

# **Criminal Liability of Child Soldiers and their Exclusion as Refugees under International Law**

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## **Abstract**

The refugee crisis is one of the most critical issues faced by countries across the globe. To effectively address the problem, the international community negotiated the Convention Relating to the Status of Refugees 1951 (“Refugee Convention”).<sup>1</sup> This Convention, with 146 states as parties, identifies individuals who qualify as refugees, the protections afforded to them, and describes the circumstances under which refugee status can be attained. However, an interesting feature of the Refugee Convention is Article 1(f), which restricts people who have committed war crimes from gaining refugee status or any protections under the law. It is imperative to note that Article 1(f) does not directly address the issue of child soldiers and the commission of any war crimes by them – perhaps because this is a relatively rare occurrence. Consequently, there is a lack of consensus around this issue. One thread of international discourse on this question proposes that child soldiers must not be denied refugee protection. This article further engages with this theme and supports the idea that the Conventions should be read as inclusive documents and should act as a tool to protect vulnerable groups. Therefore, child soldiers, irrespective of their crimes, must be given refugee protection.

## **Introduction**

One of the most alarming practices in contemporary armed conflicts is recruiting children as soldiers. Article 1 of the Convention on the Rights of the Child (“CRC”) defines the term “child” as a human being below the age of eighteen years, unless there is a specific law attributed to the child which allows majority to be acquired

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<sup>1</sup> The Convention Relating to the Status of Refugees 1951 (adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, convened under General Assembly Resolution 429 (V) of 14 Dec 1950. Entry into force: 22 April 1954).

earlier.<sup>2</sup> The recruitment of children as soldiers and their use in active hostilities has been a concern for the international community for a long time. Under international criminal law, this is regarded as a war crime.<sup>3</sup> Usually, children between the ages of ten to twelve are recruited as soldiers, cooks, spies, porters, or sex slaves. As global numbers of such recruits are rising, the threat is becoming more alarming for the global community.<sup>4</sup>

Children recruited as soldiers often experience emotional and physical trauma.<sup>5</sup> Even though these soldiers are trained and brainwashed to carry out violence on the orders of recruiters, they often lack the *mens rea*, i.e., the intent, for it – as discussed later in the article. They are manipulated into committing mass atrocities and are also at risk of persecution at the hands of their recruiters.<sup>6</sup> Many of these children are either killed or wounded, as they are more susceptible to injuries, while most of them, after growing older, are replaced by fresh recruits.<sup>7</sup> To escape this persecution, a number of child soldiers seek asylum in other states.

There are a number of international multilateral treaties that regulate the granting and withholding of asylum, and the most significant one is the Refugee Convention. Article 1(a) of the Refugee Convention provides that a person qualifies as a refugee if they are outside the country of their nationality and are unable to return. This could be due to the fear of persecution for reasons of race, nationality, religion, membership of a particular social group, or political opinion.<sup>8</sup>

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<sup>2</sup> The Convention on the Rights of the Child, United Nations, Treaty Series vol.1577, p.3, (adopted on 20 Nov 1989. Entered into force: 2 Sep 1990), art 1.

<sup>3</sup> Pilar Villanueva Sainz-Pardo, 'Is Child Recruitment as a War Crime Part of Customary International Law?' (2008) 12 The International Journal of Human Rights, 12:4, 555–612, DOI: 10.1080/13642980802204750.

<sup>4</sup> Matthew Happold, 'Excluding Children from the Refugee Status: Child soldiers and Article 1(f) of the Refugee Convention' (2002) 17(6) American University International Law Review.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

<sup>7</sup> Machal Graca, 'The Impact of War on Children: A Review of Progress since 1996', *United Nations Report on the Impact of Armed Conflict on Children* (Hurst and Company, London, 2001), 7.

<sup>8</sup> Convention Relating to the Status of Refugees, United Nation, Treaty Series, vol. 189 p. 137 (adopted on 25 July 1951. Entered into force: 22 April 1954), art 1, United Nations, Treaty Series, vol 606, p 267, (adopted 31 Jan 1967. Entered into force: 4 Oct 1967). See Article 1 of the Refugee Convention, 1951, that describes the rights and duties of the refugees and their host countries. See also the Additional Protocol of 1967 that amended the definition to include refugees after January 1951.

These persons shall not be expelled or returned to their country of origin, where they would be at risk of persecution or torture.<sup>9</sup>

In today's world, a majority of the asylum seekers are women and children who are fleeing persecution from non-international armed conflicts.<sup>10</sup> The developed world often puts forth the argument that the contemporary international legal regime regarding asylum places an enormous economic burden on them.<sup>11</sup> This has led to strict scrutiny of asylum seekers to determine whether a person, due to their past conduct, is "deserving" of refugee status – as international customary law does not grant an inherent right of asylum to any person.<sup>12</sup> Due to this intense scrutiny, not all individuals who suffer persecution or have a well-founded fear of persecution can avail themselves the benefit of Article 1(a) of the Refugee Convention. Article 1(f) of the Refugee Convention declares certain classes of people to be ineligible for refugee status due to reasons such as their past conduct, and an example of such past conduct could be the commission of war crimes. This raises a humanitarian question regarding the grant of asylum to child soldiers – as the Refugee Convention is silent on whether child soldiers fall within the exclusion of Article 1(f). Thousands of children are recruited by militias each year to commit war crimes. The question that arises is whether this disqualifies these children from seeking asylum, or whether there are individual circumstances to be considered. It is estimated that some 250,000 were used as child soldiers in the year 2022.<sup>13</sup> These children have committed mass atrocities in a number of recent international and non-international armed conflicts.<sup>14</sup> This article aims to explore the complexities of the application of the exclusion clause to child soldiers who have committed war crimes or crimes against humanity in the past, even though they may have lacked the intent.

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<sup>9</sup> Ibid art 33(1). This is also called the principle of non-refoulement, which is enshrined in Article 33(1) of the Refugee Convention. It also has the force of customary law.

<sup>10</sup> UNHCR Asia Pacific, *Figures at a Glance* (16 June 2022) <<https://www.unhcr.org/figures-at-a-glance.html>> accessed 6 Mar 2023.

<sup>11</sup> Dennis McNamara, *Exclusion Clauses: Closer attention Paid to the Exclusion Clauses in Refugee and Asylum Laws: Assessing the Scope for Judicial Protection* (International Association of Refugee Judges ed. 1997) 75.

<sup>12</sup> Colin Harvey, *Seeking Asylum in the UK: Problems and Prospects* (2000), 48–49.

<sup>13</sup> Their world, Child Soldiers <<https://theirworld.org/resources/child-soldiers/>> accessed 6 Mar 2023.

<sup>14</sup> Kelly E. Atkinson, 'Refugees and Recruitment: Understanding Violations Against Children in Armed Conflict with Novel Data' (2020) 15(1) *Journal of Peacebuilding & Development* 75.

### **Article 1(f) of the Refugee Convention**

Article 1(a) defines the term “refugee” and classifies the groups of people who can avail refugee status on the basis of their race, religion, nationality, membership of a particular social group, or political opinion.<sup>15</sup> However, Article 1(f) restricts certain individuals from availing the status of a refugee even though they may meet the listed requirements. These individuals are generally those who are not afforded state protection due to crimes against peace, war crimes, and crimes against humanity.<sup>16</sup>

Article 1(f) is couched in mandatory language, as it uses the phrase “shall not apply to any person” who has committed any of the above-mentioned crimes, amongst others.<sup>17</sup> This provision indicates that it is not at any state’s discretion to refuse the grant of refugee status to a person accused of war crimes or crimes against humanity from acquiring refugee status, but in fact, a state is bound to do so under international law.<sup>18</sup> The binding nature and enforceability of the international treaties is another concern. But for the scope of this paper, the history of this provision may be considered to discover the intent of the drafters. An *ad hoc* Committee on Statelessness and Related Problems proposed the initial draft.<sup>19</sup> During the Committee’s sessions, the United States proposed that it should be left to the discretion of the state whether it wishes to exclude war criminals from refugee status.<sup>20</sup> This resulted in an amendment to the Refugee Convention; however, it did not lose its mandatory tone.

Under Article 1(f), there is no minimum age for the application of the exclusion clause. The provision appears to apply to “any person.” Thus, Article 1(f) does not distinguish between children and adults. In their application of this provision, states do not make any distinctions on the basis of *mens rea*, and in compliance with this obligation, they do not grant refugee status to war criminals,

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<sup>15</sup> The Convention (n 1).

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> Pilar (n 3).

<sup>19</sup> The Convention (n 1).

<sup>20</sup> Goodwin-Gill, *supra* note 6, 95–96.

irrespective of the age of the perpetrator.<sup>21</sup> Despite this clarity in international law, many law experts support that child soldiers should be seen as victims rather than perpetrators of crimes. It has been argued that children who have committed mass atrocities should not be subjected to exclusion from refugee status. In practice, however, child soldiers have been strictly prohibited from getting refugee status as a result of the application of Article 1(f).<sup>22</sup>

### **Child Soldiers and Armed Conflict**

The violence that is associated with an armed conflict consumes numerous human lives and inflicts irreparable losses on communities. It is estimated that the past three decades have witnessed about 150-200 violent conflicts, both international and non-international.<sup>23</sup> People living in war zones are at an increased risk of atrocities such as ethnic cleansing, genocide, physical injuries, mental trauma, sexual violence, and deprivation of basic necessities like clean air and access to healthcare. Thus, most people are forced to leave their place of origin in order to survive.

Armed conflicts have especially severe effects on children. Children, by virtue of being inherently physically and psychologically weaker, are at a greater risk of being unable to or struggling to cope with the impact of war. Many of the affected are kidnapped or lured to work as soldiers. Young girls specifically are at greater risk of sexual violence and sex trafficking. Children in refugee camps and those affected by the violence are particularly vulnerable to being exploited by non-

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<sup>21</sup> Sonja Grover, “‘Child Soldiers’ as ‘noncombatants’: the Inapplicability of the Refugee Convention Clause’ (2008) 12(1) *The International Journal of Human Rights*, this is also discussed by Matthew Happold in ‘Excluding Children from the refugee status: Child soldiers and Article 1F of the Refugee Convention’ (2002) 17(6) *American University International Law Review*.

<sup>22</sup> Exclusion Clause Guidelines, *supra* note 23, at page 22 (“Children under eighteen can and have been excluded in special cases.”), see also Sibylle Kaepferer, *Exclusion Clauses in Europe – A Comparative Overview of State Practice in France, Belgium, and the United Kingdom*, 12 *INT’L J. REFUGEE L.* 194, 214 (2000) (providing examples of Belgian and French cases where children under eighteen were excluded); see also Matthew Happold in “Excluding Children from the refugee status: Child soldiers and Article 1F of the Refugee Convention” (2002) 17(6) *American University International Law Review*.

<sup>23</sup> International Organization for Migration, 2020. *World Migration Report*. [online] Geneva: International Organization for Migration <[https://publications.iom.int/system/files/pdf/wmr\\_2020.pdf](https://publications.iom.int/system/files/pdf/wmr_2020.pdf)> accessed 16 Dec 2021.

state armed groups to commit mass atrocities during armed conflicts.<sup>24</sup> Therefore, there seems to be a growing consensus among law experts that the exclusion clause of the Refugee Convention should not be applicable to child soldiers. Nonetheless, there is a section of experts who believe that these child soldiers should be excluded from asylum protection and instead be prosecuted in domestic courts or international criminal tribunals for committing war crimes.<sup>25</sup> Generally, under domestic and international criminal laws, a guilty verdict is rendered only when an accused commits an illegal act and has the intent to commit the same;<sup>26</sup> these two elements are known as the *actus reus* and *mens rea*, respectively.

Supporters of holding children liable for their acts believe that child soldiers should be prosecuted because they have committed atrocities voluntarily.<sup>27</sup> This belief is premised on the basis that some child soldiers join armed groups willingly and, thus, intentionally commit crimes.<sup>28</sup> Consequently, prosecuting them will provide justice to the victims and their families, as the theory of retribution demands as the foremost aim of a criminal justice system. They also argue that most child soldiers have developed psychologically at the time of committing war crimes, giving rise to intent.<sup>29</sup> Therefore, the *mens rea* requirement is being fulfilled. However, the exact age of psychological development of a child is unclear.<sup>30</sup> Some experts have also suggested that the recruitment of children under the age of fifteen has been preferred by non-state armed groups due to the child's lack of understanding, and, hence, they can be easily manipulated into committing mass atrocities.<sup>31</sup> For example, children who have been orphaned may find themselves without food and shelter and at the mercy of recruiters. The United

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<sup>24</sup> Janie Leatherman, 'Sexual violence and armed conflict: complex dynamics of pre-victimization' (2007) *Int. J. Peace* 12(1).

<sup>25</sup> Fanny Leveau, 'Liability of Child Soldiers Under International Criminal Law' (2014) 4.1 *Osgoode Hall Review of Law and Policy* 36.

<sup>26</sup> *Ibid.*

<sup>27</sup> Nienke Grossman, 'Rehabilitation or Revenge: Prosecuting Child Soldiers for Human Rights Violations' (2009) 38 *Geo. J. Int'l L.* 323.

<sup>28</sup> International Organization (n 23).

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*

<sup>31</sup> Grover (n 21).

Nations Office for Children and Armed Conflict has revealed that recruitment of children has doubled in the Middle East and Africa since 2019.<sup>32</sup>

### **Child Soldiers and International Refugee Law**

The major outcome of armed conflicts is mass displacement. A chief example of this is the displacement of Jews in the aftermath of World War II which led to the introduction of the Refugee Convention and the establishment of the Refugee Agency, the United Nations High Commissioner for Refugees (“UNHCR”).<sup>33</sup> Another recent example is the displacement of Ukrainians due to the ongoing war between Ukraine and Russia.

The definition of refugees in the Refugee Convention enfolds child soldiers within itself. However, there are a number of concerns when refugee protection is denied to child soldiers on the basis of Article 1(f). Denying refugee status to those who otherwise qualify for it increases the risk of persecution and oppression, as they would have to remain wherever they are.<sup>34</sup> In the case of child soldiers, their refugee status can provide them with an opportunity for rehabilitation. Further, the consequences faced by child soldiers who are not granted refugee status may worsen through the creation of stigma, or the status of being considered a war criminal, and may lead to criminal liability.<sup>35</sup> Sadly, Article 1(f) prevents former child soldiers from seeking asylum for the same reason that they are seeking it, i.e., acts of violence.

While Article 1(f) does not contain any specific exception for children, there are rising concerns regarding the safety and reintegration of children affected by armed conflict.<sup>36</sup> The UNHCR has provided an insightful approach regarding the exclusion clause in its handbook on Exclusion Guidelines and an accompanying

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<sup>32</sup> Mick Mulroya, Eric Oehlerich, and Zack Baddorf ‘Begin with the children: Child soldier numbers doubled in the Middle East in 2019’ (2022) Middle East Institute (April 14, 2020) <<https://www.mei.edu/publications/begin-children-child-soldier-numbers-doubled-middle-east-2019>> accessed 27 May 2022.

<sup>33</sup> Grover (n 21).

<sup>34</sup> Ibid.

<sup>35</sup> Michael A. Gallagher ‘Soldier Boy Bad: Child Soldiers, Culture and Bars to Asylum’ (2001) 13(3) Int J. Refugee Law 310, 333.

<sup>36</sup> Ibid.

Background Note. The approach adopted by the UNHCR requires decision makers in asylum cases to weigh the gravity of an excludable offence against the possible consequences of exclusion.<sup>37</sup> This balancing act is proposed to help minimise the strength of non-state armed groups while decreasing violence. Many states have rejected this balancing approach, and it has not attained any universal status or acceptance as a decision-making standard in asylum cases of child soldiers.

However, there are commentators who advocate fiercely that child soldiers should never be excluded from refugee protection based on their past involvement in an armed conflict.<sup>38</sup> To support this point, some argue that children, especially those who are under the age of fifteen, are legally protected from exclusion under Article 1(f) because they are not legal combatants. They are illegal participants in an armed conflict.<sup>39</sup> Moreover, uncertainty in international law regarding the minimum age for criminal responsibility of children favours the arguments of non-exclusion.<sup>40</sup>

### **Child Soldiers and International Criminal Law**

The International Criminal Court (“ICC”) was established in 2002 under the Rome Statute of 1998. The ICC is an international criminal tribunal with the jurisdiction to try individuals for international crimes such as genocide, crimes against humanity, and war crimes. Since the recruitment of children as soldiers is now an internationally recognised war crime, as iterated by the ICC, it thus falls under the jurisdiction of the Court. The ICC complements national judicial systems and can only exercise jurisdiction over international crimes if national courts are unwilling or unable to prosecute criminals, and the United Nations Security Council (“UNSC”) or individual states refer cases to it.<sup>41</sup>

The international community has continually materialised the importance of protecting vulnerable individuals during armed conflict and violence and

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<sup>37</sup> UNHCR Handbook para 24, background note para 76–80; also see Grover (n 21) 572.

<sup>38</sup> Gallagher (n 35).

<sup>39</sup> Ibid.

<sup>40</sup> Magali Maystre, ‘The Interaction between International Refugee Law and International Criminal Law with Respect to Child Soldiers’ (2014) 12(5) J. Int. Crim Justice 975–996.

<sup>41</sup> Cryer, Friman, Robinson, Wilmschurst, *International Criminal Law, and Procedures* (3<sup>rd</sup> edn, 2014).



prosecuting the perpetrators of the most heinous of crimes, which are a threat to the international community as a whole. The UNSC has forcefully iterated the need to end impunity for violations of international humanitarian law and violations and abuses of human rights, simultaneously stressing that the responsible parties must be brought to justice.<sup>42</sup> This commitment has materialised through the establishment of several international criminal tribunals such as the International Criminal Tribunal for the former Yugoslavia (“ICTY”). These tribunals have been involved in the prosecution of the most serious wartime atrocities. There has been a growing trend of prosecuting international crimes through international tribunals since the 1990s. The ICC is also complemented by a new set of criminal bodies, which are often referred to as “hybrid” courts that incorporate both domestic and international characteristics of law.<sup>43</sup>

The commission of international crimes by child soldiers has posed a challenge to the international community’s commitment to bring perpetrators to justice. There is an emergent unanimity in the international community that these children should not be prosecuted in courts of law; rather, they should be provided state protection and allowed to rehabilitate.<sup>44</sup> Previously, the ICC has successfully prosecuted and convicted recruiters of child soldiers, such as Thomas Lubanga, a known war criminal and commander of child soldiers. The complexity arises when former child soldiers apply for refugee protection and face exclusion from this status, given the gravity of their past criminal actions. There is no clear and universally accepted position on this issue. Firstly, the question arises as to whether child soldiers should be held individually accountable for their crimes. Secondly, under what circumstances should they be held criminally liable? A third question arises about the age that determines whether individual responsibility should be borne by children for their involvement in international crimes. Lastly, a question can arise as to what mitigating or “exculpatory effect” factors such as age, coercion, and other circumstantial elements ought to have on findings of individual responsibility.<sup>45</sup>

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<sup>42</sup> Statement by the President of the Security Council, February 2014.

<sup>43</sup> Harry Hobbs ‘Hybrid Tribunals and the Composition of the Court: In Search of Sociological Legitimacy’ (2016) 16(2) *Chicago Journal of International Law* 5.

<sup>44</sup> Grossman (n 27).

<sup>45</sup> Jennifer Bond and Michele Krech, ‘Excluding the most vulnerable: application of Article 1(F) of the Refugee Convention to the child soldiers’ (2016) 20(4) *The International Journal of Human Rights* 567.

### **The Dilemma of Individual Culpability of Child Soldiers**

The international community is divided over the issue of whether child soldiers should ever be held individually accountable for the international crimes they commit. Many have argued that the responsibility for war crimes committed by children should be placed entirely on the adults who recruit them.<sup>46</sup> Despite conflicting opinions, international criminal law does not provide immunity to child soldiers from individual criminal liability. International legal instruments do not explicitly forbid the prosecution of child soldiers.<sup>47</sup> Amnesty International also suggests that child soldiers should be held responsible for their actions in appropriate ways, while detaining them should be a measure of last resort.<sup>48</sup> Even the CRC allows for the prosecution of child soldiers so long as due process is observed.<sup>49</sup>

Although the CRC does not explicitly state that child soldiers should be prosecuted, it contains provisions that must be respected during trial if this does occur. The CRC is widely ratified, which is indicative that the international community agrees that prosecuting a child soldier is a possibility.<sup>50</sup> Under the domestic law of many states, the prosecution of children as young as ten years old is carried out.<sup>51</sup> This acceptance also reflects the belief of the international community that children below the age of eighteen may have the required *mens rea* to commit a crime. However, the minimum age to establish criminal liability for children remains vague.

A counter argument to prosecuting children for war crimes is that war crimes are different from domestic crimes. War crimes are committed at the time of war against civilians and enemy combatants, whereas domestic crimes take place

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<sup>46</sup>Asena Bosnak, 'Should child soldiers be prosecuted?' (*TRTWORLD*, 21 July 2017) <<https://www.trtworld.com/mea/should-child-soldiers-be-prosecuted--9007>> accessed 13 June 2019.

<sup>47</sup> Ibid.

<sup>48</sup> Amnesty International, 'Child Soldiers: Criminals or Victims' (Amnesty International 2000) <<https://www.amnesty.org/en/documents/ior50/002/2000/en/>> accessed 13 June 2019.

<sup>49</sup> The Convention (n 2).

<sup>50</sup> International Organization (n 23).

<sup>51</sup> Steven Freeland, 'Mere Children or Weapons of War - Child Soldiers and International Law' (2008) 29 *U La Verne L Rev* 19, 49.

in times of peace against civilians generally.<sup>52</sup> Thus, the reasons for prosecuting children at an international level should differ from the reasons for prosecuting them domestically.<sup>53</sup> It is debated that the *mens rea* required to commit war crimes is so strong that children can never truly understand the scope of the crimes they commit. Happold, however, disagrees and states that, apart from genocide, other war crimes do not require a high burden of proof. Thus, they are not entirely different from crimes committed domestically.<sup>54</sup> Apart from the CRC, the African Charter, as well as the jurisprudence developed by the European Court of Human Rights,<sup>55</sup> admits that juvenile justice under international law is allowed.<sup>56</sup>

There is reason to believe that the commission of criminal acts entails the complex concepts of *actus reus* and *mens rea*. The presence of both is required to hold an individual liable under criminal law.<sup>57</sup> However, child soldiers lack *mens rea* to be held accountable for their acts. The absence of reason and the lack of maturity sufficient to appreciate the consequences of their acts should be seen as a valid reason to omit them from the exclusion of Article 1(f) of the Refugee Convention and to not hold them criminally liable for their crimes.<sup>58</sup>

### **Case Study: The Conviction of Thomas Lubanga Dyilo**

In understanding the usage and recruitment of child soldiers, the case of *The Prosecutor v. Thomas Lubanga Dyilo* holds great significance.<sup>59</sup> The judgment given in the case of *Lubanga* is the first ever at an international tribunal that concentrates specifically on the recruitment of child soldiers.<sup>60</sup> Thomas Lubanga was convicted in 2012 by the ICC for the conscription and enlistment of children under the age of fifteen years as child soldiers and using them actively for war

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<sup>52</sup> Ibid.

<sup>53</sup> International Organization (n 23).

<sup>54</sup> Pilar (n 3).

<sup>55</sup> *T v. United Kingdom and V v. United Kingdom* [2000] 30 EHRR 121.

<sup>56</sup> African Charter on the Rights and Welfare of the Child, 11 July 1990 (entered into force 29 Nov 1999).

<sup>57</sup> Ibid.

<sup>58</sup> Ibid.

<sup>59</sup> *The Prosecutor v. Thomas Lubanga Dyilo* [2012] (Trial Chamber Judgment) ICC-01/04-01/06-2842 (14 March 2012).

<sup>60</sup> David Smith, 'Congo Warlord Thomas Lubanga convicted of using child soldiers' *The Guardian* (Johannesburg, 14 Mar 2012) <<https://www.theguardian.com/world/2012/mar/14/congo-thomas-lubanga-child-soldiers>> accessed 3 Oct 2021.

crimes.<sup>61</sup> Lubanga was the leader of the Union of Congolese Patriots, which was accused of grave human rights violations in Congo. It was alleged by prosecutors that the Union was responsible for forcefully recruiting children and making them participate in ethnic fighting.<sup>62</sup> The decision in the case of *Lubanga* crystallises international belief that child soldiers are to be seen as passive victims of war crimes. Additionally, it reinforces the idea that criminal liability for war crimes should solely fall on warlords who recruit children to carry out mass atrocities.

The judgment in the *Lubanga* case lends support to the argument that child soldiers should not be held individually responsible for international crimes. Rather, their cases should be analysed in the broader social and political matrix they belong to. The ICC, in its decision, indicates that the real perpetrators are the recruiters who induct the child soldiers. As long as the international community takes this position, child soldiers should not be excluded from refugee protection for committing war crimes.

### **Case Study: The Imprisonment of Jawad**

Another case involving a child soldier is the case of *Jawad v. Gates*.<sup>63</sup> Fifteen-year-old Jawad was arrested by Afghan authorities in connection to an attack on two American soldiers and their interpreter.<sup>64</sup> He was coerced to sign a prepared confession and was handed over to American authorities. Jawad was later sent to Guantanamo Bay when he was sixteen, where he continued to receive cruel, inhumane, and degrading treatment that often went unreported.<sup>65</sup> He later filed a habeas corpus petition and was released in 2009. In 2014, he then filed a case seeking from the United States damages that covered his illegal detainment, his status as an “unlawful enemy combatant,” and the CRC, which the US had ratified. He highlighted the fact that the CRC as well as the Optional Protocol, which the US had also ratified, have provisions on how child soldiers should be released and rehabilitated, but the US had not abided by them.<sup>66</sup> The case, however, was

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<sup>61</sup> The Prosecutor (n 59).

<sup>62</sup> Ibid.

<sup>63</sup> *Jawad v. Gates* 113 F. Supp. 3d 251, 259 (D.D.C. 2015).

<sup>64</sup> Ibid.

<sup>65</sup> Ibid.

<sup>66</sup> Ibid.

dismissed.<sup>67</sup> Jawad's case is a classic example of how child soldiers may be handled without care by authorities and are indeed in need of greater protection.

### **Factors the International Community considers when Prosecuting Child Soldiers**

Even though it is argued that child soldiers should not be prosecuted due to a lack of *mens rea*, the international community still allows for the prosecution of child soldiers. However, harsh punishments for their crimes should be avoided. The United Nations Office for Children and Armed Conflict ("UNOCAC") emphasises that child soldiers should be made to understand the gravity of their acts through restorative justice that supports their inclusion in the community.<sup>68</sup>

Supporters of child prosecution argue that child soldiers should be prosecuted for the purposes of retribution and deterrence. Many debate whether child soldiers should be prosecuted for their own safety. Their prosecution is necessary for their own well-being as providing immunity to child soldiers will expose them to further exploitation.<sup>69</sup>

Many international lawyers also argue that child soldiers should be prosecuted to promote deterrence.<sup>70</sup> It is important to prosecute children to deter them from committing crimes in the future and also to deter others from committing similar atrocities. This concept, however, is flawed as many child soldiers are either coerced or forced to commit crimes against their will. Punishing children for crimes they committed while lacking the maturity to understand the gravity of their acts can be problematic.

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<sup>67</sup> Ibid.

<sup>68</sup> Special Representative, 'Release and Reintegration' <<https://childrenandarmedconflict.un.org/our-work/release-and-reintegration/>> accessed 12 June 2019.

<sup>69</sup> Stephen Leahy, 'Prosecuting Child Soldiers for their Own Safety' (*stephenleahy.net*, Jan 2009) <<https://stephenleahy.net/non-environmental-journalism/prosecuting-child-soldiers-for-their-own-safety/>> accessed 13 June 2019.

<sup>70</sup> 'International Law Barring Child Soldiers in Combat: Problems in Enforcement and Accountability – Question & (and) Answer Session,' (2004) 32(3) Cornell International Law Journal 19 <<http://scholarship.law.cornell.edu/cilj/vol32/iss3/19>>.

Many times, prosecution can be for the purpose of rehabilitation. Their therapy and reintegration into society are important as the child soldier not only suffers from trauma but is also shunned by society. Based on the theory of rehabilitation, child soldiers should be prosecuted in a manner that encourages their reformation and acceptance in society.<sup>71</sup>

Finally, some contend that child soldiers should also be prosecuted to provide justice to the victim. It is important that the victims feel that justice has been served.<sup>72</sup> Letting child soldiers go unpunished can leave the victim feeling aggrieved and helpless. Thus, for the benefit of the victim as well as the perpetrator, it is argued that child soldiers must be prosecuted and sanctioned.

However, it must be noted that the CRC emphasises the best interest of a child.<sup>73</sup> Taking a purposive approach to this provision indicates that prosecuting child soldiers can never be in their best interest; instead, the real focus must be on their rehabilitation and inclusion in society. This leads us to the view that a child soldier will only truly be included in society if they are not refused refugee status under Article 1(f).

### **International Consensus on Age of Criminal Responsibility for Child Soldiers**

It is imperative to realise that the position of child soldiers in armed conflicts is even more sensitive than adults as they should not only be deemed as perpetrators but also as victims. A typical child soldier is usually abducted, brainwashed, coerced to train, and eventually turned into a criminal.<sup>74</sup> In most cases, child soldiers are forcefully recruited. However, José Luis Hernández, a United Nations Children's Fund ("UNICEF") officer, clarifies that it is a myth that all child soldiers are unwilling participants in armed conflicts.<sup>75</sup> Many children volunteer for various

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<sup>71</sup> Robert Cryer et al, *An Introduction to International Criminal Law and Procedure* (New York: Cambridge University Press, 2010) 31, 33.

<sup>72</sup> Ibid.

<sup>73</sup> Convention on the Rights of the Child (n 2).

<sup>74</sup> Jason Burke and Phil Hatcher, 'If you are old enough to carry a gun, you are old enough to be a soldier' *The Guardian* (London, 24 July 2017) <<https://www.theguardian.com/globaldevelopment/2017/jul/24/south-sudan-child-soldiers>> accessed 14 June 2019.

<sup>75</sup> Ibid.

reasons which include the opportunity to earn, protection for their family, and even revenge, although the latter is a rare occurrence specific to children that have reached a certain age.<sup>76</sup>

The conundrum here is this: should child soldiers be prosecuted, wholly or partly, for their involvement in international crimes? If yes, what should be the minimum age at which children are to be considered responsible for their involvement? International law has been unsuccessful in determining a fixed age at which a child soldier should be prosecuted for their participation in international crimes. The most important factor that comes into play when determining the minimum standard age for criminal liability is the element of *mens rea*.<sup>77</sup> International criminal law needs to decide the appropriate age at which a child can be held accountable for a guilty mind.<sup>78</sup> It is argued that the notion of criminal liability for children is difficult to determine for two major reasons.<sup>79</sup> Firstly, the proper development of a child's brain varies from one individual to another, and thus establishing *mens rea* becomes a subjective issue.<sup>80</sup> Secondly, as there is no consensus with regards to the minimum age requirement under international criminal law for criminal liability, there exists a conflict between different jurisdictions as to what the exact age should be.<sup>81</sup>

Under international law, an individual is considered a child if they are under the age of eighteen.<sup>82</sup> Yet this is not the minimum age set for the criminal liability of a person across all jurisdictions. Even though there is no consensus on a minimum age for liability, international law does provide various guidelines on the matter. The UN Standard Minimum Rules for the Administration of Juvenile Justice Beijing Rules ("Beijing Rules") explain that due to a lack of intellectual, emotional, and mental capacity in juveniles, there will not be a lower age limit for

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<sup>76</sup> Dima Zito, 'Between Fear and Hope – Child Soldiers as Refugees in Germany' (terre des hommes 2013) <[https://www.redhandday.org/fileadmin/user\\_docs/Between\\_Fear\\_And\\_Hope\\_Child\\_Soldiers\\_as\\_Refugees\\_in\\_Germany\\_terre\\_des\\_hommes\\_\\_BUMF\\_March2013\\_final.pdf](https://www.redhandday.org/fileadmin/user_docs/Between_Fear_And_Hope_Child_Soldiers_as_Refugees_in_Germany_terre_des_hommes__BUMF_March2013_final.pdf)> accessed 14 June 2019.

<sup>77</sup> Happold (n 4).

<sup>78</sup> Leveau (n 25).

<sup>79</sup> Ibid.

<sup>80</sup> Ibid.

<sup>81</sup> Ibid.

<sup>82</sup> Convention on the Rights of the Child (n 2).

the initial age in any legal system that has recognised juvenile criminal responsibility.<sup>83</sup> The CRC reconfirms this criterion provided by the Beijing Rules in Article 40(3).<sup>84</sup> The Committee on the Rights of the Child supports the concept that the minimum age set for criminal culpability should not be set too low.<sup>85</sup> Thus, the Committee does not accept criminal liability for children under the age of twelve.<sup>86</sup>

The ICC derives its authority to prosecute individuals from the Rome Statute, which iterates that those individuals who are above eighteen will be prosecuted for international crimes.<sup>87</sup> This indicates that the ICC does not have the jurisdiction to prosecute children. This leaves other jurisdictions to decide the minimum age of criminal liability on their own. Different international criminal tribunals have set different age limits. The statutes of the ICTY and the International Criminal Tribunal for Rwanda (“ICTR”) do not provide any guidance on this issue.<sup>88</sup> The Special Court of Sierra Leone (“SCSL”), however, has set the minimum age limit at fifteen years.<sup>89</sup>

It has been suggested by experts that the minimum age for criminal liability should be set at mid-teens, as this is the time when children are able to distinguish between what may be legal or illegal.<sup>90</sup> This suggestion, however, is least helpful as international law cannot operate on vague proposals, and there needs to be a precise universal age limit that promotes clarity in the area. Besides, social factors like access to a basic legal education and active participation in the community can also impact this capability to distinguish.

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<sup>83</sup> United Nations General Assembly, A/Res/40/33, (adopted on 29 Nov 1985) r 4.

<sup>84</sup> Convention on the Rights of the Child (n 2).

<sup>85</sup> Committee on the Rights of the Child, Concluding Observations of the Committee on the Rights of the Child: Australia, 16th Sess, UN Doc CRC/C/15/Add.79, (1997).

<sup>86</sup> Ibid.

<sup>87</sup> Rome Statute of the International Criminal Court, opened for signature 17 July 1998, (entered into force 1 July 2002) [Rome Statute], art 26(v).

<sup>88</sup> UN International Criminal Tribunal for Rwanda. International Criminal Tribunal for the former Yugoslavia.

<sup>89</sup> Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, signed 16 Jan 2002, (entered into force on 12 April 2002).

<sup>90</sup> Happold (n 4).



This lack of consensus under the international law has a direct impact on the applicability of Article 1(f) of the Refugee Convention, primarily due to two factors.<sup>91</sup> Under international criminal law, a lack of consensus as to age directly correlates to a lack of consensus as to whether child soldiers should be prosecuted at all. Maystre suggests that until the time when international criminal law includes a minimum age of individual criminal responsibility, child soldiers must be included within the provisions of protection within the Refugee Convention.<sup>92</sup> He further goes on to say that the conditions surrounding child soldiers are extreme. In addition, the requirement that the spirit of the Refugee Convention, i.e., protecting people at risk of persecution in their home countries should never be compromised, indicates that child soldiers should be protected and not be subjected to exclusion under Article 1(f)(a).<sup>93</sup> Many international conventions and judicial decisions also reflect the same concern that child soldiers should primarily be seen as victims.<sup>94</sup> The Principles and Guidelines on Children Associated with Armed Forces or Armed Groups (“Paris Principles”) also clearly state that child soldiers should be recognised predominantly as victims under international law.<sup>95</sup>

Primarily for the reasons stated above, it can be agreed that until there is a consensus reached with regards to the minimum age of criminal liability, child soldiers should not be excluded from asylum under refugee law.

### **Domestic Laws Regarding Determination of Age**

The minimum age for criminal liability varies around the world.<sup>96</sup> In most Muslim majority states, for example, the age for criminal liability is determined on the basis of reaching puberty. This is nine for females and fifteen for males.<sup>97</sup> Alternatively, in England and Wales, the minimum age for criminal liability is ten years<sup>98</sup> while

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<sup>91</sup> Bond and Krech (n 45).

<sup>92</sup> Maystre (n 40).

<sup>93</sup> Ibid.

<sup>94</sup> Elizabeth A. Rossi, ‘A “Special Track” for Former Child Soldiers: Enacting a “Child Soldier Visa” as an Alternative to Asylum Protection,’ (2013) 31 Berkeley J. Int’l Law 101.

<sup>95</sup> The Paris Principles: Principles and Guidelines on Children Associated with Armed Forces or Armed Groups, February 2007 art 3.6.

<sup>96</sup> Barry Goldson and John Muncie, *International Encyclopaedia of The Social and Behavioural* (2<sup>nd</sup> edn, James Wright 2015).

<sup>97</sup> Ibid.

<sup>98</sup> Ibid.

in Scotland, the age is set at eight (though in practice children under twelve years are not prosecuted). Belgium and Luxembourg have set this age at eighteen.<sup>99</sup> This difference shows that there is no consensus on a minimum age for criminal liability between the various states.

In Pakistan, the minimum age for criminal liability is set out in Sections 82 and 83 of the Pakistan Penal Code. Prior to 2016, this minimum age was set at seven years.<sup>100</sup> This, however, has now changed to a minimum of ten years.<sup>101</sup> Any child falling below the age of fourteen but who is older than ten will not automatically be prosecuted, as the trial judge will assess the child's level of maturity.<sup>102</sup> Children above fourteen will nevertheless have to face the consequences of their actions.<sup>103</sup> However, there are no criteria present to exactly determine this level of maturity, and it is thus left to the judge to work out a child's *mens rea*. In the case of child soldiers as well, the age limit of ten years would apply generally. As Pakistan is a signatory to the CRC, it must respect the provisions of the same, which do not accept criminal responsibility below the age of twelve.<sup>104</sup>

### **Effect of Circumstantial Elements in Individual Culpability of Child Soldiers**

Establishing a child's criminal liability is a challenging issue. Establishing the *actus reus* for an act carried out by a child may be relatively simpler. However, determining a child's *mens rea* is where the problem lies. In instances where a child is too young to fully understand the effects of their action, the defence of infancy can be established. This defence applies to the actual age at which the child committed the act.<sup>105</sup> Many studies have found that, up to a certain age, the mind

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<sup>99</sup> Ibid.

<sup>100</sup> Pakistan Penal Code 1860.

<sup>101</sup> Mudrasa Sabreen, 'The Age of Criminal Responsibility and Its Effect on Dispensation of Justice' (2017) 8 Pakistan Law Review.

<sup>102</sup> Ibid.

<sup>103</sup> Ibid.

<sup>104</sup> Ibid.

<sup>105</sup> Chris Cortolillo, 'Between a Rock and a Hard Place: The Challenges Facing Former Child Soldiers of the War on Terror in Seeking Asylum in the United States' (*birdsongslaw.com*, Jan 2011) <<http://birdsongslaw.com>> accessed 11 June 2019.

of a child has not developed enough for them to realise the gravity of their crimes.<sup>106</sup>

Other mitigating factors with regards to a child's criminal liability include the defence of intoxication. Many studies suggest that recruiters of child soldiers often encourage or even force them to take alcohol or other forms of drugs in order to impair their judgement and to instil courage in them.<sup>107</sup> The use of alcohol and drugs may compromise a person's moral judgement. This defence is even more important for child soldiers as their minds are already not developed enough to make informed choices. Involuntary intoxication is thus recognised as a possible defence under international law.<sup>108</sup>

Children are more vulnerable than adults and can easily be forced to commit crimes against their will. In circumstances like these, the defence of duress is most appropriate. It is suggested that child soldiers are exposed to extreme indoctrination methods by the groups that recruit them.<sup>109</sup> Weak child soldiers are often killed in front of their companions as a lesson to teach the others that only the fittest and strongest will survive.<sup>110</sup> Child soldiers are thus often under the constant threat that they will either be tortured or killed if they refuse to carry out the commands of their leaders. Consequently, international law accepts duress as a valid defence to mitigate the liability of a child soldier.<sup>111</sup> Even though international criminal law does recognise all of the abovementioned defences, a grey area exists in connection to the application of these defences. International criminal law does not provide any clear guidelines on the impact of these defences on individual criminal liability.<sup>112</sup> As a result, as long as no proper guidance exists as to the establishment of criminal liability for child soldiers, it can rightly be argued that children should not be automatically excluded from refugee protection under Article 1(a).

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<sup>106</sup> Leveau (n 25).

<sup>107</sup> UNICEF 'Weah Speaks out About Child Soldiers' UNICEF <[http://www.unicef.org/infobycountry/liberia\\_19220.html](http://www.unicef.org/infobycountry/liberia_19220.html)> accessed 12 June 2019.

<sup>108</sup> Rome Statute, art 31(1)(b).

<sup>109</sup> Bond and Krech (n 45).

<sup>110</sup> Justice and Reconciliation Project, "Complicating Victims and Perpetrators in Uganda: On Dominic Ongwen" (July 2008), JRP Field Note 7, online: <[http://justiceandreconciliation.com/wpcontent/uploads/2008/07/JRP\\_FN7\\_Dominic-Ongwen.pdf](http://justiceandreconciliation.com/wpcontent/uploads/2008/07/JRP_FN7_Dominic-Ongwen.pdf)> accessed 5 Oct 2021.

<sup>111</sup> Rome Statute, art 31(1)(d).

<sup>112</sup> Bond and Krech (n 45).

## **Conclusion**

It has been reasoned that the current application of the exclusionary clause to child soldiers seeking asylum is against their best interests. Thus, it is recommended that for the best interests of the child to be upheld, there is a need for states to agree on a minimum age of criminal responsibility. This will promote certainty in applying the exclusion clause as well as a revision of the legal threshold of the exclusion clause to reflect the current legal threshold in international criminal law.<sup>113</sup>

Finally, it is important to remember that even if a child soldier is excluded from refugee protection under Article 1(f), it does not necessarily mean that they can be deported. Article 1(a) permits the exclusion of those who have a well-founded fear of persecution on the basis of race, religion, nationality, or membership of a particular social group or political opinion. However, at the same time, there are serious reasons to believe that they have committed war crimes, crimes against humanity, or genocide. Such persons can be protected from refoulment for reasons of fear for their safety. The important point here is that this obligation of states is not affected by individual conduct. This rule can also be applied to suspected war criminals or suspected terrorists.

If the child soldier is prosecuted for war crimes or other international crimes in the receiving state, then the manner in which the trial is being conducted should be considered. In such situations, child soldiers should be given refugee protection for multiple reasons. Firstly, there is no consensus on the minimum age for criminal responsibility. Secondly, there is an international consensus that children should not be prosecuted or executed for their criminal actions. The executive discretion in permitting child soldiers to stay in the country of refuge must be justified. However, it does not follow that those who have committed heinous crimes are given blanket immunity. It is for the state to inquire and decide according to the circumstances, but the age of the soldier should be grounds for such an inquiry. War crimes and crimes against humanity are crimes of universal jurisdiction. If the alleged child soldier has committed heinous crimes, then the state may choose to

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<sup>113</sup>Analysing the exclusion of child soldiers seeking asylum under Article 1(f) of the Refugee Convention 1951 on the principle of the best interest of child, Muthembwa Yvone.

prosecute child soldiers and must take steps to rehabilitate them, but this must be in accordance with individual circumstances.