Training Children for Armed Conflict – Where Does the Law Stand?

Elijah Oluwatoyin Okebukola
Nasarawa State University, Keffi, Nigeria

Abstract

This article considers the question of criminal liability for training child soldiers. None of the legal instruments prohibiting recruitment and use of child soldiers expressly relates to training child soldiers. This raises the question, on the one hand, whether a trainer can be held liable for training as a distinct offence from recruiting or using child soldiers. On the other hand, it raises the question whether a trainer is necessarily liable for recruitment or use of child soldiers. In an attempt to answer these questions, this article highlights the distinct factual and legal differences between recruitment, training and use of child soldiers. This exercise demonstrates that the law is not clear on the criminal liability of a trainer especially if the trainer is not factually involved in recruitment or use of child soldiers. The article concludes that the express clarification of the nature and extent of criminal liability for training child soldiers will improve the legal regimes for the protection of children in armed conflict.

Keywords


* Acknowledgment: I am grateful to Adebayo Kareem, Yvonne McDermott, Christian Djeffal, Jan Willms and the anonymous reviewers for their comments on earlier drafts. Any error or mistake in the article is mine.
1 Introduction

The use of children as soldiers is a longstanding and complex problem. Amongst others, there are issues of: whether children may be used as soldiers in exceptional and compelling circumstances; the definition of a child; culpability of children for war crimes; the extent to which general provisions can efficaciously shield children of different gender, age group and needs.

Notwithstanding the complexity of the topic, there are some settled issues concerning child soldiers. For example, it is clear that international humanitarian law (IHL) and international criminal law (ICL) prohibit the recruitment and use of children under fifteen years as soldiers. Despite the clear prohibition of recruitment and use, the position of law on training children for armed conflict is not so clear-cut. The question of individual criminal responsibility for training children for armed conflict is particularly significant because of the momentous role training plays in the making of child soldiers.

The article is divided into five parts. This first part introduces the problem to be examined. The second looks at actual conducts that constitute recruitment, training and use. It also looks at their possible factual interaction. These lead to the conclusion that recruitment, training and use are separate activities. Moreover, while recruitment is a fixed constituent of the child soldier-making enterprise, training and use are variable. Given that training is factually

---


6 See for example Article 8 (2) (b) (xxvi) and 8 (2) (e)(vii) Rome Statute of the ICC (ICCSt).
separable from recruitment and use, the question then arises as to whether training can be included in the legal definition of recruitment or use of child soldiers. This article puts the problems raised by this question in perspective by considering if, under relevant extant law, a person can be charged and convicted for only training child soldiers.

From a prosecutorial perspective this question can be rephrased as follows: Can individual criminal responsibility for recruitment or use of child soldiers be imputed to a trainer who is not involved in the actual activities that factually constitute recruitment or use? An example of such a trainer would be an agent of a third State or an independent contractor who is invited to train persons already recruited as part of an armed force or group and upon concluding the training programme departs without having anything further to do with the recruits. This question can be further illustrated by reference to state practice regarding military aid or assistance in the area of training. Would there be criminal liability on the part of the trainers of State A who only train officers or soldiers of State or Group B if the trainees were under 15 years when recruited by State or Group B and sent to State A after they had been fully absorbed into the State or Group B forces?

Following the questions raised by the second part of the article, the third looks at the existing laws concerning the prohibition of recruitment and use of child soldiers in the light of the jurisprudence of the SCSL and ICC in the RUF, AFRC, CDF, Taylor and Lubanga cases. This leads to the position that although forcible training may constitute conscription, unforced training does not meet the requirements for either enlistment or conscription. Moreover, training alone (forced or not) does not amount to use of children for armed conflict. However, in certain circumstances, general principles as an instrument of interpretation may bring training of child soldiers within the ambit of the prohibition of torture, inhuman treatment and outrage upon personal dignity. In other circumstances, the trainer may be in joint criminal enterprise with, or may be aiding and abetting the recruiter and user. In all, the liability of the

7 There is abundant state practice in the area of military training assistance and cooperation. For example, see http://www.forces.gc.ca/admpol/mtcp-annual-report-eng.html on the 2009–2010 military training programmes of the Canadian Directorate of Military Training and Cooperation; See also http://www.state.gov/t/pm/65533.htm for the United States’ International Military Education and Training (IMET) programme which amongst others aims to ‘[p]rovide training and education that augments the capabilities of participant nations’ military forces to support combined operations and interoperability with U.S., NATO and regional coalition forces.’ And see http://www.consilium.europa.eu/homepage/highlights/eu-training-mission-in-mali-launched?lang=en for the EU’s training mission in Mali (EUTM Mali) which was launched in February 2013.
The question of liability is even more unclear where the trainer is an independent state or non-state actor who is not a party to the armed conflict in issue.

The fourth part inquires into the value of clarifying the criminal implications of training child soldiers. It does this from the perspective of the prosecutor, defendant and policymaker. The fifth concludes that the legal protection of children during armed conflict is better served by clarifying the law on training child soldiers.

2 Recruitment, Training and Use of Children for Armed Conflict

The regression from child to child soldier generally involves three significant stages; recruitment, training and use. The general three-staged sequence of events is well illustrated in the CDF Appeal where the Special Court for Sierra Leone (SCSL) found that young boys were initiated into the Civil Defence Forces (stage one), given military training (stage two) and thereafter sent into battle (stage three).8

2.1 Factual Manifestations of Recruitment, Training and Use

Prior to determining if the training aspect of the child soldier-making enterprise attracts individual criminal responsibility, it is necessary to identify the specific conduct or acts in question at each stage of the process. It is in this context, therefore, that the next paragraphs examine the acts that are required for recruitment, training and use. The paragraphs demonstrate that recruitment, training and use are separate and distinct activities.

2.1.1 Recruitment

Recruitment entails either forced or unforced absorption of the children into an armed group or regular armed forces.9 The most prevalent methods of forced recruitment include abduction, press ganging and recruitment by quota.10 For example in Colombia, children have been conscripted from

---

elementary schools and their homes.\textsuperscript{11} In the Democratic Republic of Congo (DRC) children have been abducted from schools, roadsides and markets.\textsuperscript{12}

Capturing child soldiers and then integrating them into the forces of the captors is an egregious but seldom mentioned type of forced recruitment. This form of recruitment differs from direct abduction of child civilians as the child would already have been turned into a child soldier by an opposing group prior to being captured in battle or otherwise. Take for example Witness TF2-140 in the CDF Trial case.\textsuperscript{13} He was abducted into the RUF when he was thirteen years old. While fighting alongside the RUF combatants, he was captured and imprisoned by the CDF. A CDF representative subsequently promised him freedom in return for helping the CDF Kamajors. Fearful for his life and believing he had no option but to comply, he joined the CDF.\textsuperscript{14}

Central to the various manners of forcible recruitment is the use of direct coercion on the child or threat of harm or other disadvantage to the child or someone/something connected to the child.\textsuperscript{15} It is however not the case that all recruited child soldiers are forced or coerced to join fighting forces. Notwithstanding the widespread practice of forced recruitment, a large number of children in post World War II conflicts are not physically coerced into joining armed forces or groups.\textsuperscript{16}

Nevertheless, there is a grey area between true consent and pseudo-voluntary consent. Children who pseudo-voluntarily join armed groups or forces include those that are pushed or pulled to join armed forces and groups by situations such as extreme poverty;\textsuperscript{17} desperation for food,\textsuperscript{18} water, clothing and shelter;\textsuperscript{19} peer and family pressure; starvation and the need for personal

\textsuperscript{11} Human Rights Watch ‘War without quarter’ (Oct 1998).
\textsuperscript{13} Prosecutor v. Moinina Fofana and Allieu Kondewa, SCSL-04-14-T, Judgment, 2 August 2007 (CDF Trial) para. 667.
\textsuperscript{14} Ibid., para. 667. See also Transcript of 14 September 2004, TF2-140, pp. 67, 69–72, 141, 148 and 132.
\textsuperscript{15} Amy Beth Abbott, ‘Child Soldiers-The Use of Children as Instruments of War’, 23 Suffolk Transnat’l L Rev (1999) 499, p. 514, where it is noted that both armed opposition groups and national armed forces use threats or actual physical force to recruit children.
\textsuperscript{16} Ibid., p. 516.
\textsuperscript{17} Wessells, supra note 10, p. 54.
\textsuperscript{18} Abbott, supra note 15, p. 515.
\textsuperscript{19} Wessells, supra note 10, p. 47 reports the case of a 25 year old man who joined the CDF in Sierra Leone when he was a child of 15 because the RUF had killed his parents and felt he had no means of getting food, water and other such things except by joining the CDF.
security. In all, recruitment entails the conduct of absorbing or incorporating a child into an armed force or group. It does not have to be a formal or ritualised procedure. However, there must be a direct link between the conduct of the defendant and the child joining an armed group or army.

2.1.2 Training
Following forced or unforced recruitment, children sometimes undergo training of some sort or the other. At the training stage they are instilled with a soldier’s frame of mind (indoctrination) and taught to use tools and skills needed for participation in armed conflict. Usually, training serves to prepare the child for roles in the armed force or group. Training may be conventional or non-conventional. Conventional training entails putting children through regular military drills, physical exercises and activities aimed at developing the trainee into a soldier.

An aspect of the training practices of the Revolutionary United Front (RUF) during the Sierra Leonean civil war is illustrative of conventional military training. According to the SCSL, the RUF recruits:

underwent training in guerrilla tactics such as how to mount ambushes. They were trained in infantry behaviour such as marching, parading and instructed on the importance of discipline. They also received armoury training on the use of the various types of rifles and artillery weapons available to them. They were further required to undergo physical and endurance training, through daily exercises such as jogging.

Despite physiological and psychological differences, children can undergo the same conventional training as adults. Indeed, the adaptability and malleability of children make them easier to condition than adults. The evidence of P-0038 in the Lubanga case is illustrative of children going through the same

---

22 CDF Appeal, para. 144.
25 Ibid., p. 75.
training as adults.\textsuperscript{27} According to P-0038, all recruits including adults were taught how to use AK-47s and light arms, and how to fight the enemy. They were also instructed as to the appropriate way to wear their uniforms and welcome dignitaries.\textsuperscript{28}

Although the duration and nature may vary, the training generally aims to prepare the children for the use of weapons, the conduct of military manoeuvres including ambushes and the tactics of advancing on and attacking enemy positions.\textsuperscript{29} In addition to preparing children for active combat, training is sometimes geared towards enabling the children to carry out support roles such as pillaging, loading and dismounting arms, entertainment, sabotage and midwifery.\textsuperscript{30}

The training of children for combatant roles is sometimes of a brief and rudimentary nature. Therefore duration and complexity are not necessary determinants of conduct that amounts to training children for armed conflict. For example the SCSL found in the RUF case that some children only received ‘immediate training’ where they learned ‘to cock and shoot.’\textsuperscript{31} The evidence of Witness TF2-021 in the CDF Trial is also indicative of the practice whereby children are given the most rudimentary of military training before being sent to battle.\textsuperscript{32} TF2-021 was abducted by the RUF when he was about nine years old. He was subsequently captured by the CDF and initiated as a Kamajor. Following the initiation, the Kamajor who initially captured him gave him a gun, taught him how to shoot and after this training, he started going on military missions.\textsuperscript{33}

Apart from training that consists of regular traditional military drills and physical exercises. Children may also be subjected to non-conventional training. This may be instead of, or together with conventional training. Basically, non-conventional training is focused more on controlling the minds of the children.\textsuperscript{34} The objectives of this kind of training include giving the children a

\textsuperscript{27} Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06, Trial Judgment, March 14 2012 (Lubanga Dyilo Trial), para. 803.
\textsuperscript{28} Ibid., para. 803.
\textsuperscript{29} RUF case, para. 1619. See also Transcript of 12 July 2006, TF1-296, p. 20 (CS).
\textsuperscript{31} RUF case, para. 1619, p. 484. See also Transcript of 21 March 2006, TF1-174, p. 44 (CS).
\textsuperscript{32} Ibid., para. 676.
\textsuperscript{33} CDF Trial, para. 676.
\textsuperscript{34} Michael Wessells, Child Soldiers - From Violence to Protection (Harvard University Press, Cambridge, 2006).
sense that they have reached a point of no-return and making them capable of unhesitatingly committing acts they would ordinarily find abhorrent. For example, a child that has been made to use live human beings for target practice is likely to be more amenable to committing atrocities.\(^{35}\)

Brainwashing is another form of unconventional training. Parties to the Sierra-Leonean conflict, for example, trained children to believe that mystical powers made them immune to bullets.\(^ {36}\) This belief gave the children courage, instilled a sense of invisibility in them and helped them dissociate themselves from acts done to them or done by them.

Be it conventional or not, training entails activities that are geared towards preparing a recruited child for various roles and duties. In the logical sequence of events, therefore, training occurs after the fact of recruitment and the conduct that amount to one are separate from the other. It is important to note that training may include instructions on matters such as the law of armed conflict, administration of first aid and acquisition of vocational skills. Training may also be virtual or indirect, for example where foreign training assistance is through pre-recorded media, online interaction or printed instructional materials.

2.1.3 Use of Children in Armed Conflict

Children are used in armed conflict when they are made to partake actively in hostilities. In this regard, they may be either direct or indirect participants. As direct participants, they engage in combat-related activities. As indirect participants, they are engaged in supporting roles and activities.\(^ {37}\) As decided by the ICC in the Lubanga case, an indirect role is to be treated as active participation if the support provided by the child to the combatants exposes him or her to real danger by becoming a potential target.\(^ {38}\)

\(^{35}\) See Denov, supra note 30, p. 818 where the incident of children being made to use human beings for target practice is mentioned. See also Nienke Grossman, ‘Rehabilitation or Revenge: Prosecuting Child Soldiers for Human Rights Violations’, 38 Geo J Int’l L (2006) 323, at p. 328 where it is mentioned that ‘[t]he Mozambican Resistance Organization’s (RENAMO) training regimen included physical abuse, punishment for showing sympathy for victims of violence, and forced participation in killing.’


\(^{38}\) Lubanga Dyilo Trial, para. 820.
In this sense, activities that are clearly unconnected to the hostilities do not amount to active participation.\footnote{Ambos, supra note 37, p. 26.} For example, girl soldiers in Angola were trained and used for activities which included midwifery and singing for special events.\footnote{Denov, supra note 30, p. 817.} These roles in themselves would not amount to participation in hostilities. It is however not so clear cut when it comes to activities such as using children as sex slaves. The courts in \textit{Taylor} and the \textit{Lubanga} case have towed the position that what amounts to active participation is determined by the peculiar circumstances of each case.\footnote{Prosecutor v. Charles Ghankay Taylor, SCSL-03-01-T, Judgment, 18 May, 2012, para 444; \textit{Lubanga Dyilo} Trial, para. 628.} Thus, not all roles that children are made to play qualify as use for armed conflict.

It suffices to note that the activities involved in training prepare children for various roles which may or may not involve active participation in hostilities. Therefore, in fact, training is a distinct and separate activity from the use of children for armed conflict.

\subsection*{2.2 The Possible Combinations of Recruitment, Training and Use}

Although the three stages of recruitment, training and use are distinct and separable, it does not always follow that every child soldier will go through all three stages. It is sometimes the case that the child is recruited but neither trained nor used for armed conflict. Recruitment merely implies that the child will be part of the armed force or group.\footnote{Geraldine Van Bueren, ‘The International Legal Protection of Children in Armed Conflicts’, 43 \textit{Int'l & Comp LQ} (1994) 809, p. 815.} The child may also be recruited and trained but not used for armed conflict (although the child may be used for purposes other than armed conflict). It is also sometimes the case that the child is recruited and used for armed conflict without being trained.

The testimony of witness TF1-314 in the \textit{Sesay, Kalon, and Gbao} case (the \textit{RUF} case) demonstrates how a child may be recruited, trained and then used for purposes other than participation in armed conflict.\footnote{\textit{RUF} case, para. 591.} At the age of 10, she was captured and raped by the \textit{RUF}.\footnote{\textit{RUF} Case Transcript of 2 November 2005, TF1-314, p. 25 (CS).} Thereafter, an RUF fighter told her to choose between being killed and accompanying the \textit{RUF}. She chose to follow the \textit{RUF}.\footnote{\textit{Ibid.}, p. 26 (CS).} Eventually she was given military training as part of a small girls
unit (SGU). Subsequent to the training she was made to go on food finding missions for the RUF and was ‘married’ to a rebel named Scorpion.46

It is worthy of note that the ICC in Lubanga did not decide whether or not sexual slavery in itself amounts to active participation in hostilities,47 the ICC nevertheless noted that ‘the decisive factor in deciding whether an indirect role is to be treated as active participation in hostilities is whether the support provided by the child to the combatants exposed him or her to real danger by becoming a potential target.’48 Thus where the enslaved recruits are kept away from the dangers of being targeted, the sexual slavery will be a crime on its own but may not amount to using the child(ren) for participation in armed conflict.

Some aspects of the participation of Iranian children in the Iran-Iraq War show the possibility of recruiting and using children for armed conflict without given them any real military training.49 The Iranian regime at that time conscripted children by intimidation, force or misrepresentation.50 Subsequently they were not given military training but encouraged to value martyrdom.51 Thereafter, the children would be equipped with keys, which they had been promised would open the gates of heaven. They would be kitted with shirts bearing the slogan: ‘I have the special permission of the Imam to enter heaven’.52 Thus armed, they were herded into minefields to clear the way for the Iranian Army.53 As noted by J Kuper; ‘many children who directly participate in armed conflict have no (or minimal) training. In many situations they may not have been taught military tactics or even the use of weapons’.54

There can be recruitment not followed by neither training nor participation if an intervening act prevents training and participation from occurring. For example, the conflict ends after the child is recruited. In addition, as borne out

46 Ibid., pp. 31, 33, 56 (CS).
47 Lubanga Dyilo Trial, para. 630.
48 Ibid., para. 820.
50 Ibid., p. 260.
51 See Karima Bennoune, ‘As-Salamu Alaykum? Humanitarian Law in Islamic Jurisprudence’, 15 Mich J Int’l L (1994) 605–643, fn. 203 where it stated that although this practice is ‘clearly prohibited by Islamic law, a fatwa, issued by the Ayatollah Khomeini was used to justify the practice’.
53 Ibid., p. 260.
in the Sierra Leonean conflict, the recruited child may not go through training and participation if the recruiters from the beginning set out to use the child for some purpose other than involvement in armed conflict. For example groups may not give girl recruits military training if the purpose of recruiting them is to sexually enslave or force them into conjugal relations.\(^\text{55}\) Irrespective of whether recruitment is followed by training or use, for the general purposes of the protections afforded by law, especially International Humanitarian Law (IHL), it is significant that ‘children, like adults caught up in conflict, may move back and forth between being ‘civilians’ and being ‘combatants’ according to the particular circumstances’.\(^\text{56}\)

In all, there are four possible combinations of recruitment, training and use. That is, recruitment plus training and use (R+T+U), recruitment plus training minus use (R+T-U), recruitment minus training plus use (R-T+U) and recruitment minus training and use (R-T-U). Recruitment is the only constant stage in the identified sequence of events and the two stages, of training and use, are variable.

3 Culpability for Training Children for Armed Conflict

Since, training is a factually separate activity from recruitment and use, the question then arises as to whether there is individual criminal liability for training children for armed conflict. In answering this question, four positions are examined below. First, training children for armed conflict is not an activity that is expressly and unambiguously prohibited by international humanitarian law and international criminal law.\(^\text{57}\) Second, a tribunal may interpret existing principles on the prohibition of torture, inhuman treatment and

---


56 Kuper, supra note 54, p. 12.

57 Some provisions of international humanitarian law have counterparts in international criminal law. However, ‘[i]nternational criminal law gives rise to individual criminal responsibility and, accordingly, certain provisions of war crimes law are interpreted in a narrower fashion than their international humanitarian law counterparts.’ Sandesh Sivakumaran, ‘Re-envisioning the International Law of Internal Armed Conflict’, 22 Eur J Int Law (2011) 219–264, p. 221.
outrage to personal dignity to include a prohibition of training child soldiers. Third, training may amount to a joint criminal enterprise with the recruiter or user. Fourth, applying the reasoning in the Taylor case, training may amount to aiding or abetting recruitment or use. Following the examination of these four points, it is concluded that the law is uncertain as to culpability for training child soldiers.

3.1 The Texts of Existing Laws Do not Expressly Prohibit Training Children for Armed Conflict

The first specific provisions relating to the protection of children during armed conflict are contained in the Additional Protocols to the 1949 Geneva Conventions. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I) requires the parties to armed conflicts to: take all feasible measures to ensure that children who have not attained the age of fifteen years do not take a direct part in hostilities; refrain from recruiting children under fifteen years into their armed forces; and give priority to older children if recruiting children over fifteen but under eighteen years. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II) provides that ‘[c]hildren who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities’.

Although the letters of the two additional protocols expressly mention and prohibit recruiting and using children for armed conflict, nothing in the two protocols directly mentions or prohibits training of child soldiers. Subsequent

58 Taylor Trial.
59 Matthew Happold, ‘Child Soldiers in International Law: The Legal Regulation of Children’s Participation in Hostilities’, 47 Netherlands International Law Review (2000) 27–52, where it is noted that the four Geneva Conventions do not expressly regulate the participation of children in armed conflict. Thus, ‘in regulating their participation, the two Additional Protocols (APs) of 1977 were neither developing nor supplementing the Conventions’.
60 Article 77(2) Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1977 (Additional Protocol I).
61 Article 77(2) Additional Protocol I.
62 Ibid.
to the Additional Protocols, provisions to shelter children from the horrors of armed conflict are contained in the Convention on the Rights of the Child (CRC), the African Charter on the Rights and Welfare of the Child (ACRWC), the Rome Statute of the International Criminal Court (ICCSt), and The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (OPCRCAC).

The CRC prohibits the recruitment of persons who have not attained the age of fifteen years for direct participation in hostilities. The CRC further provides that in recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, priority shall be given to those who are oldest. The ACRWC requires African States to take all necessary steps to ensure that persons under eighteen years are not recruited or allowed to participate in hostilities.

The ICCSt prohibits the conscripting or enlisting of children under fifteen into national armed forces or non-national armed forces or groups. It also prohibits using children under fifteen to participate actively in hostilities. The OPCRCAC requires that: members of armed forces who have not attained the age of 18 do not take direct part in hostilities; persons who have not attained the age of 18 are not compulsorily recruited into armed forces; and parties that allow persons under 18 into armed forces shall ensure that: the recruitment is genuinely voluntary, done with the informed consent of the person's parents or legal guardians, the recruited persons are fully informed of the duties involved in such military service, and such persons provide reliable proof of age prior to acceptance into national military service.

The letters of all the above provisions on child soldiering are limited to recruitment and use of children as child soldiers. None expressly deals with the training aspect of the child-soldier making process. Indeed, apart from the OPCRCAC, which in its preamble condemns those who recruit, train and use children in armed conflict, none of the above instruments uses the expression “train” in any form.

64 Article 38(2) Convention on the Rights of the Child (CRC).
65 Articles 2 and 22 African Charter on the Rights and Welfare of the Child (ACRWC).
66 Article 8(2)(b)(xxvi) and Article 8 (2)(e)(vii) ICCSt.
67 Article 1, Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (OPCRCAC).
68 Article 2, OPCRCAC.
69 Article 3, OPCRCAC.
70 Preamble to the OPCRCAC states inter alia that State Parties condemn ‘with the gravest concern the recruitment, training and use within and across national borders of
The non-mention of training in the texts prohibiting recruitment and use is particularly significant in the context of the *nullum crimen sine lege* principle. Under the *nullum crimen sine lege* principle an activity that is not prohibited is not criminally unlawful. The principle stipulates that ‘a person may only be found guilty of a crime in respect of acts which constituted a violation of the law at the time of their commission’.71 The elements of this principle include: the requirement of specificity of criminal rules, prohibition of criminal liability based on analogy, non-retroactivity of criminal rules, and interpretation in favour of the defendant where rules are unclear.72

The element of specificity requires that prohibited conduct must be clearly identified by the law such that *actus reus* and *mens rea* are known in advance. This does not only allow individuals to make informed choices but also helps protect them from arbitrary enforcement action.73 Does it then mean that a person that trains children for armed conflict cannot be held criminally liable for this act?

3.1.1 Interpreting Existing Provisions of Law to Include a Prohibition of Training Child Soldiers?

Recruitment, training and use are factually separable, but can training be included in the legal definition of recruitment or use. Furthermore, in the light of general principles, is it possible to interpret existing provisions of law to include a prohibition of training child soldiers? The questions may also be asked if the trainer is aiding, abetting or in a joint criminal enterprise with the recruiter or user. These questions are examined below.

3.1.1.1 *Training Constitutes Recruitment?*

Although training is not expressly mentioned in the letters of the instruments prohibiting recruitment and use of child soldiers, tribunals have taken it into consideration when determining liability for recruitment and use. For instance, the SCSL in determining liability for conscription into an armed group observed that ‘either the abduction of persons for specific use within an organisation or forced training of persons is independently sufficient to

---

children in hostilities by armed groups distinct from the armed forces of a State, and recognizing the responsibility of those who recruit, train and use children in this regard’.


constitute conscription, as both practices amount to compelling a person to join an armed group.’74

The SCSL however went on to hold that it would be impermissible to treat abduction or forced training as separate bases for findings of conscription because many of the children abducted were then forcibly trained. The court then took the position that it was necessary to review all evidence pertaining to the course of conduct of the accused before reaching a conclusion as to whether or not the abductions and forced trainings amounted to conscription.75 Following this review, the SCSL found that the children who were abducted and then forcibly trained were compelled to join the RUF.

For this reason, the SCSL concluded that the abduction and forced training constituted conscription.76 The Court noted that ‘[a]lthough not all the children abducted were eventually subjected to military training, … the children who were not trained were used for other purposes within the RUF’.77 Thus, ‘[n]otwithstanding their ultimate use, these abductees were compulsorily enlisted as members of the RUF or AFRC forces and therefore conscripted’.78

It follows from the reasoning of the SCSL in the RUF case that forced training can be evidence of conscription. The Court in the RUF case here did not consider the question of unforced training in relation to the offence of recruiting child soldiers. However, in the partially dissenting opinion of Honourable Justice Renate Winter in the CDF Appeal, it is observed that enlistment of child soldiers can constitute of several acts ‘which may substantially further the enrolment and acceptance of a child under the age of fifteen into an armed force or group’.79 Such acts may include ‘[r]eligious initiation, military training and the signing of a certificate declaring a child fit for combat’.80

The use of the dissenting opinion of Honourable Justice Renate Winter as authority for the proposition that training is evidence or a constituent of enlistment is however watered down by the decision of the Majority that acts of initiation that occurred after a child had been brought into the group did not amount to enlistment.81 By this reasoning, training which occurs after a child joins the armed force or group may not constitute enlistment.

74 **RUF** case, para. 1695.
79 **CDF** Appeal, Partially Dissenting Opinion of Honourable Justice Renate Winter, para. 12.
In all, it is not entirely clear that training *per se* constitutes recruitment. While forced training followed by integration into an armed force or group may constitute conscription,\(^82\) the matter is not so clear-cut where forced training is not followed by integration. At any rate the question of liability for training depends on the total course of the defendant’s conduct.\(^83\) Again, going by the *CDF Appeal*, while enlistment in the broad sense includes any conduct accepting the child as a part of the armed force or group,\(^84\) training which occurs after the child has joined the armed force or group may not constitute enlistment.\(^85\)

### 3.1.1.2 Training Constitutes Use?

Both the ICC and SCSL have identified conduct that fall within the legal definition of use of child soldiers. Liability for using children under the age of 15 to participate actively in hostilities is not dependent on liability for conscription or enlistment.\(^86\) The ICC in *Lubanga* noted that the determination of conduct that falls within the legal definition of use of child soldiers ‘can only be made on a case-by-case basis.’\(^87\) This definition is however not to be capricious but based on the benchmarks identified by the Court. That is to say the conduct must be related to the hostilities, support the combatants of the armed group or force and, at the very least, make the child involved a potential target.\(^88\)

It is instructive that all conducts that the ICC and SCSL have positively found to constitute use of child soldiers, meet the three criteria of being connected to the hostilities, supporting the combatants and exposing the child to the risk of being a potential target. For example, the SCSL in *AFRC* found that in addition to actual fighting and combat, ‘carrying loads for the fighting faction, finding and/or acquiring food, ammunition or equipment, acting as decoys, carrying messages, making trails or finding routes, manning checkpoints or acting as human shields’ amount to use of child soldiers.\(^89\) Similarly, guarding a highly contested and strategically located mine where diamonds

---

82 RUF case, para. 1695; CDF Appeal, para. 145.
83 RUF case, *ibid*.
84 CDF Appeal, para. 144.
85 *Ibid*., para. 145.
86 *Lubanga Dyilo* Trial, para. 620.
87 *Ibid*., para. 628.
88 *Ibid*.
89 Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu, SCSL-04-16-T, Judgment, 20 June 2007 (AFRC Trial) para. 737; Taylor Trial, para. 444.
are extracted and sold to finance the war efforts amounts to using the child for armed conflict.90

According to the travaux preparatoires of the ICCSt, using children as child soldiers ‘would not cover activities clearly unrelated to the hostilities such as food deliveries to an airbase or the use of domestic staff in an officer’s accommodation.’91 This position has been followed by the SCSL and the ICC.92 In the CDF case, ‘domesticated jobs of a purely civilian character like cooking, food finding, laundry or running routine errands’93 did not amount to using children for armed conflict. It is instructive that the examples given in the travaux preparatoires, of activities that are clearly unrelated to the hostilities, are such that do not ordinarily meet the three criteria noted above.

In the event that the activities a child is involved in amount to active participation, then the child will be protected by the provisions of IHL relating to combatants but will be a ‘legitimate target of attack’.94 On the other hand, a child involved in activities that do not constitute active participation will, at least, be hors de combat and therefore protected from being targeted amongst other things.

As the SCSL put it, ‘an overly expansive definition of active participation in hostilities would be inappropriate as its consequence would be that children associated with armed groups lose their protected status as persons hors de combat under the law of armed conflict.’95 The question of whether training amounts to active participation therefore has very far reaching consequences. In the simplest of terms, if training amounts to use, the child can be targeted even as a trainee but if it does not amount to use then the child trainee is a person hors de combat.

Applying the benchmarks of connection to hostilities, support of combatants and exposure as potential targets, it would seem that training does not fall within the legal definition of use of child soldiers. While it is arguable that training may be connected to the hostilities and it is doubtful if a trainee child is a legitimate target, a child in training cannot be said to provide support for combatants in the hostilities. Naturally, the fact of training will be taken into

90 Taylor Trial, para. 1459; AFRC Trial para. 1267.
92 CDF Trial, para. 193; RUF case, para. 188; Lubanga Dyilo Trial, para. 621.
93 CDF Trial, Separate and Partially Dissenting Opinion of Justice Itoe, para. 13.
95 RUF case, para. 1723.
context when a tribunal determines liability for use.\textsuperscript{96} Nevertheless, training does not constitute use.

In interpreting existing law, a tribunal may clarify legal provisions by reference to general principles. Thus, in determining culpability for training child soldiers, a tribunal may not be limited to only the legal instrument prohibiting recruitment and use. Rather, the tribunal may examine the facts disclosed in the light of general principles that may be applicable.

3.1.1.3 Applying General Principles in Determining Liability for Training

General principles constitute a source tribunals may look to in ascertaining international law. According to Bin Cheng, general principles are ‘cardinal principles of the legal system in the light of which international ... law is to be interpreted and applied.’\textsuperscript{97} Cheng postulates that general principles may serve as (a) a source of various rules (2) guidelines or framework for the judiciary with respect to the interpretation and application of law and (3) norms whenever there are no formulated norms governing a given question. Developing on this, M. Bassiouni postulates that general principles as a source of international law fulfil at least four functions including serving as:

\begin{enumerate}
\item A source of interpretation for conventional and customary international law;
\item A means for developing new norms of conventional and customary international law;
\item A supplemental source to conventional and customary international law; and
\item A modifier of conventional and customary international rules.\textsuperscript{98}
\end{enumerate}

Discussions on general principles such as Bassiouni’s and Cheng’s above, deal with international law in general. It would seem that in specific relation to international crimes, a tribunal would offend against the principle of legality if it purports to develop new crimes, supplement extant law or modify existing law. The tribunal may however adopt general principles in interpreting existing law as this does not amount to creating new offence(s). For example, since the facts of military training possibly will disclose a degree of pain and

\textsuperscript{96} Lubanga Dyilo Trial, para. 88g.


suffering, a tribunal may interpret existing law in the light of the general principle that prohibits torture.99

As the ICTY found in *Furundžija*,100 ‘prohibition on torture is a peremptory norm or *jus cogens*’ for which there can be individual criminal liability.101 The ICTY agreed with the view expressed in the USA case of *Filartiga v. Pena-Irala*, that ‘the torturer has become, like the pirate and the slave trader before him, *hostis humani generis*, an enemy of all mankind’.102 The court then went ahead to note that the elements of torture in an armed conflict require that torture:103

(i) consists of the infliction, by act or omission, of severe pain or suffering, whether physical or mental; in addition
(ii) this act or omission must be intentional;
(iii) it must aim at obtaining information or a confession, or at punishing, intimidating, humiliating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person;104
(iv) it must be linked to an armed conflict;
(v) at least one of the persons involved in the torture process must be a public official or must at any rate act in a non-private capacity, *e.g.* as a de facto organ of a State or any other authority-wielding entity.

The position in *Furundžija* as regards state involvement as a requirement for sustaining an allegation of torture as a war crime was based on the definition of torture in United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment of 1984.105 This position was however

---

101 *Furundžija* Trial, para. 144.
104 In the Elements of Crimes of the ICC, the ‘specific purpose’ element is absent from torture as a crime against humanity, Article 7 (1) (f). It is however contained in the elements for torture as a war crime, Article 8(2)(a)(ii)-1, Article 8(2)(c) (i)-4.
105 Article 1, United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment of 1984.
reversed in *Kunarac* where the Trial Chamber stated that ‘the presence of a state official or of any other authority-wielding person in the torture process is not necessary for the offence to be regarded as torture under international humanitarian law.’\textsuperscript{106} This was affirmed by the Appeals Chambers.\textsuperscript{107}

The conflict between the decisions in *Furundzija* and *Kunarac* is clarified in the ICCSt and ICC Elements of Crime which do not require the involvement of a state official in the commission of torture as either a war crime or crime against humanity.\textsuperscript{108} For the war crime of torture, the ICC Elements of Crimes require that:\textsuperscript{109}

1. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.
2. The perpetrator inflicted the pain or suffering for such purposes as: obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind.


\textsuperscript{108} But see Gaeta, ‘When is the Involvement of State Officials a Requirement for the Crime of Torture?’ *supra* note 106, p. 186 where it is argued that ‘in international law the notion of torture changes depending of the particular legal context in which it is applied.’

\textsuperscript{109} Article 8 (2) (a) (ii)-1 War crime of torture.
3. Such person or persons were protected under one or more of the Geneva Conventions of 1949.
4. The perpetrator was aware of the factual circumstances that established that protected status.
5. The conduct took place in the context of and was associated with an international or non-international armed conflict.
6. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

It is arguable that training children for armed conflict meets the requirements of the war crime of torture. Mental and physical pain is inflicted on the children through the training regime and this is a form of punishment. This argument is however problematic. First it fails where a child truly and willingly volunteers for military training. In addition, where the training involves neither pain-inducing nor strenuous physical activity, the requisite element of severe pain or suffering would be absent. Examples of trainings in this category are those that consist of a quick lesson on how to load, point and fire a weapon and those that are limited to teaching children they are divinely or mystically immune to harm.

Moreover, the subjective element (mens rea) of torture requires that the trainer must aim at ‘punishing, intimidating, humiliating or coercing the [child] victim or a third person, or at discriminating, on any ground, against the [child] victim or a third person’. In the most likely event that the trainer’s sole intention is to prepare the child(ren) for armed conflict, the mens rea required to sustain a charge of torture would be lacking.

The counter argument may however be raised that, the mens rea for torture is not limited to the intention to punish, intimidate, or discriminate but extends to the intention to attain ‘an impermissible purpose’. This is, for example, consistent with the reasoning that rape can constitute torture. Since the use of children for armed conflict is prohibited by law, it is an impermissible purpose. The intention to prepare children for armed conflict

---

110 Note that the child’s consent is no defence to a charge of recruitment. Pilar Villanueva Sainz-Pardo, ‘Is Child Recruitment as a War Crime Part of Customary International Law?’, 12 The International Journal of Human Rights (2008) 555–612, p. 569. See also arguments such as those contained in the submissions of Elisabeth Schauer (CHM-0001), in her report and during her evidence in the Lubanga Trial Judgment that psychologically, children cannot give informed consent when joining an armed group, because they have limited understanding of the consequences of their choices. See Lubanga Dyilo Trial para. 610.
111 See for example CDF Trial para. 721 (vii) etc.
therefore satisfies the *mens rea* requirement for the war crime of torture. The problem with this counter argument is that it risks the definitional overextension of torture in armed conflict to include virtually all situations where the victim suffers mental or physical pain.

A tribunal seeking to avoid this overextension may look to the prohibition of inhuman treatment and outrage upon personal dignity.\(^{113}\) Inhuman treatment as a breach of IHL consists of inflicting severe physical or mental pain or suffering upon one or more persons protected by the Geneva Conventions of 1949.\(^{114}\) Unlike torture, the perpetrator of inhuman treatment is not required to have inflicted the treatment for any specific purpose. Thus, where it cannot be established that the trainer had an impermissible purpose in mind, s/he may still be culpable for inflicting inhuman treatment. Nevertheless, if training activities are not such that result in physical or mental pain, it becomes difficult to see how a *bona fide* interpretation of inhuman treatment will include such activities.

In the event that training activities do not cause pain or suffering, they may still amount to outrages upon personal dignity. There is an outrage against personal dignity where the perpetrator humiliated, degraded or otherwise violated the dignity of one or more persons and the ‘severity of the humiliation, degradation or other violation was of such degree as to be generally recognized as an outrage upon personal dignity.’\(^{115}\) The indignity of being trained as a child soldier stems from the unlawfulness of being a child soldier and the general perception that child soldiering is harmful to both the child and the community at large. It is particularly instructive that the victim of outrage to personal dignity does not have to feel or be aware of the outrage. Thus voluntary enlistment and consent to training do not make the training activities any less outrageous.

In all, a tribunal applying general principles in the context described above would have to ensure that it does not punish by analogy or make any retroactive criminal rule. Moreover, any unclear rules must be interpreted in favour of the defendant.

### 3.2 *Is the Trainer in a Joint Criminal Enterprise with the Recruiter or User?*

The crime of recruitment is committed the moment a child is ‘enrolled into or joins an armed force or group, with or without compulsion.’\(^{116}\) The offence

\(^{113}\) Article 8(2)(b)xxi and Article 8(2)(c)iii CICSt.

\(^{114}\) *See for example* Elements of Crimes for the ICC, Definition of inhuman treatment as a war crime, ICC Statute, Article 8(2)(a)(ii).

\(^{115}\) Elements of Crimes for the ICC, Definition of inhuman treatment as a war crime, ICC Statute, Article 8(2)(b)(xxi).

\(^{116}\) *Lubanga Dyilo* Trial, para. 759.
ends only when the child attains the permitted age or leaves the force or group. The continuing nature of the crime of recruitment raises the query as to whether the trainer is in a joint criminal enterprise with the recruiter. The fact that training prepares for use also leads to the question as to whether the trainer is in joint commission with the user.

Essentially, the concept of joint criminal enterprise applies to perpetrators who have jointly committed an offence. It is particularly applicable in circumstances where perpetrators share the intent to commit a crime and each contributes to achieve the criminal purpose. The relationship between the co-perpetrators may or may not be hierarchical, but that is not determinative. It is the joint commission of the crime with the shared intent which defines the relationship. In Duško Tadić, the ICTY Appeals Chamber identified three possible categories of joint criminal enterprise.

In the first category, which has been described as the ‘basic form’, all co-defendants, acting pursuant to a common design, possess the same criminal intention. For example where the defendants formulate a plan to kill and in carrying out this plan, they all possess the intention to kill irrespective of the role each defendants plays within the plan.

The second category, which has been described as the ‘systemic form’, is illustrated by the ‘concentration camp cases’ where the offences charged were alleged to have been committed by members of military or administrative units such as those running concentration camps; i.e., by groups of persons acting pursuant to a concerted plan.

[117] Ibid., para. 759.
[119] Ibid., p. 550.
[120] Ibid.
[124] Ellis, supra note 121, para. 196.
[125] Ambos, supra note 123, p. 160.
The third category, described as the ‘extended joint enterprise’,\footnote{Ambos, supra note 123, p. 160.} concerns cases where defendants have a common design to pursue one course of conduct and one of them ‘commits an act which, while outside the common design, was nevertheless a natural and foreseeable consequence of the effecting of that common purpose.’\footnote{Ellis, supra note 121, para. 204.}

As stated in the Tadic case, three objective elements that are common to the above categories of joint criminal enterprise are: A plurality of persons; the existence of a common plan, design or purpose which amounts to or involves the commission of a crime; and participation of the accused in the common design to commit the crime.\footnote{Ibid., para. 227.} Although the objective elements apply to all the three categories of joint criminal enterprise, the subjective elements are different for each category.\footnote{Ambos, supra note 123, p. 161.}

The first category requires the common intention of the defendants to commit the offence. For example, where the defendants have a common purpose to kill, a co-defendant possesses the required \textit{mens rea} where he shares this intention even if s/he does not personally carry out the killing.\footnote{Ellis, supra note 121, para. 196.} The subjective element of the second category entails ‘(i) knowledge of the nature of the system and (ii) the intent to further the common concerted design’.\footnote{Ibid., para. 203.} The mental state required for the third category consists of the defendant’s intention to participate in and further the purpose of the criminal enterprise. The required state of mind for defendant’s liability for crimes committed outside the common design is that the crime was a ‘natural and foreseeable consequence of the effecting of that common purpose.’\footnote{Ibid., para. 204.} The first and second categories of joint criminal enterprise are relevant to the question at hand.\footnote{The third category is relevant to the question of whether a recruiter or user can be liable for the act of training where training is outside the common purpose. That is, when the perpetrators agree to recruit or use children for armed conflict, are they individually criminally liable if one of them goes outside the common purpose to train children for armed conflict? The analysis of this question leads back to the position that, textually, training children for armed conflict \textit{per se} is not a crime known to international humanitarian or international criminal law. Until this position changes, the third category is not relevant to the question of the individual criminal liability of the trainer.}
It follows from the above objective and subjective elements of the basic category that before the activities of a trainer can point to a joint criminal enterprise to recruit or use children for armed conflict, there must be a common plan design or purpose to recruit or use (objective element). In addition, the trainer must share that common purpose (subjective element). The fact of training alone is therefore not sufficient to lead to a conclusion that the trainer is in a joint criminal enterprise of the basic category with the recruiter or user.

For the fact of training to lead to liability under the second category of joint criminal enterprise, the trainer must be part of a system of recruiting or using children for armed conflict (objective element). Moreover, s/he must have (i) knowledge of the nature of the system and (ii) the intent to further the common concerted design (subjective element). Hence, the fact of training alone is not sufficient to establish individual criminal liability under the second systemic category of joint criminal enterprise. If, for example, the trainer is a visiting contractor or one who carries out a one-off training exercise the objective element would be lacking as the trainer is not a part of the system. In addition, if the trainer is part of the system but is proved to not know the nature of the system and not have the intent to recruit or use, the subjective element would be absent.

In any event, it is practically difficult to establish that the trainer shares a common intention with the recruiter or user solely by reference to the fact of training. Indeed the benefit of doubt swings in favour of the conclusion that the trainer is not necessarily a part of a joint criminal enterprise with the recruiter or user.

3.3 Training May Amount to Aiding or Abetting Recruitment and Use?

The Special Court for Sierra Leone in Taylor convicted Charles Taylor former Liberian president of amongst other things, aiding and abetting recruitment and use of child soldiers.\(^{136}\) The SCSL in that case identified two important elements for sustaining a charge of aiding and abetting. First, the accused must have ‘provided practical assistance, encouragement, or moral support which had a substantial effect upon the commission of the crimes (actus reus).’\(^{137}\) Second, the accused knew that his acts or omissions would assist the commission of the crime, or that he was aware of the substantial likelihood that his acts would assist the commission of the crime, and that the Accused was aware of the essential elements of the crime committed by the principal offender, including the state of mind of the principal offender (mens rea).\(^{138}\)

\(^{136}\) Taylor Trial, para. 6904.

\(^{137}\) Ibid.

\(^{138}\) Ibid.
In the *Taylor* case, four acts cumulatively and independently constituted the *actus reus* of aiding and abetting. First, Taylor ‘directly or through intermediaries supplied or facilitated the supply of arms and ammunition to the RUF/AFRC.’\(^{139}\) These materials were then, amongst other things, used in specified instances to recruit and use children for armed conflict.\(^{140}\) The court found that Taylor’s ‘provision and facilitation of the arms and ammunition to the RUF/AFRC had a substantial effect on the commission of crimes charged in the Indictment.’\(^{141}\) Second, Taylor supplied military personnel to the RUF/AFRC and this constituted practical assistance to their crimes.\(^{142}\) Third, he provided operational support to the RUF/AFRC. This included communication support;\(^{143}\) financial support;\(^{144}\) transportation support;\(^{145}\) providing accommodation, food, clothing, medical treatment for injured fighters, and herbalists who ‘marked fighters ... to ‘protect’ them against bullets and bolster their confidence.’\(^{146}\) Fourth, Taylor provided encouragement and moral support by ‘giving advice and direction to the RUF and RUF/AFRC on matters concerning or directly affecting their military strategy.’\(^{147}\) Analysed cumulatively and individually, the SCSL found that the above four acts of Taylor had a substantial effect on the crimes committed by the RUF/AFRC including recruiting and using children for armed conflict.

On three major grounds, the SCSL further found that Taylor had the *mens rea* for aiding and abetting, the crime of recruiting and using child soldiers and other crimes committed by the RUF/AFRC SCSL. First, Taylor ‘knew of the atrocities being committed against civilians in Sierra Leone by the RUF and RUF/AFRC forces and of their propensity to commit crimes.’\(^{148}\) Second, he ‘knew that his support to the RUF/AFRC would provide practical assistance, encouragement or moral support to them in the commission of crimes during the course of their military operations in Sierra Leone. Nevertheless, he provided these groups with practical assistance, encouragement and moral support.’\(^{149}\) Third,

---

139 Ibid., para. 6910.
140 Ibid., para. 6911.
141 These crimes include the recruitment and use of child soldiers.
142 Taylor Trial, paras. 6918 to 6922.
143 Ibid., para. 6931.
144 Ibid., para. 6932.
145 Ibid., para. 6934.
146 Ibid., para. 6935.
147 Ibid., para. 6944.
148 Ibid., para. 6947.
149 Ibid., para. 6949.
he ‘was aware of the essential elements of the crimes he was contributing to, including the state of mind of the perpetrators.’150

From the four acts that constituted the actus reus in the Taylor case, it may be surmised that there are several ways in which training may meet the objective element of giving practical assistance, encouragement, or moral support for recruiting or using children for armed conflict. For instance, training may support and have a substantial effect on recruitment by keeping the children occupied and indoctrinating them with ideas that support remaining in the group into which they are recruited. In this way, training reduces the opportunity and zeal of recruits to escape from their recruiters. Training may also assist and have a substantial effect on the use of children for armed conflict by teaching the children to follow orders, use weapons and conduct manoeuvres.

If the trainer knows that recruiters are recruiting children and the training activities are supporting or encouraging the work of the recruiters and users, but nevertheless continues training the children, then the mens rea for aiding and abetting recruitment of child soldiers would have been met. In all, individual criminal responsibility for training children for armed conflict will arise where training meets the objective and subjective elements of aiding and abetting recruitment or use.

4 The Value of Clarifying the Law on Training Child Soldiers

There is the view that ‘majority of crimes involving children and war remain un-prosecuted under international law’.151 Why then is there need to start a discourse on culpability for training children for armed conflict? It will be suggested below that the clarification of the law and indeed an express prohibition of training child soldiers is important to the prosecutor, defendant and policy maker. The prosecutor can determine when a crime has been committed, the defendant is rescued from arbitrary enforcement of laws and the policy maker can identify the legal status of child soldier-trainers for specific purposes such as immigration and asylum.152

150 Ibid., para. 6950.
In the absence of any specific provision of law clarifying the nature and extent of criminal liability for training children for armed conflict, it is not functionally expedient for any prosecutor to proffer a charge of training child soldiers against any defendant. Even if it is granted that in circumstances of forced training, the trainer may be charged with conscription, the charge may fail unless there is evidence beyond reasonable doubt that the trainee was absorbed into an armed force or group. The position is even more tenuous in the case of unforced training.

Assuming that training is without doubt subsumed in recruitment and use, the questions still arise as to the kinds and extent of training that will amount to enlistment, conscription and use – Is the person that gives training in field first aid as liable as the one that gives training in weaponry and combat tactics? How about the person that gives training on the law of armed conflict? These questions can be illustrated by the RUF case where the defendants were, amongst other things, charged with ‘conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities’. In holding that one of the defendants (Kallon) was involved in the execution of the plan to recruit and use child soldiers, the Appeals Chamber of the SCSL found, amongst other things, that Kallon personally brought children to a training camp and issued orders that children should be trained as combatants.

In this scenario, a prosecutor will not have too much difficulty in charging Kallon under the existing prohibitions of recruitment and use. However, it is not so easy to say the same for the individuals who trained the children and transmitted reports on the trainees to their superiors at the RUF headquarters. In the absence of evidence that these people were involved in bringing the children to the RUF and deciding of what use to put them, it would be a herculean task to proffer and sustain a charge of recruitment and use against the trainers.

Now to extend the scenario a little bit; if the children were sent to a third group or state for training would the third state or group (or its agents) be liable for recruitment and use of child soldiers? This question brings to mind the practical consideration that the person(s) who conduct or are most responsible for the training may be totally different from (or even possibly completely

153 RUF case, para. 1695.
154 Ibid., para. 1695.
155 Ibid., para. 15.
156 Ibid., para. 143.
157 Ibid., para. 764.
unconnected to) the person(s) who recruit or put the children to use as soldiers. It is also instructive that even if training amounts to being an accomplice of the recruiter or user, the accomplice cannot be convicted unless and until the recruiter or user has been convicted.\textsuperscript{158}

Even if, by application of general principles, training children for armed conflict may be interpreted to be covered by the prohibition of torture, inhuman treatment and outrage to personal dignity, an express prohibition of training of children for armed conflict would still bring certainty to this area of law. Persons involved in training would therefore know where they stand. This is preferable to being taken by surprise where a tribunal applies general principles to interpret training activities as criminally unlawful conduct.

The provisions of the law of armed conflict on children are designed to protect children from the dreadfulness and dangers of armed conflict. It is in this spirit that the existing law excludes children from being involved in armed conflict either as recruits or participants. Since training of children as soldiers is a link between recruitment of children and use of child soldiers, such training is contrary to the spirit of the relevant law of armed conflict and therefore amounts to deviant conduct.

This notwithstanding, in the absence of clear prohibition, it may be difficult for policy makers to categorise trainers for purposes such as immigration, asylum, scholarships and other matters related to the selection of suitable candidates or applicants. The policymakers in states that give military aid and assistance will clearly benefit from a clarification of the law on training child soldiers. In particular, they would want to know the threshold for liability, if any, for training persons recruited whilst still younger than 15 years. And in such cases, would liability arise for indirect training such as that given virtually or through instructional manuals? These are all questions that cannot be answered by reference to the law as it is presently constituted. It may nevertheless be mentioned that the third state or group trainer would be wise to take steps to ascertain that trainees, whether direct or indirect, are not younger than 15 years old. Whether or not this precaution is a complete defence is not ascertainable from the law on recruitment and use.

The clarification of the law is as important to the prosecutor and policymaker as it is to the defendant. If training child soldiers is clearly provided for in relevant instruments, potential defendants will be able to guide their conduct by the law. This is particularly important for defendants who may have to decide if training (and what type of training) is manifestly unlawful whilst

dealing with superior orders. A clarification of the law puts the defendant in a good position to know if: s/he is under a legal obligation to obey orders of the Government or the superior in question; the order was lawful; or the order was manifestly unlawful.

Given the complex legal and political machinations that go into the development of substantive international humanitarian and criminal law, it may seem wearisome to seek the creation of a new head of offence. However, it must be recalled that specific provisions of law relating to the protection of children in armed conflict are relatively recent and deserve to grow. Indeed, the first of such provisions were put forward in Additional Protocol I and Additional Protocol II of 1977 although international humanitarian law itself is centuries old. It is therefore not surprising to find areas that still need clarification and further development in the law on child soldiers. At any rate, children occupy such a crucial position in the continuity of the international community that protecting them surpasses the inconveniences and expenses involved in negotiating an improvement of the law.

5 Conclusion

The ICC in Lubanga noted that conscription, enlistment and use of children for armed conflict are separate offences. These three offences are established in both conventional and customary international law. The central question raised in this article is whether a person accused of training children for armed conflict may be charged under the laws prohibiting enlistment, conscription and use. The answer to this question is that it is difficult to sustain a charge alleging that by the conduct of training, the accused has acted contrary to the prohibition of enlistment, conscription and use. Nevertheless, the activities involved in training may constitute evidence of recruitment or use of child

---


160 Article 33 of the ICCSt.


162 Lubanga Dyilo Trial, para. 609.

163 CDF Appeal para. 10, partially Dissenting Opinion of Honourable Justice Renate Winter.
soldiers. Furthermore, by the application of general principles, existing legal provisions may be interpreted to include a prohibition of training child soldiers, for example, the prohibition of torture. From another angle, training amounts to aiding and abetting recruitment and use. In appropriate circumstance, the trainer may also be found to be in a joint criminal enterprise with the recruiter and user.

In all, there is a lot to be gained by the clarification of this area of law. Children have always been one of the most vulnerable categories of persons affected by armed conflict. The laws protecting children from the horrors of war are most effective if they are clear and cover children at every point of an armed conflict. The express clarification of the law on the training of children for armed conflict will enhance the present interdiction of recruitment and use of child soldiers.

Such express clarification will reinforce existing law. At any rate, such clarification does not detract from existing law or obstruct its operation. Indeed, clarification will help individuals make informed choices and protect individuals from arbitrary enforcement. The relevance of the law of armed conflict to the whole of mankind makes it an area of law that must always be certain and easily ascertained. 'The law must be known if it is to be obeyed.'

As noted in Graça Machel’s 1996 report to the Secretary General of the UN, ‘[i]n considering the future of children, we must be daring. We must look beyond what seems immediately possible and find new ways and new solutions to shield children from the consequences of war and to directly address the conflicts themselves.’

164 Barstad, supra note 9, p. 148.