In Search of Transitional Justice

Rethinking the Immunity of the Child Soldiers

By Emmanuel Brennan

"At the age of ten, Marula was kidnapped by RENAMO insurgents during an attack on his village in southern Mozambique... [He and his family] were caught attempting to escape. As punishment, and for his own life to be spared, Marula was ordered to kill his father. And so he did. Following this first killing, Marula grew into a fierce RENAMO combatant and was active for more than seven years. He does not remember how many people he tortured, how many he killed, how many villages he burnt and how many food convoys and shops he looted."[*]

The legal culpability of child soldiers is a morally charged dilemma which, unfortunately, is still relatively undeveloped under the international legal regime. As it stands, the only indictable offence is that of recruiting child soldiers;[1] child perpetrators themselves are divested of legal responsibility, irrespective of the crimes and atrocities they may have committed. In the wake of conflicts where child soldiery has been prevalent, this approach has proven to be antithetical to the local expectations of accountability of former child soldiers for their crimes and accordingly to the prospects of their own reintegration – key tenants of transitional justice. Undoubtedly, the international legal approach requires reappraisal: although the recruitment of child soldiers should continue to be prosecuted in international law courts, given its potential as a deterrent for future perpetrators, the current immunity accorded to children by the international criminal law must desist. To persist with the legal status quo would be to uphold the discourse of childhood innocence which is manifestly inadequate to deal with the realities of children's involvement in conflicts, and which obstructs the prospect of transitional justice in countries ravaged by war.

The villainy of recruiters

There is little doubt that prosecution of the recruiters of child soldiers under Additional Protocols I and II to the Geneva Conventions[2] is a positive development in international criminal law. Despite intellectual and cross-cultural disagreements as to the definition of a 'child' for the purposes of the crime itself,[3] the generally accepted view is that the use of child soldiers is a pernicious humanitarian trend, an "affront to decency and moral codes".[4]

Ethically, there is an imperative to stigmatise the phenomenon by prosecuting its leading perpetrators; however, some criticism may be leveled at the effectiveness of the deterrence provided by such large-scale criminal prosecutions of a handful of individuals. It may be argued that such trials serve as only remote threats, disconnected from the realities on the ground, and a 'cost-benefit' analysis by hypothetical future perpetrators would logically discard international prosecution as a negligible factor, especially given the exigencies of war which drastically shift standards of reasonableness.[5] However, these concerns are outweighed by a more proactive need to completely mobilize the international law principles in order to ensure that these unanimously accepted laws have a practical relevance and deterrent value. International criminal trials are one of the most public and globally relevant expressions

of the international law and therefore the prosecution of enlisters ought to be pursued as a mechanism for the eventual eradication of child soldiery.

In spite of such developments, the current focus of the law manifestly ignores the fact that child soldiers themselves commit war crimes and atrocities. In the absence of legal accountability measures for their actions, the needs of the victims of these crimes becomes largely neglected. Consequently, the prospect of transitional justice in post-conflict states is seriously impeded. To address this moral injustice, the legal approach to child soldiers must be re-conceptualized by departing from notions of abdicated responsibility for their crimes[6] and of the sole and misdirected emphasis on their victimhood.[7]

Childhood immunity as counterproductive to transitional justice - Sierra Leone

The approach of David Crane, Chief Prosecutor for the Special Court for Sierra Leone (SCSL), best represents the practical application of the international law to child soldiers. The Court's jurisdiction over children is statutorily limited to those aged 15 to 17;[8] but in 2003 this jurisdiction was rendered nugatory when Crane announced that his office would not prosecute individuals under the age of 18.[9] In the context of the war in Sierra Leone, this was an enormous statement. In a country where the median age is 17.5,[10] the appalling conflict involved some 48 000 child soldiers,[11] and unfortunately there is ample evidence of horrendous humanitarian crimes committed by some of these children.[12] This is somewhat at odds with other international law regimes: there is no such barrier to lawfully indict minors, either under the Convention on the Rights of the Child or in the Rome Statute for the International Criminal Court. Yet given the exceptional scale of child soldiery in the case of Sierra Leone, the Special Court's unequivocal policy on this class of offenders may be seen as creating a trend in international law.

This legal stance embodies a fundamental misunderstanding by the international legal community of the needs of communities trying to recover from conflicts such as the war in Sierra Leone. While the immunity granted to children at the SCSL aims to promote the rehabilitation of traumatised children, their unqualified legal innocence obstructs transitional justice in post-conflict Sierra Leone, and will potentially do so in any conflict involving child soldiers. A key tenant of transitional justice is the reintegration of ex-combatants to their communities, which can only be achieved by the reconciliation between perpetrators of violence and their victims.[13] In Sierra Leone specifically, the majority of victims of war crimes repeatedly express an overriding need to see the major perpetrators of their suffering held to account by way of substantial and public trials. Public confrontation with crimes will inevitably facilitate reconciliation and ex-combatant reintegration in local communities.[14] Yet the current international law concerning children is anathema to these community needs. By refusing to put liable children on trial, the SCSL sets an intransigent precedent which may serve to foster community resentment at the lack of repercussions for the sometimes heinous acts committed by child soldiers.

Photo: Bharata Natryan

The only other medium offered by the international community to account for the actions of child soldiers was the Truth and Reconciliation Commission (TRC) set up for Sierra Leone in 2001 by the United Nations (UN). Sadly, the TRC proved to be inadequate in addressing the people's expectations of justice being served. Aside from the historical reluctance of perpetrators to participate at such institutions,[15] the Commission's statute heavily protects children's identity (Article 19) and severely limits their participation in hearings, proscribing any cross-examination and only allowing the child's agent to conduct minimal interviews (Articles 5-8). [16] The TRC thus provided little or no prospect of accountability for child soldiers as by the time of its expiration in 2003, it had "not directly touched the lives of the vast majority of child soldiers". [17]

Child soldier victimhood: a simplistic discourse

In light of what has been said, it is apt to remind the reader that the circumstances under which children come to be enlisted are highly pluralized: the only commonality is the tremendous and often life-threatening socioeconomic disadvantages endured prior to enlistment, termed 'conditions of possibility' by Augustine Park.[18] These are frequently compounded by severe coercion used by recruiters, notably in Uganda with the Lord Resistance Army's habit of kidnapping their future henchmen while still young,[19] or the El Salvadorian government's "join us or die" ultimatum to children;[20] and as Faulkner puts it, enlisted child soldiers are subsequently conditioned to be "conscienceless". [21] Whatever the severity of coercion and socioeconomic exigencies, child soldiers have a uniquely duplicitous and tragic experience of war, both as victim and perpetrator. A possible conclusion is that drawn by Honwana,[22] perhaps echoing the SCSL's approach to child perpetrators, who contends that there is little value in legalistic inquiries into levels of guilt of individual child soldiers given the process of *"identity reconfiguration"* that they undergo.[23]

By deeming child soldiers to be solely victims, as the SCSL and other courts have effectively done, victims of their crimes are essentially told that their suffering is supervened by the victimhood of their very assailants, since they are made virtually unaccountable to the law.[24] Furthermore, theorist Mark Drumbl claims that strict immunity at international law permeates through to national and domestic law in what he calls an "exclusion cascade" of childhood accountability.[25] This is compounded by the reality that Western legal conceptions of child soldiery are more likely to be adopted in post-conflict Sierra Leone because cooperation with Western legal regimes is often tied to Western funding of resource building.[26]

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Given this high level of influence, a more appropriate and responsible approach by the international law to sensitive cases of child soldiery would be to treat them with care and vigilance rather than rejecting the idea of child soldier prosecution. This would prevent complete unaccountability from infecting local justice mechanisms. Furthermore, potential community resentment towards former child soldiers would be limited by a reformed approach in favor of limited prosecutions where appropriate, as major perpetrators would no longer be seen as unaccountable for the suffering and damage they may have contributed to.

Concluding thoughts

The arguments advanced do not support full-scale trials for every child soldier directly involved in warfare. As Drumbl is quick to point out, the vast majority of child soldiers do not commit extraordinary war crimes, and most do everything in their power to avoid committing any crimes at all. Nor does it suggest a break from the principle that the law should function with the best interest of the child in mind, regardless of their crime.[27] Child soldiers become a particularly vulnerable and often alienated group in post-conflict contexts,[28] and unprecedented punishment will never be a reasonable approach. The implications of a blanket immunity on the prospects of achieving meaningful transitional justice, however, is deeply concerning. If child perpetrators of severe crimes continue to be classed only as victims, as in Sierra Leone, then communities' ability to reaccept and reintegrate those former perpetrators will be necessarily hindered. If the fiction of unqualified childhood innocence persists, one side of this legal penumbra the truth will be obscured, and prospects of former child soldiers being reaccepted and reintegrated will be diminished. ■

References

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[5] Park, above n 3, 338.
[6] Rosen, above n 3, 304.
[7] Drumbl, above n 1.
[8] Statute of the Special Court for Sierra Leone, Freetown, Government Printing Department, (2002), Article 7.
[9] Rosen, above n 3, 303.
[10] Ibid, 304.
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[12] Drumbl, M., above n 1.
[13] International Center For Transitional Justice, What is Transitional Justice?, International Center for Transitional Justice (Online), http://www.ictj.org/en/tj/, last updated December 2008
[14] Rosen, above n 3, 303.
[15] Ibid, 304.
[16] Sierra Leone Truth and Reconciliation Commission, 2001.
[17] Rosen, above n 3, 304.
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[20] J. Courtney, 'The Civil War that was fought by childre: Understanding the role of Child Combatants in El Salvador's Civil War, 1980-1992' (2010) 74/2 *Journal of Military History* 530
[21] Faulkner, above n 4, 499.
[22] Honwana, above n 19, 65.
[23] Ibid, 65.
[24] For further discussion, Dumbl, above n 1.
[25] Ibid.
[26] Rosen, above n 3, 304.
[27] United Nations Convention on the Rights of the Child, Article 3(1)
[28] Honwana, above n 19.

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