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## THE CRIMINAL RESPONSIBILITY OF FORMER CHILD SOLDIERS: CONTRIBUTIONS FROM PSYCHOLOGY

Angela Veale

### **Introduction**

As pointed out by the two previous chapters of this book, the criminal responsibility of minors is a contested issue, both internationally and nationally. In legal terms, key issues are whether children may be held accountable for criminal actions, including consideration of the capability or otherwise of forming requisite intent and duress. With respect to age of criminal responsibility, there is no international consensus. In Ireland, the age of criminal responsibility is governed by common law and a presumption that a child under 7 years does not have the capacity to commit an offence. Under the Children's Act (2001), Part 5, there was a provision to raise the minimum age to 12 years. However the Irish Minister for Justice has repealed this provision and replaced it with an age of criminal responsibility of 10 years to be included in a Bill currently before the Government. In the UK, the age of criminal responsibility is 10 years, in France 13 years, Norway 15 years, Spain 16 and in Belgium and Luxemburg 18 years. Therefore, a child perpetrator of crime would be more fortunate to live in some countries over others as immunity may be available on the basis of chronological age alone.

For crimes of genocide, article II of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide defines genocide as “acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such”. McCarney (2003) outlines arguments that support a presumption that child soldiers are incapable of forming the requisite intent to commit genocide which include that the age of many of the children sheds doubt on whether children can understand what genocide is, that they have been so traumatised by their experienced that they can no longer distinguish between right and wrong, and that the power dynamics of social norms which demand obedience of children to adults has to be taken into account in any consideration of ‘intent’.<sup>2</sup>

As explained in Matthew Happold’s chapter, the 1989 Convention on the Rights of the Child (CRC) requires that States parties establish “a minimum age below which children shall be presumed not to have the capacity to infringe the penal law” but does not give guidance as to what that age should be. With respect to child perpetrators of crime, the CRC’s key principles are to promote their reintegration and their return to a constructive role in society. Furthermore, the Convention on the Rights of the Child calls on State parties to seek measures for dealing with child perpetrators without resorting to formal judicial proceedings, such as through diversionary practices.

This chapter seeks to ask the following questions: What are appropriate responses to children and youth that have perpetrated violence and committed gross human rights violations in the context of armed conflict? What tensions or areas of

complementarity exist between justice and child welfare agendas? In addressing the issue of minors that participate in the commission of gross human rights violations, is there a necessary or useful distinction to be made between legal justice and social justice, where social justice serves a broader agenda of promoting young people's reintegration in civil society? All of these questions will be explored from the angle of the contribution of psychological perspectives to the broader issue of societies' responses to children who, as members of armed groups, participated in committing gross human rights violations. This chapter will critically examine recruitment and choice, and consider issues relating to the age of criminal responsibility and to developmental status. It will also examine the evidence for or against the need to incorporate restorative justice perspective in addition to existing reintegration methodologies, which include quite sophisticated psychosocial community-based rehabilitation and reintegration models. Finally, utilising concepts from cultural psychology, this chapter explores what function a cultural restorative justice perspective could contribute for those who were involved in perpetrating crimes as minors. Who should administer such a justice initiative? The argument will be that it has to be fundamentally local, situated in cultural meanings and community-led. This raises questions as to what constitutes 'community'? What kind of justice for what goal? And finally, what is the relative contribution and role of the child welfare, psychosocial professionals, justice professionals and communities themselves?

### **Child agency and recruitment**

Forced abduction as a tool of war has been used in many contexts, including Cambodia, Northern Uganda, Sierra Leone and elsewhere. The Khmer Rouge rendered children and young people the prime instruments of State violence and terror during their rule. In Sierra Leone, many children were abducted and made to terrorise the civilian population. In Uganda, the Lord's Resistance Army is believed to consist of over 90% of abducted children with 200 core fighters and approximately 3,000 child combatants.<sup>3</sup>

Within social research and child psychology, there is a broad theoretical push against theorising 'incompetent children'. Accounts which stress children's power and agency are also having an influence within discourses of children and conflict. There are a number of research accounts which document children's voluntary participation in fighting. In Sierra Leone, Wessells<sup>4</sup> noted that many minors joined the Civil Defence Forces to revenge atrocities committed against family members by the Revolutionary United Front, or to defend their families and communities, using violence and commission of atrocities as tools. In Palestine, Jason Hart documented how minors see their involvement in the political struggle as stemming from a sense of grievance and injustice and a desire to defend their community:

"Young people growing up in the Occupied Palestinian Territories are often willing participants in the national struggle. Their political consciousness is developed to an extent and from an age that commonly takes outsiders by surprise."<sup>5</sup>

Boyden goes further and notes that children's active participation in political violence may in certain circumstances be an active coping strategy that serves a protective psychological function compared to an alternative of frustration, poverty hopelessness, and learnt helplessness. Commenting on her observations in Sri Lanka, she noted:

It is also worth highlighting that assuming an active role, in itself, is known to have beneficial psychological effect when children have been exposed to conflict ... During discussions, a group of

mothers revealed that 15 of their children had, as they put it, “gone over to the other side”. By this they meant that the youngsters had chosen to leave the village by night and cross over into the area controlled by the LTTE [Liberation Tigers of Tamil Eelam] in order to enlist. There was no suggestion they had been forced. Rather, ... family problems and frustration at life in the community had added to the pressures of poverty in encouraging the young to take this course of action”.<sup>6</sup>

In summary, what is the anthropological or psychological evidence regarding children’s capacity to be rational and responsible participants in conflict? It is clear that recruitment patterns are not homogenous. There are multiple routes to involvement in conflict that range on a continuum from forced to agentive participation. Much of the research evidence cited above, which highlights the rational and purposive quality of children’s voluntary participation in conflict, has an agenda of arguing strongly for the participation and inclusion of those who fought as minors in post-conflict peace-building initiatives. This contrasts with many psychosocial accounts that position former child soldiers as traumatised by their experiences.

The very little outcome evidence that exists on the psychosocial well-being of former child soldiers is mixed. In Northern Uganda, MacMullin and Loughrey<sup>7</sup> found that of youth that had gone through rehabilitation and reintegration programmes, former abductees had higher levels of anxiety and/or depression, and were less confident than their peers who were never abducted. However other research from Northern Uganda found that teachers reported that many formerly abducted children were stronger and more confident than those children who were never abducted as they had demonstrated the strength to survive.<sup>8</sup> In another study carried out by a group of non-governmental organisations in Gulu, formerly abducted girls said that, compared to girls who were never abducted, they considered themselves equal to men, they could sow, harvest and construct a granary, they felt their moral values to be stronger, they were more hard working and enduring and had no faith in witch-craft.<sup>1</sup> General Dallaire has strongly argued that ex-child fighters have developed important skills and leadership experience and, in his experience, are more confident, self-reliant, mature and developmentally advanced than many of those who remained with their families in communities or displacement camps and never fought. His concern is that such young people should not be marginalized in post-conflict social reconstruction.<sup>9</sup> Boothby noted that a group of 14 year old boys he encountered in one programme did not wish to be repositioned as ‘children’ post-demobilisation. They wished to refuse education as they felt they had earned the right to be in the army.<sup>10</sup>

This analysis of former child soldiers has many parallels with women’s experiences as fighters. In research conducted in Ethiopia with female former child soldiers of the Ethiopian Peoples’ Revolutionary Democratic Front (EPRDF), women that had volunteered to be part of fighting forces between the ages of 10 to 14, and who had fought proudly and fiercely, then felt betrayed and marginalized at the point of peace-building as the agenda *they* fought for as women was discounted in peace-building.<sup>11</sup>

A core challenge therefore, in any discussion of the criminal responsibility of children in contexts of political violence – if child agency is recognised as possible, and particularly in peace-building – is whether it is possible to maintain a stance on child

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<sup>1</sup> Grace Onyango (World Vision International), Angela Atyam (Concerned Parents Association), Christopher Arwai (Kitgum Concerned Women’s Association), and Gladys Acan (Gulu Support the Children Organization) – Uganda GIRL MOTHERS OF NORTHERN UGANDA” Paper presented at the Conference on ‘*Girl Mothers In Fighting Forces And Their Post-War Reintegration In Southern And Western Africa*’ April 12 – 18. The Rockefeller Foundation Bellagio Center, Bellagio, Italy, 2005

perpetrators of gross human rights abuses as passive, lacking rational thinking skills, and demonstrating an inability to consent, on the basis of them being minors?

Whatever the form of recruitment, there is documented evidence of minors as involved in perpetrating atrocities. In some cases, minors have even directed other children to perpetrate human rights abuses that would allow the establishment of a doctrine of command responsibility. In some conflicts, such as Liberia, children's actions as fighters have had significant political and military consequences.

Singer has noted that in many conflict contexts, there is a readily available pool of child labour:

Warlords can transform children into soldiers and thus transform an insignificant force into an army. E.g. Charles Taylor in Liberia. In the early 1990s he turned an "army" of 150 amateur soldiers armed with small arms into a force of thousands by the recruitment and use of child soldiers, to become Liberia's president, demonstrating the potential payoff. Through child soldiers, he was able to use a small gang to gain a kingdom."<sup>12</sup>

### **Developmental transitions and the role of armed groups**

Within this discussion, it is essential to look at the recruitment of child soldiers in a broader demographic, economic, political and cultural context. In many conflict contexts in Africa for example, population demographics are that 50% or more of the population may be 18 years or under. Such children potentially represent a massive recruitment pool for armed groups.<sup>13</sup>

From a psychological perspective, this has to be understood in terms of developmental transitions. A central question in developmental psychology has been to identify the nature and timing of peoples transitions from one phase of development to the next, for example from childhood to adulthood. Such transitions are cultural community events as individuals change their roles in their communities structure.<sup>14</sup> This may be marked by transition ceremonies or new levels of status and responsibility. If examined across cultures, chronological age is not a marker that systematically delineates stages of development as there is a great deal of variety in transitions in different cultural communities. Transitions are dependent on values and expectations of a cultural group. Transitions in development can be identified by children's' changing relations with others in their community.

Conflict impacts massively on developmental transition opportunities from childhood to adulthood. Normative means of achieving adult responsibility may not be open to many young people in conflict afflicted regions, displaced persons or refugee camps. Education, a chance to be economically independent and gain status may not be easily accessible. Participation in an armed group might provide many more possibilities.

The question of most relevance here is – should local and international communities allow impunity for anything that happens as part of this developmental transition, if it happens below a certain age?

### **Assumptions inherent in international legal and psychosocial responses regarding the criminal responsibility of children**

In a comprehensive review of international legal instruments, McCarney argues that international instruments tend to support a view of the child soldier as victim.<sup>15</sup> International legislation criminalizes those that recruit children under 15 years to armed

forces, while the optional protocol to the CRC prohibits any forced recruitment of children under 18 years into armed forces. The doctrine of command responsibility holds that adult commanders are criminally responsible for the actions of child soldiers.

Within child welfare and child rights discourse, concepts on incapacity and victimhood are also dominant. A UNICEF report notes:

When it comes to children- especially children under 15, - so-called 'voluntary recruitment' is always a misnomer. Child rights advocates maintain that children's participation in armed forces will always involve some form of pressure, be it cultural, political, or simply the need to ensure their safety or daily subsistence".<sup>16</sup>

Children, mostly from poor families, may be coerced into participating in crimes, either threatened, indoctrinated, manipulated or drugged ... The recognition of child perpetrators as victims can establish that they are not rational actors in a particular case and can thus mitigate their legal responsibility for the crimes they have allegedly committed".<sup>17</sup>

Psychosocial programming is also characterised by a strong assumption of victimhood and of societies' responsibility to rehabilitate and reintegrate former child soldiers.

According to Jarge and McCallin, emphasis must be placed on understanding the situation of children, and the effects of their participation in armed conflict within the context of their ongoing developmental processes; "The events that children experience as soldiers are horrific ... child soldiers have suffered extreme trauma."<sup>18</sup> Broader social discourses also support this view. Archbishop Desmond Tutu has noted:

"We must not close our eyes to the fact that child soldiers are both victims and perpetrators. They sometimes carry out the most barbaric acts of violence. But no matter what the child is guilty of, the main responsibility lies with us, the adults. There is simply no excuse, no acceptable argument for arming children".<sup>19</sup>

However, *is it in all* former child soldiers' best interests to be treated within international legislation and psychosocial programming as victims, as lacking the capacity to understand their actions, as incapable of forming intent and therefore as not culpable for their actions?

## **Impunity?**

There are significant concerns about granting impunity. Clark notes that impunity permits and even encourages the continued recruitment of child soldiers.<sup>20</sup> Mawson argues that if child or adult perpetrators believe that they can get away with atrocities, there is little incentive not to commit further violence, particularly if there are gains to be made, thus leading to a spiral of violence.<sup>21</sup> Furthermore, ignoring atrocities committed by minors could undermine the wider administration of justice, and the scope for justice systems to maintain credibility.<sup>22</sup> Brett has concerns that, in the absence of consideration of their cases in the civilian justice system, child soldiers may be subjected to a military legal system in which there may be little or no compatibility with international human rights norms and standards of juvenile justice.<sup>23</sup> There are also concerns that impunity for minors but not for others could set up categories of 'the misled' and categories of adult 'guilty' parties that are ignores local social perceptions that individuals have engaged in similar acts of violence and are similarly accountable.<sup>24</sup> Finally, McCarney asks- what happens to the doctrine of command responsibility when the person who controls the child soldiers is a child him or herself?<sup>25</sup>

With respect to sexual violence, which is widespread and often systematic in many conflicts, the issue of impunity regarding rape and sexual violence has hardly been raised. Yet addressing this at a national, regional or community level must be key to building restorative relations if young men and women are to have any possibility of being able to work together in peace-building.

There is a broader empirical question on the issue of impunity, and that is to what extent have reintegrated former child soldiers who have gone through rehabilitative psychosocial programmes, been accepted back within their communities of origin in the absence of any justice discourse?

### **Socio-economic and psychological reintegration of former child soldiers: the empirical evidence?**

In many contexts, such as Rwanda and Sierra Leone, communities have been reluctant to receive all youth involved in atrocities with impunity. After the Rwandan genocide, a community survey concluded that communities believed that children are culpable and must be punished to ensure accountability and “adherence to the established social order”. They also believed that children voluntarily committed acts of violence, and that anyone with enough strength to commit the crimes should be treated as an adult.<sup>26</sup>

In Northern Uganda, a general amnesty has been applied, and there is a broad peace discourse of forgiveness. The majority, but not all, of returned children have gone through reintegration programmes. In an in-depth survey of 183 formerly abducted children in Northern Uganda, Rodriguez and others found that longer periods spent in the bush were associated with former abductees experiencing more problems on reintegration.<sup>27</sup> Exactly half of those who reported feeling welcomed had been inducted for four months or less, and only 5% were inducted for four or more years. Only 8% of those inducted less than five months reported bad experiences, whereas induction of six years or more represented 63% of the bad experiences, such as abusive language, being avoided or isolated, or feeling intimidated or threatened. Males were less welcomed than females, with 70% of females who claimed that they felt welcomed on their return, compared to 57% of the males. The authors noted:

“The final negative experience that returnees reported from the community is jealousy from those who are still missing family members and struggle openly with accepting those that have returned....There is clearly a difference between how the community perceived they are welcoming returnees and how returnees feel they are being welcomed ... It is also hard to find examples of forgiveness”.<sup>28</sup>

A core task that must be negotiated at reintegration is that of acknowledging the identity transformations that have occurred between the child and community as a result of their participation as part of an armed group.<sup>29</sup>

Furthermore, one should realise that, if some individuals are marginalized, not forgiven, and these are individuals that have been inducted for longer periods, for whom a significant part of their development through adolescence occurred within armed forces, these individuals are arguably at higher risk of re-recruitment by civil defence forces, government forces and other armed groups.

More empirical evidence needs to be gathered to examine the effectiveness of psychosocial programmes for community acceptance and reintegration. However, it seems that a ‘restorative justice’ orientation could potentially serve a role in acknowledging and addressing identity transformations as a result of children’s involvement in conflict, for former child soldiers who have been with armed groups for a long period, who have been involved in perpetrating gross human rights violations in

the absence of ongoing coercion, and where community reintegration is unlikely to be achievable without acknowledgement and possibly some form of reparation.

### **Criminal responsibility, age and developmental status**

What can psychological research contribute to the question of the age of criminal responsibility and a consideration of developmental status in holding individuals accountable for acts committed as minors? The simple equation of age with a particular developmental level, level of knowledge, competencies, cognitive understanding or emotional maturity is not supported in developmental research.<sup>30</sup> Rogoff has comprehensively demonstrated that different cultures have very different values and expectations of the skills, behaviour, and emotional maturity expected of children of different ages.<sup>31</sup> Within that, there are differences in terms of the competencies and maturity demanded of boys versus girls. Further, there are different competencies and maturity demands of children within different socio-economic groupings and societally-provided opportunities to develop such skills. Normatively therefore, there is a wide range of abilities and developmental competency and maturity amongst children of the same chronological age.

As mentioned earlier, cultural expectations of child competency, maturity and understanding vary widely. These are linked to expectations of role transitions and observations of readiness or ableness to take on adult roles and responsibilities. In Rwanda, focus group discussions were carried out to explore cultural constructions of 'childhood' and local understandings of whether child perpetrators of genocide were viewed as responsible for their actions. There was consensus that a child was 'one who has not reached social maturity'. All agreed it was a person less than 6 years, and 'a child is one who does not have the capacity to distinguish between good and bad'. One group maintained that between 8 and 10 years a person can retain ideas and imitate them, and between 8 and 14 years can remember messages given to him or her by one person and repeat them correctly to another. A child becomes an adult between 15 and 18 years. However if an individual committed rape, no matter at what age, then this person could no longer be a child as the physical act of rape is inconsistent with the power dynamics and behavioural norms defining a 'child'.<sup>32</sup> In many African countries, an individual may remain regarded as a 'child' up to the age of 35 years for example if he or she is economically dependent on parents, is in full time education, or has not taken on the roles and responsibilities associated with adulthood. A 15 year old that is living independently and is shouldering adult responsibilities may be viewed as an adult.

Any age-based approach is problematic for other reasons also. There is the issue of 'ageing out'. As is likely, how should a justice orientation deal with individuals who, as former child soldiers, were involved in the perpetration of gross human rights abuses, and who, while within the armed group or subsequently, reached 18 years or over. Do they remain within a framework established for dealing with offences by juveniles? Challenges related to age at commission of crime would come up in societies where it is difficult to determine age and where official documents such as birth certificates are difficult to trace or have never existed. There is also a broad question about capacity to participate in and understand judicial proceedings. Again, such a question is not likely to be answered by direct reference to age. Trauma, for example, can impact significantly on developmental maturity and memory, resulting in developmental regression, memory distortion, difficulty in forming a coherent narrative, as well as the possibility of re-traumatisation through remembering.

In summary, there are so many influential variables that a judgement on developmental and psychological capability to participate in a restorative justice initiative would probably need to be made on a case-by-case basis, and should be culturally grounded in local understandings of childhood and youth. An arbitrary cut-off age of 18 years does not make cultural sense and a broader culturally-based definition of 'youth' would have more applicability.

## **Conclusion**

Can minors be held criminally responsible? This author's response is that in some cases it may be in the long term best interest of former child soldiers and their communities of origin that minors be held accountable: where former child soldiers spent a number of years as an active participant within an armed group, where he or she was responsible for the commission of gross human rights violations, held a position of responsibility or authority, where the individual is deemed to be psychologically capable of participating.

Fundamentally, any restorative justice initiative has to be situated in local cultural meanings and understandings of children, of recruitment dynamics, of developmental transitions, of what is developmentally expected, and of cultural mechanisms of acknowledging wrongdoing and means of reparation. Age as a distinctive criterion for the form of restorative justice is problematic. As we have seen above, cultural constructions of what constitutes a 'child' are extremely contested. A justice orientation may need to be flexible enough to go beyond legalistic boundaries of child/adult to incorporate a locally defined category of 'youth'.

Cultural psychological dynamics of justice, healing and forgiveness are central. For example, shaming is a central dynamic of many restorative healing approaches. In Nigeria, according to a key informant, shaming as a juvenile justice mechanism could lead to further social-relational difficulties in communities as it is not the individual that is shamed, but the extended family and clan. However in Nigeria also, community solutions may mean some form of Sharia Law in which juvenile's rights under international conventions may not be respected. At all times there is a strong argument to be made for the integration of local and international practices. International juvenile justice has made significant progress in establishing procedures, which protect children's rights in justice processes. Any local or national restorative procedures should be developed in accordance with international juvenile justice legal standards.

Almost without exception, psychosocial intervention and child welfare literature have been lacking discussion of justice issues. Yet, psychosocial programming might be the place to position such initiatives. Many such programmes are culturally and community based and therefore may have the expertise to front restorative justice initiatives at a local or national level.

At a political level, international bodies and State parties cannot ignore the massive recruitment pool that is created as a result of armed conflict, political instability, and lack of economic opportunities within civilian society for children's developmental transition to adulthood status, economic responsibility and respect.

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