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The protection of children in armed conflicts: the contradictory nature of child soldiers

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Introduction

Children are worthy and deserving of protection not only by the State's authorities, which are required to guarantee their protection against external dangers, but also by international organizations. Despite the fact that various international conventions protect the rights of children, they continue to be at risk from exploitation and mistreatment**.**

Children continue to be more exposed than adults to psychological and physical harm, including conflict-related trauma, especially in countries that enjoy less welfare and development of a social, cultural and economic nature. As I will demonstrate in my thesis, although many international objectives have been achieved, children continue to be exposed to the danger of losing their right to live a normal childhood. They are also often exposed to the harms in a forced and irreparable way. For example, in many conflict zones children are recruited as soldiers and war machines ready to perform serious atrocities also to the detriment of civil communities. The active and generically forced participation of children even under 15 years of age within armed groups, both part of the state apparatus and belonging to a non-state military force, is still particularly widespread throughout the world and constitutes an obstacle to the realization and enjoyment of the relative human and fundamental rights. The discussion of this issue must necessarily take into consideration not only what has been achieved over time by the international community from a merely formal point of view, but also of the studies on the factors that contribute to making it easier for rebel armed groups to recruit, as they make these subjects more vulnerable and sensitive to external influences. In fact, it has been shown that although children are in themselves a particularly vulnerable social group because they have not yet developed their own moral capacity and are not able to act autonomously and independently, some factors push them to find refuge from war , poverty, social and economic insecurity within the armed groups, which present to them as the only choice and way to survive.

In the first chapter of the thesis I intend to address and discuss in detail this last issue, and to identify the international treaties and conventions which currently apply to children. I will also explore what possible measures, both preventive and repressive in nature, can be adopted in response to the international crime consisting in the recruitment and use of

children in the context of both internal and international conflicts. Over the years many guidelines had been elaborated by the international community , especially UNICEF, which must be used by States in their own territory in order to avoid or undermine the possibility for the creation of a cultural, social, civil and legal environment able to favour this mechanism. Obviously, it is not possible to identify a unique and satisfactory formula or standard applicable in all circumstances, as each State, also on the basis of its origins, is characterized by its own cultural and social history. It is therefore not possible to think of a method which is effective in the same way in all circumstances and backgrounds, but it must always be elaborated and studied taking into account the specific peculiarities of the territories in which it is adopted in practice. Notwithstanding the fact that international treaties represent a fundamental success and form of recognition of their rights and freedoms, they cannot at all be considered exhaustive, since an operational action at the end of the day is way more powerful and necessary[1], according also to the opinion expressed by Norimitsu Onishi, who in fact declared how "*Words on paper do not save a child in war*"[2].

In the second chapter, I deal with a fundamental aspect of the problem of child soldiers, which is the possibility of states agreeing on a common and single minimum age parameter for criminal liability. This topic must be regarded as a priority because it is not uncommon that children, when involved in armed conflicts, are responsible of atrocities against innocent civilians. However, to this day, states have proved incapable of reaching a compromise between their interest in preserving their own traditions and cultures and, on the other hand, ensuring the implementation of a common standard; preventing discrimination in the prosecution of child soldiers responsible for international crimes. However, these obstacles must necessarily be overcome when dealing with international crimes, which do not concern the single state but the whole humanity and which are therefore of international interest. In fact it is impractical to leave the decision whether or not to prosecute a child, responsible for international crimes, to the single state exercising over the latter universal jurisdiction, as this leads to inconsistent approaches.

[1] Nienke Grossman, 'Rehabilitation or Revenge: Prosecuting Child Soldiers for Human Rights Violations' (2007) 38 Georgetown Journal of International Law, Available at SSRN: https://ssrn.com/abstract=1328982

[2] Norimitsu Onishi, 'Children of War in Sierra Leone Try to Start Over' (2002) N.Y. Times

As states still have not been able to agree on a clear and precise international definition of the minimum age for criminal responsibility ('MACR'), there is a serious uncertainty, from a criminal justice point of view, on how such individuals should be treated if they are found to be in contrast with the national law of a particular state or are responsible, in far more serious cases, for crimes affecting all humanity. Since States are free to set their own standards for MACR in their legal systems, in order to ensure that they comply with the principles and basic values established at international level as regards the protection of children, certain factors must necessarily be considered by national legislators. Therefore, I aim to highlight and underline the factors of which the subjects and entities responsible for identifying the MACR must become aware, so as to avoid the possibility that a subject is brought before the competent national court or tribunal without actually being able to not only commit the illegal action autonomously and consciously, but also to understand effectively what consequences derive from it. In the field of criminal justice, there are generally two different lines of thought: one for which young age should be considered sufficient reason to exclude their criminal liability and, on the other hand, the premise according to which age is not sufficient to exclude this liability but can only mitigate it. Nevertheless, the general principle which in any case shall be always respected and observed is the one of the best interests of the child, which has been repeatedly stressed and invoked at international level and as a result, the right to be heard by the members of the court or tribunal, which shall be proportionate to the child's level of maturity. However, this last right can be exercised only by those subjects who are sufficiently mature from an intellectual and psychological point of view, in fact only in the presence of these conditions it is possible to affirm that the subject is consciously taking part to the legal proceeding that concerns him and knowingly exercise the rights guaranteed by law. There are many studies and research on this specific issue, however none of them is able to identify in an absolute way a solution to this problem of a not only legal but also political nature. The difficulty in this regard arises from the fact that several elements are relevant to the identification of an adequate age above which the child soldier can be held criminally responsible, including: his mental, intellectual and moral development, its ability to act independently; the social, economic and cultural environment in which he was born and lives, etc. Precisely because of their variety and subjectivity, this question is still open to debate and contrasts in doctrine.

The final major issue addressed in this thesis relates the recruitment and enrolment within armed groups, especially not belonging to a state, of children, who are transformed by their military commanders into 'war machines', ready for anything in order to survive or achieve purposes and ideals to which they have been indoctrinated and instructed by the armed groups themselves. The phenomenon of child soldiers has been existent all over the world but nowadays it is especially common in the African countries, even though it cannot be said that it is exclusive of that specific geographical area. Since the non-state armed groups are currently increasingly widespread entities, to which in the majority of cases this cruel practice is attributable in violation of the human and fundamental rights of children, the need to make them somehow responsible under and according to international humanitarian and human rights law has emerged. Although this possibility has been criticized by many scholars who instead supported the impossibility and injustice that would derive from applying and imposing on the them principles and norms which not only they have not contributed to form but have not even formally accepted. However, the alternative of making non-state armed groups participating in the negotiations that produce these sources of international law has not been well accepted by the States, which in fact have expressed their resistance to this eventuality in order to prevent these forms of participation from being interpreted as indirect forms of recognition and legitimatization of the former.

To conclude, I consider it necessary to refer to two important cases that have been brought before the International Criminal Court: the Lubanga and Dominic Ongwen cases. These two cases have been regarded as innovative, as they not only brought to light the gravity of the war crime of recruiting and using children under the age of 15 in armed conflict, but also because they allowed the Court to analyse and discuss how the international community should approach the criminal liability of child soldiers, who enjoy a hybrid nature, being at the same time victims of abuses and perpetrators of atrocities against innocent third parties.

The questions, to which I refer while drafting and treating my thesis, are therefore multiple and not easy to solve, as even today the ICC or the leading experts in this field have not been able to identify a common theory or idea. These problems can be summarized as follows:

- How is it possible and why is it necessary to identify a standard common to all States with regard to the minimum age for criminal liability?
- What interests should be safeguarded in favour of minors who are subjected to criminal justice?
- What are the parameters and factors that must be taken into consideration when developing the measures to prevent recruitment or re-recruitment?
- To what extent should the ICC have guaranteed Ongwen, as himself victim of the crimes committed, a different treatment? How do we should address the criminal offences committed by child soldiers?

Through my work, I try to bring to light an obstacle, now well known, to the realization in practice of human rights formally guaranteed to children, which however still does not find an easy solution, mainly consistent in the recruitment and participation in conflicts created by adults . This is also the assumption on whose basis then in some cases, they unwittingly become guilty of crimes that go beyond their awareness. On the basis also of the conflicting opinions of the authors analysed, I was able to ascertain that each technique that can be adopted in these circumstances has its pros and cons, however it is necessary to identify the one which in the majority of cases balances the best interests of the child and the need of his social reintegration with the needs of the society that must accept and welcome him again. Despite subjecting child soldiers to justice, after having been victims of violence, could be considered in violation of their rights, it is not feasible a contrary hypothesis. De facto it would make increasingly difficult for them to be reintegrated into society, being an objective that must be achieved in order to effectively protect their freedoms. My argument is also supported by international humanitarian law and human rights law, especially the Convention on the Rights of the Child. In fact, this Convention does not totally prevent States from prosecuting child soldiers for their crimes, but rather provides for the procedural and substantive safeguards that must be guaranteed to them when they are subject to criminal proceedings before domestic courts. Unlike the existing and widespread articles and studies, I do not intend to confine myself to analysing the subject in an abstract way, outlining its various aspects, but I aim to make an innovative contribution, which can concretely offer a solution to a moral but above all legal dilemma that we have not yet been able to face.

Although no theory is flawless, the reality of the facts can no longer be ignored, and a practical approach must necessarily be identified in compliance with current international parameters. Indeed, the current silence on this issue has not led to a definitive end to the exploitation of children in armed conflicts.

CHAPTER I

1.1 The historical evolution

Since the beginning of our history, armed conflicts have caused suffering, both physical and moral, to the people who were in contact with it. Among the subjects who suffer the consequences of these conflicts are not only adults but also children, who undoubtedly remain the most damaged by such contexts characterized by violence and cruelty. In fact, they can be enrolled either in the army of the State, where they reside or be recruited within armed gangs, not connected to a specific state, in the presence for example of an internal conflict, or even be subject to different types of atrocities.

Even though nowadays the States are more and more involved in the protection of children, especially in connection to armed conflicts, they continue to suffer the horrible consequences deriving from their emergence. This environment increases the possibility for the child of being exposed to the risk of rape, sexual slavery, or they could be obliged in one way or another to be part themselves of the armed conflicts through the enlistment or conscription within the army.

The status of the child has been protected under international law through the adoption of many international treaties and conventions, which on the other hand, cannot be considered exhaustive or sufficient, with respect to the intent they propose, as children still continue to be exposed to innumerable dangers and threats all over the world.

Currently the term "*child soldier*" is used to refer to all those under eighteen who are recruited, enlisted or conscripted by a particular belligerent body[3]. Departs from this general definition what is generally provided in international humanitarian law and international criminal law, which still ensures concrete protection against damage caused by war, only to children under 15 years old. There is, therefore, a serious contradiction in the protection of the child, since despite the fact that the Convention on the Rights of the Child provides for substantive and procedural rights for all children under the age of 18, independent of the existence of armed conflict, other branches of international law have

[3] Principles and Guidelines on Children associated with armed forces or armed groups, 2007

not adopted an equivalent standard of protection. This minimum age for participation to the hostilities has been widely criticized by scholars, who believe that it is necessary for a wider protection to elevate the previously mentioned age to eighteen years old. Among the main international actors supporting the idea that this age shall be elevated, it must be mentioned necessarily the UNICEF, whose acts, which are not legally binding, and so consisting in soft laws, can still be important for the interpretation of the treaty's provisions. Furthermore, child soldiers are in the first-place children must enjoy the rights and freedoms established by human rights treaties.

At this point it is necessary to cite the treaties and conventions that have been elaborated over time by the international community, in order to guarantee protection to these individuals not only in times of war but also of peace, including the legal instruments adopted by regional organizations like the European Union and the African Union and last but not least the legal frameworks elaborated and supported by the United Nations like: the First Additional Protocol to the 1949 Geneva Convention, the Convention on the Rights of the Child (CRC) and the Optional Protocol to this latest Convention. Furthermore, in relation to internal armed conflicts, it is necessary to mention the Second Additional Protocol introduced in 1977 to the Geneva Conventions (1949).

1.2 The protection of the child's rights at the regional level

Since the European Union is an international organization which can exercise only the powers expressly conferred on it by the Member States within the treaties, according to the principle of conferral, it can guarantee protection to the child only in the specific sectors where it owns competence and in accordance with the procedures provided in the treaties. The main areas relevant for the children's rights, where the EU has legislated, are: consumer protection, asylum and immigration and cooperation in civil and political matters

The European Union law uses as a parameter, in order to identify who can be considered a minor and so the holder of the rights connected to this status, the fundamental international convention consisting in the UN Convention on the Rights of the Child

which in art. 1 establishes that a child is every person below the age of eighteen years old[4].

In the European area the children are perceived not as objects of protection but as beneficiaries of several fundamental and human rights, recognized both at the European and international level. It is peculiar the fact that within the main sources of European Union law , so constitutional treaties, secondary legislation and case law, there is not a formal definition of the term "*child*", in fact in reality they are differently defined taking into account the specific context of the concrete case. In relation to the provisions related to the EU internal market, consisting in an area characterized by the abolition of internal frontiers and barriers where is granted the free movement of goods, persons, services, establishment and capital, the child is defined as " *the direct descendant who is under the age of 21* ", so it uses a definition based on their economical and biological dependency.

Differently the secondary legislation adopted by the EU institutions consisting in the Directive 94\33 EC distinguishes those human being in different categories according to certain ranges of ages. So, it provides different working rights considering the category of belonging of the specific child, which are: young person, adolescents and children. In other areas moreover the European Union law leaves to Member States the responsibility to identify the correct definition and significance which should be given to the term, and in most of cases the Convention on the Rights of the Child would be adopted.

Actually, the majority of the rights owned by the child at the regional level had been elaborated over the decades by the international organizations consisting in the European Union and the Council of Europe. Moreover, at the international level, not only the United Nations but also other institutions have contributed to their development, like the Hague Conference on Private International Law. Even though the treaties and conventions elaborated by these institutions are separated from one another, over the years many links between them had been created, especially between the Council of European and EU law.

The European approach towards the category of human beings consisting in children has changed through the pass of time on the base of different factors such as the European

[4] Convention on the Rights of the Child (1989), art. 1

integrations, the concept of European citizenship ,which was highlighted in the Maastricht Treaty of 1992, and lastly the EU enlargement.

Originally and until the early beginnings of the 21st century, the EU was providing a little relevance to the human rights of the child, since it had a limited competence conferred by the Member States in the Treaties. Nowadays however these rights had become of greater relevance in the European legislation, because of the greater competences conferred to the regional organization in the sector.

In the past European Children law focused on the need to protect this specific category of individuals in relation to certain context, such as consumer protection and the free movement of European Citizens. While nowadays those rights consist in a fundamental aspect of the EU institutions' agenda, and they find their foundation in certain documents of particular significance like: the Charter of Fundamental Rights of the European Union[5], the Lisbon Treaty (2009) and the European Commission Communication on a special place for children in EU external action[6] and to conclude the Council Guidelines for the promotion and protection of the rights of the child[7].

With regards to the first milestone, so the Charter of Fundamental Rights of European Union, it has the value, after the entry into force in 2009 of the Lisbon Treaty, of primary source of EU law, enjoying the same legal status of the constitutional treaties founding the European Union. This document is relevant since it contained the first detailed references to the child's rights. For instance, it recognizes specifically the rights to a free and compulsory education in art. 14(2), the principle of non-discrimination (art. 21) and the prohibition of exploitation of children's labour in art. 21.

When analysing the Charter, it is important moreover to focus on art. 24 which identifies three main principles related to children's rights: the right to express their opinion and thoughts in relation to their age; the right to have their best interest taken into account for all actions related to them ,taken both by private and public actors and institutions and finally the right to a regular relationship with both parents.

[5] Charter of Fundamental Rights of the European Union, 2000
[6] A special Place for Children in EU external action, COM (2008) 55 final
[7] EU Guidelines for the promotion and protection of the rights of the Child, 2017

For what concerns the second main legal instrument, consisting in the Treaty of Lisbon which entered into force on the first December 2009, it has a major relevance since it embodied ,among the main objectives which must be achieved and promoted by the EU institutions in the exercise of their conferred competences, the promotion of the "*rights of the child*". This is evident in art. 3(3) and (5) TEU, which must be respected by the EU institutions not only when putting into being their internal competences but also in the context of their foreign policies. Not only the Treaty on the European Union, but also the Treaty on the Functioning of the European Union addresses the need to guarantee protection to this specific category of human being. The TFEU permits to the EU institution to adopt legislative measures to avoid and prohibit their sexual exploitation, sexual abuse, and pornography (art. 79,83). The last provisions previously mentioned differently identify the rights which the EU must ensure in the context of its foreign policies and relationships with non-EU states.

To conclude the European Union is engaged in many operational actions and programmes, like the Alliance for children[8], and have brought support to the international fight against sexual abuse, exploitation and pornography. This is evident from the elaboration of the launch of '*operation Icarus*', an operation and initiative targeting online child sex abuse networks. In the EU Alliance , in favour of children, the EU member states bind themselves and strongly commit to act in the same direction for the achievement of a common objective being the strengthening of the rights and freedoms generally recognized by the international frameworks, especially the Convention on the Rights of the Child. For example, they engage in the promotion and in taking practical action in the context of improvement of their life 's quality and in ending poverty.

The European institution having a leading role in the monitoring and in the exercise of a function of control, over the respect and promotion by Member States in their own territory of the fundamental rights recognized to children, consists on the Commission. The Commission Communication on '*Strategy for effective implementation of the Charter of Fundamental Rights*[9]' requires performing a 'fundamental rights check' of EU legislation to make sure that it follows the fundamental rights ensured by the Charter.

[8] EU Alliance for investing on children: Implementation Handbook, 2015
[9] Strategy for the effective implementation of the Charter for fundamental Rights, COM/2010/0573

Furthermore, it shall promote and advance children's rights at the international level by elaborating an EU Action Plan on Children in External Action.

At the regional level, not only European Union law, but mostly the Council of Europe concentrated and devoted itself to the protection and promotion of human rights. Its first human right treaty, which has been ratified by all the member states consisted in the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) which embodies several provisions specifically related to the children 's position and status. An example can be art. 6(1) ECHR[10] which permits to put limits to the principle of fair and public proceeding when this is in the major interests of the minor. In any case all the provisions within the ECHR benefit not only child but every human being, so it has a broad application.

Among the legal instruments adopted by the CoE , there is also the European Social Charter[11] which differently focuses on the recognition of social rights, with specific refence to children's rights in art. 7 which prohibits the economic exploitation of children, and art. 17 which imposes positively on Member States the duty to guarantee to these human being the necessary assistance, care and education. The main organ set up in order to verify the compliance of national legislations with the provisions contained in this legal instrument is the European Committee of Social Rights, composed of independent experts.

The CoE has moreover stipulated several conventions and treaties in specific spheres of their interests, legally binding on the Member States, such as: the *European Convention on the Exercise of Children's Rights*[12] , which aims to promote the best interest of the child and his rights, with specific relevance provided to the procedural rights in the judicial proceedings; the *Council of Europe Convention on Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention)*[13]. Additionally in 2006 the Council of Europe adopted the so called '*Building a Europe for and with Children*[14]', which consists in a programme aiming at the setting of certain minimum standards,

[10] European Convention for the Protection of Human Rights and Fundamental Freedoms, 1953
[11] European Social Charter, 1961
[12] European Convention on the Exercise of Children's Rights, 2000
[13] Council of Europe Convention on Protection of Children against Sexual Exploitation and Sexual Abuse, 2007
[14] Building a Europe for and with Children, 2016

helping the implementation and development of the international standards and CRC's provisions in the territory of all CoE member states. So the programme is focused on drawing attention to the main principles of the Convention on the Rights of the Child, consisting in non-discrimination, the right to life and development, the best interests of the child as a primary goal for decision-makers, and the right to be heard.

The European Court of Human Rights has moreover participated in the project consisting in granting increasing protection to the child, through its own judgments and case laws, where it has condemned any kind of violence against them, in the light of several rights such as the right to life , the prohibition of torture, forced labour and slavery[15].

In the framework of the disciplines adopted at regional level it is also necessary to mention the African Charter on the Rights and Welfare of the Child (African Charter)[16]. This Treaty was adopted by the countries , nowadays belonging to the African Union, following the entry into force of the 1989 UN Convention on the Rights of the Child, and its primary aim was to ensure respect for the rights enshrined therein in the African Continent. The discipline developed by this international organization has been considered by many scholars to be at the forefront, especially with regard to the situation of child soldiers and a clear expression of the commitment of African countries towards the development of international human rights law[17]. This is because, inside the African Charter, there is a higher protection than that provided by the UN Convention. While the 1989 Convention on the Rights of the Child provides children with protection from recruitment by armed groups and armed forces only until they reach the age of 15 years old, African States undertake to ensure that no person under 18 years old can participate in the armed conflict. In fact, art. 22 of the African Charter providing that Member States must undertake to take the necessary measures to prevent the participation of children in armed conflicts, uses a stronger language than the one provided for in the 1989 UN Convention which refers to "feasible measures". It also adopts the 18-year benchmark for participation in the conflict, the absence of which in the previous Convention on the Rights of the Child has been widely criticised.

[15] EU Framework of law on Children's Rights (2012), available at http://www.europarl.europa.eu/studies
[16] African Charter on the Rights and Welfare of the Child, 1999
[17] Karin C J M Arts, 'The International Protection of Children's Rights in Africa: The 1990 OAU Charter on the Rights and Welfare of the Child' (1993) 5 Afr J Int'l & Comp L 139

1.3 The Rights recognized at the international level

Not only at the regional but also at the international level, States engaged in the fight against child's abuse through the ratification of several legal instruments.

Among them, the Universal Declaration of Human Rights[18] and the two International Covenant (International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights[19]). For instance, the latter in art. 10 prescribes the right of protection of all children and young adults, which shall be granted without discrimination in order to avoid their social and labour exploitation. Another legal norm of particular relevance within the legal framework consists in art. 24, which establishes the right of non-discrimination with regard to race, colour, sex, language, religion, national or social origin, property or birth; the right to be registered immediately after birth and to have a name; and the right to acquire a nationality.

Other UN Conventions relevant in this particular field consist in the *UN Convention on the Rights of Persons with Disabilities*[20] and the *Convention on the Elimination of all Forms of Discrimination against Women*[21]. The former, in art. 7 specifies the obligation on the States Parties to grant equal rights and freedom to children with disabilities, with regard to the ones ensured to the other children; the principle according to which the best interests of the child shall be taken into due consideration when taken actions related to his position. In the latter differently the children rights discussed are strictly connected with the family life and the child-care context.

Always within the UN context, it is necessary to mention the International Labour Organization, which strongly contributed to the legal discussion around the rights and freedoms of the child. The ILO has been the first international organization to adopt legal provisions for the protection of children in the labour context, in 1919[22]. The most notable initiative of this international organization is the adoption of two 'core' Conventions aimed at abolishing child labour: the 1973 Minimum Age Convention (No. 138) and the

[18] Universal Declaration of Human Rights, 1948
[19] International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights, 1976
[20] UN Convention on the Rights of Persons with Disabilities, 2008
[21] Convention on the Elimination of all Forms of Discrimination against Women, 1979
[22] ILO Convention on the Hours of Work in Industry, 1919; Convention on Night Work, 1919

Worst Forms of Child Labour Convention (No. 182) adopted in 1999. All EU Member States have ratified these instruments. The Conventions provide for the prohibition of the employment of a child below a certain 'minimum age' and all forms of slavery or similar practices, such as the sale and trafficking of children, the use, procuring or offering of a child for prostitution or for the production of pornography[23].

These legal instruments, together with the UN Convention on the Rights of the Child, had been considered by the international community as a whole the parameters to be taken into account for the elaboration of new systems of protection both at the regional and the national level.

(a) Human rights law and international humanitarian law

The protection of the child aims to be achieved through the adoption of international treaties within the framework of international humanitarian law, international human rights law and international criminal law. However, these are not homogeneous and uniform, as they provide for the establishment of a different minimum age for the recruitment of children in international and internal armed conflicts. The practice of recruitment and use of children in conflicts is in principle inconsistent with the necessary protection of their fundamental rights and freedoms, which are recognised not only at regional level, but also and above all in the UN Convention on the Rights of the Child.

In 1989 an important development in the context of human rights has been attained by the international community of States, in fact the world's leaders had formally engaged in the protection and promotion of the rights and freedoms of each child, through the entry into force of the UN Convention on the Rights of the Child. In this legal framework the child is not just perceived as the object of legislation, but the main beneficiary and subject entitled to the exercise of certain rights. The Convention in particular focuses on the need to separate and distinguish the time of childhood from the one of adulthood, in fact during the former human beings are expressly entitled to grow, play and to receive an adequate education. It is worldwide considered one of the most important acts adopted in the sphere

[23] ILO Convention No. 182 on the worst forms of child labour, adopted on 17 June 1999 and ILO Convention No. 138 on the minimum age for admission to employment and work, adopted on 26 June 1973

of protection of the human rights of child and its strength is based moreover on the fact that it has been ratified by almost all States.

This legal instrument has a legally binding force and has been described by Nelson Mandela has "*luminous, living document that enshrines the rights of every child without exception, to a life of dignity and self-fulfilment*"[24]. The UNCRC is composed of 54 articles where it calls on the member states to meet the basic need of children, regarded as their own fundamental rights. Additionally three important Protocols has been elaborated consisting in the: the *Optional Protocol on the sale of children, child prostitution and child pornography*[25] and the *Optional Protocol on the involvement of children in armed conflict*[26] which set out additional rights for children; the *Optional Protocol on a Communications Procedure* which allows children to make complaints about child rights violations.

The doctrine regarded it as an important step towards a higher protection of the rights, freedom and dignity of the child. Within this international convention, States are making clear that children must be considered as human beings, and so entitled to human rights by virtue of this status. In this legal context the child, according to art.1, is the individual who has not reached the age of eighteen, even though it refers to the possibility of application of a different legal standard to define majority. This international legal framework, consisting in the starting point of all UNICEF policies, is an explicit expression of human rights law, but at the same time it seems to bring together two separate fields of public international law: international humanitarian law and human rights law.

International humanitarian law consists in that branch of international law which embodies the international rules and customs regulating armed conflicts, of an international or internal nature. It specifically aims at protecting certain categories of individuals who could be harmed during armed conflicts and restrict or prohibit the adoption by the parties to the conflicts of certain warfare tools. Those legal provisions

[24] Save the Children, The United Nations Convention on the Rights of the Child, available at < https://www.savethechildren.net/united-nations-convention-rights-child > accessed 13\03\2020
[25] Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, 2002
[26] Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, 2002

can be found in the *Hague Conventions of 1907* and the four *Geneva Conventions of 1949*, together with their *Additional Protocols of 1977*. The IHL is expressed also within the statutes of the international criminal courts and tribunals, like the Nuremberg Tribunal, ICTY, ICTR, ICC and their judgments.

Differently from IHL, human rights law is the law which deals with human beings and so then with human rights, deriving from UN treaties and various national constitutions. We can clearly understand that the main difference between them consist on the fact that while IHL applies only when a certain armed conflicts is in place, human rights law does not require the existence of this context for its application, so it must be respected also in peacetime. These two legal set of provisions are different for several reasons, including the way in which those rules are enforced, and the monitoring systems adopted. Usually the respect and fulfilment of the duties laid down in IHL are verified by the ICRC or in some instances by an external state functioning as a "Protecting Power".

As far as international human rights law is concerned, the states that have ratified these treaties are obliged to update a specific body, within the United Nations, on the methods adopted for the purpose of implementing the rules contained therein. Moreover, even if the observations of these bodies do not enjoy binding value, they bring with them an important value, above all of political nature, allowing them to put pressure on the defaulters. Apart from these distinctions , these different branches of international law are difficult to reconcile considering the fact that while the IHL aims to regulate behaviour between the parties during armed conflicts, the other would like to achieve complete abolition and prohibition of war, in order to avoid inevitable violations of human rights. Even if these areas seem distant and not easily reconciled, at the same time many scholars sustain that they are interconnected, and this seems to be demonstrated by the art. 38 CRC.

In fact, the first paragraph affirms that the Member States shall respect the international humanitarian law applicable to the child during armed conflicts. These provisions are formally included in the field of human rights, in fact their application is ensured by the CRC Committee, which verifies that the states apply the rules of international humanitarian law. In this way, therefore, we look at armed conflicts through a human rights perspective. Under this important provision, states are not only bound by treaties,

but also by customary international law, which is applicable to states independently on the fact that they had ratified a specific legal framework. Generally speaking the four Geneva Conventions and the Hague Convention are considered customary international law, so are applicable to states in conformity with art. 38 CRC, even though art. 41 embodies the so called " saving clause" , following which states have to respect the rules of IHL, mentioned in art. 38(1), only when they are not obliged to respect higher standards set in favour of the child. In conclusion we can declare that the rules of IHL are applicable in a residual way, since formally not part of the CRC.

The art. 38 CRC requests to states the application of the IHL's rules applicable to children within armed conflicts. Even if there is no definition of the term "*armed conflict*" within the four Geneva Conventions, traditionally *ius in bello* distinguish two different categories of armed conflicts. First we can establish that for the purpose of the existence of an armed conflict a formal declaration of war by a State is not necessary, as also claimed by the ICTY, according to which " *an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State*"[27]. Secondly an international armed conflict can be distinguished from a non-international one, because the former requires the resort to force between different States. It is more difficult to identify an internal armed conflict and differentiate it from the mere riots and internal rebellions. According to Second Additional Protocol to the Geneva Conventions, there must be a conflict between the state and a rebel group, which must have control over a substantial part of the national territory in order to carry out a military operation. The non- international armed conflict is not only disciplined by Additional Protocol II but also common art. 3 of the Geneva Conventions, considered to be customary in nature. Even though IHL makes this distinction, art. 38 CRC continue to apply this set of rules also in circumstances, which traditionally would not fall within the definition of armed conflict, and it has overcome this traditional distinction, thus being able to be considered forward-looking.

[27] Prosecutor V. Dusko Tadic A/K/A "Dule", Decision on The Defence Motion for Interlocutory Appeal on Jurisdiction (1995), par.70

According to public international law, States are only bound by the provisions contained in the international instruments which they had ratified. This international rule combined with the saving clause guarantees the application in the concrete case of the international instrument providing the higher protection to the right of the child. So the Convention on the Rights of the Child obliges States Parties to comply with the rules of international humanitarian law, which have to be considered of customary nature and moreover to all legal instruments of which they are parties, bearing in mind that the rule providing the best protection to the child is applicable, in conformity with the statement embodied in art. 41 of the CRC which states as follow:" *Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of the child and which may be contained in: (a) The law of a State party; or (b) International law in force for that State*[28]".

States over the years had found difficult to adopt a homogeneous and uniform definition of the term "*child*" within international treaties and conventions, considering the great differences between national legislations and constitutions. This explains why also the use of this term within the CRC has given rise to many issues and problematics. The Geneva Conventions in fact can be considered an example of the difficulty surrounding that topic, since the drafters decided not to identify a specific minimum age under which the single individual must be considered a child by the international community. This resulted in the fact that nowadays under IHL, the term "child" can be used in order to refer to different categories of individuals of different ages like new born, individuals under the age of 15 and those who have a age within the range of 15 and 18.

Differently, the Convention on the Rights of the Child, in art. 1, affirms that "*a child is every human being below the age of 18, unless under the law applicable to the child, majority is attained earlier*". Taking into consideration this definition, it is impossible not to conclude that it applies to all children, independently on the fact that they are participating the armed conflict or not. There is no mention of a formal distinction between combatants and civilians, differently from what happens in the context of international humanitarian law. It is therefore possible to establish that also child soldiers enjoy and can avail of the rights and protection provided by the Convention on the Rights

[28] United Nations Convention on the Rights of the Child, art. 41

of the Child, and moreover the Committee , in several occasions, has specified that child soldiers must be considered as belonging to the category of " child victims". So the general tendency within CRC consists in the adoption of an approach founded on human rights, in order not to discriminate against this category of children who are involved against their own will in the armed conflict and are obliged to live in an environment characterized by violence, violations of human rights and atrocities.

It is considered highly controversial the term used within art. 38(2) of the CRC, which obliges States parties to adopt any necessary measure in order to avoid the possibility of a direct participation of children, under the age of fifteen, in armed conflict. The same is provided within the Additional Protocol I to the Geneva Conventions of 1977[29] in art. 77, applicable in presence of international armed conflicts. The term "direct participation" has given rise to several discussions and problematics. The Commentaries to the Additional Protocols seems to require in order for the existence of this direct involvement of the child within the armed conflict a direct nexus between his action and the harm caused to the enemy, so it excluded behaviors which are generally categorized as "indirect" such as the transportation of arms or the communication of military informations. This narrow interpretation of the term "direct participation" can give rise to problems, in the sphere of the protection of children in armed contexts, since even such activities can cause harm to children and not necessarily such damages are less than those deriving from the cases in which they are directly involved. Furthermore, the use of this term seems almost to authorize the use by States of children, below the age of fifteen, provided that such participation can be considered indirect.

In order to avoid this possible consequence, deriving from a narrow interpretation of the law, many expressed themselves, in the course of the elaboration of the Convention, in favor of the use of the generic term of "participation" without the possibility of being able to distinguish between direct or indirect. However, this was considered by many delegations, working at the drafting of the conventions, impossible and unrealistic.

Despite the unfortunate formulation of the art. 38, in order to avoid the previously mentioned consequences, which are contrary to the very spirit of the convention, this

[29] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977

paragraph is interpreted, in accordance with the Commentaries to the Additional Protocols, in such a way as to render prohibited, despite the use of the term "direct participation", any involvement of such subjects in the military sphere. It is also important to point out that the use of this term within the convention entails a reduction in the protection guaranteed to these subjects, compared to that generally recognized to them in the context of other instruments of international law.

For instance, an higher protection is granted in art. 4 (3) of the AP 2, which impedes any use of children, under the age of fifteen, in the hostilities, without making any differentiation between a direct or indirect participation, even though this applies only in the context of non-international armed conflicts[30]. Another reference must be made to the Child Soldier Protocol[31], which creates a problematic and controversial distinction between international armed conflict and non- international ones. In fact, it is evident from both art. 1 and 4 that States are expected to refrain from recruiting any child under the age of 18 into their armed forces, while voluntary participation by individuals of a lower age is allowed; on the contrary a wider restriction is foreseen for non-state armed groups as it is precluded the use of any individual under the age of 18. Furthermore, the ICC Statute, has been the first legal instrument rendering the active participation of children under the age of 15 in the armed conflicts of an international and non-international nature a war crime, under art. 8.2 (b)(xxvi) and Art.8.2(e)(vii). The use of the term "*active participation*", instead of direct participation, can be interpreted as an expression of the will of the international community to enlarge the protection originally granted to children within IHL, the CRC and the Child Soldiers Protocol. In any case it is necessary to remind that it is up to the ICC to determine the real significance which must be attributed to that term.

It is possible to observe from the analysis of these rules that the Convention, although it represents an important step towards total protection of children, is not complete. In fact, despite the art. 1 establishes that every person under the age of 18 must be considered as beneficiaries of the rights provided, in the following rules it guarantees an effective protection only to those under the age of 15. This heterogeneity and inconsistency can be

[30] Additional Protocol II to the Geneva Conventions of 1977, art. 4(3)
[31] Optional Protocol on the Involvement of Children in Armed Conflict, 2002

considered the manifestation of resistances opposed by some states, especially the United States, towards adoption as a parameter for the recruitment of the 18 years old- approach.

The obligation to provide for recruitment in the first place of those older than 15 years, which has been defined as a priority rule, can be described as the greatest expression of the existing tension between States in favour of setting 18 as minimum age for participation to the conflict and those still in favour of the 15-year standard. The rule of priority is therefore the expression of a compromise, which, however, has a particularly limited value since failure to comply does not lead to the occurrence of any criminal responsibility within the jurisdiction of the ICC. Furthermore, this rule is perceived by the CRC Committee itself as temporary, destined to be applied until a common agreement is reached on the adoption of the approach based on the minimum requirement of 18 years.

Unlike the CRC, the Child Soldiers Protocol imposes the minimum requirement of 18 years only for forced participation, on the will of the State, to the army and not also for that of a "voluntary" nature, which however must be proven. Article. 3 (3) of this instrument in fact provides for three guarantees aimed at guaranteeing protection to the child who voluntarily decides to take part in conflicts: the existence of an informed consent of the parent or legal guardian; they must be informed of the duties arising from military service and must prove his age. Even though this provision has the positive effect of raising the minim age for the forced recruitment within the State army, at the same time it has lost the opportunity to establish the same for voluntary enlistment.

It is therefore possible to conclude that there is still a wide discussion about the minimum age beyond which the individual is no longer the holder of the rights reconnected to the status of child within the CRC and if it can guarantee protection not only to children who do not take part in hostilities but also to those who participate. The CRC Committee continues to argue that even child soldiers must find protection. Even if its opinions do not have binding value from a legal point of view, they have a political and moral value capable of pushing the progress in Member States' policies. The hope is therefore that the CRC Committee will continue to work so that this lack of homogeneity is eliminated, and full protection is achieved, abolishing the existing gap for subjects over the age of 15 but below 18.

The Committee on the Rights of the Child, in its report of 2006[32], declares that according to the international obligations taken by states through the ratification of the Convention on the Rights of the Child (art. 38) and arising from art. 3-4 of the Optional Protocol to the CRC, the States must necessary adopt all necessary measures to avoid the recruitment and use of children in armed conflict by each party. This obligation exists also towards former child soldiers, who must be protected from being again recruited by the armed groups, and whose rehabilitation and reintegration within the social and civil community must be ensured.

1.4 The protection of children in armed conflict: The ICC Statute

It is evident that the protection of the fundamental rights and freedoms of children must not only be ensured by the States in contexts of peace and wellness, but especially during war, which can be both international and internal of a specific state.

One of the major practices , impeding to the child the enjoyment of his human rights during the armed conflicts, consists in the recruitment and enlistment by the armed forces, not only of the States but also of rebellious and terroristic associations and groups or non-state actors. This practice, which is especially common in the African Continent, is nowadays belonging to the list of war crimes and crimes against humanity provided by the ICC Statute. The identification of this phenomenon as a war crime can be considered as an important achievement in the commitment of States in the promotion and protection of the child's human rights. It permits on the one hand to end impunity for those violating the fundamental rights recognized by international law to children and on the other hand guarantee protection to children in context characterized by the use of force and violence.

The ICC consists in the international criminal court dealing with the international crimes which shall be condemned by the international community, in order to end impunity of the perpetrators. The main crimes, falling within its jurisdiction, consist in genocide, crime against humanity, war crime and the crime of aggression[33]. The Statue of the ICC

[32] Report of the Committee on the Rights of the Child of 2006, General Assembly Official Records Sixty seventh session Supplement No. 41 (A/67/41)
[33] ICC Statute, art. 5

affirms that there are three main ways through which the perpetrators can commit a war crime affecting children, consisting in the conscription, enlistment or use of children under the age of 15 as soldiers. Nowadays the Court is not giving any more importance to the different ways through which the child soldiers are recruited, and the fact that they volunteered within the armed forces cannot be invoked as a defense.

Differently from the *actus reus*, the *mens rea* is always more difficult to be proven and verified in the concrete case. The general legal norm in the Statute dealing with it is the art. 30[34], according to which unless otherwise provided, for the emergence of the criminal liability it is necessary the existence of both the intent and knowledge. However a specific intent is provided for this specific crime, within the Elements of Crimes, stating that for the commission of the crime it is necessary that the perpetrator " *knew or should have known that the child was under the age of 15*"[35]. Through the use of the term "should have known" the court is admitting a negligence responsibility, in fact it is applied the parameter of the reasonable person.

The possibility to held criminal liable an individual who recruit, because of his negligence, children, shall be considered advantageous in the fight against this specific phenomenon since expand the possibility to bring those individuals before the international criminal court.

It is possible to affirm that there is a tension and a potential contradiction between the traditional view of the child as a subject requiring protection from the international community and the thesis describing the child has the owner of certain rights, as described for example by the Convention on the Rights of the Child, according to which , in art. 12, the child is entitled to exercise the right to express its opinion and view on the circumstances affecting his position, which must be taken into consideration in relation to his age and maturity. This specific norm underlines the existence of a contrast between the self-determination of the child, which can freely so decide for example to join the armed forces, and the necessity to guarantee his fundamental and human rights. The international court had not accepted the possibility for the child to decide whether or not to join the armed group and consider this circumstance irrelevant in order for the

[34] ICC Statute, art.30
[35] ICC Elements of Crimes, art.8(2) (b) (xxvi)

emergence of the crime falling within its own jurisdiction, in fact it declares that each individual who has put the child in danger shall be held criminally responsible.

The consequence which can arise whether we affirm that the child can in autonomy decide to take part to the hostilities can be dramatic , in fact can lead to the possibility for courts and tribunal to consider them able to perform the *mens rea* necessary for the commission of international crimes, and so responsible for their commission. The Sierra Leone Tribunal and the ICC have taken, on the issue related to the possibility to criminally prosecute child soldiers for the international crimes committed when taking part to the armed forces, different solutions. While in fact the ICC in art. 26 of the Statute, affirmed that it would only deal with the international crimes committed by individuals over the age of 18, in Sierra Leone , because of the vast presence of child soldiers participating to the hostilities and committing international crimes, it has been decided to prosecute also those having an age between 15 and 18. However, the International Tribunal has never effectively prosecuted this controversial category of persons, consisting of children who, in the context of armed conflict, have committed international crimes under its jurisdiction.

Many scholars believe that the solution provided by the Special Court is more advantageous and coherent with respect to the one provided by the ICC Statute since it makes clear the distinction between childhood and adulthood, in fact the child is only the individual under the age of 15. Differently the ICC Statute creates a lacuna since while in art. 8 punish those who conscripts, enlist or use in armed forces individuals under the age of 15, on the other hand it considers able to be criminally liable only those having an age beyond 18 years old. One of the reasons why the ICC Statute has been elaborated in this way by the member states could be the fact that its primary aim is the punishment and to end the impunity of those who can be considered the most responsible for the commission of international crimes, who unlikely can be children. However, a disadvantage which can arise from the current legal framework lies on the fact that those having an age belonging to the range between 15 to 18 years old, can be even more subject to the danger of being recruited by the non-state actors or state armed forces, since in this case the recruiters do not risk to perpetrate the international crime of recruiting child soldiers, falling within the ICC jurisdiction, and moreover the recruited cannot be considered liable

for the international crimes eventually committed[36]. On the base of the opinions expressed by the majority of scholars, the Statute of the International Criminal Court did not contribute to the debate on the identification of a minimum age for children to incur criminal liability for international crimes.

It can be concluded that since the beginning of our history, armed conflicts have caused suffering and damages, both physical and moral, to the people who were in contact with it. Among the subjects who suffer the consequences of these conflicts are not only adults but also children, who undoubtedly remain the most damaged by such contexts characterized by violence and cruelty. In fact, they can be either enrolled in the army of the State, where they reside or be recruited within non-state armed groups, in the presence for example of an internal conflict. Even though nowadays the States are more and more involved in the protection of children, especially in connection to armed conflicts, they continue to suffer the horrible consequences deriving from their emergence. This derives from the simple fact that armed conflicts carry the possibility for the child of being exposed to the risk of being raped, subject to sexual slavery, or they could be obliged in one way or another to be part themselves of the armed conflicts through the enlistment or conscription within the army.

As a consequence, even though the status of the child is protected under international human right law, international humanitarian law and international criminal law, through the adoption of many international treaties and conventions, they cannot be considered exhaustive or sufficient, with respect to the intent they propose, as children still continue to be subject to innumerable dangers and threats all over the world. The best solution would, of course, be the total abolition of armed conflicts, which impoverish society in various respects, but which is unfortunately utopian today.

1.5 Factors which contribute and favour the phenomenon of child soldier

The worldwide accepted definition of child soldiers, can actually be found in the Paris Declaration, which has been ratified by 105 Member States of the United Nations,

[36] Julie McBride, The War Crime of Child Soldier Recruitment (Asser Press ,2014)

according to which they can be regarded as "*any person below 18 years of age who is or has been recruited or used by an armed force or armed group in any capacity, including but not limited to children, boys and girls, used as fighters, cooks, porters, messengers, spies or for sexual purposes. It does not only refer to a child who is taking or has taken a direct part in hostilities*"[37]. Such children, exploited in conflicts as they are weak and easy to manoeuvre, can be considered illegal fighters who, as they enjoy this status, are necessarily protected not only by the four Geneva Conventions but also by the two additional protocols of 1977. The term of "illegal fighters" is used for identifying private individuals who participate in the armed conflict, without guaranteeing compliance with the existing rules adopted by the international community of states regarding war customs[38]. Based on data collected by various international organizations, a large number of children are unable to live a normal childhood and in social, cultural and economic conditions that guarantee peace and prevent the emergence of armed conflict. They are in fact used and forced to participate in wars between adults, which should never involve them. On the basis of the stories, experiences and testimonies collected by millions of boys and girls around the world it is possible to note the brutal reality of the facts , being that most of them do not have an effective choice in deciding whether or not to participate in the war .

In general terms the conditions, factors and contexts which contribute to the phenomenon can be distinguished in push and pull factors, which consist in terms used in several studies discussing and promoting the diffusion of knowledge on this specific topic. Even though scholars usually tend to distinguish between the forced conscription and voluntary decision of children to join the army, in reality in my opinion, it is quite difficult to draw a line and clear distinction between them. Usually those children live situations of extreme poverty, deprivation, suffering, discrimination and fear which makes almost impossible for them to think about an alternative to the joining of the armed forces[39].

Nevertheless, their participation, independently on the fact that it can be considered forced or the consequence of a "free decision", puts them in a risky position. In fact, they

[37] UNICEF, The Paris Principles: Principles and Guidelines on Children Associated with Armed Forces or Armed Groups, February 2007
[38] Lilian Peters, War is no Child's Play: Child Soldiers from Battlefield to Playground (DCAF, 2005)
[39] Michael Wessel, Child Soldiers (First Edition, The Encyclopaedia of Peace Psychology,2012) available at < https://onlinelibrary.wiley.com/doi/pdf/10.1002/9780470672532.wbepp020 > accessed on 13\03\2020

can be perceived as the targets to be attacked by enemy groups and moreover they can be asked to perform activities, which constitute a danger for their physical and psychological well-being. Consequences for this category of subjects are documented in a wide range of studies and articles and can include for instance: death, disability, drug addiction, psychological trauma, social alienation , impossibility to reintegrate within the civil society after the conflict, forced pregnancy, affected by serious diseases such as HIV and AIDS, homelessness, etc[40].

On the basis of studies conducted in countries where the phenomenon of recruitment and voluntary membership of children within armed groups is particularly widespread, it was possible to observe that the main reasons and factors that urge these individuals to make this decision voluntarily, and therefore in the majority of cases not under a coercive action, are different from each other's but simultaneously interconnected.

They consist of family and social backgrounds, poverty, lack of access to education and training, security, need of protection and so on. However, it is necessary to make an important premise on this point, in fact these factors, in the majority of cases observed, are not sufficient in themselves to determine the adhesion of the individual to the armed forces, but are generally combined with other incisive factors and events in their life , which may for example consist in the death or assassination of their relatives, and moreover an important impact is given by the very character of the individual. It is possible to support this theory as not all children who face contexts of severe poverty, loneliness, isolation then actually decide to participate in the conflict[41].

The ideological reason should not be underestimated, in fact in some cases individuals go in search of a war in which to participate and support. The war, in fact, spreading in the cities and villages, becomes part of the daily life of the local population, also becoming for some a source of work, especially for teenagers. In reality, war and belonging to a particular armed group can be seen by the child as an opportunity not only for example

[40] Lisa Alfredson ,Child soldiers, displacement and human security (Disarmament Forum, 2002), available at<https://www.researchgate.net/profile/Lisa_Alfredson/publication/237266353_Child_soldiers_displacement_and_human_security/links/58b040b492851cf7ae8ba152/Child-soldiers-displacement-and-human-security.pdf > accessed on 13\03\2020

[41] Rachel Brett, Adolescents volunteering for armed forces or armed groups (International Review of the Red Cross, 2003) , available at<https://www.icrc.org/en/doc/resources/documents/article/other/5wnjfx.htm > accessed on 13\03\2020

to escape from an oppressive familiar environment in which he suffered abuse of various kinds, but also to acquire its own independence, also of an economic and financial nature, or even just to feel part of a certain social group.

The subjects most at risk, however, are those who born in a family, which is close and participant to the armed group, in fact it will be more difficult for them to escape the duty to participate to the activities of the armed group and avoid taking up arms. These children are not aware of what peace feels like and they are more driven to use weapons as they experience a feeling of insecurity and fear, deriving from the fact that they cannot find protection from neither their relatives nor public authorities. In addition, generically in such circumstances the use of weapons, even by minors, is considered acceptable by society, in fact such weapons are accessible[42].

Furthermore, war can put in serious difficulties the economy of the country, causing an extreme poverty suffered especially by the population living in rural areas. In fact, the onset and protraction of international or national conflicts over time often leaves families without means of survival and sustenance, as for example the father of the family has died, due to the destruction of the fields that were the source of gain. Very often, therefore, the war, together with poor living conditions, determine a favourable context for the use of children in armed conflicts, in fact they are driven by the need to support themselves or to guarantee economic support to their families. The great influence that poverty exercises on the choices of these subjects was for example studied in the Democratic Republic of the Congo, where in a demobilization centre it was found that 61% of the children interviewed, about 300 in total, mentioned, among the major causes and factors that led to their participation in the conflict, the fact that the family was in serious economic situations and unable to guarantee the most basic services and possibilities for their children[43]. The social , economic and cultural status and background is of particular importance, in fact it is evident from several studies ,elaborated taken into consideration the areas where this phenomenon mostly verifies, that usually child soldiers come from rural and poor areas of the State's territory, and lived in difficult economic and familiar situations.

[42] Irma Specht and Rachel Brett, Young Soldiers: Why They Choose to Fight (Lyenne Rienner Publisher, 2004)
[43] Ibid.

As a matter of fact, they usually live in context of physical, mental or sexual abuse or have seen their mothers being sexually abused by their father or her partner[44]. Among the most common factors there is the fact that they usually suffer of malnutrition, and a deficit in the development of their socio- emotional growth. According to several studies addressing the factors contributing to the " voluntary" adhesion to the armed forced, the lack of parental control or the loss of one parent can cause a substantial emotional suffering and even determine as a consequence an emerging poverty and vulnerability. In fact, orphan, young individuals lacking primary caretakers are more at risk than the others, when an armed conflict emerges, to be enlisted or recruited. Orphans, unaccompanied children pushed by the need to survive, being unable to provide for themselves the basic needs like foods and clear water, engage in dangerous activities like trafficking or even in prostitution[45].

Displacement must necessary moreover be mentioned when discussing the elements, usually existing in context of conflicts. The refugees , who had seen their homes and properties destroyed, usually suffer in the refugees camps of discriminatory behaviours and the hard conditions in which they are obliged to live make them more sensible and fragile, being almost impossible for them to resist to the temptation to join the army in order to gain a sort of security and protection. It is well known the fact that the children who are at a particular risk of being recruited are those who are unaccompanied or separated, such as those living in settlement camps and in the street. IDPs and refugees in camps are sometimes militarized or targeted by armed forces or groups looking for new recruits. Not to mention the fact that because of the slow registration processes at camps, the recruitment can in certain cases not be documented at all and IDPs and refugees can easily disappear without none having any proof or record of their physical presence. For this reason and being the phenomenon particularly diffused, the UNHCR tried to provide a special protection from recruitment in favour of displaced populations in its Guidelines on the Protection and Care of Refugee Children (1994) and Guiding Principles on Internal Displacement (1998). The protection of these individuals however remains difficult to be

[44] Emily Vargas-Barón, National Policies to Prevent the Recruitment of Child Soldiers (In Gates S. & Reich S., Child Soldiers in the Age of Fractured States, Pittsburgh, Pa: University of Pittsburgh Press, 2010)

[45] Michael G. Wessells, Child Soldiers: From Violence to Protection (Harvard University Press, 2009), p. 25

granted because of the absence of enough economic resources and inadequate preparation on the risks, necessary methods and processes for prevention. Cross-border recruitment among refugees far from their home country is even more difficult to be handled, because of the lack of alternatives to the enlistment, which would have been granted by their communities, like for instance education and employment.

Yet for unaccompanied children, the armed groups may appear to be the unique way through which they can have access and satisfaction of certain basic and elementary needs such as food, healthcare, protection, security and gain again a sense of belonging. Not to mention the fact that many of them join or are recruited after having been testimony and witnesses of atrocities committed against their families or communities and seek a revenge.

Another aspect to be mentioned and that in no case can be underestimated, is the level of influence exerted by the companions on children of all ages[46]. In fact, they guide the future choices and behaviours of these subjects, as much as the traditions and the cultural, social and family context. An example of this can even be found in Europe where more than half of the young people who have decided to live in Syria to fight within the rebel armed groups, have made this decision, risky for their own survival, based also on the opinions expressed by their peers[47].However, precisely because they can influence their entry and participation in the armed group, it can be thought that can equally contribute to preventing both recruitment and indoctrination.

As a result of mix of different elements , like the ones previously mentioned and moreover the lack of a basic education and protective services, they usually take the decision to leave their own families in order to join armed groups, which to their eyes seems to be a better and a safer option.

Considering the importance and the weight owned by the social, economic, familiar and educational background of the child in the light of his decision to join the armed group,

[46] Shioban O'Neil and Kato Van Broeckhoven, Cradled by Conflict: child Involvement with armed groups in Contemporary Conflicts (United Nations University)

[47] Scott Atran, 'The Role of Youth in Countering Violent Extremism and Promoting Peace, Address to the UN Security Council' Psychology Today (2015), available at <https://www.psychologytoday.com/us/blog/in-gods-we-trust/201505/role-youth-countering-violent-extremism-promoting-peace > accessed 24\04\2020

many scholars sustained that probably if they could have had enjoyed of a better education, health care and nutrition and lived in a more supportive and comfortable familiar and social environment, they would have been less pushed to take that dangerous decision. Of course, the efforts of the civil society would not be enough to resist the abduction perpetrated by armed groups towards children, if not linked to a certain level of protection which shall be granted directly by the State, which shall provide police forces and militias.

Children soldiers usually have in common the fact that they suffer of a high illiteracy, because they had not the possibility to attend primary school or had been obliged to leave the educational system because too poor to afford it[48]. War and poverty bring with it the impossibility for girls and boys to access the most basic services that should be guaranteed by the State of belonging, including access to adequate education. For example, following the occurrence of a crisis in the Democratic Republic of the Congo, more than 150,000 children no longer had access to schools, as they were destroyed, damaged by war or even occupied by various armed groups[49]. Obviously, the lack of education significantly limits the possibility for the subject to be able to access in the future a job that allows him to sustain himself and survive. Consequently the lack of future job prospects as well can be considered a factor that constraints these categories of individuals to enlist, as working within the armed represents the only option to have access to a sort of gain that guarantees their survival[50].

The studies elaborated by the UNESCO exhibit education as a powerful tool to grant protection and a safe harbour to children, both boys and girls, in time of armed conflict, but also in post- conflict climate. Education can in fact permit to children to suffer less the negative consequences deriving from conflicts and permit to live in an environment which is favourable for the development of their psychological abilities and talents[51]. Moreover, among the amount of benefits and advantages provided, there is the fact that

[48] Scott Gates and Simon Reich, Child Soldiers in the Age of Fractured States (University of Pittsburgh Press, 2010)
[49] '150,000 children in Greater Kasai region need emergency support to continue education', press release, UNICEF,9 June 2017, https://www.unicef.org/
[50] World Vision International, No Choice: it takes a world to end the use of child soldiers, 2019
[51] Erin Lafayette, 'The Prosecution of Child Soldiers: Balancing Accountability with Justice' (2013) 63 Syracuse L Rev 297

it creates hope in the child's mind for a better world and life[52]. The mandatory primary school education can be so regarded as a useful mean to reduce the risk of child abduction and soldiering.

Education has always played a relevant and significant role in human development and for this reason it is placed among not only the Sustainable Development Goals, but it is even at the core of the 'Education for All' project. Even though generally talking the number of children out of primary school worldwide has fallen, the percentage is still particularly high especially in poor and developing countries, affected by civil and internal conflicts[53]. Furthermore many scholars believe in the existence of a causal link and relationship between education and conflict, in fact while on the one hand education can be beneficial to the local population, especially to children, on the other hand conflicts makes more difficult the access to the educational system and strongly undermines the safety of these infrastructures. This is due to the fact that conflicts bring as a consequence the attacks against the educational staff, the damaging and destruction of schools and universities and last but not least reduce the capacities of teachers. As affirmed by Machel, it is evident from concrete past experiences that schools represent a high-risk area of military attacks during armed conflicts[54]. In her report, she intentionally wanted to emphasize how very often thousands of schools are destroyed in the context of armed conflicts and that professors, like students, are exposed to great risks within these structures, including even in the worst case of being killed. Despite this atrocious reality, education remains a value that must be protected more than ever, since if it is necessary in times of peace, in times of war and confusion it is even more indispensable.

In fact, education assures these subjects, who are characterized by their sensitivity, the opportunity to enjoy a kind of continuity and stability which also the community needs[55].

Then looking at these studies and statistics which had been made over the decades, it is possible to deduce that even though education can be considered as a way to protect children in armed conflict and post conflict situations, still alone is not enough to prevent

[52] UNESCO, Education and Conflict, 2009
[53] Save the Children, Rewrite the Future: Education for Children in Conflict-affected Countries (International Save the Children Alliance ,2006)
[54] Graça Machel, 'The impact of Armed Conflict on Children' International conference on war-affected children (2000)
[55] UN General Assembly, A/51/306 Promotion and Protection of the rights of children, 26 August 1996

their human rights and fundamental freedoms' protection. Education so can be regarded as a path through which equality , tolerance in relation to race, sexual orientation, religion and cultural differences ca be achieved, considering that it is a system which brings people together and permit to them to be more political involved and , in case of conflict, look for more diplomatic and non-violent answers. At the same time in certain circumstances and countries it can be also used as a mean, by the political elite for their own goals. It can be generally observed that when nations are moving towards a war, the educational system's quality is impaired and the same schools become centres of indoctrination, in view of a future recruitment. In fact, nowadays many religious groups, especially in developing countries are using education as a tool to reach control over the young minds of children and teach them the main values and principles in the light of which they will fight.

Access to educational programmes for adults and parents is of no less importance. In several cases parents are unable, because of the poor economic and financial resources and education, to provide protection and a correct environment for the mental development of their children. This lack of resources pushes them to permit to their children to leave their own house to live with the armed group, which could enable them to enjoy of a proper nutrition, clothing, and protection. The family of the child plays an important role, and it has been declared that a poor home setting can be the "seabed" for child soldiering. The development of parental skills and the providing of educational programs can be considered a powerful policy which can be adopted by states in order to improve the well-being of the families, living contests of war, and significantly reduce their poverty status. Firstly, to these families, especially the ones having children in vulnerable conditions because suffering of chronicle illness, or development delays, states should grant access to basic public services such as health care, nutrition, education, public security, etc. Secondly, parents for instance shall enjoy of the possibility to attend training and programs aiming at identifying the main techniques which could be used in order to avoid the possibility of child's recruitment and the means which could be used in order to create a cooperation between individuals , belonging to the local community, able to resist to the interference and campaign of non-state actors. This has been particularly effective in Columbia, where community cohesion constituted an impediment to the advance of armed groups, which were taking control over several rural areas.

Social cohesion is one of the strongest deterrents to the emergence of internal tensions, violent crimes and targeting of minorities. "*Social cohesion is about tolerance of, and respect for, diversity (in terms of religion, ethnicity, economic situation, political preferences, sexuality, gender and age) - both institutionally and individually*"[56]. There are two important dimensions of social cohesion: the possibility for minorities to participate in the life of civil society, from a political, social, cultural point of view, in order to allow them to have equal opportunities. The marginalization of ethnic groups can determine as a result their insecurity and push them to use violent means to claim and obtain recognition of their rights. The second element deal with building community cohesion and so bringing together people coming from different perspectives and backgrounds. It has in fact been proven that in some countries where reconciliation and conflict resolutions had not been promoted, the families were more engaged in revenges for past atrocities and sufferings and educated their children in such a way that violence seems to them the only way to survive. This is evident for instance in Colombia, where almost all adult fighters in guerrillas began to commit acts of violence since they were only children.

On the top of that nations, during armed conflicts, found more difficult from an economic and political point of view to ensure certain basic services and levels of protection to the citizens, among which basic health, nutrition, education , especially in the most affected areas of the national territory. However, it has been proven that certain programs and policies can be performed and be effective also in period of chaos, governed by legal and political uncertainty and instability, and this has been proven to be true especially in the territory of Colombia, Bosnia and Herzegovina and Eritrea. "*Virtual learning centres, community outreach programs, early childhood and parenting services, and many other types of programs have functioned successfully during conflicts, and they have helped not only resident populations but also IDPs, street children, orphans, and refugees from other nations*"[57].

Usually these programs are directed by International Organizations such as the United Nations and its specialized agencies, or by NGOs etc, but they can only effectively work

[56] UNDP, Community security and Social cohesion, 2009
[57] Vargas-Barón (n 44)

and be considered fruitful when the civil society and the local executive power cooperate with them.

The difficulty inherent in the identification of the actual number of child soldiers, used in the various countries of the world, is added to the factors that today prevent a total abolition of this phenomenon. This is also due to the fact that in many countries children at birth are not registered and so in many cases it is difficult to prove the age at which they began to be an active member of the armed group. Therefore it would be favourable for UN agencies and international organizations working in the field the creation of a database, which shall identify: the child conscripted; the level of efficiency of the programs undertaken; the level of compliance and enforcement by the local governments. The policies shall especially focus on the protection of children where they are more easily targeted by armed groups, like schools, families and refugees' camps. Even though these places shall be at the centre of attention, in practice those programs primary focus on the protection of public and business buildings. The Database shall monitor and track not only the groups and entities which are, in the most of cases, responsible for the recruitment in certain zones, but additionally the techniques and tool usually used and the results that they achieve through them. This is necessary in order to permit to specialists to understand and capture their way of operating for the acquisition of new soldiers, and for the personal and individual identification of the perpetrator, in order to bring him before a court where he would be subject to a judicial proceeding, which is necessary in order to end impunity of this international crime.

1.6 Responses to the use of child soldiers

"*Our collective failure to protect children must be transformed into an opportunity to confront the problems that cause their suffering*" , these are the words of Graça Machel[58], which make clear that in our contemporary conflicts, one of the most diffused trends consist in the use of child as soldier. As previously mentioned, the already existing universal definition of child soldiers, can actually be found in the Paris Declaration according to which they can be regarded as "*any person below 18 years of age who is or*

[58] Graça Machel, 'The Impact of War on Children' (New York: Palgrave, 2001)

has been recruited or used by an armed force or armed group in any capacity, including but not limited to children, boys and girls, used as fighters, cooks, porters, messengers, spies or for sexual purposes. It does not only refer to a child who is taking or has taken a direct part in hostilities"[59].

In this paragraph I will discuss which kind of policies can be adopted by States in two specific moments of the armed conflict, consisting in the period before the arising of the conflict itself and during this period of time. Notwithstanding the fact that Member States have widely accepted their responsibility at the international level to protect this category of human being, there is still a lack of a universal response to this phenomenon, consisting for example in the adoption of common guidelines and measures to deter , prevent and avoid the emergence of the violations of the fundamental and human rights of the child. Until recently in fact the main actors which effectively committed to their protection consisted in NGOs and associations, while this topic shall be put at the top of the agenda of international organizations. Since the last years of the 20th century, their protection was promoted through the ratification of peace agreements and treaties, however they are now considered not enough to solve the issue since a comprehensive approach is needed.

The only way to ensure that effective measures are defined in this area is to consider two elements: the main methods used for their recruitment by the armed forces and moreover the main reasons that push the children within the arms of the rebel armed groups. These factors cannot be underestimated, because only a response that examines the actual and existing social, economic, political and cultural conditions can actually make a difference and reject, if not also prevent such a crime. The main organizations giving relevance and improving the field of research in this specific context consist on the United Nations University (UNU), the UN Children's Fund (UNICEF), and the UN Department of Peacekeeping Operations, and Luxemburg and Switzerland, which had in particular concentrated their researched in specific territories like the ones of Mali, Iraq and Nigeria[60].

[59] UNICEF, The Paris Principles: Principles and Guidelines on Children Associated with Armed Forces or Armed Groups (2007)
[60] Will Higginbotham, Understanding Child Soldier Recruitment Needed to Help Curb Crisis (Inter Press Service, 2018)

In our days, there is not a clear idea of how many children are effectively involved in the armed conflicts, and so recruited by the armed forces for example of terroristic associations, but the number is most likely around tens of thousands. Moreover today, not only non-state actors can be listed as the ones responsible for such violations of their fundamental and human rights, depriving them of the possibility to develop a normal conscience, understanding of what is wrong and what is right and to live the childhood that each child shall be entitled to, but also the same states. This is proven by the fact that in 2018 there were more than 46 countries involving and exploiting children within their armed forces[61]. The UN, monitoring the number of children soldiers around the world, declared in several occasions how the numbers are still increasing and how this must be so considered an emergency at the international level. The Child Soldier World Index has been created in fact as a toll , consisting in the first ever online database, which permits to verify in each moment and makes accessible to everyone the informations and data related to the child recruitment , policies and legislations in force in all member states of the United Nations[62]. The Child Soldier World Index is the most comprehensive resource on child recruitment which had been elaborated by the human rights group, Child Soldiers International.

Sadly, it shows that more than 20% of the 197 UN Member States are still enlisting children into their militaries, including 17 states which are making use of juveniles having only 16 years old. This deliberate targeting of children by States, for military purposes determines a violation and infringement of their legal duties under the Convention on the Rights of the Child. Researches have demonstrated that children who are recruited into military and armed groups are threatened by a serious and long-term harm, even when they are not actually participating actively to the conflict[63].

Even though, as we have already broadly underlined, the recruitment, enlistment and conscription of children within armed forces is condemned in several international treaties and convention, protocols and UN resolutions, now it is necessary to connect this

[61] Child Soldiers International, Child Soldier International Annual Report 2017- 2018
[62] Child Soldiers International, Child Soldiers World Index reveals shocking scale of child recruitment around the world, 2018
[63] Lucia H. Seyfarth, 'Child Soldier to War Criminal: Trauma and the case for Personal Mitigation' Chicago-Kent Journal of International and Comparative Law (2013)

formal prohibition to concrete actions to be adopted not only at the international level but also at the national one.

The actions that shall be taken by the international community and in the territory of each country can vary. Those measures must be adopted in different sectors, such as in the educational field, and must be able to give effect and enforce the prohibitions wanted and established by states at the international level. A major role in the creation of these guidelines, general practices and laws is given to the national governments, which would be less willing to elaborate them when an internal conflict and a civil war emerges in the country. When an armed conflict emerges in a country, the educational and health care system fall into a crisis. Especially internal conflicts between the national army and a rebellious armed group, and so a non-state actor, determine as a consequence the destruction or damaging of several public building and constructions among which schools and hospitals, where the teachers and medical staff are prosecuted and subject to inhumane treatment. Especially in this environment of terror and fear, it is essential that the policy-makers provide guidelines, protocols and regulations highlighting the actions and preventing measures that shall be adopted by specialized personnel but also the parents in order to prevent this phenomenon. These rules, even though not yet entered formally into force, would start to guide and direct the actions of the local population into a certain direction, which is conform to the international objectives and purposes. They could be even more effective when elaborated by the executive together with the individuals who subsequently will be under the duty to implement them.

In the elaboration of these policies which would be applied in the different fields and sectors of the civil society, a special consideration shall be given to the gender. In fact, sadly, even though both boys and girls are subject to cruel violence and deprivation of human dignity in their life within armed groups, still the law does not give relevance to the specific dangers to which girls are subjected during armed conflicts. This results in girls being less protected by the laws in force rather than boys.

Even though traditionally, when people were thinking about the image of a child soldier, they were imagining a young boy with a weapon in his hands, in recent years a greater relevance has been given to the role of female, so young girls, within the armed groups, and to their stories and experiences. When discussing about the participation of girls in

the armed conflicts, it is possible to confirm that, in the majority of cases, they don't actually take part to the hostilities, but they are involved in activities consisting for instance in taking care of the household, child-care or even providing sexual services in favour of the combatants[64]. Sadly, one of the most diffused practices put into being by the participants to the armed forces is the sexual exploitation, slavery and rape of those girls. Furthermore, after the end of the conflict, they are stigmatized not only by the local communities, but even by their family's members which consider them "impure" and so as a consequence not entitled to marriage and unable to obtain any job. For all these reasons, it must be a priority not only of international organizations but even of the States themselves to adopt Codes which take into consideration the particular vulnerability of girls during the armed conflicts.

The Dallaire Initiative[65], which has been adopted to train the security personnel in over 60 countries, is founded on the basic belief according to which the presence of girls and women in the security staff and taking part to the peacekeeping operation, created through resolutions of the Security Council of the UN, is fundamental. Their presence can in fact be considered useful to end sexual violence and in general the phenomenon of child soldiers. The need to increase their presence in such operational actions taken by the United Nations is not new, in fact it has been emphasized in several resolutions on the base of different factors such as: empowering women in the host community; addressing specific needs of female ex-combatants during the process of demobilizing and reintegration into civilian life; helping make the peacekeeping force approachable to women in the community; interviewing survivors of gender-based violence; mentoring female cadets at police and military academies and interacting with women in societies where women are prohibited from speaking to men[66].

Last but not least in 2014 in order to answer to the brutal reality consisting on the fact that child is still all over the world used as war agents, the international community

[64]Kristýna Foukalová, 'Female Child Soldiers' Global Politics (2013), available at <http://www.globalpolitics.cz/clanky/female-child-soldiers> accessed on 9/06/2020

[65] Romeo Dallaire , Innovation in the Prevention of the Use of Child Soldiers: women in the security sector (2016) 6 PRISM 164, available at < https://cco.ndu.edu/PRISM/PRISM-volume-6-no1/Article/684610/innovation-in-the-prevention-of-the-use-of-child-soldiers-women-in-the-security/ > accessed on 9/06/2020

[66]'Women in Peacekeeping' (United Nations Peacekeeping, 2019), available at < https://peacekeeping.un.org/en/women-peacekeeping> accessed on 9/06/2020

launched the campaign “Children, Not Soldier”. An action plan and initiative which has been supported by the Special Representative of the Secretary-General for Children and Armed Conflict and UNICEF, aiming at establishing the idea that children must not be used by both state and private actors like soldiers. It received immediate support from Member States, UN, NGO partners, regional organizations and the public opinion. The countries, which were mostly interested by this, consisted on states like: Afghanistan, Chad, Democratic Republic of Congo, Somalia, Sudan, South Sudan and Yemen. This campaign has been considered a success by the Security Council in fact even though it ended at the end of 2016, it pushed and suggested many countries, not only the once specifically interested, to adopted national campaigns having the same objectives and purposes. For example, Afghanistan proceeded in making illegal the use and recruitment of child soldiers in its legal system , moreover over 800 children had been released from Myanmar ‘s army after the adoption of the Action Plan in 2012, and furthermore the same country proceeded in ratifying the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts in 2015[67].

Among the most useful tools, which according to several studies of scholars , can be approached and embraced by States in their own territories, in order to give practical relevance and application to their international obligations towards children, there are: the use of social media in order to avoid or prevent he recruitment; systems of psychological support and reintegration in favor of child soldiers; maintenance of social protection and services in favor of the local population etc.

To assure these services, it would be necessary for the state, in the most of cases, to cooperate and look for the assistance of national NGOs or even international organizations. States shall furthermore engage in supporting and creating a social and public campaign aiming at increasing the knowledge that the local population has of this brutal practice and push it to help and make efforts in order to restrict the possibilities for armed forces to take away children from the civil society and their families. These campaigns are essential especially when the conflict has already started. This method has been used in countries like Colombia, where the social medias had been used to push the

[67] ‘Children, not Soldiers’ (Office of the Special Representative of the Secretary General for Children and Armed Conflict) , available at < https://childrenandarmedconflict.un.org/children-not-soldiers/> accessed on 13\03\2020

adult fighters to leave the brigades. This has been regarded as a huge success since over 32.000 fighters decided to abandon the armed forces around the 2005-2006. They can be considered quite useful instruments , taking into account the fact that almost all children involved in the conflicts are illiterate or have receive only a little education during the course of their life, and can be used also to prepare the local communities to reconcile and grant the necessary support to the child soldiers.

In the case a child soldier is able to escape from the armed group, he is entitled to receive support from a psychological and physical point of view, in order to obtain reintegration within the home country. The consequence of the impossibility to become again part of the community, and so to integrate within it, can be terrible. The child, whenever does not feel accepted, can eventually decide or be pushed to join again the rebel group[68].

Another important way through which the use of child soldiers can be sensibly reduced or even abolished can be to set, as a condition to receive military assistance, the lack of use of children within the army. In 2014, the U.N. Security Council adopted Resolution 2143, which condemns violations of relevant international law related to the use of children in the armed conflict and it requests to member states to implement action plans which aims to ensure it. Notwithstanding the adoption and the formal acceptance of states of such international instruments, children are still widely used also in the State-owned armed forces. Even though those measures can be considered as having a significant role in the promotion of the protection to be granted to children and in the fight against those using them as agents within the armed conflicts, in practice only few States had effectively adopted operational actions , for example subjecting the military assistance to the assurance that the counterpart , receiving the military help, is not using them within its own army.

With regard to the general behaviour adopted by States, it is possible to refer to China, which provided millions of dollars of military weapons to South Sudan notwithstanding the fact that the country was making use and enlisting children, who would have been obliged to take active part to the hostilities. In the same directions acted Germany and France in the context of their military relationships with the Democratic Republic of Congo, whose army is well known for making use of child soldiers; the United States,

[68] Gates and Reich (n 48)

one of the countries exporting armies, has for years made available to Yemen armies used in counterterrorism operations, even though it was widely condemned for its use of children in military operations[69].

In this context, however, it is important to mention an initiative adopted by the US government, consisting in the *Child Soldiers Prevention Act*[70], according to which the US must necessary limit the export of military weapons, foreign military financing in favour of countries that ,according to the data owned by the Department of State, are making use in their government-owned army of children, which participate to the conflicts. This act was intended and had the purpose to end or at least undermine this worldwide condemned practice and method of war in the States, where it is still quite widespread, however according to some studies it could have had a greater effect on this fight. So it can be regarded an important initiative which at the same time did not perform the results desired since the US administration had always found some exceptions and ways trough which those transfers had been put into being, without taking into account the act condemning them.

Globally talking, these kind of measures, conditioning the providing of military assistance and the commerce of military facilities to the previous verification of the absent use of child soldiers by the other State, are still rare, but there is the hope, within the international community, for the creation and elaboration of acts linking the transfer of arms to the use of child soldiers.

Considering the various techniques and ways through which children are attracted to the armed forces and also the factors that push them to voluntary join, according to some, it is necessary to provide for measures that respond systematically to these factors. According to World Vision International, effective and concrete prevention of the phenomenon of recruitment or even the voluntary participation can only occur if it is addressed from a macroscopic point of view, that is, by preventing the occurrence international and internal state conflicts, ensuring public and national security, and avoiding the supply of weapons to states that make use of minors within their own armies, but also in a microscopic way. In the latter case, paying attention in creating ways through

[69] Rachel Stohl and Shannon Dick, Using Military Assistance to Combat the Use of Child Soldiers (ISN ETH Zurich, 2015)
[70] Child Soldiers Prevention Act, 2008

which to strengthen dialogue within the population and its cohesion, guaranteeing access to educational and vocational training programs and also support and assistance to family members and parents, in a way such that they are trained on the conduct to be taken to prevent this phenomenon. The World Vision in fact elaborates operational actions, through a study and analysis of the factors contributing to the occurrence of violations of international law in the field of human rights, of which children are benefiting, focused on the duties of States and the policies that could be supported by them. At first place there is the abolition and the provision of an absolute ban on the use of children in their own armed forces but also in those of the rebels or other non-state groups[71]. Secondly, it should be ensured the entry into force of laws guaranteeing children access, not only in periods of peace but also during war, to essential services such as: health treatments, school and educational programs or vocational training, water, food and protection etc. However, this is not always easy to achieve, as the State does not always have sufficient economic resources and the foreign financing from other states and humanitarian organizations are not sufficient. The United Nations should therefore request cooperation to prevent this reality, which affects the well-being and life of millions of children worldwide. In light of this, we should proceed to the stipulation and ratification of international treaties, having an indefinite duration over time, which bind the members to provide donations and funds necessary for the realization of the appropriate techniques for the prevention and suppression of this cruel truth. These funds would in fact be destined to contribute to programs and services guaranteed to children and the civilian population, in the areas affected by armed conflicts, with the fundamental cooperation of the territorial state.

This issue should be placed at the centre and given a primary value on the world agenda, in fact the United Nations should exercise their important political influence in such a way as to prevent the Member States themselves or even third states from adopting national regulations that legitimize participation of persons under the age of 18 in the army. In fact, it is not sufficient to foresee the protection of children within the Sustainable Development Goals or even the achievement of a total abolition of the practice of torture.

[71] World Vision International, No Choice: it takes a world to end the use of child soldiers (2019)

An important United Nations initiative, which was recently adopted in 2015 by the UN Security Council through Resolution 2250, is the *global youth peace agenda*[72]. This resolution has had the merit of emphasizing how the participation of young people in the processes of maintaining, safeguarding peace and international security can help in the fight against the recruitment of children in contexts inherent international or internal conflicts.

Although this resolution may be considered an important step forward in identifying the tools for the prevention not only of the war itself but also of the consequences deriving from it, formal tools are still missing which identify the practices and the means that must be adopted to guarantee their practical participation. Indeed, it has been highlighted that recognizing young people a role in peacekeeping processes can provide various benefits. The first of these consists in the possibility of preventing the permanence or return of young people in the armed groups where they were originally enrolled. In fact, if they cannot have a role or form of participation in the negotiation of peace treaties, they can be led to think that violence is the only way to achieve inclusion and participation. Furthermore, many former soldiers argue that precisely because they took part in the conflict, their visions and opinions must be considered fundamental when negotiating the peace treaties. The negative consequences, which can emerge from the failure to include young ex-soldiers in the process of restoring security and peace, have manifested themselves in Mali, for example, where some ex-soldiers, as they did not feel part of the peace process, have decided to forcefully contest the new peace agreement[73].

Among the various reasons and factors justifying their necessary participation, it is possible to mention for example the fact that the armed forces are made up mostly of young women and men, victims of the war, and moreover they are the main beneficiaries of the measures of DDR which are adopted by states in conjunction with the international community. As peace directly affects them, their exclusion is not profitable. A modality that can be adopted and embraced, following the extinction of the conflict, may consist in the creation of various committees, also made up of young people, who discuss specific issues and participate in the direct creation of the legal rules which will then be included

[72] S/RES/2250 (2015)
[73] Ali Altiok and Irena Grizelj, We are here: an integrated approach to youth-inclusive peace processes (Youth Peace and Security, 2019)

in the peace treaties. These committees allow young people to perceive the peace treaty as legitimate and not as imposed by third parties. This occurred for example in the state of Myanmar, where it was created Union Peace Dialogue Joint Committee (UPDJC), which was in turn composed of 5 committees, which were to focus their work on certain issues and sectors, such as social security, the environment and justice[74].

Very often, moreover, young people perform, without even realizing it, the typical functions of mediators, in fact they succeed in many areas where there are tensions, in the promotion of forms of dialogue preventing the use of force and forms of violence or even the onset and spread of extremisms, which can seriously damage the durability of peace agreements. For example, in Syria, the activities carried out by young members of the peacebuilding operations of the United Nations were fundamental, in fact, through internal dialogue activities with local communities, prevented certain entities or actors from exploiting or manipulating their respective ethnic differences[75].

To all this must be added the commitment that young people have shown in peacebuilding operations, necessary for the reconstruction of a cohesion among the members of the civil community. In the context of these operations, they acted in such a way as to allow the population to understand the traumas experienced by former soldiers and ensure their reintegration into the society they belong to. The predominant function carried out by young people from the civilian population was more than evident for example in Colombia, where reconciliation activities were fundamental for the construction of a new relationship of trust and acceptance between those who had participated in the conflict and the civil reality[76].It can therefore be concluded that children and young people should be safeguarded, as they perform activities and roles of fundamental importance for the society in its entirety. In fact, they carry out activities of an informal nature, but which are nevertheless necessary for the efficacy and durability of peace and public security following the ratification of the peace treaties.

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[74] Ibid.

[75] Inside Syria: What Local Actors are doing for Peace (Swisspeace ,2016), available at <https://www.swisspeace.ch/fileadmin/user_upload/pdf/Mediation/Inside_Syria_en.pdf > accessed on 9/06/2020

[76] The Observers, The letters of reconciliation sent to ex-FARC fighters (2017), available at < https://observers.france24.com/en/20170707-letters-love-sent-ex-farc-combatants > accessed on 9/06/2020

To conclude the protection of children from the typical dangers of war presents itself an essential element and component of a value consisting in human safety which represents the other side of the medal with respect to public safety, which currently at the international level, is put back into the hands and powers conferred on the United Nations Security Council. Based on Machel's report, as intrinsically reconnected between them, it is essential that the protection of children is considered on the agenda of this international organization. Furthermore, this issue does not present itself in isolation, but allows the Security Council to deal with other serious situations that currently exist and that need immediate intervention, including serious violations of human rights, and the failure of national governments, especially in the presence of civil wars, to ensure compliance with the law on human rights and in the humanitarian sphere[77].

Moreover, since the words and formal acknowledgments are not at all sufficient to guarantee them ,in the circumstances of the specific case, an effective exercise and enjoyments of their rights and freedoms, it will be increasingly necessary to promote a practical approach , which shall focus on human rights and on the idea that as long as the recruitment of children is allowed in individual states, it will not be possible to put an end to this cruel practice. Therefore, there is a tendency to support the theory that the international community, enjoying a strong political power and beyond, should blame this category of behavior and point the finger at those states that miss to fulfil the obligations assumed[78].

A different perspective ,expressed by the scholar Singer , proves that despite the benefits of putting political pressure and humiliation, they cannot be considered sufficient because many armed groups, both of states and not, do not value their reputation on the international scene or moral and ethical standards. It is therefore necessary to add to this, the idea that the use of children in their armed forces is not advantageous in nature from an economical point of view[79].

[77] Machel (n 57)
[78] Nieke Grossman, ‘Rehabilitation or Revenge: Prosecuting Child Soldiers for Human Rights Violations’ (January 16, 2007) 38 Georgetown Journal of International Law, available at SSRN: https://ssrn.com/abstract=1328982
[79] P W Singer, 'Talk Is Cheap: Getting Serious about Preventing Child Soldiers' (2004) 37 Cornell Int'l LJ 561

It is difficult to say whether the use and recruitment of children will be completely extinct looking at the current situation, in fact, even today, child soldiers are considered by armed groups to be an important component of their military strength, as obedient, sensitive to influences and the proliferation of small arms, which are easily used by them, does not facilitate the intent of the international community[80].

[80] Sarah L Wells, 'Crimes against Child Soldiers in Armed Conflict Situations: Application and Limits of International Humanitarian Law' (2004) 12 Tul J Int'l & Comp L 287

CHAPTER 2

2.1 The Decision-making ability of children

One of the major aspects, when discussing about the rights and main forms of protection which shall be granted to juveniles, must be their position towards criminal justice. The legitimacy and admissibility of criminal proceedings against children, who in the context of armed conflicts, have been guilty of atrocities, condemned by international law as international crimes, has long been discussed. This is because children, as previously stated, are first and foremost beneficiaries of rights and protection by international law and therefore it is difficult to reconcile the protections due to them with the necessary treatment of these crimes. Add to this the fact that currently there is not a single parameter, adopted by all states, as regards the minimum age for the prosecution of such individuals, which determines a serious degree of uncertainty as regards the relative protection. This difficulty encountered by states in finding a common agreement derives from the existence of a multiplicity of factors that must be taken into consideration in these circumstances.

It is, since several decades, controversial whether it is possible to consider this specific category of individuals, first of all able to integrate the so called "*mens rea*" of crime, so to intentionally commit an action which goes against the law and secondly how the national legal systems shall answer and behave in this particular situations , involving a person who is strongly protected formally not only by international conventions and treaties but also by national legislation.

Since 1990, only few countries, such as Iran, Nigeria and Pakistan had practically faced a process involving a child in contrast with the law and executed the perpetrators of criminal actions committed when they were only children[81]. It is moreover evident that one of the main aspects which is necessary to ascertain in those circumstances is the level of maturity of the child and so then whether at the moment in which the crime was

[81] Laurence Steinberg and Elizabeth S. Scott, 'Less Guilty by reason of adolescence' (2004) 58(12) American Psychologist, available at < https://www.researchgate.net/publication/8968453_Less_Guilty_by_Reason_of_Adolescence_Developmental_Immaturity_Diminished_Responsibility_and_the_Juvenile_Death_Penalty > accessed on 13\03\2020

committed he was actually understanding the nature of his actions and the consequences which would have arisen.

In the first place, a major distinction must be made between excuses and mitigations, which are important aspects of criminal law, especially of liability and punishment. In legal terms, the term "*excuse*" refers to when the individual cannot be considered responsible at all for the criminal actions committed , and so as a consequence is considered not worthy of any punishment; while there is "*mitigation*" when a certain action is meeting the minimum level for being considered, according to national legislation, blameworthy, but because of the fact that the actor's capacity is diminished , he will be subjected to a reduced punishment than the one which would have been applied otherwise. According to certain scholars, the immaturity of children and so their less developed morality must be not be considered in terms of excuse but in terms of mitigation. In this way the child would not be subject to the same punishments applied for the same illegal action to the adults, so his personal situation and history would be considered in terms of criminal liability, but at the same it would be possible to ensure protection to the local communities. Furthermore, this system can be considered as promoting a deterrent effect, since it is clearly sending the message that illegal actions would be punished independently on the fact that the perpetrator can be considered a child or not.

Since the age can be considered among the sources of mitigation, which are linked to the belief that the individual is less culpable for the crime committed, it must be considered mandatory in any national legal system to verify on a case by case level certain factors such as the level of cognitive and psychological development[82]. Among the main reasons why the mental and intellectual development of the single individual is so important , there is the fact that it is able to shape and influence his conduct, including the criminal actions, the level of influence that others, especially adults have in their decision -making capacities, especially when they live in difficult social and familiar environments, characterized by poverty, war, lack of health care, public protection and stable and permanent institutions. So, there are two main reasons why age, and as result their

[82] Ibid.

immaturity from an intellectual and moral perspective, can be deemed relevant in terms of mitigation.

First of all, it is widely recognized and verified that the maturity of children increases and develops year by year, so it continuously changes during childhood, and there is a significant difference from the mental capacity and level of discernment expressed by children or adolescents and the adults 'one. This has been proven by many neurological studies, even though of course it is in any case common knowledge that children are less mature and so less deserving a severe punishment in case of criminal liability. Secondly, there is not a strong possibility that a young offender will become a danger in the future for the civil society since only 10% of juveniles , who are in contrast with the law, have possibilities to become in the future offenders for serious crimes. For this reason, there is the need to not subject them to the same punishment which would have been applied to the adults and to not put them in contact with older offenders in prison, who could exercise influence on their future behaviours[83].

From a total another perspective, children are considered as a category of individual who are totally immune from criminal persecutions and liability, because of their age and maturity. In fact, it can be also said that they are not in the necessary conditions to choose and decide on their own what is right and what not, and so how to behave in a way that is accepted by the national legal system.

The doctrine of *doli incapax*, although now disappeared and no longer applied by the national courts of the states, enjoyed at the origins of great relevance. Its importance stemmed from the fact that it guaranteed a sort of presumption in favour of children, as human beings unable to understand the meaning of a crime and therefore to understand that a certain action is condemned by society and the law. This theory and form of protection was guaranteed to those subjects aged 10 to 14. This presumption meant that the public prosecution, to request the application of the penalty against them, was required

[83] Laurence Steinberg, 'Sentences Should Acknowledge Juveniles' Maturity, and Immaturity', The New York Times (2015), available at https://www.nytimes.com/roomfordebate/2012/06/05/when-to-punish-a-young-offender-and-when-to-rehabilitate/sentences-should-acknowledge-juveniles-maturity-and-immaturity , accessed on 13\06\2020

to prove, beyond reasonable doubt, the fulfilment of the two elements of the crime, consisting respectively in the *actus reus* and *mens rea*[84].

It consists of a doctrine traditionally part of the English common law system, which was subsequently abolished, even if from the beginning it had been criticized as suffering from numerous weaknesses. Among these, it is possible to mention in the first place the fate that the public prosecution was, on the basis of this presumption in favour of minors, required to prove on a case-by-case basis the existence of this capacity of the subject to understand the nature of his actions, which results almost impossible in the concrete case. Furthermore, it was criticized as it determined the impossibility of guaranteeing certainty in the application of the law, in fact its application was left to a specific verification of the concrete and individual case[85]. However, after the abolition of the doli incapax doctrine, which granted a sort of protection from unjust criminal persecution to minors, a gap in their protection arised, which nowadays must be filled considering their lack of autonomy.

(a) Autonomy and maturity of the child

In this peculiar context, it must be reminded that criminal justice has as its main aim and purpose the punishment of those who have a demonstrated capacity and autonomy to choose, which is a clear manifestation of their intellectual and mental capacity and autonomy. It can be said that children lack this specific requirement, since in the majority of cases they are not autonomous and independent from external influences.

According to Cane, "It *is generally agreed that a minimum level of mental and physical capacity is a precondition of culpability. A person should not be blamed if they lacked*

[84] Leanne Munro Gibson, 'The Abolition of Doli Incapax And The Alternatives To Raising The Age Of Criminal Responsibility' (2019) Northumbria Legal Studies Working Paper Series, available at <https://ssrn.com/abstract=3481217 >

[85] Catherine Elliot, 'Criminal responsibility and children: a new defence required to acknowledge the absence of capacity and choice' (2011) 75 Journal of Criminal Law, p.289- 301

basic understanding of the nature and significance of their conduct or basic control over it, unless their lack of capacity was itself the result of culpable conduct on their part"[86].

This sentence can be regarded emblematic of this particular theory, since it makes criminal liability, not just mitigated by the age and immaturity of the child, but is conditioned by the existence of a minimum level of capacity of the single person to distinguish good from bad and to behave with conscience and a minimum level of understanding of the consequences. The factor of intellectual maturity is moreover mentioned in the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (known as the Beijing Rules), which declares in Rule 4.1 that the minimum age '*. . . shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity*'[87]. As previously stated, originally there was usually in those cases the application of the *doli incapax* doctrine[88], which mostly focus on the child awareness from a moral point of view, rather than his capacity. According to this parameter the individuals could have been persecuted for a criminal offence when it was possible to prove that he had developed the necessary ability to distinguish right from wrong. In reality it cannot be considered sufficient to evaluate the *mens rea* of the child and as a result to fix the minimum age for criminal liability.

Another important point, which must be highlighted, concerns the possibility of the existence of circumstances and a background which unable the child to act in autonomy, and so to make an independent choice. This autonomy and independence usually are not existent, taking into account for instance the fact that they are first of all subject to the power and guidance of the parents. However parents cannot be considered the only category of individuals able to exercise influence over children , in fact many other factors must be kept into consideration , when evaluating their capacity of autonomy and auto-determination, such as lack of food, clear water, protection, education, security, health care and stability or even acceptance by the local community. For example, when they grow up and live in an environment characterized by criminality and violence, they may develop the belief that this is the social norm and may associate it to the normality.

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[86] Peter Cane, 'Responsibility in Law and Morality' (1st edition, Hart Publishing, 2002), p.65.
[87] United Nations General Assembly, United Nations Standard Minimum Rules for the Administration of Juvenile Justice A/RES/40/33, 29 November 1985
[88] *See, 2.1 The Decision-making's ability of the children*

Sadly, in the majority of cases those elements are not considered as determinant by the law in terms of criminal liability, even though they exist in real life and affect on a daily basis the capacity of children to act and behave as independent rational agents[89].

Even now this debate has not been overcome. Even if on the one hand it is possible to believe that there is a need to consider age as a circumstance that mitigates the penalty deriving from the onset of criminal responsibility, since children are generally presumed devoid of the will to perform an action of an illicit nature, in reality for various reasons, especially when they are responsible for serious acts, it is difficult to consider age in this way. In fact, the ability to understand the difference between good and bad of the subject is difficult to ascertain and can be influenced by various factors both internal and external. To guarantee the certain and uniform application of the same standard across the population and to avoid forms of discrimination, it is necessary to identify a minimum age below which the child is in any case immune from contentious jurisdiction.

2.2 The importance to set a common MACR

Currently, no solution has yet been found to the problem inherent in the identification of a common MACR, which shall be adopted by all the states participating in the international community. However, due to the widespread phenomenon of child soldiers, who forcefully or voluntarily join armed groups and end up carrying out cruel crimes, it is no longer possible to ignore this issue, to which it is necessary to find a common solution as soon as possible. This common solution is necessary above all in the presence of universal jurisdiction and therefore in order to avoid that the same child who has made himself responsible for an international crime may be prosecuted in some states and not in others depending on the MACR adopted by them in their own national legislation[90]. The doctrine of universal jurisdiction over international crimes, which can be invoked by each country, provides them too much political and legal power over the lives of children[91].

[89] Elliott (n 85), pp. 289-308.
[90] Brittany Ursini, 'Prosecuting Child Soldiers: The Call for an International Minimum Age of Criminal Responsibility' (2015) 89 St John's L Rev 1023
[91] Ibid.

So, the importance to set a minimum age for criminal responsibility can be justified on different grounds. The identification by States of a unique MACR determine as a consequence the fact that the child under that age would be considered immune from criminal persecution, and so he could not be formally charged by the national or international authorities for the commission of a particular criminal offence, and could not be subject to any criminal proceeding before an independent and impartial tribunal. The recognition in favour of the child of an immunity from criminal responsibility both under national and international law would show that states take into consideration his incapacity to distinguish right from wrong, because of the fact that they did not fully matured from an emotional and intellectual perspective.

The main problem with this issue consists on the fact that there is not a common standard adopted by all states taking part to the international community, set in a legal provision, commonly recognized as legally binding. The lack of such a common minimum age for criminal persecution is evident from the fact that each state has set its own and this can vary a lot from one another. As evident it goes from the age of 6 to 18 years old, and so the median age, below which the child cannot be considered as criminally liable is 12 years old. Even though because of their particular psychological conditions, they should enjoy of certain levels of protection even when they can be considered criminally liable, at the same time in several countries , still nowadays, they are prosecuted and tried as adults and so exposed to the risk of long term consequences for what concern their future integration within the civil society.

At the international level, the UN Convention on the Rights of the Child aims at guaranteeing protection at every human being below the age of 18 years old which can be considered as falling within the definition of “child”. This however does not prevent member states from criminally persecuting individuals under the age of 18, according to their national criminal system, even though with the adoption of certain procedures specifically designed for them.

(a) The failed attempt to elevate the MACR to eighteen years old

The art. 40 CRC[92] encourages States to set a minimum age below which the human being cannot be considered as criminally liable, and so as having the mental capacity to infringe criminal law. There is a huge discussion in this field which is demonstrate by the fact , as previously mentioned, that States had been unable to identify a common minimum age, suitable to harmonize the different national legislations, and take into account their differences from a cultural and social point of view.

The Committee on the Rights of the Child has stated its point of view on this issue affirming that the age of 12 is not acceptable at the international level as a MACR and that it is of vital importance to promote an elevation of that minimum age at least at 14 or 16 years old, even though the best solution would be the adoption worldwide of the age of 18 years old. This last option has been embraced in fact by several states, including not only Brazil but also Italy and France.

Although this Committee is pushing for the raising by the Member States of the minimum age for the occurrence of criminal liability in the national territories, on the other hand these requests unfortunately do not have a legally binding value, therefore it would be of great importance or the ratification of an international treaty that provides for this change or alternatively that supranational organizations of a regional nature, including the European Union, provide for it. The Commission of the European Union has recently tried to push the Member States to adopt a parameter, in accordance with that required by the Convention on the Rights of the Child, however this international organization is based on the principle of conferral, being able to therefore adopt acts only with respect to the subjects on which it has been conferred competences and the identification of the minimum age for criminal responsibility is not among them. Because of this lack of competence, Member States are not required to harmonize the relevant national regulations with Community law, being able to foresee different minimum age for the onset of criminal liability. Part of these member states set this minimum age for criminal liability to 21 years. Furthermore, the individual who is in contrast with national law, having an age below the MACR, may eventually enjoy either a total absence of criminal

[92] United Nations Convention on the Rights of the Child (1989), art. 40

liability or even in some cases of reduced liability. In the latter cases, specific procedures and measures aimed at guaranteeing their protection are also generally managed, such as the preparation of special courts.

An important contribution to this problem has been provided by the Beijing Rules (Rule 4), according to which states, when taking this decision, must inevitably take into due account the *mental, emotional and intellectual capacity of the individual*[93]. This evaluation must be considered as inevitable because the child must be able to participate actively to the judicial proceeding according to the principle of fair trial, recognized both at the regional and international level. In the Beijing Rules this main principle is expressly stated in relation to the judicial proceedings regarding illegal actions committed by children, and sustain that those proceedings must be conducted in a way conform to the possibility for the accused to express himself freely and in an environment which recognize his specific age and maturity.

The Committee on the Rights of the Child additionally sustains that, whenever states decide to prosecute individuals, enjoying of the protection guaranteed by the UN Convention, these persons must be regarded as less culpable for the criminal action than the adult, committing the same crime. This lower culpability, supported by the Committee, is reflected on the need to adopt in these circumstances specific and special procedures and mechanism, which don't only grant the right to a fair trial, but aim at achieving the major goal which shall consist not in the mere punishment of the individual but in his rehabilitation and reintegration within the community.

Just like the UN Convention on the Rights of the Child, the International Covenant on Civil and Political Rights of 1966 is considered worldwide as one of the most influential and essential legal instruments in the sphere of human rights. This international instrument derives its importance from the fact that it has been ratified by the United States ,which is not a state party to the UN Convention on the Rights of the Child, and moreover because it expressly and explicitly impose to States to adopt specific procedures for children in the context of criminal justice.

[93] United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), adopted by General Assembly resolution 40/33 of 29 November 1985

This is visible in art. 14 (4) ICCPR where it is affirmed that "*In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation*". Even though it is not given a definition of juvenile person in the legal provision, at the same time scholars consider that it must necessarily refer to those who have an age beyond the MACR, which can be freely set by each state party with respect and in conformity with the international standards adopted by the international community and moreover it must apply without any discrimination based on gender.

Even though it is declared that it is up to each state , according to its sovereign powers to establish the minimum age for criminal liability, at the same time the Committee, looking at the correct implementation of the Convention by the state parties, sustained in several occasions that the age of 8 and 10 years old, cannot be considered as acceptable and respectful of the international standards exposed in the human rights treaties.

(b) The historical origins of this legal discussions

Nonetheless the main concerns and debates on the MACR appeared after the 2nd World War, when it was felt the necessity to further humanitarian law, within the 1949 Geneva Conventions. This need was manifested by the draft of additional protocols to the Geneva Convention by the International Committee of the Red Cross (ICRC). The draft of the Additional Protocol I showed the interest on the age of the perpetrator for example in the art. 68(3) where it was prohibited the adoption of the death penalty to those who were under the age of 18 at the time of the commission of the illegitimate action related to the armed conflict.

Moreover, at the time Brazil proposed the adoption of 16 years old as the minim age for the persecution of the individuals suspected of having committed the offences[94]. Even though the Brazilian proposal was not accepted by the international community, at the same time opened the problem related to the necessity of introducing a common minimum age for criminal liability (MACR). The main issue, during the negotiations and

[94] Don Cipriani, 'Children's Rights and the Minimum Age of Criminal Responsibility: A Global Perspective' (Routledge, 2009), p. 45

elaboration of the additional protocol, consisted on the fact that the other States at the time had their own specific MACR, sometimes below the age of 16, like Japan, which in that period was currently not prosecuting individuals below the age of 14.

The amendment proposed by Brazil, was then rejected by the majority of States since it was felt as an illicit interference in the exercise of their sovereign powers, which they own as entities which enjoy of statehood and so exercise effective control over not only their territory but also their own population. It was generally believed that the decision whether to prosecute a certain individual, having a certain age, was a necessary choice of the single state, since each of them has its own culture, tradition, background, history and conception of childhood. The States did not want to renounce to their sovereignty in favour of a greater protection of children, which would have derived from the establishment of a common MACR, and moreover did not desire to adapt their legal system to the standards of other states. Thus, one of the main problematics issued by the States in that specific circumstances consisted on the impossibility to harmonize the different legal traditions in that specific field within the draft.

While the elaboration of those Protocols was proceeding, many delegations , especially the Italian, affirmed in several occasions the necessity to include in both protocols a provision underlying the general principle according to which " *no person shall be criminally persecuted or condemned whenever at the time of the commission of the criminal act, he found himself unable to understand the consequences deriving from his actions*"[95]. Even though the Committee has recognized and never questioned this basic and general principle, at the same time left to the member states its application and did not find desirable to have it crystalized in the provision. It is relevant the opinion given, regarding this thematic by Mr. Barile, Italian representative at the negotiations, according to who: "*an omission [sic] in Article 68 of draft Protocol I and Article 32 of draft Protocol II. No mention was made in those articles of the universally recognized principle that a child, whatever its age, could not be sentenced if, at the time of the offence, it was incapable of cognizance. Should it be impossible to set a specific age for cognizance, a*

[95] Ibid.

general principle should at least be included both in a separate paragraph of Article 68 of Protocol I, and as a general rule in Protocol II"[96].

Notwithstanding the discussion emerged during its elaboration, when the Additional protocol I entered into force, it did not have any provision putting limits to the criminal responsibility of the child and so setting a minimum age to criminal persecution.

Those negotiations and discussions at the same time had the main effect of giving prominence to a general principle consisting on the fact that none shall be neither persecuted or punished for a criminal activity put into being when he was not psychologically able to understand the effects deriving from it. This general principle has been generally used in favour of children, who because of their age, could not be considered as enough mature and mentally developed to comprehend the nature of their own actions, but on the other hand its application has been left to each state, in fact no common age limit had been set in this occasion.

Another important legal instruments, aiming at regulating the topic which still remains problematic, is the 1985 UN Standards Minimum Rules for the Administration of Juvenile Justice (usually identified with the term of Beijing Rules), which contains the most detailed regulation and discipline on juvenile and children's proceeding and the MACR. Even though the main defect of this international treaty consists on the fact that it is not intended to be legally binding on state parties, the Committee on the Rights of the Child has defended the idea that it shall be considered applicable to all children. The Beijing Rules are internationally perceived as an important step towards a more deep regulation on MACR, in fact they supported the idea that the minimum age shall not be too low and the necessity for all states to set ,in accordance with their specific culture and social tradition, a MACR. The same goal has been shared by the UN Convention on the Rights of the Child which has been adopted only four years after by the General Assembly.

[96] Summary Record of the Fifty-Ninth Meeting held on Tuesday, 10 May 1977, at 3.15 p.m.: Proposals submitted by the Working Group for further study, pars. 1 and 17–18,CDDH/III/SR.59, reprinted in "Volume XV," Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, Geneva, 1974–1977, Bern, Federal Political Department, 1978, at 209 and 212

(c) The preparatory work of the UN Convention on the Rights of the Child

Since the very beginning of the negotiation in 1979, the state's delegations, working on the draft of the Conventions, had highlighted the importance that would have acquired the topic of the minimum age for criminal liability ,among the others, for the protection of child's rights. Despite this, the draft did not contain any provision regarding the MACR, so the Social Development Division of the United Nations Centre for Social Development and Humanitarian Affairs decided to show this lacuna in the project which shall have been considered inconsistent with the previous Beijing Rules, especially Rule 4, according to which each state must identify the minim age below which it is impossible to prosecute for criminal offences since the individual is not developed enough to discern the consequences and the nature of his actions[97].

After this comment, the UNICEF requested for the elaboration of a new draft related to juvenile justice, which should have been guided by a the Criminal Justice Branch of the same United Nations Centre for Social Development and Humanitarian Affairs which guided the works which led to the entry into force of the Beijing Rules. One of the drafts that had been created in this period stated as follow: "*States Parties recognize the right of children who are accused or recognized as being in conflict with the penal law not to be considered criminally responsible before reaching a specific age, according to national law, and not to be incarcerated. The age of criminal responsibility shall not be fixed at too low an age level, bearing in mind the facts and circumstances of emotional, mental and intellectual maturity and stage of growth*"[98].

The draft's text shows how the drafters relied on the general principles enshrined in the Beijing Rules and put into paper the duty for each state of the international community to set a minimum age for criminal responsibility which is sensible to the emotional background and maturity of the single human being. This draft has the merit of having contributed to the realization of an important achievement, consisting in the obligation

[97] "Comment by the Social Development Division, Centre for Social Development and Humanitarian Affairs," E/CN.4/1989/WG.1/CRP.1, reprinted in Office of the UN High Commissioner for Human Rights, Legislative History of the Convention on the Rights of the Child, vol. 2, New York, 2007

[98] "Background note submitted by the Crime Prevention and Criminal Justice Branch, Centre for Social Development and Humanitarian Affairs," E/CN.4/1989/WG.1/CRP.1/Add.2, reprinted in Office of the UN High Commissioner for Human Rights, *Legislative History of the Convention on the Rights of the Child*, vol. 2, New York, 2007

not to set a too low MACR, but it was not sufficiently strong to determine the adoption of a common MACR, which was the main idea behind the elaboration of the Beijing Rules and the CRC. This draft is now art. 40(3) of the CRC which affirms that: "*States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular: (a.) the establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law*".

What can be immediately observed is that there is no more a reference to the necessity to give relevance to the emotional and mental capabilities of the child , while setting the MACR within the national legal system, and that even though there has been a huge debate on this topic before the entry into force of the UN Convention, there is no mention to this in the preparatory works. One of the main benefits deriving from this international convention consist on the fact that it created a legal obligation for states to fix in their own laws a minimum age for criminal liability, so created an express treaty obligation. Even though according to some scholars art. 40(3)(a) CRC is not sufficiently descriptive and can so result in being a mere meaningful legal provision, in my opinion, it has still contributed to the development of children's rights. Probably the words used in the original draft article were stronger and could have had a greater effect on children's legal position, but it remains a victory, taking into consideration the long road which had brought to its elaboration and the long discussions which had taken us where we are now.

The Committee on the Rights of the Child has in this sector the main responsibility to verify the correct implementation and application of the legal provisions contained in the Convention, including the ones related to the MACR. The Committee itself made several statements where was supporting the idea that even though states are free to identify their own MACR, through national legislation, they shall not put it too low and they can't even decrease it when they already have one. These directions given by the Committee are also linked to the principle of non-discrimination, since States cannot set different MACR in their own territory, which vary on a case by case basis, but they shall have a unique MACR applicable without distinctions to all their nationals. Since the principle of non-discrimination must be considered a leading principle which guide the United Nations, a

meaningful focus has been given to it[99]. The Committee in fact wants to avoid the possibility for several state parties to set MACRs which vary on the base of subjective factors, like poverty, socio-economic status or gender.

2.3 Practical challenges related to MACR

As discussed previously the international community as a whole is debating since several decades on the topic related to the necessity to establish in every national legal system a minimum age for the criminal persecution of children, which shall be applied without discrimination to all individuals residing in the national territory. Even though the main goal would be the fixing of a common MACR, this still remains impossible for different reasons , among which the jealousy of each country of its sovereign powers in this specific field and the difficulty to find a balance between their different culture, traditions and legal history.

Even if nowadays the Committee on the Rights of the Child is pushing the states to set even higher age for the criminal liability of individuals, and the countries are working together to increase the levels of protection which shall be ensured to this category of human beings, there are many problematics and issues in the implementation and application of the international standards which had been settled.

One of them consists on the fact that even though States had established, according to their own national legal system, a minimum age for criminal responsibility, in some of them, especially African countries, children are not registered in a public registry and so it is particularly difficult to verify with certainty their effective age. The impossibility to do so, renders almost impossible so the application of the national MACR. Considering the situation of children around the world, it is possible to affirm that these problematics are not only common in the African Continent, but this proof can be problematic in several states.

According to the UNICEF, child registration is not only necessary for the implementation of the discipline related to the MACR but can serve different aims such as the economic

[99] Cipriani (n 94)

and social planning and can be generally considered a proper human right of children. With regard to the current statistics elaborated at the UNICEF level, the Western Europe and the North American states have the highest levels of registration of children, followed by Eastern Europe, Central Asia, Latin America and Caribbean. While the lowest levels of child registration under the age of 5 years old can be found in the states settled in sub-Saharan Africa[100].

This widespread issue determines therefore the struggle for the juvenile criminal systems to handle the situation in which a child has been charged with an accuse by the public prosecutor. In those circumstances, states have adopted different solutions and practices, which in the generality of cases provide a wide discretion to the judges in the courts and tribunals. Judges are able to decide whether the individual, not registered by the State, can be considered liable for the criminal offence and as a consequence if he satisfy the principle according to which only the individuals having an age beyond the MACR can be persecuted and punished, and so subject to a civil or criminal proceeding. Furthermore, only few states have elaborated general guidelines and practices which shall guide judges in those cases, like for example the Philippines. In 2006 the Philippines had approved a law, affirming the necessity to decide in favour of the child in case of doubt, regarding his age, moreover the Committee on the Rights of the Child addended that when verifying whether the child satisfy the national MACR, it shall be considered only the moment in which the alleged offence has been committed, in conformity with the legal discipline adopted by several countries like Germany and Afghanistan[101].

Sadly, the consequences of this confusion and lack of a real regulation regarding the practices that shall be used in order to handle the situation of the child, whose age is impossible to ascertain, are incredibly brutal. Many examples can be made on this regard. In Bangladesh the judges decide on the base of the mere appearance of the child, whenever it is impossible to acquire a certificate of age, while in other countries the courts and tribunals require a verification of the age by medical and hospital personnel. Especially in poor countries, the police and public authorities, in order to show to the local population an increase in the detention and arrest of criminals and so a reduction of

[100] UNICEF global databases, 2019, based on Demographic and Health Surveys (DHS), Multiple Indicator Cluster Surveys (MICS), other national surveys, censuses and vital registration systems, 2010-2018.
[101] Juvenile Justice and Welfare Act of 2006, Sect. 7

criminality, prosecute the poor street child, who are more likely not to have a age's certificate[102]. It is then necessary to impose a duty on States to elaborate a national practice which shall be respected and ensured not only by public officers, like police official but also by the members of the Tribunals, which must be respectful of the human rights recognized to each child by international treaties and conventions. The most diffused proposal consists on the subjection of the child, in the concrete case, not only to medical verification, but also to a psychological assessment, in order to identify a possible age, however also this approach has several defects[103].

The problem therefore lies on the fact that in many national systems there is no obligation to provide for the immediate registration of children born and a proper system for verification of age. This gives rise to the existence of a margin within which children are exposed to a greater risk of abuse by the judiciary and public authorities, despite the general comment n.10 of the Committee on the Rights of the Child[104], mentioning explicitly the obligation for all countries to provide for the immediate registration of these subjects. Furthermore, if it is not possible to prove with absolute certainty the age of the subject, through medical and psychological studies, the presumption must exist that the individual cannot be considered imputable and therefore criminally responsible[105]. Practical proposals have been made, for example, in this field in the European context by the European Parliament and the Council, through a directive relating to the procedural guarantees to be guaranteed to the accused minors[106].

(a) The pro and cons of setting a too high or low MACR

The idea that human beings shall be consider criminally liable and responsible for the consequences of their own actions is existent since a long time ago, in fact it is possible

[102] Owasanoye Bolaji, and Marie Wernham, 'Street Children and the Juvenile Justice' (Human Development Initiatives, 2004)
[103] International Organization for Migration and the Austrian Federal Ministry of the Interior, Resource Book for Law Enforcement Officers on Good Practices in Combating Child Trafficking (first edition, 2006)
[104] Committee on the Rights of the Child, General Comment No. 10 (2007) Children's rights in juvenile justice, CRC/C/GC/10
[105] Daniela Vigoni, 'Il difetto di imputabilità del minorenne' (Giappichelli, 2016), p. 70
[106] Directive (EU) 2016/800, available at < https://eur lex.europa.eu/legalcontent/IT/TXT/PDF/?uri=CELEX:32016L0800&from=EN>

to affirm that it is existent since the very creation of the human and civil society. However, the Table VIII of the Twelve tables showed a real and proper tendency to treat in a more favourable way the offenders when they are under a certain age, and for example had not reached the puberty.

There are two major factors which must be taken into due account when identifying the domestic MACR, respectively the possibility for the individual to appreciate and ascertain the fact that his action is wrong and condemned by the law and secondly the distinction with childish mischief, being the ability for the person to control his impulses and to avoid acting in a way which is criminally prohibited. These factors had been studied and analysed by several psychologists over the years with different results and moreover the researches that had been conducted underline the fact that they have a subjective nature and can vary from case to case.

The issue of the minimum age to consider a certain person, as criminally responsible for his actions, is of particular relevance both internationally and nationally, since the measures applied by the State when they are in conflict with the law can strongly influence its future life and development. Although it is now recognized that children do not enjoy of full autonomy and discretion when they act, as they are more susceptible to the influences exercised by external subjects and also by environmental and social factors, at the same time society cannot ignore the crimes for which they sometimes make themselves responsible. On the basis of what Cipriani argued, this minimum age for the onset of criminal responsibility must necessarily be determined to draw a distinction between children who may be subject to a penalty and who therefore can be considered responsible and those who instead shall enjoy of immunity from criminal jurisdiction[107] **.** However, due to a large number of reasons, the decision on its setting is far from easy, since the identification of a too high MACR would allow many to escape justice, only as they have not reached a certain fixed age by law, although they are fully capable of understanding the consequences of their actions and have acted independently and in accordance with the principle of self-determination. However, if the minimum age is too low, an opposite effect would occur as even subjects, whose ability to act intentionally is doubtful, could be held liable for the illegal actions carried out. To the question of how it

[107] Cipriani (n 94), p. 94

is therefore possible to indicate the exact age at which it is possible to ascertain with certainty that a particular subject has reached a certain intellectual and emotional maturity, in my opinion it is not possible to give a sure answer. In fact, there are no certain and infallible methods that can be used by national legislators, since the maturity and development of these children depends on many variables and therefore consists of a parameter that enjoys a wide fluidity.

Among the factors that push states the most to decrease, against the opinion of the Committee on the Rights of the child, the minimum age for criminal responsibility, there is the fact that they are afraid of the increase in crimes that could be committed by of this category of subjects. Therefore, they are guided by the intention to produce a deterrent effect which according to some studies however is not necessarily obtained[108]. A study demonstrating this thesis was conducted for example in Denmark where the lowering to 14 years was approved by law for the identification of the minimum age for criminal liability, voted by the majority of members of the National Parliament. The primary purpose was to reduce the crimes committed by young people and it was believed that through the introduction of this new legislation, they would have been less tempted to carry out illegal acts[109]. Due to its limited relevance in the context of the necessary reduction of crimes and as it was not generally considered a success, this discipline had a particularly limited duration in time, in fact it remained in force only from July 2010 until 2012 and subsequently the 15 years have been reinstated as a minimum age to be subject to criminal law. However, these studies also underlined how , during the reform period, the lowering of the age for criminal liability had affected the subjects of 14 years who had come into contact with the national courts and tribunals and in some way impaired their school performance.

With regard to the problems relating to the determination by States of their MACR and the consequences deriving from the use of a too low one, it is always necessary to take

[108] Goran Šimić , 'Legal Challenges in regulation of minimum age for criminal responsibility with special emphasis on Bosnia and Herzegovina'(2017) Researchgate, available at < https://www.researchgate.net/publication/320558090_LEGAL_CHALLENGES_IN_REGULATION_OF_MINIMUM_AGE_OF_CRIMINAL_RESPONSIBILITY_WITH_SPECIAL_EMPHASIS_ON_BOSNIA_AND_HERZEGOVINA > accessed on 13\03\2020

[109]Michael Schrøder, 'Lowering the minimum age of criminal responsibility has no deterrent effects' Aarhus BBS (2017) available at < https://bss.au.dk/en/insights/samfund-1/2018/lowering-the-minimum-age-of-criminal-responsibility-has-no-deterrent-effects/ > accessed on 11\06\2020

into consideration that children who are generally before the courts for having committed illicit acts are individuals who in turn have been subjected to abuse, traumatic events or experiences that have not favored the creation of a normal morality or that in any case have contributed in part to the choice to commit a crime. Very often, therefore, being subject to criminal justice at such a low age, can lead to the onset of a cycle, which further urges the subject to commit crimes.

Although therefore there is a tendency to think that a decrease and lower age for criminal responsibility may urge young people not to commit crimes and prevent them, in reality according to the supporters of the opposite thesis, according to which criminal justice should not be applied to these subjects, this practice creates the conditions for the child to become a criminal in the future. This can occur in so far as criminal processes and contact with criminal justice in general creates emotional stress in young people, which sometimes prevents their normal development, especially from a psychological point of view[110]. So although rationally one might think that a longer stay in prison determines the existence of a great deterrent, it is also possible to argue that the longer a child is subjected to the juvenile justice system and to restrictions of his own freedom, the more there are chances that this will affect his future conduct in a negative way and may therefore constitute a greater danger to national security. There are conflicting theories on the issue relating to the effects on the psychological development of the child resulting from the period during which he is subject to restrictive measures, such as imprisonment, in fact some studies consider them as positive and beneficial, while others describe them negatively[111].

Considering the opinions of the greatest scholars and experts on the subject, it is clear that States at the moment of establishing their the minimum age for criminal liability, should take into account the fact that it should be linked to the existence of conditions that allow the child to act in full autonomy and independence; the child must be considered able to fully enjoy and effectively exercise his own human and fundamental

[110] S Barnert, E., S Abrams, L., Maxson, C., Gase, L., Soung, P., Carroll, P., & Bath, E., 'Setting a minimum age for juvenile justice jurisdiction in California' (2017) 13(1) International Journal of Prisoner Health ,pp. 49–56. doi:10.1108/IJPH-07-2016-0030

[111] Loughran, T. A., Mulvey, E. P., Schubert, C. A., Fagan, J., Piquero, A. R., & Losoya, S. H., 'Estimating A Dose-Response Relationship Between Length of Stay and Future Recidivism In Serious Juvenile Offenders' (2009) 47(3) Criminology: An Interdisciplinary Journal, 699–740. Doi:10.1111/J.1745-9125.2009.00165.X

rights. So the minimum age that must be possessed so that a certain person can be considered effectively responsible for the actions taken to the detriment of others, can be determined and assessed on the basis of various heterogeneous parameters: autonomy, independence, mental, psychological and intellectual development, ability to enjoy their rights recognized internationally and nationally by states. In my opinion, it is not at all possible to think of providing total immunity in favor of children who make themselves responsible for crimes, as this would harm the victims and create feelings of revenge in their families, on the other hand whenever States decide to submit these subjects to criminal justice, certain precautions must be adopted. Among these measures, those which are a prerequisite for the realization of the best interest of the child and which have as their purpose, prevention or alternatively can serve to reduce the negative effects of the judicial processes are necessary.

Although the minimum age for criminal liability varies widely in the various European countries, it can be said that the State of England constitutes a separate and specific case in this matter[112]. In fact, unlike other European legal systems, such as Italy, for example, it subjects individuals of a much lower age, than those foreseen by others, to criminal proceedings[113]. Despite the fact that the average has substantially risen in the other states belonging to the European Union, in accordance with the requests made by the Committee on the Rights of the Child, England still enjoys as a parameter, for ascertaining the sufficient maturity for participation in the trial, of the 10 years old. Despite pressure from within the state, but also from external agents, the national government has so far remained firm on its position and has so far failed to modify this legislation in order to align itself with what are now European standards. This however has serious consequences, even of a discriminatory nature, in fact a child, prosecuted in the UK, can be damaged throughout his life by being subjected to a criminal proceeding, for an unlawful act committed when he could not still consider himself aware of your actions and choices. It could therefore be taught that ,in this specific area ,England is not acting in accordance with its international obligations deriving from the fact that it ratified the

[112] Age of criminal responsibility must be raised, say experts, 2019,The Guardian, available at https://www.theguardian.com/society/2019/nov/04/age-of-criminal-responsibility-must-be-raised-say-experts , accessed on 13\03\2020

[113] Thomas Croft, 'Catching Up with Europe: Taking the Age of Criminal Responsibility Seriously in England' (2009) 17 European Journal of Crime, Criminal Law and Criminal Justice, pp. 267–291

Convention on the Rights of the Child, which precisely defines as "child", each human being under the age of 18[114].

2.4 The procedural rights which shall be granted to children subject to judicial proceedings

When talking about children's rights in criminal justice, we refer to the rights which must be ensured to the children accused or prosecuted for criminal offences and to the ones who merely participate to criminal trials in the role of victims and witnesses.

The right to a fair trial is the core principle and right which must be respected and is recognized both at the European and international level. This represents the basic principle recognized by every democratic society which permits to children to enjoy of certain rights and protections granted to every human being, who found himself in contrast with the law. Under European Union law, it is applicable the Charter of Fundamental Rights of the EU[115], which establish not just the right to have access to justice but also to be subject to a fair and impartial proceeding. However since children must be considered as more vulnerable and sensitive than adults, they must enjoy of broader protection in the context of the trial before the courts, so EU law has elaborated standards and requirements aiming at meeting , in the best way possible, their main interests and needs[116].

In the area of competence of the Council of Europe, it is applied art. 6 of the ECHR, which establishes the principle of fair trial, including in itself several guarantees and rights ,such as the right to be subject to a public hearing, which must be concluded within a reasonable period of time before an independent and impartial tribunal previously established by the law. The presumption of innocence mentioned in the second paragraph must be necessary addended to the previously mentioned principles.

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[114] Emily Kent, 'At what age is it right to prosecute children?' (Each Other, 2019) available at < https://eachother.org.uk/age-criminal-responsibility/> accessed on 25\04\2020

[115] Charter of Fundamental Rights of the European Union, art. 47

[116] European Union Agency for Fundamental Rights, Manuale di Diritto Europeo in materia dei diritti dell'infanzia e dell'adolescenza, 2015

When considering specifically the situation of a child subject to a proceeding because accused of a criminal action under the law, the Guidelines on child-friendly justice must be necessarily taken into consideration, even though their strength is defeated by the fact that they don't enjoy of a legally binding force[117]. For example, in Chapter IV of these Guidelines, the existence of the right of the representative to obtain information about the accusation made against them is highlighted, which must also be communicated to the parents in the context of the criminal trial; or also in paragraph 30 of the same chapter, reference is made to the right to be subject to interrogation only if in the presence of a lawyer or other trusted person who may also consist of a parent. Further, other instruments have been adopted, in the light of the main principles embodied in the CRC, among which the use of liberty deprivation as a extrema ratio measure (see Article 37 (b) of the CRC). Relevance must be attributed to the UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), the UN Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines) and the UN Rules for the Protection of Juveniles Deprived of their liberty (Havana Rules).

It is possible to conclude that children at the regional level and so in the area of competence conferred at the European Union and within the legal system of the Council of Europe, enjoy of a large range of rights and levels of protection, especially in relation to criminal proceeding. Moreover even though the EU and the Council of Europe, as international organizations do not enjoy the status of members within the UN Convention on the Rights of the Child, at the same time they promote through their own legislative and legal instruments the values and principles enshrined in the UN Conventions. This provides so to the Convention a predominant power and value in the sphere of protection of children all over the world, and at the same time the responsibility to continue guaranteeing minimum levels of protection to this category of human being which must be considered vulnerable, especially in countries which suffer the difficult conditions and damages of war, as we will see.

The procedures that shall be adopted by States in the criminal juvenile justice system, must generally comply with the CRC, which highlights the necessity to ensure the active

[117] Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, adopted by the Committee of Ministers of the Council of Europe on 17 November 2010

participation of the child at the judicial proceeding in art. 12. This legal provision together with the norms linked to it, permit to see the child not only as beneficiary of rights but as an active member of the society, so they are generally regarded as norms listing the "*participatory rights*" of the individual.

At first the right to be heard, consists in a right which is strictly linked to many other freedoms recognized to the child in the UN convention. The right to be heard , recognized upon the child, can be considered not only as strongly related and interconnected with the many others rights and freedoms protected and granted to children within the Convention on the Rights of the Child, but at the same time it must be perceived as fundamental for their own enjoyment and implementation, since when applying the other rights in practical terms, it is always fundamental to take into due account the opinions and view of the single individual. The right to be heard must be granted not only in favour of the child himself, but also of those who must apply the laws, since it permits to them to embrace and become aware of his unique situation and of his specific physiological and emotional context. For all those reasons previously listed, it is necessary to discuss the General comments made by the Committee on art. 12 of the Convention on the Rights of the Child[118].

The right to be heard consists in the right to express freely, and so without the fear of repercussions and negative consequences, his own opinion and view on a specific matter. In order for the right to be effectively enjoyed by the child, it is fundamental to put him in the possibility to understand his own opinion and the right must be exercised by himself voluntary: in fact it must be an opportunity for the child and not a duty to comply with. The art. 12 UN Convention moreover is clear in affirming that this opportunity must be enjoyed in all circumstances and matters related to the child, so including "judicial and administrative proceedings". However, it must be pointed out that, to permit to him to consciously exercise it, he must be aware of all fact, and the possible consequences deriving from his actions. In order to assure that the real opinion and view of the child is manifested during the trial, it is of vital importance the role performed and assigned to his legal representative, who must be able to act for the protection of his best interest and

[118] Committee on the Rights of the Child, GENERAL COMMENT No. 12 (2009) The right of the child to be heard, CRC/C/GC/12

sometimes must also substitute himself to the child for the exercise of his legal capacity. Because of the particular role vested by the lawyer in this type of situations, it is crucial that he receives the correct formation and qualifications, so that the rights of the child are not threatened.

Not only his view must be taken into consideration in the judicial proceeding to which he is taking part, but these opinions must be evaluated "taking into consideration his age and maturity". With this specification, the aim was not to declare that the opinion and views of the child having a certain age and maturity, must be taken into consideration more than the ones expressed by a young child. It only aims at highlighting the necessity to make a specific assessment of the views taking always into account his specific situation and background, since each child has his own story so cannot be put into a standardized category.

Taking into consideration all these aspects of the right to participate in the legal proceeding and to be heard, which must be granted by States in the case in which they subject a child to a trial, it can be properly affirmed that the concept of " participation of the child" is really broad and embodies many other rights and freedoms. The international framework, consisting in the UN Convention on the Rights of the Child, aims at identifying the basic standards which shall be respected in the territory of each member state. The Convention promotes the adoption of a method which perceives the participation of the child, not only as the main goal, but also as the main instrument to ensure that his rights had been safeguarded.

(a) The leading principles of the juvenile justice

The Committee on the Rights of the Child prepared a General Comment in 2007, with the aim of reviewing the techniques and systems adopted at national level and of verifying the level of compliance of the relevant laws with the international standards set in art. 37 and 40 of the relative convention[119].

[119] Committee on the Rights of the Child, General Comment No. 10 (2007) Children's rights in juvenile justice, CRC/C/GC/10

As established within this important document, its main purpose is to help and give support and assistance to national authorities in the drafting of laws, which are successful in preventing juvenile delinquency, and which identify tools to deal with crimes committed by the children other than court trials. According to this Committee, in order to develop a policy functional to these purposes and respectful of international standards, the need to provide clarity on the principles that must guide their formulation by the competent national authorities is evident.

The first of these fundamental principles is the principle of non-discrimination identified in art. 2, whereby the state and its authorities must ensure that children who are accused of committing a criminal offense enjoy the same conditions and treatments, in accordance with the principle of equality of treatment. In fact, there can be no discrimination based for example on ethnicity, race, religion, or sex or even on the economic conditions in which they live. This principle is accompanied by that of the best interest of the child, identifiable in art. 3. Certain benefits guaranteed exclusively to children are reconnected to this principle. In fact, they must, because of their age, mental, emotional and intellectual abilities, enjoy a process that considers their experiences and their sensibility and also the complete failure to develop moral and psychological must be generically considered as an attenuating cause. The last but not least important principle is the right to life, survival and development, on the basis of which it is affirmed the impossibility of subjecting, if not as an extrema ratio, children to deprivations of their own freedom, such as for example arrest or imprisonment. In fact, these deprivations of personal freedom can make it more difficult if not to prevent the growth of the child and the recovery of his childhood, as it puts them in contact with criminals, and in addition make it difficult to reintegrate him, which is the purpose by which every criminal system must be inspired. In addition to the right to participate and therefore to be involved in the choices that interest him personally, indicated in art. 12, it is possible to mention the right to dignity in art. 40.

The treatments to which children can be subject must be respectful of their dignity, like any other human being, born free and formally equal in rights. In this context, the Convention on the Rights of the Child refers to what is stated in art. 1 of the Universal Declaration of Human Rights. Continuous application over time must be ensured to this

principle and right, that is, from the moment the minor is subjected to trial and for its entire duration.

As regards the right to a fair trial, it is an internationally recognized right, and mentioned in a plurality of treaties between states and international organizations. It is regulated by art. 40 CRC, and for the purposes of effective implementation and application, it is essential that the parties, having the duty to comply with it, enjoy adequate preparation. Among these officials, it is possible to identify the members of the police force, the bailiffs and the members of the courts who in fact must enjoy extensive information and data relating to their specific situation and experiences, which can make them particularly vulnerable. They have the responsibility to guaranteeing respect for their human rights and fundamental freedoms, including their dignity.

The second paragraph of this article refers to the principle that no child can be subject to punishment or be found guilty of an offense, which at the time of its fulfilment was not considered as such by state law or international law. This principle of non-retroactivity of the criminal law is intended to protect all individuals, including children and has the objective of guaranteeing legal certainty. Together with this principle, it is fundamental to mention the presumption of innocence, affirmed in favour of children who are accused or tried for the commission of a crime and which imposes, not on defence, but on the accusation the burden of proof and therefore to provide the necessary evidence to support of its own thesis.

The assistance that must be guaranteed to the child, even if not necessarily of a legal nature, in all circumstances must be considered appropriate. In accordance with the Convention on the Rights of the Child, sufficient and adequate time to prepare the defence must be ensured and furthermore communication between the child subject to trial and his or her lawyer must occur adequately to guarantee a certain level of confidentiality. Generally for the realization in the concrete case of a justice that is favourable to the child, it is necessary that the experts and professionals who come in contact with them, treat them in such a way as to put them at ease and ,for this purpose, forms of communication between the parties that are not only verbal but also non-verbal in nature are put into being.

Despite the fact that during the criminal proceedings, children come into contact with various figures, such as judges, police members, lawyers and psychologists, at the same time on the basis of some studies and analyses it has been possible to ascertain that they feel more comfortable to talk to people, such as members of social services, as they are used to dealing with children and making them feel safe[120].

Furthermore, in order for the process to be able to produce a pedagogical and deterrent effect of future criminal acts, without at the same time violating the rights of the child, the competent national authorities are required to set more rigid and restricted time limits than those set for processes aimed at adults. Therefore, temporal limits are necessary for the final sentence to be rendered without an excessive period of time having elapsed since the actual commission of the crime.

Although generically the presence of parents must be ensured in these processes, as it can be considered fundamental to create a non-hostile environment with respect to the child and to ensure the necessary assistance from an emotional and psychological point of view, in some cases the judicial authorities may also provide for the impossibility for parental figures to present themselves if requested by the child himself or even if it is judged that their presence is not in accordance with the best interest of the same.

As for the member states of the European Union, it is possible to note that 19 of them have established, in the relevant national legislation, the need for the process to take place in the shortest possible time, while the others have taken steps to establish this principle in other policies. In eight of these countries, for this purpose and in the light of this principle, a maximum period of time has been identified within which the process involving a minor must take place, which can vary from two weeks to 6 months. On the basis of the analysis of these disciplines, it has been possible to affirm that the average time generally applied in Europe is equivalent to two or three months. In France, moreover, a short trial was elaborated, which however does not apply every time the accused is a minor but only when he has been accused of particularly serious types of crime, and in any case the implementation of this discipline is left to the competent

[120] European Union Agency for Fundamental Rights, Child-friendly justice Perspectives and experiences of children involved in judicial proceedings as victims, witnesses or parties in nine EU Member States, 2017

judicial authorities[121]. For what concerns the special fast- track procedure, applicable in France, it is promoted in the majority of cases when the suspect and accused person is between 13 and 16 years of age and the offense discussed at the trial is punishable by the penalty consisting in imprisonment from 5 to 7 years. In some cases which occur in circumstances of importance and emergency, after the investigation phase is concluded, the public prosecution may request to proceed with the trial within two days before the juvenile court.

More recently, the Committee on the Rights of the Child has provided for the publication of a General Comment, which replaces the one made in 2007, reviewing and analysing how the States have ensured the existence in their jurisdiction of a justice that does not cause damage and prejudice to minors, but which can be considered "*child-friendly*"[122]. As part of this comment, the Committee, in addition to reaffirming the principles and core values of justice applied to minors, at the same time promotes and urges states to develop alternative systems, compared to the establishment of a process. These measures, used in order to deal with the child who has come up against the law, are generally referred to as with the term "*diversion*". It can consist of various programs and services that must necessarily be part of the justice system, aimed at children, and must be preferred to the establishment of a formal process, as it allows to ensure, with greater success, respect for their own value and dignity.

(b) Diversion

The "diversion" systems are particularly widespread and promoted by international organizations including UNICEF, as they allow to avoid the occurrence of the negative consequences, typical of instituting a formal trial against children in front of the competent jurisdictional authorities[123]. These systems and programs, alternative to the formal process, are characterized by a child-centred approach, even if more generally we

[121] European Commission, Summary of contextual overviews on children's involvement in criminal judicial proceedings in the 28 Member States of the European Union, 2014
[122] Committee on the Rights of the Child, General comment No. 24 (2019) on children's rights in the child justice system.
[123]UNICEF, Toolkit on Diversion and Alternative to Detention, 2010, available at < https://www.unicef.org/tdad/> accessed on 11\06\2020

speak of an approach that focuses on human rights, as it must ensure the realization and effective application of all those rights and principles set out in the Convention on the Rights of the Child. There are several different reasons for preferring such programs and systems over the criminal trial. Among these, there is first of all the fact that these tools are more suitable to guarantee the growth and the normal mental, moral and intellectual development of the subject who is in conflict with the law, because they are by nature faster and allow the authorities to provide in an almost immediate way to impose a kind of punishment for the illicit behaviour put in place. This punishment is necessary for such systems to have a pedagogical value. Furthermore, these programs are developed in order to avoid that his maturation is affected by the detention and other measures depriving of liberty, which can result in bringing the subject closer to other criminals and therefore produce a completely opposite effect to that desired. These are some of the advantages deriving from their use, without mentioning the fact that they entail lower costs, compared to prison measures. Even though initial investments by national governments are necessary for their correct and effective functioning, compared to the cost of maintaining the detention centre they can be considered much lower. These programs, in addition to being less expensive and therefore requiring fewer resources over time, contribute to national security, in fact it has been shown that they reduce the number of repeat offenders and also allow a better reintegration of the guilty subject into society, avoiding their exclusion, which is among the first causes that lead the child to engage in illegal activities.

UNICEF has an important role in this specific area as it belongs to this international organization, on the basis of the mandate conferred on it, the mandate to urge and support the governments of the States to develop not only a national justice system in accordance with the Convention on the Rights of the Child , but also to promote the creation of such diversion measures as they are more advantageous for children, allowing to avoid the negative consequences deriving from the detention and the restrictive measures of freedom.

2.5 Rehabilitation and re-integration of child soldiers in the civil society

Historically the child as always been seen as someone who was totally unable to have opinions and to actually understand the consequences deriving from his actions, and for this reasons was defined as "innocent", whose meaning in Latin is "*someone who is not guilty*". This perception of the child led to the use of two different approaches when he was found in violation with the law: the protection approach and an approach based on punishment. In this first case, the child was represented and considered by the law as "immature" and not able to participate to the proceeding, where his opinion and position were not only defended but also presented by an adult, while in the other case the main goal was to achieve correction through a process of punishment. In both cases however the child is not acknowledged as the owner of an individual right. Back to our days, the approach promoted by the Convention shall be adopted by all states, because it puts at the centre of the juvenile penal system the child, and more specifically his own situation, story, experiences and traumas, which must be assessed during the proceeding before the national courts. Furthermore it can be considered functional to the attainment of a major interest of the UN and so of the Member States , which lie on the rehabilitation and so reintegration of the child within the social and civil community of belonging, and not in his mere punishment and treatment. Children who had been in conflict with the law must so be treated as individuals in difficult circumstances to who certain safeguards must be ensured by the States, and moreover the national criminal juvenile system ,addressing these difficulties, shall ensure their necessary rehabilitation and reintegration in the civil society where they were born. This is so important because, as also underlined by Save the Children, it consists in a toll in order to avoid or prevent recidivism.

The necessity for such a rehabilitation of the child is highlighted in several international treaties like the Beijing Rules , which make clear in Rule 24 that "*efforts shall be made to provide juveniles, at all stages of the proceedings, with necessary assistance such as lodging, education or vocational training, employment or any other assistance, helpful and practical, in order to facilitate the rehabilitative process*"[124]. This rule affirms that States shall commit in providing certain services and facilities in order to foster the social

[124] United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") Adopted by General Assembly resolution 40/33 of 29 November 1985

integration of the child. So, it can be concluded that the reintegration and rehabilitation can be regarded as the main aim and objective which shall be pursued by the criminal juvenile system, since is in compliance also with the art. 40 CRC stating that *"'the right of every child ... to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, ... which takes into account ... the desirability of promoting the child's reintegration and the child's assuming a constructive role in society*"[125].

However, an important factor which must necessarily exist in order to attain such purpose consists in the consent and active participation of the community, which must be willing to welcome back the child, since otherwise this could be hardly achieved[126].

The war context has terrible effects on the cohesion of the local communities, making for child soldiers more difficult, after the end of the conflict, to find a place within their original civil society. It is then of fundamental relevance to promote the social reconstruction which must be based on the rebuilt respect for the dignity and fundamental rights of each society's member. However, in order to achieve social reconstruction, the social community feels the need to address the past atrocities suffered, which consists in the decisive step in order for the future creation of a new healthy culture and to let them move on. When during the armed conflicts children had been used as soldiers and had themselves committed international crimes, damaging the local community and society, according to some scholars from Western countries , it is necessary to claim those individuals accountable for the illegal actions committed, even though these proceeding can themselves lead to a greater division between the existing groups. According to such *retributive justice mechanism* in presence of mass atrocities, it is a moral imperative to held accountable the perpetrator who must face the consequences of his actions , and his behaviours must not be ignored but differently recognized and punished.

The retributive justice brings several advantages like for example the fact that it is perceived by several local communities and the families of the victims of the mass atrocities as a necessary step to move on with their lives. Its absence can determine the

[125] United Nations Convention on the Rights of the Child (1989), art. 40

[126] Rastegari B, Mousavi S and Nordin R, 'Improving the Legal Protection of Children in Conflict with the Law: Reintegration and Rehabilitation into Society (2012) available at <https://figshare.com/articles/Improving_the_Legal_Protection_of_Children_in_Conflict_with_the_Law_pdf/3141178/1> accessed 14 March 2020

creation of the feeling according to which justice has not been achieved and there is an unfinished business, which cannot permit to them to effectively rebuild the society. However, among the arguments against the individualized justice, there is the one dealing with the fact that ,in the context of mass atrocities, there are practical consideration which make difficult to bring to justice, and so before a court, each perpetrator and so much of the atrocities remains not addressed. In order to avoid this inevitable consequence, many mechanisms had been adopted like the truth commissions, which have as their main intent to permit to the local communities to be heard, to talk about the atrocities suffered and to make them known and of common knowledge.

(a) The methods to restore peace within the local community between victims and perpetrators

(i) The truth commissions

The Truth commissions had been an important tool which has been used as a method to find justice for the local communities and families who suffered the consequences of civil war and international crimes committed within the national territory. They consist in non-judicial organs , characterized by a temporary nature, which are established in order to ascertain the main factors which contributed to the emergence of international crimes in a certain area, their effects and to collect the testimonies of the witnesses among the civil society. They had been at first created in order to find out ways which could be used by the society to overcome past injuries and find a sort of peace and harmony between the victims and the perpetrators[127]. However, they are usually not used alone as a way to find social justice, but they are linked to other instruments, such as criminal prosecution before either national or international tribunals.

Those commissions are necessarily based on the law, whose function is to identify the main purposes of those transitional bodies. Three are the main aims which they shall fulfil and promote: they shall clarify the historical and social background which had led to the

[127] Mark A. Drumbl, Reimagining Child Soldiers in International Law and Policy (Oxford University Press, 2012), p. 180

emergence of the conflict, usually of internal nature; they shall give the power to the victims and witnesses to express their emotions and feelings towards the past atrocities suffered and to discuss and explain their own personal experience of the war and to conclude they shall promote a change in the behaviour of the society and of the national government which is necessary in order to overcome the feeling of revenge and to prevent the recurrence of violence between rivals[128]. To conclude, these commission can be considered accessory to a retributive justice.

The main characteristics, which must be underlined and emphasized, are several. At first it is evident that they are complementary to criminal proceedings conducted before a court or tribunal. In fact their objective and scope does not consist in the identification of the individual who is criminally liable for the international crimes committed in a certain geographic area, but at the same time they are regarded as important tool during the investigations since they collect evidence from the social community. For example, they hear and record the testimonies of the witnesses, the victims and of the same perpetrators.

Secondly, they are usually created and elaborated in contexts where an international crime has occurred, so a crime which is condemned by the international community as a whole, such as torture, enforced disappearance and sexual violence[129]. Thirdly, they are characterized by an approach which puts at the centre of attention the victim of the international crime. As they are regarded as the main sources of information and data on the events and for many other reasons, their well-being must be a priority during the investigations implemented by the truth commissions. Furthermore, many mechanisms and instruments are usually elaborated to ensure their physical but also psychological recovery.

Even though in fact originally the voices of victims of human rights and fundamental freedoms'violations were not considered a priority in the criminal justice system, nowadays things had changed. Important steps in the field of protection of the rights of victims of international crimes had been effectively reached especially after the creation, through Resolutions of the UN Security Council, of the ad hoc Tribunal for ex-Yugoslavia

[128] No Peace Without Justice and UNICEF Innocenti Research Centre, International Criminal Justice and Children, 2002

[129] Eduardo González and Howard Varney, Truth Seeking: Elements of Creating an Effective Truth Commission, Amnesty Commission of the Ministry of Justice of Brazil (2013)

and for Rwanda , and last but not least through the establishment of the International Criminal Court.

The Basic Principles and Guidelines[130] had been considered by many scholars, including Bassiouni[131], as the main source of the rights deriving to victims of international crimes. The UN Principles identify a common definition of the term "victim" which can be used in order to generally identify an individual who has suffered an emotional or physical damage, deriving and caused by acts or even omissions in contrast with criminal legislation. Even though the ICC Statute does not identify a clear definition of victim, the term is used in the ICC Rules of Procedure and Evidence, in order to identify any person who has suffered the consequences and effects of international crimes, like genocide, war crimes, crimes against humanity and the crime of aggression which expressly fall within its jurisdiction.

Among the variety of international treaties and legal instruments aiming at indicating the main rights which shall be promoted and granted to these vulnerable members of society, the UN Victims Handbook[132] must necessarily be reminded. It stresses the need to elaborate , at the national and even international level, programmes which shall be used in order to ensure support in different aspects of their own life, and first of all measures which make sure that they have the effective possibility to participate to the criminal trials, to make their own voice be heard and to acquire information on their family members, lost during the armed conflict[133]. The only way through which their rights can be ensured in practice is to safeguard the independency of the members of the truth commission from the influence of the political power, whose moral and professional reputation must be ascertain and scrutinize in a very deep way.

Many truth commissions had finally been created not just in order to grant support to the criminal proceedings before national courts and tribunals, but their mandate can moreover

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[130] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005

[131] MC Bassiouni, 'International recognition of victims' rights' (2006) 6 Human Rights Law Review 203.

[132] UN Office on Drugs and Crime (UNODC), Handbook on Justice for Victims, 1999, available at: https://www.refworld.org/docid/479eeb1a2.html [accessed 3 June 2020]

[133] Benson Chinedu Olugbuo , 'Enhancing the protection of the rights of victims of international crimes: A model for East Africa' (2011) African Human Rights Law Journal, available at < https://www.researchgate.net/publication/317450157_Enhancing_the_protection_of_the_rights_of_victims_of_international_crimes_A_model_for_East_Africa > accessed on 13\03\2020

consist explicitly on reconciliation between offenders , so perpetrators of international crimes, and their victims or even their family's members.

(ii) The Role of the ICC

The International Criminal Court was created in 2002, with the main intention to end impunity of the individuals who can be considered responsible for the commission of crimes having an international dimension, since they are able to affect the international community. Nowadays the international criminal system is gaining more and more relevance and legitimacy since almost all states have ratified its own statute, then considering it as a useful tool in order to reach peace, justice and restore stability within the countries affected. However, there are some aspects which underline in some way the inadequacy of this Court to face international crimes and to be considered as a way through which victims can find peace. This inadequacy, according to many scholars, would occur above all in African countries which enjoy a different conception of justice than that found in western countries.

An important factor which does not contribute to the possibility for the ICC to become the most effective tool for reaching peace and justice reside on the fact that it is subject to the direct influence of the political power exercised principally by the five permanent members of the UN Security Council. In fact when the international crime, falling within the jurisdiction of the ICC is committed (ratione loci) within the territory of a state which has not ratified the Court's Statute, the decision of this executive and political body of the United Nations is crucial, since in its absence would be impossible to trigger the ICC's jurisdiction. This is extremely controversial since the ICC was originally created to be an independent judicial body, not having a political nature. A specific aspect of the work of the ICC where this political influence, exercised by States of the United Nations, is manifest is linked to the investigations. In this context, the Pre-Trial Chamber in fact verifies that the situation meets a certain threshold of gravity and interest of justice, which is not applied in a uniform and equal way. This is made clear by the fact that the ICC is mostly dealing with crimes committed in the African Continent, while not giving much of attention to the situation existing in other parts of the world, like in Afghanistan.

For what concerns the victims 'vision, the ICC has several defects such as the fact that it prosecutes only the individuals who are the most responsible for the international crimes committed, providing so only a symbolic justice; it does not give relevance to the needs and interests of the victims and does not give enough space for their participation during trials[134]. The ICC, being an international court distant from the actual place where the atrocities occurred, can be seen by the local population has not satisfactory and then not preferable to a local proceeding.

Additionally , the main factors which generally push local communities to prefer a domestic persecution of international criminals are: the economical and logistic difficulty to permit all members of the local communities , who had suffered the atrocity of international crimes, to participate actively to the trial in the Hague before the ICC; the fear of victims to render a testimony before the court; the use during the legal proceeding of a language which is different from the one used by the civil population and the fact that the ICC can be seen as a judicial body created by colonials.

Notwithstanding all of this, in some circumstances and contexts the ICC received a huge support from the civil society of the State interested. From the studies conducted in Darfur and in Uganda, it is evident that the victims and the local community in general had high expectations on the ICC's contribution to the restoration of peace and justice. With specific regard to child soldiers, international courts, including the ICC, have been reluctant to exercise their criminal jurisdiction over them, although they could guarantee these individuals the procedural rights and guarantees promoted and solicited at the international level[135]. Despite this possible advantage, this type of process is rightly reserved for those who can be considered the most responsible for international crimes that occurred in a specific geographical area. It is difficult to consider children within this sphere, since they are the result of the environment that surrounds them. For this controversial category of perpetrators of crimes, often linked to armed conflicts, it is therefore more appropriate as an approach the one providing either for the establishment of a trial before the national court or alternative systems to criminal justice. Such

[134] Catherine Gegout , 'The International Criminal Court: limits, potential and conditions for the promotion of justice and peace' (2013) 34(5) Third World Quarterly, 800-818, available at <https://www.tandfonline.com/doi/pdf/10.1080/01436597.2013.800737?needAccess=true>

[135] Katherine Fallah, 'Perpetrators and Victims: Prosecuting Children for the Commission of International Crimes' (2006) 14 Afr J Int'l & Comp L 83

alternative systems are encouraged because they ensure an easier reintegration of the child soldier into the civil reality and promote forms of communication between victims and perpetrators. However, even such approach is not in itself perfect. Indeed, it is criticised by one part of the doctrine sustaining that in this way States are in breach of their obligation to prosecute international crimes and that such means are not always able to ensure his procedural and substantive rights.

(iii) Alternative to international justice

An alternative to the establishment of a criminal proceeding before the ICC, whose functions are regulated by the principle of complementarity, can be not only the creation within the State of an international tribunal ,created ad hoc by the UN Security Council, to address the atrocities committed in certain geographical areas, but even the possibility for the same national courts and tribunals to judge directly the crimes, having an international dimension, committed in the national territory by certain individuals. The domestic judicial system, just like the truth commissions and the ICC, can be considered a valuable possibility and method which could be used in order to approach international crimes, and to achieve a future and desired peace within the national territory and among the citizens.

The local methods for addressing international crimes can be considered a reflection of the idea of restorative justice, which invites members of the local communities, witnesses, victims and even the accused to talk in public about the events that occurred in a certain place and time and lead to the emergence of a internal conflict, which has been the favourable setting for the commission of international crimes. The term "*restorative*" refers to the intent of rebuilding the trust relationships ,which had been broken by the offence, between the perpetrator and the victims, and in order to attain this goal, it is

necessary that the offender takes responsibility for his actions and acts to repair the damages caused[136].

The experiences of South Africa‘s Truth commission and Rwanda’s Gacaca can be considered two valuable examples of the fact that in certain circumstances , States could prefer or believe that would be better for their own society, in the light of their own particular culture and social and historical background to not directly refer the human rights violations to the international courts and tribunals. The role and the success of the South Africa’s commission, in the context of investigations of mass atrocities led to the creation of many other commissions not just in the African Continent, like for instance in Kenya, Democratic Republic of Congo, but even in Western and European countries such as Ireland and Cyprus. The TRC had an important success since it not only investigated on the causes and effects of the mass atrocities and collected evidence and testimonies of the victims and the local population , in order to permit to them to overcome the trauma suffered, but at the same time it has been able to attain peace and stability, while addressing the human rights violations deriving from the Apartheid regime and the violations committed by the ones which were fighting against the national system. On the other hand, they cannot be described as totally granting justice to the people, for several reasons which had been highlighted by the scholars. First, it has been clarified that only a small percentage of perpetrators faced a punishment, while many others had been able to escape it, through the recognition for example in their favour of amnesties. Secondly, this method has been criticized for being too focused on the personal and subjective experiences of each individuals, rather than on the main purpose, which shall be the attainment of social reconstruction, so that still in our days a part of the population describes it as an open business. To conclude, it can be observed that even though the truth commission in this case has been relevant in order to permit to family members of the victims to be kept informed and to participate to the necessary process for justice, which obliged the perpetrators not just to face the crimes committed before the local community, but even to pay the price for them, having a social and reputational dimension, this is still controversial and discussed by scholars.

[136] Maya Goldstein-Bolocan, 'Rwandan Gacaca: An Experiment in Transitional Justice' (2004) 2004 J Disp Resol 355

1) The Gacaca Courts

Another kind of strategy had been elaborated, in the light of the same purpose, in Rwanda to face the Genocide which happened in 1994, whose results however are still widely discussed. After the end of the internal conflict between the two ethnical groups being the Hutu and Tutsi, and the failure of the United Nations to intervene during the armed conflict in order to ensure the maintenance of peace and international security, the new local government found itself in front of a big issue, consisting on the identification of the correct and most useful instruments which shall have been adopted in order to not only pursue the creation of new stable and permanent institutions, but also to permit the re-establishment of the peace and security needed.

Because of the vast number of accused for the commission of international crimes during the armed conflict, around 800.000[137], the domestic courts and tribunals simply were not able to provide a fair trial to every individual accused. Differently the ad hoc tribunal created by the UN Security Council in Rwanda had provided only a little contribution for what concerns the possibility to subject each suspect to a judicial proceeding, predominantly for the lack of sufficient economic and financial resources, but even because of the fact that it was not in line with the social, cultural history and traditions of the local community who supported the creation of a totally different kind of process.

The national authorities decided , taking into account the huge number of human rights violations committed by the members of the community between each other's and the lack of the necessary resources to subject each of them to a fair and impartial trial, to revive a traditional mechanism for the resolution of disputes, also called Gacaca.

However, they decided not to create the traditional communal hearing, usually used to overcome disputes and rivalries between or within families[138]. The original one in fact permitted to the members of the local community to talk in public, so in front of the rest of the population, about the damages caused by another individual, and the judge's

[137] Charlotte Clapham, 'Gacaca: a successful experiment in Restorative Justice?' E-International Relations (30 July 2012), available at < https://www.e-ir.info/2012/07/30/gacaca-a-successful-experiment-in-restorative-justice-2/ > accessed on 10/06/2020

[138] Allison Corey, Sandra F. Joireman, 'Retributive justice: The Gacaca courts in Rwanda' (2004) 103 (410) African Affairs, pp. 73–89, https://doi.org/10.1093/afraf/adh007

function was performed by the elders. The novity so consisted on the fact that the new gacaca was built to deal with a specific and totally different kind of illegal action, consisting in mass atrocities[139].

The government of Rwanda was hoping that the revised traditional system for solving conflicts between rivals among neighbours could have been a good and successful alternative to the establishment of numerous criminal proceedings before the national courts and tribunals. This different method of reconciliation in fact was though not only to guarantee a more direct participation of the local community, including the families of the victims and the victims themselves, in the identification of possible sanctions and punishment to be adopted, but even to ensure a continuous and not filtered dialogue between the same perpetrators of the international crimes committed in that specific historical period and those who had suffered and had been damaged by them.

According to some scholars, the system adopted in these specific circumstances could have been considered of a double nature, both restorative and retributive. Even if its purpose consisted in the identification of the most effective punishment for the atrocities committed by thousands of individuals , who participated to the armed conflict, obliging them to show in front of the community humility, at the same time it was aiming at achieving a future coexistence between perpetrators and victims and their families. The Gacaca processes had been considered effective by the international community since they permitted to bring to justice over 1.2 million people, and most of them had been punished through imprisonment.

However, they had been criticized in the literature for the relevance and influence that the political power, so the national government, had in the processes and their result. Among the most relevant defects which had been identified, there is the fact that the national and public authorities suggested and pushed the members of the civil society to accuse one another without any proof or evidence, with the reprehensible result that a vast number of actual perpetrators had not been punished at all. Some scholars also spoke about the possibility that the trials had been used as an expression of Tutsi's justice[140].

[139] Martha Minow, 'Do Alternative Justice Mechanisms Deserve Recognition in International Criminal Law? Truth Commissions, Amnesties, and Complementarity at the International Criminal Court' (2019) 60(1) Harvard International Law Journal, p.32
[140] Corey (n 138)

Other factors which did not contribute to the success of the social proceedings can be the lack of the necessary professional qualifications of the judges, participating to the processes. In fact, they had been selected among the civilians without considering their independence, impartiality or even their basic knowledge of international and national legislation. This phenomenon had been so highly controversial since even though some part of the community's members considered it a success because permitted to the victims to contribute to the attainment of social justice, at the same time the perpetrators during the proceeding were showing a sense of guilt and repentance under pressure, so not in a genuine way. While many victims and witnesses considered it the only way to rebuild the country and find a sort of peace and stability after the war, others believed that these processes were not able to bring any justice, not just because of the unsatisfactory qualifications and knowledge of the judges of international law and even national legislation, but also because they lacked of independence, impartiality and were not able to ensure an equal and fair process[141]. The principle of fair trial and procedural guarantees, safeguarded at the international level, could have not been ensured to the accused in this specific context.

During the Gacaca's proceedings, the most important perpetrators of international crimes, so the leaders of the armed forces, were brought before the ad hoc International Tribunal for Rwanda. The international tribunal differed from the Gacaca in many ways. First of all the members of the court were highly qualified and had a vast experience in international crimes and armed conflicts and as a consequence they were able to ensure ,during the judicial proceedings, the fundamental and human rights not just of the victims , but also of the perpetrators, such as the right of defence and fair trial. The ICTR was created by the UN Security Council's resolution in order to punish the most responsible for the international crimes committed, and its Rule of Evidence and Procedure was providing a certain and secure set of rights to the victims and witnesses. Even though a formal instrument had been adopted as a guideline, according to some scholars, such as Walsh, the tribunal had not been totally and completely able to ensure its application[142]. For instance, the Court did not take into account the possibility that the widows and in

[141] Erin Daly, 'Between Punitive and Reconstructive Justice: The Gacaca Courts in Rwanda' (2002) 34 NYU J Int'l L & Pol 355

[142] C Walsh 'Witness protection, gender and the ICTR: A report of investigations in Rwanda June and July 1997', ICTR 1997

general the women of the local community could find not comfortable to talk about the sexual violence suffered during the conflict, in front of the male persecutor. Some victims moreover were disappointed by the possibility for the defence to counter interrogate them during the legal proceeding[143]. Secondly, during the proceeding before the international tribunal, the death penalty had not been applied, in conformity with the international treaties condemning it.

In my opinion, the coexistence of these two parallel processes created discrimination and inequalities, because they applied different standards in the level of protection of the individuals under accuse and the victims and in the context of the applicable sanctions and punishments. This is made clear by the fact that while the leaders had only been sentenced to imprisonment, the ones subjected to the Gacaca could have been also subject to the death penalty.

(b) Effects of recruitment on children and the logic behind reintegration

Taking into consideration the different methods and systems which could be used, in order to restore peace and security after the extinction of an armed conflict, it is possible to highlight the fact that when it comes to children, who became perpetrators of international crimes, it is of vital importance not to treat them as adults and to give them the opportunity to return back to the community where they were born , so to be reintegrated. This scope has been embodied in several international instruments, among which the Beijing Rules, in Rule 24 and 25.

The Rule 24 rules that "*efforts shall be made to provide juveniles, at all stages of the proceedings, with necessary assistance such as lodging, education or vocational training, employment or any other assistance, helpful and practical, in order to facilitate the rehabilitative process*[144]", and the Rule 25 specifies that " *volunteers, local organisations and other community resources shall be called upon to contribute effectively to the rehabilitation of the juvenile in a community setting and, as far as possible, within the*

[143] International Federation of Human Rights 'Victims in the balance: Challenges ahead the International Criminal Tribunal for Rwanda' (2004) 6 (FIDH Report)
[144] United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") Adopted by General Assembly resolution 40/33 of 29 November 1985

family unit[145]". These norms highlighted the need for the national authorities, the judicial bodies and the community itself to cooperate with each other for the attainment of this common purpose. The role and cooperation of the community is in this context predominant since it is the only way to ensure to the child to gain again a place in the society, without being excluded, stigmatized or prosecuted. The society so must be willing to accept the child soldiers.

The term " *reintegration*" is generally used in order to speak about the return of the child to the civil society of which he was originally a member, after the end of the armed conflict and so after having been a soldier in favour of a certain armed group.

The reintegration of the child soldier within the community is of vital importance for several reasons. One of them consist on the fact that generally those individuals, for a prolonged period have suffered traumas, in fact war is a phenomenon which has catastrophic consequences for the humankind, especially for those who are young, in the sphere for their own development and wellbeing. Even though the recruitment of children is seriously condemned by international treaties, at the same time, as previously discussed is a pretty common experience around the world, which do not only affect children themselves but even the society where they were originally raised.

Children, who experience war and in particular the recruitment by a non-state actor or even by the State army, as many studies have demonstrated, are affected by mental health issues , traumatic stress, since they had been victims of abuse by commanders and even soldiers, like torture and rape, and moreover they had been witnesses of the death of their family members, had been separated by the local community, and suffered of the lack of the necessary health care, education, safe water and nutrition[146]. All these factors contribute to the difficulty of the child to grow a normal mental, moral and intellectual capacity.

[145] Ibid.

[146] Elisabeth Schauer and Thomas Elbert, The Psychological Impact of Child Soldiering, (In: Martz, Erin, ed.. Trauma rehabilitation after war and conflict, Springer, 2010) pp. 311-360. ISBN 978-1-4419-5721-4 available at https://www.usip.org/sites/default/files/missingpeace/The%20psychological%20impact%20of%20child%20soldiering%20-%20Schauer.pdf

The most common consequences of a prolonged exposure to the effect of an armed conflict can be alcoholism, addiction to drugs and even the exposure and possible contraction of HIV \AIDS. Several scholars and intellectuals have highlighted in their documents that most of the children ,who had experiences this specific environment, were suffering of post- traumatic stress disorder (PTSD), a debilitating psychiatric condition, which has become really common especially nowadays, since the new wars are characterized by violations of human rights, consisting in crimes against humanity and war crimes. They have developed the so called "building block effect", which has been used in order to explain how the traumatic events lived had determined in their victims a response of fear. In order to really understand in deep the consequences and effect, from a mental and psychological point of view of not only the crimes committed but even of the ones suffered , we must look at the words that a child had used in order to express and tell his own story.

For instance, a thirteen years old from Uganda who has been abducted by LRA described in this specific and detailed way his own personal experience within the armed forces and in the context of an internal conflict*: "At age 11, I was abducted and that same day they made me kill 3 of my uncles. A few days later, they 'initiated' me to be a soldier and gave me 100 strokes of beating. One year later, I was forced to cut off both hands of a hunter with a hapanga. In the same year, we fought a big battle with the UPDF, where my friend was killed. When I started crying, the commander forced me to lie in his blood. Many battles followed that one in the same year, also air attacks. We were often starving, since there was no time to find food. Once we had to ambush a bus with civilians on the road towards Atiok to get hold of food; many people died and got burnt. Two days later we were asked to attack a camp. We were told to bring food and girls; we found three, but I was forced to kill two since they couldn't manage to carry the heavy loads and keep up. It wasn't long after that incident in the same year that I got a chance to escape during a battle with the UPDF. I was 13 when I reached this center"*[147].

Taking into account and trying to find the common elements between the different and personal experiences of all individuals, especially children , a study carried out by a group of scholars , such as Schauer and Pfeiffer, had demonstrated that certain traumatic events

[147] Ibid.

are usually described and present such as: “being forced to skin or cook dead bodies (8%), forced to eat human flesh (8%), forced to loot property and burn houses (48%), forced to abduct other children (30%), forced to kill (36%), forced to beat, injure, or mutilate (38%), caused serious injury or death (44%), experienced severe human suffering, such as carrying heavy loads or being deprived of food (100%), gave birth to a child in captivity (33% of women), were threatened to be killed (93%), saw people with mutilations and dead bodies (78%), experienced sexual assault (45%), experienced assault with a weapon (77%), and experienced physical assault including being kicked, beaten, or burnt (90%)”[148].

Another study conducted by Bayer and others in 2007 by interviewing children who had been abducted in Congo and Uganda , usually at the age of 15 years old, showed in a similar way that ,among the most common experiences, there were having witnessed shooting (92.9%), having witnessed somebody being wounded (89.9%), and having been seriously beaten (84%). The 54% of the totality of children interviewed reported having killed someone, while the 28% reported that they were forced to have sexual relationships and experiences. Furthermore, 35% of the interviewed had manifested an evident post-traumatic stress disorder[149].

If we consider that those events are able to cause serious and durable problems on the adult’s mind, it is possible to declare that even worse consequences can derive to children, whose mind are still in formation. The survivors might be moreover subject to social withdrawal, lack of trust, major changes in their behaviours and ideological way of seeing the world, and feelings of guilt and shame.

Among the major problematics experienced by child soldiers, there is first addiction to drugs, depression and a tendency to suicide. Depression and suicide can be identified as consequences of their own sense of guilt, which in the majority of cases they feel since they had been obliged during the armed conflict to kill not just other members of their own community, but even family’s members , such as their mother, father, and brothers. Furthermore there is the phenomenon of dissociation, which usually arises as a defence

[148] Ibid.
[149] Ibid.

elaborated by the brain in order to permit to the individual to survive the trauma and continue to live notwithstanding the atrocities that they have lived.

If we also consider that these individuals have lived ,from a very young age, experiences characterized by violence, it is possible to fully understand the reason why although in some cases they feel empathy for the victims of abuse, at the same time they cannot conceive alternatives to the use of violence itself. The period of time lived actively participating in the typical activities of the war and under the command of soldiers of armed groups, has in fact seriously altered and impeded their ability to build a healthy relationship with civil society and to have genuine feelings towards subjects who find themselves victims of atrocities. In fact, for these children, war, violence, terror and fear are normal and, in some cases, they cannot even conceive of an existence other than that actually lived up to that moment.

(i) The recruitment's effects on girls

Despite the fact that this issue has not been the subject of a vast amount of studies and elaborations, it is also important to always take into consideration the role played by women and girls, suffering particularly the psychological, physical and social effects of war and participation in armed groups. In fact, girls were enrolled as soldiers in the last years of the 20th century in more than 55 countries around the world and had different roles, including informers, spies and even commanders of suicide operations. As demonstrated by the study conducted by the United Nations, women and girls are particularly severely victims of armed conflict and subject to serious activities and crimes, not only on the basis of their gender but because of the fact that they enjoy an important role in civil society and for the family structure itself. As they act as a bond that holds society together and provide assistance to children and other members of the family structure, they are often subject to attacks by those armed groups whose primary objective is the destruction of a particular group or society. Historically, among the violence suffered there is abuse of a sexual nature, including rape and forced prostitution. Rape is also according to some scholars, a clear expression of torture, which is prohibited in various conventions and treaties of international law, as it can be used as a tool to acquire

information or even just to humiliate the enemy. Unfortunately, moreover, girls who are victims of rape within the training camps or the armed forces they belong to, are then almost unable to live their sexuality normally or even have a normal pregnancy, as they are traumatized. Based on the evidence acquired, it is also possible to demonstrate how the majority is afraid of not only talking about these experiences but also of being judged by society. In some cases, moreover, the mere fact of having been a victim of rape makes these women unable to regain a role in society and to remarry, and this occurs especially when they have been pregnant as a result of the violence suffered[150]. Among the most commonly lived experiences, there is also the fact of having been used as sexual objects, wives by the commanders of the armed forces or as a reward for the soldiers themselves. This is evident from the analysis of the survivors' testimonials, who were able to speak ex post of the trauma experienced.

An example of the violence experienced by women is the one of a girl in Uganda who has remained under the power and direction of the LRA for more than three years: "*I was 13 years at the time. I didn't like him at first sight, but I had to sit down next to him. He told me that he had sent the boys to go and get him a girl to be his wife and that I am the one. Then he asked my name only. He spoke no more. My heart was beating much. I was scared, since I was not sure what he meant. Some people were cooking greens and I ate some food. After a while the man asked me to come with him. We went to a clearing under a tree. First, I thought that he takes me aside from the others, because he wants to kill me. He told me to lie and said that we would sleep there. I lied down on my side, like going to sleep. He was upset about this and started to beat me. I was surprised. He slapped my face and head. He said: "Don't act stupid. You know what I want from you." Then he pushed me unto the ground and laid on me. My heart was beating really fast now. He had a bad body smell. Then he forced himself into me. He said: "if you cry, I will kill you*"[151].

In the majority of cases these women are not placed in the possibility of reintegrating into society and therefore rebuilding a life within the community to which they originally

[150] Susan McKay ,The Effects of Armed Conflict on Girls and Women, Peace and Conflict (1998) 4(4) Peace and Conflict: Journal of Peace Psychology, 381-392, available at < https://www.peacewomen.org/sites/default/files/The%20Effects%20of%20Armed%20Conflict%20on%20Girls%20and%20Women.pdf > accessed on 14\03\2020

[151] Elisabeth Schauer and Thomas Elbert (n 146)

belonged. In fact, they are generally excluded for having maintained sexual relations with the commanders of the rebel forces, regardless of the whether they were voluntary or forced in nature. From time to time, moreover, society itself, considers the fruit of these relationships to be a cause for shame and obliges the woman to decide between her return to society and these children.

In addition, the former fighters have acquired ,over the years lived within the armed group, knowledge and skills not assessed positively by civil society, in fact girls participating in the conflicts have not had the opportunity to acquire the skills necessary in the community to which belong including: how to be a good mother or wife. The majority had been trained to serve the armed group and therefore they were provided with information and skills of a completely different kind. They were generally used in the public administration, teaching, industry or even in the communications necessary for the front[152].

As unlike for boys, girls who have lived in such contexts find it difficult to reintegrate and in most cases the opportunity to return to their family or find a husband are not given, at the end of the conflict they are forced to survive through prostitution.

Speaking in general terms and therefore considering the generality of children, who are exploited all over the world as weapons and instruments of war and horror, the effects of war are manifest in various areas of their existence and among these are: the loss of the family, the sense of guilt that often leads to suicide, being affected by diseases of sexual origin including AIDS and also very often, due to active participation in the conflict, become disabled[153].

(ii) Poor sanity and lack of basic resources

During conflicts, a large percentage of children are forced to live in training camps or in any case areas where they have access to a source of non-drinking and unsafe water for

[152] Elise Fredrikke Barth, 'Peace as Disappointment, the reintegration of female soldiers in Post- Conflict societies: a comparative study from Africa' (2002) PRIO available at <https://www.prio.org/utility/DownloadFile.ashx?id=470&type=publicationfile> accessed on 14\03\2020
[153] Myriam Denov, 'Coping with the trauma of war: Former child soldiers in post-conflict Sierra Leone' (2010) 53(6) International Social Work, pp. 791–806

human well-being. In 2019, UNICEF in its own report has in fact highlighted that more than 500,000 children are in a situation of need for clean water and that about 3.6 million individuals have been infected by the water to which they had access in the war zones[154]. This international organization underlines how children under 15 are much more sensitive to viruses that can be contracted through contact with water that is not safe for health, in fact it is much more likely that they die due to this respect than through of direct violence. These poor health conditions and access to an inadequate source of hygiene and water determine the existence of a fertile basis for the development and spread of epidemics and diseases of a lethal nature among those living in these areas, especially children. For example South Sudan consists of a State characterized by a young population, which following the conclusion of the relative civil war which began in 1983 and ended in 2005, has seen the spread among the population of numerous infectious diseases that led to the death of a large part of citizens, most children. Among the most lethal were VL and HAT, which in fact resulted from the consumption of unsafe and infected water and food[155].

A further effect that war produces is the scarcity of resources including not only water, but also food. The lack of these resources, necessary for survival but also for the physical development of children, determines a widespread problem consisting in malnutrition. Especially during conflicts, malnutrition is particularly serious, as not only in some cases mothers decide to stop breastfeeding but also in some circumstances preventing access to these sources of support is used as a war tool[156]. Conflicts generally determine the impossibility for the population in general, but to a greater harm to children, of having access to health services, in violation of international humanitarian law. Furthermore, among the most direct effects of the war, that leads to malnutrition in children, is the destruction of the countryside and farms, the main source of food. Sometimes these fields are not just subject of attacks, but through the mines, their use by the community is made

[154] UNICEF, Children living in protracted conflicts are three times more likely to die from water-related diseases than from violence, 2019, available at < https://www.unicef.org/eca/press-releases/children-living-protracted-conflicts-are-three-times-more-likely-die-water-related#:~:text=NEW%20YORK%2C%2022%20March%202019,in%20a%20new%20report%20today. > accessed on 16\06\2020

[155] Tami Tamashiro, 'Impact of Conflict on Children's Health and Disability' (2010) Education for All Global Monitoring Report, available at < file:///C:/Users/Utente/Downloads/190712eng.pdf > accessed on 14\03\2020

[156] Carroll, G. J., Lama, S. D., Martinez-Brockman, J. L., & Pérez-Escamilla, R., 'Evaluation of Nutrition Interventions in Children in Conflict Zones: A Narrative Review' (2017) 8(5) Advances in nutrition (Bethesda, Md) , pp. 770–779. doi:10.3945/an.117.016121

impossible. As for malnutrition resulting from the inability or unwillingness of mothers to provide breastfeeding, they may derive from the fact that women during the war may suffer from hunger and trauma of a physical or psychological nature[157].

(iii) Physical harms

The lasting active and direct participation of children in armed conflict inevitably increases the possibility of suffering serious physical harm. One of the many causes of disability in children consists, for example, in the fact that they are forced to verify and test the existence of mines in certain territories, and in these attempts, they can remain not only killed but also seriously injured.

Conflicts therefore determine the existence of various problems in the field of health care and in the area of hygiene. The authors of the 2005 State of the World's Children report, "Childhood Under Threat," sustained that over 90% of conflict related deaths until 2005 were civilians, most of them were children[158]. Despite these studies, during conflicts it is difficult to acquire clear and safe information regarding the effects on the safety and health of children. In fact, the deaths themselves in some cases are not documented, as the United Nations has also established. In fact, even though only a few hundred children have been documented as dead in 2015 in Syria, it would be possible to ascertain, despite the absence of official documentation, that they are instead thousands of individuals[159].

Keeping in mind the issues raised by the war that inevitably produce the most significant and serious damage to children around the world, I believe that the international community should continue to engage in the fight against international and internal wars and conflicts, especially through the cooperation created within the United Nations , aimed at maintaining international peace and security, consisting in its primary

[157] The impact of armed conflict on child development, Selected highlights of the Report of Graça Machel , expert of the Secretary-General of the United Nations, available at < https://www1.essex.ac.uk/armedcon/story_id/THE_IMPACT_OF_ARMED_CONFLICT_ON_CHILD_DEVELOPMENT.pdf> accessed on 11\06\2020

[158] UNICEF, State of the World's Children: Childhood Under Threat (New York, NY: UNICEF; 2005)

[159] Ayesha Kadir, Sherry Shenoda, Jeffrey Goldhagen, Shelly Pitterman and SECTION ON INTERNATIONAL CHILD HEALTH, 'The Effects of Armed Conflict on Children' (2018) 142(6) Official Journal of the American Academy of Pediatrics

responsibility. In any case, even if in some cases children can become themselves actors of atrocities against the community and civilian population, they must be considered primarily victims of abuse, violated by adults who first taught them to live in fear to die or be seriously injured. Therefore despite the fact that in order to achieve peace again in the community and avoid the resurgence of the use of force, it is necessary that the atrocities carried out by the latter are discussed, the approaches to be used to discuss the crimes committed must always take into account the crimes of which children were themselves victims and the fact that they, more than the others, suffered the devastating consequences of the war. Such means in no case can therefore determine the impossibility of reintegrating into civil society, since their protection, both in times of peace and war, is under the responsibility of the States. In order to meet their obligations, States must therefore ensure their reintegration, which avoids that they are again subject to the risk of violation of their rights, and in particular to re-recruitment.

(c) Systems of reintegration of child soldiers within the society

(i) The importance of reintegration

The idea that children must be protected, especially if they face difficult circumstances including armed conflicts of an international and national nature, is now supported almost all over the world and by the generality of international organizations. They must receive protection because in these contexts their ability to live a normal childhood, to access services ,including free education, which are necessary for the human being to grow and to mature a normal and healthy morale and conscience but also to increase intellectual potential and the relative sense of civic duty are undermined.

Certain types of services and programs, guaranteed by states to their citizens, not only can prevent the recruitment of children, who are increasingly used and exploited as instruments of death and destruction, but can also guarantee their reintegration into society. This reintegration may be necessary from various points of view: it can guarantee civil society a way to go ahead and face the crimes suffered, sometimes also carried out by these children; allows the child to not suffer social exclusion which can sometimes

lead him to return to the armed groups, within which he had found a community to belong to, after the loss of his relatives.

It is now clear the existence of thousands of children, who need help and assistance in order to obtain reintegration within the society and community to which they belonged and therefore within the social context to which they were torn.

However, this reintegration is in the concrete case far from being simple and immediate for many reasons. Firstly because of the fact that often the community feels the need for revenge and to obtain justice after the atrocities suffered. Secondly war entails serious changes and consequences in the psyche and in the way of conceiving the world of such individuals who are particularly fragile to external influences and who very often lack reference points and models to aim for. So, among the greatest difficulties that may be encountered in the reintegration process there is the difficulty or sometimes even the lack of will of the local population to re-accept these children and help them reintegrate. The reasons why this can occur are numerous and different from each other. For example, the civil community can experience a feeling of fear towards them, as they have been responsible and guilty of various atrocities and particularly serious acts of destruction or alternatively because the population generally live in conditions of extreme poverty, so they can conceive as an unnecessary loss of resources, those used in order to guarantee support of various kinds to child soldiers. To all this, it is added the fact that often children live a strong sense of guilt, or live in fear of possible acts of revenge by the families of the victims or have difficulty in accepting new standards and rules of behaviour, very distant and different to those they had been used to since childhood and who lived like normal.

In order to sensitize the population and overcome these problems, the contribution of organizations such as Save the Children or Amnesty International, which for example made use of the radio, events or gatherings in public places, including mosques, churches, is fundamental. The message that they want to spread, through these means of communication, directed to the generality of individuals, consists in the need for the community to cooperate and become involved in the process of reintegration and protection of children, especially of the special category of child soldiers.

In fact, they live for many years in training camps and are forced to hard and intense training not only from a psychological but also physical point of view. They can be represented as a special category of war victims as they suffer, due not only to the armed conflict itself, but above all because of such generically forced recruitment, extensive damage and suffering. The problem consists in the fact that they are not only victims, but at the same time perpetrators of the atrocities and crimes typical of war, including war crimes and crimes against humanity. Despite this, they must necessarily be safeguarded and be beneficiaries of special forms of protection since any individual, if subject to a regime of terror and fear, can be transformed into an atrocious soldier. An important consideration that must be made is that the phenomenon of child soldiers occurs in parallel with the context of the war, in fact if it does not exist and does not occur between States or within them, this possibility would be avoided[160].

In 2017 thousands of children were released and saved, while originally they appeared to operate under the power and direction of armed gangs in countries such as Central African Republic, Colombia, the Democratic Republic of the Congo, Myanmar, Nigeria, Somalia, South Sudan, and others[161].

The principles to which it is necessary to look at and which act as points of reference for the purpose of identifying and elaborating the best techniques and methods to be adopted for the purpose of their reintegration are numerous. The first is the principle of the best interest of the child in the concrete case, which as stated several times, is expressly provided for and required within the Convention on the Rights of the Child, which must be placed at the centre of these reintegration programs. Therefore, in the elaboration and identification of such programs it is necessary to answer the question whether a certain action or measure can be considered beneficial and to the benefit of the interests of the child or not. It should not aim only to guarantee the public safety or interests of political nature. Furthermore, if the child has lived the typical experiences of the war or has actively participated in the conflict, although he has also been guilty of crimes in his turn, he must be considered primarily by the public and national authorities as a victim.

[160] Antonio Santucci, 'I bambini Soldato' (2005) Periodico Mensile dell'IRIAD

[161] Office of the Special Representative of the Secretary-General for Children and Armed Conflict , 'Reintegration of Former Child Soldier' (2018) available at https://childrenandarmedconflict.un.org/wp-content/uploads/2018/09/Reintergration-brochure-layout.pdf

Because of this, it is therefore necessary to try to find alternative systems to the formal trial before the competent national courts, where possible, in order to avoid its exclusion.

A further principle consists in the right of the child not only to grow from a physical, but also moral, cultural and psychological point of view. The most useful tools for the attainment of such purpose are the educational and training services and programs. Furthermore, States would be required to guarantee these treatments and programs to all children, therefore in an indiscriminate way with respect to race, ethnicity, sex, religion and culture.

Even the non-profit organization of Save the Children has developed six key points, which are common to the processes and measures for the social reintegration and re-education of children, which focus on gender issues, child development, etc. These principles and key points can be found in the *Guidelines on the Care and Protection of Children in Emergencies*, drawn up in 2001[162]. In this paper, the organization highlights its institutional commitment to children all over the world, in order to ensure their general well-being in emergency and crisis situations. The six sectors ,in which the organization undertakes to intervene in the territory of the States, consist of: granting access to education in periods of crisis and difficulty; identification of reunification systems for children separated from their families; reintegration systems and recruitment prevention taking into consideration the different dangers to which boys and girls are exposed; prevention and support systems for children who have been victims of sexual crimes in these contexts and the setting up of psychological help programs for children, who have experienced traumatic experiences during the conflict.

The principles developed consist first of all in the fact that the child must be placed at the centre of the mission. Therefore, it must necessarily aim at ensuring respect for and promotion of the relative rights and freedoms recognized in the international sphere. With the words "*place children at the core of the mission* "it is understood that the relative needs must always be safeguarded, and their satisfaction must be considered as the ultimate goal of these intervention tools. Gender equity is a further basic principle, in fact the organization's intervention methods and programs in order to be considered effective

[162] Mark Lorey, 'Child soldiers. Care & Protection of Children in Emergencies: A Field Guide' (Save the Children, 2001)

and therefore successfully respond to crisis situations, must take into account the different needs and vulnerabilities of boys and girls soldier. In fact, they cover different functions and roles during the conflict and within the armed bands, but also after the extinction of the conflict within the community. Particular attention should also be paid to victims of sexual violence by soldiers or commanders of the armed forces.

The child must also be admitted participating in the identification of the measures that can be adopted in his favour and advantage, obviously taking into consideration and in proportion to his level of maturity, growth, and age. The benefits which must be guaranteed to these categories of subjects must not have a limited duration in time but must aspire to guarantee long-lasting results and therefore also the remaining organizations, engaged in the field, must collaborate. These programs aim to guarantee assistance to as many child soldiers as possible, and at the same time to maintain a high level and quality in the services and programs provided. To this end it is necessary to create an effective monitoring and verification systems that allow to measure the positive impact of these programs in the lives of the beneficiaries.

Since the 1960s, there have been numerous activities and interventions by intergovernmental and non-governmental organizations to prevent recruitment and reintegrate children into their family and society. Among these is the COOPI association which in 1967 had operated in Sierra Leone, through the implementation of various projects, involving war victims, victims of acts of sexual violence, necessary for the psychological recovery of participants in armed conflicts[163].

Usually the programs addressing child soldiers are divided into three different sections, including one dedicated to the phenomenon of recruitment, aiming at its prevention, one dedicated to demobilization and one, finally, aimed at social reintegration.

(ii) Disarmament and Demobilization

Disarmament, demobilization and reintegration programs are to be considered among the most fragile aspects of the process necessary for the restoration of social peace between

[163] COOPI, available at < http://www.coopi.org/chi-siamo/>

the factions, previously in conflict, which become necessary and are generically elaborated following the ratification of a peace agreement between them[164].

The demobilization process should place emphasis on the need to bring the child closer to the family of origin and to the community. It is important as the reintegration of these subjects allows to drastically reduce the possibility and risk of their re-rapprochement to the armed forces and therefore a re-recruitment. Although it is necessary, to ensure greater efficacy, that the process of demobilization takes place quickly, on the other hand, children and society, mainly the families of the former, must be ready to accept their reintegration. This process is generically guided by a United Nations agency, which may consist of a peacekeeping or peace-enforcement operation, and in order to guarantee efficacy, continuity and harmony in the sphere of realization of certain services and programs in favour of these subjects, it is necessary that organizations cooperate not only with that agency but also with each other's.

The DDR can be defined as a process by which we intend to guarantee support to former soldiers and fighters following the extinction of an armed conflict, having a humanitarian, social, political, security and finally military dimension. These programs have different purposes, which aim in general at the well-being not only of ex-soldiers but of the whole community so that they can live in a peaceful context. The aims to be pursued consist of re-establishing a climate and environment of trust between the conflicting factions to prevent future uses of force and in general contributing to the realization of the difficult and complex process of national reconciliation.

UNDP has played a fundamental role over the years; in fact, it operates in more than 166 countries. It was also successful in acting as an impartial and third-party actor and to assist the national authorities in developing their own programs necessary for the demobilization and reintegration[165]. Since these measures and programs developed by UNDP are costly, risky, and furthermore require a long period of time to be effectively

[164] Sarah Uppard, 'Child soldiers and children associated with the fighting forces' (2003) 19(2) Medicine, Conflict and Survival, 121-127, DOI: 10.1080/13623690308409679

[165] UNDP, Practice Note, Disarmament, Demobilization and Reintegration of Ex Combatants, 2012, available at < https://www.undp.org/content/dam/geneva/docs/UNDP%20DDR%20Practice%20Note.pdf >

implemented, it is first necessary to verify the existence of the necessary conditions for their establishment.

Based on previous missions, programs and experiences, it has been possible to identify a series of conditions and elements which, if existing, may indicate the possible success of the demobilization operations. There must be cooperation between the military and political factions. They must in fact demonstrate their agreement in the implementation of the peace agreements and therefore to extinguish the armed conflict, whose presence undermines the chances of success of such programs.

These programs must also be implemented by the UNDP in the context of a support system, within the country, generically prepared by the United Nations. In fact, the objectives that these programs set are evidently in line with those existing in the peacekeeping and peacebuilding operations that are established by the Security Council, through its resolution. The peacekeeping and peacebuilding operations are characterized by the fact that the Security Council exercise the necessary political powers to establish and create permanent institutions within a specific territory, aimed at finding peace and harmony among the members of the population. A further factor for the success and effectiveness of these measures is the will and consensus of the political parties regarding their implementation. In fact, even if the UNDP and other organizations provide the necessary material and financial resources, the DDR programs directly developed by the national authorities are more successful[166].

An example of what previously mentioned can be found in Afghanistan, where the UNDP, through the project consisting in the Afghanistan's New Beginnings Program (ANBP), has conferred responsibility for the individuation of these measures to the national government, which has created two different commissions that dealt with the identification and elaboration of the normative basis of these DDR. However, when the capacity of the state, after the conflict, is scarce, it is better as approach, the one which foresees an initial role of leader in favour of the organization and only subsequently in the hands of the national authorities, as its capabilities and resources increase .

[166] African Union Commission, National DDR Frameworks Operational Guideline, 2014, available at < https://www.peaceau.org/uploads/au-operational-guidance-note-on-national-frameworks.pdf >

Among the characteristic aspects of these measures is the fact that, if the conditions for their implementation can be considered existing, a national commission for the DDR is established through a peace agreement. It is a clear manifestation of the state's power over the implementation of these programs on the national territory, even if at the same time it consists of an inclusive structure, which admits and requires the participation not only of all political and military parties to the conflict, but also of all participants in the operations necessary for restoring peace, including NGOs, religious and civilian representatives of the population and officials of international organizations[167]. This national commission, established through a peace treaty, also has a limited duration in time, in fact they are destined to become extinct and to cease their activity once the total implementation and application of these programs has occurred.

In order to ensure the effectiveness over time of these programs and measures, on which national sovereignty is preferable, the cohesion and joint action of national institutions and actors of international nature is fundamental. One way of ensuring such coordination would be, for example, the prior consultation by the national authorities of the United Nations with respect to the elaboration of its own DDR measures.

Regarding specifically the DDR measures adopted with respect to the situation of child soldiers, it has been affirmed by various scholars and experts that in order to guarantee in the best possible way the specific interests and needs of these subjects, whose recruitment determines the commission of an international crime, it is necessary to develop measures different from those applied to the remaining ex-soldiers[168].For this reason, in accordance with the UN DDR Resource Centre, children must be beneficiaries of different measures than those applied to adults, as their reintegration into the family and community is not only necessary for the purposes of the DDR, but is essential to avoid a violation of their human rights. Based on the foregoing, therefore, under UNICEF control and monitoring activity, children are divided by adults in the disarmament and demobilization centres, so as to break the bond of authority that united them to the commanders of the armed forces.

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[167] United Nations, Integrated Disarmament, Demobilization and Reintegration Standards, 2006, available at<https://www.unddr.org/uploads/documents/IDDRS%203.30%20National%20Institutions%20for%20DDR.pdf > accessed on 16\06\2020

[168] Lysanne Rivard , 'Child Soldiers and Disarmament, Demobilization and Reintegration Programs: The Universalism of Children's Rights vs. Cultural Relativism Debate' (2010)The Journal of Humanitarian Assistance, available at < https://sites.tufts.edu/jha/archives/772 > accessed on 14\03\2020

They will also be hosted for a period of time that can vary from two weeks to 6 months within the so-called Interim Care centre, where they will have access to services that are necessary to satisfy their primary needs, including food, water, clothes and also access to medical treatment. Furthermore, as the majority have been forced to leave school because of the war, as a place subject to attacks or as they have been recruited as soldiers, they also have the possibility of being included in educational programs aimed at allowing students to acquire basic knowledge of writing and reading. These are just some of the most important activities carried out by these centres, including psychological support, as many of them suffer from trauma and post-traumatic stress and help, if they are addicted to drugs. Finally, these centres have the primary purpose of finding their families, if the family members are still alive, and the community to which they belonged. The local community, once informed of the necessary reintegration of the child soldier, is also sensitized and therefore is provided with information about the suffered traumatic experiences and the necessary tools to meet their needs. Generally, their return is accompanied by rituals, of ancient origin, which are organized with the help of the centres by the local community to cleanse the child of sins and immoral acts previously accomplished. These traditional purification rites, widespread in indigenous villages especially in African countries, allow not only a peaceful return of the young soldier to the civil community, but it is necessary in order to avoid exclusion and to be looked at by the remaining members of the community as a subject without moral. These rituals are mainly present in such contexts as it is well known that Africans enjoy a profound spirituality, which is instead missing in western countries[169]. These centres do not complete their purposes at this stage, in fact they also check whether the child has successfully integrated and if there have been episodes of violence or of rejection of civilian life.

In accordance with various studies, the best practices implemented during these programs consist in raising awareness of families and the remaining members of civil society. They are in fact helped to understand more fully the consequences that the armed conflict has had in the development and growth of the child and what experiences have been lived by

[169] Charles Wratto, The Indigenous Healing of Former Child Soldiers (Oxford Research Group, 2017) available at < https://www.oxfordresearchgroup.org.uk/blog/the-indigenous-healing-of-former-child-soldiers> accessed on 14\03\2020

the latter as if they were everyday normality. Once the community has been provided with the tools to understand what he had to endure, even for years, it will provide the purification rites, which have an important symbolic value. In fact, they allow the child to abandon his past life within the armed gang to embrace his new life as a civilian subject.

Additionally, many scholars have agreed that the interim centres, despite guaranteeing services of an essential nature to child soldiers for certain periods of time, can nevertheless lead to tensions within the population. In accordance with this thesis they treat child soldiers overly favourable, while the same opportunities are not guaranteed to the remaining children, even though they too have suffered the typical atrocities of the war[170]. A further critical issue, which has been highlighted over time, consists in the difficulty encountered by these DDR programs and also by the relative centres in the identification of child soldiers, as they were not formally designated as such by armed groups. So many of them who had served the armed group differently, either as cooks, spies etc, or did not possess any weapon at the moment of the disarmament, were excluded. In some cases, moreover, girls preferred to remain within the armed forces or voluntarily withdrew from these programs, being afraid of suffering social exclusion, being considered impure and fearing for their own survival, in case of return to civilian life.

(iii) Reintegration

After being demobilized, most child soldiers manifest the will to become useful and productive members of the society they belong to. Therefore, the respective insertion is to the benefit not only of children, who regain the sense of belonging to a community of a civil nature, but also for the benefit of the community itself. The risks that may arise in the event of failure to succeed in the reintegration process are numerous, including the possibility that the person will be recruited again or will in any case engage in activities of an illegal nature and that therefore lead to damage the local community. This area is particularly delicate since even if on the one hand the need for the child to be reintegrated

[170] Naomi Cahn, 'Poor Children: Child Witches and Child Soldiers in Sub-Saharan Africa'(2006) 3 Ohio St J Crim L 413

as soon as possible is evident, on the other hand it is also necessary to guarantee to the families and communities, the time necessary to accept him again, after having been responsible for various types of criminal acts, including against family members. The considerations that must necessarily be made by the organizations connected to the United Nations when they develop these reintegration tools are numerous. On the one hand the society could experience a feeling not only of fear, but also shame for not having been able to protect their children or not to enjoy the financial resources necessary to ensure to them support, due to the poverty aggravated by the war. On the other hand, children can live in fear not only of being recruited again but also of suffering revenge from the families of the victims, of being socially excluded or seen by community members as immoral and therefore not worthy of regaining a place inside of it.

It is possible to argue that, in general, reintegration programs aim to put the child in the possibility of deciding to live an alternative life to the military one within the armed forces. When children cannot return immediately within their community, they generally find refuge in rehabilitation centres that guarantee material and psychological services and help. However, they are not always considered positively, as they accustom the child to certain levels of services that cannot be guaranteed to this by the community to which he must return[171].This disadvantage is evident when the child voluntarily decides not to return to his family so as to continue to benefit from these advantages and services in his favour or when the same centre urges families to keep the child inside of the structure, as they do not have the necessary resources to guarantee him all these possibilities.

Further negative aspects that have been harshly judged consist on the fact that in some cases the staff participating in these missions is not sufficiently prepared to ensure the mental and intellectual development of the individual or to deal with the traumas experienced. However, despite the many defects that can be found, it is equally easy to identify and select the positive effects which contribute to the ultimate objective pursued by the international community. In fact, rehabilitation centres are a valid tool to verify ,in the concrete case and with specific attention the experiences lived by the individual ,his

[171] Jean-Claude Legrand, 'Lessons Learned from UNICEF Field Programmes For the Prevention of Recruitment, Demobilization and Reintegration of Child Soldiers'(1999)UNICEF, available at <https://www.researchgate.net/profile/Jean_Claude_Legrand2/publication/265190028_Lessons_Learned_from_UNICEF_Field_Programmes_For_the_Prevention_of_Recruitment_Demobilization_and_Reintegration_of_Child_Soldiers/links/559a310c08ae99aa62cc8be4.pdf > accessed on 16\06\2020

traumas, fears and needs and are also conceived as a point of reference and escape from a reality of violence and fear. Within them, especially girls can find a safe place from the sexual violence to which they were habitually subjected in the context of the conflict.

As regards the strategies that can be adopted for the purpose of reintegration, it is first necessary to highlight that an approach that takes into account gender differences is preferable, for various reasons, including the fact that ex-soldier girls are generically facing greater difficulties than male companions, for their social reintegration, and therefore to find their own place within the community[172]. So special programs for them and their children are a requirement from which we cannot escape. Among the measures that can be adopted and applied there are, for example, childcare services, support for mothers who take care of children who have had, in a forced way, with the perpetrators of the sexual violence committed against them, or even professional training programs, which allow these women to acquire the skills necessary to provide for themselves and their children. In fact, when returning to civilian life, very often they find it difficult to get used to the social standards and typical roles designed for women within the community. Among the reasons why DDR measures must take care of the specific needs of women, after conflicts, is the fact that if these continue to be not considered, women will be more and more exposed to the recruitment by armed forces, and therefore exposed to the risk of sexual abuse and violence[173].

Reintegration programs must therefore take care to specifically identify the category of subjects to be benefited, considering that they should not only guarantee assistance of various kinds to child soldiers, but also to the remaining young people who have not been subject to recruitment but that in different ways have suffered the negative consequences and disadvantages deriving from the war. It is necessary in order to avoid the creation of a feeling of resentment among the population and the impression that joining an armed group can bring benefits. Among the services that tend to be insured to ex-soldier and unaccompanied children, including orphans, there is accommodation. However, the child

[172] Roos Haer, 'The study of child soldiering: issues and consequences for DDR implementation' (2017) 38 (2) Third World Quarterly, pp. 450-466, DOI: 10.1080/01436597.2016.1166946

[173] Irma Specht and Larry Attree, 'The reintegration of teenage girls and young women' (2006) 4(3) Intervention , available at <https://www.researchgate.net/publication/232198153_The_reintegration_of_teenage_girls_and_young_women> accessed on 14\03\2020

must be made participant to this choice, which must be made keeping in mind that his interest must be guaranteed. In fact, many have developed a sense of independence during the war, and therefore may also wish to live alone or even within families other than those of origin. Usually children, now teenagers, prefer to live with other ex-soldiers with whom they have built a bond over time. For example, Save the Children provides accommodation for about six children, who, however, are constantly monitored and to whom assistance is also given by the community. Of course, before they are reintegrated, when possible, into biological or alternative families, they must undergo treatments necessary from a psychological point of view, which can be achieved through games, which also require the participation of companions and friends. These games are of fundamental importance because they allow officials to create an environment in which the child feels safe and can overcome previous difficulties and fears.

Healthcare must moreover be ensured by public authorities and humanitarian actors. The help that is given to them, however, is not only psychological but also physical as many because of poverty, poor hygiene, or the spread of anti-personnel mines, mutilations, also suffer from a merely physical point of view and their physical condition is viewed as a taboo by society[174]. They are originally cured when they are received in centres organized and managed by UNICEF, which verified their physical conditions, however they remain within these structures only for three months[175].

Additional tools and means necessary for their survival when they leave the assistance centres consist of education, as many of them are illiterate and moreover, opportunities must be provided to acquire skills that they can use to sustain themselves economically and financially. Education can therefore be a valid and advantageous mean by which not only recruitment is prevented, but also a possible return of the child to the armed group is avoided. In fact, he could be attracted again to live within the armed forces, if he cannot sustain and maintain himself and therefore lives in worse conditions than those previously assured him. The acquisition of new notions, skills and competences was experienced by child soldiers, especially by girls, according to the studies conducted, as a way of

[174] Katherine Curtiss, 'Saving child soldiers: Therapy, education and community are the keys'(2016) Global Citizen, available at < https://www.globalcitizen.org/en/content/medical-attention-therapy-and-education-are-lifesa/> accessed on 14\03\2020

[175] World Health Organization, Healing child soldiers (2009) available at < https://www.who.int/bulletin/volumes/87/5/09-020509/en/> accessed on 14\03\2020

salvation and a way to regain social value and be accepted. According to the Save the Children document "*If I could go to school*", educational programs have overcome the discrimination and rejection of society manifested against child soldiers[176].

Reintegration is a component of the three key points in post-conflict situations, together with disarmament and demobilization. Considering the widespread use of children in conflicts, they consist of increasingly popular programs and measures. In fact, in West Africa alone, more than 20,000 children were involved in reintegration programs in 2005[177]. For example, Mozambique is one of the countries in which these programs have been developed. In this country, the reintegration of child soldiers, with the help of UNICEF, has become possible and facilitated also by the use of traditional methods of conflict resolution. These methods and procedures were led by the religious leaders of the community and had as their ultimate goal the purification of all ex-combatants, including children who had actively participated in the conflict[178]. These rites were based on the will of the population and of the subjects who were subjected to it to overcome their past and therefore go beyond not only the violence committed but also the one suffered, producing a "cleansing" effect[179].

A different system was instead adopted following the genocide that occurred in Rwanda in 1994, in fact after three years from the occurrence of this international crime against all humanity, a commission was created for the demobilization and reintegration, which allowed to divide and distinguish the treatments reserved for children and those of adults[180]. In addition, the former enjoyed of physical, psychological support services and of structures and institutions where they could acquire adequate education and economic opportunities. These programs are favourable because they allow to acquire skills, other than those of a military nature, which can be considered useful to society.

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[176] Save The Children, If I could go to School (Child Soldiers International, 2016) available at <https://resourcecentre.savethechildren.net/node/13872/pdf/2016-11-14_-_if_i_could_go_to_school.pdf> accessed on 14\03\2020

[177] Child Soldier Coalition, Child soldiers and Disarmament, Demobilization, Rehabilitation and Reintegration in West Africa: A survey of programmatic work on the involvement of children in armed conflict in Côte d'Ivoire, Guinea, Liberia and Sierra Leone (2006)

[178] Bosede Awodola, 'Comparative International Experience with Reintegration Programmes for Child Soldiers: The Liberian Experience' (2009) 4(1) Peace and Conflict Review

[179] Michael Wessells, 'Psychosocial Issues in Reintegrating Child Soldiers' (2004) 37 Cornell Int'l LJ 513

[180] Child Soldiers International, Child Soldiers Global Report 2004 - Rwanda, 2004, available at < https://www.refworld.org/docid/49880632c.html> , accessed on 4/06/2020

Taking into consideration what previously discussed, it is possible to affirm and argue that there cannot be a single valid model for all social, economic and cultural contexts of demobilization and reintegration procedures for child soldiers within the communities to which they were torn. These measures must therefore necessarily be elaborated after an effective evaluation and analysis of the causes of the conflict and the effects that this has produced on the national territory, as the procedures and measures cannot be deemed equally valid in different contexts.

In their implementation, a continuous and coherent form of cooperation between the national authorities and the other agents of an international nature who intervene in their support is also necessary to give rise to the restoration of international peace and security after the conflict has ended. Furthermore, in the preparation of these procedures, these actors must keep in mind the standards, established at international level, in the context of the protection of the child, who is primarily a victim of abuse and violence, more than guilty. These standards require that the measures place at the centre the best interests of the child and therefore also guarantee their active participation, as necessary for the identification of the most useful measures in the specific case.

Although great steps still have to be taken to achieve gender equity, especially in African countries, which are still characterized by a patriarchal and male-dominated social structure, it is possible to note that international organizations are moving towards measures that take into account gender diversity and therefore aim to ensure specific assistance for girls, who unfortunately and sadly are subject to greater risks and damages than boys during and following the conflict. In fact, on the basis of the testimonies collected by the humanitarian organizations from these girls, it is possible to highlight how they were not only exploited as means and instruments of war and terror, together with the males, but they were also forced to marry with their commanders and subject to daily sexual violence.

In general I believe that the measures that have been adopted up to these years are to be considered positive as they take into account popular culture and traditions and promote awareness and information campaign for the civilian population, which is educated to help these victims of the war**.** Additionally, these measures fall into the category of restorative justice, which represents child soldiers as primarily children, victims of

situations not dependent on them and beneficiaries of certain levels of protection. The duty to guarantee protection to the child, however, must be balanced with the rights of the victims of the international crimes they have committed, who can interpret these measures as a refusal to recognize the atrocities they have suffered. Even if alternative approaches to retributive justice, which provides for a formal process addressing their criminal actions, are preferable as reintegration into society must be guaranteed, based on what has been repeatedly stated, at the same time this objective is not the only interest to be taken into account in these specific circumstances.

CHAPTER 3

3.1 The phenomenon of child soldier: victims or perpetrators?

What has been highlighted and discussed in the previous chapters, allow me to analyse more deeply the widespread phenomenon of child soldiers which is still diffuse ,despite the national and international measures and operational systems which had been elaborated in order to monitor the use of children in armed conflict, prevent their recruitment, ensure their rehabilitation and reintegration within the local community. These children, according to the documents collected, represent an ambiguous figure, which has created a broad discussion on the part of the doctrine from a legal point of view but also of a moral character. On the one hand they can be considered victims of an international crime, consisting in the recruitment by non-state armed groups but also by armies belonging to States; on the other hand, it is difficult not to regard them in some ways as perpetrators of crimes against all humanity, such as war crimes, crimes against humanity and genocide. These international crimes fall generally on the basis of art. 5 of the Statute of the International Criminal Court in its jurisdiction, however this criminal system is of a complementary nature and it exercises its jurisdiction over this exhaustive list of international crimes only when committed by subjects who enjoy of an age not below 18 years old. Therefore, this international court, established by States in order to combat the cruellest crimes and to end the impunity of individuals who make themselves liable, considers subjects under this age not responsible and therefore not subject to its own jurisdiction. The ICC has in this way not contributed to the identification of a common MACR to be equally adopted by all countries, but just decided to avoid expressing its political opinion on the issue, leaving so its identification to each state. Differently the Special Court for Sierra Leone had the possibility to prosecute individuals having an age between fifteen and eighteen years old, even though in reality it has never prosecuted a child for his illegal actions, believing that their prosecution cannot be considered equivalent to the prosecution of the most responsible for international crimes. So generally international courts and tribunals do not preclude the prosecution of children, but at the same time they give preference to the adults, who made themselves responsible for the use of children in armed conflict.

In conformity to a general belief, even though children could make themselves liable for cruel actions against other human beings in presence of an armed conflict and when recruited by armed groups, they are though not to bear the same criminal responsibility of adults, because of their mental, moral, intellectual capacity, the lack of basic education, and to conclude because they act under duress or intoxication.

In this Chapter, I intend to address an important issue, which is a direct consequences of the recruitment of children as soldiers, consisting on the possible approaches which could be adopted towards international crimes committed by adults, who have been themselves child soldiers exploited by armed groups. Before going into detail on this issue, I also consider it necessary to identify which kind of obligations are imposed to non-state actors in armed conflicts today, especially in the sphere of human rights law, international humanitarian law and international criminal law.

3.2 Human rights obligations of non-state actors

The non-state actors do not consist of a homogeneous group, in fact it can include various typologies which have in common the fact that their members are estranged from the rest of the civilian community of the State. The problem lies in the impossibility to monitor with certainty which and how many non-state armed groups currently exist[181]. The Stockholm International Peace Research Institute also verified the existence of seventeen internal armed conflicts in 2009[182], and according to an important scholar , Sassoli[183] , about half of the rebels in these internal conflicts must be considered to belong to an armed group not controlled by a State. The increasing attention given by the international community to these entities, especially with regard to respect for human rights is not

[181] Annyssa Bellal and Stuart Casey-Maslen, 'Enhancing Compliance with International Law by Armed Non-State Actors' (2011)1(3) Goettingen Journal of International Law , pp.175-197, available at < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2163115 > accessed on 14\03\2020

[182] SIPRI Yearbook Summary 2009, available at <https://www.sipri.org/sites/default/files/2016-03/SIPRIYB09summary.pdf > accessed on 16\06\2020

[183] M. Sassoli, 'Possible Legal Mechanisms to Improve Compliance by Armed Groups with International Humanitarian Law and International Human Rights Law', 2003, Paper submitted at the Armed Groups Conference, Vancouver, 1, available at http://www.genevacall.org/resources/other-documents-studies/f-otherdocuments-studies/2001-2010/2003-13nov-sassoli.pdf, accessed on 14\03\2020

intended to legitimize them, but only to avoid the possibility that these groups may act outside the law and in violation of the rights protected by it.

Nowadays, as more and more States have taken steps to accept the obligations deriving from international treaties in the field of human rights and armed conflict, the number of children used in the armies belonging to the States has decreased while unfortunately the percentage of minors employed as a tool and war machines within the so-called non state actors has risen. On this basis, it is therefore essential to identify the rules applicable to them in the field of human rights and in cases where armed conflicts arise. Although at the beginning it was believed that international humanitarian law could create obligations and rights only in relation to states, it is currently considered a priority to prove that even rebellious armed groups are bound by it. This requirement arises from the fact that these groups are particularly bloody and tend to endanger the lives of civilians[184].In addition to this, it would be unfair that states are subject to limits and obligations in the use of force during armed conflicts, while rebel groups could act freely[185].

This specific matter was discussed by the jurisprudence as it was difficult to identify the legal basis on which to justify the application towards this category of entities of rules contained in international treaties with respect to which they do not have formal status of parties and therefore have not ratified. According to Jan Klabbers, for instance, creating rights for non-state actors requires no special justification but imposing "*obligations directly on non-state actors . . . require[s] a justification of sorts, if only for the sake of legitimacy*"[186].

The theories on the basis of which international humanitarian law's provisions, contained not only in Article 3 but also in the Second Additional Protocol to the Geneva Convention, are applicable towards NSA are strongly affirmed and supported. For instance, the ICRC in its commentary on the rules contained in Additional Protocol II of the Convention, states that the rules contained in the latter must necessarily be considered a source of humanitarian obligations for both parties to the conflict, as it is essential that not just the

[184] Waseem Ahmad Qureshi, 'Applicability of International Humanitarian Law to non-State Actors' (2019)17(1) Santa Clara Journal of International Law
[185] Ibid.
[186] Jan Klabbers, (I Can't Get No) Recognition: Subjects Doctrine and the Emergence of Non-State Actors, in Nordic Cosmopolitanism: Essays in International Law for Martii Koskenniemi 351, 354-55 (Jama Petman & Jan Klabbers eds., 2003)

State but even the rebels respect them. Usually the intervention of non-state actors verifies in presence of internal armed conflict, whose definition is embodied within two important legal instruments being Art. 3 common to the Geneva Conventions and moreover inside the Additional Protocol II 1977. The Common Art.3 affirms explicitly that it shall apply in presence of an armed conflict not having an international dimension, and it addresses not only the territorial state, where the conflicts have emerged, but each party intervening in the internal conflict[187]. The term "*each party*" has been interpreted in several occasions as meaning that the category of subjects responsible for its applications is not limited to States but shall embody even non state actors.

The applicability of this law, inherent internal conflicts, to non-state entities can also be justified on the basis that these rules are now to be considered as having the character and value of international customary rules. This theory has been promoted for example in the *Tadic case* by the International Court for Former Yugoslavia, but at the same time , in order for international humanitarian law to apply a certain level of gravity must be met, which can be considered as existing whenever the conflict within a state's territory is not sporadic, but protracted between the different parties[188].

The problematic of identifying the possible legal basis for justifying the existence on NSA of obligations emerging from international humanitarian law comes from several reasons. First of all, international humanitarian law has been initially elaborated as a branch of international law addressing subjects, having the possibility to exercise powers of a public nature over the civilian population, so mainly the States. However, nowadays it is necessary that these rules are respected not only by the subjects who hold public powers, so States, but also by actors who do rebel against the national government of the territorial state and have spread on the international scene. If these subjects are controlled by state's authorities, in such cases it is the State itself, which exercises its jurisdiction, to remain the only responsible party in case of violation of these rules. However, this is not always the case, since various non-state actors have powers that go beyond their control and monitoring activities. In order to make these actors, relevant in the international context, responsible for compliance with human rights standards, international conventions have

[187] Geneva Conventions of 1949
[188] Prosecutor v. Tadic, Judgment (Appeals Chamber), 15 July 1999, Case No. IT-94-1, para. 98.

been drawn up not only on international humanitarian law but also on international criminal law.

As far as international humanitarian law is concerned, it applies only in the presence of an armed conflict, and towards armed groups, but nevertheless aims to guarantee respect for only a few basic rights. Unlike international criminal law aims to establish individual liability and therefore concerns crimes committed not by states, but by individuals. Therefore, they consist of two different ways through which it is possible to address the violation by armed groups of human rights in the presence or absence of an armed conflict. This is of great relevance since statistically they are to be considered the subjects, in most cases, responsible for various crimes against human rights and war crimes especially committed in our case against children.

As regards the applicability to such entities of the rules concerning respect for human rights and fundamental freedoms, it has been affirmed by scholars, such as Ronen, that this branch of international law does not enjoy a limited sphere of recipients, consisting mainly in the States. According to Ronen, in fact, the universality of the recipients of these rules, which guarantee respect for human dignity, can derive from what is established in the Universal Declaration on Human Rights, which guarantees these rights to "everyone", without however precluding its applicability to subjects other than States[189] . Differently from Ronen's opinion, many others have proclaimed that since human rights law was originally thought to be applied to States, it was impossible to be applied by analogy even to private actors[190]. This different approach is based on the main reason being that human rights law was originally intended to discipline the relationship between the national government and the ones who live under the control of the public power[191]. In order to find a balance and a common agreement on this specific issue, it has been supported the idea that human rights obligations can be imposed even on non-state actors only when they satisfy certain requirements and so when certain circumstances can be deemed as existing in the concrete case.

[189] Yael Ronen, 'Human Rights Obligations of Territorial Non-State Actors' (2013) 46(2) Cornell International Law Journal, available at: http://scholarship.law.cornell.edu/cilj/vol46/iss1/2 , accessed on 14\03\2020
[190] Bellal and Casey-Maslen (n 181), p. 186
[191] Ibid.

Generally talking its applicability and enforceability is depending on the fact that the non-state actors have the possibility and are capable of exercising any sort of control, usually territorial, on part of the State's territory or on the local population. However, these requirements limit and restrict the actual possibility to ensure protection to human rights, since not necessarily the NSA has this sort of power on the territory. A way through which this lack of protection can be avoided would be to justify its application to rebels and NSA on the base of the fact that certain human rights are legitimated in *ius cogens* norms[192].

Among the most important human rights obligations, which found political support by the UN Security Council and by State Parties to the United Nations, there are the ones aiming at ensuring protection to the wellness of children, as civilians. This specific topic has been included for the first time within the Security Council's Agenda in the 1999[193]. The year 1999 has been so the starting point for the subsequent elaboration of an important mechanism of monitoring and reporting of children during the armed conflict, also called "Mechanism", which finds its own birth from the Resolution 1612(2005)[194].

Such Resolution can be considered the most comprehensive and complete tool in the context of children and the armed conflicts, considering the previous resolutions adopted by the Security Council since 1999. Its main aim is the creation of a system useful in order to monitor the level of compliance with the children's human rights, during armed conflicts, with a specific focus on six grave violations which had been identified in a report of the Secretary General in the same year. On the 26th July 2005, the Report stated as following : "*The mechanism is to collect and provide timely, objective, accurate and reliable information on the recruitment and use of child soldiers in violation of applicable international law and on other violations and abuses committed against children affected by armed conflict*.."[195]. The list of the six grave violations included the following offences: killing and maiming of children; recruiting and using child soldiers; attacks

[192] Ibid.
[193] UN Security Council, Security Council resolution 1261 (1999) [on children in armed conflicts], 25 August 1999, S/RES/1261 (1999), available at: https://www.refworld.org/docid/3b00f22d10.html, accessed on 17\06\2020
[194] UN Security Council, Security Council resolution 1612 (2005) [on children in armed conflict], 26 July 2005, S/RES/1612 (2005), available at: https://www.refworld.org/docid/43f308d6c.html, accessed on 17\06\2020
[195] Children and Armed Conflict, UN Doc. S/RES/1612 (26 July 2005), paragraph 2(a)

against schools and hospitals; rape and other types of sexual offences committed against children; abduction of children; denial of humanitarian access[196]. Through the adoption of such resolution, there has been the creation of a working group within the Council , called Working Group on Children and Armed Conflicts, which receives the information collected and verifies the level of compliance of parties to the single action plans taking place[197]. This mechanism therefore seeks to incite the parties to the conflict to comply with existing rules of international law, protecting children, by making use of the possibility that, in case of violation, a damage to their own reputation would occur (*naming and shaming*)[198].

Although the existence of a close link between this monitoring system and the actions of a practical nature can guarantee greater effectiveness of the latter, on the other hand it is necessary that the mechanism developed by the Security Council does not detach itself excessively from the reality of the facts thus becoming an instrument devoid of practical relevance and of a purely political and bureaucratic nature[199].

This specific instrument can provide several advantages to the operational organizations and agencies, such as UNHCR and UNICEF, which provide humanitarian assistance during conflicts to the civilians in general, including children. As a matter of fact, they can have access to the great amount of informations and data collected by the Mechanism, which usually include the period of time during which the crime was committed, the name of the victims etc. Furthermore, these data are generally the base through which a UN taskforce is created with the purpose to engage in the conflict between the parties and create between them a form of negotiation and political dialogue and report violations which are each year communicated to Office of Special Representative of the Secretary-General on Children and Armed Conflict. Furthermore, MRM generates reports regarding each country which are, every year, evaluated by the Working Group which subsequently

[196] Report of the Secretary-General on Children and Armed Conflict, UN Doc. A/59/695– S/ 2005/72 (9 February 2005) paragraph 68

[197] Matthew Happold, 'Protecting Children in Armed Conflict: Harnessing the Security Council's Soft Power' (2010) 43 Isr L Rev 360

[198] Bongard P and Somer J, 'Monitoring Armed Non-State Actor Compliance with Humanitarian Norms: a Look at International Mechanisms and the Geneva Call Deed of Commitment' (2011) 93 International Review of the Red Cross 673

[199] Bo Viktor Nylund And Ida Margarita Hyllested, 'Protecting Children Affected by Armed Conflict: Accountability for Monitoring, Reporting, and Response' (2010) 2(1) Journal of Human Rights Practice, pp. 71–92, https://doi.org/10.1093/jhuman/hup026, accessed on 14\03\2020

adopts conclusions and recommendations[200]. If it is verified with certainty that a particular country has correctly implemented and respected the action plan, it will have the right to be removed from the list drawn up by the Secretary General. The reason behind the very existence of these missions and the collection of such data, related to armed conflicts, is to affirm the responsibility of armed groups for serious violations of the human rights of children, including their recruitment and use as militants. Since the system of monitoring is the starting point for the successive elaboration of an action plan, aiming at prohibiting and fighting the phenomenon of child's recruitment, many of them have been created over the years. All the action plans , until our days created, are characterized by a common factor being the fact that they do not only preclude to States to recruit children, but they even oblige them to ensure that none recruit them within their own territory. It has also been carefully noted in various studies, including that of Annyssa Bellal and Stuart Casey-Maslen, how non-state armed groups have an interest in showing themselves to the international community as favourable and compliant with international humanitarian law , for instance in order to obtain recognition and legitimacy or avoid legal sanctions.

Even though this Resolution , in general terms, has been regarded as a success in several parts of the world, at the same time , in order to have a complete vision of reality and therefore not to give a limited interpretation, it is also necessary to identify the possible defects and disadvantages. Among them, there is the fact that the system is elaborated by the Security Council, which is a political body which does not represent the will of all State Parties to the UN, but mainly of the five permanent members. The political dimension is reflected in the functioning on the MRM (monitoring and reporting mechanism) since it permits the creation of an operational action only in presence of a armed conflict between parties which are listed as violators in a report of the Secretary General, and it is evident and clear that the members of the Security Council will be hardly listed.

Moreover, national governments have criticized the system for allowing a sort of negotiation between the international organization and these non-state actors on

[200] David S Koller and Miriam Eckenfels-Garcia, 'Using Targeted Sanctions to End Violations against Children in Armed Conflict' (2015) 33 BU Int'l LJ 1

humanitarian matters regarding recruited children. These dialogues are particularly problematic and of a disputed legitimacy, especially in the case when the actor is a terroristic organization, because it could be misunderstood by national governments. Those communications are never intended to give recognition or legitimacy to the non-state actors. Not just these forms of communications are generally refused and contrasted by national governments but even the possibility for armed groups to participate in the elaboration of legal norms in the field of international humanitarian law, since these forms of cooperation and participation can lead to a sort of recognition of the rebel armed group and provide to it legitimacy. Even though recognition and legitimacy are strictly connected and the realization of one of them can determine as a consequence the other, at the same time there can be the case where those NSA are acknowledged as legitimate, even without modifying their legal status, so without their recognition[201].

The desire of States to prevent recognition as a legitimate entity of non-state armed groups in many cases implies an obstacle to the ability of United Nations bodies to undertake forms of cooperation with the former, as has happened in Afghanistan, Vietnam and finally also in Myanmar[202]. In some circumstances, whenever the international organization has started mechanisms of cooperation with armed groups, not under the direction and control of the national government, it has been pushed to leave the territory of the State itself and this usually verifies when the NSA is considered a terroristic unit. The reason behind the behaviour of States in this specific context is easy to be discovered, in fact it is obvious that they fear that permitting to non-state actors not just to cooperate but even to participate in the process of law-making can legitimize them. In order to be effectively carried out by the United Nations, these communications must be accompanied by a prior consent and permission expressed by the competent national authorities of the State in whose territory they are located, despite the fact that it limits its functionality and effectiveness enormously. However, in many cases the organization has also acted in its absence, such as in Myanmar. Consent is not required if these actors are located outside its territory and if they are motivated by humanitarian reasons.

[201] Anthea Roberts and Sandesh Sivakumaran, 'Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law' (2012) 37 Yale J. Int'l L., available at < https://digitalcommons.law.yale.edu/yjil/vol37/iss1/4 > accessed on 14\03\2020
[202] Ibid.

It can be observed that the child's recruitment is put at the centre of the Resolution and even of the action plans and Council's work. Its work is ,in my opinion, not to be underestimated since, differently from the other international instruments, although it starts from a purely formal dimension, it is then used as a foundation for the creation of an operation on the ground, aimed at establishing responsibility for the violations of human rights of these beneficiary individuals.

Having said that, it is essential to identify the boundaries of the prohibition on the recruitment and use of children by States and by the NSAs. According to some scholars, in fact, the voluntary participation and adhesion of children to these non-state groups cannot be regarded as rare and unusual , since almost in most cases the children themselves voluntarily decide to join also in order to obtain a form of protection and security not ensured by the State[203]. Defining also these voluntary forms of membership as a violation would prevent any form of communication between the United Nations and the NSA, which would in any case be seen as subjects in violation of international law; however in the opposite case as mentioned several times, it is not always easy to understand the voluntary nature of the adhesion by these subjects[204].

It shall be moreover promoted the participation of NSA in the process related to the creation and elaboration of legal norms in the sphere of international humanitarian law and human rights law, since this can determine a greater cooperation, a reduction of the violations attributable to them and to conclude it would be easier for them to accept these legal standards[205]. This has been demonstrated in a number of cases where non-state armed groups have highlighted that their non-acceptance of the norms established by the international community and the lacking intention of guaranteeing their respect in the implementation of their operations were precisely due to the fact that they have had no role in their negotiation and drafting[206].

Another important mechanism, which could be considered useful to guarantee a certain level of compliance with these legal instruments, can be the ratification of international

[203]Jonathan Somer, 'Engaging Armed Non-State Actors to Protect Children from the Effects of Armed Conflict' (2012) 4(1) Journal of Human Rights Practice pp. 106 –127, available at < https://doi.org/10.1093/jhuman/hus002 > accessed on 14\03\2020
[204] Ibid.
[205] Roberts and Sivakumaran (n 201)
[206] Ibid.

treaties and conventions between NSA and international organizations or even States. A relevant example can be the agreement reached between Sudanese armed group and the United Nations[207]. Its purpose was the abolition and prohibition of recruitment and use of children in the hostilities as soldiers and even the creation of programmes aiming at disarmament, demobilization and reintegration, which generally apply at the moment when the armed conflict has been concluded through a Peace Agreement. Additionally, the participation of NSA in the process which leads to the elaboration of rules of international humanitarian law, according to Sassoli[208], ensures that these legal dispositions mirror the actual reality of armed conflict. In fact, according to his opinion, the unique way for reaching the creation and identification of new norms of international humanitarian law, compliant and suitable for the current reality of armed conflicts, is the one that does not disregard the participation of the entities which are the protagonists, consisting of non-state armed groups.

I agree with the position presented by some scholars, such as Roberts, according to which despite objections, inherent in the danger that a kind of legitimacy of these non-state entities may arise from these forms of participation, there is a greater chance of guaranteeing respect in the concrete case to the rules of international humanitarian law and human rights when they take place. This approach moreover is nowadays well settled within the United Nations, in fact Ban Ki Moon, former UN Secretary General, has declared that even though not all States are in favour of this practice, its absence can determine even worse consequences for the civilian population[209]. In the "*Report of the Secretary-General on the protection of civilians in armed conflict*", it is highlighted the indispensability to engage in the formulation of unilateral declarations, agreements, with the armed groups, since it is the unique way for making them effectively engaged in ensuring respect and compliance to the rules of international humanitarian law. These variety of legal instruments has been developed in various countries, such as Colombia, Nepal, Philippines, Sierra Leone and in former Yugoslavia[210]. Despite the fact that

[207] South Sudan Independence Movement/ Operation Lifeline Sudan Agreement on Ground Rules (1995)
[208] Marco Sassoli, 'Taking Armed Groups Seriously: Ways to Improve their Compliance with International Humanitarian Law' (2010) 1 J Int'l Human Legal Stud 5, p.21
[209] Report of the Secretary-General on the protection of civilians in armed conflict, S/2009/277, par.40 , available at <https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/POC%20S2009277.pdf > accessed on 17\06\2020
[210] Ibid., par. 42

Member States have demonstrate their lack of willingness to cooperate with armed groups, for the reasons previously discussed, it has been shown at the same time the exigency that they do not at least impede these humanitarian cooperation with the international organizations[211].

Another disputed point is related to the discussion pertaining the possibility that, involving them in such forms of cooperation , especially in the law-making process, would cause the lowering of the international standards and levels of protection, originally provided in international humanitarian law. Even if it is true that in some cases the NSA adopt actions which are not in strict compliance with these legal standards , in other situations they don't just act in accordance with them , but they even embrace higher standards of conduct than States themselves, as affirmed by Anthea Roberts[212].

An important evidence of such commitment is the Deed of Commitment[213] elaborated by the Geneva Call, which desired to ensure compliance with the International Campaign to Ban Landmines, in 2000[214]. It has been largely approved by non-state actors through unilateral declarations and it had the main goal to establish an absolute prohibition in the use of mines, which have the effect of exploding when they come in contact with individuals. Since a large part of States and even NSA have manifested the intention to grant respect to this rule, the prohibition could acquire in the future the legal status of rule of customary international law[215]. The Geneva Call is a humanitarian nongovernmental organization whose major scope is to ensure that NSA comply with the norms applicable in presence of armed conflict, so international humanitarian law. Since the NSAs are generally considered as not entitled to become parties of the relevant treaties relating to international humanitarian law, in order to ensure their accountability for violations of the rules of this branch of international law, soft law's tools had been elaborated. Much of the success over time by the Deed of Commitments has been attributed to the fact that they adopt an inclusive approach, which protects forms of dialogue and mediation between States and non-state actors. The deed of commitments therefore allows these

[211] Ibid., par. 45
[212] Roberts and Sivakumaran (n 201), p. 138
[213] Geneva Call, Deed of commitment (2000)
[214] Sarah Hafen, 'Incentivizing Armed Non-State Actors to Comply with the Law: Protecting Children in Times of Armed Conflict' (2016) BYU Law Review
[215] Roberts and Sivakumaran (n 201), p. 138

entities to bind themselves, through unilateral and voluntary declarations, to the rules of international law. Bearing in mind the fact that the NSAs are not identical to each other, but are distinguished by the motivations and purposes pursued, according to Hafen[216], it is necessary that the system developed by the Geneva Call, which is mainly based on tools of a voluntary and non-coercive nature , is used in conjunction with other means of coercive nature. This could avoid the eventuality that these groups do not comply with the international standards, to which they voluntarily bound themselves. A combined use of these tools could in fact guarantee, with greater success, the aim of ensuring that the NSAs, the most responsible for the use of children in armed conflicts, definitively stop using them for their own military purposes.

To conclude it is possible to distinguish many different points of view , for what concerns the relationship between NSA and international humanitarian law: there can be studies that support the idea that NSA are not bound by these norms of international humanitarian law, since they did not collaborate and participate in their drafting; others differently believe that since these rules enjoy of an erga omnes application, being customary international norms, they must be considered as binding even on private actors not just States. Anthea Roberts does not support the previously mentioned theories, affirming that even though not always the NSA's participation in the law making process can be deemed as a success, at the same time in the present reality it is no more possible to exclude NSA from the mechanism which leads to the elaboration of these norms. In fact, giving to non-state actors a role in the law-making process can have positive outcomes in the context of protection of civilians during armed conflicts, including so children. A different perspective is presented by Petrov, who believes that there are different methods which can be adopted to include them, which do not have an international dimension[217].

According to Petrov, there is another possibility, which has been neglected by the doctrine and the international community, which even though support the engagement of NSA in international humanitarian law, since they are the addresses of these norms, on the other hand their involvement shall not verify at the international level, but through the use of domestic tools. Even though he recognizes as essential their involvement in the

[216] Hafen (n 214), p. 1024
[217] Anton O. Petrov, 'Non-State Actors and Law of Armed Conflict Revisited: Enforcing International Law through Domestic Engagement' (2014) 19 J. Conflict & Sec. L. 279

elaboration of these international rules, at the same time he believes that too many problematics arise from their involvement at the international level, so from the interactions between those private actors and international organizations. These issues consist on the fact that States must still be regarded at the centre of international law, and they see the possible collaboration of international organizations with NSA has a threat to their own sovereignty[218]. Notwithstanding the fact that he largely agrees with the idea of the necessary involvement of NSA in the area of creation of international humanitarian law, providing them an international role is not considered the proper way to proceed. According to him, a more domestic approach would be more beneficial and contrast the inevitable downsides of the international approach. Giving to NSA the opportunity to cooperate in the process which results in the elaboration of these legal norms produces several benefits, among which the fact that they perceive the norms as more legitimate and feel more encouraged to follow them[219]. The method which shall be adopted to ensure this result, shall be of a domestic nature, so the drafting of an ad hoc regulation, strictly linked to the single conflict at stake. These domestic instruments must be preferred because they cannot only guarantee greater effectiveness as they are linked to a specific armed conflict, but also as they are less likely to arouse the doubts invoked by States.

The theories previously presented differ in several respects and enjoy of various strengths and weaknesses, but nevertheless aim at achieving a common objective. This objective is to identify the legal basis for the obligations to be fulfilled by armed groups to ensure protection to innocents, especially children, in presence of an armed conflict. In accordance with the conclusions that can be drawn from the arguments previously presented, the cooperation and the various forms of active and direct participation of the NSA in the context of the development and drafting of rules in the field of international humanitarian law is fundamental. Its relevance derives not only from the fact that in this way the chances would be greater that these rules will be respected not only by States but also by non-state actors in favour of civilians, but as such forms of interaction and communication can permit to these standards to acquire an universal value.

[218] Ibid.
[219] Ibid.

3.3 International Criminal Law: crime of recruiting and using children in armed conflicts

Another important field of international law, aiming at granting protection to the rights and freedoms of the entire humankind is international criminal law, dealing with the responsibility of individuals who put into being conducts whose impunity must be abolished since they give rise to an offence for the entire humanity. The conduct of recruiting children is strongly condemned within the ICC Statute, in fact its commission can give rise to a war crime[220]. An important case where the International Criminal Court analysed the main characteristics and elements which must necessarily concur for this crime to come into being, consists in the Lubanga case[221]. The Lubanga case has not been only a case where the ICC clarified the main constitutive and objective elements of war crimes , indicated in art. 8 ICC Statute, but focused specifically and with a particular interest on the war crime consisting in the recruitment, enlistment and use of children under the age of 15 years old.

An element that distinguishes this case, which has been discussed and analysed by the Pre-Trial Chamber since 2014, consists on the fact that the accused was prosecuted and accused by the Prosecutor only for the offense consisting in the use and the recruitment of children, who in fact were forced to participate in the activities carried out by the armed group, consisting in the *Force Patriotique pour la Liberation du Congo (FPLC)*. He was prosecuted only for this war crime, although he could have been accused and prosecuted for many other war crimes and crimes against humanity, among which it is possible to remind the killing of nine individuals acting under the direction of the United Nations[222]. The prosecutor however made the important choice to bring against him , before the Pre-Trial Chamber, only the accuse of recruitment and use of children with the aim of making them participate actively in the armed conflict, of both an international and national nature, under respectively art. 88(2)(b)(xxvi) and Article 8(2)(e)(vii) of the ICC Statute.

[220] See, *1.4 The protection of children in armed conflict: the ICC Statute*
[221] Judgment pursuant to Article 74 of the Statute, Lubanga (ICC-01/04-01/06-2842), Trial Chamber I, 14 March 2012
[222] United Nations (UN) Press Release, 'Security Council Condemns Murder of Nine UN Peacekeepers', (UN Doc.SC/8327/Rev.1), 2 March 2005, available online at <https://www.un.org/press/en/2005/sc8327.doc.htm > accessed on 14\03\2020

The decision of the Prosecutor has been object of several criticism brought and sustained by different actors in the international scene like for example the victims, the human rights associations and the scholars, however it was for sure based on certain reasons. The reasons and factors which can determine the prosecutor to sustain this line of accusation is generally based on the evidence he had been able to collect during the investigation phase. As a matter of fact, the Prosecutor tends to bring before the Court the accusations which enjoy of sufficiently genuine and solid evidence and proof[223].

With regard to the specific case under our attention, the rationale which brought the Prosecutor to take such a decision are more complex, in fact since February 2006 the ICC issued an arrest warrant against Thomas Lubanga, alleged with the accusation of recruiting and use of children in the hostilities. The problem lied on the fact that he was already under a judicial proceeding before a domestic tribunal for certain criminal offences. It is important to always keep in mind that the International Criminal Court has been at the origins elaborated and created by the States to be complementary, for this reason it can only prosecute the individuals , who had committed crimes falling within its own jurisdiction, when State are not willing or able to prosecute them[224]. The Prosecutor decided to accuse Lubanga of this specific war crime, since he was subject to a domestic trial for different kind of offences. Some scholars had moreover examined whether something could have been done in order to include sexual offences, suffered by children soldiers, within the charges brough against the accused, such as Dav Jacobs[225]. However, as he observes in his article, the Rome Statute and the Rules of Procedure and Evidence are clear when they state that only the Prosecutor can determine the charges to be brought at the attention of the Court. In fact, the drafters of the ICC Statute in 2002 had not the intention to provide the judges of the power to interfere in their identification.

[223] Roman Graf, 'The International Criminal Court and Child Soldiers' (2012) 10(4) Journal of International Criminal Justice , available at < https://doi.org/10.1093/jicj/mqs044 > accessed on 14\03\2020
[224] Art. 17 ICC Statute, available at < https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf >
[225] Dov Jacobs, Lubanga Decision Roundtable: Lubanga, Sexual Violence and the Legal Re-Characterization of Facts (OpinioJuris, 2012) , available at < http://opiniojuris.org/2012/03/18/lubanga-decision-roundtable-lubanga-sexual-violence-and-the-legal-re-characterization-of-facts/ > accessed on 14\03\2020

The relevance of this case lies not just on the fact that Lubanga has been the first individual convicted by the ICC, but also on the fact that the constitutive elements of the war crimes had been outlined in detail.

The first element which is still nowadays examined by the Court, in the moment when it has to verify the existence of a war crime, is the presence of an armed conflict, which could have either an international or internal nature. However, this factor alone is not sufficient for the commission of a war crime by the individual accused, in fact it must be strictly linked with a nexus between the armed conflict and the concrete action committed. So the elements , necessary for the identification of a war crime and through which it is possible to distinguish a war crime from a crime against humanity are: the existence of an armed conflict (international or internal) and the nexus between the war and the act[226]. Although the distinction between armed conflicts of an international or internal nature is not particularly important nowadays, in this specific case the Court has verified the nature of this conflict, going in large part to recall the jurisprudence already affirmed within the ICTY in the *Tadic case*[227].

An important merit that is attributed to this case brought to the attention of the Court consists on the fact that it has given to this matter an international relevance, together with the related issues. In fact, although the use of children in conflicts does not consist of a new phenomenon, it has started to enjoy of significance and interest from the international community since that moment. There are various reasons on the basis of which it is possible to motivate and prove why this reality is still particularly widespread today, especially in the African Continent. Among these, it is possible to mention the fact that they, as they live in desperate conditions and are still immature from a psychological point of view, are pushed to use violence much more than adults. They are also much easier to recruit than adults, as in most cases they are looking for economic security and protection by the armed groups that enlist them. Because of the serious damage that this practice cause not only to children, but also to those who encounter them, it was foreseen as a war crime[228].

[226] Art. 8, Elements of Crimes
[227] Tadić (IT-94-1)
[228] Graf (n 223)

In Article. 8 of the ICC Statute, there are three different ways in which this specific crime can occur, even if it has long been discussed whether there was a distinction between the three distinct behaviours or if, alternatively, there is no relevant distinction between them. The Court, in the Lubanga case, nevertheless maintains that these terms, consisting in "*conscription, enlisting and use*" do not have an equal meaning, thus resulting in three different behaviours, enough to integrate this international crime. The Trial Chamber agreed in fact, in this specific legal context, with the Pre-Trial Chamber, declaring that the element which must be taken into account in order to distinguish between "*conscription*" and "*enlistment*" consist in the compulsory nature. On the one hand, conscription refers to cases where the child is obliged to take part to the armed group, on the other hand "enlistment" verifies whenever the individual, under the age of 15 years old, is willing to participate to the hostilities [229].

In consideration of the fact that for the "enlistment" there must be the consent of the child, given in a genuine and informed way, to participate actively to the hostilities, this specific conduct is problematic to be proven. The consent of the children is, for the reasons previously mentioned, ascertain on a case by case basis. In this specific judgment, it has been discussed moreover the possibility to consider the existence of children's consent to participate actively to the hostilities and take active part to the activities of the armed group as a sort of defence in favour of the accused, but at the end this possibility has been abandoned[230].

Another important topic which has been quickly discussed by the Trial Chamber in its own judgment is the one related to the "*purpose requirement*", so the *mens rea* which shall exist for the proper existence of the international crime. According to the Defence, the perpetrator was obliged to prove that the recruitment has been performed in order to use these children actively during the hostilities in favour of the armed group. However, in reality the Court did not pay much attention to the purpose requirement, affirming that the intent and rationale behind this practice had little relevance for its commission[231]. In

[229] Lubanga Judgment ICC-01/04-01/06, Judgment pursuant to Article 74 of the Statute (14 March 2012), par. 607,608.
[230] Ibid., par. 614-618
[231] Ibid., par. 609

the Lubanga judgment, the Court did not consider important the intention, since it is not required and does not appear in any international instrument, especially the Rome Statute.

For what regards differently the "*actus reus*", explicitly described in art. 8(2)(e)(vii) of the ICC Statute, it was designed in order to avoid that children could have suffered of physical injuries or even psychological traumas and stress, which can be regarded as normal and ordinary consequences of armed conflicts[232]. The term of "*active participation to the hostilities*" has been interpreted by the Court in a broad and extensive way to grant the biggest protection possible to this specific category of civilians. It must be interpreted as ensuring them protection not just when they are put by the armed group in the front line in order to fight, but even when they are obliged to perform certain activities ,which are functional to the correct functioning of the armed group's structure, and expose them to a serious danger[233]. This judgment has been object of various debates and criticisms since the Trial Chamber has not delivered a clear opinion and statement on the interpretation of the phrase "*active participation in the hostilities*". The main problem which arises in this specific context consists in the possibility that children could be regarded as lawful targets during the armed conflicts, and so are no more under the legal protection granted to civilians by international humanitarian law.

It has been argued and sustained by scholars , such as Graf[234], that even though the term "active participation" is both used in international criminal law, so within the Rome Statute, and in international humanitarian law, this does not necessarily mean that this term enjoys of the same interpretation and meaning in both fields of international law. It is true that war crimes derive their existence from international humanitarian law, but at the same time the drafters of the Rome Statute, were absolutely free to decide which meaning could be given and applied to certain terms and when a certain international crime can be considered as effectively committed. Consequently, "active participation" must be subject to a non-restrictive interpretation, in order to include all the activities performed by children, related to an armed conflict.

Another important argument which has been exposed in favour of a broad interpretation of the term of "*active participation*" consists in the possibility that, through a stricter

[232] Ibid., par. 605
[233] Ibid., par.628
[234] Graf (n 223)

interpretation, women and girls would be damaged because the level of protection guaranteed to them could not be considered equivalent to that obtained by the other children. In fact, if we interpreted this term in a restrictive way, that is, including only the activities through which the child participates directly in the conflict, the other activities to which the girls are generally assigned within the armed groups could not be included in this definition. The possibility of considering sexual offenses as included in the definition of use in conflicts, including for example forced marriage with members of the armed forces, remains still open, as ICC members have not been able to adopt a stable and clear position on this issue. However, they limited themselves to stating that the situations in which the children are to be considered used in the conflict must be verified on a case-by-case basis, since it is not possible to identify an exhaustive and comprehensive list of activities that integrate, in all circumstances, this offence.

This issue has given rise to important disagreement also among the members of the Chamber themselves, in fact while the majority, including the President, have supported the need to verify "the use of children in conflicts" on a case-by-case basis and therefore through a careful evaluation of the different and concrete circumstances of the case presented, differently the Judge Odio-Benito, has reached a different solution and for this reason has elaborated a dissenting opinion with respect to that of the majority[235].

In the dissenting opinion, in fact, this member of the Trial Chamber argues that such case-by-case verification could lead to a lack of legal certainty and non-compliant assessments of the damages and violations suffered by these children. Above all, she focuses the opinion on the failure of the Prosecutor to include within the charges brough against the accused also the sexual offenses of which he had been guilty towards especially female child soldiers. In addition, she argues that in accordance with Rule 145 (1) (c) of the Rules[236], the Court was under an obligation to take into consideration the effects and harm caused to children by their recruiting, committed in violation of the Rome Statute, including not only the corporal punishment to which they were subjected during forced training but also sexual offenses. These elements should be taken into account when the

[235] No. ICC-01/04-01/06 , Dissenting Opinion of Judge Odio Benito, available at < https://www.icc-cpi.int/CourtRecords/CR2012_07409.PDF >, pag. 41

[236] Rules of Procedure and Evidence, Rule 145, available at <https://www.icc-cpi.int/iccdocs/pids/legal-texts/rulesprocedureevidenceeng.pdf > accessed on 14\03\2020

judgment is issued. This dissenting opinion is also based on the testimony given during the trial by an expert, Elisabeth Schauer, who claimed and proved that the effects of recruitment and use in armed conflicts, as occurred in the Lubanga case, are not destined to be extinguished in the short term but rather last over time and can lead to negative consequences from generation to generation, including for example post-traumatic stress[237]. According to the opinions elaborated and exposed before the Trial Chamber by the experts, the recruitment as a child soldier can't in any case be considered a positive experience, since it impedes the individual to develop normal civilian skills and psychologically.

When considering the war crime of conscripting, enlisting and use of children under the age of fifteen in the hostilities, the experts also underline the need to take into due account the different effects , arising from participation to the armed conflict, deriving to boys and girls, since the latter are more exposed to sexual violence of different types such as rape, forced marriage, forced prostitution, forced nudity and sexual harassment on a daily basis by their companions and even by the commanders[238].

To sum up, the dissenting judge believes that since the effects and consequences of the armed conflict, more in particular of the life within the armed groups, are destined to affect the children's life in many ways, such as from an educational, health and psychological point of view, they must be brought to the attention of the Chamber, which shall consider them when determining the sentence for Lubanga. This opinion has been supported by the fact that the accused was aware of the conditions of life of the child soldiers and the abuses to which they were exposed, including the fact that girls were victims of sexual offences within the camps where they were trained. The two point of view of the Majority and the dissenting Judge highlight the existence of an important discussion related to this war crime, in fact as previously stated it is still contentious the proper meaning to be given to "active participation".

The decision to adopt a broad meaning to this term has important consequences. Above all there is the fact that in this way a more considerable protection could be granted to children and moreover this ensures a greater flexibility of the Court, which has the

[237] No. ICC-01/04-01/06, Dissenting Opinion of Judge Odio Benito, p. 43
[238] Ibid., p. 45,46

competence and power to decide , taking into account the circumstances and events which characterize the concrete experience lived by children, whether they had been effectively victims of this specific war crime. Looking at the judgment, it is furthermore possible to observe that sexual offences had been emphasized and pointed out several times[239]. The emphasis given to these offences and violence of sexual nature can be interpreted in the sense that the ICC is in favour of adopting an approach based on gender, so to deal with the different realities and sufferings of boys and girls soldiers.

The different and innovative interpretation given to the term " active participation" by the ICC in the specific case has been source of disapproval by a certain part of the doctrine, include the scholar Wagner, who sustained and indicated arguments in favour of a totally different thesis, which can be regarded as more in conformity with international humanitarian law[240]. According to Wagner, there is no possibility to interpret the term of "active participation" in a different way from direct participation since those terms are generally used by sources of international law of armed conflicts as synonyms. To counteract the interpretation supported by the ICC, for example, it makes reference to ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law[241], which clarifies in an unequivocal way that there is not such a distinction elaborated in the Lubanga case. In support of this argument, the ICRC stated that the terminology of "direct participation" has developed over time starting from "active participation in the hostilities". Therefore, it is argued differently that these terms are closely interconnected and interchangeable. Although through the more open and comprehensive interpretation, the rights of the victims of these crimes were wanted to be guaranteed to a greater extent, this concept on the other hand brings with it some disadvantages from a legal point of view. In the first place this author has highlighted how such a conception can determine a sort of discrimination and inequality in the protection of civilians, depending on whether or not armed conflicts have an internal or international nature. In fact, in this way it is foreseen the existence of a

[239] Cecile Aptel, Lubanga Decision Roundtable: The Participation of Children in Hostilities (OpinioJuris, 2012) , available at <http://opiniojuris.org/2012/03/18/lubanga-decision-roundtable-the-participation-of-children-in-hostilities/> accessed on 14\03\2020

[240] Wagner, N. 'A Critical Assessment of Using Children to Participate Actively in Hostilities in Lubanga Child Soldiers and Direct Participation' (2013) Crim Law Forum 24, pp.145–203 , available at < https://doi.org/10.1007/s10609-012-9194-0> accessed on 14\03\2020

[241] ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law (2010)

prohibition of a broader content in the context of internal conflicts than the latter. A further critical issue is that inherent in the need for the International Criminal Court to guarantee one of the most important human rights, consisting in the right to a fair and equitable trial also in favour of the accused[242]. In fact, through this extensive interpretation, the ICC actually made itself responsible for the creation of a new rule of international criminal law, which contrasts with that adopted by international humanitarian law, so that the accused's lawyers could have argued that he had in good faith interpreted the term "active participation" in accordance with international humanitarian law. This defence could have been based on an important rule contained in the ICC Statute, consisting of art. 22 (2), for which it is necessary in case of doubt in the interpretation, to adopt an interpretation that proves to be in favour of the accused according to the principle in *dubio pro reo*[243].

In line with this thought, Vité[244], underlined how the ICC, with the aim of guaranteeing greater protection for children used in armed conflicts, adopted on the one hand an extensive interpretation of the term "active participation" and a restrictive one of " direct participation ". Through this approach, it has underestimated the real extent of the latter, and can cause damages including: the possibility of perceiving these children as military targets and also the Court takes steps to prosecute actions that are not instead prohibited by international humanitarian law . The latter therefore argues that, since a different interpretation in the context of international criminal law may lead to confusion, it would have been at least desirable for the International Criminal Court to consider in this case the possibility of adopting a uniform interpretation to that already consolidated.

According to these different points of view and opinions, therefore, the ICC was not given the task of developing new rules that guarantee protection to these victims, consisting of child soldiers, even if this purpose is considered commendable and appreciated. In fact, it should limit itself to ascertaining the existence of the criminal responsibility of the

[242] Wagner (n 240)
[243] Michael E. Kurth, 'The Lubanga Case of the International Criminal Court: A Critical Analysis of the Trial Chamber's Findings on Issues of Active Use, Age, and Gravity' (2013) 5 Goettingen J. Int'l L. 431
[244] Sylvain Vité, 'Chapter 4: Between Consolidation and Innovation: The International Criminal Court's Trial Chamber Judgment in the Lubanga Case' (2012) 15 Yearbook of International Humanitarian Law, pp.61-85

accused, adopting an ordinary interpretation of the terms contained in the norms and therefore conforming to the international norms that regulate armed conflicts[245].

3.4 The implications of the Lubanga case

The general picture that emerges from the Lubanga case, accused of recruiting and using individuals under the age of 15 in the armed conflict, portrays these children as victims of an international crime, subject to physical and psychological harm and easily influenced, who suffer and go through the consequences of this crime throughout their life. These subjects, as weak and victims of violent acts and traumas of various kinds, are generally considered not responsible for the totality of the atrocities committed in the context of their collaboration with the armed group, being also considered not relevant whether they voluntarily decided or not to join the latter. Based on the final judgment and the discussions that were originated by the trial, it is necessary to verify if this description of the child soldiers is useful and advantageous.

In fact, they have been described by scholars, such as Wessels and by the Chief Prosecutor Moreno-Ocampo[246] in the concrete case, as victims, who will suffer forever from traumas and both physical and mental illnesses, caused to them by the traumatic experiences lived. Although obviously this vision of child soldiers has been adopted to give an idea of the seriousness and atrocity of the crime committed by the adults who recruited them, on the other hand, according to Drumbl, it is questionable whether this interpretation is useful for the purposes of their rehabilitation and integration after the conclusion of the conflict[247]. According to Drumbl, in fact, this vision and representation of the child soldier cannot always be considered positive, especially as it could make the civilian population think that it is a waste of money to invest in programs necessary for their rehabilitation or even threaten the credibility and relevance of the testimonies made during the trial against the accused[248].

[245] Wagner, (n 240)
[246] Moreno-Ocampo, Lubanga Trial Transcript January 2009, p. 2.
[247] Mark Drumbl, "Chapter 5: The Effects of the Lubanga Case on Understanding and Preventing Child Soldiering" (2012) 15 Yearbook of International Humanitarian Law 87
[248] Ibid., p. 102

Speaking in general terms, among the merits that can be credited to this sentence, particularly long and made by the Trial Chamber I, there is firstly the affirmation of the existence of a distinction between the conscription and enlistment, which is fundamentally based on the existence or not of the consent of the child, under the age of fifteen. Although there are therefore several acts that determine the commission of this war crime, at the same time the voluntary nature of the adhesion by the child cannot under any circumstances be considered a defence and therefore is completely irrelevant for the purpose of ascertaining criminal responsibility[249].However, although this ruling was fundamental for the development of international criminal law in various aspects, as it clarified the interpretation that must be adopted in relation to this war crime, on the other hand it has been widely criticized above all for the lack of attention of the Court to the traumas experienced by female soldiers, who have lived different experiences from their male companions.

According to Chappel[250], the beginning of this injustice occurred when the Prosecutor failed to accuse and request the initiation of a trial before the ICC against Lubanga, for the commission of crimes against child soldiers of a sexual nature. This lack has been justified in various ways, as already seen, especially because of the lack of enough evidence. This refusal to prosecute him for these crimes, as they did not satisfy the elements that characterize the crimes against humanity, is particularly serious. An association, Women's Initiatives for Gender Justice, had presented many testimonies to the OTP which precisely showed that in reality the requirement of "systematic attack against the civilian population" was widely satisfied[251].Furthermore, during the trial, the request made by the victims' legal representative to include crimes, in conformity with Regulation 55[252], such as sexual slavery and degrading and cruel treatment among the

[249] Ibid., p. 103
[250] Louise Chappell , 'The gender injustice cascade: 'transformative' reparations for victims of sexual and gender-based crimes in the Lubanga case at the International Criminal Court' (2017) 21(9) The International Journal of Human Rights, pp.1223-1242, available at < https://doi.org/10.1080/13642987.2017.1360006 > accessed on 14\03\2020
[251] Brigid Inder, 'Reflection: Gender Issues and Child Soldiers the Case of Prosecutor v Thomas Lubanga Dyilo' (International Justice Monitor, 2011) available at < https://www.ijmonitor.org/2011/08/reflection-gender-issues-and-child-soldiers-the-case-of-prosecutor-v-thomas-lubanga-dyilo-2/ > accessed on 14\03\2020
[252] ICC-BD/01-02-07, Regulation 55

accusations was rejected. This definitively prevented that such crimes could be taken into account for the purposes of the sentence[253].

This issue also divided the members of the court, in fact while the majority, despite having criticized the choice of the Prosecutor, for not including such crimes among the accusations, on the other hand eventually claimed that there was not enough evidence linking Lubanga to these crimes against female soldiers[254]. A totally different opinion, as previously discussed, was instead expressed by Judge Odio Benito, who though it was evident that sexual offenses are part of the use of children in the conflict.

A further phase in which there is a lack of consideration of gender and therefore of the violence suffered by women and girls recruited as soldiers is evident when identifying the principles for the reparation of damages. Judges Blattman and Odio Benito, with regard to this issue, expressed the need to ensure, at least in the context of the reparation, the consideration lacking in the phase of issuing the judgment. For the purpose, it was applied as principle the verification of the existence of a specific link between the conflict and the damage suffered, so as to broaden the concept of victim, who is entitled to reparation[255].

In this specific area, the Trial Chamber also urged the Trust Fund to adopt compensation programs and initiatives that were particularly sensitive to the conditions of children and gender differences[256]. Despite all these steps forward in the search to confer greater pre-eminence on crimes of a sexual nature, a limit, always deriving from the choice of the ICC persecutor not to include crimes of a sexual nature in the accusations, consists on the fact that in order to set limits and a margin to these compensation was necessary to verify the existence of a link of these sexual crimes with the war crime consisting in "*conscription, enlistment and use for the purpose of active participation in armed conflicts of subjects under 15 years*" [257].In this way, reparation was assured to a certain area of subjects, consisting of child soldiers who were victims of rape or other violence. It can therefore be observed and argued ,on the basis of these facts and also of the ICC

[253] Chappell, (n 250), p. 1229
[254] Prosecutor v Lubanga, Decision on Sentence Pursuant to Article 76 of the Statute, ICC-01/04- 01/06-2901, 10 July 2012, par. 75
[255] ICC-01/04-01/06-2904, para. 249
[256] Ibid., para. 264
[257] Ibid., para. 247

Statute, that since reparation can only be ensured to the subjects who have suffered damages, consisting in the consequences of a crime for which Lubanga was convicted, the lack of consideration for the crimes of sexual nature had serious repercussions. In this way compensation can only be ensured to those who are victims of sexual violence because they have been recruited into the armed group by Lubanga[258].

A different opinion has been expressed by Tan, who supports the idea that in reality there was a way for the Prosecutor to include that violence among the charges brought before the Trial Chamber[259]. A different way would have been to refer not so much to the crime of using children in the conflict, but to the crime of recruiting. In fact, while the crime of use of children requires their active participation in the conflict, and therefore the functions attributed to them are pertinent, the crime of conscription does not make relevant the function performed by the child soldiers, who could have been enlisted in a forced manner in order to perform sexual tasks. According to this scholar, if the difference between "conscription, enlistment and use" had been identified with greater clarity, not only such crimes of a sexual nature would have been considered in the trial but also in the sentence issuing phase. Although it is true that tracing these crimes related to the sexual sphere to the crime of conscription on the one hand allows them to be included in the accusations, on the other hand it is also true that it would be preferable bringing multiple charges directly before the accused, including specific sexual crimes[260].

3.5 Victim or villain: the case of Dominic Ongwen before the International Criminal Court

In addition to the Lubanga Case, which is particularly known as it was the first case in which the war crime was widely discussed and subject to interpretation, consisting on the conscription, enlistment and use for the purpose of active participation in the hostilities

[258] Chappell, (n 250), p. 1233
[259] Joe Tan, 'Chapter 6: Sexual Violence Against Children on the Battlefield as a Crime of Using Child Soldiers: Square Pegs in Round Holes and Missed Opportunities in Lubanga' (2012) 15 Yearbook of International Humanitarian Law, pp. 117-151
[260] Ibid., p.147

of children under 15 years, it has been relevant and source of discussions the Dominic Ongwen case.

He was a particularly controversial character, in fact his story, specific situation and experience have led to extensive discussions on child soldiers by the international community. For the purpose of a careful and profound analysis of this specific case which has been discussed before the International Criminal Court, I believe that a prior discussion regarding his experience, the cultural and social background is of primary importance, because they can show us how they can contribute to the transformation of a victim to a criminal accused of various international crimes, including war crimes and crimes against humanity. From the interviews that were provided by the relative family members, it was possible to reconstruct part of the events that characterized his childhood and that led him to become who he is in our days ,so an individual guilty of atrocities that have harmed thousands of individuals.

I have already discussed in the previous chapters of this thesis how war in general has devastating and sometimes permanent effects on the mental and physical development of individuals, especially at an early age. Unfortunately, these effects occur with greater gravity on the children who have been victims of this phenomenon, consisting in the recruitment and which often leads them to become guilty of crimes that offend the whole of humanity. Sadly, the acts of which this category of children are victims have been documented by various international organizations, also thanks to the collection of testimonies of those who were lucky enough to escape from this terror regime or managed to survive. These experiences, on the basis of the data and information collected, were not unrelated or known to the accused in this specific case.

Ongwen's story is famous for many reasons among which the fact that he was simultaneously an important element and leader within the military organization consisting of the LRA, which has been guilty of various international crimes, and a victim of the same crime of which he has been responsible, consisting in the recruitment of children[261].

[261] Raphael Lorenzo Aguiling Pangalangan, 'Dominic Ongwen and the Rotten Social Background Defense: The Criminal Culpability of Child Soldiers Turned War Criminals' (2018) 33 Am U Int'l L Rev 605

He was also a victim of these international crimes, primarily the crime of recruiting, enlisting and using children under 15 years of age, as he was only a 10-year-old boy when he was forcibly recruited and became a solid member of that armed group[262].It is possible to trace his forced accession to the armed group to a variety of reasons and factors including: the loss of both parents at a young age; poverty, lack of education, the need to guarantee the means of sustenance and protection, also in so far as he had the responsibility to safeguard his own brothers, after the death of the parents. As pointed out several times, following the recruitment, which generically originates when such children are forced to kill the remaining members of the family, they create a particularly strong bond with the members of the armed group, which guarantees them access to food, safety, water and above all protection. This armed group becomes a substitute for the family lost due to the war and a fundamental point of reference for child soldiers. Precisely for these reasons many do not succeed or do not want to escape from this reality or voluntarily return to it, also because very often they cannot find again a place in the civil society to which they originally belonged.

In this specific case, the military group that made itself responsible for the recruitment consisted of the LRA which, already in the 1987, had been rebelling against the state of Uganda and its public authorities, including the forces of the national army. This group, commanded by Kony, who saw the armed group itself as a weapon to guarantee respect to the "will of God", has only resulted since its onset in ruin against the civilian population[263]. The accused was not a mere pawn and militian under the direction of the LRA but was a commander who reported the information directly to Kony[264]. Despite the risk of being subjected to torture or even being killed, he then decided on 6th January 2015 to surrender not only to the United States government but even to the United Nations.

This case raised several perplexities before the ICC because the accused could represent himself at the same time as victim and perpetrator of the same crime. Furthermore, the national government's lack of willingness in Uganda to offer an amnesty for the crimes committed as a member of the LRA to Ongwen was also subject to various disputes,

[262] Nortje, W., 'Victim or Villain: Exploring the Possible Bases of a Defence in the Ongwen Case at the International Criminal Court' (2017) 17(1) International Criminal Law Review' 186-207, available at < https://doi.org/10.1163/15718123-01701002 > accessed on 14\03\2020
[263] Ibid., p. 194.
[264] Ibid., p. 196.

because this verified despite the fact that the civilian population wanted that amnesty to be recognized and the fact that this was generically guaranteed to all child soldiers who made themselves responsible for crimes under the power and influence of the armed group[265]. According to various scholars and experts in international criminal law, including Drumbl[266] and even Nortje, the failure of the amnesty option has been particularly serious in these peculiar circumstances. In fact, Ongwen was the first former child soldier to be tried before the international criminal court, which however according to some did not give sufficient importance and consideration to this fact, giving prominence instead to the discussion of the international crimes of which he had been accused by the Prosecutor, including war crimes and crimes against humanity. It is probably true that amnesty would have been a valid alternative to the establishment of a formal trial before the ICC. First of all, since the Court at the time did not have any experience on how to deal with this atypical case, and secondly in that way perhaps greater respect would be guaranteed to the obligation to ensure the right to reintegration and rehabilitation for child soldiers, who must be considered the main victims of the war[267]. However, this possibility was not accepted due to the seriousness and brutality of the crimes of which he was accused. This option was not accepted by the national government, which even though recognized Ongwen as a former child soldier and so an international victim, it gave more relevance to the fact that he had been responsible for large-scale atrocities against the civilian population, including child soldiers whom he continued to recruit for the purpose to increase the war force of the LRA. Additionally the amnesties were not guaranteed in an equal and non-discriminatory way to each LRA soldier who decided voluntarily to lay down their weapons, in fact the Ugandan law ensured an absolute discretion to the national prosecutor whether to prosecute or not a certain individual for the crimes committed during the war[268] and furthermore the individual could apply for the amnesty only when he was not responsible for the commission of an international crime, condemned by international law. The Ugandan government used originally the amnesties from criminal prosecution in order to restore

[265] Mark A. Drumbl, 'Victims who victimise' (2016) 4(2) London Review of International Law, pp. 217–246, available at < https://doi.org/10.1093/lril/lrw015> accessed on 14\03\2020
[266] Mark A. Drumbl, Reimagining Child Soldiers in International Law and Policy (Oxford University Press, Oxford, 2012) pp. 6–7
[267] Nortje (n 262), p. 199.
[268] Drumbl (n 265), p. 238,239

peace within the national territory, according to Manisuli Ssenyonjo[269], and so avoid to the continuation of violence, which would have resulted from the criminal persecution of the members of the rebel armed group. Furthermore, in his article, he tends to acknowledge these amnesties, ensured by the national government also to the leaders of the LRA, as a manifestation of the state's non-compliance with the obligation, imposed on it by various international treaties including the statute of the ICC, to subject to criminal justice the individuals who are responsible for serious international crimes, in order to put an end to the impunity of the latter. These total amnesties, foreseen by national law, could send a wrong message to the remaining subjects responsible for international crimes.

Nonetheless on the basis of what has been documented, it is possible to demonstrate and believe that Ongwen did not represent the typical accused before the ICC, in fact because of social and cultural circumstances, events, lived experiences he was almost obliged to become the perpetrator of these atrocities. In fact, as then also affirmed by the Defence during the trial, he was also pushed to commit these crimes by the fear of being killed in turn. There is no shortage of examples of the controversial nature of this subject, who not just pronounced himself guilty for the crimes committed and asked for forgiveness to the population of Uganda[270] but also let one of his wife escape. It is as if he in turn feels confused about his nature. This theory is corroborated by the fact that although on the one hand he showed, during the trial, repentance and a sense of guilt for the crimes committed, at the same time, it was repeatedly observed during the trial, as despite the fact that he had the opportunity several times to escape, once he became an adult, he had continued to collaborate with the armed group, in order to acquire more and more power.

Ongwen had initially been accused by OTP of four different types of crime falling under the category of war crimes, and three that could qualify legally as crimes against humanity, however subsequently the amount and number of charges of which the latter was accused increased up to 70 crimes on 23th March 2016. Among the 70 charges confirmed by the Pre-Trial Chamber II, including both crimes against humanity and war

[269] Manisuli Ssenyonjo, 'The International Criminal Court and the Lord's Resistance Army Leaders: Prosecution or Amnesty' (2007) 7 Int'l Crim. L. Rev. 361

[270] Omeri, S., 'Guilty Pleas and Plea Bargaining at the icc: Prosecutor v. Ongwen and Beyond' (2016) 16(3) International Criminal Law Review, 480-502, available at < https://doi.org/10.1163/15718123-01601007> accessed on 14\03\2020

crimes committed since 2002, there were: murder, the use of child under the age of 15, sexual violence and crimes such as rape and sexual slavery[271].

In my opinion, the method and technic that the Defence has supported to exclude the criminal liability of its client, consisting mainly in the defence of duress[272], is particularly interesting. In fact, the defence was essentially focused on reiterating how Ongwen was to be considered a victim, according to international law, as he had been a child soldier, forced to actively participate in the armed conflict. Through this argumentation they wanted to support the impossibility of holding him responsible for international crimes committed once he became an adult. More in detail, the Defence had argued in favour of the defendant that he ,as a former child soldier, had not been able to mature normally from a psychological point of view, as his development had been impeded by the traumatic experiences lived and subsequently they had instead referred to the fact that he should have enjoyed the legal protection, guaranteed by international law, to child soldiers[273].The fact that Ongwen was in turn the victim of an international crime, falling within the jurisdiction of the ICC, was not at all questioned either by the judges of the Court nor much less by the Prosecutor, Benjamin Gumpert. In fact, the latter had recognized the traumas he experienced, including the loss of the family and the fact that he had been deprived of the opportunity to live a normal childhood serenely[274].

However, at the end the Court did not prove to be in favour of this argument. Among the arguments that most prevented the Court from taking this defence into consideration, there was, first of all, the fact that, despite being forcibly recruited, he had then decided for over 30 years to live within the armed group and to become a commander[275]. He had, precisely because of his power, the opportunity to escape earlier but had not seized that opportunity. For what regards the second defence brought and sustained before the Chamber, according to which he should have enjoyed of the protection and right granted

[271] Decision on the confirmation of charges against Dominic Ongwen, Pre-Trial Chamber II, ICC-02/04-0\1/15 (23 March 2016) (Pre-Trial Chamber decision) <https://www.icccpi.int/CourtRecords/CR2016_02331.PDF>
[272] The Prosecutor v. Dominic Ongwen, para. 153.
[273] Third Public Redacted Version of "Defence Brief for the Confirmation of Charges Hearing", Pre-Trial Chamber II, ICC-02/04-01/15 (25 May 2016) (Defence Brief) [36-49] <https://www.icccpi.int/CourtRecords/CR2016_03711.PDF>
[274] Prosecutor v Dominic Ongwen, Confirmation of Charges, ICC-02/04-01/15-T-20-Red-ENG (21 January 2016) (Prosecution Transcript) 19 <https://www.icc-cpi.int/Transcripts/CR2016_00552.PDF>
[275] The Prosecutor v. Dominic Ongwen, para. 154.

to the child soldier until he surrendered to the US authorities, the judges believed that this argument did not need much of attention since it lacked of any legal basis. Even the defence of duress did not seem to be acceptable and reasonable before the Trial Chamber, since , in order to be applied, it is necessary to prove that the defendant acted in presence of a "*threat of imminent death or serious bodily harm*". The Chamber has been unconvinced by the Defence's arguments, since the cases of escape from the LRA were not that limited and unusual.

As it has been affirmed also by Kan[276], two different descriptions of the relevant facts had been presented before the ICC. The Defence has tries to portray the client as principally a victim of international crimes , so as a former child soldier, unable to understand the consequences of his own actions and to separate right from wrong, while differently the Persecutor gave more relevance to the fact that Ongwen was no more a child, but an adult who intentionally became responsible for certain criminal actions against civilians. In conclusion, the Trial Chamber in the Ongwen case reached a different verdict and result from the Lubanga Case.

In the Lubanga case, the Trial Chamber pointed out how the international crime of recruiting, enlisting and using children under the age of 15 years old, can produce permanent damages to the child's mental health, impeding to him to grow up normally. The crime has been described as having so lasting consequences on the child's mental and moral development, which continue to be existing also when he turns to be an adult. Differently in the Ongwen case, the judges reached another conclusion, in fact it seems that they restrict the relevance of these effects to the time when the subject was under the age of 18, not recognizing their importance for the purpose of determining the penalty once he became an adult[277].

The question that should be asked in this specific case according to a plurality of authors such as Kan and even Nortje, consists on whether and to what extent it would be possible to take into account the effects of the recruitment, when they were children, at the time of the emanation of the sentence and if it is possible to consider this circumstance either a mitigating circumstance the penalty or possibly a cause of exclusion of criminal

[276] Gamaliel Kan, 'The Prosecution of a Child Victim and a Brutal Warlord: The Competing Narrative of Dominic Ongwen' (2018) 5 SOAS LJ 70
[277] Ibid., p. 77

liability. According to Nortje, it is difficult to believe that if the International Criminal Court condemns Ongwen for the international crimes committed, without taking into account its history, it is doing the interests of the international community and acting rightly[278]. He declares in his article that several arguments, consisting in mitigating factors, could be sustained by the Defence in his favour. In the first place, the fact that the defendant spontaneously decided to surrender, knowing that he would have been brough in the Hague in order to be tried before the ICC. Furthermore he sustains the fact that Ongwen could not be considered a normal criminal, as he did not have the opportunity to mature normally from a psychological point of view due to the tragedies experienced as a child soldier and once an adult, he was forced in order to survive, to commit crimes.

An alternative option that could have been invoked by the defence in favour of its client in the case analysed was thoroughly evaluated in an article by Renee Souris[279]. The thesis sustained and elaborated is based on the need to recognize the child soldiers' lack, even once they become "adults", of a normal and socially accepted morality, therefore of a correct and shareable vision of what is right and what it's wrong. Having been recruited during their childhood, they were forced to embrace the ideals of the armed group they belong to, which strongly contrast with those embraced by the international community which condemns the practices which they usually carry out, such as the killing of civilians innocent and the recruitment of children. The ICC Statute allows to exclude the criminal liability of individuals, who are considered the most responsible for the atrocities that occurred, on the basis of the existence of the conditions set out in art. 31 and 33.

Art. 31 ICC Statute, which states that "'*A person shall not be criminally responsible if, at the time of that person's conduct, the person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law*"[280], subordinates to its application the existence of a total inability of the person to adapt his conduct to these rules. According to this legal disposition, an individual charged with international crimes before the ICC in order to enjoy of this defence shall necessarily

[278] Nortje, (n 262), p. 205,206
[279] Renée Nicole Souris, 'Child soldiering on trial: an interdisciplinary analysis of responsibility in the Lord's Resistance Army' (2017) 13 International Journal of Law in Context, pp. 316-335
[280] Rome Statute, Part 3, Art. 31.

prove that he has suffered at the moment of commission, of a complete and total inability to understand and appreciate the unlawfulness of his own actions and to control his impulses, being not sufficient a temporary disturbs, such as excitement. The Rotten Social Background Evidence , which is mentioned by Raphael Lorenzo , can be traced back to this specific defence, and takes into due account precisely contexts and events that are able to destroy completely the capacity of the individual to adopt a behaviour conform to the social standards, such as his own childhood and the abuses experienced[281]. This defence refers to the lasting effects of forced indoctrination and recruitment on the mental and intellectual development of the child soldier, which in fact lead him to adopt behavioural models and ideals proper to the armed group and which do not allow him to conceive the seriousness of his actions or to act in a socially acceptable way. The effects of participation in armed conflicts on children's growth from a psychological, moral and intellectual point of view is recognized by a plurality of sources, including not only the previously mentioned case relating to Lubanga, but also by international humanitarian law which in fact provides to condemn the participation of children in conflicts precisely because of the negative effects that the latter has on them. Precisely inasmuch as he has undergone, since he was about 10 years old, a strong indoctrination and imposition of ideals, the lack of ability to understand the illegality and brutality of his actions could legitimately be argued as defence, on the basis of art. 31 (a) ICC Statute.

Otherwise it could be easier to apply to these former child soldiers, the discipline provided for in art. 33 ICC Statute, which refers to the circumstance in which the subject acted by implementing an order given by the military or civilian commander. Based on this rule, the criminal liability of those who do not have the moral capacity to conceive the manifest illegality of their actions can be excluded. The doctrine of manifest lawfulness has non-recent origins. It was established by the Nuremberg Tribunal, held to judge the crimes committed by the Nazis against the Jewish people, as Nazi soldiers could not be excused for their crimes on the basis that these were not foreseen as such by Nazi law or were based on orders legally given to them by their superiors. In fact, there are some actions which are by their nature manifestly illegal and inadmissible, as they harm the whole of humanity. The Statute of the International Criminal Court is inspired by what emerged

[281] Lorenzo (n 261)

during the Nuremberg Trial, in fact implicitly it requires that the subject has the moral capacity to distinguish between right and wrong[282]. According to Renee Souris, it is necessary to keep in mind what has been shown by the experts called to testify during the trial of Thomas Lubanga. During the trial it was concluded that the effects of recruiting are of a continuous and uniform nature over time and therefore do not disappear in adulthood and are such to prevent the formation of a normal moral capacity in the individual. On this basis, it would therefore be desirable to develop an additional rule within the ICC Statute whereby the lack of such moral capacity in adults could give rise to a cause for exclusion of liability or mitigating the fault, if it derives from events traumatic experiences such as recruiting as a child soldier[283]. These conditions could alternatively result in a total defence or a cause that mitigates criminal liability according to the circumstances of the specific case[284].

3.6 Defence of Duress

According to what previously reported, the defence of duress, present in art.31(1)(d) of the ICC Statute, could have been a good defence, which could have led to the exclusion of the individual criminal liability of Ongwen. This defence has been elaborated by his lawyers, since it was evident, according to the evidence collected, that in contrast to the opinion showed by the Prosecutor, Ongwen was not totally free to act in an autonomous and independent way within the LRA, and that probably his escapee from the armed groups was not as easy as it could seem to be apparently. Many authors, such as Wessel and even Kan[285], sustained that it was a possibility to recognize him as a mere victim of a system of terror and fear of death, created by Kony. This is demonstrated by the fact that , as all the other child soldiers, he had been obliged to follow a certain ideology and to act in conformity with the orders adopted by the main leader, because the result for indiscipline and infringement of the rules was torture and in certain cases even death.

[282] Souris (n 279), p. 326,327
[283] Ibid.
[284] Ibid.
[285] Kan (n 276)

The defence of duress has been largely discussed within the Erdemovic case before the ICTY, where the majority reached a different conclusion from the one elaborated by the famous Judge Cassese in his own dissenting opinion[286]. While according to the remaining members of the Court, it was not possible to perceive duress as a factor that impede to consider the individual criminally liable for the atrocities committed against innocent civilians, Cassese elaborated a different theory which seems to be embraced even by the ICC Statute, which in fact acknowledge duress as a defence, but just when some elements are verified in the concrete and specific case, brough before the Court. The main elements which shall exist in order to permit a total exclusion of the individual criminal liability, when a certain person committed atrocities which harm the entire humankind are expressly declared within the ICC Statute. They are the following: threat of imminent death or serious bodily harm; the acts are reasonable and necessary to avoid the threat and to conclude there shall not be the intention to cause a harm which is greater than the one avoided.

The first factor for considering duress as a defence, can be well argued in the Ongwen case, since it cannot be undermined or even not admitted the existence of such a threat to death or humane treatment, which were applied indistinctly to each individual who acted against the brutal rules of the LRA, independently on the fact that he was a simple soldier or a commander. On the other hand, the term " *reasonable*" must be interpreted in such a way which takes into consideration the reasonable actions which could have been put into being by a commander of the LRA in the same position of the defendant in the concrete case. As a consequence , as also supported by the Judge Cassese[287], the Court can't ask the individual, who is accused of international crimes committed against civilians, to adopt to a standard which would have obliged him to sacrifice his life in order to avoid the commission of such atrocities, and so to act like an hero. In fact, if a higher standard is adopted than that linked to the reasonable person in the same circumstances as the accused, individuals would be required to comply with decidedly higher standards of behaviour than those of the "*ordinary and reasonable*" person and it is unlikely that international courts could adopt this parameter when they are required to evaluate the

[286] Prosecutor v Erdemovic (Separate and Dissenting Opinion of Judge Cassese) ICTY-96-22-S (7 October 1997) (Cassese's Opinion)
[287] Ibid., par. 47

accused's actions. In this case even if Ongwen enjoyed a position of leadership that could somehow avoid the abuses committed against civilians, at the same time the subjects who enjoyed with him this position of power within the armed group were subjects more than the others to checks and controls, carried out at the request of Kony. So even in this case it is difficult to prove that he could have acted differently, without risking the death of himself or his family's members.

The final element, difficult to prove both in the Erdemovic case and with regard to Ongwen, consists in the principle of proportionality, which is considered satisfied only if the damage deriving from the crime committed is not greater than the damage avoided through this action. As also stated by the Judge Cassese, in his dissenting opinion, this verification determines the obligation for the competent judge to verify which life is superior to the other and this has a philosophical and social character. On the other hand, in this specific case it is difficult to believe that such proportionality exists. In fact, Ongwen made himself responsible, over the course of time, of thousands of civilian deaths and moreover, according to the testimonies collected, he was very often the initiator of these armed attacks and therefore actively and voluntarily participated in them also at an organizational level[288].

This level of participation of Ongwen during the elaboration and planning of these massacres makes the application of this defence very difficult. However, if the court decides not to accept this defence because the proportionality test is not satisfied, at the same time it cannot miss the opportunity presented by this case to rule on the sanctions applicable to the international crimes committed by the former child soldiers. As observed by the scholars previously cited, the Ongwen case is challenging. In my opinion in this case, the members of the International Criminal Court had the responsibility to recognize the effects of recruitment on the child's psychological development, as demonstrated and verified in various scientific studies; recognize the possibility that the subject has not possibly acquired the ability to intentionally commit a crime punished by the court and to finish verify whether the circumstances of the concrete case admit duress as a complete defence for the crimes committed, as it has been shown that despite these former child

[288] Kan (n 276), p. 82,83

soldiers reach the top of the hierarchy, are threatened to commit atrocities to survive not only when they are just children, but also when they become adults under criminal law.

Probably, as also argued in various articles by Drumbl[289], international criminal law is of a limited nature in some ways in that it aims to safely and clearly distinguish the guilty and the innocent, who is to be convicted and who is not. However, this distinction is not always so simple, in fact, child soldiers up to the age of eighteen are seen as victims to be protected, but at the very moment when they reach this age are condemned for crimes committed as adults, who are able to understand the consequences their actions and distinguish good from bad. The reality is that the negative effects and trauma of these children do not vanish when they become adults, as was argued in the Lubanga case.

As regards the figure of child soldiers in general terms, the fact of having acted and therefore committed a crime under current and effective threat of death, torture, beating or other inhumane treatments, cannot be considered the only applicable excuse. It is possible to add to this specific excuse also the one consisting in intoxication, taking into due account the fact that it is not unusual the use by military commanders within the armed group of drugs in order to make these children lose their inhibition and adopt cruel and ferocious behaviour[290]. However, the mere use of narcotic substances is not in itself satisfactory for the purposes of the applicability of the defence provided also within the Statute of the International Criminal Court, in fact the level of intoxication must necessarily satisfy certain requirements. In accordance with what is expressly provided for in art. 31 of the Rome Statute[291], the level of intoxication must be such as to drastically reduce the mental capacity of the subject accused of the commission of an international crime, since in fact it must not be able to "*to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court*"[292]. Despite the fact that it is easy to prove that child soldiers, due to the difficulties,

[289] Drumbl (n 241)
[290] Lafayette (n 51)
[291] Rome Statute, art. 31 (1) (b)
[292] Ibid.

abuse and dangers they experience every day as part of their normality, because of the use of drugs and alcohol are practically unable to perceive the illegality of their actions and therefore that the acts carried out are considered to be criminal in nature; it is more difficult to prove the involuntary nature of the intake of these substances which inhibit their mental abilities. In fact, although they are usually forced by their superiors to take them, in some cases these substances are conceived as the only tool not only to acquire the strength and courage necessary to carry out the activities ordered to them, but also to forget the atrocities committed[293].

Currently there are no international courts having jurisdiction over the crimes they commit because of their participation in the armed conflict, and probably this derives from the fact that the international community prefers to deal with the subjects who can be considered the most responsible for the atrocities committed. Furthermore, when it comes to children, other systems are preferable to deal with the crimes they have committed, as long as they guarantee their procedural rights and reintegration within the civil community. What can also be derived from the case previously discussed, consists in the fact that it is impossible in the case of child soldiers to describe them either as only innocent victims or perpetrators of crimes condemned by the international community. In fact, they are an ambiguous figure who cannot be limited to these simplified categories.

[293] Lafayette (n 51)

Conclusions

Some conclusions can be drawn even if this legal matter, inherent the status of child soldiers, is still evolving and it is therefore not possible to reach solutions which, with absolute certainty and clarity, would be capable of solving an issue, which damages our civilization and prevents the realization of its potentials. The violation of children's rights and freedoms, which are mainly reflected in the norms contained in the Convention on the Rights of the Child, cannot be attributed only to the poorest states, where there is the greatest presence of armed conflicts, but is attributable even to Western states. In fact, the latter continue to be responsible themselves for non-compliance with international rules, necessary for the effective enjoyment by this category of subjects of their human and fundamental rights. The formal support in favour of their fundamental and human rights has not been accompanied by an effective extinction of the phenomena that give rise to injury to the latter, including the recruitment within groups and armed forces in periods of war. Even today, children are exploited as instruments of death not only by the rebel armed groups but even by the national armies of those same states, which in public instead express themselves in favour of their rights.

As a result of what was discussed and analysed in the first chapter, it is possible to conclude that the child is the beneficiary of various conventions and treaties of international law, in which the rights and freedoms that are necessarily guaranteed to the latter are enhanced and enforced , as a human being, endowed with his own dignity. These treaties, although they can be seen as an important milestone reached, after years of negotiations and political and legal discussions between the States belonging to the international community, cannot by themselves be considered sufficient to guarantee their protection, especially in the presence of a context such as armed conflicts, both national and international. In fact, war in itself has always represented an obstacle to the realization and safeguarding of the well-being of the community and of the cohesion among its members. This climate of violence, terror and insecurity necessarily brings with it also the loss of the possibility and the economic and political capacity of the States to guarantee and assure citizens the services necessary for survival, including public security, access to basic education, access to food and potable water, access to a functioning health system etc. In this climate characterized by the fear of dying, due to

the lack of essential and necessary goods for survival, the armed groups find themselves facilitated in their intent consisting in the recruitment of new soldiers, including unfortunately also children. For various reasons, the armed rebel groups have always shown an interest in the recruitment of children from an early age, including for example the fact that they are easier to manipulate, influence and command, and also because very often they are stronger and crueller than the same adults at the time of the commission of atrocious acts against the civilian population[294]. These children, even if in some cases autonomously and voluntarily join the armed groups, in the majority of cases it is believed that this choice is not of a conscious and free nature, due to the existence of contributing factors in such contexts which encourage children to participate in armed conflict as members of such groups. The factors are different from each other but always interconnected. Among them it is possible to mention, on the basis of the testimonies collected also by the former child soldiers, the need to guarantee for himself and the members of his family the essential resources to survive, the urgency to obtain the protection and safety which are not granted by the public authorities etc. Furthermore, very often children are pushed by the parents themselves to join the armed group, as they are unable to guarantee protection and access to the essential goods for their survival. However, those who are most at risk are those who are either displaced or orphaned by parents or other subjects who can take care of them. Armed groups therefore take advantage of these factors to increase their military strength.

Among the most important tools, according to the studies examined, not only for the purpose of prevention but also for reintegration in local communities, there is the opportunity to gain an adequate education. In fact, institutions such as schools allow children to stay as far as possible from the reality of armed conflicts and constitute a strong obstacle to their approach to the armed forces. However, this system is not sufficient on its own, but it must necessarily be accompanied by other measures taken at national level by each state, which if it is obliged to guarantee protection to them in periods of peace, it is even more so in the presence of armed conflicts. The international community must also always ensure its support and help, apart from that of an economic and financial nature, to these States which, because of the war, find themselves unable to

[294] Lakmini Seneviratne, 'Accountability of Child Soldiers: Blame Misplaced' (2008) 20 Sri Lanka J Int'l L 29

guarantee public safety and availability of indispensable services. More specifically, in fact, the United Nations consists in the international organization established in 1945, of which almost all the countries, which take part in the international community, are currently members. The UN Security Council is the executive body that has primary responsibility for safeguarding international peace and security and on this basis, it can be argued that its agenda must always take into consideration the protection of children from recruitment. Among the measures, which on the practical side, could lead to greater compliance of the behaviour of the States with the obligations imposed on them, there is the adoption in each state of a domestic legislation that prohibits the recruitment of children into the national army and by non-state armed groups. In my opinion, this is necessary for states to actually show compliance with the international legislation adopted. However, in some cases this may not be considered sufficient, in fact a further favourable mechanism for this purpose consists in the exercise by the states of political pressure but above all economic pressure, so that the counterparty conforms to international standards. It is therefore evident that words and formal acknowledgments in the treaties, without measures of a practical nature, are in themselves devoid of actual value and do not actually guarantee any protection to the child from the typical dangers of war.

As stated in the second chapter, a common minimum age for the onset of criminal liability, also called MACR, has not yet been established by the states, in conjunction and cooperation with each other's. This common MACR marks the moment from which the subject can be held responsible for the actions committed, since he not only understands the nature of his actions that he carries out independently and consciously, but above all the consequences that derive from them. Although the CRC identifies in Article 1 as a child, each person under the age of 18 years, this parameter has relevance only for the identification of the beneficiaries of the discipline contained in the Convention, even if it could have been used in order to establish a common parameter used universally. In fact, the existence of a plurality of different parameters at national level, established in the domestic disciplines of each state, does not benefit children. Indeed, if they become guilty of behaviours, which give rise to the existence of international crimes on which states can invoke universal jurisdiction, they would find themselves subject to prosecution or not depending on the state that invokes universal jurisdiction over these crimes. All this is a

source of great uncertainty and confusion. However it is no coincidence that the international community has not yet adopted a legally binding parameter for each state and the ICC has not expressed itself on this issue, in fact it is far from easy to identify a MACR that actually takes into account factors such as psychological, moral and intellectual maturity of the child, the ability to intentionally commit a crime, to perceive its illegality. These are factors and elements that, according to the generality of scholars on the subject, must be taken into consideration as criminal liability exists when it is not only possible to demonstrate the *actus reus* but also the *mens rea*.

The proof of intentionality in the commission of the offense by the subject, under the age of 18, is difficult as it depends on elements of a subjective nature that vary from subject to subject and also depend on the circumstances of the concrete case in which he lives. It is indeed difficult to prove the will to commit the crime, when it comes to a child who has been forcedly recruited by the armed forces, lives under the terror of dying or being seriously injured, who has seen his family and friends die and who has witnessed atrocious acts. It is evident that in such circumstances his moral, psychological and intellectual development have been seriously compromised and the traumatic experiences lived can have long-term effects on him, which can also hinder his reintegration into the community he belongs to, especially when he has survived within the rebel armed group for a great part of his own existence. The life of these child soldiers within these armed groups deprives them of any possibility of living a normal childhood and very often they grow without the education necessary to understand the difference between good and evil. As also sustained by the scholar Corriero, since children living in war context had not the occasion to become aware of the normal social conduct, it is morally and legally difficult to hold them accountable[295].

In the light of these factors, it is also difficult to ascertain their voluntary or forced participation in the armed conflict, so in their favour it is generally believed that they are not able to decide autonomously and consciously to voluntarily enlist. Because of the traumatic experiences they endured, they must firstly be seen as victims of the war and of the adults who enlisted them allowing their active participation in armed conflicts.

[295] Michael A. Corriero, 'The Involvement and Protection of Children in Truth and Justice-Seeking Processes: The Special Court for Sierra Leone', (2002) 18 New York Law School Journal of Human Rights, p.337

Although children and more specifically child soldiers must be beneficiaries of protection , guaranteeing their full immunity from criminal jurisdiction in the event of international crimes could lead to negative feelings, such as the need for revenge, among the members of the civilian population and families of victims of international crimes. In fact, there is the possibility that they perceive the failure to acknowledge responsibility of the children guilty of crimes, as failure to recognize the atrocities and violence suffered by the State and the international community as a whole. It is therefore of primary importance to find a balance between opposing interests and needs, consisting on the one hand of protecting children and on the other protecting the rights of victim's families of international crimes from the former committed. This balance also varies according to the circumstances of the specific case.

I believe that since the recruitment of subjects under the age of 15 is generally precluded, children under this age cannot in any case be considered guilty of any crimes committed during armed conflicts. However, the main problem consists in identifying the legal treatment that must be adopted towards those aged between 15 and 18 years. For this category of individuals there is no absolute prohibition of subjecting them to criminal justice within each interested state, and furthermore bringing them before a competent court or tribunal can be considered as inevitable in order to avoid two possible consequences, including: how previously mentioned, the possibility that the civilian population believes that justice has not been done and therefore tends to reject the former child soldier, preventing his reintegration; furthermore, if the immunity from the criminal jurisdiction of child soldiers was sustained, the commanders of the armed groups would still be more urged to arrange for their recruitment. Anyway, if it is reputed the best option to make child soldiers, over the age of 15, responsible for the crimes committed during the armed conflict, nonetheless the State must ensure that he is in the conditions to exercise all substantive and procedural rights recognized by international law and the principle of "*best interests of the child*" must always be respected.

Therefore, the criminal trial cannot, under any circumstances, prevent his reintegration into the local community to which he was torn by the armed group, in which he was forced to participate. De facto, the reintegration of the child soldier is considered the ultimate goal of the DDR policies and measures adopted by the international community and is highlighted by international human rights law.

There are various methods by which international crimes committed by child soldiers can be treated, each with its own strengths and weaknesses. However, I believe that the alternative means to the criminal trial ,before an international or national court, is to be preferred in the majority of cases, as they better respond to the principle of the best interest of the child, guarantee easier social reintegration and finally such mechanisms, such as cleansing rituals or Truth Commissions ,respect the local traditions and culture. The inclination to prefer these alternative systems to criminal justice takes into account the fact that child soldiers are , at the end of the day ,children and victims of the war, who must be protected as they have in turn suffered both physical and psychological damages and since the establishment of a formal trial against them could aggravate the situation in which they already find themselves. These rituals, of ancient origin such as the Gacaca, allow the establishment of a dialogue between the family of the victims and the perpetrators, and permit to the population, after the conflict, to go on with their lives and at the same time to the child soldiers to deal with the consequences of crimes committed. So, the ultimate goal of preventing the recurrence of armed conflict and the reintegration of child soldiers is guaranteed in most cases. An additional reason why such approaches, which fall within the definition of restorative justice, are to be preferred is that even though they were subject to a trial before national courts, it would be difficult to establish their criminal liability, because of the high number of defences that can be raised in their favour.

However, although member states are required to face the responsibility of child soldiers for crimes committed during their participation in the armed conflict, they must at the same time concentrate their efforts on prosecuting the individuals who allowed their involvement in the course of the conflict, through their recruitment. In fact, the presence and participation of children within armed groups as soldiers can only be arrested if those who first oblige them to take part are prosecuted and punished. The recruitment of children under the age of 15 is in fact prohibited by international humanitarian law and moreover this prohibition has been consolidated within the statutes of international courts, such as that of the ICC, ICTY and ICTR. The most important case in which this war crime, under art. 8 ICC Statute, was discussed related to Lubanga, who was subject to a legal proceeding before the International Criminal Court. This ruling had an important value as it allowed to specify which elements must necessarily exist and be verified for

the purposes of integrating the crime and also allowed to underline the seriousness of this practice now widespread all over the world, despite being condemned by international law. I also agree with the idea that the extensive interpretation that was adopted by the Judges of the Court in this circumstance had a vast value for the protection of the human rights of child soldiers. In fact any intervention or connection with respect to the armed conflict is condemned and not only the mere direct participation, which does not take into account all those children who do not serve the armed group in the front line, but carrying out other equally dangerous activities, such as espionage, prostitution or being forced to become sexual objects for other soldiers. An extensive interpretation of the rule that condemns the use of children ,under fifteen years old, for active participation in the conflict as a war crime, allows any circumstance which might endanger their lives to be condemned and also takes into account the different experiences and traumas experienced by girls and women recruited by armed groups, who are in most cases not deployed on the battlefield but forced to have sexual relationships with the commanders or to become their wives. In order, therefore, to avoid any kind of gender-based discrimination against child soldiers, it is necessary to adopt an approach which takes into account the different traumas to which boys and girls are exposed in such contexts, so that the latter are not less protected.

The last case-law analysed within the last chapter of the thesis pertains to one of the most important and powerful military commanders of the LRA, Dominic Ongwen. He presents himself as a person of controversial and ambiguous nature and status, both as a victim and perpetrator of international crimes against the civilian population and more in detail against children, who he recruited in violation of international humanitarian law and international criminal law. The ICC, which is responsible for judging international crimes, was faced with a case that had never been previously investigated and therefore had difficulties in verifying the existence of his criminal responsibility.

The difficulty of this specific case lies on the fact that Ongwen had been forcibly recruited when he was a child as a member of the LRA and thus had lost any possibility of living a normal childhood, of developing normal mental and intellectual abilities and of conceiving what behaviours are socially and civilly acceptable or not. He, like every other child soldier, was deprived of his human rights and lived in a climate of terror for most of his life, and in order to survive he had to adapt to the standards required by the life

within the rebel armed group. However, he has not always been just a child soldier, but he is currently an adult responsible for various war crimes and crimes against humanity, which cannot be ignored by the international community. The question that must be answered is therefore to what extent the ICC should have taken into account the experiences and traumas endured by Ongwen as a former child soldier and how they can influence his criminal liability.

In my opinion it is possible to evaluate, at least as a mitigating factor, the fact that the effects of recruiting do not disappear when they reach the age of eighteen years old, as claimed in the Lubanga case, and that therefore it is not certain that he was completely aware of the unlawfulness of his actions and of the deriving legal consequences. The defence of duress can also be considered a valid way to exclude his criminal liability, since on the basis of the evidence collected it is possible to prove that he was not totally free to act, but rather was under the strict control of Kony, who threatened to die every subject ready to rebel against his orders. Furthermore, even if Ongwen had decided to disobey him and therefore not to commit such atrocities, he would always have found someone else ready to take his place. Therefore, there is no answer, to the beforehand mentioned question, valid for all former child soldiers who have become adults responsible for international crimes, but it is always necessary to keep in mind the events that characterize the concrete case. During the trial the Court distanced itself, at least in part from what was previously argued in the Lubanga case, where it was repeatedly stressed that once the child became a soldier, the subject could no longer escape the traumas suffered. In fact, in the Ongwen case, having to find a meeting point between the need to protect the human rights of children and recognize the traumatic effects of recruiting and finally guarantee justice to the civilian population, it was forced to adopt a separation between the time when he was a child soldier and the time when he became an adult. The main difficulty in this respect is that child soldiers cannot be uniquely placed in the category of victims of international crimes, being contradictory and ambiguous in nature. The rigid divisions between victims and offenders established by international criminal law are therefore limiting.

To conclude as war represents a damage and obstacle to the effective enjoyment of human rights by children in general, the international community, especially the United Nations, must continue to commit to preventing the emergence of hostile relationships among and

within states. The protection of children must be seen as an absolute priority, as they represent the future of humanity and an instrument of growth of the States themselves.

"Let us take this opportunity to recapture our instinct to nourish and protect children. Let us transform our moral outrage into concrete action. Our children have a right to peace. Peace is every child 'right[296]*"*

Graça Machel

[296] Graça Machel, The impact of armed conflict on children (1996)

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