The Age of Criminal Responsibility

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Abstract: This study offers a comprehensive analysis of the minimum age of criminal responsibility (MACR) from an international children's rights perspective. An international standard on the minimum age for criminal responsibility has yet to be established. The Convention on the Rights of the Child does not stipulate any specific minimum age to the signatory states on this issue but only states the obligation to designate such an age. The recent decision of the Appeals Chamber of the Special Court for Sierra Leone in Prosecutor v Samuel Hinga Normanmakes it clear that the recruitment or use of children under fifteen years of age to participate actively in hostilities is a crime under international law.

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1. Introduction

On a number of occasions efforts have been made to prosecute former child soldiers. In 2001, Human Rights Watch intervened with the government of the Democratic Republic of Congo to urge that death sentences imposed on four child soldiers should not be carried out. The four had been aged between fourteen and sixteen years old at the time they were arrested, and tried, convicted and sentenced by the Court of Military Order. In the event, the four were not executed but it appears that earlier, in 2000, the Congolese government did execute a fourteen-year-old child soldier. In another example, in 2002 the Ugandan authorities brought treason charges against two former Lord's Resistance Army fighters – two boys aged fourteen and sixteen – although following lobbying by Human Rights Watch, the charges were withdrawn. According to Human Rights Watch, the boys had been kidnapped and forcibly inducted into the rebel Lord's Resistance Army and had voluntarily surrendered to the Ugandan army. In these cases, the crimes charged were crimes under domestic law. However, child soldiers have frequently committed acts amounting to international crimes. All persons have a duty to comply with international humanitarian law and failure to do so can give rise to criminal sanctions. Indeed, there is most often a considerable overlap between domestic criminal law and international criminal law, with certain types of behaviour being criminal in both domestic legal systems and international law. One of the reasons why armed forces and groups recruit child soldiers is that they are more easily led and more suggestible than are adults. Children are less socialised, and more docile and malleable than adults, and hence are more easily persuaded or coerced into committing atrocities. Even if not specifically recruited for such purposes, children's lack of mental and moral development may mean that they are more prone to behaving badly than adult troops. However, in a number of recent conflicts child soldiers have also been used deliberately for committing atrocities. This, in turn, has led to debate concerning the extent to which these children should be held responsible for their actions or simply seen as innocent tools of their superiors. The criteria brought by the Beijing rules (Art. 4.1) state that the age of criminal responsibility "shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity." This regulation is significant in that it stresses the foremost importance of medical and psychosocial data. In French Criminal Law, children under 13 do not have any criminal responsibility. An informal session is held in the Child Protection Institution or the child court about such persons. Suits can also be filed in civil court in order to protect children (Terrill, 1999, 267). While the onset of criminal responsibility in France is age 13, children aged 10-12 may be brought before child court judges solely for the purpose of applying security measures, provided that child is at risk (Unicef Innocenti Digest 3, Juvenile Justice, p. 4). Accordingly, it is possible to apply a minimum age excluding serious offenses. Sentencing young person's at least 13 but not yet 17 happens as an exception; as a rule, "educational security measures" are applied instead. The criminal law creates and reflects value by announcing which conduct is sufficiently wrong to deserve blame and punishment. It guides conduct by giving citizens good reason to comply, both by manifesting the underlying moral justification for the law and by providing incentives to obey. This article is a contribution to the theory of

desert, and assumes, with most criminal law theory, that desert is at least a necessary condition of just punishment. It also assumes that theories and practices. he sociological study of childhood is more accurately a study of 'childhoods' in which the universality of the biological immaturity of children is differently shaped, interpreted and understood by distinctive societies and cultures.

2. Postponement of Criminal Responsibility

All of these competing ideas – about rights, bearers of rights, the construction and definition of childhood, and children's competencies – come to a head in modern debates on juvenile justice. In broad terms, juvenile justice finds its origins in earlier pauper laws, criminal justice systems, child protection systems, and other elements. Even towards the end of feudal England, authorities developed a range of policies and mechanisms to cope with poverty, such as provisions for cash assistance to the disabled. Also in the late 1800s, positivist legal and criminological theory emerged and began to gain prominence, aiming its focus in criminal law upon human character and the divergent influences on it. In its view, the origins of crime lay in biological, social, environmental, and other factors – fully rejecting classic criminal law fundamentals such as free will, moral responsibility, and strictly defined offenses, which are further discussed below. Also in the late 1800s, positivist legal and criminological theory emerged and began to gain prominence, aiming its focus in criminal law upon human character and the divergent influences on it. In its view, the origins of crime lay in biological, social, environmental, and other factors – fully rejecting classic criminal law fundamentals such as free will, moral responsibility, and strictly defined offenses, which are further discussed below.

3. Islamic Law

At first glance, Islamic law may seem to hold far less influence on MACR provisions across the 192 countries of the world. Among the 64 nations that are part of the Islamic world, only 9 clearly base their MACR provisions to some extent upon Islamic law: Afghanistan, Comoros, Iran, Malaysia, Maldives, Nigeria, Pakistan, Somalia, and Sudan. In general, it is important to note that there are in fact eight major schools of thought within Islamic law, and they hold diverse viewpoints even on some questions of children's age and responsibility. Though the message of the Convention on the Rights of the Child is that criminalisation of children should be avoided, this does not mean that young offenders should be treated as if they have no responsibility.

4. The Restorative Justice Approach

In the restorative justice system, society is considered the primary organ responsible for controlling and investigating criminal incidents. In the classical approach, on the other hand, the justice system is indicated as the primary organ for preventing and investigating offenses. Restorative justice searches for the problems which cause conflicts between victims and perpetrators. Such problems may be resolved by well-educated personnel who are aware of both theory and application. In restorative justice, the fundamental purpose of the penal justice is different. The purpose here is not having someone suffer or be punished due to his or her committing a crime, but rather to prevent recurrence of the offense by tackling the problem. In restorative justice practices, the perpetrator is suggested and encouraged to undertake this responsibility, and he/she is assisted in bringing his/her private life in line with societal standards. Under Recommendation R (2003) 20, adopted on September 24, 2003 based on Article 15b of the Convention and referring to previously adopted Recommendations R(87) 20, R(88) 6, and Rec (2000) 20, the European Council requested that a highly disciplined approach be taken in the sanctions applied to juvenile crimes and that society, individuals, families and schools should play an active role in determining and applying these sanctions. Reconciliation: This means trying to reestablish amicable relations between conciliated parties in a system after a certain conflict is experienced. This initiative was first suggested by churches in Canada in 1974. When the courts decided to require use of this method, it became an institution. A volunteer, by negotiating separately with the perpetrator and the victim, determines their needs and enables a meeting between the two. In this meeting held in an impartial place, the parties can conduct negotiations which set forth their own needs. In this phase, reconciliation applications are utilized and the impartial conciliator presents to the judicial authority which charged him or her with the duty a report on the outcome of the agreement.

5. Infancy and Criminal Responsibility

Most systems of criminal law take the view that before a person can be held blameworthy and, hence, punishable, his behaviour must have contained an element of fault. To be guilty of a crime, particularly with regard to serious offences, it is not enough simply to have done a particular prohibited act; there must be the requisite *mens rea* (guilty mind) as well as the *actus reus* (wrongful act). Consequently, it is possible to escape criminal liability by showing that one was lacking a guilty mind, for example that the act was committed accidentally rather than

intentionally, or whilst in a state of automatism. In respect of one class of person, however, a lack of *means rea* is presumed. As Simester and Sullivan write in relation to the defence of infancy: Although it is a defence of status (no-one under 10 years of age [the minimum age of criminal responsibility in England and Wales] can commit a crime), the status is predicated on assumptions concerning a person's mental development and consequent moral irresponsibility for her actions. However, with regard to the criminal responsibility of children for international crimes, a particular problem exists. It is unclear what the minimum age of criminal responsibility in respect of international crimes actually is. Indeed, it is unclear whether international law fixes a minimum age of criminal responsibility at all. Although it is clear that too low a national minimum age of criminal responsibility will breach international law, where the line is to be drawn has not been specified.

6. The European Court of Human Rights

Discussion of this issue did take place in the judgments of the European Court of Human Rights in *T. v United Kingdom* and *V. v United Kingdom*. Both T and V were ten years old when they abducted and killed a two-year old boy. Aged eleven, they were tried in public in an adult court before a judge and jury (although some allowances were made for their age), convicted of murder and abduction, and sentenced to an indefinite period of detention. They applied to the European Court of Human Rights on the ground, amongst others, that their treatment had violated Article 3 of the European Convention on Human Rights, which prohibits torture and other inhuman or degrading treatment or punishment.

7. Conclusion

States have hardly shown themselves eager to prosecute child soldiers who fall into their hands, so it might be argued that the possibility that child soldiers will face prosecution for international crimes is merely theoretical. In recent years, however, at least some States have displayed a greater willingness to prosecute international crimes, even in cases where their own nationals had not been involved either as perpetrators or victims. In addition, under Article 1F(a) of the 1951 Convention relating to the Status of Refugees, States are obliged to refuse refugee status to any persons "with respect to whom there are serious reasons for considering that … he has committed … war crime or a crime against humanity". Former child soldiers have been excluded from refugee status by the application of Article 1F. There are thus a number of good reasons – both practical and theoretical – why agreement should be sought on a minimum age of criminal responsibility for international crimes. As this paper has shown, there exist at least some foundations upon which to build. However, seeing the issue of how best to deal with children who commit atrocities through the prism of criminal responsibility is often unhelpful. One of the reasons why concern has grown about the involvement of children in armed conflict is the growing belief in children's rights: that children are rights-bearers and that their rights must be respected regardless of what their parents or other adults might think. It does not necessarily follow from this that children are always viewed as having the capacity to exercise their rights, but the two ideas have tended to go hand-inhand. This can be seen, most prominently, in articles 12(1) and 13-15 of the Convention on the Rights of the Child, which respectively require that: "States Parties [to the Convention] shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child", and declare that children have the right to freedom of expression; freedom of thought, conscience and religion; and freedom of association and peaceful assembly. The traditional view of a right-holder is of a rational individual capable of making decisions for his or herself and responsible for the consequences of his or her actions. Yet children's rights campaigners have often resisted the criminal prosecution of children on the grounds that it is not in children's best interests. This has led to comments that such a position is an attempt to have one's cake and eat it. On the one hand, children are said to have the capacity to do good things, such as, to give one well-publicised example, participating meaningfully in drafting a child-friendly version of the report of the Truth and Reconciliation Commission for Sierra Leone. On the other hand, it is argued that they are too immature to be held responsible for the bad things they do, such as committing atrocities during the civil war in that country. There are good reasons, from a children's rights perspective, for seeing children as moral actors and, hence, accountable for their actions. However, accountability does not always involve criminal responsibility, and even if held criminally responsible for their actions, children should not necessarily be dealt with in the same way as adults.

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