

Challenges in establishing the accountability of child soldiers for human rights violations: Restorative justice as an option

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Summary

This paper considers the question of the criminal responsibility of child soldiers for atrocities committed in armed conflict. It highlights the innovation introduced in international criminal law by the Statute of the Special Court for Sierra Leone, which permits the prosecution of children aged 15 and above. In viewing child soldiers not only as perpetrators but also as victims of human rights abuses, it argues that the existing mechanisms of criminal sanction for human rights violations that focus on punishment of the perpetrator are inadequate and that elements of restitutive justice, which are already asserted to a limited extent in recent developments in international human rights law regarding juvenile justice, should be included in the criminal prosecution process. Such an approach would satisfy the minimum requirements of justice while ensuring that child soldiers, who are often themselves the victims of human rights abuses, are appropriately sentenced.

1 The use of child soldiers: An African dilemma?

The use of child soldiers has been an issue of global concern in recent decades.¹ From Asia to the Americas, from the Middle East to the Balkans, and to the many conflicts in Africa, both internal and interna-

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tional, various warring parties continue to recruit and to deploy children in the conduct of hostilities. The extent to which children are used in combat appears to be escalating, with estimates putting worldwide numbers of child soldiers at 300 000, of which more than half are in Africa.² A 1996 expert report by Graça Machel to the United Nations (UN) Secretary-General considered the increasing use of child soldiers as an 'alarming' global trend.³

On the African continent, child soldiers are, or have been, engaged in fighting in most of the conflicts witnessed in a number of countries: Angola, the DRC, Mozambique and Sudan.⁴ Perhaps the most well-known case involving the forceful use of child soldiers is Uganda, where the Lord's Resistance Army (LRA), made up almost entirely of 12 000 children abducted from their families, has achieved global infamy in this regard.⁵ It holds the record for fielding the world's youngest 'combatant' - a five year-old.⁶

The participation of children in armed conflict poses the question of accountability at the end of war. Some hold the view that, irrespective of age, any child involved in the commission of war crimes should be tried and punished.⁷ On the other hand, there are those who assert that, since child soldiers are indeed who they are — children — efforts should focus on rehabilitation rather than retribution.⁸ Whereas there is merit in each of these approaches — one focusing on impunity and the other underscoring the limited culpability of children — this paper argues that one cannot possibly take an absolutist stance on this, as child soldiers, though guilty of crimes, are themselves victims. As argued below, the inadequacies inherent in the punitive-oriented criminal justice model necessitate that a restorative element be emphasised

¹ See Amnesty International report 'Child soldiers: Criminals or victims?' <http://web.amnesty.org/library/Index/ENGIOR500022000?open&of=ENG-364> (accessed 10 August 2005). For further information on the use of child soldiers worldwide, see the website of the Coalition to Stop the Use of Child Soldiers <<http://www.child-soldiers.org>> (accessed 31 August 2005).

² See DM Amann 'Calling children to account: The proposal for a Juvenile Chamber in the Special Court for Sierra Leone' (2001) 29 *Pepperdine University Law Review* 171.

³ Impact of Armed Conflict on Children: Report of the expert of the Secretary-General, Ms Graça Machel, submitted pursuant to General Assembly Resolution 48/157 P 34 UN Doc A/51/306, 51st session, item 108 of the provisional agenda (1996) (Machel report).

⁴ Maputo Declaration on the Use of Children as Soldiers (22 April 1999) <http://chora.virtualave.net/maputo-declaration.htm> (accessed 10 August 2005).

⁵ PW Singer 'Talk is cheap: Getting serious about preventing child soldiers' (2004) 37 *Cornell International Law Journal* 561 572. See also M Barber 'Child soldiers: A growing concern on foreign battlefields' *Seattle Post Intelligencer* 8 April 2002.

⁶ Barber (n 5 above).

⁷ See C Reis 'Trying the future, avenging the past: The implications of trying children for participation in armed conflict' (1997) 28 *Columbia Human Rights Review* 629 635, commenting on the involvement of children in the Rwandan genocide.

⁸ Amman (n 2 above) 167 185 178.

in any approach to establish the accountability of this special category of perpetrators for atrocities.⁹

2 The criminal justice model

The current model of international criminal law, like most domestic criminal processes, is largely premised on retribution, as it focuses on the criminal responsibility of perpetrators, rather than on the concerns and rights of victims. This approach is rationalised by the fact that criminal acts are considered first as wrongs against the entire society — either the state or the international community.¹⁰ Accordingly, the state has at the national level ‘abrogated’ to itself the responsibility of punishing those whose conduct is considered criminal although such conduct may, as in the case of criminal assault, directly affect the physical integrity of the victim.¹¹ While there have been criminal justice system reforms since the 1970s in a number of countries, the victim’s place in the process remains peripheral.¹² Furthermore, international criminal processes have not benefited from these developments. The Rome Statute of the International Criminal Court (ICC) prepares the ground for progress in this regard.¹³

The retributive paradigm of criminal justice permeated into international criminal law. Since the International Military Tribunal at Nuremberg,¹⁴ the trials of persons responsible for war crimes and other international crimes such as genocide and crimes against humanity before international tribunals such as the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), have consis-

⁹ See the next section.

¹⁰ On the retributive paradigm of domestic criminal law, see, generally, H Strang *Revenge: Victims and restorative justice* (2002) and DW van Ness ‘New wine and old wineskins: Four challenges of restorative justice’ (1993) 4 *Criminal Law Forum* 251.

¹¹ A Ashworth ‘Some doubts about restorative justice’ (1993) *Criminal Law Forum* 277 299.

¹² There have been legislative reforms in countries such as Germany, the United Kingdom and the United States of America to shift the paradigm towards restorative justice in order to address, among others, the interests of the victim in the criminal process. See with respect to the USA the Victims Protection Act (1982), the Victims of Crime Act (1984) and the proposed addition to the Sixth Amendment, aimed at legislating the right of victim participation at all levels of the criminal process. See also WT Pizzi & W Perron ‘Crime victims in German courtrooms: A comparative perspective on American problems’ (1996) 32 *Stanford Journal of International Law* 37 on the ‘*Nebenklage* procedure’, through which victims are regarded as third parties in a criminal case.

¹³ The Rome Statute introduces innovation that permits victims greater participation in the Court’s process and the right to restitution. See eg arts 53, 54, 75 & 153 Rome Statute.

¹⁴ Tribunal established by the Allied Powers to try major Nazi war criminals after World War II.

tently been justified by the fact that the perpetration of such crimes jeopardises international peace and security.¹⁵ As such, the recognition of, and concern for, victims of such crimes have been incidental issues. While there have been complementary national processes such as the one in Rwanda that have been more sensitive to victims,¹⁶ the tribunals' concern for victims has been limited to the context of their service to the criminal process as witnesses.¹⁷

The criminal model of justice is inadequate in a number of respects. While prosecutions are desirable or in some cases imperative,¹⁸ they inadequately address victims' concerns, namely the right to truth and reparation for harm suffered.¹⁹ International criminal law, as currently structured, is also ill-suited for the child perpetrator. Whilst international criminal trials since Nuremberg have provided for fair trial guarantees for perpetrators,²⁰ it has not contemplated a child perpetrator within the context of the trial itself and sentencing. Indeed, such trials have only targeted those considered to bear the largest responsibility for atrocities.²¹ This is perhaps one reason why the innovative proposal to prosecute children as young as 15 before the Special Court for Sierra Leone (SCSL) deserves scrutiny to explore options for accountability.²²

Recent international responses to atrocities have seen favour for 'hybrid' tribunals established by agreement between the UN and relevant governments in Sierra Leone and Timor-Leste (formerly East Timor).²³ These mechanisms combine international and domestic elements in their composition, structure and mandates. Recourse to hybrid tribunals can, and indeed have, facilitated the deployment of domestic options for restorative justice mechanisms, hand in hand with the pursuit of criminal justice often emphasised by international players. In the

¹⁵ See eg UN Security Council Resolution 955 (1994) of 8 November 1994 on the establishment of the ICTR and Resolution 827 (1993) of 25 May 1993 on the establishment of the ICTY, both of which justify Security Council action by its powers under ch VII of the UN Charter relating to international peace and security. See also the recent SC resolution 1593 (2005) referring Darfur for investigation by the ICC.

¹⁶ On *gacaca* and victims, see M Goldstein-Bolocan 'Rwandan *gacaca*: An experiment in transitional justice (2005) *Journal of Dispute Resolution* 355 363.

¹⁷ Witness protection units created within these tribunals (ICTR) and (ICTY) do not focus on victims' concerns in their capacity as victims, but as witnesses.

¹⁸ International law imposes an obligation to prosecute at least the most serious crimes. See R Aldana-Pindell 'In vindication of justiciable victims' rights to truth and justice for state-sponsored crimes' (2002) 35 *Vanderbilt Journal of Transnational Law* 1399 1438.

¹⁹ Aldana-Pindell (n 18 above) 1402.

²⁰ See eg art 16 Nuremberg Charter, art 20 ICTR Statute, art 21 ICTY Statute and art 67 Rome Statute.

²¹ See art 1 Nuremberg Charter, art 1 ICTR Statute and art 1 ICTY Statute.

²² This is irrespective of the fact that the prosecutor of the SCSL has initially indicated that he will not indict former child soldiers. See further ahead.

²³ This breaks with the tradition of the ICTR and ICTY which were established pursuant to Security Council powers under ch VII of the UN Charter.

case of Sierra Leone, for example, the operation of the Truth and Reconciliation Commission (TRC) side by side with the SCSL, has permitted the Sierra Leonean government an option for restorative justice through the TRC in a country in dire need of truth and reconciliation.²⁴ Traditional or indigenous mechanisms have also been used in post-conflict societies to complement criminal processes.²⁵

It is asserted that the retributive paradigm of international criminal law (save to a limited extent where mixed tribunals are deployed) is narrow in perspective, not only because it solely highlights the criminal liability of the perpetrator, but also because even in its focus on the perpetrator, it does not differentiate the disparate kinds of perpetrator that may require special attention.²⁶ There is also a lack of consistency among institutions that enforce international criminal law. Whereas the SCSL is mandated to try children between 15 and 18 years, the ICC will not try such children.

3 The concept of restorative justice

By restorative justice is meant a concept of justice that seeks to take into account the interests of all parties in a criminal prosecution: the state, offenders and victims, or, in the case of international justice, the international community, perpetrators and victims. Although there is uncertainty regarding remedies in international law,²⁷ restorative justice may be understood as an umbrella term encompassing a number of processes and mechanisms through which offenders' and victims' concerns are articulated and addressed, including restitution, compensation, participation and rehabilitation.²⁸ Sarnoff notes that there is no single definition of restorative justice as the concept encompasses several principles.²⁹ Crime consists of more than a violation of criminal law

²⁴ See, generally, W Schabas 'Conjoined twins of justice? The Sierra Leone Truth and Reconciliation Commission and the Special Court' (2004) 2 *Journal of International Criminal Justice* 1082-1099. See further arguments on its relevance to accountability of child soldiers.

²⁵ See further ahead for a discussion on Rwandan *gacaca*.

²⁶ See G van Bueren *The international law on the rights of the child* (1995) 197-198, discussing the place of 'status offenders' in domestic law.

²⁷ See D Shelton *Remedies in international law* (1999) 4. On problems of terminology, see also L Zedner 'Reparation and retribution: Are they reconcilable? 1994 *Modern Law Review* 228-234.

²⁸ Strang (n 10 above) 44. See also A Morrison & G Maxwell *Restorative justice for juveniles* (2000) and D Roche *Accountability in restorative justice* (2003) 3, who state that four values are contained in restorative justice: personalism, reparation, participation and reintegration.

²⁹ S Sarnoff 'Restoring justice to the community: A realistic goal?' (2001) 64 *Federal Probation* 33-35.

and defiance of government authority. Crime disrupts victims, communities and offenders. The primary goals of restitution are the repair of harm and healing of victim and community. The victim, community and offender should all participate in determining the outcome of crime.

Applying this to the international plane, restorative justice would entail that, while the interests of the international community of international peace and security achieved partly by punishing perpetrators are met, victims' and perpetrators' interests are factored into the international criminal law adjudicative process. As noted above, the use of hybrid tribunals can permit a measure of justice that meets the ends of retribution for certain classes of crimes and restoration of victims and society. As discussed below, such mechanisms can be usefully deployed in difficult cases, requiring the establishment of accountability of child soldiers for crimes committed in war.

4 Normative gap in the responsibility of children in international criminal law

One important question in this debate on the accountability of child soldiers is whether children can be tried at all, especially for international crimes. While international criminal law has been quiet on this until the Statute of the SCSL mandated the Special Court to try children as young as 15 years,³⁰ domestic penal law provides for the prosecution of children for crimes. Since international human rights law relating to children does not prescribe this, the minimum age at which one is deemed to be criminally responsible varies from one jurisdiction to another.³¹

With regard to human rights instruments, fair trial guarantees in human rights instruments, such as the African Charter on Human and Peoples' Rights (African Charter), do not prescribe *who* may or may not be tried in terms of age, but rather under *what* conditions persons accused of crimes may be tried.³² The Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child (African Children's Charter) do not preclude the prosecution of children of *whatever* age. It is recognised, however, that children can be tried in accordance with domestic penal laws. These instruments therefore provide special protection for children within such processes.

³⁰ Art 7 Statute of the Special Court.

³¹ See I Cohn & GS Goodwill-Gill *Child soldiers: The role of children in armed conflict* (1999) 7, noting that various national laws set this at different ages.

³² Arts 6 & 7 African Charter & art 14 CCPR.

In particular, CRC³³ and the African Children's Charter,³⁴ as complemented by other more detailed non-binding norms, set standards on juvenile justice and require states to ensure that³⁵

[e]very child accused or found guilty of having infringed penal law shall have the right to special treatment in a manner consistent with the child's sense of dignity and worth and which reinforces the child's respect for human rights and fundamental freedoms of others.

While children can be prosecuted under domestic law, the responsibility in international law for atrocities committed by child soldiers focuses on those who recruit and use children as soldiers in armed conflicts. Various human rights, as well as humanitarian law standards, proscribe the recruitment and use of children in armed conflict. While the African Children's Charter prohibits the recruitment and direct use in hostilities of children,³⁶ CRC pegs this at 15 years. It provides that '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'.³⁷ The Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict enjoins states to ensure that persons who have not attained the age of 18 years are not compulsorily recruited into their armed forces and to raise the age of voluntary recruitment to 18.³⁸ This is intended to 'contribute effectively to the implementation of the principle that the best interests of the child are the primary consideration in all actions concerning children'.³⁹

The African Children's Charter breaks new ground in so far as it extends the scope of international humanitarian law as it applies to children to situations of internal strife and tensions that are ordinarily regulated by domestic law.⁴⁰ Although commentators disagree over the utility of instruments that raise the minimum age for recruitment to 18, it can be posited that human rights law has progressed with

³³ Art 40.

³⁴ Art 17.

³⁵ United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) adopted by General Assembly Resolution 40/33 of 29 November 1985 at <http://www.ohchr.org/english/law/beijingrules.htm#wp1020026> (accessed 11 August 2003).

³⁶ See arts 22 & 2 African Children's Charter. In terms of art 2, a child is a person who has not attained the age of 18.

³⁷ Art 38(2).

³⁸ See arts 2 & 3 Optional Protocol to CRC, adopted and opened for signature, ratification and accession by General Assembly Resolution A/RES/54/263 of 25 May 2000, entered into force on 12 February 2002.

³⁹ See Preamble Optional Protocol to CRC.

⁴⁰ Art 22(3); see Van Bueren (n 26 above) 12.

regard to the minimum age at which non-voluntary recruitment is permissible and thus offers greater protection to children.⁴¹

The above provisions of CRC and the African Children's Charter regarding armed conflict and child soldiers represent international law of the child as a point of convergence of human rights law and humanitarian law.⁴² Various standards of humanitarian law complement the proscriptions on recruitment and use of children in armed conflict.⁴³ The complementarity of these two bodies of law is meant to enhance protection of children at all times.

In terms of humanitarian law, protection for the child in situations of international armed conflicts, Additional Protocol I, which supplements the Geneva Conventions of 1949 in this regard, requires parties to the conflict to take all feasible measures in order that children under the age of 15 do not take direct part in hostilities and, in particular, refrain from recruiting them into their armies.⁴⁴ Additional Protocol II to the Geneva Conventions of 1949, which governs internal conflicts, provides similarly regarding recruitment into armed forces or groups.⁴⁵ This prohibition is a total one⁴⁶ and relates to forced as well as voluntary enlistment, and participation by the children in hostilities.⁴⁷ The Rome Statute of the ICC makes it a war crime to recruit, forcefully or voluntarily, and to use children under the age of 15 in hostilities.⁴⁸

Additionally, the International Labour Organisation (ILO) Convention 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, in terms of which 'child'

⁴¹ See C Jesseman 'The protection and participation rights of the child soldier: An African and global perspective' (2001) 1 *African Human Rights Law Journal* 148, who disagrees, noting that the Optional Protocol to CRC, which effects the raise in age to 18, is framed permissively and that children under 18 years continue to be recruited.

⁴² See Van Bueren (n 26 above) 349, noting that CRC is an unusual treaty because it is expressly concerned both with the principles of international human rights treaty law and the application of international humanitarian law. At least in relation to children, the two can no longer be seen as distinct bodies of law.

⁴³ For these references, see arts 22(1) & (3) African Children's Charter and arts 38(1) & (4) CRC which enjoin states to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.

⁴⁴ Art 77(2) Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts of 8 June 1977 (AP I) 16 *International Legal Materials* 1391.

⁴⁵ Art 4(3)(c) Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts of 8 June 1977 (AP II) 16 *International Legal Materials* 1442.

⁴⁶ Reis (n 7 above) 641.

⁴⁷ See Y Sandoz *et al* (eds) *Commentary on the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts* (1987) 4557, noting that this means to participate in military operations such as gathering information, transmitting orders, transporting ammunition and foodstuffs, or acts of sabotage.

⁴⁸ Art 8(e)(vii) Rome Statute.

applies to all persons under the age of 18,⁴⁹ regards forced or compulsory recruitment of children for use in armed conflict as one of the worst forms of labour⁵⁰ and requires states to take measures to eliminate the practice.⁵¹

To attain accountability for human rights violations committed in conflicts where the majority are children, it is important to get out of the mould that only those who recruit and use children should be punished.

5 Child soldiers as victims

Child soldiers may generally be considered victims of war. More specifically, as participants who have been involuntarily recruited, they have to serve as objects of the recruiters and protagonists of war. By focusing on those who recruit children, international law reflects the view that children involved in armed conflict are themselves victims. Accordingly, it can be sustained that child soldiers who participate in conflict contrary to these provisions do not forfeit special protections under the law.⁵²

Reports from countries in conflict, such as Sierra Leone and Uganda, indicate that such children often go through processes of indoctrination and severe abuse intended to maintain control over them. Stories have been told of a friend or family member killed in full view of them in order to instill fear and to gain total submission from the child.⁵³ Although a child may get a sense of security by volunteering into an army, their recruitment into war, either voluntary or otherwise, can never be said to be in their best interest as their development is affected negatively. How 'voluntary' this is, is itself questionable. Rather than being forced by someone to join, the hardships of war serve as an agent of force.⁵⁴ In fact, where the child is forcibly recruited, their right to participate in the making of decisions that affect them is at issue.⁵⁵

⁴⁹ Art 2 ILO Convention 182.

⁵⁰ Art 3(a) ILO Convention 182.

⁵¹ Art 7 ILO Convention 182.

⁵² Reis (n 7above) 643.

⁵³ See Amnesty International reports on Uganda 'Breaking the Lord's commands: The destruction of childhood by the Lord's Resistance Army' (AI Index AFR 59/01/97) of September 1997 and Sierra Leone 'Sierra Leone: Childhood, a casualty of conflict' (AI Index: AFR 51/69/00) of August 2000.

⁵⁴ Machel report (n 3 above).

⁵⁵ Jesseman (n 41 above) 145.

6 Bringing children to justice: Sierra Leone and the promise of a 'restorative model' of international criminal law

While child soldiers are victims of circumstances in which they find themselves and should therefore be treated as such, they have been responsible for some of the worst breaches of international law. Serious cases of rape, murder and other gross violations committed by children in the course of war in places like Sierra Leone and Uganda are well documented.⁵⁶ As argued above, punishment-oriented mechanisms are ill-suited to establish accountability for this class of perpetrator. The restorative justice approach is more suited to establish the accountability of such children because such children must continue to be regarded as beneficiaries of special protections attributable to their vulnerable status.

As noted, the SCSL, established to try war-related crimes in Sierra Leone, authorises the prosecution of children. This is in recognition of the fact that children formed the bulk of combatants in Sierra Leone's civil war and have been responsible for some of the worst atrocities committed in that conflict. Before this, there was no international standard that expressly provided for the prosecution of children for international crimes.⁵⁷ The statutes for the *ad hoc* international criminal tribunals — ICTY and ICTR — have no provision on age. Accordingly, no children have been indicted by either tribunal. Rwanda released *en masse* thousands of detainees who were minors at the time they were involved in the 1994 genocide, despite the fact that Rwandan domestic law recognises criminal culpability of children of 14 and above.⁵⁸ The Rome Statute of the ICC expressly forbids prosecution of individuals younger than 18 years of age when they were alleged to have committed a crime within the court's jurisdiction.⁵⁹

The novelty of the idea that children could be called to account in such tribunals raised opposing concerns. While non-governmental organisations (NGOs) argued that such moves would undermine rehabilitation efforts,⁶⁰ ordinary Sierra Leoneans, in whose minds the

⁵⁶ See Amnesty International (n 1 above).

⁵⁷ See Amann (n 2 above) 178, noting that the inclusion of juveniles within the jurisdiction of a tribunal adjudicating international humanitarian law, under the auspices of an international organisation is, to be sure, novel.

⁵⁸ See Reply to Country Report on Rwanda at <http://unpan1.un.org/intradoc/groups/public/documents/CAFRAD/UNPAN004655.pdf> (accessed 11 August 2005).

⁵⁹ Art 26 Rome Statute.

⁶⁰ Eg, Human Rights Watch recommended that the Special Court focuses on adult offenders rather than prosecution of children younger than 18 in light of the children's inherent immaturity and forced abduction into the armed conflict.

memory of atrocities was still fresh, insisted that no alleged perpetrator should be exempt from prosecution.⁶¹

Given these opposing concerns, there is a need for an approach that meets the minimum standards of accountability, while recognising that child soldiers are themselves victims of armed conflict. Such an approach could be applied, not only to Sierra Leone, but in other places where the responsibility of children for atrocities is in issue. While the seriousness of atrocities committed by child soldiers causes them to be regarded as perpetrators rather than victims, the fact that most have been forcibly and illegally recruited presents a moral dilemma.⁶² Indeed, the UN proposal entailed in the Statute of the SCSL attempts to deal with this moral problem.

The *raison d'être* of the Court is 'to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone'.⁶³ It has been suggested that the position of authority of the accused and the gravity or massive scale of the crimes committed serve as indicators of 'greatest responsibility' for purposes of prosecution under the statute.⁶⁴ This leaves open the possibility of trying children who held positions of authority in warring forces and those who distinguished themselves in the commission of gross violations. This nevertheless may have been mooted by the position taken by the Prosecutor of the SCSL that he would not indict children and that he will focus on those with command authority in the various parties to the conflict.⁶⁵

The prosecution of children should further be guided by the imperative that 'the child-rehabilitation programme is not placed at risk, and that, where appropriate, resort should be had to alternative truth and reconciliation mechanisms, to the extent of their availability'.⁶⁶ This recommendation is a rehash of muted development at international law entailed in CRC and other non-binding instruments.⁶⁷

There is merit, though, in the assertion that the criteria for commencing proceedings against an individual imply that children are not likely to be targets of prosecution by the Special Court because of their junior status in the various armies. Thus far, none of those indicted by the SCSL is a child. They are all members of the high command in armies of

⁶¹ Amann (n 2 above) 174.

⁶² See A Tejan-Cole 'The Special Court for Sierra Leone: Conceptual concerns and alternatives' (2001) 1 *African Human Rights Law Journal* 107 117.

⁶³ Art 1 Statute SCSL.

⁶⁴ I Zarifis 'Sierra Leone's search for justice and accountability of child soldiers' (2002) 9 *Human Rights Brief* 18 20.

⁶⁵ See 'Sierra Leone's Special Court: Will it hinder or help?' <http://allafrica.com/stories/200211210289.html> (accessed 15 October 2005).

⁶⁶ Art 15 Statute SCSL.

⁶⁷ n 35 above.

various warring parties.⁶⁸ Despite the wide definition of who may be tried, the prosecutor seems to have adopted a narrower view. Whereas this conforms with the desire to punish at least those with the greatest responsibility, this approach leaves unattended the other classes of people, among them children, who deserve to be tried - those who may have committed atrocities while acting entirely voluntarily, and were in control of their actions. This may send a mixed message of 'softness' on impunity.

7 Balancing trials with restorative justice

It should be a general rule that all perpetrators should be held accountable for atrocities, irrespective of their age, with minors being brought before appropriate fora such as truth commissions, enabled to order the transfer of children who in its view ought to face trial. It is suggested that this be modeled on the relationship between domestic courts and *gacaca* tribunals in Rwanda.

In terms of the law governing *gacaca* courts,⁶⁹ offenders are classified into four categories: (1) the most serious offenders, being planners, organisers, instigators, those in positions of administrative authority and sexual offenders; (2) persons whose criminal acts or whose acts of criminal participation place them among perpetrators, conspirators or accomplices of intentional homicide or of serious assault against the person causing death; (3) persons whose criminal acts or whose acts of criminal participation make them guilty of other serious assaults against the person; and (4) persons who committed offences against property. Suspects in all categories, except those in category (1), may make a confession in terms of the law and thus benefit from reduced sentences.⁷⁰ Those convicted of crimes in category 4 are liable to pay civil damages accordingly negotiated with the victims and with the involvement of the community. Community service also applies.⁷¹ It has been noted that by blending retributive and restorative approaches in an innovative way, *gacaca* courts represent a unique opportunity to seek justice in an open, accessible and participatory fashion.⁷² Although

⁶⁸ Those who have been indicted are so far: five alleged leaders of the former Revolutionary United Front; three alleged leaders of the former Armed Forces Revolutionary Council, three alleged leaders of the former Civil Defence Forces and former President of Liberia, Charles Taylor, who is exiled in Nigeria. See <http://www.sc-sl.org> (accessed 10 August 2005).

⁶⁹ Art 2 Organic Law on the Organisation of Prosecutions for Offences constituting the Crime of Genocide or Crimes against Humanity Committed since 1 October 1990.

⁷⁰ Arts 5, 6, 8 & 9 Organic Law.

⁷¹ Art 14(c) Organic Law.

⁷² Goldstein-Bolocan (n 16 above) 355.

the Organic Law does not specifically mention children over 13 years as they are criminally liable under Rwandan law, the elements of restorative justice incorporated in the concept of *gacaca* as a 'community court', and in the sentencing process, better address the accountability of children than the formal courts.

In unique circumstances, where a court operates alongside a truth and reconciliation commission, such as in Sierra Leone, the TRC could serve the function of *gacaca* courts in Rwanda in determining the cases involving child soldiers, whom in its view ought to face trial before the SCSL. It is unfortunate that the Sierra Leonian TRC, which has since completed its work, did not do much in this regard.

The guiding standard that all can face trial is of extreme importance. Whereas there is merit in considering children as persons of reduced culpability, it is submitted that this standard is too general. As noted by Amnesty International, there may be examples of young commanders of units who may commit atrocities, acting willingly and without coercion, and who may force other children to commit such acts. It is submitted that where an individual can be held responsible for his or her actions, failure to bring them to justice will perpetuate impunity and lead to a denial of justice to the victims.⁷³ An approach that embraces restorative justice would incorporate the interests of victims that demand at least the trial of those responsible for atrocities as well as those of child soldiers, who we consider a special category of victims.

With regard to Sierra Leone, the Statute applies human rights standards on juvenile justice by prescribing special protection mechanisms for juveniles in the event that they are tried. It notes that children between the ages of 15 and 18 shall be treated in accordance with international human rights standards specific to the rights of the child, and⁷⁴

[s]hall 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.

Additionally, custodial sentences are not applicable to minors, and the SCSL is required to make orders limited to a range of rehabilitative measures: care, guidance, and supervision orders; community service orders; counselling; foster care; correctional, educational and vocational training programmes; approved schools; and, as appropriate, any disarmament, demobilisation and reintegration programmes of

⁷³ See Amnesty International 'Recommendations on the draft Statute of the Special Court', stating that the rights of victims demand no less than the prosecution of those responsible for atrocities and that to do otherwise results in impunity. Report available at http://www.essex.ac.uk/armedcon/story_id/000143.html (accessed 31 August 2005).

⁷⁴ Art 7 Statute SCSL.

child protection agencies⁷⁵ within a range of protective measures the court should take during such a trial.⁷⁶

8 Conclusion

Whilst the novelty of trying children in an international criminal tribunal presents difficult problems and moral dilemmas regarding accountability, there is ample guidance in the law to direct the development of appropriate principles. This paper argued that entrenching a restorative element in international criminal law presents an opportunity to deal with child perpetrators. Although the SCSL may never get the opportunity to decide on the issue, a new avenue is presented by the Rome Statute of the ICC, which requires the ICC to develop principles to operationalise restorative justice, through which the concerns and rights of victims will be given effect.⁷⁷ This opens an avenue to increase the visibility of victims in the processes of the ICC, but also to develop jurisprudence relating to victims and thus provide guidance for other tribunals, both national and international.

⁷⁵ Zarifis (n 64 above) 25.

⁷⁶ These include trial by a juvenile chamber, privacy rights and the requirement that judges and the staff of the prosecutor's office are expected to have prior experience in juvenile justice.

⁷⁷ Art 75 Rome Statute.