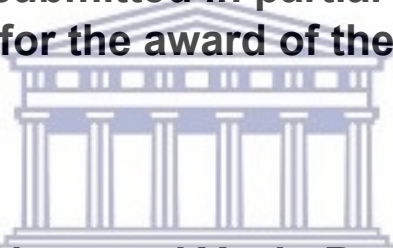


**The University of the Western Cape**

**Faculty of Law**

**Juvenile liability in armed conflicts: Determining the age of  
criminal responsibility for crimes relevant to International  
Humanitarian Law**

**Research Paper submitted in partial fulfilment of the  
requirements for the award of the LLM Degree**



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**Date: June 2022**

## Declaration

I, Muhammad Yasin Bray, declare that *Juvenile liability in armed conflicts: Determining the age of criminal responsibility for crimes relevant to International Humanitarian Law* is my own work, that it has not been submitted for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

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Date: 07 June 2022



Co-Supervisor: Prof. Letetia Van Der Poll

Signature: Letetia Van Der Poll

Date: 07 June 2022

## Acknowledgements

I would like to express my undying gratitude and appreciation for those who supported and guided me through the writing of this research paper.

Firstly, my sincere thanks to both Dr. Nortje and the late Prof. Van Der Poll for their indispensable encouragement, guidance and enlightenment throughout the completion of this paper. Absent their immeasurable knowledge and expertise, I would not have been able to navigate the previously uncharted waters of writing and completing my most challenging academic piece of work thus far. Dr. Nortje's patience and enthusiastic personality only made the challenge of working on the paper all the more straightforward and assured.

Not least, I would like to express my imperishable and heartfelt gratitude to the late Prof. Van Der Poll who, despite not being able to lend her full support during the writing of this paper due to ill-health, went out of her way to ensure the successful proposition of the paper and provided meaningful guidance whenever she could, and for that I am eternally grateful. May she enjoy a blissful rest in eternity.



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Lastly, I would also like thank my close friends and family who only encouraged and supported my efforts throughout my time as a student of the law. My dreams are only being made true due to their limitless love and foundational support.

## List of Abbreviations

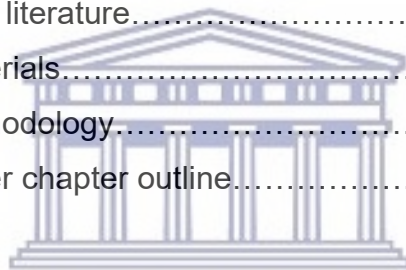
AP I	Additional Protocol I
AP II	Additional Protocol II
CORC	Committee on the Rights of the Child
CRC	Convention on the Rights of the Child
DRC	Democratic Republic of Congo
GCIII	Third Geneva Convention
GCIV	Fourth Geneva Convention
ICL	International Criminal Law
ICCPR	International Covenant on Civil and Political Rights
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
IHRL	International Human Rights Law
LRA	Lord's Resistance Army
MACR	Minimum age of criminal responsibility
SCSL	Special Court for Sierra Leone
UN	United Nations
UNHRC	United Nations Human Rights Committee
US	United States

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## CHAPTER 1

### 1. INTRODUCTION

#### 1.1 Problem Statement

International Law in general seems to saunter on the vague lines of the minimum age of criminal responsibility in armed conflicts. For example, in terms of International Human Rights Law (IHRL), as provided in the Geneva Conventions of 1949, various human rights are assigned legal protection to be effected by States. Additionally, International Humanitarian Law (IHL) provides for the prosecution of specified crimes relating to armed conflicts. However, an express legal determination on the age of criminal responsibility for international crimes in armed conflicts, such as war crimes, crimes against humanity and genocide, does not find codification in either legal regime. Additionally, the United Nations (UN) Convention on the Rights of the Child (CRC) does not specify a minimum age of criminal responsibility. Rather, it requires member States to set a minimum age of criminal responsibility in terms of Article 40 of the Convention itself.<sup>1</sup> Therefore, States are merely encouraged by international bodies such as the UN Committee on the Rights of the Child (CORC), to consider a minimum age of 16 but not below the age of 12.<sup>2</sup> Hence, there are certain legal gauges that are used to indemnify and secure children against legal liability. Children, for the purposes of this research paper, are those below the age of 18 years old.

However, the decision on whether or not to prosecute a child for crimes committed in armed conflict is left to the relevant State parties to decide. The fact that the age of criminal responsibility varies between different States,<sup>3</sup> highlights the potentially significant legal gap that exists in the international framework in outlining appropriate overarching sanctions for children in armed conflicts. Therefore, as the primary focus of this paper and the legal regime regulating the means and methods available to participants in armed conflicts, it may be beneficial for the legal regime itself, and for international law as a whole, for IHL to expand on the existing standards of criminal

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<sup>1</sup> Article 40(3)(a) of the Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577.

<sup>2</sup> CORC 'General comment No. 10 (2007): Children's Rights in Juvenile Justice' CRC/C/GC/10 (25 April 2007) para 32.

<sup>3</sup> CORC 'General comment No. 10 (2007): Children's Rights in Juvenile Justice' CRC/C/GC/10 (25 April 2007) para 30.

responsibility relating to the prosecution of children for international crimes in times of war.

## **1.2 Research Questions**

This research paper will seek to address the following three research questions. Firstly, this research paper will examine how IHL can accommodate an objective and appropriate standard for the age of criminal responsibility for children involved in crimes committed in armed conflicts. Secondly, would the relevant empirical psychological and neurological data on children provide the necessary factual content to determine an objective age of criminal responsibility? Lastly, in examining the relevant and developing international and domestic legal reconsiderations on how we charge and sentence children concerning the commission of crimes, this research paper will explore whether those standards can be effectively adopted as it relates to crimes associated with armed conflict.

## **1.3 Preliminary Argument**

This research paper, in answering the overall research question, will attempt to highlight viable avenues of enabling IHL to accommodate a standard for a minimum age of criminal responsibility. Both the empirical psychological data on children, the legal precedent existing in both international and domestic criminal law and the legal nexus that exists between them will be utilised as it should effectively inform such a determination. This research paper will firstly examine the existing international legal standards as it relates to juvenile justice to form a contextual basis. This would include, in addition to IHL, other international legal regimes such as International Criminal Law (ICL) and IHRL. In order to determine an objective standard for the age of criminal responsibility, this research paper will review contemporary neuroscience and psychological data providing information on brain development in differentiating the mental capacity, and ultimately the criminal capacity, of children from that of adults. Since the most notable developments in juvenile justice has come from various domestic precedent, this research paper will examine the most prominent judicial and legislative developments in different jurisdictions in informing an appropriate legal



standard for IHL. Such legislative and judicial developments would include those found in the United States (US) as it relates to the important US Supreme Court decisions of *Roper v Simmons* (2005),<sup>4</sup> *Graham v Florida* (2010)<sup>5</sup> and *Miller v Alabama* (2012),<sup>6</sup> and other such important landmark developments in various other jurisdictions that recognise the inherent difference between children and adults. Additionally, important international cases concerning the prosecution of Omar Khadr and Dominic Ongwen will be analysed in highlighting the practical directions one can navigate concerning juvenile justice and the formulation of a more progressive system moving forward. In comparatively analysing these developments, this paper will attempt to determine how those developing standards can be assimilated into IHL, so as to enable the legal regime to form the legislative motive force to stimulate universal consilience within the international legal order in relation to the minimum age we assign full criminal responsibility to children.

#### 1.4 Views from the literature

The fundamental issue at hand is the broad scope of discretion that is afforded to States by the absence of a common and universally accepted international minimum age of criminal responsibility. The relative application of this standard varies widely depending on the particular State, which can operate against an objective standard of juvenile justice and the principle of the “best interest of the child”. Ann Skelton and Charmain Badenhorst noted that States like Australia sets a minimum age of 10 years old, provided the prosecution can prove the child knew or had the mental capacity to know the wrongfulness of his/her actions.<sup>7</sup> Standards like Australia’s operate in stark contrast to what was reported by John Muncie. In his 2013 article, he reported that countries like the US have the minimum age set as low as 6 years old in North Carolina, or like in the case of Iran, the age of criminal responsibility is set in

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<sup>4</sup> *Roper v Simmons* 543 US 551 (2005).

<sup>5</sup> *Graham v Florida* 560 US 48 (2010).

<sup>6</sup> *Miller v Alabama* 567 US 460 (2012).

<sup>7</sup> Skelton A, Badenhorst C ‘The Criminal Capacity of Children in South Africa: International Developments & Considerations for a Review’ *The Child Justice Alliance* 2011 available at <https://dullahomarinstitute.org.za/childrens-rights/Publications/Other%20publications/The%20criminal%20capacity%20of%20children%20in%20South%20Africa%20-%20International%20developments%20and%20considerations%20for%20a%20review.pdf/view> (accessed 6 October 2021).

accordance to what is regarded as the age of puberty, which is 9 years old for boys and 15 years old for girls.<sup>8</sup> According to this report, most countries do not even have a set minimum age of criminal responsibility.<sup>9</sup> Despite the absence of an international standard for a minimum age, laws like these go against expert consensus and the passive international laws regulating juvenile justice. Since armed conflicts can occur across jurisdictions with differing standards on juvenile justice, it only stands to reason that an objective and universally accepted standard for an age of criminal responsibility be set in order to fill the gap existing in international juvenile justice in armed conflicts.

While there are notable literary works covering the age of criminal responsibility in international law and specifically IHL, there has been little attempt to expressly weld the empirical scientific data with the existing legal complexities to uncover avenues for determining a minimum age of criminal responsibility for crimes relevant to armed conflicts. Those who have covered this specific topic have mainly examined the existing domestic and international legal standards pertaining to this issue without making an adequate and express recommendation on the standard itself.

For example, Matthew Happold discussed the approaches of various national and international bodies, such as the Statute of the Special Court for Sierra Leone (SCSL Statute) and the International Criminal Tribunal for the former Yugoslavia (ICTY), in treating children as war criminals. Happold noted that it may be appropriate to allow States discretion when prosecuting children charged with crimes relating to armed conflict.<sup>10</sup> However, without making any express determination as to what would be the appropriate approach, noted that the age of criminal responsibility plays a crucial role in determining whether a child can be prosecuted for international crimes, and that States are likely provided too much discretion in terms of the broad applicable international legal standards as it relates to setting a minimum age of criminal responsibility.<sup>11</sup> Additionally, in investigating international law's attitude towards the prosecution of children for war crimes, Noëlle Quénivet recognised the broad scope of discretion regimes such as IHL, ICL or IHRL provide for States making use of the

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<sup>8</sup> Muncie J 'International Juvenile (In)justice: Penal Severity and Rights Compliance' (2013) 2 *International Journal for Crime, Justice and Social Democracy* 50.

<sup>9</sup> Muncie (2013) 50.

<sup>10</sup> Happold M 'The Age of Criminal Responsibility in International Criminal Law' 2006 available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=934567](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=934567) (accessed 6 October 2021).

<sup>11</sup> Happold (2006).

rules and policies contained in various international instruments in holding children criminally responsible for war crimes.<sup>12</sup> The author puts forward avenues for limiting the scope of State discretion in this regard to “extreme cases only”, with an approach that is more educative in its intentions than purely punitive.<sup>13</sup> However, in providing a determination on the age of criminal responsibility, Quénivet merely states that no person under the age of 16 should be prosecuted for war crimes,<sup>14</sup> which is not that much different from what already exists in IHL.

Similarly, in examining the value of a set common minimum age of criminal responsibility in international law, Giulia Botteghi notes that the ever present use of children in armed conflicts justifies an adoption of such a legally binding and universally recognised international standard by States participating in the international community.<sup>15</sup> However, Botteghi points out the failure of various important international instruments and bodies such as the CRC, the CORC, the Commission of the European Union and the International Covenant on Civil and Political Rights in codifying an appropriate international standard for the age of criminal responsibility. Rather they provide laws and regulations that passively address the issue of juvenile justice by providing basic parameters, with little to no consideration of the relevant psychological factors at play, within which States can exercise their relative discretion in creating such a standard at a national level.<sup>16</sup>

Such a passive approach, as noted by Botteghi, only creates a multitude of varying criterion by which children are judged when committing international crimes in relation to armed conflicts. Therefore, Botteghi asserts that, in accordance with existing IHL standards, children under the age of 15 should be precluded from criminal charges for crimes committed in armed conflicts.<sup>17</sup> Furthermore, children between the ages of 15 and 18 should be brought before a competent court or tribunal that applies the principle of the “best interest of the child” and all substantive and procedural rights contained in

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<sup>12</sup> Quénivet N ‘Does and Should International Law Prohibit the Prosecution of Children for War Crimes?’ (2017) 28 *European Journal of International Law* 440.

<sup>13</sup> Quénivet (2017) 455. See also Maher G ‘Age and Criminal Responsibility’ (2005) 2 *Ohio State Journal of Criminal Law* 509-510.

<sup>14</sup> Quénivet (2017) 455.

<sup>15</sup> Botteghi G *The protection of children in armed conflicts: The contradictory nature of child soldiers* (unpublished thesis, Luiss School of Law, 2020) 39.

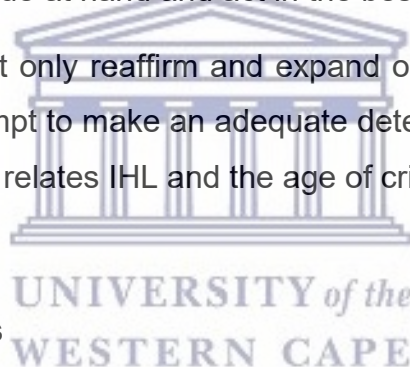
<sup>16</sup> Botteghi (2020) 57.

<sup>17</sup> Botteghi (2020) 162.

international law.<sup>18</sup> This position is echoed by Brittany Ursini, who in proposing a solution that attempts to balance the need for accountability and the move towards rehabilitation, puts forward an international minimum age of criminal responsibility of 15 and the establishment of an international juvenile criminal tribunal adjudicating over children between the ages of 15 and 18 years old based on traditional international standards.<sup>19</sup> Such a tribunal would have to serve in the best interest of the child, which includes holding such a child criminally liable for crimes committed with full awareness of the consequences.<sup>20</sup>

However, as much as this paper's author agrees with the basic premises of these assertions, the legal binary that would be created of children below 15 and those between the ages of 15 and 18 would only serve to paper over the cracks in filling the gap that exists in relation to juvenile justice in armed conflicts. A more detailed legal framework that would be tailored to address the individual mental capacities of children within specified groups as indicated by empirical psychological data is needed to meaningfully address the issue at hand and act in the best interest of the child.

This research paper, will not only reaffirm and expand on the issues brought up by these authors, but also attempt to make an adequate determination on the standards that should ideally exist as it relates IHL and the age of criminal responsibility.



## 1.5 Research Materials

This research paper will be an interdisciplinary study that will address the imbricated nature of the issue at hand. Some of the primary disciplines include law, criminology, anthropology, psychology and other relevant facets of study. In order to uncover viable avenues of setting an appropriate standard for a minimum age of criminal responsibility, empirical data and important observations contained in the social sciences needs to be consulted in regulating the behaviours of those considered to be the most vulnerable in times of armed conflict. This research paper will utilise

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<sup>18</sup> Botteghi (2020) 162. See also Musila GM 'Challenges in establishing the accountability of child soldiers for human rights violations: Restorative justice as an option' (2005) 5 *African Human Rights Law Journal* 333.

<sup>19</sup> Ursini B 'Prosecuting Child Soldiers: The Call for an International Minimum Prosecuting Child Soldiers: The Call for an International Minimum Age of Criminal Responsibility Age of Criminal Responsibility' (2015) 89 *St. John's Law Review* 1043-1045.

<sup>20</sup> Ursini (2015) 1046.

international and domestic case law, journal articles and psychological studies, which will provide both qualitative and quantitative information in informing the legal study. It will make use of institutional reports from both domestic and international bodies and organisations. The research paper will include information from international and domestic law reports and legislation relating to the topic at hand. Additionally, books and various internet sources will also be made use of in writing this research paper.

## **1.6 Research Methodology**

This research paper will consist of qualitative information, extracted from studies, journals and commentaries on the relationship between the decision making, cognitive skills, emotional functions and maturation of the prefrontal cortex and the respective legal systems that have made notable differentiations when it comes to the legal variable of age. It will be an informative piece, analysing the primary substantive and procedural content of this relationship in order to possibly accommodate a legal standard on the age of criminal responsibility in IHL.

## **1.7 Research paper chapter outline**

Chapter 2 of the research paper will address the existing legal complexities surrounding the issue at hand. The current legal provisions concerning the status and prosecution of juvenile persons in armed conflicts will be discussed in this chapter, which includes an examination of the varying approaches to the legal age measures applied in IHL, ICL and IHRL.

Chapter 3 of this research paper will review the contemporary psychological and neurological data on juvenile brain development in demonstrating its relevance to evolving juvenile justice standards.

Chapter 4 of this research paper will attempt to further inform IHL by analysing the progressive legal imbrication of the science on juvenile brain development and child justice standards, at both a domestic and international level, in uncovering an appropriate age of criminal responsibility.

Chapter 5 of this research paper will contain a summary of the research paper as a whole. It will consist of conclusions and recommendations based on the evaluated information put forward in the paper. This chapter will be followed by a bibliography written in accordance with faculty standards.



## CHAPTER 2

### 2. THE EXISTING INTERNATIONAL LEGAL GAUGES FOR THE AGE OF CRIMINAL RESPONSIBILITY

Age limits, as defined and applied in various domestic and international legal frameworks, can be branded as an essential legal yardstick that can dictate the various sorts of sanctions and legal responses children are made subject to.<sup>21</sup> It can affect a child's ability to enter into contractual agreements, make financial and health related choices independent from their legal guardians, participate in democratic processes and ultimately the ways in which they are dealt with in various criminal justice systems.<sup>22</sup>

In setting such age limits, a balance needs to be struck between the need to define the lines we draw in relation to express age limits, and the rights and privileges that such standards impede and/or promote in various different aspects of a child's life.<sup>23</sup> It has been asserted that instituting minimum ages serves two important legal functions. Firstly, to legally harbour the protected interests of children in safeguarding them from notable harm.<sup>24</sup> Secondly, to provide legal criterion and specifications for the appropriate legal and mental capacity presumed to be possessed by children of varying ages.<sup>25</sup>

In relation to criminal capacity, which is what this paper will be exclusively concerned with, a minimum age of criminal responsibility (MACR) ultimately determines the age at which the law identifies the appropriate benchmark for which children will be presumed to possess the emotional, mental and intellectual maturity necessary to appreciate the consequences of their actions and be held fully responsible for such

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<sup>21</sup> Leenknecht J, Put J, Veeckmans K 'Age Limits in Youth Justice: A Comparative and Conceptual Analysis' (2020) 1 *Erasmus Law Review* 13.

<sup>22</sup> Ehmke E, Farrow A 'Age Matters! Exploring age-related legislation affecting children, adolescents and youth' November 2016 available at [https://www.youthpolicy.org/library/wp-content/uploads/library/2016\\_YPL\\_Working\\_Paper\\_4\\_Age\\_Matters\\_Eng.pdf](https://www.youthpolicy.org/library/wp-content/uploads/library/2016_YPL_Working_Paper_4_Age_Matters_Eng.pdf) (accessed 31 January 2022).

<sup>23</sup> Ehmke, Farrow (2016).

<sup>24</sup> CRIN 'Age is Arbitrary: Setting Minimum Ages' April 2016 available at [https://archive.crin.org/sites/default/files/discussion\\_paper\\_-\\_minimum\\_ages.pdf](https://archive.crin.org/sites/default/files/discussion_paper_-_minimum_ages.pdf) (accessed 31 January 2022).

<sup>25</sup> CRIN (2016).

actions.<sup>26</sup> As such, the MACR itself affects the age at which children will be subjected to the often harsh realities of criminal justice systems in various international and domestic jurisdictions, which can significantly impede on their long-term development, rights and opportunities.<sup>27</sup>

Therefore, it is clear that setting an objective and appropriate MACR would play a crucial role in governing the behaviours, and ultimately the lives, of children and providing special protection for their distinctive interests in navigating varying criminal and juvenile justice systems. Hence, such standards should ideally be addressed with caution and with a significant degree of uniformity and certainty. However, there exists no internationally uniform consensus on this topic, but rather a diverse array of domestic approaches which can vary dramatically depending on the State itself.<sup>28</sup>

A broad scope of variation has been documented as it relates to the MACR of different frameworks, which showcases the fragmented nature of this topic on a global scale. According to earlier reports on this matter, out of 90 countries around the world the MACR varied between the ages of 6 and 18 years old, with four of those countries having no MACR at all (Brunei, Panama, Saudi Arabia and various states within the United States of America).<sup>29</sup> The age that appeared to be the most common was 14 years old and the median age was shown to be 13.5 years old across the relevant 90 States that were surveyed.<sup>30</sup>

The global discrepancies that exist and persist as it relates to the different approaches States have adopted in setting a MACR for children living within their respective jurisdictions can primarily be homogenised through international legislative action. Various important international instruments and bodies, within different international legal regimes, have made positive strides in attempting to codify and determine an appropriate international standard for the age of criminal responsibility.<sup>31</sup>

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<sup>26</sup> Penal Reform International 'Justice for Children Briefing No. 4: The minimum age of criminal responsibility' February 2013 available at [https://cdn.penalreform.org/wp-content/uploads/2013/05/justice-for-children-briefing-4-v6-web\\_0.pdf](https://cdn.penalreform.org/wp-content/uploads/2013/05/justice-for-children-briefing-4-v6-web_0.pdf) (accessed 31 January 2022).

<sup>27</sup> Penal Reform International (2013).

<sup>28</sup> Pillay L 'The minimum age of criminal responsibility, international variation, and the Dual Systems Model in neurodevelopment' (2019) 31 *Journal of Child and Adolescent Mental Health* 225.

<sup>29</sup> Hazel N 'Cross-national comparison of youth justice' *Youth Justice Board* 2008 available at [https://dera.ioe.ac.uk/7996/1/Cross\\_national\\_final.pdf](https://dera.ioe.ac.uk/7996/1/Cross_national_final.pdf) (accessed 31 January 2022).

<sup>30</sup> Hazel (2008).

<sup>31</sup> Ferreira N 'Putting the Age of Criminal and Tort Liability into Context: A Dialogue between Law and Psychology' (2008) 16 *The International Journal of Children's Rights* 30.



The core principles and norms of international law covering a MACR for child offenders are primarily sourced from a number of key international instruments which include the International Covenant on Civil and Political Rights (ICCPR), UN Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), the Geneva Conventions, the CRC and various other instruments spanning across the three primary international legal regimes of IHRL, ICL and IHL.<sup>32</sup>

However, as noted above, the problematic and broad scope of discretion IHRL, ICL and IHL provides for States making use of the inconclusive rules and policies contained in various international instruments in holding children criminally responsible for crimes, complicates any acculturation of principles relating to juvenile justice into international law, especially as it relates to armed conflict.<sup>33</sup> The notable issues and positive developments of these instruments will be discussed and expanded upon in analysing the existing legal standards pertaining to the MACR in international law.

## 2.1 The age of criminal responsibility in International Humanitarian Law

IHL as a legal regime, regulates the means and methods available to participants in international and non-international armed conflicts so as to protect persons and/or property that are adversely affected by said armed conflicts.<sup>34</sup> This protection also extends to children as will be expanded on below.

As the primary subject of attention in this paper, it is in the opinion of the author that IHL should be placed at the forefront of making a determination on the issue of the MACR. This is due to the fact that IHL superintends the extremities of war, which can be utilised by the international legal order as the most exaggerated legal template for addressing the issue of formulating an internationally acceptable MACR. This assertion will be further fleshed out in later chapters. However, IHL does suffer from the unfortunate legal dereliction of failing to construct a comprehensive and

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<sup>32</sup> Xiaorong G, Xiang G 'China / Criminal Responsibility of Minors in National and International Legal Order' (2004) 75 *International Review of Penal Law* 213.

<sup>33</sup> Quénivet (2017) 436.

<sup>34</sup> ICRC 'International Humanitarian Law and International Human Rights Law: Similarities and differences' January 2003 available at <https://www.icrc.org › file › ihl-and-ihrl> (accessed 8 February 2022).

specialised regime concerning the adjudication of children in the heightened and violent circumstances of armed hostilities. In consequence of that, IHL does not contain a conclusive and defined determination on the axial pre-requisite standard of a MACR.<sup>35</sup> Although, it is not all silent on the matter of juvenile justice and the special needs of children.

### **2.1.1 The Geneva Conventions of 1949 and their supplementary Additional Protocols of 1977**

At a fundamental level, IHL provides general and special protection to children in relation to the protection afforded to civilians not taking part in hostilities. This includes various general guarantees under the Geneva Conventions of 1949 and the Additional Protocols of 1977 such as the right to life, prohibitions on coercion, the principle of distinction and the prohibition on attacks against civilians.<sup>36</sup> Furthermore, in conformity with state practice, it is considered a norm of customary IHL that children affected by armed conflict are made eligible for special respect and protection in both international and non-international armed conflicts.<sup>37</sup>

Such special protections include the prohibition on children under the age of 18 from being subjected to the death penalty for offences committed during armed conflicts.<sup>38</sup> Yet, outside of assigning such fundamental guarantees to children and expressly providing for their exclusion from capital punishment, the Geneva Conventions make no distinction between undertaking criminal actions against adults from that of children.<sup>39</sup>

The Additional Protocols of 1977, as the title suggests, is not a treaty of independent status, as it serves the purpose of supplementing the already existing Geneva

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<sup>35</sup> Office of the Special Representative of the Secretary-General for Children and Armed Conflict *Children and Justice During and in the Aftermath of Armed Conflict Working Paper No.3* (2011) 34.

<sup>36</sup> ICRC 'Legal Protection of Children in Armed Conflict' available at <file:///C:/Users/peach/AppData/Local/Temp/children-legal-protection-factsheet.pdf> (accessed 8 February 2022).

<sup>37</sup> Henckaerts JM & Doswald-Beck L *Customary International Humanitarian Law: Volume 1, Rules* (2005) 479.

<sup>38</sup> Article 68 of the Fourth Geneva Convention of 1949. See also Henckaerts JM & Doswald-Beck L (2005) 481-482.

<sup>39</sup> McQueen A 'Falling Through the Gap: The Culpability of Child Soldiers Under International Criminal Law' (2019) 94 *Notre Dame Law Review Online* 108.

Conventions.<sup>40</sup> Therefore, as expected of such treaties, it provides further legislative sharpness as it relates to the principles and standards concerning the treatment of children during times of war, while leaving much to be desired in relation to their culpability.<sup>41</sup> Both Additional Protocol I (API) and Additional Protocol II (APII) provides requirements for the enactment of special protections to be afforded to children below the age of 15 who engage and participate in both international and non-international armed conflict.<sup>42</sup>

In fleshing out the special protection and treatment afforded to children in international armed conflict, Article 77 of API provides that children, in accordance with their age, are to be handled with special respect and safeguarded against all forms of indecent assault, while also provided with the necessary care and aid.<sup>43</sup> Moreover, in terms of Article 4 of APII, the special protection stipulated in Article 77 of API is extended to children in non-international armed conflicts as well.<sup>44</sup>

Due to a lack of consensus on the matter at the time, the word “children” in Article 77 was intentionally left undefined by the drafters so as to concede legal ground to the national laws and traditions of the relevant parties to a conflict to deliberate on and ultimately determine.<sup>45</sup> However, as recognised by the International Committee of the Red Cross (ICRC), at the time there was some agreement that anyone below the age of 15 did not possess the human faculties to be considered anything other than a child for the purposes of the treaty, and subsequently deserving of special consideration.<sup>46</sup>

Despite these legislative safeguards and specific recognition of the unique character of children's needs and participation in armed conflicts, no express provision or criminal code exists that exempts children from criminal culpability for acts committed during armed conflicts.<sup>47</sup> Instead, IHL utilises numerous laws and principles that prescribe preferential treatment and age restrictions based on unique protections

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<sup>40</sup> Pilloud C, Sandoz Y, Swinarski C & Zimmermann B (eds) *Commentary on the Additional Protocols: of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987) 116.

<sup>41</sup> McQueen (2019) 108.

<sup>42</sup> Lafayette E 'The Prosecution of Child Soldiers: Balancing Accountability with Justice' (2013) 63 *Syracuse Law Review* 302.

<sup>43</sup> Article 77(1) of Additional Protocol I of 1977.

<sup>44</sup> Article 4(3) of Additional Protocol II of 1977.

<sup>45</sup> Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: Geneva (1974-1977) 'Fourth Session: Committee III Report' CDDH/407/Rev.1 (Geneva, 17 March-10 June 1977) para 63.

<sup>46</sup> Pilloud, Sandoz, Swinarski & Zimmermann (1987) 899-900.

<sup>47</sup> Quénivet (2017) 436.

granted to children, which some have recognised as a substitute for an express determination laying forth conclusive age limits for criminal culpability.<sup>48</sup>

Demonstrations of this can be found within certain articles contained in the Geneva Conventions. According to Article 14 of the Fourth Geneva Convention (GCIV), hospitals and safety zones may be established to shelter children under the age of 15 from the consequences of war, among other concerns.<sup>49</sup> Additionally, Article 51 of GCIV provides that obligatory labour for persons under the age of 18 is prohibited from being enforced by occupying authorities.<sup>50</sup>

Nevertheless, there appears to be an agreement within the Geneva Conventions and its Additional Protocols that the age of 15 indicates a particular level of maturity, which suggests that those under the age of 15 lack the essential maturity, necessitating the application of provisions that protect those persons' unique interests. In supplementing this rule, Article 77 of the API forbids the recruitment of children under the age of 15 into the armed services and compels States to enrol children between the ages of 15 and 18 with preference to the descending order in which they were born.<sup>51</sup> Additionally, in further expanding on these legislative sentiments, Article 4 of APII ventures further by outright forbidding the enlistment and direct or indirect engagement of children under the age of 15 in hostilities.<sup>52</sup>

Since it is demonstratively presumed within IHL that children under the age of 15 cannot partake in hostilities, it follows to reason that, as a starting point, minors under this age restriction lack the internal psychological, physical, and moral capacities to grasp the implications of their conduct and/or participation in armed conflict.<sup>53</sup> However, without expressly outlining a MACR within these provisions, all it simply creates is a presumption that juveniles under the age of 15 cannot be held legally accountable for criminal offences in armed conflicts, whilst granting legal leeway for children beyond the age of 15 to be held criminally liable for such conduct.<sup>54</sup>

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<sup>48</sup> Pictet JS (ed) *The Geneva Conventions of 12 August 1949 commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (1958) 285-286.

<sup>49</sup> Article 14 of the Fourth Geneva Convention of 1949.

<sup>50</sup> Article 51 of the Fourth Geneva Convention of 1949.

<sup>51</sup> Article 77(2) of Additional Protocol I of 1977.

<sup>52</sup> Article 4(3)(c) of Additional Protocol II of 1977.

<sup>53</sup> Lafayette (2013) 303.

<sup>54</sup> Office of the Special Representative of the Secretary-General for Children and Armed Conflict *Children and Justice During and in the Aftermath of Armed Conflict Working Paper No.3* (2011) 34-35.

Such legal inadequacies provide little enlightening clarity to the discourse surrounding this issue as a whole. This uncertainty ultimately affects the international adjudicative measures applicable to children in contact with the law, which only hinders on any meaningful preclusion of juveniles who could have to bear full responsibility for infringements of IHL.<sup>55</sup>

## 2.2 The age of criminal responsibility in International Criminal Law

ICL is generally defined as the subset of public international law which focuses on the actions of individuals deemed and allocated as crimes within international law itself.<sup>56</sup> It regulates, prohibits and sanctions conduct which is in the international community's best interests to investigate, prosecute and ultimately punish.<sup>57</sup>

The international legal instruments that make up this body of law outlines and demarcates the procedures, mechanisms and subject-matter jurisdiction for various international crimes which include genocide, war crimes and crimes against humanity.<sup>58</sup> However, as with other international legal regimes, ICL does not expressly address the issue of determining the minimum age at which children would be held criminally liable for such codified international crimes.<sup>59</sup> For example, the ICTY and the International Criminal Tribunal for Rwanda have no rules or mechanisms for determining a MACR and have never prosecuted anybody under the age of 18.<sup>60</sup> Therefore, many academics have asserted that the continued absence of an internationally accepted MACR complicates and hinders the development of a conclusive stance on the individual responsibility of children within ICL itself.<sup>61</sup> The hindrance itself stems from the requisite nature of such a standard in outlining the

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<sup>55</sup> Robinson JA 'The right of child victims of armed conflict to reintegration and recovery' (2012) 15 *Potchefstroom Electronic Law Journal* 57-58.

<sup>56</sup> International Criminal Law Services 'What is International Criminal Law?' 2018 available at <https://iici.global/0.5.1/wp-content/uploads/2018/03/icls-training-materials-sec-2-what-is-intl-law2.pdf> (accessed 7 February 2022).

<sup>57</sup> ICRC 'General principles of international criminal law' available at <file:///C:/Users/peach/AppData/Local/Temp/general-principles-of-criminal-law-icrc-eng.pdf> (accessed 7 February 2022).

<sup>58</sup> Marchuk I *The Fundamental Concept of Crime in International Criminal Law: A Comparative Law Analysis* 1 ed (2014) 70.

<sup>59</sup> Podcameni AP *The Contribution of the Special Court for Sierra Leone to the Law on Criminal Responsibility of Children in International Criminal Law* (unpublished Doctor of Philosophy thesis, Florida International University, 2017) 111.

<sup>60</sup> Penal Reform International (2013).

<sup>61</sup> Podcameni (2017) 112.

necessary criterion on which to attribute criminal responsibility to those under the age of 18 years old.<sup>62</sup>

Instead, as will be discussed below, it would seem that within the procedural and substantive content of ICL, such as the SCSL Statute and the Rome Statute of the International Criminal Court (ICC Statute), exists a similar abstract understanding to that of the other legal regimes of the unique interests of children who find themselves in contact with the law.<sup>63</sup>

### 2.2.1 The Rome Statute of the International Criminal Court

Despite the general passive consensus that the prosecution of children under 18 for actions such as war crimes runs counter to international law, there exists no universal and conclusive principle addressing this issue within ICL and its court Statutes.<sup>64</sup> The notable and evolving standards concerning the attitudinal deviation from prosecuting children for both domestic and international crimes were initially avoided within ICL.<sup>65</sup> However, the first attempt at codifying a MACR within ICL can be found in Article 26 of the ICC Statute, which was more procedural than substantive in nature.<sup>66</sup>

According to Article 26 of the ICC Statute, the International Criminal Court does not possess jurisdiction over any person below the age of 18 years old.<sup>67</sup> While not explicitly defining a MACR or what a child is in terms of the Statute, Article 26 is regarded to have outlined the Statutes' prosecution threshold for those below that particular age limit.<sup>68</sup> Furthermore, in relation to Article 6(e) of the ICC Statute, the Prosecutor of the ICC stated that its office regards "children" as those below the age

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<sup>62</sup> Podcameni (2017) 112-113.

<sup>63</sup> Neal KL 'Child protection in times of conflict and children and international criminal justice' (2015) 44 *Georgia Journal of International and Comparative Law* 634-636.

<sup>64</sup> Debarre AS 'Rehabilitation and Reintegration of Juvenile War Criminals: A De Facto Ban on their Criminal Prosecution' (2015) 44 *Denver Journal of International Law and Policy* 10.

<sup>65</sup> Happold (2006).

<sup>66</sup> Happold (2006).

<sup>67</sup> Article 26 of the Rome Statute of the International Criminal Court.

<sup>68</sup> Amann DM 'The Policy on Children of the ICC Office of the Prosecutor: Toward greater accountability for Crimes against and affecting Children' (2019) 101 *International Review of the Red Cross* 542.

of 18 (in line with the CRC's definition of a child), in interpreting the elements of the forcible transfer of children as a codified crime of genocide.<sup>69</sup>

Additionally, within various other provisions of the ICC Statute, can be found references to the special needs of children and age limits that seem to be based on some level of condemnation for actions taken against children which are contrary to those special needs and international law. For example, in Article 8 of the Statute, conscripting children below the age of 15 into national armed forces or deploying them to participate in hostilities of both an international and non-international character, is categorised as a war crime for the purposes of the Statute.<sup>70</sup> This is in recognition of the various tasks children may be assigned to in armed forces that would inherently and disproportionately impede on their special needs.<sup>71</sup>

This jurisdictional solution put forward by the ICC Statute is the result of the disaccord that was present during the drafting of the provision itself.<sup>72</sup> This lack of consensus centred on reservations which propounded the inability of the court to cater to the eventual push for a special regime for juvenile offenders, and the inherent friction a restrictive MACR would have with various domestic frameworks.<sup>73</sup>

However, since then, as indicated in the Office of the Prosecutor's 2016 Policy on Children, the Office has moved towards adopting a child-sensitive approach that takes account of children's innate vulnerabilities and capabilities based on the CRC's principles of non-discrimination, the best interest principle, the right to life and other rights.<sup>74</sup> This approach requires assessments in relation to the child's age, maturity, experience and such factors as the child's social and cultural context.<sup>75</sup>

Although, this approach seemingly attempts to balance the inherent and unique interests of children with the procedures and interests of others typically dealt with by the Office. It stated, contrary to the claims that children are typically faultless, that

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<sup>69</sup> International Criminal Court Office of the Prosecutor 'Policy on Children' 2016 available at [https://www.icc-cpi.int/iccdocs/otp/20161115\\_otp\\_icc\\_policy-on-children\\_eng.pdf](https://www.icc-cpi.int/iccdocs/otp/20161115_otp_icc_policy-on-children_eng.pdf) (accessed 8 February 2022).

<sup>70</sup> Article 8(2)(b)(xxvi) and Article 8(2)(e)(vii) of the Rome Statute of the International Criminal Court.

<sup>71</sup> International Criminal Court Office of the Prosecutor (2016).

<sup>72</sup> Ambos K 'General Principles of Criminal Law in the Rome Statute' (1999) 10 *Criminal Law Forum* 22.

<sup>73</sup> Eger SC *The Prosecution of Children before the International Criminal Court: A proposal for reform* (unpublished Master's thesis, University of Amsterdam, 2010) 29.

<sup>74</sup> International Criminal Court Office of the Prosecutor (2016).

<sup>75</sup> International Criminal Court Office of the Prosecutor (2016).

children may be perpetrators or involved in the commission of crimes and are not only victims.<sup>76</sup>

The ICC Statute does demonstrate some degree of substantive proscription for the recognition that age plays a crucial and definitional role in holding individuals criminally responsible for international crimes. However, the ICC Statute primarily provides for passive jurisdictional solutions to a problem that seems to require more substantive engagement with the developing discourse in international law concerning the protection of children.

The solution offered by the ICC Statute circumvents the problem of setting a MACR and alternatively has the effect of yielding legal ground to national law in fully determining the applicative boundaries in prosecuting children for international crimes, including those relating to armed conflict.<sup>77</sup> However, as demonstrated by the Office of the Prosecutor, the ICC Statute is capable of absorbing new and developing standards of juvenile justice as conceptualised by other international legal regimes, which the author would regard as a pre-requisite for meaningful adaptation to evolving global norms.



### **2.2.2 The Statute of the Special Court for Sierra Leone**

From a historical perspective, the Special Court for Sierra Leone (SCSL) was the first international court that made express accommodation for persons under the age of 18 within its jurisdiction.<sup>78</sup> However, the nuanced contributions it has made to juvenile justice and the discourse surrounding the MACR does come with some inadequacies.

According to Article 7(1) of the SCSL Statute, the Court does not have jurisdiction over those below the age of 15, and those between the ages of 15 and 18 will be dealt with in accordance with factors such as age, maturity and international human rights standards concerning children.<sup>79</sup> Therefore, the SCSL Statute allows for the prosecution of those over the age of 15 in accordance with certain special conditions provided for in both the Statute itself and international law. These special conditions

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<sup>76</sup> Amann (2019) 543.

<sup>77</sup> Penal Reform International (2013).

<sup>78</sup> Podcameni (2017) 121.

<sup>79</sup> Article 7(1) of the Statute of the Special Court for Sierra Leone.



allowed for the rehabilitation and reintegration of child offenders while legally shielding them from the punishment of imprisonment.<sup>80</sup>

However, despite the fact that the SCSL Statute allowed for the prosecution of those below the age of 18, there were expressions of hesitancy in actually following through with such competencies. In terms of Article 1 of the SCSL Statute, the Court possessed the competency to prosecute those, “who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law”.<sup>81</sup>

The term ‘greatest responsibility’ has been interpreted as having passively included children between the ages of 15 and 18 years old who commit crimes with the appropriate level of gravity and seriousness.<sup>82</sup> In contradiction to this, the Prosecutor of the Special Court expressed a refusal to prosecute juvenile offenders under the age of 18, as they are incapable of bearing the above-mentioned “greatest responsibility” for such serious violations.<sup>83</sup>

As with the ICC Statute, the SCSL Statute has over time been revisited and reinterpreted in accordance with the evolving standards of international juvenile justice. For its time, the SCSL Statute was a crucial actor in modernising the legal mechanisms available for children in circumstances as exceptional as armed conflict. In light of that acknowledgement, the jurisdictional age limitations and the express accommodations for the special adjudication of children under 18 still fails to draw a conclusive outline on a MACR.

Though the recognition that children below the age of 18 do not possess the same psychological faculties as adults is a positive stance, merely recognising that position without substantively addressing the need for a refined framework surrounding an established MACR can be construed as a deficiency. As with the international instruments discussed above, the simple commitment of refraining from prosecuting children under 18 can produce the unfortunate consequence of encouraging the

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<sup>80</sup> McQueen (2019) 116.

<sup>81</sup> Article 1 of the Statute of the Special Court for Sierra Leone.

<sup>82</sup> UN Security Council ‘Report of the Secretary-General on the establishment of a Special Court for Sierra Leone’ S/2000/915 (4 October 2000) para 31.

<sup>83</sup> UNICEF Innocenti Research Centre *Prosecuting International Crimes against Children: the Legal Framework - Innocenti Working Paper No. 2010-13* (2010) 25-26.

recruitment of children within this “responsibility free” age period or the prosecution of children below internationally acceptable levels.<sup>84</sup>

### **2.3 The age of criminal responsibility in International Human Rights Law**

IHRL appears to be the corpus of law that concerns intrinsic entitlements involving behaviours or benefits that may be claimed from a State government by individuals operating within that government's sphere of jurisdiction, in its broadest sense.<sup>85</sup> It is primarily based on Enlightenment-era principles regarding the need for just relations between a State's citizens, which of course includes children, and their government.<sup>86</sup>

Additionally, as with IHL, IHRL applies in situations of armed conflict with the majority of rights being derogable save for a few exceptions.<sup>87</sup> For the purposes of this paper, the three chief human rights instruments, which are the ICCPR, CRC and The Beijing Rules, will take centre stage as the cardinal points of focus as it relates to IHRL's measures concerning the rights and privileges of children and their respective contributions to the discourse relating the MACR.

#### **2.3.1 The fundamental norms and standards protecting juvenile offenders under International Human Rights Law**

As will be examined below, IHRL does indeed contain provisions and measures which actualise the legal harbouring of the best interests of children that are unaccompanied by measures that completely outlaw the prosecution of children altogether.<sup>88</sup> It achieves this by providing for the express protection of children who find themselves at the mercy of penal proceedings and the punishments that are operationally handed

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<sup>84</sup> Ursini (2015) 1032-1033.

<sup>85</sup> ICRC (2003).

<sup>86</sup> Droege C 'Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict' (2007) 40 *Israel Law Review* 312.

<sup>87</sup> Droege (2007) 316.

<sup>88</sup> Grover L 'Trial of the Child Soldier: Protecting the Rights of the Accused' (2005) 65 *Heidelberg Journal of International Law* 218.

out.<sup>89</sup> However, there are notable gaps that exist concerning the determination of a MACR within its overall ambit.<sup>90</sup>

### 2.3.1.1 The International Covenant on Civil and Political Rights

The ICCPR and its provisions, which are binding by nature, appertain both to the protection of adults and children alike and was the first international treaty that included measures that allocates special procedures and protections to children involved in criminal matters.<sup>91</sup> Although the treaty itself is not age specific, Article 14 of the ICCPR seems to recognise the need to deviate from the typical practices relating to criminal procedure when dealing with juvenile offenders.

In terms of Article 14(1), the treaty provides that judicial proceedings should be made public in most situations, unless the interests of juveniles require otherwise.<sup>92</sup> Additionally, Article 14(4) provides that criminal procedures must be guided by the age of the juvenile offenders concerned and the progressive need to promote their rehabilitation in such instances.<sup>93</sup> It has been asserted that the formulation of Article 14(4) refers to the age period between a set MACR and the minimum age of penal majority.<sup>94</sup> This sets the stage for further legal development as it relates to determining a MACR according to both international and domestic norms and standards.<sup>95</sup>

The UN Human Rights Committee (UNHRC) has noted, regarding Article 14 of the ICCPR, that juveniles enjoy the same rights and guarantees provided to adults and deserve special protections, which take into account the age and situation of the child

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<sup>89</sup> Grover (2005) 219.

<sup>90</sup> CORC 'General comment No. 24 (2019) on children's rights in the child justice system' CRC/C/GC/24 (18 September 2019) para 21.

<sup>91</sup> Rastegari B 'Legal Perspective of the Criminal Responsibility of Children: Contemporary Period' POGRES January 2012 available at

[https://www.researchgate.net/publication/236960132\\_Legal\\_Perspective\\_of\\_the\\_Criminal\\_Responsibility\\_of\\_Children\\_Contemporary\\_Period](https://www.researchgate.net/publication/236960132_Legal_Perspective_of_the_Criminal_Responsibility_of_Children_Contemporary_Period) (accessed 1 February 2022).

<sup>92</sup> Article 14(1) of the International Covenant on Civil and Political Rights.

<sup>93</sup> Article 14(4) of the International Covenant on Civil and Political Rights.

<sup>94</sup> Rastegari (2012).

<sup>95</sup> Leao I 'An Analysis of Specific Laws Concerning Youth Crime and Associated Procedures for Juvenile Delinquency: The Sierra Leone Case Under the Framework of International Law' UNICRI 11 February 2011 available at

[https://www.academia.edu/3586339/An\\_Analysis\\_of\\_Specific\\_Laws\\_Concerning\\_Youth\\_Crime\\_and\\_Associated\\_Procedures\\_for\\_Juvenile\\_Delinquency\\_The\\_Sierra\\_Leone\\_Case\\_Under\\_the\\_Framework\\_of\\_International\\_Law](https://www.academia.edu/3586339/An_Analysis_of_Specific_Laws_Concerning_Youth_Crime_and_Associated_Procedures_for_Juvenile_Delinquency_The_Sierra_Leone_Case_Under_the_Framework_of_International_Law) (accessed 1 February 2022).

when navigating the relevant and established criminal/juvenile justice systems.<sup>96</sup> The UNHRC has also stressed the importance of establishing a MACR as a crucial factor in developing adequate juvenile justice systems, below which children would be barred from being subjected to criminal trial in accordance with their physical and mental maturity.<sup>97</sup>

In addition to Article 14, further recognition for the need of exceptional and specialised criminal justice mechanisms, catering to the best interests of children in criminal matters, is provided for in Article 10 of the ICCPR. According to Article 10(2)(b), children in conflict with the law must be segregated from adults and provided with a speedy consideration regarding their adjudication.<sup>98</sup> Additionally, in accordance with Article 10(3), such children are to be accorded treatment appropriate with their age and legal status.<sup>99</sup> In relation to these articles, the UNHRC has stated that these provisions are mandatory for State parties to employ within their respective criminal justice frameworks, with the goal of promoting and providing better facilitation for children's rehabilitation and reformation.<sup>100</sup>

However, the UNHRC has further noted that Article 10 does not specify any limits regarding juvenile age and that State parties should refer to Article 6(5) of the ICCPR for guidance in determining such limits.<sup>101</sup> Article 6(5) provides that sentences of death shall not be imposed on persons below the age of 18 years old.<sup>102</sup> Therefore, the UNHRC has interpreted this provision as suggesting that, at the very least, persons below the age of 18 should be treated as juvenile offenders in matters concerning criminal justice.<sup>103</sup>

Hence, the treaty itself leaves the matter of determining a MACR up to the relevant State party to consider in relation to the social, cultural and legal frameworks that exist

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<sup>96</sup> UNHRC 'General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial' CCPR/C/GC/32 (23 August 2007) para 42.

<sup>97</sup> UNHRC 'General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial' CCPR/C/GC/32 (23 August 2007) para 43.

<sup>98</sup> Article 10(2)(b) of the International Covenant on Civil and Political Rights.

<sup>99</sup> Article 10(3) of the International Covenant on Civil and Political Rights.

<sup>100</sup> UNHRC 'CCPR General Comment No.21: Article 10 (Humane Treatment of Persons Deprived of Their Liberty)' (10 April 1992) para 13.

<sup>101</sup> UNHRC 'CCPR General Comment No.21: Article 10 (Humane Treatment of Persons Deprived of Their Liberty)' (10 April 1992) para 13.

<sup>102</sup> Article 6(5) of the International Covenant on Civil and Political Rights.

<sup>103</sup> UNHRC 'CCPR General Comment No.21: Article 10 (Humane Treatment of Persons Deprived of Their Liberty)' (10 April 1992) para 13.

and function within the State party itself. However, being that the instrument itself was one of the earlier and more foundational international human rights treaties; the fact that a MACR was not established within its provisions does not constitute an express failure in this regard.<sup>104</sup>

Despite the technical gaps that exist, the ICCPR is a crucial instrument as it relates to setting the appropriate attitudes towards children in conflict with the law. It lays down the groundwork from which both international and regional legislative action can build on in refurbishing the current inadequacies that persist in drawing the proverbial legal age lines in the sands of criminal justice. However, the question of whether other important instruments within IHRL actually builds on this issue will be examined below.

### **2.3.1.2 The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules)**

The Beijing Rules is regarded as the first series of international standards pertaining to the rules, norms and mechanisms associated with juvenile justice, which covered important topics such as the MACR, adjudication, prosecution, institutional and non-institutional treatment, and other aspects.<sup>105</sup> The Beijing Rules was drafted and adopted as a response to calls for model rules and guidelines on juvenile justice administration so as to expand on and augment the ideal measures to be employed by States in dealing with child offenders.<sup>106</sup>

In providing operational guidance on juvenile justice, Rule 2.2 of the Beijing Rules allows for a juvenile to be recognised as an “offender” who has been found to have committed an offence within a particular legal system, while recognising that they ought to be dealt with differently from that of adult offenders.<sup>107</sup> The basis for this approach can be found in Rule 5.1 of the instrument, which emphasises the well-being

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<sup>104</sup> Bogale SM *Domestication of international law standards on the rights of the child with specific emphasis on the minimum age for criminal responsibility: The case of Ethiopia* (unpublished Master's thesis, University of the Western Cape, 2009) 40.

<sup>105</sup> Liefwaard T 'Juvenile Justice' in Todres J and King SM (eds) *The Oxford Handbook of Children's Rights Law* (2020) 280-281.

<sup>106</sup> Joutsen M 'UN Standards and Norms on Juveniles Justice: From Soft Law to Hard Law' 2017 available at [https://www.unafei.or.jp/activities/pdf/Public\\_Lecture/Public\\_Lecture2017\\_Dr.Joutsen\\_Paper.pdf](https://www.unafei.or.jp/activities/pdf/Public_Lecture/Public_Lecture2017_Dr.Joutsen_Paper.pdf) (accessed 2 February 2022).

<sup>107</sup> Rule 2.2 (a) - (c) of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice.

of juvenile offenders and proportional reactions to their potential indiscretions.<sup>108</sup> However, despite the broad range of topics the Beijing Rules accommodates for within its body of specialised rules and standards, it does not make a conclusive determination for a MACR. Rather, it seems to endorse an important level of consistency and unification on the matter in both criminal and civil law in Rule 4 of its provisions.<sup>109</sup>

According to Rule 4.1, States that recognise the notion of a MACR must not set the age at which the MACR begins at an inappropriately young age, and must take into consideration facts about emotional, psychological, and intellectual development.<sup>110</sup> In terms of the Beijing Rules, there should preferably be a close relationship between criminal responsibility and various other social rights and responsibilities when establishing whether a child can fulfil the moral and psychological components of criminal responsibility through individual understanding and discernment.<sup>111</sup>

Much like the ICCPR, the Beijing Rules does not provide any clarity as it relates to an actual determination of a MACR in international law. However, as with the ICCPR, it is not a complete failure in this regard. This is owing to the fact that it was written at a period when the issue was very divisive on an international political level due to the wide range of MACRs legally employed throughout the world.<sup>112</sup> Instead, in its commentary on Rule 4.1, the Beijing Rules expressly called for international consensus on a reasonable lowest age limit that can be applied globally. This, as will be discussed below, prompted crucial responses from international UN bodies that lead to further expansion on the conceptualisation of an internationally acceptable MACR.

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<sup>108</sup> Rule 5.1 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice.

<sup>109</sup> Goldson B 'COUNTERBLAST: 'Difficult to Understand or Defend': A Reasoned Case for Raising the Age of Criminal Responsibility' (2009) 48 *The Howard Journal* 516.

<sup>110</sup> Rule 4.1 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice.

<sup>111</sup> Penal Reform International (2013).

<sup>112</sup> Liefwaard T 'Juvenile justice from an international children's rights perspective' in Vandenhoe W, Desmet E, Reynaert and Lembrechts S (eds) *Routledge International Handbook of Children's Rights Studies* 1 ed (2017) 243.

### 2.3.1.3 The United Nations Convention on the Rights of the Child

The CRC is lauded as having prompted significant levels of consensus on both an international and regional scale regarding children's rights and the solidification of progressive child-specific policies.<sup>113</sup> The almost universally accepted international instrument has been an extremely useful tool in stimulating and introducing legislative action in many countries whose legal frameworks were completely unfamiliar with the principles and norms the CRC contains prior to its ratification.<sup>114</sup> This includes areas concerning juvenile justice and the MACR.

Articles 37 and 40 of the CRC, for example, provide procedural assurances for accused children. It requires that they be handled in a way that is suitable for their age, promotes reintegration, and uses imprisonment only as a last resort, all while adhering to the principles of the best interests of the child, non-discrimination, the right to be heard, the right to development and personal dignity, and so on.<sup>115</sup> Furthermore, within Article 40 of its provisions, the CRC also calls on State parties to address the issue of setting a MACR.

According to Article 40(3), in seeking to promote the establishment of legal mechanisms applicable to children at odds with the law,<sup>116</sup> State parties must determine a MACR below which children will be deemed incapable of breaking the law.<sup>117</sup> This provision has been asserted to focus more on the actual age an offending child can be held criminally responsible for his or her offence/s and subsequently subjected to prosecution, rather than the child's capacity itself.<sup>118</sup> The CORC, in commenting on Article 40(3), recognised the lack of a specified MACR in the Article itself and understands the provision to be a positive obligation on State parties to set a MACR within their jurisdiction.<sup>119</sup>

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<sup>113</sup> Arts K 'Twenty-Five of the United Nations Convention on the Rights of the Child: Achievements and Challenges' (2014) 61 *Netherlands International Law Review* 268.

<sup>114</sup> Arts (2014) 268-269.

<sup>115</sup> Mlyniec WJ 'The Implications of Articles 37 and 40 of the Convention on the Rights of the Child for U.S. Juvenile Justice and U.S. Ratification of the Convention' (2010) 89 *Child Welfare* 104.

<sup>116</sup> Article 40(3) of the United Nations Convention on the Rights of the Child.

<sup>117</sup> Article 40(3)(a) of the United Nations Convention on the Rights of the Child.

<sup>118</sup> Liefwaard (2017) 243.

<sup>119</sup> CORC 'General comment No. 10 (2007): Children's Rights in Juvenile Justice' CRC/C/GC/10 (25 April 2007) para 31.

Furthermore, the CORC has provided a strict interpretation that child offenders who are below a set MACR are barred from being held criminally responsible for their actions, due to the inherent and irrefutable presumption that such children cannot be held criminally liable under penal law and procedure, even if they possess the necessary capacity to be formally charged.<sup>120</sup> For example, in earlier observations regarding reports submitted to the CORC by Liberia, the Committee were concerned that children below Liberia's MACR of 16 were being prosecuted and subsequently recommended the State to urgently revise such measures.<sup>121</sup>

This stands in line with the position many other IHRL instruments have espoused in its recommendations and mandates, while providing further nuance in defining such age limits. In addition to these comments, the CORC has also partially defined the age period in which children are actually considered children for the purposes of furthering and refining juvenile justice measures internationally.

The CORC expressly provides an important standard indicating the end of childhood in Article 1 of its provisions. According to Article 1, a child is defined as a human being below the age of 18 years old, provided the child did not attain majority earlier in accordance with a State party's laws.<sup>122</sup> Therefore, the CRC sets a limit on when childhood ends and adulthood begins in setting a standard for a MACR, while allowing a State party to determine an age of majority in accordance with its own legal framework.<sup>123</sup> On the other end, the CORC has stated that children below the age of 8 years old are prohibited from being included in the legal definitions concerning MACRs under any circumstances in terms of Article 40, on the bases of promoting measures that increase their capacity for personal control, social empathy and conflict resolution.<sup>124</sup>

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<sup>120</sup> CORC 'General comment No. 10 (2007): Children's Rights in Juvenile Justice' CRC/C/GC/10 (25 April 2007) para 31.

<sup>121</sup> CORC 'Consideration of reports submitted by States parties under Article 44 of the Convention' CRC/C/15/Add.236 (1 July 2004) para 66-68.

<sup>122</sup> Article 1 of the United Nations Convention on the Rights of the Child.

<sup>123</sup> Mousavi S, Rastegari B, Nordin R 'When Does Childhood Begin? A Legal Analysis on the United Nations

Convention on the Rights of the Child and Islamic Republic of Iran' January 2012 available at [https://www.researchgate.net/publication/236959957\\_When\\_Does\\_Childhood\\_Begin\\_A\\_Legal\\_Analysis\\_on\\_the\\_United\\_Nations\\_Convention\\_on\\_the\\_Rights\\_of\\_the\\_Child\\_and\\_Islamic\\_Republic\\_of\\_Iran](https://www.researchgate.net/publication/236959957_When_Does_Childhood_Begin_A_Legal_Analysis_on_the_United_Nations_Convention_on_the_Rights_of_the_Child_and_Islamic_Republic_of_Iran) (accessed 2 February 2022).

<sup>124</sup> CORC 'General comment No. 7 (2005): Implementing child rights in early childhood' CRC/C/GC/7/Rev.1 (20 September 2006) para 36(i).



Additionally, the CORC also provides further lucidity in answering the call for a consensus on the reasonable lowest age limit that should be applied internationally by Rule 4.1 of the Beijing Rules. Supplementary to the codified standards of the Beijing Rules, the CORC have recommended that State parties not lower the minimum age to an internationally unacceptable age level of below 12 years old.<sup>125</sup> Reason being, as noted by the CORC, due to the continued growth of their frontal cortex, children between the ages of 12 and 13 are less likely to grasp the repercussions of their actions, increasing the inclination to engage in risky behaviour.<sup>126</sup> This position is in line with their earlier recommendations while scrutinising the criminal justice systems of Scotland and Australia. The CORC noted that a MACR of 8 years in Scotland (with 10 years old applied in the rest of United Kingdom),<sup>127</sup> and 10 years old in Australia was too low and needed to be raised to an internationally acceptable level.<sup>128</sup>

In more recent comments relating to Article 40 of the CRC, the CORC has expressly noted the contemporary findings in the field of neuroscience and the exclusive realities of adolescent development, recommending that States heed these scientific findings and not lower the MACR under any circumstances.<sup>129</sup> Therefore, the CORC has recommended that State parties not lower the MACR to the age of 12, but to opt for a higher MACR of 14 or 16 years old so as to adequately manage the needs and best interest of child offenders without resorting to judicial proceedings.<sup>130</sup>

The CRC and the CORC have made praiseworthy strides in enumerating the previously more abstract age limits concerning the MACR in international law. They have broadened the legal toolkit made available for States to utilise in properly defining age lines in criminal justice by offering further clarity on those lines and placing positive obligations and recommendations on States to align their legal frameworks with more clearly delineated international norms. However, it lacks a specified MACR and,

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<sup>125</sup> CORC 'General comment No. 10 (2007): Children's Rights in Juvenile Justice' CRC/C/GC/10 (25 April 2007) para 32.

<sup>126</sup> CORC 'General comment No. 20 (2016) on the implementation of the rights of the child during adolescence' CRC/C/GC/20 (6 December 2016) para 79.

<sup>127</sup> CORC 'Consideration of reports submitted by States parties under Article 44 of the Convention' CRC/C/15/Add.188 (9 October 2002) para 59.

<sup>128</sup> CORC 'Consideration of reports submitted by States parties under Article 44 of the Convention' CRC/C/15/Add.268 (20 October 2005) para 73.

<sup>129</sup> CORC 'General comment No. 24 (2019) on children's rights in the child justice system' CRC/C/GC/24 (18 September 2019) para 22.

<sup>130</sup> CORC 'General comment No. 10 (2007): Children's Rights in Juvenile Justice' CRC/C/GC/10 (25 April 2007) para 33.

although giving useful guidelines on the subject, leaves too much discretion to the States parties in this respect. In failing to indicate an internationally acceptable MACR, both the CRC and the CORC have not made the issue less controversial as States still fall victim to public pressure and subject children to harsh criminal justice measures.<sup>131</sup>

The one crucial commonality that persist between the three IHRL instruments discussed above is the absence of an exhaustive and conclusive internationally acceptable definition of a MACR. Purportedly, in order to better ensure the consistent application of children's rights and best interests in criminal matters, would be an unmitigated stance on an internationally acceptable MACR, which is unsusceptible to the differing and often problematic domestic legal sentiments that undermine the progressive intentions of child specific norms within IHRL and its instruments.



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<sup>131</sup> Liefgaard (2017) 244.

## CHAPTER 3

### 3. THE PIVOTAL SCIENTIFIC FINDINGS ON JUVENILE BRAIN DEVELOPMENT

Considering the foregoing discussion, it is clear that there is a reluctance to establish an express MACR within international law. This appears to be due to a mix of acknowledgements that diverse domestic legal and social systems' national interests may conflict with such a standard, as well as a lack of objective source material on which such a standard might be founded. All the international principles and laws discussed above, as it relates to the MACR, appear to base their standards on various age limits on the abstract understanding that children function differently to that of adults.

However, none has taken the authoritative step to inform the law through the science on juvenile brain development in providing certainty and conclusiveness to the process of setting an internationally acceptable MACR. This process is not uncommon, due to advancements in developmental psychology and neurological research, lawmakers and legal experts in the field of juvenile justice have been encouraged in past decades to recognise the evolutionary truth of the divide between adults and children.<sup>132</sup> When it comes to the legal variable of age, most national jurisdictions throughout the globe have established significant distinctions.<sup>133</sup>

As a result, child justice policies and juvenile offenders' criminal prosecutions have been progressively altered. These legalistic and scientific advancements can be incorporated into international jurisprudence to provide a foundation for adopting requisite legal revisions to how IHL, and perhaps international law as a whole, governs children's criminal responsibility and the manner in which their age influences this.

#### 3.1 The legal variable of age

As is common in most judicial systems across the globe, the age of the offender generally plays a role in deciding the harshness and severity of the legal responses

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<sup>132</sup> Shen FX 'Legislating Neuroscience: The Case of Juvenile Justice' (2013) 46 *Loyola of Los Angeles Law Review* 994.

<sup>133</sup> Shen (2013) 993.

and punishments afforded to them.<sup>134</sup> The level of severity often increases with the age of the offender as adult criminals generally face stiffer penalties, whereas young adults are given more leeway, and minors are afforded the most leniency in this regard.<sup>135</sup>

In relation to this, the MACR is typically the age threshold drawn to infer the capacity to comprehend a crime's purpose, seriousness, and probable repercussions, equivalent to that of an adult.<sup>136</sup> Therefore, it would only be practicable to define and incorporate a MACR that reflects, as accurately as possible, a young person's ability to detect and be held accountable for their acts on an emotional, mental, and logical level in ensuring proportional legal responses to their actions. The negative consequences of failing to do so may severely affect children's overall long-term neurological development due to the stresses, constraints and hostile environments children face when engaged with juvenile/criminal justice systems.<sup>137</sup>

Such a task would require the meaningful legal imbrication of both the science on juvenile brain development and the principles of juvenile justice, especially in the context of war.



### **3.2 The empirical findings on adolescent brain development**

The process of actually developing, and eventually attaining, the adult capacity necessary to appreciate the consequences of one's actions has been extensively studied in the fields of neuroscience and psychology. This period of development is referred to as "adolescence", which refers to the age period characterised by accelerated physical, biochemical, psychological, and social development, maturity, and growth.<sup>138</sup>

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<sup>134</sup> Braakman N 'Deterrence and age thresholds in punishment in British criminal law' 15 January 2013 available at [https://mpra.ub.uni-muenchen.de/44886/1/MPRA\\_paper\\_44886.pdf](https://mpra.ub.uni-muenchen.de/44886/1/MPRA_paper_44886.pdf) (accessed 15 February 2022).

<sup>135</sup> Braakman (2013).

<sup>136</sup> Noroozi M, Singh I, Fazel M 'Evaluation of the minimum age for consent to mental health treatment with the minimum age of criminal responsibility in children and adolescents: a global comparison' (2018) 21 *Evid Based Mental Health* 83.

<sup>137</sup> Farmer E 'The age of criminal responsibility: Developmental science and human rights perspectives' (2011) 6 *Journal of Children's Services* 90.

<sup>138</sup> Özdemir A, Utkualp N, Palloş A 'Physical and Psychosocial Effects of the Changes in Adolescence Period' (2016) 9 *International Journal of Caring Sciences* 717.

Adolescent maturation is often thought to fully occur over a long period of time between the ages of 11 and 25.<sup>139</sup> However, for the purposes of this paper, the age period of adolescence is considered to be between the ages of 10 and 19 years old as defined by the World Health Organisation.<sup>140</sup>

Interactions with people grow more complicated during adolescence, peer relationships become more important, and social cognition develops significantly.<sup>141</sup> There are a number of particularly notable anatomical and behavioural alterations that occur throughout this phase of cognitive development. The most notable of these changes is the overall decrease in grey matter in the cerebral surfaces of the brain throughout the period of adolescence, with an overall increase in white matter towards adulthood.<sup>142</sup>

### 3.2.1 The structural and psychosocial changes that occur during adolescence

The structural developmental changes that occur during adolescence is linked to a process of continual improvement in logical reasoning, cognitive ability, planning ahead, assessing risks and benefits, and making difficult decisions.<sup>143</sup> Moreover, higher dopamine density and distribution in some circuits connecting the limbic system to the prefrontal cortex raises the likelihood of engaging in sensation seeking behaviour.<sup>144</sup> Additionally, planning, verbal memory, and impulse control (located in the frontal lobes) are among the final executive processes to completely mature during this age period.<sup>145</sup>

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<sup>139</sup> Colver A, Longwell S 'New understanding of adolescent brain development; relevance to transitional healthcare for young people with long term conditions' (2013) 98 *Archives of disease in childhood* 903.

<sup>140</sup> World Health Organisation 'Recognising adolescence' available at <https://apps.who.int/adolescent/second-decade/section2/page1/recognizing-adolescence.html> (accessed 16 February 2022).

<sup>141</sup> Blakemore SJ, Mills KL 'Is Adolescence a Sensitive Period for Sociocultural Processing?' (2014) 65 *Annual review of psychology* 191.

<sup>142</sup> Blakemore SJ, Choudhury S 'Development of the adolescent brain: implications for executive function and social cognition' (2006) 47 *Journal of Child Psychology and Psychiatry* 297.

<sup>143</sup> Steinberg L 'A Social Neuroscience Perspective on Adolescent Risk-Taking' (2008) 28 *Developmental review* 79-80.

<sup>144</sup> Steinberg (2008) 82.

<sup>145</sup> Prior D 'Maturity, young adults and criminal justice: A literature review' 2011 available at [https://www.researchgate.net/publication/263273440\\_Maturity\\_young\\_adults\\_and\\_criminal\\_justice\\_A\\_literature\\_review](https://www.researchgate.net/publication/263273440_Maturity_young_adults_and_criminal_justice_A_literature_review) (accessed 16 February 2022).

With regards to risk-taking behaviour, the propensity to engage in such behaviour during this period has been asserted to be a consequence of a temporal gap that exists between the development of the socioemotional system and the cognitive control system within the adolescent brain.<sup>146</sup> During puberty, the socioemotional system experiences a significant rise in dopaminergic activity, which increases reward-seeking behaviour.<sup>147</sup> While the cognitive control system matures gradually during adolescence, allowing for more sophisticated self-regulation, abstract thinking and impulse control, however, it does not fully mature until later in adolescence.<sup>148</sup>

The developmental gap that exists between the early increase in reward and sensation seeking behaviour, and the full maturity of the cognitive control system later in adolescence causes a unique period of increased susceptibility to risk-taking behaviour during middle adolescence.<sup>149</sup> The delayed maturation of impulse control and self-regulation, coupled with the increase in reward seeking behaviour, makes children and adolescents more vulnerable to injury, suicide, accidents, and peer pressure to participate in risky behaviours.<sup>150</sup>

This also implies that emotion and social responses influence teenage behaviour more than rational thought.<sup>151</sup> Therefore, children participate in greater rates of drunk driving, sex without contraception, illegal drug usage, and smaller criminal activity during this period as a result of their unique sensitivity to risk-taking behaviour and influences.<sup>152</sup> These dynamic and accelerated structural developments that occur during adolescence are manifested in key alterations in behavioural patterns that set adolescents apart from adults in significant ways. Since adolescence is a transient stage in which a person's identity develops and refines, children are more prone than

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<sup>146</sup> Steinberg L 'Adolescent development and juvenile justice' (2009) 5 *Annual review of clinical psychology* 466.

<sup>147</sup> Steinberg (2009) 466.

<sup>148</sup> Steinberg (2009) 467. See generally also Sanders RA 'Adolescent Psychosocial, Social, and Cognitive Development' 2013 available at <https://siecus.org/wp-content/uploads/2018/07/1.8-Adolescent-Cognitive-Development.pdf> (accessed 16 February 2022).

<sup>149</sup> Steinberg (2009) 466.

<sup>150</sup> Colver, Longwell (2013) 904.

<sup>151</sup> Binford W 'Criminal Capacity and the Teenage Brain: Insights from Neurological Research' (2012) 14 *Neuroeconomics eJournal* 8.

<sup>152</sup> Spear LP 'The adolescent brain and age-related behavioural manifestations' (2000) 24 *Neuroscience and Biobehavioural Reviews* 421.

adults to participate in exploratory, experimental, and eventually unlawful behaviour.<sup>153</sup>

Another important element of adolescent brain development is social cognition and the abilities associated with it, which has been demonstrated to be in a constant state of growth throughout adolescence.<sup>154</sup> The many psychological processes and social signals that permit individuals to take benefit of being a member of a social group, which is especially crucial in adolescent development, are referred to as social cognition.<sup>155</sup>

Due to the ever-developing nature of these abilities, adolescents seem to display increased social motivation in conforming to peer influence and displaying risky behaviour to achieve social goals, increased reward sensitivity due to social influence and the propensity to engage in erratic or distracted behaviours in social contexts due to underdeveloped self-control and diminishing cognitive skills.<sup>156</sup>

However, in evaluating the developmental nature of adolescent maturation, and subsequently informing the determination of a MACR, one would have to consider both the capacity of the child, as well as, the external and environmental factors that play a significant role in this developmental process.<sup>157</sup> As is required in Rule 5.1 of the Beijing Rules, consideration must be afforded to the personal circumstances of the child offender in determining proportional responses to his/her offences, which can include the environmental circumstances the child may find themselves in.<sup>158</sup>

### **3.2.2 The external and environmental influences affecting adolescent development**

As discussed above, when it comes to adolescent brain development, studies have found significant differences between children and adults in decision-making, cognitive

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<sup>153</sup> Carroll JE 'Brain Science and the theory of juvenile Mens Rea' (2016) 94 *North Carolina Law Review* 575.

<sup>154</sup> Blakemore, Mills (2014) 191-192.

<sup>155</sup> Frith CD 'Social Cognition' (2008) 363 *Philosophical transactions of the Royal Society of London, Series B, Biological sciences* 2033.

<sup>156</sup> Frith (2008) 2035-2037.

<sup>157</sup> Blakemore, Mills (2014) 201-202.

<sup>158</sup> Rule 5.1 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice.

skills, emotional functioning, and prefrontal cortex maturity.<sup>159</sup> However, in social circumstances, such distinctions necessarily alter behavioural patterns and function as moderating variables.<sup>160</sup>

These developmental cognitive differences mediate external stressors like poverty and family adversity, since children are more likely than adults to behave impulsively or engage in dangerous conduct in reaction to such circumstances.<sup>161</sup> As documented in various studies, environments characterised by adversarial circumstances such as poverty, unemployment and early adverse caregiving have been associated with poorer neurocognitive performance in children, and even smaller brain structure.<sup>162</sup>

Additionally, early experiences of adversity, such as abuse and neglect, is a type of early life stress that makes children more vulnerable to emotion dysregulation and psychopathology.<sup>163</sup> Therefore, adolescent vulnerability is increased as a result of their often-involuntary exposure to environments of chronic stress such as armed conflicts, violence, and extreme poverty.<sup>164</sup>

Children who are exposed to long-term, severe, and frequent adversity are at risk of developing cognitive impairment, which can alter normal brain development and compromise brain architecture and neurocognitive systems.<sup>165</sup> This is especially relevant in the case of children involved in armed hostilities. Children are often used as cheap juvenile cannon fodder in such roles that can involve fighting, looting and acting as military guards, often exposed to environments of extreme violence and frequent physical and psychological abuse, unduly compelled to engage in killings,

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<sup>159</sup> Appleton SF, Barch DM, Schaefer AM 'The Developing Brain: New Directions in Science, Policy, and Law' (2018) 57 *Washington University Journal of Law & Policy* 1-2.

<sup>160</sup> Appleton, Barch, Schaefer (2018) 3.

<sup>161</sup> Rudolph MD 'At risk of being risky: The relationship between "brain age" under emotional states and risk preference' (2017) 24 *Developmental Cognitive Neuroscience* 103.

<sup>162</sup> Ferschmann L, Bos MGN, Herting MM, Mills KL, Tamnes CK 'Contextualizing adolescent structural brain development: Environmental determinants and mental health outcomes' (2022) 44 *Current Opinion in Psychology* 172.

<sup>163</sup> Achmed SP, Bittencourt-Hewit A, Sebastian CL 'Neurocognitive bases of emotion regulation development in adolescence' (2015) 15 *Developmental Cognitive Neuroscience* 20.

<sup>164</sup> UNICEF 'The Adolescent Brain: A second window of opportunity' 2017 available at

[https://www.unicef-irc.org/publications/pdf/adolescent\\_brain\\_a\\_second\\_window\\_of\\_opportunity\\_a\\_compendium.pdf](https://www.unicef-irc.org/publications/pdf/adolescent_brain_a_second_window_of_opportunity_a_compendium.pdf) (accessed 17 February 2022).

<sup>165</sup> Sandstorm H, Huerta S 'The Negative Effects of Instability on Child Development: A Research Synthesis' *The Urban Institute* September 2013 available at

<https://www.urban.org/sites/default/files/publication/32706/412899-The-Negative-Effects-of-Instability-on-Child-Development-A-Research-Synthesis.PDF> (accessed 17 February 2022).



rape, and even cannibalism.<sup>166</sup> Poor academic achievement, a lack of social skills, and an inability to manage emotions are all undesirable outcomes faced by children exposed to such circumstances.<sup>167</sup>

In consequence of the unique plasticity of the brain during adolescent development, when the brain is exposed to major stresses during critical developmental phases, it develops along a stress-responsive route.<sup>168</sup> This causes the brain to change into a state of strong rage, violence, or fearful fleeing, which increases the risk of medical and mental illnesses, drug misuse, depression, suicide, and anti-social or disruptive behaviour in children.<sup>169</sup>

Additionally, adverse environments and/or traumatic experiences that manifest themselves during the pliable age period of adolescence has been documented to carry over into negative early adulthood (18-25) outcomes.<sup>170</sup> For instance, early life abusive home environments and conflict can negatively affect adolescents for a notable time period that extends to early adulthood as it relates to factors such as delinquency, illness and substance use.<sup>171</sup> Verbal abuse experienced during childhood correlates with increased risks for personality disorders throughout adolescence and early adulthood.<sup>172</sup> Additionally, early adulthood life stress, drug usage, unlawful behaviours, emotional stress, and recurrent violent experiences are all strongly linked with violent and victimised adolescent backgrounds.<sup>173</sup> Therefore, it has become well documented that the period of adolescence, if problematic, can derail

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<sup>166</sup> Kadir A, Shenoda S, Goldhagen J 'Effects of armed conflict on child health and development: A systematic review' (2019) 14 *PLoS One* 22. See also Nortje W & Quénivet N *Child Soldiers and the Defence of Duress under International Criminal Law* (2019) 1-2.

<sup>167</sup> Sandstorm, Huerta (2013).

<sup>168</sup> Schauer E, Elbert T 'The Psychological Impact of Child Soldiering' in Martz E (ed) *Trauma Rehabilitation After War and Conflict* 1 ed (2010) 332.

<sup>169</sup> Schauer, Elbert (2010) 332.

<sup>170</sup> Turanovic JJ 'Heterogeneous Effects Of Adolescent Violent Victimization On Problematic Outcomes In Early Adulthood' *Florida State University Libraries* February 2019 available at <https://diginole.lib.fsu.edu/islandora/object/fsu:749025/datastream/PDF/view> (accessed 16 April 2022).

<sup>171</sup> Bank L, Burraston B 'Abusive home environments as predictors of poor adjustment during adolescence and early adulthood' (2001) 29 *Journal of Community Psychology* 212.

<sup>172</sup> Johnson JG 'Childhood verbal abuse and risk for personality disorders during adolescence and early adulthood' (2001) 42 *Comprehensive psychiatry* 20.

<sup>173</sup> Logan-Greene P 'The sustained impact of adolescent violence histories on early adulthood outcomes' (2013) 8 *Vict Offender* 238.

adulthood mental and physical health and increase the propensity to engage in deviant/criminal behaviour in their early adult/adult years.<sup>174</sup>

Given the inherent vulnerabilities attributed to children aged 10 to 19, it is obvious that juveniles function according to cognitive, emotional, and social functions that make them more likely to participate in deviant behaviour. Although, there are claims that neuroscience has not fully determined whether brain structure possesses any conclusive link to adult-like decision-making capacity.<sup>175</sup>

However, research has indicated, as discussed above, that adolescents are more impulsive, less inclined to contemplate the long-term ramifications of their actions, more likely to participate in sensation seeking behaviour, and more prone to focus on the possible benefits of a risky decision rather than the potential costs.<sup>176</sup> This has influenced significant changes in juvenile justice, such as the recognition that juvenile offenders merit milder punishments than adults, and that the evolving nature of cognitive maturation would lessen the necessity for punitive reactions to achieve rehabilitation and reformation goals.<sup>177</sup>

Recognitions like these have sparked a considerable discussion in various legal frameworks about how juvenile development research may shape both the legal responses to child offenders and the age at which full criminal liability can be imposed.



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<sup>174</sup> Layne CM 'Cumulative trauma exposure and high risk behavior in adolescence: Findings from the National Child Traumatic Stress Network Core Data Set' (2014) *Psychological Trauma: Theory, Research, Practice, and Policy* 44.

<sup>175</sup> Aronson JD 'Neuroscience and Juvenile Justice' (2015) 42 *Akron Law Review* 928.

<sup>176</sup> Steinberg L 'The influence of neuroscience on US Supreme Court decisions about adolescents' criminal culpability' (2013) 14 *Nature reviews. Neuroscience* 515-516.

<sup>177</sup> Appleton, Barch, Schaefer (2018) 2.

## CHAPTER 4

### 4. INFORMING THE LAW THROUGH SCIENCE

The contemporary neuroscientific findings on adolescent brain development discussed above have provided further consequential clarity on the behavioural and cognitive frameworks that children are inherently and biologically held in accordance to. Such social scientific insights have been known in the law to provide meaningful enlightenment on factual inquiries and value judgements pertinent to legal policy formation.<sup>178</sup> The value of these scientific insights, however, is indeed determined by their capacity to enlighten and inform legal decision-makers regarding factual questions involving human behaviour.<sup>179</sup>

In consideration of the scientific findings noted above, it is clear that it has fundamental implications relating to the extent to which children can be held to the same standards as adults in criminal matters.<sup>180</sup> Additionally, the findings of hard science and behavioural research can play a crucial role in guiding the reformation of international juvenile justice policies by reorienting its positions on the degree of culpability that ought to be applied to children, when in conflict with the law.<sup>181</sup> This is because juvenile offenders' age and developmental stages are considered in a variety of critical adjudicative procedures and processes where competent participation and engagement with blameworthiness are relevant.<sup>182</sup> Examples of this reality are found in the expectation for the child to understand their charges, assist their legal representatives and engage with various adjudicative procedures such as entering pleas.<sup>183</sup>

However, the primary point of legal influence the findings on adolescent brain development would be concerned with is the concept of culpability, and the subsequent punishments that run parallel to the different degrees of culpability that

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<sup>178</sup> Faigman DL 'To Have and Have Not: Assessing the Value of Social Science to the Law as Science and Policy' (1989) 38 *Emory Law Journal* 1094.

<sup>179</sup> Faigman (1989) 1095.

<sup>180</sup> Monahan KC, Steinberg L, Piquero A 'Juvenile Justice Policy and Practice: A Developmental Perspective' (2015) 44 *Crime and Justice* 578.

<sup>181</sup> Bonnie RJ, Scott ES 'The Teenage Brain: Adolescent Brain Research and the Law' (2013) 22 *Current Directions in Psychological Science* 160.

<sup>182</sup> Cauffman E 'How Developmental Science Influences Juvenile Justice Reform' (2018) 8 *UC Irvine Law Review* 28.

<sup>183</sup> Cauffman (2018) 28.

are applied to individuals in criminal matters.<sup>184</sup> This has important implications for the manner in which we deal with child offenders and the minimum age at which we hold them fully responsible for their actions.

#### 4.1 The factor of culpability

Culpability, in the context of criminal law, can be described as a combination of an agent's elemental *mens rea* (E.g. intent, negligence, recklessness), and the state of being responsible or blameworthy for wrongdoing absent of an excuse such as mental incompetence or duress.<sup>185</sup> Excuses such as insanity, which entails an impairment of an agent's internal faculties, and duress, which alternatively involves the wrongful interference of another that deprives one of the ability to act independently or freely, are used to avoid, deny or mitigate culpability or responsibility for wrongful acts.<sup>186</sup> In other words, there seemingly needs to exist some meaningful deviation or departure from the norm in which people exercise their agency, in order to excuse the carrying out of wrongful acts.

As such, in relation to the culpability of children, the neuro-deficiencies documented by the neurological research on adolescent brain development indicates that these deficiencies are indeed the norm in the adolescent population, and not mere aberrations.<sup>187</sup> Therefore, the inherent cognitive and socioemotional state of adolescents justifies and establishes a specialised and separate baseline of culpability for juvenile offenders, unlike mental abnormalities or situational failings that merely excuse wrongdoings by reducing the culpability of individuals internally and/or externally subjected to such aberrations.<sup>188</sup> This is due to the assertion that the condition of culpability requires a mature and regular functioning set of executive processes that children simply do not fully operate in accordance to.<sup>189</sup> This has an influence on their criminal responsibility, as responsible actors are those capable of

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<sup>184</sup> Cauffman (2018) 28-29.

<sup>185</sup> Brink OD 'The Nature and Significance of Culpability' (2019) 13 *Criminal Law and Philosophy* 347.

<sup>186</sup> Brink (2019) 353.

<sup>187</sup> Carroll (2016) 575.

<sup>188</sup> Carroll (2016) 575.

<sup>189</sup> Fagan T, Hirstein W, Sifferd K 'Child Soldiers, Executive Functions, and Culpability' (2016) 16 *International Criminal Law Review* 272.

organising their activities purposefully, knowingly, and more or less rationally in a way appropriate to the normative framework in which they operate.<sup>190</sup>

Therefore, when contextualising the inherent cognitive and socioemotional deficiencies documented in adolescents within the framework of criminal law, juvenile justice and the environmental context of armed conflict, it is submitted that children between the ages of 10 and 19 are less culpable than adults are and ought to be subjected to lesser sanctions and censure.<sup>191</sup> Although, this age range can be precarious in legally addressing this issue, as the age range adolescents tend to attain adequate maturity is between 15 and 22 years old.<sup>192</sup>

This separate framework of juvenile culpability also extends to children involved in armed conflict, as their unique predisposition to indoctrination and undue influence, which are key features of child soldiering, warrants legal designation of reduced culpability in such tempestuous and turbulent circumstances.<sup>193</sup>

Hence, the formation and utilisation of a separate baseline of culpability for juvenile offenders is crucial in attributing proportional blame within criminal justice and the laws regulating armed conflict. Adjusting such a baseline would allow the traditional culpability criteria applicable to adults to be adapted in accounting for the reasonable reactions to external influences and pressures that almost exclusively apply to juvenile offenders, in holding them criminally responsible for their actions.<sup>194</sup> Although, these recognitions can be found in both domestic and international case law that have provided much needed insight into the changing attitudes regarding juvenile justice, and how those can be utilised in making meaningful change in international juvenile justice standards.

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<sup>190</sup> Bigenwald A, Chambon V 'Criminal Responsibility and Neuroscience: No Revolution Yet' (2019) 10 *Frontiers in Psychology* 3.

<sup>191</sup> Cauffman (2018) 29.

<sup>192</sup> Fagan, Hirstein, Sifferd (2016) 278.

<sup>193</sup> Fagan, Hirstein, Sifferd (2016) 284.

<sup>194</sup> Scott ES 'Blaming Youth' (2003) 81 *Texas Law Review* 833.

## 4.2 The domestic and international jurisprudential insights on the developing standards on juvenile justice

Over a number of decades, the laws and policies concerning the adjudication of juvenile offenders has been legally recast to play a more rehabilitative and compassionate focused role in criminal justice. As will be discussed below, the jurisprudential discourse on the prosecution and adjudication of juvenile offenders has shifted towards recognising the inherent differences in status and culpability within the law, based on the contemporary pronouncements in both the law and science.

### 4.2.1 Commonly cited insights from the US Supreme Court

The more prominent case law on the need for differential treatment of juveniles for criminal violations can be found in the judgments formulated by the US Supreme Court. In *Roper v Simmons*, which forbade the imposition of the death penalty on individuals below the age of 18,<sup>195</sup> recognised the scientific findings that those under the age of 18 lack appropriate maturity and personal responsibility, are more susceptible to negative external influences and possess underdeveloped character.<sup>196</sup> Additionally, the court noted compelling international sentiments that reject the employment of the juvenile death penalty based on the factorable element of the emotional instability of juveniles in the commission of crimes.<sup>197</sup> In consideration of both the scientific findings on juvenile development and the changing international standards on juvenile justice, the court in *Roper* stated that juveniles were less culpable and blameworthy than adults, ultimately affecting their criminal responsibility.<sup>198</sup> Moreover, the court deemed the imposition of the death penalty on juveniles to be inappropriate, disproportionate and inconsistent with modern society, which influenced crucial changes in the application of the law in relation to juvenile offenders.<sup>199</sup>

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<sup>195</sup> *Roper v Simmons* 543 US 551 (2005) 1.

<sup>196</sup> *Roper v Simmons* 543 US 551 (2005) 15-16.

<sup>197</sup> *Roper v Simmons* 543 US 551 (2005) 24.

<sup>198</sup> Benekos PJ, Merlo AV 'A Decade of Change: *Roper v. Simmons*, Defending Childhood, and Juvenile Justice Policy' (2019) 30 *Criminal Justice Policy Review* 105-106.

<sup>199</sup> Benekos, Merlo (2019) 105.

Following the decision in *Roper*, the US Supreme Court in *Graham v Florida*, which held that the sentence of juvenile offenders to life imprisonment (without parole) for non-homicide crimes are not permitted,<sup>200</sup> further recognised that juveniles, in comparison to adult offenders, possesses a twice diminished moral culpability.<sup>201</sup> The Court carried over the recognitions of the developmental features of juvenile culpability in prohibiting the juvenile death penalty to mitigate sentences for non-homicide cases as well.<sup>202</sup> Additionally, the Court in *Graham* noted that a distinct categorical bar for juvenile offenders is necessary to prevent a judge or jury to be swayed by the possible brutality of the alleged non-homicide crime, in imposing disproportionate sentencing for which the juvenile possesses inadequate culpability.<sup>203</sup>

Furthermore, in advancing the rationales of both *Roper* and *Graham*, the US Supreme Court in *Miller v Alabama*, together with *Jackson v Hobbs*, expressly prohibited sentencing juvenile offenders to life imprisonment without parole for homicide crimes.<sup>204</sup> The Court in this case extended the rationale of reduced culpability for juveniles to crimes involving homicide, emphasising the mitigating qualities of youthfulness in sentencing schemes.<sup>205</sup>

All three cases demonstrate the effects objective data on juvenile development has on the legislative and jurisprudential gauges in assessing the fundamental ways in which we assign culpability to juveniles in comparison to adults. The age limit of 18 years old utilised by the courts acted as a proxy for culpability, as the most accurate gauge in which to measure and individualise sentencing in forming proportional legal responses to juveniles in conflict with the law.<sup>206</sup>

As showcased by the judicial decisions discussed above, criminal law and the concept of culpability are necessarily affected by the documented link between juvenile psychological development and offending.<sup>207</sup> The decisions and rationales of the three prominent US Supreme Court cases seems to inform us that this notable link

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<sup>200</sup> *Graham v Florida* 560 US 48 (2010) 1.

<sup>201</sup> *Graham v Florida* 560 US 48 (2010) 3.

<sup>202</sup> Feld BC 'Adolescent Criminal Responsibility, Proportionality, and Sentencing Policy: *Roper*, *Graham*, *Miller/Jackson*, and the Youth Discount' (2013) 31 *Law and Inequality* 292.

<sup>203</sup> *Graham v Florida* 560 US 48 (2010) 23.

<sup>204</sup> *Miller v Alabama* 567 US 460 (2012) 2.

<sup>205</sup> Feld (2013) 305.

<sup>206</sup> Feld (2013) 329.

<sup>207</sup> Farmer (2011) 87.

necessitates a separate and mitigated categorical baseline for juvenile offenders in the law, whether domestic or international. Furthermore, it demonstrates that developing international standards on juvenile justice, and even the controversial MACR, can indeed influence legal headway within domestic frameworks despite any apparent legislative friction that may exist between State practice and international legal sentiments.

#### **4.2.2 International prosecution of children involved in armed conflict**

Despite the clear evolving consensus surrounding the legal necessity of instituting separate adjudicative and legislative standards for juvenile offenders, the inadequate push for enacting meaningful change on the international level has left an unacceptable amount of wiggle room for children to be unduly prosecuted for various crimes.

As an example, in the early 2000s, children engaging in armed conflict in the Democratic Republic of Congo (DRC) were arrested, jailed, and convicted in military courts for offences related to armed conflict.<sup>208</sup> During this period, there were even executions, including the execution of a 14-year-old just 30 minutes after their trial.<sup>209</sup> This was due to the DRC's MACR and full criminal responsibility being legally fixed at 16, often allowing children below 14 years to be charged and preventing 16 to 18 year olds from benefiting from specialised measures for juvenile offenders.<sup>210</sup> Other instances include Nepal's anti-terrorism legislation, which resulted in the incarceration, ill-treatment, and torture of 195 juveniles (43% of which were under the age of 16), and Rwanda's arrest and detention of 4000 children for crimes of genocide, who were sanctioned to the same extent as adults.<sup>211</sup>

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<sup>208</sup> CORC 'Consideration of reports submitted by State parties under Article 44 of the Convention: Concluding observations: Democratic Republic of Congo' CRC/C/COD/CO/2 (10 February 2009) para 72.

<sup>209</sup> Amnesty International 'Democratic Republic of Congo: Massive violations kill human decency' 31 May 2000 available at <https://www.amnesty.org/en/wp-content/uploads/2021/06/afr620112000en.pdf> (accessed 24 March 2022).

<sup>210</sup> CORC 'Consideration of reports submitted by State parties under Article 44 of the Convention: Concluding observations: Democratic Republic of Congo' CRC/C/COD/CO/2 (10 February 2009) para 90.

<sup>211</sup> Office of the Special Representative of the Secretary-General for Children and Armed Conflict *Children and Justice During and in the Aftermath of Armed Conflict Working Paper No.3* (2011) 40.



Additionally, lack of overall consensus on the criminal responsibility of children who violate laws of IHL and IHRL has led to such cases as the Omar Khadr trial.<sup>212</sup> The case of Omar Khadr is a sobering one, as it highlights the dangers that manifest if States are able to take advantage of the tattered nature of international law's standards on juvenile justice and the MACR. Omar Khadr, a citizen of Canada, was released in May of 2015, after spending 14 years in detention for a crime he was accused of committing at the age of 15.<sup>213</sup> Khadr was apprehended, taken into U.S custody and prosecuted before the U.S Military Commission for the killing of Sergeant Christopher Speer in 2002 with a grenade during a firefight in Afghanistan.<sup>214</sup>

Khadr spent 10 years in Guantanamo Bay from the age of 16, where he was subjected to ruthless and recurring interrogation without representative counsel.<sup>215</sup> Khadr was not the only juvenile offender held at Guantanamo Bay, as two other 16 year olds, Mohamed Jawad and Mohammad El Gharani, were also detained at the camp and subjected to the same treatment afforded to adults.<sup>216</sup> However, Khadr's case was of particular significance due to the U.S government's decision to expressly prosecute his case, undeterred by accumulating evidence of psychiatric concerns, medical issues, inhumane treatment, pressured confessions, questionable evidence, and a lack of autonomy during the period he is believed to have committed his crimes.<sup>217</sup>

Khadr was prosecuted by the U.S government's Military Commission, which tried his case in the same manner as other military captives, affording him no preferential, specialised, or mitigated treatment based on his age.<sup>218</sup> The U.S did not ratify many of the international treaties which prohibit the prosecution of children under the age of 18, such as the CRC, ICC and AP I, and therefore was not obligated to enact such

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<sup>212</sup> Fritz D 'Child Pirates from Somalia: A Call for the International Community to Support the Further Development of Juvenile Justice Systems in Puntland and Somaliland' (2012) 44 *Case Western Reserve Journal of International Law* 897.

<sup>213</sup> Jones M 'Citizen in Exception: Omar Khadr and the Performative Gap in the Law' (2020) 41 *Theatre Research in Canada* 88.

<sup>214</sup> Lyons G 'Separate But Equal Accountability: The Case of Omar Khadr' (2013) 3 *University of Miami National Security & Armed Conflict Law Review* 128-129.

<sup>215</sup> Wilson RJ 'Omar Khadr: Domestic and International Litigation Strategies for a Child in Armed Conflict Held at Guantanamo' (2012) 11 *Santa Clara Journal of International Law* 33.

<sup>216</sup> Quénivet (2017) 445.

<sup>217</sup> Ali MM 'Omar Khadr's Legal Odyssey: The Erasure of Child Soldier as a Legal Category' (2018) 46 *Georgia Journal of International and Comparative Law* 348-349.

<sup>218</sup> Dore CL 'What to Do With Omar Khadr? Putting a Child Soldier on Trial: Questions of International Law, Juvenile Justice, and Moral Culpability' (2008) 41 *The John Marshall Law Review* 1318-1319.

standards as it related to the prosecution of child soldiers.<sup>219</sup> However, with regards to the international standards the U.S were actually bound to, such as the Optional Protocol to the CRC and the Third Geneva Convention (GCIII), the U.S left a lot to be desired in the case of Omar Khadr.<sup>220</sup>

For example, according to the Optional Protocol to the CRC, which deals with the treatment of children involved in armed conflict, primary consideration must be designated to the best interests of children in all actions concerning them by State parties.<sup>221</sup> Additionally, according to Article 3(1) of GCIII, prisoners are to be treated humanely in all circumstances.<sup>222</sup>

These international standards were arguably not adhered to by the U.S in the case of Omar Khadr, as Khadr was detained in the harsh conditions of Guantanamo Bay for more than three years at the age of 16 before being charged, deprived of legal assistance and detained alongside adults.<sup>223</sup> Furthermore, Khadr was afforded limited contact with his family, deprived of education and recreation, and was not afforded specialised juvenile justice measures and rehabilitation.<sup>224</sup>

Instances such as the Omar Khadr case provide necessary international incentives to efficiently regulate and construct an international juvenile framework that caters to the need for separate and specialised juvenile justice systems. In addition, which emphasises the variable of age as a crucial factor in attributing culpability and blame at different age periods for adolescents involved in armed conflict and/or at odds with the law, with a MACR that meaningfully reflects the neurological realities of the adolescent lived experience.

However, there are contrasting examples of international cases dealing with the prosecution of child soldiers that are more nuanced and efficacious in harbouring the

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<sup>219</sup> Ali (2018) 354-355.

<sup>220</sup> Ali (2018) 354.

<sup>221</sup> UN General Assembly 'Optional protocols to the Convention on the Rights of the Child on the involvement of children in armed conflict and on the sale of children, child prostitution and child pornography' A/RES/54/263 (16 March 2001) 1.

<sup>222</sup> Article 3(1) of the Third Geneva Convention.

<sup>223</sup> Human Rights Watch 'The Omar Khadr Case: A Teenager Imprisoned at Guantanamo' June 2007 available at <https://www.hrw.org/legacy/backgrounder/usa/us0607/us0607web.pdf> (accessed 30 March 2022).

<sup>224</sup> Human Rights Watch (2007).

interests of those involved in armed conflict during youth. A recent and very good example of such cases is the indictment of the former child soldier Dominic Ongwen.

The Lord's Resistance Army (LRA) in Uganda abducted Ongwen when he was close to 10 years old, trained him and forced him to fight against Government forces throughout his adolescent years.<sup>225</sup> As a child, he was trained and forced to murder, mutilate, rob and rape innocent civilians.<sup>226</sup> Additionally, he was subjected to harsh treatment by the LRA at a young age, once being forced to hang the intestines of people he killed on a tree and proceed to consume their blood mixed with beans.<sup>227</sup> After many years serving under the LRA, Ongwen was eventually promoted to a high-ranking position due to his notable loyalty and overall efficiency.<sup>228</sup>

Ongwen, along with other leaders of the LRA, was subsequently taken into custody and indicted before the ICC for 70 counts of murder, pillaging and enslavement.<sup>229</sup> In February of 2021, the Trial Chamber found Ongwen guilty for 61 crimes, which covered crimes against humanity and war crimes committed between July 2002 and December 2005.<sup>230</sup> For these crimes, Ongwen was sentenced to 25 years imprisonment in May of 2021.<sup>231</sup> It was the Trial Chambers' reasoning for such a sentence that warrants consideration, as it lays out positive and progressive guidelines on the adjudication of child soldiers and former child soldiers alike, in relation to the mitigation of sentencing.

Article 26 of the ICC Statute prevented the Chamber from considering the crimes he committed as a child before the age of 18, therefore the Chamber only considered those crimes he committed as a legal adult.<sup>232</sup> The Chamber noted its obligation under Article 78(1) of the ICC Statute, which mandates the Chamber, in determining a sentence, to consider the individual circumstances of the convicted person, which includes the age, education, social and economic condition of such a person in terms

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<sup>225</sup> Baines EK 'Complex political perpetrators: reflections on Dominic Ongwen' (2009) 47 *Journal of Modern African Studies* 163.

<sup>226</sup> Baines (2009) 163.

<sup>227</sup> *The Prosecutor v Dominic Ongwen* Case No. ICC-02/04-01/15 (6 May 2021) para 73.

<sup>228</sup> Baines (2009) 163.

<sup>229</sup> Hassellind FS 'The International Criminal Trial as a Site for Contesting Historical and Political Narratives: The Case of Dominic Ongwen' (2021) 30 *Social & Legal Studies* 791.

<sup>230</sup> ICC 'Ongwen Case' available at <https://www.icc-cpi.int/uganda/ongwen> (accessed 27 April 2022).

<sup>231</sup> ICC 'Ongwen Case' available at <https://www.icc-cpi.int/uganda/ongwen> (accessed 27 April 2022).

<sup>232</sup> *The Prosecutor v Dominic Ongwen* Case No. ICC-02/04-01/15 (6 May 2021) para 69.

of Rule 145(1)(c) of the ICC's Rules of Procedure and Evidence.<sup>233</sup> In Ongwen's case, the tumultuous and unfortunate circumstances of his childhood under the LRA was a major factor in the call for a mitigation of Ongwen's sentence.<sup>234</sup>

The Chamber recognised the long-term effects of trauma in his childhood and adolescence on the decisions he made as an adult. It did so by considering his kidnapping as a child, the disruption of his education, the undue loss of his parents, and his socialisation in the LRA's extraordinarily violent environment as notable factors in deciding the appropriate duration of punishment for Ongwen.<sup>235</sup> Additionally, in noting that Ongwen's childhood circumstances did not lead to long-term effects such as mental disease or disorder,<sup>236</sup> the Chamber arguably recognised that childhood traumas do not have to result in such extremities in order to be accounted for.

The Chamber balanced Ongwen's personal history with the gravity of his crimes, however, did not regard the magnitude of his crimes as having limited or neutralised the mitigating factors of his childhood.<sup>237</sup> The Chamber noted that Ongwen's childhood trauma does not excuse the actions he took as a responsible adult, but in the interests of justice, the international community and in consideration of the harm he caused to the victims, Ongwen's sentence must be substantiated with all relevant circumstances if the primary purpose of sentencing is to be achieved.<sup>238</sup> Therefore, the Chamber sentenced Ongwen to 25 years imprisonment, as opposed to the excessive sentence of life in prison.<sup>239</sup>

As it relates to children involved in armed conflicts, fractured international standards on these issues provide inadequate and often fragmented guidance on how states are to legally conduct themselves in the realm of juvenile justice. This is owing to the fact that nations are frequently ill equipped to comply with such standards as a result of the dismantling of their authority or infrastructure in the aftermath of armed conflict.<sup>240</sup>

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<sup>233</sup> *The Prosecutor v Dominic Ongwen* Case No. ICC-02/04-01/15 (6 May 2021) para 62.

<sup>234</sup> *The Prosecutor v Dominic Ongwen* Case No. ICC-02/04-01/15 (6 May 2021) para 67.

<sup>235</sup> *The Prosecutor v Dominic Ongwen* Case No. ICC-02/04-01/15 (6 May 2021) para 87.

<sup>236</sup> *The Prosecutor v Dominic Ongwen* Case No. ICC-02/04-01/15 (6 May 2021) para 83.

<sup>237</sup> *The Prosecutor v Dominic Ongwen* Case No. ICC-02/04-01/15 (6 May 2021) para 88.

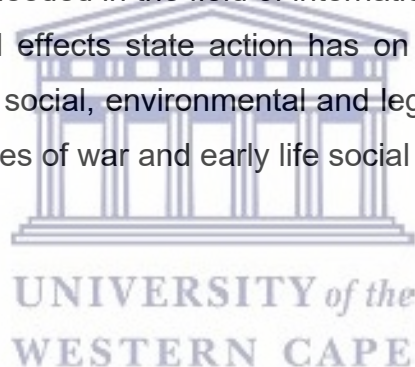
<sup>238</sup> *The Prosecutor v Dominic Ongwen* Case No. ICC-02/04-01/15 (6 May 2021) para 388-389.

<sup>239</sup> *The Prosecutor v Dominic Ongwen* Case No. ICC-02/04-01/15 (6 May 2021) para 388.

<sup>240</sup> Nagle LE 'Child Soldiers and the Duty of Nations to Protect Children from Participation in Armed Conflict' (2011) 19 *Cardozo Journal of International and Comparative Law* 20.

Additionally, as the Omar Khadr case has demonstrated, states have the often-unbounded discretion to impose strict and often brutal measures, as found in counter-terrorism measures, which have compounded impacts on children as a result of their age, for the purposes of combatting domestic or international threats.<sup>241</sup> However, the case of Dominic Ongwen provides a meaningful legal schematic on how to effectively adjudicate on extremely controversial cases involving child soldiers and former child soldiers alike that also involve crimes that are more heinous in nature. Additionally, it played an important role in legally documenting the phenomenological realities of a child attempting to navigate the nightmarish and hopeless realities of war, and what persuasive effect and weight that ought to carry in judicial proceedings. The exclusion of his childhood crimes, the consideration of his childhood misfortunes as a crucial factor in the reduction of his sentence and the scope of protection it provided for a former child soldier as an adult, despite the sentiments of those he victimised, can potentially act as a notable citation for further development in this area of the law.

Therefore, change is much needed in the field of international juvenile justice in order to pacify the disproportional effects state action has on children across the world, which favours the cognitive, social, environmental and legal sustainability of children caught up in the harsh realities of war and early life social incongruence.



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<sup>241</sup> CRIN 'The effects of terrorism and counter-terrorism measures on the enjoyment of children's rights' September 2016 available at <https://www.ohchr.org/sites/default/files/Documents/Issues/RuleOfLaw/NegativeEffectsTerrorism/CRIN.pdf> (accessed 31 March 2022).

## CHAPTER 5

### 5. CONCLUSIONS AND RECOMMENDATIONS

The age of criminal responsibility plays a crucial role in determining whether a child can be prosecuted for crimes in accordance with the operative age of adulthood assigned by the relevant overarching legal framework. It acts as the legal frontier that partitions rehabilitative care and retributive justice for individuals acting within the distinctive confines of adolescent intentionality. As such, as it relates to authoritatively determining the minimum age at which to assign such criminal responsibility, states are demonstratively afforded too much leeway under the broad and unfocused international legal principles that apply.

This upholds fractured and dangerously unspecific international standards that allows for global dissonance on issues and principles of juvenile justice, which is an area of law that arguably requires legal universality on, in order to effectively protect and provide for the special interests of those who are always considered the most vulnerable around the world in various contexts. For instance, it has been observed that the lack of clarity regarding the age of childhood and adulthood obstructs the process of defining specific human rights available to children,<sup>242</sup> as well as, constrain judicial authorities from acting with informed discretion in deliberating whether an accused actually committed an offence.<sup>243</sup>

However, it is regrettable that a number of major international instruments and legal entities within different international legal regimes have failed to codify and establish an adequate worldwide standard for the MACR. Although, as can be inferred from the above discussion, it would seem that some meaningful consensus could be extracted from and inferred between IHL, ICL and IHRL on the issue at hand. Reasonable deduction indicates that on one end, those below the age of 18 are to be treated with special consideration for their age and maturity in criminal justice matters. On the other end, the prosecution of children below the age of 15 falls within the ballpark of an “internationally unacceptable” age, with the ages between 15 and 18 being regarded

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<sup>242</sup> Hackenberg ML ‘Can the Optional Protocol for the Convention on the Rights of the Child protect the Ugandan Child Soldier’ (2000) 10 *Indiana International and Comparative Law Review* 454.

<sup>243</sup> Ottenhof R ‘Criminal Responsibility of Minors in National and International Legal Order’ available at <https://www.cairn.info/revue-internationale-de-droit-penal-2001-3-page-669.htm> (accessed 17 April 2022).

as more legally palatable. Therefore, there is indeed some meaningful guidance to be found within those respective legal regimes. However, they still appear to be deliberately avoiding any direct decision in favour of a more passive strategy that serves to offer a fundamental framework for safeguarding children in these various circumstances, without venturing to comprehensively expand on those legal parameters.

In order to successfully inform any such expansion, the empirical psychological research on adolescent development, the legal precedent in both international and domestic criminal law, and the legal nexus that exists between them must be considered. Neurological and psychological findings on the mental and emotional development of adolescents clearly provides enough factual content to support the near total separation of adults and children and inform subsequent legal avenues for effective regulation.

As discussed above, the adolescent cognitive framework renders them inherently susceptible to engage in behaviours that run counter to what society and the law generally deems acceptable and/or tolerable. This distinguishable reality solidifies the adoption of specialised and pacified legal responses by scientifically illustrating the objectively observable plasticity of the adolescent cognitive and socioemotional framework, which firmly justifies careful consideration regarding adjudication and enlightens any due determination on a MACR that ought to apply in various contexts. Furthermore, notable domestic case law has shown that such scientific findings can effectively be amalgamated with criminal jurisprudence, as it relates to the nuances of culpability, to meaningfully govern the interests of both societal standards/morals and that of the children in conflict with those standards. As such, there is little reason for the international legal order to remain hesitant on this topic.

Therefore, in order for international law to consistently address the issue at hand and act in the best interest of the child, the ideal solution to this issue would be the implementation of a more specific and self-catered legislative framework/instrument tailored to address the distinct mental capacities of children within designated groups as revealed by empirical psychological research. However, that would likely require more change, certainty and precedent than is currently feasible within the international legal framework.

Hence, given that IHL appears to provide extensive protections for children within different age categories, it would be both desirable and possible for the legal regime to act as a springboard for change and international precedent by enacting much-needed legal disentanglement on a MACR within its legal substance. Additionally, due to the fact that IHL effectively seeks to regulate the most exceptional and turbulent set of circumstances a child can find themselves operating within, the regime itself can act as the most exaggerated illustration of how to adequately adjudicate on juvenile justice issues and the determination of a viable MACR.

### 5.1 International Humanitarian Law as a catalyst for change

IHL, as the major recognised legal regime governing armed conflicts, is the outcome of mutual expectations between players in war based on the values of humanity, charity, chivalry, and civilised behaviour.<sup>244</sup> Due to these values, in many ways IHL was ahead of its time as it concerned the recognition of the special interests' children retained as a result of their innate vulnerability to the unfortunate yet unavoidable harsh realities of the world.

The regime itself ventures out of its way, according to both its treaty law and customary rules, to provide for the protection of those most vulnerable to the extremities of war by adopting a staunch principled position of sorts. IHL's core jurisprudential principles are intended to address the admissibility of general conduct and behaviour in armed conflicts (*jus in bello*), rather than the legality of preliminary incentives to engage in armed conflicts (*jus ad bellum*).<sup>245</sup> As a result, its principal mandate is to safeguard persons who are not or are no longer involved in hostilities in an armed conflict.<sup>246</sup> Those who fall within this category are given express entitlements of respect for their lives, physical and mental integrity, and to be afforded equal humane treatment at all times.<sup>247</sup>

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<sup>244</sup> Droege (2007) 313.

<sup>245</sup> Neuman GL 'Humanitarian Law and Counterterrorist Force' (2003) 14 *European Journal of International Law* 283-284.

<sup>246</sup> ICRC 'What is International Humanitarian Law?' July 2004 available at [https://www.icrc.org/en/doc/assets/files/other/what\\_is\\_ihl.pdf](https://www.icrc.org/en/doc/assets/files/other/what_is_ihl.pdf) (accessed 20 April 2022).

<sup>247</sup> ICRC (2004).



IHL provides for the respect, protection and distinction of private individuals who form part of hostile enemy countries, as well as, prisoners of war who belong to hostile enemy forces. It bases this respect and distinctions on the values of civility and prohibits undue punishment, arbitrary revenge, suffering, and promotes the veneration of civilian personhood and property due to their default status of absence from hostilities.<sup>248</sup> In consideration of the overall philosophy of IHL, the values and principles it espouses are naturally symbiotic with the values of contemporary juvenile justice, which mounts the interests of the children with great consideration and care for their innate amenability. This would only intensify in situations of armed conflict, where a child's vulnerability would only compound and their interests fatally jeopardized.

Therefore, as IHL seeks to protect those who are absent, or absent themselves, from armed hostilities, it would only be instinctive and necessary for the legal regime itself to further protect those who should not be present in such hostilities in the first place from the often-adverse judicial consequences administered to children involved in such conflict. Within its specialised and historically substantiated ambit, IHL could place itself at the forefront of the vexed debate concerning the determination of an internationally applicable MACR. All children deserve specialised protection. However, children who unduly endure the violent misfortunes of war fall within a category of their own.

The extreme circumstances of war, in the context of juvenile justice and the MACR, would allow IHL to formulate standards on these issues that would be considered as the most exaggerated outline on how international law ought to systemise its approach in determining the minimum age children are assigned full criminal responsibility for offences. This should be based on the internal cognitive frameworks observed by neurological science and its impact on the nuances of criminal culpability as observed in the law.

Hence, it is the recommendation of the author that IHL is spring boarded in order to get the proverbial ball rolling within the international legal order on the determination of a MACR. It would serve as the primary reference for other facets of international

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<sup>248</sup> Doswald-Beck L, Vité S 'International humanitarian law and human rights law' (1993) 33 *International Review of the Red Cross* 96.

law to draw from in uncovering meaningful universality on an important issue that has been left woefully and persistently unaddressed for far too long.

## **5.2 An informed determination on the minimum age of criminal responsibility**

The concerns around formulating a duly considered MACR in the often-disintegrated legal landscape of international law are valid. The international legal framework does not function with the same hierarchical certainty as domestic frameworks do. Every State operates according to its own norms, which are the products of specific historical, cultural and societal realities that do not find complete overlap with the rest of the world, or more importantly, congruence with the aggregated standards of internationally recognised laws and principles.

However, over the decades we have come to better understand the biological processes of adolescent brain development, which now provides objectively observable substance to the notion that children function according to underdeveloped and unsophisticated cognitive processes that render them worthy of special consideration. Science, in its aim to enhance our understanding of the natural world, has provided the law with the necessary factual content to, at the very least, construct general legal gauges as it relates to the adjudicative lines we draw in bisecting the legal reactions applied to minors from that of adults.

Within the ambit of IHL, the author asserts that the exceptional circumstances of war and the scientific insight gained from surveying the adolescent brain can generate a viable system, which caters to the needs of an internationally recognised MACR.

However, the cardinal question at hand would be, “At which age should be the minimum numerical indicator at which we attribute full criminal responsibility to persons at odds with the laws of war?”. It is the position of the author that such an age should ideally be set at the medial age of 18 years old. As noted in the above discussion, there seems to be an international consensus that those below the age of 18 are occupied by interests that are to be allocated the utmost due consideration in any given circumstance concerning them. Therefore, such an age should be allocated with little pushback, as it is an age most domestic and international frameworks could accommodate, especially in the context of armed conflict.

In addition to being internationally agreeable, the age of 18 also carries with it applicative utility. The age itself, by definition, falls within the latter end of the age spectrum as it relates to the adolescent age period (10 to 19 years old). Additionally, since the age range for adolescents reaching adequate levels of maturity tend to be between 15 and 22 years old, the set MACR of 18 would also fall towards the centre of that important age spectrum. Setting the MACR at the lower end of 15 would run the risk legally attributing adult maturity to many neurologically immature individuals between the ages of 15 and 18.<sup>249</sup> Inversely, setting the MACR at the higher end of 22 would arbitrarily attribute neurological immaturity to many adequately mature persons between the ages of 18 and 22.<sup>250</sup> Therefore, setting the MACR at 18 would place the line at which we assign full criminal responsibility to be equidistant from the two extremes mentioned above.<sup>251</sup>

However, being that this framework would operate in the context of armed conflict, there should ideally be further protections for those young adults who, after having been conditioned by the extremities of war, face legal retribution for crimes relating to armed conflict. As discussed above, the neurological findings on adolescent brain development have indicated that such development only fully concludes at the age of 25. Furthermore, it has been observed that the cognitive and socioemotional imprints early life adversity leave on adolescent children, carries over to often produce notable and lasting negative outcomes in adult life.

Therefore, due to this reality, it is the opinion of the author that further special consideration should be allocated to adults between the ages of 18 and 25 facing punishment for crimes committed in armed conflict. As a guiding schematic for this framework, the Dominic Ongwen case provides useful prescriptions on the criterion to be applied when adjudicating on such instances. Those above the age of 18 should be primarily treated as fully responsible adults, however, with due consideration for the unfortunate lived experience of their adolescent years that has no doubt had a notable effect on the way in which they navigated their adult lives. Such an approach

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<sup>249</sup> Fagan, Hirstein, Sifferd (2016) 278-279.

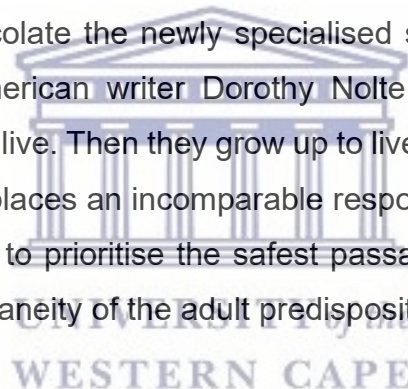
<sup>250</sup> Fagan, Hirstein, Sifferd (2016) 279.

<sup>251</sup> Steinberg L 'Should the Science of Adolescent Brain Development Inform Public Policy?' (2014) 50 *Court Review: The Journal of the American Judges Association* 75.

would cater to individualised justice and meaningfully moderate any concerns relating to a strict, arbitrary and imperfect application of the proposed linear age line.

This reality, substantiated by the neurological findings on the long-term effects of childhood trauma, should be balanced against the severity of the crimes committed during their adult years, the aims of retributive justice and the sentiments of the victims. However, as demonstrated by the Trial Chamber in the Ongwen case, the heinous nature of the crimes relevant to any prosecution, as well as, the sentiments of the victims should not needlessly sway the court to impose a punishment disproportionate to the individual circumstances of the perpetrator.

Swift and purposeful effort must be directed toward finding some common ground on the issue of an international MACR. It stands as one of the primary obstructions to relieving the plight of children dealing with the often-punitive nature of criminal justice. Such efforts would do well to start with the children navigating the most violent and disruptive of circumstances only to be found within the acute instability of armed conflict, and eventually percolate the newly specialised standards to other areas of juvenile justice. As the American writer Dorothy Nolte emphasises to the world, “Children do learn what they live. Then they grow up to live what they've learned”. The weight of this societal truth places an incomparable responsibility on the shoulders of the international legal order to prioritise the safest passage for children who unduly endure the often-cruel spontaneity of the adult predisposition for selfish apathy.



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