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The late 20th century saw a huge rise in the number of child soldiers. In Africa and the Asia-Pacific region, both victims of massive international crimes and perpetrators of human rights abuses.

In terms of the child soldier as victim, this paper focuses on the crime of child recruitment. Child soldiers will be examined for a variety of reasons and it is clear that the majority of child soldiers can be considered to have been involuntarily recruited. There are a number of legal provisions against such involuntary recruitment; several international treaties and domestic domestic law protect the recruitment of children as soldiers. The strongest denunciation of child recruitment is in the form of the Rome Statute, which specifically condemns recruitment of children under 18. Although strongly protected against recruitment, child soldiers are inadequately protected post-recruitment. It is once recruited that child soldiers are often the most badly abused. This situation must be remedied if the international law community is to completely address the recruitment.

At the same time, as being victims of massive international law crimes, child soldiers are often perpetrating horrific international law crimes themselves. There is the
ABSTRACT

The late 20th Century saw a huge rise in the number of child soldiers; it is estimated there are now over 300,000 child soldiers participating in armed conflicts. This increase has occurred globally, but most prolifically in Africa and the Asia-Pacific region. The concept of the child soldier can be considered a paradox; child soldiers are at once both victims of numerous international crimes and perpetrators of human rights abuses.

In terms of the child soldier as victim, this paper focuses on the crime of child recruitment. Child soldiers will be recruited for a variety of reasons and it is clear that the majority of child soldiers can be considered to have been involuntarily recruited. There are a number of legal protections against such involuntary recruitment; enacted international treaties and inherent customary law prohibit the recruitment of children as soldiers. The strongest denunciation of child recruitment is in the form of the Rome Statute, which specifically criminalises recruitment of children under 15. Although strongly protected against recruitment, child soldiers are inadequately protected post-recruitment. It is once recruited that child soldiers are often the most badly abused. This situation must be remedied if the international law community is to completely address the victimisation.

At the same time as being victims of numerous international law crimes, child soldiers are often perpetrating horrific international law crimes themselves. There is the
need to hold such perpetrators accountable in some way; such accountability is in the best interests of the victim, the community and the child soldier. However, accountability is not best served through prosecution. Although there has been recognition of the potential to prosecute child soldiers if they can be considered the most responsible, efforts are better spent on prosecuting child recruiters. Restorative justice is proving an ideal way to hold child soldiers accountable for any crimes they commit, while at the same time recognising the child soldier’s own victimisation in the situation. Restorative justice thus addresses the challenges posed by the child soldier paradox.

International law must protect the victimised child soldier during direct participation in hostilities, despite them being technically a combatant. Equally, the perpetrator child soldier must be dealt with appropriately; through the use of restorative justice. Efforts must be made to resolve the child soldier paradox; to rehabilitate and re-integrate both the victimised child soldier and the perpetrator child soldier post-conflict.

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I

INTRODUCTION

According to the *jus ad bellum* (the international laws regulating warfare), there has traditionally been a strongly upheld distinction between civilians and combatants. The formal rules of international humanitarian law accorded civilian status to children.

However, the according of civilian status to children is becoming more uncertain. Children as young as six are now taking combatant roles as child soldiers in various conflicts around the world and are being transformed into “merciless killers, committing horrendous atrocities with apparent indifference or pride.”

Although it is estimated that there are currently over 300,000 children involved as child soldiers in internal armed conflicts, the use of children as soldiers is not a new phenomenon. However, today children are being recruited for both direct and indirect participation in hostilities at a younger age and are reportedly “fighting in almost every major conflict in both government and opposition forces.” Most child soldiers are abducted or coerced into fighting; a smaller number are attracted to the glory and excitement of the army and view soldiering as a way of escaping poverty or family crises.

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1. These rules were formulated in the early 20th Century and reflected the growing reluctance of Western European nations to use children to fight.
5. Steven Freeland “Child Soldiers and International Crimes - how should international law be
The blurred status of child soldiers as to whether they ought to be considered civilians or combatants alludes to the central paradox of the child soldier - they are both victims and perpetrators of human rights abuses. Child soldiers are initially victims of forced recruitment into the army. Once in the army, they are victimised; beaten, drugged and forced to commit atrocities against their own communities. Child soldiers also perpetrate some of the worst human rights abuses. This paper analyses this paradox. It will examine the adequacy of the international criminal law response to child soldiers as victims of forced recruitment. It will also analyse how international criminal law can best respond to the child soldier as a perpetrator of human rights abuses, through prosecution or restorative justice.

II HISTORICAL USE OF CHILD SOLDIERS

The use of children as soldiers in armed conflict, though abhorrent, is not a recent phenomenon. Throughout history, children have been used sporadically to fight in armed conflicts. In Ancient Greece, boys as young as seven were brought up in military training camps; young warriors were seen as the key to survival. During the 1300s in the Middle East, Christian boys were kidnapped to fight for the Sultan. They became a renowned, applied?” (2005) 3 NZJPIL 303, 304.
6 Honwana, above n 2.
8 Chen Reis “Trying the Future, Avenging the Past” (1997) 28 Colum HRLR 629. This was the case in Rwanda.
elite military unit. In the 13\textsuperscript{th} Century in Europe, during the ‘Children’s Crusades’, all males over the age of ten had to begin military training.\textsuperscript{10} During the United States’ Civil War (1861 – 1865), youthful ‘Drummer Boys’, ostensibly taking only an indirect role in the fighting (for example; spying, drumming) were used by both sides. However, there is evidence that the role of children in the United States’ Civil War was not simply limited to indirect tasks. During the battle of New Market in 1864, the boys of the Virginia Military Institute reportedly held their ground against attacking forces.\textsuperscript{11}

Children have never been deliberately used as soldiers in New Zealand. However, there has been a consistent emphasis on preparing young boys for military service. Maori warriors began training for war as young children; “The training of the Maori child from his infancy to manhood was aimed at the perfection of the warrior class”.\textsuperscript{12} New Zealand also has a strong history of scouting and voluntary cadet groups teaching military skills and values to young boys. Voluntary cadet groups existed in many schools, where “photographs of boys in the military uniform of the schools cadet corp make the transition from schoolboy to soldier more plausible”.\textsuperscript{13} Victoria Cross winner Leslie Andrew made the transition to soldier at an early age by lying about his age so that he could serve overseas. Despite this, he was awarded the Victoria Cross at age 20 on the basis that his “conduct throughout was un-examplied for cool, daring.

\textsuperscript{12} http://www.nzhistory.net.nz/war/maori-in-second-world-war (last accessed 10 September 2008).
\textsuperscript{13} http://www.nhistory.net.nz/media/photo/turning-boys-into-soldiers (last accessed 10 September 2008).
initiative and fine leadership and his magnificent example was a great stimulant to his colleagues".14

During World War II, children were recruited prolifically by Hitler to be part of the militant group, the Hitler Youth. The Deutsches Jungvolk was the section of the Hitler Youth movement for young boys between the ages of 10 and 14.15 Although these children initially participated in primarily civil tasks, children as young as ten were used increasingly as anti-aircraft auxillaries.16 Despite the danger, German children volunteered for the Hitler Youth movement. When voluntary child participants were insufficient, Hitler forced children to join the Hitler Youth movement. By the 1940s, all youth organizations in Germany either had to be part of Hitler Youth, or they were forbidden.17

III CHILD SOLDIERS TODAY

Children continue to fight adult wars today. Although most focus is on Africa’s sustained recruitment of children, other nations can also be considered blameworthy in their continued recruitment of those under the age of 18 to the armed forces.

16 Kater, above n 15, 23.
17 Kater, above n 15, 26.
A  The United States and the United Kingdom

The United States allows enlistment into the armed forces at the age of 17 and their reluctance to relinquish the right to recruit under 18 year olds resulted in them being one of only two countries not yet signed up to the Convention on the Rights of Children.\textsuperscript{18} The United Kingdom continues to recruit from the age of 16.\textsuperscript{19} However, they will take “all feasible measures to ensure that selection is of those above 18”.\textsuperscript{20}

B  New Zealand

There is a similar situation in New Zealand, where 17 is the minimum age of recruitment into the armed forces.\textsuperscript{21} As at 1 August 2007, there are 120 members of the regular force under 18 in New Zealand.\textsuperscript{22} However, those under 18 are not allowed to participate in armed conflict. Section 37 of the Defence Act 1990 provides that “no person serving in the army or the air force shall be liable for active service outside New Zealand while that person is under 18 years of age”.\textsuperscript{23} Defence Force Orders for Personnel Administration also make it clear that deploying personnel under 18 years of age on “active service” is prohibited.\textsuperscript{24}

\textsuperscript{18} Only Somalia and the United States remain non state parties to the original CRC.
\textsuperscript{19} Section 328 (c), Armed Forces Act 2006 (United Kingdom).
\textsuperscript{20} Committee on the Rights of the Child (UN) CRC / C / OPAC / GBR / 1 3 Sept 2007.
\textsuperscript{21} Section 33 Defence Act 1990: “No person who is under 17 years of age may be appointed to or enlisted or engaged in, the Navy, the Army, or the Air Force”.
\textsuperscript{22} Child Soldiers Global Report 2008, 2.
\textsuperscript{23} Defence Act 1990, section 37.
\textsuperscript{24} Defence Force Orders for Personnel Administration in Robert Ludbrook “Children’s Law since
Although this is seemingly a strong protection against the participation of those under 18, this section does have several weaknesses. Section 37 only prevents ‘active’ participation. This would imply that those under 18 could theoretically serve outside New Zealand in an inactive role. An inactive role could potentially be just as dangerous as an active role (for example; peacekeeping, rebuilding missions or carrying rations to the front line).25 Furthermore, section 37 specifically only prevents active service outside New Zealand. In the unlikely event that there was a civil war in New Zealand, under-18s could be required to participate. This could be in breach of New Zealand’s international obligations.

C Australia

The minimum age of recruitment in Australia is 17 years.26 Although the Australian Defence Instructions include a number of safeguards to protect those under 18, these safeguards are far more limited than those in the New Zealand Defence Act. For example, under-18s should not be deployed to areas where there was a likelihood of hostile action. However, this is only to occur “to the maximum extent possible, provided it will not adversely impact on the conduct of operations”.27 Commanders need not

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26 Defence Act 1993 (Australia)
27 Department of Defence, “Recruitment and employment of members under 18 years in the Australian Defence Force” article 11, at www.defencejobs.gov.au (last accessed 3 September 2008).
remove under-18s from direct participation in hostilities where it would “prejudice the effectiveness of the mission”. 28

D  Asia-Pacific Region

Child soldiers have been used prolifically in the Asia-Pacific region; it is estimated that there are 75,000 children under the age of 18 involved in armed conflicts. 29 The use of child soldiers in this region is second only to the use of children in armed conflicts in Africa. 30 In response to the widespread use of child soldiers in the Pacific, there has been clear condemnation of recruitment of those under 18 and the need to monitor the use of child soldiers in the Pacific has been recognised. 31

Children were used by the Khmer Rouge in Cambodia and were considered to be "fierce warriors". This fierce reputation led to the Khmer Rouge deliberately seeking to recruit children to participate in armed conflicts, in preference to recruiting adult soldiers. 32 Child soldiers have been recruited by militia in the Solomon Islands – such child soldiers were subsequently left out of reintegration programmes. 33 The Indonesian Government continues to recruit children into “auxillary forces, civilian defence groups

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28 Above n 27, article 13.
30 Asia-Pacific Forum, above n 29, 2.
31 Asia Pacific Forum, above n 29, 4.
33 Child Soldiers Global Report 2008: Solomon Islands. Former child soldiers were left destitute after the 5 year conflict.
or in illegal militias and armed groups acting as proxies for official armed forces”.  

In Fiji there is evidence of recruitment and training of young children; reportedly “200 youths, aged between 10 and 20 have been undergoing military training by rebel soldiers”. This military training is justified as a way of keeping youths off the streets and away from crime.

Although Australia and New Zealand do not actually use child soldiers, both nations need to take a more extensive monitoring and aid provision role to prevent the use of child soldiers by other Pacific countries. As highly influential members of the Pacific community, New Zealand and Australia need to rally against the use of child soldiers. Coordinated aid to poorer Pacific countries should be increased. In 2007, Australia provided just $200,000 to help UNICEF. Such aid should be tagged for child soldier specific re-integration programmes or to increase educational opportunities for those youths at risk of being recruited as child soldiers.

As a last resort preventive measure, economic sanctions could be imposed by Australia and New Zealand against Pacific nations that do recruit children as soldiers. This must be a last resort measure since worsening the economic conditions of countries

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36 Yaya, above n 35.
37 Child Soldiers Global Report 2008: Australia, 3. This aid was for UNICEF and the United Nations Special Representative for Children and Armed Conflict to undertake a ten year review of the 1996 Machel study.
using child soldiers may increase pressure on destitute children to become soldiers. Post conflict, both countries could do more to grant refugee status to ex-child soldiers. New Zealand has reportedly granted refugee status and asylum to only 13 child soldiers fleeing Myanmar since 2004. 38

E Africa

It is clear today that the use of children in armed conflicts is most prolific in Africa: Uganda recruited over 20,000 children to participate in the Lord’s Resistance Army, the Democratic Republic of Congo recruited over 30,000 children to fight in their armed conflict and Sierra Leone similarly recruited between 20,000 and 30,000 children. 39 It is equally clear that the international humanitarian community will not allow the widespread use of child soldiers to continue. Although the use of child soldiers may have been acceptable up until World War II, the increased recognition of children’s rights means that recruitment of child soldiers is no longer acceptable today. 40

IV CHILD SOLDIERS AS VICTIMS

A The Paradoxical definition of a child soldier

How to define child soldiers is uncertain. Child soldiers are theoretically defined

38 Child Soldiers Global Report, above n 25, 2.
as “anyone younger than 18 who has participated in armed forces or groups - either on a volunteer basis or by coercion, directly or in a support function”. However, the legal definition of a child soldier is less certain. Although Article 1 of the United Nations Convention on the Rights of the Child (CRC) defines a child as being every human being under 18, Article 38 makes it clear that only children under 15 are protected from involvement in armed conflict. The Additional Protocols (I and II) to the Geneva Conventions similarly only protect those under 15 from forced recruitment. The definition of a child soldier as being anyone under 18 is not so simple; under many international legal protections a 17 year old in uniform would not be considered a child soldier.

The term ‘child soldier’ is paradoxical and illustrates the victim / perpetrator dichotomy focused on in this paper. The word ‘child’ is usually associated with innocence and dependence on adults for protection, while the word ‘soldier’ is associated with strength and aggression. The combination of these two words is unsettling and evokes the ambiguous ideas of both innocent victimisation and guilty perpetration that characterise the life of a child soldier. Established social stereotypes are merged disturbingly in this context with the result that the typically innocent and weak child must

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40 Herve-Jezequel, above n 10.
take on the role of an aggressive adult soldier.\footnote{Honwana, above n 3.}

\section*{B Legal issues raised by the paradox of child soldiers}

\subsection*{I Child soldiers as victims}

\subsubsection*{a Defining child soldiers as victims}

Child soldiers are unanimously recognised as victims by international human rights organisations. The International Red Cross, Human Rights Watch and the Coalition to Stop the Use of Child Soldiers have all released reports declaring child soldiers as victims of forced recruitment.\footnote{Faulkner “Kindergarten Killers” (2001) 22 Third World Quarterly 491, 493.} There has been continuous recognition of the status of child soldiers as victims by the United Nations Security Council and the General Assembly.\footnote{L Peters “War is no child’s play”, Geneva Centre for Democratic Control of Armed Forces, Occasional Paper 8.} The General Assembly has recently recognized the need to protect the rights and best interests of children involved in armed conflicts.\footnote{S / RES / [1314] / [2000]. This resolution condemned the victimisation of children in armed conflict.} A more protectionist stance towards children was advocated; the rights of children need to be rigorously protected to prevent victimisation in armed conflict.

\footnote{This was decided during the May 2007 United Nations General Assembly Special Session on children.}
b  Child soldiers as victims of international crimes

Child soldiers are victims of numerous international crimes. Child soldiers may be tortured or summarily executed. They will often be arbitrarily detained and will be subject to inhumane treatment. Numerous international conventions are relevant to child soldiers. The Convention Against Torture will be engaged if the child soldier has been tortured. The Geneva Conventions and the Rome Statute will be involved if child soldiers have been detained inhumanely. The Convention on the Rights of the Child (CRC) guarantees numerous rights to children. Despite the treatment of child soldiers breaching these universally guaranteed rights, there is no way to ensure the rights guaranteed are upheld or to punish those responsible.

c  Child soldiers as victims of forced recruitment

Although child soldiers are the victims of numerous international crimes, this paper will focus on just one of the crimes committed against child soldiers where perpetrators can actually be punished; the crime of child recruitment. Forced recruitment of children is a crime at international law. Children can be recruited either by rebel group forces or by actual Government forces and are primarily recruited to participate in internal conflicts between governments and rebel groups. Up until 1999, child recruitment was not expressly criminalized by any specific statutes but it was considered

50 Convention on the Rights of the Child, above n 42.
a crime against customary international law due to the general outrage against it.\textsuperscript{51} However, in 1999, the Rome Statute was opened for signature. This specifically criminalised child recruitment as a war crime under article 8.\textsuperscript{52} Although potentially not protective of children between the ages of 15 and 18 who are involved in armed conflict, the Rome Statute’s criminalisation of the recruitment of children was crucial in recognising child soldiers as powerless victims in adult wars.

2 Child soldiers as perpetrators of international law crimes

Opposed to the concept of children as victims of forced recruitment is the fact that children are also perpetrators of severe human rights abuses. Child soldiers as perpetrators raises the question as to whether or not child soldiers can be, or should ever be, prosecuted under international law. It seems evident that the victims of crimes committed by child soldiers need to see justice and accountability. However, it is also evident that there are complicating factors in the prosecution of a child soldier and it is possible that a better focus would be on their rehabilitation and reintegration into the community.

\textsuperscript{51} See \textit{The Prosecutor v Sam Hinga Norman} (31 May 2004) SCSL – 2004 – 14 – AR72 (E). The sufficiency of general outrage as a basis for a finding of customary international law will be discussed further in Part (VI) (B) (2).

\textsuperscript{52} Rome Statute of the International Criminal Court. Article 8 defines conscripting or enlisting children (under 15) years as a war crime.
C Why victimise and recruit children as soldiers?

There are numerous reasons as to why children are consistently used as soldiers in armed conflicts. Child soldiers participate largely in internal armed conflict; such conflict remains unregulated and somewhat removed from the scrutiny of the international community.

1 Psychological reasons

Psychologically, children are considered easily malleable and amenable to commands. They will tend to carry out any order unquestioningly. Children also fall more easily into a survival mode than adults - they understand that if they do not follow orders, they will likely be killed or brutally punished. Due to their inherently undeveloped moral conscience, their recognition of the need to follow orders is not constrained by moral ideals that may cause adults to refuse orders. Children will not refuse to kill because it is ‘wrong’. Children can be easily indoctrinated into believing in the cause and are easily duped into believing that they will attain a heaven-like utopia if they follow the orders of their commander.53

2 Physical reasons

Physically, child soldiers are also preferable to their adult counterparts. Children

53 Singer, above n 2, 109.
can make good spies and lookouts and can often go largely undetected or un-pursued by opposing forces due to the presumed innocence associated with children. Further, many adult soldiers do not want to have the blood of children on their hands and will refrain from killing a child soldier, even if that child soldier is aiming a gun at them. Recruiters rely on the inherent moral code of not killing a child to weaken opposing forces - if the opposing forces hesitate to kill the child soldier it is likely they will be killed themselves. Child soldiers also look less suspicious than adults and can be used on suicide bombing missions - where their physical appearance may allow them to get the bomb right into the enemy camp.

During long and protracted wars, such as those in Ethiopia and Uganda, desire by adult soldiers to continue to fight for a cause which seems hopeless can begin to wane and recruitment numbers can fall. In such situations, child soldiers become the ideal ‘stopgap’ measure. They can be kidnapped or abducted with relative simplicity and receive only the most rudimentary training. If these child soldiers are then killed during a fight, there can be rapid replacement of more children into the depleted armed forces. This cyclical pattern is what occurred during Ethiopia’s protracted internal conflict. Children represent a quick, easy and low cost way to generate an armed force and it is

54 Abbot, above n 7, 508.
56 Singer, above n 2, 111. This was a tactic used to entice children into the armed forces in Sri Lanka.
57 Singer, above n 2, 111.
58 Singer, above n 2, 113.
noted that the younger children are, the more vicious they are as soldiers.\textsuperscript{59}

\section*{3 Ongoing community rejection}

Many groups also prefer to use child soldiers because corruption of the children of a community can lead to future violence and instability.\textsuperscript{60} On being recruited, child soldiers will often be forced to harm their own community in some way – this may be by burning houses down, or even by killing members of their family.\textsuperscript{61} Post disarmament, people within the community will not want child soldiers coming back to that community and they will be rejected. Even if they are accepted back into the community, child soldiers will have been used to violence and may have become de-sensitised to such violence; they often respond to minor insults with irrational and non-proportional violence.\textsuperscript{62} This can cause the community and the child to become further alienated. The problem of female child soldiers is even more acute. Female child soldiers will often have borne children to the other soldiers and both they and their children may be rejected from her previous community. Their families and communities may not want the “product of an enemy soldier” to be raised with them; a child is a continuing mark of shame on them and they are unlikely to ever marry.\textsuperscript{63}

\begin{itemize}
\item \textsuperscript{59} Singer, above n 2, 114.
\item \textsuperscript{60} Abbot, above n 7, 506.
\item \textsuperscript{61} P Singer “Talk is Cheap” (2004) 37 Cornell Intl L J 561, 564.
\item \textsuperscript{62} Peters, above n 46, 17.
\item \textsuperscript{63} M Goetz “Victims, Perpetrators or heroes?” (2006) REDRESS Report.
\end{itemize}
Increased manufacture of light weapons

The use of child soldiers has increased markedly since the increased manufacture of light weapons. There are reportedly more than 500 million light weapons on the global scene and this new style of weapon is far lighter than traditional guns. Traditional guns were too heavy for most children to use and this led to children playing only indirect roles in armed conflict. However, the manufacture of light weapons has revolutionised the child soldier - allowing younger and younger children to take more of a direct role in the conflict. The United Nations Security Council (Resolution 1314) specifically linked the supply of light weapons to the increased use of child soldiers. Attempts have even been made to argue that United States gun manufacturers should be held liable in tort (under the Alien Torts Claim Act) to the child soldiers who they arm. Corrupt and unscrupulous gun manufacturers deliberately make their guns easy for children to use.

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64 Singer, above n 2, 47.
65 S/RES/ [1314]/[2000].
67 Moriseau, above n 66, 1278. Arguably, child soldiers could potentially have a claim against small arms manufacturers for psychological harm caused by them having to fight with such small arms. This claim could be made under the United States Alien Torts Claim Act 28 U.S.C. § 1350.
FROM CHILD TO CHILD SOLDIER

A Recruitment of child soldiers

I Involuntary recruitment

Many countries employing child soldiers use systematic forced recruitment of children into the armed forces. Involuntary recruitment of child soldiers results when children are forced by threats or physical force into the army, armed forces, militias or armed groups. Children may be threatened with death to themselves, or to their families, or abducted. Recruiters generally target secondary schools or orphanages and abductions most commonly occur to refugees, orphans or other displaced persons; 21% of child soldiers affirm that they were abducted into the army. Children from the poorest backgrounds will be easily abducted to be soldiers, because such children and their families will be unaware of legal rights relating to the minimum age of recruitment. Even if families do recognise that their children are too young to be recruited, poor children will be less likely to have any form of identification to prove that they are indeed under age. Their families will not have the money or social connections to bring a claim to the authorities for their release. Once they have been abducted, they will be brutalised, coerced and potentially drugged until they are submissive participants.

69 Honwana, above n 3, 2.
70 Cohn and Goodwin-Gill, above n 68, 26.
71 Cohn and Goodwin-Gill, above n 68, 29.
2 Voluntary recruitment

The majority of children join voluntarily.72 ‘Voluntarily’ is used here in the sense that children who ‘volunteer’ have not been abducted. However, describing the recruitment of a child soldier as ever being truly voluntary is highly questionable. Subtle factors prompt and coerce the child to volunteer. Three common characteristics have been identified in relation to children who willingly become soldiers73 - all have been affected by war, all are uneducated and all are from the most socially disadvantaged groups. For children who choose to become soldiers, poverty will be a key factor; in the Democratic Republic of Congo’s recruitment of children, 61% of those children’s families had no income.74 War leading to the disruption of family and other social networks will be the norm, not the exception. Such children are vulnerable and easily manipulated by the promise of money, excitement, vengeance and safety and community within the army.75

Voluntary recruitment results because of the lure of payment from the army; the perception is that “those with guns could eat”.76 The army may also be seen as exciting and glamorous to an immature child, and as preferable to the impoverished existence the

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72 Abbott, above n 7.
73 Rachel Brett and Irma Specht Young soldiers - why they choose to fight (Lynne Reinner Publishers, Colorado, 2004).
74 Brett and Specht, above n 73.
75 Honwana, above n 3, 55.
76 Cohn and Goodwin-Gill, above n 68, 29.
child is living. Uneducated children can be particularly susceptible to the alluring promises of army life. Religious ideology and indoctrination can influence a child’s desire to become a soldier. Children may consider they are fighting for the ‘right’ cause and that they will attain heaven or martyrdom. There is evidence that child soldiers in Iran and Sri Lanka were promised heaven if they died while fighting for ‘the cause’.

Families and communities often play a large part in determining whether a child will volunteer or not. Some children join voluntarily as a result of peer pressure due to the rest of their friends having joined the army. Many children voluntarily become child soldiers in an attempt to protect themselves or their families. This is particularly evident in regions where there is frequent civil unrest and a high degree of military involvement in daily life. Further, family pressure on the child to enlist is common in poverty stricken areas; child soldiers report a feeling of pride that they can help provide for their families. If a family situation is abusive and violent, then the child may view enlisting in the army as the lesser of two evils.

3 Conclusion on the recruitment of child soldiers

Although enlistment in the above circumstances would seem to be prima facie

77 Cohn and Goodwin-Gill, above n 68, 30.
78 Cohn and Goodwin-Gill, above n 68, 32.
79 Singer, above n 2, 63.
80 Cohn and Goodwin-Gill, above n 68, 56.
81 Emmons, above n 41, 13.
82 Singer, above n 61, 564.
voluntary, it would be a fallacy to consider the enlistment of a child under 15 as purely voluntary. Children cannot possibly fully comprehend the irrevocable nature of the decision they are making. The fact that children cannot comprehend the true nature of their decisions is recognised in New Zealand’s domestic law. Section 6(1) of the Minor’s Contracts Act 1969 provides that “every contract entered into by a minor [those under 16] is unenforceable against that minor”. Similarly, under section 7 of the Civil Union Act 2004, children under the age of 16 are not considered competent to marry; “A person who has not reached the age of 16 is prohibited from entering into a civil union”.

As well as being too young to make an informed choice, children who ‘volunteer’ to become child soldiers are subtly coerced by a variety of factors, such as family pressures and pressures of their socio-economic situation. The distinction between voluntary and involuntary recruitment is not clear since children who seemingly ‘volunteer’ have little freedom of choice - their choice is defined by the conflicts in their lives. Due to this limited freedom of choice in reality, any recruitment of those under 15 must be considered involuntary.

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83 Minor’s Contracts Act 1969, section 6(1) “subject to the provisions of this section, every contract entered into by a minor is unenforceable against the minor”.
84 Civil Union Act 2004, section 7: “A person who has not reached the age of 16 is prohibited from entering into a civil union”.
B Conversion from child to child soldier

Initiation is the primary way of converting a child into a soldier. Such initiation usually involves brutal tasks, such as forcing the child to kill members of their own family or to kill other children. Such tasks are designed to morally and psychologically disconnect the child from their previous community and family life and to make the army the child’s sole “support network”. After this initiation, children will be given rudimentary training, sometimes in a foreign country, to isolate and perturb the child. Training generally provides basic knowledge on how to use a gun and instills basic discipline. However, this training is generally insufficient to prepare children for participation in conflict; ex-child soldiers rely primarily on first hand experience as their ‘teacher on the battlefield’.

The removal of bare necessities and the protective mechanisms of family and community ensures that child soldiers are particularly vulnerable to many influences. After initiation, child soldiers will live in subsistent conditions; camps in which the child soldiers live feature high malnutrition and mortality rates. Child soldiers come to rely on their individual capabilities and will undertake the same tasks as adults. Some child soldiers initially begin as indirect participants in the conflict, as porters, spies or sex

86 Singer, above n 2, 34.
87 Honwana, above n 3, 58.
88 Emmons, above n 41, 7.
89 Faulkner, above n 45, 498.
90 Goetz, above n 63, 10.
slaves. However, they will soon be expected to undertake physically demanding tasks to a standard equal to adults and will be expected to fight directly in conflicts:

I did not kill anyone for the first four days of my captivity, and then on the fifth day, they said I had to prove I wasn’t scared, they took me back to my village and ordered me to kill my father...They do it so you can’t go back home.93

Child soldiers are desensitised to violence by a constant campaign of brutality and mistreatment against them during their time in the army. This is even more the case for female child soldiers. As well as being just as brutalised as male child soldiers, they will often have suffered sexual abuse and may consequently have unwanted pregnancies and sexually transmitted diseases.94 Child soldiers will often be heavily drugged or plied with alcohol to ensure that they “feel little fear or revulsion for the massacres which they carry out”.95

92 Emmons, above n 41, 13.
93 Goetz, above n 63, 12.
95 Cohn and Goodwin-Gill, above n 68, 26.
VI LEGAL PROTECTIONS AGAINST CHILD RECRUITMENT

A Treaties

I The Rome Statute of the International Criminal Court

The Rome Statute is the most decisive legal denunciation of the recruitment of child soldiers currently enacted in international law.96 The strong denunciation of child recruitment is reinforced by the criminal consequences that flow from breaches of the Rome Statute. The International Criminal Court (ICC) can exercise universal jurisdiction over those who breach the articles of the statute.97 Child recruitment is prohibited as a war crime under four provisions of Article 8.

a Article (8)(2)(a)(v)

In terms of international armed conflicts, child soldiering is firstly proscribed under Article (8) (2) (a) (v) which prohibits the “compelling of... protected persons to serve in the forces of a hostile power”. Because children are protected persons under International Humanitarian Law and the Geneva Conventions, they cannot be used in the military forces of either party to an international armed conflict. Children are traditionally characterised as civilians (not combatants) in situations of international armed conflict and consequently are also protected from recruitment under (8) (2) (b) (xxiii). This

provision prevents the use of civilians to “render certain points, areas or military forces immune from military operations”. The effectiveness of this provision in protecting child soldiers is limited; it only prevents children from being compelled to serve in enemy forces and it does not prohibit recruitment by one’s own side. Most children forced to serve as soldiers are forced to do so by their own side.98

b Article (8)(2)(b)(xxvi)

Article (8)(2)(b)(xxvi) specifically protects children under 15 from recruitment as soldiers. Because this Article is a specific provision against the recruitment of children under 15, it largely subsumes the more general and ineffective provision of Article (8)(2)(a)(v). Article (8)(2)(b)(xxvi) makes conscription or enlistment of children (under the age of 15) to participate “actively” in hostilities, a war crime. Although this is a strong prohibition, it is somewhat undermined by the use of “actively”. “Actively” suggests that only direct participation in hostilities is prohibited and implies that indirect participation of children under 15 could be permissible.99 This loophole could mean that children under 15 can take an ancillary role in international conflicts. Such ancillary roles can be just as life threatening as those taken by direct participants in the conflict. Children are often used as spies in a supposed “indirect” role; however, if they are captured by the opposite side their lives can be directly in danger. Children are deliberately recruited in

97 Rome Statute, above n 96, Article 13.
98 For example, in Burma, children were recruited prolifically by both government and rebel forces.
southern Thailand to be used ‘indirectly’ in support of military operations.\textsuperscript{100}

c \hspace{1em} \textit{General weaknesses}

Other potential anomalies may weaken the protection given to child soldiers by the Rome Statute. Only children under 15 are conclusively protected from being recruited as child soldiers under the Rome Statute. Yet, children under the age of 18 cannot be prosecuted according to Article 26 of the Rome Statute.\textsuperscript{101} This would allow recruiters to recruit older children between the ages of 15 and 18 without fear that either themselves, or the children will be held responsible for crimes committed.

Children most at risk of being recruited as soldiers are more likely to be involved in internal armed conflicts not of an international nature. Most child soldiers are used to fight in civil conflicts between existing Governments and insurgent or rebel forces rather than in international conflicts between states.\textsuperscript{102} There is limited protection provided in the statute for children involved in non-international armed conflicts. Article (8) (2) (e) (vii) prevents the conscription and enlistment of children under 15 into armed forces or using them to “participate actively in hostilities”. While this seems to be a strong protection for children not involved in international armed conflict, this provision is severely undermined by article (8) (2) (f). This makes it clear that article (8) (2) (e) does not apply to situations of “internal disturbances and tensions” and ironically, this is the

\textsuperscript{100} Child Soldiers Global Report, above n 34, 2.
\textsuperscript{101} Rome Statute, Article 26: “The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime”.

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type of conflict that the children most vulnerable to being recruited as child soldiers.

2  *Convention on the Rights of the Child*

The Convention of the Rights of the Child (CRC)\(^{103}\) was the first instrument to acknowledge that children possess rights to autonomy, preservation and protection.\(^{104}\) However, the CRC is not as powerful a tool in preventing child recruitment as the Rome Statute, since a breach of it does not necessarily lead to an imposition of criminal liability. The CRC is only implemented through a voluntary reporting system and there is no central body for ad hoc complaints.\(^{105}\) There is no punishment mechanism for CRC non compliance. The upholding of the CRC is dependent on the goodwill of the parties to it; governments themselves may violate the legal standards of the CRC despite having ratified it.\(^{106}\)

Under Article 38, state parties must take all “reasonable steps” to ensure that children under 15 shall not take a direct part in hostilities. No state parties have made an explicit reservation against Article 38,\(^{107}\) making it a seemingly strong protection for children involved in armed conflict. However, many state parties have allowed reservations to the whole CRC that if any articles are inconsistent with state religions or

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102 Machel, above n 91, para 36.
105 Lynch, above n 49, 12.
106 Millard, above n 104, 190.
107 Reservations to the CRC www.unhchr.ch (last accessed 4 August 2008).
with “traditional values”, the state will not consider itself bound by such articles. New Zealand has reserved the right to limit the CRC “as the Government requires” and this right to limit may include the limitation of entitlement “to benefits and other protections”. This implies that a future government may require the removal of the protections under Article 38 and allow children under 15 to take part in hostilities. Technically, reservations can only apply to the particular parts of the CRC to which they are addressed and broad reservations such as those cited could be argued as being null and void under Article 19(c) of the Vienna Convention on the Law of Treaties because they are “incompatible with the object and purpose of the CRC”. However, the high incidence of reservations potentially undermining the child recruitment provisions of the CRC implies that it potentially offers fairly weak protections for children.

**a Article 1 / Article 38 dichotomy**

The primary weakness in the CRC is the dichotomy between Articles 1 and 38. Article 1 defines a child as being “every human being below the age of 18”. This can be contrasted to Article 38, which only prohibits the direct participation in hostilities of those under 15. Although 15 years is typically the age “international usage has now settled on as defining what is meant by a child when no further description is given”, the CRC explicitly defines the cut-off age for childhood in Article 1 as being 18. The dichotomy between Articles 1 and 38 implies that children between the ages of 15 and 18

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108 Reservations to the CRC, above n 107.
109 Reservations to the CRC, above n 107.
110 Jean Pictet “Commentary, IV Geneva Convention Relative to the Protection of Civilian Persons in
can be actively recruited to take part in hostilities, without there being any breach of the CRC. The inconsistency between these articles undermines the effectiveness of the CRC and suggests that child soldiers are less worthy of protection than ordinary children. Under Article 1, ordinary children are protected up until the age of 18 by the CRC. In contrast, those children participating in armed conflict as child soldiers are only protected until the age of 15, according to Article 38.

b Optional Protocol

The Optional Protocol to the CRC was introduced to deal with some of the weaknesses of the original CRC. It partially dealt with the Article 1 / Article 38 anomaly by mandating that states which recruit children between the ages of 15 and 18 must give priority to recruitment of the oldest first. Further, Article 4 (1) makes it clear that 18 years is the minimum age of recruitment by non-state armed groups. This is an important standard because child soldiers are predominantly used by such groups.

However, the Optional Protocol has been considered ineffective in failing to deliver the desired universal standards. It did not raise the minimum age of recruitment from 15 to 18, and did not prohibit indirect as well as direct participation.
Neither the Optional Protocol itself, nor the travaux préparatoires provide any guidance on how ‘direct participation’ is to be interpreted. 116 Academic commentators have considered that direct participation requires a direct “causal relationship between the activity engaged in and the harm done to the enemy at the time and place the activity takes place”. 117 The uncertain distinction between direct and indirect participation leaves a loophole for state parties to argue that their use of children is merely indirect, and thus not in breach of Optional Protocol Article 1. 118

There is uncertainty as to whether the Optional Protocol implicitly allows those under 18 to take a direct part in hostilities if their participation is due to military necessity. This is first alluded to by the preamble to the Optional Protocol referring to article 51 of the United Nations Charter. 119 Article 51 provides that “Nothing … shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations”. 120 The reference to this provision in the

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115 Freeland, above n 5, 306.
117 Vandewiele, above n 116, 25.
118 Vandewiele, above n 116, 26.
119 Preamble of the Optional Protocol to the CRC: “Stressing that the present Protocol is without prejudice to the purposes and principles contained in the Charter of the United Nations, including Article 51, and relevant norms of humanitarian law”.
120 Charter of the United Nations (26 June 1945) 59 Stat 1031. Article 51 of the United Nations Charter provides that “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”
Optional Protocol preamble implies that children could potentially be used in armed forces in times of military necessity and self-defence.

Optional Protocol, Article 1 mandates that those under 18 are not to take a direct part in hostilities.\(^{121}\) In light of the preamble, the United Kingdom and Vietnam have both interpreted this article as not excluding the deployment of those under 18 in "exceptional circumstances".\(^{122}\) The United Kingdom has affirmed that it will deploy under-18s if "there is a genuine military need to do so because of the urgency of the situation or because, to not do so, would undermine military effectiveness".\(^{123}\) Similarly, Vietnam has declared that "those under 18 shall not be directly involved in military battles, unless there is an urgent need for safeguarding national independence, sovereignty or territory".\(^{124}\) Australia also implicitly recognises the potential to use (or at least, not to remove from hostilities) those under 18 if 'military effectiveness' requires it.\(^{125}\)

When such 'military necessity' could arise is uncertain; "the concept of military necessity is difficult to define with any precision". Arguably, what is being politically sought by parties to a conflict will greatly affect whether a military campaign can be considered to be of necessity.\(^{126}\) Merely seeking more power would be unlikely to

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\(^{121}\) Optional Protocol to the CRC, above n 113. Article 1 states that "State Parties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities".

\(^{122}\) Vandewiele, above n 116, 21.

\(^{123}\) CRC Committee Concluding Observations: United Kingdom (UN Doc CRC/C/Add. 188, 2002) para 54(a).

\(^{124}\) CRC Committee, above n 123.

\(^{125}\) Department of Defence (Australia), above n 27.

\(^{126}\) H Mann "International Law and the child soldier" (1987) 36 Intl and Comp L Quarterly 32, 40.
constitute a necessary military campaign. The Article 51 (UN Charter) reference potentially limits a claim of military necessity to a situation of self defence. Other critics argue that military necessity can never apply to humanitarian law and consider that there is no basis on which to compare a military advantage (regardless whether it is perceived to be 'necessary') with losses to civilians.

Despite the evident weaknesses of the CRC and its Optional Protocol, the convention played an important role in opening up discourse on children’s rights generally and specifically on the right of children under 15 not to be recruited to be involved in hostilities. The Convention also served as an important indicator of the customary law prohibition on the recruitment of children and this is evident by the widespread ratification of the CRC.

3 Other International Humanitarian Law protections

a The Geneva Conventions

The Geneva Conventions first included children within a category of protected

127 Ibid.
persons. However, the original conventions were “designed to protect civilians, who by definition took no part in fighting”. They thus did not deal with the issues around child participation and recruitment as soldiers and were considered the “minimum protections, treatment and guarantees to children”. For this reason, Additional Protocols to the Geneva Conventions were introduced in 1977. Protocol I mandates that all feasible measures must be taken to prevent children under 15 from taking part in hostilities. The reference to “feasible measures” sets a low standard for States to prevent child recruitment of those under 15, and implies that mere attempts to prevent it will be sufficient.

Protocol II, article 4(3) (c) applies to non-international armed conflict and declares that children under 15 shall neither be recruited into armed forces, nor allowed to take part in hostilities. This provision is not specific to the issue of child soldiers and does not apply to lesser forms of disorder or isolated violence; it applies only to conflicts reaching the standard of an “armed conflict”. It is uncertain what kind of internal conflict would meet the threshold of an “armed conflict”. Many child soldiers would be

132 Mann, above n 126, 35.
133 Hackenberg, above n 111, 432.
134 Additional Protocols to the Geneva Conventions, above n 43.
135 Millard, above n 104, 190.
136 Millard, above n 104, 193.
involved in civil disturbances and rebel uprisings not reaching the standard of an armed conflict and would receive no protection from this provision.

There has not been widespread ratification of either of the two protocols; 168 countries have ratified Protocol I and 164 countries have ratified Protocol II. There is no central court (such as the International Criminal Court) to impose criminal liability flowing from breaches of the Geneva Conventions, or their Additional Protocols. However, New Zealand has mandated that grave breaches of the Geneva Conventions and Additional Protocol I are offences under the Geneva Convention Act 1958. Recruitment of child soldiers can be considered a grave breach; Additional Protocol I, Article 85 provides that the making of a civilian population or individual civilians the object of attack amounts to a grave breach. If grave breaches have occurred, there is the potential for an ad hoc tribunal to be established to prosecute those suspected of such grave breaches.

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137 International Committee of the Red Cross www.icrc.org/web/eng (last accessed 16/9/08).
139 Additional Protocol I, above n 43. Article 85 (3) (a) provides that “In addition to grave breaches defined in Article 11, following acts shall be regarded as grave breaches of this protocol; the making of civilian population or individual civilians the object of attack”.
140 For example, the International Criminal Tribunal for the former Yugoslavia and International Criminal Tribunal for Rwanda were set up to deal with grave breaches of the Geneva Conventions that occurred in Yugoslavia and Rwanda.
The International Labour Organisation Worst Forms of Child Labour Convention 182

This convention commits each state party to “take immediate and effective measures to secure prohibition and elimination” of the worst forms of child labour, including the compulsory recruitment of children for armed conflicts. This convention mandates a minimum age of 18 years for forced or compulsory recruitment into the armed forces. This was the first international treaty to make 18 the minimum age for child recruitment and was the first denunciation of child recruitment as a form of child labour. However, it is of limited effectiveness in terms of penalties or enforcement mechanisms.

c African Charter on the Rights and Welfare of the Child

This is a regional treaty that came into force among member states of the African Union in November 1999. The enactment of such a treaty is considered an important step, because child soldiers in Africa number more than 120,000. Under Article 22, no child under 18 can neither be recruited for participation in hostilities, nor participate in hostilities. Importantly, this age of 18 is considered the universal and absolute measure

182 Article 3(a) International Labour Organisation Convention.
183 The International Labour Organisation can only refuse or remove assistance as punishment.
for childhood across all state parties, regardless of cultural practices and custom.

The African Charter does represent an important stance that child recruitment will not be tolerated. It went further than the CRC in its implementation of a uniform minimum age of 18 for recruitment of children as soldiers. However, it can be argued that the actual efficacy of the Charter is largely symbolic. Numerous African states are not party to it, and it would seem that the rendering of cultural practices and traditions (under Article 1 (3)) null and void make non-compliance more likely. Further, undermining the efficacy of the Charter is the fact that there are no significant enforcement or accountability mechanisms provided for.

4 Efficacy of treaty prohibitions against child recruitment

Although international treaties attempt to protect children from recruitment as child soldiers by making child recruitment an international crime, issues remain unresolved. There is no uniform minimum age for child recruitment in the CRC or across the numerous treaties prohibiting such recruitment. However, the enactment of the ILO Declaration and the African charter would suggest a growing “Straight 18” consensus. The issue remains of whether indirect participation can be permissible, even for those under 15. The Rome Statute and the CRC Optional Protocol only prohibit “active”

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147 Bald, above n 146, 582.
participation in hostilities. Despite the weaknesses in treaty protection against
recruitment, several child recruiters have been prosecuted under the Rome Statute
provisions (most recently, Brima and Dyilo) and under customary international law
(Hinga Norman). 150

It is unclear as to how these legal protections against child recruitment remain
simply an idealised international law concept. The reality is that most children at risk of
recruitment would not have knowledge of their legal protection, and they would not be
able to enforce such legal protections if they did have knowledge of their rights. There is
a gulf between the legal protections and the reality; “children at risk of recruitment will
not be penetrated by the ideals of the Rome Statute and the CRC”. 151

B  Custom

1  Customary prohibition against child recruitment

Both opinio juris and state practice suggest that child recruitment of those under
15 is prohibited under customary international law. This was made explicitly clear in the
*Sam Hinga Norman* decision. 152 The general attitude to the recruitment of those under 15
is that it is “immoral that adults should want children to fight their wars for them...there

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150 See *Prosecutor v Alex Tamba Brima*. Case no. SCSL-04-16-T; *Prosecutor v Thomas Lubanga Dyilo*. Case no. ICC 01/04-01/06 and the *Sam Hinga Norman* decision, above n 94.
151 deBerry, above n 129, 94.
152 *Sam Hinga Norman* decision, above n 51.
is simply no excuse, no acceptable argument for arming children".\textsuperscript{153} Although Singer would argue that the “practice of the last four millennia of warfare makes a strong case for customary international law’s proscription against child soldiers”\textsuperscript{154}, it seems evident that the universal condemnation of the practice of child recruitment is a relatively recent phenomenon. It has only been in the 20\textsuperscript{th} Century that human rights discourse recognised the need to protect children from recruitment.

Child recruitment as prohibited under customary international law is also evidenced by Henckaerts and Doswald-Beck’s comprehensive study on \textit{Customary International Humanitarian Law}.\textsuperscript{155} This study details numerous rules of customary international law; according to rules 136 and 137, children must not be either recruited into the armed forces or allowed to participate in hostilities.\textsuperscript{156} Both of these prohibitions are considered rules of customary international law because of the strong opinio juris and state practice evidencing them.

\section{Opinio juris}

Opinio juris strongly condemns the recruitment of children, and numerous United Nations Resolutions illustrate this. Resolution 1261 was passed in 1999, the first

\begin{footnotes}
\item[153] Morisseau, above n 66, 1278.
\item[154] Singer, above n 61, 568.
\item[156] Henckaerts and Doswald-Beck, above n 155, Rules 136 and 137.
\end{footnotes}
resolution to identify explicitly the problem of child soldiers.\textsuperscript{157} This resolution strongly condemned the recruitment of children as a violation of international law.\textsuperscript{158} Resolution 1314 (2000) stated that parties to conflicts in which children are involved must offer disarmament to child soldiers.\textsuperscript{159} Similarly, resolution 1379 (2001) endorsed the need to prosecute those responsible for recruiting children and expressed concern over the use of children in AC.\textsuperscript{160} In 2004, resolution 1539 declared the need for a comprehensive monitoring of the use of child soldiers by the Secretary General.\textsuperscript{161} The Red Cross and Red Crescent movement have repeatedly denounced the use of children in armed conflict.\textsuperscript{162} The ‘Plan of Action for the Years 2000 – 2003’ adopted by the 27th International Conference of the Red Cross and the Red Crescent in 1999, required that all parties to an armed conflict must ensure that all measures be taken to stop the recruitment of children into armed conflicts.\textsuperscript{163}

\textit{b} \hspace{1cm} \textit{State practice}

State practice similarly illustrates child recruitment as a breach of customary international law. Indeed, there is no official contrary state practice to this prohibition.\textsuperscript{164} At a domestic level, numerous war manuals mandate the need to protect children from

\textsuperscript{157} S / RES / [1261] / [1999].
\textsuperscript{159} S / RES / [1314] / [2000].
\textsuperscript{160} S / RES / [1379] / [2001].
\textsuperscript{161} S / RES / [1539] / [2004].
\textsuperscript{162} 25th International Conference of the Red Cross, Geneva, 23 – 31 October 1986, Resolution IX and 26th International Conference of the Red Cross, Geneva, 3 – 7 December 1995 Resolution II.
\textsuperscript{163} 27th International Conference of Red Cross and Red Crescent, Geneva, 1999, Resolution I.
being involved in armed conflict. Canada’s Law of Armed Conflict Manual provides that “children are to receive such aid and protection as required...including a ban on their enlistment while under the age of 15”.  

New Zealand’s Military Manual similarly provides that children are to receive such “aid and protection as they require, including ... a ban on their enlistment... while under 15”. 

At an international level, the 20th Century featured the “signing of numerous treaties that codified international law’s norm against the use of children in combat”. The Additional Protocols to the Geneva Conventions illustrate that the prohibition on child recruitment has long been regarded as customary international law. The widespread ratification of the CRC is also relevant. The CRC has been deemed to reflect the rules of custom related to children. Knowingly recruiting or allowing those under the age of 15 to fight will amount to a breach of custom - even if the particular state using the child is not a party to the CRC. With the enactment of the Rome Statute in 1998, the customary prohibition on the recruitment of child soldiers was reinforced by formally criminalising child recruitment. The Rome Statute arguably illustrates a crystallisation point for the customary prohibition on the recruitment of children by making such

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164 Henckaerts and Doswald-Beck, above n 155, 3109.
167 Singer, above n 61, 569.
168 Henckaerts and Doswald-Beck, above n 155, 3110.
169 Cohn and Goodwin-Gill, above n 68, 70.
171 Sam Hinga Norman, above n 51.
recruitment an official war crime.¹⁷²

2 Sam Hinga Norman decision critique

a Outline of the decision

The Hinga Norman¹⁷³ decision in the Sierra Leone Special Court considered whether child recruitment was criminalised by customary law in 1996 (the date Norman was accused of recruiting children). The defence argued that at this time, the prohibition against child recruitment was not criminalised according to customary international law, and that charging Norman with such a crime would breach the principle of *nullum crimen sine lege*.¹⁷⁴ In contrast, the prosecution argued that child recruitment was already a crime under customary international law due to the sufficiency of state practice and opinio juris.¹⁷⁵

The majority found that child recruitment had indeed crystallised as a crime under customary international law by 1996.¹⁷⁶ They looked at the introduction of the Additional Protocols to the Geneva Conventions and at the widespread and unreserved ratification of the CRC. Such treaties illustrated a high level of general consensus by states on the

¹⁷² *Sam Hinga Norman* decision, above n 51.
¹⁷³ *Sam Hinga Norman*, above n 51, 3.
¹⁷⁴ *Sam Hinga Norman*, above n 51, 3.
¹⁷⁵ *Sam Hinga Norman*, above n 51, 5.
¹⁷⁶ *Sam Hinga Norman*, above n 51, 13.
unlawfulness of child recruitment. Although the prohibition against the use of child soldiers had only recently been universally acknowledged by opinio juris (since human rights discourse on children’s rights is a relatively modern phenomenon), the high number of states supporting its customary prohibition made up for the relatively recent prohibition.

In contrast, the dissenter (Robertson J) considered that there was not sufficient state practice and opinio juris to constitute child recruitment as a crime under custom prior to 1998. Although there was a growing consensus on the abhorrence of child recruitment by 1996, there was no decisive crystallisation of child recruitment as a crime until 1998. Robertson argues that there was such insufficient state practice and opinio juris on this in 1996, that the Secretary General was not even certain as to whether child recruitment was a criminal offence. It was clear by 1996 that states should avoid enlisting those under 15 years old, but it was not clear that such enlistment was an offence that was “recognisable by international criminal law which permitted trial and punishment of individuals accused of enlisting”.

177 *Sam Hinga Norman*, above n 51, 17.
180 *Sam Hinga Norman*, above n 51, 15-16 (dissent).
181 *Sam Hinga Norman*, above n 51, 12 (dissent).
182 *Sam Hinga Norman*, above n 51, para 6 (dissent).
b Critique of the decision

Robertson J’s dissent has perceptive merit that is lacking in the majority decision. He sets aside the emotive issues concerning child recruitment, and instead focuses on the legality of the conduct. This legality cannot be eroded simply because conduct is perceived as immoral or abhorrent. His finding that there was insufficiently strong evidence of state practice and opinio juris to imply the recruitment of children was a crime under customary international law in 1996 can be contrasted to the decision of the majority. The majority relied on article 4(2) of the CRC Optional Protocol, which requires state parties to criminalise child recruitment. Arguably, due to widespread ratification of this article, criminalisation could be implied to be similarly widespread. However, the requirement to criminalise does not necessarily mean that states had made steps to criminalise the practice as at 1996. Prior to the Norman case there was no evidence of any prosecution for child recruitment.

The liberal approach of the majority to interpreting customary international law leads to a ruling that child recruitment was criminalised by 1996. This ruling has not been challenged. Despite this, the Norman precedent is weakened to a certain extent because Norman died in custody without having been found guilty, or acquitted on a potential

183 Ibid.
184 Matthew Happold “International Humanitarian Law, War, Criminality and Child Recruitment” (2005) 18 Leiden J of International Law, 283, 288. Happold considered the reliance of the majority on tenuous state practice and opinio juris as evidence “may be seen as question begging”.
185 Hinga Norman, above n 51, 20.
186 Happold, above n 184, 283.
187 Happold, above n 184, 290.
appeal. The fact that there was never an opportunity to appeal the ruling leaves several issues uncertain. If the case had been appealed, it is unclear whether the largely unsupported approach of the majority would be upheld. Robertson J's approach may have been favoured; this approach implies that mere international outrage was not sufficient to illustrate a customary law criminalisation of child recruitment in 1996.

Throughout the judgment, it is clear that the majority is concerned with punishing Norman for child recruitment and finding the "right result, even if this was for the wrong legal reasons". There is a strong sense that the majority is attempting to reflect the perspective of the wider population; the people of Sierra Leone had already stigmatised the practice of child recruitment. It would seem that the majority considers that the more serious the conduct is, the less is required in terms of proving the traditional components of international criminal law. The majority inappropriately equate seriousness with criminality. There is the strong sense that if the conduct at issue was something less emotive than recruitment of child soldiers (for example, if the conduct involved breaching international financial regulations), then criminalisation by customary international law would not have been found on such tenuous opinio juris and state practice grounds.

3 Efficacy of custom to prevent child recruitment?

The customary prohibition against child recruitment is prima facie strong. This is
illustrated by the widespread state practice of condemning child recruitment through ratification of conventions prohibiting child recruitment.\textsuperscript{190} It is also illustrated by general opinio juris of international bodies such as the United Nations. \textit{Norman} is an indicator of how strongly the international judicial community will uphold a customary prohibition against the recruitment of child soldiers and was the first international conviction for the practice of such recruitment.\textsuperscript{191} Although the majority decision can be criticised for adopting too expansive an approach towards this customary prohibition, this ruling has not been challenged.\textsuperscript{192}

\section*{VII POST-RECRUITMENT LEGAL PROTECTIONS FOR CHILD SOLDIERS}

\subsection*{A No protections for child soldiers post-recruitment}

Both customary and treaty protections strongly protect children from becoming victims of forced recruitment. Despite these strong protections against recruitment, there are no general international legal protections mandating how child soldiers participating in armed conflict are to be treated post-recruitment; the current legal protections do not

\begin{flushright}
\textsuperscript{189} Happold, above n 184, 297.
\textsuperscript{190} Widespread ratification of instruments such as the CRC and, most recently, the International Labour Organisation Convention.
\textsuperscript{191} Noah Novogradsky “Litigating child recruitment before the SCSL” (2005) 7 San Diego Intl LJ
\textsuperscript{421}.
\textsuperscript{192} William Schabas “Rights of child, law of armed conflict and customary international law” in Karin Arts (Ed) \textit{International Criminal Accountability and the Rights of Children} (Hague Academic Press, The Hague, 2006). Although see above discussion as to why the fact that the decision had not been appealed could not necessarily be indicative of the \textit{Hinga Norman} decision being of particularly strong precedent value.
\end{flushright}
mandate how children are to be treated once they have been recruited into the armed forces.\(^{193}\) Ironically, it is often after children have been recruited that they are most victimised in terms of being abused and drugged. Although children are now protected against recruitment by international conventions and custom, there is a clear need for the international legal community to set down minimum standards for treatment of child soldiers during participation in armed conflicts. Recognition and protection of children participating in armed conflicts is crucial. This was recognised by the United Nations in 2005, when they resolved that the “protection of children in armed conflicts should be regarded as an important aspect of any comprehensive strategy to resolve conflict.”\(^{194}\)

**B. Loss of civilian status**

Both the Rome Statute (Article 8 (2) (a) (v)) and the Geneva Conventions only protect civilian children from recruitment, they do not protect combatant child soldiers. Article 51 of Protocol I and Article 13 of Protocol II to the Geneva Conventions provide that “civilians shall enjoy protections afforded by this section, unless they take a direct part in hostilities”.\(^{195}\) Children who are directly participating in conflicts as soldiers will have gained combatant status, and therefore will no longer have civilian protected status. As early as 1971, distinctions had been drawn between civilian children in need of special protection and child soldiers who cannot retain civilian protected status; “the notion of special protection for children in time of armed conflict was no longer

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\(^{193}\) Millard, above n 104, 191.

\(^{194}\) S / RES / [1612] / [2005].

\(^{195}\) Protocols I and II to the Geneva Conventions, above n 43.
acceptable in view of their increased involvement in armed conflict.\textsuperscript{196}

Child soldiers will theoretically get combatant status if they are captured and will have to be treated in accordance with the Prisoner of War provisions under article 3 of the Geneva Conventions.\textsuperscript{197} However, child soldiers are not generally in a position to take advantage of combatant protections. Such protections only apply if they are taken as prisoner of war by the enemy. Article 77(3) of Protocol I to the Geneva Conventions provides that “children who have not attained the age of fifteen years take a direct part in hostilities and fall into the power of an adverse Party, shall continue to benefit from the special protection accorded by this Article, whether or not they are prisoners of war”. Although this gives limited protection to child soldiers captured by enemy forces, most child soldiers are mistreated and subjected to serious human rights abuses (such as slavery and physical abuse) by their own sides.\textsuperscript{198}

Children who participate as combatants do lose the substantive protections given to civilians under international humanitarian law.\textsuperscript{199} As combatants, child soldiers not only lose protections mandating their treatment during conflict under the Geneva Conventions and the Rome Statute, but they also lose post-conflict rights, such as refugee status. According to the Refugee Convention (Article 1F), one of the grounds of

\textsuperscript{197} Combatant protections are granted under Geneva Convention III, above n 131.
\textsuperscript{199} Wells, above n 198, 296.
ineligibility of refugee status is if the person is “an undeserving case by reason of their own behaviour”. Ex-child soldiers may be declared ineligible by reason of their combatant status.

C Outdated assumption of children as civilians

Treaty and custom surrounding child soldiers can be considered outdated since both view children solely as non-participant victims. The majority in Norman viewed child soldiers as having “inherent and exclusive vulnerability and lack of subjectivity”. There is a desire to continue to view children solely as victims of war so as not to disturb the rules of regular warfare. However, this is no longer the reality and cannot be sustained; as early as the 1960s, the basic “assumption that children could not contribute to the war effort was no longer sustainable”. Child soldiers illustrate this point, as “they not only challenge our comfort with the nature of childhood, but also about the nature of war”. This challenge derives from the growing incidence of child soldiers as perpetrators of the worst crimes against humanity, and the need to reconcile the perpetrator persona of the child soldier with the child soldier as a victim.

200 Convention Relating to the Status of Refugees (28 July 1951) 189 UNTS 150. Article (1) (F).
201 Lynch, above n 49, 80.
204 Mann, above n 126, 35.
205 Monforte, above n 203.
VIII CHILD SOLDIERS AS PERPETRATORS

A The dualism of the child soldier revisited

Child soldiers will be both victims and perpetrators of international war crimes; “the crimes that these children were forced to commit at once turned them into the perpetrators and victims of horrific human rights abuses”. Child soldiers require protection from forced recruitment and yet they must also be held accountable if they have committed war crimes. There are currently strong legal protections in place to deal with the child soldier as victim of forced recruitment. However, there is very little legal guidance on the permissibility of prosecuting former child soldiers for their crimes. It is evident that “moral dilemmas attach to the idea of prosecuting young people for egregious acts that they were often forced or compelled by circumstances to commit”. Despite this, there is a growing recognition of the need to hold child soldiers accountable in some way.

B The need for justice to be seen to be done

There are many examples of children committing brutal and heinous crimes.  

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206 UNICEF Amicus Curiae brief (referred to in Sam Hinga Norman, above n 94, 7).
208 In some conflicts children have been specially selected because of their brutality. For example, child soldiers were specifically recruited due to their ferocity by the Khmer Rouge during the Cambodian conflict.
However, there will usually be mitigating factors surrounding their commission of such crimes. Despite this, if child soldiers are not held culpable at all, then this could fit uncomfortably with the “broader aims of international justice, and with the notion that the most serious crimes against the international community cannot go unpunished” 209. Victims of the crimes committed by child soldiers will expect to see justice being done.

The Democratic Republic of Congo, Burundi, Rwanda and Sierra Leone have recognised the need for child soldiers to be held accountable for crimes they commit. In the Democratic Republic of Congo, a large number of child soldiers were arrested, prosecuted and then convicted by domestic courts. 210 Not only were these soldiers prosecuted, but six of them were sentenced to death due to the severity of their crimes. One eleven year old died from contracting tuberculosis while awaiting execution. In Burundi, children as young as nine years old have been detained for sustained periods for having alleged links to the National Liberation Force (FNL). 211

Rwanda made frequent heavy use of child soldiers to commit atrocities during the 1994 Rwandan Genocide. 212 After the conflict, the general attitude towards child soldiers was that they would be held accountable on the basis that if they were able to distinguish between those whom they should be killing from those whom they should not be, then

209 Freeland, above n 5, 327.
211 Child Soldiers Global Report, above n 34, 4.
212 Reis, above n 8, 633.

58
they are able to be prosecuted and punished. The effects of this broad prosecution mandate over children is still evident - there are currently 1741 ex child soldiers in Rwandan detention centres awaiting domestic trial for their crimes; 550 of these are under 15.

In Sierra Leone child soldiers were also perpetrators of some of the worst crimes, "it was months before the rest of the world acknowledged and addressed that the heinous acts had been carried out by children of such tender years". In recognition of the need to send a message of justice and accountability to the people of Sierra Leone, and most importantly to the victims of child soldiers, the Special Court of Sierra Leone (SCSL) was mandated to try child soldiers for war crimes if they could be considered "most responsible for crimes committed". The gravity and seriousness of crimes committed by those between 15 and 18 years of age could make prosecution appropriate under article 7 of the SCSL statute.

No child soldiers were ever prosecuted by the SCSL - presumably because it was unlikely that a child soldier would ever be in a command position, and thus personally

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213 Freeland, above n 5, 323.
214 Machel, above n 91, 16.
216 S / RES / [1315] / [2000]. This resolution declared that the personal jurisdiction of the Security Council extends to those who bear the greatest responsibility for the commission of crimes. Article 1 of the Special Court for Sierra Leone statute then declared that “the Court has competence over those most responsible for the most serious crimes”.
responsible for the crimes committed.\textsuperscript{218} Despite this, the mandate given to the court is an important acknowledgement of the need for justice to be done and a clear recognition of the need to hold child soldiers accountable where appropriate. Given the Rwandan experience of attempting to prosecute child soldiers, it is uncertain whether this accountability is best served by prosecution.

\section*{IX CRIMINAL PROSECUTION OF CHILD SOLDIERS}

\subsection*{A Potential issues with prosecuting child soldiers}

There are technical issues raised with imposing criminal liability on child soldiers; most will lack a sufficient degree of mens rea to be successfully prosecuted.\textsuperscript{219} In order to prosecute a minor, most jurisdictions require that the minor has some developmental ability to restrain or to control their actions.\textsuperscript{220} This will not be present in young child soldiers. Child soldiers of whatever maturity may not have sufficient rational understanding that their actions have resulted in criminal consequences. This would likely be the case if the child was abducted before having the chance to learn the difference between right and wrong.\textsuperscript{221} If the child has spent the majority of its formative years in the army, then it is likely to have a skewed impression of what is right and wrong, what is legal and illegal.

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{218}] Bald, above n 146, 568.
\item[\textsuperscript{219}] Claire McDiarmid “Child defendants and Criminal Responsibility: United Kingdom” in Arts and Popovski (above n 191), 181.
\item[\textsuperscript{220}] Goetz, above n 63, 7.
\item[\textsuperscript{221}] Bald, above n 146, 550.
\end{itemize}
\end{footnotesize}
Most child soldiers begin as victims of coerced recruitment, but many are converted into the perpetrators of some of the worst crimes.\textsuperscript{222} As such, child soldiers cannot be considered fully responsible for their actions since they have often been forcibly recruited in the first place or drugged into submission. However, child soldiers cannot be considered guiltless either. Some children are clearly fully aware of the atrocities they commit and take thrill from using weapons and exerting power over weaker people.\textsuperscript{223} Other children will remain haunted by the crimes they have committed and feel constant remorse:

During the war I was very sad because of all the violence and killings we had to do. I continue to be sad because some people here in the village say that I was responsible for the people killed in the war\textsuperscript{224}

There is no neat line dividing child soldiers into either victims or perpetrators; they are oxymorons of innocence and guilt. They will often “alternate between being children and adults, victims and perpetrators and civilians and soldiers”.\textsuperscript{225} It is difficult to distinguish between the acts they could control and decisively choose to do and those they could not control and where their choice was constrained by various factors.\textsuperscript{226} Due to this dualist nature of child soldiers, it is arguable whether they should ever be prosecuted.

\begin{itemize}
\item \textsuperscript{222} See Honwana, above n 3; Machel, above n 91, 15 and Goetz, above n 63, 2.
\item \textsuperscript{223} See Goetz, above n 63, 2 and D Mundis “New Mechanisms for Enforcement of International Humanitarian Law” (2001) 95 AJIL 934, 951.
\item \textsuperscript{224} Honwana, above n 3, 68. This quote is from former child soldier Ben, aged 17.
\item \textsuperscript{225} Honwana, above n 3, 71.
\item \textsuperscript{226} Honwana, above n 3, 72.
\end{itemize}
**B International law position**

1 **Approach according to international law**

Child soldiers have been prosecuted under the domestic law of several countries.\(^{227}\) New Zealand law imposes criminal liability at 10 years old for murder and manslaughter.\(^{228}\) Thus, under New Zealand law, child soldiers under 18 but over 10 years old could be held accountable for the crime of murder. This would imply that at domestic law, age only acts as a mitigating factor— if the actus reus and mens rea can be shown, then age alone need not defeat the imposition of criminal responsibility.\(^{229}\)

The International Criminal Tribunals of Nuremberg, Rwanda and Yugoslavia were all silent on whether those under 18 could be prosecuted at international law.\(^{230}\) The CRC is similarly silent on the issue as to whether those under 18 can be prosecuted. It has been argued that Article 39 prevents such a prosecution; this Article makes it clear that

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\(^{227}\) The most prolific example of this is Rwanda, where thousands of child soldiers are currently awaiting prosecution in detention camps.

\(^{228}\) Section 22 of the Crimes Act 1966, provides that "No person shall be convicted of an offence by reason of any act done or omitted by him when of the age of 10 but under the age of 14 years, unless he knew either that the act or omission was wrong or that it was contrary to law". This section has been qualified by the provisions of the Children, Young Persons, and Their Families Act 1989, where s 272(1) prevents criminal proceedings being brought against children under the age of 14, with the exception of charges of murder and manslaughter. On the other hand, the commission of an offence by a child aged between 10 and 14 years can support a determination by the Family Court that the child is in need of care and protection, with consequential orders.

\(^{229}\) Morris, above n 99, 225.

rehabilitation is to be the response to the crimes of children. Yet, it can be argued that Article 39 actually recognizes the possibility of children being held accountable, by mandating that rehabilitation should always be the end result of any child prosecution.

There is no presumption that children under 18 cannot be held criminally liable and international law certainly does not preclude the prosecution of children for war crimes. Despite this, there has never been a prosecution of a child under 18 years of age at international law.

The Rome Statute does make it clear under Article 26 that there can be no prosecution for those under 18. However, this has been considered an “absurdity.” Because child recruitment is only prevented for those 15 and under Article 8 of the Rome Statute, child soldiers between the ages of 15 and 18 can be freely recruited and can be ordered to commit heinous international law crimes and can legitimately do so with impunity. They will not be prosecuted if they are under 18. This can result in what has been dubbed a “de penalized zone,” where an adolescent between 15 and 18 can either be recruited or can volunteer to commit a war crime, and where neither the child nor the

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231 Peters, above n 46, 16.
233 Lynch, above n 49, 63.
234 Amnesty International “Child Soldiers: Criminals or Victims?” AI Index: IOR 50/02/00 (December 2000), 8.
235 A Cassesse “A Follow Up: Forcible Humanitarian Countermeasures and Opinio Necessitatis” (1999) 10 European Journal of International Law 791. In this article, Cassesse comments on the absurdity of the current arrangement; “those between the ages of 15 and 18 are regarded as lawful combatants and may commit crimes without being brought to account and punished”.
236 Davison, above n 210, 146.
recruiter can be held criminally liable.\textsuperscript{237} It would have been more appropriate and consistent to allow the International Criminal Court jurisdiction over those over 15.\textsuperscript{238} Another alternative to deal with this ‘absurdity’ would be to create a “juvenile chamber” which could deal specifically with those between the ages of 15 and 18 engaged in armed conflict.\textsuperscript{239} Despite the 18 year age minimum for prosecution imposed by Article 26, there is growing recognition of the need for justice to be seen to be done and for child soldiers between the ages of 15 and 18 to be held accountable if “they bear the greatest responsibility for crimes committed”\textsuperscript{240}

Amnesty International made it clear in their ‘Child Soldiers: Criminals or Victims?’ report that they support the prosecution of any person who is responsible for the most serious human rights breaches - even if that person is a child.\textsuperscript{241} Child soldiers not acting in a voluntary capacity will not be prosecuted due to the fact that they would not have the requisite criminal intent.\textsuperscript{242} However, if those under 18 have been acting in a clearly voluntary capacity, then they must be held accountable. Any prosecution of those under 18 must give due weight to age and other mitigating factors and must consider their vulnerability and potentially limited understanding.\textsuperscript{243} If those under 18 acting voluntarily are not brought to justice, Amnesty International fears that this may lead to impunity and

\begin{footnotesize}
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\item \textsuperscript{237} Davison, above n 210, 152.
\item \textsuperscript{238} Freeland, above n 5, 319.
\item \textsuperscript{239} Davison, above n 210, 153.
\item \textsuperscript{240} Report of the Secretary General on the Establishment of a Special Court for Sierra Leone, above n 217, 8.
\item \textsuperscript{241} Amnesty International, above n 234.
\item \textsuperscript{242} Amnesty International, above n 234, 6.
\item \textsuperscript{243} Amnesty International, above n 234, 8.
\end{itemize}
\end{footnotesize}
a lack of victim justice.\textsuperscript{244}

\section*{Approach adopted by the Special Court of Sierra Leone}

The Special Court of Sierra Leone (SCSL) allowed the prosecution of those between the ages of 15 and 18.\textsuperscript{245} This prosecutorial power was allowed on the basis that there was a clear need and desire for child soldiers to be held accountable:\textsuperscript{246} “Despite viewing the child soldiers of Sierra Leone firstly as victims, ... it was necessary to hold them accountable to legitimize the Special Court and its mission”.\textsuperscript{247} It was deemed that people would not respect a court that ignored abuses committed by child soldiers merely because they were children.\textsuperscript{248} Further, it was considered that vigilante action may occur, with citizens taking their own vengeance against child soldiers, if it was perceived that they were not being held to account.\textsuperscript{249}

Although prosecution was allowed for those between the ages of 15 and 18 in the SCSL, any exercise of this prosecutorial right was always to be carried out within tightly

\begin{itemize}
\item \textsuperscript{244} Amnesty International, above n 234, 9.
\item \textsuperscript{245} Statute of the Special Court of Sierra Leone, S / RES / [1315] / [2000]. Article 7 provides that “The Special Court shall have no jurisdiction over any person who was under the age of 15 at the time of the alleged commission of the crime. Should any person who was at the time of the alleged commission of the crime between 15 and 18 years of age come before the Court, they shall be treated with dignity and a sense of worth”.
\item \textsuperscript{246} Iacono, above n 215, 456.
\item \textsuperscript{247} Iacono, above n 215, 455.
\item \textsuperscript{248} Report of the Secretary General on the Establishment of a Special Court for Sierra Leone, above n 217, 7.
\item \textsuperscript{249} Iacono, above n 215, 450.
\end{itemize}
proscribed juvenile justice procedures, in accordance with Article 40 of the CRC.\textsuperscript{250} Any child being prosecuted was to be “treated with dignity and a sense of worth”.\textsuperscript{251} Certain juvenile justice safeguards were necessarily imposed. These included key rights such as the right to be heard, the right to legal assistance and the right to dignity and respect. Other rights, such as the child’s right to privacy and the right for the child’s hearing to be conducted in a setting appropriate to their understanding, were also emphasised.\textsuperscript{252} To ensure these rights were upheld, the court would have to be staffed with people knowledgeable about juvenile justice procedures.\textsuperscript{253}

After the trial hearing, juveniles were not to be stigmatised with a ‘sentence’, but were to receive a ‘disposition’: juvenile detention, supervision or community service. Accountability of child combatants was considered necessary, but prison would never be an appropriate result of prosecution and they should never be tried as adults.\textsuperscript{254} The outcome of any prosecution was to be reintegration and rehabilitation, not punishment by

\begin{footnotesize}
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\item \textsuperscript{250} Statute of the Special Court of Sierra Leone, above n 245. The need to prosecute children in accordance with the CRC is made clear in Article 7: those between 15 and 18 “shall be treated with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society, and in accordance with international human rights standards, in particular the rights of the child”.
\item \textsuperscript{251} Iacono, above n 215, 456.
\item \textsuperscript{252} Statute of the Special Court of Sierra Leone, above n 245. Article 7(2) provides that “In the disposition of a case against a juvenile offender, the Special Court shall order any of the following: care guidance and supervision orders, community service orders, counselling, foster care, correctional, educational and vocational training programmes, approved schools and, as appropriate, any programmes of disarmament, demobilization and reintegration or programmes of child protection agencies”.
\item \textsuperscript{253} Report of the Secretary General on the Establishment of a Special Court for Sierra Leone, above n 217, 8.
\item \textsuperscript{254} Iacono, above n 215, 455.
\end{itemize}
\end{footnotesize}
Such an approach is in accordance with the best interests of the child under the CRC and forces child offenders to recognise the gravity of their actions, without putting the full blame on them.\textsuperscript{256}

\section*{C Prosecution appropriate?}

There is growing recognition of the need to hold child soldiers accountable for any war crimes that they commit. However, it is questionable whether legal proceedings can ever be in the “best interests of the child” as required under the CRC and numerous other child rights conventions, particularly when child soldiers are generally to be considered victims as well as perpetrators of human rights abuses.\textsuperscript{257} There are several implications of prosecuting child soldiers. Child soldiers convicted of having committed a war crime will automatically lose their refugee status under the Refugee Convention.\textsuperscript{258} This can have severe impacts on ex-child soldiers who may be trying to escape from ongoing persecution. Inability to escape such persecution may lead them to return to fight.

Acknowledging crimes committed by child soldiers is important to help the

\begin{footnotes}
\item[255] Freeland, above n 5, 323.
\item[256] Corriero, above n 207, 351.
\item[257] Amnesty International, above n 234, 4.
\item[258] Refugee Convention, above n 200. Article (1)(F) provides that “The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes”.
\end{footnotes}
healing of their victims. However, prosecution may be better focused on those responsible for recruiting child soldiers in the first place. If child soldiers are prosecuted for war crimes, then the recruiters of such children essentially remain unpunished. If a child soldier is charged with a war crime under the Rome Statute, they cannot argue that they were coerced to commit such a crime by the person who may have recruited them. Coercion is not a defence under Article 31.\textsuperscript{259} Time, resources and money spent prosecuting children would be better spent on prosecuting those who recruited the children, since they are the truly culpable ones.\textsuperscript{260} Courts generally have constrained budgets and should focus any prosecutions only on those most responsible. Resources should not be wasted on lengthy prosecutions of children.

Although the SCSL technically allowed for the prosecution of those between 15 and 18 years of age, this was only to be exercised if those children were the most responsible for the crimes. This implies that for the SCSL to prosecute a child soldier, such a soldier would have to have had commander status. Child soldiers who had wounded or killed people under orders were not dealt with by the SCSL. It was deemed necessary to find other ways to ensure that accountability was imposed on such child soldiers who may have perpetrated heinous crimes, while also recognising child soldiers as victims of forced recruitment.

\textsuperscript{259} Rome Statute, above n 96, Article 31. This Article provides certain grounds for excluding responsibility; such grounds include duress, self defence, intoxication and mental disease. Duress as defined under Article 31 (d) does not comprehensively cover situations where children have been coerced to fight.

\textsuperscript{260} Davison, above n 210, 152.
X  ALTERNATIVES TO PROSECUTION: RESTORATIVE JUSTICE

There is a need for child soldiers guilty of human rights abuses to be held accountable in some way. This is important for their victims, for the wider international community and for the child soldiers themselves.²⁶¹ Often, former child soldiers will not be allowed to fully re-integrate until they have recognised the consequences of their actions.²⁶² However, this accountability is not necessarily fulfilled by prosecution. The United Nations Economic and Social Council affirmed that “diversion or other alternatives to prosecution should be developed to avoid recourse to prosecution”.²⁶³ Restorative Justice and Truth and Reconciliation Commissions are proving to be an ideal alternative to prosecuting child soldiers.

A  The concept of restorative justice

Restorative justice is a process where offenders, victims and their communities all reach agreement as to how best to deal with the offending. It recognises and seeks the participation of all involved in the offending and focuses on repairing the harm to the victim, re-integrating offenders back into society and restoring balance within the community.²⁶⁴ Offending youths have a say as to how their offending should be

²⁶¹ Webster, above n 94, 245.
²⁶² Machel, above n 91, 14. The situation in Rwanda is an illustration that lasting reconciliation requires child soldiers to be held accountable.
responded to. Victims are similarly given a role in negotiations over potential penalties to be imposed on the youth. However, the focus of any penalties is strongly on the rehabilitation and reintegration of the child into society. In New Zealand, this youth justice process is now the norm when dealing with youth offenders.

The need to use restorative justice processes when dealing with child soldiers was affirmed in the 2007 Paris Principles. Section 3.6 deals with the treatment of children accused of crimes under international law and makes it clear that such children must be treated in “accordance with international law in a framework focused on restorative justice and social rehabilitation”. In line with the general trend of not prosecuting children, alternatives to judicial proceedings are to be sought. The emphasis on a restorative justice approach when dealing with child offenders is also made clear in section 3.8, which states that the child’s involvement in truth and reconciliation committees must be supported and promoted.

B Truth and Reconciliation Commissions

The use of Truth and Reconciliation Commissions (TRCs) is a form of restorative justice that is an ideal alternative to prosecuting child soldiers. TRCs allow both victims

265 Musila, above n 55, 326.
266 Ministry of Justice, above n 264.
267 The Paris Principles: The principles and Guidance on Children Associated with Armed Forces or Armed Groups (February 2007).
268 The Paris principles, above n 267, section 3.6
269 The Paris Principles, above n 267, section 3.7
270 The Paris Principles, above n 267, section 3.8.
and offenders to participate in a forum-style proceeding where the conduct of the offender can be analysed and an appropriate victim-centred solution can be found. TRCs have been commended because they force offenders to face up to what they have done, and to acknowledge how their conduct has affected both the victim directly, and how it has affected the wider community indirectly. Victims are given the opportunity to explain how they were affected by the offence. The granting of a voice to victims is something that does not occur if offenders are prosecuted; the victim is largely forgotten in this process.

1 Sierra Leone’s TRC

Sierra Leone’s TRC was the “first ever transitional justice mechanism in the world”. In the case of Sierra Leone, a TRC was considered the appropriate method of holding child soldiers accountable, while also focusing on reintegration. The TRC in Sierra Leone was used to capture child offenders between the ages of 15 and 18 whose crimes were not serious enough to be brought before the SCSL. The Sierra Leone TRC provided a forum for both the child soldiers themselves and their victims.

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271 Morss, above n 99, 223.
273 Goetz, above n 63, 38 – 39.
275 Report of the Secretary General on the Establishment of a Special Court for Sierra Leone, above n 217, 7 – 8.
participation was crucial to the success of the TRC. Human rights organisations and non-governmental organisations sponsored public awareness campaigns to ensure that the people of Sierra Leone, who wished to have a say at the TRC, had the opportunity to do so; by the end of the process, thousands of statements of victims had been gathered.277

The TRC allowed the people of Sierra Leone an opportunity to have their say and to speak freely about what happened to them during the conflict. After these people had been oppressed and silenced for so many years during the brutal war, the high participation rate in the TRC process was not surprising. If conventional methods of prosecution were used, many of these people would not have had the opportunity to have their say.278 They may have been intimidated or excluded by the Western-style justice process, they may have been unable to afford to miss work, to travel to attend the court, or they may have been prevented from going to the court for procedural reasons (for example, closed hearings). The TRC was further valuable in that it generated optimism for reconciliation in the war-torn society, and delivered some important goals on a limited budget.279

Part of the TRC process typically involves child soldiers being made publicly accountable for any crimes they had committed. They have to confront their crime and the impact it has had on their victims and communities. This process can result in children realising the gravity of their crimes and the consequences of such crimes far

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277 Dougherty, above n 271, 45.
278 Dougherty, above n 271, 48.
279 Dougherty, above n 271, 49.
more so than if they participate in a Western process of prosecution, which may be irrelevant to them. This was how the process was initially envisaged as operating in Sierra Leone. However, child soldiers were permitted to tell their stories in confidence and anonymously as “neutral witnesses”. Consequently, it has been argued that the child soldiers of Sierra Leone would never have been able to realise the impact of their crime, nor would their victims be able to receive any meaningful justice.

2 Benefits of TRCs

Future TRCs must force offending child soldiers to acknowledge the crimes they have committed. After this process of acknowledgement, it is easier for their communities and victims to accept them back. Allowing child soldiers to return to their communities after having participated in a TRC, is far more productive than if such children had been prosecuted and detained. Prosecution and detention removes a productive person from the community for the duration of the sentence imposed. If a poor community loses a number of young adolescents to detention centres, then they forego significant labour productivity. In a nation ravaged by war and poverty it is senseless to reduce the labour supply by imprisoning ex child soliders. The detention of thousands of child soldiers in Rwanda has removed whole generations of children from some communities. Rather than ameliorating the destruction and reduced productivity of the post-conflict situation, this compounds it further.

Corriero, above n 207, 340.
Musila, above n 55, 331.
Cockayne, above n 272, 658.
TRCs implicitly acknowledge the child soldier paradox and ensure that child soldier as victim and child soldier as perpetrator are both dealt with appropriately. TRCs can achieve justice by ensuring that children acknowledge their crimes and by mandating that they make reparation to their victims. Such reparation need not necessarily be monetary - often it is also in the form of menial labour or other types of community service. As well as addressing the needs of victims, TRCs also ensure that child soldiers have the opportunity to talk about their own victimisation in the situation. After participation in a TRC, child soldiers must participate in reintegration and rehabilitation programmes.

XI REHABILITATION AND RE-INTEGRATION

A The need for rehabilitation: the impact of armed conflict on child soldiers

Children who have participated in hostilities are often scarred for life – mentally, morally and physically. Armed conflicts can have a wide range of dramatic impacts on child soldiers. However, the impacts discussed below are not limited to the child soldiers themselves; the impacts also affect the communities in which the child soldiers seek to

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283 More, above n 99, 222.
284 Peters, above n 46, 14.
285 Goetz, above n 63, 50.
286 N Udombana “War is not child’s play! International Law and the Prohibition of children’s involvement in armed conflicts” (2006) 20 Temp Intl and Com I J 57, 70.
re-integrate. Child soldiers can continue to use violence; a legacy of violence may be created with them eventually being violent to their own families. Alcoholism and drug addiction is prevalent among child soldiers. Many child soldiers become addicted to such substances during their time in the army. Other child soldiers turn to drugs and alcohol as a way of forgetting what they have done and what they have witnessed.

Mental health issues and psychosocial problems are also common. Such problems can affect the child soldier’s emotions, behaviour, thoughts and memories. Post traumatic stress disorder may result as a reaction to the severe trauma of participating in armed conflict. Moral development of child soldiers will be particularly affected. The ability to reason develops over time and this ability can be lost if children are placed in a continual situation of conflict. Despite the need to rehabilitate and reintegrate child soldiers, in Sierra Leone, less than one million dollars was dedicated to the rehabilitation and reintegration programmes.

B Rehabilitation required under international conventions

Regardless of whether child soldiers are to be prosecuted in a court of law or to be dealt with via restorative justice, the end result should be rehabilitation and re-

288 Peters, above n 46, 18.
289 Gozdziak and Russell, above n 4, 60.
290 Guyot, above n 287, 6.
291 Honwana, above n 3, 164.
integration. They should not be persecuted and punished with a jail term. Both the Paris Principles and the CRC emphasise the need to rehabilitate and re-integrate child soldiers. Under section 7 of the Paris Principles, the end goal of attempting to deal with children involved in armed conflicts must be to enable children to be reintegrated into society and to enable them to "play an active civilian role". Similarly, Article 39 of the CRC mandates the need for state parties to rehabilitate children after they have been involved in armed conflict. There is thus a general recognition that rehabilitation should be part of the administration of general juvenile justice, and that detention should be used only as a matter of last resort for dealing with juveniles.

C Rehabilitation and re-integration: requirements for success

Rehabilitation and reintegration must focus on successfully integrating child soldiers back into society. There is the strong need to take into account various factors into the rehabilitation process including: an attempt to reunite the child soldier with their family or community, a supportive rehabilitation programme to re-establish normalcy and

292 See the Statute of the Special Court of Sierra Leone, above n 252, Article 7(2). This Article provides that any disposition must be comprised of “care guidance and supervision orders, community service orders, counselling, foster care, correctional, educational and vocational training programmes, approved schools and, as appropriate, any programmes of disarmament, demobilization and reintegration or programmes of child protection agencies”. Also see Amnesty International’s perspective, above n 232, 10.

293 The Paris Principles, above n 267, section 7.

294 CRC, above n 103, Article 39. This Article provides that “State Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child".
social re-integration and the opportunity to obtain education and training.

Rehabilitation programmes must re-establish normalcy. Child soldiers should be stigmatised as little as possible and if they are willing to contribute to their rehabilitation plan, their opinions need to be valued. Fear of stigmatisation prevented tens of thousands of children from registering for Disarmament, Demobilisation and Reintegration (DDR) programmes. If such stigmatisation deters child soldiers from participating in DDR programmes, many demobilised child soldiers will continue to be as vulnerable as before. Indeed, some may be in even worse socio-economic positions than they were in before the war.

Any reintegration programme needs to be child focused – not simply part of a general reintegration programme for all soldiers involved in armed conflict. There is evidence that official DDR programmes sometimes make no provision for children, but are entirely focused on dealing with adult soldiers. In the Central African Republic, out of the 7500 combatants who went through the official DDR program following armed conflict in 2002-03, only 26 were children. Due to the risk that they have been sexually abused and raped, girls in particular must be the special focus of reintegration. Girls are particularly at risk of exclusion from DDR programmes. In the Diplomatic Republic of

295 Peters, above n 46, 21.
296 Guyot, above n 287, 8.
297 Child Soldiers Global Report, above n 34, 3.
298 Jesseman, above n 148, 153.
299 Child Soldiers Global Report, above n 34, 3.
300 Report of the Secretary General “Children and Armed Conflict”. A / [56] / [127].
Congo, only 3000 (or 15 per cent) of the total number of girls estimated to have been involved in the conflict were officially demobilised by the end of the national DDR programme. 301

D Approaches to rehabilitation and re-integration

1 Disarmament, demobilization and re-integration (DDR)

Disarmament, Demobilization and Re-integration (DDR) characterises the rehabilitation and re-integration process for child soldiers; DDR programmes are seen as crucial for the rehabilitation of child soldiers. 302 Such programmes adopt a “holistic approach” towards re-integration and community participation is seen as crucial to the healing process and to the successful re-integration and rehabilitation of the child. 303

a Disarmament and demobilisation

Disarmament requires that children fighting in armed conflicts are disarmed and are taken out of such conflict situations. Demobilisation is the interim period before the child returns home to be re-integrated with their family and community. 304 Demobilisation attempts to prevent child soldiers from re-entering armed conflict and can be facilitated by the creation of ‘reception centres’, where children can stay before

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301 Child Soldiers Global Report, above n 34, 3.
302 Smith, above n 202, 1145.
303 Gozdziaj and Russell, above n 4, 62.
returning home. While staying at the reception centre, children receive medical and psychological treatment.

b Re-integration

Attempts to re-integrate children into communities can lead to conflict between the best interests of the child and the best interests of the community; it is necessary to engage in “pluralistic dialogue between these two groups”. Not only is re-integration difficult for the children themselves, but it is also difficult for their families and communities. Child soldiers will be suffering from a range of issues as a result of their participation in the armed conflict. They may find it difficult to participate in community and family life and may feel withdrawn and isolated. Child soldiers will be set apart from other children (including their own siblings) because of their horrific experiences; on returning to communities, child soldiers have reported a hostile reaction from their peers. There is sometimes a high level of parental acceptance in the face of community and sibling rejection.

Communities may be reluctant to accept child soldiers back. Child soldiers may

304 Peters, above n 46, 15.
306 Lynch, above n 49, 66.
307 For further discussion on these issues, see above Section (X)(A).
308 Peters, above n 46, 20.
be associated with general violence within that community and may remind the community of atrocities committed during the conflict. Parents whose children have not returned from the armed conflict may blame surviving child soldiers for their personal loss. Because returning child soldiers are often aggressive and irrationally violent, there may be a fear that they will continue to kill. Older boy child soldiers have reported being the subject of continuous and long term stigmatisation by the community. Community awareness of the need to re-integrate child soldiers must be increased; communities could be made fully aware of the psychological impact the armed conflict has had on the child.

2 Traditional healing methods

Community involvement in the child soldier’s re-integration can be facilitated by the use of traditional healing methods; such methods are often used as a process to purify children. The purification process may involve burning the child soldier’s clothes, making an animal sacrifice or giving a herbal vaccination. Returning child soldiers may be kept out of the village until they have been purified; cleansing is seen as important to allow child soldiers to socialise again with family and friends.

310 Akutu and Chrobok, above n 305, 14.
311 Akutu and Chrobok, above n 305, 15.
312 Akutu and Chrobok, above n 305, 16.
313 Honwana, above n 3, 157.
314 Musila, above n 55, 333.
315 Guyot, above n 287, 11.
Traditional methods of healing are important to both the community and the child, but such methods cannot serve as long term solutions for returning child soldiers or the communities into which they are trying to re-integrate. It is necessary for child soldiers to be held accountable for any crimes they may have committed; mere traditional healing methods do not address the need for justice for victims, or the need for communities as a whole to see justice being done. If children are not held accountable at all then communities may turn against them in the future. This is particularly the case with peers of child soldiers who perceive child soldiers, who have not been held to account, as “having got away with it” or as being favored in the community.

Traditional healing methods must conform to international standards of children’s rights. Thus, the best interests of the child must always be at the forefront of any process. Healing rituals are largely unregulated and the methods differ depending on the region. While one region might employ a fairly innocuous method that does take the best interests of the child as a central consideration (for example, burning the clothes of returned child soldiers), another region might use methods dangerous to the child’s safety. There is the need to be cautious about requiring traditional healing methods to be part of the child soldier’s rehabilitation and re-integration.

Traditional healing methods will not be sufficient in terms of long term rehabilitation for child soldiers. Although traditional healing methods have an important

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316 Machel, above n 91, 15.
317 Ibid.
318 Peters, above n 46, 25.
role to play in the initial re-integration and return of the child soldier to the community, long term rehabilitation and re-integration programs need to focus on building a sustainable future for the child. A comprehensive rehabilitation and re-integration program would thus need to “focus on the whole situation” and would also need to address education and job training. There is evidence that without a comprehensive re-integration and rehabilitation programme, child soldiers may re-militarise, despite having undergone traditional healing methods.

3 Education and vocational training

Education and vocational training plays an important role in any rehabilitation programme. Education is a route to employment and to the opportunity to have a livelihood. As a result of this, education can also lead to a feeling of great personal value and accomplishment. Education potentially changes values and attitudes and shapes understanding and behaviour. Not receiving an education, or not being employed, are critical risk factors in potential re-militarisation of child soldiers. All ex-child soldiers interviewed as part of the Coalition to Stop the Use of Child Soldiers recent survey expressed a desire to receive an education and return to school.

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319 Guyot, above n 287, 12.
320 Goetz, above n 63, 58.
321 Peters, above n 46, 21.
323 Brett, above n 73, 17.
324 Brett, above n 73, 67.
325 Akutu and Chrobok, above n 305, 19.
4 Holistic approach

To rehabilitate and re-integrate child soldiers, the total societal crisis that led to them becoming child soldiers needs to be addressed. This requires a long term perspective and fundamental economic, social and political transformation. Such a “holistic approach” not only aids the demobilisation of child soldiers, but also minimises potential re-militarisation if they are unable to gain employment. Child soldiers must not be abandoned post-conflict. They need as much assistance to create a future of opportunity and to ensure that they do not return to the life of a soldier.

XII CONCLUSION: RECONCILING THE CHILD SOLDIER PARADOX

The international community must turn “outrage into action”. A global effort is required to ensure that the paradoxical challenge of child soldiers is confronted. It is necessary firstly for the victim persona of the child soldiers to be addressed. International law is currently strongly protecting children from recruitment as child soldiers. The focus now needs to be on protecting child soldiers as active participants; most child soldiers will have lost their civilian status and will be protected only against enemy mistreatment by their combatant status. Post-recruitment is the very time when child soldiers are most

326 Honwana, above n 3, 153.
327 Deborah Eade (ed) From Conflict to Peace in a Changing World (Oxfam Working Papers, Great Britain, 1998). See Mozambique’s AMOSAPU Programme which attempts to reunite child soldiers with their families. This programme is community orientated and provides therapy via dance, play and art.
328 Singer, above n 2, 147.
at risk of being abused by their own sides. Although their participation in armed conflict makes them technically combatants, they remain victimised children. Legal protections must be created to reflect this situation.

Article 77(1) of Additional Protocol I to the Geneva Conventions could potentially be extended to prevent not just the maltreatment of combatant child soldiers by the enemy (as is currently protected under Article 77(3)), but also mistreatment by the child soldier’s own side. Article 77(1) protects children against “any form of indecent assault” and it can be argued that the maltreatment of child soldiers by their own sides amounts to such indecent assault. If Article 77(1) is interpreted this way, combatant child soldiers are protected the same as civilian children. This interpretation would be legitimate, since the combatant status of the majority of child soldiers is the result of duress and necessity. In the same way that child soldiers cannot be considered voluntary soldiers, they cannot be considered to have chosen combatant status. Alternatively, a new convention could specifically mandate standards of treatment for child soldiers during their participation in armed conflict.

The perpetrator persona of the child soldier must be similarly addressed. Child soldiers who commit human rights abuses must be held accountable. However, the interests of the community and the victim are better served by ensuring accountability through restorative justice processes (such as TRCs) and not by prosecution. Prosecution should never be used in cases of children below the age of 15 and there should even be caution prosecuting seemingly ‘voluntary’ human rights abuses by those between 15 and
18 years of age. Situational circumstances imply that the acts of a child soldier could never be truly voluntary. Restorative justice should be the response to the child soldier as perpetrator; not only does it force child soldiers to acknowledge their crime and its effect on their victims and communities, but it also allows child soldiers to speak about their own victimisation.

The international community must continue to address the challenge of the child soldier paradox; they must do this “diligently, through wise policies, co-operation and continuous dialogue”.329 There is the need “to reflect the increased participation of children in hostilities and to initiate the necessary enforcement and rehabilitation mechanisms”.330 Only once the participation of children in hostilities is recognised by international law and the international community, can the paradox associated with the child soldier be confronted. International law must protect the victimised child soldier during direct participation in hostilities, despite them being technically a combatant. Equally, the perpetrator child soldier must be dealt with appropriately; through the use of restorative justice. Efforts must be made to resolve the child soldier paradox; to rehabilitate and re-integrate both the victimised child soldier and the perpetrator child soldier post-conflict.

329 Udombana, above n 286, 108.
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