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**THIS ISSUE INCLUDES CONTRIBUTIONS BY:**

Hon Michael Kirby
Philip A Joseph
Paul McHugh
Nicole Roughan
Steven Freeland
Jason N E Varuhas

VICTORIA UNIVERSITY OF WELLINGTON
*Te Whare Wānanga o te Ūpoko o te Ika a Māui*

FACULTY OF LAW
*Te Kauhanganui Tatai Ture*

Faculty of Law
Victoria University of Wellington
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Address for all other communications:

The Student Editor
New Zealand Journal of Public and International Law
Faculty of Law
Victoria University of Wellington
PO Box 600
Wellington
New Zealand
e-mail nzjpil-editor@vuw.ac.nz
fax +64 4 463 6365

# CHILD SOLDIERS AND INTERNATIONAL CRIMES – HOW SHOULD INTERNATIONAL LAW BE APPLIED?

***Steven Freeland****

*It is only relatively recently that international law has been specifically directed towards addressing the tragic problem of the use of children in armed conflict. Since 1977, a number of legal instruments have proposed various standards to prevent the recruitment and use of children in this way. These standards have largely been too weak and have not been effective in curbing the problem. As a result, it is necessary not only to "upgrade" these standards but to use criminal sanctions in an effort to provide a more efficient legal regime to combat the issue. This article examines the various ways in which international law seeks to prohibit and criminalise various aspects of the use of child soldiers and concludes that, as well as more effective specific legal standards, the underlying reasons for conflict and the use of children to fight them must be acknowledged and addressed.*

> I see problems ahead because we have no adult to take care of us[.] We ask that you give us more hope that the future will be bright.[1]

## *I THE CHILD SOLDIER PROBLEM*

It is an unfortunate reality of war and armed conflict that innocent civilians, including children, are often the victims. In 1900, it was estimated that civilians represented approximately five per cent of the casualties of conflict. By the time of the Second World War, this had risen to approximately 65 per cent. Human rights groups now calculate that

* Senior Lecturer in International Law, University of Western Sydney, Australia; Visiting Professor in International Law at the University of Copenhagen, Denmark; and Visiting Professional at the International Criminal Court, The Hague (email: s.freeland@uws.edu.au).

1 Lili Amono, 25 years of age, who had spent the past 12 years in captivity with the Lord's Resistance Army in northern Uganda: quoted in United Nations Office for the Coordination of Humanitarian Affairs "Uganda: Spare the women and children, UN agency urges" <http://www.irinnews.org> (last accessed 13 December 2004).

approximately 90 per cent of all casualties in recent armed conflicts have been made up of civilians, of which 40 per cent are children.[2] Canadian NGO, Réseau des Enfants, concluded, for example, that the Rwandan genocide that culminated in the appalling massacres from April–July 1994 claimed the lives of 300,000 children, with somewhere between 250,000–500,000 young girls being raped during that period.[3]

Armed conflict impacts on the lives of children in many ways. Very often they are "passive" victims, due to the fact that they find themselves in the path of war. In addition, children are increasingly being forced to actively participate in the conflict as child soldiers. It has been conservatively estimated that, at any one time, there are approximately 300,000 children participating in active conflict, though these figures in all likelihood understate the situation quite significantly. Indeed, in a report released in November 2004,[4] the NGO Coalition to Stop the Use of Child Soldiers found that children were "fighting in almost every major conflict, in both government and opposition forces."[5] In addition to the estimated 300,000 children who engage in actual military conflict, another 500,000 are "conscripted" into paramilitary organisations, guerilla groups and civil militias in over 85 countries.[6] As well as serving as fighting troops on the front line, they serve in other "indirect" roles, such as "sex slaves, porters, cooks, spies, and perform[ing] life-threatening tasks such as planting land mines."[7]

Children are "attractive" participants in armed conflict for a number of reasons. They can generally be intimidated and "moulded" relatively easily. They are vulnerable to

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2 Stephanie H Bald "Searching for a Lost Childhood: Will the Special Court of Sierra Leone Find Justice for Its Children?" (2002) 18 Am U Int'l L Rev 537, 543, citing "Women and Children Bear Brunt of War" (3 May 2002) *Saigon Times Daily* Ho Chi Minh City.

3 Hirondelle News Agency "'Genocide Children' Face Uphill Task" <http://allafrica.com> (last accessed 9 December 2004).

4 Coalition to Stop the Use of Child Soldiers *Child Soldiers Global Report 2004* (17 November 2004) [*Child Soldiers Global Report 2004*]. The report mentions countries such as Burundi, Democratic Republic of Congo, Myanmar, Sudan, the United States, Colombia, Uganda, Zimbabwe, Nepal, Indonesia, Australia, Austria, Germany, the Netherlands and the United Kingdom as using children, or supporting the use of children, in government and paramilitary forces. Children are also used by "opposition" forces such as the Lord's Resistance Army in Uganda, the Karen National Liberation Army (KNLA) in Myanmar, the Revolutionary Armed Force of Colombia (FARC) and the Sudan People's Liberation Army (SPLA). Neither of these lists is exhaustive.

5 Coalition to Stop the Use of Child Soldiers "Child Soldiers: Governments Failing Generations of Children" (17 November 2004) Press Release 1.

6 Cris R Revaz "The Optional Protocols to the UN Convention on the Rights of the Child on Sex Trafficking and Child Soldiers" (2001) 9 Hum Rts Brief 13, 15.

7 Nancy Morisseau "Seen But Not Heard: Child Soldiers Suing Gun Manufacturers under the Alien Torts Claims Act" (2004) 89 Cornell L Rev 1263, 1279.

outside influences and can be trained to become efficient soldiers. They can more readily be made to perform the most dangerous (and brutal) of tasks, if not through sheer intimidation or manipulation of their "bravado", then under the influence of drugs or alcohol. The proliferation of effective small arms and lightweight weapons such as the ubiquitous AK47 – equally deadly in the hands of a child trained to use them – means that children can be deployed in active combat without any apparent "hardware" disadvantages. The United Nations Security Council has previously noted the dangers posed by the illicit trade in "small arms" and the special relationship that this has with the problem of child soldiers.[8]

Adding to the enormity of the problem, the world continues to be wracked by armed conflicts. During the period 1990–2003, 59 wars were fought around the world. Over that period, 16 of the world's 20 poorest countries – where the use of child soldiers is particularly prevalent – have suffered from violent conflict.[9] As conflict takes place and escalates in various parts of the world, the recruitment of children to fight becomes increasingly common as an easy way to make up for any shortages of personnel through death or injury.

Moreover, children are easy to abduct or recruit. The International Criminal Court (ICC) is currently investigating horrific reports of the large-scale and systematic abduction of children by the Lord's Resistance Army (LRA) in northern Uganda;[10] it is estimated that children currently make up about 80 per cent of the LRA's forces. While many government and paramilitary commanders in various places around the world claim that they cannot stop the flow of children "volunteering" to join their ranks, in most cases the use of the term "volunteer" is a complete misnomer. It is usually the case that extreme circumstances – hunger, poverty, abandonment, the death of parents and family, disease and the lack of even basic medical services or the threat of violence or property confiscation – will leave a child (or his or her parents) little choice but to offer his or her services to a "cause". The very nature of armed conflict and its adverse effects on the livelihood of communities and on the natural environment further fuels this vicious cycle of poverty and violence.

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8 See for example UNSC "Small arms" (17 February 2005) Presidential Statement S/PRST/2005/7.

9 John Donnelly "UN Lists Children's Fatal Legacy of Hunger, War and Disease" (10 December 2004) *The Sydney Morning Herald* Sydney 10.

10 Relief agencies estimate that up to 20,000 children have been abducted across northern Uganda. In July 2004, the Chief Prosecutor of the International Criminal Court (ICC) determined that there was a reasonable basis to open an investigation into the situation in northern Uganda, following a referral by Uganda in December 2003: see ICC "Prosecutor of the International Criminal Court Opens an Investigation into Northern Uganda" (29 July 2004) Press Release <http://www.icc-cpi.int/pressrelease_details&id=33&l=en.html> (last accessed 14 January 2005).

This article sets out the ways in which international law mechanisms are currently being utilised to address the issue of child soldiers. In setting out the legal parameters, it is important to note that there are many other factors that must also be considered. The establishment of legal guidelines and regulations will not, alone, solve the problem. Indeed, this article concludes that the solution to the child soldier problem lies in the abatement of armed conflict on an even broader scale, which requires a fundamental reassessment of the causes of conflict and an attempt to address these in ways that minimise the circumstances leading to conflict and the involvement of children either directly or indirectly.

As a part of this broader approach to the multitude of issues associated with the child soldier problem, the United Nations Special Envoy for Children and Armed Conflict, Olara Otunna of Uganda, completed a report for the Secretary-General in February 2005 outlining ways in which the whole question of children in conflict could be addressed.[11] The report highlights the extent of the horrors taking place in many conflicts in the world, including the killing and maiming of children, recruiting and using child soldiers, attacks against schools, rape and other sexual violence against children, the abduction of children and the denial of humanitarian access to and for children. It recommends the launching of a global monitoring and reporting mechanism designed to track violations of children's rights, which would include the identification of offenders and the implementation of sanctions and other accountability measures. The drafter of the report hopes that this mechanism, if supported by action and not just words from the Security Council, will serve as an effective response to ensure compliance with international laws protecting children.[12]

In this context, without the presence of an international rule of law to regulate the problem, there will be no widely accepted standards by which to determine what is and

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11 "Report of the Secretary-General on the Promotion and Protection of the Rights of Children: Children and Armed Conflict", which the Secretary-General incorporated into his Fifth Report to the Security Council: "Report of the Secretary-General on Children and Armed Conflict" (9 February 2005) S/2005/72. This follows an earlier (1996) report to the General Assembly by Graça Machel, Expert of the Secretary-General of the United Nations: "Impact of Armed Conflict on Children" (1 January 1996) A/51/306 and A/51/306/ADD.1.

12 See also Steven Freeland "Using Children as Weapons of War" (2005) 14 Human Rights Defender 15.

what is not acceptable in relation to the involvement of children in conflict. In this regard, this article discusses the international legal rules relating to child soldiers in three principal areas:

1. How international law prohibits or restricts the recruitment of the child soldier;
2. How international law criminalises the recruitment of the child soldier;
3. How international law deals with or criminalises the actions of the child soldier.

Before looking at these questions, it is necessary to discuss the issue of what is a "child" in the context of the international legal principles regarding child soldiers.

## *II WHAT IS A "CHILD" SOLDIER?*

International law relates to what constitutes a child simply in terms of age. The 1989 Convention on the Rights of the Child (CRC)[13] generally defines a child as any person below the age of 18 years.[14] In relation to the international law principles directly regulating the issue of child soldiers, age is also the relevant determining factor. For example, and without any direct reference to the term "child soldier", Article 38 of the CRC stipulates that:

> (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 endeavor to give priority to those who are oldest.

Similarly, all other international law provisions dealing with child soldiers are made dependent on the age of the relevant individual(s).

This raises the rather complex question of "how old is a child", particularly (though not only) in relation to his or her participation in conflict. While the use of an "objective" criterion such as age is relatively simple for definitional purposes, it does not take account of cultural values that will be determinative, in specific societies, of whether the person has achieved adulthood. Many societies have initiation or "rites of passage" ceremonies that form the basis of an individual's transformation from a child to an adult. While some of

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13 Convention on the Rights of the Child (20 November 1989) 1577 UNTS 3 ["CRC"].

14 CRC, above n 13, art 1 provides as follows: "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."

these are themselves based on the specific age of the person – for example the Jewish faith declares that a boy becomes a man at 13 years of age and a girl becomes a woman at 14 years – it is clear that the requisite age may differ from the arbitrary levels set at international law.

Moreover, there are other cultures where the transformation from a child to an adult will be achieved by a specific act or acts irrespective of the age of the individual. Of particular relevance to the question of child soldiers, participation in warfare constitutes a rite of passage in some societies.[15] There may, therefore, be situations where the very act of playing a role in warfare or armed conflict will of itself deem that person not to be a child in the eyes of his or her community. Indeed, there are societies where, for a male, having a status akin to that of a "warrior" may be regarded as a positive attribute.

These factors are not taken into account by the regulations prescribed under international law, though they are – or perhaps more accurately should be – relevant in relation both to the way in which the criminality or otherwise of the actions of that person should be regarded and to the consequences – that is, any possible sentence – that may arise.

Having said this, however, the provisions under international law are clearly directed towards the age of the individual and this article now looks at the ways in which international law instruments deal with the various issues arising from the use of child soldiers.

## *III THE REGULATION OF CHILD SOLDIERS AT INTERNATIONAL LAW*

There are a number of fundamental international law instruments that are directed towards the regulation of child soldiers. As referred to above, this article will discuss these according to their particular function and effect. The majority of relevant instruments set standards for states in their recruitment of young persons. Some other instruments deal with the "criminalisation" of certain actions relating to child soldiers – either actions taken to recruit them or actions taken by the child soldier him or herself.

In effect, by entering into either of these types of agreements, states agree to take on and comply with certain international legal obligations, the breach of which renders them responsible under the customary international law principles of state responsibility.[16] This

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15 See Alison Dundes Renteln "Sixteenth Annual International Law Symposium: 'Rights of Children in the New Millennium': The Child Soldier: The Challenge of Enforcing International Standards" (1999) 21 Whittier L Rev 191, 202–204.

16 For an explanation of the international law principles of state responsibility see Martin Shaw *International Law* (5 ed, Cambridge University Press, Cambridge, 2003) 694–752. In addition, some

is very different from a finding that a state that breaches these obligations is in any way regarded under international law as having been "guilty" of a crime. Indeed, under general international law principles, we are not (yet) at the point where states can be found to have committed crimes at international law. Any criminal responsibility in relation to child soldiers will lie only with individuals.[17]

In this regard, the oft-quoted judgment of the Nuremberg International Military Tribunal reflects the traditional view. The Tribunal stated:[18]

> That international law imposes duties and liabilities upon individuals as well as upon States has long been recognized[.] Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced[.]

As a result, it is appropriate to categorise the relevant international law provisions into three different classes of regulation; the first dealing with the responsibilities imposed upon states (and falling within the rules of international humanitarian law and international human rights law) and the remaining two providing for the international criminal responsibility of individuals in relation to various issues associated with child soldiers (international criminal law).

### *A The Prohibition or Restriction of the Recruitment of Child Soldiers*

Prior to 1977, international law did not deal directly with the issue of children participating in armed conflict, though there had been some instruments affording children protection (as civilians) during times of armed conflict.[19] As the issue of child

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of these obligations may also reflect customary international law, in which case they are binding upon all states.

17 For a more detailed discussion of the dichotomy between state responsibility and individual criminal responsibility in relation to the commission of international crimes, see Steven Freeland "Human Rights, the Environment and Conflict – Addressing Crimes Against the Environment" (2005) 2 SUR International Journal on Human Rights 112, 116–119.

18 Judgment of the Nuremberg International Military Tribunal (1947) 41 Am J Int'l L 172, 221.

19 See for example Convention Relative to the Protection of Civilian Persons in Time of War (12 August 1949) 75 UNTS 287, arts 17, 24, 38, 50, 82, 94 and 132; Declaration on the Protection of Women and Children in Emergency and Armed Conflict UNGA Resolution 3318 (XXIX) (14 December 1974). These protections are reinforced in CRC, above n 13, art 38(4), which provides that: "In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict." This provision is unusual and innovative in that it seeks to "combine" principles of international humanitarian law within an international human rights law treaty.

soldiers began to fall within the international political agenda, the international community sought to address the problem more directly. The United Nations Security Council has increasingly turned its attention to the involvement of child soldiers in conflicts that threaten international peace and security and has strongly condemned the recruitment and use of children in hostilities.[20]

In addition, various fundamental instruments have been agreed upon, providing a progressive (though not always consistent) series of international standards. Several of these instruments fall within the first category of international law regulation identified above. These are highlighted below in chronological order.

*1 1977 Additional Protocols to the Geneva Conventions*

The earliest of these are to be found in the 1977 Additional Protocols to the four 1949 Geneva Conventions.[21] These provisions were introduced largely in reaction to the growing realisation among the international community that children were being used as active forces in war and armed conflict. They are binding on governmental and opposition groups. However, the standards were set at low levels – the Additional Protocols set the minimum age for the recruitment and use of children in armed conflict as 15 years and parties are only required to take "all feasible measures" to comply with their provisions.

Article 77 of Additional Protocol I, which deals with international armed conflicts,[22] provides that:

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20 See for example UNSC "Children and Armed Conflict" (23 February 2005) Presidential Statement S/PRST/2005/8.

21 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1949 Geneva I) (12 August 1949) 75 UNTS 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (1949 Geneva II) (12 August 1949) 75 UNTS 85; Geneva Convention Relative to the Treatment of Prisoners of War (1949 Geneva III) (12 August 1949) 75 UNTS 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1949 Geneva IV) (12 August 1949) 75 UNTS 287.

22 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (8 June 1977) 1125 UNTS 3 (Additional Protocol I). The distinction between internal and international conflicts is important in the context of international criminal law since certain international crimes within the jurisdiction of the international criminal tribunals only arise where the conflict is characterised as an international conflict: see for example the definition of war crimes in Article 8 of the Rome Statute, which differentiates between acts that take place in an international armed conflict (arts 8(2)(a)–(b)) and those that are committed in armed conflicts "not of an international character" (arts 8(2)(c) and 8(2)(e)). For a discussion on the nature of internal as compared with international conflict, see *Prosecutor v Duško Tadić* (Decision on the Motion for Interlocutory Appeal on Jurisdiction) (2 October 1995) IT-94-1-T (Appeals Chamber, ICTY).

> (2) The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, the Parties to the conflict shall endeavour to give priority to those who are oldest.
>
> (3) If, in exceptional cases, despite the provisions of paragraph 2, children who have not attained the age of fifteen years take a direct part in hostilities and fall into the power of an adverse Party, they shall continue to benefit from the special protection accorded by this Article, whether or not they are prisoners of war.

In relation to conflicts not of an international nature, Article 4(3)(c) of Additional Protocol II[23] provides that: "[c]hildren who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities."

*2 1990 African Charter on the Rights and Welfare of the Child*[24]

This African Charter on the Rights and Welfare of the Child (African Charter) came into force on 29 November 1999 and is the only regional instrument in the world that currently addresses the issue of child soldiers.[25] Its adoption by the former Organisation of African States (OAU) reflects the concern that the phenomena of child soldiers is causing to whole communities within a significant number of states in the African continent. It is highly appropriate that steps continue to be taken in Africa to inform the world about the extent of the problem.

The African Charter accords with the CRC in that it defines a child as anyone below the age of 18 years. Article 22.2 of the African Charter provides that: "States Parties to the present Charter shall take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain, in particular, from recruiting any child."

Interestingly, of all the international law instruments dealing with the use of child soldiers, the African Charter sets the highest standards. It sets a "without exception" minimum age of 18 years and has stronger language – "all necessary measures" – than other instruments that require states to take "all feasible measures". The tragic reality is

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23 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (8 June 1977) 1125 UNTS 609 (Protocol II).

24 African Charter on the Rights and Welfare of the Child (29 November 1990) OAU Doc CAB/LEG/24.9/49.

25 *Child Soldiers Global Report 2004*, above n 4, 8.

that these laudable standards are not currently being complied with by a number of African member states.

*3 1989 Convention on the Rights of the Child*

As detailed above, the CRC provides rules in relation to the active participation of children and their recruitment. The language used is generally reflective of the provisions set out in the 1977 Additional Protocols. The CRC provisions also set a minimum age of 15 years for "direct" participation or recruitment. This seems an anomaly when one considers the overall context of the CRC and its determination that a child is any person under 18 years.

Indeed, the inclusion of this minimum age in Article 38 was highly controversial and led to contentious debate during the drafting stages. However, states such as the United States, the United Kingdom and France objected to 18 years being set as a minimum age,[26] due to the fact that these and other states recruit people below 18 years into their armed forces.[27]

*4 1999 International Labour Organization Convention No 182 on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (ILO Convention)*[28]

This instrument was adopted in June 1999 and came into force on 19 November 2000. Interestingly, the United States, which is one of only two states (the other being Sudan) that has not ratified the CRC, played an important role in the drafting and finalisation of this instrument and was the third state to ratify it.[29]

Under the terms of the ILO Convention, a child is defined as a person under the age of 18 years.[30] States parties to the instrument are under an obligation to "take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency."[31]

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26 Renteln, above n 15, 196.

27 As at November 2004, at least 60 states continue to legally (under their respective national laws) recruit children aged 16 and 17 years: Coalition to Stop the Use of Child Soldiers "Child Soldiers: Governments Failing Generations of Children" (17 November 2004) Press Release 2.

28 Worst Forms of Child Labour Convention (17 June 1999) ILO C182 ["ILO Convention"].

29 The United States ratified the ILO Convention, above n 28, on 2 December 1999. As at 31 March 2004, the instrument has been ratified by 150 countries: ILO Website <http://www.ilo.ch/ilolex/english/convdisp1.htm> (last accessed 14 January 2005).

30 ILO Convention, above n 28, art 2.

31 ILO Convention, above n 28, art 1.

Article 3 of the instrument specifies what may constitute the "worst forms of child labour" and includes:

> (a) All forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict.

### 5 *2000 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (Children in Armed Conflict Protocol)*[32]

This is the most recent international instrument that deals with the standards to be adhered to in relation to the recruitment of children into armed forces. It was formulated in conjunction with another important instrument relating to the welfare of children – the 2000 Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (Sale of Children Protocol).[33] Both of these instruments were adopted by consensus by the United Nations General Assembly on 25 May 2000. The Children in Armed Conflict Protocol came into force on 12 February 2002 and the Sale of Children Protocol came into force on 18 January 2002. States are able to ratify either Protocol without becoming a party to the CRC,[34] leaving the way open for the United States to become a party to either or both Protocols. Indeed, the United States ratified both the Children in Armed Conflict Protocol and the Sale of Children Protocol on 23 January 2003.[35]

Both Protocols were formulated to strengthen international standards in relation to specific areas where children were particularly vulnerable. In this respect, the promulgation of international instruments such as these Protocols, concluded as they were in a high-profile atmosphere involving statements of support from many states and specifically addressing the issue of child soldiers (and sale of children), is an important

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32 UNGA Resolution 54/263 (25 May 2000) A/RES/54/263, adopting the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict ["Children in Armed Conflict Protocol"] and the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography ["Sale of Children Protocol"].

33 For a discussion of the Sale of Children Protocol, above n 32, see Michael J Dennis "Newly Adopted Protocols to the Convention on the Rights of the Child" (2000) 96 Am J Int'l L 789, 793–795.

34 Children in Armed Conflict Protocol, above n 32, art 9(2) provides that it is "subject to ratification and is open to accession by any State." See also the Sale of Children Protocol, above n 32, art 13(2).

35 Office of the United Nations High Commissioner for Human Rights "Ratifications and Reservations" (as at 7 October 2005) <http://www.ohchr.org> (last accessed 26 October 2005).

step forward, particularly in further raising the level of international consciousness in relation to these issues.

Nevertheless, in certain important respects the Children in Armed Conflict Protocol represents something of a disappointment. The opportunity was missed to provide appropriate universal standards for the new millennium. The instrument recognises "a need to increase the protection of children from involvement in armed conflict",[36] but it is clear that the spectre of *realpolitik* continues to play a significant role in these areas – even though the protection of the child should be the overriding concern. While the terms of the Children in Armed Conflict Protocol raise the minimum age to 18 for non-government armed forces,[37] they fall short of the standards set by some of the previous instruments – the ILO Convention and the African Charter – in relation to recruitment into state armed forces. In this regard, the instrument fails to respond to the magnitude of the problem with appropriate prohibitions and restrictions on the recruitment of child soldiers.

Some of these shortcomings are discussed below, after the relevant provisions of the Children in Armed Conflict Protocol are outlined.

Article 1 of the Children in Armed Conflict Protocol sets a minimum age for "direct" participation in armed conflict. It provides that "States Parties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities."

In relation to the compulsory recruitment or conscription of children, Article 2 provides that "States Parties shall ensure that persons who have not attained the age of 18 years are not compulsorily recruited into their armed forces."

Article 3(1) deals with the issue of "voluntary" recruitment and seeks to raise the minimum age standard from 15 years. It provides that:

> States Parties shall raise in years the minimum age for the voluntary recruitment of persons into their national armed forces from that set out in [Article 38(3) of the CRC], taking account of the principles contained in that article and recognizing that under [the CRC] persons under the age of 18 years are entitled to special protection.

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36 Children in Armed Conflict Protocol, above n 32, preamble, para 6.

37 Children in Armed Conflict Protocol, above n 32, art 4(1) provides that: "Armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years." Article 4(2) obligates states to take "all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalize such practices."

It is regrettable that the terms of the instrument leave the way clear for a number of unacceptable loopholes. The use of the term "all feasible measures" in Article 1 is unfortunate. Even though this reflects the standard set out in both the 1977 Additional Protocols and the CRC, this level of obligation allows other factors – which do not involve the protection and rights of the child – to be taken into consideration. As a result, there will be circumstances where the use of children below the age of 18 years will be permissible under the Protocol. The term "feasible" has been defined under another international humanitarian law instrument as "practicable or practically possible taking into account *all circumstances* ruling at the time, including humanitarian and *military considerations*."[38]

Various countries also included a similar definition in the interpretive declarations accompanying their respective ratification of Additional Protocol 1.[39] The United States has included an almost identical definition in its interpretive declaration when ratifying the Children in Armed Conflict Protocol.[40] Should such a definition of "feasible" be widely applied by other states to the obligations under the Children in Armed Conflict Protocol (which seems likely), or if this definition represents a principle of customary international law (also quite possible), then the effect of the obligations imposed on states is significantly diluted and the provision would allow for the use of children under 18 years in exceptional circumstances or where it is "justified" by military contingencies.

Moreover, Article 1 refers to "direct" participation in hostilities. As has already been discussed, children around the world are being forced to perform many roles as part of the armed forces of a state, not all of them involving actual fighting against an enemy. The United States interpretive declaration to the Children in Armed Conflict Protocol asserts that the term "direct part in hostilities":[41]

> (i) means immediate and actual action on the battlefield likely to cause harm to the enemy because there is a direct causal relationship between the activity engaged in and the harm done to the enemy; and
>
> (ii) does not mean indirect participation in hostilities, such as gathering and transmitting military information, transporting weapons, munitions, or other supplies, or forward deployment[.]

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38 See Protocol to the 1980 Conventional Weapons Convention Concerning the Use of Mines, Booby-Traps and Other Devices (3 May 1996) 35 ILM 1206, art 3(4) (emphasis added).

39 Dennis, above n 33, 79, fn 18.

40 Children in Armed Conflict Protocol, above n 32, United States declaration para 2(A).

41 Children in Armed Conflict Protocol, above n 32, United States declaration paras 2(B)(i)–(ii).

The use of children in functions other than as front line troops on the battlefield – what might be described as "indirect" participation in the activities of the armed forces – appears to fall outside of this interpretation of the provision.

Articles 2 and 3 of the Children in Armed Conflict Protocol have the combined effect of raising the minimum age of compulsory recruitment to 18 years, but allowing for voluntary recruitment at a younger age. States are obligated to raise – to some undefined level – the age of voluntary recruitment from 15 years. This article has previously highlighted the difficulties in regarding much of the "voluntary" recruitment that does occur as a genuine expression of the child's free will and, in any event, in many cases it will be difficult to prove a child's age when he or she volunteers.

Another concern with the terms of the Children in Armed Conflict Protocol is that it is expressly "stressed" by the drafters to be "without prejudice to the purposes and principles contained in the Charter of the United Nations, *including Article 51*, and relevant norms of humanitarian law." [42]

The reference to humanitarian law once again serves to introduce considerations of military necessity and advantage into the question of the use of child soldiers. More disconcertingly perhaps is the explicit reference to Article 51 of the United Nations Charter. This provision affirms the "inherent right" of a state to use force in self-defence once "an armed attack occurs".[43] Recent events, indicative of a trend towards assertions by a number of states of the existence of a "pre-emptive strike" doctrine of force in reaction to the perceived threats posed by weapons of mass destruction, are seen by many as challenging the traditional international law limitations to this Article 51 right of states. Indeed, the United Nations Secretary-General has created a High-level Panel on Threats, Challenges and Change to, in part, consider the "relevance" of these principles in light of current and future challenges to collective security.[44]

It is not yet apparent whether, and how far, these challenges will expand the scope of Article 51; suffice to say, for the purposes of this article at least, that the express reference to this provision in the Children in Armed Conflict Protocol again emphasises the political

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42 Children in Armed Conflict Protocol, above n 32, preamble, para 13 (emphasis added).

43 Article 51 of the United Nations Charter provides inter alia: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."

44 See "Note by the Secretary General Transmitting Report of the High-level Panel on Threats, Challenges and Change, Entitled 'A More Secure World: Our Shared Responsibility'" (17 November 2004) A/59/565, paras 188–192.

nature of the instrument and leaves an uncomfortable degree of flexibility for those states that are determined to ignore its underlying principles.

Overall, the Children in Armed Conflict Protocol constitutes an important element in the international law regime that seeks to prohibit or restrict the recruitment of child soldiers. The very fact that it has been introduced and is increasingly accepted by states indicates that the use of children in armed conflict is no longer a problem that the international community can ignore. Civil society and human rights groups now have another legal "weapon" with which to pressure states to address the problem more directly. States are now under more specific legal obligations to act than they had been previously.

Yet, as these brief comments indicate, this instrument is not satisfactory. It represents another step in a long road towards ending the problem but suffers due to the inherently political nature of recruitment practices for the armed forces of many states. These are problems that restrict many areas of international law, particularly those that seek to impose on states the obligation to comply with universal human rights standards. For this reason, it is important that other international law principles can also be utilised in an effort to combat the use of child soldiers. These primarily involve the "criminalisation" of certain acts relevant to the problem of child soldiers. In a general sense, these are less political forms of regulation, in that they involve actions against individuals rather than sanctions and restrictions upon a state. This article now looks at the two main ways in which international criminal law deals with the child soldier issue.

### *B The Criminalisation of the Recruitment of Child Soldiers*

The rules of international criminal law embody a legal regime that defines certain "international crimes" and provides for the individual criminal responsibility of those who commit these crimes. An international crime differs from what may be regarded as an "ordinary" crime under national law. For a crime to attain the "status" of an international crime, it is necessary that it is regarded as an affront to us all – literally a crime against humankind. In this sense, it is the international community that determines the notion and general scope of international crimes, including the creation of "new" elements of these crimes, both through inclusion within the mandates of established international criminal tribunals and via the traditional development of customary international law through other state practice.

In this regard, the international community has rightly seen fit to regard the recruitment of children into armed forces as an international crime in certain circumstances. Once again, the limitations placed on the scope of this crime centre around the age of the child or children involved – with the standard set at an unacceptably low level.

The principal international criminal tribunal that has recently been established to deal with this type of crime is the ICC.

*1 The International Criminal Court*

In July 1998, the Rome Statute of the International Criminal Court (Rome Statute) was finalised.[45] This treaty established for the first time a permanent international criminal tribunal – the ICC – to try persons charged with committing various international crimes. The Rome Statute came into force on 1 July 2002, following its 60th ratification.[46] Although it currently still faces opposition from the United States, which has undertaken a number of steps to limit the effectiveness of the Court to pursue perpetrators of international crimes,[47] it reflects the desire that "the most serious crimes of concern to the international community as a whole must not go unpunished".[48] The mandate of the ICC is "complementary" to the national jurisdiction of states, meaning that the Court is essentially to be regarded as a court of last resort.[49]

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45 Rome Statute of the International Criminal Court (Rome Statute) (17 July 1998) 37 ILM 999.

46 At the time of writing, 99 states have ratified the Rome Statute.

47 It is interesting to note that, in its interpretative declaration to the Children in Armed Conflict Protocol, above n 32, the United States asserted that: "The United States understands that nothing in the Protocol establishes a basis for jurisdiction by any international tribunal, including the International Criminal Court": United States Declaration paragraph 5. For a discussion of other actions taken by the United States in relation to the ICC, see Steven Freeland and Michael Blissenden "The International Criminal Court – Politics, Justice and Impunity" in T Dunworth (ed) *International Governance and Institution: What Significance for International Law?* (ANZSIL, 11th Annual Meeting, Wellington, 2003) 319.

48 Rome Statute, above n 45, preamble, para 4.

49 See Rome Statute, above n 45, arts 17–18. For a discussion of the principle of "complementarity" as it is applied in the Rome Statute, and some of the uncertainties that its implementation may give rise to, see Alexis Goh and Steven Freeland "Report on the Rome Statute and the International Criminal Court" in Gabriël A Moens and Rodophe Biffot (eds) *The Convergence of Legal Systems in the 21st Century – An Australian Approach* (The Australian Institute of Foreign and Comparative Law, Brisbane, 2002) 290, 290–296.

The ICC has jurisdiction with respect to the following crimes committed after 1 July 2002:[50]

(a) The crime of genocide;

(b) Crimes against humanity;

(c) War crimes;

(d) The [as yet undefined] crime of aggression.

Within the definition of "war crimes", the Rome Statute specifies that the recruitment of (certain) child soldiers would constitute a crime. In the context of an international armed conflict, the definition of war crimes includes "[c]onscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities." [51]

This is repeated in the definition of war crimes in the context of an armed conflict not of an international character, except that in those circumstances it applies to recruitment into "armed forces or groups" rather than "the national armed forces".[52]

Immediately one is struck by the minimum age limit. It is difficult to reconcile the apparent desire of the international community to protect children under the age of 18 years from participating in armed conflict – as reflected in the Children in Armed Conflict Protocol (even if it is subject to exceptions) – with the criminalisation of recruitment activities only in respect of children below the age of 15 years. One can surely accept an argument that the recruitment or use of children of, for example, 15 years does constitute (in the absence of other factors that may properly negate criminal responsibility) an action that is at odds with the basic norms that have now been set by the international community. Given this, such an action should constitute an international crime and the definitions in the Rome Statute should be "upgraded" accordingly.

Amendment to the terms of the Rome Statute is possible, but not before the Review Conference to be held in 2009.[53] It is to be hoped that an appropriate amendment is made to these provisions so that the criminalisation of the recruitment of child soldiers is set at a higher minimum age, though it is likely that several of the states parties will dissent to raising this to 18 years given their existing recruitment policies.

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50 Rome Statute, above n 45, art 5(1).

51 Rome Statute, above n 45, art 8(2)(b)(xxvi).

52 Rome Statute, above n 45, art 8(2)(e)(vii).

53 Rome Statute, above n 45, art 123(1) provides for the convening of a Review Conference seven years after the instrument enters into force to consider any proposed amendments.

In other aspects, the provisions in the Rome Statute are an improvement on the Children in Armed Conflict Protocol. During the drafting process of the Rome Statute, it was generally agreed that the terms "using" and "participate" in the relevant war crimes provisions would apply not only to direct participation in conflict, but also to other military activities linked to combat such as "scouting, spying, sabotage, … the use of children as decoys, couriers, or at military checkpoints [and] carrying supplies to the front line".[54]

There is, however, another cause for concern with these provisions. Under the obliquely sanitised heading of "Transitional Provision", Article 124 of the Rome Statute enables states to "opt out" of the war crimes provisions for seven years.[55] The inclusion of Article 124 was regarded as a necessary compromise to allow for the acceptance of the Rome Statute, given the political sensitivities associated with any restriction on the actions of a state's official armed forces (war crimes are typically, though not exclusively, committed by military personnel). At the time of writing this article, France, Colombia and Burundi have indicated that they intend taking advantage of this provision. Although Article 124 applies to all war crimes as defined under the Rome Statute, there is, of course, the risk that it might be invoked in relation to the recruitment of children. It is to be hoped that states will be discouraged from availing themselves of this escape route and that the provision is deleted from the Rome Statute at the Review Conference.

Within the definition of "crimes against humanity" in the Rome Statute, there are a number of other provisions that may be applicable to the recruitment and use of child soldiers in specific circumstances. These include acts of

1. "Enslavement",[56] which is defined as: "the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children";[57]

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54 Coalition to Stop the Use of Child Soldiers *International Standards* <http://www.child-soldiers.org> (last accessed 21 November 2004).

55 Article 124 of the Rome Statute provides that: "a State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in Article 8 when a crime is alleged to have been committed by its nationals or on its territory."

56 Rome Statute, above n 45, art 7(1)(b).

57 Rome Statute, above n 45, art 7(2)(c). For a discussion of the relevant international criminal law principles relating to enslavement, see *The Prosecutor v Kunarac, Kovak and Vukovic* (22 February 2001) IT-96-23, paras 542-543 (Trial Chamber, ICTY). The Appeals Chamber in the same case confirmed that the Trial Chamber's definition of the crime reflected customary international law at the time that the alleged crimes were committed.

2. "Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law";[58]

3. "Rape, sexual slavery, [or] enforced prostitution".[59]

For an act to constitute a crime against humanity within the terms of the Rome Statute, it must be "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."[60]

This is a difficult legal threshold to prove and may not be applicable in every case that involves the recruitment or use of children. However, the ICC Prosecutor should certainly consider these provisions when investigating and indicting persons alleged to have been involved in acts that encourage the use of child soldiers.

*2 The Special Court for Sierra Leone*

Brief note should be taken of the international criminal tribunal that has been established to investigate the events in Sierra Leone since 30 November 1996. The use of child soldiers was common during the conflict in that country. The Special Court for Sierra Leone was established by an agreement between the United Nations and the Government of Sierra Leone dated 16 January 2002, pursuant to Security Council Resolution 1315 on 14 August 2000.[61] Under the terms of the Statute of the Special Court for Sierra Leone (Sierra Leone Statute), the Special Court has the jurisdiction to try persons who are alleged to have committed one (or more) of various international crimes – crimes against humanity,[62] violations of Article 3 common to the Geneva Conventions and of Additional Protocol II[63] or other serious violations of international humanitarian law[64] – as well as certain criminal offences under the national laws of Sierra Leone.[65]

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58 Rome Statute, above n 45, art 7(1)(c).

59 Rome Statute, above n 45, art 7(1)(g).

60 Rome Statute, above n 45, art 7(1).

61 UNSC Resolution 1315 (14 August 2000) S/RES/1315/2000.

62 Statute of the Special Court for Sierra Leone (14 August 2000) <http://www.sc-sl.org/scsl-statute.html> (last accessed 19 October 2005), art 2 ["Sierra Leone Statute"].

63 Sierra Leone Statute, above n 62, art 3.

64 Sierra Leone Statute, above n 62, art 4.

65 Sierra Leone Statute, above n 62, art 5.

Mirroring the terms of the Rome Statute in the context of armed conflicts not of an international character, Article 4(c) of the Sierra Leone Statute criminalises the "[c]onscripting or enlisting [of] children under the age of 15 years into armed forces or groups or using them to participate in hostilities."

Once again, the minimum age limit has been set at a low level.

In addition, the Special Court has jurisdiction in relation to the following alleged violations of the Sierra Leone Prevention of Cruelty to Children Act 1926:[66]

(i) Abusing a girl under 13 years of age, contrary to section 6;

(ii) Abusing a girl between 13 and 14 years of age, contrary to section 7;

(iii) Abduction of a girl for immoral purposes, contrary to section 12.

Overall, the international community has recognised the need to criminalise acts which amount to the recruitment or use of children for participation in armed conflict. This is an important step, though the standards that have been specified – relating to the minimum age limit – in order to constitute a crime at international law must be reassessed and upgraded. With ongoing pressure from civil society and human rights groups, this is an achievable goal.

### *C The Criminalisation of the Actions of Child Soldiers*

A far more complex and difficult issue is the question of whether the child soldier him or herself should be held criminally responsible under international law for his or her actions. Tragically, there are many examples of child soldiers committing acts of violent brutality; acts that at first sight would constitute an international crime. In most circumstances, there will be "excuses" for such behaviour; threats and intimidation ("kill these people or we will kill you and find someone else to do it anyway"), the effects of forced drug taking or a genuine lack of understanding of the nature and scope of the act. But what of the situation where such actions are committed by a child soldier without any such extenuating circumstance being present? In such a case, consider the position of a victim's family after a brutal act has been committed by a child soldier. Would it be acceptable to assert that the perpetrator is not to be tried under international law simply because of his or her age? Does this satisfy the broader aims of international justice and support the notion that "the most serious crimes of concern to the international community as a whole must not go unpunished"?[67]

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66 Sierra Leone Statute, above n 62, art 5(a).

67 Rome Statute, above n 45, preamble, para 4.

A consideration of these questions will necessarily involve many cultural, societal and moral factors – including the issue of "who is a child?" as well as the community's view as to where responsibility should lie. For example, a Save the Children Federation study in Rwanda concluded that public opinion in that country supported the view that children should be held responsible for their actions during the genocide that occurred during 1994.[68] An author on this subject explains this view as follows:[69]

> You will hear Rwandans say that if a child was able to kill, if a child was able to discriminate between two ethnic groups, to decide who was a Hutu moderate and who wasn't, and was able to carry out murder in that way, why should that child be considered differently from an adult? And therefore the punishment should be the same.

Yet, the rules of international criminal law cannot always reflect the differing cultural approaches to difficult issues such as this. A clear example of this is the question of the death penalty – neither the ICC nor either of the two ad hoc international criminal tribunals established by Resolutions of the United Nations Security Council[70] allow for the death penalty. Article 77 of the Rome Statute provides for the following penalties:

> (a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or
>
> (b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.

At the time that the United Nations Security Council was voting on Resolution 955 to establish the International Criminal Tribunal for Rwanda (ICTR), Rwanda was (coincidentally) a non-permanent member of the Council. The vote to establish the ICTR was 14 in favour and one (Rwanda) against. Although it was in favour of the establishment of an international criminal tribunal, Rwanda's opposition to Resolution 955 was, among other things, on the basis that it viewed the death penalty as an integral part of any system of justice established to deal with acts of genocide.

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68 See Renteln, above n 15, 200.

69 Chen Reis "Trying the Future, Avenging the Past: The Implications of Prosecuting Children for Participating in Internal Armed Conflict" (1997) 28 HRLR 629, 634–635.

70 International Criminal Tribunal for the former Yugoslavia, established by UNSC Resolution 827 (25 May 1993) S/RES/827; International Criminal Tribunal for Rwanda, established by UNSC Resolution 955 (8 November 1994) S/RES/955.

Similarly, international law does not reflect the views of some states in relation to the responsibility of children for their actions. Whereas under many national legal systems, children as young as 10 years (or even less in some jurisdictions) are deemed capable of forming the requisite intent to commit a crime,[71] international law has tended to gloss over this very difficult issue. This is particularly reflected in the terms of the Rome Statute.

*1 The International Criminal Court*

The Rome Statute sets a minimum age for persons over whom the ICC has jurisdiction. This has a direct impact on the possibility of a child soldier being held criminally responsible for his or her actions in that Court. Article 26 of the Rome Statute provides that: "The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of the crime."

We are struck with a sense of inconsistency as far as the regulation of international criminal law through the ICC is concerned. On the one hand, there is a prohibition on the recruitment of children under the age of 15 years. The international standard that is (quite wrongly) being set at this level means that there is no criminal wrongdoing in engaging children of 15, 16 or 17 years to take part in armed conflict. Yet, the Court is not mandated to examine the actions of those children, even where they might have committed international crimes.

This anomaly has at least two adverse consequences. First, it may, perversely, encourage the recruitment of children in this "responsibility free" age bracket. To recruit someone in this category attracts no international criminal responsibility under the specific war crimes provisions relating to child soldiers, and there is no possibility that the actions of the child him or herself will be the subject of direct investigation (though of course they may be relevant for other investigations). In this sense, the terms of the Rome Statute send entirely the wrong message to those who are involved in the recruitment of children to participate as child soldiers.

Secondly, it appears that the Rome Statute has completely avoided confronting the issue of the criminal responsibility of child soldiers. By having jurisdiction only in respect of persons of 18 years or above, the Court will only ever try those who are universally accepted as not being children under international law. It is almost as if the drafters of the Rome Statute would prefer that a consideration of this important aspect of the shameful problem of child soldiers be delegated elsewhere. As the first and only (at least thus far)

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71 For example, the minimum ages for criminal responsibility in the following national legal systems are as follows: Australia – 10 years; Sierra Leone – 10 years; Canada – 12 years; Denmark – 15 years; the United Kingdom – 10 years; France – 13 years; Ireland – seven years; New Zealand – 10 years; Norway – 15 years; Scotland – eight years: see Goh and Freeland, above n 49, 302.

permanent court of its kind, it is important that the ICC be in a position to set standards that play a vital role in the evolution of international criminal law. It is the stated "determination" of the international community that the ICC work to "put an end to impunity for the perpetrators of these crimes and thus contribute to the prevention of such crimes".[72] In this regard, the Court appears to fall short of its goals.

It would have been preferable to allow the ICC to have the jurisdiction to try persons under the age of 18 years. This would not lead to a "flood" of trials, since the ICC Prosecutor would first undertake a rigorous investigation and then only seek to prosecute in appropriate circumstances where there are no justifiable excuses for the relevant actions of the alleged perpetrator. Indeed, if the Prosecutor did proceed with such a case, it would highlight even more to the international community in a transparent and highly public forum the horrors of the child soldier issue and further galvanise attempts to properly address it in more effective ways. In the case where there was such a trial and subsequent conviction, the Court is required – as it is with all sentences – to take into account "such factors as the gravity of the crime and *the individual circumstances of the convicted person*" in determining an appropriate sentence.[73] This would give it sufficient flexibility in the rare case of a person under the age of 18 years being found guilty by the Court.

On this issue, it is once again instructive to compare the position with that under the terms of the Sierra Leone Statute.

*2 The Special Court for Sierra Leone*

The Sierra Leone Statute approaches the question of the criminal responsibility of the child soldier in a different way. Article 7 of the instrument provides:

> (1) The Special Court shall have no jurisdiction over any person who was under the age of 15 at the time of the alleged commission of the crime. Should any person who was at the time of the alleged commission of the crime between 15 and 18 years of age come before the Court, he or she shall be treated with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society, and in accordance with international human rights standards, in particular the rights of the child.

72 Rome Statute, above n 45, preamble, para 5.

73 Rome Statute, above n 45, art 78(1) (emphasis added).

> (2) In the disposition of a case against a juvenile offender, the Special Court shall order any of the following: care guidance and supervision orders, community service orders, counselling, foster care, correctional, educational and vocational training programmes, approved schools and, as appropriate, any programmes of disarmament, demobilization and reintegration or programmes of child protection agencies.

The Special Court, therefore, has the jurisdiction to consider the actions of child soldiers between 15 and 18 years, reflecting not only the prevailing cultural values of Sierra Leone in relation to the conflict but also, significantly, ensuring that the crimes committed (in the absence of extenuating circumstances) are themselves dealt with. Besides bringing some element of "closure" and justice to victims and their families, this highlights the unacceptable nature of the crimes in any circumstance. This is the important message of international criminal law – that there is certain behaviour (acts amounting to international crimes) that is not and cannot be tolerated and will be prosecuted.

In addition, the provisions allow for a standard of particular care for child offenders as is appropriate in their specific circumstances. The abhorrence of the crime is not in any way diminished or dismissed. The fundamental standards set by international law are not compromised. Yet, there is still a mechanism in place to deal "sympathetically" with the child perpetrator, as is appropriate in "the individual circumstances of the convicted persons".[74] Indeed, Article 19(1) of the Sierra Leone Statute goes further to provide that "[t]he Trial Chamber shall impose upon a convicted person, *other than a juvenile offender*, imprisonment for a specified number of years."[75]

In this way, the system of justice established under the Sierra Leone Statute seeks not only to maintain the gravity of the crimes but also to address the equally difficult issue of somehow aiding a traumatised child and giving him or her some hope for the future. Without this, any response to the problem as it exists today provides only partial comfort to those children caught up in the mire of the child soldier phenomenon.

## *IV CONCLUDING REMARKS*

The child soldier problem is one of the tragedies of our time. For every one of the estimated 800,000 children being forced to participate in some way in armed conflict, there is a childhood lost. Those who survive the ordeal are often so traumatised that it is virtually impossible for them in any way to recover the lost years, lost sensitivities, lost hope, lost trust and lost optimism. For example, most former female child soldiers are often ostracised by their societies because of the stigma associated with their use as sex

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74 Sierra Leone Statute, above n 62, art 19(2).

75 Sierra Leone Statute, above n 62, art 19(1) (emphasis added).

slaves during that time.[76] Even if they are able to return to their home communities, many have little means of supporting themselves and are forced to turn to sex work, further compounding their stigmatisation.[77]

It is clear that the international community, particularly in the face of constant pressure from civil society and human rights groups, must do more to protect children. That is the message from the February 2005 report of the United Nations Special Envoy for Children and Armed Conflict.[78] The proposed global mechanism in that Report is an important element in this movement. After considering the Report, the Security Council reiterated the "crucial need" for such a mechanism as well as its determination to ensure compliance with its requirements. Its implementation will aim to provide key bodies in the front line with specific, objective and reliable information about the violation of children's rights, with the prospect of sanctions against those who persist. As the Report concludes, it is important to determine "the whom, where and what" regarding grave violations committed against children in conflict situations.

In this regard, the international community must "tak[e] into consideration the economic, social and political root causes of the involvement of children in armed conflicts."[79]

In the end, the only way to stop the child soldier tragedy is to stop armed conflict altogether. The "advantages" of using children in warfare, coupled with the flawed (though improving) regime of international law dealing with child soldiers, means that as conflict continues, so will the use of children to wage its deadly fight. Unless more is done, another 800,000 (or more) children will, over time, replace those currently being used. International law – including those provisions that seek to protect the child soldier – does not, unfortunately, go far enough to prevent armed conflict. We must acknowledge and address the entire context of conflict – the social, cultural, geopolitical, economic, geographical, development and equity considerations – and the circumstances in which children "voluntarily" or by coercion become weapons of war.

International law must be upgraded to provide the necessary support. It must be utilised to establish and reflect alternate policies and institutions that truly address these concerns. Without a more effective international legal regime, no amount of good

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76 "The Special Burden of Girl Soldiers" (26 April 2005) *The International Herald Tribune* 6 col 5.

77 BBC News "World Armed Groups 'Abduct Girls'" (25 April 2005) <http://newsvote.bbc.co.uk> (last accessed 11 May 2005).

78 "Report of the Secretary-General on the Promotion and Protection of the Rights of Children: Children and Armed Conflict", above n 11.

79 Children in Armed Conflict Protocol, above n 32, preamble, para 16.

intentions will suffice. We do not as yet have all of the answers but must recognise that international efforts should also focus on structures that provide a realistic alternative to joining and participating in armed conflict. All of us owe this much to the current and future generations of innocent children.