THE USE OF CHILD SOLDIERS IN ARMED CONFLICT AS WAR CRIME UNDER INTERNATIONAL LAW

BY

ODOGUN, AL-HAKIM KAYODE
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DECLARATION

I HEREBY DECLARE THAT THE WORK EMBODIED IN THIS RESEARCH THESIS IS ORIGINAL, AND IT IS THE RESULT OF HOURS OF MY PAINSTAKING EFFORT, ABILITY AND DETERMINATION. I SOLELY TAKE FULL RESPONSIBILITY FOR ANY ERROR(S) SUBSEQUENTLY REALIZED. ALL REFERENCES AND QUOTATIONS ARE INDICATED WITH THEIR RESPECTIVE ACKNOWLEDGMENTS.

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CERTIFICATION

This Research Thesis entitled **"THE USE OF CHILD SOLDIERS IN ARMED CONFLICT AS WAR CRIME UNDER INTERNATIONAL LAW"**, by **ODOGUN, AL-HAKIM KAYODE**, meets the Requirements and Regulations governing the Post Graduate Degree, **MASTER OF LAWS, LL.M.**, of **AHMADU BELLO UNIVERSITY, ZARIA**, and, it is hereby Approved for its Contribution to Knowledge and Literary Presentation.

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DR. YUSUF DANKOFA DATE
CHAIR, SUPERVISORY COMMITTEE

_____ _____

PROF. NUHU MOH'D JAMO DATE
MEMBER, SUPERVISORY COMMITTEE

_____ _____

DR. YUSUF DANKOFA DATE
HEAD, PUBLIC LAW

_____ _____

DEAN, DATE
POST GRADUATE SCHOOL

DEDICATION

This Research Work is dedicated to the Loving Memory of My Late Sister, Ms. RAMAT SHOLA OMO-ODOGUN. During her sojourn on this planet, she was an embodiment of Love, Humility and Encouragement. I am privileged and extremely thankful to the almighty ALLAH for making her an unforgettable part of my life. May Allah SubhanahWata'alah Forgive ALL Her Sins, Favour her with Al-JanatFidaus and Bless All Those She left behind, especially Her Daughter, GbemisolaShakeerah, with Long Life, Good Life, Inner Peace and ALLAH's Divine Albarka, AMIN.

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20. Rome Statute of the International Criminal Court, 1998
21. Statute of the International Criminal Tribunal for Rwanda, 1994
22. Statute of the International Criminal Tribunal for the former Yugoslavia, 1993
23. Statute of the Special Court for Sierra Leone, 2002
24. The Hague Conventions (1899 & 1907)
25. Torture Victim Protection Act (TVPA), 1991
26. Treaty of Versailles, 1919

Appendix

- Summary Table of International Humanitarian Laws Specifically Applicable to Children

ABBREVIATIONS

AC	Appeal Cases
AFRC	Armed Forces Revolutionary Council (Sierra Leone)
AJICL	African Journal of International & Comparative Law
AP	Additional Protocols to the Geneva Conventions, 1977
ATCA	Alien Tort Claims Act, 1789
CAT	Convention against Torture & Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (CAT), 1984
CDF	Civil Defence Forces (Sierra Leone)
CIR	Circuits
CT	Court
CRA	Child Rights Act, 2003
CRC	Convention on the Rights of the Child, 1989
CVR	Congolese Truth & Reconciliation Commission
CYPA	Children & Young Persons Act
DR Congo	Democratic Republic of Congo
FPLC	Patriotic Force for the Liberation of Congo
GC	Geneva Conventions, 1949
HL	House of Lords
ICC	International Criminal Court
ID	Identification Paper/Card
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
ILO	International Labour Organization
ILR	International Law Report

IPA	International Peace Academy
IRRC	International Review of the Red Cross
ISS	Institute for Security Studies
JPCL	Journal of Private & Comparative Law (ABU)
LFN	Laws of the Federation of Nigeria.
LR	Law Report
NHRC	National Human Rights Commission
NIALS	Nigerian Institute of Advanced Legal Studies
NGOs	Non-Governmental Organizations
NUPI	Norwegian Institute of International Affairs
PCIJ	Permanent Court of International Justice
POWS	Prisoners of Wars
Rome Statute	Statute of the International Criminal Court
RUF	Revolutionary United Front (Sierra Leone)
SC	Supreme Court
SCSL	Special Court for Sierra Leone
TRC	Truth & Reconciliation Commission
TPA	Trafficking in Persons Act, 2003
TVPA	Torture Victim Protection Act, 1991
UCP	Union of Congolese Patriots
UK	United Kingdom
UN	United Nations
USA	United States of America
USIP	United States Institute for Peace
VOL	Volume
VRS	Bosnian Serb Army
V V F	Vesico Vaginal Fistula

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ABSTRACT

This dissertation entitled ***"The Use of Child Soldiers in Armed Conflict as War Crime under International Law"*** *is premised on an appraisal of the legality of the atrocities visited upon children during armed conflicts, especially as coerced active participants. This is approached from the perspective of the menace being a form of child abuse and exploitation of such children, and how international justice combats such illegality and impunity to justice of their commanders and recruiters. Despite a catalogue of laws – both national and international– which prohibits and protects against the illegal use of children as active participants in armed conflicts, it is sadly observed that children find themselves forced into different armed conflicts all over the world. The illegal use of child soldiers has manifest negative effects on both the children and the society at large. Apart from causing deaths and injuries, this menace depletes the society of its real resource and future – children. The purpose of this study therefore include among other things, enhancing access to appropriate information and knowledge about the protection of the fundamental human rights of children during armed conflicts, and how the law de-mystifies the aura of impunity to justice of their recruiters and commanders. This also entails an appraisal of the level of culpability or otherwise of child soldiers in the commission of grave crimes during armed conflicts. Our study revealed that this menace is a problem of both developed and developing countries of the world, though at varying levels. The study also showed that there are various laws and regulations protecting against the illegal use of child soldiers, and it is therefore the lack of the political will and the non-implementation of obligations under these laws that has provided this aura of impunity to justice of the perpetrators of these atrocities and war crimes. Based on our research, we realized that individual criminal responsibility for war crimes does not depend on a person's status, and even states can be liable for grave crimes and reparations under international humanitarian law. Child soldiers may also be liable for their actions and misdeeds, though age may be a mitigating factor when the question of their responsibility is raised. Consequently, perpetrators of grave crimes must be punished in order to satisfy the victims and prevent the commission of further atrocities, and the responsibility for this task falls on states, their citizens and the international community. It is therefore advocated that this can also be achieved or reduced, through non penal modes of justice as alternative and complement to the penal system of justice as a means of combating, preventing and reducing the menace of war crimes and atrocities.*

Chapter One

1.0. BACKGROUND

Armed conflicts with devastating effects have been part of mankind since time immemorial and thesedays, there are easily accessible light weapons and even more destructive weapons, leaving a large number of the wounded, maimed and dead in their wake. Children all over the world constitute the largest and most powerless members of the society and; it used to be assumed that adults had the best interests of children at heart and there was no need to think in terms of children's rights or their protection. This idealized perception of adult-child relationship ignored the grim realities of our world today.It is virtually impossible to watch international television stations like Cable News Network (CNN) or British Broadcasting Corporation (BBC) without hearing or seeing the sufferings of children in one part of the world or the other.

On these international television stations, the glares of child soldiers with their oversize 'AK-47' weapons from war torn countries, calls out to the world to end these endless and senseless wars. Luckily, Nigeria has not experienced these horrors although she had had to contend with refugees from war torn countries, faced her own various communal, ethnic and sectarian clashes. The Niger Delta insurgency readily comes to mind; and in all these situations, the people who are most affected are the innocent children. It is children who are increasingly becoming the principal victims of hostilities and acts of violence perpetrated in the course of armed conflicts. Children are often in greater danger than adults during armed conflicts - the danger and form of harm to which children are subjected to, is specific to them due to their innocence, vulnerability and age.

In order to prevent the use of children and ensure their protection during armed conflicts and most especially, to bring to justice all those engaged in such callous acts, preventive and counter measures must be perfected.This work is an inquiry into the consequences of traumatic man made actions which were borne out of flawed leadership and greed for money and power and, of political failure by our leaders to prevent the tragedy that has befallen an entire, defenseless population and; how international justice is confronting the aura of impunity to justice of all those involved in this unlawful creation, called Child Soldiers or Child Combatants (which shall be used interchangeably throughout this research work).

1.1. STATEMENT OF THE RESEARCH PROBLEM

The use of child soldiers poses a challenge to moral norms and legal regulations guiding the conduct of warfare. The direct involvement of children in armed conflicts has dire implications for the development of children and the society as a whole.[1] Child soldiering is a relatively new phenomenon even though it has quickly gained notoriety, and it is not restricted to any continent or region of the world but fortunately, Nigeria has been spared such horrors. There is however scarcity of relevant authorities on the subject, either in our public or private libraries, and even those found on the internet are restricted or too costly.

Most of the available authorities on child soldierswere not focused on the liability of child soldiers, and their recruiters and commanders. With the foregoing, several research questions therefore beg for answers:Who are combatants? Are child soldiers liable for their actions? What are the legal

[1]Sesay, A., Civil Wars, Child Soldiers & Post Conflict Peace Building in West Africa, College Press, Ibadan (2003) p. 4, (hereinafter called Sesay's Civil Wars).

prohibitions of the use of child soldiers? Are the recruiters and commanders of child soldiers liable? How is international justice combating the aura of impunity to justice of the recruiters and commanders of child soldiers? Answers to these and other important questions are the bedrock of this study.

1.2. OBJECTIVES OF THE RESEARCH

This work attempts to focus on how international justice is used to protect the fundamental human rights of children during armed conflicts, most especially, as active participants. And how it is also been used to confront and combat the atrocities of their recruiters, commanders and the perpetrators of these callous atrocities in order to de-mystify the aura of impunity surrounding such misdeeds.We shall attempt to answer the above questions and many more, posed in our statement of the research problem, and this shall be done with reference to relevant laws, practical applications and thereafter, proffer our findings andrecommendations tothe issues so raised.

1.3. SIGNIFICANCE OF THE STUDY

Many victims of atrocities were denied justice for such crimes and many more, continue to suffer gross human rights violations during armed conflicts. The aura of impunity surrounding such atrocities has provided a fertile ground for the commission of new horrendous crimes, which must not be left unpunished.[2] It is noticed that not much research had been done on how perpetrators of war crimes are dealt with, in order to avert further atrocities and help reduce and stop it.

[2]Ladan, M.T., "An Overview of International Criminal Law: The Work of the Rwandan Tribunal", A Paper presented at the 9th African Human Rights Workshop, Ota, Nigeria, Sept. 28-Oct.17, 2003, p.2, (hereinafter called Ladan's Article).

This issue must be investigated and given appropriate attention, especially with post-war or post-conflict reconstruction and peace building efforts.

Our work is designed to address some of the salient issues which many other authorities have so far ignored. Considering the lack of good relevant materials on this issue in Nigeria, ourresearch will be of great value to judges, legal academics, private practitioners, students, legislators, sociologists, social workers and, would hopefully help in shaping policy and judicial thrust. We shall try to highlight the nature, forms, causes and effects of child soldiering on both children and the society. We shall examine the culpability of both child soldiers and their recruiters and; how the law prohibits this phenomenon, and how the law is been used to bring justice to all concerned.

1.4. SCOPE OF THE RESEARCH

This study is not restricted to any country or region of the world, but it rather encompasses recent developments of the law in this area within a global perspective. We have triedto depart from previous studies by examining the roles and restriction placed on the use of children in armed conflicts, and the aura of impunityto justice surrounding their recruiters. We shall highlight the provisions of the law designed to combat the illegal use of child soldiers and, focus on those aspects of the law that has direct relevance to the illegal use of child soldiers, and how international justice redresses such impunity to justice.

1.5. RESEARCH METHODOLOGY

A doctrinal research methodology is adopted in the conduct of this work. Some of the information in this research work are from primary sources like statutes, conventions, protocols, and case law. The bulk of the information however, consist

of secondary sources from relevant and authoritative books, writings and opinion of leading experts in articles, journals, magazines, newspapers, periodicals and the internet. The footnote method of referencing shall be used while all sources will be duly acknowledged, with a bibliography of all the materials consulted made at the end of chapter five.

1.6. LITERATURE REVIEW

Armed conflicts are meant to be conducted with some form of civility under international humanitarian law. There are codes which all warring groups are expected to obey during armed conflicts. With regards to these laid down procedures on how armed conflicts are to be conducted, this research work tries to highlight the special provisions of international justice designed to protect and prevent the use of children during armed conflicts. Dramatic changes in the conduct of armed conflicts in recent times has however taken on a new dimension, including killing and raping of innocent women and children, children forced into combat and yet, no culprits are held responsible for these crimes. Although there is now a worldwide focus on the subject of child soldiers, the lack of many relevant authorities on the liability of child soldiers and, on the impunity and culpability of their recruiters and commanders is noticed.

Most available authorities on child soldiers focuses mainly on issues such as the use of children as combatants, deprivation of their childhood, the societal effects, post conflict reconstruction, peace building and reintegration of such societies.All these taken as a whole, dictated our approach, in which we have aimed not only to examine and appreciate what others have done in this area and of course, to benefit from their work, but also to examine the liability of child

soldiers and, the culpability and impunity of recruiters of child soldiers under the international justice system. Most of the available authorities cover hypothetical issues, while we have tried to cover more practical issues. The central themes of some of our consulted books as serialized below are briefly highlighted:

(a). The book,The Use of Children as Soldiers in Africa,[3]is basically a report of country by country analysis of child recruitment and participation in armed conflicts in Africa. The report provides details of national legislations governing recruitment into the armed forces, national recruitment practices and, where armed conflicts were ongoing, the extent of child participation in hostilities, whether as part of government armed forces, government sponsored armed groups or militia, or non-governmental armed groups or militia. It included basic demographic data and the estimated size of governmental armed forces and non-governmental armed groups.

(b). Whilethe book, Child Soldiers: The Role of Children in Armed Conflicts,[4]has a lot of pictorials and is one of the earliest books on child soldiers. It dealt with the status of child soldiers in international law and, highlighted the ways in which international humanitarian law fails to provide effective protection, particularly in internal armed conflicts which are now more common. The book is based on empirical data gathered from different parts of the world, examined the reasons and forms of recruitment of child soldiers, effects of child soldiering on the children, their families, and the larger society and also, examines the treatment of children who had participated in acts of violence.

[3]Coalition to Stop the Use of Child Soldiers, 1st ed., London (1999).

[4]Cohn, I., Goodwin-Gill, G.S., Clarendon Press, Oxford (1994) (hereinafter called Cohn's Child Soldiers).

(c). In "A Critical Examination of Crimes Against Humanity Under International Law",[5]the writer examined the nature of various war crimes and the challenges facing the existing laws in this area. It dealt with the judicial and procedural practices of the various international courts, and the challenges facing them. There were also definitions and explanations of various terms in the thesis.

(d). Thearticle, "The Law of Warfare: Non-International Armed Conflicts and Respect for the Law",[6] is mainly concerned with striving to determine the quantum of international humanitarian law applicable in non-international armed conflicts and their conditions of applicability. It also analyses the rules or norms that regulate non-international armed conflicts.

(e). In "An Overview of International Criminal Law: The Work of the Rwandan Tribunal",[7]the writer examined the purpose of sanctions in international criminal law; the contribution of international tribunals to the development of the law and the challenges facing international criminal law especially, the conceptual clarifications or definitions of international crimes. The writer was of the view that the future of international criminal justice and the effective enforcement of international criminal law lies in an invigorated domestic justice system. A description of the provisions regarding the minimum age for child combatants was made within the context of the International Criminal Tribunal for Rwanda.

(f). The GracaMachel Study,The Impact of War on Children,[8]which has since become the basis of global action on child soldiers was mainly concerned with the effects of war on children. It examined both the psychosocial and physical effects

[5]Fatuyi, Y., LL.B. Thesis (Unpublished), Faculty of Law, O.A.U., Ife (2005) (hereinafter called Fatuyi's Thesis).
[6]Galega, S., Nguimaisa, B., JPCL (2006), Vol.1, No.1., p.99 (hereinafter called Galega's Article).
[7]Ladan's Article, op.cit.
[8]Machel, G., UN (A/51/306) (2001) (hereinafter called Machel's Report).

of war on children and, made recommendations on the way forward. It examined some threats to children in armed conflicts like HIV/AIDS, landmines, small arms, the peace process, media and security.

(g). The book, Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy,[9] appraised the issue of individual accountability for human rights atrocities under international law. It considered the development of the law and, the mechanisms of accountability for violations of the law with the promises and pitfalls of individual responsibility. Procedural, evidential and prosecutorial issues were also examined in the book.

(h). The book, Civil Wars, Child Soldiers and Post Conflict Peace Building in West Africa,[10] centers on linking the nature of civil wars to post-conflict reconstruction in Liberia and Sierra Leone. The book examined the impact of the civil wars in these countries on children as combatants and, the implications for post-conflict peace building and reconstruction in those societies, and West Africa as a whole. The book also dealt with the actual roles assigned to children in those wars and, the role of multilateral agencies in post conflict reconstruction.The noticed themes and gaps in all our reviewed literatures are however found in one way or the other, individually and/or collectively to be premised on:

a. Legislations concerning recruitment of children into different armed forces, report and analysis of the extent of child participation in hostilities.
b. Post-conflict treatment of child soldiers and the failure of international law to provide effective protection to children during armed conflicts.

[9] Ratner, S.R., Abrams, J.S.(2nd ed) Oxford (2001) (hereinafter called Ratner's Accountability).
[10] Sesay's Civil Wars, op.cit.

c. Judicial, evidential, procedural issues and practices of the various international courts and their challenges.
d. Determination of international humanitarian law applicable in non-international armed conflicts and their conditions of applicability.
e. Effects of war on children during and after armed conflicts; the role of multilateral agencies in post-conflict reconstruction and, the effects of child soldiering on post-conflict peace building and reconstruction.
f. The effects and purposes of sanctions in international criminal law and, the contribution of international tribunals to the development of the law.

The approach adopted in this study is however different but complementary to our reviewed literatures, as it is geared towards focusing on the following:

a. Analysis of the nature, causes, effects and forms of child soldiers as a form of child abuse and exploitation.

b. Nature of war crimes, and the legal provisions on the use of child soldiers and, the jurisdiction of international tribunals over war criminals and the fight to combat the menace of child soldiers.

c. The culpability or otherwise of child soldiers and the liability of recruiters of child soldiers and, how international justice deals with their 'aura' of impunity to justice.

It should be noted that we have not dwelled on the theoretical, practical challenges and requirements of engaging the mechanisms of actual prosecution like the judicial, procedural and evidential requirements; the mensrea elements of the crimes, nor the elements that confine nor define the scope of these crimes. The essence of this work is to focus on the illegal use of children as combatants

under the law, their culpability if any; whilst stressing how international justice protects children by making their recruiters and commanders accountable. We shall try to focus globally on relatively recent developments and we shall highlight the key features of these new mechanisms of justice and identified some of the major issues. We hope that our work will help fill in some of the gaps, if any, in earlier authorities and encourage more debate and awareness on this subject.

1.7. STRUCTURE OF THE THESIS

Our work is divided into five distinct and separate chapters. Chapter one is the introductory chapter and it introduces the concept, background and objectives of the study. This chapter deals with the study's literature review, methodology, research problem and structure of the thesis.

The second chapter is the 'actual' start of our study and deals with issues such as child abuse and exploitation. The chapter also covers the nature and forms of war crimes under international humanitarian law.

Chapter three has to do with topics such as the nature and prohibitions against the use of child soldiers. This chapter examines the meaning, forms, recruitment methods, functions, involvement, nature and scope of child combatants. This examination also extends to the meaning and distinctions between combatants and civilians.

Chapter four examines issues relating to criminal responsibility and liability for war crimes; state responsibility; individual criminal responsibility; superior responsibility and the liability or otherwise of child soldiers.

Chapter five is the conclusion of our effort and it encompasses a summary of our observations, recommendations, and the general conclusion of this work. The research bibliography and appendix are inserted at the end of this chapter.

Chapter Two

2.0. EXPLOITATION OF CHILDREN AND WAR CRIMES

Children constitute the most vulnerable members of the society but, the concept that children have specific rights deserving of enforcement and protection is a comparatively modern development. Concern for the protection of the dignity, equality and basic human rights of children have since come to the forefront of public consciousness subsequent to the various reform movements of the 19th century. Children are now a constituency in their own right on whose behave, laws have been made, and are being made for their protection against the abuse of parents, other adults, social neglect and economic exploitation.

Children face various problems of neglect, maltreatment, exploitation and abuse due to their tender ages, immaturity and dependence on adults. These problems revolve round welfare, food, health, shelter, education and other necessaries for their proper growth and development. This sorry state of affairs however takes on a more terrible dimension during armed conflicts. Armed conflicts are as old as man but the use of children as active participants in such conflicts either as combatants or non-combatants is a relatively new and scary dimension found across conflict zones of the world. This pathetic situation is caused by the adult-older generation, without regard to the effectsof their actions on the innocent-younger generation.

2.1. CHILD ABUSE AND EXPLOITATION

A happy and healthy child with a sound mind, body and spirit is an asset to the society. But unfortunately in this ever changing world of ours, so many children are denied attainment of this fundamental state due to one form of child abuse or the other. According to Gil, child abuse and exploitation is any act of commission or omission by individuals, institutions or society as a whole, and any conditions resulting from such acts or inaction, which deprive children of equal rights and liberties, and/or interfere with their optimal development, while to Dr. Alan Gilmour, it occurs when any avoidable act, or avoidable failure to act, adversely affects the physical, mental or emotional wellbeing of a child.[1]

The Convention on the Rights of the Child (Art.32) recognizes"the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education or to be harmful to the child's health or physical, mental, spiritual, moral or social development". This is echoed by the Child Rights Act [S.28(a)]which states inter aliathat no child shall be subjected to any forced or exploitative labour. While the Oxford Advanced Learner's dictionary however, simply defines child abuse and exploitation as, the crime of harming a child in a physical, sexual or emotional way. Child abuse and exploitation therefore takes many forms, amongst which are:

(a). CHILD LABOUR

This is the employment of children and ILO estimates that around 250 million children worldwide, aged between 5-14 years old are working part-time or on a

[1] Lyon, C., Child Abuse, Jordan Publishing, Bristol (2003), p.34

full-time basis.[2] Children can be engaged to work in several ways such as, scavengers in the streets to sort out useable materials in rubbish dumps. This can be dangerous to their health because of toxic chemicals, radiation, and injuries from scrap metals.Children may also be employed as miners in underground mines which can lead to dangerous health conditions, injuries and death. Domestic workers, bus conductors and child porters also come under this category. See S.28 & 29 of CRA & S.22, TPA.

(b). STREET TRADING

This refers to the hawking of petty goods and services on the streets of both urban and rural areas by children. This may involve the selling of items to motorists stuck in traffic jams ('go-slows') with the attendant hazards.[3] Young children are mandated by their family members and at times on their own free will, to sell petty goods to supplement the family income, at the detriment of their education, youth and overall development. See S. 30&33, CRA.

(c). STREET BEGGING

In some parts of Nigeria, there is in operation the "Almajiri System", in which young children are left to roam the streets. These children were mostly entrusted to Islamic teachers who in turn, rather than care for them, send them out to 'beg' and do menial jobs. These children are expected to bring back part of the proceeds of their activities to such teachers.[4] Children also 'beg' on behalf of themselves or could be engaged in leading other blind or handicapped adult beggars. See S. 30, CRA.

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[2] Hodgkin, R., Newell, P., Implementation Handbook for the Convention on the Rights of the Child, UNICEF, Geneva (2002) p.475 (hereinafter called Hodgkin's Book).
[3] Ayua, I.A., Okagbue, I.E., (eds.), The Rights of the Child in Nigeria, NIALS Series 2, Lagos (1996), p.186 (hereinafter called Ayua's Rights of the Child).
[4] Ibid, p.176

(d). APPRENTICES

This is where children are contracted to an employer for a period to learn a trade, handicraft or skill. The employer is paid a fee by the child's parent or guardian for the "training" he impacts. There are no legal regulations governing the apprenticeship and very often, the effectiveness of the training provided depends on the goodwill of the "master" and the facility of the apprentice.[5]

(e). MARKET TRADE[6]

This is trading in market areas, which may be 'open air' or enclosed. The traders are confined to their stalls for which they pay a fee to the local authority. Most stalls are owned and manned by adults while children act as assistants.

(f). FOOD SELLERS (BUKA)

This is a local roadside restaurant under a tree, an umbrella or some shanty structure. The food is either cooked and transported from another place or is cooked nearby on an open fireplace. This is common in Nigeria and, the business is usually owned by adult(s) with children serving primarily as assistant(s).[7]

(g). BONDED LABOUR

Many children are trapped in one form of slavery or the other in many parts of the world. This is a form of debt bondage or debt repayment and, it refers to a situation where a feudal labourer (or his children) is bound to work for someone due to a debt or service owned, mostly indefinitely. Sometimes children are sold for a sum of money out rightly and, it may take the form of an advance payment of a certain sum to rural families in order to take their children away to work somewhere. But the most common is where impoverished parents surrender their

[5] Ibid, p.186
[6] Ibid, p.187
[7] Ibid.

children to outsiders simply to work in exchange for their up-keep because they feel the children will have a better life than with them.[8] See S. 28; 29 & 33 CRA.

(h).CHILD PROSTITUTION

Commercial sexual exploitation is a contemporary form of slavery involving millions of children all over the world. Child prostitution connotes the sexual exploitation and engagement of children for cash or any other form of consideration, usually but not always, organized through an intermediary. Such acts and activities include offering, obtaining, procuring or providing a child for sexual activity in exchange for a form of consideration, usually cash. A corollary of child prostitution is "*child sex tourism*", in which people travel or are encouraged to travel to a place in order to get sex and/or view sexual acts.

(i). CHILD PORNOGRAPHY

Child pornography and/or pornographic performances is the producing, distributing, disseminating, importing, export, offering, selling or possessing any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child, the dominant characteristics of which is depiction for a sexual purpose. Millions of children worldwide are unfortunately trapped in this terrible and illicit activity controlled by organized gangs. See S. 2, CYPA (Harmful Publications), Lagos State, 2004.

(j). CHILD SOLDIERS

Due to the changing nature of armed conflicts, a noticeable and scary dimension of child soldiering has emerged. Thus, young children who should be enjoying their childhood are forcefully thrust into armed conflicts as active participants, with the resultant injuries, deaths, traumas and other negative

[8] Hodgkin's Book, op.cit, p.477

societal effects. These young children are made to partake and witness the commission of various heinous atrocities and, invariably turning them in the process into killers and cannibals. See S. 34, CRA.

(k). SEXUAL ABUSE

Young children mostly girls, are forced into sexual activities by adults and, this is mostly done by their family members or people known to such children. The coercion of a child into such sexual activity could be through use or threat of violence, deceit or inducement and, the child is usually unable or cannot give an informed consent to such an act. See S. 31 & 32, CRA.

(l). CHILD MARRIAGE

In some countries and cultures, many child marriages do take place. It is unfortunate that many young girls are forced into marriage relationships, even with men far too old for them, with the resultant sexual activities and responsibilities of marriage. See S. 21-23, CRA.

(m). CHILD PREGNANCY

An inevitable corollary of child sexual abuse and child marriage is child pregnancy. It is very sad to see children carrying pregnancies and giving birth. Children, who are themselves not yet matured and developed enough, are forced to go through such rigors of life. Apart from preventing children from been educated, it is obvious that such early sexual activities are harmful to children as witnessed by the phenomenon of "vesico vaginal fistula" (VVF)[9] amongst other health hazards. See S. 21-23, CRA.

[9]Vesico Vaginal fistula is a condition common to young girls who give birth before their pelvic bones have fully matured. In such girls, prolonged obstructed labour gives rise to injury to the bladder, urethra and lower end of the bowel causing constant leakage of urine and sometimes vaginal excretion of faeces.

(n). CHILD MUTILATION

This connotes *"female genital mutilation"*, which is the practice in some cultures of female circumcision, excision, infibulations or mutilating of the female genitals under the illusion that it prevents the female-child from being prone to sexual inclinations. This has been found to be inaccurate and very harmful to the female-child. Child mutilation could also be construed to refer to the practice especially, during armed conflicts of "mutilating parts" of the bodies of children of the enemies. This heinous act is done in order to prevent such children from later on carrying arms against their attackers.

(o). STREET CHILDREN

This refers to many children worldwide who due to a variety of reasons and, in order to survive are forced to eat, live and sleep on the streets. In Nigeria, there are a large number of young children living in motor parks, market places, petrol stations, railway stations or on the streets begging for alms or just wandering around the streets.[10] Majority of these children have neither homes nor families to go back to at the end of the day. These children are exposed to all kinds of morally bankrupt people and very often, engage in truancy and delinquent acts such as cheating, lying, stealing, drug abuse and prostitution. In many countries, street children are vulnerable to extra-judicial killings by the police, criminal gangs and vigilantes. Many children have been tortured or "disappeared" after detention by the security forces and armed opposition groups.[11]

[10] Ayua's Rights of the Child, op.cit, p.174
[11] Foley, C., Global Trade, Labour& Human Rights, Amnesty International, London (2000) p.22

(p). PHYSICAL ABUSE

This may involve hitting, shaking, throwing, poisoning, burning or scalding, drowning, suffocating, or otherwise causing physical harm to a child. This could be deliberate or otherwise and, may include corporal punishment. Such punishment in order not to be physical abuse must not result in the infliction of a wound or any grievous harm on the child. No correction is justified which is unreasonable in kind or in degree, taking into account the age, physical and mental condition of the child on whom it is inflicted.

(q). EMOTIONAL ABUSE

This involves the persistent emotional ill-treatment of a child which leads to severe and persistent adverse effects on the child's emotional development. It may involve conveying to children that they are worthless, unloved or inadequate and, this may feature age or developmentally inappropriate expectations being imposed on children. It may involve causing children frequently to feel frightened or in danger or corruption of children. Some level of emotional abuse is involved in all types of ill-treatment of a child, though this may occur independently.[12]

(r).CHILD NEGLECT

This involves the persistent or severe failure to meet or provide a child's physical and/or psychological needs, likely to result in the serious impairment of the child's health or development. It may involve a parent or guardian failing or neglecting to provide adequate food, shelter and clothing, failure to protect a child from physical harm or danger, or the failure to ensure access to appropriate

[12] Lyon, C., op.cit, p.43

medical care or treatment. It may also include neglect of, or unresponsiveness to a child's basic emotional needs.[13]

(s).CHILD TRAFFICKING

This refers to the trafficking in children for the purposes of providing child labour in the homes of alleged 'guardians', some of whom may even be extended family members.[14] The sale of children also extends to the transfer of children's organs, their forced labour or improperly inducing parental consent to a child's adoption.[15] Child trafficking is in most cases, carried out by organized gangs with worldwide connections. Among the acts and activities related to the sale of children, is the offering, delivering or accepting by whatever means, a child for the purposes of engaging such a child in forced labour. See S. 11-15, TPA.

(t). DRUG ABUSE

This is the illicit use of narcotic drugs and 'hard' substances, and the use of children in the production, refining or trafficking of such hard drugs. The use of such hard drugs by children is mostly facilitated through the connivance and encouragement of adults because of the economic benefits they derive from it. Rising rates of drug abuse by children and young people is threatening child development, national economic prosperity and social order. Parents dependent on drugs may have babies with physical, mental or drug addiction problems.

(u). SOCIAL EXPLOITATION

The term is used in this context to connote some other forms of 'exploitation' of the child. For example, "**Gifted Children"**, that is, children with talents in competitive sports, games and the performing arts, can have these

[13] Ibid.
[14] Ibid, p.15
[15] Hodgkin's Book, op.cit, p.648

talents developed by their families, the media, businesses and state authorities at the expense of their overall physical and mental development.[16] Children can also be exploited by the "**Media",** for example, by identifying child victims or child offenders, or by securing performances by children without their informed consent which are potentially harmful to them.

"**Research and Experimentation",** like the recent Pfizer Plc failed drug experimentation in Kano State, Nigeria, which resulted in the deformity and death of many children (the case has since been settled out of court). This can breach their privacy, and/or require them to undertake tasks disrespectful to their rights and dignity, and could lead to death of innocent children. Denying children those aspects of their development, child abuse and exploitation is often a critical link in the cycle of deprivation and disadvantage that feeds other abuses. Children can find themselves trapped in a cycle of poverty, illiteracy, unskilled, prone to crime, violence and death.[17]

2.2. NATURE AND CONCEPT OF CRIMES

Although States at peace have shown themselves quite capable of committing gross abuses of human rights; the hatred, tension and upheaval inherent in armed conflicts, creates a fertile ground for horrendous attacks on the dignity of the individual.[18]It is common knowledge that not all illegal acts nor all legal wrongs are crimes and punished as such; neither can all civil wrongs be remedied by mere adjudication between the individuals concerned. The difficulty experienced by many writers on the English Common Law has been to give a

[16] Ibid, op.cit, p.535
[17]Foley,C., op.cit, p.20
[18] Ratner, S.R., Abrams, J.S., Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy, 2nd ed., Oxford (2001) p.80 (hereinafter called Ratner's Accountability).

definition of "crime"[19] which will not only be descriptive of what is meant, but will at the same time exclude other wrongs.Many eminent writers have sought with varying results to postulate such a definition. But as stated by Chukkol, it is often a difficult and an elusive task to give a concise and apt definition of most legal terms.[20]The difficulty of enunciating a satisfactory definition of "crime" under the Common Law is however, not usually experienced under a codified system of criminal law where the code itself usually defines the word.

The Nigerian criminal law is completely codified with perhaps minor exception(s). The two codes containing the bulk of the law are the Criminal Code Act which applies to Southern Nigeria, and the Penal Code Law which applies to Northern Nigeria. These codes do not define "crime" but "offence", which for our purpose may be taken as meaning the same thing. The Criminal Code (S. 2) states that "an act or omission which renders the person doing the act or making the omission liable to punishment under this Code or under any Order-in-Council, Act or Law or Statute, is called an offence". The Penal Code simply states that "except where otherwise appears from the context, the word "offence" includes an offence under any law for the time being in force".

According to this definition, an offence is what a particular law says is an offence.[21]Thus, a crime in a broad sense is an act which violates a political or moral law, while it can be construed in the narrow sense, as a violation of the criminal law. A crime can be the action of violating or breaking the law. According to western jurisprudence, there must be a simultaneous concurrence of both

[19]Aguda , A., Okagbue, I., Principles of Criminal Liability in Nigerian Law, Heinemann, Ibadan (1990) p.3 (hereinafter called Aguda's Criminal Liability).
[20]Chukkol, K.S., The Law of Crimes in Nigeria, Zaria (1988) p.1
[21]Aguda's Criminal Liability, op.cit, p.4

actusreus (guilty action) and mensrea (guilty mind) for a crime to have been committed; except in crimes of strict liability. Crimes are therefore viewed as offences against the society and as such, punishable by the state even though in many cases crimes are a violation of individual rights.[22]

2.2.(i). INTERNATIONAL WAR CRIMES

With respect to criminality, the evolution of international humanitarian law has resulted in the identification of certain acts as crimes - "war crimes"- even when those acts might not create individual culpability under international law during times of peace. Also, the existence of a separate corpus of war crimes in no way diminishes the pertinence of norms concerning genocide, crimes against humanity, and other independent crimes, for they apply both in times of peace and during armed conflicts.[23]We shall try to provide an explanation of the concept of "war crimes" rather than give a definite definition of the term, because the term refers to a variety of different transgressions.

War crimes are the violation of national and international laws and customs regarding the resort to armed conflict, the conduct of armed conflicts, and other activities associated with armed conflicts. War crimes are violations of established protections of the laws of wars, failure to adhere to norms of procedure and rules of battle. These laws are fundamental to a civilized world, and are designed to protect human beings from the barbarity of war. These laws prohibit war except in the narrowest of circumstances; they severely restrict who can be killed, the appropriate targets, and the types of weapons that can be used.

[22]Fatuyi, Y., "A Critical Examination of Crimes Against Humanity Under International Law", LL.B. Thesis (Unpublished), Faculty of Law, O.A.U., Ife (2005) (hereinafter called Fatuyi's Thesis), p.8
[23] Ratner's Accountability, op.cit, p.80

An indicia of a civilized country is adherence to these laws, not only by pious words but through actions. To disobey these laws is to become "hosteshumani generis"- an enemy of all mankind. In days past "enemies of all mankind" were slave traders and pirates who could be brought to justice wherever found. Such enemies include those countries and individuals who violate the fundamental laws that enhance peace and limit war.[24]War crimes are violations by a country and/or its officials and citizens - civilians or military personnel of the laws of wars. These laws are laid down by international custom, certain treaties and international tribunals. These laws have arisen over hundreds, if not thousands of years and, all countries and their citizens must obey such laws.[25]

Similar concepts have existed for many centuries as customary law between countries and many of these laws were clarified in the Hague Conventions of 1899 and 1907. The modern concept of war crimes was further developed under the auspices of the Nuremberg Trials based on the definition in the *London Charter* of August 8, 1945. Along with war crimes, the Charter also defined crimes against peace and crimes against humanity, which are often committed during wars and in concert with war crimes.Article 22 of The Hague IV (Laws of War: Laws and Customs of War on Land; October 18, 1907) states that,"the right of belligerents to adopt means of injuring the enemy is not unlimited" and, over the last century many other treaties have introduced positive laws that place constraints on belligerents. Some of these provisions such as those in The Hague Conventions, are considered to be part of customary international law, and are binding on all.[26]

[24] Ratner, M., "International Law & War Crimes", The Commission of Inquiry for the International War Crimes Tribunal, New York (24/03/'10).
[25] Ibid
[26] "War Crime", www.wikipedia (05/02/,10).

The international society began to codify the laws of war in the 19th and early 20th centuries as weapons grew more destructive and industrialized warfare began to blur the lines between combatants and non-combatants. The Geneva Convention (1864) adoptedagreements to protect wounded soldiers; The Hague Peace Conferences (1899, 1907) prohibited the use of certain weapons; subsequent Geneva Conventions in 1906, 1929 and 1949 expanded the laws of war as they applied to civilians, prisoners of wars, sick and wounded military personnel.[27] After World War I, in 1919, the Victorious Allies created a Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties. Article 227 of the Treaty of Versailles, 1919 arraigned the former German Emperor, Wilhelm II, "for a supreme offence against international morality and the sanctity of treaties", and provided for his trial by a Special Allied Court. But since Wilhelm had abdicated and fled to neutral Netherlands which refused to surrender him, the trial never took place. The Allied action of holding individuals accountable to an international body set an important precedent.[28]

During World War II, the barbarities perpetrated by the Nazis led the Allies in the Declaration of Moscow (1943) to assert that those responsible for the atrocities committed during the war would be tried and punished. In August 1944, the Allies signed the London Agreement establishing an International Military Tribunal to try accused Axis war criminals not only for conventional war crimes, such as brutal treatment of POWs, but also for waging aggressive war and committing crimes against peace and against humanity.[29]There was general determination that those responsible should be brought to justice and that any

[27] Cornish, P., "Military History Companion: War Crimes", www.answers.com (07/02/'10).
[28] Ibid
[29] Ibid

future atrocities should also be punished.[30]Since the Nuremberg and Tokyo Trials of 1945-48, it has been accepted in international law that there are at least three categories of war crimes and these are; Crimes against Peace; Crimes against the Laws and Customs of War; and Crimes against Humanity.

2.2.(i).(a). CRIMES AGAINST PEACE

The August 1945 Charter for the Nuremberg Tribunal (Art.6) defined the three categories of crimes. Crimes against peace were defined as "planning, preparation, initiation, or waging of a war of aggression or a war in violation of international treaties, agreements, or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing". Crimes against peace were difficult to prove, and the attempt to do so was thought by some to be an example of retroactive legislation. Nevertheless, with the Kellog-Briand Pact of 1928 and other treaties and resolutions, there were sufficient grounds to try acts of aggression as infringements of international law.[31] General Hideki Tojo, the Japanese Prime Minister in 1941-44, was charged after World War II with this war crime during the Tokyo Trials of 1946-48.

2.2.(i).(b). CRIMES AGAINST THE LAWS AND CUSTOMS OF WAR

Crimes against the laws of war were defined in the Nuremberg Tribunal Charter as "murder, ill-treatment, or deportation to some labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity". It was accepted that violations of the laws

[30] Ibid
[31] Ibid

ofwar could include the use of banned weapons or the misuse or deceptive use of flags of surrender, which were not explicitly mentioned in the Charter but were covered elsewhere. Given that there was already a body of laws particularly the Geneva and Hague Conventions, against which the conduct of combatants could be tested, the prosecutions of violations of the laws of wars were in many respects the least contentious aspects of the war crimes trials.[32]

2.2.(i).(c). CRIMES AGAINST HUMANITY

The Nuremberg Tribunal Charter defined Crimes against humanity as "murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population before or during the war, or persecutions on political, racial or religious grounds". Since crimes against humanity could be committed "before or during the war", and since "any civilian population" (including that of the offending state) was to be protected against such crimes, the Nuremberg and Tokyo Tribunals tried new and very broad categories of offences. Nazi leaders like Ernst Kaltenbrunner, head of the Nazi Security Organization in charge of the Gestapo (the German Secret Police), were prosecuted and convicted for crimes against humanity during the Nuremberg trials.[33]

Thus, any violation of these sets of laws is a war crime; if the violations are done on purpose, recklessly or knowingly, they are considered very serious and called "grave breaches"; Nazis and Japanese following World War II were hanged for such grave breaches. Enemy soldiers and political leaders have long been punished with or without trial by the victors for heinous acts.[34]War crimes may be committed by a country's regular armed forces, such as its army or by irregular

[32] Ibid
[33] Ibid
[34]"US Military History Companion: War Crimes", www.answers.com (15/03/'10).

armed forces, such as guerrillas and insurgents. Soldiers may be punished for war crimes, so also could military and political leaders, members of the judiciary, industrialists, and civilians who are enlisted by a belligerent to contravene the rules of war.[35]Military personnel in a position of authority have an obligation to instruct their subordinates on the customs and practices of war and, a duty to supervise and oversee their conduct on the battlefield. A military commander who neglects this duty can be punished for war crimes committed by his troops.

Isolated instances of terrorism and single acts of rebellion are rarely treated as war crimes punishable under the international rules of warfare. Instead they are ordinarily treated as criminal violations punishable under the domestic laws of the country in which they occur.[36]For more than five centuries the rules of war has been applied to military conflicts between countries. Until the last decade, it was thought that the rules of war do not govern hostilities between combatants in civil wars that took place wholly within the territorial boundaries of a single state. During the 1990s the United Nations established two international tribunals to investigate and prosecute war crimes that allegedly took place in the civil wars fought within Bosnia-Herzegovina and Rwanda.[37]

Article 8(2)(c)&(e) of the Rome Statutespells out that war crimes can in fact be committed during internal armed conflicts. In 1998, Jean-Paul Akayesu, a civilian and the former Hutu Mayor of Taba in Rwanda, was convicted for genocide, torture, rape, murder, crimes against humanity and breaches of the 1949 Geneva Conventions. Akayesu was the first person ever to be convicted of genocide by an international court. The judgment also established that rape and sexual violence

[35] Ibid
[36] Ibid
[37] Ibid

could be considered genocidal. The ICTR held him responsible for the deaths and rape of many people, even though the actual attacks were carried out by others.

The court held that individual criminal responsibility does not depend on a person's status – civilians and combatants are capable of committing and being prosecuted for grave crimes and, this applies to both international and internal armed conflicts.[38]War crimes are understood in terms of those acts that are defined as "grave breaches" of the 1949 Geneva Conventions and Additional Protocol 1 of 1977. More recently they are defined in the Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda, and in Article 8 of the Statute of the International Criminal Court.[39]While the Rome Statute's definition and explanation of what constitute war crimes appears to be the most comprehensive and all-encompassing till date.

[38] The Prosecutor V. Jean-Paul Akayesu, Case No. ICTR-96-4-I, Judgment (Appeals Chamber) O1/06/01, para-444
[39]Hurrell, A., "Political Dictionary: War Crimes",www.answers.com (03/03/'10).

Chapter Three

3.0. NATURE OF CHILD COMBATANTS

The 20th century will be remembered for the millions of innocent children, women and men who needlessly perished in armed conflicts. The words "genocide", "war crimes", "crimes against peace" and "crimes against humanity", were coined so as to express the horrors of these crimes.[1] Children regularly face forced participation in armed conflicts, social violence, murder and torture, as well as the destruction of their families, communities and the civilian infrastructures meant to support them.[2] Under international humanitarian law in both international and internal armed conflicts, children are accorded 'general' protection as civilians, and 'special' protection as children.

But with all these corpus sets of laws and protections against the use of children in hostilities, they are still forced into armed conflicts in a variety of ways and due to a number of factors.International humanitarian law places limits on children's participation in hostilities, and even those children that do take part in hostilities, still retain the 'special' protection enjoyed by children, but only lose the 'general' protection applicable to civilians. Tabulated below inter alia at the Appendix on page 86 are some of the legal provisions applicable to children for their protection under international humanitarian law.[3]

[1] Goldstone, R., "Preventing & Prosecuting Crimes Against Humanity in the 21st Century", Lectured delivered at Abuja, NHRC News (06/06/'03), p.29 (hereinafter called Goldstone's Article).
[2]Freedson, J., Peters, C., "A More Effective Monitoring of Violations Against Children in Armed Conflicts", UN Chronicle, No.2, (2004) p.37.
[3]ICRC, "Summary Table of IHL Provisions Specifically Applicable to Children", Geneva (03/03/'10).

3.1. CONCEPT OF CHILD COMBATANTS

Means and methods of warfare have become more sophisticated and deadly with the emergence of new types of conflicts. The impact of armed conflicts on children has become more severe and devastating, given their vulnerability and inability to protect themselves. Children are protected from recruitment and participation in armed conflicts under the law. Reports however on the impact of armed conflicts on children has shown that thousands or millions of children had, were and are serving either in government armies or opposition forces in different parts of the world. Such children are seriously injured and many more are forced to flee their homes to become refugees in other countries. Many other childrenare forced to participate in one way or the other in these armed conflicts, thereby being deprived of their childhood and young lives.[4]

There are various views on who a child is and, the customary concept of a child varies from ethnic group to ethnic group due to the lack of a uniform system of customary law in Nigeria. In some ethnic groups, a boy remains a child until initiated into an "age-grade society" or until he is old enough to contribute financially to community developments, while in others childhood terminates at puberty. The statutory definition adopted by the states of the federation through the Children and Young Persons Act (CYPA) is a blanket definition which is not in conformity with the different systems of customary lawsnor the perception of the different ethnic groups in Nigeria today.[5]

[4]Sagay, S., "The 2000 Optional Protocol to the Convention on the Rights of the Child", The Humanitarian, Nigerian Red Cross Society, Abuja (June 2007) p.16.
[5]Ayua, I.A., Okagbue, I.E., The Rights of the Child in Nigeria, NIALS Series 2, Lagos (1996), p.30 (hereinafter called Ayua's Rights of the Child)

A child is statutorily defined in Nigeria as a person below 14 years of age, while a young person is between the ages of 14 and 17 years.[6] The CRA (S. 277) however defines a child as a person less than 18 years of age. The CRA (S. 34) states that "no child shall be recruited into the armed forces of nor be involved in any military operation or hostilities". The African Charter on the Rights and Welfare of the Child (Art. 22) prohibits the recruitment or direct participation in hostilities of anyone less than 18 years of age.The Rome Statute (Art. 8) states that "conscripting or enlisting children under the age of 15 years into the national armed forces or using them to participate actively in hostilities" is a war crime.

The "age of maturity" is a social, religious, cultural or legal device by which societies acknowledge the transition to adulthood; and there is no necessary correlation between any of the levels. For the purpose of participating in religious rituals, for example, a child may become an adult at 13 years. For legal purposes, however, such as contracting obligations, including marriage, giving evidence under oath, being criminally liable, or voting in elections, other age requirements may prevail. On some occasions the child's actual capacity to understand will be determinative, for example, in appreciating the meaning of evidence under oath; in other cases, the legislator will make assumptions as to capacity and understanding at a certain age, for example, in setting voting age.[7]

In most countries, there is no correlation in national legislation between voting age and liability to or eligibility for military service. Variations occur among states as concern 'military age' but there is a strong tendency towards 18 yearsas

[6] Children & Young Persons Law, Laws of Lagos State, 2004.
[7] Cohn, I., Goodwin-Gill, G.S., Child Soldiers: The Role of Children in Armed Conflicts, Clarendon Press, Oxford (1994), p.7 (hereinafter called Cohn's Child Soldiers).

the minimum age for military obligations.[8] In Nigeria, 18 years is both the voting and military age. Thus, given the essentially political dimension to armed conflicts, the choice of 18 years as the moment of transition to adulthood seems reasonable. The practice of requiring parental consent for voluntary enlistment below the age of 18 is equally consistent with such a principle.[9]

International law and national legislations in many countries combineto proscribe the death penalty on persons under 18 years as at the time of the commission of an offence.[10] This prohibition applies both in time ofpeace, and in international and internal armed conflicts, and acknowledges the reduced ability of those under 18 years to appreciate the nature of their actions in the context of criminal responsibility. The same consideration however, is not given to the capacity of the child or young person to evaluate the reasons for death in combat.

The idea of the child as a person under 18 years therefore enjoys a good measure of support.[11] A combatant according to Black's Law dictionary "is a person who participates directly in hostilities". A combatant means any member of the armed forces except the medical and religious section personnel. A child combatant can therefore be considered as any person under 18 years who is a member of or included in or used by or attached to governmental armed forces or any other regular armed force or armed political group or militia, whether or not an armed conflict exists and, regardless of his or her level of participation and involvement in the conflict.

[8] Ibid, p.8
[9] Ibid
[10] Ibid; Schabas, W.A., The Abolition of the Death Penalty in International Law, University Press, Cambridge, 2nd ed., (1997) p.193.
[11] Ibid

3.1.(i). DISTINCTION BETWEEN COMBATANTS AND CIVILIANS

A civilian person under international humanitarian law means any person who is not a member of the armed forces and does not take part in a "levee en masse". The 3rd Geneva Convention says that participants in a "levee en masse", provided they carry arms openly and respect the laws of war, are considered as combatants and are entitled to prisoners of wars status. International humanitarian law permits members of the armed forces to an international armed conflict and associated militias who fulfill the requisite requirement to directly engage in hostilities. They are considered "lawful or privileged combatants" who may not be prosecuted for taking part in hostilities as long as they respect international humanitarian law and are under military command and subject to the laws of war.

Upon capture, they are entitled to "prisoners of wars" status under the 3rd Geneva Convention.[12] Civilians, such as mercenaries, who directly engage in hostilities are considered "unlawful or unprivileged" combatants or belligerents and, upon capture do not qualify for prisoners of wars status. They may be prosecuted under the domestic laws of the detaining state for engaging in hostilities.Both lawful and unlawful combatants may be interned in wartime, may be interrogated and may be prosecuted for war crimes. But both are entitled to humane treatment in the hands of the enemy. A "non-combatant" refers to civilians not engaged in combat and this include members of the armed forces that do not or no longer engage in hostilities such as medics, chaplains, prisoners of wars, the sick, the wounded and persons who are hors de combat.[13]

[12] The 8th edition of Black's Law dictionary defines *levee en masse*as a large conscription or mobilization of troops especially in response to a threatened invasion; 3rd Geneva Convention (4).

[13] Article 43.2 of Geneva Convention's Protocol 1, 1977; Aperson *hors de combat* is: (a) anyone who is in the power of an adverse party; (b) anyone who is defenceless because of unconsciousness, shipwreck, wounds or sickness or (c) anyone who clearly expresses an intention to surrender; provided he or she abstains from any hostile act and does not attempt to escape.

Under the law and while engaged in combat action or in a militia operation preparatory to it, combatants must at all times distinguish themselves from the civilian population. Members of regular and assimilated armed forces must distinguish themselves from civilians and they need to follow four conditions in satisfying this requirement of distinguishing themselves: they must wear their uniforms and have a fixed recognizable distinctive sign and emblem; they must carry their arms openly; they must be commanded by a person responsible for his subordinates and they must conduct their operations in line with the laws and customs of war.In situations where owing to the nature of hostilities, an armed combatant cannot distinguish himself, he keeps his status as a combatant if he carries his arms openly during every military engagement and, as long as he is visible to the enemy while he is engaged in a military deployment, that is, in any movement towards a place from which or where a combat action is to take place.[14]

And in case of doubt as to whether a person is a civilian or not, that person shall be considered as a civilian.[15]Thus, in the Malaysian case of Osman Bin Haji &Another V. Prosecutor, two men who did not wear military uniforms and had no ID papers, placed explosives that killed three people in a Singapore bank. They thereafter claimed to be members of the Indonesian Armed Forces and, therefore entitled to the protection of the prisoners of war status. The Privy Council convicted the men, holding that they were not entitled to such status.[16]

Thus, combatants have a right to fight, civilians and criminals do not. The laws of war generally do not grant "combatant" status to non-state actors, but

[14] ICRC, Handbook on the Laws of War for Armed Forces, (Geneva), p.12; Article 44 of Additional Protocol 1 to the Geneva Conventions of 1949.
[15] Article 50 of Additional Protocol 1 to the Geneva Conventions of 1949.
[16] Law Reports, (1969) Vol.1, AC.

leaves their detention and punishment to domestic laws. The Geneva Conventions therefore govern military conflicts between states and non-state actors; they just subject them to a different set of rules. Those rules insist on decent treatment for all detainees, but also draw a distinction between "combatants" who have a right to fight, and "civilians" who do not.[17]

3.2. RECRUITMENT OF CHILD SOLDIERS

The outbreak of armed insurgencies in Liberia and Sierra Leone in 1989 and 1991 respectively, not only earned West Africa the unenviable tag of the most volatile sub-region in the 1990s, but equally generated thousands of child soldiers.[18] Over the last few years, hundreds of thousands of children under 18 have been made a part of government armies, rebel forces, militia groups and paramilitary. The majority of child soldiers are boys, but a significant proportion of them are girls.[19] It is important to note that not all children are involved in child soldiering in armed conflict zones. Research has identified the categories of children usually engaged as soldiers, regardless of country, continent or region, whether forced or voluntary, and whether fighting on behalf of a government or an armed opposition group. Categories of such children include children separated from their families; children with a disrupted family background; children with little or no education; children from the poor and marginalized sectors of the society; children from conflict zones.[20]

The main reason for child recruitment is the need for large numbers of soldiers to perform a variety of tasks, combined with circumstances in which it is

[17] Cole, D., "David Cole on the al-Marri Case", www.explore.georgetown.edu (20/03/'10)
[18] Sesay, A.,Civil Wars, Child Soldiers & Post Conflict Peace Building in West Africa, College Press, Ibadan (2003) p.13, (hereinafter called Sesay's Civil Wars).
[19] Machel, G., The Impact of War on Children, UN (A/51/306) (2001) p.7 (hereinafter called Machel's Report).
[20] Muscroft, S.,(ed), Children's Rights: Reality or Rhetoric?, The International Save the Children Alliance, London (1999), p.46

easier to recruit children than adults. Child recruitment is rare at the beginning of conflicts but increases as the conflict continues and the supply of adults diminishes through death, injury or evasion. The legal conscription age may be reduced to meet this need and, both armed opposition groups and governments may resort to forced recruitment, irrespective of the law.[21] It must be noted that recruitment is either "forced" or "voluntary", and this is usually done in several ways. The practice of recruiting and using child soldiers cuts across both developed and developing countries, though through different patterns.

The recruitment of child soldiers in developed countries such as the United States where under 18 year olds are exposed to military training through programmes such as the Peace Corps and Young Marines, and are eventually recruited into the armed forces; and in the United Kingdom where it is increasingly taking the form of volunteers into military service in a bid to overcome persistent shortfalls in recruitment quotas. In contrast, in most Third World Countries where child soldiering exists, recruitment takes the form of conscription, kidnapping and even where it is voluntary; the recruitment is closely linked to the often poor security situation in such countries.[22] Unaccompanied children, street children, minority children or those in schools, orphanages, refugee camps and other children-centred places are usually vulnerable targets for forced recruitment of children involving raids, kidnappings or conscription for institutional and non-institutional child soldiering.[23]

[21] Ibid, p.47
[22] Sesay's Civil Wars, op.cit, p.140
[23] Ibid, p.14

Armies and militias may arbitrarily seize children from the streets or even from schools or orphanages.[24] In some countries like Britain and America, secondary schools and college campuses are often used as rallying points for recruitment drives.[25] As noted by GracaMachel in her groundbreaking report, many children are forced to join armed forces or groups; others may present themselves for service. Rather than exercising free choice, those children that present themselves for service are usually responding more often to a variety of pressures - economic, cultural, social and political. One of the basic pressures is poverty and, parents who are impoverished can be tempted to offer their children for service, especially where armies pay the wages of a child soldier directly to the family. Children may "volunteer" if they believe that itis the only way to guarantee regular meals, clothing and medical attention.[26]

In some cases, armed forces or militias will take in unaccompanied children to protect them from violence. But this is no guarantee that the children will not end up as soldiers, particularly if they stay with a group long enough to identify it as their "protector" or "new family". Thus, for such children, it becomes an alternative source of emotional and family ties for theirs which had been lost. Seeing violence and chaos all round them, such children may feel safer if they too, have guns in their hands. Other children have joined armed forces or opposition groups after being harassed by the other forces. Many young people have joined rebel groups as a reaction to extensive human rights violations.[27]

[24]Machel's Report, op.cit, p.9
[25] Ibid, p.11
[26] Ibid.
[27] Ibid, p.11

Children fighting with civil defence forces and other militias were atimes offered-up by parents who may have been pressured by authorities seeking to fill recruitment quotas. For example, children of the local chieftains of the "Kamajor" in Sierra Leone and of the "MayiMayi" in eastern DR Congo may have been given over for service as a "duty" to the community.[28] Children also become soldiers in other to avenge and revenge the death of family members or as a form of social justice or ethnic service. This may be the reason some children take up arms for the Palestines' Intifada against the Israelis.Children, like adults can be attracted by specific ideologies, identifying with and fighting for social and self-determination or national liberation causes. As was the case in South Africa, they may join the struggle in pursuit of political freedom. Some children become soldiers in order to fulfill a "religious" sense of duty. It is further claimed by GracaMachel that many Islamic Madrasas (schools) in Pakistan provided the Taliban with thousands of new Afghan and Pakistani child recruits.[29]

This might be the reason for the child soldiers of the Afghan Mujahedeen's and Palestine's child suicide bombers. Forced recruitment entailing harassment, destruction of homes, the threat or actual violation of the physical integrity of the youth or someone close to him or her, is practiced by both the armed forces and opposition militias. Even some states in which conscription is regulated by law, engage in systematic forced recruitment, sweeping up under-age adolescents along with young men.[30]Sesay contends that the prevalence of child soldiers in contemporary Africa can be linked to the pervasive conflicts in the region. The presence of nearly half of the global estimates of child soldiers in Africa parallels

[28] Ibid, p.12
[29] Ibid, p.10
[30] Cohn's Child Soldiers, op.cit, p.24

the prevalence of conflicts in the region. Between 1960 and 1980, about eight civil wars were fought on the continent with about 10 more in the next decade. He also contends that the volatility of the African region has been compounded by a population structure in which those under 18 account for over half of its peoples.

Recruitment of child soldiers is also facilitated by the nature of the wars. Thus, the fact that wars were internal in nature - that is within states- tends to facilitate the use of children as soldiers. The wars in Angola, Liberia, Sudan and Sierra Leone, for instance, involved the pervasive use of children in both active and support roles. The link between the nature of war and the use of child soldiers, albeit in varying degrees of intensity, is equally noticeable in non-African theatres of war like, Guatemala, Sri Lanka, Peru and Chechnya.[31]The emergence of child soldiers in Liberia and Sierra Leone could be linked to the outbreak of war, as there were no pre-war cases of child soldiering in both countries. Moreover, the pre-war socio-economic conditions had resulted in high unemployment, dropout rates due to disruptions in education, hyper-inflation and poverty. These developments led to large pools of restless, unemployed and barely educated children who were easily exploited as soldiers.[32]

The political alienation of certain groups by the incumbents of political power and, the desire of such groups for change in their favour, increased local support for insurgents and local militia forces. Thus, the pre-war victimization of certain ethnic groups by a regime and the reckless counter-insurgency operations might contribute to initial massive child volunteers from such ethnic groups. Children from such ethnic groups will join such forces either as a survival

[31]Sesay' Civil Wars, op.cit, p.10
[32] Ibid, p.15

strategy, to avenge the killing of family members or to protect themselves and their families from further attacks.[33]The stalemate factor identified by Sesay also influences the involvement of children in armed conflicts. The prolongation of armed conflicts, the high casualty rates and attendant manpower needs will inevitably force all factions to coerce children into playing active roles in armed conflicts. While Goodwin–Gill and Cohn contend that insecurity and a feeling of helplessness are some of the more serious considerations that tilted in favour of voluntary or forced enlistment of children during armed conflicts.[34]

The recruitment of child soldiers is also facilitated by the widespread use of light, inexpensive weapons like the "AK-47" that require no physical prowess or technical expertise to use. The proliferation of light weapons occasioned by the loosely regulated nature of the international arms market has made such weapons easily affordable, common and cheap.[35] Another attraction is the fact that children are regarded as more loyal and easier to control than adults. Commanders can compel children to commit more heinous acts and they can take more risks than an average adult-soldier. Child soldiers also rarely demand payment and, they are less likely to be deserters than adults.[36]

3.2.(i).(a).FORMS AND FUNCTIONS OF CHILD SOLDIERS

Once children are recruited as soldiers, they are usually treated as adults and receive the same training. These trainings, which start with induction ceremonies, are often brutal. Most child soldiers start out in support functions to the troops and, this involves great risk and hardship to these children. Child

[33]Ibid.
[34] Ibid, p.17
[35] Ibid.
[36] Ibid, p.142

soldiers are commonly used as porters and carriers and, they may be forced to carry loads of up to 70-80 kilograms for miles. Those unable or too weak to perform this burden are often beaten or at times executed. There are arbitrary and savage beatings and, other forms of violence visited upon these children. While children who are considered "good" soldiers may receive rewards of extra food, promotion in rank or other incentives and, boys may even have girls assigned to them for forced sexual services. Child soldiers perform other duties, like cooking, hunting for wild fruits, vegetables, stealing food, general washing and cleaning.[37] Child combatants are used by their commanders as spies, advance party informants and reconnaissance agents. These children are forced to act as informants about the enemies and in enemy territories, preparatory to launching of an attack and gathering information about the enemy's troop movement.

Children are also used as messengers and couriers of messages,even to other militias or informants in enemy territory. Girls perform most of the same functions as males; girls prepare food and tend to the wounded, while both girls and boys are often compelled to provide sexual services. Most, if not all of the abducted girls are forced into sexual slavery with majority of them becoming pregnant, and having sexually transmitted infections.[38]While some of the roles assigned to these child soldiers may seem less perilous than combat, they can imperil all children in an area by making them all objects of suspicion. Children might initially be assigned to support functions; they often find themselves in the heat of battle as actual combatants - their inexperience and lack of training leaves them particularly vulnerable to danger.

[37]Machel's Report, op.cit, p.13
[38] Ibid

Some commanders deliberately exploit such children's "fearlessness", to the point of plying them with alcohol or drugs, so that they may do all their bindings. Children are used as guards, saboteurs, baits, and lookouts to protect them against the first wave of attacks from the enemy. Most armed conflicts have roots in economic motives and, these children are exploited to mine the minerals under the militiamen's control. Child soldiers are also callously used as landmine sweepers, to lay and detect landmines; the large number of former child soldiers with just an arm or leg is a testimony to this. Child soldiers are deliberately exposed to horrific scenes and acts by their commanders in order to harden them.These childrenare exposed and forced to commit grave atrocities against their own people, ranging from beatings, mutilations and participation in massacres.[39]

[39] Ibid, p.15

Chapter Four

4.0. RESPONSIBILITY FOR WAR CRIMES

Children have the right to and require special protection from and during armed conflicts and, this protection is essential to allow conflict-affected communities a chance to survive, rebuild and maintain a sustained peace.[1] One of the main effects of armed conflicts and dictatorship can often be a lack of accountability for grave crimes - such as war crimes, genocide and crimes against humanity. This situation often arises from a complete breakdown of the national legal system directly affected.[2] When crimes of lesser magnitude are committed within a state, good governments use their criminal justice system to hunt down and punish the perpetrators. The domestic crime rate in any country is directly in proportion to the efficiency of policing and the system of criminal justice. The more efficient those systems are, the lower the crime rate will become.[3]

In the world today, with our various legal protections, prohibitions and moral values, there are still many instances in which children are forced by their commanders and recruiters to actively participate in armed conflicts. In any society, regardless of the various laws and protections put in place, there are still people who think that they cannot be apprehended or punished and, crimes therefore continue to be perpetrated.[4] The most serious international crimes are shocking cruelties attracting universal condemnation. While the acts themselves

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[1]Freedson, J., Peters, C., "A More Effective Monitoring of Violations Against Children in Armed Conflicts", UN Chronicle, No.2, New York, (2004), p.37

[2]Barea, P., "Complementary Jurisdiction Helps Define the ICC", In: Law, Crime Justice, (03/04/'10) (hereinafter called Barea's Article).

[3] Goldstone, R., "Preventing & Prosecuting Crimes Against Humanity in the 21st Century", Lecture delivered at Abuja on 06/06/'03,, NHRC News, p.29.

[4] Ibid.

are intolerable to our sense of humanity; impunity for these acts, the fact that perpetrators of such crimes escape being brought to account, offends our notions of justice. If the crimes were not egregious enough, impunity adds insult to the injury already suffered by the victims and their families.[5]

4.1. UNIVERSAL AND COMPLEMENTARY JURISDICTIONS

Developing mechanisms to manage and prevent conflicts, creating accountability in government and strengthening the rule of law and access to law, are all key elements of long term post-conflict peace building and reconstruction. In many instances, post-conflict peace building is threatened by a culture of impunity and the widespread lack of accountability among those responsible for the many violent armed conflicts which are characterized by torture, rape, murder and other callous atrocities.[6] All these threatens newly established peace processes – not only because those responsible for these grave atrocities remain free to commit further acts, but also because impunity fuels a desire for revenge which can lead to further violence. Moreover, public confidence in attempts to establish the rule of law is undermined, as are the chances of establishing a meaningful form of accountable governance.[7]

The national judicial systems of some countries are often too weak to cope with rendering justice for these crimes. Atrocities are characterized by large numbers of victims and perpetrators, and are often committed with the complicity and/or active participation of state structures or top political leaders. Successful domestic prosecutions are further limited by resource and skills shortages,

[5] Max du Plessis, Ford, J.,(eds.), "Unable or Unwilling? "Case Studies on Domestic Implementation of the ICC Statute in Selected African Countries", ISS Series, No.141, Pretoria (Mar. 2008) p.1(hereinafter called Ford's Article).
[6] Ibid, p.7
[7] Ibid

together with the strain of establishing functional criminal justice systems in countries with little tradition of democracy and the rule of law.[8]Some countries like the United States with a supposedly well-developed tradition of democracy and the rule of law sometimes refuse to investigate and prosecute some of their own citizens and public officials, who are accused of serious crimes, especially for acts associated with armed conflicts in other countries.

It is in circumstances such as these, where and when the national justice systems are "unable or unwilling" to investigate or prosecute those responsible for the commission of such serious crimes, that the international community can and should assist with these judicial processes; and this is allowed under the principles of "Universal and Complementary Jurisdictions".[9]Precedent of an early form of these principles can be traced back to the year 1549, when English law extended the death penalty to anyone caught and convicted of aiding and abetting pirates anywhere. Although this precedent does not demonstrate these principles as they stand today, it is however believed that it shows that these principles are not totally new concepts. It is seen to have developed from past experiences and, as a response to the political climate within the international community.[10]

4.1.(i). UNIVERSAL JURISDICTION

"Universal Jurisdiction" is a principle of international law which allows national courts and international tribunals, to investigate and prosecute a person suspected of committing a crime anywhere in the world; regardless of the nationality of the accused or victim, or where the offence was committed or the absence of any links to the state where the national court or international tribunal

[8] Ibid
[9]Barea's Article, op.cit.
[10] Ibid

is located.[11]The concept of universal jurisdiction is based on the ground that certain acts are so grave and heinous, that they are considered as crimes against the whole world and humanity; which any state is obliged, and allowed to punish and redress, and as such, itis too serious to tolerate jurisdictional arbitrage. The people who commit such "serious international crimes" are taken as "hosteshumani generis" (enemies of all mankind), who may be brought to justice wherever found.

Universal jurisdiction is closely linked to the idea that certain international norms are, "ergaomnes" or owed to the entire world community, as well as the concept of "jus cogens" – that certain international law obligations are binding on all states and cannot be modified by treaty.[12]The world has witnessed the commission of various atrocities without the perpetrators facing justice. This aura of impunity is fostered by governments' refusal to investigate crimes, by granting government officials immunity from prosecution, and by enacting amnesty laws to shield some people from accountability. The toll of impunity is often seen in the continued sufferings of victims and the steady erosion of the rule of law.[13] International law used to be defined solely in terms of relationships between states. Top government officials and world leaders acted with impunity because international law did not hold them accountable – but this is changing.

The international community through international justice ensures cooperation between countries to hold perpetrators of grave human rights abuses accountable. International justice acts as a safety net to ensure that perpetrators of heinous crimes don't evade justice by crossing borders into "safe havens". Bringing perpetrators to justice before a court of law -whether in domestic courts

[11] Amnesty International, "Universal Jurisdiction: Questions & Answers", www.amnestyusa.org (02/02/'10).
[12]"Universal Jurisdiction", wikipedia, www.answers.com (02/02/'10).
[13]Amnesty USA, "What is International Justice?" Fact Sheet 5, 2007-08, www.amnestyusa.org (03/03/'10).

or internationally established courts– sends a clear message that grave human rights abuses will not be tolerated, regardless of where the crimes are committed nor the status of such offenders.[14]Trials should take place where crimes occurred, provided that such trials are not shams nor unfair, but in many cases, trials which meet these standards have been impossible in many countries where these crimes occurred. Legislation making such conduct criminal may not exist or the legal system may have collapsed. The country may not have the resources for such trials nor the capacity to provide the required security for such proceedings. Prosecutors may not have the political will to open investigations or they may be prevented from investigating or prosecuting such crimes by executive authorities - some of whom may be implicated in such crimes- or by amnesties, pardons or similar measures of impunity.[15]

Universal jurisdiction can be traced to the writings of scholars such as Grotius and to the punishment of early forms of piracy and slavery.[16] The idea gained ground after World War II through the establishment of the International Military Tribunal and the adoption of new conventions containing explicit or implicit clauses on universal jurisdiction.[17] The Four Geneva Conventions provided in clear terms for universal jurisdiction over grave breaches of the Conventions and

[14] Ibid
[15] Amnesty International, "The International Criminal Court: Fact Sheet 2-The Case for Ratification", www.amnestyusa.org (03/03/'10).
[16] Philippe, X, "The Principles of Universal Jurisdiction and Complementarity", IRRC Geneva, Vol.88,No.862, (June 2006) p.378 (hereinafter called Philippe's Article); Also see Barea's Article, op.cit.
[17] The 1948 Genocide Convention does not by its terms create universal jurisdiction, but it doesn't preclude it either. Article 5 of the Genocide Convention provides that persons charged with genocide shall be tried by an international tribunal. The Convention against Torture,1984, requires that a State Party either prosecute alleged torturers who are found in its territory or extradite them to face trial elsewhere (see Articles 4 - 7).

of international humanitarian law.[18] Other international conventions and to some extent, rules of customary law enlarged the doctrine's scope of application.

The Nuremberg Tribunal established a number of principles, central to the development of international law in the 20th century. And one of the "Nuremberg Principles" was that war crimes, as defined in the Charter of the Tribunal, were an offence against customary international law and as such, were subject to universal jurisdiction. Thus, when a state found that it could not exercise domestic jurisdiction over an alien who chose not to present himself for trial, it was entitled to bring a prosecution under international law. Another principle was that individuals (civilians or military personnel) and not just states could be tried under international law as criminals. Such individuals, regardless of their post, could not now attribute their heinous acts to 'state action' and must bear responsibility for acts over which they presided. The tribunal rejected the contention that the state and not individuals, was responsible for war and national policies.

Furthermore, it was not acceptable for an individual accused of committing war crimes to claim either that he had acted under superior orders or that he had acted out of military necessity. Instead, they were held responsible for their actions and the orders they gave, regardless of who ordered them in the first instance.[19] Universal jurisdiction can be applied to most ordinary crimes (murder, manslaughter and theft), as well as to crimes of international concern (hijacking, piracy and hostage-taking) and, crimes under international law including genocide, crimes against humanity, war crimes, torture and disappearances.[20]

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[18] See Common Article 49 of GC1; Article 50 of GC II; Article 129 of GC III; Article 146 of GC IV & Article 85 of Additional Protocol 1 to the Geneva Conventions.
[19] "War Crime", op.cit, www.answers.com (05/02/'10).
[20] Amnesty USA, "Universal Jurisdiction", Fact Sheet 2, amnestyusa.org (03/03/'10).

The idea that in certain circumstances sovereignty could be limited for such heinous crimes was accepted as a general principle. This was confirmed by a number of cases, starting with the Eichmann Case[21] in 1961; the Demanjuk Case in 1985[22]; the Pinochet Case[23] in 1999 and the Butare Four Case[24] in 2001; emphasizing that universal jurisdiction could lead to the trial of perpetrators of international crimes. International law empowered and in certain cases mandated states to prosecute crimes that were regarded as harming the whole international community – international crimes were no longer to remain unpunished.[25] In the Eichmann Case, Adolf Eichmann, a leading participant in the Nazi's 'final solution', was tracked down in Argentina by Israeli agents and secretly abducted to Israel. He was tried in Jerusalem for his crimes against the European Jews, found guilty, and sentenced to death by hanging. This is the first, well known use of universal jurisdiction in the world. The concept of universal jurisdiction is not new, though states have shown an increasing willingness to enlarge the zone of their jurisdiction, and to prosecute or extradite those in high places.

The most famous use of universal jurisdiction was probably in the Pinochet Case.[26] The former Chilean dictator, Augusto Pinochet, was accused of genocide and torture by a Spanish Court and, was arrested when he arrived in London on a Spanish warrant, for his extradition to face the law in Spain and some other countries – for his alleged crimes. The House of Lords ruled that his immunity as a former head of state extends only to acts done in his official capacity as a head of state. The Law Lords ruled that acts of torture, as crimes under international

[21] See SC of Israel, *EichmanCase*, 298-300; *Finta Case*, SC of Canada, 24/03/94, ILR, 305.
[22] *Demajuk V.Petrovsky,* US Ct. of App., 6th Cir., 31-10-85, ILR 79, 546.
[23] House of Lords, 25/03/99; (1999) 2 WLR 837 (HL).
[24] Courd'Assises de Bruxelles, 8/6/01.
[25] Philippe's Article, op.cit.
[26] Supra

law could not be acts within the official capacity of a head of state and as such, extradition proceedings to Spain should continue. He was eventually allowed to return home on health grounds, following a ministerial discretion by the British Home Secretary's refusal to submit his medical records and tests, for the court to determine whether he was fit to stand trial or not.

When he got home, he faced multiple charges stemming from his role in massive human rights violations and, was on the verge of being tried in the Chilean Courts when he died. This ruling however stands as an important precedent on immunities and universal jurisdiction. Though Pinochet was never put on trial, the use of universal jurisdiction in this case had a very broad legal impact. As a result of the "Pinochet effect", other leaders who had also committed grave crimes have been pursued in many parts of the world. This case, along with other cases, shows the potential for universal jurisdiction-based cases to serve as catalyst for domestic legal systems. In some cases, a failure to extradite to a state requesting extradition as a result of a case brought under universal jurisdiction can trigger a state's "extradite or prosecute" legal obligations.[27]

4.1.(ii). IMMUNITIES FOR STATE OFFICIALS

The International Court of Justice in the Arrest Warrant Case[28] held that state officials did have immunity under international law while serving in office. The court held that immunity was not granted to state officials for their own benefit, but instead to ensure the effective performance of their functions on behalf of their respective states. The court stated that when abroad, state officials enjoy full immunity from arrest in another state on criminal charges,

[27]Roht-Arriaza, N., "How is Universal Jurisdiction Used in Response to Genocide?", Amnesty USA, IJA, Chicago (18/04/'10).
[28] Arrest Warrant Case of 11/04/00 (DR Congo V. Belgium).

including charges of war crimes or crimes against humanity. The court rejected a Belgian arrest warrant for some ministers from DR Congo but qualified its conclusions, stating that state officials "may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction.[29]

There are however many provisions of international law and case law which are contrary to the above decision, and demonstrate that state officials don't have immunity from prosecution for grave crimes; and therefore approves the use of universal jurisdiction. Thus, if a person has been granted an amnesty for crimes by the state where the crimes took place, he can still be prosecuted in another state using universal jurisdiction. National amnesties, pardons or similar national measures to prevent a person from being brought to justice for grave crimes; have no place in the international system of justice and are also prohibited under international law. Such steps cannot prevent courts from another state or an international tribunal from investigating and prosecuting such accused persons.[30]

The Rome Statute (Art. 27(1)) states that "this statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a head of state or government, a member of a government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this statute, nor shall it, in and of itself, constitute a ground for reduction of sentence." And goes further in Article 27(2) also states that "immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the court from exercising its jurisdiction over such a person".

[29] "Universal Jurisdiction", www.answers.com (16/02/'10).
[30] Amnesty USA, "Universal Jurisdiction", Fact Sheet 2, 2007-08, www.amnestyusa.org (03/03/10).

The Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (Articles 4-7) stipulates that states must prosecute or extradite any alleged torturers found within their territory.

On July 7, 1999, in an effort to end the civil war in Sierra Leone, the Lome Peace Agreement was signed with the warring factions. Article IX of the Lome Agreement made broad concessions to the militias including, amongst other things, a blanket amnesty which granted unconditional and free pardon to all the participants in the conflict. The Special Representative of the United Nations' Secretary General for Sierra Leone however, appended a disclaimer to the Agreement, stating that the amnesty provision therein would not apply to international crimes of genocide, war crimes and other serious violations of international humanitarian law. Article 10 of the Statute of the Special Court for Sierra Leone accordingly states that; "an amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in Articles 2 - 4 of the present statute shall not be a bar to prosecution".

In the case of Prosecutor V. Morris Kallon&Brima Buzzy Kamara, the Appeals Chamber of the Special Court for Sierra Leone ruled that amnesties granted to persons of the warring factions in the civil war by the Lome Peace Agreement were no bar to prosecution of international crimes before international or foreign courts. The court held that the crimes are international crimes, which can be persecuted under the principle of universality. Amnesties granted by Sierra Leone therefore, cover crimes under international law as they are subject to universal jurisdiction and, by reason of the fact that "the obligation to protect human dignity is a peremptory norm and has assumed the nature of obligation ergaomnes". The grant of an amnesty for international crimes therefore is not only in breach

of international law, "but is in breach of a state's obligation towards the international community as a whole.[31]The above decision is believed to be the first of an international tribunal to clearly state that amnesties are no bar to prosecution for all international crimes before international or foreign courts.

The world has witnessed dramatic changes in international law where both the head of state immunity and state sovereignty, though important principles of international law, are eroded in the interest of protecting humanity from criminal atrocities through the use of universal jurisdiction.[32]Charles Taylor,theformer President of Liberia was indicted on 07/03/03 by the Special Court for Sierra Leone, whilst still in office. This happened when he was attending the Liberian Peace talks in Ghana in the company of about five other heads of states. As part of a Peace Accord, he stepped down as president on 11/09/03 and, was subsequently arrested on 29/03/06 in Calabar, by Nigerian security forces and was handed over to the United Nations. He is presently facing trial at The Hague sitting of the Special Court for Sierra Leone, for the war crimes of using child soldiers, looting, torture, sexual and physical violence.[33]

While on 04/03/09, the International Criminal Court issued an arrest warrant for the current Sudanese President, Omar el-Bashir, for war crimes, genocide and crimes against humanity.[34] Furthermore in 2009, a British court issued an arrest warrant against the former Israeli Foreign Minister,TzipiLivni. The warrant was requested by Palestinian plaintiffs under the principle of universal jurisdiction to prosecute Livni for war crimes committed during

[31] Case No. SCSL- 2004 -12-A; Meisenberg, S.M., "Legality of Amnesties in International Law: The Lome Amnesty Decision of the Special Court for Sierra Leone", IRRC Geneva , Vol. 86, No. 856, (Dec. 2004) p.842
[32]Bhoke, C., "The Trial of Charles Taylor: Conflict Prevention, International Law & An Impunity-Free Africa", ISS Paper 127, Pretoria (Aug.2006) p.5 (hereinafter called Bhoke's Article).
[33]Bhoke's Article, op.cit.
[34] Amnesty USA, "Universal Jurisdiction", op.cit (04/02/'10)

"Operation Cast Lead" in Gaza. Also, in 2008, Charles "Chuckie" Taylor Jr., was tried before an American Federal Court in Miami on the basis of universal jurisdiction, for war crimes committed in Liberia. Thisis the first case in which an American was tried for war crimes committed overseas.[35]

4.1.(iii). UNIVERSAL JURISDICTION IN CIVIL ACTIONS

Generally, universal jurisdiction is used in relation to criminal law. It can however be extended to civil actions, mostly over human rights abuses. Thus, in the United States for example, there are special laws that allow international law to be enforced through domestic courts. These are mainly the Alien Tort Claims Act (ATCA), 1789 and the Torture Victim Protection Act (TVPA), 1991.

4.1.(iii).(a).ALIEN TORT CLAIMS ACT (ATCA), 1789

This Act grants jurisdiction to American Federal Courts over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States". Non-American citizens can use this law to bring civil suits and to get civil remedies in American courts against any person or entity with a legal capacity - individuals, corporations, associations or governments who have violated the "law of nations".[36]The law therefore allows foreign victims of human rights abuses to sue perpetrators who are present in the United States.[37]Since all that plaintiffs seek and can realistically get under this law, is compensation and damages for the alleged atrocities, it is necessary for the defendant(s) to have sufficient assets in the United States to satisfy the final judgment.

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[35] "Universal Jurisdiction", www.globalpolicy.org (10/02/'10)
[36] "Alien Tort Claims Act", www.globalpolicy.org (02/02/'10); Earth Rights International, Transnational Litigation Manual, 2nd ed., New York (2006) p.26 (hereinafter called Transnational Litigation Manual).
[37] Amnesty USA, "Victims Rights", Fact Sheet 4, (03/03/'10); Human Rights First, "The Alien Tort Claims Act: Promoting Accountability & Limiting Impunity for Serious Human Rights Violations", New York, (02/02/'10).

It was held in Sosa V. Alvarez-Machain, that human rights cases could be brought under the law and, that violations of modern international law, such as torture and genocide, could be challenged in American courts. The court however dismissed the case, deciding that the abuse alleged here - brief arbitrary detention - was not a well established violation of customary international law. The case was decided in 2004 and is the first transnational human rights case to reach the American Supreme Court.[38] A new development has been the recent efforts to use the law to sue corporations for violations in the area of human rights, environmental pollution and degradation.

In Bowoto V. Chevron Corp.,[39] the plaintiffs were Nigerians who suffered torture and killings in the hands of the military operating on behalf of Chevron. The plaintiffs alleged that Chevron used the Nigerian military to suppress protests against it, and punish opposition to its activities. The court initially ruled that Chevron could be liable for the actions of its subsidiaries in Nigeria. The court also ruled that corporations can be liable for human rights abuses – the case was still onas at the time of our research.

4.1.(iii).(b). TORTURE VICTIM PROTECTION ACT (TVPA), 1991

This Act allows for the filing of civil suits in the United States, against individuals, who acting in an official capacity for any foreign nation, committed torture and/or extra-judicial killing(s).The plaintiffs may be Americans or not, but the American government and other states cannot be sued under this law; though it is unclear whether corporations or other types of groups can be sued. This law allows suits against people who allegedly committed torture or extra-judicial

[38] (542 US 692); Alien Tort Claims Act, op.cit; Transnational Litigation Manual, op.cit, p.58
[39] (2006 WL 2455752, 312 F.Supp. 2nd 1229); Alien Tort Claims Act, op.cit; Transnational Litigation Manual, op.cit, p.65

killings "under actual or apparent authority of any foreign nation", when the home nation lacks adequate remedies for such offences.[40]Foreign states that have been designated by America as state sponsors of terrorism can be sued.[41]

It must however be noted that though there have been many suits under both the Alien Tort Claims Act and the Torture Victim Protection Act; many forces and interests have not allow the suits to proceed to judgment. Due to the several challenges to plaintiffs suing under these Acts, such as the protection of world leaders by sovereign immunities, the actual impact of suits under these Acts have been generating publicity and, stirring up politics more than anything else.[42]Even though many suits under these Acts have not resulted in legal victories for the plaintiffs, the suits still force such countries and, companies to focus and improve their human rights record and, corporate social responsibilities in order to protect their names, images and brands, and also to deflect negative publicity.

It is clear from the above cases and the provisions of international law, that in an historic shift, investigations and prosecutions of grave crimes is beginning to be almost routine under the principles of universal jurisdiction, and denial of immunity for either private or public citizens. It must however be noted that the recognition of universal jurisdiction by a state as a principle is not sufficient to make it an operative legal norm. There are basically three necessary steps to get the principle working and these are: the existence of a specific ground of universal

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[40] "Alien Tort Claims Act",op.cit; Transnational Litigation Manual,op.cit, p.26; Amnesty USA, "Victims Rights", Fact Sheet 4, op.cit; Human Rights First, "The Alien Tort Claims Act: Promoting Accountability & Limiting Impunity for Serious Human Rights Violations", op.cit ; Human Rights First, "The Alien Claims Act & The Torture Victim Protection Act: Important Tools in the Fight Against Impunity, op.cit; "Torture Victim Protection Act of 1991: Legal Issues", www.wikipedia.org; Joffe, E., "Supreme Court Hears Arguments Over Immunity for Foreign Leaders: Trends in International Litigation", (03/03/'10).

[41] Ibid; See Daliberti V. Republic of Iraq, 97 F. Supp. 2nd 38 (DDC 2000) & America's Anti Terrorism& Effective Death Penalty Act, 1996 (AEDPA).

[42] Ibid

jurisdiction; a sufficiently clear definition of the offence and its constitutive elements and national means of enforcement allowing the national judiciary to exercise their jurisdiction over these crimes.[43]

4.1.(iv). COMPLEMENTARY JURISDICTION

The physical boundaries that separated countries have given way to a global economy, instantaneous communication, the ability to span the globe in less than a day and the proliferation of crimes that have international implications. The trend towards a "globalization of justice" is defined by an increasingly wide net of international obligations covering everything from free trade to labour standards, environmental regulations and the protection of fundamental human rights. It is evidenced by the establishment of the International Criminal Court, the creation of Ad Hoc Tribunals for Rwanda and the former Yugoslavia, the creation of internationalized courts and, the increasing use of domestic courts to bring criminal and civil cases against individuals and corporations accused of gross violations of international human rights.[44]

Prior to World War II, war criminals and those accused of grave human rights abuses had no reason to fear prosecution, because in reality, there was no international criminal justice. The war crimes' tribunals in effect, gave birth to international criminal justice.[45] For a long time after the Nuremberg and Tokyo trials, states largely failed to bring to justice, those responsible forgrave crimes. The continued impunity of war criminals from processes of justice mocks our notions of a coherent, civilized and competent world system based on universal

[43] Philippe's Article, op.cit, p.379
[44] Amnesty USA, "The Globalization of Justice", Fact Sheet 2007- 08, www.amnestyusa.org (03/03/'10).
[45] Goldstone's Article, op.cit.

values.[46]Complementary jurisdiction is a principle aimed at granting jurisdiction to another body when the main body or state fails to exercise its jurisdiction – of bringing perpetrators of international crimes and gross human rights abuses to justice and thereby, providing redress to victims when such main bodies or states are genuinely "unable or unwilling" to do so.[47]

The adoption of the Rome Statute symbolizes the implementation of the 'complementarity principle' for the benefit of member states within the framework of universal jurisdiction.[48] The principle requires the existence of both national and international criminal justice functioning in a subsidiary manner for curbing crimes of international law and, when the former fails to do so, the latter intervenes and ensures that the perpetrators do not go unpunished.[49]It is based on a compromise between respect for the principle of state sovereignty and respect for the principle of universal jurisdiction; that is, on acceptance by the former that those who have committed atrocities may be punished through the creation and recognition of international criminal bodies. The Rome Statute is an accurate illustration of this idea, and probably the most sophisticated.

The principle of complementarity is regarded by the promoters of international justice as a means of giving the last word to the court when states fail to fulfill their obligations in good faith.[50] Under this principle, international law tries to complement national criminal jurisdictions, rather than replace them.[51]Under complementary jurisdiction, international tribunals are intended as courts of last resort; investigating and prosecuting only where national courts have

[46] Ford's Article, op.cit, p.1
[47] Philippe's Article, op.cit, p.380
[48] Ibid
[49] Ibid
[50] Ibid
[51]Barea's Article, op.cit; See Para. 10 of Preamble; Articles 1; 17 & 20 (3) of Rome Statute.

failed. The Rome Statute provides that the court will not interfere with the judicial system of any country, if that country is "able and willing" to try equitably those accused of grievous crimes. The court does not replace viable national efforts but helps in the attainment of justice where other options are not possible.

There might be impunity for abuses at the highest levels and, these crimes were perpetrated in most cases by the same leaders who are supposed to protect the people. A viable judicial institution is required to try and bring to justice those perpetrating such crimes.[52]The court does not per se, exercise universal jurisdiction but its jurisdiction is triggered when states are "unable or unwilling" to act. The preconditions for the exercise of the court's jurisdiction are in Article 12 of the Rome Statute, under which the court's jurisdictionis accepted by a state that becomes a party to the statute or by declaration where it is a non-party state. Under Article 13, the procedure for the exercise of the court's jurisdiction is triggered by three possible mechanisms: (a). Referral by a state party; (b). Referral by the Security Council acting under Chapter VII of the United Nations Charter, in which case the court may initiate the investigation even if the national and territorial states have not accepted the court's jurisdiction; and (c). By an investigation ordered by the prosecutor.

In each of these situations it is the prosecutor and not the states nor the Security Council, which decides whether or not to open an investigation and, based on that investigation, whether to prosecute, subject to judicial approval.[53]The

[52]Abeng, R., "ICC Doing the Job of Failed African Judiciary", In: Justice in Africa: the Great Debate Continues, New African, July 2009, p.15

[53]Solera, O., "Complementary Jurisdiction & International Criminal Justice", IRRC Geneva, Vol.84, No.845, (Mar.2002) p.164 (hereinafter called Solera's Article); Ford's Article, op.cit, p.12

United Nations' Security Council under Article 16 of the Rome Statute can vote to block any investigation or prosecution. The court under this principle can therefore bring to trial an individual regardless of his or her civilian or military status or official position. It should however be noted that in international law, the exercise of police power and penal law are deemed to remain within the competence of the state and, the principle of complementary jurisdiction is therefore more like an exception to such state prerogative.[54]

The principle of complementarity as enshrined in the Rome Statute should be considered as a safety valve allowing for rationalization and the improved efficiency of the principle of universal jurisdiction.[55]It offers states the right to exercise universal jurisdiction and, to decide what to do with the perpetrators of serious crimes, according to its own penal rules.[59]Complementary jurisdiction is an advance towards the greater efficiency of universal jurisdiction and, of course, international justice. The doctrine is not trouble-free and might be conflict-prone with states; when, how, where and under what circumstances this mechanism will be triggered is still subject to actual practice.[57]

4.2. CRIMINAL LIABILITY AND ACCOUNTABILITY

International Humanitarian Law lays down the minimum protection and standard applicable to situations where people are most vulnerable in armed conflicts. It aims to prevent situations that might exacerbate vulnerabilities, such

[54]Solera's Article, op.cit, p.158
[55] In Philippe's Article, op.cit, p.388 the writer says that this is an integral part of the ICC Statute. As outlined by him and several other authors, this was not the case for the ICTY and the ICTR, since their Statutes provided for primacy of the international ad hoc tribunals and complementarity or at least concurrent jurisdiction for the national courts. Under the ICC Statute, the system is inverted.
[59] Ibid, p.388
[57]Ibid, p.398.

as displacement and destruction of civilian properties.[58]However, in defiance of international humanitarian law, deliberate acts against civilians still result in terror, starvation, sexual violence, forced disappearances, the use of children as fighters and families being torn apart.[59]Forcing children, many who were as young as 6 years old when they were recruited, to fight and kill, or to serve as human shields or sex slaves, is amongst the worst crimes in the world. Until those responsible are held accountable and responsible for these grievous crimes, the victims and the larger society will continue to be denied justice.

4.2.(i). STATE RESPONSIBILITY

The concept of "State Responsibility" encompasses different spheres of responsibility of individual states and collectively, to both themselves and the international community. The undertaking by states to 'respect and ensure respect' for the Four Geneva Conventions and the Protocols Additional thereto, means that states are obliged under international humanitarian law to bring about compliance with these Conventions and their Additional Protocols whenever they are applicable, even in conflicts in which those states are not involved. This provision reinforces the responsibility of each contracting state, which besides regulating its own conduct, must act by all appropriate means to ensure that humanitarian law is observed by all other states.[60] States must pass national legislation enabling its legal provisions to be brought into line with those of international law.[61]

State responsibility arises when a state acts in an internationally wrongful manner. The International Law Commission has stated that international crimes

[58] "Africa-Asia: Part 1: The Law & Civilians in Conflicts", IRIN, (16/12/09)
[59] Ibid.
[60] Gutierrez Posse, H.D.T., "The Relationship Between International Humanitarian Law & the International Criminal Tribunals", IRRC, Vol.88, No.861, Geneva (March 2006) p.93 (hereinafter called Gutierrez's Article).
[61] Ibid, p.97.

include serious breaches, "on a widespread scale of an international obligation of essential importance for safe-guarding man, such as those prohibiting slavery, genocide and apartheid".[62] A state that breaches its humanitarian or human rights obligations under international law, and injures a national of another state may be responsible to that state for reparation.

Thus, an obligation to pay compensation for breaches of international humanitarian law is laid down in Additional Protocol 1 (Art. 91) to the Geneva Conventions, and in the 1907 Hague Convention (Art. 3). According to the general international law of state responsibility, compensation encompasses a range of measures, including both monetary and non-monetary measures. In the Nicaragua Case,the ICJ ruled that America was "in breach of its obligation under the Treaty of Friendship with Nicaragua not to use force against Nicaragua" and ordered America to pay war reparations. Also in the Congo Case,the Court held that the armed activities of Uganda in the DR Congo between August 1998 and June 2003 violated international human rights and international humanitarian law and, ordered Uganda to pay reparations to the DR Congo.[63]

State responsibility for breaches of international human rights law also creates the right to effective remedy for individual persons and groups of persons who are under the jurisdiction of the offending state and who are victims of those breaches. The possibility of an individual-victim's claim for reparations for

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[62]Pfanner, T., "Various Mechanisms & Approaches For Implementing International Humanitarian Law & Protecting & Assisting War Victims", IRRC Vol.91, No.874, Geneva (June 2009) p.305 (hereinafter called Pfanner's Article); Draft Articles on State Responsibility, Part 1, Article 19, Year Book of the International Law Commission, 1980, Vol.11, Part 2, In: Linda Chavez's, "Preliminary Report of the Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery & Slavery Like Practices during Periods of Armed Conflicts", Economic & Social Council, 16/07/96 (hereinafter called Linda Chavez's Report); "Report on the Right to Compensation", by Theo van Boven (EKN.4/Sub. 2/1993/8) In: Linda Chavez's Report (hereinafter called the Theo van Boven Report).

[63] See Pfanner's Article, op.cit, p. 287 & 324; Theo van Boven's Report, op.cit; Nicaragua Case infra, p.84; Congo Case, (ICJ Reports 2005).

violation of international humanitarian law can be inferred from the Rome Statute(Art. 75).[64]Both the Inter-American and European Court of Human Rights have ordered reparations for victims of human rights violations that were simultaneously violations of international humanitarian law. Compensation and reparation has also been provided directly to individuals via different procedures like mechanisms set-up by the Security Council; Inter-State Agreements; Unilateral Acts such as national legislation or in response to Requests submitted directly by individuals to national courts.[65]

Several instruments set forth the state responsibility for violations of humanitarian law. The 4th Geneva Convention names the party to the conflict in whose hands protected persons are, and responsible for the treatment accorded them by its agents, irrespective of any individual responsibility which may be incurred.[66]The 4th Geneva Convention (Art. 32) states that; "The Parties specifically agree that each of them is prohibited from taking any measure of such a character as to cause the physical suffering or extermination of protected persons in their hands. This prohibition applies not only to murder, torture, corporal punishment, mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person, but also to any other measures of brutality whether applied by civilian or military agents".

Thus, pursuant to Protocol 1 to the Geneva Conventions, a party to the conflict which violates the Geneva Conventions or Protocol 1 shall be responsible for all acts committed by persons forming part of its armed forces (Art. 91). A

[64] Ibid
[65] Ibid; See Pfanner's Article, op.cit, p.288 & 289;
[66]Article 29 of the 4th Geneva Convention.

state or country can therefore be liable for war crimes. In Cyprus V. Turkey,[67] it was found or implied that a country can be liable for war crimes. The court found that Turkey had violated the prohibition against torture and inhuman or degrading treatment contained in the European Convention on Human Rights. Turkey had invaded Cyprus and Turkish soldiers committed numerous human rights abuses, including mass rape of Cypriot women. It was found that Turkey was imputedly responsible for the rapes and its failure to prevent the crimes happening.

In the Bosnian Genocide Case,[68] the ICJ ruled for the first time that a state -and not just individuals- can be responsible for acts of genocide. It held that the Srebrenica massacre was genocide butdid not find Serbia directly responsible for the genocide, holding that it "could and should" have prevented the killings as the Genocide Convention required. The court ruled that Serbia had committed breaches of the Convention by not cooperating with the ICTY in punishing the perpetrators of the genocide, and for violating its obligation to comply with the provisional measures ordered by the court. Serbia was ordered to hand over all individuals accused of genocide and other crimes.

By failing to hand over individuals accused of genocide, Serbia was violating the 1948 Geneva Convention, which requires the arrest and punishment of perpetrators.This ruling was in response to a civil suit brought by Bosnia against Serbia; the first time a nation sued another over claims of genocide. Serbia's links with the Bosnia-Serb troops were close and firmly established, the court said, but ruled that it did not have enough proof to justify Serbia been held directly liable

[67] 4 ECHR 482 (1976)

[68] Application of the Convention on the Prevention & Punishment of the Crime of Genocide (Bosnia and Herzegovina V. Serbia and Montenegro), Case 91, ICJ Judgment of 26/02/07; Marlise Simons, "Mixed Ruling on Genocide Still Puts Pressure on Serbia", New York Times of 06/03/07 (hereinafter called Marlise Simons' Article) (03/03/'10).

for the genocide. The court faulted Serbia for not using its considerable influence to prevent the genocide, while a minority of the court found Serbia guilty of complicity in the genocide. Serbia was absolved of having to pay the war reparations that Bosnia had demanded.[69]

States have an obligation (individually and collectively) to prevent and to bring to justice all perpetrators of grave crimes. There must be international justice, which is the co-operation between countries to hold individuals accused of grave human rights abuses accountable. Bringing perpetrators to justice before a court of law - whether in domestic courts or international courts - sends a clear message that atrocities will not be tolerated, regardless of where the crimes were committed.[70]There are international standards which all states are obliged to adhere to in order to end impunity which drives more atrocities. Impunity is fostered by governments' refusal to investigate and punish crimes, by not adhering to their obligations under international laws, customs and treaties, by granting government officials immunity from prosecution, and/or by enacting amnesty laws to shield people from accountability. The toll of impunity is often seen in the continued sufferings of victims and the steady erosion of the rule of law.[71]

In the case of Prosecutor V. Morris Kallon and Brima Buzzy Kamara (Supra), the Special Court for Sierra Leone held that amnesties do not bar the prosecution of international crimes before international or foreign courts. Since the 1990s, the international community has taken unprecedented steps to limit the impunity all too associated with mass slaughter, grave atrocities, forced dislocation of

[69]Marlise Simons' Article, op.cit.
[70] Amnesty International USA, "What is International Justice?", 2007-08 Fact Sheet, www.amnestyusa.org (03/03/'10); Linda Chavez's Report, p.11.
[71] Ibid.

ethnic groups, torture and use of child soldiers. Along with genocides and many other widespread crimes, the world has witnessed novel creations of the international criminal justice mechanisms and the application of universal jurisdiction to hold perpetrators of the most serious crimes to account.[72]

Soon after the end of the Cold War, the horrors in the former Yugoslavia and Rwanda and the stark failures of their national court systems freshly in mind; the United Nations, governments and NGOs worked to create international criminal tribunals, especially the International Criminal Court to try alleged perpetrators of serious crimes. Using complementary and domestic universal jurisdiction laws in domestic courts, Denmark, Belgium, Canada, America, Britain, Spain and some other states have tried several accused individuals far from the countries where the crimes were committed.[73]There is an obligation on states, which was brought about through developments in the law that took the form of collective and effective measures to prevent and eliminate threats to peace, which has resulted in the establishment of international jurisdictions whose mandate are to prevent atrocities and prosecute those accused of having committed serious crimes and atrocities under international law.[74]

Under the Geneva Conventions and customary international law, states have an obligation to respect and ensure respect for international humanitarian law.[75] It was held in the Nicaragua Case[76] that; "there is an obligation on the United States government, in terms of Article 1 of the Geneva Conventions, to "respect" the Conventions and even "to ensure respect" for them "in all circumstances," since

[72] Dicker, R., Keppler, E., "Beyond the Hague", Human Rights Watch, Jan. 2004, www.globalpolicy.org (18/03/'10)
[73] Ibid.
[74]Gutierrez's Article, op.cit, p.67.
[75] See Article 1 Common to the Geneva Conventions & the Corresponding Article 1 in Protocol 1; Pfanner's Article, op.cit, p.308.
[76] Military & Paramilitary Activities in & Against Nicaragua, Merits, Judgement, ICJ Reports 1986.

such an obligation does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression".[77] Hence, Common Article 1 to the Geneva Conventions is based on customary law and ensures that every state regardless of whether it has ratified a treaty or not, has obligations that must be assumed. It was further stated in the above case that, the United States is under an obligation not to encourage persons or groups engaged in the conflict in Nicaragua to act in violation of the provisions of Article 3 Common to the Four Geneva Conventions".[78]

4.3. INDIVIDUAL CRIMINAL RESPONSIBILITY

RadhikaCoomaraswamy told the ICC that "children cannot consent to their own exploitation, making the use of children in warfare particularly abusive. Children have an "underdeveloped notion of death" and the lack of the concept of death makes them fearless (and dangerous) in battle.[79] The use of child soldiers is a serious crime under the law.[80] The Geneva Convention for the Protection of the Victims of Armed Conflicts stipulate that state parties are obliged to search for those alleged to have committed crimes or ordered them to be committed, and to bring them before their own courts orhand them over for trial to another state provided that other state has made out a prima facie case against them.[81]

Several laws and the statutes of many international tribunals like the Rome Statute are based on the assumption of individual criminal responsibility for

[77] Ibid, p.114, para. 220; Gutierrez's Article, op.cit, p.93.
[78] Ibid
[79] UN News Centre, "Use of Child Soldiers Particularly Abusive: UN Expert Testifies", Testimony of the Special Rep. of the UN Sec.Gen. for Children & Armed Conflicts (RadhikaCoomaraswamy), The Hague in the Trial of Thomas LubangaDyilo (07/01/10)
[80] See Articles 8(XXVI) & (VII); 25; 27; 28; 29 & 33 of the Rome Statute.
[81] GC1, Article 49; GC11, Article 50; GC 111, Article 129; GC1V, Article 146; Gutierrez's Article op.cit, p.69.

criminal violations.[82]Criminal responsibility falls on natural persons who commit an act specifically defined as a crime by international law and, this responsibility can take different forms. Criminal responsibility for war crimes, in this case, the use of child soldiers, falls not only on the individuals who commit them, but also on those who ordered them to be committed, no matter what their official function. The ICTY and ICTR Statutes, and the Rome Statute expressly mention both forms of responsibility; they also reflect customary law and specify the extent of that responsibility, providing that those who plan or induce the commission of the crime and those who helped in any wayare also culpable.[83]

Responsibility lies not only with those who commit crimes but also with their accomplices, those who covered for them and those who ordered, proposed or induced the commission of the crime or the attempt to commit such crimes.[84] Individual criminal responsibility is incurred not only by acting, but also by intentionally or imprudently ignoring a rule that stipulates a clear obligation to act in a certain way, that is, by failure to act.[85] The Nuremberg Tribunal asserted that crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.[86]Individuals will be held accountable for acts which breach international law, in this case, the use of child soldiers. The Rome Statute{Art. 8 (xxvi & vii)}prohibits and categorizes the use of child soldiers as a war crime, while holding anyone who uses child soldiers liable (Art. 25). The Rome

[82] ICTR Statute, Article 6; ICTY Statute, Article 7; Article 25, Rome Statute; Gutierrez's Article, op.cit, p.69.
[83] Gutierrez's Article, op.cit, p.70; See TheDuskoTadic Case, Case No. IT- 94-1-T, Opinion & Judgment (7/5/97)
[84] Gutierrez's Article, op.cit, p.70; AutoFurundzija Case, Case No. IT-95-17/1-T, Judgment, 10/12/98; Prosecutor V. Jean-Paul Akayesu, ICTR -96-4-T, Judgement, 02/09/98.
[85] Gutierrez's Article, op.cit, p.70
[86]Graditzky, T., "Individual Criminal Responsibility for Violations of International Humanitarian Law Committed in Non-International Armed Conflicts", IRRC No.322, Geneva (March 1998) p.30

Statute holds that the statute shall apply irrespective of the official capacity of such individuals (Art. 27) whileArticle 28 establishes the responsibility of commanders and superiors and, holds them liable for such war crimes.[87]

If war crimes or crimes against humanity are committed, the provisions of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanityapply to representatives of the state authority and private individuals who, as principals or accomplices, participate in or directly incite others to the commission of any of those crimes, or who conspire to commit them, irrespective of the degree of completion, and to representatives of the state authority who tolerate their commission (Article 11).The Rome Statute further holds that the crimes within the jurisdiction of the court shall not be subject to any statute of limitations (Art. 29).

In Prosecutor V. Alex TambaBrima, BrimaBazzyKamara&SantigieBorbor Kanu,[88] the Appeals Chamber of the Special Court for Sierra Leone confirmed the conviction of the defendants for the war crime of recruiting children below the age of 15 into military groups, amongst other serious crimes. This is the first time that individuals have been convicted for the use of child soldiers. The court held that recruitment of child soldiers is a war crime under international law.The court also delivered guilty verdicts in the case of Prosecutor V. Issa Hassan Sesay, Morris Kallon& Augustine Gbao.[89] The defendants were accused of using child soldiers, amongst other atrocities. Sesay and Kallon were part of the country's ruling council, while Gbao was a rebel commander. The decision also included the

[87] Linda Chavez's Report, p.11
[88] Case No. SCSL – 2004 – 16 - A
[89] Case No. SCSL – 2004 – 15 – A.

first conviction in an international court for "attacking and killing of international peacekeepers, and the new sexual crime of forced marriage".

Furthermore, in Prosecutor V. MoininaFofana&Allieu Kondewa,[90] the court convicted two former leaders of the CDF militia of war crimes, including murder, pillage, mutilating civilians during the Sierra Leone armed conflict. AllieuKondewa was also convicted for conscripting child soldiers. The head of the militia, Sam Hinga Norman, had also been named in the indictment but died before their conviction. But the most famous or infamous cases involving the use of child soldiers are the on-going trials of Thomas LubangaDyilo and former President, Charles Taylor of Liberia.

Thomas LubangaDyilo,[91] is the first suspect to be arrested and tried by the ICC. He is charged with many war crimes including conscripting and enlisting child soldiers and, then using them to participate in hostilities in the Ituri Region of Congo. His trial is the first to deal exclusively with the use of child soldiers. The prosecution alleges that he was driven by a desire to maintain and expand his control over the lucrative gold-mining region. Theformer President of Liberia,Charles Taylor, is also facing war crimes charges at the Special Court for Sierra Leone, sitting at The Hague; accused of orchestrating a campaign of terror in Sierra Leone to gain control of that country's vast diamond resources, using methods including murder, sexual slavery and the recruitment of child soldiers.[92]

[90] Case No. SCSL – 2004 – 14 – A.
[91] Case No. ICC – 01/04-01/06.
[9294]Marlise Simons, "Long Sentences for Atrocities in Sierra Leone", New York Times, 08/04/09 (03/03/'10); "Use of Child Soldiers Particurlarly Abusive: UN Expert Testifies", UN News Centre, op.cit; "Democratic Republic of Congo", www.icc-cpi.int (02/02/'10); Marlise Simons, "Star Turns at Liberian's War Crimes Trial", New York Times, 17/01/10; Human Rights, "Liberia: Taylor Claims War Crimes Trial is Built on Lies", Financial Times, 17/07/09, (03/03/'10).

4.3.(i). SUPERIOR RESPONSIBILITY

This doctrine is used in this context to include the "Yamashita Standard"; the "Medina Standard" and "Command Responsibility". It prescribes the criminal liability of those persons who being in positions of "command or authority", have failed to either prevent or punish the crimes of their subordinates and/or instigated, encouraged, abetted, conspired, approved or ordered the commission of such crimes by their subordinates. This concept does not differentiate between military officers and civilians placed in positions of command or authority, since the duty to prevent and punish the offences of their subordinates in situations of armed conflicts is considered to be incumbent upon both. This duty is well recognized both in customary and treaty law as far back as the Leipzig Trials, following World War I by the German Supreme Court, in the trial of Emil Muller.[93]

"Command Responsibility" depicts where a military leader or someone acting as such is responsible for the conduct of those under his command or authority and, over whom he has effective control, given that he not only should but indeed, is obliged to know what they are doing and to adopt necessary and reasonable measures, within his power to prevent or suppress the commission of such unlawful acts. The "Yamashita Standard" is based upon the precedent set after World War II by the United States Military Tribunal in the South Pacific, in the case of Japanese General Tomoyuki Yamashita. He was prosecuted in a controversial trial, for atrocities committed by troops under his command in the Philippines. Yamashita was charged with 'unlawfully disregarding and failing to discharge his

[93]Bantekas, I., "The Interests of States Versus the Doctrine of Superior Responsibility", IRRC No.838, Geneva (June 2000) p.391 (hereinafter called Bantekas' Article).

duty as a commander to control the acts of members of his command by permitting them to commit war crimes".[94]

The "Medina Standard" is based upon the prosecution of United States Army Captain Ernest Medina in connection with the My Lai Massacre during the Vietnam War. It holds that a Commanding Officer being aware of human rights violations or war crimes will be held criminally liable when he does not take appropriate action (Medina was, however, acquitted of all charges).[95]The contemporary formulation of the doctrine of superior responsibility is found in a plethora of legal instruments, such as Article 28, Para 2, of the Rome Statute and, Article 86 of 1977 Protocol 1 Additional to the Geneva Convention.[96]The Rome Statute provides that the statute applies 'equally to all persons without any distinction based on official capacity', and no one is 'exempt from criminal responsibility' under it. Therefore, all individuals, including heads of states, government officials, military commanders, soldiers, militia members and civilians are subject to prosecution for the crimes proscribed by the statute.[97]

The doctrine is most contentious and difficult to determine in cases of responsibility by virtue of the failure to control the unlawful conduct of subordinates. The term 'command' or 'superior' responsibility is in current times often confined to this more controversial aspect of the responsibility of a commander or superior.[98] The doctrine of command or superior responsibility holds an individual responsible on the basis of a relationship between that individual (the

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[94] "Command Responsibility" , www.wikipedia (03/03/'10)
[95] Ibid.
[96]Bantekas' Article, op.cit, p.391
[97] Powell, C., Erasmus, A.,"General Principles of International Criminal Law", In: African Guide to International Criminal Justice, Max du Plessis (ed.), ISS Pretoria (2008) p.144 (hereinafter called Max du Plessis' African Guide to Justice); See Art. 27 of Rome Statute.
[98] Ibid, op.cit, p.145.

commander or superior) and his or her subordinates, or those who share a particular relationship of subordination with them, who had committed, are committing or are about to commit serious crimes. It must however be noted that the doctrine is limited in its application, as it applies only when the superior fails to exercise proper supervision and control over his or her subordinate(s).[99]

The tribunals established at the end of World War II did not hesitate to hold high-ranking military officers criminally liable under the doctrine of command responsibility as well as civilians, both distinguished industrialists and senior government members.[100]This shows that no individual is immune from prosecution for violations of the laws of war, whether perpetrated directly or through lack of adequate supervision. This has been reflected in the practice of both national and international tribunals and; the rejection of immunity has been upheld in the case of heads of states, both in and out of office.[101]The doctrine of superior responsibility has therefore been applied in numerous international criminal cases. For example, Charles Taylor is presently charged before the Special Court for Sierra Leone for his acts and omissions –with being individually responsible for these grave crimes 'while holding positions of superior responsibility and exercising command and control over subordinate members of the AFRC/RUF junta or alliance, and/or Liberian fighters'.[102]

In 2009, the first arrest warrant against a sitting head of state was issued by the ICC against the President of Sudan, Omar el-Bashir. He is wanted on charges of genocide and war crimes in relation to the on-going armed conflict in

[99] Ibid.
[100] See Bantekas' Article, op.cit, p.391
[101] Ibid
[102]Max du Plessis', African Guide to Justice,op.cit, p.148.

the Darfur region of Sudan, even though the actual atrocities were committed by other people. The doctrine which had previously been restricted to military commanders has now being expanded to include civilian superiors. The extension of the doctrine is in recognition of the important role civilian officials and political leaders often play in the commission of atrocities during armed conflicts.[103]

4.3.(ii). LIABILITY OF CHILD COMBATANTS

Children are affected by the proliferation of small arms and armed groups, landmines and unexploded ordnances. They are forcefully recruited as combatants, targeted during attacks against schools and hospitals, victims of aerial bombardments, or illegally detained. Girls and boys also face sexual violence, including rape, which is used as a weapon of war.[104]Children are forced to play active parts in armed conflicts, and those who survive are likely to be seriously scarred for life - physically and emotionally by their experiences.[105]Because of their age, their victimization and limited appreciation of their actions,are in a unique situation when the question of their responsibility arises for crimes committed during conflicts. The notion of accountability should be balanced with the special needs and problems of children in contemporary armed conflicts.[106] In international armed conflicts, children enrolled in the armed forces or taking part in a mass uprising of the population (levee en masse), have 'combatant status' and are ipso facto entitled to 'prisoners-of-wars' status if captured.[107]

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[103] Ibid, p.150

[104] Press Release, "Machel Study 10 Year Strategic Review", Office of the Special Rep. of the UN Sec.Gen. for Children & Armed Conflicts, New York, (03/03/'10).

[105]RadhikaCoomaraswamy's Testimony, op.cit

[106] Joseph Rikhof, "Child Soldiers: Should They Be Punished?", Sword & Scale, May 2009, CBA Nat. Military Law Section News Letter, Ottawa, p.1(hereinafter called Joseph Rikhof's Article) (03/03/'10).

[107]Dutil, M.T., "Captured Child Combatants", IRRC No.278, Geneva (Oct. '90) p.424 (hereinafter called Dutil's Article); Article 43(2) of Additional Protocol 1; Article 2 of the Regulations Respecting the Laws & Customs of War on Land, Annex to the Hague Convention of 18/10/1907; Article 4A. Para. 1 of GC III.

Although the participation of children in armed hostilities is prohibited, it was necessary to ensure that they are protected if captured. There is no age limit for entitlement to prisoners-of-wars status; age may be a factor justifying privileged treatment and special protection to children.[108]This special status does not exclude penal proceedings in respect of serious breaches of international humanitarian law committed by children, in particular war crimes or offences against the laws of the detaining power. In such circumstances, their responsibility should always be evaluated according to their age, and as a general rule, educational measures, rather than penalties, should be decided on. Although penal sanctions may be applied against them, no person can be condemned to death if at the time of committing the offence that person was under 18 years; and even if so sentenced, the sentence is not to be carried out.[109]

Children who participate in hostilities but are not combatants within the meaning of international humanitarian law remain subject to the domestic legislation of the countries of which they are nationals. If they are captured by the enemy power and come within the category of persons protected by the 4th Geneva Convention, such children are 'civilian internees'. Even if children who have taken part in hostilities are not entitled to any special status, they must in all cases, under Article 45, Para 3, of Protocol 1 to the Geneva Conventions, be granted the general protection afforded by Article 75 thereof.[110]It must be noted that in non-international armed conflicts, the status of combatant does not exist, and consequently that of prisoners-of-war, which derives from it, does not exist either. Equally, there are no categories of protected civilians or of civilian

[108]Dutil's Article, op.cit, p.424.
[109] Ibid; Article 68, para. 4 of the GC IV & Article 77.
[110] See Dutil's Article, op.cit.

internees. In this situation, child combatants, regardless of whether they are members of the armed forces or not, may be punished under the internal legislation of the country concerned for the simple fact of having taken part in the hostilities.However, the assessment of their level of responsibility must take into account their limited capacity of discernment, which is inherent in their youth. Consequently, educational measures rather than penal sanctions should be imposed on indicted children for atrocities committed by them.

A child soldier captured during a non-international armed conflict is still protected by Article 3 Common to all Four Geneva Conventions which is applicable to all persons who are not taking part in hostilities or have ceased to be so involved.[111] The Convention of the Rights of the Child, states in Article 40.2(a) that "No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at that time they were committed". This principle was further developed by the "Paris Commitments" and the "Paris Principles",[112] the former of which states that; "to ensure that children under 18 years of age or who have been unlawfully recruited or used by armed forced or groups and are accused of crimes against international law are considered primarily as victims of violations against international law and not only as alleged perpetrators. They should be treated in accordance with international standards for juvenile justice, such as in a framework of restorative justice and social rehabilitation".[113]

Some post World War II jurisprudence were found where children were tried and convicted for war crimes, whilst at the same time taking into account the

[111] Ibid.
[112] Joseph Rikhof's Article, op.cit, p.2
[113] Ibid, p.2

special circumstances of their young age. The Bommer Case decided in France in 1947, held that two girls aged16 and 18 should receive reduced sentences because of extenuating circumstances, while a third girl under the age of 16 should be 'freed from responsibility on account of her age'. All three were accused of the war crime of theft and receiving stolen goods.[114]The International Criminal Court has no jurisdiction to try any person under the age of 18.[115] Neither the International Criminal Tribunals for the former Yugoslavia and Rwanda have a specific prohibition to deal with young offenders, but on the other hand neither has special provisions related to the trials of juveniles with the exception of the sentencing provisions,[116] which require the tribunals to take the individual circumstances of the accused persons into account.[117]

The Statute of the Special Court for Sierra Leone has some provisions dealing with children, as a result of that country's problems with child soldiers. The age of criminal responsibility was an issue, but a compromise was reached whereby the court has jurisdiction over juvenile offenders who were between 15 and 18 years of age at the time of the commission of the offence (the court's minimum age was 15).[118] While at the same time measures were put in place to ensure that the trial process was in accordance with internationally accepted standards. The court's prosecutor decided early on not to prosecute minors.[119]
We are not aware of any criminal proceedings in international institutions; and only in a few domestic jurisdictions against former child soldiers. In late 2002, the Ugandan authorities brought treason charges against two former members of the

[114] Ibid, p.1; Law Reports of War Criminals, Vol. X1, p.62.
[115]Article 26.
[116] Joseph Rikhof's Article, op.cit, p.3; Article 24(2) of the ICTY Statute & Article 23(2) of the ICTR Statute.
[117]Joseph Rikhof's Article, op.cit, p.3.
[118] Ibid; Article 7(1); See www.sc-sl.org
[119] Ibid; Articles 7(2); 13(1) & 15(5).

'Lord's Resistance Army' who were 14 and 16 years old. As a result of international pressure on the government, the charges were withdrawn and the boys were allowed to apply for amnesties in 2003.[120]In January 2000, DR Congo executed a 14 year old child soldier,[121] while in the same year eight other children were sentenced to death and a number of others pardoned.[122]

In Rwanda, in both the criminal and quasi-judicial "gacaca" systems, children have been tried and sentenced for involvement in genocide.[123]In the Saridag Case, a court in Canada decided in the context of complicity for crimes against humanity, that a person, who was a member of a terrorist organization in Turkey while between 11 and 13 years old, could be denied asylum as long as it could be established that he "had knowledge of some of the acts of violence".[124]A number of decisions indicated that young persons under the age of 18 who had been forcibly recruited into the armed forces, and were involved indirectly in the commission of serious crimes could be denied asylum status.[125]

In the Moreno Case, a minor was forcibly recruited into the Salvadoran army, took part in some serious crimes but was granted asylum by the court in Canada, as a result of a number of factors, including but not excluding age.[126] The Poshteh Case,[127] involved a person involved in the distribution of propaganda materials on behalf of the Mujahedin-e-khalq (MEK) in Iraq for some time, as a result of which he was given a deportation order under Canadian law, for being a

[120] Matthew Happold, Child Soldiers in International Law, London (2005) p.141
[121]Ibid, p.142.
[122] Joseph Rikhof's Article, op.cit, p.4; Fallah, K., "Perpetrators & Victims: Prosecuting Children for the Commission of International Crimes", AJICL Vol.14, No.1, 1998/99.
[123] Ibid; Gacaca is a Kinyarwanda (Rwandan) term for the grass on which traditional village assemblies are held.
[124]Ibid; Saridag (1994) 85 F.T.R. 307.
[125] Ibid; See the Gracias-Luna, IMM-1139-92, 25/05/95; Penate, (1994) 2 F.C.79
[126](1992) 21 IMM.L.R.(2nd), 225.
[127] F.C.A. (2005) 3 F.C. 489; Also see Joseph Rikhof's Article, op.cit.,&Fallah's Article, op.cit.

member of a terrorist organization; he was between 16 and 18 years old as at the time of his alleged activities in Iraq.

Chapter Five

5.0. CONCLUSION

There has been a catalogue of atrocities and the loss of millions of innocent lives in armed conflicts at the hands of individuals and oppressive regimes, in flagrant violation of international humanitarian and customary laws. The non-fulfillment of obligations accepted by the majority of the international community to prevent, prosecute and punish serious crimes and grave breaches of international humanitarian law, has created a safe environment for the perpetrators of such heinous acts.[1] The atrocities and forms of violence which are now too frequently encountered in armed conflicts has given rise to an increase in the number of civilian victims, particularly children, who on account of their special vulnerability, are the most affected.

This is compounded by such children having been coerced and made active participants during hostilities.[2] The active participants in armed conflicts used to be primarily the regular troops, but since the emergence of new types of conflicts involving regular troops against guerrillas – we have frequently been seeing children forced into combat theatres, brandishing weapons and ready to use them indiscriminately. Such immature children, who are forced to lose their childhood and even their lives, are a deadly threat to both the society and themselves.[3]

[1] Griffin, M., "Ending Impunity of Perpetrators of Human Rights Atrocities: A Major Challenge for International Law in the 21st Century", (hereinafter called Griffin's Article) IRRC No.838, Geneva (June 2000) p.369.
[2] Dutli, M.T., "Captured Child Combatants", IRRC No.278, Geneva (Oct.1990) p.421
[3] Ibid.

5.1. OBSERVATIONS AND RECOMMENDATIONS

It is evident that despite the extensive protections and prohibitions against the use of child soldiers, they continue to be forced into taking part in hostilities. The commanders of these child soldiers easily force them into committing a variety of horrendous atrocities - for their own selfish reasons. Child soldiers do commit atrocities, but the reality is that, they are pawns in a deadly game played by their commanders. The law is however catching-up with the perpetrators of these crimes, who have no regard for such young lives nor the effects of their actions on these children and the larger society – this is a serious illegality deserving of punishment.

International humanitarian case law shows that perpetrators of war crimes no matter how highly placed cannot escape punishment. We are not unmindful that this viewpoint might be contested in some quarters, because it might appear that in actual practice, international justice (for example, the ICC) is been directed towardspeople from some 'countries' rather than those of the western world. Thus, despite lots of claims and protests from international non-governmental organizations, UN Resolutions and international condemnations; many westerners' especially British, American, Russian and Israeli citizens and leaders who are accused of serious crimes are yet to answer for such charges.

This is buttressed by allegations made againstpeople like the former American president, George Bush and former British prime minister, Tony Blair for their parts in atrocities committed in conflict zones such as, Iraq and Afghanistan. A strong case is also made against the several alleged Israeli atrocities committed against the Palestinians. It is strongly argued that with so much evidence and/or allegations against such people, no action has ever been taken against them. We

are aware that they are not likely to face international prosecution for such misdeeds, and the best that can realistically be expected from such countries are belated 'apologies' or 'explanations' or 'denials' for such alleged atrocities. While accepting the truth of some of such claims, we believe that the fight against impunity to atrocities must start from somewhere. Moreover, even if some people from some 3rd World countries appear to be the main targets of international justice, the allegations made against them are generally believed to be true. Thus, despite existing laws and prohibitions, the international community has lacked the commitment and political will to bring perpetrators of atrocities to justice. This has fostered an aura of impunity and encouraged more atrocities - impunity is not a natural phenomenon but rather the failure to enforce the law.[4]

It is imperative and safer for states and militia groups, to acknowledge and enforce their obligations and responsibilities to children and the international community. Individual criminal responsibility does not depend on a person's status - civilians, combatants, militia leaders and government officials are all equally capable of committing and being prosecuted for war crimes and grave breaches of the international humanitarian law, either in international or internal armed conflicts. Even states, militia groups and non-state actors can also be accountable for violations of human rights and war crimes.[5]

The use of children in armed conflictsis morally callous and a war crime which has grave multiplier effects on future generations (and it is noteworthy, that we didn't come across any evidence of the use of child soldiers in Nigeria,

[4]Griffin's Article, op.cit.

[5] See Bosnia Genocide Case (Supra); Claphan, A., Human Rights Obligations of Non-State Actors, Oxford University Press, Oxford, 2006, p.299-310; Legal Consequence of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004; The Ongoing ICC Trial of Thomas Lubanga (Supra); The Case of Cyprus V. Turkey (Supra); & see Prosecutor V. Morris Kallon&Brima Buzzy Kamara (Supra).

especially in the volatile Niger Delta area). Because of the grave impact of such war crimes on children and the society, the impunity of the perpetrators must not be allowed to continue. Increased international awareness about the illegal involvement of children in armed conflicts has ensured that the concern for child soldiers is on the international agenda.[6]

There can be no peace without justice[7]and as such, perpetrators of war crimes should be punished, regardless of the position they occupy, in order to satisfy the victims and prevent the commission of further crimes. Responsibility for prosecuting the perpetrators falls first and foremost to the states, but if they do not wish or are not in a position to do so, then other willing states or international institutions shall step in; so that those engaging in such prohibited conduct can account for it through 'penal' or 'non-penal' means, no matter the context in which the criminal conduct took place.[8]

Many countries like Nigeria with a history of traditional justice have not encouraged the use of such alternative modes of justice as a complement to their western-type justice system. Rwanda with its 'gacaca' justice system has however, started a trend towards the use of such traditional modes of justice, and hopefully other countries will follow along the same path. The sad reality in many 3rd World Countries is a poor western-type judicial system, compounded by insufficient and unskilled personnel, which invariably leads to delay in justice or no justice at all. As an outcome of our research work, we recommend the following:

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[6] "Child Soldiers: One of the Worst Abuses of ChildLabour", www.annesty.org (03/03/'10).
[7]Bhoke, C., "The Trial of Charles Taylor", ISS Paper 127, Pretoria, (Aug. 2006) p.14
[8] Gutierrez Posse, H.D.T., "The Relationship Between International Humanitarian Law & the International Criminal Tribunals", IRRC Vol.88, No.861, Geneva (Mar. 2006) p.86; **Non-Penal Modes of Justice** refers to complementary non-judicial mechanisms that may, in addition to penal modes, be used to address human rights atrocities and, these approaches include; Truth Commissions; Lustration; Reparation; The 'Gacaca' System of Rwanda; Public Apology; Civil Proceedings; UN Panel of Experts; Protecting Power; Immigration Measures; Amnesties & Immunities.

1. Explicit prohibition of child soldiering and non-recruitment of under 18 year olds into armed forces or armed groups, since non-recruitment is the most effective means of preventing this menace.[9]
2. Increase respect and adherence to humanitarian law by enhancing and increasing combatants' instruction in humanitarian law and the fighting forces should have legal advisers available to assist and advise them.
3. Establishment of a worldwide system of compensation and reparation for victims of past human rights abuses and; enactment, implementation, and domestication of international laws and treaties like the Rome Statute.
4. The defence of duress should be available to child soldiers and as such, there should be a determination of the requisite mensrea for committing war crimes.[10]
5. There should be increased banking and financial co-ordination and cooperation between countries, in order to monitor and control the financial resources of perpetrators of war crimes.
6. Due to its flexibility and easy accessibility there should be increased use of alternative and complementary modes of justice in tackling pre-conflict, conflict and post-conflict issues, especially for people in the rural areas; and prosecution of perpetrators on the basis of universal jurisdiction should be pursued.

[9] See Joseph Rikhof, "Child soldiers:Should they be punished? Sword & Scale, May 2009, CBA National Military Law Section News Letter, Ottawa, p.8, (hereinafter called Joseph Rikhof's Article); In **Sackie V. Ashcroft,** 270 F. Supp. 2nd 596 (18/06/03), a former Liberian child soldier was held entitled to remain in America under its immigration law because as a child soldier, he had been subjected to threats of torture, death, & upon his return to Liberia, a similar fate awaits him there.
[10] Joseph Rikhof's Article, op.cit, p.9.

5.2. CONCLUSION

The global rules and system that enforces human rights at the international level has become significant tools to prevent conflicts, prevent atrocities, promote peace and justice. International justice is essential to deter those contemplating human rights crimes, to enable victims and their families to obtain justice and redress, to punish perpetrators, to rebuild nations ravaged by armed conflicts and to support post-conflict reconciliations.[11]States can only address the effects of war crimes and atrocities like the illegal use of child soldiers by confronting them, and reflecting on the fact that their communities find such crimes totally unacceptable.[12]

It is the duty of states and the international community at large to put a stop to atrocities and all inhuman practices. And this, they can do by putting mechanisms in place and, enforcing such mechanisms, in order to ensure that the violators of international law are held responsible. The victims who suffer these grave crimes and their families deserve nothing less.The illegal use of children as active participants in armed conflicts is a grave form of child abuse and exploitation, and a war crime, which has far-reaching effects on both the children and the society. Grave breaches of international law constitute war crimes that incur the individual criminal responsibility of those who commit them - by their actions or inactions.

The impunity with regard to the illegal use of child soldiers is the result of an apparent lack of political will to combat the violators of humanitarian law, and is not the result of an international legal vacuum with regard to these illegalities.

[11] Amnesty USA, Fact Sheets, www.amnestyusa.org (03/03/'10)
[12]Engelbrecht, G., "The ICC's Role in Africa," Africa Security Review, Vol.12, No.3, Pretoria (2003) p.61.

Responsibility for tackling this menace falls first and foremost to states; but this responsibility does not rest on the individual criminal perpetrators and the commanders of these child soldiers, but rather on the whole society at large. There can be no compromise over the fact that criminal sanctions must be imposed in the case of serious violations, to show that the prohibitions are absolute and that no departure from them will be tolerated. There must be the political will, determination and co-operation of both governments and citizens, in order to bring criminal perpetrators of grave atrocities to justice.

APPENDIX

Summary Table of International Humanitarian Laws Specifically Applicable to Children

It should be noted that the 3rd and 4th Geneva Conventions and Additional Protocol 1 apply only to international armed conflicts; while Additional Protocol II applies to non-international armed conflicts. The Convention on Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity; European Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes; Convention on the Rights of the Child; African Charter on the Rights and Welfare of the Child; the Statute of the International Criminal Court; the Convention on the Worst Forms of Child Labour and the Optional Protocol on the Involvement of Children in Armed Conflicts; all apply to both international and non-international armed conflicts. The Statutes of the International Tribunals for the former Yugoslavia and Rwanda apply to the armed conflicts which took place in those countries.

S/NO	ARTICLE	CONVENTION / PROTOCOL / STATUTE / CHARTER
a.		***3rd Geneva Convention on Prisoners Of Wars, 1949***
	16	**Equal Treatment:** Prisoners of war must be treated alike by the detaining power, subject to any privileged treatment which may be accorded to them by reason of their age, amongst other criteria.
	49	**Labour:** The detaining power may utilize the labour of prisoners of war who are physically fit, taking into account their age, amongst other criteria.
b.		***4th Geneva Convention on Protection of Civilians, 1949***
	24	**Special Measures:** The parties to the conflict must take the necessary measures to ensure that children under 15, who are orphaned or are separated from their families as a result of war, are not left to their own resources, & that their maintenance, the exercise of their religion & their education are facilitated in all circumstances. Their education must, as far as possible, be entrusted

		to persons of a similar cultural tradition. The parties to the conflict must facilitate the reception of such children in a neutral country for the duration of the conflict. They must endeavour to arrange for all children under 12 to be identified by the wearing of identity dics, or by some other means.
	27	**General Provisions:** Protected persons are entitled in all circumstances to respect for their persons, their honour, their family rights, their religious convictions & practices, & their customs.
	50	**Children:** The occupying power must facilitate the proper working of all institutions devoted to the care & education of children. It must take all necessary steps to facilitate the identification of children & the registration of their parentage & for their maintenance & education, if possible by persons of their own nationality, language and religion. The occupying power may not, under any circumstances, change their personal status or enroll them on training courses or in organizations under its authority. It must not hinder the application of any preferential measures which may have been adopted prior to the occupation in favour of children under 15 years, expectant mothers, & mothers of children under 7 years (in regard to food, medical care & protection against the effects of war).
	51	**Labour:** The occupying power may compel protected persons to work if they are over 18 years of age, under specific conditions.
	68	**Death Penalty:** The occupying power may only apply the death penalty in specific cases. At all events, however, the death penalty may not be pronounced on a protected person who was under 18 years of age at the time of the offence.
	76	**Treatment of Detainees:** In the treatment of protected persons who are accused or have been convicted of offences proper, regard must be paid to the special treatment due to minors.
	82	**Grouping of Detainees:** Members of the same family, & in particular parents & children, must be lodged together in the same place of internment, except when separation is necessitated for reasons of employment or health or for the application of disciplinary sanctions, &, wherever possible, must be given separate accommodation from other internees. They must be given the facilities needed for leading a proper family life. Children who are left at liberty without parental care may be interned with their parents if the later so request.

	94	**Education & Sports:** The education of children & young people must be ensured; they must be allowed to attend schools either within the place of internment or outside. Special playgrounds must be reserved for children & young people so that they can engage in physical exercise, sports and outdoors games.
	119	**Disciplinary Sanctions:** The disciplinary punishments applicable to internees must take account of their age, amongst other criteria.
	132	**Repatriation:** The parties to the conflict must endeavour, during the course of hostilities, to conclude agreements for the release, repatriation, return to places of residence or the hospitalization in a neutral country of certain classes of internees, in particular children, pregnant women & mothers with infants & young children.
c.		***Convention on Non-Applicability of Statutory Limitations, 1968***
	1 **2**	**No Statutory Limitation:** No statutory limitation shall apply inter alia to war crimes, grave breaches of the Geneva Conventions, and crimes against humanity whether committed in time of war or in time of peace & the crime of genocide, even if such acts do not constitute a violation of the domestic law of the country in which they were committed. The provisions of this Convention shall inter alia extend to representatives of the state authority & private individuals who, as principals or accomplices, commit any of the crimes in Article 1.
d.		***European Convention on the Non-Applicability of Statutory Limitations to Crimes Against Humanity & War Crimes, 1974***
	1	**No Statutory Limitations:** No stationary limitation shall inter alia, apply to the prosecution of crimes against humanity, genocide, violations of the Geneva Conventions, & the rules & customs of war & international law, or to the enforcement of the sentences imposed for such crimes.
e.		***Additional Protocol 1 to the Geneva Conventions, 1977***
	8	**Terminology:** The terms "wounded" & "sick" also cover expected mothers, maternity cases & new-born babies. Articles 10 – 20 of Protocol 1 & Geneva Conventions grant special protection to the wounded & the sick. Article 10 of the Protocol extends this protection to civilians.
	52	**Civilian Objects:** Civilian objects must not be the object of attack or of reprisals. Civilian objects are all objects which are not military objectives, that is to say, objects which do not make an effective contribution to military action. In the event of doubt, schools are presumed not to be military objectives
	70	**Relief Actions:** In the distribution of relief consignments, priority must be given to children, expectant mothers, maternity cases & nursing

		mothers, amongst other persons.
	74	**Reunion of Families:** The high contracting parties & the parties to the conflict must facilitate in every possible way the reunification of families dispersed as a result of armed conflicts. They must encourage the work of the humanitarian organizations engaged in this task.
	77	**Protection of Children:** Children must be the object of special respect & must be protected against any form of indecent assault. The parties to the conflict must provide them with the care & aid they require, whether because of their age or for any other reason. The parties to the conflict must take all feasible measures in order that children who have not attained the age of 15 years do not take a direct part in hostilities &, in particular, they must refrain from recruiting them into their armed forces. In recruiting among those persons who have attained the age of 15 years but who have not attained the age of 18 years, the parties to the conflict must endeavour to give priority to those who are oldest. If, in exceptional cases, children who have not attained the age of 15 years nevertheless take direct part in hostilities & fall into the power of an adverse party, they continue to benefit from the special protection accorded by international humanitarian law, whether or not they are prisoners of war. If arrested, detained or interned for reasons related to the armed conflict, children must be held in quarters separate from the quarters of adults, except where families are accommodated as family units. The death penalty for an offence related to the armed conflict must not be executed on persons who had not attained the age of 18 years at the time the offence was committed.
	78	**Evacuation of Children:** No party to the conflict may arrange for the evacuation of children, other than its own nationals, to a foreign country. There is one exception, however: in case where the evacuation has become necessary for compelling reasons of health or safety of the children. Where the parents or legal guardian can be found, their written consent to such evacuation is required, & the children's education must be provided. With a view to facilitating the return to their families & country of children thus evacuated, the authorities concerned must establish for each child a card with photographs, which they must send to the Central Tracing Agency of the ICRC.
f.		***Additional Protocol II to the Geneva Conventions,1977***

	4	**Fundamental Guarantees:** Children must be provided with the care & aid they require. In particular: (a) they must receive an education, including religious and moral education; (b) all appropriate steps must be taken to facilitate the reunification of families temporarily separated; (c) children who have not attained the age of 15 years must neither be recruited into the armed forces or groups nor allowed to take part in hostilities; (d) the special protection provided by international humanitarian law to children who have not attained the age of 15 years remains applicable to them if they take a direct part in hostilities; (e) measures must be taken, if necessary and whenever possible with the consent of their parents or persons who are responsible for their care, to remove children temporally from the area in which hostilities are taking place to a safer area within the country.
	6	**Penal Prosecutions:** Persons prosecuted for a criminal offence related to the armed conflict enjoy minimum protection. In particular, the death penalty must not be pronounced on persons who were under the age of 18 years at the time of the offence, and must not be carried out on pregnant women or mothers of young children.
g.		***Convention on the Rights of the Child, 1989***
	38	**Armed Conflicts:** The state parties undertake to respect & to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child. Article 1 of the Convention defines a child as every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier. The state parties must refrain from recruiting into their armed forces any person who has not attained the age of 15 years. In recruiting among those persons who have attained the age of 15 years but who have not attained the age of 18 years, states parties must endeavour to give priority to those who are oldest. In accordance with their obligations under humanitarian law to protect the civilian population in armed conflicts, state parties must take all feasible measures to ensure protection & care of children who are affected by an armed conflict.
h.		***African Charter on the Rights & Welfare of the Child, 1990***
	22	**Armed Conflicts:** State parties must undertake to respect & ensure respect for rules of international humanitarian law applicable in armed conflicts which affect the child. State parties must take all necessary measures to ensure that no child takes a direct part in hostilities. They must retrain, in particular, from

		recruiting any child. Article 2 of the Charter defines a child as every human being below the age of 18 years. In accordance with their obligations under international humanitarian law, the state parties must protect the civilian population in armed conflicts & must take all feasible measures to ensure the protection & care of children who are affected by armed conflicts. Such rules also apply to children in situations of internal armed conflicts, tension and strife.
i.		***Statute of the International Criminal Tribunal for the former Yugoslavia, 1993***
	4	**Genocide:** Genocide means, inter alia, forcibly transferring children of a national, ethnic, & racial or religious group to another group with intent to destroy, in whole or in part, that group as such.
j.		***Statute of the International Criminal Tribunal for Rwanda, 1994***
	2	**Genocide:** Genocide means, inter alia, forcibly transferring children of a national, ethnic, racial or religious group to another group with intent to destroy, in whole or in part, that group as such.
k.		***Rome Statute of the International Criminal Court, 1998***
	6	**Genocide:** Genocide means, inter alia, forcibly transferring children of a national, ethnic, racial or religious group to another group with intent to destroy, in whole or in part, that group as such.
	8	**War Crimes:** A war crime is defined to include, inter alia, conscripting or enlisting children under the age of 15 years into the national armed forces (or into armed groups) or using them to participate actively in hostilities, in either international or non-international armed conflicts.
l.		***Convention on the Worst Forms of Child Labour, 1999***
	1 & 3	**Compulsory Recruitment:** The state parties must take immediate & effective measures to secure the prohibition & elimination of the worst forms of child labour as a matter of urgency, including the forced or compulsory recruitment of children for use in armed conflict.
m.		***Optional Protocol on Involvement of Children in Armed Conflicts, 2000***
	1	**Direct Participation in Hostilities:** The state parties must take all feasible measures to ensure that persons who have not attained the age of 18 years do not take a direct part in hostilities.
	2	**Compulsory Recruitment:** The state parties must ensure that persons who have not attained the age of 18 years are not compulsorily recruited into their armed forces.
	3	**Voluntary Recruitment:** The state parties must raise the minimum age for voluntary recruitment into their armed forces in relation to the age laid

		down in the Convention on the Rights of the Child (15 years), recognizing in particular that persons under 18 years of age are entitled to special protection. Upon ratification of or accession to the Protocol they must deposit a binding declaration stating the minimum age at which they will allow voluntary recruitment. If that age is below 18 years, they must maintain certain safeguards: that such recruitment is genuinely voluntary, that it is carried out with the consent of the parents or legal guardians, that the persons recruited are fully, informed & that they provide reliable proof of their age. This obligation does not apply to military academies.
	4	**Armed Groups:** Armed groups that are distinct from the armed forces of a state should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years. The state parties must take all feasible measure to prevent such practices, including the adoption of legal measures necessary to prohibit & criminalize them.
	6	**Demobilization & Recovery:** State parties must take all feasible measures to ensure that children recruited or used in hostilities contrary to the present Protocol are demobilized & must, when necessary, accord to such persons all appropriate assistance for their physical & psychological recovery & their social reintegration.

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