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An Elusive Mandate: Enforcing the Prohibition on the Use of Child Soldiers

Sarah J. Diaz¹

I. INTRODUCTION: THE USE OF CHILDREN IN ARMED CONFLICT AND THE LIMITED PROHIBITION

The United Nations International Children's Emergency Fund (UNICEF) defines child soldiers as "any child—boy or girl—*under eighteen years of age*, who is part of any kind of regular or irregular armed force or armed group *in any capacity*."² This definition, unfortunately, bears no real connection to the prohibition on the use of child soldiers. Instead, the practice of using child soldiers, while universally viewed as morally repugnant, has only recently been construed as applying to children age fifteen and older. This age limit was established in 2002 by the Optional Protocol to the Convention on the Rights of the Child (OPAC).³ Accountability mechanisms have not yet caught up to OPAC, and the contemporary restriction under international humanitarian law (IHL) and international criminal law (ICL) applies only to children under the age of fifteen years.⁴ Consequently, the use of child soldiers remains pervasive, and the systems of enforcement designed to remediate the problem have been unable to effectuate the prohibition.

The Council on Foreign Relations (CFR) reports that "[a]pproximately 300,000 children are believed to be combatants in some thirty conflicts worldwide. Nearly half a million additional children serve in armies not currently at war, such that 40 percent of the world's armed organizations have children in their ranks."⁵ Failure to apply a universal definition to the term "child soldier," in part, facilitates confusion around the norm. Human Rights Watch, on behalf of the Coalition to Stop the Use of Child Soldiers (Coalition), attempts to describe what acts are conceived of under the prohibition:

Child soldiers perform a range of tasks, including: participation in combat; laying mines and explosives; scouting, spying, acting as decoys, couriers or guards; training, drill or other preparations; logistics and support functions, portering, cooking and domestic labour. Child soldiers may also be subjected to sexual slavery or other forms of sexual abuse.⁶

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² Council on Foreign Relations, *Child Soldiers Around the World* (Dec. 2, 2015), available at <https://www.cfr.org/backgrounder/child-soldiers-around-world> (emphasis added).

³ Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, Feb. 12, 2002, 2173 U.N.T.S. 222 [hereinafter OPAC], available at https://treaties.un.org/doc/source/docs/A_Res_54_263-E.pdf.

⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, art. 77(2), 1125 U.N.T.S. 3, 7 [hereinafter Geneva Protocol I].

⁵ Council on Foreign Relations, *supra* note 2.

⁶ Human Rights Watch, *Child Soldiers Global Report* (2008), https://www.hrw.org/legacy/pub/2008/children/Child_Soldiers_Global_Report_Summary.pdf.

As the article will explore below, the normative restriction on the use of children in times of war has led to the failure of international enforcement mechanisms to address the issue as comprehensively as has been done by advocacy groups. In order to bridge that gap, IHL and ICL must be properly aligned with contemporary definitions of what it means to be a child soldier within the international human rights advocacy paradigm.⁷

II. HISTORICAL CONTEXT AND CONTEMPORARY USE OF CHILD SOLDIERS

A. *Historical Use of Child Soldiers*

The use of child soldiers is not a new phenomenon in human history;⁸ however, attempts to create a universal prohibition have only recently begun. As a result, there is a disjointed approach to prohibiting the use of children in efforts of war. The normative divergence is tied to the use of children in war over the course of history.

The earliest known use of child soldiers can be traced back to the ancient Greeks, specifically to the city-state of Sparta... [T]he Spartan government required male children to begin military training at seven years old...

The recruitment of child soldiers was also common in Europe during the Middle Ages... [M]any boys were enlisted to serve alongside Christian knights in battle as squires or de facto infantrymen.

Child soldiers also played a role in the American Civil War... It is estimated that around 5 percent of the soldiers in the Civil War were under the age of eighteen, with some even being as young as ten.⁹

Contemporary military history shares this unfortunate theme. Indeed, the tragic use of children in the events of World War II is largely attributed to the prohibition's creation.

Thanks to the demand for increased manpower, the use of child soldiers became a frequent strategy during both World War I and II. Nearly every country involved in these wars made use of child soldiers, with the notable exception of the United States, which had a generally strict enlistment age limit of seventeen.¹⁰

With the service of children during wartime as pervasive as it was, it is hard to imagine that IHL would create a strict enforcement mechanism designed to prevent all children under the age of eighteen from engaging in any war efforts. Indeed, the concept of treating children as

⁷ This requires going beyond even the human rights norms illustrated under OPAC, detailed below.

⁸ See generally Gale Student Resources in Context, *Child Soldiers in History*, GALE (2013), <http://saimun2018.ishcmc.edu.vn/wp-content/uploads/2018/02/FINAL-GA1-4.pdf> [hereinafter *Child Soldiers in History*].

⁹ *Id.*

¹⁰ *Id.*

children, rather than property or adults in miniature, is only a relatively recent phenomenon developing with the rise of children's rights during the latter half of the last century.¹¹

B. Development of the Prohibition

In the aftermath of World Wars I and II, the ravages of war led the world community to develop concrete rules and guidance relating to the protection of civilians during times of armed conflict. That regime contemplated the protection of children, but it was not until the development of the Geneva protocols that a prohibition on the *use* of children during war was codified.¹² The details of the prohibition under international law are explained at length below, but the context for the prohibition is summarized in the following excerpt:

... [T]he unprecedented carnage of the first industrial war altered worldwide perceptions of battle forever – this was now no place for a child, and by the First World War, recruiters were under orders to keep under-18s from the front. They didn't try too hard, though, and failed to stop perhaps a quarter of a million under-age volunteers... By the end of the Second World War, after the grotesque militarism of the Hitler Youth decayed into the slaughter of the German schoolboys sent out to defend Berlin to the last, the international consensus had hardened – war was now to be a professional business, not a glorious game in which to involve the young.¹³

The prohibition that developed under IHL has led to a global consensus that children should not be involved in armed conflict, but the details with regard to how old a child may be before volunteering, or what exact activities are proscribed, has not been clearly delineated. The practical reality remains that many children are either recruited or volunteer to participate in various capacities in the armed forces during times of war.¹⁴

¹¹ Library of Congress, *Children's Rights: International Laws* (July 2007), <https://www.loc.gov/law/help/child-rights/international-law.php> (“It was not until the late nineteenth century that a nascent children's rights' protection movement countered the widely held view that children were mainly quasi-property and economic assets. In the United States, the Progressive movement challenged courts' reluctance to interfere in family matters, promoted broad child welfare reforms, and was successful in having laws passed to regulate child labor and provide for compulsory education. It also raised awareness of children's issues and established a juvenile court system. Another push for children's rights occurred in the 1960s and 1970s, when children were viewed by some advocates as victims of discrimination or as an oppressed group. In the international context, '[t]he growth of children's rights in international and transnational law has been identified as a striking change in the post-war legal landscape.'”).

¹² Geneva Protocol I, *supra* note 4; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol II), June 8, 1977, art. 4(3), 1125 U.N.T.S. 609 [hereinafter Geneva Protocol II].

¹³ Brian Schofield, *Boy soldiers: Using children in warfare is not a modern phenomenon*, INDEPENDENT (Dec. 16, 2010, 1:00 PM), <https://www.independent.co.uk/news/world/boy-soldiers-using-children-in-warfare-is-not-a-modern-phenomenon-2161593.html>.

¹⁴ See CHILD SOLDIERS WORLD INDEX, <http://childsoldiersworldindex.org/> (noting that as of February 2018, 46 states still recruit children under the age of 18 into their armies and children have participated in 18 conflict situations worldwide since 2016) (last visited Mar. 11, 2019).

III. INTERNATIONAL LEGAL FRAMEWORK PROHIBITING THE USE OF CHILD SOLDIERS: IHL, ICL & HUMAN RIGHTS CONVENTIONS RELATING TO THE PROHIBITION

There are an extraordinary number of instruments that touch upon protections for children in armed conflict and expressly prohibit the use of children in armed conflict.¹⁵ Yet, even in light of the significant number of documents designed to protect children, the regime falls short. Perhaps this is because the multitude of documents provide contradicting norms for protection. Moreover, the enforcement regime, most critically the International Criminal Court (ICC), follows IHL guidance rather than contemporary treaty law governing the permissible norms on the age of recruitment. As a result, there is a gap in accountability for the use of all children during wartime.

A. *Geneva Conventions Relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV)*

Following World War II, Geneva Convention IV relative to the Protection of Civilian Persons in time of War (Geneva Convention IV) was the first international instrument explicitly addressing the protection of children during armed conflict. Notably, the Conventions fail to prohibit the use of children in armed conflict. Article 24 of Geneva Convention IV addresses measures relating to child welfare. That provision explains:

The Parties to the conflict shall take the necessary measures to ensure that children under fifteen, who are orphaned or are separated from their families as a result of the war, are not left to their own resources, and that their maintenance, the exercise of their religion and their education are facilitated in all circumstances. Their education shall, as far as possible, be entrusted to persons of a similar cultural tradition.

The Parties to the conflict shall facilitate the reception of such children in a neutral country for the duration of the conflict with the consent of the Protecting Power, if any, and under due safeguards for the observance of the principles stated in the first paragraph.

They shall, furthermore, endeavour to arrange for all children under twelve to be identified by the wearing of identity discs, or by some other means.¹⁶

¹⁵ Rather than review every treaty touching upon the use of child soldiers, I am limiting my research to IHL and ICL enforcement-based treaties as well as UN documents designed specifically to expound upon the prohibition. In light of this, regional documents and ILO conventions are omitted.

¹⁶ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 24, (Aug. 12, 1949), 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV] (additional protections appear at Geneva Convention IV art. 50, art. 82 & art. 89 stating that: “Article 50 – The Occupying Power shall, with the cooperation of the national and local authorities, facilitate the proper working of all institutions devoted to the care and education of children. The Occupying Power shall take all necessary steps to facilitate the identification of children and the registration of their parentage... A special section of the Bureau set up in accordance with Article 136 shall be responsible for taking all necessary steps to identify children whose identity is in doubt. Particulars of their parents or other near relatives should always be recorded if available. The Occupying Power shall not hinder the application of any preferential measures in regard to food, medical care and protection against the effects of war, which may have been adopted prior to the occupation in favour of children under fifteen years, expectant mothers, and mothers of children under seven years;

However, the Articles addressing implementation of penal laws or disciplinary sanctions do not contain child-specific provisions.¹⁷ As a result, violations against children are subsumed generally by the enforcement rules governing the protection of all civilians during wartime.

Additionally, critics of the Geneva structure for child protection note that Geneva Convention IV is only applicable in international armed conflict, and while Common Article 3 contains basic provisions for internal conflicts, it does not contain child-specific protections.¹⁸

[W]hen one looks at the actual provisions of the Fourth Geneva Convention and analyses their applicability to the child population affected by armed conflict, one is faced with the sobering conclusion that the Fourth Geneva Convention is inadequate in assuring the protection of children and the promotion of children's rights as envisaged in the United Nations Convention on the Rights of the Child: it fails to protect every child in his or her status as a child, and very little attention is paid to children's special needs. In addition, as protection from the conduct of hostilities is outside the scope of the Convention, it does not protect children from military operations as such. *One must confront the inevitable conclusion that children are not a focus of the Convention. Indeed, they are barely recognised as a separate group and are treated as only one segment of the vulnerable part of the civilian population.*¹⁹

As a historical note on children and the development of Geneva law, one author explains that negotiations began for a Fifth Geneva Convention which would have protected children during times of war, but its progress stalled and, consequently, more robust protections for children went unattended in the Geneva Conventions.²⁰

Article 82 - During internment, families—in particular parents and children—shall stay in the same place; Article 89 - [E]xpectant and nursing mothers and children under fifteen years of age, shall be given additional food.”).

¹⁷ Jaap Doek, *International Legal Framework for the Protection of Children in Armed Conflict*, in DISARMAMENT FORUM: CHILDREN AND CONFLICT 7, 9 (Kerstin Vignard & Ross McRae eds., Valérie Compagnon trans., 3d ed. 2011) available at <http://www.unidir.org/files/publications/pdfs/children-and-conflict-en-315.pdf>.

¹⁸ *Id.*

¹⁹ Carolyn Hamilton & Tabatha Abu El-Haj, *Armed Conflict: The Protection of Children Under International Law*, 5 INT'L J. CHILD. RTS. 1, 12 (1997) (emphasis added), available at https://www1.essex.ac.uk/armedcon/story_id/000577.html.

²⁰ *Id.* at 12-13 (“But, why does the Fourth Geneva Convention have so little reference to children, especially as there is no separate instrument of humanitarian law relating to children? In view of the huge number of child victims in the Second World War, it is surprising that there is no separate instrument of humanitarian law relating to children. There were attempts in the 1930’s and 40’s to draft such an instrument. In 1938, the ICRC co-operated with the International Union for Child Welfare to produce a Draft Convention for the Protection of Children in Emergency and Armed Conflict. On 12th January 1939, the ICRC and Save the Children (SCF) accepted the draft but, owing to the outbreak of the Second World War, it was never taken any further. In 1946, another Draft Convention was submitted by the Bolivian Red Cross to the Preliminary Conference of the National Red Cross Societies for the Study of the Geneva Conventions; however, it was decided that its provisions should be incorporated into the Fourth Geneva Convention rather than push for a Fifth Convention... The failure to obtain a separate Fifth Convention has had serious consequences for children caught up in armed conflict. The focus on children and the need to protect them and promote their rights is itself devalued by the lack of a separate instrument in relation to them: they are not seen by states and other groups involved in armed conflict as a separate group in the population deserving of special protection. Moreover, the specific and, on occasion, very different needs of children have been subsumed into the general need for protection of the civilian population.”).

B. Protocols Additional to the Geneva Conventions of 12 August 1949 (Protocols I & II)

The additional Protocols to the Geneva Conventions sought to clarify ambiguities in the rules of war laid out under the initial Geneva Conventions. One such area in need of clarification related to the treatment of children during times of war. Specifically, “Protocols I and II further specify the protection of children, and Protocol II extends [those protections] to non-international armed conflicts.”²¹ Most relevant to this article, Article 77 of Protocol I for the first time sets out the parameters of the prohibition on the use of child soldiers:

Article 77 -- Protection of children

1. Children shall be the object of special respect and shall be protected against any form of indecent assault. The Parties to the conflict shall provide them with the care and aid they require, whether because of their age or for any other reason.

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

3. If, in exceptional cases, despite the provisions of paragraph 2, children who have not attained the age of fifteen years take a direct part in hostilities and fall into the power of an adverse Party, they shall continue to benefit from the special protection accorded by this Article, whether or not they are prisoners of war.

4. If arrested, detained or interned for reasons related to the armed conflict, children shall be held in quarters separate from the quarters of adults, except where families are accommodated as family units as provided in Article 75, paragraph 5.

5. The death penalty for an offence related to the armed conflict shall not be executed on persons who had not attained the age of eighteen years at the time the offence was committed.²²

A close look at the prohibition demonstrates that it was designed only to *deter* the use of child soldiers rather than strictly forbid the practice. First, rather than simply foreclose the use of children in direct hostilities, the language merely requires states to “take all feasible measures” to avoid their use.²³ Second, the prohibition on the use of children during wartime is extremely

²¹ Doek, *supra* note 17.

²² Geneva Protocol I, *supra* note 4, at art. 77 (emphasis added).

²³ INT’L COMM. OF THE RED CROSS, COMMENTARY OF 1987: PROTECTION OF CHILDREN 900, (1987), <https://ihl-databases.icrc.org/ihl/COM/470-750099?OpenDocument>. (stating “Nevertheless, the ICRC proposals encountered some opposition, as on this point governments did not wish to undertake unconditional obligations. In fact, the ICRC had suggested that the Parties to the conflict should “take all necessary measures,” which became in the final text, “take all feasible measures.” This formula already exists in other articles, particularly Article 76 (Protection of women), and we refer to the commentary thereon... Although the obligation to refrain from recruiting children under

limited. The prohibition requires states to take measures to prevent the use of children from taking a “direct part in hostilities.” While undefined in the Convention and Protocols, other sources of law suggest that this phrase is intended to encompass specific acts intended to cause harm and with a direct causal link between the act and the harm caused.²⁴ In short, direct participation in hostilities is likely to only include acts of combat rather than military support services. Third, the age of children prohibited from use in direct hostilities applies only to children aged fourteen and under.²⁵ Consequently, IHL does not unequivocally prohibit the use of children aged fifteen and over from participating in direct armed combat on behalf of the armed forces or non-government armed groups. Finally, the prohibition under Protocol I seeks to deter recruitment or enlistment of children under the age of fifteen but does not explicitly proscribe recruitment or enlistment of children under the age fifteen *for use in non-combat or indirect participation in hostilities*. Neither do the Protocols appear to strictly prohibit the use of volunteers under a restricted age. A complete analysis of the shortcomings of IHL follows at Section IV, *infra*.

Protocol II does not offer much more to the prohibition. In fact, Protocol II does not contain an article devoted exclusively to children. Rather, children are included under the general provisions of Article 4 relating to “fundamental guarantees.” Article 4(3) sets out:

3. Children shall be provided with the care and aid they require, and in particular:

(c) Children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities;

(d) The special protection provided by this Article to children who have not attained the age of fifteen years shall remain applicable to them if they take a direct part in hostilities despite the provisions of sub-paragraph (c) and are captured.²⁶

fifteen remains, the one of refusing their voluntary enrolment is no longer explicitly mentioned. In fact, according to the Rapporteur, Committee III noted that sometimes, especially in occupied territories and in wars of national liberation, it would not be realistic to totally prohibit voluntary participation of children under fifteen.”)

²⁴ INT’L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (2009), <https://shop.icrc.org/guide-interpretatif-sur-la-notion-de-participation-directe-aux-hostilites-en-droit-international-humanitaire-2601.html>

(stating “IV. Direct participation in hostilities as a specific act: The notion of direct participation in hostilities refers to specific acts carried out by individuals as part of the conduct of hostilities between parties to an armed conflict”;

“V. Constitutive elements of direct participation in hostilities: In order to qualify as direct participation in hostilities, a specific act must meet the following cumulative criteria: (1) [t]he act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm), [and] (2) [t]here must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), [and] (3) The act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).”).

²⁵ INT’L COMM. OF THE RED CROSS, *supra* note 23 (explaining that increasing the age for use of children was widely rejected by state parties negotiating Geneva Protocol II: “The second sentence of [Article 77(2)] is the result of a compromise; in fact, in an amendment one delegation had proposed that the limit on non-recruitment should be raised from fifteen to eighteen years... The majority was opposed to extending the prohibition of recruitment beyond fifteen years, but in order to take this proposal into account it was provided that in the case of recruitment of persons between fifteen and eighteen, priority should be given to the oldest.”).

²⁶ Geneva Protocol II, *supra* note 12 (emphasis added).

The language of the prohibition at Article 4(3)(c) is terser than Protocol I. Yet, this version of the prohibition seems to broaden the scope of the protection by removing “direct” from the clause “take part in hostilities.” Both Protocols are limited by prohibiting only the use of children *under the age of fifteen* from being recruited into the armed forces.

C. *Convention on the Rights of the Child*

The UN Convention on the Rights of the Child (CRC) was the product of sustained effort by the United Nations to support the proposition that children should enjoy special protection. The CRC was adopted by the General Assembly on November 20, 1989. The Convention entered into force less than a year later, on September 2, 1990.²⁷ This was the first universal recognition of children as entitled to special status and protection as children rather than property or other economic interests or merely adults in miniature.

While the CRC was a landmark convention for the universal rights and special treatment of children, it provided no additional protections for children during times of war. The CRC addresses the protections in virtually identical terms as the Geneva Protocols, stating pursuant to Article 28:

1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.
2. States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.
3. States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest.²⁸

The language of the CRC references the international humanitarian law applicable to children and merely restates, at section 28(3), the same tenets of the prohibition under the Geneva Protocols. The CRC came under great scrutiny for failing to protect children in the most dangerous environment: the theatre of war.²⁹ As a result, an initiative began to address the age gap and

²⁷ United Nations Office of the High Commissioner, Convention on the Rights of the Child, adopted Nov. 20, 1989, 1577 U.N.T.S. 3 I.L.M. 1448, [hereinafter CRC], available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>.

²⁸ *Child Soldiers in History*, supra note 8 (emphasis added).

²⁹ Daniel Helle, *Optional Protocol on the involvement of children in armed conflict to the Convention on the Rights of the Child*, INT'L REV. OF THE RED CROSS at No. 839 (Sept. 30, 2000) (“From the very start, Article 38 was subject to considerable criticism, for two reasons. First, it is the only provision of the Convention departing from the general age limit of 18 years, in spite of the fact that it deals with one of the most dangerous situations that children can be exposed to armed conflict. Second, with respect to the prohibition against recruitment and participation, it largely confined itself to repeating Article 77 of Protocol I additional to the Geneva Conventions, applicable in international armed conflict. In so doing, it not only brought nothing new, but could also detract attention from the stronger standard contained in Protocol II additional to the Geneva Conventions, which provides a more absolute and comprehensive prohibition for non-international armed conflict. [3] Against this background, and in line with a growing awareness

protection deficits of the CRC relating to children in armed conflict. It was not until that initiative was realized that a more rigorous prohibition emerges: the prohibition found in the CRC's Optional Protocol on the involvement of children in armed conflict.

D. Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict

The Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (OPAC)³⁰ has been described as “the most specific prohibition of child soldiers under international law.”³¹ Indeed, the document is designed to address the scope of protections that should apply to children during times of war. OPAC has now been ratified by 168 states.³² It entered into force on February 12, 2002.³³ The number of states party to OPAC is critical since one of the main goals of OPAC was to raise the age of recruitment and use of children in armed conflict to eighteen years, the age of majority under the CRC.³⁴

Articles 1 and 2 of OPAC directly address the age gap by raising the minimum age for participation in hostilities and compulsory recruitment to eighteen years.³⁵

Article 1

States Parties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities.

Article 2

States Parties shall ensure that persons who have not attained the age of 18 years are not compulsorily recruited into their armed forces.³⁶

The Optional Protocol, in furtherance of the principles of best interests and a child's right to self-determination, permits voluntary participation in the armed forces but requires states to develop a robust procedure to ensure that such participation is both truly voluntary and appropriate for the child under the circumstances.³⁷ Article 3 of OPAC details the following protections:

and concern within the international community of the severe plight of children affected by armed conflict, an initiative was taken within the United Nations system only a few years after the entry into force of the CRC to raise the minimum age for recruitment and participation in hostilities to 18 years.”)

³⁰ OPAC, *supra* note 3.

³¹ Human Rights Watch, *supra* note 6.

³² United Nations Treaty Collection, Status of Treaties, OPAC, (May 25, 2000) *available at* https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11-b&chapter=4&lang=en (last visited Apr. 17, 2018).

³³ *Id.*

³⁴ OPAC, *supra* note 3, at Preamble.

³⁵ The first time this development occurs in international law is under the Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (ILO Convention 182), adopted in 1999. ILO Convention 182 determines that compulsory recruitment of children in armed conflict is included amongst “the worst forms of forms of child labour” which the ILO Convention seeks to prohibit and eliminate. Beyond inclusion of the practice as one of the worst forms of child labor, the document does not provide any additional guidance around the IHL prohibition.

³⁶ OPAC, *supra* note 3.

³⁷ Helle, *supra* note 29. (OPAC seeks to “raise[] the minimum age for voluntary recruitment by at least one year, in accordance with the declaration to be submitted by States when becoming party to the new Protocol. In other words, the minimum age for voluntary recruitment would hereafter be 16 years.”).

1. States Parties shall raise the minimum age for the voluntary recruitment of persons into their national armed forces from that set out in article 38, paragraph 3, of the Convention on the Rights of the Child, taking account of the principles contained in that article and recognizing that under the Convention persons under the age of 18 years are entitled to special protection.
2. Each State Party shall deposit a binding declaration upon ratification of or accession to the present Protocol that sets forth the minimum age at which it will permit voluntary recruitment into its national armed forces and a description of the safeguards it has adopted to ensure that such recruitment is not forced or coerced.
3. States Parties that permit voluntary recruitment into their national armed forces under the age of 18 years shall maintain safeguards to ensure, as a minimum, that:
 - (a) Such recruitment is genuinely voluntary;
 - (b) Such recruitment is carried out with the informed consent of the person's parents or legal guardians;
 - (c) Such persons are fully informed of the duties involved in such military service;
 - (d) Such persons provide reliable proof of age prior to acceptance into national military service.³⁸

OPAC goes on to require states to take the necessary measures to prevent children from being exploited by non-state actors, including the adoption of criminal codes capable of punishing such practices.³⁹

The breadth of the substantive protections under OPAC are limited to these few specific prohibitions. However, raising the age of recruitment and use in armed conflict, alongside the developments of positive state obligations to ensure voluntariness for children seeking to participate indirectly in the war effort, signified a change in the world's view of the overall prohibition. Kathy Vandergrift, President of the Board of Directors of the Canadian Coalition for the Rights of Children, explained the significance of the change:

When we began work on the Optional Protocol, the debate focused on the legitimacy of using child soldiers. Most of the time now, we no longer have to engage in that debate; rather, we focus on how to achieve the goal. The goal itself is widely accepted: Using children in armed conflict should be as unacceptable as using nuclear arms or chemical weapons.⁴⁰

This proposition, the goal of achieving the prohibition, relies heavily on the ability to effectively enforce the prohibition. The potential for enforceability under OPAC is explored further below along with critiques of whether or not children are ever truly capable of "voluntary" participation in the war effort.

³⁸ OPAC, *supra* note 3 (emphasis added).

³⁹ *Id.* at art. 4 (emphasis added).

⁴⁰ Kathy Vandergrift, *Challenges in Implementing and Enforcing Children's Rights*, 32 CORNELL INT'L L. J. 547, 548 (1999).

E. Individual Criminal Responsibility (Rome Statute of the International Criminal Court)

The Rome Statute criminalizes the use of child soldiers, thus giving teeth to the international prohibition.⁴¹ The Rome Statute was negotiated to codify existing international criminal law rather than create criminal accountability for new international crimes.⁴² As a result, accountability for violating the international prohibition reflects the level of culpability delineated pursuant to customary international law, specifically that of the Geneva Conventions and the additional Protocols. The criminal statute thus criminalizes “[c]onscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.”⁴³ The identical language⁴⁴ appears again in Section (e)(vii) of the War Crimes Article relating to conflicts not of an international character.⁴⁵

The enforcement mechanism is available for both international and internal armed conflicts. However, the enforceability of the prohibition is limited to state or non-state actors who utilize children fourteen years of age or under via conscription/enlistment or in active hostilities. Actors who conscript/enlist children fifteen years of age or older or who do not use children to actively participate in hostilities are immune from liability. This gap in enforcement will be explored further below, but it should be noted that the Rome Statute is the first time we see a prohibition against voluntary *enlistment* of children under the age of fifteen.

IV. IMPEDIMENTS TO THE EFFECTIVE PROHIBITION ON THE USE OF CHILD SOLDIERS: DEFINING THE PROHIBITION UNDER INTERNATIONAL LAW

It has been stated that “[n]either humanitarian law (including the Geneva Conventions of 1949 and the Additional Protocols to the Geneva Conventions of 1977) nor human rights law has managed, as yet, to reduce the suffering and involvement of children in armed conflict.”⁴⁶ The inclusion of child soldiers in the protocol demonstrates that children were something of an afterthought in drafting the rules of war. As a result, the Geneva Conventions and the additional Protocols never reached an acceptable prohibition on the use of children in armed conflict, at least by contemporary standards. The perception of children as rights-holders and the movement away from the treatment of children as adults in miniature may be a relatively new concept, but the need to develop an effective enforcement mechanism to subvert the use of child soldiers is critical. Converging humanitarian law, international criminal law, and the human rights regime is the only way to reconcile competing definitions that have adversely impacted enforcement capabilities.

⁴¹ Rome Statute of the International Criminal Court, July 17, 1998, art. 8(2) (b) (xxvi), U.N. Doc. A/CONF.183/9, 37 I.L.M. 999, 1008, available at <https://www.icc-cpi.int/nr/rdonlyres/add16852-ae9-4757-abe7-9cdc7cf02886/283503/romestatutengl.pdf> [hereinafter Rome Statute].

⁴² David Scheffer, Former Ambassador for War Crimes & Prof. of Int’l Law, Remarks during lecture of International Criminal Law (on file with author).

⁴³ Rome Statute, *supra* note 41, at 8 (“grave breaches international armed conflict (xxvi)”).

⁴⁴ Rome Statute, *supra* note 41, at 9. Because this particular section is committed to internal armed conflict, the language is modified from “national armed forces” to “armed forces or groups” in order to apply the provision to non-state actors. Otherwise the character of the prohibition is identical.

⁴⁵ Rome Statute, *supra* note 41.

⁴⁶ Hamilton & Abu-Haj, *supra* note 19, at 1.

This section explores problematic ambiguities caused by the divergence in laws in order to understand how enforcement might be better tailored to address a more universal prohibition.

A. Defining the Term “Child” and Delineating Who is Protected

The ability to develop an effective proscription relating to the use of children in armed conflict requires, as a starting point, consensus around the legal definition of the child: “[t]he normative language used to describe childhood is the key to defining the beneficiaries of legal protection.”⁴⁷ The human rights framework for defining the child treats individuals up to the age of eighteen as children, with the notable exception under Article 28 of the CRC.⁴⁸ Even within the Geneva Conventions there exists ambiguity with respect to who is protected and at what age those protections commence. This phenomenon creates discord when trying to decipher who is a child for purposes of receiving protection:

The protections offered by the Fourth Geneva Convention do not, on the whole, extend specific protections to children over fifteen: for instance, Article 24 only applies to children up to the age of fifteen who have been separated from their parents as a result of war. Fifteen is not, however, the only age reference employed in the Convention. Children under seven have an additional right, to be with their mothers, if in such a safety zone. An occupying power may not compel a child under the age of eighteen to work or pronounce the death penalty against a protected person who committed an offence while under the age of eighteen. Article 76, relating to conditions of detention in occupied territories, includes a provision acknowledging “the special treatment due to minors,” but there is no definition of the term “minor.” The inconsistencies in definition of “child” throughout the Convention lessen the protection available to children and are incompatible with current thinking in the field of children’s rights which establishes eighteen as the end of childhood and the age at which adult responsibilities can be enforced.⁴⁹

In order to properly define the prohibition and identify those responsible for violating the prohibition, international law requires a coherent standard of childhood.⁵⁰ Experts argue that “[t]here is an urgent need for a common denominator on the definition of childhood as a first step in the process of the universalization of a prohibition regime. Protection space cannot be constructed without agreed upon limits without clear definitions of the beneficiaries of the law.”⁵¹ Indeed, the failure to define children under the “straight 18” approach resulted in the drafting of a statute for the Special Court for Sierra Leone (SCSL) that made it permissible to prosecute war crimes committed by child soldiers aged fifteen to seventeen.⁵² The jurisdiction of the SCSL over

⁴⁷ Iuliia Kononenko, *Prohibiting the Use of Child Soldiers: Contested Norm in Contemporary Human Rights Discourse*, NORDIC J. OF HUM. RTS. 89, 91 (2016).

⁴⁸ Recall that Article 28 of the CRC codified the IHL prohibition against the use of children in armed conflict thus applying only to children under the age of fifteen. CRC, *supra* note 27.

⁴⁹ Hamilton & abu-Haj, *supra* note 19, at 15-16 (emphasis added).

⁵⁰ Kononenko, *supra* note 47, at 92-93.

⁵¹ *Id.* at 93.

⁵² S.C. Res. 1315, U.N. SCOR, 4186th mtg., art. 7, U.N. Doc. S/RES/1315 (2000), available at <http://www.rscsl.org/Documents/Establishment/S-Res-1315-2000.pdf>.

those who committed atrocity crimes during Sierra Leone's civil war encompassed "persons of 15 years of age."⁵³ Those between the ages of fifteen and eighteen were to be:

[T]reated 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.⁵⁴

The inability to determine who receives protection under IHL led to the determination that those not entitled to protection could be perceived as maintaining criminal culpability. The SCSL came under great scrutiny for developing a mechanism that could prosecute child soldiers, but the genesis of this outcome lies in the failure of IHL to clearly define protections and prohibitions under the existing legal framework.

B. Can Children Volunteer for Military Service?

With the notable exception of the Rome Statute, every document drafted to address the prohibition on the use of child soldiers permits, in some form, the child to volunteer for armed service. Competing views exist as to the preferability of this exception to the prohibition.

One view is that children may "volunteer" to join a national army or a guerrilla movement but need not necessarily take direct part in hostilities. According to this view, child soldiers can perform non-combat duties such as delivering messages, conducting spy missions and scores of other non-combat activities....

Some scholars argue that although many children may have entered voluntarily into participation in armed conflicts, the whole concept of what is "voluntary" needs to be called into question. Various indirect coercive mechanisms have been used on minors, such as physical protection, the stimulation of machismo, the symbology of concepts such as defence of the fatherland, the heroic nature of enlistment, revenge and adventure; or through economic, cultural and social considerations such as belief in the justice of the cause, social pressure, and provision of food. Therefore, the dividing line between voluntary and forced participation is very thin and ambiguous.⁵⁵

Indeed, in countries that lack economic development and opportunities, the influences on a child to join a military group can be difficult to divorce from true voluntariness.⁵⁶

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Alex Obote-Odora, *Legal Problems with Protection of Children in Armed Conflict*, MURDOCH E. L. J. 6, 6-7 (1999) (emphasis added).

⁵⁶ Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Judgment ¶¶ 611 (Mar. 14, 2012) [hereinafter *Lubanga*]. ("The recruitment and enlisting of children in [the] DRC is not always based on abduction and the brute use of force. It also takes place in the context of poverty, ethnic rivalry and ideological motivation. Many children, especially orphans, join armed groups for survival to put food in their stomachs. Others do so to defend their ethnic group or tribe and still others because armed militia leaders are the only seemingly glamorous role models they know. They are

While children may be forcibly recruited by both government armies and opposition groups, they are sometimes the first to voluntarily join these groups. Their motivation lies in the social, economic, and political issues defining their lives. Experts have estimated that voluntarily participation exceeds forced recruitment. The term “voluntary” in reference to the use of child soldiers is questionable, given the brutal conditions that motivate children to join armed forces. Children volunteer for the armed forces because of what they have experienced personally: poverty, death, loss, displacement, religious motivations, need for revenge, and collapse of social structure... In addition, children’s surroundings influence their decision to volunteer in armed conflict... Families, peer groups, and religious or other community-based groups may exert pressure that leads or encourages children to join armed hostilities.⁵⁷

While OPAC attempts to create an obligation on states to understand the voluntary nature of a child’s commitment to recruitment, much is left to be desired with respect to understanding exactly how to define the scope of voluntariness for children. The Rome Statute prohibits voluntary enlistment of children for those under the age of fifteen.⁵⁸ The International Criminal Court finds the distinction to be inapt, as children under the age of fifteen are considered by the court to lack the capacity to voluntarily join the armed forces.⁵⁹ Nonetheless, the inclusion of a prohibition on enlistment remains contentious as a matter of customary international law.⁶⁰

C. What Acts are Proscribed Under the Prohibition?

Another factor that impedes effective prohibition results from the ill-defined limits of what *conduct* is proscribed under international law. There remains a question under IHL as to whether children under fifteen years of age may volunteer for *indirect* participation in hostilities.⁶¹ This has led to a lack of clarity around what conduct is permissible under IHL or what constitutes permissible non-combat activities. “One view is that children may ‘volunteer’ to join a national army or a guerrilla movement, but need not necessarily take direct part in hostilities. According to this view, child soldiers can perform non-combat duties such as delivering messages, conducting

sometimes encouraged by parents and elders and are seen as defenders of their family and community. [...] Children who ‘voluntarily’ join armed groups mostly come from families who were victims of killing and have lost some or all of their family or community protection during the armed conflict.”)

⁵⁷ Dorcas Mulira, *International Legal Standards Governing the Use of Child Soldiers*, U. OF GA. L. THESES & ESSAYS 1, 11-12 (Dec. 1, 2007), http://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1085&context=stu_ilm.

⁵⁸ Rome Statute, *supra* note 41.

⁵⁹ See Lubanga, *supra* note 56, at ¶ 614–18.

⁶⁰ See e.g., Prosecutor v. Fofana, Case No. ICC-04-14-A, Judgment, (May 28, 2008) [hereinafter Fofana].

⁶¹ As discussed above, the Rome Statute forbids 1) enlistment, 2) recruitment or 3) use in active participation of children under the age of 15. Elements of Crimes sets out that “Article 8 (2) (b) (xxvi): War crime of using, conscripting or enlisting children, Elements: (1) The perpetrator conscripted or enlisted one or more persons into the national armed forces or used one or more persons to participate actively in hostilities; (2) Such person or persons were under the age of 15 years; (3) The perpetrator knew or should have known that such person or persons were under the age of 15 years; (4) The conduct took place in the context of and was associated with an international armed conflict; [and] (5) The perpetrator was aware of factual circumstances that established the existence of an armed conflict.”

spy missions and scores of other non-combat activities.”⁶² Whether or not these acts constitute direct or active⁶³ participation in hostilities is also unsettled law. Recently, the ICC in the Lubanga case held that the term “[a]ctive participation” in hostilities means not only direct participation in hostilities, combat in other words, but also covers active participation in combat-related activities such as scouting, spying, sabotage and the use of children as decoys, couriers or at military check-points.”⁶⁴

The question of enlistment complicates the analysis of what level of participation is prohibited under IHL.⁶⁵ Even the ICC statute, which prohibits the enlistment of children under the age of fifteen, requires an analysis as to whether *the use* of those children renders them an active participant in hostilities in order to determine criminal liability.⁶⁶ Lubanga, before the ICC, was specifically convicted of the use of child soldiers vis-à-vis using girls as domestic workers.⁶⁷ The analysis asserted that “during the period of the charges a significant number of girls under the age of 15 were used for domestic work, in addition to the other tasks they carried out as UPC/FPLC soldiers, such as involvement in combat, joining patrols and acting as bodyguards.”⁶⁸ The test for determining criminal liability for the use of children under the age of fifteen is as follows: “[t]he decisive factor in deciding whether an indirect role is to be treated as active participation in hostilities is whether the support provided by the child to the combatants exposed him or her to real danger by becoming a potential target.”⁶⁹ The mere existence of this test means that there is no strict liability for *enlisting* children under the age of fifteen for use, indirectly, in hostilities. Thus, ambiguity remains as to whether or not children under the age of fifteen can participate in indirect hostilities via enlistment.

Assuming, arguendo, that it is permissible under IHL and ICL to permit children under the age of fifteen to engage in non-combat activities, children who volunteer for armed movements but who do not participate in combat are still at significant risk. The UN Office of the Special Representative of the Secretary General for Children and Armed Conflict reports that “[m]any girls and boys are also used in support functions that also entail great risk and hardship... Their tasks can vary, from combatants to cooks, spies, messengers and even sex slaves.”⁷⁰ Girls are at an increased risk with “vulnerabilities unique to their gender and place in society and suffer specific consequences including, but not limited to, rape and sexual violence, pregnancy and pregnancy-related complications, stigma and rejection by families and communities.”⁷¹ Indeed,

⁶² Obote-Odora, *supra* note 55 (emphasis added).

⁶³ See Rome Statute, *supra* note 41 (using the expression *active participation* in hostilities).

⁶⁴ Lubanga, *supra* note 56, at ¶ 622.

⁶⁵ See Fofana, *supra* note 60 (the Appeals Chamber acquitted him of the count of enlistment on principles of *nullem crimen sine lege*).

⁶⁶ Lubanga, *supra* note 56, at ¶ 607 (“The Chamber accepts the approach adopted by the Pre-Trial Chamber that “conscription” and “enlistment” are both forms of recruitment, in that they refer to the incorporation of a boy or a girl under the age of 15 into an armed group, whether coercively (conscription) or voluntarily (enlistment). The word “recruiting,” which is used in the Additional Protocols and in the Convention on the Rights of the Child, was replaced by “conscripting” and “enlisting” in the Statute. Whether a prohibition against voluntary enrolment is included in the concept of “recruitment” is irrelevant to this case, because it is proscribed by Article 8.”).

⁶⁷ *Id.*

⁶⁸ *Id.* at ¶ 882.

⁶⁹ *Id.* at ¶ 820.

⁷⁰ OFF. OF THE SPECIAL REP. OF THE SEC’Y GEN. FOR CHILD. & ARMED CONFLICT, *Child Recruitment and Use*, <https://childrenandarmedconflict.un.org/six-grave-violations/child-soldiers/> (last visited Feb. 13, 2018).

⁷¹ *Id.*

expert testimony in the Lubanga case explained “that children in this context frequently undertake a wide range of tasks that do not necessarily come within the traditional definition of warfare. As a result, they are exposed to various risks that include rape, sexual enslavement and other forms of sexual violence, cruel and inhumane treatment, as well as further kinds of hardship that are incompatible with their fundamental rights.”⁷²

V. HOW IS THE PROHIBITION ENFORCED?

In seeking to ensure that the consequences suffered by child soldiers are addressed, the sources of obligation must be clarified and those responsible for addressing the consequences should be identified. Unfortunately, international humanitarian law is not always clear in this area. In addition, questions that cannot be answered once and for all are questions like who should intervene, when and how... Nonetheless, international legal obligations do offer general principles and a framework for action.⁷³

A. *The Role of State Responsibility in Enforcing the Prohibition*

UNICEF has summarized the responsibilities of states as it relates to enforcement of the prohibition under the human rights regime and specifically vis-à-vis OPAC, the most comprehensive document relating to the treatment of children in armed conflict.

Article 6 of the Optional Protocol requires States Parties to reform and enforce domestic laws and procedures... The process of national law reform can create opportunities for broader reforms or revisions of child rights laws. Activities such as the training of government, military and law enforcement officials as well as the development of a national plan of action can strengthen implementation and help build partnerships between government agencies and civil society... States are also responsible for children who have been recruited by any party, including on the territory of another State, but who are now within the jurisdiction of the State Party.⁷⁴

The obligations, if followed, would go a long way toward effectively curtailing the use of child soldiers. However, even leaders in this field, like the United States, are having difficulty giving meaning to national law reform, and OPAC's only enforceability regime exists vis-à-vis the U.N. Committee reporting and shaming processes.⁷⁵

The inability to give meaning to national law reform is illustrated by the U.S. response to a landmark law adopted in 2008, the Child Soldiers Prevention Act (CSPA). Under CSPA, “the U.S. prohibits giving certain categories of U.S. military training and assistance to countries that use child soldiers in their official armed forces or support paramilitaries or militias that do.”⁷⁶ Yet,

⁷² Lubanga, *supra* note 56, at ¶ 606.

⁷³ See Mulira, *supra* note 57.

⁷⁴ UNICEF, *Guide to the Optional Protocol on the Involvement of Children in Armed Conflict* 1, 41 (Dec. 2003), https://www.unicef.org/publications/files/option_protocol_conflict.pdf.

⁷⁵ OPAC, *supra* note 3, at art. 8 (containing the reporting process pursuant to the Protocol).

⁷⁶ Jo Becker, *Children on the Front Lines, With U.S. Dollars*, POLITICO (June 30, 2016), <https://www.politico.com/magazine/story/2016/06/children-soldiers-jo-becker-214003>.

in October of 2011, the Obama Administration announced that it would grant waivers under CSPA, allowing military assistance to Chad, the Democratic Republic of Congo, and Yemen, notwithstanding their continued use of children in their armed forces.⁷⁷

The current Administration takes this one step further. A confidential State Department memo was recently leaked to the press. In the “dissent” memo, it is argued that then-Secretary of State Tillerson breached CSPA “when he decided in June to exclude Iraq, Myanmar, and Afghanistan from a U.S. list of offenders in the use of child soldiers.”⁷⁸ This decision was reportedly made despite the State Department’s prior public statement that child soldiers were pervasively utilized in those countries.⁷⁹ It was surmised that keeping them off the country list will make it easier for this administration to provide strategic military support and training to those countries.⁸⁰ If countries are unwilling to enforce national mandates relating to the prohibition, it seems unlikely that reliance on state responsibility will be an effective tool in the fight to achieve prohibition.

Under the IHL regime, in particular related to the Geneva Conventions, states can make referrals to the International Court of Justice if breaches of these treaties occur.⁸¹ Under the doctrine of state responsibility, states can hold one another accountable for the use of child soldiers under IHL. However, as evidenced by the treatment of states violating the prohibition in the domestic context highlighted by the U.S. above, there appears to be a lack of political will to create the tensions necessary to file a state-to-state action before the ICJ. Furthermore, in order for the IHL regime to be activated, there must be armed conflict. As a result, this begs the clear question: must there be armed conflict in order for the protection to arise and accountability to be maintained under this enforcement regime?

B. The Role of Individual Accountability in Enforcing the Prohibition: The International Criminal Court

Some argue that clarification and/or additional treaty law is not needed, but rather additional efforts toward enforcing the existing regime are necessary to effectively enforce the prohibition.⁸²

⁷⁷ Human Rights Watch, *US: Don’t Finance Child Soldiers* (Oct. 4, 2011), <https://www.hrw.org/news/2011/10/04/us-dont-finance-child-soldiers>.

⁷⁸ Jason Szep & Matt Spetalnick, *U.S. diplomats accuse Tillerson of breaking child soldiers law*, REUTERS (Nov. 21, 2017), <https://www.reuters.com/article/us-usa-tillerson-childsoldiers/u-s-diplomats-accuse-tillerson-of-breaking-child-soldiers-law-idUSKBN1DLOEA>.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Article 146 of Geneva Four requires contracting parties to “enact effective legislation to provide effective penal sanctions” for the commission of grave breaches of Geneva Four. However, the grave breaches at 147 do not seem to include the use of child soldiers. Article 147 prohibit “inhuman treatment” and “compelling a protected person to serve in the forces of a hostile power” as grave breaches. However, the interpretations of Geneva Four generally indicate an intent to protect those who have fallen into enemy hands or under enemy occupation. As such, it doesn’t appear to contemplate children recruited into the armed forces of their own national armies. *See generally*, INT’L COMM. OF THE RED CROSS [ICRC], *Commentary of 1958* (Aug. 12, 1958), <https://ihldatabases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=659A26A51BB6FE7AC12563CD0042F063>.

⁸² *See generally* Mulira, *supra* note 57, at 9.

There is no need for additional law in this area, given the number of treaties, declarations, and resolutions this practice violates. Instead, the full measure of international law needs to be applied to eliminate the sense of impunity enjoyed by those who use child soldiers. This impunity can be challenged through national courts, ad hoc tribunals, and the International Criminal Court (ICC).⁸³

The Lubanga case demonstrates the capacity for the ICC (and future ad hoc or hybrid tribunals) to deter the practice by holding individuals accountable for violations of the rules of war.

i. Use of Child Soldiers Prosecuted Before the ICC

The ICC has taken an important step in advancing the prohibition against the use of child soldiers. War crimes charges relating to the conscription, enlistment and active participation in hostilities of children under fifteen years old were prosecuted and a conviction was rendered against members of armed groups in the Democratic Republic of the Congo (DRC) and Uganda.⁸⁴ In so doing, the Court clarified the manifest purpose of the prohibition:

The principal objective underlying these prohibitions historically is to protect children under the age of 15 from the risks that are associated with armed conflict, and first and foremost they are directed at securing their physical and psychological well-being. This includes not only protection from violence and fatal or non-fatal injuries during fighting, but also the potentially serious trauma that can accompany recruitment (including separating children from their families, interrupting or disrupting their schooling and exposing them to an environment of violence and fear).⁸⁵

The landmark decision was progressive in its treatment of non-combat activities, effectively proscribing the use of children that would expose them to danger by putting them in harm's way in the war effort.⁸⁶

The prosecution of individuals for the use of child soldiers is a landmark tool in international justice first seen “in 2007 [when] the Special Court for Sierra Leone [convicted] four people on charges that included the recruitment and use of children during the civil war.”⁸⁷ Similar efforts in the pursuit of accountability “ha[ve] also been furthered by the work of truth commissions in Sierra Leone, Timor-Leste and recently Liberia, all of which have addressed the issue of child soldiers.”⁸⁸ While individual accountability is essential to the process of effectively curtailing the use of child soldiers, there are practical considerations relating to the availability of individual accountability mechanisms as an enforcement tool.

⁸³ *Id.*

⁸⁴ *See* Lubanga, *supra* note 56.

⁸⁵ Lubanga, *supra* note 56, at ¶ 605.

⁸⁶ *Id.* at ¶820. (“As set out above, those who actively participated in hostilities included a wide range of individuals, from those on the front line, who participated directly, through to those who were involved in a myriad of roles supporting the combatants. The decisive factor in deciding whether an indirect role is to be treated as active participation in hostilities is whether the support provided by the child to the combatants exposed him or her to real danger by becoming a potential target.”).

⁸⁷ Human Rights Watch, *supra* note 6.

⁸⁸ *Id.*

ii. Availability of Individual Accountability as an Enforcement Tool

Ad hoc tribunals may be a thing of the past now that the ICC maintains jurisdiction over UN Security Council Referrals. For criminal cases to be brought before the ICC, it must be accomplished pursuant to the mechanisms outlined at Article 13:

Article 13: Exercise of jurisdiction

The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

- (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;
- (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or
- (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.⁸⁹

This provision limits jurisdiction to 1) a State Party referral, 2) UN Security Council referral, and 3) limited *sua sponte* decisions to investigate by the Prosecutor (also known as “*proprio motu*” investigations). Regarding State Party referrals, as indicated above, it remains highly unlikely that states will develop the political will to refer another state party situation to the ICC. This act would entail significant political fallout, and to date, only once has a state party referred another state party to the ICC.⁹⁰ UN Security Council referrals are heavily limited by the veto power available to its five permanent members. *Proprio motu* investigations are perhaps the most accessible to an individual seeking justice before an international court. However, the ability of the Prosecutor to investigate crimes requires that the situation be located within the territory of a State Party, that the perpetrators be nationals of a State Party, or that the situation be referred by the Security Council in order to even commence the investigation.⁹¹ Whoever is seeking access to justice must also have some ability to persuade the ICC Prosecutor to pursue the relevant charges, which requires significant legal support.

Finally, the ability to investigate the use of child soldiers under IHL jurisdiction must arise in the context of “armed conflict” because the use of child soldiers is only conceived of as a war crime under the Rome Statute. As a result, the standardized use of children in armed forces – without armed conflict – is not prosecutable at the ICC. For example, “the widespread practice of

⁸⁹ Rome Statute, *supra* note 41, at 11.

⁹⁰ In September of 2018, for the first time ever, Article 13(a) jurisdiction was invoked when five South American countries asked the ICC to place Venezuela under investigation for crimes against humanity. See Nat’l Pub Radio, *Latin American Countries Urge Investigation Of Venezuela For Crimes Against Humanity* (Sept. 27, 2018), available at <https://www.npr.org/2018/09/27/652330896/latin-american-countries-urge-investigation-of-venezuela-for-crimes-against-huma>.

⁹¹ Rome Statute, *supra* note 41, at 12. (Notably, the ICC’s Prosecutor’s use of *proprio motu* powers to investigate Afghan situation will be interesting to understand how these two jurisdictional tenets align – whether or not nationals of a non-state party can be subject to the jurisdiction of the court where the alleged crimes took place on the territory of a state party and notwithstanding the existence of status of forces agreements foreclosing such prosecutorial jurisdiction.)

bacha bazi, or “boy play,” in which some Afghan commanders keep underage boys as sex slaves”⁹² can only be properly prosecuted as the use of a child to support the war effort if it is determined that there is an armed conflict during the relevant periods of prosecution.⁹³ This practice is deliberately ignored by the United States military,⁹⁴ lending additional support to the proposition that we are a long way from observing the role of state responsibility in the advancement of the prohibition.

VI. RECOMMENDATIONS AND CONCLUDING THOUGHTS ON EFFECTIVELY BANNING THE USE OF CHILD SOLDIERS

International humanitarian law and international criminal law paradigms for proscribing the use of child soldiers need to be brought in line with the human rights advocacy framework. Specifically, the prohibition on the use of child soldiers should take a “straight 18” approach to banning children from recruitment into the armed forces. Additionally, children should not be permitted to volunteer for the armed forces in any capacity, direct participation in hostilities or otherwise. While OPAC sets out possible factors for safeguarding the use of children in non-combat capacities, empirical evidence shows that 1) the concept of “voluntary” is a dangerous one when evaluating the factors that lead children to participate in war and 2) there is no safe way for children to participate in the war effort. Expert testimony demonstrates, again and again, that children are exposed to extraordinary danger when they are employed in the theatre of war.⁹⁵

Most importantly, child victims need to be given actual, tangible access to justice when they are victimized in violation of the rules of war. The use of child soldiers can be accompanied by unthinkable acts of atrocity (genocide, crimes against humanity, etc.) such that the gravity upon individual child victims used in the war effort can get lost. Children need access to a meaningful mechanism for all forms of justice, including individual criminal accountability, in order to properly restore them in the aftermath of these crimes. Only when there are tangible repercussions for violating this norm will there be any real incentive to change. In order to effectively proscribe the use of child soldiers, international humanitarian law needs to evolve to meet the unique demands required of this complex prohibition.

⁹² Rod Nordland, *Afghan Pedophiles Get a Free Pass from U.S. Military*, N.Y. TIMES (Jan. 23, 2018), <https://www.nytimes.com/2018/01/23/world/asia/afghanistan-military-abuse.html>.

⁹³ See *id.* Arguably, this particular practice might be prosecuted as a Crime Against Humanity which doesn't require a war nexus under the Rome Statute. The general use of child soldiers absent armed conflict might possibly be entertained as “other inhuman acts” under the Rome statute's definition of crimes against humanity, but that is also an unexplored proposition.

⁹⁴ *Id.*

⁹⁵ See Lubanga, *supra* note 56; Council on Foreign Relations, *supra* note 2; Obote-Odora, *supra* note 55.