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To my parents

Preface and Introduction

The recruitment of child soldiers remains a prevalent, and highly topical, issue in 2013,[1] and the practice of recruiting children for use as soldiers is the newest addition to the corpus of war crimes in international criminal law. This research provides a critical analysis of how the international justice institutions—namely the Special Court for Sierra Leone (Special Court) and the International Criminal Court (ICC)—have dealt with the challenges of developing this new crime, while also giving effect to the intention of the criminal prohibition: to punish those who recruit children as soldiers, and thus increase the protection afforded to children in conflicts.

A number of key challenges can be identified, that will guide this chronological examination of the war crime from human rights principle to prosecution at the Special Court and at the ICC. They are (i) identifying the *mens rea* and *actus reus* of the crime; (ii) establishing the appropriate modes of liability and the ambit of the mistake of law defence and (iii) accounting for cultural considerations, including the question of prosecuting child soldiers.

The *Actus Reus* and *Mens Rea*

This research will explain how the international jurisprudence has elaborated upon the human rights and humanitarian law treaties to determine a succinct *mens rea* and *actus reus* for the crime of recruiting child soldiers. The moment at which the prohibition of recruiting and using child soldiers became a crime is when these concepts gained sufficient clarity for breaches to incur individual criminal responsibility. This moment can also be described as the 'crystallisation' of the crime, to use the parlance of the Special Court for Sierra Leone. The author argues that this took place upon the drafting of the Rome Statute, the official codification of the crime in international law. However, the Special Court ruled that crystallisation had already taken place prior to this, and these arguments on the development of the crime will be examined in Chap. 3.

[1] SOS Children (2013); AFP (2013); Wired (2013); Save the Children (2013).

Actus Reus

The text of the Rome Statute suggests that there are three means of committing this crime—conscripting, or enlisting or using children under the age of 15 years as soldiers. A number of terms therefore require clarification.

First, 'conscripting' and 'enlistment', with the former seen as the more aggressive and forceful version of the latter. They involve different acts of recruitment, yet the consequence is the same, and accounting for the ability of children to volunteer is questionable. Therefore, it will be shown that the case law is moving away from the distinction in these terms, to encompass all forms of accepting a child into an armed group. Ultimately the form of recruitment is irrelevant, and even if a child allegedly 'volunteered', this is by no means a defence. It was briefly suggested at the Special Court that conscription represents an aggravated form of enlistment,[2] and the ICC has stated that the distinction may have an effect when determining sentence,[3] but this is yet to be demonstrated as a factor in handing down convictions, or shown to mitigate sentencing.[4]

Second, 'using to participate actively'. The alternative means of proving this crime rests on the concept of 'using' child soldiers, and again the case law has expanded upon the text. Determining what constitutes active participation has been a grey area since Article 77(2) of Additional Protocol I used the phrase 'direct part in hostilities'[5] to create a distinction between two different types of participation in international conflicts—indirect and direct. This gap in the international law—which fails to protect children from equally dangerous yet non-traditional combat roles—was repeated in the Convention on the Rights of the Child[6] and its Optional Protocol.[7] The Rome Statute was the first treaty to move away from this direct versus indirect classification, instead invoking 'active' as the benchmark for prohibited participation. The question of what constitutes 'active' has proved challenging for the international judiciary, as they initially chose to create lists of acts that fall within the scope of the prohibition. It is contended that this approach is ineffective in giving effect to the terms of the Rome Statute, and instead a case-by-case assessment of which roles constitute active participation ought to be conducted. Such an approach accounts for the disparities in conflicts and provides

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[2] *Prosecutor v Moinina Fofana and Allieu Kondewa* ('The CDF Case') (Judgment) SCSL-04-14-T (2 August 2007) [192].

[3] *Prosecutor v Thomas Lubanga Dyilo* (Trial Chamber Judgment) ICC-01/04-01/06-2842 (14 March 2012) [617].

[4] On 10 July 2012, Thomas Dyilo Lubanga was sentenced to 14 years' imprisonment, to include 8 years of time already served.

[5] Protocol No. I Additional to the 4th Geneva Convention relative to the Protection of Civilian Persons in Times of War, Article 77(2).

[6] Convention on the Rights of the Child, UN Doc. A/44/49 (20 November 1989) (entered into force on 2 September 1990) Article 38 [Hereafter 'CRC'].

[7] Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict. UNTS Vol. 2173, 222 (entered into force on 12 February 2002).

flexibility in determining whether the tasks undertaken by a given child in a given conflict could give rise to active participation. The most recent decision—the judgment in the *Prosecutor v Thomas Lubanga Dyilo*—is the first to adopt this approach, although, as discussed in Chap. 4, its application is not without controversy.

Mens Rea

The question of *mens rea* is naturally more complex. Two key questions arise: first, what are the *mens rea* requirements, and second, is there provision for negligence? The relevant articles in the international human rights and humanitarian treaty framework aim to prohibit the recruitment of children, but as they are not framed in terms of a crime, they make no reference to a mental requirement. The Rome Statute was thus the first opportunity to outline the specific elements of this new war crime, and the resulting text creates some confusion.

Article 30 provides that 'unless otherwise provided', perpetrators are liable if they committed a crime with both intent and knowledge.[8] However, in relation to child recruitment, the Statute's supplementary Elements of Crimes document[9] requires that a perpetrator 'knew or should have known' that the child or children were aged less than 15-years old. This situation creates two competing *mens rea* standards, with the Elements allowing for negligence liability ('should have known'). Similarly, the Special Court took the route of incorporating negligent liability into its interpretation of the crime. This entails the standard of the reasonable person, and asks whether an accused had 'reasonable cause' to believe or suspect that the child concerned was under the age of 15 years.

The ICC Pre-Trial Chamber, in resolving the inconsistency between these two *mens rea* standards, ruled that both standards have a role to play, with the 'intent and knowledge' of Article 30 applicable to the existence of an armed conflict and the nexus between the acts charged and the armed conflict,[10] while negligence liability may arise in relation to confirming the ages of the child recruits. This unusual approach towards *mens rea* is to be welcomed. Providing for negligence in the crime of child recruitment is one way in which the knowledge requirement can give effect to the intention of the Statute Articles, and assist in protecting children in conflict. A recruitment strategy that is implemented in a reckless manner, with little regard for age verification, ought rightly to incur criminal responsibility. By

[8] UN Doc. A/CONF.183/9 (1998) Rome Statute of the ICC (Hereafter 'Rome Statute) Article 30(1).

[9] UN Doc. PCNICC/2000/1/Add.2 (2000) Elements of Crimes, Element (3) of Article 8 (2)(b)(xxvi) ICC Statute.

[10] The Prosecutor v. Thomas Lubanga Dyilo (Décision sur la confirmation des charges) ICC-01/04-01106 (29 January 2007) 359 (Hereafter 'Lubanga Confirmation of Charges Decision). The French version of the decision is the original and authoritative version.

including negligent liability within the scope of the provisions, an obligation is placed on those who recruit young people to confirm their ages, as recklessness in this regard will be sufficient to meet the knowledge requirements.

Another way in which the ICC jurisprudence has successfully interpreted the Rome Statute's provisions on *mens rea* is to incorporate *dolus directus* of the second degree—the situation whereby an accused does not intend for a prohibited circumstance to occur but acts in the knowledge that it may occur. It will be shown that, in failing to apply the same standard in the CDF case, the Special Court could not prosecute an accused for recruiting children, as despite evidence of knowledge, there was no evidence of intent.

Modes of Liability and the Defence of Mistake

Two issues linked to the elements of the crime are that of the modes of liability and the defence of mistake. It will be shown that the 'Joint Criminal Enterprise' doctrine has not been successfully deployed in securing convictions for this crime, and looks set to be avoided entirely by the ICC. Defective indictments at the Special Court paved the way for convictions based on command responsibility and individual criminal responsibility, while the ICC Prosecutor chose the route of co-perpetration in the Lubanga case. Each of these approaches brings with it advantages and disadvantages. Command responsibility at the Special Court required clear evidence of a command role. For child recruitment charges, this requires that the perpetrator knew or ought to have known that his subordinates were recruiting child soldiers and he had failed to take measures to prevent this occurring. While this would appear to be the most straightforward mode of liability for this crime, the ICC appears to be more inclined towards utilising co-perpetration, which has also presented challenges for the Court. Thomas Lubanga was found guilty of recruiting child soldiers on the basis of co-perpetration, yet the Trial Chamber avoided the issue of a perceived incompatibility between co-perpetration and the negligence provisions provided by the Elements of Crimes, choosing not to rule in the abstract. It is contended that while co-perpetration represents a valuable mode of liability for ensuring that those responsible for knowingly supporting child recruitment policies (yet not in a direct command role over those who implement such a policy) do not escape prosecution, the ICC's interpretation of the Rome Statute provisions is not ideal. The Pre-Trial Chamber gained inspiration from Roxin's 'control over the crime' theory, which places emphasis on whether a perpetrator played an 'essential role' in a given crime. This approach presents a number of problems, not least the risks involved in judges imagining a parallel crime where the perpetrator was not involved and estimating whether the crime would have nonetheless proceeded in the same manner.

Considerations of Culture

The importance of cultural relativism in the development of the crime of child recruitment cannot be underestimated. Chapter 1 discusses the obstacles in striking a balance between international justice and cultural norms, comparing child recruitment with the practice of female genital mutilation. It also examines the question of what age marks the end of childhood, and discusses the competing Western and non-Western viewpoints on this issue.

One element of this cultural discussion that is pervasive throughout this book is the relatively new concept of child autonomy. This is a concept that operates in complete contrast to the commonly accepted notion of children requiring protection and nurture. Freeman recognises that children have a right to self-determination and must be permitted to exercise such.[11] While Aristotle contended that children have free will,[12] their ability to exercise this will has traditionally been viewed as hindered by their physical weaknesses and lack of purpose or long-term objectives. Advocates of child autonomy instead view child soldiers not as weak victims, but as 'competent survivors'.[13] There is a stark contrast between this 'dynamic self-determination' of children and the classic view of a child as requiring protection.[14] This contradiction is nowhere more manifest than within the articles of the Convention on the Rights of the Child, which aims to further children's best interests while also recognising children as possessors of rights:

> States Parties (to the Convention) shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.[15]

This contradiction between protecting children and allowing them the power to make their own decisions on issues that affect them has repercussions for the child soldier phenomenon, with some sociologists viewing a child's choice to fight as a legitimate autonomous decision, made from the 'subjective appraisal of their options and safety'.[16] It will be shown that this position has not been endorsed by the international courts, which have clearly determined that a child's 'choice' is irrelevant and those who placed them in danger should be held to account. However, there is one facet of the child soldier phenomenon where the opposite may apply: the prosecution of child soldiers for their crimes. If a child's right to autonomy becomes accepted by society, then the terrible acts committed

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[11] Freeman (1997).

[12] Woods (1982)

[13] Boyden (2000).

[14] Eekelaar (1994).

[15] CRC Article 12(1).

[16] J. de Berry, Child Soldiers and the Convention on the Rights of the Child' 2001, 575 AAAPSS 92, 94.

by child soldiers must consequentially be punished—just as the actions of any other person who possesses the power to self-determine.

The Statute of the Special Court for Sierra Leone and the Rome Statute have taken divergent paths on the issue of prosecuting child soldiers, with the Rome Statute choosing to restrict jurisdiction to those over the age of 18. However, conscious of the vast numbers of child soldiers that played a role in the civil war in Sierra Leone, the decision was made by the drafters of the Special Court's Statute to extend jurisdiction to cover persons aged between 15 and 18. It is argued that the approach taken by the Special Court on this issue is preferable, for a number of reasons. First, it sets 15-years old as the clear demarcation between 'child' and 'adult' that is missing in the Rome Statute, where a child is less than 15, but a legally responsible adult is over 18. Second, should a child ever have been the subject of a trial by the Special Court, any 'punishment' would have been construed in terms of rehabilitation and reintegration. It is argued that the Rome Statute should have taken this approach. In any event, as the ICC aims to prosecute only those 'most responsible' for atrocities, it is unlikely that children will ever be the subject of an ICC warrant, yet instigating an age limit of 15 prevents the scenario whereby those aged between 15 and 18 are 'legally untouchable' for any crimes they commit. The current regime has the effect of placing those aged between 15 and 18 at additional risk of recruitment, as they can be targeted for the toughest assignments by their recruiters, and neither the recruiters nor the children risk ICC prosecution.

Structure

The opening chapter—*The Child Soldier Dilemma*—introduces the topic and gives a brief history of the phenomenon of child soldiers, including an examination of the factors that lead to their involvement in hostilities. As Cassese advises, 'how could one understand the way the law is today if one does not study its evolution into its current state?'[17] The linked social science issues of cultural relativism and child autonomy, which raise an interesting ethical debate on the victim status of child soldiers, will be introduced. The chapter also introduces the question of the legal responsibility of child soldiers. Should they be prosecuted for their actions? Development in human rights law over the past few decades has confirmed the importance of child autonomy, yet the failure to hold children accountable for their actions does not conform to this concept. The suggestion that they are responsible for their actions is also incompatible with the current formulation of the crime, the key tenet of which suggests that responsibility alone rests with the recruiters. Has the criminalisation process overlooked this element of the child soldier problem?

[17] Cassese (1998).

The chapter then goes on to analyse the substantive international law framework, which provided the foundation for the criminalisation of the practice, as well to assess the role played by civil society during the drafting of this framework. The remainder of this chapter discusses the shift away from drafting human rights treaties towards enforcing international criminal law as a new means of addressing violations and curtailing impunity. The effectiveness of international instruments is discussed, as is the specific problem of their application to non-state parties, a key factor for the issue of child soldier recruitment. The chapter concludes by identifying the possible advantages in relying on international criminalisation in enforcing certain human rights principles.

The next chapter, *The Rome Statute: Codification of the Crime*, evaluates the pinnacle of the criminalisation process—the drafting of the Rome Statute and the formal codification of the crime in Article 8. It looks at the rationale behind the inclusion of a provision on child recruitment, and the reasoning behind the decision to decline jurisdiction for those aged less than 18, thus removing the option to try former child soldiers.

The determination of *mens rea* is a particularly indispensable point to be analysed. A number of arrest warrants have been served relating to child soldier recruitment, and the prosecution of recruitment has become a cornerstone of the Court's work to date.[18] However, the terms of the Rome Statute are somewhat unclear, and specific issues have arisen regarding the *mens rea* requirements of Article 30. It provides that in order for *mens rea* to be established the accused must have an 'awareness that a circumstance exists or a consequence will occur in the ordinary course of events'. Therefore, the Prosecutor must prove that the accused actually knew that the policy of recruiting without distinction as to age would ordinarily lead to the conscription of children under 15. Yet there is a discrepancy between the phrasing of several indictments and the ICC Elements of Crimes,[19] with the latter appearing to require 'knowledge and intent' on the part of the accused, rather than awareness. Resolving this discrepancy will be a key test of the applicability of the crime, and this chapter analyses the text of the Rome Statute

[18] The crime of child enlistment, conscription or use is currently being heard in the DRC case *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* (ICC-01/04-01/07). Katanga and Ngydjolo Chui were opponents of Lubanga's UPC in the Ituri conflict and allied their two militia—the Force de résistance patriotique en Ituri (FRPI) and the ethnic Lendu Front des nationalistes et intégrationnistes (FNI) respectively—to battle the UPC. The ICC charges against them relate specifically to an attack on the Ituri village of Bogoro between January and March 2003. In confirming the charges, Pre-Trial Chamber, I found grounds to believe that they consistently used children under the age of 15 to take part in hostilities within the FNI and FRPI militias prior to, during and following the Bogoro attack. As the count made reference only to the 'use' of children in hostilities, the issues of enlistment and conscription do not feature in this trial. At the time of writing, the closing statements had concluded and the judgment was imminent. The charge is also included in the warrants of arrest issued in the Lords's Revolutionary Army (LRA) case of *Prosecutor v Joseph Kony, Okot Odhiambo and Dominic Ongwen* (ICC-02/04-01/05), with the accused remaining at large.

[19] Elements of Crimes, see n. 9 above.

and the Elements of Crimes to determine the evidential basis upon which the crime of child recruitment may be prosecuted. The chapter concludes with a discussion of the applicable mistake defences and modes of responsibility as outlined within the Statute.

The next three chapters address, in a chronological manner, the two courts—the Special Court for Sierra Leone and the ICC—that drew upon this text in addressing the crime.

Chapter 3, *Crystallisation at the Special Court for Sierra Leone* commences the examination of the contribution made by the Special Court in the development of the crime of child soldier recruitment. While the Rome Statute had established that the crime existed in positive criminal law, the alleged offences took place prior to the coming into force of the Rome Statute and the ICC. Therefore, it was necessary to determine whether there was evidence that the crime was established as a matter of customary international law: whether it had 'crystallised' as a crime. The first indictment at the Special Court (*Prosecutor v Samuel Hinga Norman*) raised interesting questions on this topic of 'crystallisation' in customary international law, amidst Nuremburg-reminiscent arguments of violations of *nullum crimen sine lege*. Evidence of convictions taking place in the absence of a firm legal basis could taint the legacy and precedential qualities of these early, tentative prosecutions. This chapter further examines the influence of cultural practices in international justice, in two ways. First, the use of tribal initiation as a means of enlisting children, and second, the contentious issue of prosecuting former child combatants for their crimes.

Chapter 4—*Special Court for Sierra Leone: The First Judicial Interpretation*—continues the examination of the Special Court, moving on to focus on its case law on the crime of child recruitment: the first indictment and subsequent convictions in the Armed Forces Revolutionary Council and the judgment and appeal in the Civil Defence Forces cases. The Special Court was the first international tribunal specifically mandated to address the crime of child recruitment and thus provides a unique forum in which to examine the application of the crime in international criminal justice.

The penultimate chapter, *Child Soldiers at the ICC*, examines the most recent jurisprudence on the crime—the controversial first case before the ICC of *Prosecutor v Thomas Dyilo Lubanga*. It begins by asking why the Prosecutor chose to focus his first trial entirely on the issue of child recruitment, before going on to discuss the Confirmation of Charges decision and the strengths of the resulting judgment.

The final chapter summarises the main theoretical and empirical conclusions and consolidates the findings of the research. It outlines the key findings from the jurisprudential analysis, and evaluates how successful the two courts have been in responding to the challenges of this crime, while giving effect to child protection concerns. It will also summarise the findings on the position of child soldier witnesses and the involvement of civil society in the development of the crime: two issues that are recurring throughout this analysis. The book concludes with a brief discussion of the deterrent capacity of this international jurisprudence.

The author wishes to note from the outset that she will use the term 'crime of child recruitment' instead of the 'crime of conscripting or enlisting children under the age of 15 years… or using them to participate actively in hostilities', for the purposes of brevity. This phrase is intended to cover all three facets of the crime—use, enlistment and conscription—unless otherwise stated.

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Chapter 1
The Child Soldier Dilemma

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1.1 Introduction

This chapter has a number of objectives. First, it will introduce the topic and outline the background to the child soldier issue. The history of the use of child soldiers will be briefly examined, before moving to analysing the current position and the factors that contribute to the widespread use of children in conflict.

Second, the chapter will address the highly contentious issue of cultural relativism in international criminal justice. Does the legal framework that addresses the issue of child soldiers bear the hallmarks of culturally sensitive criteria? It is important at the outset to assess what position the issue of differing cultures and societies should play in determining what constitutes 'childhood' and who is a 'child' soldier on the international platform.

Third, the chapter will analyse the substantive legal framework from which the crime of child recruitment 'evolved', in response to pressure from non-

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governmental organisations and human rights groups. There have been contributions to this framework from humanitarian law, human rights law and the International Labour Organisation, and a significant number of treaties and conventions include prohibitions on using children in conflict. Issues that arise include the political motivations at play during the drafting of the instruments, how they are reflected in the final texts and the input of the 'straight-18' movement, which advocates for eighteen to be instated as the minimum age of recruitment. However, these instruments have had limited success and there appears to have been a growing trend towards criminalisation as a means to ensure compliance, representing a new 'era of application'.[1] The effectiveness of international instruments is discussed, as is the specific problem of their application to non-state parties. Perhaps international legal instruments have achieved all they can in bringing about an expectation of compliance with their principles, and this expectation can only be fully realised through international criminal justice? This author believes that the movement towards eradicating the use of child soldiers has undergone such a shift in approach.

Later chapters will expand upon these topics, and demonstrate how the elements of the crime were built upon its international human rights law foundations, by codification in the Rome Statute and judicial interpretation at the Special Court for Sierra Leone (Special Court) and the International Criminal Court (ICC).

1.2 The Child Soldier

The oft-used image of the African boy with a machine gun and ammunition strung around his neck has become a symbol of modern warfare. In 1998, UNICEF estimated that there were over 300,000 minors involved in more than 30 conflicts worldwide.[2] In 2002, it was estimated that children as young as six comprised as high as 10 % of the world's soldiers and those under fifteen played a role in 75 % of the conflicts around the globe.[3] A report released in November 2004 by the Coalition to Stop the Use of Child Soldiers found that children were 'fighting in almost every major conflict, in both government and opposition forces'.[4] The situation did not improve in 2006, a year Radhika Coomaraswamy, the former UN Special Representative for Children and Armed Conflict, referred to as 'a terrible year for children in armed conflict.'[5]

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[1] Statement by Olara A. Otunnu (Special Representative of the Secretary-General for Children and Armed Conflict), 'Era of Application—Instituting a Compliance and Enforcement Regime for CAAC' (2005) Security Council 5129th Meeting (23 February 2005).

[2] Seneviratne 2003, p. 39.

[3] Cset 1998, p. 4.

[4] Coalition to Stop the Use of Child Soldiers, *Child Soldiers Global Report* (2004) 13.

[5] General Assembly GA/SHC/3853 Sixty-first General Assembly Third Committee 14th Meeting (AM), 12 October 2006.

Since then a number of conflicts have ended, rendering the figure of 300,000 out-dated,[6] yet it is still invoked by advocacy groups and the media.[7] As recently as 2008, the estimate had increased to in excess of 400,000.[8]

The 2011 and 2012 Annual Reports of the Secretary General to the United Nations General Assembly on children and armed conflict provide the most recent statistics.[9] The 2011 report noted improvements on child soldier numbers in Burundi, where no new reported cases of recruitment or use of children were recorded in 2010. Chad and Sudan both reported a decrease in the number of reported cases of child recruitment or abduction, including a substantial decline in Darfur.[10] However, the statistics in other States were less positive. The Lord's Revolutionary Army (LRA) committed numerous violations against children in the Sudan, the Democratic Republic of Congo (DRC) and the Central African Republic, despite widespread media attention,[11] while the report noted a 'worrying trend of youth militarisation' in Cote d'Ivoire.[12] In the DRC, there was 'ongoing recruitment and threats of re-recruitment, including from schools' and 'accountability for perpetrators of crimes against children remained problematic'.[13]

In Afghanistan and Pakistan, there were reports of cross-border recruitment and use of children by armed opposition groups as suicide bombers.[14] In Iraq, many reports pointed to Al-Qaida operating a youth wing for children under the age of 14 called 'Birds of Paradise', charged with carrying out suicide attacks.[15] There was also a 'significant increase' in reports of child enlistment in Myanmar in 2010,[16] and several incidents of Palestinian children being used as human shields by Israeli security forces.[17] There were also reports of widespread and systematic recruitment of children in central and southern Somalia, with particularly

[6] Beber and Blattman 2011, abstract.

[7] Cassandra Clifford, 'Child Soldiers Continue to be Recruited in Central African Republic' *Foreign Policy* (5 May 2011); Charles Appel, 'Children are not soldiers' *United Nations News and Media* (14 February 2011); Cataldi and Briggs 2011.

[8] Save the Children International, 'An International Effort to Deal with the Issues of Child Soldiers' University of Nottingham Position Paper, March 2008.

[9] UNGA 'Report of the Secretary-General on Children and Armed Conflict' 65th Session, Agenda item 64 (a), UN Doc A/65/820 (2011) [Hereafter 'Secretary-General's Report 2011']. UNGA 'Report of the Secretary-General on Children and Armed Conflict' 67th Session, Agenda item 66 (a), UN Doc A/67/256 (2012) [Hereafter 'Secretary-General's Report 2012'].

[10] Secretary-General's Report 2011 paras 35, 60, 72, 140.

[11] Ibid para 191.

[12] Ibid para 84.

[13] Ibid paras 85–88.

[14] Ibid paras 7–9; Secretary-General's Report 2012 para 66.

[15] Ibid para 97.

[16] Ibid para 106.

[17] Ibid para 122.