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BABES WITH ARMS: INTERNATIONAL LAW AND CHILD SOLDIERS

TIMOTHY WEBSTER*

I. INTRODUCTION

Among many recent developments in international criminal law, the prohibition on child soldiers stands out for its universality and speed of implementation. Barely a crime thirty years ago, the ban on recruiting children took root in the 1990s and has since blossomed into over a dozen indictments in contemporary international criminal courts. Though hundreds of thousands of children still fight in wars across the globe, the age of impunity has finally passed for those who use and recruit child soldiers.

This Article examines the advances in preventing children from participating in armed conflict. Since the Convention on the Rights of the Child (CRC) entered into force in 1990, the world's attention has increasingly focused on the plight, problems, and protection of children. In the past decade, numerous legal instruments have evinced worldwide concern for the rights and safety of children. The evolution of treaties, protocols, statutes, and case law attests to both the achievements and limits of an engaged international community. Until sharper teeth are sunk into enforcement—tougher sentences at international criminal courts, more assertive countermeasures by the international community, or implementation of *any* of the United Nations Security Council's threatened sanctions—it is unlikely that children serving in armies, militias, or other rebel groups will lay down their guns.

Part II of this Article outlines the global phenomenon of child soldiery. Current estimates suggest that more than 300,000 chil-

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dren are involved in armed conflicts throughout the world.¹ Though West Africa and the Great Lakes region receive the most attention for the use of child soldiers, the problem is endemic to Colombia, Nepal, and several Southeast Asian states, such as Burma, Cambodia, and the Philippines. Indeed, even the United States has been criticized for its recent efforts to attract young and impressionable teenagers to join its armed forces. The problem plagues boys and girls, but it disproportionately harms girls, who often stomach the additional indignity of sexual slavery and forced marriage to the leaders of armed forces.

Part III examines the international legal framework recently drawn up to ban child soldiery. A brief chronological listing includes the First and Second Additional Protocols to the Geneva Conventions (AP I and AP II); the 1989 CRC; the 1997 Cape Town Principles, which enumerate legal principles and social programs for child soldiers; the 1998 Rome Statute of the International Criminal Court, which criminalized the enlistment of children into armed groups; and the 2002 Optional Protocol to the CRC (OP), which encouraged violating states to crack down on the practice.

Part IV investigates the contributions made by recent international criminal courts in the proscription process. Both the Special Court for Sierra Leone (SCSL) and the International Criminal Court (ICC) have charged numerous people with recruiting child soldiers. The ICC has taken an especially aggressive stance in this regard. In its most recent indictment, the ICC charged the Congolese rebel leader Thomas Lubanga Dyilo with only one crime: the use of children in hostilities, a violation of the Rome Statute.² The jurisprudence of these courts could provide the necessary groundwork to instill this relatively new international norm into the socio-legal fabric of key African regions, and the world more generally.

Part V surveys the United Nations' various attempts to solve the problem of child soldiers. The United Nations has set up working groups to draw up the legal framework, publicized and condemned this form of abuse, and even passed Security Council resolutions against the use of child soldiers. While the United Nations has adequately fulfilled its expected normative role, it has not yet

1. See Human Rights Watch, *Children's Rights: Stop the Use of Child Soldiers!*, <http://www.hrw.org/campaigns/crp/index.htm> (last visited Jan. 21, 2006).

2. Rome Statute for the International Criminal Court, Nov. 10, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute], available at <http://www.un.org/law/icc/statute/rome.htm>.

devoted the resources necessary to end the practice. Despite the occasional threat, the Security Council has effectively deferred to the ICC and SCSL on the issue of enforcement.

The Article concludes with observations about the gestation and crystallization of international law, and its ability to grapple with transcontinental problems. At this point, the most one can say is that the era of absolute impunity has ended for those who recruit child soldiers. When the practice will cease, who will be punished, and how many more children will be affected remain questions for the international community to ponder.

II. THE WORLD OF CHILD SOLDIERY

Although the drastic spike in child soldiers globally has captured the attention of many, the problem is hardly recent. Tens of thousands participated in the “Children’s Crusade” of 1212, and Napoleon had divisions of young boys in his army.³ During World War II, Nazis employed child fighters to carry out underground missions on a large scale.⁴ After the war, the British established “Small Boy Units” in various colonies, including Sierra Leone.⁵ By the 1980s, national armies and non-national armed groups all over the world freely used and recruited children; Iran, Cambodia, and Colombia are a few of many examples.⁶ The Iranian Minister of Education claimed that 150,000 children “volunteered” to fight for the Iranian army, 60% of all recruits.⁷ Due to the rapid expansion of this practice after the Cold War, the last fifteen years have come to be known as the “era of the child soldier.”⁸

A working definition of the term “child soldier” will help ground the following discussion. Under current international law, a

3. AFUA TWUM-DANSO, *AFRICA’S YOUNG SOLDIERS: THE CO-OPTION OF CHILDHOOD* 17 (2003).

4. See Sarah L. Wells, *Crimes Against Children in Armed Conflict Situations: Application and Limits of International Humanitarian Law*, 12 TUL. J. INT’L & COMP. L. 287, 290 (2004).

5. In an unfortunate case of history repeating itself, many military leaders who used child soldiers in Sierra Leone during the 1990s had themselves been recruited as young teens into the British colonial forces in the 1950s. The term “Small Boy Units,” used in Sierra Leone in the 1990s to describe platoons comprised of children as young as ten, had been coined by the British half a century earlier. See William A. Schabas, *Conjoined Twins of Transitional Justice? The Sierra Leone Truth and Reconciliation Committee and the Special Court*, 2 J. INT’L CRIM. JUST. 1082, 1087 (2004).

6. See, e.g., GERALDINE VAN BUEREN, *INTERNATIONAL LAW ON THE RIGHTS OF THE CHILD* 336 (1999); GEORGE KENT, *CHILDREN IN THE INTERNATIONAL POLITICAL ECONOMY* 85 (1995).

7. See KENT, *supra* note 6, at 85.

8. TWUM-DANSO, *supra* note 3, at 17.

"child" is generally defined as anyone under the age of eighteen.⁹ As for "soldier," it is important to remember that the concept encompasses more than machine-gun toting boys.¹⁰ Rather, the term "child soldier" has also been used to encompass "any person under the age of eighteen who is or has been associated with any kind of regular or irregular armed group, including those who serve as porters, spies, cooks or messengers, and including girls recruited for sexual purposes and many others."¹¹ So even if the term "child soldier" evokes an image of a heavily-armed boy, it also includes girls and unarmed children carrying out various tasks behind the front lines.

A. *The Growing Prevalence of Child Soldiers*

The issue of child soldiers came to the fore of international consciousness with Graça Machel's stunning report, "Impact of Armed Conflict on Children."¹² After the U.N. General Assembly adopted Resolution 48/157,¹³ which sought to protect children from armed conflict, it appointed Ms. Machel to survey comprehensively this social pandemic. Her report outlines the scope of child soldiery, the methods of recruitment, and the reasons children enlist.¹⁴ It has become an oft-cited touchstone for subsequent scholarship carried out by nongovernmental organizations (NGOs), U.N. bodies, and academics. By combing through the voluminous, though incomplete, academic literature, one catches a daunting glimpse of the world of child soldiery.

9. See Convention on the Rights of the Child art. 1, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC] ("For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.").

10. See, e.g., NEW YORK REVIEW OF BOOKS, Dec. 1, 2005, at 1 (featuring a fourteen-year-old Sierra Leonean boy wielding a machine gun next to an article that reviews three recent books about child soldiers).

11. Christine Knudsen, *The Problem of Re-Acclimating Child Soldiers into Society Assuming Peacekeeping Is Successful: Demobilization and Reintegration During an Ongoing Conflict*, 37 CORNELL INT'L L.J. 497, 497 (2004). Knudsen notes that the more inclusive phrase "children associated with fighting forces" has gained currency in discussions of child soldiers. *Id.*

12. The Secretary-General, *Promotion and Protection of the Rights of Children: Impact of Armed Conflict on Children*, U.N. Doc. A/51/306 (Aug. 26, 1996) [hereinafter *Machel Report*], available at http://www.unicef.org/graca/a51-306_en.pdf.

13. G.A. Res. 48/157, U.N. Doc. A/RES/48/157 (Mar. 7, 1994).

14. See generally *Machel Report*, *supra* note 12. The report has exerted considerable influence on debates over child soldiers both in the United Nations and in the international community. See Marsha L. Hackenberg, *Can the Optional Protocol for the Convention on the Rights of the Child Protect the Ugandan Child Soldier?*, 10 IND. INT'L & COMP. L. REV. 417, 420 n.9 (2000).

The most recent estimates suggest that between 250,000 and 500,000 children engage in armed conflict around the globe, with some 300,000 actively engaged in combat.¹⁵ These numbers are “deliberately vague and conservative,” however, because “no one keeps real statistics” on child soldiers.¹⁶ While the number of troops in national forces is readily ascertainable, no one knows how many children are presently engaged in armed conflict.¹⁷

Of the estimated 300,000 children actively engaged in combat, some 120,000 are thought to be in Africa.¹⁸ Though this figure represents a sizeable proportion, it also demonstrates that the problem is far more widespread than media reports and popular images might intimate—this is neither a solely African issue¹⁹ nor a “third world” issue.²⁰

Rather, the problem has spread to the farthest corners of the globe. In the past decade, children serving in national armies or rebel factions have actively participated in wars on five continents; they have been recruited on six continents.²¹ National govern-

15. Compare Olara A. Otunnu, *Ending Wars Against Children*, INT’L HERALD TRIB., Aug. 6, 2005, at 4 (putting the number at 250,000), with Franklyn Bai Kargbo, *International Peacekeeping and Child Soldiers: Problems of Security and Rebuilding*, 37 CORNELL INT’L L.J. 485, 487 (2004) (putting the number at 500,000 children, with 300,000 of them engaged in active combat). The figure of 300,000 children engaged in active combat is cited in numerous sources. See, e.g., TWUM-DANSO, *supra* note 3, at 9.

16. SAVE THE CHILDREN, CHILDREN’S RIGHTS: REALITY OR RHETORIC? 53 (1999).

17. UNICEF, CHILDREN CAUGHT UP IN CONFLICT 41 (2005).

18. Africa Recovery, *The Road From Soldier Back to Child*, 15 AFR. RECOVERY 3, 10 (2001), available at <http://www.un.org/ecosocdev/geninfo/afrec/voll5no3/153chil2.htm>.

19. The young African boy, AK-47 tucked nonchalantly under his arm, has become the visual cliché in the image repertoire of child soldiery. Yet, as scholars have repeatedly noted, this image merely distorts the global proportions of this phenomenon. See TWUM-DANSO, *supra* note 3, at 19–20 (discussing numerous countries where children have been used in armed conflicts). Moreover, child soldiery is not a time-honored African tradition but a “wholly new phenomenon which promises to change radically the nature of warfare, with profound consequences for the ability to resolve conflicts and demilitarize the continent.” Alex De Waal, *Contemporary Warfare in Africa*, in 1 RESTRUCTURING THE GLOBAL MILITARY SECTOR, NEW WARS 319 (Mary Kaldor & Basker Vashee eds., 1997).

20. See, e.g., Ernst M.H. Hirsch Ballin, *Children as World Citizens*, in GLOBALIZATION OF CHILD LAW: THE ROLE OF THE HAGUE CONVENTIONS 10 (Sharon Detrick & Paul Vlaardingerbroek eds., 1999) (“This problem [of child soldiers] has to do with the population growth under poor economic circumstances in third world countries, which considerably lowers a child’s economic value.”). It is certainly true that the majority of child soldiers hail from the developing world, yet the practice of recruiting and enlisting children is common in the United States, United Kingdom, and Russia. See COALITION TO STOP THE USE OF CHILD SOLDIERS, CHILD SOLDIERS: GLOBAL REPORT 152–54, 156, 266–70, 285–88 (2004) [hereinafter GLOBAL REPORT].

21. See SAVE THE CHILDREN, *supra* note 16, at 45 (showing a map of the world that highlights countries where children have either served in combat or are recruited into armed groups).

ments that send children to the frontlines include the Democratic Republic of Congo (DRC), Rwanda, Sudan,²² and the United States.²³ Other governments, such as Colombia and Zimbabwe, vicariously engage in the practice by supporting militias and local armed groups that employ child soldiers.²⁴ Even though information about children in national armed forces is difficult to obtain, Myanmar—with over 70,000 recruits—is reputed to have the largest number of child soldiers serving in its national military.²⁵

More difficult to monitor, influence, or negotiate with, however, are scores of unofficial factions that have sprung up in unstable regions in South America, Africa, and Southeast Asia. To understand these “rebels” and “armed groups,” some background into their social and historical context is in order.

These groups frequently engage in what scholars call “new wars.” Traditionally, centralized states with national armies waged war for political and territorial motives.²⁶ “New wars,” by contrast, arise in a context characterized by “the fragmentation of armies and police forces; the growth of organized crime and paramilitary groups; [and] the ready availability of weapons and mercenaries.”²⁷ In such situations, a state army may face off against an opposition group, or two rebel groups may face off against each other. The fighting, however, is usually carried out among civilians, who frequently find themselves the targets of horrific violence.²⁸ In the “new wars,” over ninety percent of the casualties are civilian, rendering the environment particularly dangerous for children.²⁹ Such conflicts have festered for many years in Western Africa (Liberia, Côte d’Ivoire, Guinea, Sierra Leone), Central Africa

22. GLOBAL REPORT, *supra* note 20, at 13.

23. The Director of Military Personnel Policy of the U.S. Army told Human Rights Watch (HRW) that scores of seventeen-year-old soldiers served “in all capacities” in Afghanistan in 2004. The U.S. Marines and Air Force did not respond to HRW requests for information about child soldiers, leaving their practices open to speculation. *See id.* at 153.

24. *Id.* at 13.

25. COALITION TO STOP THE USE OF CHILD SOLDIERS, CHILD SOLDIER USE 2003: A BRIEFING FOR THE 4TH UNITED NATIONS SECURITY COUNCIL OPEN DEBATE ON CHILDREN AND ARMED CONFLICT 27 (2004).

26. *See generally* MARY KALDOR, NEW & OLD WARS: ORGANIZED VIOLENCE IN A GLOBAL ERA 13–17 (1999).

27. Mary Kaldor, *Introduction to 1 RESTRUCTURING THE GLOBAL MILITARY SECTOR*, *supra* note 19, at 11.

28. Rachel Brett, *Child Soldiers*, in IN THE FIRING LINE: WAR AND CHILDREN’S RIGHTS 59 (1999). Brett further notes that this kind of war has “been instrumental in producing the child soldier as a widespread modern phenomenon.” *Id.* at 58.

29. *Machel Report*, *supra* note 12, ¶ 24.

(Burundi, the DRC, Rwanda, Uganda), and in states such as Sri Lanka, Indonesia, and Colombia.³⁰

How do prolonged, low-intensity conflicts increase the risks of child recruitment? First, these conflicts separate children from their parents, either permanently (by making them orphans) or temporarily (by leaving children to fend for themselves). Without support or supervision, children—often correctly—view life in a militia or national armed force as a safer alternative to begging on the street. In the words of one Sierra Leonean teenager, “You had to collaborate with the military in order to breathe.”³¹

Second, growing up in a war-torn area increases the likelihood that one will become a child soldier.³² Having faced years of destruction and disruption, these areas lack schools or other educational facilities where children may learn skills other than soldiery.³³ War also marginalizes and impoverishes people caught in its crossfire; several scholars have noted the inverse proportion between socio-economic status and the probability of becoming a child soldier.³⁴ As sixteen of the world’s poorest twenty countries have suffered civil war in the past fifteen years,³⁵ many disenfranchised children have grown up in the context of war. Past experience indicates that many will go on to replicate the violence they experienced as children.

B. *Recruitment of Child Soldiers*

A variety of factors contributes to the vast numbers of children in combat. This section examines the problem first from a recruiter’s perspective, focusing on why youths are preferable in armed conflict. Next, this section investigates the reasons why children join armed groups, and why they are particularly well suited for combat.

1. The Recruiter’s Perspective

A prominent factor in the recruitment of children lies in their plentitude. Years, if not decades, of conflict in countries such as Afghanistan,³⁶ Ethiopia, and Sudan³⁷ have decimated the available

30. See generally GLOBAL REPORT, *supra* note 20.

31. See, e.g., Africa Recovery, *supra* note 18, at 10 (describing the decision to join a militia made by a thirteen-year-old in Sierra Leone whose family was killed by rebel forces).

32. Brett, *supra* note 28, at 58.

33. *Id.*

34. See *id.*; De Waal, *supra* note 19, at 321.

35. CHILDREN CAUGHT UP IN CONFLICT, *supra* note 17, at 40–41.

36. See Machel Report, *supra* note 12, ¶ 40.

37. See De Waal, *supra* note 19, at 320.

pool of adult soldiers. Faced with shortages of "manpower," militias and national armed forces turn to younger sources of blood to fill the ranks.

Recruiters favor children for more insidious reasons as well. First, their naiveté attracts those who seek to sculpt impressionable minds, and teach them to commit horrific acts. As one scholar explained, children

lack inhibitions and a sense of proportion, and so can be persuaded to carry out acts of extreme violence. They have no responsibilities at home that may inhibit their commitment to fighting. They are less prone to contemplate desertion and a return to a civilian life when bored—as adult soldiers so often are. Child soldiers are particularly terrifying when manning roadblocks because they combine total, arbitrary power with a lack of judgment—they may shoot people for trivial reasons³⁸

Indeed, this recklessness is frequently amplified by supplying children with alcohol, tranquilizers, gunpowder, marijuana, and other drugs.³⁹

Second, armed forces favor children because their physical features may be profitably exploited on battlegrounds. As a young member of the Mozambican National Resistance (RENAMO) clarified, children both "have more stamina" and "are better at surviving in the bush" than adults.⁴⁰ Moreover, their size, weight, and agility make them better-suited for certain activities, such as planting and detecting landmines⁴¹ and reclaiming weapons from corpses.⁴²

Third, in this age of light, cheap, and advanced technology, small hands can handle large arms. According to Machel, a ten-year-old boy wields sufficient strength to strip and reassemble an AK-47.⁴³ Additionally, that boy easily could buy one for the price of a chicken in Uganda or a goat in northern Kenya.⁴⁴ This has led one observer to suggest that gun manufacturers could be held liable for perpetuating wars fought by children.⁴⁵

38. *Id.*

39. Brett, *supra* note 28, at 64. One Colombian child soldier reportedly drank milk mixed with gunpowder to "stay energetic." *See id.*

40. Lisa Hughes, *Can International Law Protect Child Soldiers?*, 12 PEACE REV. 399, 402 (2000).

41. SAVE THE CHILDREN, *supra* note 16, at 50.

42. Brett, *supra* note 28, at 64.

43. *Machel Report*, *supra* note 12, ¶ 27.

44. *Id.*

45. *See* Nancy Morisseau, Note, *Seen But Not Heard: Child Soldiers Suing Gun Manufacturers Under the Alien Tort Claims Act*, 89 CORNELL L. REV. 1263, 1300–02 (2004).

Other scholars believe that armed groups place children on the frontline so that adults will take pity and not fire on them.⁴⁶ Of course, this practice is questionable in its assumptions and tragic in its results. Lacking a sense of proportion or fear of death, a child on the frontline will not hesitate to shoot when told to do so; over time, as the child inures to brutality, no such orders are necessary.⁴⁷

2. The Child's Perspective

What is in it for the children? Scholars cite a panoply of reasons that children join the armed forces. Ilene Cohn states that child soldiers take up arms "to survive, to seek vengeance, to protect their families, to emulate their peers, to forge their identities as warriors or heroes, to overcome feelings of helplessness, or for lack of a better alternative."⁴⁸

This last reason—lack of a better alternative—is particularly important in understanding the "voluntary" recruitment of many children. Rather than being a purely voluntary act, the decision to enlist often results from a convergence of economic, cultural, social, and political pressures that pushes children into the line of fire. Armies usually will provide a child's basic sustenance (food, clothing, medicine) and may even pay parents directly for the use of their children.⁴⁹ As noted above, for orphaned children, the need for protection renders the militia a more palatable option to life on some of the world's toughest streets.⁵⁰ Yet in most cases, child "volunteers" simply seek a less precarious alternative to an otherwise very dangerous existence.

III. THE INTERNATIONAL LEGAL FRAMEWORK

The proliferation of child soldiers has been matched only by the explosion of treaties outlawing the practice. This section examines the international legal framework and the background debates that engendered it. The prohibition of child soldiery was on the map of international concern in the late 1970s, appearing in a

46. Hughes, *supra* note 40, at 402.

47. See Ishmael Beah, *The Making and Unmaking of a Child Soldier: One Boy's Tortuous Entanglement in an African Civil War*, N.Y. TIMES MAG., Jan. 14, 2007, 36, at 40 ("The idea of death didn't cross my mind, and killing had become as easy as drinking water. After that first killing, my mind had stopped making remorseful records, or so it seemed.").

48. Ilene Cohn, *The Protection of Children and the Quest for Truth and Justice in Sierra Leone*, 55 J. INT'L AFF. 1, 8 (2001).

49. GRAÇA MACHEL, *THE IMPACT OF WAR ON CHILDREN* 11 (2001).

50. See *id.*

vaguely worded provision of the Additional Protocols to the Geneva Conventions. Since then—and concurrent with the global attention devoted to children's rights—international law has gradually hardened the interdiction against child soldiers. Presently, the prohibition is firmly entrenched in various bodies of law: international humanitarian law, international human rights law, and international criminal law.

A. *Additional Protocols to the Geneva Conventions*

Initial condemnations of the practice of child soldiery can be found in both Additional Protocols to the Geneva Conventions (AP I and AP II).⁵¹ While the original Geneva Conventions viewed children as persons requiring special protection,⁵² the subsequent Additional Protocols significantly altered, or perhaps *updated*, the notion of a child's needs. Article 77(2) of AP I provides:

The Parties to the conflict shall *take all feasible measures* in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, the Parties to the conflict *shall endeavour* to give priority to those who are oldest.⁵³

Though this provision was a significant initial step, its fragility should not be overlooked. It only requires parties to “take all feasible measures” and “endeavour,” relatively low levels of commitment in comparison with other obligations imposed by the Additional Protocols.⁵⁴ As one might expect in an international

51. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 77(2), *opened for signature* Dec. 12 1977, 1125 U.N.T.S. 3 [hereinafter AP I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 4(3)(c), *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 609 [hereinafter AP II]. Additional Protocol I (AP I) pertains to international conflict while Additional Protocol II (AP II) pertains to internal conflict.

52. See Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 14, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (calling on high contracting parties to create “safety zones” to protect “children under fifteen”); *id.* art. 24 (obliging parties to take “necessary measures to ensure that children under fifteen . . . are not left to their own resources”).

53. AP I, *supra* note 51, art. 77(2) (emphasis added).

54. Compare *id.*, with *id.* art. 11(1).

The physical and mental health . . . of persons who are in the power of the adverse Party . . . shall not be endangered by any unjustified act or omission. Accordingly, it is prohibited to subject the persons described in this Article to any medical procedure which is not indicated by the state of health of the person concerned

treaty, this language resulted from a compromise between numerous constituencies. Countries such as Brazil, Uruguay, Venezuela, and the Holy See argued that the minimum age of recruitment should be eighteen.⁵⁵ In opposition, nations committed to recruiting children under eighteen into their national armed forces—including Canada, West Germany, and the United Kingdom—insisted that fifteen- and sixteen-year-olds were better prepared to engage in combat than older men.⁵⁶

The resulting provision offers very limited protection to children under fifteen and even less to those under eighteen. In fact, AP I clearly envisions that parties will continue to recruit children under fifteen. It extends “special protection” to children under fifteen who “take a direct part in hostilities and fall into the power of an adverse Party”⁵⁷ Children “detained or interned for reasons related to the armed conflict” must be housed separately from adults.⁵⁸ To be sure, providing for violations of the law of war is preferable to *not* providing for such violations; giving a combatant state the discretion to make spontaneous decisions about captured children would only lead to further acts of inhumanity.

Though putting the issue of child soldiery on the map of international concern, the Additional Protocols do not take a particularly strong stance against recruiting children. Viewed most favorably, they can be credited with (1) starting the discussion of child soldiers; (2) providing sparse and largely aspirational protection under international humanitarian law; and (3) laying a foundation for age limits, an issue that rends the international community up to the present day.

B. *Convention on the Rights of the Child*

The 1989 U.N. Convention on the Rights of the Child (CRC) strongly condemned the recruitment of child soldiers.⁵⁹ The most quickly and widely ratified international treaty in history,⁶⁰ it took less than a year to enter into force and won nearly global accept-

Id. art. 11(1). The Additional Protocols thus lay out both prohibitions (complete bans) and exhortations (strong expressions of disapproval), but only give the latter protection to child soldiers.

55. See GERALDINE VAN BUEREN, *THE INTERNATIONAL LAW ON THE RIGHTS OF THE CHILD* 337 (1999).

56. See *id.*

57. AP I, *supra* note 45, art. 77(3).

58. *Id.* art. 77(4).

59. CRC, *supra* note 9, art. 38.

60. See P.W. SINGER, *CHILDREN AT WAR* 141 (2005).

ance in less than a decade.⁶¹ Given the universality of the CRC, one might think that the age of majority it established—eighteen years—has attained global status and that anyone under eighteen qualifies as a child.⁶² The CRC, however, adopts a more flexible approach to age in the realm of child soldiery.

The murky commitments enshrined in Article 38 of the CRC sound familiar:

1. States Parties [to the CRC] undertake to respect and to ensure respect for rules of international humanitarian law applicable *to them* in armed conflicts which are relevant to the child.
2. States Parties shall take all *feasible measures* to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.
3. States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall *endeavour* to give priority to those who are oldest⁶³

Though the level of commitment in the CRC largely mirrors AP I, the three provisions protecting child soldiers in the CRC were the fruit of protracted negotiations by its drafters. Even basic definitional material of paragraph 1 was vigorously debated; including “to them” after “applicable” came at the insistence of the U.S. representative, who did not want the United States to be bound by conventions to which it was not a party.⁶⁴ This would not be the only time the United States got its way.

More pressing matters in the drafting process of the CRC included age limits and the level of state involvement. Countries such as Venezuela and Sweden aimed to increase the age limit to eighteen.⁶⁵ They met strong opposition, however, from the countries advocating an age limit of only fifteen: Bangladesh, Canada, the United Kingdom, the United States, and the U.S.S.R.⁶⁶ During

61. See Yuri Kolosov, *The Rights of the Child*, in HUMAN RIGHTS: CONCEPT AND STANDARDS 260 (Janusz Symonides ed., 2000). Only the United States and Somalia have not ratified the Convention on the Rights of the Child (CRC). OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS (UNHCHR), RATIFICATIONS & RESERVATIONS TO THE CONVENTION ON THE RIGHTS OF THE CHILD, <http://www.ohchr.org/english/countries/ratification/11.htm> (last visited Oct. 23, 2006).

62. See CRC, *supra* note 9, art. 1.

63. *Id.* art. 38 (emphasis added).

64. See SHARON DETRICK, A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD 650 (1999).

65. *Id.* at 652.

66. See *id.* at 652–54; KENT, *supra* note 6, at 94–95 (noting opposition from the United Kingdom and several Arab states).

the negotiations, the United States essentially froze discussion on raising the age limit by insisting that the CRC reflect “existing international law.”⁶⁷ In other words, the United States urged that the CRC—though a human rights treaty—should aim no higher than the drafters of the Additional Protocols had when they defined international humanitarian law over a decade before.

After setting the age limit at fifteen, the United States and the U.S.S.R. wanted to minimize the burdens placed on states to protect children aged fifteen to eighteen.⁶⁸ One proposal, supported by dozens of countries, would have (1) unequivocally *proscribed* children under fifteen from directly participating in war, and (2) required states to “endeavor to prevent” children aged fifteen to eighteen from taking part in hostilities.⁶⁹ The United States and the U.S.S.R. would not budge, however, and succeeded in setting a lower level of protection⁷⁰ than many other states would have preferred.⁷¹ That the United States, almost two decades later, refuses to ratify the CRC makes one wonder if the placatory efforts were worth it.

C. *The Rome Statute*

In many respects, the Rome Statute establishing the International Criminal Court marked a great leap forward in the international legal protection of children: (1) intentional attacks on educational institutions became war crimes; (2) children under eighteen are exempted from the court’s prosecution; (3) special measures for taking evidence from children are part of the court’s procedural machinery; and, most importantly for these purposes, (4) the conscription of children under age fifteen into armed groups or national armed forces became a war crime.⁷²

The Rome Statute, which entered into force in 2002, bans both “conscripting or enlisting children under the age of fifteen”⁷³ and

67. See DETRICK, *supra* note 64, at 654.

68. See KENT, *supra* note 6, at 95.

69. See DETRICK, *supra* note 64, at 653–55.

70. *Id.* (noting that Article 38 ultimately “reflected the maximum level of protection on which a consensus could be reached”).

71. See *id.* (describing Dutch regret that paragraph two had been adopted despite widespread opposition).

72. An excellent summary of these developments can be found on the website of Human Rights Watch. See HUMAN RIGHTS WATCH, PROMISES BROKEN: AN ASSESSMENT OF CHILDREN’S RIGHTS ON THE 10TH ANNIVERSARY OF THE CONVENTION ON THE RIGHTS OF THE CHILD (1999), <http://www.hrw.org/campaigns/crp/promises/>.

73. Rome Statute, *supra* note 2, art. 8(2)(b)(xxvi).

“using them to participate actively in hostilities.”⁷⁴ While this language is drawn largely from the CRC and AP I,⁷⁵ the Rome Statute nevertheless enhances the safeguards to children in one important respect. The use of the phrase “conscripting or enlisting” suggests that both actively recruiting children and passively allowing them to sign up⁷⁶ are banned. In other words, the “terms used seem to encompass every act—formal or *de facto*—of including persons in the armed forces.”⁷⁷

On other levels, however, critics pointed out that the Rome Statute did not go far enough. Human Rights Watch, for instance, expressed disappointment⁷⁸ that the age limit was set at fifteen and not eighteen as UNICEF⁷⁹ and NGOs had proposed.⁸⁰ Critics also voiced dissatisfaction with the ambiguity of the phrase “participating actively in hostilities.” Did this cover merely *direct* participation in hostilities, as imagined in the Additional Protocols? Or did it also extend to activities *connected* with combat, such as reconnaissance, weapons transport, landmine detection, and so on?

The final version of the Rome Statute should have been more explicit in its proscription of activities.⁸¹ Indeed, several delegations requested such clarification.⁸² A footnote written by the Preparatory Committee of the Rome Statute, however, spelled out the definitions of both “use” and “participation” with some degree of specificity:

The words “using” and “participate” have been adopted in order to cover both direct participation in combat and also active participation in military activities linked to combat such as scouting, spying, sabotage and the use of children as decoys, couriers or at military checkpoints. It would not cover activities clearly unrelated to the hostilities such as food deliveries to an airbase or the use of domestic staff in an officer’s married accommodation.

74. *Id.* art. 8(2)(e)(vii).

75. See WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 50 (2001).

76. See *id.*

77. KNUT DÖRMANN, ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: SOURCES AND COMMENTARY 377 (2003).

78. See HUMAN RIGHTS WATCH, *supra* note 72 (follow “The Use of Children as Soldiers” hyperlink).

79. See UNICEF, THE STATE OF THE WORLD’S CHILDREN 2005, at 50 (2005) (“UNICEF believes that the minimum age of recruitment into the military should be eighteen years.”).

80. See HUMAN RIGHTS WATCH, *supra* note 72, ¶ 3.

81. In contrast to the ambiguity found here, the Rome Statute includes a specific *mens rea* requirement (“knew or should have known”) for the crime of recruiting children. Rome Statute, *supra* note 2, art. 8(2)(b)(xxvi), art. 30(3).

82. See Dörmann, *supra* note 77, at 376.

However, use of children in a direct support function such as acting as bearers to take supplies to the front line, or activities at the front line itself, would be included in the terminology.⁸³

Even though this specification does not appear in the text proper, it still forms part of the *travaux préparatoires* to the Statute⁸⁴ and may elucidate future interpretations.

Thus, the Rome Statute protects children from direct participation in combat as well as a host of activities related to armed conflict. Like the Additional Protocols and CRC before it, however, the Rome Statute could not break the impasse over setting the age limit at fifteen. Still, the institution it created, the International Criminal Court, is among the most active organizations currently engaged in the criminalization of child soldiers.⁸⁵

D. *Optional Protocol to the Convention on the Rights of the Child*

After drafting the CRC, the Committee on the Rights of the Child turned its attention to an issue that the CRC itself merely grazed over: children in armed conflict. The idea of an optional protocol governing children and war first surfaced in 1992, and it gained considerable momentum after the U.N. Commission on Human Rights established a working group in 1994.⁸⁶ To date, 104 states have ratified and 121 states have signed the Optional Protocol to the Convention on the Rights of the Child (OP).⁸⁷

The OP enhances the legal safeguards to protect children in several ways, but it does not raise the age limits for recruitment.⁸⁸ First, it precludes compulsory recruitment of children under age eighteen,⁸⁹ though fifteen- and sixteen-year-olds may “voluntarily”

83. Hermann von Hebel & Darryl Robinson, *Crimes Within the Jurisdiction of the Court, in THE INTERNATIONAL CRIMINAL COURT, THE MAKING OF THE ROME STATUTE, ISSUES, NEGOTIATIONS, RESULTS* 118 (Roy S. Lee ed., 1999).

84. DÖRMANN, *supra* note 77, at 376.

85. These efforts of the International Criminal Court (ICC) will be more fully explored in Part IV.B.

86. See Marsha L. Hackenberg, *Can the Optional Protocol for the Convention on the Rights of the Child Protect the Ugandan Child Soldier?*, 10 IND. INT'L & COMP. L. REV. 417, 442 (2000).

87. See UNHCHR, STATUS OF RATIFICATIONS OF THE PRINCIPAL INTERNATIONAL HUMAN RIGHTS TREATIES, June 9, 2004, <http://www.unhchr.ch/pdf/report.pdf>.

88. The United States was among the countries most doggedly opposed to a “straight eighteen” approach to military recruiting. See Frances Williams, *World News: Anger at U.S. Stance on Child Soldiers*, FIN. TIMES, Jan. 11, 2000.

89. Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict art. 2, *opened for signature* May 25, 2000, S. TREATY DOC. NO. 106-37, 39 I.L.M. 1285, [hereinafter OP], *available at* <http://www.unhchr.ch/html/menu2/6/protocolchild.htm>.

enter the national armed forces.⁹⁰ Second, it asks state parties to “take all feasible measures” to ensure that children under eighteen do not directly participate in hostilities.⁹¹ Problematically, and indicative of the state-centered origins of the OP, only *non*-national armed groups are banned from both the use and recruitment of children under eighteen.⁹² To this end, state parties are called on to adopt legal measures criminalizing the recruitment and use of children under eighteen by such armed groups.⁹³ This could lead to the uncomfortable situation where a country both recruits sixteen-year-olds into its armed forces and simultaneously prosecutes internal armed groups for their use of the same. Such are the ironies of international humanitarian law.

Two other important facets of the OP include its reporting requirement⁹⁴ and its suggested programs for demobilization and reintegration of children used in hostilities contrary to the OP.⁹⁵ The reporting requirement forces states to monitor and account for the steps they take to implement the protections of the OP.⁹⁶ A state cannot simply sign off on the OP but instead must submit compliance reports describing its internal situation once every five years.⁹⁷

Finally, the OP moves beyond simple prophylactic measures by requesting that states create social programs for children currently in armed conflict.⁹⁸ Demobilization and reintegration are critical elements to reintroducing child soldiers back into a meaningful social context where they can lead productive lives. The inclusion of this commitment in the OP reflects the influence of the many NGOs set up for rehabilitative purposes.

90. For children under eighteen to join national armed forces, the following conditions must be met: (1) the decision to join is “genuinely voluntary”; (2) the military has received the “informed consent” of parents or legal guardians; (3) the child is “fully informed of the duties involved in such military service”; and (4) the child provides “reliable proof of age.” *Id.* art. 3(3).

91. *Id.* art. 1.

92. *Id.* art. 4.

93. *Id.*

94. *Id.* art. 8.

95. *Id.* art. 6(3).

96. *Id.* art. 8(1).

97. *Id.* art. 8(2).

98. *Id.* art. 6(3).

E. *Regional Arrangements: The African Charter and the Cape Town Principles*

Regional mechanisms round out the current international legal framework governing child soldiers. While several regional conventions ban the recruitment of children for armed conflict,⁹⁹ two African arrangements are particularly important because they (1) reflect the continent's unified voice in dealing with a widespread social threat; (2) have gained broad acceptance by almost all states, *at least on paper*; and (3) provide a model for other regions grappling with this problem, such as Southeast Asia.

Following on the heels of the CRC, the African Charter on the Rights and Welfare of the Child¹⁰⁰ (African Charter) fills in various gaps left by the former. Unlike other conventions, it adopts a bright-line "straight eighteen" approach, making eighteen the undisputed age of majority.¹⁰¹ Moreover, it demands that state parties "take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain, in particular, from recruiting any child."¹⁰²

The African Charter thus offers broader protections than either the CRC or OP, both of which permit "voluntary" engagement of children under the age of eighteen. The drafters of the African Charter intended to advance the best interests of the child and not the most convenient format for national armies.¹⁰³ While one can criticize the *implementation* of the African Charter—several signatory states employ children in their national armies¹⁰⁴—it is undeniable that the African Union has taken a strong stance against this social pandemic.

99. See, e.g., Latin American and Caribbean Conference on the Use of Children as Soldiers, July 5–8, 1999, *Montevideo Declaration on the Use of Children as Soldiers*, available at <http://www.unesco.org/cpp/uk/declarations/montevideo.htm> (July 8, 1999).

100. African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (July 11, 1990).

101. *Id.* art. 2.

102. *Id.* art 22(2).

103. GERALDINE VAN Bueren, *INTERNATIONAL LAW ON THE RIGHTS OF THE CHILD* 332 (1999).

104. Burundi, Côte d'Ivoire, the Democratic Republic of Congo (DRC), and Uganda are among states that have either signed or acceded to the African Charter but still have serious child soldier problems. See AFRICAN UNION, *LIST OF COUNTRIES WHICH HAVE SIGNED, RATIFIED/ACCEDED TO THE AFRICAN UNION CONVENTION ON AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD*, <http://www.africa-union.org/root/au/Documents/Treaties/treaties.htm> (last visited Jan. 21, 2007) (follow corresponding "List of Countries which have Signed, Ratified/Acceded" hyperlink).

The African Charter took almost a decade to enter into force,¹⁰⁵ raising concern among NGOs, the United Nations, and other interested parties. UNICEF, cooperating in the meantime with a working group from the CRC, convened a meeting in Cape Town, South Africa, at the end of April 1997. The objectives were manifold: (1) to raise the minimum age of recruitment to eighteen; (2) to discuss strategies and practices for the demobilization and effective reintegration of child soldiers; and (3) to share knowledge gained by NGOs' various experiences in disarming children.¹⁰⁶ The resulting Cape Town Principles enumerate preventative measures and coping mechanisms for child soldiers in Africa. They have served as the basis for a host of reintegration programs that have sprung up on the continent in the past several years.

IV. INTERNATIONAL CRIMINAL TRIBUNALS

In addition to treaties and various other legal agreements, the major proscriptive pressure on child soldiers comes from international courts. In many of its indictments, the International Criminal Court (ICC) has charged individuals with conscripting, enlisting, or using children under the age of fifteen to participate actively in hostilities.¹⁰⁷ Likewise, the Special Court for Sierra Leone (SCSL) has indicted twelve men for this serious violation of international humanitarian law, including the former President of Sierra Leone, Charles Taylor.¹⁰⁸ While indictments further crystal-

105. The African Charter entered into force in November 1999, although it had been adopted by the Organization of African Unity (OAU) in 1990. See UNIVERSITY OF MINNESOTA HUMAN RIGHTS LIBRARY, RATIFICATION INFORMATION FOR THE AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD, <http://www1.umn.edu/humanrts/instree/afchil-dratifications.html> (last visited Jan. 21, 2007).

106. See UNICEF, CAPE TOWN PRINCIPLES AND BEST PRACTICES ON THE PREVENTION OF RECRUITMENT OF CHILDREN INTO THE ARMED FORCES AND ON DEMOBILIZATION AND SOCIAL REINTEGRATION OF CHILD SOLDIERS IN AFRICA (1997), [http://www.unicef.org/emerg/files/Cape_Town_Principles\(1\).pdf](http://www.unicef.org/emerg/files/Cape_Town_Principles(1).pdf).

107. The ICC has issued arrest warrants for men in two of the four situations it is monitoring. In the Uganda investigation, all five suspects—Joseph Kony, Vincent Otti, Raska Lukwiya, Okot Odhiambo, and Dominic Ongwen—have been charged with recruiting child soldiers. In the DRC investigation, one man—Thomas Lubanga Dyilo—has been charged with the same crime. See, e.g., Situation in Uganda, Case No. ICC-02/04-01/05, Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005, Count 13 (Sept. 27, 2005), available at http://www.icc-cpi.int/library/cases/ICC-02-04-01-05-53_English.pdf; Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Warrant of Arrest (Feb. 10, 2006), available at http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-2_tEnglish.pdf.

108. Summaries of the indictments can be found on the website for the Special Court for Sierra Leone (SCSL). See The Special Court for Sierra Leone, <http://www.sc-sl.org/>

lize international law, ultimately the *decisions* of the ICC and SCSL will shape the contours of this recently reified violation.

A. *Special Court for Sierra Leone*

The Special Court for Sierra Leone (“SCSL”) has made two contributions to the criminalization of recruiting children. First, Article 4(c) of the court’s statute gives it jurisdiction to hear cases of “[c]onscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities.”¹⁰⁹ This in itself improves upon an earlier draft version of the statute approved by the U.N. Secretary-General, which would have proscribed the “abduction and forced recruitment of children under the age of fifteen.”¹¹⁰ The Secretary-General wanted to except children who enlisted “voluntarily,” as each of the warring factions in Sierra Leone had made abundant use of child soldiers. The president of the Security Council—speaking with the unanimous consent of that body¹¹¹—requested that the language conform “to the statement of the law existing in 1996 and as currently accepted by the international community.”¹¹² This in effect set a lower bar for the crime, leading to its repeated appearance in SCSL indictments.

What was the state of the law in 1996? That was the key question in the 2004 *Norman* decision, the SCSL’s second major contribution to the criminalization of recruiting children.¹¹³ Samuel Hinga Norman, Sierra Leone’s former Minister of the Interior, challenged the SCSL’s jurisdiction to try him for recruiting children. He made three interrelated claims: (1) recruiting children was not a crime under customary international law in 1996;¹¹⁴ (2) the SCSL

(last visited Oct. 31, 2006) (follow any hyperlink under “Cases”; then follow “summary” hyperlink).

109. Statute of the Special Court for Sierra Leone art. 4(c)(2000), Jan. 16, 2000, available at <http://www.sc-sl.org/scsl-statute.html>.

110. See The Secretary-General, *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, ¶ 15(c), U.N. Doc. S/2000/915 (Oct. 4, 2000), quoted in *Prosecutor v. Norman*, Case No. SCSL-2004-14-AR72(E), Summary of Decision on Preliminary Motions Based on Lack of Jurisdiction (Child Recruitment), ¶ 8 (May 31, 2004), available at <http://www.sc-sl.org/CDF-decisions.html> (follow “SCSL-04-14-AR72(E)-131-7383” hyperlink).

111. See Alison Smith, *Child Recruitment and the Special Court for Sierra Leone*, 2 J. INT’L CRIM. JUST. 1141, 1143 (2004).

112. See The President of the Security Council, *Letter Dated 22 December 2000 from the President of the Security Council Addressed to the Secretary-General*, ¶ 3, U.N. Doc. S/2000/1234 (Dec. 22, 2000), quoted in *Norman*, Case No. SCSL-2004-14-AR72(E), ¶ 8.

113. See generally *Norman*, Case No. SCSL-2004-14-AR72(E).

114. *Id.* ¶ 1(a).

statute violated the cardinal criminal law principle of non-retroactivity (*nullum crimen sine lege*);¹¹⁵ (3) recruiters of child soldiers could not incur individual criminal responsibility for their conduct.¹¹⁶ None of these arguments persuaded the SCSL, but Norman's submissions elicited a lengthy dissent from Justice Geoffrey Robertson.

The SCSL, after reviewing many of the treaties discussed in Part III of this Article,¹¹⁷ found the prohibition on recruiting child soldiers sufficiently intact to attach criminal responsibility. The norm apparently reified *while* Norman was using children during the early 1990s.¹¹⁸ On the one hand, the court found it "impossible . . . to determine a given event, day, or date upon which it can be stated with certainty that a norm has crystallized."¹¹⁹ Nevertheless, the court held, international law had hardened sufficiently by November 1996 (when its temporal jurisdiction began) to attach criminal liability to Norman.¹²⁰

In drawing its conclusion, the SCSL adverted to the widespread acceptance of "key international instruments" banning the practice of child recruitment in the early 1990s.¹²¹ Further, many states had passed national laws criminalizing the use of child soldiers, particularly in the mid-'90s.¹²² The combined effect of domestic and international prohibitions enmeshed the crime firmly enough in the international community to render recruitment a cognizable crime by the 1990s.¹²³

Justice Geoffrey Robertson dissented. Though he acknowledged that the prohibition extended as far as *forcible* recruitment of children,¹²⁴ he drew the line at what he called "child enlistment."¹²⁵ According to Justice Robertson, the U.N. Secretary-General's definition of the crime, discussed above, more accurately represented the status of the law in 1996.¹²⁶ In contrast, Justice Robertson

115. *Id.* ¶ 1(b).

116. *Id.* ¶ 1(c).

117. *See id.* ¶¶ 12–4, 18, 21 (noting widespread acceptance of the norm prohibiting child recruitment enshrined in AP II, the CRC, the African Charter, and the domestic legislation of various states).

118. *See id.* ¶ 53.

119. *Id.* ¶ 50.

120. Prosecutor v. Norman, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), ¶ 17 (May 31, 2004).

121. *Id.* ¶ 50.

122. *Id.*

123. *See id.*

124. *See id.* ¶ 4 (Robertson, J., dissenting).

125. *See id.* ¶ 2.

126. *See supra* text accompanying note 112.

believed that the expansion of the terms “use” and “enlistment” in drafting the SCSL’s statute did not reflect consensus among the international community.¹²⁷

Justice Robertson hesitated to attach criminal liability to a crime of such recent vintage.¹²⁸ Because few states imposed *individual* criminal responsibility for “non-forcible enlistment” of children under fifteen, he believed that the SCSL should not do so either.¹²⁹ While a useful complement to the majority view, Justice Robertson’s critique hews strictly, and somewhat formalistically, to the crystallization of customary international law.

It is unlikely that any leader in Sierra Leone’s civil war knew he would be prosecuted for using or recruiting child soldiers. Indeed, the crime was not enumerated among the federal statutes of Sierra Leone. Still, there was no doubt that the international community, and much of Africa, condemned the use—forcible or “voluntary”—of child soldiers. To be sure, the crystallization process was contemporaneous with the civil war in Sierra Leone, which lasted from 1991 to 2002. Sierra Leone signed the CRC in 1990¹³⁰ and the African Charter in 1992,¹³¹ which in turn gave Sierra Leone’s leadership notice that the international community condemned the use of children in armed conflict, and also imposed a good faith effort to abide by the provisions of the treaties. The lack of domestic criminal sanctions at the time of the conflict does not mean that criminal liability could never attach.

B. *International Criminal Court*

Alongside the SCSL, the ICC plays the preeminent role in the ongoing prescription of the use and recruitment of child soldiers. Like the SCSL, the ICC has indicted several high-ranking leaders in internal armed conflicts. In October 2005, the court unsealed its first arrest warrants, charging five commanders of the Ugandan rebel forces known as the Lord’s Resistance Army (LRA).¹³² Among dozens of other counts, charges of enlistment, conscrip-

127. See *Prosecutor v. Norman*, Case No. SCSL-2004-14-AR72(E), ¶ 5 (May 31, 2004) (Robertson, J., dissenting).

128. See *id.* ¶ 33 (Robertson, J., dissenting).

129. *Id.* ¶ 34 (Robertson, J., dissenting).

130. See STATUS OF RATIFICATIONS OF THE PRINCIPAL INTERNATIONAL HUMAN RIGHTS TREATIES, *supra* note 87.

131. See AFRICAN UNION, *supra* note 104.

132. See *Situation in Uganda*, Case No. ICC-02/04-01/05, Decision on the Prosecutor’s Application for Unsealing of the Warrants of Arrest (Oct. 13, 2005), available at http://www.icc-cpi.int/library/cases/ICC-02-04-01-05-52_English.pdf.

tion, and the use of child soldiers were brought against three men: Joseph Kony,¹³³ Vincent Otti,¹³⁴ Okot Odhiambo.¹³⁵ As these men are still at large, the warrants can merely exhort them to change their practices. Whether warrants in fact exert this curative influence remains an open question.

In February 2006, the ICC issued another arrest warrant for the situation in the Democratic Republic of the Congo (DRC).¹³⁶ Interestingly, the sole charge brought against the suspect, Thomas Lubanga Dyilo, is the use and conscription of child soldiers. As president, founder, and commander-in-chief of a large rebel force in the region, Dyilo exercised "de facto authority" over his group's recruitment and enlistment policies.¹³⁷ He is charged with being "aware" and "making active use" of child soldiers.¹³⁸ Recent estimates suggest that his organization, the Union of Patriotic Congolese (UPC), uses roughly 6,000 eight- to seventeen-year-olds, making it one of the gravest offenders in the DRC.¹³⁹

Dyilo's subsequent arrest will give the ICC an opportunity to more fully develop the crime of recruiting and using child soldiers. The Rome Statute's broad approach to the prohibition on child soldiers—including conscripting, enlisting, or using them to participate—will permit examination of a wide swath of conduct. With the trials of Dyilo and eventually the members of the LRA, the ICC can take the next steps in reifying and refining the recent international norm prohibiting the recruitment of child soldiers.

V. THE UNITED NATIONS AND CHILD SOLDIERS

Finally, in addition to its contributions to the international legal framework and international criminal tribunals, the United Nations has assumed a prominent role in campaigning to end the

133. See *id.*, Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005, Count 13 (Sept. 27, 2005), available at http://www.icc-cpi.int/library/cases/ICC-02-04-01-05-53_English.pdf.

134. See Situation in Uganda, Case No. ICC-02/04, Warrant of Arrest for Vincent Otti, Count Thirteen (July 8, 2005).

135. See Situation in Uganda, Case No. ICC-02/04, Warrant of Arrest for Raska Lukwiya, Count Thirteen (July 8, 2005).

136. See Situation in the Democratic Republic of the Congo (Prosecutor v. Dyilo), Warrant of Arrest, Case No. ICC-01/04-01/06 (Feb. 10, 2006).

137. See Press Release, ICC, Issuance of a Warrant against Thomas Lubanga Dyilo, ICC-OTP-2006-0302-126-En (Mar. 17, 2006) available at <http://www.icc-cpi.int/press/press-releases/133.html>.

138. *Id.*

139. See GLOBAL REPORT, *supra* note 20, at 52–53 (2004) (discussing the numbers of child soldiers used by various armed groups in the DRC).

recruitment of children into armed groups. Since commissioning Graça Machel's report in 1993, the problem of child soldiers has been the object of numerous General Assembly reports, Secretary-General recommendations, and Security Council resolutions. This section focuses on the important resolutions, reports, and mechanisms introduced by the United Nations to combat the use and recruitment of child soldiers. Taken as a whole, the response has been far-reaching but ultimately inadequate to halt these practices.

According to the Secretary-General, the 1996 Machel Report "laid the foundation for the children and armed conflict agenda and constituted a seminal call to action."¹⁴⁰ Later in the year, the General Assembly established the position of Special Representative for Children and Armed Conflict, from whom it requested annual reports on the effects of armed conflict on children.¹⁴¹ Since 1996, the Special Representative has engaged in numerous activities in connection with the problem of child soldiers, including (1) conducting twenty-six field visits to areas where children suffer;¹⁴² (2) canvassing African governments to ratify the African Charter;¹⁴³ (3) helping cultivate cultural norms that protect children in times of war;¹⁴⁴ (4) speaking to offending groups to elicit commitments to stop recruiting children;¹⁴⁵ (5) engaging in numerous media outreach and public awareness campaigns;¹⁴⁶ and (6) collaborating in the production of documentaries.¹⁴⁷ While this list may appear to privilege the word over the deed, it is important to remember that the United Nations did not appoint the Special Representative to conduct rescue missions or "operational activities."¹⁴⁸ That is the bastion of other U.N. bodies and specialized NGOs. Rather, the Special Representative is charged with

140. The Secretary-General, *Children and Armed Conflict*, ¶ 60, delivered to the Security Council and the General Assembly, U.N. Doc. S/2005/72, A/59/695 (Feb. 9, 2005) [hereinafter *Children and Armed Conflict*].

141. See G.A. Res. 51/77, ¶¶ 35–37, U.N. Doc. A/RES/51/77 (Feb. 20, 1997). This position is currently held by Sri Lankan Radhika Coomaraswamy. See generally Press Release, The Secretary-General, Secretary-General Appoints Radhika Coomaraswamy of Sri Lanka Special Representative for Children and Armed Conflict, U.N. Doc. SG/A/979 (July 2, 2006).

142. Special Representative of the Secretary-General for Children and Armed Conflict, *Report of the Special Representative of the Secretary-General for Children and Armed Conflict*, ¶ 34, delivered to the General Assembly, U.N. Doc. A/60/335 (Sept. 7, 2005).

143. *Id.* ¶ 13.

144. *Id.* ¶ 14.

145. *Id.* ¶¶ 51–52.

146. *Id.* ¶¶ 21–22.

147. *Id.* ¶ 22.

148. *Id.* ¶ 61.

assessing progress, raising awareness, working with other U.N. bodies, and fostering international cooperation to ensure respect for children.¹⁴⁹

The U.N. bodies responsible for taking a more active role in halting the spread of child soldiers include the Security Council and specialized agencies like UNICEF and the Department of Peacekeeping Operations. The Secretary-General, for his part, issues guidance to help these bodies focus on the most effective practices.¹⁵⁰ In light of the preeminence of the Secretary-General and Security Council in clarifying and enforcing international law, however, their efforts are discussed here in tandem.

In Resolution 1261 (1999), the Security Council first identified children and armed conflict as an issue affecting international peace and security, therefore including it within the Security Council's aegis.¹⁵¹ Through annual debates, additional resolutions, enforcement mechanisms, and other means, the Security Council has applied pressure on groups and governments that use children in armed conflict. Resolution 1314 (2000), for instance, reflected international concern by requesting that parties to armed conflict offer disarmament, demobilization, and reintegration programs for child combatants in peace negotiations.¹⁵²

Disappointed with the pace of progress, the Security Council passed Resolution 1379 (2001) to widen the scope of potential activity and actors. First, it urged U.N. member states to prosecute those responsible for recruiting and using children in war.¹⁵³ Second, it discouraged corporate actors from transacting business with parties appearing on the Security Council's agenda.¹⁵⁴ Third, it called on U.N. agencies to consider how they could help reduce child recruitment in recipient states.¹⁵⁵ The boldest initiative, however, was a request for the Secretary-General to

attach to his report a list of parties to armed conflict that recruit or use children in violation of the international obligations applicable to them, in situations that are on the Security Council's agenda or that may be brought to the attention of the Security Council by the Secretary-General . . . which in his opin-

149. G.A. Res. 51/77, *supra* note 141, ¶ 36.

150. *See Children and Armed Conflict*, *supra* note 140, ¶ 111.

151. S.C. Res. 1261, U.N. Doc. S/RES/1261 (Aug. 30, 1999).

152. S.C. Res. 1314, U.N. Doc. S/RES/1314 (Aug. 11, 2000).

153. S.C. Res. 1379, ¶ 9(a), U.N. Doc. S/RES/1379 (Nov. 20, 2001).

154. *Id.* ¶ 9(b).

155. *Id.* ¶ 11(b).

ion may threaten the maintenance of international peace and security.¹⁵⁶

By naming and (ideally) shaming groups brazen enough to continue child recruitment, the Secretary-General would demonstrate the international community's refusal to acquiesce to these assaults on human dignity. While not as vigorous a denunciation as one might hope—the threat of force or other sanctions remained viable alternatives—the Security Council finally exhibited a small amount of resolve to stand up to this international scourge.

In his next report on children and armed conflict,¹⁵⁷ the Secretary-General included the list of offending parties, albeit a partial one. He decided to enumerate only those parties in conflict situations “of which the Security Council was seized,”¹⁵⁸ thus excluding a significant number of violating groups in Colombia, Myanmar, Uganda, and other countries.¹⁵⁹ Nevertheless, three state governments and twenty armed groups were listed in the annex of shame.¹⁶⁰ However light such a punishment may seem, it is notable that the three government parties and several of the armed groups disappeared from the list published three years later.¹⁶¹

The Secretary-General's list of violating countries became a focal point in subsequent resolutions. Resolution 1460 (2003) called on listed parties “to provide information on steps they have taken to halt their recruitment or use of children in armed conflict.”¹⁶² Moreover, the Security Council threatened to take “appropriate steps to further address this issue . . . if it deems that insufficient progress is made upon the review of the next Secretary-General's report.”¹⁶³

In Resolution 1539 (2004), prompted by the continual “lack of overall progress on the ground,”¹⁶⁴ the Security Council assumed a tougher stance on parties using child soldiers. First, it demanded

156. *Id.* ¶ 16.

157. See The Secretary-General, *Report of the Secretary-General on Children and Armed Conflict*, delivered to the Security Council, U.N. Doc. S/2002/1299 (Nov. 26, 2002).

158. *Id.* ¶ 29.

159. *Id.* ¶¶ 41–46.

160. See *id.* at annex.

161. Compare *id.*, with *Children and Armed Conflict*, *supra* note 140, at annex I. The governments of the DRC, Liberia, and Congo, as well as various insurgent groups in Congo and Somalia, have been removed from the list. Of course, groups in both Congo and Somalia have taken the place of the removed groups, showing the hydra-like nature of the problem of child recruitment.

162. S.C. Res. 1460, ¶ 5, U.N. Doc. S/RES/1460 (Jan. 30, 2003).

163. *Id.* ¶ 6.

164. S.C. Res. 1539, pmbl., U.N. Doc. S/RES/1539 (Apr. 22, 2004).

that violating parties “prepare within three months concrete time-bound action plans to halt recruitment and use of children.”¹⁶⁵ A party’s failure to meet the commitments articulated in the plan may lead to sanctions, including a ban on the export of small arms, light weapons, or other military equipment.¹⁶⁶ Second, the Security Council requested that the Secretary-General devise “a systematic and comprehensive monitoring and reporting mechanism” to obtain reliable information on child soldiers.¹⁶⁷

While Resolution 1539 seemed to point in the right direction, the Security Council’s residual *irresolution* on the issue is remarkable. First, an arms ban on groups that routinely violate international law is the least that the United Nations could do in response. Second, the phrasing of the proposed sanctions is comparatively weak: the Security Council merely “[e]xpresses its intention to consider imposing targeted and graduated measures”¹⁶⁸

In July 2005, the Security Council passed Resolution 1612,¹⁶⁹ which both realized and deferred on the above developments. On the positive side, it created a monitoring and reporting system, setting a deadline of July 31, 2006, for an independent review of the system.¹⁷⁰ It also established a working group to review the reports generated by the reporting mechanism.¹⁷¹

The most disappointing part of Resolution 1612, however, lies in the Security Council’s simultaneous acknowledgement of the gravity of the problem and refusal to take action. As with previous resolutions, Resolution 1612 repeatedly expresses concern about the “lack of progress” on halting the spread of child soldiers.¹⁷² Yet after threatening to “consider” sanctions on arms in Resolution 1539, the Security Council merely “recalls” and “reaffirms its intention to consider imposing” sanctions.¹⁷³ Is it any wonder that armed groups “continue to violate with impunity the relevant provisions of . . . international law”?¹⁷⁴ Certainly, another series of paper threats is not going to deter them from recruiting child soldiers.

165. *Id.* ¶ 5(a).

166. *Id.* ¶ 5(b).

167. *Id.* ¶ 2.

168. *Id.* ¶ 5(c).

169. S.C. Res. 1612, U.N. Doc. S/RES/1612 (July 26, 2005).

170. *Id.* ¶ 3.

171. *Id.* ¶ 8.

172. *See id.* ¶ 7.

173. *Id.* ¶ 9.

174. *Id.* at pmbl.

VI. CONCLUSION

International law shows a mixed record in ending the recruitment of child soldiers. On a normative level, there is little doubt around the globe that children should not engage in military activities. The United Nations and several NGOs have succeeded in raising awareness, mobilizing support, and helping to reintegrate thousands of former child soldiers. With the broad support of many nations, they also have set up an international legal framework—the CRC, Rome Statute, Optional Protocol, Statute of the Special Court of Sierra Leone—that forbids the use and enlistment of child soldiers.

Presently, the ICC and SCSL are further entrenching the prohibition by indicting and arresting leaders of armed groups that use children in combat. These proceedings could help ground this new norm into the socio-legal fabrics of West Africa and the Great Lakes region. Much depends on these trials and, ultimately, the sentences handed down to Charles Taylor, Joseph Kony, Thomas Lubanga Dyilo, and others. In the meantime, armed forces using children must hear of these proceedings and learn of the consequences these men are facing.

The rapidity of this ripening process should not elude us; widespread acceptance of any norm in the agonistic arena of international law is a feat for reflection. This formation is even more impressive because the beneficiaries—children—generally lack political power or other means to address the situations in which they find themselves. Instead, these efforts were undertaken by adults committed to the notion that childhood should, at the very least, be spent in pursuits less degrading, and degraded, than armed combat.

As an agent or active force, however, international law has failed to defend persons in dire need of protection. Threats on paper have not, and will not, prevent governments or armed groups from recruiting children. Most reports on child soldiers conclude with pessimism comparable to that of a 2004 briefing prepared for the Security Council: “remarkably little progress has been made in ending the use of child soldiers, and some violators have even increased their recruitment of children.”¹⁷⁵

175. COALITION TO STOP THE USE OF CHILD SOLDIERS, *CHILD SOLDIER USE 2003: A BRIEFING FOR THE 4TH U.N. SECURITY COUNCIL OPEN DEBATE ON CHILDREN AND ARMED CONFLICT* 3 (2004).

The tepidity of the U.N. Security Council in ending recruitment of child soldiers is troubling but not surprising. Three of its permanent members—the United Kingdom, the United States, and Russia—have consistently tried to dilute the prohibition when drafting the international treaties discussed in Part III of this Article. Moreover, the United States and the United Kingdom only recently have stopped using children under eighteen in their national armed forces.¹⁷⁶ Russia still does.¹⁷⁷ Surely, some of the unevenness of the norm's diffusion rests in the unwillingness evinced at the highest levels of the U.N. Security Council.

By implementing any of the sanctions threatened in its various resolutions, the Security Council could begin to chip away at the financial and military resources that keep child recruiters afloat. Though the passage of Resolution 1643 (2005) indicates that the Security Council has finally warmed to the idea of sanctioning offenders,¹⁷⁸ its reluctance to punish known offenders reflects inconsistency and a lack of commitment.¹⁷⁹ At the risk of oversimplification, the following dichotomy emerges: an inert Security Council will contribute to both international insecurity in the world's most unstable regions and the further ruination of yet another generation of children, but an active Security Council could take the first step toward reclaiming hundreds of thousands of lives.

176. See GLOBAL REPORT, *supra* note 20, at 152, 285.

177. *Id.* at 266.

178. See S.C. Res. 1643, U.N. Doc. S/RES/1643 (Dec. 15, 2005) (banning member states from importing diamonds from Côte d'Ivoire because of the links between the diamond trade and weapons procurement in that country).

179. See, e.g., S.C. Res. 1649, U.N. Doc. S/RES/1649 (Dec. 21, 2005) (refusing to take similar action against the Democratic Republic of Congo, a notorious user of children in armed conflict).