

YOUTH - INTERNATIONAL LAW ON THE RECRUITMENT OF CHILDREN



The recruitment of children raises many important questions, the most important being whether children should be recruited at all and what is the definition of a child. The most internationally accepted definition for a child soldier is established in the Cape Town Principles 1997 by UNICEF: “any person under 18 years of age who is part of any kind of regular or irregular armed force or armed group in any capacity.”^[1] However, this is not a legal definition.



The issue of child soldiers is governed by three bodies of international law: international humanitarian law, international human rights law and international criminal law. The international humanitarian law is established in the four Geneva Conventions of 1949 (GCs)[2] and their Additional Protocols of 1977 (APs)[3] which are focused on the rules of armed conflicts. The main international human rights law governing the issue of the recruitment of children is the Convention of the Rights of the Child of 1989 (CRC)[4] and the Optional Protocol on the Involvement of Children in Armed Conflict (OPAC), 2002. The international criminal law is established in the Rome Statute of 1998[5] that regulates the jurisdiction of the International Criminal Court (ICC). Further, there is customary international law which is not written in a statute but is universally binding to everyone.

The GCs are silent

on the issues of recruitment and the participation of children in hostilities because these were originally considered as domestic decisions for states to establish independently. According to the GCs, children are not participants in conflicts and are therefore protected as civilians.[6]

The two APs to the GCs aimed to voice the issue of children participating in the conflict. There are two APs because the Member States held that it was important to differentiate the rules of an international armed conflict from the rules of a non-international armed conflict.[7]

The First Additional Protocol (AP1), which is applicable for international armed conflicts only, allows the recruitment of children between the ages of 15 and 18 into the state armed forces.[8] However, it prevents them from directly taking part in hostilities. This leaves open the question of what is meant by direct participation. According to the Second Additional Protocol (AP2), which applies to non-international armed conflicts, persons under the age of 15 shall not be recruited by either the state armed forces or non-state armed groups and they shall not participate in conflicts in any way.[9] This means that both APs consider 15 as the minimum age for recruitment and participation. However, this does not address the issue of children between the ages of 15 and 18. It should be noted that the APs do not include any measure of implementation or monitoring which makes them less effective.[10]

Article 77 of the AP1 orders states to give priority

to the older children when recruiting persons between the ages of 15 and 18.[11]

When it was drafted, it was commented that children between the ages of 16 and 18 were more physically fit to fight than their fathers and therefore would be more preferred for the armed forces. Further, due to the age structure in many countries, there are actually more children capable of fighting than people over the age of 18.[12]

Under the APs children are eligible for two kinds of protection. First, children are considered to receive general protection as civilians and secondly, children under the age of 15 receive special protection if they fall into enemy hands.[13]

However, this protection is very narrow and reflects the fact that the APs are not designed to protect children as combatants.[14]

The CRC is a universal treaty which provides a definition for a 'child': a person under the age of 18. According to article 38

of the CRC, states must ensure that persons under the age of 15 do not partake in conflicts directly.^[15] and shall take measurements to protect children affected by armed conflicts.^[16] The main international human rights law regulating children in conflicts is the OPAC. In 2018, 167 states had ratified the Protocol and 12 other states had signed it making the law nearly as universal as the CRC itself. The OPAC requires the State Parties to introduce the protocol into domestic legislation, inform the public of the regulations, demilitarise children from armed groups and aid them in reintegration to the communities.^[17]

Article 1 of the

OPAC imposes an obligation on the state to ensure that members of the state armed forces under the age of 18 do not take a direct part in the hostilities.^[18]

According to article 2, the state is responsible for ensuring that children will not be forcibly recruited to their armed forces.^[19]

However, article 3 permits a state to accept voluntary recruits without an age limit.^[20]

Stricter terms are applied when determining the rules of other armed groups within a state under article 4. Non-state armed groups are prevented from recruiting and using children under the age of 18 in any situation. This was confirmed by the Special Court for Sierra Leone (SCSL) in the case of Issa Hassan Sesay which determined that non-state armed groups cannot recruit children under the age of 18 'under any circumstances'.^[21]

Even though this case is not binding on states, it should be viewed as a good precedent on how the law should be interpreted.

The only protection the OPAC provides for voluntary recruits under the age of 18 is that the states recognise that they are under a special protection under the OPAC.^[22]

Further, OPAC suggests that states set the minimum age of voluntary recruitment according to the CRC article 38^[23]

which sets the limit of direct participation at 15.^[24]

These two articles seem to be inconsistent with each other as article 1 sets a clear limit at 18 and article 3 provides a way around it. Further, the OPAC fails to distinguish what is meant by a direct or an indirect participation and brings a question whether it is ever possible for a person under the age of 18 to truly volunteer. The Cape Town Principles attempted to solve these issues by abolishing the concepts of direct and indirect participation as well as the idea of a voluntary recruitment of a person under the age of 18. However, these principles are not enforceable law.

There are practical issues in the states guaranteeing that no person under the age of 18 is recruited to the armed forces. The OPAC states that a 'reliable proof of age'^[25]

must be shown upon recruitment but this is hard to fulfil in many States, where national birth registration systems are weak or unreliable.^[26]

Various international human rights bodies argue against prosecuting children for the grave breaches because it harms their chances for rehabilitation and it is controversial to the state's responsibility to demilitarise children and to

provide them with the necessary support for rehabilitation is established in article 6(3) of the OPAC.

Article 8 of the

Rome Statute also criminalises the enlistment of children under the age of 15 by the state armed forces^[27] and by non-state armed groups^[28] and allowing them to participate in conflicts, confirming the position that the APs have taken. The Statute does not address the issue of recruitment of children between the ages of 15 and 18 but article 26 limits criminal liability to 18.^[29]

This means that the ICC does not prosecute anyone for crimes they have committed during conflicts while being under the age of 18. Further, it leaves children between the ages of 15 and 18 are without a status: they are neither victims nor perpetrators.

Most countries have ratified or signed the Rome Statute establishing the recruitment of children under the age of 15 as a war crime.^[30]

The International Labour Organisation (ILO) Convention on the Worst Forms of Child Labour which prohibits the compulsory recruitment of persons under 18 by an armed group have been ratified by 186 states.^[31]

It seems that the international law is more lenient to allow government armed forces to recruit volunteers between the ages of 15 and 18 to take some part in hostilities whereas non-state armed groups are prevented from recruiting anyone under the age of 18.^[32]

The enforceability of this is difficult as the international law ratified by the State Parties is only binding on those states and no other armed groups within the states. Further, it is likely that the armed groups within the state are fighting against the state.^[33]

These discrepancies in international law of the definition of a child, the minimum age for recruitment and the age for criminal liability create loopholes which are exploited by Member State governments as well as non-state armed groups.

The case of Uganda and the efficiency of the law

The civil war in

Uganda started in the early 1980s when rebellion groups moved against the Ugandan Government. Since the beginning of the conflict, hundreds of thousands of people have died. Further, more than a million people have been displaced from their homes which have caused pressure and unrest to the neighbouring countries as well. The conflict is particularly complex due to the many armed groups with different agendas in the region. One of the main rebel groups is the cult-like group called the Lord's Resistance Army (LRA).^[34]

The leader of the LRA is the notorious Joseph Kony. He originally established the group to protect the Acholi people in northern Uganda and later recruited and abducted many Acholi children to his ranks in order to make up for his diminishing army.[35] It is hard to estimate how many children were partaking in the hostilities but some sources claim that the LRA may have abducted more than 60,000 children.[36] It has been estimated that child soldiers formed three-quarters of the LRA army.[37] The original agenda for the LRA was liberating north Uganda, however, the changes in the conflict forced them to abandon this goal. Since the LRA was forced out of Uganda, they have executed missions in South Sudan, Democratic Republic of the Congo (DRC) and the Central African Republic (CAR) contrary to their original goal.[38]

Uganda ratified the Rome Statute in 2002 and in 2004 referred the conflict in its territory to the ICC giving the ICC jurisdiction to prosecute for breaches of the Rome Statute in the Ugandan territory since 2002.[39]

The ICC executed arrest warrants against the five main leaders of the LRA for war crimes including the recruitment of children. Out of the five three, are now believed dead, Joseph Kony remains at large and Dominic Ongwen is facing trial at the ICC.[40]

If Kony is alive, bringing him to justice could help stabilise the situation in Uganda and enforce accountability for the recruitment of children.

Uganda has also ratified the African Charter on the Rights and Welfare of the Child (ACRWC) of 1990, in 1994. Article 22 (2) specifically prevents the recruitment of children under the age of 18 and requires states to take measures to ensure that children do not partake in hostilities in any way. This law is providing children with a stronger protection than the international law does. It is important to notice that Uganda is Party to both the OPAC and the ACRWC, which both have a 'straight 18' standard. It is also a Party to the Rome Statute which holds the age of criminal liability at 18. Contrary to the international law Uganda has ratified, the Ugandan Children Act holds minimum age for criminal responsibility 12.[41]

This law seems to be inconsistent not only with the international law but also with their own constitution which defines a child as a person under the age of 18.[42]

The reasons for the recruitment of child soldiers

By 2010 children have been recruited to participate in conflicts in 85 countries and fought in at least 36 conflicts.[43]

The issue of child soldiers in Uganda is not unique and worldwide there are estimated 300,000 children in armed groups.[44]

Especially in the African conflicts, ethnic and cultural tensions, unemployment and lack of education put children at high risk for getting involved in conflicts.[45]

There are at least 20 states globally that have children between the ages of 10 and 18 participating in military training.[46]

This clearly shows the issue in the international law and its interpretation; there is a difference between training children which might even be considered a safety measure for them and children actually partaking in hostilities.

According to the Report of the Secretary-General of the United Nations "In 2017, changing conflict dynamics, including the intensification of armed clashes, directly affected children. Verified cases of the recruitment and use of children quadrupled in the Central African Republic (299) and doubled in the Democratic Republic of the Congo (1,049) compared to 2016. The number of verified cases of the recruitment and use of children in Somalia (2,127), South Sudan (1,221), the Syrian Arab Republic (961) and Yemen (842) persisted at alarming levels. In addition, boys and girls recruited and used were often doubly victimized by subsequently being detained for their former association with armed forces or groups. Surges in the recruitment and use of children often coincided with increasing levels of killing and maiming of children. In addition, spikes in armed clashes and violence led to a substantial increase in the number of child casualties in Iraq (717) and Myanmar (296). Afghanistan, the Syrian Arab Republic and Yemen remained the country situations with the highest number of verified casualties. In Nigeria, Boko Haram continued to force civilians, including children, to perpetrate suicide attacks, which led to over half of all the verified child casualties in the country [...]. Additional developments included the abduction of over 1,600 children by Al-Shabaab in Somalia, pointing to a sustained reliance on children for combat and support duties." [47]

It is beneficial for rebel groups to use child soldiers because

other armed forces face a moral issue to kill children even if they are partaking in hostilities. Further, it is easier to manipulate what children think and they can be trained well for the group's purposes. The constant fear of punishment is an effective tool to divide the children against each other as well.[48]

According to Cairns: "children are pliable in that they are flexible and easily manipulated and controlled. Young children are controllable through terror and brutality, a point not lost on older, stronger, and more cunning commanders. Through violence or threat of violence, young children can be trained to obey commands that many adults would contest or find ways around." [49]

One of the LRA commanders commented in an interview said: "It was easy to make the newly

abducted children participate with us. We taught them to become loyal and do what we said. They listened. This was difficult with grown-ups; we could not change their minds easily. They were always thinking about going home to their families. It was much easier to make the children become good, integrated rebels.”[50]

From the rebel group’s perspective, children who do not become good fighters are easily disposed of since they can be sent to a raid against other groups. In this sense, they consider child soldiers very expendable.[51]

Technological advances have also enabled children to participate as weapons can be lighter in weight and certain weapons can be easier for children to manage than for adults.[52]

The trend of fighting conflicts in urban areas has spread and it can be argued that it might even be beneficial for children to learn how to fight and to defend themselves as they are increasingly more likely to be victims of conflicts whether they are bystanders or perpetrators. For this reason, it can be justified to teach children how to use weaponry.[53]

However, this view ignores the fundamental issue of whether children are actually mature enough to volunteer to fight.[54]

Especially in Northern Africa, the rebel groups take advantage of children’s belief of manhood. Many of the tribal cultures, such as the Acholi, have rites for boys to achieve manhood. The armed groups copy these rituals and create their own versions that are used as initiations. Many of the initiation rituals include killing a family member or executing a prisoner, sometimes even drinking the blood of the victim after the act.[55]

The children commit these acts in the fear for their lives; being a victim makes you a perpetrator.

Methods of reintegrating children back into society

Children are also in danger of being re-recruited if there are no mechanisms in place to support them and to reintegrate them into the society. Unaccompanied refugee children are exposed to the same risk. Being a member of the rebel group is easier for many former child soldiers than seeking income elsewhere which is also why some children volunteer.[56]

Further, rebel groups, such as the LRA, are known to mutilate their soldiers’ faces upon recruitment which makes it even harder for the children to be released from the stigma they carry.[57]

Article 39 of the CRC, imposes this duty to reintegrate and rehabilitate children to the states who are to take all appropriate measures to aid in the recovery of the child.[58]

The Truth and Reconciliation Commission (the Commission) was established in Sierra Leone in 2000 with the help of UNICEF and other international human rights organisations. Together they drafted a report of recommendations on what should be done in order to rehabilitate children in post-conflict. The SCSL decided that it would not hold children responsible for war crimes and established the Commission in order to break the cycle of violence and to re-establish the faith in the rule of law. The Commission, with the input from the children, recommended that the children should be placed in foster families where they could not be found; that the children should return to schools as soon as possible and receive both psychological and physical help as many of them were recovering from permanent damage and drug addiction. The Commission held it important that they gathered the facts of the conflict and the role of the children in order to assist the society to understand what the children had gone through and to raise awareness on the issue. The Commission provided the children with immunity for all their acts. This took away the shame the children were experiencing and allowed the community to help them in their recovery.^[59]

Actions to be taken to improve enforcement and prevent recruitment

It seems more effective to try and solve the issue of recruitment at its root and prevent it from taking place. Instead of addressing the issues related to child soldiers individually, with several bodies of international law, it would be beneficial to combine the legal and the humanitarian efforts and create a body to govern over all four aspects of the issue: prevention of recruitment, enforcement of the law, rehabilitation and reintegration of child soldiers. The creation of the Cape Town Principles shows that states are aware of the issues related to the international legal framework governing the issues of child recruitment.

The first step towards decreasing the number of child soldiers and the rehabilitation of former child soldiers is to create consistency in the international law governing the issue. There needs to be a clear universal definition for child soldiers, for example, the definition from Cape Town Principles, and the international law rule that non-state armed groups cannot recruit persons under the age of 18 should be extended to apply to state armed groups as well. Further, the possibility of persons under the age of 18 to volunteer should be abolished due to the abuse of this rule.

At the moment, the threat of prosecution by the ICC is one of the most powerful tools that the international community has against the recruiters of children and it is vital that the ICC sets precedents that discourage armed groups from recruiting persons under the age of 18. The international criminal tribunals, such as the International Criminal Tribunal

for the Former Yugoslavia (ICTY), have taken the view that regulations applicable to international armed conflicts should also be applicable for non-international armed conflicts.^[60]

As the non-state armed groups are unable to become treaty members, it is vital to establish customary international law rules that apply to everyone equally.

Once the international legal framework is consistent, it is important for the international community to put pressure on states to fully implement and enforce of the OPAC by abolishing contradicting domestic laws, strengthening domestic justice systems and holding the recruiters accountable. States must create mechanisms to prevent non-state armed groups from recruiting children. They must ratify and implement the Rome Statute and cooperate with the ICC in order to put pressure on the armed groups to abide the international humanitarian law.

The UN has reaffirmed the crucial role of child protection advisers in peacekeeping missions and is continuously ensuring that they are assessed and able to provide children with the best possible protection. The UN recognises that one of the main issues after the children have been demilitarised is reintegrating them in their families and has established programmes to assist through education, job training and family counselling. This work starts by securing adequate funding for child protection services combined with UN peacekeeping missions.^[61]

In 2007, the UN Secretary-General published a 'list of shame' which consisted of the names of persons responsible for recruiting and using children. This was a successful tool for demobilisation as it immediately led to the release of hundreds of children from several armed groups.^[62]

Child soldier

recruitment can be fought domestically by spreading awareness of the issue, lifting children from poverty and providing them with education. This would decrease voluntary recruitment and provide children with a safeguard from being coerced into armed forces. States should improve their birth registration mechanisms in order to ensure that age limits are truly applied. It is important to establish peace talks with non-state armed groups and demobilise children from these groups. This would create a necessary customary international law practise to support the existing legal framework.

The resources should be on the rehabilitation of child soldiers where possible and the community should work together towards ensuring that the children will receive the childhood they were taken from before. There are many strategies in place to rehabilitate and reintegrate children into society once they have been demobilised. These multi-national projects are called DDRs for disarmament, demobilisation and reintegration. DDR programmes have generally been reserved for children who have fought in conflicts but such programmes should be available for all children whether they have been directly or indirectly involved in the hostilities. Many of the children feel ashamed

and impure for the acts that they have committed and have been shunned by their societies. This is why it is important to heal the children as both victims and as perpetrators. A successful way to address this has been religious and tribal purification rituals meant to provide the former child soldiers with a fresh start in society.^[63]

There is an argument to be made that no law has managed to prevent wars, merely to change their nature and if effective measures are established to prevent armed groups from recruiting children, they will simply move onto another strategy such as autonomous weapons or robotic weapons which could cause even more destruction than the currently used arsenals.

The Author

Mira Luoma is information officer and humanitarian worker at the Finnish Refugee Council in Kampala, (Uganda).

Ms.

Luoma participated in the UNICRI specialised training course in 2017 followed by an internship at the International Criminal Tribunal for the former Yugoslavia and the United Nations Mechanism for International Criminal Tribunals as a senior legal intern at the Registry.

Ms. Luoma completed her LL.M at Stellenbosch University in Cape Town (South Africa), with a cum laude and a thesis on the criminal responsibility of child soldiers.

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^[14] Janet McKnight “Child Soldiers in Africa: a global approach to human rights protection, enforcement and post-conflict reintegration” (2010) 113 A.J.I.C.L.

^[15] Article 38 (2).

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^[17] Article 6.

^[18] Article 1.

^[19] Article 2.

^[20] Article 3 (3).

^[21] Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao 25-2-2009 SCSL-04-15-T.

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