Addis Ababa University

College of Law and Governance Studies

LLM Program in Human Rights Law

Jurisdiction of the International Criminal Court on Child Soldiers: Promoting Impunity?

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A Thesis Submitted to the School of Law of Addis Ababa University in Partial Fulfillment of the Requirements of Masters Degree of Laws (LLM) in Human Rights Law

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Declaration

I, the undersigned, declare that the thesis is my original work and has not been presented for a degree in any other university and that all sources of materials used in the thesis have been duly acknowledged.

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Acknowledgements

From the rising of the sun to the place where it sets, the name of the Lord is to be praised. (Psalms 113:3). I am very much grateful to God who has done everything to me and enabled me to enjoy the capacity he has given me.

And I would like to extend my utmost thanks to my Advisor Mr. Getahun Kassa for his scholarly, constructive and timely comments which I have used to overcome the shortcomings I had.

I also owe a duty to extend my thanks to my wife, Gidete Sharew, for all her tolerance and assistance throughout the preparation of the thesis. It is my pleasure to forward my thanks to my big brother Tesfaye Mesele.

Last but not least my sincere gratitude goes to friends including Ashenafi Molla, Berihun Gezahegn, Kahsay Giday, Mere'ed Mengesha, Taame Berhu, Abera Nigus, and Halefom Hailu who helped me morally and ideally in the preparation of this thesis.

Acronyms/Abbreviations

ACRWC	African Charter on the Rights and Welfare of the Child
AP I	Additional Protocol I
AP II	Additional Protocol II
FDRE	Federal Democratic Republic of Ethiopia
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for former Yugoslavia
IHL	International Humanitarian Law
ILO	International Labour Organization
MACR	Minimum Age of Criminal Responsibility
MAR	Minimum Age of Recruitment
NGOs	Non- governmental Organizations
OP	Optional Protocol
RUF	Revolutionary United Front
SCSL	Special Court for Sierra Leone
STL	Special Tribunal for Lebanon
TRC	Truth and Reconciliation Commission
UDHR	Universal Declaration of Human Rights
UN	United Nations
UN CRC	United Nations Convention on the Rights of the Child
UNSC	United Nations Security Council
USA	United States of America
VCLTs	Vienna Convention on the Laws of Treaties
WWII	World War Two

Abstract

This thesis investigates the issues of jurisdiction of the ICC on child soldiers with respect to war crimes potentially or actually committed by children between the age of fifteen and eighteen during armed conflicts. It examines the legal frameworks governing child soldiers particularly the ICC Rome Statute and see if there exists impunity under the ICC regime. After a thorough examination on the images of child soldiers in different international human rights instruments, a cross reference is drawn to the ICC Rome Statute on its implication of exclusion of jurisdiction to child soldiers or jurisdictional limitation.

The definition of children as every person below eighteen years of age, in most of the international human rights instruments, is creating a misleading concept on the issues of criminal culpability for criminal accountability for serious violations of human rights. Most, if not all international human rights instruments imagined children as innocent victims needing only legal and humanitarian protection. However, this imagination is implausible to all sorts of children because children can be classified as infants, young and adolescents where the criminal culpability hugely so differs.

Hence, a mechanism must be figured out for those persons between the age of fifteen and eighteen for their criminal accountability in the ICC Rome Statute for serious human rights violations during armed conflicts. This is because children in this age group are allowed to participate in armed conflicts in cases of emancipation, military schools or voluntarily in the CRC and CRC Optional Protocol. Holding accountable for serious violations of human rights for persons in this age group reinforce the reintegration, demobilization, disbarment, rehabilitation, and reconciliation of child soldiers into the society for normal and constructive civil life.

This can be realized by introducing a sort of criminal accountability suitable for these categories of persons like restorative justice, TRC and others in the normal theories of criminal punishments. The punitive criminal punishments can harm children in these age groups but it is possible to introduce what I call restorative responsibility in order to fight against impunity and bring about sustainable justice and social cohesion for lasting peace.

Incidentally however, the issue of child soldiers and its implications are also seen in birds eye view manner in Ethiopia though not part to the ICC Rome Statute to see other grounds where the

ICC can embark upon Ethiopia through the UNSC referral, ratifying State referral and other means.

Key Words: ICC Rome Statute, ICC, War Crimes, Jurisdictional limitation, Child Soldiers, Minimum Age of Criminal Responsibility, Human Rights Protection, Impunity, justice, UNSC referral and Ethiopia.

Chapter One

Introduction

1.1. Background of the Study

The International Criminal Court is the first Permanent Criminal Court established by a treaty called the Rome Statute. The Court prosecutes over the most heinous crimes of concern to the international community as a whole and aims, like other Courts, at ending impunity against perpetrators of crimes against humanity, genocide, war crimes and [*crimes of aggression]*[1]. The Court is believed to have an experience from the *ad hoc* and limited Courts of Nuremberg Military Tribunal, International Tribunal for Tokyo, International Criminal Tribunal for former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR), Special Court for Sierra Leone (SCSL) and Special Tribunal for Lebanon (STL) which preceded the Permanent Court.

One of the major purposes of the Rome Statute of the International Criminal Court is to put an end to impunity[2] by prosecuting perpetrators of genocide, crimes against humanity, and war crimes when member States are *unable or unwilling* to prosecute such crimes nationally. This approach ensures the future respect of human rights. The International Criminal Court (hereinafter called the ICC) can exercise jurisdiction on the basis of complementarity[3]— when member States are *unwilling or unable* to exercise their primary criminal jurisdiction upon the commission of the horrendous crimes. However, additional admissibility requirement has been placed under the Rome Statute to exercise jurisdiction; age[4] — where ICC cannot prosecute persons below the age of eighteen at the time of the alleged commission of the crime (an exception to the *ratione personae jurisdiction of the ICC Rome Statute*). This is despite there

[1] The ICC will assume jurisdiction after 2017 on crime of aggression as per Article 15 ^{bis} (3) of the Rome Statute and it is difficult whether aggression is prosecutable individually because aggression is believed to be an act of State other than an act of individuals. The definition of aggression is given under article 8 ^{bis} which was inserted by Resolution RC/Res.6 of 11 June 2010.

[2] *Preamble paragraph five* of the Rome Statute of the International Criminal Court, Adopted at the plenipotentiary conference, sponsored by the United Nations (UN) on 17 July 1998 and entered into force on 1 July 2002.

[3] Id, *paragraph ten* cum Article 1 of the ICC Rome Statute

[4] Article 26 of the International Criminal Court Statute(Rome Statute) 1998 and entered into 2 July 2002; *The Court shall have no jurisdiction over any person who was under the age of eighteen at the time of the alleged commission of a crime*

exists evidence showing the commissions of the crimes by persons below the age of eighteen where the ICC could possibly assume jurisdiction.

Despite the jurisdictional limitation of the ICC Rome Statute as said above, the Convention on the Right of the Child (UNCRC)[5] has a clear provision whereby individuals can participate in armed conflict even when they are below the age of eighteen. In contrast however, the African Charter on the Rights and Welfare of the Child totally bans the participation and recruitment of children in armed conflicts without placing any exception[6], following the *straight eighteen position (so called International Human Rights Position)*. In the African Charter, the ICC Rome Statute, at least legally speaking, has no problem in excluding persons below the age of eighteen from its jurisdiction for consistency purposes. This is due to the non existence of exception under the African Charter for possible participation and recruitment of children in armed conflicts despite the practical challenges ahead. Although not a solution in and of itself, a comprehensive legal framework is the starting point towards reducing the practice of child participation as soldiers.[7] Problem comes with regard to the UNCRC because it allows participation and recruitment of children in armed conflicts. Yet the ICC Rome Statute clearly excludes this from its jurisdiction despite a provision on exemptions of recruiting children above the age of fifteen without constituting a crime under its jurisdiction.

Beyond this, the UNCRC provides a procedure for emancipation where a child can be considered as adult despite his/her age is still below eighteen. Hence, participation of persons below the age of eighteen in armed conflicts would be possible through emancipation if emancipating is to the best interest of the child by member States. And this discretionary provision empowers members States to recruit, enlist or use children to perform a competent

[5] Article 38(2) and (3) United Nations Convention on the Rights of the Child, Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entered into force 2 September 1990 according to Article 49; *States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities. States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest*.

[6] Article 22(2) African Charter On The Rights And Welfare Of The Child OAU Doc. CAB/LEG/24.9/49 (1990), *Entered Into Force* Nov. 29, 1999; *States Parties to the present Charter shall take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain in particular, from recruiting any child.*

[7] Benyam D. Mezmur (Dr.) (2008), *Children at Both Ends of the Gun: Child Soldiers in Africa.* In Julia Sloth-Nielsen, (2008), Children's Rights in Africa: A Legal Perspective. *University of the Western Cape, South Africa,*Ashgate Publishing Company, P203

juridical act, having legal consequences including in armed conflicts. However, the participation on armed conflict by persons below the age of eighteen is without placing any legal consequence to such persons even though there are evidences showing the commission of war crimes or other crimes pragmatically by such persons.

According to the *New York Times,* the use of *child soldiers*[8] is probably the world's most *unrecognized form of child abuse*.[9] On the basis of this, the ILO Convention No. 182 under Article 3 (a) provides that *forced or compulsory recruitment of children for use in armed conflic*t is categorized under *the worst forms of child labour* but the enforcement mechanism is still weak.

Though the Optional Protocol on Involvement of Children in Armed Conflicts[10] tried to lessen the age problem, it did not totally ban the possibility of participating children in armed conflict due to allowance of voluntary recruitment by government armed forces. And hence, the problem of impunity in such case will perpetuate if member States are *unwilling* or *unable* to prosecute because the ICC has no jurisdiction over such persons obviously as said hereinabove.

The exclusion of jurisdiction by the ICC Rome Statute allows member States to recruit more children and their armed force will be more of child soldiers who cannot be held accountable internationally. This is a good means to evade international accountability for individuals and

[8] Concerning child soldiers many scholars have conducted research including *inter alia*, David M. Rosen, (2005), Armies of the Young: Child Soldiers in War and Terrorism, The Rutgers Series in Childhood Studies, P.W. Singer, (2006). Children at War. University of California Press, Mark A. Drumbl, (2012), Reimagining Child Soldiers in International Law and Policy. Oxford University Press, Steven Freeland. (2008). Mere Children or Weapons of War-Child Soldiers and International Law. University of LA Verne Law Review vol. 29, Nsongurua J. Udombana (2006). War is not a Child's Play: International Law and Prohibition of the Children's Involvement in Armed Conflict. *Temple International and Comparative Law Journal, and* Benyam D. Mezmur (Dr.) (2008), *Children at Both Ends of the Gun: Child Soldiers in Africa.* These are prominent scholars who have conducted research on child soldiers but mine only focuses on the ICC Jurisdictional Limitation to any person below eighteen and its legal consequences. In most cases, the issue of jurisdictional limitation has not been discussed in detail but only a passing mention by some of the researchers. Here, I'm going to focus on whether excluding jurisdiction to any person below eighteen promote impunity or protect child rights. Above this, I will address whether the problem demands legislative amendment under the ICC Rome Statute currently taking into consideration the *de facto* participation of children in armed conflicts and commissions of crimes.

[9] As cited in P.W. Singer, (2006). Children at War. University of California Press, P9

[10] Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts, General Assembly Resolution A/RES/54/263of 25 May 2000, entered into force on 12 February 2002. Above this, the numbers of ratifying countries to the Optional Protocol are *by far* less than the numbers of ratifying countries of the Parent Convention (nearly universal ratification). This indicates that the Optional Protocol will face implementation challenges never mind it introduced a new protection to children by upgrading the minimum age of children's participation as soldiers to eighteen.

States. But rebel groups are prohibited from recruiting any person below eighteen even voluntarily without any sort of incentive.

Against this background, this thesis tries to explore the normative framework regarding the participation of child soldiers in armed conflicts in case of the commission of crimes like war crimes, crimes against humanity and genocide vis-à-vis the exercise of jurisdiction of the ICC to this effect. This will be made by juxtaposing the ICC Rome Statute and the UNCRC together with the Optional Protocol on Involvement of Children in Armed Conflict. Thereby, the thesis sees the (in) compatibility and the possible (in) existence of impunity under various international legal frameworks especially the ICC Rome Statute. This brings the dilemma between criminal culpability and the question of impunity for child soldiers. The possible leeway if children commit these crimes and member States remain *unable or unwilling* to prosecute these groups of individuals will be explored. The conditions of impunity under the ICC Rome Statute and other child concerned Conventions will also be studied. Beyond this, exploration will be made whether the exclusion of jurisdiction by the ICC towards any person below eighteen benefits or harms children.

It is known that Africa is blamed for recruiting, enlisting or using children[11] for armed conflicts which could be a crime under the ICC Rome Statute. Hence, responses regarding States defense on the basis of allowance by the UNCRC and the exclusion of the ICC Rome Statute from its jurisdiction when children participate in armed conflicts will be scrutinized. Lastly, the implications of these aspects under Ethiopian legal regime will be highlighted coincidentally.

1.2. Research Questions

The thesis tries to answer the following main research question and ancillaries:

1. If States can recruit, conscript and use persons above the age of fifteen and below the age of eighteen for military service, what will be the international criminal responsibility to such persons by the time they commit crimes like genocide, crimes against humanity and war crimes if the State is *unwilling* or *unable* to prosecute such commission of crimes domestically?

[11] P. W. Singer. (2001). Caution: Children at War. Belfer Center for Science and International Affairs at Harvard University. P 158

1.2. What are the criminal responsibilities of persons above the age of fifteen and below the age of eighteen under international criminal law? Does such gap under the ICC Rome Statute assure the continuity of impunity? And what will be the line of interpretation and leeway if the Rome Statute failed to be in conformity with the UN Convention on the Rights of the Child? Is it possible to resort to the Vienna Convention on the Laws of Treaties to solve such problems? Does totally banning children from *participation* in armed conflict like the African Charter on Rights and Welfare of the Child defeat the right of *participation of children*, which is important among the three *P's* (*Participation, Provision and Protection(including prevention*)?

1.3. Does this legal lacuna under the ICC Rome Statute promote violations of human rights or prevent the commissions of human rights, particularly children's rights? Who benefits from the jurisdictional limitations? Does accountability of children for their perpetration reinforces the reintegration or inimical to their overall development?

1.3. Statement of the Problem

The ICC intends to end impunity by prosecuting crimes of genocide, war crimes, and crimes against humanity and thereby ensure the respect of human rights at international level. However, the Court's jurisdiction is complementary to national criminal jurisdictions of courts. The ICC, to exercise jurisdiction, requires some prerequisites *inter alia*, *unwillingness* or *inability* on the part of member States to exercise criminal jurisdiction and the perpetrator of such crime should be above eighteen at the time of the commission of the crimes mentioned hereinabove. On one hand the ICC does not have jurisdiction to children below the age of eighteen at the time of the commission of the crimes, on the other, States are at discretion to recruit, enlist or use children on voluntarily basis, emancipated, military schools, and cross-border recruitment for armed conflicts. The existence of such provisions paves a leeway for impunity if States are *unwilling or unable* to prosecute such individuals for war crimes by child soldiers which in fact the ICC does not have jurisdiction. Though the Optional Protocol on the Involvement of Children on Armed Conflict tries to narrow down child participation in armed conflicts, it did not totally ban the possibility of children's participation in armed conflict in voluntary basis above the age of fifteen. And many States are ratifying countries to the CRC than to the Optional Protocol which

the former attains almost universal ratification. This worsens the problem of excluding jurisdiction by the ICC to any person below the age of eighteen. This is because of the numbers of ratifying countries to the Optional Protocol is by far less than the Parent Convention which impends the implementations of the new upgraded age of the Optional Protocol for participation children in armed conflicts which could possibly benefits children.

Recruiting, conscripting or using children in armed conflicts will be worse in countries where registration is not effectively taking place to determine over the age requirement for participation of children on armed conflicts. This is true because birth certificate is believed as one of the guarantees in order to provide evidence over the age of a person in the Optional Protocol on the Involvement of Children in Armed conflict for voluntary recruitment. "Birth registration is more than just a right. It's how societies first recognize and acknowledge a child's identity and existence," said Geeta Rao Gupta, UNICEF Deputy Executive Director. She added that registration is also key "to guaranteeing that children are not forgotten, denied their rights or hidden from the progress of their nations.[12]

Age is relational; the majority age required for voting must be differentiated from the majority age required for carrying arm.[13] Beyond this, technological advancement is creating conducive environment for the participation of children in armed conflict by making weapons very easy to carry lightweight and small[14] and automatic guns which did not require a lot might from children[15] to coup with adults. The production of such weapons cancels the difference of childhood and adulthood in carrying arms in armed conflicts.

> Technological advances in weaponry and the proliferation of small arms has also *facilitated the increasing use of child soldiers*.[16] Lightweight automatic weapons

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[12] UNICEF Reports, One in three children do not officially exist, (2013) available at http://www.un.org/apps/news/story.asp?NewsID=46713&Cr=unicef&Cr1=#.UqqZjeLbuKc (Accessed on 13 December 2013)

[13] Tanya M. Monforte, (2007). Razing Child Soldiers. Alif: Journal of Comparative Poetics, No. 27, Childhood: Creativity and Representation. pp. 169-208 available at http://www.jstor.org/page/info/about/policies/terms.jsp (Accessed on 25/06/2013 07:14)

[14] Steven Freeland. (2008). Mere Children or Weapons of War-Child Soldiers and International Law. University of LA Verne Law Review vol. 29, p26. Available at http://ssrn.com/abstract=1306169 (Accessed on 19 July 2013)

[15] Ibid

[16] Graca Machel, (Aug. 26, 1996), The Secretary-General, *Report of the Expert of the Secretary-General: Impact of Armed Conflict on Children, delivered to the General Assembly*, U.N. Doc. S/RES/1612(July 26,2005) . As cited

> are simple to operate, often easily accessible, and children can use them *as easily as adults*.[17] Such weapons allow small children to shoot steady streams of bullets with merely a pull of the trigger.[18] (*Italics mine*)

The thesis will approach child soldiers from accountability perspective in order to ascertain over whose shoulder international criminal responsibility lies in case of war crimes committed by child soldiers under such scenario in the ICC Rome Statute legal framework. This helps to counterbalance the image of children as faultless passive victims. And how much participation of children in warfare would likely jeopardize their rights will be assessed. Furthermore, whether having accountability procedure for child perpetrators reinforces integration or not will also be studied. Hence, the benefits and downsides of having accountability procedure for persons below the age of eighteen will be seen.

1.4. Objectives of the Study

The thesis has both general and specific objectives:

1.4.1. General Objective

The thesis is purported to see the legal frameworks of the ICC Rome Statute over the jurisdiction of the ICC to child soldiers under war crimes and whether to have a juvenile child soldiers under the ICC promote reintegration of former child soldiers or not.

1.4.2. Specific Objectives

The specific objectives, *inter alia,* includes to:

1) To see the legal permission and prohibition of participation of children in armed conflicts and consequences of children in the participation of armed conflict in different international legal frameworks;

Nsongurua J. Udombana (2006). War is not a Child's Play: International Law and Prohibition of the Children's Involvement in Armed Conflict. *Temple International and Comparative Law Journal,* P67

[17] Ibid

[18] COALITION TO STOP THE USE OF CHILD SOLDIERS, STOP USING CHILD SOLDIERS! 5 (1998). As cited in Nsongurua J. Udombana (2006). War is not a Child's Play: International Law and Prohibition of the Children's Involvement in Armed Conflict. *Temple International and Comparative Law Journal,* Vol.20 No.1 P67

2) To examine the anomalies of the ICC Rome Statute in its provisions of conscripting, recruiting and using children for armed conflicts and the criminal culpability of children in armed conflicts;
3) To see whether having accountability procedure reinforces reintegration of child soldiers or harms children's overall development;
4) To show the lines of interpretation in cases where the purposes of Conventions are contradicting each other in the assurance and implementation of human rights in general and
5) To see if there is legal impunity under the ICC Rome Statute regime.

1.5. Significance of the Study

The thesis signifies the following:

a) In the proliferations of international treaties concerning the protection of children, dialogue must exist in order to holistically address human rights.
b) To provide an insight on who should be responsible for commissions of war crimes by children in case a member State is *unwilling or unable* to prosecute such individuals under national criminal jurisdiction.
c) To give an alternative dimension of approaching child soldiers, that is, to let readers see the child soldiers from accountability and look whether having accountability procedure for child soldiers promote reintegration.
d) To inform about the anomalies of the ICC in its provisions on conscripting, recruitment and using children for armed conflicts either to include child soldiers (between the age of fifteen and eighteen) in its jurisdiction as juvenile offenders of war crimes by crafting the Rules of Procedure and Evidence for them different from adults or holding accountable for conscripting, enlisting or using children as soldiers below eighteen as war crime without exception.

1.6. Methodology

The study relies mainly on primary sources which include the ICC Rome Statute, UN Convention on the Rights of the Child, Optional Protocol on Child Soldiers, African Charter on the Rights and Welfare of the Child, the Statute of the Special Court for Sierra Leone and ILO provisions. Moreover, secondary sources like books, journals, internet sources, reports and

comments of UN, and Articles are also be consulted. In order to see the challenges with the issues of criminal responsibility of persons below the age of eighteen, decisions of international courts and their respective Statute are also consulted. The provisions of the Statute of the SCSL over persons below eighteen are taken as a comparison to see whether the ICC Rome Statute has something to learn lessons from.

1.7. Scope of the Study

The thesis is limited to child soldiers above the age of fifteen and below the age of eighteen encapsulated under the ICC Rome Statute, UN Convention on the Rights of the Child, Optional Protocol on Involvement of Children in Armed Conflicts, African Charter on the Rights and Welfare of the Child, Additional Protocol on Geneva Convention 1949, and ILO Convention. It focuses on scrutinizing if there is impunity created under such Conventions for the commissions of heinous crimes under the ICC Rome Statute. Beyond this, the thesis is limited to *war crimes* that can potentially and possibly be committed during warfare by child soldiers against themselves and to others.

1.8. Limitations of the Study

The limitations of the thesis are lack of observing the practice going on such aspects personally either by member countries or ICC in fighting and ending impunity. Furthermore, the thesis is somehow dependent on secondary sources, due to absence of interviewees in the area, except few.

1.9. Organization of the Study

The thesis is organized into four chapters. The first chapter is about the introduction of the thesis indicating the themes of the thesis whereas chapter two is going to address the general notion of the ICC jurisdiction, impunity and interplay of impunity and human rights in general. The third chapter will mainly focus on the legal regime governing child soldiers, registration of children, recruiting children and obligations of member States towards recruiting children; compulsorily, voluntarily, emancipated children, and military schools. The fourth chapter will dwell on legal frameworks governing war crimes especially in cases of child soldiers when member States are *unwilling or unable* to prosecute and the reasons behind exclusions of children from the

jurisdictions of the ICC Rome Statute and its implications impunity and human rights in general. Moreover, chapter four will provide some interpreting guidelines which can assure the protection and respect of human rights in general and children's right in particular.

1.10. Citation Rules

I duly acknowledged the works of others using citation method of footnote following the usual citation method of Addis Ababa University, School of Law.

Chapter Two

General Notions of ICC Jurisdiction on Child Soldiers and Impunity

Before venturing upon the merit of the chapter, I found worth discussing the historical antecedents relating to prosecution of international crimes that preceded the ICC. This helps to see whether the ICC has something lesson to learn from the preexisting *ad hoc* and limited tribunals procedurally and substantively in the development of international criminal law. This is particularly with regard to ending impunity, which is also reinforcing in the protection and enforcement of human rights in general and children's right in particular. Beyond this, looking into history will help to appreciate the prevalence of impunity and the need to struggle it in the interest of human rights especially *Post World War II* where unprecedented degree of attention have been given to human rights despite the increase in violations of human rights. As Dominic Mcgoldrick, put that looking back to history is an important approach because it provides important guidance on relevant issues and questions[19] faced by the Permanent International Criminal Court these days. The establishment of International Criminal Tribunals in the aftermath of *WWII* and following was a great leap forward in the world community in the struggle towards ending impunity. The establishment of International Tribunals challenges the Westphalian State-Centric theory of non-interference over a sovereign country for individual accountability. This was the emerging concept of individual responsibility for the commissions of international crimes which offend the international community.

2.1. Brief Historical Development of International Criminal Law

Before the Permanent International Criminal Court comes into existence in 2 July 1998, many *ad hoc* tribunals were established to prosecute international crimes *inter alia*, the International Military Tribunal at Nuremberg and Tokyo in 1945 (Known as the London Agreement)[20],

[19] Dominic Mcgoldrick. (2004). The Permanent International Criminal Court: Legal and Policy Issues. *Crimina*l *Trials Before International Tribunals: Legality and Legitimacy.* Oxford, England, Hart Publishing, P9

[20] B. V. A. Roling argued that the International Military Tribunal at Nuremberg was multinational tribunal and not international tribunals in the strict sense on reasoning that the victorious Allies had done together what any one of them might have done. Others argued that the International Military Tribunal at Nuremberg defeated the principles of justice of non-retroactivity of criminal law due to the application of *ex post facto.* However, others argue that even the ICTY and ICTR was a victor justice because these ad hoc tribunals were established by the UNSC Resolution which is tied by the veto power holder (USA, UK, China, France and Russia) were allied powers except china.

International Tribunal for the Former Yugoslavia in 22 February 1993(ICTY)[21], and the International Tribunal for Rwanda in 1994(ICTR). Beyond this, *special hybrid tribunals* were also established *among others*, Special Court for Sera Leone in 2000 (SCSL), Cambodia Tribunal, and the Court of the UN Transitional Administration in East Timor ("UNTAET") and elsewhere which can be treated as national prosecutions with the exception to the former. The major *ad hoc* tribunals, with the exception of the International Military Tribunals at Nuremburg and Tokyo, were established by the United Nations Security Council (hereinafter called UNSC) through the exercise of its "mandate under Chapter VII" in realizing international order, peace and security. The establishment of such *ad hoc* tribunals by the UNSC using its mandate under Chapter VII of UN Charter for international order, peace and security is debatable[22]. However, one thing is clear— the UNSC has something to do with the protection, promotion and enforcement of human rights as clearly articulated under its Articles 1(3) cum 55(c) and 56, the preamble[23] and the prohibition of use of force under Article 2(4) cum Article 51 of the UN Charter.

Subsequently, a short assessment will be made as to the scenarios of criminal responsibilities for enlisting, conscripting or using children in warfare under the major international *ad hoc* tribunals including International Military Tribunal at Nuremberg and Tokyo, ICTY and ICTR. And I took one special *ad hoc* tribunal, the Special Court for Sera Leone (SCSL) in order to see how child soldiers are treated in such Court so that experiences could be drawn to the ICC Rome Statute in addressing child soldiers as perpetrators in striking a balance among justice, impunity and criminal culpability.

Looking into the International Military Tribunals[24] which was established by the Allied Powers, (including United States of America, United Kingdom of Great Britain and Northern Ireland, the

[21] UN Doc. S/RES/807 (1993), Adopted by the Security Council at its 3174th , Meeting on 19 February 1993

[22] The first argument denies to the establishment of the *ad hoc* tribunals that there is no mandate under Chapter VII of the UN Charter mandating the UNSC to establish courts for the prosecution of international crimes. Whereas the second arguments favors the establishments of courts as an implied mandate of UNSC under Chapter VII because international order, peace and security can be achieved through the persecution of perpetrators of international crimes like genocide, war crimes, crimes against humanity and aggression. It is one means to bring the purpose of Chapter VII into reality by holding criminals of international crimes responsible which potentially deter future criminals.

[23] The Charter of the United Nations signed on 26 June 1945 at San Francisco, at the conclusion of the United Nations Conference on International Organization.

[24] This was annexed to the London Agreement of the 1945 recognizing the Moscow Declaration. Above this, the International Military Tribunal at Nuremberg and Tokyo have had understood as "victor justice" prosecuting only

Union of Soviet Socialist Republic and France), in the aftermath of the *WWII* but not by the UN Charter to try perpetrators of *WWII*. This was established to prosecute the defeated war criminal of the European Axis Powers (especially the Nazi German officers). And it was an international criminal tribunal to prosecute over war crimes, crimes against peace and crimes against humanity committed in *WWII*. The International Military Tribunal was the beginning towards conclusions of various treaties to establish the normative frameworks of human rights globally. And the trail taken place in the absence of major international human rights documents especially relevant to children's rights: UDHR 1948, Child Rights Convention 1989, Additional Protocol I and II of the 1977 to the Geneva Convention 1949 and ICCPR 1976 among others. Statistics show that 6% of the soldiers who died in World War II were 16 years old and an estimated 10% enlisted to fight with the allied forces[25]. However, the International Military Tribunal neither prosecute the enlistment and participation of children in warfare as war crimes nor hold responsible children who have participated and committed war crimes in WWII.[26] This is especially true for the youths (*Hitler Jugend*) who were feeder organizations in WWII once they reached the age of maturity, however, when the Allied forces invaded German territory in the final months of the war, Hitler's regime ordered these boys to fight even before attainment of maturity.[27]

The ICTY was established by the UNSC using its mandate under Chapter VII of the UN Charter for the prosecutions of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia in 1990s in the Balkan wars. The issues of criminal responsibility was not raised in this tribunal however, a reference was made to the Geneva Convention of the 1949 which did not regulate more about the issue of criminal responsibility over child soldiers. This is despite the huge numbers of participation and enlistment of children in the warfare conducted in the former Yugoslavia in the 1990s both on

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the defeated Axis Powers leaving those Allied powers outside its justice system despite the existence of evidences showing the commission of similar offences, which again bring the concept of selective justice in the discourse of international criminal law.

[25]Nima Elmi. (2005). 'Child Soldiers, Where Is The Law?' available at http://ssrn.com/abstract=1646645 (accessed on 10 July 2013)

[26] E. van Sliedregt,(2003) The Criminal Responsibility of Individuals for Violations of International Humanitarian Law, P 33. As cited in David M. Rosen, (2009), Who Is a Child? The Legal Conundrum of Child Soldiers. *CONNECTICUT JOURNAL OF INT'L LAW*, Vol. 25:81, P88

[27] P.W. Singer, (2006). Children at War. University of California Press, P14

the sides of government forces and armed groups. The ICTY Statute never prosecutes any person below eighteen at the time of the commission of the alleged crime.[28]

The ICTR was established again by the UNSC for the prosecution of persons responsible for the serious violations of international humanitarian law committed in the territory of Rwanda between 1 January 1994 and 31 December 1994 between the *Hutu* ethnic groups and *Tutsi* ethnic minorities. A reference was given to the Geneva Convention common Article 3 of the 1949 and *Additional Protocol I* of the Geneva Convention of the 1977 which is relevant to some extent in the age of criminal majority and protection of children in warfare. Article 77(2) and (3) of *Additional Protocol I* addresses about the enlistment and participation of children in armed conflicts which is given a reference by the Statute of the ICTR however, there was neither prosecution of those who enlist children below the age of fifteen nor criminalize children[29] who have participated and committed international crimes in the Rwandan Genocide between the *Hutu* ethnic majority and *Tutsi* ethnic minorities. However, domestic courts of *gacaca courts*[30] entertained case of child perpetrators in the Rwandan genocide.

The Special Court for Sierra Leone was established by the agreement of the United Nations and the government of Sierra Leone after the failure of the *Lome' Peace Agreement*[31] but it was *ad hoc* hybrid court which is very similar with the national criminal jurisdiction and emanating from international law not domestic law. In the SCSL, there is one unique feature about the criminal majority for establishing criminal responsibility from its precursor a*d hoc* tribunals. The unique feature of the Statute of the SCSL is assuming jurisdiction for any person who was above the age of fifteen at the time of the alleged commission of the crime under its Article 7(1). This

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[28] See the Report of the Secretary-General pursuant to Para. 2 of Security Council Resolution No. 808 (1993), UN Doc. S/25704, reprinted in (1993) 32 *International Legal Materials* 1170, Para. 58: "The international tribunal [for the former Yugoslavia] will have to decide on various personal defenses which may relieve a person of individual criminal responsibility, such as minimum age or mental incapacity, drawing upon the general principles of law recognized by all nations. As cited in Matthew Happold, (2007), The Age of Criminal Responsibility in International Criminal Law. P6, Available at http://ssrn.com/abstract=934567 (accessed on 19 July 2013)

[29] Ibid

[30] The *gacaca* process is a traditional method of justice rooted in the local community and was reinstated in an attempt to speed up the judicial process. Hence, the Rwandan *gacaca* court recognized the culpability of children above the age of 14 domestically.

[31] Michael P. Scharf, (October 2000) "The Special Court of Sierra Leone", (ASIL Insights), http://www.asil.org/insights/insigh53.htm>. See Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front [the "Lome' Peace Agreement"], UN Doc. S/1999/777, 12 July, 1999, Anne as cited in David M. Rosen,(2005),Armies of the Young: Child Soldiers in War and Terrorism, The Rutgers Series in Childhood Studies, P177

was taking into consideration the common use of child soldiers in the conflict in the country[32] which around 5,000 children were said to be serving in one of the various military groups at any given moment (mainly by Revolutionary United Front).[33] Appreciating those children above the age of fifteen would participate in armed conflicts, the Statute fix criminal majority to be fifteen.

I personally believe that such formula is very important in fighting impunity by the international community because enlisting, conscripting or using children below fifteen would constitute war crime and those children who are above the age of fifteen and below the age of eighteen are made to participate in armed conflicts and hence, mechanism must be figured out where such persons would be held responsible for commissions of international crimes like war crimes. However, a strong opposition comes from NGOs reasoning that children should not be held criminally responsible for crimes committed in a war they should not have been a part of in the first place[34]; considering child soldiers as faultless passive victim image.[35] Therefore, I believe that the Statute totally closed the door for possible evasion of criminal responsibility in the international criminal legal parlance despite the difficult of fixing criminal majority for children. However, the trial procedure is believed to be conducive for juvenile offenders and the handling procedure is different form adult offenders as clearly indicated under Article 7(2) of the Statute states that [s]hould any person who was at the time of the alleged commission of the crime between fifteen and eighteen years of age come before the Court, he or she shall be treated with *dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society, and in accordance with international human rights standards, in particular the rights of the child. (Italics mine)*

Moreover, the SCSL Statute offers some guidelines in sentencing of child soldiers under its Article 7(2) stating as [i]n 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,*

[32] Supra Note at 13, P47
[33] David M. Rosen,(2005),Armies of the Young: Child Soldiers in War and Terrorism, The Rutgers Series in Childhood Studies, P61
[34] Kenneth Roth (Executive Director of Human Rights Watch), (November 1, 2000), Justice and the Special Court for Sierra Leone: Letter to the Security Council, <http://hrw.org/press/2000/11/sl. As cited in infra note 24, P178
[35] Mark A. Drumbl, (2012), Reimagining Child Soldiers in International Law and Policy. Oxford University Press. PP6-11. Available at http://ssrn.com/abstract=1921527 (Accessed on 7 August 2013)

approved schools and, as appropriate, any programmes of disarmament, demobilization and reintegration or programmes of child protection agencies. (Italics mine)

Generally, the *ad hoc* tribunals were not in a position to end impunity and protect the human rights of children due to problem of age of criminal majority[36] in the international criminal law which, I will address it under subtitle 2.3. The following statement from Tanya M. Monforte is worth mentioning:

> All the special tribunals have been criticized for having been created under imperfect, or irregular, conditions and procedures, affecting their perceived legitimacy.[37]

In contrast, the *ad hoc* tribunals' contribution to the development of international criminal law and other human rights regime is undeniable truth and is something to be acknowledged. The *ad hoc* tribunals of the later in time has adopted best experiences from the previous ones and corrective mistakes of the past *ad hoc* tribunals both substantively and procedurally which has been used as an input for the development of international criminal law.

2.2.Definitions of Terms and Concepts

The definitions given to terms and concepts are only for this thesis and should be understood in such context.

Child, under the CRC article 1, is defined as "every human being below the age of eighteen years *unless under the law applicable to the child, majority is attained earlier*. However, this definition under international human rights law is considered to be framed in a manner opening space for countries to determine, creating disparity. [t]his slippery definition has been criticized as a failure of will at the international level to protect children, by allowing states to define differently the age of transition to adult- hood[38] which possibly creates dual norm nationally and internationally.

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[36] The age problem in the international criminal law is attributable from different factors *inter alia* culture, religion, physical strength, social, political, and economic and it is not the problem of the international law. The Age problem is an ongoing debate between different scholars and community of people. But eighteen is taken as a transition age from child to adulthood and it becomes international norm.
[37] Supra Note at 13, p178.
[38] Id. p173

Age, however, cannot be the only element to define children because children are a social construction and the understanding so differs across different cultures. Hence, some countries take puberty and other social constructions to define a child which is more subjective than age. The social construction other than age brings different attitude of looking at the competence of children.

Child soldiers are any person below the age of eighteen, who are members of the armed force; whether governmental or rebel groups and taking part in active hostilities. This is with exception of emancipated children where for various reasons the law considered a child as adult despite his or her age is below eighteen. The Paris Principle in this affair articulates that [t]he internationally agreed definition for a child associated with an armed force or armed group (child soldier) is any person below eighteen years of age who is, or who has been, recruited or used by an armed force or armed group in any capacity, *including but not limited* to children, boys and girls, used as *fighters, cooks, porters, messengers, spies or for sexual* purposes. It does not only refer to a child who is taking or has taken a direct part in hostilities.[39] This can be termed as *de jure* adult despite the existence of *de facto* child. (*Italics mine*)

Adolescent is a transitional age from childhood to adulthood. Adolescent is stage of maturation between childhood and adulthood. The term denotes the period from the beginning of puberty to maturity; it usually starts at about age fourteen in males and age twelve in females. The transition to adulthood varies among cultures, but it is generally defined as the time when individuals begin to function independently of their parents.[40]

> Adolescence is a formative period during which children grow into their rightful place as full citizens and agents of change in their own lives and the lives of their societies.[41]

[39] *Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups, (2007) available at http://www.child-soldiers.org/about_the_issues.php (accessed on 27 July 2013).* The Definition for children as any person below eighteen years of old is attaining customary international law. Article 1 cum 38 of the CRC indicates the existence of a child soldier when recruitment is made between fifteen and eighteen.

[40] Jones, Frank Allen, and Meyer, William J. (2009). Adolescence, Microsoft Encarta 1993-2008 Microsoft Corporation.

[41] UNICEF (2012),Progress for Children: A report on adolescents (No.10) http://www.unicef.org/publications/index_62280.html (accessed on 7 September 2013)

Jurisdiction is the powers of courts or tribunals to entertain a case and render an enforceable judgment. Jurisdiction here should be understood the jurisdiction of the ICC in prosecuting perpetrators of core international crimes. It is actually, the power of law-the authority to speak:

> In the face of challenge, the judge - armed with no inherently superior interpretative insight, no necessarily better law -must separate the exercise of violence from his own person. The only way in which the employment of force is not revealed as a naked jurispathic act is through the judge's elaboration of the institutional privilege of force -that is, jurisdiction.[42]

Impunity is "the impossibility, de jure or de facto, of bringing the perpetrators of violations to account—whether in criminal, civil, administrative or disciplinary proceedings."[43] It is providing a kind of shield for a person suspected of committing international crime or failure to prosecute a suspect and thereby failed to punish under both national criminal jurisdictions and international criminal courts like the ICC.

Complementarity is a jurisdictional power next to national criminal jurisdictions. International criminal tribunals, in my case the ICC, could assume jurisdiction when the national criminal jurisdictions are either *unwilling* or *unable* to prosecute the international crimes committed under their jurisdiction. Therefore, the primary jurisdiction will remain within the ambit of national criminal system if they are *willing* or *able* to prosecute the commissions of crimes however, the ICC will take over the case when this is not the case. Hence, the ICC will complement the national criminal system. Complementarity is trying to manage to convince States that they would remain masters over their own judicial proceedings without allowing perpetrators of serious crimes to go unpunished. It bridges between international judicial organs and national criminal jurisdictions.

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[42] Robert Cover. (1983). Foreword: Nomos and Narrative. *Harvard Law Review 97* p54. as cited in Tanya M. Monforte. (2007). Razing Child Soldiers. *Alif: Journal of Comparative Poetics, No. 27, Childhood: Creativity and Representation*. Department of English and Comparative Literature, American University in Cairo and AmericanUniversity in Cairo Press. p178.Available at http://www.jstor.org/stable/30197979 (accessed on 25/06/2013 07:14)

[43] Principles for the Protection and Promotion of Human Rights through action to combat impunity, 8 February 2005, E/CN.4/2005/102/Add.1, p. 6. As cited in Sang-Hyun Song (2012). The Role of the International Criminal Court in Ending Impunity and Establishing the Rule of Law. Available at https://un.org/wcm/content/site/chronicle/home/archive/issues2012/deliveringjustice/therole oftheinternationalcriminalcourt (accessed in 30 September 2013)

Recruitment/Enlisting/Conscripting refers to compulsory, forced and voluntary enrolment of children into any kind of armed forces whether government or armed groups/ rebel groups (notably rebel militias, dissident factions, and insurgent). Recruitment can have different forms including voluntary, forced or compulsory and cross border recruitment either by government or armed groups in order to *use or participate in armed conflicts.* Recruitment covers any means by which a person becomes a member of the armed forces or the armed forces.[44] Enlisting implies the existence of an active policy to have persons join the armed forces. Whereas recruitment is a term which implies some active soliciting of recruits i.e. to pressures or induce them to enlist: it is not synonymous with enlistment. The ordinary meaning of "to enlist" is "to enroll on the 'list' of a military body; to engage as a soldier": "to conscript" means "to compel to military service by conscription; to enlist compulsorily".[45] To enlist comprises both the acts of recruiting and conscripting.[46]

> The words 'using' and 'participate' have been adopted in order to cover both direct participation in combat and also active participation in military activities linked to combat such as scouting, spying, sabotage and the use of children as decoys, couriers or at military checkpoints.[47]

Moreover, the Paris Principle (Paris Commitment) under principle 2(1) articulates that the acts of recruiting, conscripting or using as to include different capacity in warfare. Any person below 18 years of age who is or who has been recruited or used by an armed force or armed group in *any capacity*, including but not limited to children, boys, and girls used as fighters, cooks, porters, messengers, spies or for sexual purposes. It does not only refer to a child who is taking or has taken a direct part in hostilities. (*Italics mine*)

Armed Conflicts can be either international armed conflict or non-international armed conflicts. Where the first is active hostilities created between two or more opposing States and the later is

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[44] G. Goodwinn-Gill and I. Cohn, (1994), Child Soldiers. The role of children in armed conflicts. Oxford, Clarendon Press , p. 62, As cited in Tiny Vandewiele, (2006), *A Commentary on the United Nations Convention on the Rights of the Child, (Optional Protocol the Involvement of Children in Armed Conflicts*). Martinus Nijihoff Publishers, p29

[45] Knut Dörmann, (2003), *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* p. 377.

[46] Ibid

[47] Draft Statute for the ICC, Report of the Preparatory Committee on the Establishment of an International Criminal Court, Addendum, Part One, A/Conf.183/2/Add.1 (14 April 1998)

between governmental forces and non-governmental armed groups, or between such groups only. IHL treaty laws also establishes a distinction between non-international armed conflicts in the meaning of common Article 3 of the Geneva Conventions of 1949 and non-international armed conflicts falling within the definition provided in *Article 1 of Additional Protocol II*.[48]

2.3. Criminal Responsibility in General

Only those responsible to their acts are alone liable to punishment in criminal law; whether domestic or international criminal law. The elements leading to responsibilities in criminal law include mental element *(mens rea),* material element *(actus reus)* and legal element. Such general principles are also recognized in the ICC Rome Statute under Articles 22 and *et. seq*. The moral element of a criminal widely varies in the domestic system of criminal law due to the fact that construction of mental maturity varies from place to place and from society to society. And hence, moral culpability is the most difficult to establish criminal liabilities at international legal parlance due to failure to fix minimum age of criminal responsibility at international level. This is partly justified in terms of cultural sensitivity and respect for State sovereignty[49]. However, in contrast it creates a wide discretion to State to determine the age of culpability for criminal offences.

In most cases, domestic criminal systems determine the moral culpability on the basis of age where it ranges from seven to eighteen in the domestic criminal system. However, it will be very difficult in the international criminal system for offences of international crimes because international crimes need much higher level of culpability than the usual standard at home. This is not the same to all types of international crimes. For example, moral culpability in genocide is different from the requirement of moral culpability in war crimes because for the commission of the crimes of genocide a special intent is required. This makes the crimes of genocide unique from other types of ordinary homicide and war crimes domestically and internationally respectively.

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[48] ICRC (2008). How is the term "Armed Conflict" defined in international humanitarian law? http://www.icrc.org/eng/resources/documents/article/other/armed-conflict-article-170308.htm (accessed on 07 August 2013)

[49] Katherine Fallah (2006). Perpetrators and Victims: Prosecuting Children for the Commission of International Crimes. *African Journal of International and Comparative Law* Vol. 14:83, Page 61

Any person who offends the international community can only be held liable if and only if the three elements of a crime are fulfilled. This is with the exceptions of cases of lawful, excusable and justifiable acts permitted as a defense for criminal liabilities.

2.4.Minimum Age of Criminal Responsibility

2.4.1. National and International

To better understand the concept of criminal responsibility, it is important to discuss some preliminary points about the capacity of children.

Though there are different approaches and meanings of rights, rights can be understood as "special or justified type of claim, or a claim against someone whose recognition as a valid is called for by some set of governing rules or moral principles".[50] And rights are either liberty rights or protection rights where the former is a condition to act in a specific freedom whereas the later is a claim that other people owe some duty to protect important interests of the right holder.[51] Children, in this context, cannot exercise liberty rights by themselves as these rights need a competency or capacity to act in a certain way and must be assisted by adults. Soldiering is one of the liberty rights where children in this context cannot act autonomously due to lack of competence. And rights are not without a corollary duty when infringement against the criminal provision happens because competency is a juridical act. To evaluate the competencies of children, age may be required. Yet to know the minimum age of criminal responsibility may be hard task.

Minimum Age of Criminal Responsibility (MACR) in international criminal law is the most difficult concept and blurred owing to different factors *inter alia*, different political outlooks, historical, cultural, and other factors that feed into the construction of childhood and designation of age limits.[52] Moreover, the age of criminal majority, though not fixed at international human rights law, is always relational or dependent on context.[53] For example, the age of majority for

[50] Feinberg, Joel (1980), "The Nature and Value of Rights," in *Rights, Justice, and the Bounds of Liberty: Essays in Social Philosophy*, Princeton, Princeton University Press, at 155 cited in Don Cipriani. (2009). Children's Rights and the Minimum Age of Criminal Responsibility: A Global Perspective (advances in Criminology). Ashgate Publishing, p 1
[51] Ibid
[52] Don Cipriani. (2009). Children's Rights and the Minimum Age of Criminal Responsibility: A Global Perspective (advances in Criminology). Ashgate Publishing, p4
[53] Supra Note at 34,PP 173-174

voting must be different from the age of majority to be a soldier. MACR is not uniform across many countries of the world. However, the problems of MACR were thought to reconsider and to solve it by the CRC.

> [w]hen the UN embarked on the drafting of a convention that would solely address the rights of the child, the inclusion of a provision addressing the situation of armed conflicts was considered essential. Some States and non-governmental agencies hoped it would be the perfect opportunity to improve the provision of International Humanitarian Law on the *question of age, type of participation*.[54] *(Italics mine)*

The MACR for children is further complicated by the domestic criminal jurisdictions by setting the MACR anywhere from seven to eighteen years.[55] Determining the age at which a child could be held criminally responsible is attributable to different factors including physical and mental maturity, traditions and cultures among other things. The construction of child much depends not on age and competence but over social attitudes towards childhood and their capacity.

An author on issues of child responsibility and problem of age explains in the following manner in the *Hutu-Tutsi* conflict of Rwanda where an assertion is made to the accountability of children showing their competence:

> [y]ou will hear Rwandans say that if a child was able to kill, if a child was able to discriminate between two ethnic groups, to decide who was a Hutu moderate and who wasn't, and was able to carry out murder in that way, why should that child be considered differently from an adult? And therefore the punishment should be the same.[56]

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[54] Institute for Security Studies (1997), Child Soldiers and International Law. http://www.iss.co.za/pubs/ASR/6No3/Fontana.html (accessed 17 March 2005) as cited in Benyam D. Mezmur (Dr.) (2008), *Children at Both Ends of the Gun: Child Soldiers in Africa.* In Julia Sloth-Nielsen, (2008), Children's Rights in Africa: A Legal Perspective. *University of the Western Cape, South Africa,*Ashgate Publishing Company, P201

[55] Infra note at 51

[56] Chen Reis, (1997). *Trying the Future, Avenging the Past: The Implications of Prosecuting Children for Participating in Internal Armed Conflict*, 28 COLUM. Human Rights Law Review, V. 629, 634-35. As cited in supra note 19, P49.

With an estimated 300,000 child soldiers currently participating in armed conflict around the world[57], children are undoubtedly responsible for numerous deaths, rapes, mutilations, and other crimes. From this understanding, children are capable of committing crimes including the heinous crimes of concern to the international community and hence, should be held accountable for the criminal participation.

Both the CRC under Article 40(3) (a)[58] and the Beijing Rule (Rule 4(1)[59] urge member States to fix MACR under their respective criminal codes for juvenile justice however, there is no need to be consistent throughout the world about the MACR. And hence, countries opt for different MACR taking different factual and policy grounds of their respective country. As a result of these a wide range of variation exists across many countries as to MACR of children. Beyond this, international law, particularly the international criminal law, did not put a black and white MACR for State to fix. The Beijing Rule recommends State parties not to make the MACR too low an age level taking into consideration the facts of emotional, mental and intellectual maturity.

However, what is *too low an age level* to countries is not clear and which age level is considered to be *too low an age level* are not clearly articulated. Some indicative criteria is placed under the Beijing Rule to show as to the determination of *too low an age level* for example, if a country did not fix MACR at all, it is tantamount to *too low an age level*. Beyond this, in the determination of the MACR, the *lowest reasonable limit* should be taken. The Committee on the Rights of the Child has gone no further than to state that any minimum age of criminal responsibility below the age of 12 is not "internationally acceptable"[60]. The case of MACR will be difficult and worse

[57] BBC, (Jan. 12, 2012), *Children of Conflict: Child Soldiers*, http://www.bbc.co.uk/worldservice/people/features/childrensrights/childrenofconflict/soldier.shtml. This number is unclear due to the difficulty in accurately counting children recruited into armed conflict and participatory in it. As cited in Erin Lafayette, (2013) The Prosecution of Child Soldiers: Balancing Accountability with Justice. Syracuse Law Review, Vol. 63:297, p298

[58]United Nations Convention on the Rights of the Child, Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entered into force 2 September 1990) *The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law,*

[59] United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules")General Assembly Resolution 40/33, 29 November 1985) In *those legal systems recognizing the concept of the age of criminal responsibility for juveniles, the beginning of that age shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity.*

[60] Committee on the Rights of the Child, General Comment No. 10 (2007): Children's rights in juvenile justice, UN Doc. CRC/C/GC/10, 25 April 2007, para. 32

again due to the non-existence or minimum practice of birth registration in most of the countries for proof of age in the juvenile criminal justice administration.

The CRC is the UN treaty which has got nearly universal ratification by all countries except USA, Somalia and South Sudan[61]. But the way the obligation is framed with regard to MACR under the Convention is not clear and gives away the discretion to States to fix the MACR which opens for countries to opt for different MACR. As a result of this, the communication between international criminal law on one hand and national criminal jurisdiction on the other remains weak creating *lacunae* for the enforcement of human rights in general and children's rights in particular. This is true because of the maximum incommunicado relationship and dual normatively created between national criminal laws and international criminal laws. How the incoherent fixation of MACR across countries affect the efficiency of international criminal law especially the ICC is going to be determined in subsequent other subtitles.

2.5. Jurisdiction of the ICC

2.5.1. Complementarity

As defined above, jurisdiction is competence of courts; international or national, to entertain a case and render a valid decision on such case which is enforceable. Traditionally, courts of one State would exercise jurisdiction over persons who have committed a crime in their own respective territory (territorial jurisdiction).[62] However, gradually, the jurisdiction of States increased to other basis of jurisdiction including active personality jurisdiction (where a citizen of a country commit a crime in other State), passive personality jurisdiction (when a crime is committed against nationals of a State) and over crimes committed against the State's essential security interests (protective principle jurisdiction)[63] and introduced the *universal jurisdiction*[64]

[61] *South* Sudan is because of the recent secession from the Sudan and its membership is going to be determined either by State succession or any other means of treaty making.

[62] Yves Beigbeder. (2005). International Justice Against Impunity: Progress and New Challenges. Martinus Nijhoff Publishers,P55

[63] Id, P56

[64]R. O'Keefe, (2004) 'Universal Jurisdiction: Clarifying the Basic Concept', *Journal of International Criminal Justice* (JICJ) 735-760, at 738-740 and 745-747, Defines Universal Jurisdiction as competence of a State under international law to criminalize and, should the occasion arise, prosecute conduct when no other internationally recognized prescriptive link - chief among them territoriality, nationality, passive personality and the protective principle - exists at the time of the alleged commission of the offence. Universal Jurisdiction allows the prosecution of aliens for certain crimes as a matter of international public policy where the nationality State refuses to try the

concept. Historically, the *ad hoc* tribunals were having primary jurisdiction over national criminal jurisdictions but later the concept changed into complementarity principle of jurisdiction by the ICC. The ICC will have the role of complementing national criminal jurisdictions, not substituting, respecting the Westphalian State Centric theory for sovereignty. It is upon either the consent or voluntary relinquishment (optional complementarity)[65] of criminal jurisdiction by a State in favor of the ICC or *unwillingness* or *inability* (mandatory complementarity)[66] of the State to effectively discharge the criminal jurisdiction, the ICC would assume jurisdiction.

The readings of Article 1 and *preamble ten* the ICC Rome Statute, the ICC will exercise jurisdiction in complementarity or in supplementary to the domestic criminal jurisdictions for the violations of international crimes which are of concern to the international community rather than supplant the domestic courts on their criminal jurisdiction.

> The complementarity principle is intended to preserve the ICC's power over irresponsible States that refuse to prosecute those who commit heinous international crime.[67]

The principle of complementarity is trying to balance between the need to end impunity on one hand and preserving the sovereignty of States on the other. Complementarity gives the first chances to States themselves in their own affairs as long as the crime committed is a concern to the international community, the ICC will take over it if the State is *unwilling*, *unable* or *voluntarily relinquish* its jurisdiction. The principle of complementarity is analogous with the principle of exhaustion of local remedies required under international human rights enforcement bodies. On the determination of complementarity, the principle of due process should be taken into consideration to see the *unwillingness* side of the State as articulated under Article 17(2) (a-c) of the Rome Statute. Elements to ascertain over the *inability* of the State, is clearly articulated under Article 17(3) of the Rome Statute. But with regard to *unwillingness* and *inability* on the part of the State discussion will be made below.

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person or the individual is not subject to the jurisdiction of any State as defined by Ian Brownlie, (2008), Principles of Public International Law. 7th Edition

[65] Cases of self-referral by a State voluntarily to the ICC to take over the case and thereby adjudicate

[66] Mohamed M. El Zeidy (Dr.) (2008). The Principle of Complementarity in International Criminal Law: Origin, Development and Practice. Martinus Nijhoff Publishers

[67] Id p158

2.5.2. Admissibility

Assumption of jurisdiction by the ICC, as said above, is not an automatic it is rather subject to upon fulfillment of certain conditions. These criteria are pin down under Article 17 of the ICC Rome Statute so that admissibility to the ICC would be possible upon determination. Article 17 allocate jurisdiction to the ICC and members States where the crime is committed. The criteria set under Article 17 are safeguards for sovereign power which espouses non-intervention principle. The rule of presumption for assuming jurisdiction is given to member States as a primary competence whereas the ICC is given an exception complementing the rule. Hence, the competence of the ICC is the exception to the presumption; primacy of national criminal jurisdiction.[68] Article 17 is framed in the negative and gives reference to paragraph ten of the *preamble* and Article 1 where it shows that the ICC is complementing national criminal system. The ICC cannot exercise jurisdiction if: 1) [t]he case is *being investigated* or *prosecuted* by a State which has jurisdiction over it, unless the State is *Unwilling or unable genuinely* to carry out the investigation or prosecution, 2) [t]he case *has been investigated* by a State which has jurisdiction over and the State has decided not to prosecute the person concerned, unless the decision resulted from the *unwillingness or inability of the State genuinely* to prosecute, 3) [t]he person concerned *has already been tried* for conduct which is the subject of the complaint and a trial by the Court is not permitted under *Article 20(3*)[69], and 4) [t]he case is not of *sufficient gravity to justify* further action by the Court. Moreover, a person to be prosecuted under the ICC jurisdiction she or he must be eighteen and above years of age at the time of the commission of the alleged crime as an admissibility criterion which I will discuss thoroughly later in *Chapter Three*. The criteria set out under Article 17(2) and (3) of States for *unwillingness* or *inability* can be raised to challenge over the primacy of jurisdiction of States so that ICC can assume jurisdiction. However, the primacy of State's jurisdiction could be challenged on the basis of evidence presented whether such evidence can justify unwillingness or inability of States.

[68] *Ad hoc Committee Report*. (1996). *Preparatory Committee Report*, Vol. I, Para. 154, as cited in Mohamed M. El Zeidy (Dr.) (2008). As cited in supra note 52, p160

[69] Article 20(3)(a) and (b) of the ICC-[t]here are grounds whereby the Court could permit the investigation or prosecution of such person if the decision was for the purpose of shielding the person or was not conducted independently or impartially in accordance with the norms of due process recognized by international law and was inconsistent with an intent to bring the person concerned to justice

2.6.ICC Jurisdiction and Impunity

The allocation of jurisdiction as to primary for State's criminal jurisdiction and ICC complementarity role is not a constant formula. In some instances, the ICC could assume primary jurisdiction for two reasons; firstly if the State voluntarily relinquishes jurisdiction in favor of ICC and secondly if the State is *unwilling or unable* to prosecute, investigate or try the case genuinely. This line of interpretation finds support in the recent decision of ICC Pre-Trial Chamber I in the *Lubanga* case:

> The Chamber also notes that when a State with jurisdiction over a case is investigating, prosecuting or trying it, or has done so, it is not sufficient to declare such a case inadmissible. The Chamber observes on the contrary that a declaration of inadmissibility is subject to a finding that the relevant State is not unwilling or unable to genuinely conduct its national proceedings in relation to that case within the meaning of Article 17(1)(a) to (c), (2) and (3) of the Statute.[70]

There are two instances where the ICC can assume jurisdiction despite the concerned State is undertaking the investigation, prosecution or trial of the case if it is found to falling under Article 17(2) and (3) of the Rome Statute.

Therefore, due to the presence of jurisdictional limitation of the ICC Rome Statute, it cannot discharge its role of complementing State's primary jurisdiction. Hence, impunity will happen if the primary State's jurisdiction remains *unable, unwilling or voluntary relinquishment of* jurisdiction in favor of the ICC.

2.6.1. *Unwillingness* of member States

What is *unwillingness* on the side of the concerned State for the primary criminal jurisdiction? The Rome Statute defines it nowhere for it contravenes sovereignty of States compelling States to fail to cooperate with the ICC which can paralyze the existence of the Court. Beyond this, *unwillingness* test on the side of the State was intended to minimize vagueness by attaching *genuinely* on national criminal jurisdiction which can reduce the subjectivity element. It is not

[70] *Prosecutor v. Thomas Lubanga Dyilo, Decision on the Prosecutor's Application for a Warrant of Arrest, Art. 58, No. ICC-01/04-01/06-8-US-Corr, 10/02/2006, para. 32, unsealed pursuant to Decision ICC-01/04-01/06-37 dated 17/03/2006.* As cited in Supra note at 45, p162

determined whether *unwillingness* should be securitized from the vintage point of subjective or objective tests.[71] *Genuinely* in the context of Article 17(2) and (3) is purported to compel States to carry out the criminal investigation consistent with the aims of the Rome Statute.[72] And again, *genuinely* is not defined either in the *travaux preparatoires,* the Statute, the Rules or Regulation of the Court. *Genuine,* in this understanding, means that the States acted and processed their national criminal jurisdiction in real, reliable, authentic, and trustworthy by duly vesting with all the necessary formalities and legally attested procedures.[73] This definition is close to the concept of *good faith or bona fide* on the side of States as it is usually used in similar vein in international human rights enforcement bodies. To act in *good faith* obligations owed (*Pacta sunt servanda*) under international law is one of the principles of Vienna Convention on the Laws of Treaties under Article 26. The Statute provides some guidelines for the interpretation of *unwillingness* and its determination under Article 17(2) (a) - (c). *Unwillingness* occurred when (a) [t]he proceedings were or are being undertaking or the national decision was made for the purpose of *shielding the person* concerned from criminal liability for crimes with the jurisdiction of the ICC; or (b) [t]here has been an *unjustified delay* in the proceedings which in the circumstance is inconsistent with an intent to bring the person concerned to justice; or (c)[t]he proceedings were not or are not being conducted *independently or impartially*, and they were or are being conducted in a manner which in the circumstances, is inconsistent with an intent to bring the person concerned to justice. The reference to the key issues unjustified, delay of justice and the lack of independence or impartially in carrying out the domestic proceedings draws *some sort of objective boundaries* to the assessment making the test less subjective.[74] Moreover, the Statute used that the Court shall consider principle of due process recognized in international law to lessen the subjectivity test. This requirement of quality of justice in the domestic criminal jurisdiction is supported under Article 21(3) of the Statute.[75] The Appeals Chamber in *Lubanga* confirmed such understanding when it stated that Article 21(3):

[71] John T. Holmes, (2001) "Jurisdiction and Admissibility", in Roy S. Lee et al. (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* Ardsley: Transnational Publishers, p49 as cited in Supra note at 47. p163
[72] Ibid
[73] Supra note at 35, p132
[74] Supra note at 56, p 168
[75] Article 21(3) of the Rome Statute-*The application and interpretation of law pursuant to this Article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds*

> [R]equires the exercise of jurisdiction of the Court in accordance with the internationally recognized human rights norms…Human rights underpin the Statute; every aspect of it…first and foremost in the context of the Statute, the right to a fair trial, a concept broadly perceived and applied, embracing the judicial process in its entire.[76]

However, the requirement under Article 17(2) (a) appears to be encompassing the other requirements because when a State failed to discharge Article 17(2) (b) and (c), it tantamount to infringe the requirement of shielding any person possibly responsible under Article 17(2) (a). The whole purpose of Article 17 is to end impunity as intended by the Rome Statute. A thorough scrutiny is important in the admissibility requirements because States are given the chance to see the case primarily, they may use this opportunity to shield a person from the sight of international criminal law in holding criminals accountable. The following statement is important to quote:

> [W]hile the jurisdiction of an international criminal court was compelling where there was no functioning judicial system, the intervention of the court in situations where an operating national judicial system was being used as a shield required very careful consideration.[77]

Generally, the test of *unwillingness* is purported to check on the effectiveness of national criminal jurisdictional administration and thereby to assure the non-existence of impunity or holding accountable those perpetrators of crimes against the international community.

2.6.2. *Inability* of member States

The test of *inability* of member States is, somehow, clear than the test of *unwillingness*. In order to determine *inability*, the Court shall consider whether, due to *a total or substantial collapse* or

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such as gender as defined in Article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

[76] *Prosecutor v. Thomas Lubanga Dyilo, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19(2) (a) of the Statute of 3 October 2006*, No.: ICC-01/04-01/06-772, 14/12/2006, paras. 36 – 39; See also the recent decision rendered by Trial Chamber I, which refers to the obligation of interpreting the Statute in the light of internationally recognized human rights as set out in Article 21(3) of the Statute: *Prosecutor v. Thomas Lubanga Dyilo, Decision on Victims' Participation*, No.: ICC-01/04-01/06-1119, 18/01/2008, paras. 34 – 35. Cited in supra note at 44, p169

[77] *1995 Ad hoc Committee Report, Para. 45*, as cited in supra note 46, p171

unavailability of its national judicial system, the State is *unable to obtain the accused* or the *necessary evidence and testimony* or otherwise *unable to carry out* its proceedings.[78] In case of *inability* test, it is more of objective and easy to determine as compared to the *unwillingness* test. It was in such case that the ICTY and ICTR were empowered to have the primary jurisdiction over national criminal jurisdiction because the States were faced a total or substantial collapse of the necessary State apparatus including inadequate availability or unavailability of the judicial system. *Inability* of member States to investigate, prosecute or try the perpetrators may emanate from:

> [P]ublic disorder, natural disasters and chaos resulting from a civil war or the unavailability of an effective judicial system, that is, one capable of guaranteeing a full, effective domestic criminal process in relation to a certain situation or case.[79]

Generally, *inability* of a State to hold accountable perpetrators of human rights violations is caused due to a total or partial rapture of State machineries especially the judiciary.

2.7. Jurisdictions of the ICC with Regard to Non-member States

ICC can assume jurisdiction for crimes pin down under Article 5 of the Rome Statute if committed after the entry into force of the Rome Statute (1 July, 2002) and either on the bases of self-referral (State referral)[80], self-initiative of the ICC Prosecutor (*proprio motu*)[81] and UNSC referral.[82] Beyond this, there could be auto-referral by a non-member State country if the State relinquishes its jurisdiction voluntarily to the ICC, like *Cote d'Ivoire*. Despite the fact that the Court is an independent judicial organ and not part of the UN, a means is crafted under the Rome

[78] Article 17(3) of the Rome Statute-In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or *otherwise unable to carry out its proceedings.*

[79] *Paper on Some Policy Issues before the Office of the Prosecutor,* September 2003, p. 2. As cited in Supra note 39

[80] Article 13(a) cum 14 of the Rome Statute- *A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14*;

[81] Article 13(c) cum 15 of the Rome Statute - *The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15*; or

[82] Article 13(b) of the Rome Statute - *A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations;*

Statute whereby the Court and the UNSC could enter into an agreement for referral purposes. *Preamble nine* of the Rome Statute provides the following:

> Determined to these ends and for the sake of present and future generations, to establish an *independent permanent International Criminal Court* in relationship with *the United Nations system*, with jurisdiction over the most serious crimes of concern to the international community as a whole;[83] (*Italics mine*)

Moreover, Article 2 of the Rome Statue provides that the Court shall *be brought into relationship* with the United Nations through an agreement to be approved by the Assembly of States Parties to this Statute and thereafter concluded by the President of the Court on its behalf. The UNSC referral under the Rome Statute "emanates from the mandate of UN Charter Chapter VII" to maintain international peace and security. Hence, if there is anything which could fall under Chapter VII of the UN Charter, the UNSC could refer the case to the ICC. However, UNSC is blamed for its unresolved problems of veto power for the decision whether to refer the case or not. Beyond this, any non-member country's citizen or crime committed in its territory which constitutes crimes under Article 5 of the Rome Statute could be held accountable under the ICC Rome Statute through the UNSC referral.

The justice –politics dilemma comes to the fore in such scenario because the ICC Rome Statute cannot prosecute citizens or crimes committed in the territory of non-member countries with the exception of UNSC referral which is entangled with veto power. For example, USA is a non-ratifying country to the ICC Rome Statute and its citizens or crimes committed in its soil cannot be prosecuted under ICC despite there is evidence justifying the *unwillingness or inability* of USA to investigate or prosecute or try the case. But to investigate, prosecute and try such events under the ICC, three steps are expected to be complied with. Firstly, UNSC must refer the case to the ICC if the situation falls under its mandate, *Chapter VII*. Secondly, the referral of the UNSC must have the blessing of the USA which is impossible because it is veto power holder. Finally, ratifying countries could refer the case to the ICC if a citizen of the USA commit a crime in the soil of other countries but still impossible because USA has concluded a Bilateral Immunity Agreements (BIAs) with most ratifying countries of the ICC Rome Statute especially

[83] Preamble nine of the ICC Rome Statute

in Africa where member countries to the ICC Rome Statute are more than thirty.[84] Therefore, the agreement between UNSC and the ICC Rome Statute is an obliquely intended power by the international politics in the UN to dilute the justice system in the ICC.

Coming to children's participation in warfare, this problem will also happen never mind the exclusion of jurisdiction by the ICC to exercise its complementarity jurisdiction over national criminal jurisdictions. More will be discussed about this under *Chapter Three* section 3.8 of the thesis.

2.8.Interplay of Impunity and Accountability for Human Rights Violations

It is not arguable that impunity and human rights in general and child right in particular have much interplay. Impunity arises where those responsible for acts that amount to serious human rights violations are not brought to account or justice as defined hereinabove. Impunity is caused or facilitated notably by the lack of *diligent reaction of institutions* or State agents to serious human rights violations.[85] As a result of this, ending impunity is articulated as one of the purposes of the Rome Statute in *Preamble Ten and many other Articles*. The existence of impunity (lack of accountability) nationally and internationally, encourages repetition of crimes as perpetrators and others feel free to commit further offences without fear of punishment[86] thereby increase serious human rights violations. And hence, impunity must be fought as a matter of justice for the victims, as a deterrent to prevent new violations, and to uphold the rule of law and public trust in the justice system, including where there is a legacy of serious human rights violations.[87]

Many International Human Rights Covenants and Regional Human Rights Documents emphasized on providing an *effective redress* to violations of human rights, which attained the

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[84] Isaac Bakayana, (2007). "Enforcing Uganda's Amnesty Act (2000) Within the Context of the Rome Statute" 13 *East African Journal of Peace and Human Rights* 321, 326 as cited in Ifeonu Eberechi. (2011). "Rounding Up the Usual Suspects": Exclusion, Selectivity, and Impunity in the Enforcement of International Criminal Justice and the African Union's Emerging Resistance. *African Journal of Legal Studies* 4, pp 51-84. Martinus Nijhoff publishers p 83

[85] Infra note at 89, article I (1)(2)

[86] Council of Europe, (2011). Eradicating impunity for serious human rights violations. Guidelines adopted by the Committee of Ministers on 30 March 2011 at the 1110th meeting of the Ministers' Deputies. Preamble two. available at http://www.coe.int/t/dgi/publications/others/h-inf_2011_7en.pdf (accessed on 02 August 2013)

[87] Id, preamble three.

status of *customary international law.*[88] For example Article 13 of the European Convention on Human Rights, Article 2 of the ICCPR, Article 8 of the UDHR and as reflected in the United Nations General Assembly's Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.[89]Moreover, criteria for an effective investigation are set under the *Guidelines* on how to end impunity by closing every legal or otherwise of loopholes leading to impunity. These criteria include adequacy of the investigation, thoroughness in its scope, impartiality and independence, promptness, and public scrutiny which is closely regulated under the Rome Statute on determination of admissibility before the Court. *The Reparation Principle of the United Nations* which was endorsed by the Human Rights Council in 2006, related impunity in the following way:

> The impunity issue and the reparations issue are undoubtedly *interrelated*, certainly from the perspective of transitional justice in societies emerging from dark episodes of violence, persecution and repression.[90] (*Italic mine*)

From the forgoing understanding, it can be said that crafting mechanisms of accountability for those perpetrators of human rights violations reinforces the transitional justices warranting future peace and order of a previous societies in violence. And hence, the blanket exclusion of jurisdiction of persons below the age of eighteen by the ICC Rome Statute is opening for impunity and assures the continuity of serious human rights violations and disorders. More will be addressed on such in *Chapter Four* of the thesis.

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[88] Customary International Law is unwritten law created by State Practice informed by a sense of legal duty (*opinio juris*), however, this principle is not clear with regard to the principle of international criminal law as to the principle of legality and non-retroactivity of criminal law.

[89] United Nations, (2010). General Assembly Resolution 60/147(*Reparation Principle*) Available at http://untreaty.un.org/cod/avl/pdf/ha/ga_60-147/ga_60-147_e.pdf (accessed on 02 August 2013)

[90] Ibid

Chapter Three

International Legal Frameworks Governing Recruitment, Conscripting and Using of Persons below the Age of Eighteen in Armed Conflicts

The legal regime governing the recruitment and using children in armed conflicts are found in different Convention and UN Resolutions including the *United Nations Convention on the Rights of the Child and its Optional Protocol on Involvement of Children in Armed Conflict, ICC Rome Statute, AP I and II on Geneva Conventions 1949, and the Beijing Rule and UN Resolutions(1261(1999),1314(2000),1379(2001),1460(2003) and 1539(2004))* which can be categorized under different but interrelated legal regimes of International Human Rights, International Criminal Law and International Humanitarian Law respectively.

Moreover, specific provisions concerning the rights of children are embodied in the UN Human Rights Treaties bodies *inter alia*, ICCPR, ICESCR, UDHR, ILO Convention No. 182, and CEDAW. Due to the minimum dialogue between such subject matters, the regulation on child soldiers becomes much more complex and fragmented, leaving violations of human rights unaddressed or difficult for implementation in the international criminal law. This is of course partly attributable to the difficulty of ascertaining age of criminal majority on the involvement of children in warfare. Moreover, as domestic jurisdiction is the main forum for the enforcement of human rights, obligations of States is not clear with regard to child soldiers allowing them to determine the MACR creating disparity among different States. Above this, the diehard State Centric theory of Westphalia for non-interference over sovereign countries opens wide disparity to the understanding of human rights which impends the accountability mechanism of perpetrators of human rights violations.

3.1.Antecedents of Child Soldiers

From the very beginning of human history, conflicts over food, territory, riches, power, and prestige have been an almost constant recurrence.[91] And hence, the world community cannot avoid warfare. From early times, International Customary Law and other laws (*jus in bello*) and

[91] Supra Note at 27, P3.

jus ad bellum were trying to regulate effects of war and *legitimacy of war*[92] on civilians worth of protection but the modern law comes into existence in International Humanitarian Laws.[93]

Children were treated as civilians and were accorded special protection under the *jus in bello (IHL)*, the principle of distinction, among others. In the history of warfare, the role of children was shifting from non-participant civilian to active participants in due course. In addition, child soldiers have been serving in significant numbers on every continent of the globe but Antarctica and the issue of children participating in armed conflict is now a global concern in scope and massive in number.[94] For the purpose of this thesis, I will not discuss about participation and enlistment of children in armed conflicts beyond *WWII*. This holds true because child soldier is a recent origin in international human rights discourses. The *Geneva Convention of the 1949* did not include the concern of children but children were categorized under civilian; non-combatant.

> These various categories among the *civilian population* are based on a very simple criterion: they are persons who are *taking no part in the hostilities* and whose weakness makes them incapable of contributing to the war potential of their country; they thus appear to be particularly deserving of protection.[95] (*Italics mine*)

The Regulation of child soldiers comes to existence in the 1977 *Additional Protocols to the Geneva Convention under International Humanitarian Law (IHL)*. A wide range of coverage and protection increases as time went by from *AP I and II* to the *Optional Protocol on the Involvement of Child Soldiers in Armed Conflict*. The following can be a summary of children's participation in early times:

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[92] Threat or use of force is prohibited under Article 2(4) of the UN Charter but a means is crafted under the UN Charter Article 51 whereby States, either individually or collective, are inherently allowed to take self-defense measures against any armed attack or use of force. But this is until the UNSC will take the case over. And hence, the means to happen war is not closed and the opportunity of children participating on such will exist as the Optional *Protocol Preamble Paragraph 12* clearly give reference to of the UN Charter and Humanitarian Law in.

[93] Common Article 3 of the Geneva Conventions articulates that "Persons taking no active part in hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall be treated humanely in all circumstances, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

[94] Supra Note at 27, PP15-16

[95] Jean Pictet, (ICRC, 1958), *Commentary, IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (, 1958), p.284. As Cited in Howard Mann, (1987), International Law and the Child Soldier.
The International and Comparative Law Quarterly, Vol. 36, No. 1, pp. 32-57, Cambridge University Press, British Institute of International and Comparative Law, Available at http://www.jstor.org/stable/760458 (Accessed on 25/06/2013 03:50)

- 1212 between French and German War of Children's of Crusades in the Middle Ages to hold the Holy Land of Jerusalem[96]
- 1864 American Civil War[97]
- 1918 US School Garden Armies [98]
- 1980s War conflagration between Iran-Iraq [99]
- 1990s an estimated 1.5 million children were killed and another 4 million were injured by warfare, while 12 million become refugee in different countries. [100]
- 2000 and 2001 in Gaza Strip Palestinian Children against Israel –Day of Rage[101]
- 2001 Johnny and Luther Htoo led a band of Karen Rebels called "God's Army" against the government of Myanmar. They were thirteen and fourteen years of old.[102]

In different parts of Africa, Sierra Leone (Revolutionary United Front), Uganda (Lord's Resistant Army), Sudan and South Sudan, Central Africa Republic, Somalia, Rwanda and etcetera children do participate in hostilities.[103] Africa is more vulnerable in child warfare because nearly 50% of Africa's population is under the age of eighteen.[104] However, this problem is not only in Africa but democratic States like the United States and UK recruits children less than the age of eighteen.[105]

> The exclusion of children from warfare has held true in almost every traditional culture. For example, in pre-colonial Africa armies the general practice was that the warriors typically joined three to four years after puberty. In the Zulu tribe, for instance, it was not until the age of eighteen to twenty that members were eligible for *ukubuthwa*(the drafting or enrollment into the tribal regiments). In the Kano region of West Africa, only married men were conscripted, as those unmarried

[96] James Alan Marten (2002). Children and War: A Historical Anthology. New York University, Page
[97] Ibid
[98] Ibid
[99] Ibid
[100] Ibid
[101] Ibid
[102] Ibid
[103] Supra Note at 95 , pp. 32-57
[104] Christine Ryan, (2012). The Children of War: Child Soldiers as Victims and Participants in the Sudan Civil War (1983-2005), I.B. Tauris and Co Ltd.P1
[105] Rachel Brett, (1996), *Child Soldier: Law, Politics and Practice*. 4 International Journal of Child Rights 115, 125 n.19 as cited in Nsongurua J. Udombana (2006). War is not a Child's Play: International Law and Prohibition of the Children's Involvement in Armed Conflict. *Temple International and Comparative Law Journal,* P61

> were considered too immature for such an important job as war. When children of lesser ages served in ancient armies, such as the enrollment of Spartan boys into military training, at age seven to nine, they typically did not serve in combat. Instead, they carried out more menial chores, such as herding cattle or bearing shields and mats for the more senior warriors. Likewise, the Bible tells of the young shepherd David slaying Goliath. But in absolutely no cases were traditional tribes or ancient civilizations reliant on fighting forces made up of young boys or girls. These are ancillary roles as played by Medieval Europe.[106]

However, the regulation and responsibility of child soldiers are regulated under *Geneva Conventions of AP I and II of 1977, Convention on the Rights of Children of 1989 and its Optional Protocol of 2000, and the ICC Rome Statute of the 1998,* among others and I will see cases of child soldiers in such Conventions in majority circumstances.

3.2.Recruiting Children for Armed Conflicts

David M. Rosen provided the following comments on recruitment of children to active hostilities:

> The primary locus of the child soldier problem has shifted from recruitment by the armed forces of nation-states to recruitment of children by non-State armed groups, such as insurgents; militants; rebels; revolutionary movements; guerilla fighters; global terrorist networks; regional tribal, ethnic, and religious militants; and local defense organizations.[107]

Furthermore, the phenomenon of children's recruitment into armed forces is particularly alarming because today's conflicts have become increasingly internalized and localized, often grounded in a nationalist, ethnic, and religious dissension.[108]

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[106] Supra Note at 27, P9

[107] David M. Rosen, (2012). Child Soldiers: A Reference Handbook. Contemporary World Issues, ABC-CLIO, LLC,P2

[108] Amy Beth Abbott, (2000) ,*Child Soldiers: The Use of Children as Instruments of War*, 23 SUFFOLK TRANSNAT'L L. REV. 499, 507-08 As cited in Nsongurua J. Udombana (2006). War is not a Child's Play: International Law and Prohibition of the Children's Involvement in Armed Conflict. *Temple International and Comparative Law Journal,* P61

There are many compelling conditions that lure children to join the armed conflicts, *inter alia*, extreme poverty, lack of livelihood opportunities, the desire to join peers, avoidance of school, problems with family members or relatives and family breakdowns. And hence, recruitment can be either compulsorily or voluntarily.

3.2.1. Compulsory Recruitment

Compulsory implies that a certain force makes the person do something.[109] Let me begin by discussing the Parent Convention on child soldiers with regard to compulsory recruitment.

Article 38(1) of the CRC provides that compulsory recruitment can be made to any person who has attained the age of fifteen. However, State Parties shall endeavor to give priority to persons who are oldest when there is an available option between oldest and youngest in age as per Article 38(2) of the CRC. A gross reference is made to International Humanitarian Law under such provision. Materially speaking, Article 38 is clearly an International Humanitarian Law provision but formally speaking Article 38 is part of human rights instruments which clearly shows their complementarity. Though there is a new dimension of merger between these bodies of laws, a slit difference exists where International Humanitarian Law is only applicable in times of war whereas International Human Rights Law is applicable in both times of war and peace with the exception to derogation.

Among the Four Geneva Conventions of the 1949, the Fourth one bestowed some protection to children under the category of civilians; non-combatants (Articles 14,17,23,24 and 132 of the Fourth Geneva Convention). Clearly, these provisions fall short of addressing protection to child soldiers. Hence, *AP I and II* comes with certain provisions for the protection of child soldiers though inadequate in 1977. *AP I* is about international armed conflicts and did not cover the non-international armed conflicts which are covered by the AP II. Both Conventions set the minimum age of compulsory recruitment at fifteen.

Article 2 of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts provides that States Parties shall ensure that persons

[109] Tiny Vandewiele, (2006), A Commentary on the United Nations Convention on the Rights of the Child, (Optional Protocol the Involvement of Children in Armed Conflicts). Martinus Nijihoff Publishers, p29

who have not attained the age of eighteen years are not compulsorily recruited into their armed forces. From this, compulsory recruitment is laminated and can be explicated that States can compulsorily recruit any person who have attained the age of eighteen however, there is no compulsory recruitment for persons below the age of eighteen.

Beyond these, the ICC Rome Statute under Article 8(2) (b) (xxvi) and Article 8(2) (e) (vii) put that conscripting or enlisting or using children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities is war crime. From this, it can be explicated that armed forces of government or armed groups can conscript or enlist or use children above the age of fifteen and it does not constitute war crime under the ICC Rome Statute.

3.2.2. Voluntary Recruitment

This is a scenario whereby any person can be recruited voluntarily to an armed force if she/he is below the age of eighteen which cannot be recruited compulsorily. Under Article 3(1) of the Optional Protocol which a reference is given to the Parent Convention Article 38(3), four walls of protection are devised taking into consideration that voluntarism is susceptible for abuse. These safeguards under Article 3(3) of the Optional Protocol include a) such recruitment is *genuinely* voluntary; b) such recruitment is carried out with the *informed consent of the person's parents or legal guardians*; c) such persons are *fully informed of the duties* involved in such military service; and d) such persons provide *reliable proof of age* prior to acceptance into national military service. These safeguards appear to be interesting but it sounds impractical because many child soldiers, for example in Africa, come from poor families and are often children without parental care, or refugees or internally displaced persons or orphans.[110] Beyond this, the reliable proof of age is impractical as many nations did not have or did not exercise registration of birth. Another added problem in a voluntary recruitment is the consent of parents which emanates from the assumption that children cannot appreciate their undertakings due to incompetence and lack of appropriate wisdom however, Article 12 of the CRC is bedrock for the rights of children's participation challenging the assumption.

[110] Supra Note at 7, P205

Still however, the safeguards are trying to strike a balance between the role of the child and parents in the decision making with regard to the voluntary recruitment.

> [o]ne of the problems is that young people can easily be forced to say they joined voluntarily; we witness this in many places. Is it truly voluntary when there are immense pressures to join armed forces and there are few options for those who do not join?[111]

Genuine voluntarism on the side of a child to be recruited for armed conflict is misleading[112] one for the fact there are many compelling reasons to defeat this *genuine voluntarism*.

> "They filled the forms and asked my age, and when I said 16, I was slapped and he said, 'You are 18. Answer 18' He asked me again and I said, 'But that's my true age'. The sergeant asked, 'Then why did you enlist in the army?' I said, 'Against my will. I was captured.' He said, 'Okay, keep your mouth shut then.' and he filled in the form. I just wanted to go back home and I told them, but they refused. I said, 'Then please just let me make one phone call,' but they refused that too."[113]
>
> *Maung Zaw Oo, describing the second time he was forced into the Tatmadaw Kyi (army) in 2005*

Under the voluntary recruitment armed groups that are distinct from the armed forces of a State should not, under any circumstance, recruit or use in hostilities persons under the age of eighteen years as articulated under Article 4(1) of the Optional Protocol. In this respect, it appears commendable because child recruitment below eighteen is higher and harsh in armed groups

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[111] Vandergrift, K. (2004), International Law Barring Child Soldiers in Combat: Problems in Enforcement and Accountability: Challenges in Implementing and Enforcing Children's Rights', Cornell International Law Journal 37, 550. As cited in Benyam D. Mezmur (Dr.) (2008), *Children at Both Ends of the Gun: Child Soldiers in Africa.* In Julia Sloth-Nielsen, (2008), Children's Rights in Africa: A Legal Perspective. *University of the Western Cape, South Africa*,Ashgate Publishing Company, P206

[112]P.W. Singer, (2006). Children at War. University of California Press. P62. As cited in Mark A. Drumbl (2013), The Effects of the *Lubanga* Case On Understanding and Preventing Child Soldiering.
Washington and Lee University School of Law - Sydney Lewis Hall – Lexington - VA – 24450. P11. Available at http://ssrn.com/abstract=2253494 (Accessed on 27 September 2013)

[113] Human Rights Watch (HRW), (October 2007),Sold to be soldiers – The recruitment and use of child soldiers in Burma, http://www.childsoldiersglobalreport.org/content/voices-child-soldiers as cited in Kirthi Jayakumar, (2007) Wars and the Child- The Unending Saga of Child Soldiers. Available at http://ssrn.com/abstract=1745284 (accessed on 19 June 2013)

than in government armed groups as explained hereinabove. But ignoring totally armed groups from the ambit of regulation in such scenario will undermine the implementation of the Optional Protocol.[114]

> *We prefer to recruit children at the age of eleven or twelve. - Syed Salahuddin, Supreme commander of Hizbul Mujahideen(Kashmir –based militant group)*[115]

This is due to the blind obedience of children to orders of a commander and easy to discipline them than adults. Furthermore, children are recruited because they are perceived to be cheap and expendable commodities that are easier for guerrilla soldiers to indoctrinate and control child soldiers than adults as children are raised in most parts of the world to follow instructions.[116]

3.2.3. Military Schools

With regard to military schools, Article 3(5) of the Optional Protocol exempts military schools from the new rules on voluntary recruitment. This exemption is to protect the right to education of any person to join either military or otherwise of his choice as encapsulated under Articles 28 and 29 of the CRC which is given reference by the Optional Protocol for the realization of the right to education. However, a caution should be made as to the choice of children to join military schools as has been given some safeguards to the voluntary recruitment. This is because, children are not fully autonomous and are not well informed about the consequences of their choices. In such aspects, due regard must be made to the principle of best interest of the child encapsulated in the CRC and the Optional Protocol where a primary consideration in all actions must be given to children. However, a beam balance must be kept in mind in appreciating between participation and vulnerability.

> *I regret that I fought and hate the war. It took everything from us. I have studied [until] sixth class. If there was not war, I would have already finished school by now. –R., Age 18)*[117]

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[114] Supra Note 7, PP206-207
[115] As cited in P.W. Singer, (2006). Children at War. University of California Press, P27
[116] Nsongurua J. Udombana (2006). War is not a Child's Play: International Law and Prohibition of the Children's Involvement in Armed Conflict. *Temple International and Comparative Law Journal, p67*
[117] As cited in P.W. Singer, (2006). Children at War. University of California Press, P27

3.2.4. Emancipated Children

Emancipation is the act by which one who was unfree or under the power and control of another, is rendered free or set at liberty and made his own master.[118]An emancipated child is a person who is at liberty to do the roles of adults including soldiering. And hence, emancipated children have the liberty right to participate in soldiering as adults. The definition set under Article 1 of the CRC provides a way whereby a child can be major before the attainment of the age of eighteen in certain State. For emancipated children, a compulsory recruitment is possible and participation in active hostilities is equally regulated as adults. The concept of emancipation is provided neither in the Optional Protocol nor in any Convention except in the CRC. However, the ACRWC totally closed the opportunity of being major before the age of eighteen as clearly articulated under Article 2 forbidding State's earlier legal emancipation.

3.2.5. Cross-border Recruitment

One of the difficulties in the protection and regulation of child soldiers is cross-border recruitment. This is true because cross-border recruitment involves two or more States citizens. Cross-border recruitment especially in border disputes among neighboring nations is extensive. For example, Gliding back and forth across the borders of Guinea, Burkina Faso and Sierra Leone is a migrant population of young fighters –regional warriors –who view war mainly as an economic opportunity.[119] The Optional Protocol is limited use in addressing cross-border recruitment, if any at all.[120] Paragraph eleven of the *Preamble of the Optional Protocol*, provides '[c]condemning with the gravest concern the recruitment, training and use within and *across national borders* of children in hostilities by armed groups distinct from the armed forces of a State…'(*italics mine*). Though a *Preamble* forms part of a treaty's context, the notion of cross-border recruit is not supported substantively nowhere in the Optional Protocol.[121] The issue of cross-border recruitment raises extra-territorial obligations of States currently emerging in the International Human Rights discourses and will be governed by such concepts. This concept articulates that if human rights are going to be universal across the globe, corresponding

[118] Henry C. Black. (1990). Black's Law Dictionary. West Publishing Co.6th edition ,P251
[119] Human Rights Watch (2005b), Youth, Poverty and Blood: the Lethal Legacy of West Africa's Regional Warriors. Available at http://hrw.org/reports/2005/westafrica0405/westafrica0405text.pdf (accessed on 22 July 2005), As cited in Id, P208
[120] Ibid
[121] Supra Note at 7, P208

obligation of States should also be universal without territorial limitations. Cross-border recruitment can be worse in Africa where abusive interstate wars and conflicts[122] provide fertile ground for the abusive recruitment, enlistment and use of children into hostilities.

Moreover, most of the time non-government armed groups are fighting government armed forces hosting their center in neighboring countries attracting many children to their armed groups from refugees, street, politically discontented and others which make the age problem more difficult to control. This is especially true for non-government armed groups which the international legal parlance did not give any incentive by totally prohibiting them not to recruit, enlist or use any person below the age of eighteen without exception.

3.3.Distinction Between Government Forces and Armed Groups

A distinction is drawn under the Optional Protocol as to government forces and armed groups with regard to recruiting children. But the Optional Protocol nowhere defines what constitutes armed groups that are distinct from the armed forces of States. *Article 1(1) of the AP II* to the *Geneva Convention* lists various objective criteria which must be satisfied in order to qualify a group as armed groups. These criteria includes *under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations* and to implement this protocol. *Responsible command* implies a certain degree of organization sufficient to enable the group to conduct sustained and concerted military operations and impose discipline. *Control* is understood to mean domination of a part of the territory, but it is not specified what part of the territory should be conducted sustained and concerted military operations and to implement the protocol. And the *operations* must not be sporadic and must be planned or prepared by organized armed groups capable of taking concerted action.[123] The last criteria demand that the armed group has the ability to implement the *Additional Protocol*. The absolute prohibition of voluntary recruitment for armed groups different from government forces though appears smart, shows the traditional view that only States have obligations under International Human Rights Law, whereas, the behavior of non-

[122] Yaoundé Declaration, (July 8-10, 1996). (Africa: Preparing for the 21st Century), ¶ 6, OAU Doc. AHG/Decl.3 (XXXII) As cited in Nsongurua J. Udombana (2006). War is not a Child's Play: International Law and Prohibition of the Children's Involvement in Armed Conflict. *Temple International and Comparative Law Journal,* P62

[123] International Committee of the Red Cross,(27 October 1997), Optional Protocol to the Convention on the Rights of the Child concerning the involvement of children in armed conflicts: Position of the International Committee of the Red Cross Geneva, Not 17, No. 50

States entities is be regulated by domestic law. Hence, rebel groups are under a moral obligation rather than a legal obligation, making compliance to non-State parties will thus be difficult. However, this is not true for the ICC Rome Statute where it prosecutes individual responsibility under international criminal law because [a]ny criminal responsibility in relation to child soldiers will lie only with individuals[124] and will be seen in *Chapter Four* later in this parameter.

With regard to government armed forces, some guidelines are provided under Article 43(1) of *AP I* in the following manner:

> The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.

Moreover, *Article 43(3) of AP I* is also germane in this affair, as it states that: "Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict." This would seem to suggest that recruitment of children, who have not yet attained fifteen years of age into such organizations, unless they fall within Article 43(1), is not *per se* criminal.[125] Article 4(3) of the Optional Protocol is intended to apply the principles of International Humanitarian Law that all parties to a conflict must be treated on foot of equality and hence, armed groups that are distinct from the armed forces of a State must be treated equally in active hostilities taking into account the principles of International Human Rights. From this, it is understandable that children recruited and already have the status of a combatant must be treated in equal footage with other adult soldiers of government armed forces. Article 4(1) of the Optional Protocol on armed groups that are distinct from the armed forces of a State is without incentive for rebel groups to adhere to better standards pragmatically as compared to armed forces of government which are given a chance to recruit children below eighteen voluntarily as stipulated under Article 3(3) of the Optional

[124] Supra Note at 14 , p30.
[125] Matthew Happold,(2005), Child Recruitment as a Crime under the Rome Statute of the International Criminal Court. University of Hull, PP8-9, Available at

Protocol. The Optional Protocol did not provide any incentive for rebel groups which encourages them to change their minds of recruiting children below eighteen as compared to government armed forces.

3.4.Direct and Indirect Participation in Armed Conflicts

The degree of participation of children in hostilities could be either direct or indirect. The United States interpretive declaration to the 2000 Children in Armed Conflict Protocol asserts that the term "direct part in hostilities":

(i) Means immediate and actual action on the battlefield likely to cause harm to the enemy because there is a direct causal relationship between the activity engaged in and the harm done to the enemy; and

(ii) Does not mean indirect participation in hostilities, such as gathering and transmitting military information, transporting weapons, munitions, or other supplies, or forward deployment.[126]

Under International Humanitarian Law, the concept of direct participation in hostilities refers to conduct which, if carried out by civilians, suspends their protection against the danger arising from military operations. Who is a civilian will be determined by the circles of persons who are protected against direct attack unless and for such time as they directly participate in hostilities. Direct participation in hostilities happens when a conduct of an individual that leads to the suspension of a civilian's protection against direct attack. However, in case of doubt, the benefit of the doubt should given to the protection of the civilian and hence, the person must be presumed to be protected against direct attack.

The CRC under Article 38(2), the Optional Protocol under Article 1 and the ACRWC under Article 22(2) all prohibit children taking a 'direct part' in hostilities. 'Direct' according to Benyam D. Mezumer (Dr.) seems to imply a combatant position and to exclude supplementary roles(serving as scouts, porters and the like) which also involve a great risk for the life, survival and development of the child. However, *APII* Article 4(3) (c) provides an obligation to take all

[126] United States Interpretive Declaration to Optional Protocol, 2(B) (i) and (ii) as cited in Steven Freeland. (2008). Mere Children or Weapons of War-Child Soldiers and International Law. University of LA Verne Law Review vol. 29, p38. Available at http://ssrn.com/abstract=1306169 (Accessed on 19 July 2013)

the necessary measures to ensure that children under eighteen would not *take part in hostilities*. The phraseology 'direct' participation in hostilities used in both the Optional Protocol and the CRC is, in my view, creating a problem in the establishment of accountability of those persons who are allowed to participate in armed conflicts. Therefore, the use of direct participation in hostilities is a misnomer leaving children in the horrific situations of conflicts as indirect and supplementary roles of conflicts. This argument is buttressed by the *Cape Town Principles* abandoned any distinction between direct and indirect participation by defining child soldiers as 'any person under eighteen years of age who is part of any kind of regular or irregular armed forces or group in any capacity.[127] And the *Paris Principle* also avoids the distinctions by stating as in *any capacity* in warfare under 2(1). Though the *Cape Town Principle* and *Paris Principle* are not binding, they are well crafted to do away with the problem of direct and indirect distinction for children as a best practice which can be regarded as quasi-legal in character[128]. Both instruments have considerable professional, operational, and political currency, indicating *de lege ferenda*.[129]

Above this, the *APII* Article 77(2) provides the same phraseology with the Optional Protocol and the CRC as provided in the following:

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

The Rome Statute under 8(2) (b) (xxvi) and Article 8(2) (e) (vii) introduced a new dimension of participation as *active* participation in hostilities. Though there is no clear articulation as to the difference between active and inactive participation and whether it is similar with the above direct and indirect participation under the Rome Statute, active participation was not intended to

[127] Supra Note at 125, P2118
[128] Mark A. Drumbl, (2012), Reimagining Child Soldiers in International Law and Policy. Oxford University Press. P5. Available at http://ssrn.com/abstract=1921527 (Accessed on 7 August 2013)
[129] Mark A. Drumbl (2013), The Effects of the *Lubanga* Case On Understanding and Preventing Child Soldiering. Washington and Lee University School of Law - Sydney Lewis Hall – Lexington - VA – 24450. P4. Available at http://ssrn.com/abstract=2253494 (Accessed on 27 September 2013)

exclude the inactive participation in hostilities. However, if we take the interpretation of criminal law very strictly as it deserves, Article 22 of the Rome Statute provides for the principle of legality. The principle of *Nullum crimen sine lege* under Article 22 is all about prohibition of crime by analogy and hence, inactive participation in hostilities cannot be considered as war crime.

3.5. The Nature of Obligations of States in Voluntary Recruitment

The nature of obligations of States with regard to child soldiers, who can voluntarily join the armed forces of states, is vaguely crafted creating problems on the scope of the undertakings of States to the Optional Protocol on involvement of children in armed conflict. Article 1 of the Optional Protocol provides the following:

> States Parties shall take *all feasible measures to ensure* that members of their armed forces who have not attained the age of eighteen years do not take a direct part in hostilities.

The nature of obligation of States could be either obligation of means /obligation of conduct or obligation of result. But the above obligation is obligation of conduct where it is sufficient for States if they take all feasible measure. This means that the obligation framed is not an absolute and there could be individuals below the age of eighteen involving in armed conflicts. This is because the obligation of the State is to take all feasible measures of conduct not of result. Feasible according to International Committee of the Red Cross (ICRC) to mean capable of being done, accomplished or carried out, possible or practicable.[130] But feasibility is not clearly worded in the obligations of States and complicates the protection given to children and the corollary responsibilities. This further worsens that States could take advantage of the Optional Protocol's vagueness to enter decorations interpreting the word "feasible" in ways that weaken their obligations under the Optional Protocol.[131] Because *feasibility* takes into account all the circumstances ruling at the time, including humanitarian and military considerations of military urgencies and can be justified in certain circumstances by States to this end. Furthermore, the

[130] Supra Note at 125, p26
[131] Supra Note at 116, P98

Optional Protocol under *Preamble Paragraph 12* clearly gives reference to Article 51 of the UN Charter for States to take self-defense and to apply Humanitarian Law principles.

In contrast, the obligation under Article 2 is an absolute and obligation of result than obligation of conduct stated hereinabove. States Parties *shall ensure* that persons who have attained the age of eighteen years are not compulsorily recruited into their armed forces (*italics mine*). This is framed in a strong word "*shall ensure"* but the above Article 2 is articulating "*all feasible"* which is less strong in terms of State obligations. In addition, States obligations involve undertaking all appropriate legislative, administrative, and other measures for the implementation of the Optional Protocol. This holds true because State's ratification of a treaty is a *pacta sunct servanda* and in *good faith* as articulated in the Vienna Convention on the Laws of Treaties. Domestication of treaties compatible with the international standards is one of the pillar principles of international human rights system due to the fact that domestic jurisdiction is the main forum for the implementation of human rights in general and children's rights in particular.

3.5.1. Registration of Birth

Under Article 7(1) and (2) of the CRC provides that [t]he child *shall be registered immediately after birth* … and State parties *shall ensure the implementation* of these rights in accordance with their *national law and their obligation under the relevant instruments in the field*, in particular where the child would otherwise be *stateless*. Such stipulation is very important particularly to overcome the problem of age in child soldiers because most of the time recruitment of children into armed forces is made by physical strength due to lack of appropriate birth registration. This is especially problematic for voluntary recruitment for government armed forces in ascertaining the exact age of a recruit. Conditions of statelessness and refugee are conducive for recruiting children below the age of eighteen especially by rebel groups and to close such conditions, registration of birth has a vital importance. According to a report of the Secretary –General on Children and Armed Conflict in Myanmar (Burma) UN S/2013/258, recruiters continued to target working and unaccompanied children at workplaces, bus and train stations, ferry terminals

and markets and in the streets, and orphans and non-working children in home villages and wards.[132]

Despite such stipulation however, registration of birth is highly impractical particularly in Africa. And hence, can be said that States are not discharging international obligations they owed. Though having a legal framework is a step forward, it is not in and of itself an end.

3.5.2. Minimum Age of Recruitment(MAR)

Article 3(2) of the Optional Protocol obliges States Parties to deposit a binding declaration upon ratification or accession. In this declaration, States must set forth the minimum age at which they will permit voluntary recruitment into their national armed forces and describe the safeguards have adopted to ensure that such recruitment is not forced or coerced.[133] Failure of States in submitting a binding declaration results in refusal of acceptance of the instrument of ratification or accession and will be held pending. In contrast to this obligation, the *Beijing Rule* obliges States not to fix the MACR *too low an age* without prohibiting the probability of children's accountability for criminal offences.

3.6.Protection Rights and Liberty Rights of Persons below the Age of Eighteen?

Children's rights are either protection rights or liberty rights which conveniently grouped into three categories: protection, provision and participation of which participation remains by far the most contested and neglected.[134] Participation rights are also means for the realizations of other rights. Usually children are regarded as passive beneficiaries due to their vulnerability rather than active actors in the enjoyment of their rights. The liberty rights of children are not autonomous and must be supported by adults or parents of the children where the protection rights will become complementary.

[132] Report of the Secretary –General on Children and Armed Conflict in Myanmar, 16 Aug 2013 - S/AC.51/2013/2 (UN S/2013/258), P4, Available at http://childrenandarmedconflict.un.org/ (accessed on 25 August 2013)
[133] Supra Note at 109, P34
[134] Iain Byrne, (2003), Participation: the Forgotten 'P' in the Convention on the Rights of the Child. INTERIGHTS Bulletin, A Review of the International Centre for the Legal Protection of Human Rights , Vol. 14 No.2

One of the liberty rights of children is to be voluntarily recruited as a soldier as one case of participation[135]. However, a contention arose between protection rights and liberty rights. ACRWC under Article 22(2) which is against voluntary enlistment is an appropriate humanitarian gesture although its underlying philosophy may conflict with regard to, for instance, freedom of expression.[136] Yet others argue that protection rights are more convincing than liberty rights taking into consideration the common assumptions that children are vulnerable, all child soldiers are abused and exploited-victims, and child soldiers are a product of the new barbarism of war.[137] I will argue later on *Chapter Four* the existence of otherwise of the common assumptions where child soldiers are committing atrocious crimes which can be categorized as serious breaches of the Geneva Convention 1949.

3.7.Overseeing Organ over the OP on the Involvements of Children in Armed Conflicts

The Optional Protocol does not provide for an individual or inter-state complaint procedure nor does it vest the CRC Committee. However, the Committee on the Rights of the Child monitors the implementation of the CRC and the Optional Protocol as clearly referred under Article 8(2) of the Optional Protocol. Under the Parent Convention, the issue of child recruitment and enlistment are provided giving references to International Humanitarian Law, though amended in some way under the Optional Protocol. Above this, the Optional Protocol though does not provide its own implementation mechanism, is part of the Parent Convention. Article 43(1) of the CRC provides that [f]or the purpose of *examining the progress made by States Parties in achieving the realization of the obligations undertaken* in the present Convention, there shall be established a Committee on the Rights of the Child, which shall carry out the functions under Article 44 and 45 of the CRC.

3.7.1. State Reporting

Reporting procedure is the Committee's basic Supervisory tool for the implementation of the Parent Convention, CRC and the Optional Protocols. The report States must submit to the Committee includes both an initial report and periodic reports. Moreover, there is on office of the

[135] Article 3(5) provide that "The requirement to raise the age in paragraph 1 of the present article *does not apply* to schools operated by or under the control of the armed forces of the States Parties, *in keeping with articles 28 and 29 of the Convention on the Rights of the Child*."
[136] Supra Note at 7, P206
[137] Supra Note at 33,PP19-24

Special Representative of the Secretary-General for Children And Armed Conflict working on Children and Armed Conflict on *inter alia*, to review reports on children in armed conflict in specific country-situations, progress made in the implementation of action plans to end violations against children, and other relevant information, and keeping the pressure.[138] The Committee on CRC upon the reception of the reports makes suggestions and general recommendation(concluding observation) and countries whose report shows deviance will be *named and shamed and characterize as persistent violators* of human rights in general and children's rights in particular. Although State reporting provides a unique form of international accountability, the concluding observation upon reception of State reports cannot be guarantee for full implantation. In this concern the U.S. Court of Appeals for the Second Circuit Court stated in *Wiwa v. Royal Dutch Petroleum Co.* "universal condemnation of human rights abuses 'provide[s] scant comfort' to the numerous victims of gross violations [of international human rights law] if they are without a forum to remedy the wrong."[139] This is an implication where it is necessary to have a procedure of accountability for children too.

Beyond State Reporting Mechanism under the Parent Convention, the United Nations Security Council is becoming involved into the affairs of child soldiers. By the application of soft power, Resolutions, the United Nations Security Council has been involving in the issues of conflict – affected children in the 1990s.[140] In 1999, the Security Council adopted its first thematic resolution on the situation of children in armed conflict (S.C.Res.1261 U.N. Doc.S/RES/1261) and other more subsequently. This mechanism is different from the legal sanction mechanism, criminalization process in international criminal tribunals. There is also United Nations Secretary –General's Special Representative for Children and Armed Conflict, for implementation purposes. This power emanates from the UN Charter Article 99.

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[138]Role of the Security Council Working Group on Children and Armed Conflict Resoultion1612 (2005) http://childrenandarmedconflict.un.org/our-work/role-of-the-security-council-working-group/ (accessed on 13 August 2013)

[139]Wiwa v. Dutch Petroleum Co., 226 F.3d 88, 106 (2d Cir. 2000) (quoting H.R. Rep. No. 102-367(I) (1991), reprinted in 1992 U.S.C.C.A.N. 84, 85). As cited in Nsongurua J. Udombana (2006). War is not a Child's Play: International Law and Prohibition of the Children's Involvement in Armed Conflict. *Temple International and Comparative Law Journal*, P99

[140] Supra Note at 125, P362

> The Secretary-General may bring to the attention of the *Security Council* any matter which in his opinion may *threaten the maintenance of international peace and security*. *(Italics mine)*

And hence, the UNSC has established a Monitoring and Reporting Mechanism (MRM) and a Working Group on Children and Armed Conflict although such mechanisms are not strong in bringing the paper into reality saving children from horrific effects of child soldiering.

3.7.2. Individual Complaint

There is no individual complaint procedure under the CRC Committee and the Optional Protocol and meanwhile such complaints may be made to other Committees, like the *first Optional Protocol* on the ICCPR with the competence to consider individual complaints specifically concerning children under the ICCPR.

3.8. ICC Jurisdiction on Non-member States and Persons below the Age of Eighteen

As regards to non-member countries, enlistment or conscripting of children below the age of eighteen compulsorily, could be held accountable under the ICC jurisdiction for enlistment or conscripting if such actions of enlistment or conscripting of children falls under *Chapter VII of the mandates of the UNSC* of international order, peace and security. And hence, there is a chance to countries who are not members to the ICC Rome Statute to be accountable by the UNSC referral agreement with the ICC Rome Statute explained elsewhere above. Detailed perspectives on such will be addressed later on *Chapter Four*.

This scenario can be best explained by the recent arrest warrant to President Omar Hassan al-Basher for the crimes committed in Darfur though problem of cooperation on the sides of AU and the concept of deferral of the ICC are still pending. Though the arrest warrant is not related with recruitment of children below fifteen, it is a case which shows that a non-member country, Sudan is the subject of the ICC due to the agreement of the UNSC and the ICC through referral.

Hence, the issues of child soldiering could be referred by the UNSC if it is believed to be falling under *Chapter VII* of the UN Charter concerning the mandate of the UNSC.

Chapter Four

ICC Jurisdiction on Child Soldiers: Promoting Impunity?

As said above in the introductory part, the ICC Rome Statute has clearly excluded jurisdiction over any person below eighteen at the time of the commission of the crime, leaving the issues of the beginning of age of criminal responsibility unaddressed as clearly articulated under Article 26 of the ICC Rome Statute. However, conscripting, enlisting or using children under the age of fifteen years into *national armed forces* to participate actively in hostilities is a war crime under Article 8(2) (b) (xxvi) and Article 8(2) (e) (vii) of the Rome Statute. From this, it can be said that conscripting, enlisting or using children above the age of fifteen into *national armed* forces to participate actively in hostilities is not a war crime though not clearly permitted. What about the responsibilities of rebel groups? What about the direct and indirect participation in hostilities? What about the dichotomy of international and non-international armed conflicts and their criminal responsibilities for child soldiers?

The CRC and its Optional Protocol on Involvement of Children in Armed Conflict address the issues of child soldiers differently from the ICC Rome Statute. The Optional Protocol provides that children who become soldiers through voluntary recruitment, military schools and emancipation can participate in direct hostilities. What if, a child who becomes a soldier through voluntary recruitment, is taking part in recruiting other children into active hostilities? Is there any criminal responsibility? How the International Criminal Law regulates the issue of vicarious engagement of countries in the recruitment, enlisting or using children into the armed conflicts? For example, Colombia and Zimbabwe vicariously engage in the practice by supporting militias and local armed groups that employ child soldiers.[141]

In this *Chapter*, I will address issues of responsibilities of children under International Criminal Law, International Human Rights Law and International Humanitarian Law and address the bewildering conditions inculcated in such fields of studies with regard to child soldiers together

[141] Timothy Webster, (2007), Babes with Arms: International Law and Child Soldiers. *The George Washington International Criminal Law Review* Vol.39:227-254. P232

with impunity. What will be the future of child soldiers and their responsibilities and corollary rights? Does the existence of impunity assure the violations of children's rights or curb the violations of children's rights? What is the tendency of the international community in fixing the MACR, which is important to solve the whole gamut of the problem?

4.1. International Criminal Accountabilities and Moral Culpability of Persons below the Age of Eighteen?

In this sub title, exploration will be made to the legal frameworks governing the responsibilities of child soldiers beyond the faulty assumption of passive victimhood of children in warfare. The ascertainment of criminal responsibilities for children whether in warfare or in peacetime depends on the variety of images of children. The first image typifies the child soldier as a *faultless passive victims*[142] needing protection from others, adults, due to the assumption of vulnerability. The second image is related to the victim's narrative where children are considered as *irreparable damaged goods*[143]. Hence, the second focuses on the post conflicts in order to protect children from the irreparable damage proactively taking into account their vulnerability especially during warfare. The third image posits the child solder as a *hero*[144], which plays up the independence, conviction, nobility, and enterprise[145] of the child soldier considering the rights of children's rights for participation. And lastly, the fourth image stylizes the child soldier as *demon and bandit: irredeemable, baleful, and sinister*[146]. This image advocates that children are blood thirsty, a young person programmed to commit atrocities according to orders and considered very dangerous. According to Professor Mark A. Drumbl, children below eighteen years of age are imagined in blanket as faultless passive victims conveying a *simple message*[147]. According to him, this simple message is important but insulates the realistic and humanistic aspects of child soldiers under one category. For example, adolescents between the age of fifteen and eighteen should not be treated equally with the other age groups for protection, provision and participation and the degree of criminal responsibilities. On the bases of this, child soldiers, the faultless passive victim image fills the international legal imagination. This image thereby

[142] Mark A. Drumbl, (2012), Reimagining Child Soldiers in International Law and Policy. Oxford University Press. P7. Available at http://ssrn.com/abstract=1921527 (Accessed on 7 August 2013)
[143] Ibid
[144] Ibid
[145] Ibid
[146] Id P8
[147] Id. Available http://www.youtube.com/watch?v=USK6EwX7XlQ (accessed 29 August 2013)

contributes to and influences the substance of international law and policy.[148] The justifications used either to use child soldiers without responsibility or to provide excessive protection as faultless passive victims depends on the interests of States, International Organizations, armed groups and others. This is what is called *the danger of a single story*[149] which did not give the whole picture of child soldering. This is especially true for the international legal imagination of children which treat child soldiers as witness and victims taking out the perpetrator aspects of child soldiers. International legal imagination is a two dimensional ignoring the reality of three dimensional aspects of child soldiering[150] including the perpetrators dimension.

With the above thoughts, an assessment would be made which type of image is inculcated under various treaties concerning child soldiers and thereby appreciate how much the imagination influences child criminal responsibility in warfare.

4.1.1. Additional Protocols to the Geneva Convention 1949

The four Geneva Conventions of the 1949 and their Additional Protocols coupled with International Customary law makes up the body of International Humanitarian Law. From the Geneva Conventions of the 1949, the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War provides protection to children under the auspices of civilian or non-combatants without any special provision on child soldiers. For example, under Article 14 of Geneva Convention IV, hospitals and safety zones and localities so organized as to protect from the effects of war, wounded, sick and aged persons, children under fifteen, expectant mothers and mothers of children under seven are persons protected as civilians, non combatants. Geneva Conventions IV under Articles 14, 17, 23, 24 and 132 articulates a special protection for children as civilians taking into account the assumption of vulnerability of children during warfare.

However, an advanced protection of child soldiers comes during the 1977 of the Additional Protocols to the Geneva Convention. Additional Protocol I Article 77(2) provides:

> The Parties to the conflict *shall take all feasible measures* in order that children who have not attained the age of fifteen years do not *take a direct part* in

[148] Id P8
[149] Chimamanda Adichie, (2013), The Danger of a Single Story. Available at http://www.youtube.com/watch?v=D9Ihs241zeg (accessed on 25 April 2013)
[150] Supra Note at 142 . P20.

> hostilities and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years the Parties to the conflict *shall endeavour* to give priority to those who are oldest.

Though worded in a weak phraseology of obligations of States, AP I urge member States to take all *feasible measures* for children below fifteen years do not take a direct part in hostilities. The *all feasible measures* phrase is an escaping mechanism for States to justify their encroachment on the prohibition on the basis of military necessities. It is implicated that children below fifteen are assumed vulnerable and needs protection on the convention that they did not have any criminal responsibility that could emanate from the commission of crimes in warfare. However, any children above fifteen years of age are beyond the assumption of vulnerable and can participate in a direct hostility. This has been put without placing any corollary duties on the side of child soldiers in case they commit crimes. Furthermore, children who have participated in warfare in exceptional cases will not be denied the protection and benefits of Article 77 as per Article 77(3) AP I. However, during the negotiations to the AP I, a representative of Brazil proposed that what is now Article 77(5) of the Protocol to be amended to add the sentence: "Penal proceedings shall not be taken against, and sentence not pronounced on, persons who were *under sixteen years* at the time the offence was committed."[151] But this proposal was not accepted.

Additional Protocol II provides similar provisions with AP I with the exception that AP II addresses the issues of non-international armed conflicts (Articles 4,6,78, and 79) as opposite to the AP I which concerns with international armed conflict. AP II is more relevant to child soldiers because most wars conducted are of non-international armed conflicts which affect the lives of millions of children. Article 4 of the AP II is relevant for the protection of children. However, the participation of children in a direct hostility will not deny the benefits of children under Article 4(3) (d) of AP II.

[151] Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian law Applicable in Armed Conflicts (1974-1777: Geneva, Switzerland), O.R. III, p. 307; CDDH/III/325. As cited in Matthew Happold, (2007), The Age of Criminal Responsibility in International Criminal Law. P3. Available at http://ssrn.com/abstract=934567 (Accessed on 19 July 2013)

Generally, the Geneva Conventions of the 1949 and their Additional Protocols were approaching children from the imagination of *faultless passive victims* requiring protection without regulating the responsibilities of children in warfare. However, children above the age of fifteen who can participate in a direct hostility will have a responsibility when they commit war crimes though not clearly regulated. The criminal responsibility sides of child soldiers under international human rights and international criminal law is ignored and forgotten due to the imagination that children are not in a position to offend the international community.

4.1.2. UNCRC and Its Optional Protocol

The UN Convention on the Rights of Children, which is very comprehensive, regulates also about child soldiers. The language used under Article 38 of the CRC is generally reflective of the provisions set out in the 1977 AP I and II and a gross reference is made to humanitarian laws (Article 38(1) of the CRC. Article 38(2) is a direct verbatim of the AP I and II:

> States Parties *shall take all feasible measures* to ensure that persons who have not attained the age of fifteen years do not take a *direct part* in hostilities.

Above this, Article 38(3) urges member States to give first priority of recruiting children older in age than those who are youngest placing fifteen years of age as a minimum threshold for participation in a direct hostility. The policy behind Article 38 is twofold: the first policy is the image of children as *irreparable damaged goods where prohibition to participate in direct hostilities is made below fifteen years of age.* And the second policy is the image of children as *faultless passive victims* by allowing participation in a direct hostility above the minimum threshold of fifteen years of age but without placing any responsibility on the sides of child soldiers. In addition to this, the CRC has crafted a mechanism whereby a child can be major through emancipation despite she/he is below eighteen years of age in fact as per Article 1. This is without regulating the consequences of emancipation for criminal responsibilities because the emancipation under the CRC enables children to perform juridical acts including participation in armed conflicts but without a consequence in case of violations of the rules of war.

However, this is without denying the regulation of juvenile offender under Article 40 of the CRC which is not specific to child soldiers. This Article implicates that children could be held liable for criminal offences though there is no clear procedures to this effect. This Article

provides that children are capable to commit crimes defeating the assumption of children as *faultless passive victims*. Article 40(3)(a) of the CRC urges States Parties to establish a minimum age below which children shall be presumed not to have the capacity to infringe the penal law(*doli incapax*). And the Committee on the Rights of Child, General Comment Number 10(2007), children's rights in juvenile justice, did not fix the MACR but stated that any MACR below the age of 12 is not "internationally acceptable"[152]. The Committee urges State Parties to increase their lower MACR to the age of 12 years as the *absolute minimum* age and to continue to increase it to a higher age level[153].

And failure to fix a minimum age of criminal responsibility amounts failure to discharge obligation owed in the international legal parlance. This Article articulates that there is a minimum age of criminal responsibility where a child is at volition to commit criminal offences. This is because Article 12 of the CRC is intended in ensuring that children are *engaged actors rather than passive beneficiaries*[154] in demanding full enjoyment of their rights.

Knowing the inadequacies of the Parent Convention under Article 38, an Optional Protocol on the Involvement of Children in Armed Conflict comes into its existence on 25 May 2000 to complement the Parent Convention on children in armed conflicts. The Optional Protocol upgrades the minimum threshold of recruitment from fifteen to eighteen for compulsory recruitment as per Article 2. Yet a voluntary recruitment is possible above the age of fifteen to armed groups of governments as provided under Article 3(3) (a-d). Still exemptions are made to emancipated children, military schools (Articles 3 (5)) and compulsorily for *indirect hostilities* as per Article 1 of the Optional Protocol for children to participate in hostilities. This is without addressing the issues of criminal responsibilities of children in armed conflicts for potential war crimes. Above this, the Optional Protocol needs an independent ratification to be bound by it and in the majority of circumstances almost all countries are ratifying countries to the CRC. This indicates that the upgrading of the age under the Optional Protocol is non-sense as it requires

[152] Committee on the Rights of the Child, General Comment No. 10 (2007): Children"s rights in juvenile justice, UN Doc. CRC/C/GC/10, 25 April 2007, para. 32
[153] Ibid
[154] Supra Note at 134

independent ratification and still the number of ratification to the Optional Protocol[155] is far less than the Parent Convention.

In a nutshell, both the Parent Convention and the Optional Protocol provide a total weight for the protection of children as faultless passive victims of warfare ruling out the possibility or existing commissions of atrocious crimes by child soldiers. Failure to address this kind of issues will burdensome the reintegration process of children in the post-conflict to the society for decent life. The reintegration process will fail due to the non-existence of a procedure to see the criminal responsibility of children for war crimes. This compels child soldiers to opt to continue to be a soldier from reintegration to the society and thereby assure their continuity as victims and perpetrators unaddressed in the human rights discourse.

4.1.3. ACRWC

African Charter on Rights and Welfare of the Child (ACRWC) under Article 22(2) provides that [s]tates Parties to the present Charter *shall take all necessary measures* to *ensure* that no child *shall take a direct part in hostilities* and refrain in particular, from *recruiting* any child.(*italics mine)*

African children are considered more vulnerable in armed conflicts and a total ban is made to this effect. And there is no mechanism under the ACRWC for a child to attain majority before eighteen as per Article 2. The above provision is better drafted than AP I and II to the Geneva Conventions and the CRC with regard to obligations of member States. The ACRWC under Article 22(3) of the last phrase goes beyond the international and internal armed conflicts dichotomy by including tensions and strife as parts of its project for the protection of children. The ACRWC imagined children as faultless passive victims at all times with no exception. The total ban of children from taking a direct part in armed conflicts could contravene the participation rights of children as articulated under Article 3(5) of the Optional Protocol on Involvement of Children in Armed Conflicts. And this imagination insulates the realistic aspects of adolescents between the age of fifteen and eighteen by giving excessive protection in warfare.

[155] As of 12/11/2013 the numbers of signatories to the Optional Protocol on the involvement of children in armed conflict is 129 and the numbers of parties is 152 available at http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-b&chapter=4&lang=en (accessed on 12 December 2013)

However, Article 17 of the ACRWC is a provision where it administers juvenile justice for potential commission of crimes treating children as capable of committing crimes. Still nothing is said about the capacity of children in committing war crimes and its administration under the ACRWC. Article 17(4) of the ACRWC stated that there *shall be a minimum age below which children shall be presumed not to have the capacity to infringe the criminal law*. This Article implicates that there is a person below eighteen who is capable to infringe the penal law. This implication contravenes the image of children under Article 22 cum 2 of the ACRWC as faultless passive victims who cannot commit war crimes or crimes of any type.

4.1.4. ILO Convention No.182

Though the 1999 ILO Convention No.182 is an important regulation to the best interest of children, it is very shallow in addressing many issues with regard to child soldiers. Under Article 3(a) of the ILO Convention No. 182, it characterizes *forced or compulsory recruitment* as one *forms of worst forms of child labor*. The Convention did not deal how this provision could be enforced by the time violations occur. And for the purpose of the Convention, child is defined as any person below eighteen years of age without any exception for emancipation or other purposes as per Article 2. Taking children as faultless passive victims, the ILO Convention does not have any provision to criminal responsibilities for children as juvenile offenders.

4.1.5. ICC Rome Statute

The ICC Rome Statute was considered by many as a success to the international criminal law as a means to end impunity. Furthermore, the Rome Statute brought an end for the fragmentation of international criminal law due to the continuous establishment of the *ad hoc* tribunals by the UNSC. The coming into existence of the Rome Statute was a dream for the UNSC because UNSC was under tribunal fatigue and unbreable cost[156] of establishing *ad hoc* courts.

Article 26 of the Rome Statute clearly excludes the *ratione personae* below eighteen years of age following the simple assumption of children as faultless passive victims by assuming children for protection only. However, Article 8(2) (b) (xxvi) and Article 8(2) (e) (vii) of the Rome Statute

[156] Carsten Stahn and Göran Sluiter (2009).The Emerging Practice of the International Criminal Court. *Introduction: From "infancy" to emancipation? – A review of the Court's first practice*, Martinus Nijhoff publishers, Vol.48. *P XV*

provides the possibility of adolescents whereby they can participate in warfare above the age of fifteen and below eighteen years of age without constituting war crime.

The Rome Statute is not clear at what age the duty of States to prosecute applies to crimes listed under Article 5 of the Rome Statute when committed by adolescents. This helps to ascertain the extension of duties of States to prosecute children which the ICC Rome Statute surrenders the determination of age to respective member States.

The Rome Statute too imagined child soldiers as faultless passive victims requiring protection and provision only. This can be understood from the readings of the preamble to the Rome Statute stating "[m]indful that during this century millions of *children*, women and men have been *victims of unimaginable atrocities that deeply shock the conscience of humanity*. Yet it also create anomaly by providing contradicting images under Article 26 that children are not in a position to commit crimes whereas enlisting, conscripting or using children for war above the age of fifteen is not a war crime under Article 8(2) (b) (xxvi) and Article 8(2) (e) (vii). The later Articles under war crimes imagined adolescents between the age of fifteen and eighteen as capable and fit for warfare and States are at liberty to conscript, enlist or use adolescents at this age group for armed conflicts. Article 8(2) (b) (xxvi) prohibits [c]onscripting or enlisting children under the age of fifteen years into the *national armed forces* or using them to participate actively in hostilities. What about armed groups other than national armed forces? However, Article 8(2) (e) (vii) prohibits to both armed groups and armed forces without drawing distinction. An illustration on such will be made in the next subtopic.

As per Article 121 of the Rome Statute, a mechanism for amendment was inserted for possible review. After the expiry of seven years from the entry into force of the Rome Statute, any State Party may propose amendments. Taking into consideration this provision, a review conference was held in Kampala, Uganda in 31 May – 11 June 2010. The review conference was heavily discussed about the definition of the crime of aggression. Though USA is not a ratifying country to the ICC, most representatives were from USA in the Kampala Conference. Any amendment made to Articles 5, 6, 7 and 8 of the Rome Statute, there is a need for a State Party to accept the amendment so that the ICC could have jurisdiction. Discussions were circulating to delete Article 124 of the Rome Statute but failed and Article 124 remains part of the Rome Statute. Any

amendment made to the Rome Statute must be ratified independently by States to bind by such amendments.

However, nothing was pondered about child soldiers and Article 26 cum Article 8(2) (b) (xxvi) and Article 8(2) (e) (vii) of the Rome Statute together with other human rights Conventions like the Optional Protocol on the Involvements of Children in Armed Conflicts and the CRC. We must wait seven years in the 2017 to see discussions on these Articles.

4.1.5.1. War Crime and Culpability of Persons below the Age of Eighteen under the Rome Statute

War crime is one of the crimes under the substantive jurisdictions of the ICC Rome Statute. The crime has both general elements and special elements under different constituents. The general requirements include that war crimes must be committed as *part of a plan* or *policy* or as *part of a large –scale commission* as per Article 8 (1) of the Rome Statute during warfare. The special elements under Articles 8(2) (b) (xxvi), which was derived from Article 77(2) of the AP I, constitute the following elements:

a) The perpetrator *conscripted or enlisted* one or more persons into the *national armed forces* or used one or more persons to *participate actively in hostilities*.
b) Such person or persons were under the *age f fifteen years*.
c) The perpetrator *knew or should have known* that such person or persons were *under the age of fifteen years*.
d) The conduct took place in the context of and was associated with an *international armed conflict.*
e) The perpetrator was *aware of factual circumstances* that established the existence of an armed conflict.[157] (*Italics mine)*

Under the *Travaux Pre'paratoirees the word* children was used but the Statute use the word person in order to avoid confusions with national legal systems because children may be defined[158] differently under national criminal systems. Hence, the easiest way is to have any person plus his/her age limit for considering the above elements falling under war crimes. Article

[157] Supra Note at 45, P375.
[158] Ibid

8(2) (e) (vii) of the Rome Statute is similar with the above Article's element of crime with the exception to armed force or groups instead of national armed force. This offence was derived from Article 4(3) (c) of the AP II.

As per Article 77 of the ICC Rome Statute the maximum punishment is life imprisonment. There is no death penalty under the ICC Rome Statute. The abolishment of death penalty under the Rome Statute is compatible with the urging provision of the ICCPR Article 6(5) for abolishment of death penalty. Above this, death penalty cannot be passed to children below eighteen under the ICCPR. This is also in line with the United Nations Rules for the Protection of Juveniles Deprived of their Liberty[159] which alternative to imprisonment can be made under Article 77(2) of the ICC Rome Statute. Hence, the penalties under the ICC Rome Statute could suit to adolescents committing war crimes if the ICC Rome Statute could assume jurisdiction over such individuals. But crimes, under the jurisdictions of the ICC, are without period of limitation or statute of limitation which shows how horrendous such crimes are.

The ICC Rome Statute has a provision where the ICC can use other applicable laws as a source to adjudicate cases before it. These include in hierarchal, the Statute itself, applicable treaties and principles and rules of international law (including the established principles of the international law of armed conflict), *general principles of law derived by the Court from national laws* and judicial precedents of the Court as per Article 21 of the ICC Rome Statute. However, the application and interpretation of these laws by the Court must be consistent with internationally recognized *human rights principles*.

The problem will be clearly manifested if an adolescent between the age of fifteen and eighteen involves in armed conflicts whether international or non-international armed conflicts. And thereby commit crimes under Article 8 of the Rome Statute. The problem will be complicated if national criminal jurisdictions remain *unable* or *unwilling* to prosecute such individuals. This holds true due to the fact that the Rome Statute does not have any jurisdiction to any person below eighteen years of age in blanket.

[159] United Nations Rules for the Protection of Juveniles Deprived of their Liberty, Adopted by General Assembly Resolution 45/113 of 14 December 1990

Coming to the children's culpability of committing crimes under the Rome Statute, it is left unaddressed on the assumption that children are faultless passive victims that laminate the real issue inside. In the first place, International Criminal Law in general and the ICC Rome Statute in particular imagined children in only two dimensions, victims and witnesses[160] leaving out the perpetrator dimension unaddressed. The ICC Rome Statute is not the relevant legislation with regard to children's culpability of committing crimes because of the faulty assumption of the ICC Rome Statute on every person below eighteen as faultless passive victims. War crimes are different from crime of genocide which the later requires a special genocidal intent of the *mens rea*. This makes war crimes easy for adolescent criminal capacity to commit. War crimes require that the prohibited conduct took place in the context of and was associated with an armed conflict but only require proof that the perpetrator was aware of factual circumstances that established the existence of the conflict[161]. Article 30 of the Rome Statute provides the mechanisms of establishment of mental element where the material element is committed with the intent and knowledge (engagement in the conduct and causing the consequence with awareness of the occurrence and the existence of awareness about the circumstance respectively for intent and knowledge)

However, the defenses, among others, like insanity, superior order, intoxication, self-defense and duress under Article 31 and et.seq. of the Rome Statute could also be raised by adolescent soldiers if a mechanism is crafted to prosecute such individuals under the Rome Statute. These are defenses other than age but age unlike other defenses, under the Rome Statute; disable the jurisdictions of the ICC from the very beginning. However, the other defenses, other than age, are means either for mitigating circumstance or exoneration of criminal liability after the litigation and proof of the defenses.

The CRC and the Beijing Rule could be cited as having some indications with regard to regulating the age of culpability of children in criminal responsibilities though still incomplete. These legal frameworks are incomplete because they gave the opportunity of determining age of criminal culpability to domestic legal systems without fixing the minimum age of criminal responsibilities. However, one thing is clear that children below eighteen are not totally ignored

[160] See also Guidelines on Justice Matters involving Child *Victims and Witnesses* of Crime *Adopted by the Economic and Social Council in its Resolution 2005/20 of 22 July 200.*
[161] Supra Note at 125, P2.

of their volition on criminal responsibilities. This is because the CRC and the Beijing Rule are urging member States not to fix *too low an age* for criminal responsibility in the respective domestic legislations. And failure to fix MACR by countries under domestic legal system amounts violations of the Beijing Rule and the CRC. International law recommends for the existence of a *reasonable lowest age* limit for child to be criminally responsible. Anyways, there is no MACR under International Criminal Law. The MACR under the Rome Statute is fixed to be eighteen from the spirit of Article 26 of the Rome Statute which falls outside the definition of children in many international instruments. Hence, there is no MACR under the Rome Statute for children.

Comments made by the CRC Committee urge member States to raise the age of criminal liability taking into consideration historical and cultural values of a country. In case of criminal charges against children, caution must be made about the procedures and their respective effects taking into account the age and desirability of the punishments. The procedures concerning child suspects must guarantee the child friendly justice as per Article 10(3) of the Beijing Rule and Article 40(3) (a) and (b) of the CRC. Any criminal proceedings against children according to the Beijing Rule and Article 37(b) of the CRC must focus not on the formal trial but alternatives like restorative justices, counseling and community service. These are clear provisions indicating the potentiality of children in committing crimes and the possible procedure that must be followed in case where children materialize a commission of a crime.

MACR varies widely in different countries. It ranges from six years of age to sixteen years of age.[162] However, there are countries which still did not fix the MACR. Some States also fix MACR taking aspects of puberty into consideration like Saudi Arabia to determine criminal culpability of children. Subjective factors such as puberty, the age of discernment or personality of the child are dangerous criteria for possible flaw. Age, which is objective relatively, is preferable than the subjective factors of determination.

Generally speaking, the Rome Statute did not regulate the age problem. It creates a problem by allowing adolescents to participate in armed conflicts without any criminal responsibilities. This method of legal frameworks under the Rome Statute prevents the ICC from contributing its part

[162] Supra Note at 52. PP187-224

in punishing and preventing impunity. Beyond this, it is not a better mechanism for the protection of children's rights because such mechanisms impends the reintegration, reconciliation and disarmament of child soldiers for a constructive role into the society for normal life.

4.2. The Nature of State Obligations under the Rome State with Regard to Child Soldiers

The ICC Rome Statute cannot be implemented without the support from member States due to the existence of sovereignty. Trading off and cooperation are in the heart of the implementation stage of the Rome Statute. As described by Judge Antonio Cassese that international courts as "a giant without arms and legs – it needs artificial limbs to walk and work".[163] The ICC is not different in this instance that cooperation of member States for the Court to walk effectively is *sine qua non* for implementation. Hence, the Court needs cooperation from States, NGOs, Intergovernmental Organizations and Civil Societies.

However, the nature of State Obligations in the Rome Statute is not strong. An obligation of member States in the Rome Statute regarding child soldier's perpetration is not regulated because of the assumption that children are faultless passive victims. Yet obligations are imposed upon member States not to enlist, conscript or use children below fifteen into their armed forces or armed groups. Furthermore, States are urged to prosecute, try and punish perpetrators of such offences under their criminal jurisdiction by making such offences part of their criminal law. Failing this, for reasons of *inability or unwillingness* on the part of States, member States must *cooperate* to the ICC in prosecuting, trying and punishing such individuals to put an end to impunity. The ICC Rome Statute Preamble provides the following:

> Affirming that *the most serious crimes of concern to the international community as a whole must not go unpunished* and that *their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation, (Italics mine)*

[163] Antonio Cassese, available at www.southernafricalitigationcentre.org/.../Cooperation-with-the-ICC.pdf *(accessed on 31 August 2013)*

As it is said elsewhere hereinabove, the first duty to prosecute, try and punish is given to member States under their respective national criminal jurisdictions.

> Recalling that it is the *duty of every State to exercise its criminal jurisdiction* over those responsible for international crimes, (*Italics mine*)

However, if States fails to prosecute an individual (whether an adolescent or adult who violates international criminal law), they may find themselves in violations of international criminal law. And hence, States which fails to prosecute will be obligated to prosecute such individuals under international treaty and customary law. This failure amounts to inability or unwillingness on the part of States and the ICC will take the case.[164] But the complementarity of the ICC will work only as regards to adults offenders, not to any person below eighteen at the time of the commission of the crime due to lack of jurisdiction.

4.2.1. Duty to Cooperate

As per Article 86 of the Rome Statute cooperation of member States is a must. Here is the text of Article 86 which stipulates the general obligation to cooperate: States Parties *shall*, in accordance with the provisions of this Statute, *cooperate fully with* the Court in its *investigation and prosecution* of crimes within the jurisdiction of the Court. (*Italics mine*)

Unless the Court is supported by the cooperation and assistance of the State Parties, the Court cannot discharge a minimum of its duties. This is because the Court does not have its own police force for investigation and prosecution of perpetrators of crimes within its jurisdiction. For this reason, the Rome Statute provides that State Parties must not refuse to comply with a request from the ICC for assistance or cooperation with very few and limited exceptions[165]. Under Article 87(7) of the Rome Statute, failure to comply with a request for cooperation authorizes the ICC to make a finding of non-compliance and to refer the matter to the Assembly of State s Parties or to the Security Council if the Security Council had referred the situations being investigated or prosecuted.

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[164] Nienke Grossman, (2009), Rehabilitation or Revenge: Prosecuting Child Soldiers for Human Rights Violations. Westlaw 38 Georgetown Journal of International Law 323, p5. Available at http://ssrn.com/abstract=1328982 (accessed on 30 September 2013)

[165] See Articles 72 (protection of national security), Article 90 (competing requests for surrender), and Article 93(1)(l) (prohibition under national law).

For the effective realization of this obligation of cooperation of State Parties with the ICC, Article 88 specifically requires State Parties to "ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under Articles from 89 up to 92 of the Rome Statute.

Beyond general cooperation, the Rome Statute provides other forms of specific cooperation and assistance for investigation and prosecution purpose under Article 93 (1) (a)-(i) of the Rome Statute.

The duty to cooperate, whether general or specific, could exist for non-member countries on two grounds: the first is when a country relinquish its jurisdiction voluntarily (auto-referral) like in the case of Cote d'Ivoire and secondly when the issue of recruiting children falls under the mandate of *UNSC Chapter VII* through referral.

Generally, cooperation and assistance, whether general or specific, can be with regard to *information, documentation and evidence, suspects, victims and witnesses, warrants, searches and seizures, enforcing orders and judgments of the ICC* to the perpetrators of crimes under ICC jurisdiction. However, a ratifying country to the ICC Rome Statute can withdraw from the Rome Statute using Article 127 of the Rome Statute. But pending obligations and the duty to cooperate will continue to have effects upon the withdrawing State (Article 127(2) of the Rome Statute.

Kenya becomes the first country in the world which its parliament has voted a motion to withdraw from the International Criminal Court.[166] And this withdrawal lays a dangerous foundation for the freezing perspective of Africa to follow Kenya under the guise of "selective justice" by the ICC to Africans. This propensity lays dangerous ground to the struggle against impunity for serious breaches of human rights and children's rights particularly.

4.3.Interpretation of Conventions in case of Inconsistency on Child Soldiers

In this sub-section, assessment will be made as to the interplay of international criminal law, particularly the Rome Statute and Human Rights, particularly on children's rights. What is the dialogue and what ought to be the dialogue between such areas of treaties with regard to child

[166] http://www.voanews.com/content/kenya-may-vote-to-withdraw-from-icc/1743641.html (accessed on 7 September 2013)

soldiers is the central point of this sub-section. This sub-section is intended to see the consequences of better dialogue between treaties to children's rights.

This question has been raised because the CRC and the Optional Protocol on one hand and the ICC Rome Statute on the other regulate child soldiers differently. The CRC and the Optional Protocol articulate the possibility of adolescents to participate in armed conflicts above the age of fifteen and below the age of eighteen, whereas the ICC Rome Statute makes conscripting, enlisting or using children below fifteen as war crime. The ICC Rome Statute does not govern what will be the responsibilities of those individuals who are permitted to participate in armed conflicts using voluntary recruitment, emancipated children or military schools. If participation in armed conflicts is allowed in such circumstances, mechanism must be crafted as to the responsibilities sides of adolescent soldiers in warfare.

Hence, the treaties were enacted under different imaginations of child soldiers. The CRC and the Optional Protocol imagined children into two categories: the first category is faultless passive victims due to their vulnerability (children below fifteen) and the second category is capable and fit for warfare and with restorative responsibilities[167]. However, the ICC Rome Statute put itself in quandary by imagining children as faultless passive victims under Article 26 and Article 8(2) (b) (xxvi) and Article 8(2) (e) (vii) by making conscripting, enlisting or using children as war crimes without regulating what will be the scenario of the adolescents between the age of fifteen and eighteen. This will be worse if two or more countries are ratifying members to the three treaties bodies (CRC, Optional Protocol and the ICC Rome Statute) or alternatively some may be ratifying countries to either treaties and others may not.

With these questions, a resort is made towards Vienna Convention on the Laws of Treaties (VCLTs) to explore the solution if any of contradicting treaties in order to achieve the full gamut of child soldiers' rights and responsibilities.

Public international law in general, international human rights in particular is highly vulnerable to contradictions due to lack of central legislator, lack of comprehensive hierarchical order, lack of continuity and systematic congruency in international law making and fragmented legal

[167] See also United Nations Standard Minimum Rules for *Non-custodial Measures* (The Tokyo Rules) Adopted by General Assembly Resolution 45/110 of 14 December 1990.

order.[168] The rapidly increasing numbers of treaties has aggravated the dimension of the problem dramatically.[169] Rules aimed at solving inconsistencies or contradictions between treaties not only enhance legal certainty and clarity; by delimiting the rights and obligations of States Parties to various treaties, they also contribute to the observance of treaties and, therefore, to the observance of international human rights conventions in general and child rights conventions in particular.[170]

Article 41 of the CRC provides a possibility of applying more conducive laws of a State Party or International Law in force other than those provisions of the CRC itself if the laws of a State Party or International Law are *more conducive to the realization of the rights of the child*. As per article 120 of the Rome Statute, no reservation is permitted to the ICC Rome Statute.

Article 30 of the VCLTs may be relevant to my questions. Though there is no apparent contradiction between the Rome Statute and the CRC Optional Protocol, they show inconsistence and incompatibility in regards the rights of children. Article 30(1) of the VCLTs provides the UN Charter as superior in hierarchy to other treaties bodies in interpreting treaties as supported by UN Charter Article 103. The very purpose of the CRC Optional Protocol is to better safeguard children's rights in warfare. While the very purpose of the ICC Rome Statute is to hold individuals accountable for violations of serious criminal offences under Article 5 of the Rome Statute and thereby to put an end to impunity.

Both Conventions are not in a position to live to their purposes and thereby realize the purposes because the CRC Optional Protocol allows for voluntary recruitment, military schools and emancipated children to participate in active hostilities without strong responsibility on the sides of child soldiers. And the ICC Rome Statute allows adolescents to be conscripted, enlisted or used by national armed forces or groups without constituting war crime while it avoids jurisdiction over such adolescent soldiers.

Both the CRC Optional Protocol and the ICC Rome Statute enter into force on 12 February 2002 and 1 July 2002 respectively. And the CRC Optional Protocol comes first to that of the ICC

[168] Oliver Do¨ rr and Kirsten Schmalenbach, (2012), Vienna Convention on the Law of Treaties: *A Commentary*. Springer-Verlag Berlin Heidelberg. P506.
[169] Ibid
[170] Ibid

Rome Statute. However, the later prevails over the previous argument is not tenable for various reasons. Some scholars however, argued that the date of adoption[171] should be taken in order to solve the inconsistence of successive treaties (earlier and later treaties) which, in this case, the ICC Rome Statute was adopted in 17 July 1998 and CRC Optional Protocol in 25 May 2000. This inconsistence is partly the outcome of minimum dialogue or lack of dialogue between treaties which opens a wide array of incompatibilities creating fertile grounds for the violations of human rights in general and children's rights in particular. Member States will have valid defenses using either treaty to their advantages. The existence of impunity reinforces the violations of human rights in general and children's rights in particular due to inconsistent treaties too.

Article 41 of the CRC could be a better clause because it provides an opportunity for other international treaties to be applicable in case where such treaties are to the best interest in realizing children's rights. However, the provisions of the ICC Rome Statute cannot be considered as conducive for children in realizing their right as the Rome Statute provides contradicting images over children creating a responsibility free age bracket.

There is no activity which needs more blameworthiness than involving in armed conflicts. Involvement in armed conflict is the highest responsibility an adult can do. And there is no means to categorize such person under the definitions of children as faultless passive victims. The ICC Rome Statute under Article 8(2) (b) (xxvi) and Article 8(2) (e) (vii) criminalizes conscripting, enlisting or using any person below fifteen for warfare. However, conscripting, enlisting or using children above the age of fifteen is not a war crime implicating that such persons could participate in armed conflicts as being adults. Yet there is no means to hold such persons accountable in case where they commit the abhorrent crimes of concern to the international community which affirmed that the most serious crimes of concern to the international community as a whole must not go unpunished.

One of the principles of international criminal law is *the principle of legality* where a person cannot be held accountable for actions or omissions which did not constitute a crime under the Statute as per Article 22(1) of the Rome Statute (*Nullum crimen sine lege).* Hence, there must be

[171] Id. P509

a mechanism to hold accountable under the ICC Rome Statute for those adolescents who are permitted to involve in armed conflicts by the time they commit crimes under Article 5 of the Rome Statute. Having a provision to hold such persons accountable in the ICC Rome Statute will reinforce the reintegration process for lasting peace among disputing societies.

4.4.Implications of Exclusion of Jurisdiction by the ICC Rome Statute on Child Soldiers

The implications of exclusions of jurisdiction by the ICC Rome Statute over child soldiers can be pin down in the following manner:

- Failure to have jurisdiction encourages member States to apt for conscripting, enlisting and using adolescents between the age of fifteen and eighteen in armed conflicts on the knowledge that these individuals will not be held accountable in the ICC. Because there is neither prohibition nor responsibility on such involvements under the Rome Statute. This perversely, *encourages* the recruitment of children in this "responsibility free" age bracket.[172] Hence, the Rome Statute sends entirely the wrong message to those who are involved in the recruitment of children to participate as child soldiers.[173]
- Failure to have jurisdiction over adolescents between the age of fifteen and eighteen will make difficult the reintegration, demobilization and rehabilitation processes which compel adolescent soldiers to apt for the continuation of soldiering.
- *What is not clearly prohibited is permitted* is the principle of international criminal law and hence, the Rome Statute impliedly allows adolescent soldiers between the age of fifteen and eighteen to participate in armed conflicts. This permission affects the rights of children in armed conflicts. Article 8(2) (b) (xxvi) and Article 8(2) (e) (vii) cum Article 26 of the Rome Statute.
- The Rome Statute has completely avoided confronting the issue of the criminal responsibility of a child soldier[174] due to the false images of children below eighteen as faultless passive victims by providing excessive protection. This clearly assures the continuation of impunity and the Rome Statute is not able to live to its promises where it intends to end to impunity as a major goal. The physical strength of children between the

[172] Supra Note at 14, p152.
[173] Ibid
[174] Ibid

age of fifteen and eighteen is becoming immaterial for warfare due to the increase advancement of technology in providing lightweight and automatic weapons these days.

- The ICC Rome Statute did not provide a regulation on adolescents between the age of fifteen and eighteen when they involve in recruiting other children below the age of fifteen by the time member States are *unable or unwilling* to prosecute. The ICC Rome Statute impliedly promotes impunity in such affairs. The case of *Prosecuto*r *v. Thomas Lubanga Dyilo*[175] is the first case concerning the recruitment of children below fifteen years of age under the ICC. In such case, *Lubanga* is charged with only recruitment of children below the age of fifteen for war crimes. However, *Lubanga* has recruited many children above the age of fifteen and below eighteen compulsorily, which is a free age bracket without responsibility. Yet, these individuals equally suffer in the war and must enjoy same protection of law. Therefore, there is a need to harness the interplay of the Convention on the Rights of Children and the ICC Rome Statute for better protection, provision and participation of children's rights.
- Due to the exclusion of jurisdiction to children below the age of eighteen by the ICC Rome Statute, ICC will lack competence at international level and then the international community will no longer trust such institution anymore. This affects the legitimacy of the Court.

The CRC Optional Protocol Article 3(4) prohibits armed groups, other than armed forces of government, totally from recruiting children below eighteen and there is no voluntarily recruitment of these groups in my case the *Force Patriotique pour la Libération du Congo* (FPLC) and using them to participate actively in hostilities, that had occurred in the *Ituri* region in north-eastern Democratic Republic of the Congo (DRC). Above this, the ICC Prosecutor leaves out many war crime issues under Article 8 of the Rome Statute to *Lubanga* despite evidences justifying commissions of crimes like sexual violence and other ill-treatments caused

[175] *Prosecutor v. Thomas Lubanga Dyilo, Decision on the Prosecutor's Application for a Warrant of Arrest, Art. 58, No. ICC-01/04-01/06-8-US-Corr, 10/02/2006, para. 32, unsealed pursuant to Decision ICC-01/04-01/06-37 dated 17/03/2006*

by the child soldiers, or with any other crimes[176] which could possible the substantive jurisdictions of the ICC had there been jurisdictions for such persons.

4.4.1. Age, Impunity and Criminal Responsibilities

Treating every person below eighteen years of age under one category for criminal culpability is a misleading dichotomization which galvanizes the realistic aspects of adolescents. This is because the claim those children, by definition and as a class, do not possess the understanding, experience, and cognitive capacity necessary to be held criminally liable[177] and hence, must be seen differently. Above this, there is nothing in the CRC, the CRC Optional Protocol, customary international law or domestic legislations that preclude the prosecution of a juvenile, even for war crimes[178].

I endorse the categorization of these age groups into three age groups: the first age group from birth to nine (infants), the second age from nine to fifteen (young) and the last age group from fifteen to eighteen (adolescents). This is the case in most countries domestically and International Criminal Law must take lessons in order to strike a balance between the purposes of criminal law of punitive nature and rehabilitative nature as indicated under its Article 21 (1)(c) of the ICC Rome Statute.

Matthew Happold argues that there were good reasons for regulating criminal responsibility of international crimes through international law as they were often distinguished from crimes under national law because they transcend national boundaries and are of concern to the international community.[179] He said about the discretion given to domestic criminal jurisdiction to determine the age of culpability:

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[176] Natalie Wagner, (2013), A Critical Assessment of Using Children to Participate Actively in Hostilities in *Lubanga*: Child Soldiers and Direct Participation. *Criminal Law Forum (2013) 24:145–203, P146*

[177] Elizabeth Cauffman et al, (1999), Justice for Juveniles: New Perspectives on Adolescents' Competence and Culpability. 18 Quinnipiac Law Review (403, 407). As cited in Cynthia V. Ward, (2006), punishing Children in the Criminal Law. Notre Dame Law Review , Vol. 82 No. 1, PP433-434. Available at SSRN: http://ssrn.com/abstract=1776353 (accessed on 26 September 2013)

[178] Defense Reply to Government Response to Motion for Dismissal Due to Lack of Jurisdiction Under the MCA in Regard to Juvenile Crimes of a Child Soldier, 1, United States v. Khadr (No. D-022) (Jan. 31, 2008), [hereinafter Defense Reply] available at http://www.defense link.mil/news/d2008O43OMotion.pdf. As cited in Paola Konge, (2010), International Crimes and Child Soldiers. Southwestern Journal of International Law, Vol.16, 41-74, p46

[179] Supra Note at 125, P2.

> [T]hat from the perspective of a defendant, it would seem wrong for an individual's liability under international law to depend upon the place of prosecution…. States are obliged to prosecute and punish offenders. Permitting States to decide their own age of criminal responsibility would allow them to *determine the scope of their international obligations*. (*Italics mine*)

The criminal culpability so differs among these age groups. The age group from birth to nine is criminally exonerated in some countries. Between the age of nine and fifteen, a rehabilitative measure is taken as an appropriate measure. However, age group from fifteen to eighteen are treated as adults but imprisoned in a segregated place from adults. For example, in England and Wales, lack of *mens rea* of any person below ten years of age is presumed because such person's mental development and consequent moral irresponsibility for his/her action[180] so exists. A study on adolescents' competence and culpability shows as nearly equal as adults and provide the following ideas:

> Contrary to the stereotype of adolescents as markedly egocentric, for example, or as handicapped by deficiencies in logical ability, studies show that adolescents (at least, from age fifteen on) are no more likely than adults to suffer from the "personal fable"(the belief that one's behavior is somehow not governed by the same rules of nature that apply to everyone else, as when a cigarette smoker believes that he is immune to the health effects of smoking) and no less likely than adults to employ rational algorithms in decision-making situations. In fact, there is substantial evidence that adolescents are well aware of the risks they take….[181]

If a person's *mens rea* is competent to commit heinous crimes domestically, there is no means to let such individual free at international level for international accountability. As Happold said there is no principled difference between the issues arising from attempts to hold children

[180] Ibid

[181] Elizabeth Cauffman et al, (1999), Justice for Juveniles: New Perspectives on Adolescents' Competence and Culpability. 18 Quinnipiac Law Review (403, 407). As cited in Cynthia V. Ward, (2006), punishing Children in the Criminal Law. Notre Dame Law Review, Vol. 82 No. 1, PP433-434. Available at http://ssrn.com/abstract=1776353 (accessed on 26 September 2013)

responsible for complex domestic and complex international crimes.[182] Hence, there is no plausible argument used to distinguish children's legal responsibility for international crimes from their criminal responsibility in domestic law[183]. This is despite the international legal framework's failure to fix the minimum age of criminal responsibility though moved half-way. Generally, the ICC and national courts will need to understand that they are part of a common mission[184]- to put an end to impunity by holding responsible for perpetrators of unspeakable international crimes to the international community.

Age is a single criterion under international criminal law for criminal culpability and imagined every person below eighteen as *faultless passive victims*. However, regard must be given to the above dichotomy because international law is intending not to fix too low an age for criminal responsibilities. Hence, international law, particularly international criminal law must adopt better standards than national criminal laws. This helps the national criminal, which is diverse, to draw an aspiration from better international standards for better universality of human rights protection. This is true currently, where the occurrence of conflicts of a non-international character and purely internal conflicts has dramatically increased in number, intensity, and victimization.[185]

For adolescent soldiers, between the age of fifteen and eighteen, a rehabilitative punishment must be adjusted than totally exonerate punishment because rehabilitative punishment will accelerate the reintegration, demobilization, rehabilitation, and reconciliation process of child soldiers into the constructive roles of the society. Following this argument has two advantages: first potential offenders will be given a lesson to adjust their behavior as market deterrence in the struggle against impunity and second adolescents will join soldiering after due considerations and knowledge of the criminal responsibility to war crimes during warfare. The involvement of adolescents between the age of fifteen and eighteen under a genuine voluntarism in the CRC Optional Protocol will decrease and save children from the horrific consequences of armed conflicts. The following statements from Ismene Zarifis are important in this connection:

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[182] Supra Note 125, P2-3.
[183] Ibid
[184] William W. Burke-White, (2003), The International Criminal Court and the Future of Legal Accountability. *ILSA Journal of International & Comparative Law* ,195-205, Vol.10:195, *P205*
[185]M. Cherif Bassiouni, (1997), Searching for Peace and Achieving Justice: The Need for Accountability. Law and Contemporary Problems, Vol.59 No.4, P1. Available at http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1013&context=lcp (Accessed on 13 September 2013)

> The child combatant's unique position of first victim and then victimizer requires a *special accountability mechanism such as the TRC*. The unique position of the child combatant, first victim then perpetrator, would best be served by *truth telling* before the TRC to facilitate effective *social rehabilitation and reintegration*.[186] (*Italics mine*)

Though TRC is arguable whether it is a real punishment for wrong doers under criminal system or not, it is important from the perspectives of both victims and perpetrators in bringing about sustainable justice to the future by reintegrating and rehabilitating perpetrators to the society for emotional and psychological healing. In the absence of adequate punishment, like in the ICC Rome Statute, chaos and social upheaval will result, since decriminalizing criminal behavior negates the deterrent and retributive bedrocks of criminal law, leaving the victims no remedy other than self-help[187] in the international legal parlance.

In addition to the above importance, restorative responsibility can reinforce for the umbrella principle of the best interest of the child as the primary concern. This is because of the principle of restorative responsibility of juvenile justice are rehabilitative and primarily focus on the well-being of the child. This kind of procedure allows former child soldiers to play a constructive and productive role in a society after reincorporation. And if children are competent to fight, then there must be a mechanism to hold such persons accountable in the international legal parlance. For example, in July 2002 United States soldiers shot twice *Omar Khadr*[188] (a Canadian citizenry, fifteen years old who threw a grenade at the soldiers, killing a Special Forces Sergeant), captured and arrested him. He was detained and after treatment on his injury, he has been transferred to Guantanamo Bay, Cuba in October 2002. The is a clear indication where persons between fifteen and eighteen are capable to offend war crimes internationally and there is no plausible reason to provide absolute immunity in the international criminal law for any person below the age of eighteen. Because having accountability procedures reinforces

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[186] Ismene Zarifis, (2002), Sierra Leone's Search for Justice and Accountability of Child Soldiers. *American University Washington College of Law, Human Rights Brief, Vol.9 Issue 3,* P21. Available at http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1459&context=hrbrief (accessed on 13 September 2013)

[187] Joshua A. Romero. (2004) The Special Court for Sierra Leone and the Juvenile Soldier Dilemma. *Northwestern Journal of International Human Rights, Vol.2, Issue 1, Article 8,* Page 11

[188] The details of the charges of the case can be accessed from http://www.humanrightsfirst.org/uploads/pdfs/khadr-referred-charges%204-24-07.pdf (Accessed on 27 December 2013)

reintegration and other fundamental due process rights in the prosecution, trail and punishment of juveniles. Above this, the international criminal law will have the opportunity to complement national criminal systems in case where there is unwillingness or inability on the sides of the national criminal jurisdictions for the fact that most national criminal jurisdictions have a procedure for criminal accountability of such persons nationally.

4.4.2. Age, Impunity and Children's Rights

A total exemption of criminal responsibilities of any person below eighteen under the ICC Rome Statute is not benefiting children because having a provision to account will reinforce reintegration and reintegration benefits former child soldiers. The first reason is the use of age as a single criterion to determine criminal culpability in one category as any person below eighteen years of age which galvanizes the adolescents who are given a chance to involve in armed conflicts. Impunity will continue existing under the guise of children's vulnerability and incapacity. If such persons are given the chance for participation in warfare, a mechanism must be crafted for criminal responsibilities for war crimes. Hence, understandings towards age of children as below eighteen assures the continuity of impunity without benefiting children by the immunity given to them in the ICC Rome Statute. The legal framework of the ICC Rome Statute on exclusion of jurisdiction on child soldiers, who are below eighteen at the time of the commission of the alleged crime, is an incentive for their commanders to delegate to the child soldiers the dirtiest orders[189] which aimed at the continuity of impunity.

Article 33 of the ICC Rome Statute clearly provides that superior order is not a defense with limited exception *inter alia*, the person was under legal obligation to obey orders, the person did not know the unlawfulness of the order, and the order was not manifestly unlawful. Genocide and crimes against humanity are presumed manifestly unlawful but not *war crimes*. For example, Dominic Ongwen was charged with war crimes in October 2005 by the ICC but he has compulsorily joined LRA of Uganda when he was ten in 1980s[190]. Though ICC prosecutes

[189]As cited in IRIN (the humanitarian news and analysis service of the UN Office for the Coordination of Humanitarian Affairs), Analysis: Should child soldiers be prosecuted for their crimes? http://www.irinnews.org/report/93900/analysis-should-child-soldiers-be-prosecuted-for-their-crimes (Accessed on 13 September 2013)
[190] Ibid

crimes committed from 1July 2002 onwards, it is a clear scenario whereby children could be both perpetrators and victims of war crimes.

The image of children under international law generally brings negative consequences to children's rights. In order to benefit adolescents soldiers, total exclusion of jurisdiction is not a solution, but to hold such individuals accountable domestically and internationally by following different procedures from adults. The Rome Statute must take a lesson, in this affair, from the Statute of SCSL Article 7(1):

> Should any person who was at the time of the alleged commission of the crime between 15 and 18 years of age come before the Court, he or she *shall be treated with dignity* and *a sense of worth*, taking into account his or her *young age* and the *desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society*, and in accordance with international human rights standards, in particular the rights of the child. *(Italics mine)*

The SCSL discloses the reality where child soldiers could be both victims and perpetrators taking into account their respective age and degree of criminal culpability. The Statute firmly believed that child soldiers between the age of fifteen and eighteen are capable to infringe the criminal laws which are serious breaches to international community as the whole. This helps to properly address the issues of child soldiers to the degree of their age and thereby to fight against impunity as well as the ease of reintegration process later into the society for civil life. This line of argument is also compatible with the best interest principle of children's rights.

The image of child soldiers under international criminal law in general and the Rome Statute in particular as faultless passive victims classing children under a single category disables former child solders, discourages their input in the process of *post conflict reconstruction*, impair a full understanding of child soldiering, and hamper the development of a robust culture of juvenile rights[191]. Crafting a procedure to hold accountable for adolescents, who are permitted to

[191] Mark A. Drumbl (2013), The Effects of the *Lubanga* Case On Understanding and Preventing Child Soldiering. Washington and Lee University School of Law - Sydney Lewis Hall – Lexington - VA – 24450. P3. Available at http://ssrn.com/abstract=2253494 (Accessed on 27 September 2013)

participate in armed conflicts voluntarily, reinforces the post conflict justice facilitating the reintegration process to the community for lasting peace and reconciliation.

4.5.Implications for Ethiopia?

Ethiopia, one of the Eastern African countries, has ratified many international treaties in general and human rights treaties in particular. Coming to the CRC[192], Ethiopia is an acceding country to the CRC on 14 May 1991 and hence, ratifying country to the CRC. However, the country is a signing nation to the Optional Protocol on the Involvement of Children in Armed Conflict[193] on 28 September 2010 yet signature is not a binding act. The country however acceded to the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography on 25 March 2014.[194]The country neither sings nor ratifies the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure[195] too. Ethiopia is a ratifying and founding country to the UN Charter on 13 November 1945.[196] Furthermore, all the UNSC resolutions are binding to all member States of the UN Charter including Ethiopia. Beyond this, the country neither sings nor ratifies the ICC Rome Statute[197]. However, Ethiopia is a ratifying country to the Geneva Convention AP I and II of the 1977, ILO 182 and ACRWC.

The status of international agreements ratified by the country domestically is not the scope of this thesis and will not be discussed here in detail. But, to give a passing remark, all international

[192] Adopted by resolution 44/25[2] of 20 November 1989 at the Forty-fourth session of the General Assembly of the United Nations. The Convention is open for signature by all States at the Headquarters of the United Nations in New York.

[193] The Optional Protocol was adopted by resolution A/RES/54/263 of 25 May 2000 at the fifty-fourth session of the General Assembly of the United Nations. In accordance with its article 9 (1), the Optional Protocol will be open for signature by any State that is a party to the Convention or has signed it.

[194] The Optional Protocol was adopted by resolution A/RES/54/263 of 25 May 2000 at the fifty-fourth session of the General Assembly of the United Nations. In accordance with its article 13 (1), the Optional Protocol will be open for signature by any State that is a party to the Convention or has signed it.

[195] The above Protocol, which was adopted at the sixty-sixth session of the General Assembly of the United Nations by resolution 66/138 of 19 December 2011, opened for signature in Geneva, Switzerland, on 28 February 2012 and remains open for signature thereafter at United Nations Headquarters in New York.

[196] San Francisco, 26 June 1945 and entered into force 24 October 1945.

[197] The Statute was adopted on 17 July 1998 by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. In accordance with its article 125, the Statute was opened for signature by all States in Rome at the Headquarters of the Food and Agriculture Organization of the United Nations on 17 July 1998. Thereafter, it was opened for signature in Rome at the Ministry of Foreign Affairs of Italy until 17 October 1998. After that date, the Statute was opened for signature in New York, at United Nations Headquarters, where it will be until 31 December 2000. Entered into force on 1 July 2002, in accordance with Article 126.

agreements ratified by Ethiopia are an integral part of the law of the land as depicted under Article 9(4) of the FDRE Constitution keeping in mind Article 13(2) of the FDRE Constitution which demands the interpretations of human rights under Chapter three of the Constitution in conformity with international principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and international instruments adopted by Ethiopia. These two Articles bring the debate between monism and dualism-self executing or non-self executing treaties into life.

The country's obligations with regard to the CRC *inter alia,* includes taking appropriate legislative, administrative and others measures for the implementation of the rights recognized in the Convention as per Article 4 to the maximum extent of availability of resources. Above these, the country is expected to submit an initial and periodical report as per Article 44 of the CRC. Individual complaint to the Human Rights Committee is impossible against the government of Ethiopia due to the country's failure to ratify the *First Optional Protocol*[198] to the ICCPR which allows individual complaints. But this does not mean Ethiopia will not be asked in any means because the ICCPR has its own complaint procedure which Ethiopia is a part. In such cases Socio-economic rights can be brought under the shield of civil and political rights.

The implications of jurisdictional limitation of the ICC Rome Statue over children in Ethiopia as a case scenario will be illustrated and how impunity could exist as a result of the above problems under the ICC Rome Statute.

Of course Ethiopia is a ratifying country to the CRC but not the Optional Protocol on the Involvement of Children in Armed Conflicts as said above. The Federal Democratic Republic of Ethiopia (herein under FDRE) Criminal Code divides the age of criminal responsibilities of children into three phases. The first phase extends from birth to nine where there is no criminal responsibility at all.[199] The second phase is from nine to fifteen where criminal responsibility exists but with different treatment and different procedure from those adult offenders.[200] The

[198] The Protocol was opened for signature at New York on 19 December 1966 and entered into force on 23 March 1976, in accordance with Article 9.
[199] Article 52 of the FDRE Criminal Code
[200] Article 53(1) of the FDRE Criminal Code

third extends from fifteen to eighteen where for all practical purposes, the criminal responsibility of such persons are treated as adults.[201]

Under the FDRE Constitution Article 28, which the title and the contents are different, could be a ground to war crimes if such offences are committed during warfare or armed conflicts. In addition to this, under Part II Book II Chapter II and Title II of the FDRE Criminal Code, recruiting children below the age of eighteen is punishable crime in Ethiopia under Article 270(m) of the FDRE Criminal Code as war crime. The Article states that "…*recruiting* children who have not attained the age of eighteen years as a members of a defense forces to take part in armed conflicts …" *italics mine*. The FDRE Criminal Code of this very Article approached children as civilians which is similar to the Geneva Convention of the 1949. And the crime is punishable with rigorous imprisonment from five years to twenty-five years, or, in more serious cases, with life imprisonment or death. However, this Article only criminalizes the recruitment of children without prohibiting the use of children in armed conflicts. This is true because recruitment is different from using children in armed conflicts as defined hereinabove.

And if any person commits this crime and the Ethiopian criminal jurisdiction (of course in this case the Ethiopian Military Court as implicated under Article 26 of Proclamation Number 27/1996) is *unable or unwilling* to prosecute this person, the international criminal court can take over it but Ethiopia is not part to the ICC Rome Statute as said hereinabove. This does not mean that there is no means where any citizenry of Ethiopia or any crime committed in the soil of Ethiopia will remain unprosecuted in this scenario. This is because there is a means to prosecute non-member states in the ICC via UNSC referral if the recruitment or using of persons below the age of eighteen for armed conflicts is threatening the international peace and security violating Chapter Seven of the UN Charter.

Apparently speaking, there is no problem in Ethiopia as long as it is punishable to recruit any person under eighteen keeping in mind the difference between recruitment and using of persons below eighteen in armed conflicts. However, birth registration is unachievable in Ethiopia due to the non-existence of mandatory laws; which the registration of Vital Events and National Identity Card Proclamation[202] is a recent legislation and which again will face the practical

[201] Article 56(1) of the FDRE Criminal Code
[202] Proclamation Number 760/2012, Registration of Vital Events and National Identity Card Proclamation

difficulty. Hence, the ascertainment of age is unsolved in Ethiopia too. Although having a legal framework is a good progress in the implementations of human rights, it is not by and itself a panacea solution. According to the UNICEF reports in the 2013, birth registration plays a paramount role in the implementation of children's rights. Only around 60 per cent of births last year were recorded, with the lowest levels of registration in South Asia and sub-Saharan Africa, according to 'Every Child's Birth Right: Inequities and trends in birth registration[203] which Ethiopia shares.

Furthermore, Article 36(1) (d) of the FDRE Constitution provides that [e]very child has the right "not to be subject to *exploitative practices*, neither to be required nor permitted to perform work which may be *hazardous or harmful to [their] health or well-being.*" Above this, Article 36 (2) provides that emphasis must be given for the primary consideration of the best interest of the child on any undertaking concerning children whether private or public undertakings. However, Article 18(4) (b) of the FDRE Constitution implicates that there could be a compulsory military service which cannot be categorized under forced or compulsory labour.

A minor, in Ethiopia, is person of either sex who has not attained the full age of eighteen years as per Article 215 of the Federal Family Code[204]. And proof of age can be adduced by certificate of birth or failing this, by any reliable documents or testimony of not less than two witness as per Article 217 of the Federal Family Code. However, there is a mechanism whereby a person below eighteen can be considered as major by way of emancipation under Article 310(2) of the Federal Family Code. And this emancipation must be made quoting the best interest of the child in mind.

The age of employment in Ethiopia is fixed to be fourteen under Article 89 of the Labour Proclamation No. 377/2003 however; any work which endangers the life of the young worker is prohibited.

Military service is not compulsory in Ethiopia however; the FDRE Constitution implicates the existence of compulsory military service as said hereinabove under Article 18(4) (b). The Defense Force Proclamation Number 27/1996, Article 4 states that the Defense Ministry "may,

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[203] UNICEF Reports, One in three children do not officially exist, (2013) available at http://www.un.org/apps/news/story.asp?NewsID=46713&Cr=unicef&Cr1=#.UqqZjeLbuKc (Accessed on 13 December 2013)

[204] Federal Negarit Gazetta Extra Ordinary Issue No. 1/2000, The Revised Family Code Proclamation No.213/2000

in accordance with criteria *periodically* issued by it from time to time, recruit persons *fit and willing* for military purposes. The physical fitness and mental willingness requirements under this Article is an escaping mechanism to reduce the requirement of eighteen years of age and inclined towards *physical fitness and mental willingness as the only requirement*. This could be a tenable argument, because of the lack of adequate birth registration in Ethiopia as said above, the UN Committee on the Rights of the Child expressed concern over possible flaws[205] in the recruitment process. Voluntary and compulsory recruitment is set to be eighteen as minimum years of age in Ethiopia to be a soldier. There were no reports of child recruitment or use by government forces or armed opposition groups in Ethiopia, although *independent monitoring was severely limited*[206] which could possibly galvanize the reality. Above this, the *Kebelle*, in every district, are discharging the duty of recruitment of persons for soldiering in Ethiopia and these recruitment will be latter checked by training organ to see whether the criteria are fulfilled or not. But the evidences to adduce that a person has reached the required age is the difficult task and vulnerable for abuse due to absence of documentary proof (birth certificate).

Although Ethiopia is not a ratifying country to the ICC Rome Statute, any citizen of Ethiopia or any crime committed in Ethiopia could be prosecuted in the ICC. This is when the UNSC under its mandate *Chapter VII* of the UN Charter exercises over war crimes under Articles 8(2) (b) (xxvi) and Article 8(2) (e) (vii) of the Rome Statute if such activities fall under the mandate of the UNSC. This is true, because Ethiopia is a ratifying country to the UN Charter and a mechanism is crafted for the UNSC to refer a case to the ICC through referral agreement. Furthermore, any Ethiopian citizens who are found committing the crimes under Article 5 of the Rome Statute in the soils of other ratifying countries, such countries could refer the case by handing over such individuals to the ICC, unless Ethiopia entered into a Bilateral Immunity Agreements (BIAs) with the ratifying countries of the Rome Statute like the United States. Of course entering into such agreements contravenes the purposes of the ICC Rome Statute for ratifying countries according to the VCLTs interpretations.

[205]UN Committee on the Rights of the Child, Consideration of report submitted by Ethiopia, Concluding observations, UN Doc. CRC/C/ETH/CO/3, 1 November 2006 as cited in Coalition to Stop the Use of Child Soldiers, (2008) http://www.child-soldiers.org/ (accessed on 1 August 2013), PP 140-143
[206]Ibid

Ethiopia could be a fertile ground for different armed groups moving in the borders to recruit children below the age of eighteen because Ethiopia is hosting millions of refuges including child refugees from Sudan, South Sudan Somalia and Eritrea. Furthermore, Ethiopia failed to ratify the CRC Optional Protocol which could be a guarantee for these vulnerable children. Hence, cross-border recruitment could happen. Above this, Ethiopia is participating in different Missions (either UN or AU) in other countries and there could be an opportunity for Ethiopian troops to found themselves fighting with minors. In such instances, the legal repercussion would be difficult to implement in both sides (Ethiopian troops and minors fighting them).

Chapter Five

Conclusion and Recommendation

5.1.Conclusion

International accountability is important for peace which complements justice. Peace is a *sine qua non* for sustainable justice if there is international individual accountability for serious human rights violations. This accountability in the international legal parlance sends message to potential offender to take precautionary measures before violating human rights. In this regard, the ICC Rome Statute is different from other human rights documents in its implementation mechanism. This is because other human rights documents mechanism of enforcement is so blunt teeth (only naming and shaming in the international arena and State reporting) however, the ICC Rome Statute placed a mechanism to hold individual perpetrators to account for their human rights violations. The ICC Rome Statute has introduced "sharper teeth" for individual accountability to do way with impunity than other international human rights Covenants. Yet this is not the case for child perpetrators in the ICC Rome Statute Regime when States are unable or unwilling to prosecute such groups of persons in the national criminal systems. As Graca Machel, an expert for the UN on Involvement of Children on Armed Conflicts, concluded that "[i]t is difficult if not impossible, to achieve reconciliation without justice. In order to realize justice and implement laws; whether international or domestic, punishment for wrong is mandatory to enforce.

The ICC Rome Statute is wavering in the protection of children by making conscripting, enlisting and using children below fifteen years of age in armed conflict as war crime. Yet, the ICC Rome Statute does not regulate what happened to persons above the age of fifteen and below the age of eighteen if conscripted, enlisted and used in armed conflicts. Above this, the ICC Rome Statute does not also regulate the legal repercussion of persons above the age of fifteen and below the age of eighteen if such persons commit war crimes. If conscripting, enlisting and using children above the age of fifteen and below eighteen is not a war crime under the ICC Rome Statute, it means that such age groups have the opportunity to participate in armed conflicts. Such articulation leaves such persons unaccounted by the time such persons commit war crimes and the concerned State remains unable or unwilling to prosecute. This in turn promotes impunity which the ICC Rome Statute intended to end.

Furthermore, due to minimum communication/dialogue between various human rights treaties, particularly the CRC and its Optional Protocol with that of the ICC Rome Statute, cases of emancipated children, military schools and voluntary enlistment under the Optional Protocol where children below eighteen are allowed to participate in armed conflicts are not covered by the ICC Rome Statute. Hence, the blanket/absolute immunity to children in the ICC Rome Statute regime, not to prosecute any person below eighteen at the time of the commission of the crime, leaves children to remain in their problem, continuation of children having the status of a soldier.

The blanket immunity for children below the age of eighteen under the Rome Statute appears in its face interesting because the ICC Rome Statute seems to protect children from punishment in the international legal parlance. However, in contrast, having accountability procedure for children different from adults reinforces the reintegration process which balances the interests of children and victims. This can be used as a tool to fight against impunity which the ICC Rome Statute intends to end.

The assumption that every person below eighteen years of age has the same moral culpability hides the reality because the degree of moral culpability hugely so differs as age increases. Therefore, a mechanism must be crafted to hold accountable to those persons who are allowed to participate in armed conflicts. This helps the international criminal system to lead the domestic criminal system for having better standards and norm diffusion for the protection of human rights in general and children's rights in particular. Above this, giving the discretion to States to decide over the age of criminal culpability can defeat the whole purpose of the ICC Rome Statute. This will result in an endless fragmentation in the fight against impunity. And the purpose of the principle of complementarity in the ICC Rome Statute will remain meaningless due to the discretion given to States to determine the age criminal culpability and the absolute immunity given by the ICC Rome Statute for any person below eighteen years of age under Article 26.

The international criminal system is suitable and better procedure in addressing grave human rights breaches than the national criminal system. If national criminal system has a mechanism to address juvenile offender, there is no reason in the international criminal system to leave out those persons from the juvenile justice. Leaving out those juvenile offenders in the international criminal system, like the ICC Rome Statute, will not alleviate or better protect the best interest of the child rather will place children to continue in the armed conflicts because reconciliation without minimum accountability will fail surely.

The drafting period of the ICC Rome Statute was conducive to take lessons from other *ad hoc* tribunals as to the criminal culpability of children in armed conflicts. For example, the SCSL Statute has introduced accountability of persons between fifteen and eighteen who have participated in the conflicts and encroached serious human rights violations. Hence, the international legal framework must establish a minimum age of criminal responsibility for uniformity and consistency to complement the domestic criminal system in order to bring about universality of human rights.

5.2.Recommendation

From the forgoing discussions and analysis; the recommendation can be pin down in the following manner:

- The ICC Rome Statute must either include persons between fifteen and eighteen in its jurisdictions for prosecutions of juveniles or upgrade the crime of conscripting, enlisting or using in armed conflicts to eighteen as war crime. Hence, the purpose of ending impunity can be realized in the ICC Rome Statute regime by complementing the national criminal systems. However, the inclusion of jurisdiction for persons between the age of fifteen and eighteen in the jurisdiction of the ICC is suitable in order to realize the purpose of the ICC Rome Statute. The accountability procedure for persons between the age of fifteen and eighteen must differs from adults. This must be done without forgetting the lasting solution-ending war, whether international or non-international armed conflicts, though difficult in practice.
- International treaties on the same subject matter must harness and design their legal frameworks to be comprehensive in order to better protect human rights in general and children's rights in particular. When human rights treaties are concluded, whether regional or international, there must be a dialogue among various treaties for better communication and protection of human rights. For example, had there been a dialogue between the ICC Rome Statute and the CRC and its Optional Protocol, there would have been better protection bestowed to children through better international standards that can lead the national criminal systems. Hence, proliferation of human rights treaties can bring about confusions and lacunae where States and individuals can escape from possible obligations and accountabilities respectively if dialogue does not exist.
- In order to better reintegrate and rehabilitate former child soldiers, it is worth important to have a procedure to account such persons for it is nearly impossible to reintegrate and rehabilitate former child soldiers without justice. Hence, on the basis of their criminal culpability (mostly from fifteen to eighteen), accountability procedure must exist in the international criminal system in order to complement the

national criminal systems when unwillingness, inability or voluntary jurisdictional relinquishment is made by States to this effect.

- The ICC Rome Statute on recruitment, conscripting and using children in armed conflicts can better benefit children if there are procedures of accountability in its jurisdiction which must differ from other adult procedures. This true especially for those who are not protected from the conscription, enlistment or usage in armed conflicts (those persons between fifteen and eighteen years of age in the ICC Rome Statute). Doing this will reveal the reality and this reality will be addressed than ignoring and placing children in the horrific circumstance of armed conflicts.
- Managing conflicts and solving disputes amicably must be the primary objectives of the international community before the voluntary allowance of persons between fifteen and eighteen in armed conflicts however, in order to seek and assure the continuity of a sustainable peace, justice must be rendered pragmatically.
- Generally the ICC Rome Statute must introduce a legislative amendment in order to answer and satisfy the conditions of persons between fifteen and eighteen to prosecute such persons as long as a voluntary recruitment, military schools and emancipation exists in order to fight the purported agenda of ending impunity.
- The international legal framework, including the ICC Rome Statute, must establish a minimum age to establish a procedure of accountabilities in case where violations of human rights occurred by juveniles in armed conflicts when States remain unable or unwilling to prosecute, try and punish such commissions. This is important for consistency and uniformity in the struggle against impunity to complement national criminal systems in order to realize the much ado of the international community to bring about the universality of human rights in the international arena.
- The international criminal system neglects the rebel groups than imposing duties not to recruit, enlist or use any person below eighteen even voluntarily otherwise such groups will be criminalized by States. But the use of child soldiers by rebel groups is at increasing because the rebel groups are left to the mercy of sovereign States. Whosoever recruits, enlists or uses child soldiers below the age of fifteen is punishable for war crimes under the ICC Rome Statute but those persons between fifteen and eighteen must be held accountable whether they are recruited, enlisted or

used by rebel groups or government armed forces. Hence, the punishments of recruiters, enlisters and users of child soldiers should not be used to justify the absolute immunity of child soldiers who commit war crimes by themselves.

- With regard to the implications for Ethiopia, I think the government of Ethiopia must see the possible obligations that Ethiopia owes despite the fact that Ethiopia is not a ratifying country to the ICC Rome Statute. This is because there are scenarios whereby the country's citizen can be held liable under the ICC due to UNSC referral, ratifying countries State referral for universal jurisdictions.

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