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## RECRUITING AND USING CHILDREN AS SOLDIERS: THE CASE FOR DEFINING THE OFFENCE AS A CRIME AGAINST HUMANITY

SHAWN TOCK<sup>†</sup>

### ABSTRACT

*The increasing number of domestic conflicts around the world has put civilian populations in general, and children specifically, in harm's way. Due to their vulnerability and the lack of social support that is likely to result as a consequence of combat, children are often recruited and put to use as soldiers and participants in these wars. The international community has only recently begun to address this egregious practice, and much remains to be done to halt the recruitment and use of child soldiers.*

*This paper surveys the current humanitarian and human rights laws applicable to this issue, and examines the likely effect the new International Criminal Court will have on the prosecution of those who forcibly conscript children. The definitions of War Crimes and Crimes Against Humanity will be considered, and it will be recommended that the latter concept extended to include the offence of using and recruiting children as soldiers. Such an extension will facilitate the prosecution and punishment of offenders, while increasing the likelihood that proceedings are brought in domestic courts.*

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## I. INTRODUCTION

It has recently been estimated that at any given time, there are more than 300,000 children across the globe, some as young as seven years old, actively participating in hostile combat.<sup>1</sup> This pervasive and socially destructive phenomenon has proven exceedingly difficult to address from the legal perspective.

International Law has always been faced with the paradox of instilling the rule of law while respecting the sovereignty of states. This challenge has been particularly prevalent in the areas of International Humanitarian and International Human Rights Law. The increasing number of internal conflicts occurring around the world poses a significant problem for International Law, which is not applicable to the internal matters of a state. However, civil wars have become increasingly common over the past forty years, a trend that has seen the majority of the world's armed conflicts become internal as opposed to international.<sup>2</sup> The unwillingness of states, the United Nations, and other international organizations to infringe state sovereignty has limited their ability to respond to atrocities that have arisen during and after these conflicts.<sup>3</sup>

This unwillingness is apparent when looking at the issue of child soldiers. The UN Security Council did not address this issue until 1998.<sup>4</sup> Since that time, a great deal of international legislation has been developed regarding the matter, and though recent efforts have resulted in a series of international conventions and conferences, the widespread exploitation of this uniquely vulnerable group remains an area of law in urgent need of improvement.

While the International Criminal Court (ICC) has jurisdiction over parties accused of crimes such as genocide, War Crimes, and Crimes

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<sup>1</sup> Jisha S. Vachachira "Report 2002: Implementation of the Optional Protocol to the CRC on the Involvement of Children in Armed Conflict" (2002) 18 N.Y.L. Sch. J. Hum Rts. 543 [Vachachira, "Report"]. Under the 1989 Convention on the Rights of the Child [UN Doc. A/44/25 (1989)], a child is defined as someone under the age of eighteen. This becomes important when looking at the age of recruitment stated in human rights law. This is covered in Part III of the paper.

<sup>2</sup> "Global menace of Local Strife" *The Economist* (22 May 2003) online: Economist.com <[http://www.economist.com/PrinterFriendly.cfm?Story\\_ID=1795830](http://www.economist.com/PrinterFriendly.cfm?Story_ID=1795830)> [Global Menace].

<sup>3</sup> Article 2(7) of the United Nations Charter, dealing with non-intervention in internal matters, and article 2(1), dealing with sovereign equality of states. *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No. 7 [Charter].

Against Humanity, a key concern that remains to be addressed is how to apply international regulations to internal conflicts without violating state sovereignty so that those responsible for crimes relating to child soldiers may be brought to justice.

This paper is divided into four parts. The first will explore the vulnerability and plight of children who are involved in conflicts in Africa, Asia, Europe and Latin America. The second will discuss current conventions, treaties, and other forms of international law that have been created to address the recruitment and use of child soldiers. The third part will survey the Rome Statute of the ICC and argue that it is not the proper forum for dealing effectively with the matter of child soldiers. Finally, it will be argued that the use of child soldiers constitutes a Crime Against Humanity and that national courts should be granted primacy in adjudicating these matters.

## **II. THE RECRUITMENT AND USE OF CHILDREN IN SITUATIONS OF CONFLICT**

### **1. The Changing Nature of Warfare**

In the last decade, two million children have been killed in armed conflicts, while a further four to five million have been disabled, and twelve million left homeless.<sup>5</sup> In West Africa alone, more than one and half million children have been internally displaced as a result of armed conflict, gross violations of human rights, and other traumatic events.<sup>6</sup> These alarming numbers can be traced in part to the evolving nature of warfare. A century ago, most conflicts were between nations, and ninety

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<sup>4</sup> "Kalashnikov Kids" *The Economist* (8 July 1999) online: Economist.com <[http://www.economist.com/PrinterFriendly.cfm?Sotry\\_ID=220134](http://www.economist.com/PrinterFriendly.cfm?Sotry_ID=220134)> [Kalashnikov].

<sup>5</sup> Rebecca Rios-Kohn, "The Impact of the UN Convention on the Rights of the Child on UNICEF's mission" (1996) 6 *Transnat'l L. & Contemp. Probs.* 287 at 292.

<sup>6</sup> Internally displaced people are those who have been uprooted from their homes, but unlike refugees have not crossed an international border and remain within their country of origin. See: Erin Mooney, on behalf of The Office of the United Nations High Commissioner for Human Rights and the Representative of the Secretary-General on Internally Displaced Persons, "Standards for the Protection of Internally Displaced Children: The Guiding Principles on Internal Displacement" (Presented to the Conference on War-Affected Children in West Africa, 28 April 2000) [unpublished].

percent of casualties were soldiers. Today, the balance has reversed: Almost all wars are civil, and ninety percent of the victims are civilians.<sup>7</sup> Graça Machel, an expert on children in armed conflict appointed by the Secretary-General of the United Nations, has cited the legacy of colonialism as a primary factor for this reversal. She also points to economic, social and political crises, which have contributed to the dissolution of public order inside national boundaries. She states that:

[Countries] caught up in conflict today are also under severe stress from a global world economy that pushes them ever further towards the margins. Rigorous programmes of structural adjustment promise long-term market-based economic growth, but demands for immediate cuts in budget deficits and public expenditure only weaken already fragile States, leaving them dependent on forces and relations over which they have little control. While many developing countries have made considerable economic progress in recent decades, the benefits have often been spread unevenly, leaving millions of people struggling for survival.<sup>8</sup>

An unfortunate corollary to the intrastate trend in modern warfare is the dramatic increase in the level of civilian involvement in such conflict. This is a trend especially destructive to children in developing countries, where they often constitute half or more of a country's population.<sup>9</sup> As hostilities from protracted civil wars spill over the borders of well-defined battlegrounds, and as soldiers exert increasing control over civilian territory, civilian infrastructure can rapidly deteriorate, and the line between civilians and combatants becomes blurred. As these situations continue over time, the risk of civilian inhabitants being drawn into the conflict increases.<sup>10</sup>

While children make up a large portion of a country's citizens, what constitutes a "child" defies easy definition. The 1989 Convention on the Rights of the Child offers one useful and widely accepted standard, de-

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<sup>7</sup> "Global Menace", *supra* note 2.

<sup>8</sup> Note by the Expert of the Secretary General, Ms. Graça Machel, *Promotion and Protection of the Rights of Children Impact of Armed Conflict on Children*, 51<sup>st</sup> Sess., Agenda Item 108, UN Doc. A/51/306 (1996) at para. 22 [Machel].

<sup>9</sup> Mike Wessels, "Child Soldiers", *Bulletin of the Atomic Scientists* (Nov. 21, 1997), online: *Bulletin of the Atomic Scientists* <<http://www.thebulletin.org/issues/1997/nd97/nd96wessells.html>> [Wessels].

<sup>10</sup> Amy Beth Abbott, "Child Soldiers- The Use of Children as Instruments of War" (2000) 23 *Suffolk Transnat'l L. Rev.* 499 at 509 [Abbott].

fining a “child” as a human being who has yet to attain either the age of eighteen, or the age of majority specified by the domestic law applicable to children.<sup>11</sup> This characterization fails to take into account cultural distinctions that exist amongst children around the world, and since it allows for differing standards to be reflected in the age of majority, it does not represent a definitive age for who is and who is not a child. The two additional protocols to the Fourth Geneva Convention offer an explicit definition of a “child soldier,” condemning the use of any child under the age of fifteen as a soldier. However, the limited applications and legitimacy of these Protocols renders this lesser age a limited legitimacy. In general, the age of eighteen is at least a useful starting point for defining who is a child and will be used for the purposes of this paper, unless specified otherwise.

## 2. The Recruitment of Children to Serve as Soldiers

The assertion of control by militant groups or state armies over a state’s cities and towns affords them easy access to children for use in their ranks, through either recruitment or forcible conscription. In Colombia, guerilla groups involved the country’s forty-year civil war have carried out recruitment campaigns in elementary schools and children’s homes.<sup>12</sup> In the Democratic Republic of the Congo, thousands of children were abducted to serve in the state’s six-year civil war, often from schools, roadsides and markets.<sup>13</sup> Refugee camps are also frequently infiltrated by armed forces, including rebel and paramilitary groups, as they often contain large numbers of children.<sup>14</sup>

Poverty is a major driving force behind the use of children in warfare. In Cambodia, children joined armed groups in the 1980s as a

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<sup>11</sup> UN Doc. A/44/25 (1989) [Convention].

<sup>12</sup> Human Rights Watch, “War Without Quarter” (October, 1998), online: Human Rights Watch <[http://www.hrw.org/reports98/colombia/Colom989-06.htm#P1873\\_455945](http://www.hrw.org/reports98/colombia/Colom989-06.htm#P1873_455945)> [War Without Quarter].

<sup>13</sup> Jo Becker, Testimony to the Hearing on U.S. Ratification of the Optional Protocols to the Convention on the Rights of the Child Before the Senate Foreign Relations Committee, 107th Cong. 2002, online: Human Rights Watch < <http://www.hrw.org/press/2002/03/childsoldiers0307.htm>> [Becker].

<sup>14</sup> Abbott, *supra* note 10 at 514.

means to secure food and protection.<sup>15</sup> The destruction of infrastructure in many war-ravaged nations removes social institutions which might have otherwise presented alternatives to would-be child soldiers. The displacement and destruction of a familial ties and other social networks also renders many children susceptible to the ideologies and strategies that are used to lure them into service.

Many of the internal conflicts in which children participate are multi-year conflicts, which created cultures of violence in their host nations.<sup>16</sup> The longer such conflicts persist, the more likely it is that children will be recruited to fight, as increasing casualties, a lack of volunteers and conscripts, and other shortages of manpower make the increased use of child soldiers an attractive method of regaining strength. Growing up in a system that mixes violence, poverty, hunger and political instability leaves an indelible impression on children whom, because of their age, already lack the freedom of choice and capacity to determine their best interests.<sup>17</sup>

### 3. Causes and Effects of Child Recruitment

Militias, armed groups, and governmental armed forces target children for conscription for several reasons. A child's lack of knowledge and vulnerable nature make them easier to control and condition than an adult.<sup>18</sup> A child does not demand payment and is more amenable to following orders.<sup>19</sup> Combined with the simple, lightweight design and widespread proliferation of modern-day handheld weaponry, it is often not only feasible but worthwhile for military leaders to arm children.<sup>20</sup>

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<sup>15</sup> Stephanie H. Bald, "Searching for a Lost Childhood: Will the Special Court of Sierra Leone Find Justice for its Children?" (March-April 2003) 18 Am. U. Int'l L. Rev. 537 at 543, note 30 [Bald].

<sup>16</sup> Civil wars are getting longer, as an average conflict now lasts eight years, which is twice the norm before 1980. Some conflicts have dragged on for decades, and in countries such as Sierra Leone, Afghanistan, and Sri Lanka, many of the rebel leaders and officers had first taken part in war as children themselves. See Kalashnikov, *supra* note 5. By 1995, wars in Angola, Afghanistan, Sri Lanka, and Sudan had all lasted longer than 10 years, and saw thousands of children recruited and used as soldiers. See Abbott, *supra* note 10.

<sup>17</sup> Abbott, *supra* note 10.

<sup>18</sup> "Children at War", *Newsweek Web Exclusive* (May 4, 2002), online: Newsweek <<http://www.msnbc.com/news/747688.asp>>.

<sup>19</sup> Abbott, *supra* note 10.

<sup>20</sup> Machel, "Report", *supra* note 8 at para. 27.

Children assume both direct and indirect roles in armed conflict. Though both girls and boys are expected to perform the same duties, girls in addition must often face gender-specific abuses such as sexual exploitation. In Uganda, girls kidnapped by the Lord's Resistance Army throughout its almost two decade long effort to overthrow the government were obliged to have sexual relations with combatants and were given to commanders as wives.<sup>21</sup>

Indirect duties that are often assumed by children in combat include cooking and acting as messengers or porters. While these duties do not always place children on the front lines, they still face significant danger as opposing forces see all enemy personnel as targets.<sup>22</sup> In addition, those that serve indirect support functions are likely to end up directly involved in combat at some later date. Children are also often deemed expendable by their adult commanders and are used as such for heinous purposes, including being used to clear minefields,<sup>23</sup> as decoys to draw enemy gunfire, and as suicide bombers.<sup>24</sup>

These recruits are often subjected to brutality and abusive initiation ceremonies with the purpose of hardening them to violence and subordinating them to authority.<sup>25</sup> They are often physically abused to keep them in a state of terror, which makes them more pliable and open to suggestion.<sup>26</sup> Between 1992 and 2002, rebel forces in Sierra Leone selected child soldiers from their ranks to commit murder, arson, rape, and amputations.<sup>27</sup> Abducted children in these ranks are often forced to attack their own villages and families, in an effort to ostracize the child from his or her community and cement loyalty to the rebel group.<sup>28</sup> In addition to this abuse, child soldiers are often forcibly given drugs before going into battle to reduce fear. In Sierra Leone, rebels cut children

<sup>21</sup> "Children at Both Ends of the Gun", online: UNICEF <<http://www.unicef.org/graca/kidsoldi.htm>>.

<sup>22</sup> In Latin America, reports tell of government forces that have deliberately killed even the youngest children in peasant communities on the grounds that they, too, were dangerous. See Machel, *supra* note 8.

<sup>23</sup> In Cambodia, 43% of mine victims consist of recruited child soldiers between the ages of 10 and 16. Machel, *supra* note 8 at para. 115.

<sup>24</sup> Becker, *supra* note 13.

<sup>25</sup> "Amnesty International Cites Child Atrocities, Seeks Minimum Age for Soldiers", online: CNN <<http://edition.cnn.com/WORLD/africa/9901/11/child.soldier.01/#1>>.

<sup>26</sup> Abbott, *supra* note 10.

<sup>27</sup> Abbott, *supra* note 10.

<sup>28</sup> Kalashnikov, *supra* note 4.

with machetes and fill the wounds with cocaine before sending the recruit into combat.<sup>29</sup> Such practices are rampant, and carried out “before entering battle so that [the children...] feel invincible and unafraid.”<sup>30</sup>

The physical and emotional wounds acquired by children involved in conflict last well into the child’s adult life. Thirty years of war in Angola, which purportedly ended with the 1994 cease-fire, have left generations of children reporting nightmares and flashbacks, displaying heightened aggressiveness, and suffering from hopelessness. Former child soldiers often carry heavy burdens of guilt and suffer considerable anxiety about their futures.<sup>31</sup>

Substance abuse and criminal activity are common amongst demobilized child soldiers, particularly where the frustrations of poverty and injustice remain after the fighting has stopped. Child soldiers may find it difficult to abandon the notion that violence is a legitimate means of achieving one’s aims and continue to perpetuate the cycle of violence after a war is officially over.<sup>32</sup> Such was the case in Angola, where gangs of bandits terrorized civilians in rural areas. Many of the bandits were boys who had served in the military during the war and lacked proper education and job skills.<sup>33</sup>

Children recruited to serve in rebel and guerrilla units often also learn much about criminal activity, posing a considerable criminal hazard to a post-conflict society.<sup>34</sup> Their lack of schooling and vocational training may result in their contributing “little to their country’s growth... [Instead] of producing goods and services, they will need them.”<sup>35</sup>

The widespread enlistment of children in armed conflict has many obvious negative ramifications, both for the children and for their communities. The intentional targeting of children is an egregious breach of

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<sup>29</sup> Matthew Price, “Sierra Leone: The Battle for Childhood”, BBC News, online: BBC News Online <<http://news.bbc.co.uk/2/hi/world/africa/1136430.stm>>.

<sup>30</sup> Bald, *supra* note 15 at 553.

<sup>31</sup> Wessels, *supra* note 9.

<sup>32</sup> Machel, *supra* note 8.

<sup>33</sup> Wessels, *supra* note 9.

<sup>34</sup> In Colombia, factions fight to control the drug trade, while in certain African states, much of the fighting is over mineral wealth. See Global Menace, *supra* note 2. It is widely accepted that Charles Taylor supported rebel groups in Sierra Leone and Guinea in order to gain control of diamond-rich areas. See Lansana Gberie, “West Africa: Rocks in a Hard Place”, online: Partnership Africa Canada <[http://action.web.ca/home/pac/attach/w\\_africa\\_e.pdf](http://action.web.ca/home/pac/attach/w_africa_e.pdf)>.

<sup>35</sup> Gare Smith, “Rights of the Child”, Item 21, U.S. Dep’t of State, online: U.S. Department of State <[http://www.state.gov/www/policy\\_remarks/970414.smith.html](http://www.state.gov/www/policy_remarks/970414.smith.html)>.

international law that requires abrupt and definitive action on the part of the international community to deter its continued practice. The next part of this paper will outline the measures that exist at International and the actions being taken to deal with this issue.

### III. INTERNATIONAL LAW AND THE RESPONSE OF THE UNITED NATIONS

There are two realms of International Law that deal with civilians involved in armed conflict and the use of children as soldiers; International Humanitarian law and International Human Rights law. The second part of this paper will provide an overview of the various applicable principles within each realm and outline how the UN has responded to these charges.

#### 1. International Humanitarian Law

International Humanitarian Law governs the conduct of states in times of war by delineating the means and methods of combat available to them and by limiting the parties that may be targeted for attack. The principles are set out in the four Geneva Conventions of 1949 and in two additional protocols of 1977, with the Fourth Geneva Convention specifically protecting civilians.

##### *i) The Geneva Conventions*

The Fourth Geneva Convention, which has been ratified by 186 states, deals with the protection of civilians during times of war and in situations of military occupation. Children who are not directly involved in hostilities are protected by a number of articles that specifically address their needs.<sup>36</sup> Common Article 3 of the Geneva Convention, which ap-

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<sup>36</sup> Some of the protections include, but are not limited to:

- Article 14 creates “safe spaces” for children during conflicts;
- Article 17 mandates the removal of children from besieged areas;
- Article 50 ensures that institutions for children are maintained and that measures are taken for the proper identification of children;

*Geneva Convention Relative to the Protection of Civilian Persons In Time of War*, 12 August 1949, 50 UNT.S. 287 [Geneva Convention IV].

plies equally to internal, national and international conflicts, also affords a measure of protection by mandating the humane treatment of civilians.<sup>37</sup>

*ii) Additional Protocols to the Geneva Conventions of 1949*

The first additional protocol (Protocol I) contains several requirements that further the protection of civilians supplied by the Fourth Convention. Protocol I calls for a distinction to be made between civilians and combatants, prohibits attacks against civilians, and provides additional protection for children in international conflicts.<sup>38</sup> Article 77 of the Protocol I specifically addresses the recruitment and use of children as combatants.<sup>39</sup>

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 endeavor 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.

Protocol I has only been ratified by 144 states. Many influential nations, including the United States, the United Kingdom and France, have not signed the Protocol thereby limiting its applicability and usefulness.<sup>40</sup>

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<sup>37</sup> 1949 Geneva Conventions (1950) 75 UNT.S. 31, 85, 135 and 187. This article protects civilians from torture, humiliating treatment, unjust imprisonment, and being taken hostage. It also enumerates the rights to life, dignity and freedom.

<sup>38</sup> Under the Protocol I, children are entitled to be preferential recipients of relief efforts (Article 70). Protocol I also forbids the evacuation of children from their homes except for reasons relating to their health or safety (Article 78). *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, 1125 UNT.S. 17512 (1977) [Protocol I].

<sup>39</sup> Protocol I, *ibid.*

<sup>40</sup> See Machel, *supra* note 8 at para. 217.

The second additional protocol<sup>41</sup> (Protocol II) supplements Common Article 3 and deals with the protection of children that are directly and indirectly involved in internal conflict and applies to state parties as well as to armed opposition groups.<sup>42</sup> This is of vital significance given the internal character of the majority of modern conflicts, as discussed earlier in this paper.

Protocol II also furthers the protection of children, which was discretionary in Protocol I, by providing complete bans on both the recruitment and direct and indirect participation in hostilities by children under the age of fifteen (Article 4). This applies to the conscription of child recruits and also bars their voluntary enlistment.<sup>43</sup>

The security promised by Protocol II is significantly undermined as it only applies to a restricted category of internal conflicts, namely those between the armed forces of a high contracting party and dissident armed forces or other organized armed groups.<sup>44</sup> Few governments are likely to concede that any disturbance within their borders constitutes a conflict that would fall under the scope of the Protocol, which results in a large number of internal conflicts being excluded from the reach of reach of Protocol II.<sup>45</sup>

### *iii) Conclusion*

International Humanitarian Law has evolved since 1949 and now includes a complete prohibition on the use of children as soldiers. There are several limitations, however, as discussed above, that consistently place children beyond the reach of this international protection. Further safeguards are required to ensure that children are not forced to participate in, nor be subjected, to violent conflict. Protocol II recognizes this

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<sup>41</sup> *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts*, 1125 UNT.S. 609 (1977) [Protocol II].

<sup>42</sup> There are certain conflicts, such as those exclusively between insurgent groups, where only common article three will apply, even though Protocol II was meant to enhance it. See Chen Reis, "Trying the Future, Avenging the Past: The Implications of Prosecuting Children for Participating in Internal Armed Conflict", (1997) 28 *Colum. Hum. Rts. L. Rev.* 629, at 639 [Reis].

<sup>43</sup> Alison Dundes Renteln, "The Child Soldier: The Challenge of Enforcing International Standards", (1999) 21 *Whittier Law Review*, 191 [Renteln].

<sup>44</sup> See Machel, *supra* note 8 at para. 216.

<sup>45</sup> See Machel, *supra* note 8 at para. 216.

need and alludes to international instruments relating to human rights as offering only basic protection.<sup>46</sup>

## 2. International Human Rights Law

### *i) The Universal Declaration of Human Rights, the ICCPR, and the ICESCR*

Human Rights Law, which is largely constituted by a body of international treaties, establishes the rights that all individuals should enjoy during times of both peace and conflict.<sup>47</sup> Human rights laws can thus be valid and useful tools for the protection of children during wartime; however, as only states are parties to these treaties, opposition groups are not bound by them.

The United Nations adopted the Universal Declaration of Human Rights (the Declaration),<sup>48</sup> in 1948, setting the stage for the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR) in 1966. The Declaration, though technically not binding, has come to be regarded as customary International Law, namely, it has become the basis for a consistent and general practice among states that has accepted by the international community. Article 3 declares that everyone “has the right to life, liberty and the security of person.” Article 5 prohibits torture, and cruel and inhuman treatment and punishment. The second paragraph of Article 25 is the only specific reference to children in the Declaration and grants childhood special status by stating that “motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.”<sup>49</sup>

The ICCPR and the ICESCR elaborate on the rights enumerated in the Declaration, though they are significantly different as they are binding treaties and not customary law. While the substantive rights in the ICE-

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<sup>46</sup> Reis, *supra* note 42.

<sup>47</sup> Machel, *supra* note 8 at para. 219.

<sup>48</sup> *Universal Declaration of Human Rights*, GA Res. 217 (III), UN GAOR, 3<sup>rd</sup> Sess., Supp. No.13, UN Doc. A/810 (1948) [Universal Declaration].

<sup>49</sup> *Ibid.*

SCR deal mostly with issues of employment, social security, standards of living, health and education,<sup>50</sup> there are certain articles that relate to the welfare and status of children.<sup>51</sup> The ICCPR specifies a number of fundamental human rights, including the inherent right to life in Article 6(1), protection from torture and inhuman treatment in Article 7, and the prohibition of slavery in Article 8, which are directly applicable to the use of children as soldiers.<sup>52</sup> The ICCPR also states in Article 24, paragraph 1, that:

Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State [emphasis added].

There have been a great deal of ratifications to the ICCPR and the ICESCR, however, that limit their effectiveness. There have been 144 ratifications to the ICCPR and 141 to the ICESCR. Furthermore, there are only ninety-five signatories to the First Optional Protocol to the ICCPR, which grants a right to petition to individuals who believe that a member state that has ratified the Protocol has violated their rights in the ICCPR.<sup>53</sup> None of these treaties specifically deal with the issue of the recruitment and use of child soldiers; instead, the matter must be subsumed under one of the broader grounds. This basic weakness is but one more instance of how humanitarian law has failed to deal in a satisfactory manner with the issue of child soldiers.

*ii) The 1989 Convention on the Rights of the Child*<sup>54</sup>

Though it is one of the most recently developed human rights instruments, the 1989 Convention on the Rights of the Child (CRC)

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<sup>50</sup> Hugh M. Kindred *et al.*, *International Law Chiefly as Interpreted and Applied in Canada*, 6<sup>th</sup> ed., (Emond Montgomery Publications Limited, 2000) at 788 [Kindred].

<sup>51</sup> Article 10(3) mandates that states provide “special measures of protection and assistance [...] on behalf of all children and young persons...” *International Covenant on Economic, Social and Cultural Rights*, 19 December 1966, 993 UNT.S. 3.

<sup>52</sup> *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNT.S. 171.

<sup>53</sup> Kindred, *supra* note 50 at 773.

<sup>54</sup> Convention, *supra* note 11.

is the most widely ratified, with 191 nations as signatories.<sup>55</sup> The CRC recognizes a comprehensive list of rights that exist both during war and at peacetime, and specifically addresses the matter of child soldiers.<sup>56</sup> Article 38 of the CRC states:

- 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 15 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 15 years into their armed forces. In recruiting among those persons who have attained the age of 15 years but who have not attained the age of 18 years, States Parties shall endeavor to give priority to those who are oldest.
- 4) In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.

This article, especially paragraph 4, is significant, in that it incorporates aspects of both humanitarian law (i.e. the treaty-based laws applicable in times of conflict) and human rights law (laws that are embedded in the notion of human dignity and that are not necessarily legislated), showing how the two can interact in a supportive fashion when dealing with the rights of children.<sup>57</sup>

Though the CRC sets out in Article 38, paragraph 2, that children under fifteen should not take direct part in hostilities, this falls short of

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<sup>55</sup> Vachachira, *supra* note 1.

<sup>56</sup> The rights enumerated in the CRC include: protection of the family environment; essential care and assistance; access to health, food and education; the prohibition of torture, abuse or neglect; the prohibition of the death penalty; the protection of the child's cultural environment; the right to a name and nationality; and the need for protection in situations of deprivation of liberty. Additionally, states must ensure access to, and the provision of, humanitarian assistance and relief to children during armed conflict.

<sup>57</sup> Machel, *supra* note 8 at para. 228.

the protection offered by Protocol II to the Geneva Conventions, which states that children under fifteen should not participate directly or indirectly in hostilities. As was previously shown, even indirect participation in combat can often lead to serious consequences, and to more direct involvement at a later stage of the conflict.

While the CRC does not contain any direct enforcement mechanisms, it does create the Committee on the Rights of the Child, whose mandate is to monitor the implementation of the special care and protection provisions mandated by the CRC.<sup>58</sup> However, it is the duty of signatory states to enact legislation to implement the Convention, and the Committee is reliant on states to submit periodic reports indicating their progress. Without this cooperation, the CRC has no actual effect.

Despite being almost universally ratified, the United States is one of only two countries that have yet to ratify the CRC, Somalia being the other.<sup>59</sup> The U.S. absence undermines the CRC's efficacy as the U.S. is not entitled to appoint an expert to the Committee and is therefore unable to influence the interpretation of the treaty through the Committee's general comments, nor can they reasonably expect to use their political power to encourage adherence and respect of the CRC's provisions.

### *iii) The Optional Protocol to the CRC on the Involvement of Children in Armed Conflict*

Some of the limitations of the CRC were addressed in 2000 when the the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (CRC Protocol) adopted in 2000.<sup>60</sup> As of January 2002, ninety-three countries had signed the CRC Protocol and thirteen countries had ratified it.<sup>61</sup>

The negotiations that surrounded the drafting of the CRC Protocol focused mainly on the issue of the minimum age for entry into the military.<sup>62</sup> These negotiations resulted in the age of sixteen being set as the

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<sup>58</sup> See Abbott, *supra* note 10 at 524.

<sup>59</sup> See Vachachira, *supra* note 1 at 544.

<sup>60</sup> G.A. Res. 54-263, UN GAOR, 54<sup>th</sup> Sess., Agenda Item 116 (a), UN Doc. No A/RES/54/263 (2001) [CRC Protocol].

<sup>61</sup> See Vachachira, *supra* note 1 at 545.

<sup>62</sup> Michael J. Dennis, "Newly Adopted Protocols to the Convention on the Rights of the Child", (2000) 94 American Journal of International Law 789 [Dennis].

minimum age for voluntary recruitment (Article 3), further prohibiting the compulsory recruitment of anyone under the age of eighteen (Article 2).<sup>63</sup> Additionally, state parties must take all feasible measures to ensure that members of their armed forces who have not reached eighteen years of age do not take direct part in hostilities (Article 1).<sup>64</sup>

Article 4 of the CRC Protocol states that armed groups distinct from the national armed forces should not recruit, compel to serve, or otherwise use in hostilities any people under the age of eighteen.<sup>65</sup> The lack of a direct prohibition on this provision is something of a weakness, though the fact that it is directed at non-state parties is an encouraging sign that progress is being made in recognizing these forces as serious agents in the realm of child soldiers. Article 9(2) states that the CRC Protocol will operate as an independent multilateral agreement under International Law, thereby allowing states who have not ratified the CRC to be a party to this Protocol.

The CRC Protocol therefore addresses many of the shortcomings of the CRC, namely by increasing the minimum age of both recruitment and of open entry into hostilities. It also allows for the U.S. to become a party to the Protocol, while not forcing it to ratify the CRC itself, which the U.S. has chosen to do. Most importantly, the CRC Protocol applies to non-governmental parties, thereby imposing standards on them. Under the CRC Protocol, militias and other paramilitary organizations can no longer operate with impunity and without fear of international law.

### 3. United Nations Resolutions

Under Article 25 of the United Nations Charter, decisions of the Security Council are binding on all UN members.<sup>66</sup> As such, it is important to conduct a comprehensive overview of the resolutions passed by the Security Council relating to child soldiers.

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<sup>63</sup>“Canada and the International Criminal Court” online: Department of Foreign Affairs and International Trade <[http://www.dfait.maeci.gc.ca/foreign\\_policy/ICC/ICC\\_youth-en.asp](http://www.dfait.maeci.gc.ca/foreign_policy/ICC/ICC_youth-en.asp)>.

<sup>64</sup> *Ibid.*

<sup>65</sup> “Legal Protection of Children in Armed Conflict”, online: International Committee of the Red Cross <[http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/57JQUS/\\$FILE/ANG03\\_03\\_juridique\\_NEWlogo.pdf?OpenElement](http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/57JQUS/$FILE/ANG03_03_juridique_NEWlogo.pdf?OpenElement)>.

<sup>66</sup> “The Members if the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present charter.” Charter, *supra* note 3.

*i) Resolution 1314 (2000)*

Resolution 1314 addresses the issue of children and armed conflict and recalls the relevant provisions on the protection of children contained in the Rome Statute of the ICC. It urges member states to sign and ratify the CRC Protocol, and called on regional and sub-regional organizations to establish child protection units with child protection staff for their field operations, in order to address the needs of children involved in armed conflicts.

The Resolution called on all states, including those who are not UN members, to prosecute those responsible for War Crimes and Crimes Against Humanity. It urges all parties that are involved in armed conflict, including both state and non-state actors, to respect international law applicable to the rights and protection of children, specifically the Geneva Conventions of 1949 and its additional protocols, the CRC and the CRC Protocol, and the Rome Statute.

*ii) Resolution 1379 (2001)*

This resolution expresses the Security Council's intention to include provisions for the protection of children and to include child protection advisers when considering the mandates of peacekeeping operations.<sup>67</sup> It also repeats many of the intentions and mandates of Resolution 1314. The resolution also requests that the Secretary-General submit a list of the participants in armed conflict which recruit or use child soldiers in violation of international obligations applicable to them. This request applies to non-state parties as well, indicating that the Security Council may take action against non-state parties.

*iii) Resolution 1460 (2003)*

While this resolution continues in the same vein as the preceding two, it is crucial to note that the Security Council expressed its intention to consider taking appropriate measures within their Charter-given pow-

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<sup>67</sup> "Two current peacekeeping missions, the United Nations Mission in Sierra Leone (UNAMSIL) and the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC), have specifications in their mandates regarding child protection and the deployment of child protection advisers." See Vachachira, *supra* note 1 at 545.

ers, further addressing the issue of child soldiers and the efforts made to halt their recruitment and use if it deems that the parties are not making sufficient progress. Though the Security Council did not outline what “appropriate measures” might constitute, they did not limit the application of the measures to states or states party to international conventions. Instead, the measures would be put into operation against all parties involved in armed conflicts that recruit and use child soldiers.

A problem inherent in these conventions, protocols, and resolutions, however, is that it is often difficult for states to reach a consensus as to their meaning and content, or to implement national legislation once agreement has been reached. Non-state parties often fail to abide by such formal norms altogether. As such, non-governmental organizations (NGOs) intervene at this stage and play a key role in lobbying for the recognition and enforcement of these rules. Though a thorough survey of this critical function is beyond the scope of this paper, it would be remiss not to mention the invaluable work done by these organizations.

Among other accomplishments, NGOs were also crucial in lobbying for the establishment of the ICC. However, while the new Court is an important step forward in the prosecution of war criminals, it is not necessarily the ideal forum for adjudicating groups and individuals accused of recruiting and using child soldiers. The next section of the paper will explore this issue, examining the Rome Statute, which empowers the ICC, the crimes that will be adjudicated there, and limits the jurisdiction of the court.

#### **IV. THE INTERNATIONAL CRIMINAL COURT: THE WRONG FORUM**

For almost half a century, attempts by the UN to draft a treaty that would establish an international method for prosecuting war criminals have failed.<sup>68</sup> Though atrocities in Cambodia, Ethiopia, and Iraq in recent decades did not move the international community to resurrect these efforts, the commission of such crimes in the former Yugoslavia spurred

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<sup>68</sup> In 1957, the General Assembly indefinitely deferred an initiative to establish an international criminal court. See Richard J. Goldstone, “The Role of the United Nations in the Prosecution of International War Criminals” (2001) 5 *Journal of Law & Policy* 119, at 119 [Goldstone].

nations to create a permanent body (the ICC) capable of adjudicating such crimes.<sup>69</sup>

The establishment and experience of *ad hoc* tribunals in Rwanda in 1994 and the former Yugoslavia in 1993 further convinced many that these methods were not an acceptable means of bringing war criminals to justice.<sup>70</sup> Unfortunately, the mass genocide and gross violations of Humanitarian Law clearly indicate that there is widespread repudiation of the most basic principles of human rights,<sup>71</sup> and since the statutes governing the *ad hoc* tribunals permit them only to have a limited retrospective effect, they are seriously restricted in the role they can perform. The ICC, as a permanent body and not an *ex post facto* tribunal, can have a deterrent effect, as well as satisfying the need for international justice. However, it will be shown that the ICC may not always be the proper forum for prosecuting those who illegally make use of children as soldiers in times of war.

## 1. The Rome Statute

Article 1 of The Rome Statute<sup>72</sup> indicates that the ICC is to have complementary jurisdiction over persons accused of the “most serious crimes of international concern.”<sup>73</sup> These offences are listed in Article 5 as the crime of genocide, Crimes Against Humanity, War Crimes, and the crime of aggression (which has yet to be defined). Under the Rome Statute, enslavement of children is a Crime Against Humanity, while the conscription and use of child soldiers in national and international armed conflicts is a War Crime.

The Statute defines a Crime Against Humanity in Article 7:

For the purpose of this Statute, “crime against humanity” means any of the following acts when *committed as part of a widespread*

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<sup>69</sup> *Ibid.*

<sup>70</sup> See Goldstone, *supra* note 77, at 120-123, for a discussion on the inefficiencies and drawbacks of such tribunals, including cost, the length of time it takes to begin working on a matter, and politically inspired delays.

<sup>71</sup> Mary Robinson, “Genocide, War Crimes, Crimes Against Humanity” (1999) 23 *Fordham International Law Journal* 275 [Robinson].

<sup>72</sup> UN Doc. A/CONF. 183/9 (1998).

<sup>73</sup> *Ibid.* at Article 1. As such, the ICC will only take jurisdiction where states are unwilling or unable to do so.

*or systematic attack directed against any civilian population, with knowledge of the attack; [emphases added; the acts mentioned in the preceding article are list in Part IV of this paper].*<sup>74</sup>

The definition of a War Crime is set out in Article 8 of the statute:

1. The Court shall have jurisdiction in respect of War Crimes in particular when *committed as part of a plan or policy or as part of a large-scale commission of such crimes.*

2. For the purpose of this Statute, “war crimes” means: (b) Other serious violations of the laws and customs applicable *in international armed conflict*, within the established framework of international law

(e) Other serious violations of the laws and customs applicable *in armed conflicts not of an international character*, within the established framework of international law<sup>75</sup>

Article 21 of the Statute articulates the sources of law that the ICC is to apply, starting with the provisions of the Statute itself and including the applicable treaties, principles, and rules of international law. Therefore, the ICC has jurisdiction to apply the laws set out in Part III of this paper. However, the classification of using and recruiting children as soldiers as a War Crime, and not as a Crime Against Humanity, renders the ICC *forum non conveniens* for adjudicating such matters. In addition to the limitations of the ICC set out below, this categorization restricts the potential for prosecuting and convicting offenders. The reasons for this circumscription will be explained in Part IV.

## **2. Limitations on the ICC**

There are a number of limitations that the ICC must contend with when deciding to pursue a case against an individual. One major drawback is that the ICC only has jurisdiction to prosecute offenders if the parties involved accept the Court’s jurisdiction. In addition, either the state where the crime occurred, or the state of which the accused is a national, must be a signatory to the Rome Statute in order for prosecution to proceed.

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<sup>74</sup> *Ibid.* at Article 7.

<sup>75</sup> *Ibid.* at Article 8.

Though the Security Council can refer a matter to the Prosecutor [Article 13(b)], the inability of the Council to render a decision in a timely fashion has the potential to undermine this provision. Such a reference would also import politicization into the office of the Prosecutor, damaging the administration of “blind justice” by allowing a Security Council rife with ulterior considerations and agendas to dictate the focus of the office.

Another manner in which the Security Council can interfere with a prosecution is outlined in Article 16. The Council can make the Prosecutor defer an investigation or prosecution for a period of twelve months, thereby allowing the Council to intervene in the course of justice when it sees fit to do so.

Article 17 outlines the requirements for admissibility of a matter before the ICC. If a state is genuinely pursuing a case, or if a state with jurisdiction has already investigated the matter and decided not to prosecute, the ICC cannot bring a charge. This limit stems from the complementary jurisdiction of the ICC, set out in Article 1. The second paragraph of Article 17 states that if there is an unjustified delay in the proceedings of the state, or if a “sham trial” had occurred, this will not serve as a bar to admissibility before the ICC. However, the decision to make such an intrusion into a state’s sovereignty will not be made lightly and will likely require a great deal of deliberation and time before occurring. This inability to prosecute can be exacerbated by the appointment of former rebels into the ranks of post-conflict governments, as often occurs as a result of peace accords and cease-fires. Though immunity for crimes listed in the Rome Statute does not exist before the ICC, sympathetic national governments may hinder prosecution of their ministers and members, thus hampering the pursuit of justice.

Though the ICC is unquestionably a crucial step forward in the enforcement of human rights, the role of national courts cannot be denied or forgotten in the rush to prosecute offenders of international law.<sup>76</sup> For example, the International Criminal Tribunal for Rwanda (ICTR), which was established by UN Resolution 955 of November 8<sup>th</sup>, 1994 to prosecute people responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda

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<sup>76</sup> Theodor Meron, “International Criminalization of Internal Atrocities” (1995) 89 Am. J. Int. 554 at 555 [Meron].

(and by Rwandan nationals in neighbouring states) throughout the 1994 calendar year, had indicted forty-eight individuals between 1994 and 1999, but had only tried and sentenced four of these people. In contrast, Rwandan national courts had issued more than 20,000 indictments, held 1989 trials, and accepted 17,847 guilty pleas over the same period of time.<sup>77</sup> While the ICC would not suffer from the same inadequacies and shortcomings that plagued the ICTR in its early days<sup>78</sup> it would be imprudent to dismiss the success and efficiency national courts can achieve, not to mention the cathartic effect national prosecution of war criminals can have on a newly peaceful state.

Thus, while the ICC has been given jurisdiction over the matter of child soldiers in Article 8 of the Rome Statute, it is not the ideal forum for prosecuting offenders. Its inherent limitations, both in terms of procedure and in how it substantively defines the offence of using and recruiting children as soldiers as a War Crime, render it *forum non conveniens* for such purposes. National courts should be used as an alternative to the ICC when indicting and trying offenders. The next part of this paper will look at how charging the crime of recruiting and using child soldiers as a Crime Against Humanity rather than a War Crime will facilitate prosecutions in national courts.

## V: CHILD SOLDIERS AS A CRIME AGAINST HUMANITY

The Rome Statute and the ICC are both *sui generis* developments in the area of International Criminal Law. A unique aspect of the Rome Statute is that it constitutes the first document to codify the customary law surrounding Crimes Against Humanity.<sup>79</sup> Though contemplated since the conclusion of the First World War, the concept of Crimes Against Humanity had mainly existed at customary law only, while the law relating to War Crimes was heavily codified. As such, it is useful to look

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<sup>77</sup> David Wippman, "Atrocities, Deterrence, and the Limits of International Justice" (1999) 23 *Fordham International Law Journal* 473 at 482 [Wippman].

<sup>78</sup> For an elaborate account of the difficult issues faced by both the ICTR and the International Criminal Tribunal for the former Yugoslavia, see Goldstone, *supra* note 68. Similarly, the hardships faced by the Special Court of Sierra Leone are elaborated upon in Bald, *supra* note 15.

<sup>79</sup> William J. Fenrick, "Should Crimes Against Humanity Replace War Crimes?" (1999) 37 *Columbia Journal of Transnational Law* 767 at 777 [Fenrick].

at the accepted provisions of customary law regarding Crimes Against Humanity.

### **1. Crimes Against Humanity Through the Eyes of Customary Law**

Customary law requires that five conditions be met for an act to constitute a Crime Against Humanity:<sup>80</sup>

- i) the act is one of a list of prohibited acts;
- ii) committed as part of a widespread or systematic attack;
- iii) pursuant to or in furtherance of a state or organizational policy;
- iv) directed against any civilian population;
- v) with knowledge of the attack.

Examining each condition individually, there is a strong argument that the recruitment and use of children as soldiers meets all five conditions and qualifies as a Crime Against Humanity at customary International Law.

#### *i) The Act Is One Of A List Of Prohibited Acts*

The Statutes of the International Criminal Tribunal for the former Yugoslavia<sup>81</sup> (ICTY) and the International Criminal Tribunal for Rwanda<sup>82</sup> (ICTR) both enumerate the same prohibited acts in their respective definitions of Crimes Against Humanity, while the Rome Statute includes some additional acts, listed here in italics. The specified acts that relate to the use and recruitment of children as soldiers are produced below:

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<sup>80</sup> *Ibid.* at 778.

<sup>81</sup> The language of the ICTY Statute is found at 32 I.L.M. 1192 (1993), and was adopted unanimously by the Security Council in 1993, S.C. Res. 827, UN SCOR, 48th Sess., 3217th mtg., UN Doc. S/RES/827 (1993), *reprinted in* 32 I.L.M. 1203 (1993) [ICTY].

<sup>82</sup> S.C. Res. 955, UN SCOR, 49th Sess., 3453rd mtg., art. 1, UN Doc. S/RES/955 (1994), *reprinted in* 33 I.L.M. 1598 (1994) [ICTR].

- a) Murder;
- c) Enslavement;
- d) Deportation (*and forcible transfer of population*);
- e) Imprisonment (*or other severe deprivation of physical liberty in violation of fundamental rules of international law*);
- f) Torture;
- g) Rape (*sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity*);
- i) Other inhumane acts.
- k) *Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.* [emphases added]<sup>83</sup>

As these proscribed acts are common both to the constituent elements of Crimes Against Humanity, and often occur when children are used and recruited as soldiers, it would not be a significant conceptual leap to include that offence as a prohibited act. Further, even if it were not directly included, it has already been demonstrated in Part II of this paper that use of child soldiers has all the necessary characteristics of an inhumane act.

*ii) It Is Committed As Part Of A Widespread Or Systematic Attack*

The argument can be made that the commonplace use and recruitment of child soldiers in today's armed conflicts constitutes a violation of this principle. Children are often targeted specifically for recruitment, whether it is forced or voluntary. In Afghanistan, the ruling-Taliban government has been known to recruit children from the religious schools of Pakistan.<sup>84</sup> Similarly, rebel and paramilitary groups in Colombia commonly recruit children as young as twelve by entering elementary schools and homes, forcing them into ranks already swollen with under-

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<sup>83</sup> Fenrick, *supra* note 79 at 775-778.

<sup>84</sup> Becker, *supra* note 13.

age combatants.<sup>85</sup> These alarming practices can easily be interpreted as part of a widespread or systematic attack on children.

*ii) It Is Undertaken Pursuant To Or In Furtherance Of A State Or Organizational Policy*

The wording of this provision lends itself to being applied both to state and non-state parties, which is essential when dealing with the matter of child soldiers, as they are recruited and used by both rebel groups and national militaries. As for the matter of being pursuant to or in furtherance of a policy, the use and recruitment of children has become a well established policy in a number of countries, with the purpose of building strength and manpower to achieve success in battles, or of exerting control over lucrative natural resources, both legal and illicit.<sup>86</sup>

*iii) It Is Directed Against Any Civilian Population*

Article 77 of the first additional Protocol to the Fourth Geneva Convention specifies that children are the object of “special respect and shall be protected against any form of indecent assault.”<sup>87</sup> Additionally, the Universal Declaration of Human Rights, ICCPR, ICESCR, CRC and the optional protocol to the CRC afford increased protection and special status to children. As such, attacks on them would qualify as attacks directed against civilian populations under the customary international law governing Crimes Against Humanity.

*iv) The Actor Has Knowledge Of The Attack*

This provision varies with respect to who is being charged with a crime. If the individual who actually recruited and commanded a child in armed conflict is the one being charged, then there is no question that knowledge was present. An example from the ICTY illustrates the logic behind such an analysis.

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<sup>85</sup> See War Without Quarter, *supra* note 12.

<sup>86</sup> See note 34 detailing how children are used to guard interests in the drug trade and natural resources such as diamonds.

<sup>87</sup> Protocol I, *supra* note 38.

In the case of *The Prosecutor v. Tadic*,<sup>88</sup> the ICTY set out that the appellant Tadic had the intention to further a purpose by committing inhumane acts against the non-Serb population of the Prijedor region. That non-Serbs might be killed in effecting this purpose was foreseeable. Tadic was aware that the actions of his group of were likely to lead to such killings, but he nevertheless willingly took that risk. The ICTY accordingly found him guilty of committing Crimes Against Humanity. Applying such a rationale to the case of child soldiers, if it is reasonably foreseeable that actions could result in the use or recruitment of children into armed service, then the actor would be guilty of committing a Crime Against Humanity.

International tribunals such as the ICTR, ICTY and the Special Court for Sierra Leone (SCSL) understandably endeavor to prosecute high ranking officials who may not have been directly involved in commanding soldiers in battle. As such, the issue of command responsibility must be examined in order to determine if such individuals could be found guilty of a Crime Against Humanity for the act of recruiting or using child soldiers.

In the case of *The Prosecutor v. Delalic et al*,<sup>89</sup> the ICTY decided that “command responsibility” can be held by both military commanders and civilians holding positions of authority. These individuals can be held criminally responsible if they knew or had reason to know that offences had been, or were soon to be, committed by their subordinates, and they failed to take measures to prevent the occurrence of such acts.

The numerous issues surrounding the use and recruitment of child soldiers satisfy the customary law requirements for establishing a Crime Against Humanity. The body of international treaties and conventions regarding the establishment of Crimes Against Humanity is not large, as it remains in large part a matter of customary International Law. It is prudent, however, to look at the conditions set out in the statutes of the ICTR and ICTY for establishing Crimes Against Humanity.

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<sup>88</sup> (July 15, 1999) (ICTFY), online: < <http://www.un.org/ICTY/tadic/appeal/judgement/index.htm> > [Tadic].

<sup>89</sup> (November 16, 1998) (ICTFY) summary in (1999), 38 *Int. Leg. Mat* 57.

### 3. Crimes Against Humanity and the Ad Hoc Tribunals

Article 5 of the ICTY Statute requires that for an act to constitute a Crime Against Humanity, it must be committed during armed conflict.<sup>90</sup> This is an increased burden on what is commonly accepted since customary international law already stipulates that Crimes Against Humanity can take place during times of peace as well. This was specifically recognized by the Appellate Division of the ICTY in the *Tadic* case.<sup>91</sup> Consequently, courts should not feel required to limit themselves to the definition expressed in the ICTY Statute.

Article 3 of the ICTR Statute does not require that Crimes Against Humanity occur solely in times of conflict, but mandates only that the offences be committed on national, political, ethnic, racial, or religious grounds.<sup>92</sup> This condition of discrimination has typically been reserved for persecution related Crimes Against Humanity.<sup>93</sup>

It is unclear why each Statute would legislate in a manner that contradicts a separate tenet of customary International Law. Whether for political reasons or other considerations, it is nonetheless important to note the weight accorded to the customary norms by the ICTY in *Tadic*, and the pliability of the concept of a Crime Against Humanity, which lends itself to such myriad interpretations.

The use and conscription of child soldiers can be defined simultaneously as a Crime Against Humanity, as well as a War Crime. The importance of punishing offenders for this deplorable and shocking practice highlights the need for such a change. This will increase the likelihood of prosecuting and convicting offenders for their actions. This rise in convictions can be further augmented by cases being tried in national courts.

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<sup>90</sup> See ICTY, *supra* note 81.

<sup>91</sup> See *Tadic*, *supra* note 88 at para. 251.

<sup>92</sup> See ICTR, *supra* note 82.

<sup>93</sup> There is a commonly accepted division of Crimes Against Humanity, into the “murder-type”, and “persecutions”. Only the latter division habitually requires the discriminatory element. See Fenrick, *supra* note 79.

#### 4. National Prosecution of Crimes Against Humanity

The limitations of the ICC set out in Part III of the paper (admissibility, complementary jurisdiction, and the possible politicization of trials) point to the need for national prosecutions. In addition, the therapeutic effect this can have on a post-conflict society should not be underestimated. Allowing victims to see their former oppressors appear before a judge within their own country can help them to restore their lives, and is a potent symbol that the conflict has ended and that the rule of law is being re-established.

Domestic courts do not suffer the same burdens as the ICC or the *ad hoc* tribunals that have been established in the past to deal with these crimes. The issues of jurisdiction and admissibility do not apply, and the national control over the judicial process eliminates the threat of internationalization of the proceedings.

By defining the use and recruitment of child soldiers as a Crime Against Humanity, the likelihood of successful prosecution increases, which ultimately improves the chances of such a charge being laid. Under customary International Law, Crimes Against Humanity do not need to occur in times of conflict. This is significant for a number of reasons. As an example, peace accords drafted at the conclusion of a conflict can assert seemingly arbitrary dates establishing the beginning and end of hostilities, thereby limiting who can be charged with a crime. This is important as it is not always clear at what exact point a conflict, internal or international, begins. This increased scope of applicability will lead to more charges being brought forward, ultimately allowing for more accountability and culpability.

Contrary to War Crimes, which are today heavily legislated, the concept of Crimes Against Humanity is rooted largely in customary International Law, granting it a greater flexibility which increases the probability of convicting offenders. As was shown in the Statutes of the ICTR and ICTY, the customary nature of Crimes Against Humanity allows them to be interpreted in a number of ways, therefore allowing the laws surrounding them to be applied in a more generous and liberal fashion. This can help prosecutors in tailoring their strategies to the specific offenders charged.

## VI. CONCLUSION

The increasing number of internal conflicts in the world poses a serious threat to children in war-torn regions, and the resistance to allowing outside nations to intervene in such matters can often exacerbate the issue. Allowing countries to prosecute those guilty of using and recruiting child soldiers addresses the problem of interfering with a state's sovereignty in terms of applying Human Rights and Humanitarian Law. While such laws exist to protect children, there are serious gaps in this body of legislation which restrict its effectiveness. Allowing national courts to prosecute offenders for committing Crimes Against Humanity when they use and recruit child soldiers in part serves to fill the void in the international treaties and conventions.

The establishment of the ICC, while undoubtedly a landmark event in international criminal law, is not necessarily suited to adjudicate all cases of the recruitment and use of child soldiers. The Rome Statute established such a practice as a War Crime, giving the ICC jurisdiction over the matter, but a number of inherent limitations in the ICC's structure prevent it from being a model institution for trying these cases.

The versatile nature of Crimes Against Humanity allows it to be applied to state and non-state actors, in both internal and international conflicts, and removes it from the restriction of having to be applied solely during times of conflict. The issues surrounding the use and recruitment of child soldiers satisfy the customary law requirements of a Crime Against Humanity. These factors are likely to increase the probability of national courts bringing actions and succeeding in convicting accused criminals of using and recruiting child soldiers. This, coupled with the intrinsic cathartic effect that exercising the rule of law has on an immediately post-conflict society, forms a strong case for including the use and recruitment of child soldiers under the rubric of Crimes Against Humanity.