting appeals).⁸⁵

⁷⁷ Noah B Novogrodsky, 'Litigating Child Recruitment Before the Special Court for Sierra Leone' (2006) 7(2) *San Diego International Law Journal* 421, 423.

⁷⁸ *Ibid* 423.

⁷⁹ *Ibid* 424.

⁸⁰ *Ibid*.

⁸¹ SC Res 1315, UN SCOR, 4186th meeting, UN Doc S/RES/1315 (14 August 2000).

⁸² Special Court of Sierra Leone, *The Special Court for Sierra Leone: Its History and Jurisprudence*, Special Court of Sierra Leone <<http://www.rscsl.org/>>.

⁸³ *Ibid*.

⁸⁴ Chiara Giorgetti, *The Rules, Practice, and Jurisprudence of International Courts and Tribunals* (Martinus Nijhoff, 2012) 287.

⁸⁵ *Ibid*.

C *Statute of the Special Court for Sierra Leone*

In terms of provisions, the *Statute of the Special Court for Sierra Leone* contains much of the same language as other international legal mechanisms governing the protection of children.⁸⁶ For instance, conscripting or enlisting children below the age of 15 years into armed forces or groups or using them to participate actively in hostilities is prohibited.⁸⁷ A further safeguard emerges from the distinction between the recruitment of children into armed units and their employment in active combat.⁸⁸

1 *RUF Trials in the Special Court of Sierra Leone*

The first trial involved three former military leaders of the AFRC, all of whom were convicted of crimes related to child soldiering. The trial of defendants Brima, Kamara, and Kanu centred on abduction, which is the forced participation of children in armed forces.⁸⁹ The guilty verdict and lengthy sentences handed down by the court were upheld in the appeal process, consequently reinforcing the universal prohibition against the use of children in armed conflict.⁹⁰ The AFRC Sentencing Judgment summarises the Court's view on child soldiering:

Children were forcibly taken away from their families, often drugged and used as child soldiers who were trained to kill and commit brutal crimes against the civilian population. These child soldiers who survived the war were robbed of a childhood and most of them lost the chance of an education.⁹¹

The second trial saw the prosecution of CDF leaders Moninina Fofana and Alieu Kondewa.⁹² The Trial Chamber acquitted Fofana of the charge of recruiting youths below the age of 15 into an armed group, reasoning that Fofana's presence at the base where child soldiers were present was insufficient to establish criminal liability.⁹³ Kondewa was initially charged with recruiting child soldiers but the conviction was overturned during later appeals.⁹⁴

The final of the three trials focused on the surviving leaders of the RUF: Issa

⁸⁶ *Agreement between the United Nations and the Government of Sierra Leone on the Establishment of Special Court for Sierra Leone*, signed 16 January 2002, 2178 UNTS 137 (entered into force 12 April 2002) ('*Statute of the Special Court for Sierra Leone*').

⁸⁷ *Statute of the Special Court for Sierra Leone*, art 4 (c).

⁸⁸ *Ibid.*

⁸⁹ Charles Chernor Jalloh, *The Sierra Leone Special Court and Its Legacy: The Impact for Africa and International Criminal Law* (Cambridge University Press, 2013) 365.

⁹⁰ *Ibid.*

⁹¹ *Prosecutor v Brima, Kamara and Kanu (Sentencing Judgment)* (Special Court for Sierra Leone) Trial Chamber II, Case No SCSCCL- 04-16-T, 20 June 2007) 36.

⁹² *Prosecutor v Fofana and Kondewa (Sentencing Judgment)* (Special Court for Sierra Leone) Trial Chamber I, SCSCCL-04-14-A (August 2 2007).

⁹³ *Ibid.*

⁹⁴ *Ibid.*

Hassan Sesay, Morris Kallon, and Augustine Gabo. During proceedings, Sesay and Kallon were convicted of pre-meditating the forcible recruitment of children into armed conflicts.⁹⁵ The RUF trial emphasised the recruitment and employment of children for both the purpose of active combat and non-combatant roles.

Jointly, the three trials demonstrate a concerted *ex-post* determination to showcase ‘the widespread and systemic use’ of child soldiers in Sierra Leone and to ‘elucidate the criminalisation’ of the custom.⁹⁶

VI BRIDGING THE GAP IN THE FUTURE

Children, as the most vulnerable group in armed conflicts, deserve special consideration and full protection through international law. Consequently, it is the responsibility and duty of every state to forbid the recruitment of children into armed conflict and to establish relevant judicial systems, through the implementation of domestic law, to ensure the prosecution and punishment of perpetrators who commit the crime of child recruitment.

The achievement of the international community is undeniable in the development of international standards concerning the prohibition and punishment of child recruitment. Progress is clearly visible from mapping the evolution of international legal mechanisms in establishing and increasing focus on the protections of children. For instance, the prohibition on forcible recruitment of children under the age 15 has advanced to include bans on both forcible and voluntary recruitment, as well as raising the minimum recruitment age to 18 years. Moreover, the adoption of the Rome Statute, which for the first time expressly criminalised the act of child recruitment, is generally regarded as a big step forward.

However, these developments in legislation have so far failed to produce a drastic reduction in the use of child soldiers. The inhumane and widespread practice of child recruitment in various war zones and the miserable lives of child soldiers during protracted conflicts require continued vigilance and commitment from the international community. The widespread and prevalent use of child soldiers may stem from three overarching reasons. First, every international instrument relating to child recruitment contain flaws, resulting either from compromises on some of the key issues, or from vague and broad language. Secondly, the applicability of international humanitarian law depends largely upon the adoption of appropriate national legislation, and the end of child soldiering cannot be achieved without the respect of each state. Accordingly, the governments of these states should fulfil entirely their obligation to adopt or supplement

⁹⁵ *Prosecutor v Sesay, Kallon, and Gabo (Sentencing Judgment)* (Special Court for Sierra Leone) Trial Chamber I, Case No SSCL-04-15-T 2 March 2009).

⁹⁶ Jalloh, above n 86, 365.

the relevant national legislation. What is encouraging is that the rapid development in the regulatory mechanism to stop the use of child soldiers on the international level has witnessed a subsequent rise in state practice and *opinio juris* of the criminalisation of child recruitment. Thus, since the adoption of the Rome Statute, child recruitment has crystallised as a crime under customary international law.

Most significant to the protection of children, however, is bridging the gap between the emerging law and the practice on the ground. This gap can be bridged by focusing on the root causes of child soldiering. This can be attained through a number of ways. First, it is crucial to have knowledge of the context that leads to children becoming soldiers and employing the practical information learned about child soldiering to identify real-world solutions that can be implemented to resolve the issue.⁹⁷

Next, the international community needs to build bridges and network with relevant authorities who have a better understanding of what drives a particular conflict or armed group; and lastly, observe the situation long enough to see if preventative or responsive interventions work.⁹⁸ In this way, the international community will gain a better understanding of the root causes of child soldiering, cultivate a strong system at both state and international levels that can play a big role in inducing compliance from armed groups, and gain an enhanced comprehension of the preventative and responsive programs that are effective.⁹⁹ This will ultimately aid in guiding enforcement of future programs and assistance for warfare-stricken children.¹⁰⁰

VII CONCLUSION

The argument is therefore made that existing legal standards are insufficient by themselves and the international community needs to improve enforcement so as to meet these insufficient standards. Until this happens, there will not be adequate deterrence to ensure the prohibition of the use of children in conflict and consequently children will remain largely unprotected within the international criminal law framework. To achieve the real progress of eliminating child soldiering, it is not simply a comprehensive legal standard setting that is required. Moreover, state practice must be established; norms must be fully enforced, and prosecution must always be brought to perpetrators who commit the crime of child soldier recruitment.

⁹⁷ Dorcas B Mulira, 'International Legal Standards Governing the Use of Child Soldiers' (2007) *University of Georgia Law* 1, 56.

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*