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## How the Law Should View Voluntary Child Soldiers: Does Terrorism Pose a Different Dilemma?

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# HOW THE LAW SHOULD VIEW VOLUNTARY CHILD SOLDIERS: DOES TERRORISM POSE A DIFFERENT DILEMMA?

*Cristina Martinez Squiers\**

## I. INTRODUCTION

“[W]ar is evil and should be ended; children are innocent and should be protected.”<sup>1</sup>

**C**HILDREN’S participation in armed conflict has occurred for centuries. Children, those under the age of eighteen,<sup>2</sup> fought in wars dating back to the Middle Ages; even “[t]he Civil War in the United States was a war of boy soldiers.”<sup>3</sup> What has occurred recently is the international concern over the use of “child soldiers”<sup>4</sup> in modern armed conflicts, mostly due to the criminalization of the way in which adults have recruited and used these children to violate the laws of war and commit reprehensible atrocities.<sup>5</sup> The international human rights concern has aggregated the use of children in every armed conflict under a strong discourse of victimization despite the important distinctions between the different types of conflicts in which children fight and the dif-

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1. DAVID M. ROSEN, *ARMIES OF THE YOUNG: CHILD SOLDIERS IN WAR AND TERRORISM* 1 (2005).

2. The use of the word “child” and “children” in this Comment will refer to those eighteen and younger.

3. ROSEN, *supra* note 1, at 4–5.

4. For the purposes of this Comment, “child soldier” refers to anyone under the age of eighteen fighting with an armed group. “Armed group,” in this Comment, is used according to the manner in which it is used in international law: “Armed groups are made up of individuals over whom the state on the territory of which they operate wishes to maintain special control thanks to its internal laws. As such, armed groups do not benefit from the same status as government forces. In internal law, or in the language of the public authorities, the members of armed groups simply refuse to obey the law; they are bandits under ordinary law, terrorists, stateless persons who can be punished for the mere fact of having taken up arms. In international law, no instrument places insurgents on an equal footing with government troops. Armed groups therefore have relatively low status in international law, when it applies.” Zakaria Daboné, *International Law: Armed Groups in a State-Centric System*, 93 INT’L REV. OF THE RED CROSS 395, 397 (2011).

5. MARK A. DRUMBL, *REIMAGINING CHILD SOLDIERS IN INTERNATIONAL LAW AND POLICY* 27 (2012).

ferent motivations prompting the children to fight.<sup>6</sup> While child soldiers, in varying types of conflicts and out of differing motives, have committed grave atrocities, the prevalent discourse of victimization completely excuses criminal responsibility for those younger than eighteen.<sup>7</sup> Criminal law is designed to hold perpetrators accountable, in part to protect the victims they have harmed. But because child soldiers are both perpetrators and victims, due to their vulnerability and tender age, children's rights advocates and international law strongly advocate for complete prosecutorial immunity.<sup>8</sup>

While a categorical approach that excuses all criminal responsibility for children who engage in conflicts, like every categorical rule, is easily applied, a more nuanced look at the issue of why child soldiers fight would better achieve justice. Despite what the international discourse about child soldiers has become, children both are coerced into and volunteer to join armed groups.<sup>9</sup> However, the international community has erased this distinction for purposes of criminal accountability: "[a]lthough prosecuting child soldiers . . . is certainly not unlawful, such prosecutions . . . increasingly are seen as inappropriate and, even, illegitimate."<sup>10</sup> But in order to pursue justice in the midst of, and in the wake of, armed conflicts, the "legal fiction"<sup>11</sup> that assumes all child soldiers are alike must be addressed.

The question of criminal responsibility for child soldiers has particular salience regarding the War on Terror and the emerging threat of extremist groups, such as ISIS, who are actively recruiting juveniles.<sup>12</sup> While not all child terrorists are fighting voluntarily, the unique ideology that attracts youth to volunteer to join terrorist organizations and the transnational nature of terrorism implicate different notions of justice and criminal responsibility, while also raising important questions about which courts, domestic or international, are best suited to prosecute crimes related to terrorism.<sup>13</sup>

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6. See, e.g., U.N. Office of the Special Representative of the Secretary-General for Children and Armed Conflict, Child Recruitment, <https://childrenandarmedconflict.un.org/effects-of-conflict/six-grave-violations/child-soldiers/> ("Regardless of how children are recruited and of their roles, *child soldiers are victims*, whose participation in conflict bears serious implications for their physical and emotional well-being.") (emphasis added).

7. See, e.g., DRUMBL, *supra* note 5, at 37, 62; MATTHEW HAPPOLD, *The Age of Criminal Responsibility in International Criminal Law*, in INTERNATIONAL CRIMINAL ACCOUNTABILITY AND CHILDREN'S RIGHTS (Karin Arts & Vesselin Popovski eds., 2006) (manuscript at 2), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=934567](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=934567).

8. See *supra* notes 5 and 6.

9. See ROSEN, *supra* note 1, at 17; DRUMBL, *supra* note 5, at 62.

10. DRUMBL, *supra* note 5, at 18.

11. See *id.* at 19.

12. See, e.g., Gul Tuysuz & Ivan Watson, *Missing UK girls believed to be in Syria, police say*, CNN (Feb. 24, 2015, 8:30 PM), <http://www.cnn.com/2015/02/24/europe/turkey-uk-missing-girls/>. The use of the word "terrorism" and "terror" in this Comment refers specifically to the efforts of radical Muslim groups such as ISIS, Boko Haram, and Al-Qaeda.

13. See Jethro Mullen, *What is ISIS' appeal for young people?*, CNN (Feb. 25, 2015, 2:33 PM), <http://www.cnn.com/2015/02/25/middleeast/isis-kids-propaganda/>; Kimiko De Freytas-Tamura, *Teenage Girl Leaves for ISIS, and Others Follow*, N.Y. TIMES (Feb. 24,

Even though the International Criminal Court (“ICC”), partly due to the international disapproval of prosecuting child soldiers, does not have jurisdiction over those under the age of eighteen, should national criminal justice systems and military commissions take a different approach? While the ICC focuses on international and internal armed conflicts, terrorism is a different crime, one that is transnational, but also localized in many different countries due to the geographically diverse locations of attacks and victims.<sup>14</sup> There is a dearth in scholarship addressing this difference and the difference between an armed group’s use of voluntary child soldiers for committing acts of terror from the use of the more prototypical child soldiers<sup>15</sup> in internal armed conflicts like those in Sierra Leone and Rwanda.<sup>16</sup> Should voluntary child soldiers participating in terrorist activity be treated differently in terms of criminal responsibility?

This Comment argues that those who commit acts of terror voluntarily between the ages of fifteen and eighteen should be prosecuted, but their young age should merit special protections in their prosecutions. Furthermore, these prosecutions are best suited to domestic criminal justice systems, including military commissions, and not to the ICC or other international tribunals. However, voluntary child soldiers of terrorism should still be seen as both perpetrators and victims under the law; the opaque line between the two categories should not be superficially clarified due to the “voluntariness” of the crimes committed and the widespread fear of growing terrorism. Until a proper, age-appropriate method of prosecution for these child terrorists is accomplished, neither the children nor the victims who suffer at their hands will see true justice.<sup>17</sup>

Part II of this Comment will provide a historical background on child soldiers and explain the evolution of international and United States laws relating to child soldiers. Part III will discuss the current legal issues regarding child soldiers, focusing on the unique dilemma posed by terrorism. Part IV will analyze what “voluntary” means, and at what age child

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2015), [http://www.nytimes.com/2015/02/25/world/from-studious-teenager-to-isis-recruiter.html?\\_r=0](http://www.nytimes.com/2015/02/25/world/from-studious-teenager-to-isis-recruiter.html?_r=0).

14. Farouk Chothia, *Who are Nigeria’s Boko Haram Islamists?*, BBC (May 4, 2015), <http://www.bbc.com/news/world-africa-13809501> (Boko Haram); Holly Yan, *Why is ISIS so successful at luring Westerners?*, CNN (Oct. 7, 2014, 8:01 AM), <http://www.cnn.com/2014/10/07/world/isis-western-draw/> (Westerners joining ISIS); Kim Willsher, *Seven weeks after attack, Charlie Hebdo resumes regular publication*, LA TIMES (Feb. 25, 2015, 11:08 AM), <http://www.latimes.com/world/europe/la-fg-charlie-hebdo-resumes-publication-20150225-story.html> (Charlie Hebdo attack).

15. The typical child soldier being an African child abducted and handed an AK-47. See, e.g., *Many South Sudan boys ‘kidnapped to be child soldiers’*, BBC NEWS (March 1, 2015), <http://www.bbc.com/news/world-africa-31681302>.

16. The civil wars in these countries led to the creation of international and hybrid, international and domestic, tribunals that all chose not to prosecute child soldiers. See Linda Van Brakel, *Minding the Impunity Gap: Child Soldiers, International Law and Human Rights Policy* 18, 38 (July 18, 2013) (unpublished L.L.M. Thesis, Utrecht University), available at <http://ssrn.com/abstract=2353009>.

17. This Comment will not attempt to address what type of punishments, in particular, are most appropriate for child terrorists, nor will it make an argument about which courts within domestic systems, military or civilian, are best.

soldiers of terrorism should be held accountable under the law. Part V will give recommendations regarding how domestic criminal justice systems should treat voluntary child soldiers of terrorism.

## II. HISTORICAL BACKGROUND OF CHILD SOLDIERS

### A. WHO IS A CHILD SOLDIER?

UNICEF's 1997 Cape Town Principles define a child soldier as "any person under 18 years of age who is part of any kind of regular or irregular armed force or armed group in any capacity."<sup>18</sup> This widely accepted definition does not distinguish between those who voluntarily enlist in armed groups and those who are forcibly conscripted into armed groups. The prototypical "child soldiers" live in a conflict zone and have been forcibly taken from their family and threatened by leaders of whatever group has abducted them to commit atrocities or face rape, torture, or even death.<sup>19</sup> Most of these child soldiers are teenagers, the average age "being between twelve and thirteen years old."<sup>20</sup> This narrative does not encompass the number of youth who are fleeing their homes to join ISIS or other terror organizations, as many of these youth come from privileged backgrounds, are well-educated, and do not reside in countries that are war-torn.<sup>21</sup> Even so, all those under eighteen fighting with armed groups around the world are considered "child soldiers."

There exists no completely accurate estimate of the current number of child soldiers worldwide, but most agree there are as many as 300,000 children involved in an estimated thirty conflict zones around the world who are considered child soldiers.<sup>22</sup> Geographically speaking, much of the current situation surrounding voluntary child soldiers is concentrated in Africa and the Middle East. At least half of child soldiers worldwide are in Africa, but the use of child soldiers occurs in "at least fourteen other countries on four continents."<sup>23</sup>

Child soldiers have a prominent presence in the Middle East.<sup>24</sup> In Palestine alone, it was estimated that seventy percent of the First Intifada (uprising against Israeli authorities)<sup>25</sup> was comprised of young teenag-

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18. ROSEN, *supra* note 1, at 9.

19. Tessa Davis, Comment, *Lost in Doctrine: Particular Social Group, Child Soldiers, and the Failure of U.S. Asylum Law to Protect Exploited Children*, 38 FLA. ST. U. L. REV. 653, 656-58 (2011).

20. *Id.*

21. See Tim Stanley, *Isil's Western converts are not motivated by Islam. They are motivated by boredom*, THE TELEGRAPH (Sep. 4, 2014), <http://blogs.telegraph.co.uk/news/timstanley/100285161/isils-western-converts-are-not-motivated-by-islam-they-are-motivated-by-boredom/>.

22. Christopher L. Dore, Comment, *What to Do with Omar Khadr? Putting A Child Soldier on Trial: Questions of International Law, Juvenile Justice, and Moral Culpability*, 41 J. MARSHALL L. REV. 1281, 1293 (2008).

23. *Id.*

24. See *id.*

25. Damien McElroy, *Israel-Gaza conflict: What is an infitada?*, THE TELEGRAPH (Nov. 6, 2014, 7:25 AM), <http://www.telegraph.co.uk/news/worldnews/middleeast/israel/10990699/Israel-Gaza-conflict-What-is-an-intifada.html>.

ers.<sup>26</sup> Child soldiers fought in the Iran-Iraq War, the Gulf War, and are currently fighting with various terrorist organizations, including Al-Qaeda and ISIS.<sup>27</sup> A recent study suggests that eight thousand child soldiers are currently associated with terrorist groups in the Middle East.<sup>28</sup>

While children under the age of eighteen have long been fighting in wars, “child soldiers” became an international human rights issue in the 1990s. Graca Machel’s 1996 report *Impact of Armed Conflict on Children* “was one of the first [reports] to make the issue of child soldiers an international concern.”<sup>29</sup> Now many NGOs, the U.N., the ICC, and even the U.S. have made efforts to combat the use of child soldiers in armed conflicts.<sup>30</sup> Further international attention spotlighted the problem when the ICC tried its first defendant, Thomas Lubanga, who was convicted of conscripting children under the age of fifteen.<sup>31</sup>

Amidst this international discussion, the discourse has become one of victimization, which makes the problem of voluntary child soldiers even more difficult to address. “On the topic of child soldiers, the content of transnational persuasive authority includes . . . faultless passive victimhood.”<sup>32</sup> As laws have developed over the past fifty years to hold those who forcibly or voluntarily recruit child soldiers accountable, no laws have clarified what to do with the child soldiers themselves—should they be prosecuted, and if so, at what age? Laws regarding child soldiers have failed to address these important issues and have only focused on victimization, not the perpetration of crimes by these children. In the name of advancing children’s rights, international criminal prosecutions and laws have treated all child soldiers the same, never asking why they are fighting.

#### B. THE EVOLUTION OF INTERNATIONAL LAWS RELATING TO CHILD SOLDIERS<sup>33</sup>

Until 1977 there were no laws directly addressing child soldiers, but as public awareness of the use of child soldiers has expanded, so has the

26. *Id.*; see also ROSEN, *supra* note 1, at 91–92, 116 (explaining the prevalent use of children in Palestine’s ongoing conflict with Israel).

27. See Dore, *supra* note 22 at 1294; Mullen, *supra* note 13.

28. P.W. SINGER, CHILDREN AT WAR 26 (2006).

29. Dani Cepernich, Comment, *Fighting for Asylum: A Statutory Exception to Relevant Bars for Former Child Soldiers*, 83 S. CAL. L. REV. 1099, 1102 (2010).

30. See *id.*; *Children, not soldiers*, COALITION FOR THE ICC (Feb. 12, 2015), [https://ciccglobaljustice.wordpress.com/2015/02/12/children-not-soldiers/?utm\\_source=CICC+Newsletters&utm\\_campaign=758db15b7c-2\\_13\\_15\\_GlobalJustice\\_Weekly&utm\\_medium=email&utm\\_term=0\\_68df9c5182-758db15b7c-408862701&ct=t\(2\\_13\\_15\\_GlobalJustice\\_Weekly\)#more-1952](https://ciccglobaljustice.wordpress.com/2015/02/12/children-not-soldiers/?utm_source=CICC+Newsletters&utm_campaign=758db15b7c-2_13_15_GlobalJustice_Weekly&utm_medium=email&utm_term=0_68df9c5182-758db15b7c-408862701&ct=t(2_13_15_GlobalJustice_Weekly)#more-1952).

31. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Judgment Pursuant to Article 74 of the Statute (Mar. 14, 2012), available at <http://www.icc-cpi.int/iccdocs/doc/doc1379838.pdf>.

32. DRUMBL, *supra* note 5, at 191.

33. Not every single law since 1977 related to child soldiers is included. See ROSEN, *supra* note 1, at 139–46 (detailing a complete list of legislation regarding child soldiers).

body of law.<sup>34</sup> In 1977, “Additional Protocols” were added to the Geneva Convention, which set the minimum age for the recruitment of children in armed conflicts at fifteen.<sup>35</sup> The Protocols also instructed that “[t]he Parties to [a] 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.”<sup>36</sup>

In 1989, the Convention on the Rights of the Child (“CRC”) articulated a similar rule, asking countries to refrain from recruiting children under the age of fifteen in armed conflicts, even though the CRC generally defined a child as anyone under the age of eighteen.<sup>37</sup> In 2000, the United Nations adopted the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (“Optional Protocol”), which was ratified by the United States in 2002, and increased the age of recruitment of child soldiers to eighteen.<sup>38</sup> Under the Optional Protocol, “All recruitment of child soldiers by non-State armed groups is presumed to be involuntary, and thus illegal.”<sup>39</sup> The Optional Protocol encourages State Parties<sup>40</sup> to “take all feasible measures to ensure that members of their armed forces who have not attained the age of eighteen years do not take a direct part in hostilities.”<sup>41</sup> Since 2000, many countries, including the United States, have taken efforts to prevent the forced recruitment of child soldiers and help rehabilitate child soldiers back into society.<sup>42</sup> Despite the laudable efforts made by countries to combat the concerning issue of child soldiers, the applicable laws fail to distinguish between voluntary and involuntary recruitment and incorrectly presume that any recruitment under the age of eighteen is involuntary, encouraging impunity for every child soldier.<sup>43</sup>

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34. Steven Freeland, *Mere Children or Weapons of War - Child Soldiers and International Law*, 29 U. LA VERNE L. REV. 19, 31 (2008).

35. *Id.* at 32.

36. Protocol Additional to the Geneva Conventions of Aug. 12 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, art. 1(1), June 8, 1977, 1125 U.N.T.S. 609.

37. Freeland, *supra* note 34, at 27.

38. *Id.* at 35.

39. Grantland Lyons, Comment, *Separate but Equal Accountability: The Case of Omar Khadr*, 3 U. MIAMI NAT'L SEC. & ARMED CONFLICT L. REV. 125, 137–38 (2013) (quoting Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict Annex I, art. 4, G.A. Res. 54/263, U.N. Doc. A/RES/54/49 (May 25, 2000)).

40. “A ‘State party’ to a treaty is a country that has ratified or acceded to that particular treaty, and is therefore legally bound by the provisions in the instrument.” Introduction to the Convention on the Rights of the Child: Definition of key terms, UNICEF, <http://www.unicef.org/crc/files/Definitions.pdf>.

41. Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict Annex I, art. 1, G.A. Res. 54/263, U.N. Doc. A/RES/54/49 (May 25, 2000).

42. Lyons, *supra* note 39, at 139 (“Specifically, the US noted that it contributed over \$10 million towards the demobilization of child soldiers and their reintegration in several countries, including Afghanistan.”).

43. See DRUMBL, *supra* note 5, at 45 (quoting the clinical psychologist who testified in *Lubanga* that a child can never be considered psychologically to have voluntarily joined an

In 2002, the International Criminal Court (ICC) became the first permanent international criminal tribunal to hear and decide cases involving genocide, crimes against humanity, and war crimes.<sup>44</sup> The Rome Statute of 1998 formed the International Criminal Court,<sup>45</sup> and the statute designates the way in which the ICC can prosecute international crimes.<sup>46</sup> Those involved in the drafting of the statute decided that criminal responsibility for crimes under the subject matter jurisdiction of the court would begin at age eighteen.<sup>47</sup> The statute reads: “[t]he Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime.”<sup>48</sup> Even though the ICC does not have jurisdiction of anyone under the age of eighteen, the Rome Statute only makes the conscription of child soldiers under the age of fifteen a war crime.<sup>49</sup> This discrepancy and “gray zone” has left many wondering how the law should view child soldiers between the ages of fifteen and eighteen.<sup>50</sup> If they can be legally recruited, why are they not held accountable for the crimes they commit? Furthermore, the lack of jurisdiction, and therefore criminal responsibility, for those under eighteen is not, as many have claimed, a principle of the ICC and international law.<sup>51</sup> Instead, the drafters of the Rome Statute vigorously debated the appropriate age restrictions to the ICC’s jurisdiction and ultimately chose eighteen.<sup>52</sup> While the ICC has continued to bring attention to the important issue of the illegal conscription of child soldiers,<sup>53</sup> due to its jurisdictional limit, it has failed to address the issue of voluntary child soldiers and how the law should view those between the ages of fifteen and eighteen.

The latest international law that has continued the discourse of victimization is the 2007 Paris Principles.<sup>54</sup> The Paris Principles state that juveniles accused of committing international crimes involving armed conflicts should be viewed “primarily as victims of offenses against inter-

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armed group because if they could “we wouldn’t have a law that makes you 18 to become an adult”).

44. Freeland, *supra* note 34, at 42, 44.

45. ROSEN, *supra* note 1, at 139.

46. Freeland, *supra* note 34, at 42–44.

47. See generally OTTO TRIFFTERER, ed., COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS’ NOTES, ARTICLE BY ARTICLE 494 (1999).

48. Rome Statute of the International Criminal Court, art. 26, July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter Rome Statute], available at [http://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome\\_statute\\_english.pdf](http://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf).

49. Rome Statute art. 8.

50. ROSEN, *supra* note 1, at 142–45 (explaining the gray zone).

51. See HAPPOLD, *supra* note 7, at 6.

52. *Id.*

53. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Trial Chamber Judgment, (March 14, 2012).

54. United Nations Children’s Fund (UNICEF) Paris Principles: Principles and Guidelines on Children Associated with Armed Forces or Armed Groups, February 2007 [hereinafter Paris Principles], available at <http://www.unicef.org/emerg/files/ParisPrinciples310107English.pdf>.



national law; not only as perpetrators.”<sup>55</sup> Throughout these principles, “[t]here is no mention of ending impunity for atrocities committed by child soldiers, no matter their age or degree of voluntary participation . . . .”<sup>56</sup> Not only has international law repeatedly evaded the question of criminal responsibility for child soldiers, U.S. laws have also continued the discourse of victimization, but have done so without ignoring the issue of voluntariness.

### C. U.S. LAWS REGARDING CHILD SOLDIERS

Many of the issues surrounding international legislation, the failure to distinguish between voluntary and involuntary child soldiers, and the failure to address the gray zone of those fifteen to seventeen years of age, are resolved by U.S. legislation regarding child soldiers. While the United States has not become a State party to the ICC, it has enacted several laws criminalizing the use of child soldiers.<sup>57</sup> The Child Soldiers Accountability Act (“CSAA”) was passed by Congress and signed into law by President George W. Bush in October of 2008.<sup>58</sup> The CSAA confers criminal responsibility on any person who “knowingly . . . recruits, enlists, or conscripts a person to serve while such person is under 15 years of age in an armed force or group; or . . . uses a person under 15 years of age to participate actively in hostilities.”<sup>59</sup>

Although the CSAA defines a child soldier as any “person under 15 years of age,” another relevant piece of legislation, the Child Soldiers Prevention Act (“CSPA”), an amendment to the William Wilberforce Trafficking Victims Protection and Reauthorization Act, criminalizes the use of child soldiers under the age of eighteen only when the children are “*compulsorily* recruited” to participate in armed conflicts.<sup>60</sup> The law considers those who *voluntarily* join governmental armed forces to be unlawful child soldiers, meaning the leaders of the countries who recruit these children face consequences only when the children are younger than fifteen.<sup>61</sup> The CSPA prevents the U.S. from providing military assistance to government forces that recruit child soldiers in violation of the law.<sup>62</sup> The CSPA clarifies the gray zone and is the only piece of legislation that creates a distinction between voluntary and involuntary child soldiers. While these statutes are a step in the right direction, like the Rome Statute, they

55. Paris Principles, art. 3.6.

56. Brakel, *supra* note 16, at 28.

57. In addition to this legislation, the United States has “been a leading donor to the effort to rehabilitate child soldiers.” Bryan Lonagan, *Sinners or Saints: Child Soldiers and the Persecutor Bar to Asylum After Negusie v. Holder*, 31 B.C. THIRD WORLD L.J. 71, 74 (2011).

58. Cepernich, *supra* note 29, at 1112.

59. Child Soldiers Accountability Act §2(a)(1), 18 U.S.C.A. § 2442 (West 2009).

60. William Wilberforce Trafficking Victims Protection Reauthorization Act 22 U.S.C.A. § 2370c 2(A)(ii) (West 2014) (emphasis added).

61. *Id.* § 2370c 2(A)(iii).

62. *Id.* at § 2370c-1(a). *But see generally* Heather L. Carmody, *The Child Soldiers Prevention Act: How the Act’s Inadequacy Leaves the World’s Children Vulnerable*, 43 CAL. W. INT’L L.J. 233 (2012) (explaining the law’s inadequacy to protect child soldiers).

only focus on the criminal responsibility of those recruiting child soldiers, leaving an important question unanswered: how should the law view and treat the child soldiers themselves?

### III. CURRENT LEGAL ISSUES CONCERNING CHILD SOLDIERS

#### A. PERPETRATOR OR VICTIM?

The international and U.S. legislation represent the discourse of victimization that has occurred regarding children fighting in armed conflicts. “The dominant view in international law is that minors who have committed international crimes, such as genocide, crimes against humanity or war crimes, are victims of the adults who recruited them and are not legally culpable.”<sup>63</sup> While children recruited, whether voluntarily or involuntarily, do face incomprehensible trauma, they are also “perpetrators of some of the most violent crimes” in conflicts around the world.<sup>64</sup>

The categories of victim and perpetrator for child soldiers are not mutually exclusive. In fact, child soldiers often oscillate between the two. One child’s involvement in the armed conflict in Sierra Leone illustrates the ambiguity well. A young girl forcibly conscripted by the Armed Forces Revolutionary Counsel (“AFRC”) witnessed soldiers cut her aunt’s newborn baby in half and burn her house down.<sup>65</sup> She was then taken to a camp and told to fight.<sup>66</sup> She initially refused, but after being involved in AFRC operations for some time, she and other child combatants participated in the infamous invasion of Freetown and “cut off people’s arms, heads, and breasts.”<sup>67</sup> For many of these children, “self-preservation can be mingled with an actual thirst for killing,” and they can vacillate back and forth between shame and unspeakable violence.<sup>68</sup> Despite the atrocities committed by these children, the international legal consensus is that they are victims incapable of criminal culpability. “In humanitarian accounts, child soldiers are either victims or demons, or, better yet, they are demons because they are victims. Neither demons nor victims are rational actors.”<sup>69</sup>

Certain children who join terrorist organizations experience a different type of confusion of categories as they may join voluntarily, yet many in the international community would see their choice as coerced simply

63. Pacifique Manirakiza, *Les Enfants Face au Système International de Justice: À la Recherche d'un Modèle de Justice Pénale Internationale Pour les Délinquants Mineurs*, 34 *QUEEN'S L.J.* 719 (2009).

64. Lucia H. Seyfarth, *Child Soldiers to War Criminals: Trauma and the Case for Personal Mitigation*, 14 *CHI.-KENT J. INT'L & COMP. L.* 117, 124 (2013).

65. ROSEN, *supra* note 1, at 87.

66. *Id.*

67. *Id.*; see Michelle Staggs, Comment, *Special Court Monitoring Program Update #45 Trial Chamber II - AFRC Trial Covering*, Sierra Leone Trial Monitoring Program Weekly Report, available at <http://wscs.berkeley.edu/wp-content/uploads/SL-Reports/045.pdf> (explaining Freetown Invasion).

68. Seyfarth, *supra* note 64, at 125.

69. ROSEN, *supra* note 1, at 134.

due to their age. In the past few months, a significant number of news articles have lamented the number of Western youth fleeing their homes to join ISIS.<sup>70</sup> What will happen when these teenagers are apprehended? Will they be prosecuted or seen as victims without any criminal responsibility? Their stories seem quite different from the experience of a child in Sierra Leone who was abducted and given an AK-47, yet laws have failed to recognize this difference.<sup>71</sup>

The view of child soldiers primarily as, and maybe even only as, victims is reflected in the lack of international prosecution of child soldiers for the crimes they have committed even though no international law forbids this type of prosecution.<sup>72</sup> With one exception, international tribunals have not prosecuted child soldiers.<sup>73</sup> Furthermore, the only tribunal to explicitly address the age of criminal responsibility and possibility of prosecuting those under eighteen was the Special Court for Sierra Leone (“SCSL”), which was established after the bloody civil war that spanned over ten years and involved thousands of child soldiers.<sup>74</sup> The SCSL statute provides:

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.<sup>75</sup>

Even though the court had formal jurisdiction over those fifteen and older, international pressure led the Chief Prosecutor not to prosecute anyone under the age of eighteen.<sup>76</sup> “[I]nternational and national NGOs responsible for child-care and rehabilitation programs in Sierra Leone objected to any kind of judicial accountability for juveniles below eighteen years for fear that such a process would place at risk the entire rec-

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70. See, e.g., Terrence McCoy, *How ISIS and other jihadists persuaded thousands of Westerners to fight their war of extremism*, THE WASHINGTON POST (June 17, 2014), <http://www.washingtonpost.com/news/morning-mix/wp/2014/06/17/how-isis-persuaded-thousands-of-westerners-to-fight-its-war-of-extremism/>.

71. Not every child who fought in Sierra Leone was abducted, but the war was “notably brutal” due to the pervasive kidnapping practices of rebel leaders. See DRUMBL, *supra* note 5, at 64.

72. See Brakel, *supra* note 16, at 91; DRUMBL, *supra* note 5, at 133.

73. This includes tribunals created after World War II (in both Nuremberg and Japan) as well as the International Court Tribunal for the former Yugoslavia and the International Court Tribunal for Rwanda. See Brakel, *supra* note 16, at 18. The only exception occurred in the hybrid tribunal set up in Timor-Leste, which charged a fourteen-year-old with crimes against humanity. See DRUMBL, *supra* note 5, at 124.

74. See Brakel, *supra* note 16, at 33.

75. Statute of the Special Court for Sierra Leone, U.N.-Sierra Leone, art. 7(1), Jan. 16, 2002, 2178 U.N.T.S. 145, available at <http://www.rscsl.org/Documents/scsl-statute.pdf>.

76. See Brakel, *supra* note 16, at 42.

conciliation and rehabilitation program.”<sup>77</sup> The child soldiers were instead encouraged, but not forced, to participate in Truth and Reconciliation Commissions (“TRC”).<sup>78</sup> Several scholars have pointed out the paradox underlying this approach: “child soldiers are on the one hand supposedly incapable of volunteering for military service, but on the other hand capable of volunteering to participate in TRC proceedings.”<sup>79</sup>

One way to explain the hesitancy in prosecuting child soldiers in Sierra Leone was the brutal manner in which many of them were abducted, raped, and drugged into military service.<sup>80</sup> Although there were voluntary fighters, the victim/perpetrator divide was murky and the devastation of the country extreme, so perhaps advocates of non-prosecution thought the best way for the country to move forward was to encourage the reconciliation of its fighting youth with the rest of the civilians through TRCs. While Sierra Leone’s criminal tribunal followed other international tribunals by not prosecuting child soldiers, the United States broke the pattern of non-prosecution after the September 11th terrorist attacks.

The U.S. Military Commission at Guantánamo charged Mohammed Jawad and Omar Khadr with crimes committed in Afghanistan when they both were under the age of eighteen.<sup>81</sup> But these charges are definitely the exception and not the rule.<sup>82</sup> One possible explanation for the United States’ decision is that the acts allegedly committed by Jawad and Khadr did not occur in the wake of a brutal civil war, but instead were attacks on American soldiers in a war between the United States and Afghanistan. Therefore, the appeal of a TRC, like the one in Sierra Leone, was non-existent as Jawad and Khadr had no need to reconcile with their fellow countrymen in an attempt to move a war-ravaged country forward. Those who have outspokenly opposed Khadr’s prosecutions, and many have,<sup>83</sup> have ignored the specific context in which the prosecutions occurred.

77. *Id.* at 39–40.

78. *Id.* at 43, 51 (“The Truth and Reconciliation Commission (TRC) was established in 2000 to create an impartial historical record of violations and abuses of human rights and international humanitarian law related to the armed conflict in Sierra Leone, from the beginning of the Conflict in 1991 to the signing of the Lome Peace Agreement; to address impunity, to respond to the needs of victims, to promote healing and reconciliation and to prevent a repetition of the violations and abuses suffered.”).

79. *Id.* at 51; see also DRUMBL, *supra* note 5, at 184.

80. See DRUMBL, *supra* note 5, at 64.

81. Associated Press, *Guantánamo Detainee Released*, N.Y. TIMES (Aug. 24, 2009), <http://www.nytimes.com/2009/08/25/world/asia/25gitmo.html?ref=topics> (Mohammed Jawad); Charlie Savage, *Delays Keep Former Qaeda Child Soldier at Guantánamo, Despite Plea Deal*, N.Y. TIMES (Mar. 24, 2012), <http://www.nytimes.com/2012/03/25/us/delays-keep-omar-khadr-at-guantanamo-despite-plea-deal.html> (Omar Khadr).

82. Other exceptions have also existed in domestic courts. The government of the Democratic Republic of Congo executed a fourteen-year-old child soldier in 2000. The Congolose Court of Military Order sentenced four child soldiers between the ages of fourteen and sixteen to death in 2001, but those sentences were not carried out. The Ugandan government charged two former Lord’s Resistance Army fighters with treason when the child soldiers were fourteen and sixteen; these charges were later withdrawn. See Matthew Happold, *Child Soldiers: Victims or Perpetrators?*, 29 U. LA VERNE L. REV. 56, 71 (2008).

83. See, e.g., *Warped Justice*, N.Y. TIMES (Nov. 8, 2010), <http://www.nytimes.com/2010/11/09/opinion/09tue1.html> (referring to Khadr’s detention as a “disturbing case”).

## B. THE WAR ON TERROR

After the terrorist attacks that occurred on September 11, 2001, Congress authorized President Bush to commence the War on Terror by using “all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States.”<sup>84</sup> The War on Terror has involved the use of many child soldiers. “Iraqi youth . . . participated in the 2003 conflict against the United States and its allies. In post-Saddam Iraq, children have engaged in suicide bombing. Child soldiers have fought, killed, and died in Afghanistan through successive conflicts.”<sup>85</sup> Currently, not only are children from the Middle East recruited into terrorism, many youth in the West have joined terrorist organizations.<sup>86</sup>

As part of the War on Terror, the U.S. Military Commission at Guantánamo Bay began detaining and trying suspects.<sup>87</sup> Practices at Guantánamo Bay have received harsh criticism, one criticism being the detention and trial of Omar Khadr.<sup>88</sup> Scholars have debated the detainment and trial of Omar Khadr by the U.S. Military because Khadr was subjected to harsh treatment at Guantánamo Bay starting at the young age of fifteen.<sup>89</sup>

From the age of ten, Khadr held close ties with Osama Bin Laden and senior members of Al-Qaeda.<sup>90</sup> Khadr’s family even made annual visits to Osama Bin Laden’s home.<sup>91</sup> Even though Khadr was a Canadian citizen, his family moved frequently, visiting Al-Qaeda training camps. Khadr then joined Al-Qaeda, and when he was fifteen years old, he “engaged in a firefight with U.S. forces, [and] threw a grenade, killing Sergeant First Class Christopher Speer.”<sup>92</sup>

The international community, including many Americans, vehemently opposed Khadr’s treatment at Guantánamo.<sup>93</sup> The U.S. Military classified Khadr as an enemy combatant, a perpetrator of war crimes, and not as a child soldier, a victim.<sup>94</sup> Many have argued, “because of his age and [the] circumstances surrounding the alleged offenses, Khadr should have been

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84. S.J. Res. 23, 107th Cong. (2001), available at <http://www.law.cornell.edu/background/warpower/sj23.pdf>.

85. DRUMBL, *supra* note 5, at 31.

86. Holly Yan, *Why is ISIS so successful at luring Westerners?*, CNN (Oct. 7, 2014, 8:01 AM), <http://www.cnn.com/2014/10/07/world/isis-western-draw/>.

87. *Guantánamo Bay Timeline*, JURIST, available at <http://jurist.org/timelines/2012/01/guantanamo-bay-timeline.php>.

88. *See Four Days in Guantanamo*, ALJAZEERA (Jan. 12, 2012), <http://www.aljazeera.com/programmes/witness/2012/01/20121121051543501.html> (discussing the documentary produced to examine “one of the most controversial detention facilities in the world”).

89. Freeland, *supra* note 34, 21–22.

90. Lyons, *supra* note 39, at 129.

91. *Id.*

92. *Id.*

93. *See* N.Y. TIMES, *supra* note 83.

94. *Khadr v. Bush*, 587 F. Supp. 2d 225, 228 (2008).

classified as a child soldier.”<sup>95</sup> Aside from Khadr’s status as an enemy combatant, the legal issues arising from his “youth span[ned] many contexts, raising judicial questions regarding the legality of his detention, his treatment and separation from adults while detained, jurisdiction to prosecute him for war crimes, and the inadmissibility of his statements based on his youth.”<sup>96</sup> Despite these concerns, Khadr was kept at Guantánamo Bay until he was twenty-four, spending a third of his life there.<sup>97</sup> He ultimately pled guilty to murder and attempted murder in violation of the laws of war, along with other less serious crimes, accepting a sentence of eight years.<sup>98</sup>

Embedded in the public outcry against Khadr’s detention and trial was the discourse of victimization.<sup>99</sup> An important challenge to this discourse is whether all child soldiers should be treated the same for purposes of criminal punishment—should voluntariness matter? Khadr argued, “[C]hildren can’t be expected to understand the law of armed conflict. The laws of war require a degree of maturity and sophistication that children simply cannot be expected to have.”<sup>100</sup> Khadr’s attorneys invoked the same general categorization of all child soldiers that international human rights advocates do—all children are incapable of voluntarily participating in armed conflict because they cannot comprehend the laws of war. This argument implies that children should not be prosecuted for their participation in armed conflict because they do not have an understanding of what they are doing.

However, evidence at the trial showed Khadr “considered himself an active member of Al- Qaeda and shared its goals of killing all Americans.”<sup>101</sup> Khadr further articulated that “the proudest moment of his life was constructing and planting land mines; he did so voluntarily and was not forced to participate.”<sup>102</sup> During the four-hour firefight that proceeded Khadr’s throwing the grenade, “Khadr had the opportunity to leave . . . and understood he would not face any repercussions for doing so, but [he] chose to stay and fight. He and the others made a pact to die fighting rather than be captured by U.S. forces.”<sup>103</sup> While children’s rights advocates and legal scholars wanted Khadr classified as a child soldier so that he would receive prosecutorial immunity, it is difficult to say

95. See, e.g., Lyons, *supra* note 39, at 130.

96. Richard J. Wilson, *Omar Khadr: Domestic and International Litigation Strategies for A Child in Armed Conflict Held at Guantánamo*, 11 SANTA CLARA J. INT’L L. 29, 33–34 (2012).

97. *Id.* at 70.

98. *Id.* at 73.

99. See, e.g., Andrea Prasow, *The Child Soldier on Trial at Guantánamo*, HUMAN RIGHTS WATCH (Oct. 27, 2010), <http://www.hrw.org/news/2010/10/27/child-soldier-trial-guantanmo>.

100. United States v. Khadr, 1 M.C. 223 (Apr. 30, 2008) (Ruling on Defense Motion for Dismissal Due to Lack of Jurisdiction Under the MCA in Regard to Juvenile Crimes of a Child Soldier), available at <http://www.defense.gov/news/d20080430Motion.pdf>.

101. Brakel, *supra* note 16, at 83.

102. *Id.* at 84.

103. *Id.*

Khadr's choices were involuntary to merit such immunity. Nor were the circumstances surrounding Khadr's actions like those every other child soldier experiences. Without defending Khadr's long-term detention and the nature of that detention,<sup>104</sup> the decision to prosecute Khadr represented a more nuanced approach to the problem of voluntary child soldiers.

### C. WHY TERRORISM IS DIFFERENT

Whether and how to prosecute voluntary child terrorists is a question still needing an answer today as ISIS' expanding conquests include recruiting many Western teenagers under the age of eighteen. What will happen if these teenagers are apprehended? Will they be categorized as victims and receive prosecutorial immunity? Very little scholarship has discussed the difference between the prototypical child soldier and child soldiers involved in terrorism. Even scholars who have said child soldiers have the capacity to fight voluntarily have failed to account for the differences between child soldiers in civil wars, such as the internal armed conflict in Sierra Leone, and child soldiers joining terrorist organizations.<sup>105</sup>

Treating teenagers joining ISIS just like the teenagers who fought in Sierra Leone not only dilutes the suffering and trauma experienced by those in Sierra Leone, it creates an artificial category that includes all children worldwide who participate in conflict, claiming they do so in the same manner and for the same reasons. "[I]t is simply easier for internationalists to view the problem as one of abduction or unstoppable coercion, instead of one that involves a mix of compelled participants and participants who exercise . . . initiative."<sup>106</sup> A teenager voluntarily joining ISIS is not the same as a teenager who is abducted and forced to kill others. No two child soldiers are alike, but those involved with terrorism create a distinct legal dilemma because terrorism affects countries differently than other traditional wartime crimes.

Because of the nature of terrorist attacks, the prosecution of those committing the attacks is better suited to domestic courts, including military tribunals, and not to international courts. After the civil war in Sierra Leone ended, it was necessary to establish a hybrid tribunal, one involving international and domestic resources and law, to bring about justice in light of the widespread devastation caused by over ten years of ruthless fighting.<sup>107</sup> In contrast, acts of terror are usually more sporadic and located in geographically diverse places. Take, for example, the recent at-

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104. Khadr's detention was anything but just. "It ran afoul of good faith, given the dilatory nature of the process. Military commission procedural rules fell short of appropriate due process standards. Khadr's prosecution inflicted gratuitous punishment, namely lengthy pre-trial detention. It also subjected him to great evils, notably, distressing custodial treatment and extraction of confessions through threats of gang rape." DRUMBL, *supra* note 5, at 212.

105. See generally ROSEN, *supra* note 1; DRUMBL, *supra* note 5.

106. DRUMBL, *supra* note 5, at 213.

107. Brakel, *supra* note 16, at 31-33.

tacks in Paris at Charlie Hebdo by terrorists associated with Al-Qaeda.<sup>108</sup> France is not ravaged by civil war and therefore unable to prosecute the perpetrators of the attack; the criminal justice system in France is capable of achieving justice.

Furthermore, due to the extent of the war's destruction in Sierra Leone, there was no conceivable way to prosecute every perpetrator. The hybrid tribunal decided only to prosecute those most responsible for the grave crimes committed, which excused child soldiers from criminal responsibility.<sup>109</sup> In situations like the terrorist attacks at Charlie Hebdo or the September 11th attacks in the United States, the lack of countrywide death and destruction eliminates the need to focus only on prosecuting the most egregious offenders, making the prosecutions of voluntary child soldiers who assist in committing these types of attacks possible.

Additionally, Sierra Leone's decision to achieve justice for the atrocities committed by child soldiers through TRCs is inapplicable to situations of terrorism. Those under eighteen travelling to join ISIS and other terrorist organizations do not need to make peace with their neighbors once they are apprehended. Their crimes are not centralized in their own communities, rendering the reasons TRCs were preferred for juveniles in Sierra Leone, and other countries, irrelevant.<sup>110</sup>

The ICC is also not a suitable place for these prosecutions as the ICC only intervenes to prosecute when a domestic court is unwilling or unable to carry out justice after a particular conflict.<sup>111</sup> As explained above, many of the countries terrorized have the means to carry out prosecutions of voluntary child terrorists. The need for ICC intervention or the creation of international tribunals usually arises when a country is incapable of prosecuting all of the perpetrators because of reasons that also suggest prosecuting juveniles is not the best way to administer justice. Without these rationales, the inability to prosecute perpetrators due to the devastation of war or the unwillingness to prosecute juveniles because of the high volume of adult offenders, the categorical approach towards abdicating criminal responsibility for all child soldiers is untenable. If terrorism is in fact different, and there is a greater justification for juvenile prosecutions, at what age should voluntary child terrorists be held accountable?

#### D. AGE IS MORE THAN JUST A NUMBER

Aside from the U.S.'s prosecution of Khadr, child soldiers, even voluntary ones, are not prosecuted because of the prevalent understanding that due to their young age, children are incapable of making rational and

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108. *Charlie Hebdo attack: Three days of terror*, BBC NEWS (Jan. 14, 2015, 12:55 PM), <http://www.bbc.com/news/world-europe-30708237>.

109. Brakel, *supra* note 16, at 42.

110. *See id.* at 61.

111. Understanding the International Criminal Court, *available at* <http://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf>.



intentional decisions meriting criminal liability.<sup>112</sup> Even if laws should hold child soldiers accountable, the age at which they should be held criminally responsible is strongly contested. There is no law besides the SCSL statute, which allowed for the prosecution of those fifteen and older, that articulates an appropriate age for criminal responsibility for child soldiers. The debate is further complicated by the distinction between the voluntary and forced recruitment of child soldiers.

#### IV. VOLUNTARINESS AND AGE

Critical questions concerning child soldiers, particularly voluntary child soldiers, need to be answered in order for domestic courts to pursue justice following terrorist attacks. In light of the many young men and women voluntarily joining extremist groups, the current laws and discourse of victimization must be updated. The following questions need to be answered to ensure domestic prosecutions of young terrorists are done in a fair and just manner: What is voluntariness? At what age can a child soldier voluntarily fight in an armed conflict, and more importantly, at what age should voluntariness result in prosecution?

##### A. VOLUNTARINESS

Some have argued that no child soldier legitimately volunteers to fight in armed conflicts.<sup>113</sup>

[I]n most cases the use of the term “volunteer” is a complete misnomer. It is usually the case that extreme circumstances [like] 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/her parents) little choice but to offer his/her services to a “cause.”<sup>114</sup>

Even the Special Representative in the *Lubanga* case, the ICC’s first conviction, said “[t]he line between voluntary and forced recruitment is therefore not only legally irrelevant but practically superficial in the context of children in armed conflict.”<sup>115</sup> Maybe the distinction is difficult to make, but that does not render it “legally irrelevant.” The distinction matters because without an articulation of the legal difference between forcible conscription and voluntary recruitment, full justice cannot be brought to the victims who suffer greatly at the hands of child soldiers and their leaders. Moreover, the purpose of criminal law is accountability. The only way to choose who is held accountable under the law is to know who is criminally responsible—defining voluntariness makes that determination possible.

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112. See HAPPOLD, *supra* note 7, at 11.

113. See, e.g., FREELAND, *supra* note 34, at 27–28.

114. *Id.*

115. Noëlle Quéniévet, *The Liberal Discourse and the “New Wars” off/on Children*, 38 BROOK. J. INT’L L. 1053, 1076 (2013) (quoting *Lubanga*).

Voluntariness can be defined using legal norms and rules in other contexts. For instance, the United States Supreme Court has articulated that voluntariness can be looked at through a totality of the circumstances lens.<sup>116</sup> When deciding whether consent to a Fourth Amendment search is voluntary or not, the Court has stated:

In examining all the surrounding circumstances to determine if in fact the consent to search was coerced, account must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents. Those searches that are the product of police coercion can thus be filtered out without undermining the continuing validity of consent searches.<sup>117</sup>

The same analogy can be applied to the recruitment of child soldiers. Judges can look at the totality of the circumstances, including an assessment of coercive forces by recruiters and leaders of terrorist organizations (instead of the police), to determine voluntariness without simply deciding that juveniles can never make voluntary decisions to fight in armed conflicts (this process filters out cases of coercion so that “voluntary” still has meaning). At a certain age, voluntariness is not impossible to assess, and courts can look to the circumstances under which children decide to join armed conflicts to determine whether they legitimately volunteered to join.

One scholar has argued that voluntariness can be assessed using two factors: “whether a child appreciates the consequences of his/her decision and whether there are viable alternatives to joining the armed forces or groups.”<sup>118</sup> While looking at psychology research can help judges and lawmakers assess the first factor, using the second factor would virtually eliminate all criminal responsibility for children and adults alike. Assessing what a viable alternative is would cause more confusion than clarity, and while domestic and international laws may be broken out of desperation, that desperation does not excuse the wrongful act or negate the need for punishment. Who would determine viability—a judge, the child, a member of the community facing similar pressures in a similar environment?

Assuming the first factor, whether children appreciate the consequences of their decisions, is a viable metric of voluntariness, legislatures must decide when children can do so. Obviously no two children are alike in maturity, and anywhere one draws the line will seem arbitrary. But the law requires line drawing, and that line drawing is most fair regarding crimes related to terrorism when it comports with international understandings of child psychology. While cultures regard adult responsibility differently, there are universal norms about juvenile development that can help legislatures and judges formally decide at what age children

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116. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973).

117. *Id.* at 229.

118. Quéniwet, *supra* note 115, at 1072.

should be held accountable for voluntarily making the choice to fight in an armed conflict.

Furthermore, laws within the U.S. outside of the criminal context recognize that juveniles should have autonomy in decision-making. Those under eighteen can give consent for certain medical procedures, including having an abortion.<sup>119</sup> To claim that minors can never voluntarily consent to fighting in armed conflicts means they are also incapable of giving valid consent to any medical decisions that have long-term consequences.<sup>120</sup> Children's rights advocates who claim all child soldiers are victims who cannot voluntarily make a decision to fight also claim that children have the right to self-expression and self-determination.<sup>121</sup> Children cannot be capable of both making serious medical decisions and self-expression and yet completely incapable of making the decision to join a terrorist organization. The question should not be whether a juvenile can make a voluntary decision to fight, but at what age should criminal responsibility begin in light of the child's legitimate, voluntary choice.

#### B. AT WHAT AGE CAN A CHILD MAKE A VOLUNTARY DECISION?

Any age cutoff for criminal responsibility will seem arbitrary. However, deciding each child's culpability on a case-by-case basis is too arduous a task for the courts to perform. Furthermore, not having a categorical rule will frustrate deterrence objectives as those children who voluntarily join armed conflicts will know they can always argue their situation does not merit prosecution based on their particular circumstances. Instead of trying to rationalize an appropriate age of culpability based on international norms concerning the transition from childhood to adulthood, the law should look at the lines already drawn in criminal statutes and at scientific research that focuses on the ability of juveniles to make informed choices, all of which point to fifteen as an appropriate age for criminal responsibility.

While there is no international consensus about when a child reaches adulthood,<sup>122</sup> there are ways to quantify moral culpability. The age at which children enter adulthood is inconsistent across countries, but the age at which children should incur criminal responsibility poses a different question; it is not just a cultural inquiry. When asking whether we

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119. See *Parental Consent and Notification Laws*, PLANNED PARENTHOOD, <http://www.plannedparenthood.org/health-info/abortion/parental-consent-notification-laws> (listing state laws relating to whether parental consent is necessary for obtaining an abortion and explaining that even in states where parental consent is required, the minor can petition for "judicial bypass" of this requirement).

120. See Terry A. Maroney, *The False Promise of Adolescent Brain Science in Juvenile Justice*, 85 NOTRE DAME L. REV. 89, 159 (2009).

121. Convention on the Rights of the Child arts. 11-14, Nov. 20, 1989, 1577 U.N.T.S. 3, available at <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>.

122. "Americans let sixteen-years-olds drive, but not drink, and the Dutch let their sixteen-year-olds drink, but not drive." David Pimentel, *The Widening Maturity Gap: Trying and Punishing Juveniles As Adults in an Era of Extended Adolescence*, 46 TEX. TECH L. REV. 71, n.96 (2013).

should prosecute those under the age of eighteen, we are not asking whether they are as morally culpable or personally responsible as adults, but whether they are morally culpable or personally responsible enough to be punished for their actions.<sup>123</sup>

The age most often referenced in the U.S. and international laws regarding criminal responsibility and child soldiers is fifteen. The ICC has jurisdiction over those eighteen and older, but the crime of conscription only applies to those who recruit children fifteen and younger.<sup>124</sup> The Special Court of Sierra Leone, in the wake of the gruesome civil war, included children fifteen to eighteen in the court's jurisdiction.<sup>125</sup> The CSPA, enacted by the U.S. legislature, considers those who voluntarily join governmental armed forces to be unlawful child soldiers, in the sense that they are victims, only when they are younger than fifteen. Although the law does not address the possibility of prosecuting voluntary child soldiers fifteen and older, it at least recognizes the reality that fifteen-year-olds are capable of making the decision to fight in armed conflicts. Perhaps those who tried Omar Khadr in Guantanamo Bay had this statute in mind when they pursued his prosecution. The CSPA, Rome Statute, and SCSL statute provide a defensible justification for using fifteen as the age at which voluntary child soldiers should be prosecuted.

The age of fifteen is also supported by psychology research, which has shown that by fifteen, young men and women are capable of making decisions and realizing the consequences of those decisions.<sup>126</sup> One study found that by age 14 or 15 reasoning capacities "roughly reach adult levels."<sup>127</sup> Another study found that past the age of fourteen, adolescents of at least average intelligence are capable of giving knowing and voluntary consent as it relates to decision-making.<sup>128</sup> "Fifteen, sixteen, and seventeen-year-olds, the age groups that commit most juvenile crime, are much closer to adults than pre-adolescents on the traditional measures of criminal desert."<sup>129</sup> It is important that those fifteen and older who voluntarily join armed conflicts are prosecuted because, from a psychological perspective, fifteen year olds are capable of forming the requisite mens rea to be found guilty of their crimes.

The voices calling for accountability of child soldiers are few, but the

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123. See *Roper v. Simmons*, 543 U.S. 551, 599 (2005) (O'Connor, J., dissenting).

124. See DRUMBL, *supra* note 5 and accompanying text; Freeland, *supra* note 34, at 42–44 and accompanying text.

125. Freeland, *supra* note 34, at 52.

126. See, e.g., Praveen Kambam, M.D. & Christopher Thompson, M.D., *The Development of Decision-Making Capacities in Children and Adolescents: Psychological and Neurological Perspectives and Their Implications for Juvenile Defendants*, 27 BEHAVIORAL SCIENCES AND THE LAW 173 (2009).

127. *Id.* at 175.

128. Carrie S. Fried & N. Dickson Reppucci, *Criminal Decision Making: The Development of Adolescent Judgment, Criminal Responsibility, and Culpability*, 25 LAW AND HUMAN BEHAVIOR 45, 46 (2001).

129. Christopher Slobogin & Mark R. Fondacaro, *Juvenile Justice: The Fourth Option*, 95 IOWA L. REV. 1, 6 (2009).

many who argue against it exclude discussions about mens rea.<sup>130</sup> “To be guilty of a crime, particularly with regard to serious offences, it is not enough simply to have done a particular prohibited act; there must be the requisite mens rea (guilty mind) as well as the actus reus (wrongful act).”<sup>131</sup> In order to justify the non-prosecution of child soldiers, it would have to be shown that all children lack “a guilty mind.”<sup>132</sup> Most scholars argue that children lack the mental capacity to fully appreciate their choices, and thus should be given leniency.<sup>133</sup> But what the law requires is different—mens rea is “a guilty mind,” not a mind capable of understanding the full effect of each decision as an adult would.

Some examples of the horrific acts committed by children provide sufficient evidence of their mens rea. One sixteen-year-old member of the RUF described his involvement in Sierra Leone’s civil war this way:

My men knew I had to drink human blood every morning. If we had a prisoner, I would kill him myself. I would cut off his head with a machete . . . if one of the boys tried to escape and was caught, my fighters would murder him themselves, because they knew it would [be] even worse if they brought him to me.<sup>134</sup>

The way in which many child soldiers interviewed by anthropologists describe their crimes reveals they knew what they were doing and what the result of their actions would be.<sup>135</sup> Omar Khadr made similar comments.<sup>136</sup> When Khadr became angry with his guards, “he recalled killing the [American] soldier” and said “it made him feel good.”<sup>137</sup> While some child soldiers can describe their killings with chilling accuracy, should their age still be a defense to having the requisite mens rea necessary for prosecution?

While the infancy doctrine is a defense to mens rea, that doctrine, in the United States, provides a presumption of a lack of mens rea only for

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130. Even if the discussion is not entirely excluded, it is presumed that children are never capable of having the requisite *mens rea* for international crimes. HAPPOLD, *supra* note 7, at 2 (“It has been argued that international crimes have such onerous *mens rea* requirements that children will always lack capacity to commit them.”)

131. HAPPOLD, *supra* note 7, at 71–72.

132. *Id.*

133. See, e.g., Sara A. Ward, Comment, *Criminalizing the Victim: Why the Legal Community Must Fight to Ensure That Child Soldier Victims Are Not Prosecuted As War Criminals*, 25 GEO. J. LEGAL ETHICS 821, 833 (2012) (“Because their judgment, cognitive abilities, and impulse control mechanisms are still being developed, juveniles are less able than adults to control their impulses, to use reason to guide their behavior, and to think through the consequences of their actions.”).

134. ROSEN, *supra* note 1, at 60–61.

135. See ROSEN, *supra* note 1, at 17 (“The relatively few published interviews with current and former child soldiers carried out by anthropologists in the field make plain that the experience of children at war has scant connection with the depictions in the humanitarian literature. [ ] [I]nterviews with male and female child soldiers . . . show that ‘many under-age combatants choose to fight with their eyes open, and defend their choice, sometimes proudly.’”).

136. See Brakel, *supra* note 16, at 85.

137. *Id.*

adolescents up to the age of fourteen,<sup>138</sup> further confirming that fifteen is an appropriate age at which to hold voluntary child soldiers accountable. Like other international standards and psychology research show, the age of fifteen is a time when youth can better appreciate their actions and act from a guilty mind. “It cannot be presumed that children, particularly those closer to eighteen, who voluntarily join armed forces, do not understand their actions or the consequences of their decisions.”<sup>139</sup> If older youth who voluntarily commit international crimes are not seen as having the requisite mens rea, justice cannot be seen for the victims of these children’s voluntary choices.

However, just because adolescents are capable of making voluntary and informed decisions does not mean they fully appreciate the consequences of those decisions; therefore, those prosecuted between the ages of fifteen and eighteen should be afforded special protections. To that end, the U.S. (and other national court systems) should formally declare jurisdiction over those fifteen and older who voluntarily join armed groups involved in terrorism. This would clear up the confusion surrounding voluntary child soldiers between the ages of fifteen and eighteen. Furthermore, formally declaring jurisdiction would keep countries accountable to prosecuting in a way that comports with notions of juvenile justice instead of prosecuting on an ad-hoc basis as happened in the case of Khadr. Without the recognition of both criminal responsibility and special juvenile protections, countries like the U.S. will continue to treat detainees like Omar Khadr as an adult without sufficient protections, and children’s rights advocates will continue to advocate for prosecutorial immunity for teenagers who have voluntarily committed atrocities.

## V. HOW COURTS SHOULD RESPOND: PROTECTIONS AND SAFEGUARDS

While the U.S. Military should have prosecuted Omar Khadr, he should not have been treated the same as every other Guantánamo prisoner. The law can hold children accountable without violating children’s rights by protecting their immaturity and sensitivity. In the wake of the controversy surrounding Omar Khadr’s detention and trial, it was discovered that boys as young as ten and twelve were detained at Guantánamo in the same space as much older adult men.<sup>140</sup> Only after media attention surrounding this injustice were the young boys transferred to a separate

138. See Lara A. Bazelon, Comment, *Exploding the Superpredator Myth: Why Infancy Is the Preadolescent’s Best Defense in Juvenile Court*, 75 N.Y.U. L. REV. 159, 159–61 (2000).

139. Erin Lafayette, Comment, *The Prosecution of Child Soldiers: Balancing Accountability with Justice*, 63 SYRACUSE L. REV. 297, 311 (2013).

140. Richard J. Wilson, *Children in Armed Conflict: The Detention of Children at Guantánamo Bay, and the Trial for War Crimes by Military Commission of Omar Khadr, a Child*, 5 (Washington College of Law Research Paper No. 2009-13) (2009), available at <http://ssrn.com/abstract=1368323>.

facility.<sup>141</sup> The discourse surrounding the victimization of child soldiers, whether voluntary or not, has caused many to argue in favor of complete immunity from prosecution, when in reality justice requires criminal responsibility and accountability, but accountability that is age appropriate.

The U.S. juvenile justice system already affords protections for juveniles; it is presumed that juveniles are not as morally culpable as adults, but the juveniles are not excused from criminal responsibility altogether.<sup>142</sup> The juvenile justice system in the United States has set up flexible ways for youth to be punished, but also rehabilitated, through community service programs and placement at treatment-based facilities.<sup>143</sup> While the juvenile justice systems in states across the U.S. are far from perfect, the effective programs that do exist can be used for voluntary child terrorists. This type of prosecution that is age appropriate better achieves the criminal justice goals of retribution and rehabilitation as perpetrators would not go unpunished, but they would also be treated in a way that promotes their reintegration into society.

Studies have shown that youth are more capable of changing their ways and reintegrating into society than adults are.<sup>144</sup> In fact, one of the reasons the United States Supreme Court raised the age of those convicted of murder who qualify for the death penalty to eighteen was because “the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed.”<sup>145</sup>

Even with an understanding that juveniles are different from adults, their treatment within the U.S. criminal justice system can take several different forms. Juveniles can be adjudicated in juvenile court, tried and sentenced in adult courts for especially egregious crimes, or tried in military commissions if the juvenile falls within courts-martial jurisdiction.<sup>146</sup> Voluntary child soldiers should always receive special protections no matter in which court they are tried because of their susceptibility and vulnerability, which make recruitment to groups like ISIS frighteningly easy.<sup>147</sup>

While military commissions do not have the same juvenile protections as domestic courts, after Khadr’s case, and most likely due to the concern so many expressed for Khadr’s well-being, changes were made regarding Khadr’s detention.<sup>148</sup> A significant reason so many human rights groups

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141. *Id.*

142. See Brakel, *supra* note 16, at 63.

143. R. Daniel Okonkwo & Dylan Nicole De Kervor, *There Are Two Sides to Every Story: Collaboration Between Advocates and Defenders in Achieving Systemic Juvenile Justice Reform*, 15 U. PA. J.L. & SOC. CHANGE 435, 451 (2012).

144. See *Roper v. Simmons*, 543 U.S. 551, 570 (2005).

145. *Id.*

146. See Brakel, *supra* note 16, at 70, 77 n.423, 80 (explaining that juveniles may be tried as adults for egregious crimes and explaining why Khadr was under courts-martial jurisdiction); *United States v. Ali*, 71 M.J. 256, 262 (C.A.A.F. 2012) (explaining when courts-martial, military courts, have jurisdiction).

147. Francesca Trianni & Andrew Katz, *Why Westerners are Fighting for ISIS*, TIME (Sep. 5, 2014), <http://time.com/3270896/isis-iraq-syria-western-fighters/>.

148. See Wilson, *supra* note 140; *supra* notes 140–41 and accompanying text.

and academics publicly argued on behalf of Khadr was because of his confinement with adults and treatment as just another adult detained at Guantánamo Bay.<sup>149</sup> The Military Commission at Guantánamo did a great disservice to Khadr because his prosecution only focused on justice for the victims of his actions and not on justice for him as a child. If juveniles are going to be prosecuted by military commissions, they should receive the same protections juveniles in the federal and state court systems receive. Juveniles are treated with particular precautions in the criminal justice system because of their age, which remains a concern whether they are tried in domestic courts or military courts.

If the teenagers who have fled the country to join ISIS are tried in domestic courts, the concern over their treatment as juveniles is not as grave. Just this year, a nineteen-year-old female was prosecuted in federal court for conspiracy to support ISIS, revealing that many of these teenagers may not be tried in military commissions if they are apprehended before engaging in armed conflict.<sup>150</sup> Despite the location of their trials, whether they take place in domestic or military courts, those under eighteen prosecuted for crimes related to terrorism should receive special protections.

In 2000, Amnesty International released a report concerning the prosecution and treatment of child soldiers. “Amnesty International calls for all those who commit serious crimes such as genocide, crimes against humanity, and war crimes, to be held accountable for their actions.”<sup>151</sup> The report recognized that some children commit these crimes voluntarily and international law does not bar their prosecution.<sup>152</sup> The report lists the following safeguards, as well as others, in the criminal prosecution of child soldiers<sup>153</sup>:

1. “The right to be heard: a defendant should participate in criminal proceedings with a full understanding of the process.”
2. “Deprivation of liberty should be used as a last resort.”
3. “The right to legal advice and care according to their age.”
4. “The right to assistance to aid physical and psychological recovery and social reintegration.”
5. “Fair trial guarantees appropriate to the needs of children.”

With these safeguards in mind, criminal prosecutions of voluntary child soldiers can occur while respecting the due process rights of the child as well as promoting rehabilitation.

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149. *The Omar Khadr Case*, HUMAN RIGHTS WATCH 1 (2007), available at <http://www.hrw.org/legacy/backgrounders/usa/us0607/us0607web.pdf>.

150. Michael Martinez, Ana Cabrera, & Sara Weisfeldt, *Colorado woman gets 4 years for wanting to join ISIS*, CNN (Jan. 24, 2015, 9:29 AM), <http://www.cnn.com/2015/01/23/us/colorado-woman-isis-sentencing/>.

151. Amnesty International, *Child Soldiers: Criminals or Victims* 3 (2000), available at <https://www.amnesty.org/en/documents/ior50/002/2000/en/>.

152. *Id.* at 3, 8.

153. *Id.* at 11–13.



Despite these potential safeguards, Mark Drumbl has argued that even if child soldiers can fight voluntarily, they should not be criminally prosecuted.<sup>154</sup> He posits: “the prospect of criminal prosecution and punishment may inhibit the child soldier from the . . . decision to exit armed factions.” According to Drumbl, if children know they will be prosecuted, they will have less incentive or desire to leave armed groups and stop fighting. This particular argument is based on the larger concern of his latest book, which focuses on how to most effectively eradicate the problem of child soldiers.

However, within the context of terrorism, the concern does not stop at the elimination of children fighting in armed conflict. The national security threat terrorism poses as well as the atrocities committed by terrorist organizations create a separate concern from ending the use of child soldiers—ending terrorism. In order to balance both of these goals, child terrorists should be held accountable through criminal prosecution, but in a way that not only punishes, but also rehabilitates. This type of accountability addresses both the problem of terrorism and the problem of child soldiers by rehabilitating the youth from terrorist ideology and deterring future youth from joining extremist groups.

## VI. CONCLUSION

While child soldiers are not a new phenomenon, the brutality with which they are recruited and the subsequent human rights discourse labeling these children as victims are novel.<sup>155</sup> The issue of voluntariness is also new as the threat of global terrorism increases, and young men and women under the age of eighteen, such as Omar Khadr, are joining the threat. These children are not just victims but also perpetrators of atrocious crimes. At the same time, these child soldiers are also victims in the sense that they are young and therefore have limited decision-making capacities, leaving them vulnerable to recruitment into terrorist organizations. While this victim/perpetrator labeling is complicated and confuses norms surrounding criminal prosecution, the law can respond in a way that pursues justice without artificially considering all child soldiers to be identical.

Holding child soldiers who voluntarily commit international crimes accountable does not mean that these children should be treated just like everyone else. Their childhoods should be taken into account and reflected in their punishment, a punishment that should promote rehabilitation. To prosecute child terrorists as any other war criminal would be a grave failure of the criminal justice system to pursue the goals of retribution and rehabilitation.

The consequences of non-prosecution involve more than just a lack of justice. A lack of accountability may encourage militant leaders to use

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154. See generally DRUMBL, *supra* note 5.

155. Quénivet, *supra* note 115, at 1088–89.

teenagers to carry out the worst offenses rather than committing the acts themselves, as they know the atrocities could be committed with impunity.<sup>156</sup> Accountability for these child soldiers is not an inhumane thirst for revenge; it is a demand for justice and protection for the children and those they harm.

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156. Linda Van Brakel articulated similar concerns. *See* Brakel, *supra* note 16, at 50.

