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CHILDREN AT WAR: THE CRIMINAL RESPONSIBILITY OF CHILD SOLDIERS

Megan Nobert*

ABSTRACT

The problem of child soldiers is not going to go away. While it may not be a popular solution, child soldiers need to be prosecuted for the actions they commit during conflicts in addition to the prosecution of child soldier recruiters. Without legal ramifications, there is no incentive for the child soldier recruiters to stop their actions. This article explores how both child soldiers and their recruiters can be prosecuted for actions committed during conflict.

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INTRODUCTION

This article explores the issue of child soldiers. First, the question of what child soldiers are and which relevant international legislation applies to them is explored. Next, varied experiences of child soldiers throughout the world are discussed in order to provide a full explanation of what child soldiers do and why they commit the crimes for which they are accused.

According to some reports, over two million children have been killed in conflict situations in the past decade.[1] Children in conflict situations are often injured; they are displaced from their families and orphaned.[2] Such children are at a high risk for sexual abuse and exploitation.[3] They are often the first to be deprived of basic needs like food, water, and medical attention.[4] This deprivation results in stunted development and severe psychological impacts.[5]

The impact of conflict on child soldiers is even worse than that on civilian children. The fact of the matter is that child soldiers, despite their youth, commit horrific crimes during conflict for which some say they should be held accountable.[6]

The central question of this article is: should we be prosecuting child soldiers? This article examines the issue of individual criminal responsibility and its definition under international criminal law in order to determine whether or not child soldiers should be held criminally responsible for their actions. Additionally, this article explores several other issues surrounding the prosecution of

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[1] *Children in Conflict: Child Soldiers*, SOS CHILD. VILLAGES, http://www.child-soldier.org/ (last visited Nov. 17, 2011).

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *See* AMNESTY INT'L, CHILD SOLDIERS: CRIMINALS OR VICTIMS 2 (2000) (stating that, "as a general principle, Amnesty International calls for all those who commit serious crimes such as genocide, crimes against humanity, and war crimes, to be held accountable for their actions").

child soldiers such as the prosecution of civil war leaders for the recruitment of child soldiers. All of these issues are particularly important, as alternatives to prosecuting child soldiers are considered.

Child soldiers are taken from their homes, their schools, and the streets.[7] Although there are cases of children volunteering for armies, such children often volunteer because of a lack of options (as opposed to a statement of free will).[8] The worst part of becoming a child soldier, however, is the loss of childhood. The physical and psychological effects of becoming a child soldier are far reaching and cannot be undone in an afternoon.[9] Child soldiers are forced to perform horrible acts, a direct result of their situation. This article begins by discussing the definitive question surrounding child soldiers: should they be held criminally responsible for their actions during times of conflict?

INTERNATIONAL RIGHTS OF CHILDREN

The first step in discussing the issue of child soldiers is to determine their international rights. This determination will reveal the reasons for how and why they might be prosecuted for genocide, crimes against humanity, and war crimes. The United Nations Convention on the Rights of the Child ("UNCRC") is the leading international legal document outlining children's human rights. It was adopted by the General Assembly on November 20, 1989, entering into force on September 2, 1990.[10] The UNCRC received an unprecedented number of states signing onto the instrument.[11] The sheer number of rati-

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[7] Children and Human Rights, AMNESTY INT'L, http://www.amnesty.org/en/children (last visited Nov. 17, 2011).

[8] *Id.*

[9] *Id.*

[10] Convention on the Rights of the Child, *adopted* Nov. 20, 1989, 1577 U.N.T.S. 3.

[11] *See* Status of the Convention on the Rights of the Child, UNITED NATIONS TREATY COLLECTION (May 10, 2011, 7:18 PM), http://treaties.un.org/

fications makes the treaty the leading legal instrument in the world with respect to children. Upon ratification, the UNCRC was seen as a universal sign that the rights of the child were a high priority for the international community.[12]

Although a large number of countries have signed and ratified the UNCRC, very few have actually implemented the document.[13] This failure could be attributed to a lack of resources available to poorer countries of the world, which prevents them from implementing a number of the measures necessary to protect children from poverty, labor, and a life lived on the streets.[14]

Lack of resources, however, cannot excuse the more developed countries that have committed themselves to the protection of children.[15] The Vienna Convention on the Law of Treaties ("VCLT"), in Article 2(1)(a), states that a treaty is an international agreement between states, in written form, governed by international law.[16]

The UNCRC qualifies as a treaty under this definition. It was a document created to be binding upon the states that agreed to the principles held within. By signing, and thereby adopting the text of the treaty, a government is bound to not purposively violate its provisions once it enters into force under international law,[17] While a government is not obligated to implement the treaty's

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pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en.

[12] *Convention on the Rights of the Child: The Burkina Faso Report*, 38 J. AFR. L. 197, 197 (1994) [hereinafter *The Burkina Faso Report*].

[13] *See generally* Report of the Comm. on the Rights of the Child, 49th Sess., Sept. 15-Oct. 3, 2008, U.N. Doc. CRC/C/49/3 (Feb. 22, 2010) (noting the need for state parties to implement legislation with respect to the treaty across multiple provisions).

[14] *See, e.g.*, *id.* at 17, 21, 27, 54.

[15] *See The Burkina Faso Report*, *supra* note 12, at 198.

[16] Vienna Convention on the Law of Treaties art. 2, *adopted* May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

[17] *See generally*, David S. Jonas & Thomas N. Saunders, *The Object and Purpose of a Treaty: Three Interpretative Methods*, 43 VAND. J. TRANSNATION'L L. 565 (2010) (discussing the various ways that states are obligated to uphold treaty principles under the Vienna Convention on the Law of Treaties).

principles, it still must not violate them.[18] Nations, having signed and ratified the treaty, are obligated to implement the treaty's principles in their domestic legal systems.[19] The UNCRC, thus, is a legally binding document upon states that have ratified it. It is not merely a suggestion for states who agreed to the principles held within the document.

The UNCRC has been used as a framework for promoting the rights of children of both sexes. It defines children as persons under the age of eighteen,[20] which is the generally accepted definition throughout the world. The document is designed to ensure that children be able to enjoy their time as children so that they may have a better chance of becoming responsible adults who promote and participate in the economic and social development of their communities. The UNCRC is also designed to ensure that children are raised with the principles of democracy, peace, and justice.[21] More importantly, at least for the purposes of this article, the UNCRC recognizes that children have rights as citizens.[22] The treaty recognizes that children are capable and deserving of having a say in what happens to them.[23]

Aside from the UNCRC, various conventions created by the UN over the past few decades are indicative of a new generation of progressive laws with respect to children. There is recognition now that children should be students, not workers.[24] This concept can be difficult to grasp in traditional societies, where agriculture is still the main employment sector and where children are expected to assist in expanding the family's resources.[25] It should

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[18] VCLT, *supra* note 16, at art. 18.

[19] *Id.* art. 14, 26-27.

[20] Convention on the Rights of the Child, *supra* note 10, art. 1.

[21] *Id.* at pmbl.

[22] *See, e.g.*, *id.* art. 15.

[23] *See id.* art. 12.

[24] *See infra* text accompanying notes 27-29.

[25] *See* David Post, *Education and the Child Labor Paradox of Today*, 45 COMP. EDUC. REV. 127, 128-29 (2001).

be noted that Article 3(d) of the Convention Concerning Minimum Age of Admission to Employment does not include children working on their parents' farms under traditional rules prohibiting child labor.[26] Nevertheless, the developing law plays into the idea that children should not be burdened by the responsibilities of adulthood before they are adults, a concept that is directly relevant to the issue of child soldiers, as such children are taking on very adult roles.

The International Labour Organization ("ILO") created treaties regarding the protection of children from illegal labor, including child soldiering. The first of these Conventions, No. 138, sets out that no child below the age of fifteen can be employed in any economic sector.[27] Convention No. 182 further sets out that dangerous or harmful employment—prostitution, combat, mining, or pornography[28]—is banned for all children under the age of eighteen years.[29] While both of these Conventions, on their face, may appear capable of making a real difference in the lives of children, they have presented a number of problems. Convention No. 138 was not accepted by any of the Asian, African, or Latin American countries, where child labor is the most prevalent.[30] In addition, while Convention No. 182 clearly forbids the involvement of children under eighteen in combat, the practice continues to occur.

Further, the UNCRC states that children are supposed to be educated to at least a basic level so that they can become productive and engaged adults. Article 7(2)(c) codified the belief that states must ensure that children have access to basic free education and, where appropri-

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[26] Michael J. Dennis, *The ILO Convention on the Worst Forms of Child Labor*, 93 AM. J. INT'L L. 943, 945 (1999).

[27] Convention Concerning Minimum Age of Admission to Employment art. 2(3), *adopted* June 26, 1973, 15 U.N.T.S. 297.

[28] Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour art. 3, *adopted* June 17, 1999, 2133 U.N.T.S. 161.

[29] *Id.* art. 2.

[30] Post, *supra* note 25, at 127.

ate, vocational training to ensure that they are not forced into child labor or prostitution.[31] A quick study of the developing countries, however, shows that children do not have access to free education and that astronomical school fees imposed in some countries have prevented millions of children from getting any sort of education at all.[32] One might suggest that the high cost of education in most of the developed world is a serious impediment to the education of children, particularly given the present economic situation. Nevertheless, it would seem that the international community feels that children should be in a classroom, not on a combat field.

There was a great deal of debate at one time about whether or not the UN should ban the use of children in the military by classifying military service as labor, as it was felt, for obvious reasons, that participation in military operations jeopardizes the health and safety of children. This concept, however, was ultimately codified in UNCRC Article 38, which requires states to take feasible measures to ensure that those under the age of fifteen do not take a direct part in hostilities.[33] This provision is interesting since, as already stated, the age of children is internationally defined as those under the age of eighteen.[34] The discrepancy has raised a number of questions, with academics arguing about why the age was lowered to fifteen for combat situations, as children are far more likely to be exposed to danger by participating in a war than by participating in labor situations (with the exception perhaps of prostitution). Nevertheless, in states that have only ratified the UNCRC, fifteen remains the age for the participation of children in combat situations.

As stated before, the biggest problem that the

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[31] Convention on the Rights of the Child, *supra* note 10, art. 7(2)(c); *see also* Dennis, *supra* note 26, at 946-47.

[32] Arye L. Hillman & Eva Jenkner, *Educating Children in Poor Countries*, *in* ECONOMIC ISSUES 2004, at 1 (Int'l Monetary Fund, Ser. No. 33, 2004).

[33] Convention on the Rights of the Child, *supra* note 10, art. 38(2).

[34] *See supra* note 20 and accompanying text.

UNCRC has faced is the implementation and monitoring of nations that claim to be committed to its principles. Once ratified, the UNCRC creates a binding responsibility on nations to implement the principles contained within, as per the VCLT.[35] States bound by the treaty are supposed to make regular reports on the progress of children's rights in their nation to ensure compliance;[36] most do not, however, as the mechanism is self-reporting. If a country simply wishes not to report, nothing is done to make it do so. Reports sent in are supposed to be reviewed by a committee of experts; these experts, however, are chosen by the governments themselves, so their independence and impartiality have been questioned.[37] The UNCRC reporting structure, in part, explains the continued use of child soldiers. States are not likely to admit to using child soldiers when they know there may be consequences under international law.

Further, the UNCRC also allows reservations to be filed against the instrument.[38] Those states that attach reservations to the treaty are not barred from ratifying it despite any number of concerns. Reservations have been filed against quite a few of the freedoms posed by the UNCRC, specifically against freedom of religion, assembly, and education, which should all be fundamental rights guaranteed to children.[39] It has been pointed out that some of these rights are culturally specific; not all countries may agree about guaranteeing them, as they are not universal.[40] Such an issue should not apply to the issue of child soldiers, however. Most countries, even

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[35] *See supra* note 19 and accompanying text.

[36] Convention on the Rights of the Child, *supra* note 10, art. 44.

[37] Abhinaya Ramesh, *UN Convention on the Rights of the Child: Inherent Weakness*, 36 ECON. & POL. WKLY. 1948, 1949-50 (2001); *see* Cynthia Price Cohen, *Monitoring the United Nations Convention on the Rights of the Child: The Challenge of Information Management*, 18 HUM. RTS. Q. 439, 464-65 (1996).

[38] Convention on the Rights of the Child, *supra* note 10, art. 51.

[39] Ramesh, *supra* note 37, at 1949.

[40] *See* Dunu Roy, *Rights of Child Labour: Ethics, Production and Nation-State*, 33 ECON. & POL. WKLY. PE-25, PE-26 to PE-27 (1998).

those who allow the use of child soldiers, do not necessarily believe that children should be needlessly exploited. In developing countries, despite the high numbers of children, children are still highly prized, if for no other reason than for family labor and to take care of their elders at a later date.[41]

More specific legislation concerning the idea of child soldiers dates back to the League of Nations, when the organization adopted the first declaration on the rights of the child, namely the Geneva Declaration of the Rights of the Child.[42] This document, like that of the organization itself, proved impossible to enforce. Regardless, the official international legal prohibition against child soldiers was eventually contained in Article 4(3)(c) of Protocol II to the Geneva Conventions, which states: "children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities."[43]

This provision is a direct prohibition against the use and recruitment of children for soldiers under the age of fifteen. Note the similar language to that which is now contained in UNCRC Article 38(2). Previous drafts of this UNCRC article had included language of all feasible measures as well as simple prohibitions against those less than fifteen years of age being allowed to take a direct part in hostilities.[44] The final draft produced was clearly a stronger stance. In fact, the existence of legislation on the issue dating back to 1949 further emphasizes the fact that the international community does not abide the use

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[41] *See* Arye L. Hillman & Eva Jenkner, *User Payments for Basic Education in Low-Income Countries* 7 (Int'l Monetary Fund, Working Paper No. 02/182, 2002).

[42] Geneva Declaration of the Rights of the Child, *adopted* Sept. 26, 1924, League of Nations O.J. Spec. Supp. 21, at 43.

[43] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 4(3)(c), *adopted* June 8, 1977, 1125 U.N.T.S. 609.

[44] Howard Mann, *International Law and the Child Soldier*, 36 INT'L & COMP. L.Q. 32, 39-40 (1987).

of child soldiers.

For its part, the African Charter of the Rights and Welfare of the Child has chosen to prohibit the use of children as soldiers under the age of eighteen.[45] This document disallows the recruitment and direct participation of younger children in conflict situations. It is rather interesting that the continent most condemned for using child soldiers is the one maintaining the strongest stance against the use of child soldiers through a treaty. While this reality could be considered a form of pandering by the African continent to the opinions of the developed countries of the world, nonetheless, it may indicate a developing movement among African nations to move in a more appropriate direction away from the use of child soldiers. It should be noted that the actions of a few do not necessarily reveal the beliefs of the majority, so perhaps this movement away from the use of child soldiers is more robust than it appears in a number of African nations.

Additionally, the UN has developed other treaties to address the issue of child soldiers. An example is the treaty known as the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict ("Optional Protocol"). The Optional Protocol prohibits children less than eighteen years of age from being used in hostilities and forcefully recruited during conflicts.[46] Even though this treaty was developed ten years ago,[47] only two-thirds of states have ratified it thus far. Approximately sixty states still need to ratify the treaty.[48] Furthermore, a majority of the non-ratifying

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[45] *Compare* African Charter on the Rights and Welfare of the Child art. 2, *adopted* July 11, 1990, OAU Doc. CAB/LEG/24.9/49, *with id.* art. 22.

[46] Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict art. 1, *adopted* May 25, 2000, 39 I.L.M. 1285.

[47] *Id.*

[48] *See* Status of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, UNITED NATIONS TREATY COLLECTION (May 10, 2011; 7:18 PM), http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-b&chapter=4&lang=en.

states actively promote the recruitment of child soldiers.[49] Ideally, of course, all states would ratify the document, which might then allow for prosecutions in the International Criminal Court ("ICC").

Questions are raised about whether to follow the definition contained in the UNCRC or its Optional Protocol with respect to the prohibition on the use of child soldiers. Given that a decent number of states have ratified the Optional Protocol, it would seem appropriate to use the definition of eighteen or under and, therefore, amend the original definition contained in the UNCRC. The situation actually comes down, however, to which state is trying to prosecute child soldiers. If a state has ratified the Optional Protocol, it would be free to use the definition of eighteen or under. On the other hand, if a state has not ratified this document, it would have to prove that the African Charter of the Rights and Welfare of the Child is the more appropriate document in order to use this same definition.[50] This result causes a rather difficult situation for child soldiers. For the purposes of this article, therefore, the definition of child soldiers as the prohibition of children in a combat situation under the age of eighteen will be used, as it appears to be the more widely used definition.

EXPERIENCES OF CHILD SOLDIERS

Having established that the use of children under the age of eighteen in combat situations is against international law, we will now look at the experiences of child soldiers. It is difficult to determine exactly how many child soldiers are serving in the world right now since armies do not count the number of children serving in their forces, which this author suggests might be because of a

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[49] *Facts and Figures on Child Soldiers*, COAL. TO STOP THE USE OF CHILD SOLDIERS, http://www.childsoldiersglobalreport.org/content/facts-and-figures-child-soldiers (last visited Nov. 17, 2011).

[50] *See supra* note 45 and accompanying text.

fear of potential punishment. Figures from the late 1990s show that there were around 300,000 child soldiers throughout the world.[51]

Currently, the number of child soldiers is higher. Between April 2004 and October 2007, evidence proves that child soldiers were being used in the following countries: Chad, Democratic Republic of the Congo, Israel, Myanmar, Somalia, Sudan, Uganda, and Yemen.[52] This list is not exhaustive. Even the United Kingdom utilized child soldiers in Iraq during this time period.[53] Further, India and Germany in the past few years have been accused of knowingly using child soldiers in their government operated military.[54] It is nearly impossible to calculate accurate numbers of child soldiers because accounts of them are established continually through the media. Therefore, at this time, the numbers of child soldiers worldwide are indeterminate.

Regardless, it has been stated that some children voluntarily join armies,[55] a fact that is undoubtedly true to a certain degree. Some former child soldiers name revenge and/or the defense of their country as reasons for joining combat groups.[56] Others join for more prudent reasons, such as ensuring survival for either long or short term needs.[57] Further, children who have lost their parents look to the military for a surrogate familial relationship, which is important for their emotional development.[58] Nevertheless, the following quotation illustrates how some of these children have no choice in becoming child soldiers:

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[51] Frank Faulkner, *Kindergarten Killers: Morality, Murder and the Child Soldier Problem*, 22 THIRD WORLD Q. 491, 492 (2001).

[52] COAL. TO STOP THE USE OF CHILD SOLDIERS, CHILD SOLDIERS GLOBAL REPORT 16 (2008).

[53] *Id.*

[54] *Id.* at 151, 170.

[55] AMNESTY INT'L, *supra* note 6, at 2.

[56] A.B. Zack-Williams, *Child Soldiers in the Civil War in Sierra Leone*, 28 REV. AFR. POL. ECON. 73, 78 (2001).

[57] *Id.* at 79.

[58] *Id.* at 78-79.

> I remember the day I decided to join the mayi-mayi. It was after an attack on my village. My parents, and also my grand-father were killed and I was running. I was so scared. I lost everyone; I had nowhere to go and no food to eat. In the mayi-mayi I thought I would be protected, but it was hard. I would see others die in front of me. I was hungry very often, and I was scared. Sometimes they would whip me, sometimes very hard. They used to say that it would make me a better fighter. One day, they whipped my [11-year-old] friend to death because he had not killed the enemy. Also, what I did not like is to hear the girls, our friends, crying because the soldiers would rape them.[59]

How can anyone believe that such an existence is a choice?

Recruiters prey on children for a number of reasons. First, they are easy targets susceptible to manipulation and threats. Telling children that their family will be murdered if they do not join, or actually murdering a child's family, leaves them with few choices and serves to persuade them to join militias relatively easily.[60] Another popular method of indoctrinating children is to force them to watch the torture and murder of others, as both a reminder of what will happen if they disobey and as an instructional demonstration of what to do when the same is requested of them by superiors.[61]

Second, children are also viewed as being excellent fighters, as they have not developed an innate sense for determining danger.[62] The older fighters send child sol-

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[59] *Stories from children associated with fighting forces,* AMNESTY INT'L (Sept. 15, 2011, 5:42 PM), http://www.amnestyusa.org/children/child-soldiers/stories-from-children-associated-with-fighting-forces/page.do?id=1021177. *See generally Mayi-Mayi: Alliance pour la resistance democratique (ARD)*, GLOBALSECURITY.ORG (Sept. 15, 2011, 5:51 PM), http://www.globalsecurity.org/military/world/para/mayi-mayi.htm (describing the Mayi-Mayi).

[60] Zack-Williams, *supra* note 57, at 80.

[61] *Id.*; *see* RAMESH THAKUR & PETER MALCONTENT, FROM SOVEREIGN IMPUNITY TO INTERNATIONAL ACCOUNTABILITY: THE SEARCH FOR JUSTICE IN A WORLD OF STATES 257 (2004).

[62] Jerkia Richardson & Lara Setrakian, *Child Soldiers Recall Learning Lessons of War Instead of the Classroom* (Dec. 7, 2006), ABCNEWS.GO.COM, http://abcnews.go.com/International/LegalCenter/story?id=2706722&page=1.

diers into dangerous situations to determine whether or not harm or danger exists.[63] Additionally, children are used as spies, messengers, guards, cooks, porters, and security officers.[64] Child soldiers are considered to be expendable since their death in the line of duty can be easily replaced by abducting other innocent children.[65] One writer, interviewing a number of former child soldiers in Sierra Leone, described them as hunting dogs.[66] He emphasized the expendability of the children by stating that the older and more valuable soldiers would stay at the back of the group and allow them to go out and die first.[67]

Third, the technological advancements of weapons used in combat makes it easier to have child soldiers defend and fight. Due to the development of lighter guns, such as the M16 and AK-47 assault rifles, children are now able to easily carry, load, and shoot weapons.[68] Children as young as ten are even able to strip and reassemble these guns.[69] Further, assault rifles can be purchased for a relatively cheap price, which makes it efficient for armies to supply masses of children with weapons of destruction.[70] Naturally, child soldiers have little concept of the weapons they hold or of the power that such weapons give them over others.

One of the worst cases of child soldiers is in the Democratic Republic of the Congo ("DRC"). Thomas Lubanga's liberation force is said to have recruited so many children that it is known as the Army of Children,[71] a rather dubious title. Lubanga, now being tried in the International

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[63] Zack-Williams, *supra* note 57, at 79.

[64] COAL. TO STOP THE USE OF CHILD SOLDIERS, *supra* note 53, at 22.

[65] P.W. Singer, *The Enablers of War: Casual Factors Behind the Child Soldier Phenomenon*, *in* CHILD SOLDIERS IN THE AGE OF FRACTURED STATES 107 (Scott Gates & Simon Reich eds., 2009).

[66] Zack-Williams, *supra* note 57, at 79.

[67] *Id.*

[68] Faulkner, *supra* note 52, at 495.

[69] *Id.*

[70] *Id.*

[71] Jo Becker, *Paying for sending children to war*, THE GUARDIAN (Jan. 27, 2009, 2:30 PM), http://www.guardian.co.uk/commentisfree/2009/jan/27/war crimes-humanrights.

Criminal Court, is of course stating that those claiming to be child soldiers have lied.[72] It should be noted that Lubanga is one of the first leaders to be charged with recruiting child soldiers.[73] He is accused of allowing his military forces to abduct children as young as eleven from their schools and homes, and then placing them in training camps where they were indoctrinated through beatings and the use of drugs.[74]

Lubanga's militia has also been accused of abducting female children to be used as sexual slaves.[75] There are a number of accounts of such female children being repeatedly raped and subjected to forced abortions.[76] Despite the fact that Lubanga is on trial, children are still being recruited in the DRC.[77] And even after the children leave the battlefield, their lives are destroyed. They are sent back to their homes infected with HIV and addicted to drugs.[78] Often, children with families are unable to face them after the acts that they have committed.[79] This results in a number of former child soldiers living on the streets.[80]

In the Sudan, hundreds of children were recruited by the Sudan People's Liberation Army, most around the age of eight.[81] Even though the army has been releasing

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[72] '*Child soldiers' are liars, Lubanga's lawyer tells court*, APF.COM (Jan. 27, 2010), http://www.google.com/hostednews/afp/article/ALeqM5gBXlKuy4KZ4GjDud1nj4nAQL7SGQ [hereinafter *'Child soldiers' are liars*].

[73] *The International Criminal Court Trial of Thomas Lubanga*, HUMAN RTS. WATCH (Jan. 23, 2009), http://www.hrw.org/news/2009/01/22/international-criminal-court-trial-thomas-lubanga.

[74] *'Child soldiers' are liars*, *supra* note 73.

[75] *Id.*

[76] *Trial over Congo's Child Soldiers Resumes in the Hague,* SOS CHILD. VILLIAGES CAN. (Jan. 28, 2010), http://www.soschildrensvillages.ca/News/News/child-charity-news/Pages/Trial-Congo-Child-Soldiers-203.aspx.

[77] *Id.*

[78] *Id.*

[79] *See id.*

[80] *See id.*

[81] *Child Soldiers in Sudan*, SOS CHILD. VILLAGES, http://www.childsoldier.org/sudan (last visited Sept. 24, 2011).

these children since 2004, [82] their road to developing new lives will certainly be a long one. Additionally, hundreds of children were also recruited in Nepal.[83] Even though they were eventually released through peace agreements,[84] a number of these child soldiers became so indoctrinated that convincing them to go home was a rather difficult task.[85]

More importantly, child soldier recruiters rarely face sanctions.[86] The abductions they carry out are quite simply crimes with little punishment. When there is little danger of punishment, there exists a correlated lack of care to abstain from such behavior. In some nations, in fact, perhaps due to a lack of fear of punishment, the practice of using child soldiers is encouraged. In Burma, for example, child soldier recruitment is actively rewarded with cash bonuses and food.[87] If the use of child soldiers cannot be stopped, then it will be nearly impossible to deal with the child soldier situation on a global basis. Further, the issue of punishing child soldiers cannot be addressed without discussing the punishment of those that encourage child soldiers. Therefore, the most appropriate solution may very well be the punishment of both child soldiers and the recruiters.

INDIVIDUAL CRIMINAL RESPONSIBILITY

As this article moves into considering the punishment of child soldiers and child soldier recruiters, the legal requirements that would have to be met for such a situation to occur must be considered. There is no doubt that individuals should be held criminally responsible for

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[82] *Id.*

[83] Sarah Crowe & Martin David Logan, *First Group of Maoist child soldiers being process to rejoin civilian life in Nepal*, UNICEF (Jan. 8, 2010), http://www.unicef.org/protection/nepal_52362.html.

[84] *Id.*

[85] *See id.*

[86] As evidenced by the fact that there are no trials facing child soldier recruiters.

[87] Becker, *supra* note 72.

their actions. Individual criminal responsibility is, in fact, a core legal concept in international criminal law. Three of its pertinent issues, currently, are:

> 1. The doctrine of joint criminal enterprise; 2. The defining criteria of the international criminal courts for the purpose of evaluating the lifting of state official immunity for other core international crimes; [and] 3. The imposition of individual criminal responsibility for terrorism as a crime against humanity in both international law and the ICC Statute.[88]

Without going too deeply into the legal aspects, individuals who planned, instigated, ordered, committed, or aided and abetted in the planning, preparation, or execution of a crime under Articles 2 to 4 of the Statute of the International Criminal Tribunal for Rwanda ("ICTR");[89]Articles 2 to 5 of the Statute of the International Criminal Tribunal for the former Yugoslavia ("ICTY");[90] and Articles 6-8 of the Rome Statute of the International Criminal Court[91] can be found criminally responsible for such a crime, despite the fact that they may not have pulled the trigger. This reality is clearly important when considering the issue of finding child soldier recruiters responsible for acts of genocide, crimes against humanity, and war crimes.

As a classic legal theory, individual criminal responsibility has a strong basis. Criminal responsibility, in general, is the punishment of those who know right from wrong, but who choose not to abide by accepted rules of society.[92] Therefore, individual criminal responsibility is the prosecution of those who are blameworthy for violat-

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[88] CIARA DAMGAARD, INDIVIDUAL CRIMINAL RESPONSIBILITY FOR CORE INTERNATIONAL CRIMES 132 (2008).

[89] Statute of the International Criminal Tribunal for Rwanda art. 2-4, Nov. 8, 1994, 33 I.L.M. 1598.

[90] Statute of the International Criminal Tribunal for the Former Yugoslavia art. 2-5, May 25, 1993, 32 I.L.M. 1192. [hereinafter ICTY Statute].

[91] Rome Statute of the International Criminal Court art. 6-8, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

[92] *See* Harry Manuel Shulman, *Cultural Aspects of Criminal Responsibility*, 43 J. CRIM. L., CRIMINOLOGY, & POLICE SCI. 323, 323 (1952).

ing the basic criminal laws that the international community has established.[93] In essence, individual criminal responsibility transitions from a rigid view of collective responsibility to the subjective view of making persons accountable for their actions, regardless of their 'closeness' to the committing of the crime.[94]

Yet, the concept of knowing right from wrong may exist as a defense for child soldiers. Since children are not able to mentally calculate consequences in the same manner as adults, a child who may know that it is wrong to hit another person, yet may not be able to connect the consequences of hitting someone with that individual's potential death. Further, even if a child is able to predict such a consequence, he may not be mentally developed enough to connect such an act with a violation of society's norms.

In addition, individual criminal responsibility, despite its existence in customary international criminal law, has not been widely prosecuted until modern times.[95] It is only now within the international community, due to the UN Tribunals' stance towards prosecuting those most responsible for atrocities, that the feasibility of charging leaders of these criminal contexts as individually criminally responsible has become more than just an idea.[96]

The most obvious cases of individual criminal responsibility can be found in the ICTR and ICTY. It should be noted, however, that the legal concept of individual criminal responsibility recently became an issue in the *Anfal* trial, particularly concerning the prosecution's clarity of the chain of command.[97] In addition, the ICC vacillated

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[93] *See id.*

[94] *See* Guglielmo Verdirame, *The Genocide Definition in the Jurisprudence of the* Ad Hoc *Tribunals*, 49 INT'L & COMP. L.Q. 578, 583-87 (2000).

[95] *See* GIDEON BOAS ET AL., FORMS OF RESPONSIBILITY IN INTERNATIONAL CRIMINAL LAW 145-52 (2007).

[96] *Id.* at 274-77

[97] *See* Letter from Richard Dicker, Dir., International Justice Program, to President of the Iraqi Tribunal (Mar. 28, 2007), *available at* http://electroniciraq.net/news/internationallaw/Anfal_Proceedings_Raise_Concerns_Open_Letter_to_th_2972_printer.shtml.

in assessing how to handle the indictment of Sudan's President, Omar al-Bashir, for genocide, crimes against humanity, and war crimes in Darfur.[98] It seemed evident that his was a case in which individual criminal responsibility should apply. In theory, Omar al-Bashir's indictment should have been immediately similar to that of the Rwandan President or the leaders of the former Yugoslavia.

Individual criminal responsibility was first codified in the Hague Convention of 1907. The first article in the Annex to the Hague Convention states that an armed force must be "commanded by a person responsible for his subordinates."[99] The Geneva Conventions further expounded this definition, as each of the four Conventions incorporated individual criminal responsibility as an idea, although their definition was limited to conflicts between states.[100]

The evolution of individual criminal responsibility did not encompass the failure to prevent a subordinate's crime until World War I. In the aftermath of World War I, the Allies recommended the establishment of a tribunal designed to try individuals who either ordered or abstained from the prevention of violations of the laws or customs of war.[101] Despite the theoretical breakthrough in international criminal law, no commanders were tried

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[98] *See Sudan head accused of war crimes*, BBC NEWS (July 14, 2008, 3:30 PM), http://news.bbc.co.uk/2/hi/africa/7504640.stm.

[99] Hague Convention Respecting the Laws and Customs of War on Land Annex art. 1, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631.

[100] *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field art. 3, *adopted* Aug. 12, 1949, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 3, *adopted* Aug. 12, 1949, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Civilian Persons in Time of War art. 3, *adopted* Aug. 12, 1949, 75 U.N.T.S. 287; Geneva Convention Relative to the Treatment of Prisoners of War art. 3, *adopted* Aug. 12, 1949, 75 U.N.T.S. 135.

[101] Edoardo Greppi, *Evolution of Individual Criminal Responsibility Under International Law*, INT'L REV. RED CROSS, no. 138, Sept. 30, 1999, *available at* http://www.icrc.org/eng/resources/documents/misc/57jq2x.htm.

on the basis of this notion.

It was not until World War II, and the trials associated with the conflict, that individual criminal responsibility was prosecuted.[102] The World War II Tribunals statute did not specifically include provisions pertaining to the prosecution of command responsibility; the World War II Tribunals, however, expanded the established doctrine in order to hold superiors liable for crimes committed by subordinates.[103] These Tribunals sparked the discussion of culpability and the knowledge of subordinate behavior necessary for the prosecution of commanders.[104]

The first international trial specifically charging a commander for failure to fulfill his responsibility during times of conflict was the trial of General Yamashita, conducted by the United States Military Commission.[105] The Commission found General Yamashita guilty and set a strict standard for determining the liability of commanders.[106] This strict standard extended liability to commanders who failed to discover the illegal acts of their subordinates.[107]

The Tokyo Tribunal later revised the standard to include those commanders who "should have known of the actions of the[ir] subordinates."[108] The purpose of the Tokyo Tribunal, as far as individual criminal responsibility was concerned, was to prosecute those who had taken part in the formulation or execution of a common plan to commit crimes.[109] This revision of the standard led to controversies regarding the appropriate degree of knowledge a commander must have of his subordinates' actions in order to proceed with prosecution.[110]

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[102] Greppi, *supra* note 102.

[103] *Id.*

[104] *See id.*

[105] *See* 3 Evan Wallach & Maxine Marcus, *Command Responsibility*, *in* INTERNATIONAL CRIMINAL LAW 459 (3d ed. 2008).

[106] *See id.*

[107] *See id.*

[108] *Id*

[109] *See* Greppi, *supra* note 102.

[110] *See generally* Jenny S. Martinez, *Understanding* Mens Rea *in Command*

The concept of individual criminal responsibility was finally codified in the Statutes of the ICTR, ICTY, and ICC, the last of which enshrined the principle to natural persons with no distinction of official capacity.[111] Each of these international instruments has established the modern jurisprudence for the legal requirements of individual criminal responsibility.[112]

The first head of state to be indicted for war crimes was President Slobodan Milosevic in May of 1999.[113] His indictment paved the way for future indictments of other leaders found to be criminally responsible for their participation, complicity, or influence in the committing of international crimes.[114] His trial and other similar trials have cemented the legal theory not only creating a commander's duty to prevent crimes during war, but a commander's liability for the negligent training of soldiers who commit international crimes.[115] Commander liability is an additional duty and should be understood as separate from the duty to control and discipline troops in the prevention of international crimes, which includes a commander's duty to act and punish upon the discovery of such crimes.[116]

Commander liability extends now, in theory, to the prosecution of politicians who are aware of crimes being carried out in their jurisdiction, but take no preventive measures.[117] The argument further extends to situations in which subordinates obey the unlawful orders of their

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Responsibility, 5 J INT'L CRIM. JUST. 638 (2007) (setting out the parameters of the debate).

[111] Reinhold Gallmetzer & Mark Klamberg, Address at the Lieden Univ. Summer Sch. on Int'l Criminal Law: Individual Responsibility for Crimes Under International Law (2005).

[112] *See supra* notes 90-92 and accompanying text.

[113] *In Depth: War Crimes*, CBC NEWS ONLINE, http://www.cbc.ca/news/background/warcrimes/ (last updated Mar. 14, 2006).

[114] *See id.*

[115] *Id.*

[116] *See id.*

[117] *Id.*

superiors. It is my contention that a court would not excuse a soldier's actions despite the soldier's adherence to the orders of his superiors, including orders involving the recruitment and use of child soldiers.

For a successful prosecution of individual criminal responsibility, there must be an international and national desire to hold an individual accountable for his misconduct. While the initial sentiment has been to hand individuals over to an applicable tribunal, demonstrated by the recent flux of international bodies, military tribunals have proven to be as legally appropriate as an international tribunal.[118] As illustrated by the universal jurisdiction of crimes under international law,[119] domestic courts are just as capable of administering justice in cases of individual criminal responsibility.

In regards to child soldiers, it must be considered whether an international desire to hold them accountable for their actions exists. In light of Lubanga's indictment, it appears that there is an international focus on punishing child soldier recruiters; but what about the child soldiers themselves? Without international support, individual criminal responsibility of children becomes moot. Further, if a consensus were to develop that children should be punished, what would be considered the most appropriate forum for them to be tried: the domestic courts of the state that recruited them or the military for which they fought?

Accountability is an essential concept that must be considered within the context of the international criminal law, excluding any form of liability when the accused made no personal contribution to the commission of the crime. Punishment must always be based on the material commission of the crime of the accused. Additionally, principles of punishment in basic criminal theory dictate that responsibility must be based on the guilt of the ac-

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[118] Geoffrey S. Corn & Jan E. Aldykiewicz, *New Options for Prosecuting War Criminals in Internal Armed Conflicts*, 32 PARAMETERS 30, 39-42 (2002).

[119] *See id.*at 38.

cused.[120] This concept applies both to the punishment of child soldiers and to those that recruit them. Can child soldiers be considered to have contributed to a crime when they were forced into militias and forced again into fighting?

This question is exemplified by legal theory stating that individuals who feel remorse will generally not be punished as harshly as individuals who do not feel remorse.[121] The ICTY Appeals Chamber in *Prosecutor v. Tadic* stated that:

> The foundation of criminal responsibility is the principle of personal culpability: nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated . . . in national legal systems this principle is laid down in Constitutions, in laws, or in judicial decisions. In international criminal law the principle is laid down, inter alia, in Article 7(1) of the Statute of the International Tribunal.[122]

This principle is soundly based in domestic and international law and provides the foundation for societies that hold the deterrence of crimes in high regard.

This principle can also apply to states in the same manner as it is applied to individuals. This idea, however, was rejected during the preparation of the ICC Statute since it was found to be more practical to prosecute an individual as opposed to a state.[123] As stated by the Draft Code of Offences Against the Peace and Security of Mankind, prepared by the International Law Commission, crimes of individual criminal responsibility are punishable whether or not they are punishable under national

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[120] *See supra* note 94-95 and accompanying text.

[121] *E.g.,* Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 92-95 (2004).

[122] Prosecutor v. Tadic, Case No. IT-94-1-A, Decision on Appeal Against Judgment, ¶ 186 (Int'l Crim. Trib. for the the Former Yugoslavia July 15, 1999).

[123] *See* Stephano Manacorda, *The Principles of Individual Criminal Responsibility: A Conceptual Framework*, 9 J. INT'L CRIM. JUST. 913, 914 (2007).

law, as reflected by the 1949 Geneva Conventions.[124] Only one proposal proclaims that an act of an individual of a state performed in the name of that state will be considered an act of the state.[125] This attempt to bridge the gap between state and individual criminal responsibility is a needlessly complicated route to condemning state actions in relevant situations.

These considerations lead to a number of interesting arguments in regards to the individual criminal responsibility of child soldiers. Since child soldiers commit crimes, it follows that they should be prosecuted for them. Contrastingly, however, should they be held accountable for their actions if they display remorse or if they are found to have been influenced by coercion or other forces? If one, such as this author, considers accountability to be the cornerstone of international peace, can we create exceptions for child soldiers who have committed crimes? Or would exceptions inadvertently increase the international use of child soldiers in combat? In this respect, it is important to note that child soldiers are used to commit some of the worst crimes in conflict because they are expected to escape punishment.

In order to hold child soldiers and child soldier recruiters responsible, they must meet the legal requirements of the crimes for which they are accused. Article 30 of the Rome Statute sets out the mens rea for basic individual criminal responsibility as follows: "[u]nless otherwise provided a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge."[126] The statute defines intent in two parts: conduct and consequence. A person evinces intent according to Article 30 when: "(a) [i]n relation to conduct, that person means to engage in the conduct; [or] (b) [i]n relation to a consequence, that person means to

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[124] Greppi, *supra* note 102.

[125] F.B. Schick, *War Criminals and the Law of the United Nations,* 7 U. TORONTO L.J. 27 (1947).

[126] Rome Statute, *supra* note 92, art. 30.

cause that consequence or is aware that it will occur in the ordinary course of events."[127] In addition, to fulfill the mens rea element, the accused must also have knowledge, as will be discussed below within the context of command responsibility.

In regards to command responsibility, there have been two different formulations of constructive knowledge. The stricter standard sets out an assessment of whether or not a commander should have, in the circumstances, known of the subordinate's actions and then taken appropriate preventative steps.[128] The more lenient standard sets out that a commander is only responsible when he failed to discover the subordinate's actions and such information was readily available.[129] Both standards were applied in the World War II prosecutions, contributing to the ambiguity surrounding the definition of constructive knowledge.[130]

Article 86(2) of the Protocol I to the Geneva Conventions was the first international provision to explicitly address knowledge as an element of command responsibility.[131] A literal interpretation of the provision imposes criminal liability on a commander only if he could have learned of his subordinates' conduct through information already available, as liability is imposed on superiors "if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that [the subordinate] was committing or was going to commit such a breach."[132] This would eliminate any diligence requirement of the commander to actively seek information

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[127] *Id.*

[128] *See* Matthew Lippman, *The Evolution and Scope of Command Responsibility*, 13 LEIDEN J. INT'L L. 139, 147 (2000).

[129] *See id.*. at 149.

[130] *Id.* at 152.

[131] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 86(2), *adopted* June 8, 1977, 1125 U.N.T.S. 3.

[132] *Id.*

and monitor his subordinates.[133]

ICTY Article 7(3) states, however, that if a subordinate commits a crime, his superior is not relieved of criminal responsibility if the superior "knew or had reason to know" of the actions of the subordinate.[134] In this respect, the 'knew' language would refer to actual knowledge, but the 'had reason to know' language would revive the more controversial constructive knowledge requirement.

Prosecutor v. Delalic was the first of the ICTY cases to consider the scope of individual criminal responsibility. The Trial Chamber held that the stricter requirement of 'should have known' must be applied; this ruling, however, was checked by the fact that the commander could only be held responsible when there was specific knowledge that could in fact be made available to him.[135]

In *Prosecutor v. Blaskic*, the ICTY again considered the question of the constructive knowledge requirement. With some small differences in the meaning of 'should have known,' the stricter standard was upheld.[136] The appeal of *Delalic* bound the court to the status that there was no consistent trend in the decisions from the World War II tribunals and, therefore, that Article 86(2) of the ICTY Statute represented a consolidation and elucidation of the mens rea standard of individual criminal responsibility so that the ordinary meaning of the provision is that the commander must have some information available to him that puts him on notice of his subordinates' commission of unlawful acts.[137] Similarly, in the ICTR case of *Prosecutor v. Nahimana*, the accused were found guilty and criminally responsible for the actions of others based on this definition.[138]

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[133] *See* Lippman, *supra* note 131, at 158 (noting that Art. 86(2) requires actual knowledge, constructive knowledge, or wanton reckless disregard).

[134] ICTY Statute, *supra* note 91, art. 7(3).

[135] Prosecutor v. Delalic, Case No. IT-96-21-A, Judgement, ¶¶ 222-226 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001).

[136] Prosecutor v. Blaskic, Case No. IT-95-14-T, Trial Judgement, ¶¶ 304-307 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000).

[137] Delalic, Case. No. IT-96-21-A, ¶¶ 229-236..

[138] Prosecutor v. Nahimana, Case. No. ICTR 99-52-T, Judgment and Sen-

In addition, the Rome Statute, in Article 28, imposes individual criminal responsibility on commanders for crimes committed by individuals under their command if they knew, or in the circumstances should have known, that their forces were committing or about to commit unlawful acts.[139] Interpreted literally, the statute appears to adopt the stricter 'should have known' standard of constructive knowledge.[140] How the court will interpret the statute remains to be seen, as the ICC delves further into its mandates and trials.

Hence, the definition of criminal responsibility provided by the ICC is not radically different from that of the ICTR and ITCY. Due to the fact that the ICC has not yet produced any substantial jurisprudence in this area, this definition will have to stand as is for the time being. Thus, this author would go out on a limb and say that, as the state of the law appears currently, the 'should have known' standard, or the stricter version of constructive knowledge, should be adopted for the mens rea of individual criminal responsibility and command responsibility.

Another, though far more logistical, problem raised by individual criminal responsibility is that of reconciling the specific intent requirement for crimes such as genocide[141] or crimes against humanity,[142] with that for individual criminal responsibility. There is a fundamental wrong that occurs when intent from a subordinate who perpetrates genocide is imported onto a superior who knew or had reason to know of the crime when he himself either did not believe in its commission or did not have the requisite mens rea for genocide. It must be kept in mind that while command responsibility is not in itself a crime, individual criminal responsibility is, since it denotes that there was a crime committed with common intent. Com-

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tence, ¶¶ 970-972 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 3, 2003).

[139] Rome Statute, *supra* note 92, art. 28.

[140] Lippman, *supra* note 131, at 163-64.

[141] Rome Statute, *supra* note 92, art. 6 (requiring "with intent to").

[142] *Id.* art. 7 (requiring "with knowledge of").

mon intent is not necessary though, as the mens rea for individual criminal responsibility stops at knowledge.

In addition, this author is aware that command responsibility only applies to child soldier recruiters. Under concepts of command responsibility, if those who promote the use of child soldiers can be found to have knowledge of recruitment, they can be convicted.[143] Similarly, if it can be proved that child soldiers themselves were recruiting child soldiers knowing that this is an illegal act, they can be punished. The logic derived from command responsibility, however, can help to decide whether or not child soldiers should be found guilty of genocide, crimes against humanity, or war crimes. Could we not consider it to be a fundamental wrong to impart specific intent onto these children, despite the fact that they are committing horrendous crimes?

Perhaps the most critical aspect of individual criminal responsibility is the question of who should be criminally responsible for gross violations of human rights in the international context. Which individuals are deserving of convictions in either the pursuit of justice or the satisfactory solution to a situation? While international criminal law puts individuals under an obligation to prosecute violators of international crimes who possess individual criminal responsibility, it must still be considered how this concept should apply to child soldiers.

Some suggest that children cannot fulfill the special intent requirement for committing genocide, crimes against humanity, or war crimes. These crimes have a higher standard of mens rea than other crimes, and children may not be capable of forming such intent.[144] This argument is certainly a valid. Regardless, as discussed above, blindly following orders is not an excuse for com-

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[143] *See supra* notes 131-138 and accompanying text.

[144] *See* John R. Morss, *The Status of Child Offenders Under International Criminal Justice: Lessons from Sierra Leone*, 9 DEAKIN L. REV. 213, 219 (2004); *see also* Matthew Happold, *The Age of Criminal Responsibility in International Criminal Law*, *in* INTERNATIONAL CRIMINAL ACCOUNTABILITY AND THE RIGHTS OF CHILDREN 79 (Karin Arts & Vesselin Popovski eds., 2006).

mitting genocide or crimes against humanity. If child soldiers are to be prosecuted, the same rules pertaining to adult soldiers may have to apply. If child soldiers are going to commit crimes recklessly, without regard for political or social circumstances, then they might still have to be found guilty of crimes unless, of course, it could be proved that they were unaware of the larger scale or plan in committing them. If this were the case, child soldiers would not meet the necessary specific intent elements for genocide and crimes against humanity.[145] Nevertheless, they might still have the sufficient intent necessary to be convicted of war crimes.[146]

This author suggests that this concern could be alleviated in part by implementing a minimum age for the prosecution of child soldiers; this still leaves the question, however, of what the age set for the prosecution of child soldiers should be. There has been little assistance on the matter from the international community. Rwanda has set its age at fourteen;[147] is it possible, however, for children even at this age to fully understand their actions? Further, would a child of this age be capable of making up his own mind regarding the complexities of a conflict? This question must be kept in mind along with the fact that children under the age of eighteen are not even supposed to be used in combat situations.[148]

An argument does exist that the Western domestic courts prosecute children as young as twelve[149] or even ten,[150] so why would we not prosecute child soldiers of that age as well? This argument, however, is countered by the onerous level of mens rea necessary for genocide, crimes against humanity, and war crimes.[151] There are

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[145] *See supra* note 144-145 and accompanying text.
[146] *See* Rome Statute, *supra* note 92, art. 8.
[147] Morss, *supra* note 147, at 218.
[148] *See supra* note 46 and accompanying text.
[149] Criminal Code § 13, R.S.C. 1985, c. C-46 (Can.).
[150] The Children and Young Persons Act, 1963, c. 37, § 16 (Eng.).
[151] Rome Statute, *supra* note 92, art. 6-8.

already problems with determining whether children of this age have the necessary mental capacity to be found guilty of a more simple definition of murder, let alone that of the much more serious crimes being considered in this article.

It should be noted that the Rome Statute, in Article 26, specifically states that the relevant authorities do not have jurisdiction over anyone under the age of eighteen.[152] Unless this age limit changes in the future, if child soldiers were to be prosecuted, prosecution would have to be done by special tribunals or domestic courts. Allowing domestic courts to prosecute these types of crimes is problematic. If they do not have the capacity to prosecute child soldiers in a fair and even-handed way, then nothing will have been gained. Thus, if we wish to prosecute child soldiers, it may become necessary for the Rome Statute to be altered in order to ensure proper prosecution.

Some suggest that, despite the fact that the ICC does not have jurisdiction over persons under eighteen, this bar should not prevent prosecutions under appropriate circumstances.[153] If a child soldier volunteered to commit punishable acts for an army, that individual should be held accountable for his actions.[154] While an interesting thought, this argument does not take into account the fact that child soldiers really do not have options. As pointed out earlier, how can we consider it to be an option to be forced to join an army and then be forced to rape, pillage, and torture your family, friends, and fellow citizens? Is it not just as bad to punish child soldiers for being forced to take up arms in a situation in which they had no control as it is to punish them for having committed such crimes?

One option might be to take into account the age and circumstances of the child soldier, perhaps only as a mitigating factor (if not a total defense).[155] When considering

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[152] *Id.* art. 26.
[153] *See* Morss, *supra* note 147, at 221.
[154] AMNESTY INT'L, *supra* note 6, at 6.
[155] *See id.* at 6-7.

whether or not to prosecute child soldiers, however, it again must be made clear that there are no international mechanisms by which they might be prosecuted, despite the fact that the UNCRC does allow for young people to be prosecuted under appropriate circumstances;[156] although, again, this allowance does not specifically address the issue of child soldiers. The UNCRC only notes that the best interests of the child must be taken into account at all times.[157] Is it in the best interests of child soldiers to be prosecuted for largely involuntary actions?

DEFENSES TO INDIVIDUAL CRIMINAL RESPONSIBILITY

If one was to determine that child soldiers should be prosecuted, there is still the question of whether or not there might be defenses available other than age and capacity. Defenses to individual criminal responsibility are detailed in the Rome Statute in Articles 31 and 33. Article 31 outlines the defenses of insanity, intoxication, self-defense, duress, and necessity,[158] which would, in theory, operate in the same manner as in common law jurisdictions under a reasonable person test. For those readers who are not aware of the reasonable person standard in international criminal law, it states that persons are deemed to be not criminally responsible if, at the time of their conduct, they suffered a mental disease or defect that destroyed their capacity to appreciate the nature of their conduct or the capacity to control their conduct to conform to the requirements of the law.[159]

This author would remind the reader that a number of child soldiers have been found to be addicted to drugs,[160] this being one of the ways in which the children

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[156] *See* Convention on the Rights of the Child, *supra* note 10, art. 40.

[157] *Id.* art. 3.

[158] Rome Statute, *supra* note 92, art. 31.

[159] Kirsten Ainley, *Responsibility for Atrocity: Individual Criminal Agency and the International Criminal Court*, *in* EVIL, LAW, AND THE STATE: PERSPECTIVES ON STATE POWER AND VIOLENCE 143, 149 (John T. Parry ed., 2006).

[160] *E.g.*, COAL. TO STOP THE USE OF CHILD SOLDIERS, *supra* note 53, at 299.

are indoctrinated and controlled.[161] Further, their capture and entrapment into military groups may constitute duress, as the child soldiers are left with little options but to commit crimes.[162] It would seem clear, and frankly logical, for child soldiers to assume that if they do not fight, they will be killed.

Though it would be tricky to raise the defense in a military situation, self-defense might be raised on behalf of child soldiers. If they are forced into a situation outside of their control and then have individuals trying to attack them, can they, in good conscience, be held responsible for subsequently defending themselves? Defending oneself is considered to be a part of war; it is only when the limits of self-defense are stretched that war crimes can start to be considered.[163]

Another loophole in individual criminal responsibility, under Article 33 of the Rome Statute, is the defense of superior orders.[164] This defense is not allowed under the Statutes of the ICTR or ICTY; however, the ICC has allowed it in very limited and specific circumstances, and even then only for war crimes.[165] The only circumstances which might apply are if: "(a) [t]he person was under a legal obligation to obey orders of the Government or the superior in question; (b) [t]he person did not know that the order was unlawful; and (c) [t]he order was not manifestly unlawful."[166]

If the ICC was to follow the jurisprudence established by the World War II Tribunals, however, it would likely reach the conclusion, in regard to superior orders, that an obligation addressed to a government, for example the signing of one of the UN treaties, does not dispose of the criminal responsibility of an individual if he is

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[161] *E.g., id.*
[162] AMNESTY INT'L, *supra* note 6, at 2.
[163] *See supra* notes 144-145 and accompanying text.
[164] Rome Statute, *supra* note 92, art. 33.
[165] *Id.*
[166] *Id.*

charged with carrying out that obligation.[167] In simpler terms, so long as an individual acts on behest of the state, he is unable to escape the instruments that the state has signed and ratified. While this argument could run into problems if it were to be claimed that child soldiers act alone and, therefore, are not governed by the international laws their state had signed, this argument has not yet been raised as an issue with regard to child soldiers. In addition, as already stated, the ICC at this time cannot even take jurisdiction over child soldiers, as they commit their crimes before their eighteenth birthday.[168] If this policy were to change, child soldiers might be excused on the basis of superior orders, but this kind of defense is purely speculation at this point.

There has been a suggestion that the supposed 'innocence' of child soldiers should not be a defense to their actions. This idea follows as such: when children are attached to a military organization, they become part of the military mentality and, automatically by joining, lose their innocence and therefore the defense of their age.[169] While this argument is certainly interesting, it fails to take into account the fact that child soldiers often do not join military organizations of their own free will. Even if they do, we must take into account their mental capacity in light of their age and the circumstances in which they are forced to join. Are individuals between the ages of eight and eighteen really capable of deciding whether or not they should be allowed to join the army? If children have seen their family killed before their eyes, or feel the threat of such an event, can they be considered capable of forming the capacity necessary to make such an important decision?

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[167] Theodor Meron, *Reflections on the Prosecution of War Crimes by International Tribunals*, 100 AM. J. INT'L L. 551, 573 (2006).

[168] *See supra* note 155 and accompanying text.

[169] Milla Emilia Vaha, Address at the International Studies Association Annual Convention Victims or Perpetrators: Adolescent Child Soldiers and the Vacuum of Responsibility (Feb. 15, 2009).

Regardless of the defenses that can be raised, should we allow child soldiers to operate in a situation of total impunity? In theory, there is no reason why they should not be held liable. There are no international guidelines laying out at what age child soldiers should or should not be prosecuted for violations of genocide, crimes against humanity, or war crimes. Some might consider sixteen to be an appropriate age since this is the age, according to the international guidelines, at which children are allowed to join armies, albeit in a limited fashion. As the saying goes, if they are old enough to fight, then they are old enough to be prosecuted for international crimes.[170] This age group, however, would leave out a very significant number of child soldiers.

Further, as this author has alluded to throughout this article, being a child soldier has great physical and psychological implications. Children are damaged by constant exposure to extreme violence.[171] Child soldiers who have been removed from their respective armies have been found to have a wide range of serious psychological illnesses due to their involvement in militia groups. Their psychoses range from somatization[172] and depression, to varying levels of posttraumatic stress disorder.[173] The impact of serving as a child soldier is particularly troublesome when one considers the fact that individuals in war-torn countries will most likely not be able to get the necessary medical assistance needed to recover from these disorders.[174]

Child soldiers are clearly seriously damaged by their involvement in combat situations. This in and of itself should affect our ability to gage their mental capacity to

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[170] Happold, *supra* note 147, at 73.

[171] *See* Faulkner, *supra* note 52, at 497.

[172] *Somatization Disorder*, MEDLINEPLUS (Aug. 9, 2010), http://www.nlm.nih.gov/medlineplus/ency/article/000955.htm (describing somatization as a "long-term (chronic) condition in which a person has physical symptoms that involve more than one part of the body, but no physical cause can be found.").

[173] Daya Somasundaram, *Child Soldiers: Understanding the Context*, 324 BRIT. MED. J. 1268, 1270 (2002).

[174] *See* Faulkner, *supra* note 52, at 500.

have committed the crimes for which they may be charged. Also, in order to combat these disorders, former child soldiers need to be provided with stable and happy households where their needs will be met.[175] Prison could hardly be described as such an environment.

If we were to allow the prosecution of child soldiers, it would need to occur under appropriate circumstances.[176] There has been evidence that child soldiers in the Democratic Republic of the Congo who have been prosecuted have also been sentenced to death.[177] There is further evidence that at least one individual was in fact executed for crimes committed as a child soldier.[178] These punishments are quite clearly taking the prosecution of child soldiers too far. Capital punishment has been condemned by most of the Western world for serious crimes; this condemnation would also have to be upheld for child soldiers.

Some point out, rightly so, that not prosecuting child soldiers denies victims their right to justice.[179] Victims have a right to face those that harm them; they have a right to have their attacker be held accountable. In order for child soldiers to be able to fully integrate back into their communities, perhaps some sort of punishment may be necessary.[180] Can their victims be expected to sit idly by while child soldiers are allowed to walk back into their homes and villages without any consequences?[181] This point, however, does not take into account the fact that child soldiers are often just as much a victim as those they are forced to hurt.

Further, not prosecuting child soldiers may lead to

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[175] *Id.*; *see also* MICHAEL WESSELLS, CHILD SOLDIERS: FROM VIOLENCE TO PROTECTION 221-24 (2006) (providing an interesting discussion on the use of restorative justice with child soldiers).

[176] AMNESTY INT'L, *supra* note 6, at 1.

[177] Happold, *supra* note 147, at 69.

[178] *Id.*

[179] Rose Grogan, *Child Soldiers, Prosecution*, IDEA (Sept. 12, 2009, 3:01 PM), http://www.idebate.org/debatabase/topic_details.php?topicID=924.

[180] *Id.*

[181] *Id.*

their being used by military commanders for increasingly worse crimes.[182] If we make it clear that child soldiers will not be held accountable for their actions, there is no incentive for child soldier recruiters to stop their practices unless we take a strong stance on the prosecution of child soldier recruiters as well.[183] Stopping the recruitment of child soldiers is most certainly an important aspect of solving the child soldier problem.

Overall, there is no argument that child soldiers commit crimes. Sometimes they commit crimes considered to be the worst in all of humanity, namely genocide, crimes against humanity, and war crimes. In the scope of these larger crimes, child soldiers also commit other heinous crimes such as murder, theft, torture, and rape. The question, however, is not whether child soldiers are committing these types of crimes. The question is whether they should be held accountable. We often, in the Western world, consider the circumstances that lead to the formation of the individual's behavior when considering whether or not they may be held criminally responsible for their actions. Why should we not consider the same for child soldiers? They are forced into a situation, often against their will, or, at the very least, in a highly coercive manner, which in turn shapes them in their most formative years.

If one of us was forced into a state of civil war and handed a gun at ten while being told to defend our families' honor, how would we react? Would these children have turned out the same way had they grown up somewhere else in the world, or at the very least in a different age and time? This author is of the opinion that we cannot hold these children responsible for actions in a scenario that shaped them in a very different way than their parents may have envisioned for them. Child soldiers should be pitied, they should not punished, and they should be given the care and attention necessary to unindoctrinate them so that they may stand a chance of be-

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[182] *Id.*
[183] *Id.*

coming responsible and functioning members of a peaceful society.

We must also compare the crimes of child soldiers to the crimes children commit in the domestic legal sphere. If a young person, so long as he is over the age of twelve in Canada, for example, commits a crime, he is criminally responsible for this action.[184] Coercion, duress, and mental incapacity are considered to be mitigating factors lessening or alleviating his criminal responsibility.[185] This same theory applies to child soldiers. As a result of these mitigating factors, we should not allow child soldiers to be convicted.

At the end of the day, the most important fact is this: child soldiers are children. No matter how terrible the crimes that they have committed are, they are still children. We must bear in mind our own children. What solution would we wish to pursue if this was one of our children being forced to commit acts which were against their will?[186]

As for the prosecution of child soldier recruiters, there appears to be an easy answer. In order to stop the use of child soldiers, those who recruit them must be punished. It seems clear from the statements of those recruited to be child soldiers that if they had not been recruited, they would not have taken up arms. If we punish those that recruit, we may very well put a stop to the use of child soldiers all together.

CONCLUSION

The issue of child soldiers is not going to disappear anytime soon. What must be done, as a strong first step, is to stop the recruitment of these children. If there is no further recruitment, than a significant portion of children

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[184] Criminal Code § 13, R.S.C. 1985, c. C-46 (Can.).

[185] *See id.* §§ 16-17.

[186] *See generally* JIMMIE BRIGGS, INNOCENTS LOST: WHEN CHILD SOLDIERS GO TO WAR (2005) (providing interesting insight into this question).

will not become child soldiers in combat situations.

To further dissuade the use of child soldiers, we may punish those that commit the worst and most unimaginable of crimes. This author believes that child soldiers should be prosecuted for the crimes they commit in conflict situations. This belief, however, must be prefaced with a disclaimer: while child soldiers should be prosecuted, child soldiers should not be convicted: a defense exists for child soldiers.

As discussed in this article, duress is a valid defense for child soldiers. They are, for the most part, forced into committing crimes against their morals and better judgment. They do not commit such crimes willingly and are generally incapable of forming the requisite mens rea to be convicted of genocide, crimes against humanity, and war crimes.[187] Further, child soldiers are severely damaged by what they have seen and done during war.[188] Convicting them of such crimes would be counterproductive to their healing. If child soldiers acting under duress must be punished, let it be through reconciliation programs and local methods of integrative justice.[189] Prison is never the right place for such children, particularly when they did not have the opportunity to choose their path in life.

As stated earlier, the most important fact to remember is that child soldiers are children. Children, at the end of the day, likely do not have the capacity the meet the necessary elements for genocide, crimes against humanity, and war crimes. Even if a court is persuaded that they meet such a stringent test, duress must be kept in mind. We must keep and utilize the defenses available to child soldiers in order to ensure that only those most deserving of punishment are in fact punished. No matter how one tries to spin the scenario, most child soldiers are not joining armies of their own accord. It is not their

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[187] Morss, *supra* note 147, at 219.
[188] Somasundaram, *supra* note 176, at 1270.
[189] *See* Morss, *supra* note 147, at 221-22.

hands pulling the trigger; it is largely the hands of misguided adults who have forced these children into one of the most horrific situations in this world, namely, war.