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REHABILITATION OR REVENGE: PROSECUTING CHILD SOLDIERS FOR HUMAN RIGHTS VIOLATIONS

Nienke Grossman*

INTRODUCTION

International law provides no explicit guidelines for whether or at what age child soldiers should be prosecuted for grave violations of international humanitarian and human rights law such as genocide, war crimes, and crimes against humanity. Due to increasing numbers of children participating in armed conflict and engaging in serious human rights breaches,1 a coherent policy response consistent with international legal standards, including states' duties to promote children's well-being and to prevent and prosecute human rights abuses, is necessary. This paper argues that the hundreds of thousands of children under age eighteen 2 participating in armed conflicts around the globe should be treated primarily as victims, not perpetrators, of human rights violations and that international law may support this conclusion. In the case of children, the world community should choose rehabilitation and reintegration over criminal prosecution because of children's unique psychological and moral development,3 the Convention on the Rights of the Child's emphasis on promoting the best interests of the child,4 and the damaging psychological effects

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* Associate, Foley Hoag LLP. B.A., Harvard College; J.D., Harvard Law School. © 2007, Nienke Grossman. I wish to thank Claudio Grossman, Martha Minow, Anne-Marie Slaughter, and Ezequiel Steiner for helpful comments on drafts of this Article and for encouraging me to publish it.


3. See generally Joseph Adelson, The Political Imagination of the Young Adolescent, in TWELVE TO SIXTEEN: EARLY ADOLESCENCE 106 (Jerome Kagan & Robert Coles eds., 1972). This study examined the views of 450 boys and girls from West Germany, the United States, and Great Britain. Findings did not vary significantly by sex or by nationality. Id. See infra Part III.A.

that trials may have on children forced to recount violence done to them and others.  

The political science paradigms of Liberalism and Institutionalism are instructive in crafting a strategy to achieve specific policy goals, such as setting an age of criminal responsibility for child soldiers engaged in human rights abuses and promoting their rehabilitation. If, as Institutionalism posits, institutions or international norms have an independent impact on states' policy choices, creating explicit, uniform standards at the international level for the disposition of child soldiers accused of human rights violations may encourage states to better promote the welfare of former child soldiers. Under the Liberal weltanschauung, non-state actors such as international child advocates and non-governmental organizations may play a role in both shaping and encouraging compliance with these new standards at the domestic and international levels. Further, both Liberals and Institutionalists may undercut the problem of prosecuting former child soldiers by focusing increased efforts on eradicating the use of child soldiers altogether.

After providing background information on child soldiers in Part I, Part II of this Article analyzes the current legal framework under international humanitarian, human rights, and criminal law, and the international law of the child, considering both a state's duty to prosecute perpetrators of international crimes and its affirmative obligations to rehabilitate and reintegrate former child soldiers into society. Next, Part III formulates a policy proposal for filling lacunae in the law, suggesting in particular that children under age eighteen should not be prosecuted for international crimes, and instead, should be treated primarily as victims of armed conflict. Part III also examines how the differing assumptions of the international relations paradigms of Liberalism and Institutionalism affect strategies for achieving this policy goal, and it provides other solutions for addressing the problem of child soldiers who commit atrocities. In conclusion, this paper

emphasizes our responsibilities to make this a world "fit for children." 9

PART I. THE BASICS ON CHILD SOLDIERS

We are the world's children.
We are the victims of exploitation and abuse.
We are street children.
We are the children of war.
We are the victims and orphans of HIV/AIDS.
We are denied good-quality education and health care.
We are victims of political, economic, cultural, religious and environmental discrimination.
We are children whose voices are not being heard: it is time we are taken into account.
We want a world fit for children, because a world fit for us is a world fit for everyone. 10

Over 300,000 11 children under age eighteen actively participate in armed conflict in 41 12 countries across the globe, according to the Coalition to Stop the Use of Child Soldiers, a group of six non-governmental organizations ("NGOs") including Amnesty International and Human Rights Watch. An additional 200,000 children are recruited into paramilitary and guerilla groups and civil militias in more than 87 countries. 13 Paramilitary groups in Colombia have recruited children as young as eight years old; eleven-year olds have been drafted into the Northern Alliance in Afghanistan; and teenage boys are frequently forced from their villages into the national army in

11. Amnesty Int'l, supra note 2, at 1; see also Report of the Special Representative of the Secretary-General for Children and Armed Conflict, ¶ 5, delivered to the General Assembly, U.N. Doc. A/60/335 (Sept. 7, 2005) (stating that over 250,000 children are exploited as child soldiers).
13. Id.
Myanmar. Despite demobilizations of child soldiers in Sierra Leone and Southern Sudan, the use of child soldiers is most prevalent in Africa, with more than 120,000 children engaged in active combat. Children are involved in soldiering in the developed world as well; about 7,000 children under the age of eighteen were in the British Armed Forces in June 2001. Children are increasingly participating in internal armed conflicts, and the more protracted the conflict, the higher the likelihood of child participation.

Children enter armed conflicts either involuntarily, through the threat or use of violence against them or their loved ones, or "voluntarily," due to dire poverty, feelings of helplessness and vulnerability, peer pressure, or the desire for revenge. In Northern Uganda from 1995 to 1997, between five and eight thousand children were abducted by the Lord's Resistance Army to serve as child soldiers — some were even taken directly from school. Similarly, the army surrounded and forcibly conscripted groups of school children in Burma between the ages of fifteen and seventeen, according to a U.N. report. Young soldiers may be abducted or recruited from the conflict areas themselves, second countries, refugee communities, ethnic

16. Nicol Degli Innocenti, 'About 800,000 Children' Used as Soldiers, FIN. TIMES, June 13, 2001, at 10; see COALITION TO STOP THE USE OF CHILD SOLDIERS, SOME FACTS (2006), http://www.child-soldiers.org/childsoldiers/some-facts (estimating that, in 2004, there were "up to 100,000 children, some as young as nine" involved in armed conflict).
17. Id.
20. COHN & GOODWIN-GILL, supra note 18, at 24.
21. Id. at 31-43.
23. Id. at 5 ("On 25 July 1996, 23 girls were abducted from St Mary's College and on 21 August 39 boys from Sir Samuel Baker School . . . On 10 October 1996 . . . 139 girls were abducted from St Mary's College . . . ").
Diasporas or by trafficking across borders. Children are considered particularly desirable recruits because they are more easily intimidated and physically vulnerable than adult soldiers.

Once they become soldiers, children may suffer from a variety of physical health risks, as they are frequently given the most dangerous jobs. Many fight on the front lines, facilitated by increasingly lightweight weapons that they can carry, facing the conventional dangers of injury and death during armed conflict. Of the 140 Liberation Tigers Tamil Eelaam (LTTE) soldiers killed during a battle at Ampakamam, Sri Lanka in October 1999, 49 were children; 32 of those children were girls between the ages of eleven and fifteen. Other children are used as spies, messengers, porters, and servants. In Myanmar, children were used to sweep roads with tree branches or brooms to detect landmines. One child soldier in Uganda innocently recounts how he was trained to place landmines:

I was not trained in their names—I was shown how to use them. There are three different kinds. Small ones, which open like a mathematical set, for use against people. Then there are round ones, which are set off by 70-80 kilos—a bicycle will make them explode. And big ones, the size of a small washing basin, which are for heavy vehicles.

In addition to engaging in combat and other tasks the boys participate in, girls are also frequently victims of sexual exploitation through rape, sexual slavery, and abuse. Younger children often are malnourished and may suffer from respiratory and skin infections. It is likely that child soldiers are at higher risks of drug and alcohol abuse, sexually transmitted diseases, pregnancy, and auditory and visual impair-

27. COALITION I, supra note 19.
29. COALITION I, supra note 19.
31. Amnesty Int'l, supra note 22, at 8.
32. COALITION I, supra note 19.
33. Id.
ments from frequent exposure to landmines.34

The psychological trauma of soldiering is undoubtedly severe. Robbed of their childhood, these children witness the worst of humanity on a daily basis. One thirteen-year-old from Sierra Leone described his first day of combat with children eight and nine years old, dragging their AK-47's because they were too heavy to carry:

I was in an ambush and bullets were flying back and forth, people were shooting. I didn’t want to pull the trigger at all but when you watch kids ... being shot and killed and ... dying and crying and their blood was spilling all over your face you just moved beyond, something just pushed you and you start pulling the trigger.35

A Ugandan girl abducted by the Lord’s Resistance Army in Uganda was forced to kill a boy who tried to escape, witnessed another boy hacked to death, and was beaten when she dropped a water container and ran for cover under gunfire.36 Brutal hazing practices include everything from torture and beatings inflicted upon the new recruit to forcing him or her to commit these atrocities on others. The Mozambican Resistance Organization’s (RENAMO) training regimen included physical abuse, punishment for showing sympathy for victims of violence, and forced participation in killing.37 Children exposed to rampant violence and death through involvement in armed conflict may suffer flashbacks, nightmares, sleep disorders, and post-traumatic stress disorder, in addition to desiring revenge and fearing retribution from the communities they have hurt.38

Although these children are themselves victims of violence, they are also perpetrators of atrocities. Once they become child soldiers, these children murder, maim, and plunder. Graca Machel, a former Expert of the Secretary General of the U.N. on the impact of armed conflict on children, wrote that children from countries including Afghanistan, Mozambique, Colombia, and Nicaragua, sometimes committed atrocities against their own families and communities.39 The children in Uganda’s Lord’s Resistance Army were both brutally abused and

34. Id.
37. See COHN & GOODWIN-GILL, supra note 18, at 93 n.1.
38. Id. at 106-11.
Abusive, killing attempted escapees, captured government soldiers, and civilians, using everything from stones to axes.\(^{40}\) Children as young as five were accused of participating in the Rwandan genocide.\(^{41}\)

Deciding what to do with these children once the conflict ends is a daunting task; the government(s) involved must fulfill international humanitarian, human rights, and criminal law commitments to both the former child soldiers and their victims. While working to reintegrate the children into their communities, continuing their educations, and helping them overcome the psychological and physical injuries of war,\(^{42}\) governments must address the concerns of the victims of war crimes and their families, as well as the challenges of national healing after conflict. At least as late as 1996, no peace treaty had ever explicitly recognized the existence of child soldiers.\(^{43}\) States, particularly in Africa, are squarely faced with the problem of what to do with children who committed serious violations of international humanitarian law. Despite the strong opposition of international child advocates, in October 2000, United Nations Secretary General Kofi Annan endorsed a proposal for a Sierra Leone war crimes tribunal with jurisdiction over children aged fifteen to eighteen.\(^{44}\) In May 2001, the Government of Congo sought to execute four child soldiers for violations committed under age eighteen, according to Human Rights Watch.\(^{45}\) Only 1,500\(^{46}\) of the approximately 4,000\(^{47}\) children accused of participating in the Rwandan genocide had been released from detention as of November 14, 2001.

\(^{40}\) Amnesty Int'l, \textit{supra} note 22, at 1, 14.


\(^{42}\) See \textit{Machel Report, supra} note 1, ¶¶ 49-57.

\(^{43}\) \textit{Id.} ¶ 49.


\(^{45}\) See \textit{Press Release, Human Rights Watch, Congo: Don't Execute Child Soldiers} (2001), http://www.hrw.org/press/2001/05/congo0502.htm. Although this author looked for follow-up information about what happened to these four children, she was unable to find any.


PART II. INTERNATIONAL LAW ON PROSECUTING CHILD SOLDIERS

A. States’ Obligations to Child Soldiers

International humanitarian law, or the “laws of war” that seek to regulate behavior during international and internal armed conflict, and the international law of the child explicitly prohibit the recruitment and use of children under age fifteen in armed conflict. Article 38 of the Convention on the Rights of the Child ("CRC") commits States Parties to refrain from using or recruiting children under age fifteen in their armed forces, and when recruiting children aged fifteen to eighteen, to prefer the oldest children. This is consistent with Article 77 of the Protocol Additional (No. I) to the Geneva Conventions Relating to the Protection of Victims of International Armed Conflicts, and Part II, Article 4 of the Protocol Additional (No. II) to the Geneva Conventions Relating to the Protection of Victims of International Armed Conflicts.

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48. The sources of international law are provided in Article 38 of the Statute of the International Court of Justice:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
   (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
   (b) international custom, as evidence of a general practice accepted as law;
   (c) the general principles of law recognized by civilized nations;
   (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determinations of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto.


49. CRC, supra note 4, art. 38.

1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.
2. States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.
3. States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces . . .

Id.

Non-International Armed Conflicts, the prohibition on the “use” of children under fifteen suggests children under fifteen may not volunteer to participate directly in armed conflict. The CRC has been ratified by 190 states—every country in the world except Somalia and the United States.

In recent years, various international treaties have sought to raise the age of permitted participation in armed conflict to eighteen years. For example, the Optional Protocol to the CRC on the Involvement of Children in Armed Conflict amended the age of allowable direct participation in hostilities to eighteen years for Parties to the Protocol, stating that “States Parties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of

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1. Children shall be the object of special respect and shall be protected against any form of indecent assault. The Parties to the conflict shall provide them with the care and aid they require, whether because of their age or for any other reason.

2. The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years the Parties to the conflict shall endeavour to give priority to those who are oldest.

3. If, in exceptional cases, despite the provisions of paragraph 2, children who have not attained the age of fifteen years take a direct part in hostilities and fall into the power of an adverse Party, they shall continue to benefit from the special protection accorded by this Article, whether or not they are prisoners of war.

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3. Children shall be provided with the care and aid they require, and in particular...

(c) 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;

(d) the special protection provided by this Article to children who have not attained the age of fifteen years shall remain applicable to them if they take a direct part in hostilities despite the provisions of subparagraph (c) and are captured...

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52. See id.

53. Cohn, supra note 5, at 195 n.1.
eighteen years do not take a direct part in hostilities." Although a child beneath age eighteen may not be compulsorily drafted into a Party's armed forces, a child may still volunteer to join a state's armed forces as long as he or she is not participating directly in hostilities. The Optional Protocol is stricter with respect to armed groups distinct from a state's armed forces since these must refrain from both using and recruiting children under eighteen, suggesting children aged fifteen to eighteen may not join armed opposition groups although they may join the state's armed forces voluntarily. As of March 2007, 122 states were signatories, and 110 were parties to the Optional Protocol to the CRC. The I.L.O. Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor ("I.L.O. Convention 182") defines a child as a person under the age of eighteen and includes "forced or compulsory recruitment of children for use in armed conflict" as a worst form of child labor for all countries to work toward eradicating, but does not address voluntary participation. The


55. Id. arts. 1-3. "Article 2: States Parties shall ensure that persons who have not attained the age of 18 years are not compulsorily recruited into their armed forces." Id.

56. Id. art. 4.

1. Armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years.

2. States Parties shall take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalize such practices.

Id.


Article 1: Each Member which ratifies this Convention shall take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency.
African Charter on the Rights and Welfare of the Child defines a child as a person under age eighteen and calls on all African States to take action to "ensure that no child shall take a direct part in hostilities and refrain in particular, from recruiting any child." Since the Charter applies to children in situations of "internal armed conflicts, tension and strife" in addition to international conflict, and proposes that children shall not take a direct part in hostilities, it suggests that children under eighteen should not be allowed to volunteer to engage actively in hostilities.

Contrary to the evolution of the allowable age of direct participation in armed conflict in the African Charter, I.L.O. Convention 182, and the Optional Protocol to the CRC, the Rome Statute for the International Criminal Court makes it a "war crime" to conscript or enlist children under the age of fifteen into national armed forces or use them to participate actively in hostilities. Despite the Rome Statute's con-

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Article 2: For the purposes of this Convention, the term *child* shall apply to all persons under the age of 18.

Article 3: For the purposes of this Convention, the term *the worst forms of child labour* comprises: (a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and servitude and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict.

Id.


60. Id. art. 22, ¶ 3.

61. The regional human rights treaties and declarations of the Americas do not define the age of majority or explicitly prohibit forced or compulsory recruitment of children of any age. *See* American Declaration of the Rights and Duties of Man (1948); *American Convention on Human Rights* (1969); *see also* Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador" (1988). Nevertheless, in *Vargas Areco v. Paraguay*, a case involving the recruitment of a fifteen year-old into the Paraguayan Army, and his subsequent death while serving in the army, the Inter-American Court of Human Rights, recognized that "... en el derecho internacional existe una tendencia a evitar que se incorpore a personas menores de 18 años en las Fuerzas Armadas, y a asegurar, en todo caso, que los menores de 18 años de edad no participen directamente en hostilidades." Judgment of 26 September 2006 ¶ 122 ("... in international law, there is a tendency to avoid the incorporation of persons younger than 18 years into the Armed Forces, and to ensure, in every case that those under 18 years of age do not participate directly in hostilities") (translation by author).

62. Rome Statute of the International Criminal Court art. 8, ¶ 2(b) (xxvi), July 17, 1998, U.N. Doc.A/Conf.183/9* (1998) [hereinafter Rome Statute]. "Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities" is a war crime. *Id.*
tinuing emphasis on age fifteen, an international consensus appears to be emerging around raising the age of allowable direct participation in hostilities to eighteen years of age.

States’ obligations to children during armed conflict extend beyond merely refraining from recruiting them into their armed forces, according to both global and regional legal instruments. During both international and internal armed conflict children receive special affirmative protection under humanitarian law, in addition to blanket guarantees under Common Article III of the Geneva Conventions, prohibiting all states and other Parties to the Conflict, including dissident groups, from harming all persons taking no active part in the hostilities.63 Under the Optional Protocol to the CRC, states are required to demobilize, release, and aid child soldiers in physical and psychological recovery and social reintegration.64 Article 39 of the CRC similarly states:

States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of


In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention . . . shall in all circumstances be treated humanely . . . . To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
(b) taking of hostages;
(c) outrages upon personal dignity, in particular humiliating and degrading treatment;
(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

64. Optional Protocol to the CRC, supra note 54, art. 6, ¶ 3. “States Parties shall, when necessary, accord to these persons all appropriate assistance for their physical and psychological recovery and their social reintegration.” Id.
a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and re-integration shall take place in an environment which fosters the health, self-respect and dignity of the child.\textsuperscript{65}

Under the African Charter on the Rights and Welfare of the Child, states are required to “take all feasible measures to ensure the protection and care of children who are affected by armed conflicts,”\textsuperscript{66} in addition to respecting the norms of international humanitarian law relevant to children in armed conflict.\textsuperscript{67} Although the Americas have not signed a substantively equivalent charter, the General Assembly of the Organization of American States issued a Summit Declaration in June 2000 urging its members to consider signing and ratifying the Optional Protocol to the CRC, to adopt I.L.O. Convention 182 without delay, and to support efforts at demobilization, rehabilitation, and reintegration into society of children affected by armed conflicts.\textsuperscript{68} In addition, the Geneva Convention (No. IV) Relative to the Protection of Civilian Persons in Times of War mandates that Parties to a conflict shall take appropriate action to “ensure that children under fifteen who are orphaned or separated from their families as a result of the war, are not left to their own resources, and that their maintenance, the exercise of their religion and their education are facilitated in all circumstances . . . .”\textsuperscript{69} The same Convention also states that women, and presumably girls, are entitled to special protection from “any attack on their honor” including rape, prostitution, and assault.\textsuperscript{70}

B. States’ Duty to Prosecute Persons Who Commit Crimes Under International Criminal Law

A state that fails to prosecute an individual—child or adult—who violates international criminal law may find itself in violation of international law. If a person commits certain international crimes, a state may be obligated to prosecute him or her under international treaty and

\begin{itemize}
\item \textsuperscript{65} CRC, \textit{supra} note 4, art. 39.
\item \textsuperscript{66} African Charter, \textit{supra} note 59, art. 23, ¶ 3.
\item \textsuperscript{67} \textit{Id.} art. 23, ¶ 1.
\item \textsuperscript{68} Summit Declaration on Children and Armed Conflict, G.A. Res. 1709, O.A.S. GAOR, June 5, 2000, AG/Res. 1709 (2000).
\item \textsuperscript{69} Convention (No. IV) Relative to the Protection of Civilian Persons in Time of War art. 24, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 287.
\item \textsuperscript{70} \textit{Id.} art. 27.
\end{itemize}
customary law,71 even if these crimes are committed against the state’s own nationals.72 For example, the Convention on the Prevention and Punishment of the Crime of Genocide explicitly binds states to “undertake to prevent and to punish”73 the crime of genocide.74 Similarly, the Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment establishes that States Parties must criminalize torture75 under its domestic law and “shall make these offenses punishable by appropriate penalties which take into account their grave nature.”76

Although various treaties, such as the International Covenant on Civil and Political Rights,77 the European Convention for the Protection of Human Rights and Fundamental Freedoms,78 and the American Convention on Human Rights79 do not explicitly state that states are obligated to prosecute violations, they may implicitly and through subsequent interpretation require prosecution to protect the fundamen-

72. Id. at 2555.
74. Id. art. 2. The crime of genocide is defined as carrying out certain enumerated acts with the “intent to destroy, in whole or in part, a national, ethnical, racial or religious group . . . .” Id.
75. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1, Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987) [hereinafter Torture Convention]. Torture is defined as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Id.

76. Id. art. 4.
tal rights they enumerate and seek to protect.\textsuperscript{80} Furthermore, the Restatement (Third) of the Foreign Relations Law of the United States indicates that a state violates customary law if it "practices, encourages or condones" severe human rights violations, and it will be presumed to be encouraging or condoning "if such acts, especially by its officials, have been repeated or notorious and no steps have been taken to prevent them or to punish the perpetrators."\textsuperscript{81} The Preamble to the Rome Statute suggests a growing international consensus toward requiring prosecution and punishment, explicitly recalling that "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes" and affirms "that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation."\textsuperscript{82}

Nevertheless, some believe that during cases of internal strife, the decision to prosecute rests on domestic criminal law.\textsuperscript{83} Article 3 common to the four Geneva Conventions of 1949, although prohibiting parties to a conflict from harming unarmed civilians in an internal conflict, contains no "grave breaches" provision mandating criminal punishment,\textsuperscript{84} making the duty or decision to prosecute dependent on domestic law. Furthermore, Article 6(5) of the Protocol II to the Geneva Conventions, addressing the protection of victims during internal conflicts, seems to encourage amnesty over prosecution, implying a dissimilar duty to prosecute in internal rather than international conflicts:\textsuperscript{85} "At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict . . . ."\textsuperscript{86}

Despite these interpretations of Article 6(5) of Protocol II and Common Article 3, the international community advocated for criminal tribunals in Rwanda and the former Yugoslavia, even though those

\begin{itemize}
\item \textsuperscript{80} Orentlicher, \textit{supra} note 71, at 2568-69.
\item \textsuperscript{82} Rome Statute, \textit{supra} note 62, at pmbl.
\item \textsuperscript{84} Reis, \textit{supra} note 41, at 636.
\item \textsuperscript{85} Gallagher, \textit{supra} note 83, at 176.
\item \textsuperscript{86} Protocol II, \textit{supra} note 51, art. 6(5).
\end{itemize}
conflicts were internal. This advocacy reflects a duty to prosecute serious violations of international humanitarian law.\textsuperscript{87} Furthermore, when the Special Representative of the U.N. Secretary General for Sierra Leone signed the Lome Peace Accord of 1999, he was instructed to add a disclaimer “to the effect that the amnesty provision contained in article IX of the Agreement (‘absolute and free pardon’) shall not apply to international crimes of genocide, crimes against humanity or other serious violations of international humanitarian law,”\textsuperscript{88} explicitly rejecting the idea of a broad amnesty. Consequently, a state’s failure to prosecute a child who commits a serious violation of international law may itself be in breach of international law.

C. \textit{The Minimum Age of Criminal Responsibility for Child Soldiers}

At what age the duty to prosecute applies to international humanitarian crimes such as crimes against humanity and war crimes committed by children appears unresolved under the statutes of recent human rights tribunals and the Rome Statute. Although the International Criminal Tribunals for the Former Yugoslavia\textsuperscript{89} and for Rwanda\textsuperscript{90} do not address the minimum age of criminal responsibility, both stress the importance of prosecuting and punishing those responsible; their silence does not necessarily preclude prosecution of children under

\begin{itemize}
\item \textsuperscript{87} E.g., Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, art. 6, U.N. Doc. S/RES/827 (May 25, 1993) [hereinafter ICTY Statute]. “The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute.” \textit{Id.}
\item \textsuperscript{89} ICTY Statute, \textit{supra} note 87, art. 6. “The International Tribunal shall have jurisdiction over natural persons pursuant to the provisions of the present Statute.” \textit{Id.}
\item \textsuperscript{90} Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, annex art. 1, U.N. Doc. S/RES/955 (Nov. 8, 1994) [hereinafter ICTR Statute].
\end{itemize}

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States between 1 January 1994 and 31 December 1994, in accordance with the provisions of the present Statute. \textit{Id.}
These mechanisms. The Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, however, explicitly allows for all persons aged fifteen and above to fall under the jurisdiction of the Court. The Rome Statute does not include persons under eighteen at the time of commission of a crime within its jurisdiction, although it is a war crime to conscript or enlist children under age fifteen into armed forces.

Treaty law on the treatment of juveniles undergoing ordinary domestic criminal prosecutions similarly acknowledges the lack of consensus on the minimum age of criminal responsibility, showing the absence of both treaty and customary norms. The CRC recognizes not only the differences of opinion regarding the definition of a "child," describing a child as "every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier," but also the broad scope of views regarding the age at which children may be prosecuted, and it calls on States Parties to set a minimum age. The U.N. Standard Minimum Rules for the Administration of Juvenile Justice ("Beijing Rules") echo the variety in the age of criminal responsibility among states:

92. Sierra Leone Report, supra note 88. The Secretary General calls for those "most responsible" to be tried. Id. Paragraph 31 states:

Within the meaning attributed to it in the present Statute, the term 'most responsible' would not necessarily exclude children between 15 and 18 years of age. While it is inconceivable that children could be in a political or military leadership position (although in Sierra Leone the rank of "Brigadier" was often granted to children as young as 11 years), the gravity and seriousness of the crimes they have allegedly committed would allow for their inclusion within the jurisdiction of the Court.

93. Rome Statute, supra note 62, art. 26. "The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime." Id.
94. CRC, supra note 4, art. 1.
95. Id. art. 40.

3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:
(a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law . . . .
It should be noted that age limits will depend on, and are explicitly made dependent on, each respective legal system, thus fully respecting the economic, social, political, cultural and legal systems of Member States. This makes for a wide variety of ages coming under the definition of 'juvenile,' ranging from 7 years to 18 years or above. Such a variety seems inevitable in view of the different national legal systems and does not diminish the impact of these Standard Minimum Rules.\(^{96}\)

The Beijing Rules further add that the lower limit should not be set "at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity."\(^{97}\) In the same vein, although the most recent international treaty on juvenile delinquency defines a juvenile as any child under age eighteen, it requests that states determine "an age below which it should not be permitted to deprive a child of his or her liberty,"\(^{98}\) while providing no direction for what that lower limit should be. A 1997 UNICEF report on the progress of the CRC illustrates the wide variety of the age of criminal liability: twenty in Japan, seven in India, South Africa, and Sudan, ten in England, thirteen in France, sixteen in Argentina, eighteen in Peru, and fourteen in China.\(^{99}\)

Despite the lack of an explicit consensus in the statutes of interna-

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97. Id. at rule 4; Id. at cmt. to rule 4.

98. United Nations Rules for the Protection of Juveniles Deprived of Their Liberty, G.A. Res. 45/113, annex, U.N. GAOR, 45th Sess., Supp. No. 49A at 205, U.N. Doc. A/45/49 (1990). "11. For the purposes of the Rules, the following definitions should apply: (a) A juvenile is every person under the age of 18. The age limit below which it should not be permitted to deprive a child of his or her liberty should be determined by law . . . ." Id.

tional criminal tribunals and the absence of a customary norm regarding the exact minimum age of criminal responsibility for international humanitarian crimes, interpretation of the CRC in light of the Vienna Convention on the Law of Treaties may point to a legal obligation to refrain from prosecuting at least children under fifteen for serious crimes arising from armed conflict. Article 31 of the Vienna Convention states as a “General Rule of Interpretation” that “[a] Treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

The preamble to the CRC repeatedly addresses the need and commitment of the Parties to provide special protections for children; it recalls the Universal Declaration of Human Rights, in which the UN “proclaimed that childhood is entitled to special care and assistance,” and the Declaration of the Rights of the Child, stating, “the child by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection . . . .” By setting the minimum age for recruitment and use at fifteen, the drafters of the CRC pointed to the need to protect children from the dangers of war, in accord with international humanitarian law. In addition to the psychological and physical dangers of war, the

102. CRC, supra note 4, at pmbl.
104. CRC, supra note 4, at pmbl.
105. In the working group, when discussing at what age to set the prohibition on recruitment, several countries expressed the desire not to violate international humanitarian law with respect to the child, and some hoped to raise the age of allowable participation in direct hostilities. Nigel Cantwell, The Origins, Development and Significance of the United Nations Convention on the Rights of the Child, in THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: A GUIDE TO THE ”TRAVAUX PREPARATOIRES” 19, 27 (Sharon Detrick ed., 1992). Despite these efforts, the United States alone but clearly benefiting from the silent support of several other delegations—categorically refused to give such protection to the fifteen to seventeen age-group. Despite vociferous opposition, the Chairman declared that, since there was no consensus on the upper age limit and no delegation was arguing for an age-limit under fifteen, this clearly implied that there was consensus on age fifteen. With that, he immediately closed the debate.

Id. Despite the uproar that ensued, the text remained at under age fifteen. Id.
prohibition on both forced recruitment and use of children under age fifteen in direct hostilities suggests that the States Party to these treaties believed children under fifteen do not possess the mental maturity to express valid consent to join an armed group. If children under fifteen are not sufficiently mature to consent to engage directly in armed conflict and must be protected from the dangers of war under the CRC, they arguably are more like victims of armed conflict than its perpetrators. In agreement with this interpretation of the CRC, the Sierra Leone Report allows for the prosecution of only children aged fifteen and over while recognizing the victimhood of all child soldiers. Similarly, the Rome Statute makes it a war crime to conscript or enlist children under age fifteen in armed conflict.

The Rome Statute and the Optional Protocol to the CRC arguably demonstrate an emerging consensus that children aged fifteen to eighteen should also be shielded from criminal liability. Although it is a war crime to conscript or enlist children aged under fifteen according to the Rome Statute, the international community expressed a preference for not prosecuting persons aged fifteen through seventeen by limiting the ICC’s jurisdiction to persons aged eighteen and over at the time of commission of a crime. Furthermore, since the Optional Protocol precludes States Parties from allowing children under eighteen to participate in direct hostilities, they should be protected from criminal liability if they are used in armed conflict. Finally, the CRC itself prefers the measures most “conducive to the realization of the rights of the child” when the CRC and domestic law or domestic treaty obligations differ, suggesting that the higher the age of allowable recruitment and criminal responsibility, the better.

106. Sierra Leone Report, supra note 88, ¶ 32.

The possible prosecution of children for crimes against humanity and war crimes presents a difficult moral dilemma. More than in any other conflict where children have been used as combatants, in Sierra Leone, child combatants were initially abducted, forcibly recruited, sexually abused, reduced to slavery of all kinds and trained, often under the influence of drugs, to kill, maim and burn. Though feared by many for their brutality, most if not all of these children have been subjected to a process of psychological and physical abuse and duress which has transformed them from victims into perpetrators.

107. Rome Statute, supra note 62, art. 8, ¶ 2(b) (xxvi).

108. Id. art. 26.

109. CRC, supra note 4, art. 41. “Nothing in the present Convention shall affect any provisions that are more conducive to the rights of the child and which may be contained in: (a) the law of a State party; or (b) International law in force for that State.” Id.
D. Protective Guidelines for Children Undergoing Prosecution

In addition to the affirmative obligation to reintegrate former child soldiers into society as previously noted, if a state chooses to prosecute a former child soldier for violations of domestic or international criminal laws, he or she is entitled to special protections under international law. As delineated in Article 3 of the CRC, "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." As well as providing a variety of procedural safeguards for children accused of criminal activity, such as presumption of innocence, knowledge of charges against him or her, and rights of privacy and appeal, Article 40 of the CRC articulates that such a child should be:

- treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's re-integration and the child's assuming a constructive role in society.

Rule 5 of the Beijing Rules similarly establishes that the aims of juvenile justice should include an emphasis on the "well-being of the juvenile" and a consideration of the individual circumstances of the offense and the offender, including examination of individual social status, family situation, and gravity of the crime in fashioning an appropriate response. In the same vein, in describing the powers and duties of the Prosecutor of the International Criminal Court, Article 54 of the Rome Statute charges the Prosecutor with considering both incriminating

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110. Id. art. 3.
111. Id. art. 40, ¶ 2.
112. Id. art. 40, ¶ 1.
113. Beijing Rules, supra note 96, at rule 5; Id. at cmt. to rule 5.

The response to young offenders should be based on the consideration not only of the gravity of the offence but also of personal circumstances. The individual circumstances of the offender (for example social status, family situation, the harm caused by the offence or other factors affecting personal circumstances) should influence the proportionality of the reactions (for example by having regard to the offender's endeavor to indemnify the victim or to her or his willingness to turn to wholesome and useful life).

Id.
and exonerating circumstances, which presumably might include the age of the alleged offender, in deciding whether to investigate and prosecute crimes. In deciding how a child offender should be punished, the CRC, the ICCPR, and the Beijing Rules specify that capital punishment shall not be imposed upon persons under age eighteen, and the CRC and Beijing rules state that deprivation of liberty of a child "shall be used only as a measure of last resort and for the shortest appropriate period of time." If a state is obligated or chooses to prosecute a child who allegedly

114. Rome Statute, supra note 62, art. 54.

Duties and powers of the Prosecutor with respect to investigations

1. The Prosecutor shall:
   (a) In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally;
   (b) Take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in doing so, respect the interests and personal circumstances of victims and witnesses, including age, gender as defined in article 7, paragraph 3, and health, and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children . . . .

Id.

115. CRC, supra note 4, art. 37(a). "No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age." Id.

116. ICCPR, supra note 77, art. 6(5). "Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women." Id.

117. Beijing Rules, supra note 96, at rule 17.2. "Capital punishment shall not be imposed for any crime committed by juveniles." Id.

118. CRC, supra note 4, art. 37(b). "No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time." Id. See also Beijing Rules, supra note 96, at rule 17(b)-(c).

17(b). Restrictions on the personal liberty of the juvenile shall be imposed only after careful consideration and shall be limited to the possible minimum.

17(c). Deprivation of personal liberty shall not be imposed unless the juvenile is adjudicated of a serious act involving violence against another person or of persistence in committing other serious offences and unless there is no other appropriate response.

Id.
committed international crimes, the state must also ensure that the child meets the substantive intent requirements for commission of the crime. Since these often severely abused children frequently were forced to commit crimes under duress or to take desensitizing drugs, the requisite mens rea may not be present. Although in the commission of certain crimes the order of a supervisor ordinarily does not shield a suspect from liability, since children under fifteen presumably do not possess the mental maturity to volunteer to participate directly in armed conflict, they are probably insufficiently mentally developed to resist an order from a supervisor. If drugs were involved, the child likely did not possess the necessary will to perform the acts at all. Furthermore, in the case of genocide, the mens rea requirement is even more complex and difficult to fulfill; a child must possess the "intent to destroy, in whole or in part, a national, ethnic, racial or religious group." A child soldier under the age of fifteen or even eighteen may not satisfy this intent requirement because he or she may not understand the meaning of the crime itself.

E. Summary of International Law on Prosecution of Child Soldiers

Although a duty to prosecute exists in cases of grave international crimes, special rules apply to child soldiers who meet the requisite criteria for the commission of those crimes, including mens rea. International treaty and customary law indicate the existence of an age below which states should not find children criminally responsible. Because the purpose of the CRC is to protect children, and states are prohibited from recruiting or using children under age fifteen in their armed forces, the state must also ensure that the child meets the substantive intent requirements for commission of the crime.

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120. Rome Statute, supra note 62, art. 33.

Superior Orders and Prescription of Law:
1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:
   (a) The person was under a legal obligation to obey orders of the Government or the superior in question;
   (b) The person did not know that the order was unlawful; and
   (c) The order was not manifestly unlawful.
2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.

Id.

121. Genocide Convention, supra note 73, art. 2.
122. Reis, supra note 41, at 645.
forces partly because they lack physical and mental maturity, they should not be held legally accountable for serious violations of international humanitarian law. If a state chooses to prosecute a child aged fifteen through seventeen, it must maintain procedural safeguards to protect the child’s rights and consider his or her best interests and well-being throughout the judicial process. In determining what disposition to impose upon the child, states may not utilize capital punishment for children under age eighteen and should consider the child’s age and circumstances as mitigating factors. Finally, states have affirmative obligations to seek to rehabilitate and reintegrate former child soldiers into society.

PART III. POLICY GOALS

A. Why Children Under Eighteen Should Not be Prosecuted

Following any national crisis involving serious violations of international humanitarian law, national healing includes elements of both “vengeance” and “forgiveness.” According to Martha Minow, while vengeance in the wake of massive human rights violations includes the desire for revenge, justifiable moral outrage, and condemnation of repugnant misconduct, forgiveness is the need to move on, reestablish trustful relationships, and create the foundation for collective governance. Focusing on forgiveness may result in a failure to punish those who commit egregious crimes, weaken the precarious rule of law in a fledgling democracy, and fail to deter the proscribed conduct in the future. Emphasizing vengeance may undermine a fragile transition to democracy through politically charged trials, particularly if the military maintains some degree of control. Ultimately, “peacemaking does more than end war; it lays the normative ground for transition and sets the agenda for peace time.” When the time for peacemaking arrives, children under age eighteen should not be prosecuted and punished, as an adult might be. Although they are perpetrators of armed conflict, and in some cases have committed gruesome acts, children should be recognized primarily as its victims.

124. Id. at 10-14.
125. Id. at 14-15.
126. Orentlicher, supra note 71, at 2542.
127. Id. at 2544-45.
128. Cohn, supra note 5, at 131.
They should occupy a role in the peacemaking process\textsuperscript{129} that recognizes their vulnerabilities, with a view toward their rehabilitation.

The international community should set the minimum age of responsibility at eighteen years old for serious crimes arising from armed conflict. As more and more children participate directly in armed conflict and in human rights violations, practical concerns, unfortunately, require a concrete policy delineating which children, if any, should be held responsible for international crimes. The CRC, the Beijing Rules, and the Machel Report all call for the establishment of a minimum age of criminal accountability.\textsuperscript{130} Although the setting of any minimum age of criminal responsibility is somewhat arbitrary and may be over and under-inclusive in terms of moral culpability, the cut-off chosen should maximize opportunities for rehabilitation for former child soldiers and protect as many young people as possible from long deprivations of liberty in chaotic post-conflict states. It should also be in accord with the general purposes of the CRC—protection and promotion of children’s rights—and consider the psychological and moral development of children. The Machel Report states that a child’s “emotional, mental and intellectual maturity” should be taken into account, instead of “subjective or imprecise” criteria such as personality or puberty.\textsuperscript{131} Choosing the age of eighteen as the lower limit for criminal accountability recognizes the state of adolescents’ psychological and moral development, and refraining from prosecuting persons below this age promotes the underlying rehabilitative goals of the CRC.

Psychological studies show a child’s understanding of the world is fundamentally altered during adolescence, suggesting he or she does not possess the same abilities to act independently or appreciate the rights of others as an adult and should be shielded from liability for crimes arising from war. A child’s grasp of the political world changes dramatically between ages twelve or thirteen and fifteen or sixteen; a child’s cognitive mode changes, his or her authoritarian views of the political system sharply decline, and he or she achieves a capacity for ideology.\textsuperscript{132} While older children are capable of shifting back and forth between concrete examples and abstract generalizations or principles,

\textsuperscript{129} See generally id. (supporting the proposition that children’s concerns should be considered in the peacemaking process). See also Machel Report, supra note 1, ¶ 92.

\textsuperscript{130} CRC, supra note 4, art. 40(3)(a). See Beijing Rules, supra note 96, at rule 4; Machel Report, supra note 1, ¶ 251.

\textsuperscript{131} Machel Report, supra note 1, ¶ 251.

\textsuperscript{132} Adelson, supra note 3, at 106-08.
younger children are generally limited to concrete examples. Younger children are usually incapable of imagining social reality in the abstract; an early adolescent:

enters adolescence with only the weakest sense of social institutions, or their structure and functions, or of that invisible network or norms and principles which link these institutions to each other. Furthermore, the failure to achieve abstractness does not permit him to understand, except in a most rough and ready way, those concepts essential to political thought—such ideas as authority, rights, liberty, equity, interests, representation, and so on.

Younger children also have a difficult time understanding the concept of individual and minority rights juxtaposed with state power. Although adults are not shielded from liability for war crimes and crimes against humanity because they were following orders, if children do not know how to question state or organized authority or understand the concept of rights, they should not be held criminally accountable for following orders.

Similarly, significant changes in moral development may also occur during adolescence, supporting the idea that holding children accountable for violations of the laws of war may be inappropriate when they are too young to hold independent moral views. Although not every person passes through every stage of moral development at the same age, or ever, Lawrence Kohlberg and Carol Gilligan suggest the sequence of stages is universal across at least three cultures: Taiwan, the US, and Mexico. Generally, post-conventional thought, or “a major thrust toward autonomous moral principles which have validity and application apart from authority of the groups or persons who hold them and apart from the individual’s identification with those

133. Id. at 108.
134. Id. at 109.
135. Id. at 118. When asked whether an imaginary island government should require men over forty-five to undergo annual medical examinations, while most younger adolescents deemed this a “splendid idea,” older children questioned whether it might be an excessive state intrusion. Id.
137. Lawrence Kohlberg & Carol Gilligan, The Adolescent As A Philosopher, in TWELVE TO SIXTEEN, supra note 3, at 144, 161-62. The Kohlberg/Gilligan article bases its conclusions on studies of boys’ moral development only.
138. Id.
persons or groups” first appears at adolescence. One example of the shift from conventional to post-conventional thinking in a child’s understanding of motives for rule obedience occurs at stage 5A:

1. Obey rules to avoid punishment.
2. Conform to obtain rewards, have favors returned, and so on.
3. Conform to avoid disapproval, dislike by others.
4. Conform to avoid censure by legitimate authorities and resultant guilt.
5A. Conform to maintain the respect of the impartial spectator judging in terms of community welfare.
5B. Conform to avoid self-condemnation.

If a child does not understand that he or she may choose to disobey an order to protect community welfare or to avoid self-condemnation, it may be inappropriate to hold him or her accountable for crimes when ordered by a supervisor or in the context of collective armed action.

Further, prosecuting children under age eighteen is inconsistent with the underlying goals of the CRC: to promote the best interests and well-being of the child. The default rule for the age of the child is eighteen, differing only when he or she attains majority earlier under the domestic law applicable to the child. The CRC specifically states that the best interests of the child “shall be a primary consideration” in all actions concerning the child. It further specifies that States Parties should undertake all feasible measures to care for and protect children in armed conflict, and that states must seek to promote physical and psychological recovery and social reintegration of child victims of armed conflict. Recovery and re-integration is meant to take place “in an environment which fosters the health, self-respect and dignity of the child.” The CRC itself states that States Parties should promote the establishment of measures for children accused of violating penal law “without resorting to judicial proceedings.” It proposes a variety of dispositions including counseling, vocational training, and

139. Id. at 161-62.
140. Id. at 161.
141. CRC, supra note 4, art. 1.
142. Id. art. 3.
143. Id. art. 38.
144. Id. art. 39.
145. Id. art. 39.
146. Id. art. 40.
other alternatives to institutional care to ensure that “children are dealt
with in a manner appropriate to their well-being and proportionate
both to their circumstances and the offence.” The CRC discourages
the use of deprivation of liberty as an adequate disposition, stating that
it “shall only be used as a measure of last resort and for the shortest
appropriate period of time.”

Trials are not in the best interest of former child soldiers. They are
less likely to promote their well-being and social reintegration than
primarily rehabilitative measures or other post-conflict accountability
methods. From a practical standpoint, many post-conflict, transitional
governments cannot prosecute children while upholding the proce­
dural safeguards of the CRC. For example, the twenty percent of the
judiciary that survived the conflict in Rwanda simply could not
expeditiously process the thousands of children that were detained while
protecting their rights. In June 1996, 1741 children were being held in
detention “in dreadful conditions” in Rwanda, and 550 of these chil­
dren were under fifteen years old. Two years later, children still
lacked legal assistance, and no child-specific legal procedures were in
place. According to the Africa News Service, only 1500 of the
approximately 4000 children accused of participating in the Rwandan genocide had been released from detention by November 14,

Even if a child is pardoned or provided with a disposition other than
a deprivation of liberty after undergoing a trial, the process itself

3. States Parties shall seek to promote the establishment of laws, procedures,
authorities and institutions specifically applicable to children alleged as,
accused of, or recognized as having infringed the penal law, and, in particu­
lar . . .
(b) Whenever appropriate and desirable, measures for dealing with such
children without resorting to judicial proceedings, providing that human
rights and legal safeguards are fully respected.

Id.

147. Id.
148. Id. art. 37.
149. Machel Report, supra note 1, ¶ 252.
150. Id. ¶ 250. See also Cohn, supra note 5, at 186-87.
151. Cohn, supra note 5, at 186.
152. AFRICA NEWS SERVICE, supra note 46.
153. LA. TIMES, supra note 47.
154. Ultimately, in a final agreement between Sierra Leone and the UN, a Special Court was
set up which would allow for children aged fifteen to eighteen to be prosecuted, but if found
guilty, would serve no jail time. Chris McGreal, "Unique Court to Try Killers of Sierra Leone, THE
may threaten the child’s psychological healing by making him or her re-live trauma, delaying the return of any semblance of normalcy, and making it more difficult for him or her to reintegrate into society, particularly if the trial is public. While telling the truth about perpetrating or being a victim of a crime may be an integral part of the psychological recovery process, without adequate support and care, it may be damaging for a child; an adversarial process like a trial is likely to aggravate a child’s distress, instead of providing a supportive environment for healing. On the other hand, “done well, determinations of moral culpability for abuses committed both against and by children can advance the child’s moral development and reinsertion into a family or community.” Although it may thwart a victim’s legitimate desire for justice, putting child soldiers on trial endangers their reintegration and rehabilitation into society.

Because of their youth and victimhood, post-conflict societies should focus on rehabilitation, rather than punishment of former child soldiers. These children have been more wounded by the world than vice versa. Even children who “volunteer” to join an armed group are driven to do so by hunger, poverty, political or cultural pressures, fear, and desire for protection. After being deliberately exposed to atrocious human rights violations like rape, murder, and maiming, or being forced to commit such violations themselves, many of them become completely desensitized to violence. Particularly in cases of abduction or forced recruitment, these children are ripped out of their community and familial networks; they live, suffer abuse or die at the whim of their superiors.

Instead of prosecuting children under age eighteen, post-conflict governments should seek alternative methods of addressing the needs of victims of child soldiers and their communities while rehabilitating the child soldiers themselves. Truth commissions may serve as a viable alternative to trials as long as procedures “(1) do not conflict with local healing methods, and (2) incorporate the supportive programs neces-

Guardian, Jan. 17, 2002, available at http://www.guardian.co.uk/sierra/article/0,2763,634697,00.html. It is unlikely that any children will be charged, however, since the focus is to be “on very few people who bear the greatest responsibility for what happened in Sierra Leone over the years.” Id.

155. Cohn, supra note 5, at 180-81.
156. Id. at 181.
157. See generally Machel Report, supra note 1, ¶ 36-43 (saying that some parents even encourage their daughters to become soldiers “if their marriage prospects are poor”). See generally Cohn, supra note 5.

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sary to enhance the therapeutic value, and minimize any negative impact, that participating in a truth-seeking process might have on child victims, witness and perpetrators, and on their care-givers and communities." 159

In South Africa, the Truth and Reconciliation Committee chose not to elicit testimony from children for fear of inflicting more pain on them, although it did hear adults speak of their experiences as children. 160 Neither truth commissions nor trials may ultimately be the answer to this quandary; the Machel Report highlights the importance of culturally appropriate, community-based methods for helping to heal child soldiers and encouraging communities to reintegrate them. Because some African cultures believe that accepting a person who has killed into the community will lead to evil spirits, any social reintegra­tion and forgiveness process must include traditional healers and "cleansing" processes. 161 In one village in Angola, after living with a former child soldier for one month, feeding him a special cleansing diet while advising the child on proper village behavior, a traditional healer convened the village for a ceremony where he buried a frequently used weapon such as a machete or an AK-47 and declared the boy's life as a soldier ended and life as a civilian begun. 162 In Mozam­bique, a child taken by RENAMO at age eight participated in collective prayer and singing in a local church where he was welcomed back as a member of his community. 163 No matter which specific methods are chosen for handling the reintegration of child soldiers into their communities in the wake of mass violence, the child's psychological and physical well-being and dignity must be taken into account. The focus should be on forgiveness when children are involved.

B. Applying International Relations Paradigms to the Child Soldier Quandary

International relations theory is part of an international lawyer's "toolkit" for achieving specific policy goals, 164 such as setting the age of

159. Cohn, supra note 5, at 182.
160. MINOW, supra note 123, at 85.
161. Machel Report, supra note 1, ¶ 55.
criminal responsibility at eighteen for child soldiers engaged in human rights abuses and promoting their rehabilitation. Institutionalism's and Liberalism's positive assumptions about who the principal players in the international system are and what motivates them can influence strategies for achieving normative goals such as mutual policy adjustment, or cooperation. In Anne-Marie Slaughter's words, "excavating and challenging assumptions about the nature and form of the international system emerges as an essential component of legal analysis, an effort to understand the realm of the possible and expand the realm of the probable."  

i. The IR Paradigms: Liberalism and Institutionalism

The three core assumptions of Liberalism in the international relations context are: (1) the primary actors in international politics are individuals and private groups; (2) states represent a subset of domestic society, and state officials define and promote international policy based on this subset's beliefs; and (3) the preferences of other states shape state behavior. Through this international relations lens, domestic constituencies, non-governmental organizations ("NGOs"), intergovernmental organizations ("IGOs"), and states seek to shape or have their own beliefs reflected through a particular government's policy choices. Whether and how governments perceive a particular group's demands determines if they become part of the state's agenda. Actors attempt to mobilize public opinion around a specific norm with the goal of its adoption by official decision-makers and often with the hope it will filter up to international institutions. Consequently, according to the Liberal paradigm, the best way to achieve common ends is by "changing individual and group preferences or by ensuring that they are accurately represented," ultimately resulting in aligned state interests.  

Institutionalism's "top-down" perspective, on the other hand, posits that: (1) states are the primary actors in the international system;
states engage in the pursuit of power in an anarchic world; (3) institutions can allow states to cooperate in the long-term by modifying anarchy to achieve common goals when common interests are present; and (4) institutions can have an independent impact on state behavior. Institutions, or “rules, norms, principles and decision-making procedures,” can “provide information, reduce transaction costs, make commitments more credible, establish focal points for coordination, and in general facilitate the operation of reciprocity.” Institutions not only provide a locus for establishing standards of behavior, but also increase the cost of non-compliance with norms.

Both Liberals and Institutionalists wrestle with how preferences arise in the first place. Like the “chicken or the egg” dilemma, they ask whether the international system shapes state preferences or vice versa. While Rationalists posit that cold calculation based on current realities determines policy choices, Constructivists believe that socialization or “ingrained psychological or cultural impulse” results in state preferences. Alternatively stated, Constructivists posit that “shared ideas, expectations, and beliefs about appropriate behavior are what give the world structure, order, and stability,” and these shared ideas or “social facts” can be altered. “Norm entrepreneurs” or “agents having strong notions about appropriate or desirable behavior in their community” can help foster the creation of convergent state interests and mobilize domestic constituencies to pressure their governments to alter their policies. A norm or “standard of appropriate behavior” can be modified through the actions of norm entrepreneurs.

172. Keohane & Martin, supra note 7, at 41-44; See also Hague Lecture I, supra note 6, at 36-37. But see John Mearsheimer, The False Promise of International Institutions, 19 J. INT’L SEC. 5 (1995) (arguing that institutions do not have an independent impact on international outcomes).

173. Hague Lecture I, supra note 6, at 35.

174. Keohane & Martin, supra note 7, at 42 (stating that institutions can have an “independent” impact when controlling for the effects of power and interests).

175. See Hague Lecture I, supra note 6, at 36-37.

176. See id. at 43.

177. Id. at 44.


179. Hague Lectures I, supra note 6, at 47.

180. Finnemore & Sikkink, supra note 178, at 896.

181. Id. at 891.

182. Id. at 896-97.
ii. The Paradigms Applied: Creating and Institutionalizing a New Norm

Strategies crafted from both Institutional and Liberal standpoints may be employed to encourage states to refrain from prosecuting child soldiers under age eighteen, and to focus, instead, on their rehabilitation and reintegration. From the Liberal perspective, child advocates can pressure key decision makers by mobilizing public opinion. For example, they may construct new “cognitive frames”\textsuperscript{183} through which to view these children, transforming the formerly appropriate possibility of prosecuting child soldiers into an inappropriate measure endangering the rehabilitation of child victims.\textsuperscript{184} Through publications, studies, documentaries, and other consciousness-raising activities, Liberals can attempt to alter domestic perceptions, substituting the image of deadly child soldiers committing atrocities with that of children robbed of their childhoods and severely scarred by their experiences. In addition, interested parties can lobby decision makers to change state policy by showing them it is in their state’s economic and social interest to do so: trials and detentions create long-term economic costs, particularly when children are involved; states in the wake of mass violence will likely violate the procedural and substantive guarantees mandated by international law in submitting children to judicial proceedings; and the social trauma to communities and children forced to relive soldiering experiences may be difficult to endure.

As they seek to change domestic preferences, Liberal norm entrepreneurs will likely be faced with “a highly contested normative space where they must compete with other norms and perceptions of interest,”\textsuperscript{185} including a legitimate desire for justice from the victims of child soldiers in the wake of mass violence. In Sierra Leone and Rwanda, domestic groups explicitly called for the prosecution of youth involved in mass violence; the Sierra Leone Report states,

The Government of Sierra Leone and representatives of Sierra Leone civil society clearly wish to see a process of judicial accountability for child combatants presumed responsible for the crimes falling within the jurisdiction of the Court. It was said that the people of Sierra Leone would not look kindly

\textsuperscript{183} \textit{Id.} at 897.

\textsuperscript{184} See Hague Lecture I, \textit{supra} note 6, at 43-45 (comparing “appropriate” and “instrumental” behavior).

\textsuperscript{185} Finnemore & Sikkink, \textit{supra} note 178, at 897.
upon a court which failed to bring to justice children who committed crimes of that nature and spared them the judicial process of accountability.\textsuperscript{186}

The same report points out that child-focused NGOs were "unanimous in their objection" to judicial accountability for these children for fear it would endanger rehabilitation efforts.\textsuperscript{187} Liberals concerned with protecting former child soldiers must use the arguments at their disposal to convince the domestic population, find a way to have their views better represented in the governing elite, and encourage other states to pressure their elites.

While Liberals think pressure from domestic constituencies and other states is an effective way to alter the disposition of child soldiers, Institutionalists will look to current institutional frameworks, converging state interests, and the development and implementation of new institutions in pursuing this change. First, Institutionalists can argue that current international law of the child and norms of juvenile justice require states to refrain from prosecuting former child soldiers under eighteen\textsuperscript{188} and if they fail to comply, states will suffer reputational costs. By prosecuting children, an Institutionalist child advocate might argue, a state is not acting in the "best interests" of the child, as the Convention on the Rights of the Child demands,\textsuperscript{189} and other states may seek to shame the rogue state into compliance. Alternatively, if current international law is not sufficiently explicit to convince states the costs of non-compliance are high, Institutionalists might raise other reasons for this important shift in policy toward former child soldiers, such as avoiding the economic costs of trials and detention or the possible failure to comply with juvenile justice norms.

When state interests converge around raising the age of criminal responsibility to eighteen and focusing efforts on the rehabilitation of former child soldiers, Institutionalism posits that states will seek to institutionalize their new understanding. States could make clear, either through the Optional Protocol to the CRC or otherwise, that children should be considered primarily victims of armed conflict and should not be prosecuted, or the Rome Statute could be changed to criminalize the use of child soldiers under the age of eighteen instead of fifteen, emphasizing child soldiers are victims until age eighteen.

\textsuperscript{186} Sierra Leone Report, supra note 88, ¶ 35.
\textsuperscript{187} Id.
\textsuperscript{188} See supra part II.C.
\textsuperscript{189} CRC, supra note 4.
Once an expected behavior or rule is codified in a binding way, such as by modifying a treaty, the reputational costs of non-compliance are higher than prior to the existence of the codified change.

Like Liberal norm entrepreneurs, Institutionalists will encounter obstacles in their attempts to show states why it is in their interest to institutionalize this new view of child soldiers. Despite some signs of an emerging consensus around the age of eighteen as the minimum age of criminal responsibility for violations of international humanitarian law, the current focal point of fifteen may present a hurdle, or at least institutional drag. International humanitarian law’s proscription of the use of children under age fifteen is a clear, recognized benchmark age around which states have expressed consensus in the past. Although the Rome Statute establishes the lower limit of criminal responsibility at age eighteen, the ICC’s success is still in question, and the Rome Statute only criminalizes the use of child soldiers under the age of fifteen. Even though the Optional Protocol to the CRC prohibits any use of children under age eighteen in direct hostilities, it still allows children age fifteen and over to volunteer to join a Party’s armed forces. Finally, in the Sierra Leone Report, the Secretary General used the age of fifteen as a minimum age of criminal accountability, suggesting the current institutional framework, at least as embodied in the U.N. Secretary General’s Report, considers prosecuting persons under age eighteen a legitimate, although unfortunate, measure.

Assuming state interests are malleable, norm entrepreneurs such as child-centered NGOs, friendly states, and institutions can work to alter this perception of child soldiers. Further, because norms focusing on vulnerable groups tend to be more widely accepted and adopted, norm entrepreneurs may enjoy a higher likelihood of success in shifting the understanding of child soldiers from perpetrators to victims. As long as Institutionalist “norm entrepreneurs” can convince a core group of states to alter their policies, it is likely a new norm will

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193. Finnemore & Sikkink, supra note 178, at 907 (proposing that norms involving “bodily integrity and prevention of bodily harm for vulnerable or ‘innocent’ groups, especially when a short causal chain exists between cause and effect” are more successfully translated into concrete policy changes than norms with other intrinsic characteristics).
emerge.\textsuperscript{194} Then, it may "cascade" to other states due to "pressure for conformity, desire to enhance international legitimization, and the desire of state leaders to enhance their self-esteem."\textsuperscript{195} Transnational advocacy networks\textsuperscript{196} like the Coalition to Stop the Use of Child Soldiers and individual NGOs like Human Rights Watch may serve as Rationalist "institutional enablers"\textsuperscript{197} by showing states that the long-term benefits of protecting and focusing their efforts on rehabilitating children outweigh their short term costs. They may also target institutions themselves to pressure states to comply with norms.\textsuperscript{198}

\section*{Conclusion}

Perhaps the best way to solve the dilemma of what to do with child soldiers who violate international humanitarian law, however, is by eliminating the use of children as soldiers altogether. Actors have taken both Liberal and Institutional steps to achieve this goal. In 2002, the U.N. Secretary General's former Special Representative on Children and Armed Conflict, Mr. Olara Otunnu, implicated both Institutionalist and Liberal paradigms when emphasizing the need both for better monitoring mechanisms that would "name and shame" states using child soldiers and for local networks of civil organizations actively promoting children's rights:\textsuperscript{199}

The international community has done very well in terms of developing and elaborating norms, standards and rules against the use of child soldiers . . . . But where we have not been effective is their application on the ground. Words on paper do not save a child in war.\textsuperscript{200}

Since that time, the Optional Protocol to the CRC has become much more widely ratified, and better monitoring mechanisms to embarrass

\begin{itemize}
\item \textsuperscript{194} \textit{Id}. at 895 (supporting the proposition that persuasion by norm entrepreneurs leads to the emergence of new norms once a critical mass of states is convinced).
\item \textsuperscript{195} \textit{Id}. (The norm "cascade" is followed by norm "internalization"; "norms acquire a taken-for-granted quality and are no longer a matter of broad public debate.").
\item \textsuperscript{196} Hague Lecture III, supra note 168, at 107-09.
\item \textsuperscript{197} \textit{Id}. at 104. "Enabling NGOs are typically pushing states down a path they have already chosen, at least in some degree. The constructivist task is to widen and deepen their preferences for environmental preservation, or arms control, or economic integration—but not create those preferences \textit{ab initio}."] \textit{Id}. at 105.
\item \textsuperscript{198} \textit{Id}. at 111.
\item \textsuperscript{199} Norimitsu Onishi, \textit{Children of War in Sierra Leone Try to Start Over}, N.Y. TIMES, May 9, 2002.
\item \textsuperscript{200} \textit{Id}.
\end{itemize}
countries into compliance are being implemented. For example, the
U.N. Secretary General established an action plan for the creation of a
monitoring and reporting mechanism on children in armed con­
clict, and a report about the Democratic Republic of Congo was
submitted to the U.N. Security Council Working Group last year.
Also, the ICC’s first prosecution is against Thomas Lubanga Dyilo, a
former leader of a militia group in the Democratic Republic of the
Congo, for enlisting and conscripting children under the age of
fifteen, a sign of the importance the world community is putting on
protecting its most vulnerable members. Nevertheless, much remains
to be accomplished, particularly in rehabilitating former child soldiers.
The current U.N. Secretary General’s Special Representative on
Children and Armed Conflict, Radhika Coomaraswamy, has called for
increased focus on “long-term developmental responses that will result
in meaningful re-integration .. .” of former child soldiers.
Prosecuting those who conscript and enlist children is an important and
essential preventive measure, but it affords no remedy for children
already subject to the horrors of armed conflict.
In its preamble, the CRC aspires to a world where children grow in “a
family environment, an atmosphere of happiness, love and understand­
ing.” Two million children were killed in armed conflict from 1986
to 1996 and three times as many were seriously injured or permanently
disabled. Instead of growing up in the ideal set out by the drafters of
the CRC, the Machel Report describes our world as “[a] space devoid of
the most basic human values; a space in which children are slaugh­
tered, raped, and maimed; a space in which children are exploited as
soldiers; a space in which children are starved and exposed to extreme
brutality.”
The trauma these children suffer and their psychological develop­

202. Security Council Open Debate on Children and Armed Conflict, Statement of Radhika
Coomaraswamy, Under-Secretary-General, Special Representative of the Secretary-General for
Children and Armed Conflict, at 2, U.N. SCOR, 61st Sess., 5494th mtg. at 4, S/PV.5494 (July 24,
2006) [hereinafter SC Record].
203. Press Release, International Criminal Court, Child Soldier Charges in the First Interna­
204. See, SC Record, supra note 202, at 5.
205. CRC, supra note 4, at pmbl.
207. Id. ¶ 3.
ment at the time of their crimes mandates that we treat them as victims, not perpetrators of armed conflict, and that we seek to rehabilitate them. Although international law arguably requires the prosecution of severe violations of human rights, it also establishes that the best interests of children are paramount and reflects an emerging trend toward forbidding the use of children under eighteen in direct hostilities. By mobilizing domestic constituencies and states, international child advocates can institutionalize this trend and implement better monitoring and enforcement mechanisms to keep children off battlefields. Advocates can use both Institutionalist and Liberal understandings of the international system to encourage states to refrain from prosecuting former child soldiers and focus on their rehabilitation—to work toward making this a world "fit for children.”

As demonstrated by the statement drafted, debated, and agreed to by child delegates from one hundred countries during the May 8-10, 2002 Children's Forum of the United Nations Special Session on Children, perhaps the children of the world will themselves call us to task:

We pledge an equal partnership in this fight for children’s rights. And while we promise to support the actions you take on behalf of children, we also ask for your commitment and support in the actions we are taking—because the children of the world are misunderstood.

We are not the sources of problems; we are the resources that are needed to solve them.

We are not expenses; we are investments.

We are not just young people; we are people and citizens of this world.

Until others accept their responsibility to us, we will fight for our rights.

We have the will, the knowledge, the sensitivity and the dedication.

We promise that as adults we will defend children’s rights with the same passion that we have now as children.

We promise to treat each other with dignity and respect. We promise to be open and sensitive to our differences.

We are the children of the world, and despite our different backgrounds, we share a common reality. We are united by our struggle to make the world a better place for all. You call us the future, but we are also the present.\textsuperscript{209}

\textsuperscript{209} Id.