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Child soldiers: rescuing the lost childhood

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The phenomenon of child soldiering, as medieval a practice as it may seem, remains a surprisingly contemporary and global concern today. Governments and paramilitaries in countries all over the world, whether they be developed or underdeveloped, war-torn or peaceful, are regularly enlisting and recruiting children into various combat-related positions and support functions. This article seeks to outline the scale of the problem, describe the sad realities faced and consequences faced by these girls and boys — the so-called little 'bells' and 'bees' of war — and discuss the complex social, psychological and moral issues involved. Finally, it analyses the practical and legal approaches that have been taken to avoid and respond to the practice, commending the successes, assessing the failings, and highlighting a number of courses for future reform.

Introduction

The use of children under the age of 18 for any role in armed conflict (child recruitment) is a deplorable practice that affronts many rights of humans generally and children particularly. This article attempts to deconstruct and explore the many issues involved. The first part of the article seeks to define the exact problem in terms of the propensity of the practice and the implications for children. The second part tracks the international development of the legal prohibition against child recruitment, through conventions and customary international law, and its eventual maturity into a crime attaching individual responsibility. Finally, the legal framework is evaluated and recommendations made. Child recruitment remains today an open wound in the international body of human rights that needs more creative and committed surgery.

Child recruitment

> *In the past decade, an estimated two million children have been killed in armed conflict. Three times as many have been permanently disabled or seriously injured.*
> — Center for Defense Information (1997)

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The history of child recruitment

Child recruitment is not a new phenomenon, and can be traced back to the Romans, Vikings and all those involved in both World Wars (Arzoumanian and Pizzutelli 2003), but it has recently become more prominent. In Sierra Leone, children make up roughly 80 per cent of fighters among the Revolutionary United Front. In Liberia, 65 per cent of demobilised combatants by 1997 were believed to have been minors at some stage during the conflict, with one documented seven-year-old (UNICEF Liberia 1998). In Afghanistan, 30 per cent of all children have been active in war with the Taliban and Northern Alliance forces. And one in every four combatants in Colombia is suggested to be underage. Such is the extent of the problem that by 2005, 60 per cent of non-state armed groups were believed to be using children and up to 50 states were recruiting in violation of international law (Singer 2005b, 30). Overall, it is estimated that more than 300,000 children in over 40 countries are currently in active state military service, while another 500,000 in over 85 countries are recruited into paramilitary groups (International Committee of the Red Cross 2003; UNICEF 2007).

Children are being predominantly enlisted into paramilitary groups, This is explained by the fact that paramilitaries tend to be more under-resourced; fly under the radar of international monitoring; are less receptive to international condemnation; and claim not to owe the same obligations to children that states do. It is even the case that some paramilitaries are discretely allied to and sponsored by state governments. The UN recently accused Sri Lankan governmental security forces of recruiting child soldiers on behalf of an associated paramilitary group, called the Karuna faction, which is also fighting the Tamil Tigers (UN Sri Lanka 2006). Such a reality makes addressing the child soldiering problem more complicated.

Africa has the worst record for the recruitment of children. By early 2007, it had the largest number of active child soldiers, with up to 200,000 involved in armed conflict, constituting well over one-third of global worldwide figures. In Chad, there is no minimum age for children volunteering with parental consent, while the Uganda People's Defence Force also permits children as young as 13 to enlist. In Asia, the Coalition to Stop the Use of Child Soldiers reported in 2004 that thousands of children were involved in armed forces in the Philippines, Afghanistan, Laos, India, Indonesia, Nepal, Sri Lanka and Burma, the last being unique as the only country where *government* forces abduct and use children as young as 12. However, astonishingly, the use of child soldiers is not confined to the developing world. Of the 19 NATO members, 13 recruit children under the age of 18 into their military (Renteln 1999, 202). The US and UK accept 17- and 16-year-old volunteers respectively, and both deploy them to the front line (Price Cohen 1995, 171). In fact,

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some 35 per cent of British recruits in 1996 were under the age of 18 (Brett 1996, 125). All things considered, the only continent on which child soldiers have not served in significant numbers is Antarctica.

Children are enlisted for many reasons. Valued for their fearlessness, commanders have found them to be less cautious and more expendable, impressionable and obedient than adults (Bandu 2001, 235–36). In Sri Lanka, for example, rebel groups indoctrinate children to be used as suicide bombers or mine clearers. Technological advancements that have increased the availability and decreased the size, complexity and cost of modern weapons have also made the use of children more feasible. And occasionally, it is simply a case of numbers: the longer the conflict, the greater the need to replace casualties (Foneska 2001, 70). These attractions of children have driven many armies to conduct 'press-ganging', a process by which soldiers, or even hired professionals paid on a per-head basis, move through villages abducting children (Davison 2004, 138).

The problem of child recruitment

The general thrust behind all child rights is the recognition that children need special care and protection. In this context, there are a number of problems caused by child recruitment, even though there are certainly variations in the way they are affected by war in different regions.

First, given the protection that children are understood to require and deserve, their subjection to the high risk of physical injury is of major concern. The conditions of war often involve disease, sexual assault, humiliation and mutilation. Human Rights Watch reported in 1998 that child guerrillas in Colombia were being used to collect intelligence; construct and deploy mines; and serve as advance troops in ambush attacks:

> The guerillas call their child soldiers 'little bees', because they sting before the enemy realizes it's under attack. Paramilitaries call them 'little bells' because child soldiers are usually deployed in forward positions, where they warn the adults of an early attack — and often bear the worst of it. [Human Rights Watch 1998.]

Those who managed to escape were considered deserters and often subjected to on-the-spot execution. To prevent resistance and harden them into ruthless combatants, children are brutalised even by their own commanders (Machel 1996). Drugging is a common method to increase their courage and dull their sensitivity to pain (Revaz 2001, 15). But it is important to remember that the term 'child soldier' is not restricted to combative functions, a common and unfortunate assumption. In Uganda, young

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girls abducted were commonly divided up and allocated to soldiers to serve as their 'wives', subject to forced slavery and rape (Leibig 2005, 6).

Second, there is the heightened danger that war-related experiences will have harmful psychological outcomes for children in the form of depression, stress and aggression disorders. There is much debate as to the nature and extent of these effects, and there is little reliable data. However, few doubt that combat has 'a tremendous impact on the psychological development of children, their attitudes toward society, and their outlook on life' (Macksoud and Aber 1996, 78). A survey of 40 child soldiers run by UNICEF in 1993 revealed that 85 per cent had participated directly in armed conflict; 70 per cent had been violently victimised; and nearly all 'exhibited symptoms of different levels of post-traumatic stress, with 15% requiring serious psychological care'. When children are subject and witness to rape, violence and torture of that degree, and are forced to commit horrendous atrocities against even their own relatives, it is hard to envisage that they do not carry emotional scars (Corriero 2002, 338). Third, some commentators theorise that the exposure to conflict risks encouraging children to accept violent behaviour as normal and the way to resolve issues (Save the Children/UK 1997). Their perceptions of what is acceptable will be associated with their experiences in a lawless world in which looting and death are the norm. According to Singer (2005a, 72), it is similar to the psychology of indoctrination found in the social order of violent gangs. Typically:

> … groups … seek to diffuse any sense of responsibility among the children for future violence … dehumanizing their victims, such as by creating a moral split that divides the world into an 'us vs them' dichotomy. The overall intent is to create a moral disengagement from the violence that children are supposed to carry out as soldiers … The effect is that many children often emerge from such programs with weakened senses of remorse and obsessions with violence.

Children are often given 'code-names', branded with the group insignia, forced to regularly kill and watch death, and taught to forget their past lives and assume new identities as conditioned killers. In Iraq during the Gulf War, for example, Saddam Hussein constructed vast recruitment programs to target children as young as 10. In these camps, the children were permitted no contact with their families and were subjected to as much as 14 hours of military training per day, intense political and religious indoctrination that was intended to desensitise them to rabid violence, and frequent beatings.

Fourth, child soldiers, even if involuntarily recruited, lose the protective status of civilians and become legitimate military targets and liable to post-conflict detainment, criminal prosecutions and sometimes the death penalty (Davison 2004,

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125). Although there is a trend towards treating them as victims not criminals (for instance, the Special Court for Sierra Leone had jurisdiction only over children between the ages of 15 and 18, and even then was restricted to certain sentencing alternatives excluding imprisonment (Secretary-General 2001, 14–15)), children still face truth commissions, inquiries into the nature of their recruitment and often the assignment of moral, if not legal, culpability. Also, Gallagher (2002, 324) notes that the status of child soldier can cripple a child's ability to receive assistance. By way of Art 1(F)(b) of the Convention Relating to the Status of Refugees (1951), states regularly hold such children as having 'committed a serious non-political crime' and ineligible for asylum protection.

Furthermore, the lost education time and separation from family have negative social results for child soldiers. According to Art 9(1) of the Convention on the Rights of the Child (1989), states have an obligation to ensure that there is no separation of a child and parents against their will, while under Art 32(1) states must protect children from 'work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development'. An estimated 82 per cent of children involved in the 1990s Liberian conflict had been removed from school in order to fight (UNDHA-HACO 1996). The process of post-conflict demobilisation and reintegration is difficult and rarely executed properly. Human Rights Watch (2004), reporting on the return to their homes of child soldiers fighting for the Liberation Tigers of Tamil Eelam in Sri Lanka, noted that many of the children lived in perpetual fear of re-recruitment, were ostracised by their communities who saw them as traitors and enemies, and found it very difficult to resume a normal way of life. Most former child soldiers were permitted no contact with their families during their recruited years, and many dreaded attending school for the simple reason that that was from where they had originally been abducted to fight.

Finally, there are issues of consent and autonomy. Some might question why a child of 16 or 17 cannot be responsible for deciding whether or not to join an armed force, in circumstances where that decision is genuinely voluntary, given that children as young as 14 or even 12 can, in many legal systems, be held criminally responsible and accountable for their actions. The answer to this is twofold. First, the fact that a child may be able to fully understand and comprehend the consequences of his or her criminal actions does not mean that society loses its obligations to protect that child from certain harmful decisions that he or she may make. How else can legal systems around the world justify the common imposition of lawful drinking, sex, driving and guardianship ages, to mention just a few, at say age 16, 18 or even 21? Although many children know what may happen to them if they drink alcohol, smoke cigarettes or enlist for war, lawmakers understand that protecting them from

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it is a more important societal interest. The law must frequently curb the rights of children to consent or volunteer where the dangers to their wellbeing and society in general outweigh the damage done to those rights. In other words, it is the *effects* of combat on children, not so much the elements of *coercion* or *consent*, that should be the real rationale for legal intervention.

But perhaps more importantly, those who believe that child soldiering may be less morally reprehensible when a child 'volunteers' must really question the sincerity of consent in many of the countries where underage volunteering is empowered. Although consent can be and often is the result of an informed process of decision making (in many countries, such as the United States and Australia, the armed services offer education, training and employment that may otherwise be unavailable), many forms of unwarranted pressure can lead children to enlist. Children are by nature vulnerable, especially when orphaned and poor. One story transcribed to an aid worker in Afghanistan talks of two boys 'who were so desperate that they literally had to choose between following a cow around to scoop up its excrement to sell as fuel or joining one of the armed factions' (Singer 2005a, 59). Often the children are disillusioned by deceptive concepts of honour or camaraderie and wild promises of future rewards, food and access to heaven. The Taliban in Afghanistan is famous for generating strong connections between fighting and religion during primary years of education, before children are capable of thinking critically. Disturbingly, these pledged rewards are sometimes offered to parents, who consequently coerce their children to enlist. Sometimes politics are involved, as in the case of Guatemala, where non-recruits were automatically branded as communist rebels (Cohn and Goodwin-Gill 1994, 25). Moreover, Abbott (2000, 518) supposes that it is frequently a simple case of children growing up in a militarised culture that encourages participation. Children are drawn into a cycle of violence that they are too young to resist and with consequences they cannot comprehend.

Assuming that children even have a choice, consent in any of these circumstances is illusory. Even where the volunteer safeguards specified in some international law instruments are strictly abided with *at a minimum* (see, for example, Art 3(3) of the Optional Protocol to the Convention on the Rights of the Child (2000)), no distinction between volunteers and conscripts should be maintained. Permitting such a delineation would raise immensely complicated issues in drawing a line between genuine and artificial volunteering — what circumstances would trigger a judgment that the recruitment is non-voluntary? Furthermore, separating volunteers would simply encourage recruiters to disguise forceful recruitment behind a veil of consent. Davidson (2001, 217) believes that it would open the door for those under age 15 to be recruited, because often birth certificates are lost, dates are changed and administrative systems are dysfunctional.

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The law on child recruitment

> *The continued use of child combatants affronts the underlying human ideals that motivated the creation of these laws … [and] illustrates the international community's failure to protect the world's children*.
> — A B Abbott (2000, 520)

The historical development

The development of the prohibition of child recruitment has been slow and, until 1998, mostly perfunctory, demonstrating aspirations rather than intentions. It was not until Arts 2, 8(b)(xxvi) and 8(e)(vii) of the Rome Statute (1998) that adults who recruit or enlist children under age 15 were officially branded as war criminals and prosecutable, jurisdictional constraints permitting.

The Hague Convention Respecting the Laws and Customs of War and Land (No 4) (1907) incorporated the principle of respecting family life under Art 46, but fell short of protecting separated children. In 1924, the League of Nations adopted the Declaration of the Rights of the Child, which provided under Art 3 that children should be the first entitled to relief in times of distress. Special protection was provided for child civilians under Art 17 of the Fourth Geneva Convention (1949) and the Universal Declaration of Human Rights (1948), and the Declaration of the Rights of the Child (1959) recognised their right to special care. Although these early developments provided modest protection, they evidenced a movement that would pave the way for future efforts.

The two 1977 Additional Protocols were the first to deal with child soldiers. Article 77 of Protocol I prohibited 'direct' child (under age 15) involvement in international armed conflicts. The criticisms of limiting the application to front-line roles were silenced with Art 4(3)(c) of Protocol II, which specifically forbids children from 'taking part' in hostilities. This extended to voluntary enlistment, domestic conflicts and all military roles, including ammunition transporter and sex slave.

In 1989, the General Assembly adopted the milestone Convention on the Rights of the Child (CRC). This is the most widely ratified human rights treaty and was rapidly enforced, with 61 states signing it on its first day. Today, 192 countries are signatory, and only two — the United States and Somalia — have failed to ratify it. Article 38(2) declares that state 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'; however, many ratifying states, including Argentina, Austria, Colombia, Germany, the Netherlands, Spain and Uruguay, have attached declarations extending this to children under 18. Article 22(3) of the African Charter on the Rights

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and Welfare of Children (1990), adopted one year later, raised the bar to 18 years of age, applying to children caught in 'tension and strife' as well as armed conflict (lower levels of violence), and making parties take all 'necessary' measures of prevention (a higher standard than 'feasible').

Various conferences have been held since then. In 1992, the Committee on the Rights of the Child recommended raising the minimum age for recruitment to 18, and to this effect the International Labour Organisation adopted Art 3 of the Convention Concerning the Prohibition and Immediate Elimination of the Worst Forms of Child Labour (1999). Also in that year, the Maputo Declaration (Africa) and the Berlin Declaration (Europe) supported the 'straight-18' approach, and the Organization of American States (Americas) and the Kathmandu Declaration (Asia) appealed to governments and armed groups to take the issue forward in 2000. The message of these movements was clear: the use and recruitment of children *under the age of 18* should be discontinued immediately. Finally, in May 2000, the General Assembly approved the Convention on the Rights of the Child on the involvement of Children in Armed Conflict (the CRC Optional Protocol), elevating the bar to 18.

The prohibition under customary international law

To gain the status of customary international law, a rule must be evidenced by sufficient state practice and *opinio juris*, the belief that the rule is legally binding (North Sea Continental Shelf Cases, 1969, at 73). The majority of the Sierra Leone Appeals Chamber held in 2004 that the prohibition on recruiting and enlisting *under-15-year-olds*, no matter the form of participation, crystallised under customary international law sometime before 1994 (Winter and King JJ in *Prosecutor v Hinga Norman*, 2004, at [52]–[53]). And from the above developments, little doubt is cast on this finding. What is of greater concern is first whether the same protection extends to those between the age of 16 and 18. Davison (2004, 144) is confident that the compulsory recruitment of children under 18 is now deeply enshrined in customary international law. Most countries willingly comply with this standard under the belief that the law requires it. But she hesitates, probably correctly, to say that it prohibits their voluntary enlistment. The importance of this restriction becoming customary is that all states will be bound by it regardless of treaty non-ratification. Second, of particular significance is whether the act of recruiting a child under the age of 15 or 18 is a *crime* under customary international law, as well as a *prohibited act*.

The crime under customary international law

Until 1998, no convention provided for the crime of child recruitment. Therefore, according to Art 38(1) of the Statute for the International Court of Justice (1945), the

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only avenue under international law for prosecuting offences committed before that time was if customary international law had criminalised it. A rule of customary international law can be created by uniform state practice (where a convincing number of states conduct themselves in a way that would seem to conform to a standard) and opinio juris (that this conduct of the states can be explained by their intention or belief that they are bound by a standard).

On 7 March 2003, the Special Court for Sierra Leone indicted Samuel Hinga Norman on eight counts of crimes against humanity. Hinga Norman was a chieftain from the Mende tribe in Sierra Leone and led the traditional paramilitary force, the Kamajors. The Kamajors had fought under the banner of the Civil Defence Front, which supported the government of Ahmed Tejan Kabbah against the Revolutionary United Front, which was led by Foday Sankoh and funded in part by Charles Taylor of Liberia. The Special Court was an ad hoc tribunal, similar in character to the ad hoc International Criminal Tribunals for Rwanda and the Former Yugoslavia, established in 2002 by an agreement between the UN and the government of Sierra Leone to 'try those who bear greatest responsibility' for war crimes and crimes against humanity committed in the region since 30 November 1996, the outbreak of the national civil war.

The crimes alleged against Hinga Norman included that of 'conscripting or enlisting children under the age of 15 years into armed forces or groups using them to participate actively in hostilities ("child recruitment")', a charge which the court was empowered to hear under Art 4(c) of its statute. The defence challenged the jurisdiction of the court, contending that there was no such proscribed 'child recruitment' offence, as outlined by Art 4(c), by November 1996. This date was significant because it was the start of the court's temporal jurisdiction. Therefore, if this were established, then the hearing would violate the principle of *nullum crimen sine lege:* 'without a crime, no punishment shall be administered'. The majority of the Appeals Chamber held that the crime had customarily developed by *at least* November 1996 (Winter and King JJ in *Hinga Norman*, 2004, at [53]). However, Justice Robertson (dissenting) considered that the earliest time at which this occurred was in 1998 with the Rome Statute (at [48]).

Requirements for a crime under customary international law

To determine whether individual criminal responsibility attached to the child recruitment prohibition, Winter and King JJ (*Hinga Norman,* 2004, at [37]) adopted the test as formulated in *Prosecutor v Tadic*. This required the standard elements of customary law (state practice and opinio juris), as well as an added element of *specificity* (reasonable awareness of the elements of the crime). Justice Robertson

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disagreed with the majority's interpretation of the specificity conditions, believing that more is demanded than simply showing that punishment was foreseeable and the elements of the offence were reasonably ascertainable. However, despite supporting stricter criteria, Robertson still found insufficient 'state practice indicating an intention to criminalize the prohibition' even when applying the majority's test (at [37]).

Evaluating the judgment of the Appeals Chamber

The majority decision, although morally attractive, is legally debatable. In the circumstances, the inconsistency of state practice made the need for opinio juris more apparent (*Nicaragua v United States of America*, 1984, at 188), yet the bulk of evidence fails to demonstrate a clear intention of states to treat the prohibition as a crime. There is also a distinct absence of evidence to satisfy the requirement of specificity. Thus, Justice Robertson was arguably correct in finding that the majority was stretching the legal principles and the crime had not developed into a rule of customary international law until 1998.

State practice

The history of international conventions addressing child recruitment is certainly impressive. The majority interpreted this as strong evidence of the fundamental nature of the prohibition and widespread state support of it. No doubt, the CRC has attracted the 'highest acceptance of all international conventions' and no reservation has sought to detract from the significance of Art 38 (Winter and King JJ in *Hinga Norman*, 2004, at [19]). However, the majority concentrated on the support for the prohibition, critically ignoring its substance. Justice Robertson rightly pointed out that such support falls far short of an intention to criminalise.

He noted that support for the Conventions prohibiting child recruitment was undoubtedly strong, widespread and immediate, but there were some drawbacks. Although by November 1996, the Geneva Conventions and the Convention on the Rights of the Child were each ratified, acceded or succeeded by 187 states, Additional Protocol II was ratified by fewer states and many denied its scope and application to internal disturbances (International Committee of the Red Cross 2005a). The African Charter had few supporters, only entered into force in 1999 and was formally subject to any inconsistent religious or cultural practices (Singer 2004, 563). Furthermore, in relation to the CRC generally, many argue that its widespread ratification is of little significance, given that states had 'entered sweeping reservations … rendering its ratification almost meaningless' (Kuper 2000, 48; Hackenberg 2000, 429). In 1996, there were 25, 34 and 13 reservations attached, respectively, to the Geneva Convention and Additional Protocols I and II.

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The Conventions were purposefully weak, crippled by deficient enforcement mechanisms, and placed no duties on non-state entities. No international body was created to supervise Additional Protocol II and determine which conflicts met its criteria. Similarly, the CRC did not found criminal sanctions, but an inadequate system of periodic reporting to a special committee with no faculty to force compliance, to punish non-compliance or to even hear complaints (Art 7(2)). Importantly, O'Rourke von Streunsee (1995, 590) has noted that the obligation to report has been consistently breached by many states with no consequence. In addition, the CRC's simple requirement that states use 'feasible measures' to protect children is also weak. Such a low standard — lower than the *necessary* measures proposed in the drafting process (Working Group on a Draft Convention on the Rights of the Child 1987) — restricted in application and vague in scope, demonstrates a lack of commitment by states which falls short of an intention to criminalise. In fact, Brett (1996, 117) comments that the CRC's obligation represented a reduction of the broader responsibilities created by Additional Protocol II.

In Justice Robertson's view, the confusion as to the scope of the prohibition as it changed in each Convention demonstrated that states did not have the level of concurrence that the principles of customary international law require. The particular wording and form of the Conventions was an important consideration in determining intention (North Sea Cases, 1969, at 72). The coverage of Art 4(3)(c) of Additional Protocol II, extending to *all* forms of child participation, was an anomalous shift from the general standard of 'direct' involvement in hostilities. Both Art 77(2) of Additional Protocol I and Art 38(2) of the CRC only forbade 'direct' participation. Furthermore, the consistent use of the term 'recruitment' implied no protection for volunteers. No reference was made to a crime or to a duty on states to criminally legislate. With too many uncertainties (element of force, level of participation) and insufficient commitment (low obligations, no enforcement), it is doubtful that the prohibition was a crime before 1998, especially because the criminal elements were inadequately determinable.

The Rome Statute (1998) preamble stated that its purpose was 'to contribute to the prevention of such crimes', seeming to indicate codification of the crime of recruitment. But the contribution it was making was in fact criminalisation itself. Neither the Draft Rome Statute (1994) nor the Draft Code (1996) made any reference to the offence. The issue of criminalisation was mostly a reaction to the Machel Report, received in 1996 and discussed in 1997, and the joint 1997 New Zealand and Switzerland working paper (Vachachira 2002, 544; Gaditzky 1999, 206). The version of the offence, as it finally appeared in the statute, was not suggested until 1997 by Germany, and no clear agreement existed as late as 1998, when the Preparatory Committee proposed four options for the provision, including its complete exclusion

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(Preparatory Committee on the Establishment of an International Criminal Court 1998, 21). As the Secretary-General (2003a) acknowledged, 'the issue of war-affected children was not officially placed on the agenda until 1998'. Furthermore, as Robertson J noted (at [45]), the CRC Optional Protocol preamble, a later 2001 Machel report, and statements of the General Assembly (1998) and Latin American Conference (1999) applauded the Rome Statute for creating the offence.

Another key factor to consider when determining the practice of states is the 'measures' that they took to enforce the principles endorsed in the conventions, particularly by way of national legislation. The majority in *Hinga Norman* (at [18]) acknowledged the list of 'almost all states' with prohibitive national legislation, which in many cases were instituted a 'long time' ago and incorporated criminal sanctions. But only five of these states had actually criminalised the offence prior to 1998, hardly significant to demonstrate 'common state practice' (Robertson J, at [42]–[43]). Of the 99 African states that had relevant legislation in 1996, none had criminalised child recruitment (UN Economic and Social Council, Commission on Human Rights 1996, at para 22). Nor had any person been domestically prosecuted. It was acknowledged in *Tadic,* 1995, at [128] that the intentions of states are particularly indicated by 'punishment of violations by national courts and tribunals'. If anything, the fact that so many states had introduced legislation failing to proscribe the crime indicates clearly a belief that 'feasible measures' did not involve the criminal law.

Winter and King JJ (*Hinga Norman,* 2004, at [47]) further claimed that other states made violation impossible by strict administrative processes or military law sanctions. England, Mauritania and Switzerland had strict administrative controls that effectively prevented children from being enlisted, while Austria and Germany were two states that had military controls on the prohibition. Furthermore, they alleged that the evident lack of national *criminal* legislation did not indicate disapproval of the criminalisation of the act given that most states did not breach the prohibition and 108 had criminally legislated against it by 2001 (at [44]). But these findings provided no grounds for establishing an intention to criminalise the practice. Impossibility of commission did not absolve states of their legislative obligations, and evidence showed that administrative procedures were in fact fallible.

Of further significance to the question of state practice are the decisions of international judicial bodies. Winter and King JJ referred to the judgments of the Rwandan and Yugoslavian tribunals and found substantial similarities between the fundamental 'character' and 'gravity' of the child recruitment prohibition to the offences prosecuted before those tribunals (*Hinga Norman,* 2004, at [30] and [39]). The

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fact that the tribunals could prosecute individuals for violations of the Additional Protocols and Common Art 3, from which the prohibition was also derived, provided 'further evidence of the criminality of child recruitment' (at [39]). However, those cases did not deal with the issues of retroactivity and foreseeability; there was a much greater 'corpus of authority' to support criminalisation of the offences those tribunals dealt with (Robertson J at [22]), and to simply interpret evidence for those offences as verification of this one would be illogical.

Winter and King JJ also referred to other materials. In Security Council debates over Iran (1983) and Liberia (1996), some delegates (at [33]) condemned the use of child combatants. However, these discussions reveal no consensus on the issue other than the view that the practice was 'abhorrent'. No delegate articulated an opinion that the practice was a crime (Robertson J, at [44]). The same goes for the 1996 Security Council Resolution condemning the 'inhumane and abhorrent practice' referred to by the majority (at [29]). More noteworthy is a 1996 Secretary-General report, which strongly disputed the existence of the crime under customary international law at that time.

Opinio juris

Perhaps of most significance to the question of criminality is the *actual* practice of states. To be customary, a rule need not be adhered to by all states with 'absolutely rigorous conformity' (*Nicaragua*, 1984, at 186). All that is required is 'that the conduct of states should, in general, be consistent with such rules' (*Nicaragua*, 1984, at 187). However, a *significant* number of states recruited children in 1996. In at least 40 countries, children were involved in state military training, and in 85 they were conscripted into guerrilla groups (Van Bueren 2004, 813; Morrisseau 2004, 1279). Importantly, many of these states had ratified the CRC. Columbia signed the conventions simply 'to appease the international community' (Escobar 2002–03, 867), as did Uganda, demonstrating political expediency rather than the necessary opinio juris.

It is difficult to conclude that states intended to criminalise the recruitment of children under 15 when they provided *no* protection for those between 15 and 18. If they had so intended it to be a crime, it is safe to assume that they would likely have stated this explicitly as they did in other instruments concerning other transgressions, such as Art 1 of the Genocide Convention, and in the offence's final formulation in Art 8 of the Rome Statute. The Andorra and Argentina declarations on ratifying the CRC criticise the prohibition's intentional limitations and non-binding character. And, more energy in the Conventions was directed towards

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providing for the treatment of child soldiers than on prevention of their recruitment (see Art 77(3) of Additional Protocol I and Art 4(3)(d) of Additional Protocol II).

There are a number of reasons why states dragged their feet on criminalising child recruitment until 1998, including 'vested commercial interests, market pressures [and] moral indifference and cultural attitudes' (Davidson 2001, 214). Many states hesitated not because violation was impossible, but since 'children are attractive combatants because they are more obedient and are easier to manipulate' (Machel Report 1996, 34). Several UN delegates elaborated views in 1996 that economic difficulties often made it necessary to recruit children (United Nations Economic and Social Council 1996, at para 24). Importantly, many others saw military service simply as a form of education or work, or alternatively criminalisation as an invasion of the child's freedoms of choice and association (Davison 2004, 147). Most of the states that used under-18 volunteers did not have compulsory service to meet their military requirements, and argued that under-18 volunteers were more desirable than just-18 conscripts.

The International Court of Justice has commented that the best evidence of opinio juris is the practice of those states 'specifically affected' by the prohibition (North Sea Cases, 1969, at 29), which in this case primarily means developing states engaged in conflict. But in 2003, only five of the 63 parties to the CRC Optional Protocol were wracked by war, and all were on the Secretary-General's violation list (Secretary-General 2003a, 12). Clearly, the Conventions did little more than spin a 'set of fine-sounding phrases' designed to 'satisfy the conscience of those concerned' (Kuper 1997, 43).

The above discussion illustrates that the prohibition on child recruitment has certainly become deeply enshrined in international law. So too has the *crime*; however, pinpointing this development has proven much more difficult. The majority of the Sierra Leone Appeals Chamber found that sometime in early 1996 was the critical turning point. However, from the evidence above, significant doubt is cast on the accuracy of that judgment, especially given the strict level of intention necessary to establish customary international law. From a purely legal view that puts all moral loyalties aside, it is more likely that, as Justice Robertson found, the crime had not developed until the introduction of the Rome Statute in 1998. The most frustrating characteristic of international law is that it so often falls short of what one should hope it would be. Whichever is the case, the Rome Statute nonetheless now stands as formal testament to the crime of child recruitment for those under the age of 15.

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Evaluation and recommendations

> *Despite working on the issue since 1996, the United Nations and the broader international community have yet to take one single formal action beyond condemnation of known child soldier recruiters and users.*
> — P W Singer (2005b, 146)

Despite the legal regime, the practical response to child soldiers has been slow and non-participation remains a major issue. The Secretary-General (2003b, at para 28) commented that 'perhaps more children have suffered from armed conflicts and violence since the [CRC] than at any comparable period in history'. And certainly the figures verify this. A number of matters should be addressed in order to narrow the gap between progress in the law and progress on the ground, and several recommendations are outlined below.

Research

To construct better solutions, the problem must be further understood. Research is required 'to increase our knowledge base on the organization of children's war trauma … and [other] negative and positive developmental outcomes' (Macksoud and Aber 1996, 71). Improving our comprehension of the effects of combat on children will aid the construction of more successful rehabilitation and reintegration programs. Moreover, no initiative has yet assessed the long-term impacts of the many and varied conflict interventions, and little is known about what works to guide the architecture of future programs. Cohn (2004, 534) notes the tendency to pursue humanitarian processes without serious appraisal of the political, economic and social dynamics driving the conflict. For example, child soldiers were required to relinquish a weapon in order to gain access to the Sierra Leone program, despite UN documents commenting that commanders were unlikely to prioritise child demobilisation if they must consequently sacrifice armaments. Networks should draw on the knowledge of specialists and regional operatives whenever a response is intended, and recovery agenda should be tailored to local circumstances.

Clearer standards — 'straight-18' legislation covering both volunteering and indirect participation

Brett (1996, 117) observes the confusion in interpreting the exact scope of the legal rules. This is no doubt a result of the vague 'direct' participation requirement and 'feasible measures' obligation, which have cultivated inconsistent responses from different states. It would be advantageous to create comprehensive international legal guidelines rather than rely on state interpretations — guidelines that clarify that 18 is the minimum age for conflict recruitment and that no distinction is made for

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volunteers or indirect involvement. A collective response will fuse resources, avoid uncertainty and move the debate in this area on from the finer details.

First, although customary law may have already progressed, states should endeavour to absolutely set the legal participation limit at 18 for both children who are recruited and those who volunteer. It is unfortunate that the CRC fell short in this regard. Article 38(2) is the *only* CRC provision specifying an age lower than 18, and ultimately it was the US alone that mandated this (ironic, given that it remains one of the only two non-parties) (Hammarberg 1990, 101). The Art 38(3) obligation requiring states 'to endeavour to give priority to the oldest' when recruiting 15- to 18-year-olds is insufficient and falls well short of offering the protection deserved.

While this changed with the introduction of the CRC Optional Protocol, many people are cautious of relying on it. Brett (1996, 123) remarks that there is less pressure to ratify it than the CRC, demonstrated certainly by the poor number of signatories. There are currently only 121 signatories and 101 parties to the CRC Optional Protocol. This means that 91 states that are party to the CRC have failed to act upon the CRC Optional Protocol — including Australia, which has signed yet failed to ratify. Also, while Art 2 of the Optional Protocol prohibits *conscription*, Art 3 places no definite minimum on *volunteers* and even provides guidance on how those under 18 should be enlisted to ensure true consent. Different rules cannot apply for child volunteers because, as noted earlier, consent is often illusory; such concessions can further open the door for recruiters to circumvent the protections; and it is the effects of combat on children, not the lack of consent, which necessitates protection. Furthermore, some maintain that the Art 51 'self-defence' power in the UN Charter permits states to legitimately erode the Art 3 protection (Gallagher 2002, 335). Nevertheless, the Rome Statute is still limited to an age-15 threshold, meaning that 15- to 18-year-olds do not enjoy formal criminal protection. Therefore, international law has some way to go in terms of legally protecting all children.

A treaty approach is not of itself the solution. The majority of violating states are parties to both the CRC and CRC Optional Protocol, and Cohn (2004, 534) aptly notes that the probability of compliance with a new standard when the earlier, lower ones are consistently violated is slim. But, despite their weaknesses, the strengths of such legal measures include: (1) establishing global standards; (2) codifying moral norms; (3) setting age limits that are tougher to avoid; (4) raising public awareness; and (5) empowering activism (Stohl 2002, 140). Raising the threshold in tandem with a concerted effort of prevention could provide real results.

Davison (2004, 126) believes that grouping all children under 18 together would actually hinder the success of the legal response, leaving no child fully protected. She

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argues that a separate instrument for those between 15 and 18 is warranted, given their more developed mental capacities. Article 12 of the CRC, protecting a child's right to autonomy and free expression, may provide some support for this argument. However, age demarcations such as Davison's seem to contradict the realities of child recruitment, the evidence and opinion of the bulk of experts on war trauma, and the fact that the age-18 standard has been selected for *every* other international child provision and is universally accepted as the threshold into adulthood. Having an age limit anywhere below 18 creates the curious twist of logic in many countries whereby a 16-year-old may be able to hold a gun and kill someone, but not drive or drink alcohol.

Finally, no distinctions between direct and indirect involvement in combat are sustainable. Narrow state definitions of child soldiers leave many children without protection, particularly girls who usually work in the back lines as prostitutes or slave labour, which creates an unfortunate 'gender imbalance' in the law (Leibig 2005, 8). Furthermore, experience shows that children in indirect support functions are at similar risk of death and mental damage and frequently become combatants over time or when the forces are under pressure (Brett 1996, 124). To make a distinction, therefore, is to ignore the realities of conflict situations and to provide recruiters with the opportunity to abuse children behind the lines.

Implementation

The prohibition on child recruitment has historically been weakened by pitiful enforcement mechanisms. The CRC is the only instrument given any significant power, requiring under Art 43 that states report intermittently to a committee on their compliance. Self-governance is not particularly effective and the procedures are rarely observed. Uganda presented a report in 1996 and the committee noted 17 major issues. Yet nothing has happened to alleviate these problems (Leibig 2005, 15). Enforcement of the CRC currently relies on diplomatic pressure and, at worst, shaming by the Security Council. Enabling the committee to initiate enquiries, hold hearings, produce reports and make recommendations would add legs to the movement. Also, the problem with relying on state obligations is that children are mostly recruited in countries where there is no state (Somalia) or the state is too weak to protect them (Democratic Republic of Congo).

Now that criminal sanctions are available, at least for recruiting children under the age of 15, international bodies must ensure that violators do not benefit from impunity. In countries where the use of child soldiers is common, recruiters are hard to access and even harder to hold to account. At a 2007 UN Press Conference, the Special Representative for Children and Armed Conflict acknowledged the

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difficulties associated with arresting known persecutors, particularly in countries such as the Democratic Republic of the Congo and Burundi. In 2005, the UN Security Council had passed a resolution that read:

> … while noting the advances made for the protection of children affected by armed conflict, particularly in the areas of advocacy and the development of norms and standards, [the Security Council] remain[s] deeply concerned over the lack of overall progress on the ground, where parties to conflict continue to violate with impunity the relevant provisions of applicable international law relating to the rights and protection of children in armed conflict. [Security Council Resolution 2005a.]

The objectives of the International Criminal Court are hindered by the arrangement of 'no police force, no prison system, [and] no true mechanism of coercing recalcitrant states to comply with its orders' (Penrose 1999, 392). The difficulties faced by the tribunal for the former Yugoslavia in bringing to account war criminals serves to demonstrate this. More particularly, in 2005 Joseph Kony in Uganda was indicted for, inter alia, two counts of child enlistment, yet he has not yet been brought to trial. The Special Court for Sierra Leone indicted the former Liberian dictator Charles Taylor on 3 March 2003, yet it was not until 29 March 2006 that he was apprehended crossing the Cameroon border and only on 27 May 2007 that he first appeared before the tribunal. Considering that most of Taylor's involvement with child recruitment occurred during the years of 1991 to 1996, it will be interesting to see how the court will deal with the charges in light of the decision in *Hinga Norman*. To date, the Special Court for Sierra Leone has been the most active in pursuing child recruiters, having included the charge of 'the recruitment and use of child soldiers' in each of the court's 13 indictments, and the appearance of Charles Taylor before the court is promising, given that the original drafts of the Liberian peace agreement intended to grant a general amnesty to all those engaged or involved in military activities during the conflict.

Furthermore, without US support, the ICC will continue to lack legitimacy (Leibig 2005, 16). The US has forced many countries, on the threat of losing aid, to sign bilateral treaties excluding US citizens from the ICC's jurisdiction. Under the *American Service Member's Protection Act 2002* (US), military assistance may be cut off from countries that sign the Rome Statute.

The Sierra Leone trials have paved the way for future prosecutions, but it is yet to be seen whether they have a deterrent effect. Cohn (2004, 557) does not believe that a few prosecutions far away will deter recruiters in pursuit of victory. However, the fact that many generals have felt the need to globally publicise that they do not recruit children (see, for example, the Ugandan Lord's Resistance Army website)

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would seem to indicate that there is in fact some form of effect. The powers of the ICC should be strengthened. Although the recent experience of the Special Court for Sierra Leone in the field of child recruitment has been pioneering and precedent-setting, until now few persecutors have been brought within the ICC's jurisdiction and there have only been sporadic ad hoc tribunals tackling conflict crises, such as Sierra Leone, the former Yugoslavia and Rwanda. The ICC's rules should be amended in a number of ways — for example, to permit children and victims to testify and the court to indict and prosecute immediate offenders, rather than the present practice of waiting and acting post-conflict. If the purpose of criminalisation is deterrence, then the threat of prosecution must be real. And, it must be remembered that moral, as well as legal, accountability is essential to enforcement.

National legislation

International standards are a means, not ends, in the process of change. Until international law provides clear rules and mechanisms of enforcement, action must stem from the adoption of national legislation (Fonseka 2001, 86). Article 4 of the CRC Optional Protocol places an obligation on 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'. However, many states fall short of competent national legislation and fail to take their positive obligations under the conventions seriously. The United Kingdom, for example, 'undermined the [Optional Protocol's] purpose by reserving wide discretion to use young people in battle' (Amnesty International 2003). In 2000, of the mere 90 countries with laws setting a minimum age for military service, only 70 specified an 18-years threshold (Smith 2004, 1145). Australian legislation maintains 18 for conscription (Art 59 of the *Defence Act 1903* (Cth)), but no minimum age for volunteering (s 34 of the *Defence Act;* Art 24 of the *Naval Defence Act 1910* (Cth); Art 4E of the *Air Force Act 1923* (Cth)), despite Minister of Defence information that an over-17-years limit is observed. The Commonwealth also provides a program involving the use of firearms for cadets as young as 12 and a half years, which many fear militarily indoctrinates children.

Practically, national legislation will not suffice alone. Children as young as 14 are recruited in El Salvador despite a clear straight-18 prohibition (Van Bueren 1998, 825). In 2004, all five states engaged in major armed conflict — Afghanistan, Democratic Republic of Congo, Philippines, Sri Lanka, and Uganda — were gross violators with similar legislation (Mitchell 2004, 108). Therefore, legal norms must be complemented by other preventative measures.

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Other preventative measures

The focus on standard-setting is important, but has done little to deter child recruitment. Without addressing root causes, children will continue to volunteer and be recruited. Most groups are either untouched or unmoved by moral models, and to make a difference states must alter the political and economic calculations that make recruitment attractive, what Singer (2004, 563) coins the 'child soldier doctrine'. Criminalisation has been one device to change the recruiter's decision mix. But there are also other means.

First, states could institute strict administrative systems for maintaining birth records that are harder to subvert (many children are recruited because they cannot legally prove they are underage). In many countries, identification cards do not exist, while in others the militia are able to amend them to meet legal criteria (Toney and Anwar 1998, 522). An efficient system of identification can avoid a number of these problems (though identification cards raise human rights issues in and of themselves).

Second, states can use aid to address the problem. Kargbo (2004, 486) notes some common characteristics of areas that generally use children in conflict: 'low-income developing countries with collapsed infrastructure, high unemployment, moribund economic and educational systems, and non-functioning governments.' Conditions of bad governance, disease, ethnic rivalry and high illiteracy rates tend to marginalise children and drive them to fight. By implementing long-term development programs and increasing aid aimed at sustainable progress, states can mitigate these problems. At the same time, states must control support to violating parties. China, India, Canada and others supply weapons and aid to Sudanese and Congo rebel forces. During the 1990s, the US transferred an average quarter billion dollars worth of weapons and training annually to state forces that employed child soldiers (Singer 2004, 582). These states should question whether there is any difference between directly using child soldiers and indirectly providing the means to.

A third measure is to ban small arms. One commentator notes, 'the international community in general, and national governments in particular, must address the socio-economic roots of conflict and ban arms shipments to conflict zones' (Obote-Odora 1999, 13). At a 2001 Conference on the Illicit Trade in Small Arms and Light Weapons, UNICEF called for binding codes to better regulate the transfer of light weapons, particularly to child soldier problem areas. The ability of children to fight will be restricted if this supply is plugged. In many cases, this will simply involve targeting illicit arms traders who are often known to authorities. Also, post-war weapon collections have proved modestly successful in El Salvador and Albania in preventing recurrence.

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Fourth, political stigmatisation can often be a powerful tool. Criminalisation has made advocacy much easier and states are less willing to associate with war criminals. Shame is especially effective in circumstances where fighting groups seek not only power, but also popularity and legitimacy. Singer (2004, 571) disagrees, however, noting that lobbying simply results in attempts to better hide abusive practices. To Singer, '[o]ne cannot shame the shameless', and most promises and child demobilisations are token public relations stunts. However, the fact that such 'stunts' are performed shows that many armed groups are politically stimulated. Commanders often crave recognition: a boost to their egos and a means to distinguish themselves. The Lord's Resistance Amy in Uganda even has a website to deny its practice of child recruitment. So long as reporting is efficient and awareness is encouraged, the child recruiters will remain accountable.

Fifth, economic sanctions can be valuable strategies in the not uncommon circumstances of profit-driven groups seeking to control and exploit natural resources. Control over timber and rubber was the objective in Liberia, and diamonds in Sierra Leone. Continuing business as usual in these situations is analogous to fuelling the fire. There is the danger that discontinuing trade with violating states may have adverse flow-on effects for communities and children. The economic sanctions that were imposed on Iraq in the wake of the Gulf War by the Security Council's 1990 resolution had disastrous impacts for civilians, particularly children. UNICEF child mortality figures indicated that the sanctions were responsible for the deaths of over half a million children under five since the sanctions began in 1990 until 2000 (Wareham and Henderson 2000). However, sanctions could work so long as they are appropriately confined, skilfully executed and regularly assessed.

And there are many other measures. The UN Secretary-General (2003a) announced a list that also included the imposition of travel controls on leaders and their exclusion from governance structures and amnesty provisions. The Security Council initially paid little more than lip service to the recommendations, and the Secretary-General added later that year a further 10 violating parties to those originally reported. However, in 2005 the Council strongly condemned the recruitment and use of child soldiers by parties to armed conflict, expressed serious concern at the lack of progress since the 2003 report, and requested the Secretary-General to implement a monitoring and reporting mechanism on the issue (Security Council 2005a). Such a mechanism is intended to collect and provide timely, objective, accurate and reliable information on child recruitment, but it is yet to be seen how effective it will be. In addition, Vandergift (2004, 556) suggests that even banning the offspring of perpetrating leaders from attending Western schools can work, but clearly only in limited circumstances.

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Education

When it comes to educating about the issue of child recruitment, there are three categories of audience — the recruiters, children and states. First, it is important that current and potentially future child recruiters are educated on the relevant issues and their legal obligations. International legal mechanisms will always find it difficult to reach or influence offenders. However, there is evidence indicating that many recruiters are illiterate or otherwise unaware of the existence or content of the rules, despite the obligation of states under Art 42 of the CRC to 'make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike'. The flow of information from government to the governed is usually weak in developing states. Grassroots advocacy can solve this. In Peru, forced recruitment drives reportedly declined in areas where they were denounced by local churches (UNICEF website 2007). In Sudan, humanitarian groups successfully negotiated agreements with commanders to prevent recruitment. But it would be wrong to assume it is simply a case of ignorant commanders. Most know it is a crime and believe, not foolishly, that they will never be caught.

Second, supporting the education of children is vital, both in general and in particular relation to their rights in this area. The majority of child soldiers are, at least notionally, volunteers and will not be discouraged by the criminal responsibility of recruiters (Brett 1996, 123). Davison (2004, 140) notes that a common characteristic of those that volunteer is a deprived education. Education is an alternative to fighting and should be encouraged. One Liberian commented, 'all they think about is war, but if you are educated you can think of other things. Many do not know right from wrong' (quoted in Tate Roland 2004). Also, educating children about their rights may give them greater resilience. 'Increased aid to community leaders and NGOs can help such advocates appeal against the practice on the basis of local values and customs' and counter the propaganda that often manipulates children into volunteering (Singer 2004, 573). An appreciation of the law has in many cases empowered children and their families to resist recruitment and to contribute to prevention and advocacy.

Finally, the system of education in developed states needs to be used. In terms of achieving international action, raising awareness in developed states through humanitarian organisations and media has proved the most effective textbook strategy. Recent academic papers, human rights organisational workings, documentaries and movies (such as the Sierra Leone-based *Blood Diamond*), newspaper articles and the like have encouraged awareness of and debate on the issue of recruited children. However, by and large, the plight of child soldiers and the issues discussed in this paper go unnoticed by governments, media and the general public. And even within academia, treatment of the subject has been at most peripheral.

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Disarmament, demobilisation and reintegration (DDR)

Accepting the difficulties with prevention, international law must also offer post-conflict solutions. Article 39 of the CRC requires states to take 'all appropriate measures' to promote recovery and reintegration, while Art 6 of the CRC Optional Protocol obliges them to take 'all feasible measures to ensure' demobilisation and provide appropriate rehabilitation and reintegration assistance 'when necessary'. On one hand, there is the human rights impulse to bolster legal norms; on the other, there is the humanitarian impulse to assist war-affected children. States tend to elevate the former and neglect the latter.

Peacemaking processes are few and far between and, when executed, bear two central problems. In general, they suffer from unclear mandates, poor resources and shortsightedness (Kargbo 2004, 493). In particular, child soldier concerns are routinely overlooked when restructuring policies vis-a-vis offending states (Cohn 1998, 179). These issues include prosecution, refugee status, demobilisation and reintegration schemes, family-reunification, education and vocational programs, and psychosocial counselling. No peace process has placed these prominently on their agenda, and most over-emphasise demobilisation at the expense of reintegration.

Prosecution

For former child soldiers, there are two issues here — being prosecuted and assisting the prosecution of others. The UN Mission in Sierra Leone is generally acclaimed as the best response yet. Under the Lomé Accord, the Mission introduced Truth and Reconciliation Commissions aimed at fostering reconciliation, documenting the experiences of children, redressing suffering, administering responsibility and punishing where possible (Zarifis 2002, 23). Many experts believe that this process, sensitive to the needs of victims, was a success. Despite this, Kofi Annan's proposal for a special juvenile chamber was unjustly criticised and never realised.

There is a lot of debate on the topic of prosecuting child soldiers. In Sierra Leone, the Security Council granted jurisdiction over those charged with committing war crimes when they were over 15, but acknowledged that they should be subject to special treatment and never imprisoned (Art 7 of the Statute of the Special Court). Again, little is known about the effects of proceedings on children and more research is required. Some believe that children benefit from judicial processes that teach accountability for their actions and are specially designed to complement their reintegration (Cohn 2004, 547). Others, most notably UNICEF, insist that the threat of prosecution undermines rehabilitation efforts, stigmatises children and places them at greater risk of re-recruitment.

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Refugee status

There is a clear case for amending (ideally) or interpreting (alternatively) current refugee law to permit former child soldiers to receive asylum. Almost 50 per cent of global refugees are children unsettled by war. Under Art 1F of the Convention Relating to the Status of Refugees, adopted in 1951, a person will not benefit from the protections the Convention affords if:

> (a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
>
> (b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
>
> (c) He has been guilty of acts contrary to the purposes and principles of the United Nations.

There is no internationally accepted minimum age of criminal responsibility, and it would be possible to exclude child refugee applicants of any age if they acted contrary to Art 1F (UNHCR 1996, at para 14).

In 1996, an Australian Refugee Tribunal ruling held that an asylum seeker from a Liberian rebel group that committed many atrocities should not be denied refuge because he had been forcibly recruited and acted under duress (Australian Refugee Tribunal, Case Reference N96/12101). The tribunal found that although the actions of the applicant could fall within the ambits of any of the categories of Art 1F, exclusion by way of those provisions must be considered in the light of all the facts — those being that the applicant was forcibly conscripted; had never shot to kill; was never in a position of authority in the armed force; and had escaped from the group at the first real opportunity. Under those circumstances, the remedy (shooting not to kill) was not disproportionate to the evil (being killed by leaders of the group for not participating). In two earlier Canadian cases, a forcibly conscripted teenage El Salvadoran who was present at the torture of prisoners was not excluded from the Convention (*Moreno v Canada,* 1993), and a Mexican army deserter who reported political executions was similarly not excluded, despite his participation in certain killings (*Zacarias Orsorio Cruz,* 1988). However, although these decisions provide some hope for child soldiers seeking refuge, they provide no guarantees and the reality still remains that any of the Art 1F provisions may be activated against them. Child soldiers will be excluded unless they can factually demonstrate a lack of mens rea (UNHCR 2003, 6–7).

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Officially recognising child soldiers as victims, not perpetrators, justifies not only giving them *access* to refugee status, but also should in most cases be a persuasive consideration in granting such status. The UNHCR (1998) has argued that even if one applies Art 1F to a child, they should still be protected from 'refoulement' because 'the fact that a child has been a combatant may enhance the likelihood and aggravate the degree of persecution he or she may face upon return'. States should not contribute to the trauma of the child by 'washing their hands of them' through the process of exclusion from refugee status (Gilbert 2001, 34).

Reintegration

The rehabilitation and reintegration of former child soldiers is not a hopeless cause. A 2001 study focusing on the post-conflict responses in El Salvador and Angola demonstrates that children involved in armed conflict can re-engage positive social relations and productive civilian lives (Verhey 2001). The process of reintegration is most difficult in the common situation of having little to reintegrate into. The first step is the explicit inclusion of children in peace agreements and demobilisation processes. The complete exclusion of child soldiers from the 1992 peace accord and demobilisation and reintegration processes in El Salvador left them economically and socially marginalised, whereas in Angola, a formal resolution that prioritised children was essential to their effective demobilisation. Second, re-establishing contact with family and community is an important step. Third, disarmed children must be supported, as by UNICEF in Sierra Leone, with basic necessities, psychological counselling, information sessions and transitional financial allowances. And, finally, they must be educated away from violence, because they often find it difficult to disengage from the idea that violence is a legitimate means to achieving ends. Corriero (2002, 352), drawing upon Kantian ethics, speculates that education develops a sense of accountability and humanity essential to their recovery. Education can help normalise life in the long term and cultivate an identity separate from that of soldier (Fonseka 2001, 87). In order to minimise the risk of re-recruitment, it is important that throughout the process of reintegration the child soldiers are effectively separated from military authority and personnel. In Angola, of the 8613 child soldiers who were mixed with adult soldiers in UN sectioning areas, only 57 per cent could later be tracked for family reunification.

The Sierra Leone reintegration program was not entirely successful. It did not succeed in saving ex-child soldiers from social ostracism and it failed to help those who entered the conflict as children but emerged as adults. Furthermore, Wessells (2004, 517) notes that there were problems with imposing Western practices, particularly psychological solutions, where specific cultural sensitivities were involved. Western rehabilitation tended to emphasise the individual, when in a

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number of the communities collective methods could have achieved a lot more. Setting up customised care centres that can respond to region-specific demands, work closely with local and informal organisations and have long life spans can mitigate this. Programs are often designed by experts lacking contact with those affected. Wessells (2004, 523) also believes that treating only child soldiers in reintegration programs, rather than children generally, served to socially segregate them. Therefore, states should devote more resources to researching conflict areas, and designing more appropriate and long-sighted programs.

Conclusion

The devastating effects of war on children are well documented. In the prevention of child recruitment, and the rehabilitation of child soldiers, there has been considerable progress, particularly in terms of strengthening the legal regime. But actions speak louder than words and a significant void exists between the law and reality. The number of children recruited today in armies around the world is confronting. Renteln (1999, 204) cynically comments that 'the only way to protect the child soldier is to stop armed conflict altogether'. That may be true if the aim was to stop child soldiering absolutely, but here the objective is to minimise the practice within realistic parameters. To achieve real progress, a unified and comprehensive assault on recruitment must be waged. It is not simply a case of legal standard-setting: norms must be strictly enforced, widely disseminated, permanently observed and supplemented by other practical preventative measures, and punishment must be real (Escobar 2002–03, 869). The majority of these deficiencies are a result of the failure, on both the state and international levels, to prioritise the interests of children over national interests. Individuals, states, the UN and the international community must take this problem seriously and prove that justice does exist.

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