

**Research Article****INTERNATIONAL CRIMINAL COURT IN CRIMINALIZING CONSCRIPTING OR ENLISTING CHILDREN FOR HOSTILITY****Abhay Singh**

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**ABSTRACT**

Conscripting or enlisting children for hostility has shown itself to be a serious predicament. Not only rebels and militia armed forces but even the state military forces are recruiting children to fulfill their military constraints. The research has been divided into 4 major parts the I part includes the Historical Development of Crimes Relating to Recruitment or use of Child Soldiers, and the inclusion of the same as an offence under the 1977 Additional Protocol I of the Geneva Convention and how the development helped in shaping of the criminalization conscripting or enlisting children for hostility under the Rome statute of ICC, the II part provides for the treatment of the offence and the procedure followed by the International Criminal Court (ICC). It provides for both the substantive and procedural treatment of the offence focusing on the leading cases as practical implementation of the Articles of Rome statute and procedure laid down by Office of Prosecutor, the IV part is based on a critical question that whether the 15 years age criteria provided under Art 8(2) (b) (xxvi) and Art 8(2) (e)(vi) for considering someone as a child soldier is appropriate? Which puts into question the legal reasoning behind the offence. The V part provides for conclusion and suggestions stating that ICC being a new judicial body needs to grow and develop. It does have a steady structure however, its mechanism is too slow to for speedy justice. There is a requirement that the procedural structure of ICC is re-evaluated

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**INTRODUCTION**

War is not a cheap price to pay, it causes destruction of life and resources, it may not cause such intense damage to the wealthy nations, however, for the poor nations like the African nations the damage is excruciating. It renders the poor nations already suffering low economic growth, with deep economical and social crises and forces civilians to face most terrible economic hardship, consequently often, the poor nations either conscripting or enlisting children for hostility. Children being most venerable are easily persuaded to take up arms in exchange of very less or even without remuneration. The rebel groups, militia and similar armed groups also find children as most easy targets to join their cause<sup>1</sup>. Children are also often abducted from schools or streets or even from their homes and are forcefully made to join armed forces.

Even children below the age of 10 years are used as child soldiers because of availability of light and inexpensive small

arms. These children often have to face severe cruelty. Tales of children being drugged before deployed to battle and being forcefully made to render violence on their own families in order to end their family and social bonds<sup>2</sup>. For Children who have seen the horrors of armed conflict and war, social rehabilitation becomes unrealistic<sup>3</sup>.

Moreover Children's fighting manner is most unpredictable as they shoot more easily and aimlessly at whatever that moves. Because of such conduct of child soldiers they pose more of threat. The total number of child soldiers is difficult to access. But studies have suggested that there are approximately three hundred thousand child soldiers being exploited in more than 30 conflicts around the world but the real number still remains unknown<sup>4</sup>.

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## **II - Historical Development of Criminalizing Conscripting or Enlisting Children for Hostility.**

The First international conventions on the issue of child soldiers are 1977 Additional Protocols to the Geneva Conventions. The Additional protocol I under Article 77 para 2 and Additional Protocol II under Article 4 para 3(c) forms an obligation upon the state party to prohibit the direct participation of children below 15 years of age in any hostile activity. The United Nations Convention on the Rights of the Child 1989 under Article 38 para 2 and 3 reaffirms Additional protocol I under Article 77 para 2 and Additional Protocol II under Article 4 para 3(c). Then again the 17<sup>th</sup> June 1999 International Labour Organization Convention No. 182 provides that States Parties shall prohibit the inclusion of children in hostility. The African Charter on the Rights and Welfare of the Child 1990 under Article 22 para 2 states that State Parties shall take all essential steps to make certain that no person below 18 years of age shall take a direct part in hostilities. While drafting Rome Statute the Preparatory Committee in the Rome Conference found majority support for maintaining the conscripting or enlisting of child soldiers as a war crime and thereby the ICC jurisdiction<sup>5</sup>.

## **III – Child Soldiers under International Criminal Court**

The Rome Statute of International Criminal Court, The Rule of Procedure and Evidence of the International Criminal Court and also The Office of Prosecutor Policy of Children 2016 deals with special mechanisms and procedures that are to be taken while specifically dealing with a prosecution relating to Child Soldier. These regulations provide a) the nature of proceeding, b) the kind of offence under which issues relating child to soldier fall, c) the procedure for conducting evidence in such issues and d) also the approach that needs to be taken by the court, prosecution, defence and the whole international community in such issues.

### **Child Soldiers under Rome Statute of International Criminal Court.**

The Rome Statute of International Criminal Court, 1998 endows upon International Criminal Court (ICC) with jurisdiction to trial offences of genocide, crimes against humanity and war crimes under Article 5. Under Article 8 of the Rome statute there is specific mentions of what ‘war crimes’ are and under 8(2)(b)(xxvi) conscripting or enlisting children soldiers under fifteen years of age in a nationalized arm force or for deploy them to indulge in actively of hostilities is taken up as a war crime i.e. use of child soldiers in international conflict and Art 8(2)(e)(vii) bring use of child soldiers for non-international conflicts<sup>6</sup>. The charges under ICC against the accused are to be laid down as per the procedure provided under Article 13. ICC can implement its jurisdiction in three methods. Firstly state parties can refer to the prosecutor for taking action in case of violation of Article 5. Secondly, the United Nation Security Council can ask the court to take initiative. Thirdly, the prosecutor itself can investigate in accordance with Article 15. Also Article 26 prohibits the court to carry on any proceedings against a person below 18 years of age<sup>7</sup>. This article ensures that no proceedings shall be conducted against a child soldier

who might have committed any offence under Article 5 so that a child soldier could be treated as a victim rather than a perpetrator.

Nevertheless, ICC can only implement its jurisdiction for crimes that have been committed after the year 2002 i.e. after the enforcement of ICC as the Rome Statutes as the statute does not provide for retrospectively applicability. But where a declaration has been made by the State Party under Article 12 and it accepts the jurisdiction of the Court for offence in question, then ICC can apply its jurisdiction even for the crimes committed before 2002. Moreover, the Court will only proceed if the concerned State is reluctant or is not able to proceed with the investigation or prosecution<sup>8</sup>.

The first ever judgment pronounced by ICC was in *Lubanga case*<sup>9</sup> on March 14, 2012 which is regarding recruitment and use of children in armed conflicts in which the court sentenced the ex-Congolese armed force head Thomas Lubanga Dyilo for imprisonment of 14 years for commission of war crimes. The present case was called upon and referred by Democratic Republic of Congo to the ICC under Article 14 of the Rome Statute in 2004 and thereafter, in 2005 Lubanga was arrested. ICC charged Lubanga and ultimately found him guilty for violating Article 8 (2) (e) (vii) of the Rome Statute which deals with recruitment of child soldiers for non international armed conflicts by “enlisting and conscripting children under the age of fifteen years” into the Patriotic Force for the Liberation of the Congo (PFLC) and making them actively take part in hostilities from the month of September 2002 until August 2003<sup>10</sup>. In the present case amicus curiae, as an expert witness, submitted its report before ICC arguing that it is meaningless to see the distinction regarding the children in war being voluntary enlistment or children in war recruited forcefully as in both cases, the most intentional action by a child can merely be a frantic effort to stay alive. Also the view regarding the use of children participating in war should be broadened as children are involved in various ways for instance as a spy, messenger, porter, scout, and also as a cook this practice also place them in danger. Further, it was also suggested that using child soldiers as sex slaves and violence should be regarded as a form of being actively used in hostilities to give girls access to justice and reintegration programs. Considering these submissions ICC in its judgment approved the broad interpretation and included boys and girls serving as spy, messenger, porter, scout, and cook under the meaning of child soldiers. This judgment has lay down essential international jurisprudence regarding crime of recruiting children for armed force and has become a precedent for deciding future proceedings. However, court was not able to decide relating the issue of child soldiers as sex slaves and violence, as no such charges were confirmed against the accused<sup>11</sup>.

In the ongoing trial of *The Prosecutor v. Joseph Kony and Vincent Otti*<sup>12</sup> the Pre-Trial Chamber of ICC has confirmed and framed indictment against the alleged Commander and Vice Commander of the Lord’s Resistance Army (LRA) which is an operating Christian based rebel group in Uganda<sup>13</sup>. The Pre-Trial Chamber of ICC has stated that there are adequate amount of evidence to proceed against the accused for charges of committing crimes against humanity such as murder,

enslavement, sex slavery, rape, inflicting severe bodily injury and pain under Art 7 and for 21 war crimes under Art 8 inclusive of “*conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities*” provided in Article 8(2)(e)(vii) of the Rome Statute. Accused however have not been apprehended so far<sup>14</sup>.

Further in the ongoing trial of *The Prosecutor v. Bosco Ntaganda*<sup>15</sup> the Pre-Trial Chamber of ICC has confirmed and framed indictment against the Former Deputy Chief of the Staff and commander of operations of the Forces Patriotiques pour la Libération du Congo in 13 of war crimes including Article 8(2)(e)(vii) and for commission of sexual violence against child soldiers under articles 7(1)(g), 8(2)(b)(xxii) and 8(2)(e) (vi) therefore this case has brought an opportunity in the hand of ICC to include the use of child soldiers in sexual slavery and violence as a form of being actively used in hostilities to give girls access to justice and reintegration programs which ICC was not able to establish in the Lubanga case<sup>16</sup>. In this case accused has been apprehended and the trial has commenced on 2<sup>nd</sup> September 2015 in ICC<sup>17</sup>

However, in *The Prosecutor v. Dominic Ongwen*<sup>18</sup> a new question has came before the court, as in this case the alleged Former Brigade Commander of the LRA, who has been accused of committing war crimes including use of child soldiers under Article 8(2)(e)(vii)<sup>19</sup> has claimed that he was abducted by LRA at the age 10 and was a child soldier himself thereby he is the victim not the perpetrator<sup>20</sup>. Thus whether the claim of being an ex Child soldier can be regarded as a defence or a kind of mitigating factor will be answered in this case.

#### ***The Rules of Procedure and Evidence of the International Criminal Court***

The Rules of Procedure and Evidence is a mechanism for applying the Rome Statute in the ICC proceedings. This instrument regulates the evidence procedure in the ICC. The Rules provides that witnesses before giving evidence must take an oath to speak the truth. However, exemption is provided to those who are under 18 years of age or a person with impaired judgment. Thus if the Chamber believes that the witness would not be able to understand the nature of oath but is competent to give evidence, then oath can be skipped and evidence can be taken on record. Therefore a child soldier who can make out whatever happened to him and has the knowledge about atrocities against him and can distinguish between truth and lie is allowed to give evidence in a proceeding. ICC Judges have an obligation to dismiss any question asked, that may intimidate or harass child soldier appearing as witness.

Rule 86 provides for witnesses considered as most vulnerable which includes child soldiers. Also Rule 87 provides for protection of witnesses or victims on request of victim or witness or his or her legal counsel. The court may *suo moto* call for an in camera trial or may expunge the name of witness or victim to hide their location or identification or may deny giving any information that could lead to their identification. The Rules of Procedure and Evidence also permit witness to be heard via electronic means. Therefore this enables the

prosecution and defence to use videoconferencing in case a child is unable to appear. These rules also provide freedom to child witnesses not to present witness against their family member<sup>21</sup>.

#### ***The Office of the Prosecutor's Policy on Children 2016***

The Office of the Prosecutor raised the issue of “*enlistment, conscription and use of children under the age of 15 years to participate actively in hostilities*” into one of the six planned objectives for its Strategic Plan<sup>22</sup> of 2012–15, assuring that it will “*pay particular attention to sexual and gender-based crimes and crimes against children*”. This assurance was reiterated under Strategic Plan of 2016–18. The 2016 Policy on Children is in line with these Strategic Plans and it contributes in achieving these strategic goals. The Office of Prosecutor considers persons below 18 years of age as children and also respects Article 26 of the Rome Statute which provides that no investigation shall be conducted against a child below 18 years of age. The policy also consider such young person as children whose age may be unknown, only for meeting with them. The Policy provides that the office looks into the context in which the child soldier has been affected by the crime and it will ensure that an impact assessment of crime is taken up while deciding on the seriousness of the offence. The office also recognizes children as reliable witness however this is dependent upon level of maturity, age, vulnerabilities, capabilities and the availability supporting evidence<sup>23</sup>.

Policy encourages the promotion of children rights and also strengthens the responsibility for preventing crimes affecting children. The Policy has taken a child sensitive approach based on Convention on the Rights of the Child 1989 (CRC) which is a treaty ratified by the United Nation members and as United Nations is a non state member of ICC the policy has provided itself to work in accordance with the whole international community<sup>24</sup>.

The purposes for framing of this Policy for Children are to affirm that the office is committed and pay special attention particularly in regard to the crimes that effect children include the issue of child soldiers. The Office provides clarity and guidance to its staff so that they can properly interpret the statutes and rules of ICC so that the crimes affecting or against children could be effectively addressed. Policy also ensures that staff interacts with children in a sensitive manner and in accordance with the rights granted to them under international law<sup>25</sup>.

#### ***IV – Children between the age of 15 years and 18 years***

When the draft of Rome Statute was being prepared, the UNICEF and some other organizations proposed to the state representatives to set age criteria for child soldiers at under 18 years of age, but the same was not accepted by majority of states. Thus, soldiers above the age of 15 years are not regarded as child soldiers for the purpose of Art 8(2)(b)(xxii) and Art 8(2)(e)(vi), and are not considered as victims before the ICC. The soldiers between the ages of 15 to 17 are outside the scope of Office of The Prosecutor, because Article 26 of the Rome Statute disallows prosecutor to investigate and prosecute

persons who at the time of commission of crimes were below 18 years of age. This builds a legal lacuna as a soldier who is 16 year old and has committed mass atrocities is not covered within the legal framework of ICC and the said soldier is not considered to be victim neither perpetrator of war crimes<sup>26</sup>

International crime can be prosecuted when a person have committed an international crime i.e. actus reus and also had malafide intention to commit the offence i.e. mens rea. Thus mens rea has to be there. Psychological studies of children to analyze their ability of committing a crime provide that children cannot entirely understand the consequences of their actions until they reach a certain age but that age has not been determined. Criminal responsibility has to be founded upon subjective factors of the acquiring puberty, the age of discernment rather than objective factors of age<sup>27</sup>.

#### ***IV – Conclusion and Suggestions***

International Criminal Court is a new body that has came into establishment only after 2002 and is limited to prosecute crimes that have occurred after 2002. Thus being a new body it is still going under development stage. Interestingly enough, the first ever judgment pronounced by the ICC was for the offence of conscripting or enlisting of child soldiers. However, despite the judgment certain issues were left undecided and these issues can be solved when the three matters are decided by the ICC in due course. ICC took twelve years to pronounce its first judgment making it a very slow process thus this development in the form of precedents may take a long time. But the atrocities that are being conducted against the children will not wait for the court to make its mind. Thus it is suggested that rather than waiting for these judgments to be made, it would be better if the international community take up the issue more seriously.

ICC has an adequate framework and positive approach for dealing with the issue of conscripting or enlisting of child soldiers. Rome Statute, Rule of Evidence and Procedure and Office of the Prosecutor Policy on Children, ensures that children be protected against any kind threat, including the threat of prosecution or any harsh behavior that might hurt them in any way. ICC and the Office of the prosecutor keep a sensitive approach while dealing with such an issue and ensure that they work in accordance with the United Nations Convention on the Rights of the Child.

ICC should re-evaluate its policies while dealing with children between the ages of 15 and 18 as they do not fall under the category of victims or perpetrators. They may suffer many atrocities however by active participation they commit various heinous crimes as well. Also the protection under ICC for child soldiers until the age of 15 years also needs re-evaluation as such criteria has been used in domestic laws of various countries to escape criminal liabilit.

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