

**RESTORATIVE JUVENILE JUSTICE AND THE CHILD SOLDIER:
*PROTECTION OF THE PERPETRATOR?***

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I. Introduction

All the clauses of the Convention on the Rights of the Child, 1989 were designed so that together the aegis of the best interests of the child takes primary importance. Yet in the context of conflict coming, as it did in Uganda and Sierra Leon, so often after the hijacking of the state processes into military brutality is a context where it is precisely the conceptualization of best interests that is at stake. (Berry, 2001: 93).

The Convention, by stating that children have rights of their own, represents something new and special in the field of international humanitarian law (Miljeteig-Olssen, 1990: 149), however it seems to have ignored that the roles of victim and perpetrator are not necessarily mutually exclusive. (West, 2000: 282, 283).

The General Assembly recognizes that children being defenseless, there is no greater moral obligation on States than to provide for the protection of children and that the child welfare system needs to be strengthened accordingly so that the best interests of the children have precedence at every stage of juvenile court proceedings. Hence the key principles of juvenile justice are rehabilitation and the primacy of the well-being of the child. (Toutounji, 1998). These principles may be said to be universally applicable regardless of the nature of the crime committed by the child. They would hence also apply to the war crimes that the international community wishes to incriminate the child soldiers with.

The result of this understanding is an area of international criminal law that is fraught with doubt and potential harm; the dilemmas range from basic issues regarding the attribution of culpability to the determination of guilt and imposition of punishment. In light of these dilemmas this paper seeks to analyze the criminalization of the actions of child soldiers committed in times of war and their rehabilitation through Truth and Reconciliation Commissions as a mechanism of Restorative Juvenile Justice at the international level.

II. The Criminalization Debate

The debate relating to the criminalization of the acts committed by child soldiers in armed conflict must necessarily consider the special conditions under which these children are recruited or “voluntarily” enlisted and the delinquency theories propounded by various thinkers. The same is essential to determine the efficacy of the approach adopted.

A. Special Conditions relating to the enlistment of Child Soldiers

Child soldiers are a phenomenon of two levels; the crisis ridden State and social relations. The social relations are more nuanced, for example, in narratives from former child soldiers in Teso, it is evident that young men were motivated to enter the bush forces through feelings of anger and frustration over the loss of their cattle at the hands of the Karamojong raiders. (Berry, 2001: 94, 102). Furthermore, millenarian tendencies capture the support of alienated youth¹ who are easily swayed in light of their desire to seek revenge for lost parents and destruction of their environment has been a major reason for children enlisting in the armed forces. (Zack-Williams, 2001: 78).

Hence the fact that children become soldiers in light of the influences and pressures upon them, which they experience as part of their day-to-day environment stands; child soldiers cannot only be seen as victims of the wider political-economic context in which they live but must also be credited with agency and volition in the decisions that take them to fight.² We cannot assume, says Dawes, that children and young people are “strangers to power and violence in the world”. (Berry, 2001: 94). Even in the mire of war, children can be seen to take the decision to fight from the subjective appraisal of their options and safety. They might not understand this in terms of state-level political processes but more in terms of how they understand their personal social relations and future. (Goodwin-Gill and Cohn, 1994: 35).

Added to this is the fact that many who have worked with ex-child soldiers in a post-war context have reported that they suffer long-term remorse and guilt for such deeds, even when carried out under compulsion. This challenges the general assumption

in the literature that war, and young people's participation in it, gives rise to a future generation of adults for whom violence is a part of everyday life. Today's victims reproduce the "trauma" they have experienced, giving rise tomorrow to cycles of recurring violence. (West, 2000: 180, 182).

This dual characteristic of the enlistment process creates an inconsistency in the application of most traditionally used theories to determine the necessity of criminalization.

B. Theories of Delinquency

Traditionally these theories have been applied in the domestic arena; however their importance as determinants of effective criminalization strategies cannot be discounted. Of the numerous theories³ that have developed in relation to the problem of delinquency, only a few may be said to be relevant in the context of child soldiers. They include: Positivism,⁴ which is of little help as there is little opportunity of actually observing the lives of these children; the Social Control Theory⁵ hits home on account of the fact that most recruits are from war ravaged areas and belong to the impoverished and marginalized sections of society. (Gullotta, Adams, and Montemayor, 1998: 21). In relation to the Strain theory;⁶ it may be argued that most children voluntarily enlist as it assures them food, shelter and medical attention. (Gullotta, Adams, and Montemayor, 1998: 27).

The Neo-classical theory⁷ may be questioned with regard to child soldiers as the empirical data shows that the maximum number of recruitments is by force. Only in a few cases have children voluntarily taken to arms for the purposes of power. The Social Development theory⁸ is apt when noting the manner in which the armies deal with recruits that try to escape; they are killed by the other recruits using clubs and machetes or their families are murdered. (Steiner and Alston, 2000: 532). The Social Learning Theory⁹ is bolstered by the fact that it is common for the armies to harden recent recruits by forcing them to kill family members or members of their community.

A study of these theories is helpful to determine whether the child soldiers ought to be held responsible for their actions. However, it has been noted that policymakers tend to cycle between two general approaches to youth crime: punishment and rehabilitation

regardless of the underlying theory. Bernard labels this tendency the “cycle of juvenile justice”. (Gullotta, Adams, and Montemayor, 1998: 43).

C. Arguments for and against Criminalization

The understanding that calls for criminal action to be taken draws on the logic of deterrence and past precedents for mandating criminal responsibility. Recriminalization produces alternate legal avenues with and between systems of juvenile and criminal justice. (Singer, 1996: 187, 190). It accords greater community protection, more effective deterrence of future crime, and more proportionate, retributive responses to serious crimes. (Howell, et al, 1995: 238). As opposed to “decriminalizing” which leaves the victim no remedy other than self-help. (Romero, 2004).

In light of child soldiers; consideration of the elements required to constitute culpability for war raise complex issues of *mens rea*, which according to Reis, children are incapable of conceptualizing. However certain authors believe that, the same is no justification for reading any precise chronological-age threshold into the requirement for the offence and so long as the elements can be fulfilled, the liability should ensue. (Morss, 2004).

Furthermore, it is noted that the local viewpoint, in areas that have witnessed armed conflict which uses child soldiers, is that a child who has demonstrated the competence to murder another person is patently competent to be prosecuted for doing so. It might be suggested that the views of the local community are intrinsically worthy of consideration whenever there is local participation in international justice. (Morss, 2004).

On the other hand; punishment of juvenile soldiers challenges both the rehabilitative assumptions of truth and reconciliation mechanisms and the propriety of informal, non-punitive, and relatively short-term social control. This high standard of criminal liability normatively corresponds with international criminal law jurisprudence, which requires one to possess an undiminished capacity to exercise free will in choosing between right and wrong. (Romero, 2004). This capacity is arguably absent in the case of

child soldiers. Furthermore, the threat of punitive sanction has negligible deterrent effect on desperate youth who foresee little future for themselves. (Lawrence, 1998: 213).

It may therefore be proposed that in light of the circumstances and the relevant theories of delinquency, it is clear that the acts of child soldiers committed in armed conflict are not best suited for culpability instead an approach of rehabilitation should be followed. However, the international regime does not view it in this manner and makes child soldiers above the age of 15 liable for the war crimes they commit. The same has been analyzed in light of the International Criminal Tribunal for Sierra Leone.

III. Culpability of Child Soldiers, their Prosecution and Punishment

Unless expressly provided in a relevant instrument (such as the Statute of a Special Court or International Criminal Tribunal) the indictment and prosecution of an alleged offender for an international crime may proceed irrespective of the chronological age (at the relevant time) of the person accused. (Morss, 2004).

At the conclusion of the war in 2000, the Government of Sierra Leone and the United Nations jointly established the Special Court for Sierra Leone to prosecute those “persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law.” Despite this strict statutory directive, juveniles between the ages of fifteen and eighteen adjudged to be guilty of committing heinous war crimes are not subject to imprisonment. Instead, juvenile criminals will be “sentenced” to a truth and reconciliation mechanism, where, regardless of culpability, they are ultimately released back into the very communities they once tortured. (Romero, 2004).

The efficacy of the same can be studied on the grounds of procedure, judicial attitude and punishment.

A. Procedure

The procedure of the trial for child soldiers by the Special Court is varied in favour of the juvenile, the Prosecutor for the Special Court is required to make use of truth and

reconciliation measures, where appropriate and available, with respect to juvenile offenders. The Secretary-General initially proposed a Juvenile Chamber within the Special Court, to deal with those aged under eighteen at time of trial, but this proposal was rejected by the Security Council. (Morss, 2004).

It may be argued herein that the suggestion of the Secretary-General is noteworthy as studies have shown that there are larger increases in violent crime rates for juveniles who enter the adult justice system. (Rashid, 2004: 31, 32, 52). Also the methodologies of trial vary for juvenile offenders, being more tilted towards the collection of evidence in order to determine mitigating factors.

The said proposal has been critiqued on the principle of Rule of Law. Special treatment for children or juveniles may have the effect of limiting their exercise of inherent rights, by in effect re-inventing a welfare or protectionist orientation. The availability of diversion at the discretion of police, on the basis of chronological age of the alleged offender, also raises complex matters of equity. To the extent that the discretion is implemented in a discriminatory fashion, this supposedly rehabilitative or educational measure functions to entrench the privileges of class and race. The Rule of Law, it might be argued, knows no distinctions based on chronological age. (Morss, 2004).

However, regardless of a special chamber with special procedures, when determining the culpability of child soldiers, the following should be given special consideration: extent of poverty suffered and the causal connection between poverty and association with the faction; mitigating factors of age, immaturity, abduction and force to engage in battle; sentencing based on deterrence and retributive goals; recognition of heinousness of the offence, dangerousness to the community and amenability to treatment. (Howell, et al, 1995: 243).

B. Judicial Attitudes

The juvenile justice judge must be able to understand the child's ideas of justice; he must be willing and patient enough to search the underlying causes of the trouble and to formulate the plan by which, through the cooperation, oft times, of many agencies, the cure

may be affected. The problem for determination by the judge is what had best be done in the child's interest and in the interest of the state to save him from a downward career.

Criminalizing delinquency may have unintended consequences, reflecting the social organization of the courts and processual contexts, rather than the legal statute. Hence there is a paramount need for the judges to be well aware of the social contexts. (Howell, et al, 1995: 240).

C. Punishment

The Sierra Leone Statute provides for the special treatment of juvenile offenders, that is, persons aged between fifteen and eighteen at the time of alleged offences, in relation to conditions of detention and sentencing. (Morss, 2004). Article 7(7) of the Special Court statute calls for "rehabilitative sentencing". The same has been critiqued by many writers. The debate herein, is essentially one between rehabilitation and retribution.

The proponents of retributive punishment state that the Court's current policy towards juvenile punishment makes impossible the attainment of just results and neglects to effectuate fundamental notions of deterrence and retribution. "When, the most culpable juveniles face no *bona fide* punishment, the decade-long war merely serves as a training ground to lead future rebellious revolts as skilled and undeterred leaders." (Romero, 2004). They rely on studies which show that violent crime rates would decline with increases in punishment. (Rashid, 2004: 31, 32, 52). Also, they state that "rehabilitation", which is often used as a justification for giving consideration to chronological youth is an objective not restricted to the treatment of the juvenile offenders.¹⁰ There are, furthermore, inherent dangers with rehabilitation; indoctrination can masquerade as recovery and reintegration. (Bueren, 1994: 824).

The supporters of rehabilitative methods state that there are inherent limitations within the retributive approach which prevent it from achieving any of its designated aims. They include: a "reactive" and not proactive or preventive approach; promotion rather than prevention of delinquency by bringing offenders together and isolating them from the

community; inadequacy of correctional agencies as the factors that generate and influence delinquent behavior lie for the most part within the community. (Lawrence, 1998: 212).

Furthermore, there is an increasingly impressive body of evidence that non-custodial sentences are far more likely to lead to rehabilitation of the child - one of the main goals of juvenile justice. Alternatives to imprisonment can include guidance and supervision orders, foster care, probation, counseling and victim reparation programs. In South Africa, for example, initiatives have been taken in the juvenile justice process to combine international standards with traditional methods of conflict resolution. (Toutounji, 1998).

Lastly, they rely on the best interest of child principle to ensure that the juvenile justice principles that are derived from it are met.

However, both these methods suffer from inherent difficulties. Officials cannot make decisions about juveniles as if they were their own children, because legal decision making is embedded in a complex bureaucracy where routine decisions must be made quickly without the time and resources to discover all that there is to know about juveniles as individuals. (Singer, 1996: 193).

The juvenile court eschews technical rules of evidence and procedure to ensure that all the evidence about the offender is available which is antithetical to the formal due process requirements. (Howell, et al, 1995: 241). In light of the rampant corruption and absence of infrastructure in these war torn nations this poses a large difficulty.

Treatment models assume: antecedent social or psychological factors cause delinquent behavior; courts base individualized sentences on clinical assessments of treatment needs; correctional staff can apply appropriate interventions to alleviate the sources of criminality and reduce recidivism, and determine when the youths successfully complete treatment and release them; and delinquents' youthfulness and greater malleability would enable them to respond more readily to treatment. (Feld, 1999: 321).

It is therefore concluded that in light of the theories of delinquency and their application to the special conditions of child soldiers, the imposition of culpability itself is questionable. However, even if the same were to be accepted, the methods of reform and rehabilitation must necessarily be employed and not the processes of incrimination. For

even if we are to agree that the latter is in the best interest of the State,¹¹ the former is definitely in the best interest of the child; and since this is the underlying basis of child rights there is no justification for denying child soldiers the same.

IV. CONCLUSION

Armed conflicts create ruptures in the intergenerational bargain through which, in less troubled circumstances, one generation provides a nurturing environment for the next. It creates the ambiguous situation of the current generation of the country's children, who are caught between disintegrating family forms, an authoritarian state and a grasping global capitalism. (Zack-Williams, 2001: 73). It is this current generation that we have lost to wars not merely as victims, but worse yet, as forced perpetrators; and it is upon them that we now wish to impose responsibility for our failures as an international community.

It is essential when we discuss these mutual responsibilities of children and their States that we draw attention to the correct moral question: whether children will be treated like people, not whether they will be treated like adults, the usual benchmark. Even in the area of child protection, research has often focused on credibility of child victims and the reliability of professional reporting, to the neglect of more fundamental policy issues; those of responsibilities of the State to provide for children; not by virtue of their age, but by virtue of their citizenry. For only if they were treated as the latter does the State gain the privilege to hold them liable as the same.

It is unfair to place upon children the burdens of citizens but deny them its benefits. The absence of individual petition creates hurdles in effective implementation, as it is reformative and not deterrent. (Ramesh, 2001: 1949). Furthermore, Courts present an image of adolescents as incompetent and vulnerable but largely unaffected by restrictions on their liberty and intrusions on their privacy. All these factors together with the more specific questions of the minimum age of recruitment as interfering with the rights of

children to freedom of association and arguably also raise issues of freedom of expression, particularly since children have proved themselves to be competent soldiers, particularly when children believe the only contribution they can make is to fight in wars of liberation as occurred among some of the Ugandan child soldiers; has lead to the anomaly wherein the child is not protected from being recruited as a soldier but is punished for being one. (Bueren, 1994: 816).

A solution to the problem of child soldiers necessarily involves a removal of conflict. There is a need for effective programs of demobilization and reintegration which identify and address the factors which drive children into those social movements. Reintegration programs must re-establish contact with the family and the community. However, even children who are successfully reunited with their families, have little prospect of smoothly taking up life as it was before, also in many cases reunification is impossible. (GA/51/306, 44). This calls for a culturally relevant therapeutic model which is not constrained by the conventional correctional measures. (Mar., Zack-Williams, 2001: 81).

Therefore it is concluded that in keeping with Article 39 of the Convention, the process of reintegration must help children to establish new foundations in life based on their individual capacities; for it is fallacious to ignore the “child” in child soldiers and unjust to derogate from the universality of the best interest principle that applies to them.

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Notes

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¹ In the autumn of 1980 a religious uprising broke out in Kano taking the Nigerian authorities by surprise. Like the RUF it was led by a mysterious figure, an Islamic preacher and self-proclaimed prophet, Alhaji Marwa Maitatasine. His community and base of support consisted 'largely of youths, gardawa (Koranic students) and unemployed migrants'. Marwa 'condemned the widespread corruption of existing secular and religious classes ... and admonished his enemies with the phrase Allah ta tsini ('May God damn you')'. (Zack-Williams, 2001: 74).

² Writing about young activists in South Africa, Dawes has stressed that children may grow up in situations where violence is legitimized, and they often devise their own violent strategies of political struggle. Again, working in South Africa, Reynolds suggests that young political activists might even go to the extent of renouncing ties with elders and relatives in order to pursue their cause.

³ These theories include, but are not restricted to the following. Traditional theories of original sin and classical theories support a system that offers delinquent and pre-delinquent youth new "parents" to train them how to function in society. The *Parens Patriae* theory which was enunciated by the English Chancery court asserted protective jurisdiction over children on behalf of the King. The theory of Social Darwinism sees less evolved groups as the source of social problems because of their inferior genetic constitution. The theory of Psychodynamics as evolved by Sigmund Freud views maladaptive behaviors of youth and adults as manifestations of unconscious mental conflict. Tannenbaum, who laid down the Labeling theory, rejected the idea that delinquents and non-delinquents were fundamentally different types of people and stated that criminal behavior started within groups of children who "playfully" experimented with low-level delinquent acts. (Gullotta, Adams, and Montemayor, 1998: 15, 17, 18, 20, 27).

⁴ As popularized by Lombroso which focuses on prediction and control of observable phenomena.

⁵ Laid down by Compe, the theory was advanced in relation to juvenile delinquents by Shaw and McKay who hypothesized that delinquent behavior was characteristic of youth living in disorganized areas with high rates of poverty.

⁶ The theory uses capitalism as a foundation, states that delinquency is a function of the great disparity between what the members of the lower classes want and what they can actually obtain; because few legitimate opportunities are available to rise out of poverty, impoverished youth were thought to turn to crime as the only available means to achieve wealth.

⁷ The theory rejects the notion that society is responsible individual behavior; it frames delinquency as a function of individual propensities.

⁸ This theory posits that delinquent behavior is generated, nurtured, and maintained within social relations through reinforcements and punishments. (Gullotta, Adams, and Montemayor, 1998: 33).

⁹ Herein, Albert Bandura postulated that human learning is a continuous reciprocal interaction of cognitive, behavioral, and environmental factors.

¹⁰ In the International Criminal Tribunal for Rwanda a thirty-seven year old was awarded a reduced sentence of fifteen years, following convictions for genocide and crimes against humanity, on the express ground of rehabilitation. In the International Criminal Tribunal for the Former Yugoslavia, Drazen Erdemovic was convicted for war-crimes — killing defenseless civilians — and was given mitigating consideration based (in part) on his age of twenty-three years when the crimes were committed. (The decision to mitigate in this way was displaced but not overruled by the subsequent appeal process.) Also in the ICTY, Furundzija, also aged 23 years when the offences were committed, had this young age taken into account in sentencing. (Morss, 2004).

¹¹ It may be argued that the same is in fact harmful as it denies the State a valuable human resource and the war torn community its children; some of whom actually fought for their land and cultures.

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- **Member**, Academic Support Program Committee, NLSIU, 2007-2008.
- **Member**, Legal Services Clinic, NLSIU, 2006-2007.
- **Facilitator**, NLSIU Sexual Harassment Code, 2007-08.
- **Member**, Human Rights Cell, Symbiosis Society's Law College, Pune, 2005-06.

SPECIAL AWARDS

- Goldman Sachs Global Leader, attendee in the Goldman Sachs Global Leadership Institute, 2008 (selected to represent India).
- Global Scholar, Global Young Leaders Conference, 2005 (nominated to represent India).

EXTRA-CURRICULAR PARTICIPATION AND ACHIEVEMENT

1. **Winner**, Best Delegate, Harvard National Model United Nations, Committee of Special Court for Sierra Leone, 2009.
2. **Best Researcher**, All India Moot Court Competition, Kozhikode, 2005.
3. **Member**, Team representing NLSIU at Oxford Union Inter-Varsity Debate and Cambridge Union Inter-Varsity Debate, 2007.
4. **Speaker**, Indian Society of International Law and G.H. Rasoni Law School National Moot Court Competition, 2007. (Team ranked 5th).
5. **Member**, NLSIU Debate Team, 2007-08 and 2008-09.
6. **Member**, NLSIU University Moot Court Team, 2006-07.
7. **Member**, Symbiosis Society's Law College Moot Team, 2005-06.
8. **2nd Runner Up**, District-level Figure Skating Competition, 2001.
9. **Member**, NLSIU Theatre, Acapella and Dance (Western and Indian Semi-Classical) Teams, 2007-08.
10. **Participant**, Pink Floyd Tribute Concert, Bangalore, 2003.
11. **Participant**, American Modern Dance Show (alongside Mr. Jaan Freeman, Artistic Director, Freeman Dance Company, New York), Bangalore, 1997.

COMMUNITY SERVICE AND VOLUNTEER ACTIVITIES

1. **Counselor** for transsexuals, with Sangama (NGO for minority rights), Bangalore, 2007;
2. **Participant**, Peer Counseling Program, NLSIU, 2007-08;
3. **Participant**, numerous Legal Literacy and Mediation Programs, Bangalore, 2006-07;
4. **Participant**, Legal Literacy Program for commercial sex workers in Budhwar Peth, Pune, 2005-06;
5. **Participant**, Street Children Drive (rehabilitation of destitute children), Pune, 2005;
6. **Teacher** – Music and Drama, SOS Children's Village, Bangalore, 2004-05
7. **Participant**, Counseling and Legal Advice program at Women's Prison, Bangalore, 2004;
8. **Counselor**, Adolescents' Camp, Lions Club International Youth Wing, 2001;
9. **Member**, Youth Wing of Lions Club International, 2000 onwards.