

Leiden University,
The Netherlands



Faculty of Social and
Behavioural Sciences

Deterring the Use of Child Soldiers in Africa:
Addressing the Gap Between the Mandate of the
International Criminal Court and Social Norms and
Local Understandings.

Candidate: Abigail Reynolds

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Supervisor: Frank de Zwart
Second Reader: Daniel Thomas

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ABSTRACT

Recruiting children for armed conflict occurs in many countries, with its clandestine nature often resulting in public ignorance. Nevertheless, it remains a widespread and highly topical issue. Accordingly, the practice of child soldier recruitment is one of the newest additions to the body of war crimes under international criminal law. The International Criminal Court presents the first international opportunity to have those responsible for the crime of child soldier recruitment punished, as the Rome Statute bestows it with the authority to prosecute both national and rebel armed forces who use or recruit child soldiers. Deterrence is one of the central goals of the Court, with it asserting that it is “determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes”. Whilst many are optimistic about the deterrent effect of the Court, others argue that international criminal tribunals are unlikely to deter potential child soldier recruiters. This thesis uses the classical theory of deterrence in order to ascertain whether the Court has the requisite capacity to successfully deter the crime. It does so by analysing the Court’s workings against the three key components of deterrence theory; severity, celerity, and certainty. Though this study finds that the ICC represents some capacity to deter future child soldier conscription in accordance with classical deterrence theory, the crime still persists. This calls into question the applicable relevance of deterrence theory to Court’s practices. The hypothesis that I put forward is that issue of child soldiers requires less rule based deterrence and more social and normative change. Specifically, the supply and demand aspects of child soldier recruitment must be tackled. Social background, loss of family, warlike environments, religious and ideological beliefs, and inescapable poverty contribute to the ever-ready supply of children willing to join militaries and militias. Thus, the central thesis of this paper is that global discourse must engage more seriously with the complex interplay between cultural norms and local understandings in order to put an effective end to child soldier recruitment.

Introduction

Deterrence theory predicts that when judicial sanctions meet a number of criteria, potential criminals will be deterred from committing crime, thus, it is “the avoidance of criminal acts through fear of punishment” (Bottoms, Burney & Wikstrom, 1999, 5). The three main elements are; severity, celerity, and certainty. Severity refers to whether the punishment is harsh enough to outweigh the benefit gained from commission, celerity to the swiftness in which criminals receive sanctions, and certainty to the probability of punishment (Onwudiwe, Odo, Onyeozili, n.d, 235). Additionally, deterrence focuses on the individual’s *knowledge* of the threat and imposition of punishment, thus informing and influencing their choice (Ritchie & Ritchie, 2011, 16). Consequently, the threat must be credible and communicated; resulting in the target group believing that the system is capable of apprehending them (Zimring, 1971, n.p).

The general hypothesis of deterrence theory is that when the certainty, severity, and celerity of criminal apprehension are high, criminality will be low. Implicit in this definition is that actors enjoy the choice of whether or not to commit the crime, rooting the theory within the “rational choice” model of human behaviour (Akers, 1990, 653; Pratt, Cullen, Blevins, Daigle, & Madensen, 2006, 367). Presumably, the actor would be aware of, and thus able to weigh the risks, costs and benefits before breaking the law.

The International Criminal Court¹ presents the first international opportunity to punish those responsible for the crime of child soldier recruitment (Green, 2009, 395). The Rome Statute bestows upon the ICC the authority to prosecute those guilty of "conscripting or enlisting children under the age of fifteen years into national armed forces or using them to participate actively in hostilities" in armed conflict (UNGA, 1998, art.8(b)(xxvi)).

¹ Hereinafter ‘the ICC’ or ‘the Court’.

Additionally, deterrence is one of the central goals of the Court, which labels itself as “determined to put an end to impunity...and thus to contribute to the prevention of such crimes” (UNGA, 1998, preamble).

The Court took its first steps in punishing those who commit crimes of child soldier recruitment in 2012. In *The Prosecutor v Thomas Lubanga Dyilo* (2012),² the Court sentenced the defendant for crimes relating to the conscription of child soldiers to fourteen years imprisonment. The ICC has subsequently convicted Jean-Pierre Bemba Gombo for these crimes; investigated Joseph Kony, Vincent Otti and Okot Odhiambo, and is trying Dominic Ongwen and Bosco Ntaganda.

Many are optimistic about the deterrent effective of the Court, with former Prosecutor, Luis Moreno Ocampo, dubbing *Lubanga* as “a landmark in the fight against impunity for these crimes affecting children” (ICC, 2006). Corroborating this, the United Nations High Commissioner for Human Rights, submitted that the judgement sent “a strong signal against impunity for such grave breaches of international law that will reverberate well beyond the DRC” (Simons, 2012, A12). In addition, former rebel leader, Xavier Ciribanya, was reported stating, “we are now all thinking twice... We do not know what this Court can and will do” (Burke-White, 2005, 587). The ICC’s establishment has unequivocally sent a strong signal to would-be perpetrators that impunity for such crimes will not be tolerated. Furthermore, particularly in this age of global media, one can predict that the Court’s findings of guilt will increase the stigma attached to child soldier use (United Nations News Centre, 2012; McBride, 2014, 195). Additionally, it is not only the prosecution of individuals that deters but also the announcement of investigations and the mere monitoring of a situation (OTP, 2006, 6).

² Hereinafter *Lubanga*.

Though the Court has presented the international arena with an instrument to deter future child soldier conscription in the aforementioned ways, the crime persists, with a 2014 report purporting that that year 51 armed groups were known to recruit child soldiers (UN Human Rights Council, 2015, 7). This questions both the Court's practices and the validity of deterrence theory when applied to international criminal tribunals with some suggesting that detached tribunals, with light international sanctions, are less likely to deter government opponents than harsh local sanctions (Ku & Nzelibe, 2006, 17).

My hypothesis is that legal discourse on child soldiers fails to take into the account the local understandings of child soldiers and cultural relativism,³ and thus an acute engagement with the complex relationship between cultural norms and practices must occur in order to tackle this issue in the long term.

As such, I will enquire into the alternatives of the rational choice model of deterrence and conclude that meaningful deterrence must address issues of both the supply and demand of child soldiers, and occurs from compliance that takes place for normative reasons, even in the absence of enforcement or sanctioning mechanisms (Chayes & Chayes, 1993, 186; Risse & Sikkink, 1999, 11). Primarily, the supply of children requires grassroots change, as a direct relationship exists between child soldier recruitment and the most marginalised groups (UNICEF, 1997, 2-3). Such an approach has the "demonstrated potential to impact on the policy and practices of some groups" (Child Soldiers International, 2008, 23).

Secondly, the demand aspect of the crime needs to be tackled. Actors need to recognise that recruiting children is wrong, or be deterred from using them through fear of social repercussions. This can be achieved through normative change and social learning. Through this, the actor can be deterred by the communal belief that the rule is legitimate and therefore needs to be obeyed (Flathman, 1993, 527-33; Beetham, 2013). Such a perception

³ Cultural relativism is the concept that an individual's ideals and activities should be perceived and understood in terms of that individual's culture. See Donnelly, 1984.

will affect the actor because it means that the moral decision to not recruit children will have been internalised and thus will affect how the actor perceives its own interests (Hurd, 1999, 381).

Academic journals and anecdotal reports are the main sources used in this thesis. Anecdotal reports, that have provided this study with the majority of its data, have been published by; *inter alia*, the United Nations, the ICC, various non-governmental organisations and some secondary sources. Information will also be based on the author's personal observations whilst working at the Court between January and July 2016. These sources will be used, because conducting primary research regarding child soldiers is not possible given available resources and the brevity of this master's programme. Nonetheless, I will use these reports to aid the qualitative application of the empirics of the Court's proceedings to deterrence theory in order to disprove the theory's relevance when applied to international criminal law tribunals. I will then use the sources to substantiate my hypothesis by assessing ethnographic data regarding children in conflict areas, and use case studies to illustrate how grassroots activism can prevent the recruitment of children.

The Issue of Child Soldier Recruitment

This section has a number of aims. After initially introducing the topic of and outlining the background relating to the issue of child soldiers, the history of child soldiers will be examined. To follow there will be an analysis of their present position, including the factors contributing to their widespread use.

Worldwide, children are targeted and trained as combatants to assist the militaries of states as well as opposition and militia groups (Frostad, 2013, 71; UN Human Rights

Council, 2015, 7). Though official statistics are rough, in the 1990s, there were an estimated 300,000 minors utilised as either combatants or auxiliaries in over 30 conflicts globally (Twum-Danso, 2003, 12). In 2002, it was estimated that children as young as six accounted for ten per cent of the world's soldiers and in 2004, it was found that children were "fighting in almost every major conflict" (Csete, 1998; Coalition to Stop the Use of Child Soldiers, 2007, 13). Since, a number of the conflicts have ceased, rendering the statistics out-dated, however, as recently as 2008, Human Rights Watch⁴ estimated that 250,000 children were fighting as child soldiers (2011), and Save the Children International projected a figure in excess of 400,000 (2008). These numbers, however, are thought to be inadequately substantiated (Drumbl, 2012, 26).

The use of child soldiers is a relatively new phenomenon. McBride notes that the change of sentiment towards children was established in the Second World War with the foundation of the *Hitlerjugend* (2014, 5). Further, as warfare modernised, the introduction of lighter and less complex weapons meant the tide turned in favour of employing children and this dramatic downsize in weaponry coupled with technological advances has led to the proliferation of children in combat (McBride, 2014, 5; UN Human Rights Council, 2007; *United Nations News Centre*, 2008).

Additionally, the increased recruitment of children has been attributed to the rise of internal conflicts (McBride, 2014, 9). Localised and civilian communities represent today's battlefields, with most modern conflicts occurring within states (Boyden & de Berry, 2004). There are a number of reasons for this increase. First, such intra-national conflicts are often long, averaging seven years (McBride, 2014, 10). As such, there becomes a need for cheap and replaceable soldiers and children pose a "dispensable" and "unlimited resource" (Fonseka, 2001, 76; Vautravers, 2008, 103). Additionally, there has been an increasing in

⁴ Hereinafter HRW.

“guerrilla warfare”, with its clandestine nature meaning that children, with “their size, weight, and ability” (Webster, 2007, 234), are “better-suited for certain activities,” (Webster, 2007, 234) such as hiding, look out duties, and planting and detecting landmines.

Additionally, children lack the cognitive ability to understand the ramifications of armed conflict, due to an undeveloped “faculty for moral reasoning”, (Lubanga, 2010, 12) which makes them “so controllable.” (Menkhaus, 1999, 3). It is thought that children under the age of 18 generally do not have a ‘death concept’ (Waschefort, 2014, 25-52) and therefore cannot make the informed decision, or give informed consent, to participate freely in conflict as they fail to understand the realities of their mortality.

Testifying before the ICC in *Lubanga*, Radhika Coomaraswamy, an ‘expert witness’, submitted the common reasons of child recruitment. Aside from the well-known method of abduction, she suggested that the prevalence of ethnic-centred warfare means “children are persuaded by parents and...communities to join” (Lubanga, 2010, 13). Groves remarks “children volunteer because they feel compelled to protect their hometowns...or are persuaded to fight for social causes, religious expressions, or national liberation.” (2000, 49) Further, children find themselves indirect victims as they are left orphaned, sometimes catalysing retributive sentiments as they “take arms to...seek vengeance, to protect their families, to emulate their peers to forge their identities as warriors or heroes, to overcome feelings of helplessness” (Webster, 2007, 235).

Additionally, situations of “extreme poverty” (Lubanga, 2010, 21) were listed as another supplying factor. Militias provide an effective solution to this, offering protection, food, and even a surrogate family (Pauletto & Patel, 2010, 44). Consequently, the AK-47 Kalashnikov has often been dubbed as the “African credit card” (Ewart, 2012). In conflict areas many high needs populations have “symbiotic” relationships with rebel groups, in which both parties benefit (HRW, 1997, 2). For example, in South Sudan, the Sudanese

government supplies the Lord's Resistance Army with food and arms in exchange for its support, making living conditions within the LRA camp better than those in the local communities (HRW, 1997, 2).

By virtue of this, youth volunteerism, however controversial, cannot simply be abated and the factors contributing to child recruitment must be recognised in order to develop operative deterrent mechanisms (Drumbl, 2012).

Classical Prosecutorial Deterrence Theory

Certainty

The certainty component of deterrence requires “the Court’s existence and actions [to] raise the perceived likelihood that an individual will be tried and punished” (Jo & Simmons, 2014, 9). This factor is regarded as the key deterrence mechanism for most domestic criminals (Kleinman, 2009). Moreover, empirically, within the American population, certainty has had the greatest deterrent effect (Wright, 2010, 5). Certainty of punishment means ensuring that sanction occurs whenever a criminal act is committed; if individuals are certain that their acts will be punished, they will refrain from offending.

The importance of certainty poses an issue for international criminal tribunals. At the international level, certainty of punishment implies a perfectly efficient and effective judicial procedure, however this is not seen at the ICC. For instance, the Court can only investigate situations under its jurisdiction or those that are referred to it by the Security Council, acts complimentary to national jurisdictions, and lacks a police force (Kersten, 2011). Moreover, it also suffers from lack of resources. Unsurprisingly, the number of individuals prosecuted for international crimes thus far has been limited, arguably making the risk of perpetrator arrest slim.

As stated, the Court's principle of complementarity negatively impacts its deterrent efficacy. The duty of State Parties to investigate and prosecute the perpetrators of international crimes is reinforced with the Statute, underlining that priority of jurisdiction rests with the states themselves (UN General Assembly, 1998, art. 17). Accordingly, the Court promotes itself as "a Court of last resort", designed to step in only when national jurisdictions demonstrate the lack of capacity, or will, to address crimes (ICC-OTP, 2003). The ultimate goal of complementarity is to strengthen domestic capacity positively impacting the prevention of future abuses, establishing a channel for the Court to support deterrence at a national level. An active and cooperative relationship between State Parties and the Court is imperative to the Court's success and its long-term preventative, and deterrent impact (Marshall, 2010, 17).

This principle has the potential to reinforce the ICC's deterrent impact as it incentivises states to strengthen their own enforcement capabilities, as has been achieved in both the DRC and Sudan (Jo & Simmons, 2014, 18). Further, states that have ratified human rights treaties are more likely to hold domestic trials (Jo & Simmons, 2014, 18). Thus, the Court exerts indirect deterrence, stimulating national authorities to create favourable conditions for internal scrutinising and law enforcement (Jo & Simmons, 2014, 18). Despite this, oftentimes, this complimentary relationship has led to the diminution of certainty of prosecution. The Court's failure in some cases to encourage domestic trials has resulted in many perpetrators facing no sanction, leading to an "impunity gap" (Clark, 2011, 535).

The Court possesses no police force and is therefore fully reliant on the cooperation of State Parties in attempts to effectively investigate and prosecute cases (Chung, 2008, 289). This cooperation has not always been forthcoming. The Court often suffers with lack of cooperation when conducting its investigations and issuing arrest warrants, particularly in conflict-ridden and unstable situations (Singh, Evenson, Keppler, Franco, Sandler, Baudot,

Orlovsky, 2008, 33).⁵ As it is within these environments that child soldiers are most commonly used, the lack of cooperation has a disproportionately negative effect regarding this crime. The lack of national will coupled with the tendency of rebel militias to be located in regions that make their crimes difficult to investigate (Jo & Simmons, 2014, 34) means that international institutions and national jurisdictions traditionally have “scant authority” over them (Jo & Simmons, 2014, 2). This has been particularly problem in *The Prosecutor v Joseph Kony* with the joint mission of the ICC and national authorities unable to locate him (Kersten, 2012). Illustrative of this issue are the ten individuals that the Court has released arrest warrants for who remain at large today. Accordingly, it can be assessed that the Court’s decisions and orders are only as effective as their enforcement in situation countries (HRW, 2008, 35).

Finally, the ICC’s budget and lack of resources have proved problematic to increasing its prosecutorial certainty. Firstly, the Court is under-resourced and over-burdened, resulting in the forthcoming danger of the Court only being able to respond to some cases (Kersten, 2011). In the last decade, the number of investigations and cases in front of the Court has grown dramatically (Kersten, 2011a) but the Court’s resources to investigate and prosecute those cases saw marginal increases leading to it calling for additional funding (Stahn, 2014). As such, it is a fallacy to expect the ICC to effectively respond to the increasing demands of the international community “hampering the delivery of justice” (Kersten, 2011). In accordance with deterrence theory, the Court’s finances define “the quality and extent of justice served” (Kersten, 2011) and thus impact the certainty of prosecutions, investigations and arrest warrants served.

Severity

Regarding the severity component, the price of punishment must not be less than that

⁵ Hereinafter HRW.

required to offset the profit of the crime (Bentham, 1781, 141). The crime of child soldier recruitment was included in the Rome Statute due to the fact that “children are particularly vulnerable [and] require privileged treatment in comparison with the rest of the civilian population.” As such, in *Lubanga*, the Prosecution requested a sentence of 30 years imprisonment, hoping it would “confirm this special protection (of children) and the gravity of the crime” (ICC-OTP, 2012). Consequently, the Prosecution requested a sentence in the name of each child recruited (ICC-OTP, 2012). However, the actual sentence received by Lubanga was 14 years (Sharma & Welsh, 2015, 151). Whilst Lubanga’s sentence was handed down with the hope of sending a clear message to other grave offenders (Stein, 2014, 521-522), his sentence, the minimum required by the Statute, has sent an unfortunate message highlighting the timidity of the Court.

An additional criticism of the Court is its undertaking of “hit-and-run” investigations (Kambale, 2012, 16), particularly notable in *Lubanga* where the defendant was charged with two counts of using children under the age of 15 to participate actively in hostilities (ICC, 2016). This was despite allegations that he committed an additional assortment of “horrific crimes, including murder, torture and rape” (HRW, 2008, 63) and the Prosecutor’s initial intentions to include these additional charges (Associated Press, 2008; HRW, 2008, 64). Despite this, for reasons of celerity, cost, and pressure to complete a case, none of these charges materialised (Kambale, 2012, 16; HRW, 2008, 63).

Many human rights organisations expressed their “disappointment” that the investigations did not yield a broader range of charges (HRW *et al*, 2006). However, the same issue has subsequently arisen in *The Prosecutor v. Bosco Ntaganda* (HRW, 2008, 63). HRW argues that the charges brought forward by the Court do not reflect the “full range of serious crimes under ICC jurisdiction committed by perpetrators against civilians” (2009), and that in Ituri many stakeholders felt aggrieved by the perceived insufficiency of the

charges (HRW, 2008, 63) and the limited scope of the ICC's investigations led many victims in Ituri to question the credibility and capacity of the Court (HRW, 2009). The Court's action, or inaction, exemplifies its will to convict perpetrators for lesser crimes in order to achieve an expedited verdict rather than risking a protracted, but more representative, trial (Clark, 2008, 41).

Therefore, whilst Lubanga was sentenced to 14 years, he enjoys impunity for these other untried crimes (Maassen, 2011, 52). The Court, by limiting its investigations, hampers its ability to produce the deterrent effect it desires because the severity of the punishment does not correlate to the actuality of the perpetrator's crimes. Moreover, as illustrated, local communities have already called the capacity of the Court into question and, presumably, such an opinion extends to the militia groups that the Court attempts to deter. From the perspective of deterrence theory, this poses a grave problem for the Court, as it is imperative target groups believe that the system is capable of apprehending them (Kennedy, 1983, 5).

Similarly, the Court's focus on auxiliaries rather than key political or military officials has been criticised. In *Lubanga*, the ICC was accused of taking "the small fish...leaving the big fish because they're in positions of power" (The Atlantic, 2009). Though Lubanga was the leader of a prominent ethnic armed group associated with multiple atrocities, he did not act alone (HRW, 2012). HRW research between 1998 and 2012 suggested that key political and military officials in the capitals of DRC, Rwanda, and Uganda played a flagrant role in "creating, supporting, and directing armed groups in Ituri" (2012). These top commanders should also be, or have been, investigated regarding their potential criminal liability. By not investigating prominent officials the Court, once again, risks credibility and reputational damage (HRW, 2012). Whilst deterrence theory recognises that punishment of a single perpetrator deters other potential perpetrators (Mannecke, 2007, 320-328), one can assume that the deterrent effect would be magnified should the apprehended be of a high status. As

such, targeting individuals of the highest rank will have the strongest deterrent effect, as their sheer influence will mean that more people are aware, and affected, by their apprehension.

Celerity

International criminal trials are notoriously time-consuming (HRW, 2010, 5), and additional delays were inevitable in the Court's first trials as it was required to work out issues relating to its unique pre-trial procedures and victim participation (HRW, 2010, 5). Regardless, a "favourite" criticism of the Court is that trials take too long to conclude (Kersten, 2011a).

As already mentioned, the Court has severe budgetary restraints, elongating the timeline of proceedings, with some claiming that without adequate funds, trials could take even longer to conclude (Kersten, 2011a). As this issue has already been discussed, I will not pursue it further.

The inadequate threat of celeritous punishment thus presented by the ICC could have the uninvited effect of emboldening would-be war criminals (McBride, 2014, 212). This, McBride notes, has been exacerbated by the blatant flouting of arrest warrants, for example in *The Prosecutor v. Omar Hassan Ahmad Al Bashir* the ICC launched two arrest warrants for the President of Sudan, as well as supplementary requests to Sudan and State Parties (2014, 212). Despite these legal documents, Al Bashir has enjoyed travelling between State Parties despite their professed obligation to arrest him, weakening the authority of the Court (New York Times, 2015).

Additionally, despite Ntaganda's surrender to the US Embassy in Rwanda in 2013, there was a seven-year period in which he flouted his outstanding warrant (McBride, 2014, 212). Although some scholars suggest arrest warrants have *per se* value in terms of 'interim justice' by forcing people into hiding (Maassen, 2011, 52), such optimism bears no relevance

in this situation (Maassen, 2011, 52). Despite Ntaganda's outstanding arrest warrant, between 2006 and 2013, he was integrated into the Congolese military, and promoted to the position of Deputy Commander (McBride, 2014, 212) whilst the Congolese authorities refused to hand him over (Barria & Roper, 2005, 359). In the case of child soldiers, where social norms have led to a high propensity for recruitment, further emboldening would-be perpetrators would be particularly undesirable. Moreover, the political undercurrents that obstructed the execution of Ntaganda's arrest warrant could have the result of instilling military and militia leaders with the confidence that, they too, will be able to negotiate or bribe their way out of prosecution (Kersten, 2012). Thus, the marginal chance of being arrested, coupled with the room to negotiate politically with those in authority, prevents the fear of apprehension from manifesting as a reduction of child soldier recruitment (Kersten, 2012). As such, it imperative for the Court that the political peculiarities of situation countries do not obstruct or negatively influence the celerity of arrest, which would ultimately undermine the Court's deterrent impact (Kersten, 2012).

Furthermore, lack of celerity poses the threat of would-be perpetrators 'discounting the future'. The criminal theory of discounting the future takes into account the "inherent trade-off between the immediate returns associated with committing the crime and the possibility of future punishments" (Mastrobuoni & Rivers, 2015, 1). Thus, the importance that the potential felon ascribes to their future will have a direct impact on how potential incarceration affects them (Mastrobuoni & Rivers, 2015, 1). Those who heavily discount the future are more likely to engage in criminal activity (Mastrobuoni & Rivers, 2015, 1). Further, the likelihood that actors will discount the future increases as time passes (Mastrobuoni & Rivers, 2015, 2). This has two important implications for the Court's deterrent impact. First, "the more an individual discounts future events, the less deterrent power future punishments have [, and s]econd, discounting shapes the relative deterrent

power of punishments received at different points in the future” (Mastrobuoni & Rivers, 2015, 1).

Such thinking is detrimental to the ICC’s deterrent capabilities, as trials take so long. Additionally, this theory poses significant issues relating to child soldier deterrence. The average life expectancy of civilians in armed conflict in Africa is 47 years (Hoeffler, 2008, 24) and the life expectancy of child soldiers in Uganda is a mere 21 (Chee-Hing, 2005). Thus, the life expectancy of a militia leader must be between 21 and 47 years. As such, the likelihood that militia leaders discount the future is high as the probability of an arrest warrant being launched resulting in their successful indictment within their lifetime is low. Such an assumption is based on the empirics of cases undertaken by the Court. Additionally, particularly illustrative of this point, is the sheer amount of arrest warrants the Court has revoked due to the demise of the suspect (ICC, various, see footnote).⁶

Credible and Communicated

Whilst certainty, celerity, and severity of punishment are necessary in order to make deterrence effective, in isolation they are insufficient. For the threat of punishment to be effective as a deterrent it must be credibly communicated and the target group must believe that the system is capable of catching and punishing them (Kennedy, 1983, 5). As Jo and Simmons proclaim, “prosecutorial deterrence is possible only if the Court’s existence and actions raise the *perceived* likelihood that an individual will be tried and punished” (2014, 10). Thus, in order to make an impact the Court’s work must be *understood* by the communities most affected by international crimes (HRW, 2008, 116). A communications strategy would enable the Court to inform the perceptions of those within communities

⁶ For instance, 2007’s Decision to terminate the proceedings against Raska Lukwija; 2015’s decision to terminate the proceedings against Okot Odhiambo; 2014’s decision to terminate the proceedings against Mr Jerbo; and 2011’s decision to terminate the case against Muammar Mohammed Abu Minyar Gaddafi (ICC, various).

affected by crimes who would otherwise be vulnerable to distorted views of the ICC's mandate (HRW, 2008, 116). Understandably, HRW dubs a robust strategy for both outreach and communications to make the proceedings meaningful and relevant to these communities "vital" (2008, 116) and would "sustain short-lived influence over the longer term", thus contributing towards the prevention of future crimes (HRW, 2008, 70). Due to the geographical detachment of the Court and the possibility of "seeming remote and of little consequence to the communities most affected" (HRW, 2008, 99) effective communication is of increased importance.

In this regard, in 2007 the Court established Public Information and Outreach Section⁷ under the Registry in order to "bridg[e] the distance between The Hague and the communities affected by the commission of crimes under its jurisdiction." (ICC Outreach Report, 2007, 7) and does this through Outreach, Public Affairs, and External Relations (ICC, 2007). The Court describes its Outreach Unit as facilitating a sustainable discourse between the Court and all affected stakeholders in order to tackle misinformation and build relationships (ICC, 2016). Communicating in a robust and decisive manner about on-going investigations, as well as voicing the Court's opinions when crimes are committed, will remind parties of the Court's jurisdiction (HRW, 2008, 70). In sum, Outreach can foster awareness and an interest in the legal process and, by raising awareness about crimes in the ICC's jurisdiction, can increase respect for the rule of law and human rights, something that will be discussed later (HRW, 2008, 117).

However, in reality ICC Outreach has had a notoriously slow start battling against pre-existing rumours and misperceptions (HRW, 2008, 118). HRW found that the lack of public profile of field offices established in Kinshasa in 2005 and Bunia in 2007 in order to communicate *Lubanga* proceedings, left communities aggravated, with some NGOs referring

⁷ Hereinafter PIOS.

to the offices as “Guantanamo” due to their “secrecy, isolation, and a perceived bunker mentality” (2008, 104). Although the former Prosecutor explained that secrecy was intentional in order to avoid jeopardising the peace process (Davis & Hayner, 2007), the delay of outreach nevertheless resulted in distortion.

Further, the Court did not undertake outreach efforts in Ituri, the location of the Second Congo War and where Lubanga was found to use child soldiers (IRIN, 2005), until the year after his detention. ICC staff have acknowledged that an outreach campaign addressing the Court’s mandate and core values “should have been conducted before the arrest warrant against Lubanga” (HRW, 2008, 128) in order to avoid “deeply-rooted” and damaging rumours regarding its work (HRW, 2008, 126-127). The International Bar Association recognises the importance of engaging with local populations as early as the analysis phase in order to reflect the reality of the Court’s work and the actual focus of outreach activities (2008, 19), in contradiction with the Court’s 2007 Strategic Plan for Outreach, which placed the heaviest importance on the trial phase of the proceedings (21).

Pitifully, the Court’s Outreach Unit in Ituri did not broadcast the *Lubanga* verdict despite the magnitude of this key moment (Drumbl, 2012a). Broadcast should have been of utmost priority to the Court if deterrence of international crimes, in the traditional sense, is ever to occur (Drumbl, 2012a). Deterrence theory explicitly states that punishment works as a key medium for communicating the deterrence message as it creates “conscious and unconscious inhibitions against committing crime” (Andenaes, 1952, 179). Therefore, it is imperative that the Court does not repeat these mistakes and provides prompt and adequate communications of future proceedings. The ICC communications team in Ituri blamed the lack of broadcast on insufficient funding (Drumbl, 2012a). However, despite the increase in investigations and the corresponding increase in the budget of the Office of the Prosecutor, the Registry has yet to see an increase in resources (HRW, 2008, 84). It can be argued that

without a mirroring budget increase the Registry stands little chance of providing sufficient outreach in order to communicate its mandate (Jacobsson, 2015).

Lastly, the Court has suffered with the remote location of many of its affected communities, hampering the ability to spread its mandate, and ultimately help the prevention of atrocities. Independent research reported that awareness of the ICC is low in dispersed populations (Vinck & Pham, 2010, 31-34). A population based survey undertaken in Uganda in 2005, right before the Prosecutor released its arrest warrant for *Kony et al*, at an Internally Displaced Persons camp, showed that 27 per cent of the population surveyed had heard of the Court (Vinck & Pham, 2010, 31-34). In 2007, during peace negotiations, 70 per cent of the population had knowledge of the ICC (Vinck & Pham, 2010, 31-34). However, in 2010 when 90 per cent of the population had returned home from Internally Displaced Persons camps, the number fell to 59 per cent (Vinck & Pham, 2010, 31-34). Such data reveals the limits of ICC outreach in isolated and remote areas, as the Court struggles to spread its message to dispersed populations.

This poses a particularly pertinent issue for child soldier deterrence as armed groups who enlist child soldiers often live “deep in the bush” (Gettleman, 2007) in “remote and rugged” locations (Drumbl, 2012, 26). If the ICC’s mandate struggles to travel to remote locations, the Court will have little presence in the bush where it would reach would-be perpetrators and have the biggest impact on deterrence.

The Supply and Demand of Child Soldiers

The previous section has highlighted the strengths and weaknesses of the ICC in relation to deterrence theory, this chapter will show how adherence to the components of deterrence theory alone is not sufficient in preventing further crime, other obstacles must also be

overcome as deterrence suffers the risk of failing if any societal conditions exist that negate the successful transmission or reception of the deterrence message (Geerken & Gove, 1975, 500). I argue that the current focus on the impact of the ICC neglects important normative dynamics and thus, international, national, and local dynamics need to be taken into account to understand the Court's relevance (Zwingel, 2012, 115). As such, the Court's ability to provide social deterrence and generate a receptive environment is vital in order for it to achieve its deterrence aims.

The Normative Value of the ICC in Addressing the Demand for Child Soldiers

The ICC needs social deterrence capabilities in order to negate my previously drawn conclusion that the threat of formal sanctions by a geographically detached and culturally foreign international organisation will do little to deter child soldier recruiters. Whilst material punishment is important, normative pressures are also fundamental in order to create a more comprehensive form of deterrence because they influence an individual's behaviour in a way that is more meaningful to the individual and their community (Kim & Sikkink, 2010, 4; Kersten, 2012, 137).

Constructivists stress the importance of international organisations in promoting “a common social world by fixing the meaning of behaviour” (Kratochwil and Ruggie quoted in Hasenclever, Mayer, and Rittberger 1997:163), in effect, contributing to the establishment of shared values. As such, the Court's apprehension of criminals contributes to emerging accountability norms that act to limit future crimes, by making crimes both costlier in terms of rational choice, and by establishing them as firmly outside accepted behavior (Grono, 2012). As such, the Court's proceedings act as “high-profile *symbolic* events that communicate and dramatize norms” (Kim, Sikkink, 2010, 2). As a consequence, many scholars have stressed the normative value of the ICC in creating *extra*-legal sanctions (Nagin

& Pogarsky, 2001).

Norms are the expectations of an agent about the behaviour of other agents in society (Savarimuthu & Cranefield, 2009, 2), and in order to become communally-held they must be shared among a community and sustained by their approval or disapproval, such as feelings of shame that an individual would feel were he to violate them. Further, they are perpetuated by feelings of shame (Sikkink, 2011, 11; Elster, 1989, 100). Norms can be spread through a number of channels (Savarimuthu & Cranefield, 2009, 3), and international criminal tribunals are a key way of enabling the development of a “moral community” (Koskenniemi, 2002, 9).

Jo and Simmons have been optimistic about the Court’s ability to produce and strengthen community norms via its legal mandate (2014, 13). In their theory, they advance that social deterrence works through extra-judicial actors who use both material and non-material sanctions, such as the cessation of financial assistance or shaming, respectively (Jo & Simmons, 2014, 13). As such, social deterrence mechanisms are highly conditional on the existence of important stakeholders whom the target group consider to *matter*, and who also have the ability to apply pressure (Jo & Simmons, 2014, 18). Thus, social deterrence mechanisms will have the greatest effect on state actors, as they possess a wider range of stakeholders that they must illustrate their legitimacy to and reputational concerns are typically of high importance to states (Downs & Jones, 2002, S95). As such, they are sensitive to pressure mobilised by organisations that advocate human rights (Simmons, 2009).

The serious effect that community norms have on state actors will indirectly affect rebel groups who often rely on state support. As governments learn that recruitment will not be tolerated, incentives for states to cease funding for rebel militias that use child soldiers will be created. This could have a great deterrent impact in South Sudan for example, where the Defence minister, claimed they were funding the activities of the Uganda Peoples Defense

Forces and the Sudan Peoples' Liberation Army (Sudan Tribune, 2014). Hafner-Burton claims social pressures backed by economic sanctions bear the greatest deterrent impact (2013), and as a result could contribute greatly to prevention of child soldier usage.

Additionally, states that use child soldiers may find themselves deterred. Through the Court's successful communication that child soldier usage will not be tolerated, as it has achieved in *Lubanga*⁸ (HRW, 2008, 68), many state militaries who actively recruit child soldiers may feel pressure to release them, in order to enhance their legitimacy on the world stage. It is estimated that children have been used in conflict by 20 states since 2010 (Child Soldiers International, 2012). As a result of this normative prescription by the Court, a great number of children stand the chance of release due to emerging norms regarding their use.

Finally, community norms can indirectly strengthen prosecutorial deterrence when community actors push for legal reforms and cooperate with the Court as a result of heightened social sensitivity (Jo & Simmons, 2014, 21). As such, the ICC can improve its deterrent impact through mobilising domestic societies to demand justice (Sikkink, 2011). In this regard, communication is vital and for this reason I will briefly revisit my argumentation for improving the Outreach mechanisms of the Court. Conveying information about the Court's proceedings would positively influence the will of national governments to try similar crimes and create a climate of understanding that would make citizens more willing to assist the Court on the ground. Simultaneously, whilst social norms develop, so too does the prosecutorial efficacy of the Court.

It must be remembered that the realisation and enforcement of international norms is left virtually exclusively in the hands of sovereign states whose duty it is to ratify the relevant treaties that reject child soldier recruitment (Donnelly, 2007, 39). However, the Court is still

⁸ HRW reported that the apprehension of Lubanga increased awareness that using child soldiers is a serious crime. After the pre-trial stage against Lubanga, they reported that it "became apparent that there was an increased awareness among the population at large that the enlistment, recruitment and use of child soldiers are in fact crimes" (HRW, 2008, 68).

in its infancy and thus the full extent of its normative power has not yet been realised. However, similarities can be found between the Court's mandate regarding child soldiers, and the Convention on the Elimination of All Forms of Discrimination Against Women⁹ and women's rights. Briefly, both issues have traditionally been considered 'domestic affairs', with violations rooted in cultural traditions and perpetrators often being non-state actors (Zwingel, 2012, 116). As such, we can use CEDAW's normative experience to predict the Court's potential. Zwingel states that CEDAW has had such a large normative impact due to it being a concrete part of a broader normative framework, which fosters complex learning, and joint problem solving (2012, 117). Such a framework can also be found within the Court, particularly in its complementarity principle. As such, one can argue that Court has a similar normative potential as that of CEDAW, and considering the vast progression of gender equality in the last 40 years since CEDAW's adoption, we can argue that the Court's potential for norm diffusion is high. In other words, the ICC, due to its framework, has the potential to contribute to the deterrence of child soldier recruiters via its normative influence.

Cultural Relativism and Understanding the Supply of Child Soldiers

The present subsection will draw from studies of child soldiers in the hope of demonstrating how the Court's discourse on child soldier recruitment fails to take into account the local understandings and experiences of children in armed conflict. I will argue that serious engagement with the complex relationship between social norms and practices must take place in order to address the *supply* side of the child soldier phenomenon.

First, as the ICC's child soldier discourse rests upon the definition of the use of child soldiers as "conscripting or enlisting children under the age of fifteen years" (UN General Assembly, 1998, art. 8(b)(xxvi)). I will examine the local norms and perceptions of

⁹ Hereinafter CEDAW.

‘childhood’ in countries known to use child soldiers within the Court’s jurisdiction. Many of these define the boundaries of childhood in social terms rather than chronological (Lee, 2009, 15). For example, the practice of registering a child at birth is uncommon, and thus knowledge of a child’s exact age is often unclear, this issue has proved problematic in *The Prosecutor v. Dominic Ongwen*, and consequently the journey to adulthood is often shaped through symbolic events such as initiation ceremonies (Lee, 2009, 15). As such, adolescence is often understood in local contexts as a profoundly social category, ranging between the ages of 10 and 19 (Lee, 2009, 15). Accordingly, children are often treated as young adults and “bear significant social, economic, and political responsibilities for their families and communities” (Lee, 2009, 14). Cultural studies undertaken in Sierra Leone show that the various types of labour children are expected to undertake actually define childhood, and accordingly, they are seen as valuable to the workforce (Lee, 2009, 15).

As a result of these different perceptions, in many instances, societies may regard military recruitment and ‘social adolescence’ as synonymous, and even an understandable progression, in the context of war (Rosen, 2007, 297). However, it has often been stated that, “customs and traditions cannot be put forward as a justification for violating rights” (HRW, 2013, 21) Therefore, at a grassroots level, initiatives aimed at building the awareness of children’s rights among armed groups and the communities that surround them, for instance carried out by schools or NGOs, have the potential to have a normative impact on the policies and practices of these groups (Coalition to stop the Use of Child Soldiers, 2008).

As discussed, inescapable violence coupled with poverty and social inequalities is foundational to child soldier usage and, accordingly, poverty alleviation coupled with more equitable resource allocation is crucial to reducing recruitment (Wessell, 2000, 409). The political and economic crises endured by African states have led to a number of structural socio-economic challenges facing youth, including, *inter alia*, lack of educational and

employment opportunities, generating a phenomenon labelled the ‘crisis of youth’ (Lee, 2009, 22; Ugor, 2014, 4-5). This crisis of youth is considered a key factor in contributing to young people in armed conflict. The expanding global economy has been largely concentrated within the Northern hemisphere with the emergence of capitalism and globalisation arriving later in the Global South. This delay has led to pervasive debt in African nations as well as the widespread contraction of social and economic opportunities for young people (Lee, 2009, 22). This, coupled with Structural Adjustment Programmes, imposed by postcolonial political elites in the 1980s calling for severe cutbacks in public expenditure, have contributed hugely to suffering amongst young Africans due to lack of education and training, unemployment, and lack of healthcare, to name just a few of the socio-economic disjunctures they have faced (Lee, 2009, 22; Ugor, 2014, 4-5).

Additionally, the context of war poses many incentives for young people to voluntarily enlist. First, war has the ability to rapidly become the norm for everyday life. The average length of civil wars is ten years (Fearon, 2004, 275-301; 2005, 10), hitting the lower end of what has been discussed as the ‘social age’ at which children reach adolescence. This, coupled with aforementioned cultural relativism makes warfare a natural progression (Brett, Specht & Grey, 2005, 10). Secondly, war presents itself to children as an *opportunity*; most “young people who become involved in warfare do so because there is a war.” (Brett, Specht & Grey, 2005, 10) Third, living in a violent situation creates the necessity of self-protection and sometimes retribution, and violence is used in order to achieve both this and justice for communities (Lee, 2009, 20). Lastly, war is the cause of many of the other conditions that push children to conflict, for example the closing of schools, exacerbating already high social tensions, causing family breakups, orphaning children, and ultimately increasing poverty (Brett, Specht & Grey, 2005, 9). As such, vulnerable children need to be presented with an opportunity to escape the context of war and widespread poverty.

Education is a vital tool in preventing children from joining military groups. Reintegration of child soldiers into society has been described as “the process through which children transition into civil society,” thus we can deduce training is vital in teaching children how to do this (Paris Principles, 2007, 2.8). HRW interviewed a number of child soldiers who unanimously stated that they been drawn to fighting because conflict had wrecked their educational opportunities (HRW, 2015, 52). Children interviewed by HRW were ubiquitous in their desire for education and showed regret over education that they had lost (2015, 52). Former child soldiers and government authorities alike often cite education as a crucial tool in preventing both the recruitment and re-recruitment of children (HRW, 2015, 52) as it can provide vulnerable children with the competencies to tackle pervasive inequality and promote socioeconomic equality. Blattman and Annan found there to be a clear chasm between the educational attainments of child soldiers compared to non-combatants resulting in personal economic inequality (2008). As such, education would provide opportunity and alternatives to violence, deterring children from engaging in combat; higher levels of education thus reduce the likelihood of voluntary recruitment (Beber & Blattman, 2011). Moreover, school environments can prevent feelings of loneliness and the glamorisation of conflict as they encourage the formation of peer groups, which serve as sources of support (Annan and Blattman, 2006). In northern Uganda, support of friendship groups helped former child soldiers maintain moderate to high levels of functionality (Annan and Blattman, 2006).

International actors must invest resources and efforts in formal educational systems in addition to funding for programmes that promote community norms that disincentivise child soldiering. The ICC has acted in this sense, organising the “Day of the African Child” to educate children, teachers and parents about the use of child soldiers as a war crime. Such incentives must continue in order to promote community norms and provide children with a ladder out of poverty.

Lastly, as I have previously discussed in the section detailing the complementarity principle, many governments lack the ability, resources, and even the will to prevent human rights abuses. This is particularly prevalent in countries with widespread child soldier recruitment as they are characteristically marred by civil and international wars, poverty, and social instability, thus, protecting citizens against human rights violations is particularly challenging. Moreover, in cases such as Uganda, states are notorious in either the recruitment of child soldiers, or in supporting those who do (Coalition to Stop the Use of Child Soldiers, 2008, 346). Such corruption gives little hope for the state to create incentives for child soldier cessation. However, as discussed, the normative behavioural and social values that accompany the ICC's mandate offer some hope for the change in state attitude.

Conclusions and Recommendations

This thesis has critically examined the ICC's discourse on child soldiers and demonstrated the gap between this, and the lived realities of child soldiers.

In the first section, I demonstrated how deterrence theory, however credible, bears little applicable relevance to the practices of the Court. I assessed whether the ICC's existence and actions raised the perceived likelihood of apprehension and concluded that the principle of complementarity has led to a diminution of certainty of prosecution in conflict-ridden and unstable situations. Additionally, I evaluated the Court's budget and resources, and determined them insufficient, hampering the quality and extent of justice served. Next, I looked at the severity of sanctions handed down by the Court and highlighted issues related to the timidity of sentences and the low rank of those prosecuted. Subsequently, I assessed the celerity of the Court's actions and reasoned that the ICC's slowness in investigating and prosecuting individuals has led to the undermining of its mandate and the belief that there is room for perpetrator negotiation with those in authority. Finally, I looked at the Court's

ability to sustain long-term influence through communication with State Parties and concluded that outreach efforts thus far have been underwhelming.

In the next section I examined the impact of social and extra-legal norms. I first looked at the normative value of the ICC and concluded that it promotes the opportunity of a “moral community” which could help deter military agents from using child soldiers and such an action can mobilise civil communities to demand further justice. Further, through international norms, states could cease their use of child soldiers in a move to improve their legitimacy on the world stage. Next, I examined children’s agency in their own recruitment concluding that a number of circumstances result in young peoples’ voluntarily recruitment.

Accordingly, I am now able to go some way in posing an alternative conceptual framework in order to combat child soldier recruitment. In the interests of brevity I am unable to enter into a detailed discussion, however, I make a single recommendation to the ICC: local contexts and social norms surrounding the agency of children need to be placed front and centre in their policies and deterrence strategies. This thesis has demonstrated that young people have agency in their choice and often consciously devise ways to escape unfavourable situations, and consequently simplistic efforts to remove children from the risk of recruitment, in this case through the mandate of the Court, may be ineffective in addressing their underlying quandaries and ambitions. Whilst I recognise that such a strategy may be beyond the scope of the Court’s mandate, an active engagement with humanitarian organisations both internationally and on the ground may help the ICC make its deterrent and preventive more meaningful as it will mean enable to the Court’s mandate to be cross-culturally negotiated rather than imposed by a geographically distant institution.

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