

# THE PROSECUTION OF CHILD SOLDIERS: BALANCING ACCOUNTABILITY WITH JUSTICE

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## INTRODUCTION

*I saw some other SBU [Small Boys Unit] boys coming closer to me with another small boy and the boy was crying, screaming. He asked them, “What have I done?” They didn’t say anything to him, but the boy was screaming. At first they had to put his right arm on a log. They took a machete and amputated it at the wrist. The boy was screaming and they took the left arm again and put it on the same log and sliced it off. He was still screaming and shouting. They took the left leg and put it on the same log and cut it off at the ankle. At last they took the right leg again and put it on the same log and cut it off with a machete. Some held him by his hand at that time now and I am speaking about the same SBU boys. They are the same people doing*

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*this. Some held his other hand, legs. They were swinging the boy. They threw him over into a toilet pit. I was there, I saw it myself.*<sup>1</sup>

Children are capable of committing atrocious crimes. With an estimated 300,000 child soldiers currently participating in armed conflict around the world,<sup>2</sup> children are undoubtedly responsible for numerous deaths, rapes, mutilations, and other crimes. However, the international community has failed to set an age at which these children can be held legally responsible for their actions. In contrast, domestic courts have further complicated the issue by setting the minimum age of criminal responsibility anywhere from seven to eighteen-years-old.

The Convention on the Rights of the Child (“CRC”) provides the most widely accepted definition of childhood:<sup>3</sup> a child “means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.”<sup>4</sup> Unfortunately, the CRC lacks support from any international treaties binding this definition as the proper age of criminal responsibility. Nonetheless, it correctly appears to allow for a lower age of majority taking into account individual cultures and domestic laws.

In determining the proper age at which a child can be held criminally liable, many factors must be considered, including physical and mental maturity, traditions, and culture. Victims of these atrocities must also receive proper consideration. Their quest for justice cannot be secondary to the rehabilitation and forgiveness of a child soldier. This delicate balance is difficult to accommodate and certain non-judicial mechanisms, such as truth and reconciliation commissions and cultural cleansing rites, have provided some relief for both the victims and perpetrators.

While rehabilitative measures are preferable to judicial measures for all individuals under eighteen, both international and domestic courts must continue to retain their discretion to prosecute juveniles for

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1. Transcript of Record ¶¶ 699-700, *Prosecutor v. Taylor*, SCSL 2003-01 (Jan. 8, 2008). The SBU was a group of approximately 10,000 children, generally between the ages of 8-10, who were recruited by the Revolutionary United Front as militants during the civil war in Sierra Leone. This was a common form of mutilation by children.

2. *Children of Conflict: Child Soldiers*, BBC, <http://www.bbc.co.uk/worldservice/people/features/childrensrights/childrenofconflict/soldier.shtml> (last visited Jan. 12, 2012). This number is unclear due to the difficulty in accurately counting children recruited into armed conflict.

3. Matthew Happold, *Child Soldiers: Victims or Perpetrators?*, 29 U. LA VERNE L. REV. 56, 62 (2008). The CRC has been ratified by every State except the United States, Somalia, and South Sudan.

4. Convention on the Rights of the Child, art. 1, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC].

the most atrocious crimes. To properly ensure these judicial systems promote equality and justice, not simply retribution, it is crucial that the international community determine a uniform age at which a child can be held responsible in a global forum and consequently begin to set a precedent for domestic courts.

Part I of this Note introduces the basic concepts of international law, including international criminal law and the legal protections that have been established for individuals under eighteen-years-old. Part II examines the difficulties that arise when determining the roles of children in armed conflict and the extent to which they can be held responsible for their actions. Additionally, this section suggests several possible defenses that should be made available to juveniles if they are prosecuted in an international tribunal. Part III provides a case study of the only person under eighteen years of age who has been prosecuted for a war crime since World War II and further evaluates the United States' role in this trial and their general perspective towards the treatment of minors in combat. Finally, Part IV emphasizes the need for an international consensus regarding the minimum age of criminal responsibility in international courts.

#### I. THE BASICS OF INTERNATIONAL LAW

The contemporary understanding of “war” has evolved to include intra-State as well as inter-State conflicts.<sup>5</sup> What has historically been called “war” is now characterized as “armed conflict.”<sup>6</sup> According to the Geneva Convention Common Article 2, to constitute an international armed conflict, the hostilities must exist between multiple “High-Contracting Parties.”<sup>7</sup> There is a general agreement that this precludes non-State groups from taking part in an international armed conflict.<sup>8</sup> In contrast, a non-international armed conflict requires “protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”<sup>9</sup> While traditionally international crimes only applied to international

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5. GARY D. SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW* 10 (2010).

6. *Id.* at 20-21.

7. Geneva Convention Relative to the Treatment of Prisoners of War, art. 2, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III].

8. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Study on Targeted Killings*, Human Rights Council, ¶ 51, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) (by Philip Alston).

9. *Prosecutor v. Tadic*, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

armed conflicts, the Geneva Conventions, Additional Protocols of 1977, and international trial court opinions have now extended individual international criminal liability to internal armed conflicts, crimes against humanity, and crimes against peace.<sup>10</sup>

*A. International Criminal Law*

International criminal law is a subset of public international law, derived from sources of law such as international treaties, customary international law, and secondary sources.<sup>11</sup> These crimes “are breaches of international rules entailing the personal criminal liability of the individuals concerned” and do not apply to any possible criminal responsibility of a State.<sup>12</sup> Crimes within this category include war crimes, crimes against humanity, genocide, torture, aggression, and certain forms of terrorism.<sup>13</sup>

Each of these categories of crimes must meet different requirements. War crimes can be linked with either international or internal armed conflicts and can include crimes by civilians against other civilians within these conflicts.<sup>14</sup> In the absence of this level of combat, the crime must be prosecuted domestically.<sup>15</sup> Crimes against humanity do not have a requisite level of conflict and are instead defined by the seriousness of the systematic offense against human dignity.<sup>16</sup> A person acting in a private capacity can be guilty of this crime for the commission of only one or two offenses as long as they are part of a consistent pattern of inhumane acts.<sup>17</sup> Genocide consists of the killing or imposition of inhumane, mentally or physically destructive conditions on members of a national, ethnic, racial or religious group.<sup>18</sup> This international crime can apply to both armed conflicts and sporadic acts of violence.

These different categories of international crimes and the situations in which they apply are important in determining the criminal liability of any person, including a child. With the diminution of international armed conflicts, differentiating between non-international armed conflicts and internal, isolated acts of violence is crucial in determining

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10. ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 40-41 (1st ed. 2003).

11. *Id.* at 16, 32.

12. *Id.* at 23.

13. *Id.* at 24.

14. *Id.* at 49.

15. CASSESE, *supra* note 10, at 49.

16. *Id.* at 64.

17. *Id.* at 66, 83.

18. *Id.* at 98, 100.

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whether an individual can be prosecuted under international law or must be tried in a domestic court at the discretion of the State.

The jurisdictional issue is only one component in determining whether an individual can be held liable for their actions. Most judicial systems require a showing of mens rea in addition to the actus reus.<sup>19</sup> A third dimension also underlies these elements. The defendant must have a clear understanding of the nature of their actions, the circumstances surrounding them, and the possible consequences<sup>20</sup> as well as the genuine opportunity to have made a different choice and instead chose this particular action.<sup>21</sup> While it is often assumed adults necessarily meet these additional requirements, a child's ability to do so must be closely scrutinized when determining whether he or she meets the mens rea requirement of the offense.<sup>22</sup> A person who lacked the capacity to fully understand the effects of their actions or had no alternative to taking this action cannot be held responsible for their crimes. This dimension of the mens rea element is therefore essential to the determination of a minimum age of criminal responsibility. The age dictated by domestic courts or international tribunals is the age at which these institutions believe the child has the requisite comprehension to be held presumptively liable for the crime at issue.

*B. International Law Relating to the Rights of the Child During Armed Conflict*

Formed primarily through international customs and treaties, International Humanitarian Law ("IHL") dictates the laws of armed conflict in both international and non-international armed conflicts.<sup>23</sup> Its protections are limited based on an individual's status in the conflict.<sup>24</sup> IHL is intended only to protect individuals not taking part in the armed conflict and to limit the combatants' rights to certain methods of warfare.<sup>25</sup> While the Geneva Conventions do not specifically reference child soldiers or define childhood, Geneva Convention III lays

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19. Happold, *supra* note 3, at 72.

20. Claire McDiarmid, *What do They Know? Child-Defendants and the Age of Criminal Responsibility: A National Law Perspective*, in INTERNATIONAL CRIMINAL ACCOUNTABILITY AND THE RIGHTS OF CHILDREN 85, 90 (Karin Arts & Vesselin Popovski eds., 2006).

21. *Id.* (quoting NICOLA LACEY, STATE PUNISHMENT: PRINCIPLES AND COMMUNITY VALUES 63 (1988)).

22. McDiarmid, *supra* note 20, at 91.

23. SOLIS, *supra* note 5, at 23.

24. *Id.* at 26.

25. *Id.* at 23.

out specific guidelines regarding legal protections and privileges for combatants during war and Common Article III enumerates the rights of non-combatants in non-international conflicts. In an armed conflict, the general protections of IHL for civilians also apply to children.<sup>26</sup> Children are also accorded additional special protections that apply regardless of whether they are civilians or participants in the armed conflict.<sup>27</sup>

The First Additional Protocol to the Geneva Conventions requires that States take all feasible measures to ensure that children under the age of fifteen do not directly participate in hostilities during an international armed conflict.<sup>28</sup> The Second Additional Protocol broadens these provisions by prohibiting the recruitment or participation of children under fifteen in non-international hostilities.<sup>29</sup> Under both Protocols, children under fifteen-years-old who participate in the conflict are entitled to all of the applicable special protections despite their combat status.<sup>30</sup> Under no circumstances can the child be subject to the death penalty for an offense related to the combat if it was committed prior to their eighteenth birthday.<sup>31</sup>

In an international armed conflict, all children directly participating in the conflict are entitled to all prisoner of war protections.<sup>32</sup> These protections include the right not to be judicially prosecuted for an act committed during the conflict which may be illegal if conducted by a civilian.<sup>33</sup> However, prisoner of war legal protections are not applicable in a non-international conflict or any domestic hostilities. Therefore, children acting within those capacities are not afforded the protection from prosecution for crimes committed during their direct participation in the conflict.

The CRC enumerates many of the fundamental rights of children

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26. Int'l Comm. of the Red Cross, *Legal Protection of Children in Armed Conflict*, 0577/002-03 (Feb. 2003) [hereinafter ICRC Legal Protection].

27. *Id.*

28. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, art. 77(2), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I].

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

30. Additional Protocol I, *supra* note 28, art. 77(3); Additional Protocol II, *supra* note 29, art. 4(3).

31. Additional Protocol I, *supra* note 28, art. 77(5); Additional Protocol II, *supra* note 29, art. 6(4).

32. ICRC Legal Protection, *supra* note 26.

33. *See* Additional Protocol I, *supra* note 28, art. 82.

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and largely reinforces the rights of the child set forth in the Additional Protocols. Further, it strengthens Additional Protocol I's requirements prohibiting recruitment of children under fifteen but only requires States to attempt to give priority to the oldest children when recruiting to non-international armed conflicts.<sup>34</sup> This does not rise to the level of the ban imposed by Additional Protocol II prohibiting any direct or indirect participation of children. The CRC also enumerates the rights of children after arrest and throughout the judicial process, thereby providing minimum safeguards in the event of their prosecution.<sup>35</sup>

The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict ("OPAC") amended the acceptable age of direct participation in any State armed forces who are party to this Protocol to eighteen and prohibits the compulsory recruitment of children.<sup>36</sup> Furthermore, it provides minimum safeguards that all party States must follow when allowing voluntary recruitment of any person under eighteen.<sup>37</sup> The Protocol completely prohibits non-State forces from recruiting or using children in any hostilities.<sup>38</sup>

Presumably, given the international community's general agreement that any child under fifteen cannot directly participate in hostilities, States also agree that children below this age cannot be held responsible for the crimes committed while engaged in the hostilities. Prohibiting the child's participation at a specific age indicates a belief that this child does not have the requisite mental, physical, or moral development to make a logical decision regarding his or her participation in the conflict. If this is true, in adhering to the principles set forth by international law and custom, States have arguably agreed that, in some circumstances, children between the ages of fifteen and eighteen may have the requisite *mens rea* and psychological development to be held accountable for their actions and participation. Certainly as the individual approaches eighteen-years-old, he or she is more likely to be considered eligible for prosecution.

## II. THE PROSECUTION OF CHILD SOLDIERS

There is no doubt that the international community recognizes the limitations of juveniles and provides special accommodations for these

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34. CRC, *supra* note 4, art. 38(3).

35. *Id.* arts. 37, 40.

36. Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, arts. 1, 2, May 25, 2000, G.A. Res. 54/263, Doc. A/54/49 (May 25, 2000) [hereinafter OPAC].

37. *Id.* art. 3(3).

38. *Id.* art. 4(1).

individuals. Rules governing armed conflict involving children under fifteen are clear. However, the laws governing the minimum age of criminal responsibility of children between fifteen and eighteen in armed conflict are ambiguous. To determine when a child has the sufficient mental capacity to participate in, and be held responsible for, his actions in armed conflict, an adolescent's right to form and express his own opinions must be examined in light of his psychological development and cultural perspective.

A. *The Minimum Age of Criminal Responsibility*

There is no general consensus on the minimum age at which children can be held criminally responsible for their actions. The Rome Statute, establishing the International Criminal Court ("ICC"), only gives the Court jurisdiction over individuals eighteen years or older.<sup>39</sup> The International Criminal Tribunal for the Former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR") do not state any minimum age requirement for prosecution.<sup>40</sup> Only the statute for the Special Court for Sierra Leone ("SCSL") directly addressed this issue by asserting jurisdiction over any person who committed a crime between the ages of fifteen and eighteen.<sup>41</sup>

The ultimate issue in deciding whether a child can be prosecuted for any crimes committed during an armed conflict rests on the determination of mens rea. There is little research regarding the moral and psychological development and maturity of children living in long-term violent environments. Further, vast cultural differences among societies and tribes ensure that the delineation between childhood and adulthood at the age of eighteen is an arbitrary construct, ideally not to be imposed on international courts without further scientific evidence.

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39. Rome Statute of the International Criminal Court, art. 26, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter ICC]. There is a general agreement that this decision was procedural and not substantive in order to avoid disagreement between the States and to leave the decision to prosecute to the individual State's discretion. See OFFICE OF THE SPECIAL REPRESENTATIVE OF THE SECRETARY-GENERAL FOR CHILDREN AND ARMED CONFLICT, *Children and Justice During and in the Aftermath of Armed Conflict* (U.N. Working Paper No. 3, 27, Sept. 2011) [hereinafter Children and Armed Conflict]; see also Matthew Happold, *The Age of Criminal Responsibility in International Criminal Accountability*, in THE INTERNATIONAL CRIMINAL ACCOUNTABILITY AND RIGHTS OF CHILDREN 69, 77 n.26 (Karin Arts & Vesselin Popovski eds., 2006).

40. Happold, *supra* note 39, at 79.

41. Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (with Statute), art. 7, Jan. 16, 2002, 2178 U.N.T.S. 137. While the Court claimed jurisdiction over these individuals, it established special protections for their treatment and prosecution. Ultimately, no person under the age of eighteen was indicted.



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*1. The Psychology of Children*<sup>42</sup>

There is minimal research on the moral consequences for children and adolescents who have engaged in armed conflict and the majority of the research concerning the general moral development of children has focused on homogeneous middle class groups residing in peaceful societies.<sup>43</sup> Therefore, assessing the development of children and their ability to recognize the consequences of their actions has been subject to many interpretations and may depend on incongruent factors based on the individual's societal and cultural upbringing.

Although children are more easily influenced into committing atrocities due to their obedience and lack of mental and moral development,<sup>44</sup> this does not help to establish an age at which a child is morally and psychologically competent to be held responsible for their actions. Instead, this notion perpetuates the ease of an arbitrary age delineation of eighteen between childhood and adulthood and ignores individual development as well as the obvious differences between the reasoning of a fifteen-year-old child and a seventeen-year-old.

Children become associated with armed groups for a variety of reasons. The clearest example is forced participation including conscription, abduction, intimidation, and coercion.<sup>45</sup> Many other reasons are not so clearly categorized. Economic pressures such as hunger and poverty may cause children to join a certain group, or families to volunteer their children for service, so as to ensure they have adequate food, clothing, and medical attention.<sup>46</sup> Others join to protect themselves or their families from other armed forces, including government troops, and feel safer with access to guns and a new supplemental family unit to protect them.<sup>47</sup> Finally, participation in an armed group can confer a sense of power and control, feelings often lacking during war time.<sup>48</sup>

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42. For the purposes of this section, I will define morality as the ability to differentiate between right and wrong and to conform to a standard of socially acceptable behavior.

43. Jo Boyden, *The Moral Development of Child Soldiers: What Do Adults Have to Fear?*, 9(4) PEACE AND CONFLICT: J. OF PEACE PSYCHOL. 343, 351-52 (2003).

44. See Expert of the Secretary-General, *Impact of Armed Conflict on Children*, ¶¶ 30, 31, 34, 43, U.N. Doc. A/51/306 (Aug. 26, 1996) (by Graça Machel) [hereinafter Machel Report]; see also Happold, *supra* note 3, at 62 (citing RACHEL BRETT & MARGARET MCCALLIN, *CHILDREN THE INVISIBLE SOLDIERS* 153-54 (Rada Barnen ed. 1996) (citations omitted)).

45. Children and Armed Conflict, *supra* note 39, at 27; Machel Report, *supra* note 44, ¶ 36.

46. Machel Report, *supra* note 44, ¶ 39.

47. *Id.* ¶ 41.

48. *Id.* ¶ 42.

Distinguishing between voluntary and involuntary affiliation with armed forces cannot be a factor in determining legal responsibility.<sup>49</sup> There is minimal evidence that voluntary versus involuntary involvement in the conflict makes a difference in a child's moral development during war.<sup>50</sup> While the simple presence of intense violence and a constant threat of harm can pervert a child's moral development and understanding of right and wrong, altering his or her ability to form interpersonal relationships,<sup>51</sup> scholars have suggested that, depending on cultural factors, children in middle childhood "may not be as liable to moral disorientation as many imagine" and may have strong moral competence.<sup>52</sup> Whether voluntary or involuntary, by the time the crime is committed, the child's moral development has been altered to varying degrees. This demonstrates that the focus on determining whether a child should be prosecuted must be based on the specific individual and their surrounding environment and not the voluntariness of their enrollment.

In respecting the various international treaties protecting the rights of children, it is necessary to recognize an important principle advanced by the CRC: children capable of forming their own views have the right to freely express these views in any matters affecting them, in accordance with their age and maturity.<sup>53</sup> The fact that the CRC recognizes the ability of children to form these thoughts implies an acknowledgment that children can reach a high level of logical and moral thinking prior to their eighteenth birthday. Moreover, an additional CRC principle limiting a child's right of expression in accordance with respect to the rights of other individuals<sup>54</sup> affirms a belief that children are capable of both recognizing and consequently violating these fundamental human rights and can therefore be held accountable for their actions.

If the international community has decided to demonstrate their respect for children by providing them with certain benefits generally afforded to adults, such as the freedom of thought and expression, they must also be willing to impose the disadvantages associated with these

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49. The distinction is only important in the context of the child soldier's liability. It is irrelevant when prosecuting an adult for violating child soldier laws.

50. Boyden, *supra* note 43, at 353.

51. Julie Guyot, *Suffer the Children: The Psychosocial Rehabilitation of Child Soldiers as a Function of Peace-Building*, COAL. TO STOP THE USE OF CHILD SOLDIERS, at 6 (2007) available at [http://www.crin.org/docs/Linked\\_Guyot\\_2007.pdf](http://www.crin.org/docs/Linked_Guyot_2007.pdf).

52. Boyden, *supra* note 43, at 350.

53. CRC, *supra* note 4, art. 12(1).

54. *Id.* art. 13(2)(a).

rights. To not do so creates an imbalance that further perverts a child's moral well-being. Accepting the consequences of an action or series of actions plays a large part in the development of differentiating right from wrong. A lack of accountability given a certain set of freedoms confers a sense of immunity on children, indicating to them that they are free to behave in whatever manner they choose. In ratifying the CRC, States undoubtedly realized the extent of these allowances and the potential harms that could arise from these liberties.

## 2. *Cultural Conflicts*

In addition to the lack of research regarding child development and morality during war time, the wide range of cultural differences among countries, tribes, and regions makes the question of child responsibility increasingly more difficult. These vast differences among the societal expectations of children depending on their culture and beliefs have led some scholars to argue that childhood is simply a social construct determined by local traditions and values.<sup>55</sup>

While not binding, the Beijing Rules are indicative of the common thinking among many States.<sup>56</sup> These Rules recommend that in determining the age of criminal responsibility, emotional, mental, and intellectual maturity should be taken into account.<sup>57</sup> The age can also widely vary depending on history and culture.<sup>58</sup> Furthermore, a juvenile's understanding of acceptable behavior is often determined by their social rights and responsibilities, such as marital status and civil majority.<sup>59</sup> While these Rules may be impractical in determining a uniform age of criminal responsibility across a country, and particularly internationally, they are crucial in understanding the difficulties the international community and courts face in determining who to prosecute. These Rules also present a strong argument for the need to establish a minimum age below eighteen and subsequently allowing prosecutorial discretion, such as that seen in Sierra Leone.

Unlike in Western cultures, where eighteen often marks the delineation between childhood and adulthood, African tribes and societies apply different measures to identify the age of maturity. Western African societies, such as the Poro, Bundu, or Sande, initiate

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55. Boyden, *supra* note 43, at 348.

56. Happold, *supra* note 3, at 75.

57. United Nations Standard Minimum Rules for the Administration of Juvenile Justice, r. 4, G.A. Res. 40/33, U.N. Doc. A/RES/40/33 (Nov. 29, 1985) [hereinafter Beijing Rules].

58. *Id.* r. 4 cmt.

59. *Id.*

adolescents through ceremonial practices to transition them into adulthood.<sup>60</sup> The timing of the rituals is based on external mental and physical manifestations of maturity, not age.<sup>61</sup> For many of the males, this initiation defines them as a warrior and imposes upon them a duty to protect their community.<sup>62</sup>

Even in the absence of respect for cultural differences, courts may have significant difficulty in determining if a child meets the jurisdictional age requirements. Traditionally in many African societies, there are no birth certificates,<sup>63</sup> and child development experts have trouble determining a child's age due to the lack of a standard measure for bone maturation, ethnic differences, and food deficiencies.<sup>64</sup> These problems may discourage many prosecutors from pursuing child soldiers, particularly when there are other participants in the armed conflict who most likely had more control or played a larger role in the violence.

In situations where children believe they are fighting for their family, tribe, or community depending on the cultural and historical context, acts viewed by others as violence can be seen within the community as acts of heroism and sacrifice, consequently, the only moral choice available.<sup>65</sup> Murder, rape, and destruction of property are not condoned in any society. However, in these circumstances, judicial proceedings against children who think their actions are justified because of their cultural beliefs and whose morals and ethics have developed out of a respect for their community, are harsh and inappropriate methods of pursuing justice.<sup>66</sup> Other rehabilitation measures must be considered.

### *B. Alternatives to Prosecution*

The CRC requires that State Parties "take all appropriate measures to promote physical and psychological recovery and social reintegration

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60. David M. Rosen, *Who is a Child? The Legal Conundrum of Child Soldiers*, 25 CONN. J. INT'L L. 81, 106 (2009).

61. *Id.*

62. *Id.*

63. *Id.* at 102, 106. See also U.N. CHILDREN'S FUND, THE STATE OF THE WORLD'S CHILDREN 2008, at 147, U.N. Sales No. E.08.XX.1 (2007) (stating that between 1999 and 2006, only thirty-four percent of children under five years old in Sub-Saharan Africa were registered after birth, only twenty-four percent were registered in Eastern and Southern Africa, and forty-one percent were registered in West and Central Africa).

64. Rosen, *supra* note 60, at 102.

65. Boyden, *supra* note 43, at 356.

66. If there is a strong demand for judicial accountability, the child's state of mind should instead be used as a mitigating factor during sentencing.

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of a child victim of . . . armed conflict.”<sup>67</sup> The purpose of this brand of restorative justice is to reintegrate the perpetrators of crimes into their communities while providing their victims with an opportunity to heal.<sup>68</sup> Non-judicial mechanisms for accountability include truth and reconciliation commissions, local traditional and cultural rites, and community based programs under State control.<sup>69</sup>

Children are the products of their environment. They seek protection in their families, communities and other social networks,<sup>70</sup> and their moral development occurs largely through their interactions with these groups.<sup>71</sup> War strips children of this comfort and the ability to be nurtured and safely continue their maturation process.<sup>72</sup> It takes them away from their families, depriving them of their rights to normal physical and emotional development.<sup>73</sup> Consequently, at the end of a conflict, a child’s rehabilitation is often best promoted by reuniting them with their family and community, and reintegrating the familiar local cultures and traditions into their daily life.<sup>74</sup> Unfortunately, given many children’s propensity to look to their family for social cues, seeing their caregivers’ vulnerability and fears can undermine children’s confidence in those closest to them,<sup>75</sup> hindering their ability to trust the people who are best able to assist them. In cases where the family or community refuse to take the child back, or the child can no longer establish a relationship with these groups, all efforts should be made to place the child in a different environment that fosters his or her health,

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67. CRC, *supra* note 4, art. 39. This concept is re-iterated in the OPAC, the African Charter on the Rights and Welfare of the Child, and the International Covenant on Civil and Political Rights. It is further elaborated upon in the Paris Principles (stating that children accused of crimes under international law should be primarily considered as victims and any imposed sanction should promote reintegration, not punishment).

68. See Children and Armed Conflict, *supra* note 39, at 45; Laurel Stovel & Marta Valiñas, *Restorative Justice After Mass Violence: Opportunities and Risks for Children and Youth 2* (UNICEF Innocenti Research Centre, Working Paper No. 2010-15, 2010) [hereinafter Innocenti Working Paper].

69. Children and Armed Conflict, *supra* note 39, at 44-45.

70. Machel Report, *supra* note 44, at 14.

71. Guyot, *supra* note 51, at 3.

72. Machel Report, *supra* note 44, at 15.

73. *Id.* at 19. *But see* Guyot, *supra* note 51, at 8-9 (claiming that the military can provide a psychological replacement for the lack of a parental presence).

74. Machel Report, *supra* note 44, at 15. However, even successful reunification with family may not be sufficient. Children often return feeling independent and unwilling to have their actions regulated. Additionally, girls who were subjected to sexual violence may be shunned by their families due to cultural beliefs or not considered suitable for marriage. *Id.* at 19.

75. *Id.* at 50.

respect, and dignity.<sup>76</sup>

Communities reluctant to accept child soldiers back into their group will often engage in traditional or local cleansing rituals prior to receiving these children.<sup>77</sup> Traditional practices include apologies to the community, reparations, or providing some form of compensation.<sup>78</sup> This can be difficult given that traditional customs are often destroyed due to death and displacement during an armed conflict.<sup>79</sup> Depending on the culture, cleansing ceremonies also act to symbolically welcome the child back into the community or to remove the spirits of the people tied to the child who killed them.<sup>80</sup>

An equally important aspect of a child's rehabilitation is access to education. The CRC provides that one purpose of a child's education is to develop the child's personality, talents, and mental and physical abilities.<sup>81</sup> Access to teachers may also provide the child with an adult role-model, similar to that of a parent. In the absence of education, it is more likely that children will re-engage in armed conflict, given the lack of options in their community.<sup>82</sup> Children who receive further education and occupational skills have an easier time escaping future recruitment and can more successfully become part of a community.<sup>83</sup> Consequently, on a social level, a child's reunification with their community and family and an opportunity to continue their primary schooling and education are seen as keys to the reintegration and establishment of a non-combatant identity for former child soldiers.<sup>84</sup>

A large problem with only relying on judicial remedies is the number of people who bear some form of responsibility for the atrocities. This pursuit of justice can overwhelm the courts, ensuring less effective prosecution of those who bear the greatest responsibility for the horrors committed. After a conflict, many courts lack the basic resources necessary to provide adequate judicial procedures.<sup>85</sup> As a substitute, Truth Telling Commissions provide an alternative form of justice, by allowing numerous people to communicate as both perpetrators and victims. They provide a mechanism for individuals to

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76. *Id.* at 19.

77. *Id.* at 20.

78. Children and Armed Conflict, *supra* note 39, at 23.

79. *Id.*

80. Innocenti Working Paper, *supra* note 68, at 18.

81. CRC, *supra* note 4, art. 29.

82. See Guyot, *supra* note 51, at 9.

83. Machel Report, *supra* note 44, at 20.

84. *Id.*

85. *Id.* at 71.

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publically acknowledge their guilt and to hear the crimes and pain of other perpetrators and victims. The reconciliation process promotes healing within the public and individual communities, eliminating much of the pressure on the court system and implementing a more traditional and comprehensive system.

Despite a strong international emphasis on rehabilitation as the preferable alternative to prosecution, in the interests of justice, there is sometimes a demand in the community for judicial accountability despite the age of the child.<sup>86</sup> If judicial remedies are not pursued in a community demanding retribution, there is concern that civilians may take the law into their own hands or that mob violence may ensue.<sup>87</sup> Many children also face anger, mistrust, and general disapproval and shunning by society.<sup>88</sup> In the absence of judicial accountability, leaders of armed groups are more likely to avoid liability by encouraging children to commit the most atrocious crimes and assuring them they will not face judicial ramifications.

Unfortunately, the prosecution of certain children may be a necessity. While rehabilitation continues to be the preferable alternative in the international community, it may not fully satisfy the needs of the victims or the general community. The rehabilitation of children, therefore, must be balanced with the emotional and physical scars of the horrors sustained by others on a case-by-case basis. It cannot be presumed that children, particularly those closer to eighteen, who voluntarily join armed forces, do not understand their actions or the consequences of their decisions. To do so both allows these individuals to escape any form of accountability and promotes their use by older soldiers who would be liable if they themselves committed the crimes. Finally, it denies justice to the adults and children who have suffered years of violence and fear. These victims deserve the chance to find peace and move forward with their lives.

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86. See U.N. Secretary-General, *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, 7, Sec. Council and the Gen. Assembly, U.N. Doc. S/2000/915 (Oct. 4, 2000) (“It was said that the people of Sierra Leone would not look kindly upon a court which failed to bring to justice children who committed crimes of that nature and spared them the judicial process of accountability” and the term “greatest responsibility” does “not necessarily exclude persons of young age from the jurisdiction of the Court.”).

87. Rosen, *supra* note 60, at 114; see also Paola Konge, *International Crimes & Child Soldiers*, 16 SW. J. INT’L LAW 41, 63 (2010).

88. Boyden, *supra* note 43, at 346.

C. *Defenses: Justifications and Excuses to the Criminal Liability of Minors*

Youth is not a legal defense for a person's conduct and only applies to the jurisdiction or right of a court to try the individual.<sup>89</sup> Consequently, if an international tribunal or domestic court decides that the jurisdictional requirements are met and the prosecution of the minor is an acceptable action, the child must have recourse to all applicable defenses. There are several options that can be raised on the individual's behalf. While each State judicial system provides its own list of defenses, it is less clear what international law considers to be valid defenses to criminal liability. Nonetheless, international criminal law does provide the defendant with both justifications and excuses.<sup>90</sup> The Rome Statute sets forth most of the common defenses presented in international tribunals.<sup>91</sup> While there are several grounds for excusing criminal liability, the most applicable to child soldiers are intoxication and duress.<sup>92</sup>

Child soldiers are often forced to consume drugs and alcohol by their commanders,<sup>93</sup> often in order to lower the child's inhibitions and increase their ferocity.<sup>94</sup> To successfully argue this excuse, it must be proven that the defendant's intoxication altered their mental state to a point where they were not aware of their actions and were incapable of understanding the unlawfulness of their actions, consequently negating the mens rea element.<sup>95</sup> If the intoxication was voluntary, it must be shown that the person did not become intoxicated knowing that, as a result, they would be likely to engage in criminal actions.<sup>96</sup>

A child's mental state is already more delicate than an adult's, regardless of whether they exceed the minimum age for criminal culpability. Consequently, a child's ability to understand the

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89. ROBERT CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 331 (1st ed. 2007).

90. CASSESE, *supra* note 10, at 221.

91. ICC, *supra* note 39, art. 31. While the ICC does not have jurisdiction over individuals under eighteen, this portion of the Rome Statute represents the defenses agreed upon by a large number of States and there is little reason to believe these grounds for excusing criminal liability would not extend to minors in other international tribunals.

92. *Id.* The Rome Statute also provides defenses due to mental disease or defect, self-defense and defense of others, and necessity. Additionally, it provides for defenses not listed which may be covered under applicable law, including treaties and customary law.

93. Machel Report, *supra* note 44, ¶ 47; Children and Armed Conflict, *supra* note 39, at 10.

94. CRYER ET AL., *supra* note 89, at 335.

95. CASSESE, *supra* note 10, at 228.

96. *Id.*



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unlawfulness of their actions may be more easily impaired under the influence of intoxicants. Given that the intent of the officers in providing the drugs and alcohol is to increase a child's violent tendencies and lower their inhibitions, the requirements of the first element of an intoxication defense may not be difficult to establish.

The voluntariness of the drug consumption presents a more challenging burden. While children may initially be forced to take intoxicants, many might continue to take the drugs voluntarily in order to complete the tasks demanded of them and forget the horrors of their crimes. This would indicate an awareness of the unlawfulness and consequences of their actions. It also demonstrates that the child consumes the intoxicants knowing that, as a result, they will likely engage in illegal conduct.

Necessity as a justification offers another significant support to a child's defense. Relevant case law indicates that international law generally allows this defense if four criteria are met:<sup>97</sup> (1) the act was done under a threat of severe and irreparable harm, (2) there were no means of adequately preventing these actions, (3) the crime was proportional or less severe than the crime to which this action was a response, and (4) the situation leading to the duress was not voluntarily induced.<sup>98</sup> Therefore, situations where the defense of necessity for an international crime arise are often ones where there is a group activity with the expectation of coercion by colleagues.<sup>99</sup>

Child soldiers are often faced with the prospect of death if they do not fight. This threat commonly comes from other members of the armed group.<sup>100</sup> Measures instituted against the child in order to ensure their forced participation include torture, beatings, and threats of death against themselves or their families.<sup>101</sup> These facts, applicable on a case-by-case basis, meet the four required criteria under international customary law and therefore form a legitimate defense of necessity.<sup>102</sup>

Given that no child has been prosecuted in an international court, it

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97. *Id.* at 242.

98. *Id.*

99. CRYER ET AL., *supra* note 89, at 339. This defense should be differentiated from one no longer accepted under international law where a person claims they were only acting on the orders of a superior.

100. Nienke Grossman, *Rehabilitation or Revenge: Prosecuting Child Soldiers for Human Rights Violations*, 38 GEO. J. INT'L L. 323, 328 (2007).

101. *Id.*

102. *But see* CRYER ET AL., *supra* note 89, at 339 (summarizing a decision by the ICTY wherein the Court accepted necessity as a defense under international law but held it could not apply in cases involving the murder of innocents).

is difficult to identify how these defenses would be applied to a person under eighteen. At minimum, they may constitute mitigating circumstances. However, the availability of these defenses, and potentially others, does not adequately protect the rights of children, regardless of the public's demand for justice. If international courts decide to prosecute a person under eighteen, they must be willing to establish additional safeguards to adequately provide remedies to those individuals in the twilight zone between childhood and adulthood.

### III. THE INTERSECTION OF DOMESTIC AND INTERNATIONAL CHILDREN'S RIGHTS IN THE UNITED STATES

While the issue of the use of child soldiers in armed conflict has been increasingly recognized and prosecuted, there is no end in sight. As a powerful force in the international community, the United States must bear some responsibility in promulgating a universal minimum age of criminal responsibility. Instead, the country has further blurred the line for determining a proper age for accountability. The U.S. must remedy this appearance and take a firm stance regarding the role of minors in the commission of international crimes.

#### A. *The Case of Omar Khadr*

In July 2002, United States soldiers discovered a compound with five al-Qaeda fighters in a small Afghan town on the Pakistani border.<sup>103</sup> After the men refused to surrender, the soldiers sent two translators into the building who were immediately killed.<sup>104</sup> The soldiers called in air support, bombing the compound.<sup>105</sup> After a four-hour battle killing four of the five fighters, U.S. soldiers entered the ruins.<sup>106</sup> Immediately, the sole remaining fighter, Omar Khadr, threw a grenade at the soldiers, killing a Special Forces Sergeant.<sup>107</sup> The soldiers shot Khadr twice in the chest but did not kill him, despite his pleas to “[p]lease, just shoot me.”<sup>108</sup> Instead, Khadr was captured,

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103. Jeff Tietz, *The Unending Torture of Omar Khadr*, ROLLING STONE (Aug. 24, 2007), [http://www.rollingstone.com/politics/story/11128331/follow\\_omar\\_khadr\\_from\\_an\\_al\\_qaeda\\_childhood\\_to\\_a\\_gitmo\\_cell](http://www.rollingstone.com/politics/story/11128331/follow_omar_khadr_from_an_al_qaeda_childhood_to_a_gitmo_cell).

104. *Id.*

105. Isabel Vincent, *The Good Son*, NAT'L POST (Canada), Dec. 28, 2002, at A1, available at <http://hvk.org/archive/2002/1202/293.html>.

106. Happold, *supra* note 3, at 56.

107. Tietz, *supra* note 103.

108. Vincent, *supra* note 105.

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detained, and treated for his wounds at an airbase in Afghanistan.<sup>109</sup> In October 2002, he was transferred to Guantanamo Bay, Cuba.<sup>110</sup>

Stories such as this one seem unfortunately common when listening to regular news reports about the war in Afghanistan. However, Khadr's story is not common. It raised international controversy and brought to light the issue of the minimum age of criminal responsibility. Khadr, a Canadian citizen,<sup>111</sup> was only fifteen when he was shot and arrested.<sup>112</sup> In April 2007, a United States Military Commission charged Khadr with conspiracy, murder in violation of the law of war, attempted murder in violation of the law of war, providing material support for terrorism, and spying.<sup>113</sup> Despite condemnation from the international community, the United Nations, and Amnesty International, the U.S. did not reduce or dismiss any of the charges against Khadr.<sup>114</sup> He eventually pleaded guilty on all counts and was sentenced to eight years in prison in addition to the eight years already spent while awaiting trial and sentencing.<sup>115</sup>

Between 1990 and 2001, Khadr spent most of his time moving around Afghanistan and Pakistan.<sup>116</sup> His father was a senior al-Qaeda member and associate of Osama Bin Laden, introducing him to various other senior members of al-Qaeda, as well as showing him training camps and guest houses.<sup>117</sup> He received formal military training, including bomb-making and combat tactics, before his twelfth

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109. Happold, *supra* note 3, at 56.

110. *Id.* at 57.

111. Charges ¶ 12, United States v. Khadr, No. 05-0008 (U.S. Ct. of Mil. Comm'n Rev. 2005), *available at* <http://www.defenselink.mil/news/Nov2005/d20051104khadr.pdf> [hereinafter Military Commission Review].

112. Khadr was born on September 19, 1986. *Id.*

113. Press Release, U.S. Dep't of Defense, Military Commission Charges Referred (Apr. 24, 2007), *available at* <http://www.defense.gov/releases/release.aspx?releaseid=10779>.

114. *Omar Khadr Guantanamo Military Trial Condemned*, AMNESTY INT'L, Aug. 12, 2010, <http://www.amnesty.org/en/news-and-updates/omar-khadr-guantanamo-military-trial-condemned-2010-08-12>.

115. Press Release, U.S. Dep't of Defense, DOD Announces Sentence for Detainee Omar Khadr (Oct. 31, 2010), *available at* <http://www.defense.gov/releases/release.aspx?releaseid=14023>; *see also* Rosen, *supra* note 60, at 116 (stating that as an unlawful combatant, Khadr was only protected by Common Article 3 and therefore eligible for the death penalty). In September 2012, Khadr was transferred to a maximum security prison in Canada to serve the remainder of his sentence. He is eligible for parole in 2013. *Omar Khadr Leaves Guantanamo to Return to Canada*, GUARDIAN (Sept. 29, 2012), <http://www.guardian.co.uk/world/2012/sep/29/omar-khadr-guantanamo-canada>.

116. Military Commission Review, *supra* note 111, ¶ 16.

117. *Id.* ¶ 13.

birthday.<sup>118</sup> Khadr and his siblings were regularly warned that Islam was being compromised and must be re-purified through the destruction of evil forces.<sup>119</sup> His family showed great respect to suicide bombers and his father prayed to be a martyr.<sup>120</sup> Additionally, his family was poor and often relied on the generosity of their mosque.<sup>121</sup> In essence, Khadr was the product of a fundamentalist environment. He was deeply devoted to his father<sup>122</sup> and raised to believe his duty was to protect Islam. He saw his father imprisoned and tortured by Pakistani forces and feared American retaliation after the September 11, 2001 attacks.<sup>123</sup> To him, his faith was truly under attack and his duty was to fight for its salvation and purification.

Since World War II, no child has been prosecuted for a war crime by any court or military tribunal.<sup>124</sup> However, domestic and military courts have tried child soldiers for other crimes committed during armed conflict.<sup>125</sup> The difficulty with trying a child in a military tribunal arises from the differences between these tribunals and traditional courts. Military tribunals are not required to consider a child's rehabilitation and reintegration as their primary concern and the judicial safeguards provided for in the CRC are not mandatory to the

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118. Tietz, *supra* note 103.

119. *Id.*

120. *Id.*

121. *Id.*

122. See Vincent, *supra* note 105.

123. *Id.*

124. OFFICE OF THE SPECIAL REPRESENTATIVE OF THE SECRETARY GENERAL FOR CHILDREN AND ARMED CONFLICT, *9 August 2010—Trial of Omar Khadr*, CHILDREN AND ARMED CONFLICT (Aug. 10, 2010), available at <http://childrenandarmedconflict.un.org/statements/9-august-2010-trial-of-omar-khadr/>; see Trial of Johannes Oenning & Emil Nix, British Military Court, Borken, Germany, Dec. 21-22, 1945, 11 L. REP. TRIALS OF WAR CRIMES 74 (1949), available at [http://www.loc.gov/rr/frd/Military\\_Law/pdf/Law-Reports\\_Vol-11.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-11.pdf) (convicting a fifteen-year-old ex-Hitler Youth of violating the laws of war by participating in the shooting of a prisoner of war; the court used Oenning's age as a mitigating factor in his sentencing); see also Trial of Alois and Anna Bommer & Their Daughters, Permanent Military Tribunal at Metz on Feb. 19, 1947, 11 L. REP. TRIALS OF WAR CRIMES 62 (1949), available at [http://www.loc.gov/rr/frd/Military\\_Law/pdf/Law-Reports\\_Vol-9.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-9.pdf) (convicting two sisters between the ages of sixteen and eighteen of receiving stolen goods as a violation of the laws of war but acquitting the third sister who was under sixteen due to her having "acted without judgment" because of her age).

125. Happold, *supra* note 3, at 71; see also Children and Armed Conflict, *supra* note 39, at 40 (discussing cases in Myanmar and the Democratic Republic of the Congo ("DRC") where child soldiers were charged with desertion and sentenced before a military tribunal and a case in the DRC where a fourteen-year-old was executed after being found guilty of murder by a military tribunal).

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treatment of the alleged offender.<sup>126</sup> Consequently, while international agreements and pressures have generally limited the prosecution of children in domestic courts for acts committed during armed conflict and have succeeded in preventing the prosecution of a child in any international tribunal, if a child is tried for a war crime, it must be in a court that respects the accepted international standards.

The United States is only bound by its domestic law, the Geneva Conventions, the Optional Protocol to the CRC, and any relevant customary international law in its treatment of children and prisoners of war. It is one of only three countries not party to the CRC and the Beijing rules are not binding. Consequently, while the U.S. may not have violated its legal obligations, it did ignore international custom by prosecuting Khadr instead of ensuring his rehabilitation.

From the beginning, it is clear that the United States attempted to remain faithful at least to the minimum standards regulating children under international law, although arguably principally for self-serving purposes. After Khadr's arrest in July 2002, he was kept on an Afghani airbase for several months. He was not transferred to Guantanamo until October 2002, one month after his sixteenth birthday. This has raised speculation that the delay in his transfer was calculated to avoid having to treat Khadr as a child upon his arrival in Cuba.<sup>127</sup>

The Optional Protocol to the CRC states that "[a]rmed 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 [eighteen] years."<sup>128</sup> Under these guidelines, Khadr was unlawfully recruited and his involvement in this conflict was therefore one of a victim to an international crime, not the perpetrator of one. Despite his apparent victimization, the Military Commission ruled that nothing in the Optional Protocol prohibited Khadr's prosecution by the tribunal.<sup>129</sup> Arguably, the court may have been relying on the notion that the victim of one crime can still be held responsible for another crime although this fails to account for the psychological effects that may have led

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126. See Children and Armed Conflict, *supra* note 39, at 40.

127. Happold, *supra* note 3, at 60 (citing a letter from Deputy Assistant Attorney General Thomas R. Lee stating that "[a]s a matter of policy, the Department of Defense has treated individuals assessed upon their arrival at Guantanamo Bay to be younger than age [sixteen] in a manner appropriate to their age and to the military mission" (citation omitted)).

128. OPAC, *supra* note 36, art. 4(1).

129. Ruling on Defense Motion for Dismissal Due to Lack of Jurisdiction Under the MCA in Regard to Juvenile Crimes of Child Soldier ¶ 16, *United States v. Khadr*, D-022 (Military Comm'n, Apr. 30, 2008), available at <http://www.defense.gov/news/d20080430Motion.pdf>.

Khadr to commit his crimes.

Regardless of the lack of any legal violations per se,<sup>130</sup> the United States ignored its responsibility to promote the rehabilitation and reintegration of Khadr into mainstream society. Khadr was a product of his environment. Described as a smart and polite child,<sup>131</sup> he was raised to believe that the survival of his family, friends, and way of life were at risk if he failed to participate in this conflict. To Khadr, his actions were at the height of morality. As previously discussed, a child's family and culture can dictate his morality. The prosecution of a youth for adhering to his genuine beliefs is cruel. It is impossible to know whether Khadr understood the consequences of his actions or had the requisite mens rea to stand trial. However, his prosecution did not aid in his understanding of the reasons why his actions contradicted common morality. Providing access to mental health facilities and schooling would have been more appropriate measures for the tribunal to take and these actions would have supported the U.S.' duty to ensure rehabilitation, not simply retribution, to any person under eighteen.

*B. The United States' Perspective on the Role of Minors in Combat*

The United States has continually issued rules, regulations, and Supreme Court opinions supporting the principle that individuals under eighteen-years of age should be treated differently than adults. This may result from a desire to protect the next generation of Americans or a belief that a child's mental state and moral development are not fully established until the age of eighteen. In either case, this raises the question as to what are the applicable standards for determining when a juvenile should be legally considered an adult.

In *Roper v. Simmons*, the United States Supreme Court applied international customary law as well as domestic law in holding that individuals under eighteen-years-old could not receive the death penalty.<sup>132</sup> In doing so, they demonstrated a consensus that children under eighteen must be treated differently than adults.<sup>133</sup> The Court set forth three differences that must be taken into account when evaluating a juvenile's mental state: (1) juveniles have a "lack of maturity and an underdeveloped sense of responsibility;"<sup>134</sup> (2) juveniles are more prone

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130. It should be noted that the Military Commission found that Congress did not limit this court's jurisdiction to a certain age. *Id.* ¶ 7.

131. Vincent, *supra* note 105.

132. 543 U.S. 551 (2005).

133. *Id.* at 577-78.

134. *Id.* at 569 (internal quotation marks and brackets omitted).

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to acquiesce to outside pressures;<sup>135</sup> and (3) juveniles have not yet fully formed their character or identity.<sup>136</sup> Regardless of whether these determinations are correct,<sup>137</sup> the Supreme Court has re-iterated these factors in subsequent case law<sup>138</sup> and therefore the criteria should be reflected in the actions and decisions of the federal courts and military tribunals.

As a party to the OPAC, the United States has followed its obligation to “take all feasible measures” to prevent individuals under the age of eighteen from taking a direct part in hostilities.<sup>139</sup> This Protocol allows voluntary recruitment of people under eighteen when, upon ratification by a State, that State sets forth a minimum age when it will permit this enlistment, as well as a list of safeguards to ensure that the recruitment is not forced or coerced.<sup>140</sup> The U.S. set the minimum age of voluntary recruitment at seventeen-years-old when it ratified the OPAC and listed a safeguard requiring a parent or guardian’s written consent if the individual was not eighteen-years-old.<sup>141</sup> This conformed with previously established U.S. law that allowed the voluntary recruitment of a seventeen-year-old with a guardian’s consent.<sup>142</sup>

Branches of the United States military have taken various steps to ensure compliance with the international and domestic law. The Army does not permit soldiers under eighteen to be assigned or deployed outside the U.S., Puerto Rico, or other U.S. territories.<sup>143</sup> The Navy prohibits enlisted soldiers under eighteen from receiving orders to report to an operational command and, when practical, they must remain in the training pipeline.<sup>144</sup> When impractical, the sailors are assigned to shore

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135. *Id.*

136. *Id.* at 570.

137. Despite concurring, Justices Stevens and Ginsburg rejected the argument that these three factors can be unilaterally applied without looking at the individual person and crime. *Roper*, 543 U.S. at 598-602.

138. See e.g. *Graham v. Florida*, 130 S. Ct. 2011, 2026 (2010); *Miller v. Alabama*, 132 S. Ct. 2455, 2465 (2012).

139. OPAC, *supra* note 36, art. 1.

140. *Id.* art. 3(2).

141. Optional Protocol on Children in Armed Conflict, (Dec. 23, 2002), Reservation/Declaration text by the United States to the Optional Protocol on Children in Armed Conflict, *available at* <http://www.icrc.org/ihl.nsf/NORM/CBD3F057EDC894954125693D0047EFE6?OpenDocument>.

142. 10 U.S.C. § 505(a) (2006).

143. U.S. DEP’T OF ARMY, REG. 614-30, ASSIGNMENTS, DETAILS, AND TRANSFERS: OVERSEAS SERVICE 6, 10 (Mar. 30, 2010).

144. U.S. DEP’T OF NAVY, NAVY MILITARY PERSONNEL MANUAL 1306-126 at 4 (Apr. 22, 2010).

duty.<sup>145</sup> The Air Force will not assign enlistees under eighteen to any imminent danger areas or hostile fire.<sup>146</sup> These precautionary measures indicate that the United States government believes it has a duty to protect individuals under eighteen and has placed a high value on the lives of children, even those on the cusp of the age of majority.

The U.S. has established foreign policy emphasizing the need for rehabilitation and reintegration of child soldiers in the community and preventing future use of child soldiers.<sup>147</sup> In the last fifteen years, it has supported multiple United Nations Security Council resolutions promoting this foreign policy goal.<sup>148</sup> In 2003, the U.S. donated \$4.5 million to a United Nations Children's Fund ("UNICEF") initiative to rehabilitate and reintegrate former child soldiers in Afghanistan.<sup>149</sup>

In prosecuting Khadr, the United States drew a contradictory line between its stance on helping to eliminate child soldiers and the prosecution of those soldiers if they were captured. The irony of prosecuting Khadr, a child soldier in Afghanistan, while supporting UNICEF's rehabilitation measures in the same country, cannot be ignored. By insisting on this prosecution, the U.S. established a position that it will take measures to eliminate the recruitment and harm of children during conflict, but will not excuse their actions once they have committed a crime against Americans. In doing so, the U.S. seemingly eliminated the basic domestic and international legal necessity of establishing the mens rea element of a crime, a state of mind that should be given particular attention in relation to minors, and instead placed an emphasis on retribution and the potentially unnecessary or excessive punishment of children.

Given the current lack of clarity regarding the minimum age of criminal responsibility under international law and the U.S.' decision to further complicate the matter by prosecuting the first child since World War II for a war crime, it is now critical that the United States adhere to its stated foreign policy and take an active role in helping to set an appropriate age for prosecution. The country cannot support the rehabilitation and future elimination of child soldiers, thereby recognizing their unique physical, mental, and moral state, while also

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145. *Id.*

146. U.S. DEP'T OF AIR FORCE, AIR FORCE INSTRUCTION, 36-2110, ¶ 2.13 (Sept. 22, 2009).

147. *The Omar Khadr Case: A Teenager Imprisoned at Guantanamo*, HUMAN RIGHTS WATCH, 7 (June 2007), available at <http://www.hrw.org/reports/2007/06/01/omar-khadr-case>.

148. *Id.*

149. *Id.* at 8-9.



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prosecuting these same individuals. The Supreme Court, various branches of the military, and the U.S.' ratification of the OPAC, all indicate a domestic consensus that children must be treated differently than adults. Armed conflict creates a fear of physical harm, violence, and death, leaving individuals little choice but to perpetuate these horrors when recruited. If, in times of conflict, the United States has decided that its military cannot expose soldiers under the age of eighteen to hostilities, this age should also act as a delineator in the U.S.' view of the minimum age of criminal responsibility for international crimes.

**IV. THE NEED FOR A CONSENSUS: INTERNATIONAL V. DOMESTIC LAW**

Most systems of criminal law require that a person have the necessary mens rea and actus reus in order to be held liable for their crime. These basic requirements are necessary in both domestic and international law. However, the international community has yet to reach a general consensus as to when a child is capable of attaining this requisite mental state while States have set the minimum age of criminal responsibility anywhere from seven to eighteen.<sup>150</sup> These large discrepancies create a system wherein children may be immune from prosecution in international and many domestic courts but can still face prosecution in other countries. This injustice invokes political, legal, and cultural questions.

Pursuant to customary international law, States can obtain jurisdiction over alleged criminal perpetrators in several ways. Traditionally, States have asserted jurisdiction based on the principles of territoriality,<sup>151</sup> nationality,<sup>152</sup> passive nationality,<sup>153</sup> or protection.<sup>154</sup> However, a considerable number of States now also apply universal

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150. For example, India and Switzerland have set the age of criminal responsibility at seven-years-old while States such as Guinea and Venezuela have set the age at eighteen. RIGHT TO EDUC. PROJECT, *At What Age...? Comparative Table*, <http://www.right-to-education.org/node/279> (last visited Oct. 16, 2012).

151. This principle allows the State in which the crime is either commenced or committed to claim jurisdiction. IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 301 (7th ed. 2008).

152. Nationality is generally recognized as a basis for jurisdiction for extra-territorial crimes and is based on citizenship, evidence of allegiance, and residency. *Id.* at 303.

153. This is a controversial principle that allows States to exercise jurisdiction over aliens for acts committed against their nationals while abroad. There is significant disagreement as to the lawfulness of this principle. *Id.* at 304; *see also* CRYER ET AL., *supra* note 89, at 49.

154. The protective or security principle allows States to claim jurisdiction over acts done abroad that affect the national security of that State. BROWNLIE, *supra* note 151, at 304-5.

jurisdiction, allowing the prosecution of aliens for certain crimes as a matter of international public policy where the nationality State refuses to try the person or the individual is not subject to the jurisdiction of any State.<sup>155</sup>

States' assertion of jurisdiction over an alleged offender based on the concept of universal jurisdiction is a controversial international principle.<sup>156</sup> Through multilateral treaties, certain countries choose to invoke universal jurisdiction by incorporating international criminal offenses into their domestic law.<sup>157</sup> The four Geneva Conventions, updated by the 1977 Additional Protocols and multiple international conventions, bind the courts of any contracting State to exercise jurisdiction over crimes committed on their territory or abroad, when the alleged offender is within their State.<sup>158</sup> If they do not prosecute, the State "must surrender [the suspect] to any other State concerned . . . or, as in the case of the four Geneva Conventions, they must bring the alleged offender to trial, or otherwise hand him over to a State concerned."<sup>159</sup>

A State that does not prosecute a person accused of violating international criminal law may itself be in violation of international law.<sup>160</sup> Given that international law obligates States to prosecute individuals for certain violations of the laws of war, a mandatory minimum age to establish responsibility is crucial. If the essence of creating international criminal law and recognizing various forms of jurisdiction in both domestic and international courts is to promote the best interests of the international community and international public policy, then any lack of uniformity across courts is inconsistent with these goals. Conflicts often extend beyond the boundaries of one State. Allowing the prosecution of children in one territory when they would not be eligible for indictment in another State involved in the conflict, may promote the ideals of justice in the country claiming jurisdiction, but may fail to take into account equality or the overarching goals of justice.

Commentary in the Beijing Rules recommends that in addition to history and culture, the age of criminal responsibility should be tied to other social rights and responsibilities.<sup>161</sup> Consequently, barring a

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155. *Id.* at 305.

156. CRYER ET AL., *supra* note 89, at 50.

157. CASSESE, *supra* note 10, at 9.

158. *Id.*

159. *Id.*

160. Grossman, *supra* note 100, at 335.

161. Beijing Rules, *supra* note 57, r. 4 cmt.

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uniform domestic age of criminal responsibility in all States, when establishing the minimum age of accountability, States should adhere to their other social norms. Most countries have laws governing the minimum age of marriage, sexual consent, driving, voting, and enlistment in the State armed forces. Allowing individuals to legally take part in these activities indicates the individual State has recognized an age at which it believes the child has the sufficient mental development to understand and safely undertake such responsibilities. These activities bear no significant difference from a child's ability to participate in an armed conflict or take responsibility for his or her actions during hostilities.

There is no doubt that the age assigned to these aforementioned rights are established through arbitrary constructs since children mentally develop at different speeds. Given the Beijing Rules have been criticized for putting forth subjective factors such as emotional and intellectual maturity instead of advocating for a uniform, objective, minimum age, it is illogical to judge a child's accountability based on factors other than those already accepted and legally implemented by the State. If countries are willing to impose arbitrary age limits on other basic rights, these limits must also be the starting point when determining the minimum age of criminal responsibility of any child, despite any arbitrariness.

Due to the overlap between international and domestic criminal law,<sup>162</sup> and the codification of certain international crimes into domestic law, the fact that international tribunals have not been willing to prosecute children under eighteen is not surprising. Broadly, this demonstrates a respect for State sovereignty and law. However, it is also indicative of the international community's acute awareness of the political risks involved in any indictment of this kind and its hesitancy to create discord among various countries. Unfortunately, the results of this lack of action are too severe to ignore. By allowing States to allege jurisdiction over children for a crime which, if committed in another country, they would not be held liable, promotes disparity among the prosecution of minors based solely on political and cultural beliefs.<sup>163</sup> This discrepancy also creates a situation wherein two children of the same age, commit the same crime, in the same country, but one escapes prosecution if he or she leaves the State.

While an international agreement on a minimum age of criminal

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162. Happold, *supra* note 3, at 71.

163. For example, Khadr would not have been prosecuted in Sierra Leone, regardless of his combat status or the number of soldiers he killed.

responsibility would be a large step towards ending inconsistencies between international judicial systems, it does not prevent States with jurisdictional claims from prosecuting juveniles within their domestic courts. Consequently, reform must also occur on a domestic level. Treaties and conventions such as Geneva, the Additional Protocols, and the CRC require minimal dedication to reformation from their member States. Arguably, to demand more may conflict with the principles of State sovereignty. However, if the international community is able to reach a threshold age, subsequent years of application may slowly allow this age to develop into customary international law. This extended process is far from ideal and would fail to protect children for a number of years. Nonetheless, with the continual participation of child soldiers in conflicts around the world, a long term solution may be the only possible remedy.

#### CONCLUSION

Determining an age at which a child should be held criminally responsible for his or her actions during an armed conflict is complicated. There is no correct answer. Culture, tradition, and politics ensure that an internationally agreed upon age may never be reached, and, if it is, will be necessarily arbitrary. No two children are the same.

Granting impunity to any person defined as a child under the CRC raises numerous problems. If children believe they are immune from legal punishment, they are more likely to commit crimes and adults may use them for the most heinous acts in an effort to escape liability themselves. Allowing immunity helps perpetuate these crimes, undermining the credibility of the justice system and disregarding the pain and needs of the victims. Impunity also ignores the determinations of individual countries or tribes regarding when an individual becomes an adult.

A final possible threshold issue presents an additional problem. Scholars cannot agree if children who volunteer to join armed forces, as opposed to those who are illegally or forcibly recruited, should differ in a court of law. Considerations such as poverty, hunger, and safety may or may not be taken into account. However, the CRC's recognition that children should be free to make their own decisions and freely express themselves should be respected. As a child grows closer to eighteen, he or she is more likely to be making a rational choice, on par with one made by an adult. A court must therefore look to age and culture but also consider whether the recruitment was voluntary and forced. How can a person of seventeen-years-old not be held to the same standards as an eighteen-year-old if both make the same voluntary decision? These

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issues, as well as the suggestion of immunizing all individuals under the age of eighteen from any prosecution for international crimes, illustrate the necessity of judging each case on the specific facts and granting significant prosecutorial discretion in an international tribunal when a child is a potential defendant.

International treaties and customary law and practice cannot be ignored. Any child under eighteen should be treated with the primary goal of rehabilitation and reintegration into society. However, this does not exclude the possibility that prosecution of a minor may be lawful, justified, and in society's best interest. The prescribed sentence resulting from prosecution and the demand for accountability can itself be a series of rehabilitative measures instead of imprisonment. Truth and Reconciliation Commissions, community traditions, reunification with family, and education all help the child soldiers accept responsibility and begin healing. Nonetheless, in certain cases, other actions may be necessary. Even when children are considered to be primarily victims, it is imperative that their needs do not supplant those of the other victims of the conflict.