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The Liberal Discourse and the "New Wars" of/on Children

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THE LIBERAL DISCOURSE AND THE "NEW WARS" OF/ON CHILDREN

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> "We are urging all governments and armed groups to end the military recruitment of children under 18 and to release those children already in service. There can be no excuse for arming children to fight adult wars."[1]
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> *Statement by Mary Robinson, United Nations High Commissioner for Human Rights, Feb. 12, 2002*

INTRODUCTION

The typical armed conflict of the last few decades has not been one where instruments of high technology such as unmanned drone and guided missiles has been used; rather, it has been fought by young people with AK-47s[2] and machetes.[3] The conflicts in the Democratic Republic of Congo, Sierra Leone, and Uganda illustrate the extensive participation of children in hostilities. Since the early 1990s, after Graça Machel's[4]

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1. Office of the High Commissioner for Human Rights, *High Commissioner for Human Rights Welcomes Entry into Force of Instrument against Use of Child Soldiers*, UNITED NATIONS HUMAN RIGHTS (Feb. 12, 2002), http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=6633&LangID=E.

2. In relation to the conflict in Sierra Leone, see *AK-47: The Sierra Leone and Child Soldier*, BBC NEWS (Dec. 6, 2005), http://news.bbc.co.uk/1/hi/world/europe/4500358.stm.

3. Harold Koh explains that "[j]ust as Rwanda was a 'low-tech genocide,' committed largely by machete, small arms constitute today's real weapon of mass destruction." Harold Hongju Koh, *A World Drowning in Guns*, 71 FORDHAM L. REV. 2333, 2338 (2003).

4. In 1993, the United Nations Committee on the Rights of the Child and the General Assembly requested a report to be produced on the impact of armed conflict on children. In 1994, United Nations Secretary-General Boutros Boutros-Ghali entrusted this task to Graça Machel, Mozambique's first post-independence Minister for Education.

seminal report on the impact of armed conflict on children,[5] a coalition of non-governmental organizations ("NGOs") and individual activists has strongly argued against the use of children, defined as individuals below eighteen years of age, in armed conflict. A black African boy holding an AK-47 has become universally recognised as a symbol of child soldiering,[6] a situation viewed by many as intolerable. It has been argued that a liberal society, which cherishes values such as universality of human rights, cannot possibly approve of children's involvement in armed conflicts, since this is contrary to the values of the civilized world;[7] "War Is Not Child's Play"[8] is one recent academic article that astutely reflects this view. This raises a number of questions. What distinguishes this African boy from the French, canonized heroine Joan of Arc? Also, why is the world's attention focused on the plight of African children when both the United Kingdom[9] and the United States of America continue to recruit children to join their armed forces?[10] The way we look at children, more specifically children in conflicts, has changed over time; thus, examining the issue of child soldiering in a historical context appears expedient.

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5. *See* Expert of U.N. Secretary-General, *Impact of Armed Conflict on Children*, U.N. Doc. A/51/306 (Aug. 26, 1996) (by Graça Machel) [hereinafter *Impact of Armed Conflict on Children*].

6. *See* Lindsay Stark, Neil Boothby & Alastair Ager, *Children and Fighting Forces: 10 Years on From Cape Town*, 33 DISASTERS 522, 524 (2009).

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

8. *See generally* Nsongurua J. Udombana, *War is Not Child's Play! International Law and the Prohibition of Children's Involvement in Armed Conflicts*, 20 TEMP. INT'L & COMP. L.J. 57 (2006).

9. "The UK . . . remains among a group of fewer than 20 countries which continue to permit in law the recruitment of children into the armed forces from the age of 16 years. No other country in the European Union and no other UN Security Council permanent member state recruits from this age." COAL. TO STOP THE USE OF CHILD SOLDIERS, CATCH 16–22: RECRUITMENT AND RETENTION OF MINORS IN THE BRITISH ARMED FORCES 8 (2011) [hereinafter RECRUITMENT OF MINORS IN BRITISH ARMED FORCES].

10. "The majority of recent scholarly research relating to children and armed conflict has, quite rightly, been directed toward eliminating the use of child soldiers by rebel groups in developing nations." Stephen Brosha, *Children as Tools of War: Seeking Global Solutions Through Theoretical Analysis*, 2 ATLANTIC INT'L STUD. J. (2005), http://atlismta.org/online-journals/0506-journal-government-and-the-rights-of-individuals/children-as-tools-of-war; *see also* Jason Hart, *The Politics of "Child Soldiers,"* 13 BROWN J. WORLD AFF. 217, 221 (2006).

Moreover, childhood is defined by social policymaking predicated on many factors, including "ideas of what children are or normally should be."[11] This, in turn, involves analyzing the subject matter from a socio-legal perspective.

Liberalism, which is based on the concept of human dignity and universal human rights, conceives of children's involvement in armed conflicts as a violation of their human rights. Consequently, an international lobbying campaign,[12] led by a number of human rights and humanitarian NGOs as well as the International Committee of the Red Cross ("ICRC"), has attempted to transform the moral value of disapproving children's involvement in armed conflicts into a legal norm that problematizes their involvement. The main achievements of this campaign, favoring "[a] universal approach . . . perceiv[ing] all under-18 recruitment into armed groups as offensive, from under-18-year-olds enlisting in state armies with parental permission to young teenagers joining an armed group in order to defend their own social group to pre-teens abducted and desensitized to the act of killing,"[13] have been the adoption of a series of hard and soft law instruments such as the Optional Protocol on Children in Armed Conflict,[14] the creation of the United Nations Office of the Special Representative of the Secretary-General on Children and Armed Conflict,[15] among others.[16] This norm entrepreneurship[17]—of transforming moral values into legal norms—has been such a success that it is

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11. Allison James & Adrian L. James, *Childhood: Toward a Theory of Continuity and Change*, 575 ANNALS AM. ACAD. POL. SOC. SCI. 25, 32 (2001).

12. For a background on progression of the campaign, see generally Perinaz Kermani Mendez, *Moving from Words to Action in the Modern 'Era of Application': A New Approach to Realising Children's Rights in Armed Conflicts*, 15 INT'L J. CHILD. RTS. 219 (2007).

13. Mary-Jane Fox, *Child Soldiers and International Law: Patchwork Gains and Conceptual Debates*, 7 HUM. RTS. REV. 27, 42 (2007).

14. Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict and on the Sale of Children, Child Prostitution and Child Pornography, G.A. Res. 54/263, U.N. Doc. A/54/RES/263 (Mar. 16, 2001) [herein after Optional Protocol].

15. *See* UNITED NATIONS OFF. SPECIAL REPRESENTATIVE TO SECRETARY-GENERAL FOR CHILD. & ARMED CONFLICT, http://childrenandarmedconflict.un.org (last visited Mar. 6, 2013).

16. For an overview of the new mechanisms, see R. Charli Carpenter, *Setting the Advocacy Agenda: Theorizing Issues Emergence and Nonemergence in Transnational Advocacy Networks*, 51 INT'L STUD. Q. 99, 105–12 (2007).

17. For a discussion on norm entrepreneurship, see *id.*, at 113–14.

commonplace to consider child soldiering as an enormity and an affront to human dignity. Criticism against the opinion that child soldiering is inacceptable as such has been raised at times,[18] but it has not been welcome. Nonetheless, the mainstream view that child soldiering is unacceptable not only fails to consider it from a historical perspective[19] but also is insufficiently sensitive to local and regional cultures and traditions.[20]

Additionally, liberals contend that law is "the best instrument for securing liberty, empowering humanity, and bringing about social change."[21] Yet, the current legal framework does not offer such a straight-forward position as three legal regimes apply in relation to child soldiers: the human rights law regime that applies at any time (United Nations Convention on the Rights of the Child[22] and the Optional Protocol[23]), the international humanitarian law regime that only applies in times of conflict of an international (Geneva Conventions[24] and Addi-

18. *See* David M. Rosen, *Child Soldiers, International Humanitarian Law, and the Globalization of Childhood*, 109 AM. ANTHROPOLOGIST 296, 296 (2007).

19. *See* Hart, *supra* note 10, at 219.

20. In the discrete context of child labor, Timothy Ivins refers to the "'West cultural arrogance' [that] does not take into consideration local cultural norms and needs." Timothy Ivins, *A Contextual Approach to Child Labour*, 1 CROSS-SECTIONS: BRUCE HALL ACAD. J. 36, 38 (2005).

21. *See* Ah-Jung Lee, *Understanding and Addressing the Phenomenon of 'Child Soldiers': The Gap Between the Global Humanitarian Discourse and the Local Understandings and Experiences of Young People's Military Recruitment* 7 (Refugees Studies Ctr. Working Paper Series, Paper No. 52, 2009); *see also* BARBARA GOODWIN, USING POLITICAL IDEAS 40–41 (4th ed. 2005).

22. *See* United Nations Convention on the Rights of the Child art. 1, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter UNCRC].

23. Optional Protocol, *supra* note 14.

24. Geneva Convention for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field (First Geneva Convention), Aug. 12, 1949, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), Aug. 12, 1949, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), Aug, 12, 1949, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287, *available at* http://www.icrc.org/ihl.nsf/full/380 [hereinafter Geneva Convention IV].

tional Protocol I[25]) or non-international nature (Common Article 3 of the Geneva Conventions and Additional Protocol II[26]), and international criminal law which relates to the prosecution of individuals having committed crimes in times of armed conflict (Rome Statute of the International Criminal Court, also known "Rome Statute"[27]).

Whilst it is true that human rights instruments condemn the participation and use of children in armed conflict, since 1977 little, if any, progress has been made in international humanitarian law in actually tackling the issue of child soldiering. And this is despite the work of ICRC and some humanitarian NGOs. A key underlying question remains: why should child soldiering between fifteen and eighteen years of age be universally banned?[28]

This Article aims to radically rethink the notion of child soldiering in human rights and international humanitarian law in order to assess whether a change in the law is indeed necessary. With this view, it begins by exploring how and why the phenomenon of child soldiering has gained prominence in recent years. It then examines the current legal framework—including human rights law, international humanitarian law, and international criminal law—in relation to the recruitment, conscription, enlistment, and participation of children in armed conflict. This Article ends by critically analyzing international law in this area through the prism of two values that are essential to liberal thinkers: universality, the idea that liberal values apply across cultures, and autonomy, the idea that each individual is able to take decisions independently of third party interference. The Article concludes that the issue of child soldiering is more difficult to grasp than the liberal thinkers present it and that "the zero under 18" campaign[29] launched by

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25. 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, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I].

26. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II].

27. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute].

28. *See* Lee, *supra* note 21, at 8.

29. The idea behind the campaign is that no child under the age of eighteen should be allowed to be recruited or take part in the hostilities. This

the Special Representative on Children and Armed Conflict[30] is unlikely to be successful because it fails to take into consideration the weight of history, politics, and culture. That being said, the Article's aim is certainly not to portray child soldering as a positive experience or excuse human rights violations that such children suffer once they have, even voluntarily, joined armed forces or armed groups.

I. THE CHILD SOLDIER PHENOMENON

Undoubtedly, moral and societal values reflect the times we live in. As Lisa McNee explains, the constructions of childhood "are products of a particular period and a particular cultural framework."[31] Until recently, the idea of children taking a direct and indirect part in armed conflicts was commonly accepted as an inevitable aspect of warfare. Yet, the rise of the human rights ideology and the emergence of the so-called "new wars"[32] have led child soldiering to be condemned.

A. Historical Approach to Childhood and Children in Wars

Social scientists contend that the concept of childhood did not exist during the Middle Ages.[33] The underlying belief was that as soon as children's abilities grew, so did their participation in

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campaign is based on the fact that although the UNCRC states that a child is anyone under the age of eighteen years old, this definition is repudiated in Article 38 that allows for the recruitment and participation of children aged fifteen and more. UNCRC, *supra* note 22, art. 38(3).

30. *See Zero Under 18 Campaign*, UNITED NATIONS OFF. SPECIAL REPRESENTATIVE TO SECRETARY-GENERAL FOR CHILD. & ARMED CONFLICT, http://childrenandarmedconflict.un.org/our-work/zero-under-18-campaign (last visited Apr. 4, 2013). One of the campaign's objectives is to "[e]ncourage all States to raise the age of voluntary recruitment to a minimum of 18 years." *Id.*

31. Lisa McNee, *The Languages of Childhood: The Discursive Construction of Childhood and Colonial Policy in French West Africa*, 7 AFR. STUD. Q. 20, 20 (2004); *see also* Lee, *supra* note 21, at 4.

32. As Mary Kaldor summarizes, "the new wars involve a blurring of the distinctions between war (usually defined as violence between states or organized political groups for political motives), organized crime (violence undertaken by privately organized groups for private purposes, usually financial gain) and large-scale violations of human rights (violence undertaken by states or politically organized groups against individuals)." MARY KALDOR, NEW & OLD WARS 2 (2d ed. 2007).

33. James & James, *supra* note 11, at 26. It must also be noted that a child's experience in medieval times highly depended on its social status.

society expand. The idea that a person reached adulthood at a certain fixed age simply did not exist at that time. One has to wait until the late 1990s to see when a consensus began to emerge, at least in regard to human rights law, which unequivocally declared that a child was anyone below eighteen years of age.[34] Furthermore, in medieval times young people "were not granted any sort of special or distinctive social status."[35] By the fifteenth century, however, an awareness developed to the effect that children should be afforded some special consideration, as their social experience and interaction was different from that of adults.[36] The first legal instrument to recognise the specificity of "childhood" was the Geneva Declaration of the Rights of the Child of 1924[37] followed by the more comprehensive Declaration of the Rights of the Child adopted in 1959 by the United Nations General Assembly[38] and finally the United Nations Convention on the Rights of the Child.[39]

Despite the acknowledgment that children's role and place in society was different, it remained common for them to partake in armed conflicts. Examples include "the drummer boys in the American Revolution," "powder monkeys in the war of 1812, the Mexican war, and the Civil War [of the United States]," and the Hitler Youth during World War II.[40] Closer to our time,

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34. *See* UNCRC, *supra* note 22; *see also* Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor art. 2, June 17, 1999, 2133 U.N.T.S. 161.

35. James & James, *supra* note 11, at 26.

36. *See id.*

37. *See* Geneva Declaration of the Rights of the Child, Sept. 26, 1924, League of Nations O.J. Spec. Supp. 21, at 43. Article 25(2) of the Universal Declaration of Human Rights also specifies that childhood is entitled to special care and assistance. Universal Declaration of Human Rights, G.A. Res. 217A (III) A, art. 25(s), U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR].

38. Declaration of the Rights of the Child, G.A. Res. 1386 (XIV), U.N. GAOR, 14th Sess. Supp. No. 16 (Vol. I), U.N. Doc. A/4354 (Vol. I), at 19 (Nov. 20, 1959). As Joel Bakan asserts, "[b]y the middle of the [twentieth] century, childhood was a robustly protected legal category." Joel Bakan, *The Kids Are Not All Right*, N.Y. TIMES, Aug. 21, 2011, http://www.nytimes.com/2011/08/22/opinion/corporate-interests-threaten-childrens-welfare.html.

39. UNCRC, *supra* note 22.

40. Kristin Gallagher, *Towards a Gender-Inclusive Definition of Child Soldiers:* The Prosecutor v. Thomas Lubanga,7 EYES ON ICC 115, 115 (2010–11). Twelve year old boys were recruited by Robert Baden Powell during the

during the Iran-Iraq war, Iranian president Rafsanjani declared that children as young as twelve should be fighting.[41] Just as is the case today, military apprenticeship or military service was an attractive vocation, especially where a formal universal education system did not exist.[42] In 1999 the Council of Delegates of the International Red Cross and Red Crescent Movement stated that it was "seriously alarmed by the increasing number of children involved in armed conflict and by the tremendous suffering endured by those children . . . ."[43] Three years earlier, in 1996, Machel had published her report exposing the plight of children in armed conflicts.[44] As Ah-Jung Lee aptly summarizes, "the global discourse is that children have no place in war under any circumstance . . . ."[45] Despite this growing consensus, no one has yet actually addressed the loaded question of *why* child soldiering, defined for the working purposes of this Article as an individual below the age of eighteen who takes a direct or indirect part in hostilities, is so widely and flatly condemned. To answer this question, one must investigate two key developments that have occurred in recent decades that have radically changed mainstream perceptions of child soldiering, namely the growing impact of liberal human rights ideology and the emergence of "new wars."

B. Human Rights Ideology

One key development in recent decades has been the growing impact of a human rights ideology that finds its foundations in liberal thought. Liberalism is committed to a society in which individuals can freely and autonomously pursue and realize their interests.[46] Because liberals tend to view the individual as "inviolable" and human life as "sacrosanct," violence is prohib-

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siege of Mafeking in 1900 to deliver messages under fire. Michael Bartlet, *Britain's Child Soldiers*, THE GUARDIAN, Mar. 11, 2011, http://www.guardian.co.uk/commentisfree/2011/mar/11/britain-child-soldiers-army; *see also* Ilona Topa, *Prohibition of Child Soldiering—International Legislation and Prosecution of Perpetrators*, 3 HANSE L. REV. 105, 106 (2007).

41. *See* Gallagher, *supra* note 40, at 115–16.

42. Mary Jonasen, *Child Soldiers in Chad*, 10 INTERSECTIONS 309, 311 (2009).

43. Int'l Comm. of the Red Cross [ICRC], *Children Affected by Armed Conflict*, Council of Delegates Res. No. 8, pmbl. (Oct. 29–30, 1999).

44. *See generally Impact of Armed Conflict on Children*, *supra* note 5.

45. Lee, *supra* note 21, at 3.

46. *See* GOODWIN, *supra* note 21, at 37.

ited barring the rare cases in which the liberal society is threatened.[47] For liberals, individual human rights, such as those enshrined in the 1948 Universal Declaration of Human Rights (e.g., right to life, freedom from torture, freedom of speech),[48] are fundamental in any given society. The advent of a human rights ideology that began with the adoption of the 1948 Universal Declaration of Human Rights, and a range of universal and regional human rights treaties has solidified the liberal position in law.

As a result of liberalism's "rights-based approach,"[49] issues relating to children have been entirely perceived through the prism of human rights. In fact, the first comprehensive report on the plight of children in armed conflict[50] was based on a human rights law framework: the 1989 United Nations Convention on the Rights of the Child ("UNCRC").[51] The seminal work of Machel led to a discourse on which "child soldiering is an unambiguous violation of universal children's rights."[52] The plight of children in armed conflict is viewed as child abuse and a violation of human rights law.[53] Remarkably, "[o]ver the past 20 years, human rights law involving the rights and welfare of children has become increasingly focused on children participating in armed conflict."[54] That being said, it must be stressed that in an armed conflict a different body of law, namely international humanitarian law, acts as the law governing the specific subject matter of children in armed conflict.[55] As a result,

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47. *Id.*

48. *See* UDHR, *supra* note 37, pmbl., art. 3, 5.

49. Lee, *supra* note 21, at 6 (noting that the "rights-based approach" refers to "humanitarian agencies conceptuali[zing] 'child soldering' in terms of a clear violation of universal children's rights and a breach of international humanitarian law").

50. *Impact of Armed Conflict on Children*, *supra* note 5.

51. RACHEL HARVEY, CHILDREN AND ARMED CONFLICT: A GUIDE TO INTERNATIONAL HUMANITARIAN AND HUMAN RIGHTS LAW 14 (2003).

52. Lee, *supra* note 21, at 3.

53. *See* Vanessa Pupavac, *Misanthropy Without Borders: The International Children's Rights Regime*, 25 DISASTERS 95, 107 (2001).

54. Janet McKnight, *Child Soldiers in Africa: A Global Approach to Human Rights Protection, Enforcement and Post-Conflict Reintegration*, 18 AFR. J. INT'L & COMP. L. 113, 117 (2010).

55. Principle of *lex specialis* means that a law governing a specific subject matter (e.g., international humanitarian law) overrides a law which only governs general matters (e.g., human rights law). For a discussion on the concept of *lex specialis*, see generally Conor McCarthy, *Legal Conclusion or Interpre-*

children are protected via human rights *and* humanitarian law[56] and attention should also be paid to international humanitarian law provisions.

C. Emergence of New Wars

A second key development in recent decades that has radically changed mainstream perceptions of child soldiering has been the emergence and subsequent proliferation of so-called "new wars." A link can arguably be drawn between such wars and the proliferation of the recruitment and use of children in combat.[57] These wars stand in stark contrast to contemporary international armed conflicts or previous wars of national liberation.

Three salient features of these "new wars" contribute to the increased involvement of children in them. Firstly, modern warfare "is an especially aberrant and horrific phenomenon"[58] as such conflicts are typically characterized by the abandonment of all moral standards and the "lack of a clear delineation between war and peace . . . ."[59] Distinctions between fighters and civilians are generally not made,[60] and worse still, the civilian population becomes the target of systematic attacks carried out with extreme levels of brutality and violence (e.g., use

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tative Process? Lex Specialis *and the Applicability of International Human Rights Standards*, *in* INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS LAW: TOWARDS A NEW MERGER IN INTERNATIONAL LAW 101 (Roberta Arnold & Noëlle Quénivet eds., 2008).

56. *See* HARVEY, *supra* note 51, at 6–7.

57. "The Special Representative is of the view that the risk or likelihood of the realization of the crimes of conscripting or enlisting children under the age of 15 years into the national armed forces, is inevitably high due to the nature of some contemporary armed conflicts." Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Written Submissions of the United Nations Special Representative of the Secretary-General on Children and Armed Conflict, ¶ 6 (Mar. 18, 2008); *see also* Topa, *supra* note 40, at 105.

58. Rosen, *supra* note 18, at 298.

59. Gallagher, *supra* note 40, at 116.

60. HARVEY, *supra* note 51, at 5; *see also* Amy Beth Abbott, *Child Soldiers—The Use of Children as Instruments of War*, 23 SUFFOLK TRANSNAT'L L. REV. 499, 509 (2000); Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Statement of Witness Elisabeth Schauer, at 6 (Apr. 7, 2009), http://www.icc-cpi.int/iccdocs/doc/doc662611.pdf.

of systematic rape, torture, ethnic cleansing,[61] abductions, etc.).[62] In such conflicts "opposing sides do not distinguish between children and adults,"[63] for they are all part of the same communities. In fact, due to the nature and pattern of this type of warfare,[64] an increasing number of children have become the primary targets of armed forces and opposition groups who abduct or forcefully recruit them into the military factions.[65] As David Rosen argues, modern war is contemplated as an adult enterprise that exploits inherently "vulnerable, weak, and irrational children."[66] Children are deemed to be a ready and expandable commodity.[67] Mary Jonasen also notes that "[a]s the number of available men to fight decreases, so does the age of potential recruits, from youth to younger and younger children."[68] The objectification of children is illustrated by the fact that boys are sent to the front and, if killed, simply replaced by other boys.[69] Children are also regarded by military leaders as fearless,[70] "cheaper to maintain within the ranks,"[71] and "less

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61. "The most common objective in [intrastate conflicts or internal power struggles in developing countries] is persecution, expulsion and the extermination of an ethnic group." Jonasen, *supra* note 42, at 314.

62. *See* Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Statement of Witness Elisabeth Schauer, at 9–10 (Apr. 7, 2009), http://www.icc-cpi.int/iccdocs/doc/doc662611.pdf.

63. Joseph N. Madubuike-Ekwe, *The International Legal Standards Adopted to Stop the Participation of Children in Armed Conflicts*, 11 ANN. SURV. INT'L & COMP. L. 29, 30 (2005).

64. Michael Klaus, *Kinder und Krieg—eine Bestandsaufnahme* [*Children in War—A Survey*], *in* FRIEDRICH-EBERT-STIFTUNG & UNICEF, Konferenz: Kinder im Krieg [Conference: Children in War] 9, 12 (Aug. 25, 1999), *available at* http://library.fes.de/pdf-files/iez/01374.pdf.

65. *See* P.W. SINGER, CHILDREN AT WAR 5 (2005); Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Statement of Witness Elisabeth Schauer, at 41 (Apr. 7, 2009), http://www.icc-cpi.int/iccdocs/doc/doc662611.pdf.

66. Rosen, *supra* note 18, at 298; *see also* David Rosen, *Social Change and the Legal Construction of Child Soldier Recruitment in the Special Court for Sierra Leone*, 2 CHILDHOOD AFR. 48, 49 (2010) [hereinafter *Child Solder Recruitment*].

67. Jonasen, *supra* note 42, at 315.

68. Ann Davison, *Child Soldiers: No Longer a Minor Incident*, 12 WILLAMETTE J. INT'L L. & DISP. RESOL. 124, 137–38 (2004).

69. Human Rights Watch, *How to Fight, How to Kill: Child Soldiers in Liberia*, 1, 21 (Feb. 2, 2004), *available at* http://www.hrw.org/sites/default/files/reports/liberia0204.pdf.

70. Daya Somasundaram, *Child Soldiers: Understanding the Context*, 324 BRIT. MED. J. 1268, 1270 (2002).

demanding and easier to manipulate than adult soldiers."[72] Children, who are known to be unaware of concepts such as mercy and sympathy until a later age,[73] are often used to terrorize the population, thus increasing the overall level of violence and contributing to and reinforcing the cycle of violence.

A second salient feature of the "new wars" that has contributed to the increasing involvement of children in them is that, since these conflicts tend to occur in poor countries, they are typically fought with light weapons that are cheap to buy. The increased accessibility of small arms[74] since the end of the Cold War and the decreased difficulty in using such weapons due to technological improvements[75] have led to a higher number of children taking a direct part in hostilities.[76] The conflict in Sierra Leone is a sad testimony to the institutionalized nature of conscription and use of children by armed opposition groups.[77]

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71. Gallagher, *supra* note 40, at 117.

72. Bhavani Fonseka, *The Protection of Child Soldiers in International Law*, 2 ASIA-PAC. J. HUM. RTS. & L. 69, 69–70 (2001).

73. *See* Jo Boyden, *Children's Experience of Conflict Related Emergencies: Some Implications for Relief Policy and Practice*, 18 DISASTERS 254, 260 (1994); *see also* Gus Waschefort, *Justice for Child Soldiers? The RUF Trial of the Special Court of Sierra Leone*, 1 INT'L HUMANITARIAN L. STUD. 189, 189 (2010).

74. Koh defines "small arms and light weapons" as weapons that can be carried by an ordinary person, that are "capable of delivering lethal force" and that are "primarily designed for military use." Koh, *supra* note 3, at 2334; *see also* David Southall, *Armed Conflict Women and Girls Who Are Pregnant, Infants and Children; A Neglected Public Health Challenge. What Can Health Professionals Do?*, 87 EARLY HUM. DEV. 735, 739 (2011).

75. Davison, *supra* note 68, at 138; *see also* Carol B. Thompson, *Beyond Civil Society: Child Soldiers as Citizens in Mozambique*, 80 REV. AFR. POL. ECON. 191, 191 (1999); Anatole Ayissi & Catherine Maia, *La lutte contre le drame des enfants soldats ou le Conseil de Sécurité contre le terrorisme à venir* [*The Struggle Against the Tragedy of Child Soldiers, or the Security Council Against Coming Terrorism*], 58 REV. TRIM. DR. H. 341, 345–46 (2004) (Fr.); William P. Murphy, *Military Patrimonialism and Child Soldier Clientalism in the Liberian and Sierra Leonean Civil Wars*, 46 AFR. STUD. REV. 61, 74 (2003).

76. SINGER, *supra* note 65, at 45–49; HARVEY, *supra* note 51, at 66; Koh, *supra* note 3, at 2335; Meredith Turshen, *Women's War Stories*, *in* WHAT WOMEN DO IN WARTIME: GENDER AND CONFLICT IN AFRICA 1, 7 (Meredith Turshen & Clotilde Twagiramariya eds., 1998).

77. *See* Prosecutor v. Taylor, Case No. SCSL-03-01-T, Judgment, ¶ 1603 (May 18, 2012).

This has led to a corresponding increase in the "victimization of women and children" alike.[78]

Thirdly, a wide range of actors—national liberation movements, insurgents, partisans, rebels, local militia, terrorist groups, corporations, and others—are involved in the "new wars," and in practice, it is often difficult to distinguish between these factions and understand their interrelationships. For example, an armed opposition group may use a local militia to "recruit" individuals to work in mines. The harvested natural resources are then sold to a corporation and the money received from the proceeds of the resources is used to buy weapons from a terrorist group. In this environment, children are an ideal weapon of war. Due to their young age, they "can . . . act relatively inconspicuously in war zones, observing troop deployments, dispositions of weapons and noting logistical arrangements without attracting undue attention."[79] As children are usually not suspected of being part of the hostilities, they are neither monitored nor stopped and searched whilst there are on duty. They are therefore an undeniable asset for these armed opposition groups, notably because they can provide information on enemies' movements and activities and also work as a communication bridge for the groups.

Whilst liberal states such as the United Kingdom recruit children into their own armed forces[80] and sometimes let them participate in conflicts (e.g., Iraq[81]), they decry the use of children in the "new wars". Three main reasons can be adduced to elucidate this seemingly contradictory view and why the inter-

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78. HARVEY, *supra* note 51, at 60.

79. Frank Faulkner, *Kindergarten Killers: Morality, Murder and the Child Soldier Problem*, 22 THIRD WORLD Q. 491, 494 (2001).

80. For the United Kingdom's viewpoint on its recruitment process, see JOINT COMMITTEE ON HUMAN RIGHTS, LEGISLATIVE SCRUTINY: ARMED FORCES BILL, 2010–12, H.L. 145, H.C. 1037, ¶ 1.50 [hereinafter, ARMED FORCES BILL, 2010–12]; *see also* Bartlet, *supra* note 40.

81. For example, between 2003 and July 2005, fifteen soldiers below the age of eighteen years old were deployed to Iraq. RECRUITMENT OF MINORS IN BRITISH ARMED FORCES, *supra* note 9, at 5. Five underage soldiers were also deployed between 2007 and 2010. *UK Submission to the UN Universal Periodic Review*, CHILD SOLDIERS INT'L ¶ 16 (Nov. 2011), http://www.child-soldi-
di-
ers.org/user_uploads/pdf/unitedkingdomsubmissiontoununiversalperiodicreview13thsession2012771268.pdf [hereinafter CHILD SOLDIERS INT'L].

national campaign against child soldiering has focused on conflicts waged in non-liberal states. First, there is the acknowledgment that the "new wars" have fostered a culture of using and encouraging children to commit unspeakable acts of violence. International humanitarian law is systematically violated, and war crimes are chronically perpetrated by all parties to the conflict.[82] However, liberal states tend to take a range of precautions to avoid such violations or at least lessen the occurrence of them, all the while being involved in conflicts.[83] Second, liberal states recognize that child soldiers, who are in large supply, both perpetuate the cycle of violence and lead to the escalation, prolongation, and geographical expansion of the conflict. Contemporary warfare as carried out by liberal states tends to adopt strategies that allow such conflicts to be geographically and temporally controlled,[84] and also uses technologies that require high levels of skills, thus providing no particular incentive for them to use children. Finally and most importantly, the overwhelming majority of children entangled in such conflicts have not chosen a military path voluntarily. This tends to differ from the experience of such liberal states as the United Kingdom, where children appear to willingly opt for a career in the armed forces or had responded to a historical call in World War I.[85] These three main reasons explain why the focus of the international campaign against child soldiering has been on conflicts waged in non-liberal states.

II. THE LEGAL FRAMEWORK RELATING TO CHILD SOLDIERING

In order to understand the current movement towards banning child soldiering one must first examine the current legal framework in relation to recruitment, conscription, enlistment, and participation of children in armed conflict. International humanitarian law does not outlaw the recruitment and use of children between fifteen and eighteen years of age in armed conflict. Yet the ICRC, the guardian of the international humanitarian law treaties, contends that, "[d]espite the rules laid down by international law, thousands of children are today tak-

82. For examples, see conflicts in Uganda and the Democratic Republic of Congo.

83. *See generally* A.P.V. Rogers, *Zero-Casualty Warfare*, 82 IRRC 165 (2000).

84. For examples, see the conflicts in Kosovo and in Libya.

85. Lee, *supra* note 21, at 3.

ing an active part in and are victims of hostilities."[86] In fact, it is human rights law that is at the forefront of the campaign against child soldiering. Therefore, although this Article examines these key issues by mostly concentrating on international humanitarian law, it also looks at international human rights law and, at times, international criminal law to provide a better understanding of the child soldier phenomenon.

Two key issues need to be addressed when examining the legal framework that relates to child soldiering and the liberal discourse: the recruitment (conscription and enlistment) of children and the participation and use of them in armed conflict.[87] Whilst recruitment relates to the manner in which a child becomes associated with an armed group, the use relates to the way in which he/she participates in the conflict.[88]

A. Recruitment of Child Soldiers

1. Definition of Recruitment

Children are recruited into armed forces and armed opposition groups in various ways; some are abducted, some are forcibly recruited, and others join voluntarily. International humanitarian law—Article 77 of Additional Protocol I,[89] Article 4(3) of Additional Protocol II,[90] and Rule 136 of ICRC's Study on Customary International Humanitarian Law[91]—groups

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86. ICRC, Advisory Service on International Humanitarian Law, *Guiding Principles for the Domestic Implementation of a Comprehensive System of Protection for Children Associated with Armed Forces or Armed Groups*, 11 (Sept. 15, 2011), *available at* http://www.icrc.org/ara/assets/files/2011/guiding-principles-children-icrc.pdf [hereinafter *Guiding Principles*].

87. It must be stressed that "the three alternatives (*viz.* conscription, enlistment and use) are separate offences." Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Judgment, ¶ 609 (March 14, 2012), http://www.icc-cpi.int/iccdocs/doc/doc1379838.pdf; *see also* Alison Smith, *Child Recruitment and the Special Court for Sierra Leone*, 2 J. INT'L CRIM. JUST. 1141, 1147–48 (2004).

88. Sandesh Sivakumaran, *War Crimes Before the Special Court for Sierra Leone: Child Soldiers, Hostages, Peacekeepers and Collective Punishments*, 8 J. INT'L CRIM. JUST. 1009, 1012 (2010).

89. Additional Protocol I, *supra* note 25, art. 77.

90. Additional Protocol II, *supra* note 26, art. 4(3).

91. *See* 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 482–85 (2006), *available at*

these different ways in which children join the armed forces or an armed group involved in hostilities under the single term "recruitment." It also useful to remember that the term "recruitment" predates "enlistment" and "conscription,"[92] two concepts that are now covered by "recruitment."[93]

As the Commentary to Article 77 Additional Protocol I explains, whilst the obligation to refrain from recruiting children under fifteen is clear, the voluntary enrollment of children is neither explicitly mentioned nor prohibited.[94] As there is no express prohibition of the voluntary enrollment of children under fifteen years of age, it seems to indicate that voluntary enlistment is allowed by law. In other words, international humanitarian law distinguishes between two forms of recruitment, active recruitment by the armed forces (known as conscription) and voluntary enrollment, but only bans the former in international armed conflict. By contrast, the Commentary to Article 4(3) Additional Protocol II stipulates that "[t]he principle of non-recruitment also prohibits accepting voluntary enlistment."[95] Rule 136 of the Study on Customary International Humanitarian Law does not elaborate on this, though it does refer to the Rome Statute[96] which distinguishes between two forms of recruitment: conscription and enlistment of children under fifteen years of age.[97] A further distinction is hereby introduced inasmuch as enlistment can be either compulsory or voluntary depending on which legal instrument is used. Yet, as the Commentary to the Rome Statute clarifies, "[c]onscription refers to the compulsory entry into the armed forces. Enlistment . . . refers to the generally voluntary act of joining armed

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http://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf.

92. Waschefort, *supra* note 73, at 196.

93. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Judgment, ¶ 607 (March 14, 2012), http://www.icc-cpi.int/iccdocs/doc/doc1379838.pdf; Prosecutor v. Sesay (*RUF Case*), Case No. SCSL-04-15-T, Judgment, ¶ 184 (Mar. 2, 2009), http://www.sc-sl.org/LinkClick.aspx?fileticket=D5HojR8FZS4%3D&tabid=215.

94. CLAUDE PILLOUD ET AL., COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 ¶ 3184 (Yves Sandoz et al. eds., 1987).

95. *Id.* ¶ 4557.

96. Rome Statute, *supra* note 27.

97. *See id.* arts. 8(2)(b)(xxvi), 8(2)(e)(vii) (addressing both international armed conflicts and non-international armed conflicts).

forces by enrollment, typically on the 'list' of a military body or by engagement indicating membership and incorporation in the forces."[98] A similar position was recently adopted by the International Criminal Court ("ICC") Trial Chamber in the *Prosecutor v. Lubanga* case[99] and the Special Court of Sierra Leone in the *Prosecutor v. Taylor* case.[100] Again, a difference is made between compulsory and voluntary acts. It must also be stressed that the Rome Statute applies not only to armed forces but also to armed opposition groups.[101]

Yet, the distinction between voluntary and compulsory recruitment fails to account for abductions, which are one of the chief means used—especially by armed opposition groups—to recruit children.[102] Indeed, in the past few decades, abduction and kidnapping have become the main ways to forcefully include children in armed groups.[103] In some countries, abduction of children has reached a level of automaticity. For example, during the second part of the 1980s, Resistência Nacional

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98. KAI AMBOS ET AL., COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVER'S NOTES, ARTICLE BY ARTICLE 261 (Otto Triffterer ed., 2d ed. 2008); *see also* Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges, ¶ 246 (Jan. 29, 1997), http://www.icc-cpi.int/iccdocs/doc/doc266175.pdf. In the AFRC trial, the Trial Chamber commented that "the only method described in the evidence is abduction . . . ." Prosecutor v. Brima (*AFRC Case*), Case No. SCSL-2004-16-T, Judgment, ¶ 1276 (June 20, 2007), http://www.sc-sl.org/CASES/ProsecutorvsBrimaKamaraandKanuAFRCCase/TrialChamberJudgment/tabid/173/Default.aspx.

99. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Judgment, ¶ 608 (March 14, 2012), http://www.icc-cpi.int/iccdocs/doc/doc1379838.pdf.

100. Prosecutor v. Taylor, Case No. SCSL-03-01-T, Judgment, ¶ 442 (May 18, 2012).

101. Article 1 of the Rome Statute stipulates that it has "the power to exercise its jurisdiction over persons" and thus does not distinguish between members of armed forces or members of armed opposition groups. Rome Statute, *supra* note 27, art. 1. In contrast, the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict ("Optional Protocol") differentiates between state actors and non-state actors in this regard, and specifically recognizes the duties of non-state armed groups. Optional Protocol, *supra* note 14, art. 4(1).

102. "Most armed groups recruit children by force." Madubuike-Ekwe, *supra* note 63, at 33; *see also* Prosecutor v. Sesay (*RUF Case*), Case No. SCSL-04-15-T, Judgment, ¶ 1616 (Mar. 2, 2009), http://www.sc-sl.org/LinkClick.aspx?fileticket=D5HojR8FZS4%3D&tabid=215.

103. *See* Rights of the Child, G.A. Res. 63/241, ¶¶ 29, 51, U.N. Doc. A/RES/63/241 (Mar. 13, 2009).

Moçambicana ("RENAMO") systematically abducted children and forced them to participate in activities against the government of Mozambique.[104] A method commonly used to forcefully recruit children is press-ganging, "where armed militia groups . . . roam the streets and public gathering places, including school gates, to round up individuals they come across."[105] Such groups also raid schools and orphanages. A notorious example is a 1996 event where the Lord's Resistance Army ("LRA") captured 136 girls from St. Mary's College, an Aboke school in Northern Uganda.[106] Similarly, in 2001, armed groups in Burundi abducted 300 children from schools and forced them to carry military equipment or help wounded soldiers.[107]

With this view, the Special Court for Sierra Leone, whose statute refers to two types of recruitment,[108] has interpreted "conscription" to include "acts of coercion, such as abductions and forced recruitment," for the purpose of using children in hostilities.[109] Undoubtedly, this "definition of conscription reflects its recognition of the changed nature of modern warfare."[110] The Special Court also explained that enlistment means "accepting and enrolling individuals when they volun-

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104. Jean-Claude Legrand & Fabrice Weissman, *Les enfants soldats et usages de la violence au Mozambique* [*Child Soldiers and the Function of Violence in Mozambique*], 18 CULTURES & CONFLICTS 2 (1995) (Fr.).

105. Madubuike-Ekwe, *supra* note 63, at 33; *see also* Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Witness Testimony DRC-OTP-WWW-0046, at 18 (July 9, 2009), http://www.icc-cpi.int/iccdocs/doc/doc713215.pdf.

106. *See generally* ELS DE TEMMERMAN, ABOKE GIRLS: CHILDREN ABDUCTED IN NORTHERN UGANDA (2d ed. 2001).

107. MICHAEL WESSELLS, CHILD SOLDIERS: FROM VIOLENCE TO PROTECTION 41 (2006).

108. *See* Statute of the Special Court for Sierra Leone art. 4, Jan. 16, 2002, *available at* http://www.sc-sl.org/LinkClick.aspx?fileticket=uClnd1MJeEw%3D&.

109. Prosecutor v. Brima (*AFRC Case*), Case No. SCSL-2004-16-T, Judgment, ¶ 734 (June 20, 2007), http://www.sc-sl.org/CASES/ProsecutorvsBrimaKamaraandKanuAFRCCase/TrialChamberJudgment/tabid/173/Default.aspx.

110. Referring to the judgment of the AFRC Case: "While previously wars were primarily between well-established States, contemporaneous armed conflicts typically involve armed factions which may not be associated with, or acting on behalf, a State. To give the protection against crimes relating to child soldiers its intended effect, it is justified not to restrict 'conscription' to the prerogative of States and their legitimate Governments, as international humanitarian law is not grounded on formalistic postulations." *AFRC Case*, Case No. SCSL-2004-16-T, ¶ 734.

teer to join an armed force or group;"[111] in other words, enlistment does not involve an actual list of new recruits but also "children enrolled by more informal means."[112] What it also means is that whilst conscription is compulsory, enlistment remains a voluntary act.

International human rights law instruments impose restrictions upon states related to recruitment in general. Article 38 of the UNCRC affirms that "State Parties shall refrain from recruiting any person who was not attained the age of fifteen years into their armed forces." The prohibition on recruitment of children under fifteen years of age is applicable both in peacetime and in times of armed conflict, thereby leaving aside the difficult question of qualification of the conflict. Moreover, it does not distinguish between compulsory and voluntary recruitment.[113] Yet, the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict ("Optional Protocol") does make this distinction,[114] thereby espousing a perspective similar to the one propounded in international humanitarian law and leaving open the definition of "voluntary."[115]

2. How Voluntary Is "Voluntary"?

It is imperative to determine what makes an enlistment "voluntary," since this is the distinguishing factor between conscription and enlistment[116] not only in international humanitarian and human rights law[117] but also between lawful and

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111. *Id.* ¶ 735; *see also* Prosecutor v. Fofana (*CDF Case*), Case No. SCSL-04-14-A, Appeals Judgment, ¶ 140 (May 28, 2008), http://www.sc-sl.org/LinkClick.aspx?fileticket=9xsCbIVrMlY%3d&tabid=194.

112. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Written Submissions of the United Nations Special Representative of the Secretary-General on Children and Armed Conflict, ¶ 9 (Mar. 18, 2008).

113. During the negotiations, such distinction was made but later abandoned. Claire Breen, *When Is a Child Not a Child? Child Soldiers in International Law*, 8 HUM. RTS. REV. 71, 83 (2007).

114. Article 3 of the Optional Protocol refers to voluntary recruitment. Optional Protocol, *supra* note 14, art. 3.

115. *See id*. at 89; Breen, *supra* note 113, at 83.

116. *See* Alice Schmidt, *Volunteer Child Soldiers as Reality: A Development Issue for Africa*, 2 NEW SCH. ECON. REV. 49, 56 (2007).

117. However, it must be borne in mind that the Rome Statute does not refer to the degree of voluntariness in joining the armed groups. Thus, Alison Smith notes that "the forcible or voluntary nature of the recruitment is not

unlawful recruitment under international humanitarian law. It is argued that the level of voluntariness can be assessed by examining 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.

In Western states, a minor must make a willing and informed decision with the consent of his or her parents or guardians.[118] A range of safeguards exist to ensure that this is an informed choice[119] by the child.[120] This is congruent with state obligations under the Optional Protocol that stipulates that states are required to ensure that voluntary recruitment is genuine and not coerced (i.e., the informed consent of the recruits' parents or legal guardians has been obtained and the recruits are well informed about the duties involved in the military service).[121] In reality, in the United Kingdom, a fair number of young recruits come from the "least educated backgrounds"[122] and are visited by army recruiters in economically deprived areas where these recruits reside.[123] This certainly raises concerns as to the voluntariness of young people to join the armed

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an element of the crime." Smith, *supra* note 87, at 1148. In other words, there is no defense to recruitment of children under the age of fifteen. *See id.*

118. *See* Armed Forces Act, 2006, c. 52, § 328(2)(c) (U.K.).

119. Elisabeth Schauer argues that a child, and even someone under twenty years of age, is not able to give informed consent to joining military. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Statement of Witness Elisabeth Schauer, at 90 (Apr. 7, 2009), http://www.icc-cpi.int/iccdocs/doc/doc662611.pdf.

120. The four safeguards specified in Article 3 of the Optional Protocol are:

> (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.

Optional Protocol, *supra* note 14, art. 3.

121. *See id.*

122. Bartlet, *supra* note 40.

123. *See Army 'Targeting Poorer Schools'*, BBC NEWS (Dec. 4, 2006), http://news.bbc.co.uk/1/hi/wales/6199274.stm; *see also* RECRUITMENT OF MINORS IN BRITISH ARMED FORCES, *supra* note 9, at 11.

forces. Moreover, recruits must be able to leave if they wish to do so.[124]

Article 3(1) of the Optional Protocol requires states to raise the legal age for voluntary recruitment to at least sixteen years of age. Upon ratification of the Optional Protocol, states must deposit a binding declaration setting out the standards in place to meet their legal obligations in pursuance of the Optional Protocol. The United Kingdom has adopted the minimum standard established in the Optional Protocol—recruitment from sixteen years of age onwards—and has failed to issue a declaration to abide by the higher standard of eighteen years of age. Further, the United Kingdom has deposited a declaration[125] allowing for sixteen year olds to be deployed.[126] Despite

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124. This is a highly debated issue in the United Kingdom. Whilst a recruit has a right to discharge "at the end of the first month of training and before six months have elapsed since enlistment" once that period has elapsed discharge is at the discretion of the commanding officer. THE SELECT COMMITTEE ON THE ARMED FORCES BILL, THE ARMED FORCES BILL: SPECIAL REPORT OF SESSION 2010–11, H.C. 779, at Ev 76. As a result, the Joint Committee on Human Rights has expressed its concern that this lack of right to leave might be in breach of the Optional Protocol. ARMED FORCES BILL, 2010–12, *supra*, note 80, ¶ 1.58; *see also* RECRUITMENT OF MINORS IN BRITISH ARMED FORCES, *supra* note 9, at 3–4. *See* Comm. on the Rights of the Child, Concluding Observations on Kingdom of Great Britain and Northern Ireland, transmitted in consideration of reports submitted by States Parties under Article 8 of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, ¶¶ 16–17, CRC/C/OPAC/GBR/CO/1 (Oct. 17, 2008) [hereinafter Concluding Observations: UK].

125. The Declaration reads:

> The United Kingdom of Great Britain and Northern Ireland will take all feasible measures to ensure that members of its armed forces who have not attained the age of 18 years do not take a direct part in hostilities.
>
> The United Kingdom understands that Article 1 of the Optional Protocol would not exclude the deployment of members of its armed forces under the age of 18 to take a direct part in hostilities where:
>
> a) there is a genuine military need to deploy their unit or ship to an area in which hostilities are taking place; and
>
> b) by reason of the nature and urgency of the situation:
>
> > i) it is not practicable to withdraw such persons before deployment; or

repeated calls by NGOs and the Committee on the Rights of the Child,[127] the United Kingdom has not amended its interpretative declaration, which has the effect of a reservation, to the aforementioned instrument. Although this provision of the Optional Protocol has been criticized for still allowing recruitment of children between sixteen and eighteen years of age,[128] states insisted upon it to keep the armed forces available as a source of employment, training, and continuing education for those leaving school early.[129] Additionally, it is argued that it would take a couple of years to train a soldier fully before sending him or her to a conflict theatre.[130]

During wars of national liberation, a number of children willingly and strategically joined armed groups. Undoubtedly, ideological attraction plays a significant role in the involvement of children in such conflicts[131] and this is why Additional Protocol I allows the direct participation in hostilities of children under fifteen years of age. The Commentary to the Additional Protocol I expounds that the Committee that designed this provision "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"[132] as "[i]t is difficult to moderate [the children's] enthusiasm and

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> ii) to do so would undermine the operational effectiveness of their ship or unit, and thereby put at risk the successful completion of the military mission and-or the safety of other personnel.

Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, Declaration upon Signature of the United Kingdom, *entered into force* Feb. 12, 2002, 2173 U.N.T.S. 222.

126. *See* Armed Forces (Enlistment) Regulations, 2009, S.I. 2009/2057, art. 4 (U.K.); *see also* Concluding Observations: UK, *supra* note 124, ¶¶ 12–19.

127. RECRUITMENT OF MINORS IN BRITISH ARMED FORCES, *supra* note 9; *see also* Concluding Observations: UK, *supra* note 124, ¶¶ 10–11; CHILD SOLDIERS INT'L, *supra* note 81, ¶ 4.

128. *See* HARVEY, *supra* note 51, at 28; Jay Williams, *The International Campaign to Prohibit Child Soldiers: A Critical Evaluation*, 15 INT'L J. HUM. RTS. 1072, 1076 (2011).

129. Breen, *supra* note 113, at 71–72.

130. *Id.* at 90–91.

131. One may nonetheless question how "voluntary" this type of involvement is.

132. PILLOUD ET AL., *supra* note 94, ¶ 3184.

their will to fight."[133] In such cases, the Commentary highlights that

> the authorities employing or commanding [children] should be conscious of the heavy responsibility they are assuming and should remember that they are dealing with persons who are not yet sufficiently mature, or even have the necessary discernment of discrimination. Thus they should give them the appropriate instruction on handling weapons, the conduct of combatants and respect for the laws and customs of war.[134]

This provision in international humanitarian law seems to allow recruiters, if prosecuted for recruitment of children under fifteen years of age, to raise the defense of consent by the child. However, the jurisprudence of various international criminal tribunals asserts that consent of an under fifteen year old child to taking part in the hostilities does not constitute a valid defense for a recruiter accused of recruitment.[135] In other words, whilst a child can voluntarily join an armed group, his or her enlistment is a punishable offense under international criminal law.[136]

In the "new wars," children join armed groups and armed forces for a range of reasons.[137] The main "push and pull factors"[138] can be divided in three broad categories: (1) "environmental factors," (2) "factors relating to the child's personal

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133. *Id.* ¶ 3185.

134. *Id.*

135. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Judgment, ¶¶ 613–17 (March 14, 2012), http://www.icc-cpi.int/iccdocs/doc/doc1379838.pdf; Prosecutor v. Fofana (*CDF Case*), Case No. SCSL-04-14-A, Appeals Judgment, ¶ 139 (May 28, 2008), http://www.sc-sl.org/LinkClick.aspx?fileticket=9xsCbIVrMlY%3d&tabid=194.

136. "Given that both (voluntary) enlistment and (coerced) conscription are ways of committing the same offence, the question of consent loses its relevance for the purposes of conviction." Roman Graf, *The International Criminal Court and Child Soldiers: An Appraisal of the* Lubanga *Judgment,* 10 JICJ 945, 956 (2012).

137. For an excellent overview, see Rachel Brett, *Adolescents Volunteering for Armed Forces or Armed Groups*, 85 IRRC 857, 859–62 (2003) (claiming that there are "five major factors in the decision of youngsters to join armed forces or armed groups" without being coerced: "war, poverty, education, employment and family").

138. For the origins of this expression, see Somasundaram, *supra* note 70, at 1268.

characteristics and histories," and (3) "trigger events."[139] Factors include economic hardship and poverty,[140] the lack of opportunities,[141] a sense of belonging, ideological attraction, feelings of revenge,[142] survival, the loss of parents and relatives able to protect them,[143] the need to find a safe environment,[144] the impression that one is able to act free of coercion, and thus be proactive rather than passive and victimized,[145] fear of being abducted,[146] etc. Children may also be sent by their families to defend the community[147] or to find a basic source of income. In other cases, school curricula contain military elements, which contribute to the indoctrination of the children who may wish to join "willingly," yet are arguably not fully able to understand the ideological nature of their decision or to adequately assess the implications of their decisions and actions.[148] It is the combination of these factors that accentuates and amplifies the

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139. Schmidt, *supra* note 116, at 52. Based on the conflicts in Sierra Leone and Liberia, William Murphy four categories of child solders: "coerced youth," "revolutionary youth," "delinquent youth," and "youth clientalism." Murphy, *supra* note 75, at 64–66.

140. MATTHEW HAPPOLD, CHILD SOLDIERS IN INTERNATIONAL LAW 13 (2005); Radhika Coomaraswamy, *The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict—Towards Universal Ratification,* 18 INT'L J. CHILD. RTS. 535, 536 (2010).

141. WESSELLS, *supra* note 107, at 50.

142. Diane Taylor, *I Wanted to Take Revenge*, GUARDIAN (July 6, 2006), http://www.guardian.co.uk/world/2006/jul/07/westafrica.congo; Coomaraswamy, *supra* note 140, at 536.

143. HAPPOLD, *supra* note 140, at 13; WESSELLS, *supra* note 107, at 49.

144. SINGER, *supra* note 65, at 64 (noting that "children may decide they are safer in a conflict group, with guns in their own hands, than going about by themselves unarmed.").

145. *See* Hughes, *supra* note 7, at 403.

146. Harendra de Silva, Chris Hobbs & Helga Hanks, *Conscription of Children in Armed Conflict—A Form of Child Abuse. A Study of 19 Former Child Soldiers*, 10 CHILD ABUSE REV. 125, 128 (2001).

147. "Societal attitudes, as advanced by community leaders, teachers and parents, and their peers can direct children to the conclusion that that the best way of . . . displaying maturity and becoming a full member of the collective is to join the struggle." HAPPOLD, *supra* note 140, at 140; *see also* Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Witness Testimony DRC-OTP-WWW-0046, at 18 (July 9, 2009), http://www.icc-cpi.int/iccdocs/doc/doc713215.pdf; *Child Solder Recruitment*, *supra* note 66, at 51 (illustrating example of children enlisting in the Kamajors in Sierra Leone).

148. *See* de Silva, Hobbs & Hanks, *supra* note 146, at 130.

child's willingness to take a part in the hostilities. Voluntary recruitment in this specific context is defined as not being abducted or physically forced to join a party to the conflict, as a "coerced choice." In her written submission to the ICC in the *Lubanga* case, the Special Representative stressed that "[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."[149] Whilst the Special Representative prefers to ignore the relevance of the variety of push and pull factors that lead a child into soldiering, others claim that along a continuum starting with informed consent and ending with abduction there are various degrees of choices.[150] As Rachel Brett aptly notes, "the degree of choice varied,"[151] and Alice Schmidt stresses, "children choose to join armed groups despite having alternatives that—under the given circumstances—are acceptable."[152] Also, a fair number of children who joined armed groups believed that they would be able to leave at any time or had no, or very little, idea of what war really entailed.[153]

3. Conscription

Conscripting children under fifteen years of age is clearly prohibited under international humanitarian and human rights law treaties, customary international humanitarian law,[154] and international criminal law.[155] Article 2 of Optional Protocol outlaws the compulsory recruitment of persons under the age of eighteen years. Whilst conscription is clearly banned

149. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Written Submissions of the United Nations Special Representative of the Secretary-General on Children and Armed Conflict, ¶ 14 (Mar. 18, 2008).

150. Whilst in social sciences it might be possible to conceive of voluntariness along a continuum or spectrum, in law, a distinction must unfortunately be made unless all participation is deemed lawful or unlawful. For a discussion on the possibility to think of voluntariness along a continuum or spectrum, see Schmidt, *supra* note 116, at 55–57.

151. Brett, *supra* note 137, at 863.

152. Schmidt, *supra* note 116, at 54.

153. Brett, *supra* note 137, at 863.

154. *See* HENCKAERTS & DOSWALD-BECK, *supra* note 91, at 485.

155. The Rome Statute provides that "'conscripting or enlisting children' into armed forces or groups constitutes a war crime in both international and non-international armed conflicts." *Id.* at 483 (citing Rome Statute, *supra* note 27, art. 8(2)(b)(xxvi), 8(2)(e)(vii)).

with regard to children under fifteen years of age, the question is whether it is also banned with regard to children between fifteen and eighteen years of age. Again, international human rights law raises the minimum age of permissible recruitment while other relevant branches of international law specify an age of fifteen.

Conscription is traditionally viewed as the prerogative of the state to require its nationals to take part in some form of national services, in this case, military service.[156] By definition, conscription is compulsory and, thus, coerced. Failure to comply with conscription often leads to imprisonment.[157] The great majority of states do not conscript individuals under eighteen years of age and the Optional Protocol specifies a minimum age of eighteen or more. Yet, despite the existence of legal safeguards set by states to combat forced recruitment, inefficiency, corruption, and structural inadequacies mar the system; "[a]s a result, forced recruitment occurs even in states where legislation is in place to prohibit compulsory military service before the age of eighteen."[158] One of the reasons for this is that many states do not properly document the age of people, which has the effect of facilitating the recruitment of minors as a state can always argue that it was not aware that the child was under eighteen years of age.

As explained earlier, conscription, in its contemporary understanding, encompasses abductions, forced recruitment, and forced military training.[159] The Trial Chamber of the Special Court of Sierra Leone explained in the *Armed Forces Revolutionary Council* ("AFRC") case that conscription should be interpreted as "encompass[ing] acts of coercion, such as abductions and forced recruitment . . . committed for the purpose of

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156. Prosecutor v. Brima (*AFRC Case*), Case No. SCSL-2004-16-T, Judgment, ¶ 734 (June 20, 2007), http://www.sc-sl.org/CASES/ProsecutorvsBrimaKamaraandKanuAFRCCase/TrialChamberJudgment/tabid/173/Default.aspx.

157. For examples, see situations in Germany until 2011, and also those in Finland and Russian Federation.

158. Stephanie Bald, *Searching for a Lost Childhood: Will the Special Court of Sierra Leone Find Justice for Its Children?*, 18 AM. U. INT'L L. REV. 537, 548 (2002).

159. Prosecutor v. Sesay (*RUF Case*), Case No. SCSL-04-15-T, Judgment, ¶¶ 1695, 1700, 1707 (Mar. 2, 2009), http://www.sc-sl.org/LinkClick.aspx?fileticket=D5HojR8FZS4%3D&tabid=215.

using them to participate actively in hostilities."[160] Even if children are not actually used in the conflict, their abduction with the aim of using them is sufficient to sustain a conviction for conscription.[161] The law in this area has been interpreted such that it applies to non-international armed conflicts.[162]

Although it is clear that no children under fifteen years of age under international humanitarian law or under eighteen years of age according to the Optional Protocol can be recruited, the reality is very different. Owing to the general lack of enforcement of such laws, e.g. punishment for armed groups when they recruit children, forced recruitment has become endemic in many of these conflicts (e.g., the conflict in Sierra Leone).[163]

4. Enlistment

On the other hand, enlistment, which is understood as allowing individuals to enroll to join an armed force or group,[164] is not clearly banned by international humanitarian law. To some extent, this lack of prohibition caters to the fact that not all children are forced into soldiering. As discussed earlier, many choose to join an armed group or a state's armed forces of their own volition.

According to international humanitarian law treaties, enlistment is only banned in a non-international armed conflict. Enlistment in an international armed conflict is allowed. Indeed, under Article 77(2) of Additional Protocol I, if such children voluntarily enlist in the armed forces, there is no obligation upon the state to refuse the new recruit.[165] The general prohibition of recruitment in non-international armed conflicts under Article 4(3) of Additional Protocol II is to be welcomed because the great majority of cases of child recruitment today take place within the context of non-international armed conflicts. That being said, customary international humanitarian

160. *AFRC Case*, Case No. SCSL-2004-16-T, ¶ 734.
161. *RUF Case*, Case No. SCSL-04-15-T, ¶ 1700.
162. *Id.* ¶ 194.
163. Aubrey F. Mitchell III, *Sierra Leone: The Road to Childhood Ruination Through Forced Recruitment of Child Soldiers and the World's Failure to Act*, 2 REGENT J. INT'L L. 81, 85–87, 102–03 (2003–04).
164. *AFRC Case*, Case No. SCSL-2004-16-T, ¶ 735.
165. *See* Additional Protocol I, *supra* note 25, art. 77(2).

law bans enlistment in all conflicts,[166] whilst the UNCRC and the Optional Protocol ban enlistment of children without referring to the type of conflict involved.[167]

An important aspect of the prohibition of enlistment is that international humanitarian law is binding upon armed forces and armed groups.[168] In contrast, the UNCRC, as a human rights law treaty, can only bind a state's armed forces.[169] As many contemporary conflicts are of non-international nature and pit armed opposition groups against each other, it is imperative that there are provisions relating to non-state actors. Hence, the Optional Protocol adopts a more demanding position, asserting that "[a]rmed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years."[170] Still, one of the main flaws of Article 4 of the Optional Protocol, and any human rights instruments in general, cannot bind non-state actors[171] as they cannot sign up to the agreements in the first place. The device used to ensure compliance of armed opposition groups with human rights law is by virtue of national law inasmuch as States are, in pursuance of the Optional Protocol, required to criminalize forced recruitment carried out by armed opposition groups.[172] Remarkably, the U.N. Secretary-General explains in *Children and Armed Conflict* that armed opposition groups are to be held to the same standards as those of the state in which they are fighting.[173] Indeed,

166. HENCKAERTS & DOSWALD-BECK, *supra* note 91, at 483–85.

167. Neither Article 38 of UNCRC nor Articles 1 through 4 of the Optional Protocol refers to the type of conflict involved.

168. *See* Annyssa Bellal, Gilles Giacca & Stuart Casey-Maslen, *International Law and Armed Non-State Actors in Afghanistan*, 93 IRRC 47, 52–63 (2011); Pascal Bongard & Jonathan Somer, *Monitoring Armed Non-State Actor Compliance with Humanitarian Norms: A Look at International Mechanisms and the Geneva Call Deed of Commitment,* 93 IRRC 673, 674–75 (2011).

169. Matthew Happold, *Protecting Children in Armed Conflict: Harnessing the Security Council's 'Soft Power,'* 43 ISR. L. REV. 360, 364 (2010).

170. Optional Protocol, *supra* note 14, art. 4(1).

171. *See* Mendez, *supra* note 12, at 230; *see also* Wasantha Seneviratne, *International Legal Standards Applicable to Child Soldiers*, 15 SRI LANKA J. INT'L L. 39, 41 (2003).

172. Optional Protocol, *supra* note 14, art. 4(2).

173. *See* U.N. Secretary-General, *Children and Armed Conflict: Rep. of the Secretary-General*, ¶ 30, U.N. Doc. S/2002/1299 (Nov. 26, 2002). The minimum standard, as spelled out in the UNCRC, Additional Protocol II, and the

as Matthew Happold notes "[w]hereas it is generally agreed that [non-state armed groups] have obligations in international humanitarian law, it remains disputed whether they are bound by international human rights law . . . ."[174]

As a result, it is generally agreed that, as a matter of customary international law, the recruitment of children under the fifteen years of age into armed forces and armed groups, whether in international or non-international armed conflict, is prohibited. No distinction is made as to whether recruitment was compulsory or voluntary. There might be an emerging norm barring the compulsory recruitment of children under eighteen years of age, but this does not seem to be universally accepted at the moment.[175]

B. Use and Participation of Children in Armed Conflict

In addition to the recruitment, conscription, and enlistment of children, international law also regulates children's participation in armed conflict. The type of legal framework that is applied in regulation of children's participation in such conflict, whether it be international humanitarian law, human rights law, international criminal law, or a combination of these, will determine which kinds of participation are prohibited.

The 1977 Additional Protocols were the first international legal instruments to regulate the participation of children under fifteen years of age. According to Article 77(2) of Additional Protocol I, children are barred from "tak[ing] a direct part in hostilities" in international armed conflict.[176] In contrast, Arti-

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Rome Statute is that "children under age 15 shall not be conscripted or enlisted into armed groups or used by them to participate actively in hostilities in either international or internal armed conflicts." *Id.* The higher standard regarding non-state armed groups is from the Optional Protocol that prohibits the recruitment and use of children under the age of eighteen. *See* Optional Protocol, *supra* note 14, art. 1.

174. Happold, *supra* note 169, at 374.

175. Whilst some armed opposition groups agree that no child below the age of eighteen years old should be recruited, others prefer to set a lower threshold. For the discussion on the position of armed opposition groups on the recruitment of children, see generally Jonathan Somer, *Engaging Armed Non-State Actors to Protect Children from the Effects of Armed Conflict: When the Stick Doesn't Cut the Mustard*, 4 J. HUM. RTS. PRAC. 106 (2012).

176. The Commentary to Article 51(3) Additional Protocol I explains that "'direct' participation means acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy

cle 4(3)(c) of the Additional Protocol II does not use the adjective "direct," thus encompassing indirect functions such as "gathering information, transmitting orders, transporting munitions or foodstuffs or committing acts of sabotage."[177] This distinction in terminology prompted the ICRC to comment that since "[t]he intention of the drafters of the article was clearly to keep children under fifteen outside armed conflict,"[178] indirect participation in *international* armed conflict should also be ruled out. A resolution adopted at the 26th International Conference of the Red Cross and Red Crescent in 1995 reinforces this position: "parties to conflict . . . take every feasible step to ensure that children under the age of 18 years do not take part in hostilities," thereby refraining from using any adjective such as "direct" or "indirect" before "take part."[179] The Abo Turku declaration, which is considered to encapsulate minimum standards of humanity, also stresses that children should not take part in acts of violence, thereby setting a higher standard than the "direct participation" expression enshrined in Additional Protocol I.[180] Rule 137 of the Study of Customary Inter-

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armed forces." PILLOUD ET AL., *supra* note 94, ¶ 1944. This definition is reiterated verbatim in Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Judgment and Sentence, ¶ 99 (Dec. 6, 1999), http://www.unictr.org/Portals/0/Case/English/Rutaganda/judgement/991206.pdf. In 2009, the International Committee of the Red Cross issued a publication with the aim to assist in delimiting the borders between direct and other types of participation in hostilities. *See generally* NILS MELZER, INTERPRETIVE GUIDE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (2009), *available at* http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf. For a discussion on this publication, see generally Michael N. Schmitt, *Direct Participation in Hostilities: Perspectives on the ICRC Interpretive Guidance: Deconstructing Direct Participation in Hostilities: The Constitutive Elements*, 42 N.Y.U. J. INT'L L. & POL. 697 (2009–10).

177. Maria Teresa Dutli, *Captured Child Combatants*, 30 IRRC 421, 423 (1990).

178. "The intention of the drafters of the article was clearly to keep children under fifteen outside armed conflict, and consequently they should not be required to perform such services." PILLOUD ET AL., *supra* note 94, ¶ 3187.

179. ICRC, *Resolution 2: Protection of the Civilian Population in Period of Armed Conflict*, § C(d), 26th Int'l Conference (Jul. 12, 1995), *available at* http://www.icrc.org/eng/resources/documents/resolution/26-international-conference-resolution-2-1995.htm.

180. Comm. on Human Rights Declaration of Minimum Humanitarian Standards (Declaration of Turku), 51st Sess., Jan. 30–Mar. 10, 1995, reprinted in report of the Sub-Commission on Prevention of Discrimination and Pro-

national Humanitarian Law confirms that the expression "participat[ion] in hostilities" encompasses both direct and indirect acts that affect the enemy forces.[181]

International human rights law also prohibits children's participation in armed conflict. Article 38 of the UNCRC prohibits the *direct* participation of children under fifteen years of age in hostilities.[182] The Optional Protocol uses similar wording but stipulates that the age be eighteen years.[183] Notwithstanding, one may argue that due to the wording used (i.e., "do not take *direct* part in hostilities") these provisions seem to allow for, or at least do not preclude, indirect participation in hostilities.[184] In this sense, there is congruence among the UNCRC, the Optional Protocol, and international humanitarian law instruments in the sense that they all forbid direct participation in hostilities. Arguably, the relevant provision in Additional Protocol I that governs international armed conflict should be interpreted as to align it with customary international humanitarian law.[185] Therefore, it is argued that the *lex specialis* (i.e., the Additional Protocol I and customary international humanitarian law) goes further than human rights law in relation to the *types* of participation by children in armed conflict that it prohibits.

Additional Protocol II, by virtue of the *lex specialis* character of international humanitarian law, supersedes the UNCRC and its Optional Protocol for those cases of non-international armed conflict governed by it, which means that all forms of participation are prohibited since Additional Protocol II bans all forms of participation. Nevertheless, to the extent that Additional

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tection of Minorities on its 46th Session, art. 10, U.N. Doc. E/CN.4/1995/116 (1995); *see also* Theodor Meron & Allan Rosas, *A Declaration of Minimum Humanitarian Standards*, 85 AM. J. INT'L L. 375, 375–81 (1991).

181. *See* HENCKAERTS & DOSWALD-BECK, *supra* note 91, at 485–88.

182. As previously explained, the UNCRC does not bind non-state entities such as armed opposition groups. A notable exception is the Sudan People's Liberation Movement and the South Sudan Independence Movement which in July 1995 committed themselves to the UNCRC (Save the Children Sweden, 1996).

183. *See* Optional Protocol, *supra* note 14, art. 1.

184. Seneviratne, *supra* note 171, at 43.

185. By virtue of the lex posterior rule and Article 31(3) of the Vienna Convention on the Law of Treaties, Additional Protocol I should be interpreted in light of subsequent rules. Vienna Convention on the Law of Treaties art. 31(3), May 23, 1969, 1155 U.N.T.S. 331.

Protocol II will not apply because of non-international armed conflict's inability to reach the threshold set out in Article 1(1), then Article 38 of the UNCRC and Article 1 of the Optional Protocol will be the only legal instruments that will apply in a non-international armed conflict that falls within the scope of Common Article 3 of the Geneva Conventions.[186] Consequently, one must refer to the norms established in customary international humanitarian law that prohibit both the direct and indirect participation of children in non-international armed conflict. Again, human rights law is less restrictive than international humanitarian law; however, the difference lies in the set age because the Optional Protocol prohibits the direct participation of children under eighteen years of age.

Whilst binding legal instruments such as treaties and customary international law, whether relating to international humanitarian law or human rights law, are of utmost importance, it is crucial to examine non-binding instruments as they often show a trend in international law. In the instance, non-binding instruments such as the Paris Commitments adopted in February 2007[187] and the 1997 Cape Town Principles[188] have broadened the definition of a child taking part in the hostilities. Both instruments deal with children below eighteen years of age in armed conflict. Yet, they differ in their approaches. Paragraph 6 of the Paris Commitments employs the expression "us[ing] them to participate actively in hostilities," which indicates that participation must take a direct

186. As the threshold of applicability for non-international armed conflicts in Additional Protocol II is high, the overwhelming majority of non-international armed conflicts fall within the scope of Common Article 3 of the Geneva Conventions.

187. ICRC, *The Paris Commitments Consolidated Version: The Paris Commitments to Protect Children from Unlawful Recruitment or Use by Armed Forces or Armed Groups*, ¶¶ 6, 11 (2007), *available at* http://www.icrc.org/eng/assets/files/other/the-paris-commitments.pdf. It should be noted that the ICRC uses this definition. *See* ICRC, *Child Soldiers and Other Children Associated with Armed Forces and Armed Groups*, at 2, Publication Ref. 0824 (2012), *available at* http://www.icrc.org/eng/assets/files/other/icrc-002-0824.pdf.

188. United Nations Children's Fund [UNICEF], *Cape Town Principles and Best Practices Adopted at the Symposium on the Prevention of Recruitment of Children into the Armed Forces and on Demobilization and Social Reintegration of Child Soldiers in Africa* (Apr. 27–30, 1997), *available at* http://www.unicef.org/emerg/files/Cape_Town_Principles(1).pdf [hereinafter *Cape Town Principles*].

form—though "active" is considered to be broader than "direct."[189] The term "used" seems to indicate that the focus shifts away from the children (i.e., children take part in the hostilities) and turn to those who are making them take an active part in the hostilities (i.e., individuals "use" children). Moreover, the choice of the word "use" rather than "participation" denotes an objectification of the child that clearly impacts on how recruitment is perceived from the perspective of those recruiting children rather than of the children themselves.

Going a step further, the 1997 Cape Town Principles concentrate on the concept of a child soldier, making no distinction between direct/active and indirect participation.[190] Under the Principles, a child soldier is defined as "[a]ny person under 18 years of age who is part of any kind of regular or irregular armed force or armed group in any capacity, including but not limited to cooks, porters, messengers and anyone accompanying such groups, other than family members. It includes girls recruited for sexual purposes and forced marriage. It does not, therefore, only refer to a child who is carrying or has carried arms."[191] Machel also argues for such a definition in her 2001 follow-up book,[192] and it certainly seems to better reflect the myriad of tasks in which children are involved.[193] But does this mean that all forms of participation in hostilities turn children into child soldiers?[194]

A growing body of international criminal law deals with the use of children under fifteen years of age in armed conflict. According to the Rome Statute, it is a crime to compel children to

189. For the distinction between "direct" and "active," see Waschefort, *supra* note 73, at 194–95, 197–98.

190. As Janet McKnight elucidates, the distinction between direct and indirect participation was abandoned. *See* McKnight, *supra* note 54, at 119.

191. *Cape Town Principles*, *supra* note 188, at 8 (under the heading "Definitions").

192. GRAÇA MACHEL, THE IMPACT OF WAR ON CHILDREN: A REVIEW OF PROGRESS SINCE THE 1996 UNITED NATIONS REPORT ON THE IMPACT OF ARMED CONFLICT ON CHILDREN 7 (2001).

193. See discussion below for the types of activities in which children are involved.

194. Janet McKnight explains that "[p]arties disagree on whether international law is meant to protect only child combatants that directly participate in battle or whether such protection extends to all children involved in the conflict." McKnight, *supra* note 54, at 115.

participate in armed conflict.[195] During the negotiation process, it was argued that the expression "participate actively,"[196] as enounced in the Rome Statute in Articles 8(2)(b)(xxvi) under the context of international armed conflict and 8(2)(e)(vii) under the context of non-international armed conflict,[197] covers not only direct participation in combat activities but also military-related activities such as "scouting, spying, sabotage, and the use of children as . . . couriers . . . ."[198] This also includes such activities as taking supplies to the front line.[199] The word "using" reinforces the wish of the drafters of the Rome Statute to prohibit the participation of children in hostilities in general, rather than in combat only. Activities "unrelated to the hostilities such as food deliveries to an airbase [or] the use of domestic staff in an officer's married accommodation,"[200] however, do not qualify as participation in hostilities.[201] This infers that

195. *See* Rome Statute, *supra* note 27, art. 8(2)(b)(xxvi), 8(2)(e)(vii).

196. In international criminal law, the word "actively" rather than "directly" is used. In IHL both "directly" and "actively" are used. Due to space constraints, it is not possible to elaborate here on the difference in terminology. For an in-depth discussion on this subject, see Waschefort, *supra* note 73, at 194–95, 197–98.

197. *See* Rome Statute, *supra* note 27, art. 8(2)(b)(xxvi), (2)(b)(e)(vii). Here, it must be noted that the threshold of applicability for non-international armed conflicts is lower since it does not require that the conflict fall within the purview of Additional Protocol II. The crime of using children in armed conflict may also be committed in Geneva Convention Common Article 3 conflicts.

198. United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, June 15–July 17, 1998, *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, at 21, n.12, U.N. Doc. A/CONF.183/2/Add.1 (April 14, 1998), *available at* http://www.un.org/law/n9810105.pdf [hereinafter *Report of the Preparatory Committee*]. This interpretation is confirmed in the Lubanga judgment. *See* Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Judgment, ¶¶ 624–27 (March 14, 2012), http://www.icc-cpi.int/iccdocs/doc/doc1379838.pdf.

199. The Special Court for Sierra Leone added that carrying looted goods is also tantamount to active participation in the hostilities. Prosecutor v. Taylor, Case No. SCSL-03-01-T, Judgment, ¶ 1546 (May 18, 2012).

200. *Report of the Preparatory Committee*, *supra* note 198, at 21 n.12.

201. *See* Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges, ¶ 262 (Jan. 29, 2007), http://www.icc-cpi.int/iccdocs/doc/doc266175.pdf. However, in the *Taylor* case, the Special Court for Sierra Leone explained that if "a clear link between the [food-finding] mission and the hostilities" can be demonstrated, this constitutes active participation in the hostilities. *Taylor*, Case No. SCSL-03-01-T, ¶ 1479.

domestic labor, cooking, and other similar activities are therefore not prohibited by international law. Although these activities are "vital for group survival in terms of logistics,"[202] they do not appear to fall within the scope of the prohibition. That being said the Trial Chamber in the *Lubanga* case appears to have widened the remit of the prohibition as it replaced the test of active participation by one relating to exposure to danger.[203]

An unintended consequence of broadly-defined "active participation" in hostilities is that children might then become legitimate targets for military operations,[204] as the Trial Chamber of the Special Court for Sierra Leone stated in the Revolutionary United Front case[205] and the *Taylor* case,[206] and as the ICC stated in the *Lubanga* case.[207] For this reason, one must be mindful not to give too broad an interpretation to the concept of "active participation in hostilities," and apply it in an international humanitarian law context since this would correspondingly reduce the number of children who would be legally protected from direct attack.[208] For example, the use of children to commit crimes against civilians is deemed to constitute active participation in hostilities, a position that is understandable as

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202. FLORENCE TERCIER HOLST-RONESS, ICRC, VIOLENCE AGAINST GIRLS IN AFRICA DURING ARMED CONFLICTS AND CRISES (REPORT AT SECOND INTERNATIONAL POLICY CONFERENCE ON THE AFRICAN CHILD: VIOLENCE AGAINST GIRLS IN AFRICA, MAY 11–12, 2006), 14, *available at* http://www.icrc.org/eng/assets/files/other/international-policy-conference.pdf (referring to activities such "cooking, fetching water and wood, cleaning, caring for the sick and wounded.").

203. "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." Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Judgment, ¶ 820 (March 14, 2012), http://www.icc-cpi.int/iccdocs/doc/doc1379838.pdf.

204. *See* Graf, *supra* note 136, at 963–64.

205. *See* Prosecutor v. Sesay (*RUF Case*), Case No. SCSL-04-15-T, Judgment, ¶ 1723 (Mar. 2, 2009), http://www.sc-sl.org/LinkClick.aspx?fileticket=D5HojR8FZS4%3D&tabid=215.

206. *Taylor*, Case No. SCSL-03-01-T, ¶¶ 1459, 1604.

207. "All of [children's] activities [that support combatants], which cover either direct or indirect participation, have an underlying common feature: the child concerned is, at the very least, a potential target." Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Judgment, ¶ 628 (March 14, 2012), http://www.icc-cpi.int/iccdocs/doc/doc1379838.pdf.

208. Waschefort, *supra* note 73, at 200.

such acts of violence are directly linked to hostilities.[209] The Trial Chamber in the *Lubanga* case explained that "[t]he decisive factor, therefore, in deciding if 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 as a potential target."[210] In other words, a sweeping statement that a child is "used in hostilities" because any of his or her activities actively contribute to the hostilities is ill advised. As long as children are involved in conflict, it might not be sensible to broaden the concept of a child soldier in international humanitarian law too far and refer to "active" rather than "direct" participation in hostilities. This reveals that the current liberal approach of the international community towards the child soldier phenomenon (e.g., definition such as the one enshrined in the Cape Town Principles) is at odds with international humanitarian law and the realities of war; this concept appears to be better grasped by international criminal tribunals.

III. THE DISCOURSE CONDEMNING CHILD SOLDIERING: A "POLITICS OF AGE"

David M. Rosen argues that "the 'problem' of child soldiers . . . derives not from any new phenomenon of young people being present on the battlefield but, rather, from an emerging transnational 'politics of age' that shapes the concept of 'childhood' in international law."[211] As demonstrated earlier, the child soldier phenomenon is not new; in the past, those young people taking part in the hostilities were not branded "child soldier" but "brave young men" or young "heroes."[212] The key explanation for this seems to be the adoption of a human rights discourse, especially a discourse of children's rights, rather than an international humanitarian law framework. This discourse stems from the liberal Western values that define childhood[213]

209. *Taylor*, Case No. SCSL-03-01-T, ¶ 1604.
210. *Lubanga*, Case No. ICC-01/04-01/06, ¶ 628.
211. Rosen, *supra* note 18.
212. *See* Lee, *supra* note 21, at 3.
213. As Nancy Kendall explains, "international definitions of childhood and vulnerability have been critiqued as rooted in Western ideas about individuals and their relationships." Nancy Kendall, *Gendered Moral Dimensions of Childhood Vulnerability*, 2 CHILD. AFR. 26, 27 (2010).

as a long period of innocence and fun,[214] and it aims to spread such values universally. Moreover by taking a human rights approach to the issue of child soldiering, the liberal discourse becomes a humanitarian one that indistinctively strips children of their autonomy and thus ability to be agents of their own lives and portrays them as innocent victims.

A. Universality

The first main factor for this change in the liberal discourse is a re-conceptualization of childhood as "a particular generational and cultural space."[215] The current state of international law models is based on the assumption that "childhood is different from adulthood and that it requires special protection,"[216] for children are perceived "as defenceless, unable to protect themselves and therefore dependent" on others.[217]

International humanitarian law takes two seemingly contradictory approaches in this regard. On the one hand, it offers special protection to children (new-born,[218] children under seven,[219] children under twelve,[220] children under fifteen,[221] and

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214. Hart, *supra* note 10, at 219–20 (noting that under the United Nations Convention on the Rights of the Child, a childhood is intended to last until the age of eighteen); Pupavac, *supra* note 53 (noting that "a prerequisite for the Western protective model of childhood [is] . . . 'happiness, love and understanding.'").

215. James & James, *supra* note 11, at 31–32; *see also* Happold, *supra* note 169, at 361 (arguing that "perceptions of the boundaries and dimensions of childhood have changed.").

216. *See* Kendall, *supra* 213, at 27; Breen, *supra* note 113, at 73; McNee, *supra* note 31, at 20 (quoting Mary Galbraith, *Hear My Cry: A Manifesto for an Emancipatory Childhood Studies Approach to Children's Literature*, 25 LION & UNICORN 187, 190 (2001)); RECRUITMENT OF MINORS IN BRITISH ARMED FORCES, *supra* note 9, at 9–14. Moreover, the way we see children and "the ways we behave toward them . . . shape" a child's experience as a child and his/her involvement with the adult world. James & James, *supra* note 11, at 27.

217. Julia Fionda, *Legal Concepts of Childhood: An Introduction*, *in* LEGAL CONCEPTS OF CHILDHOOD 1, 9 (Julia Fionda ed., 2001).

218. *See* Geneva Convention IV, *supra* note 24, art. 17 (noting "maternity cases").

219. *See id.* art. 14 (prescribing access for children under seven and their mothers to hospital and safety zones); *see also id.* art. 38(5) (mothers of children under seven years benefit from preferential treatment).

220. *See id.* art. 24 (wearing of identification to preserve their identity in case they are separated from their parents).

children under eighteen[222]). On the other, the Geneva Conventions, the Additional Protocols, and customary international humanitarian law do not differentiate between children and adults who take a direct part in the hostilities. When children are involved in hostilities, they are considered as combatants in international armed conflicts or persons taking a direct part in the hostilities[223] who can be targeted.[224] And if captured, the children benefit from the treatment of prisoners of war in international armed conflicts[225] or if in non-international armed conflicts, they can be captured and prosecuted for taking part in the hostilities.[226] What international humanitarian law prohibits is the recruitment of children, thus pointing the finger at those who recruit them. Children as such are not violating international humanitarian law by taking a direct part in the hostilities. Whilst this indicates that international humanitarian law is rather blind to the notion of childhood, in contradistinction to adulthood, once children are participants, this position fails to acknowledge that international humanitarian law seeks to prevent the participation of children under fifteen years of age in armed conflict in the first place and, thus, in-

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221. *See id.* art. 14 (prescribing access for them and their mothers to hospital and safety zones); *id.* art. 23 (provision of relief supplies); *id.* art. 24 (child welfare facilities); *id.* art. 38(5) (preferential treatment).

222. *See id.* art. 68(4) (protection against the death penalty); Additional Protocol I, *supra* note 25, art. 77(5); Additional Protocol II, *supra* note 26, art. 6(4).

223. Stuart Maslen, *Kinder sind keine Soldaten—politische und rechtliche Aspekte des Phänomens Kindersoldaten* [*Children Are Not Soldiers—Political and Legal Aspects of the Phenomenon of Child Soldiers*], *in* FRIEDRICH-EBERT-STIFTUNG & UNICEF, *supra* note 65, at 23, 25.

224. When children participate in hostilities, they "lose their inviolability as non-combatants; indeed, they become 'legitimate' military targets, individuals whose death or disablement result in that weakening of the armed forces of the enemy which is the only legitimate aim in war." GUY GOODWIN-GILL & ILENE COHN, CHILD SOLDIERS: THE ROLE OF CHILDREN IN ARMED CONFLICT 70 (1994).

225. The Commentary on the Additional Protocols explains that "[t]heoretically prisoners of war may be very young or very old." PILLOUD ET AL., *supra* note 94, ¶ 3194.

226. Individuals, whether adults or children, who take part in hostilities in non-international armed conflicts can, under domestic law, be detained and prosecuted for taking part in the hostilities. *See* David M. Rosen, *Who Is a Child? The Legal Conundrum of Child Soldiers*, 25 CONN. J. INT'L L. 81, 88–90 (2009).

stinctively disapproves of their involvement in hostilities.[227] In other words, international humanitarian law distinguishes between childhood and adulthood, and it follows the international trend set in recent years by international human rights law.

The key is to demarcate the Rubicon between childhood and adulthood. Technically, there are two ways to do this: either to set a specific age for adulthood or to link adulthood to certain skills and abilities. As Schmidt argues, "[i]n liberal thought, chronological age draws a clear demarcating line between childhood and adulthood,"[228] which is a position found also in the international legal and humanitarian discourse. The new political agenda propagating the "straight eighteen" position[229] aims to set up a new cultural and legal norm that will lead to a single international definition of childhood as beginning at birth and ending at age eighteen.[230] The most common age for individuals to obtain special protections under international humanitarian law is fifteen years of age.[231] A literal interpretation[232] of the relevant provisions demonstrates that international humanitarian law considers a child to be anyone under eighteen years of age.[233] Rosen argues that this holds "open the possibility that the concept of 'childhood' could be extended beyond [the age of fifteen]."[234] Moreover, "[t]o adopt a general notion of 'child' in the absence of a definition, as being relevant only those under 15 years of age, would be detrimental to the

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227. *See* ICRC, *Plan of Action Concerning Children in Armed Conflict*, at 3–4, Ref. 95/CD/10/1 (Feb. 12, 1995), *available* at http://www.icrc.org/eng/assets/files/other/movement-plan-of-action-children-1995.pdf [hereinafter *Plan of Action*] ("Objective 1.2.[:] Prevent children from joining armed forces or groups by offering them alternatives to enlistment.").

228. Schmidt, *supra* note 116, at 57.

229. "[I]nternational advocacy has now created a human rights framework, that raises the minimum age for recruitment and participation in hostilities from fifteen to eighteen." Coomaraswamy, *supra* note 140, at 536; *see also* Lee, *supra* note 21.

230. *See* Rosen, *supra* note 18, at 296–97; *see also* Matthew Happold, *Child Soldiers: Victims or Perpetrators?*, 29 U. LA. VERNE L. REV. 56, 69–70 (2008).

231. *See* HENCKAERTS & DOSWALD-BECK, *supra* note 91, at 479–82.

232. *See generally* Daniel Helle, *Optional Protocol on the Involvement of Children in Armed Conflict to the Convention on the Rights of the Child*, 82 IRRC 797 (2000).

233. The Conventions refer to "persons under 18 years of age" and "children under 15" thereby implying that there are children above fifteen years of age. *See id.* at 803–04; Fox, *supra* note 13, at 31.

234. Rosen, *supra* note 18, at 301.

interest of the child and thus not in conformity with the spirit underlying international humanitarian law."[235]

Nevertheless, the Commentaries to the relevant treaty provisions do not seem to entirely support this standpoint. The Commentary to Article 14 of the Fourth Geneva Convention explains that the age of fifteen was set to match the "physical and mental development of children,"[236] though Article 77 of Additional Protocol I concedes that "some flexibility is appropriate, for there are individuals who remain children, both physically and mentally, after the age of fifteen."[237] Therefore, it is difficult to rigidly conclude for purposes of international humanitarian law that a child is simply anyone under eighteen years of age.

Furthermore, whereas international humanitarian law does not prohibit the recruitment and participation of children above fifteen years of age, the ICRC, together with the National Red Cross and Red Crescent Societies, considers that no children under eighteen years of age should be recruited or used in hostilities.[238] This, of course, follows the Optional Protocol and the latest position in international human rights law that define children as persons younger than eighteen years of age. For example, the 1995 Plan of Action Concerning Children in Armed Conflict shows that the International Movement of the Red Cross and Red Crescent militates in favor of no recruitment and no use of children under the age of eighteen.[239] Should international humanitarian law follow a policy that is congruent with international human rights law? This would be difficult to achieve because, interestingly, some of the opponents to the straight eighteen approach are liberal states such as the United States of America and the United Kingdom even though they have ratified the Optional Protocol.

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235. Helle, *supra* note 232, at 804.

236. OSCAR M. UHLER ET AL., COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949: IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 126 (Jean Pictet ed., 1958).

237. PILLOUD ET AL., *supra* note 94, ¶ 3179.

238. *Plan of Action*, *supra* note 227, at 1 ("Commitment 1: To promote the principle of non-recruitment and non-participation in armed conflict of children under the age of 18 years."); *see also* ICRC, *Peace, International Humanitarian Law and Human Rights*, § 1.5, Council of Delegates Res. No. 8 (Nov. 27, 1997).

239. *Plan of Action*, *supra* note 227, at 1.

The straight eighteen approach appears to contradict established cultural and local norms. Given that international human rights law is based on universal ethical standards,[240] some claim that the straight eighteen approach does not acknowledge local and regional cultures and traditions, including differing views as to who is a child and who is an adult.[241] Hence, a contextual approach that pays heed to "the culturally constructed" and developed ideas and "practices of childhood versus adulthood"[242] might be more appropriate in this area. Remarkably, this is also the approach taken by Article 1 of the UNCRC, since this provision states that adulthood can be reached before eighteen years of age if majority is attained earlier in a specific state, thus allowing states to set an age for majority that is in line with cultural and social norms.[243] Contextualists, who interpret the law by paying particular attention to the social and cultural context in which norms are applied, contend that the cut-off age between childhood and adulthood needs to be challenged.[244] Initiation rites, culturally scripted phenomena that are not determined by an abstract age, are the true markers of the passage into adulthood.[245] Conspicuously, there is a difference between the categorizations and definitions made by local communities and those established by the international legal discourse.[246]

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240. "[S]ome basic human goods span the considerable diversity of modern cultures and support a set of ethical standards that are universal at least for the world as we know it and human beings as we know them." Amy Gutmann, *The Challenge of Multiculturalism in Political Ethics*, 22 PHIL. & PUB. AFF. 171, 193 (1993).

241. *See generally* Rosen, *supra* note 18; *Child Soldier Recruitment*, *supra* note 66.

242. Fox, *supra* note 13, at 43.

243. UNCRC, *supra* note 22.

244. *See generally* Rosen, *supra* note 18; *Child Soldier Recruitment*, *supra* note 66.

245. "One of the most important of these differences was that communities did not view 18 as the age at which children suddenly transitioned to adulthood." Kendall, *supra* 213, at 32; *see also Child Soldier Recruitment*, *supra* note 66, at 52.

246. *See* McKnight, *supra* note 54, at 125. This discourse informs and is fed by "researchers [who] tend to assume a 'universal decontextualized model of child development.' That is, researchers tend to forget that 'childhood, adolescence and adulthood are . . . socially defined statuses which include social expectations that differ across cultures.'" ED CAIRNS, CHILDREN AND POLITICAL VIOLENCE 166 (1996); *see also* Lee, *supra* note 21, at 8.

Anthropological research underwrites this assertion, stressing that "there are a multiplicity of childhoods, each culturally codified and defined by age, ethnicity, gender, history, location, and so forth."[247] Since law is applied within a specific context, ignoring such context whilst drafting universal norms inevitably leads to discrepancies between the state of the law and its application.[248] The importance of cultural legitimacy of international human rights norms is overlooked.

While the efforts of the NGO community to limit the extent and number of individuals embroiled in armed conflicts must be praised, it should be stressed that NGOs and political groups discount the "more varied and complex local understandings of children and childhood found in anthropological research."[249] Article 1 of the UNCRC acknowledges this assertion by leaving states some leeway in deciding when majority is attained.[250] The definition of a child soldier under UNCRC clashes with local understandings of the involvement of young people in armed conflicts.[251] For example, anthropologists point out that "[i]t is a misnomer in many parts of Africa to call a 14-year-old carrying an AK-47 a child soldier since local people may regard that young person as an adult"[252] and that childhood and military life are not necessary understood as either incompatible or contradictory.[253] Moreover, the demography of African countries, where the population is mainly comprised of children—individuals under eighteen[254]—helps to explain the fact that children there often take on earlier adult responsibili-

247. Rosen, *supra* note 18, at 297.

248. *See* Jonasen, *supra* note 42, at 316.

249. Rosen, *supra* note 18.

250. "For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier." UNCRC, *supra* note 22, art. 1.

251. *See* Rosen, *supra* note 18, at 297.

252. Michael Wessells & Davidson Jonah, *Recruitment and Reintegration of Former Youth Soldiers in Sierra Leone: Challenges of Reconciliation and Post-accord Peacebuilding*, *in* TROUBLEMAKERS OR PEACEMAKERS? YOUTH AND POST-ACCORD PEACEBUILDING 27, 29 (Siobhan McEvoy-Levy ed., 2006).

253. For example, "[t]he Dinka of the Sudan initiated boys into warriorhood between ages 16 and 18." Rosen, *supra* note 18, at 297.

254. *See* Schmidt, *supra* note 116, at 49–50.

ties[255] and are more politically and socially aware than their counterparts in the West. African children are also often entrusted with responsibilities that Western liberal culture may consider as an abuse of their rights even though they are acceptable under certain cultural contexts.[256] For example, children may assist "relatives on market stalls and in small family businesses."[257] Street vending and running errands are also common tasks given to children.[258] Also, in this context, adolescence is defined as "a pre-adult phase."[259] Nonetheless, it must be borne in mind that the danger to which children are exposed as soldiers can hardly be "justified by arguments based on cultural and regional variations regarding the maturity of child soldiers."[260]

The approach adopted by international humanitarian law is one that seems to align better with the views of contextualists because it sets the age of childhood in relation to recruitment and participation in hostilities at fifteen rather than eighteen years of age. As the Commentary to Additional Protocol II explains, "[t]he moment at which a person ceases to be a child and becomes an adult is not judged in the same way everywhere in the world. Depending on the culture, the age may vary between about fifteen and eighteen years."[261] Aware of the significant cross-cultural variation in the ages of childhood, the drafters of Additional Protocol II could not agree to raise the age of recruitment and participation to eighteen years of age because national legislations were too divergent.[262] Similarly, the bulk of the discussions that took place during the negotiations of Additional Protocol I focused on cultural and regional

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255. Farkhanda Zia-Mansoor, *The Dilemma of Child Soldiers: Who is Responsible?*, 16 KINGS C.L.J. 388, 389 (2005); *see also* Schmidt, *supra* note 116, at 58.

256. *See generally* Chris A. Ike & Kwaku Twumasi-Ankrah, *Child Abuse and Child Labour Across Culture: Implications for Research, Prevention and Policy Implementation*, 14 J. SOC. DEV. AFR. 109 (1999).

257. Sylvia Chant & Gareth A. Jones, *Youth, Gender and Livelihoods in West Africa: Perspectives from Ghana and The Gambia*, 3 CHILD. GEOGRAPHIES 185, 190 (2005).

258. *Id.*

259. Stark, Boothby & Ager, *supra* note 6.

260. Breen, *supra* note 113, at 79.

261. PILLOUD ET AL., *supra* note 94, ¶ 4549.

262. *Id.* ¶ 4556.

variations in relation to child soldiering.[263] Consequently, the age of fifteen was adopted as the lowest common denominator.

B. Autonomy

When a rights-based approach is adopted in relation to child soldiers, one has to address the concept of autonomy upon which the liberal human rights enterprise is founded. In a modern world led by liberal thoughts, the individual is conceived as someone who has the capacity and autonomy to act. The individual, who is viewed as independent and self-sufficient,[264] is taken to be an essentially rational actor,[265] someone who is able to contribute to a society[266] that values his or her capacity to act. Autonomy literally means living by one's own law; it is the ability to make certain decisions for oneself without undue interference from others. According to liberal thought, "[t]he individual is . . . attributed with knowledge of his own best interests and the ability to pursue them rationally."[267]

This discourse, however, is difficult to apply to children who are viewed as not having fully developed autonomy even though the UNCRC clearly spells out in its Article 12 that "States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child."[268] It is at this point where the liberal discourse seems to contradict itself; on the one hand liberals wish chil-

263. *See id.* ¶ 3179 (noting that "[t]he age of puberty varies, depending on climate, race and the individual," thereby again taking into account the broader context); Breen, *supra* note 113, at 79.

264. "Independence and self-sufficiency are set up as transcendent values, attainable aspirations for all members of society." Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 AM. U.J. GENDER SOC. POL'Y & L. 13, 17 (2000).

265. GOODWIN, *supra* note 21, at 37.

266. Marc-Henry Soulet, *La vulnérabilité comme catégorie de l'action publique* [*Vulnerability as a Category of State Intervention*], 2 PENSÉE PLURIELLE 49, 50–51 (2005).

267. GOODWIN, *supra* note 21, at 37.

268. UNCRC, *supra* note 22, art. 12(1).

dren to enjoy their autonomy and their rights[269] but on the other hand, they—probably influenced by a more humanitarian discourse—regard children as innocent human beings whose safety and rights should be protected and promoted and whose needs must be adequately addressed.[270] Liberals often view children as victims, as vulnerable individuals who need to be helped by adults as adults appear to know best what their interests are. As a result, the discourses of children as victims and individuals as autonomous agents of their own fate clash. As Alice Macdonald summarizes, "[t]he emergence of individual agency threatens discourses of victimhood."[271] Yet, liberals have tempered their claims of autonomy and rights to emphasize the protection of children and the principle of the best interests of the child as enshrined in Article 3(1) of the UNCRC.[272] This can be explained in the following manner: Some liberals tend to believe that those "who reject [the liberal] human-rights culture should change their ways" and that "this culture is a morally superior way of life."[273] Thus, liberals wish to extend their ideas on a universal level, and this means intervening and engaging in a discourse of the others borders on paternalism.[274] In their eyes, children are not autonomous in-

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269. *See* Michael Freeman, *Introduction: Rights, Ideology and Children*, *in* THE IDEOLOGIES OF CHILDREN'S RIGHTS 3, 3 (Michael Freeman & Philip Veerman eds., 1992).

270. Alice Schmidt explains that "[l]iberal views, which dominate at least the western, developed world, essentially see children as innocent, weak and in need of protection rather than as agents of their own and significant contributors to social and political life." Schmidt, *supra* note 116, at 57.

271. Alice Macdonald, *'New Wars: Forgotten Warriors': Why Have Girl Fighters Been Excluded from Western Representations of Conflict in Sierra Leone?*, 33 AFR. DEV. 135, 142 (2008).

272. UNCRC, *supra* note 22, art. 3(1). Unfortunately the United Nations Committee on the Rights of the Child has so far refused to provide a precise definition of the term or to outline the common factors of the best interests of the child. The term "best interests of the child" broadly describes the well-being of a child. Such well-being is determined by a variety of individual circumstances (e.g., age, level of maturity, presence or absence of parents, his/her environment and experiences).

273. Mark Evans, *Liberalisms*, *in* CONTEMPORARY POLITICAL THOUGHT: A READER AND GUIDE 113, 118 (Alan Finlayson ed., 2003).

274. As Goodwin explains, "the liberal desire to fuse political and human rights suggests an element of moral imperialism . . . ." GOODWIN, *supra* note 21, at 337; *see also* Schmidt, *supra* note 116, at 59 ("It seems . . . that liberal notions of childhood are applied at will by some or at least whenever it is

dividuals, endowed with the ability to make decisions; on the contrary, children are vulnerable individuals. There are several reasons that explain this position.

First, a liberal approach tends to regard children as being unable to make conscious and informed decisions, especially when this concerns their participation in armed hostilities. After all, the Western society identifies childhood with innocence and play. It is widely understood that children have a limited capacity to understand the world. This inability plays against the child in the liberal discourse inasmuch as he or she is coaxed into recruitment and used in hostilities because he or she is obedient, easy to manipulate, and lacks fear when engaged in battle.[275] It is also easy to indoctrinate a child.[276] It is not difficult to convince a child to take part in hostilities without the child fully understanding the consequences of his or her acts.[277] Ethics, culture, and society are often used to legitimate the use of child soldiers:[278] defending one's people and homeland from violent aggression or political oppression[279] and being able to provide for one's family.[280] They are fighting for a cause "that is portrayed as being in their political and economic best interests."[281] But does this mean that children are not psychologically able to make informed decisions? At this juncture, it must be underlined that whilst the international community often shows young children taking part in the hostilities, "ado-

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convenient, for example, for the north to patronize the south."); Pupavac, *supra* note 53, at 109.

275. *See* Sabine Collmer, *Child Soldiers—An Integral Element in New, Irregular Wars?*, 3 CONNECTIONS Q.J. 1, 8 (2004).

276. "Both advocacy literature and media accounts routinely refer to child soldiers as having been 'programmed,' in the sense of being trained to function like robots or members of a cult." *Child Solder Recruitment*, *supra* note 66, at 50.

277. PILLOUD ET AL., *supra* note 94, ¶ 4555; *see also* de Silva, Hobbs & Hanks, *supra* note 146, at 130–31.

278. As Michael Wessells explains "contextualists do not want to rule out the acceptability of child soldiering under certain circumstances." Michael Wessells, *How We Can Prevent Child Soldiering*, 12 PEACE REV. 408 (2000).

279. "[C]hildren were not plucked from . . . a normal childhood to fight in a conflict they neither wanted nor understood, but were compelled to fight to preserve the lives of their families, community, and culture." Jonasen, *supra* note 42; Hughes, *supra* note 7, at 402; *see also* Abbott, *supra* note 60, at 517–18.

280. *See* Davison, *supra* note 68, at 140; Hughes, *supra* note 7, at 403.

281. De Berry, *supra* note 2, at 98.

lescents make up the vast majority of child soldiers worldwide . . . ."[282] Their understanding of the situation is undoubtedly different from the one of an eight year old.[283] The conflicts in Sierra Leone and Liberia have demonstrated that this distinction between younger and older children was even institutionalized as the younger ones between nine and thirteen years old of age were enrolled in the "Small Boy Units" while adolescents were not classified as boys anymore but full-fledged soldiers,[284] often in charge of younger children.

Also, if children are not able to make informed decisions, then one may ask how much children nowadays differ from those who took part in past conflicts.[285] One possible answer is that whereas past conflicts could be easily understood as one state fighting against another state, the "new wars" are incredibly difficult to understand, even for adults. The recruitment of seventeen years old children in the British forces appears acceptable to the public as it appears that he will likely be fighting in a conventional war. Further, Western society believes that this individual is deciding to take on a career in the armed forces.[286] Yet, a child of the same age engulfed and in-

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282. Schmidt, *supra* note 116, at 54; Williams, *supra* note 128, at 1074. The term "adolescents" describe young individuals undergoing "a transitional period during which a young person is no longer a 'child' in the commonly understood sense, but not yet an 'adult' although increasingly expected to take on adult tasks and roles." Brett, *supra* note 137, at 858 n.4.

283. *See* Hart, *supra* note 10, at 223–24.

284. Murphy, *supra* note 75, at 74.

285. As Mary Jonasen explains in relation to children in conflicts, "some critics ask how contemporary child soldiering differs in the current context from past comparisons." Jonasen, *supra* note 42.

286. For example, see the UK's position: "In order to compete in an increasingly competitive employment market, the Services need to attract young people aged 16 and above into pursuing careers in the armed forces. In doing so, the armed forces provide valuable and constructive training and employment to many young people, giving them a sense of great achievement and worth, as well as benefiting society as a whole." Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties under Article 8, Paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict. Initial Reports of States Parties Due in 2007. United Kingdom of Great Britain and Northern Ireland*, ¶ 18, U.N. Doc. CRC/C/OPAC/GBR/1 (Sept. 3, 2007). That being said, Jason Hart argues that "[a]ccording to emerging norms, 18, 19 and 20 year olds should be studying at universities to lay the foundations for their future lives, not dying in a road-

volved in a "new war" in another state raises eyebrows even though, as Roger Rosenblatt argues, "[a] kid fighting with a bunch of rebels is far more apt to know why he is doing it than a recruit of a national guard."[287] Fighting in an armed group or even in the armed forces of a non-liberal and democratic state is perceived to be a judicious career path.[288]

Perhaps, at the very least, the liberal discourse seems to miss the point that with age and experience, children are able to acquire the ability to understand the world and thus become active agents of their own lives. Indeed, "[a]lthough, in many areas of the world, people are deemed to be intellectually and emotionally mature at earlier ages, eighteen years of age appears to be the most widely accepted point at which individuals are no longer considered children."[289] For example, "[i]t is generally accepted that from the age of 15 the development of a child's faculties is such that there is no longer the same need for special, systematic measures."[290] Therefore, international humanitarian law appears to be more in line with this reality than international human rights law, which sets eighteen years of age as the end of childhood. In other words, international humanitarian law takes it that children beyond fifteen are capable of autonomy.

Reverting to the issue of the "new wars" and bearing in mind that it might indeed be difficult for children to understand the intricacies of such conflicts, one can reasonably ask whether international humanitarian law's approach is appropriate. International humanitarian law is principally built on the idea of traditional armed forces, and the bulk of the law pertains to international armed conflicts and non-international conflicts between armed forces and armed opposition groups.[291] Is international humanitarian law, particularly its provisions on child soldiers, outdated? It might be, but even though customary in-

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side bomb incident in a theatre of war thousands of miles from home." Hart, *supra* note 10.

287. ROGER ROSENBLATT, CHILDREN OF WAR 101 (1983).

288. This position is redolent of earlier liberalism that believed that there was a "family of civilized nations" that was allowed to teach other nations. *See* EDWARD KEENE, INTERNATIONAL POLITICAL THOUGHT: A HISTORICAL INTRODUCTION 170, 192 (2005).

289. Brosha, *supra* note 10.

290. Dutli, *supra* note 177, at 422.

291. *See* HARVEY, *supra* note 51, at 8.

ternational humanitarian law covers additional types of conflicts, particularly non-international armed conflicts in which two armed opposition groups fight against each other, it still allows for the recruitment and use of children above fifteen years of age.[292] In fact, customary international humanitarian law cannot be altered unless those taking part in the hostilities—both state and non-state actors—change their behavior or practice and also consider that by doing so, they are bound by a legal norm.[293] As of now, there is no solid evidence that states and armed opposition groups consider the recruitment and participation of children between fifteen and eighteen years of age to be a violation of international humanitarian law.

A second reason why liberals have tempered their claims of autonomy and rights and emphasized the protection of children and the principle of the best interest of the child can be explained by the persistent and unceasing discourse of children as victims and vulnerable individuals,[294] especially within the context of armed conflict.[295] The mainstream liberal view is that children cannot properly be considered perpetrators of violent acts and that their actions must be understood by looking at the wider social context; "the neo-liberal approach often involves viewing children as passive victims that must be saved through legal protections."[296] On the other hand, the reality is much grimmer.

Indeed, many children are full participants in the armed conflict. Their participation ranges from helping out with cooking or managing the camp to committing atrocities. In many of these conflicts, after being forced to perform ritualistic killings,[297] such as killing their family or their relatives,[298] children are provided with some rudimentary training on how to

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292. Additional Protocol I, *supra* note 25, art. 77; Additional Protocol II, *supra* note 26, art. 4(3); HENCKAERTS & DOSWALD-BECK, *supra* note 91, at 482–85.

293. *See* Robert McCorquodale, *An Inclusive International Legal System*, 17 LEIDEN J. INT'L L. 477, 498 (2004).

294. Hart, *supra* note 10, at 220.

295. *See* Schmidt, *supra* note 116, at 60.

296. Brosha, *supra* note 10.

297. Human Rights Watch, *supra* note 69, at 19, 27.

298. Aaron Young, *Preventing, Demobilizing, Rehabilitating, and Reintegrating Child Soldiers in African Conflicts,* 7 J. INT'L POL'Y SOLUTIONS 19, 20 (2007); *see also* Graf, *supra* note 136, at 952.

operate weapons.[299] They gradually enter a process of military socialization that aims to transform them into killing machines, a practice that can be witnessed in various African states.[300] The *Taylor* judgment is replete of sad examples of crimes committed by children.[301] Generally, children who live in such an environment tend to lose their personality and identity,[302] as well as any connection to the real world.[303] Furthermore, by living in such a violent world—where disorder and arbitrariness are commonplace—they lose touch with any concepts of morality that may have been inculcated to them before they joined the armed groups.[304] Indeed "[c]hildren participating in hostilities are a deadly threat, not only to themselves, but also to the persons whom their impassioned and immature nature may lead them to shoot at."[305] African conflicts show that many children, trapped in a world of sustained and orchestrated violence, turn into merciless killers,[306] becoming

299. Breen, *supra* note 113, at 73. Regarding extensive training, see Prosecutor v. Taylor, Case No. SCSL-03-01-T, Judgment, ¶¶ 1598–99 (May 18, 2012).

300. Legrand & Weissman, *supra* note 104, at 2–3; *see also* Thompson, *supra* note 75, at 193; R.A. DALLAIRE ET AL., CHILDREN IN CONFLICT: ERADICATING THE CHILD SOLDIER DOCTRINE 13 (2007); GABRIELA MISCHKOWSKI, ABDUCTED, RAPED, ENSLAVED: THE SITUATION OF GIRL SOLDIERS IN THE CASE OF UGANDA 4 (2005); Abbott, *supra* note 60, at 510; Prosecutor v. Sesay (*RUF Case*), Case No. SCSL-04-15-T, Judgment, ¶¶ 1619–22, 1632, 1637 (Mar. 2, 2009), http://www.sc-sl.org/LinkClick.aspx?fileticket=D5HojR8FZS4%3D&tabid=215.

301. *See*, *e.g.*, *Taylor*, Case No. SCSL-03-01-T, ¶¶ 1462, 1565 (listing the crimes perpetrated by the children).

302. Alcinda Honwana, *Innocents et coupables: Les enfants-soldats comme acteurs tactiques* [*Innocent and Guilty: Child-Soldiers as Tactical Actors*], 80 POLITIQUE AFRICAINE 58, 67–68 (2000) [hereinafter *Innocents et coupables*], (Fr.).

303. *See* Faulkner, *supra* note 79, at 495; *see also* Zia-Mansoor, *supra* note 255, at 397.

304. Maslen, *supra* note 223, at 25; *see also* LISA ALFREDSON, SEXUAL EXPLOITATION OF CHILD SOLDIERS: AN EXPLORATION AND ANALYSIS OF GLOBAL DIMENSIONS AND TRENDS 7 (2001), *available at* http://reliefweb.int/sites/reliefweb.int/files/resources/C216BEBEEF8597E1C1256DAB002D9450-csusc-exploit.pdf.

305. Dutli, *supra* note 177, at 421.

306. Maslen, *supra* note 223, at 24; *see* Faulkner, *supra* note 79, at 495; *Innocents et coupables*, *supra* note 302, at 65.

"horde[s] of insensate killers"[307] that are still portrayed in the liberal discourses as innocent individuals.[308]

Children should not only be seen as reluctant participants in armed conflicts but also as active agents. It is imperative to understand the reality on the ground in order to be in a position to fully appreciate the hurdles faced by those trying to set new legal norms. The current international discourse decontextualizes child soldiers from the social, political, and economic context that regulates their lives.[309] One might question whether children trapped in such a situation are still able to genuinely consent to their participation in the conflict, or are simply the means to an end for the armed group. It is reported that child soldiers often feel empowered through their experiences of fighting,[310] bearing arms,[311] and killing.[312] For some, being in an armed group means enhanced opportunities, autonomy, and respect.[313]

At this stage, the concept of "agency" must be introduced. The liberal discourse is uneasy with regard to the application of the concept of "agency" to children, for its "focus on the rights of autonomous actors does not . . . account for individuals—

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307. Faulkner, *supra* note 79, at 499.

308.

> Romeo Dallaire . . . recalled how one of his soldiers was faced with a situation in Somalia during which he was fired upon by young children using AK-47s . . . . [T]he soldier in question experienced almost unimaginable emotional and moral torment at the prospect of having to return fire at 'innocent' children. Ultimately, however, the soldier had to protect those around him, including a church full of villagers; he fired back.

Brosha, *supra* note 10.

309. *See* Murphy, *supra* note 75, at 63. Murphy also argues that the question "'[w]ho recruited, armed and commanded' the children?" can be "asked in a human rights framework, but it also should be asked in a social science framework in order to stimulate inquiry into the institutional structures through which these events are taking place." *Id.* at 63–64.

310. Schmidt, *supra* note 116, at 63.

311. Possession of a weapon often "conferred a certain status" within the group. R.A. DALLAIRE ET AL., *supra* note 300, at 13.

312. *See* AFUA TWUM-DANSO, AFRICA'S YOUNG SOLDIERS: THE CO-OPTION OF CHILDHOOD 41 (2003), *available at* http://www.issafrica.org/uploads/Mono82.pdf.

313. *See* Harry West, *Girls with Guns: Narrating the Experience of War of Frelimo's "Female Detachment,"* 73 ANTHROPOLOGICAL Q. 180, 186–87 (2000).

specifically children—whose autonomous identity is not yet fully formed."[314] Agency is a form of autonomy that focuses on the capacity to conceive and act upon projects and values, including those outside of one's own experiences.[315] Agency, as explained by Alcinda Honwana, "concerns events of which an individual is the perpetrator, in the sense that the individual could, at any phase in a given sequence of conduct, have acted differently. Whatever happened would not have happened if that individual had not intervened."[316] Thus, the agent must have transformative capacity—"the power to intervene or to refrain from intervention."[317]

Are children agents of their own lives, that is, do they have the capacity to make informed choices? The simple answer seems to be in the affirmative, at least to a large extent. For example, "[i]n all conflicts, children can take, and some choose to take, an active role in supporting violence. Children make calculated decisions during armed conflict about how to access shelter, food, medicine, and best ways to keep themselves and their family members safe."[318] This shows that some children do in fact manipulate situations in order to turn them into opportunities. Alcinda Honwana refers to "tactical agency," "a specific type of agency that is devised to cope with the concrete, immediate conditions of their lives in order to maximize the circumstances created by their military and violent environment."[319] Similarly, Schmidt contends that children, as actors in a conflict, make rational choices based on the "[limited] in-

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314. Neil S. Binder, *Taking Relationships Seriously: Children, Autonomy and the Right to a Relationship,* 69 N.Y.U. L. REV. 1150, 1150 (1994).

315. DAVID JOHNSTON, THE IDEA OF A LIBERAL THEORY: A CRITIQUE AND RECONSTRUCTION 71, 75 (1994).

316. Alcinda Honwana, *Innocent & Guilty: Child-Soldiers as Interstitial & Tactical Agents*, *in* MAKERS AND BREAKERS: CHILDREN & YOUTH IN POSTCOLONIAL AFRICA 31, 48 (Alcinda Honwana & Filip De Boeck eds., 2005) (quoting ANTHONY GIDDENS, THE CONSTITUTION OF SOCIETY 9 (1984)).

317. *Id.* at 48.

318. *See* Expert Group Meeting of the United Nations Division for the Advancement of Women (DAW) in collaboration with UNICEF on the Elimination of All Forms of Discrimination and Violence Against the Girl Child, Florence, It., Sept. 25–28, 2006, *The Girl Child and Armed Conflict: Recognizing and Addressing Grave Violations of Girls' Human Rights*, at 3, U.N. Doc. EGM/DVGC/2006/EP.12 (Sept. 25–28, 2006) (by Dyan Mazurana & Khristopher Carlson).

319. Honwana, *supra* note 316, at 49.

formation they possess and their [limited] ability to weigh one choice against another . . . ."[320]

Notwithstanding this, it could also be argued that a child soldier's actions are constrained by his or her weak position, and that in reality, he or she is acting in relation to a specific event rather than looking at the long-term consequences of his or her actions.[321] It might thus be argued that these children are indeed not autonomous. Furthermore, whilst children may exercise their agency, they do so without a moral compass and ethical guidance. To illustrate the point, it is worth noting that some child soldiers attain positions of command in armed groups and become leaders by actively participating in the hostilities and committing the worst atrocities (e.g., committing murders, punishing and executing fellow child soldiers, press-ganging other children into armed groups).[322] The liberal approach to autonomy presupposes a conception of a morally autonomous agent.[323] Again, this can hardly be applied to child soldiers. Another factor that needs to be taken into account is the age and maturity of a child. A child soldier can be a teenager as well as an eight-year-old. As such, in the context of child soldiers, it is indeed a fine line between victimhood, autonomy, and agency. The reality is thus more complex than the one portrayed in the liberal discourse.

CONCLUSION

Drawing again on the comparison between the African boy soldier and Joan of Arc—the French heroine and Catholic Saint—the phenomenon of child soldiering must be understood in its historical context, bearing in mind the rise of the human rights ideology that has led the world to look at child soldiering through the prism of children's rights rather than through international humanitarian law.

Children are shaped by their experiences but are "also shaped by the nature of the childhood that they experience."[324] Liberals, however, seek to produce a social construction of

320. Schmidt, *supra* note 116, at 60.

321. *Innocents et coupables*, *supra* note 302, at 75–76.

322. TWUM-DANSO, *supra* note 312, at 29, 41.

323. *See* Gerald F. Gaus, *The Place of Autonomy Within Liberalism*, *in* AUTONOMY AND THE CHALLENGES TO LIBERALISM 272–73 (John Christman & Joel Rogers eds., 2005).

324. James & James, *supra* note 11, at 30.

childhood that reinforces a social legal order in which adults are autonomous individuals protecting the innocent child,[325] who is endowed with a range of rights, the most significant of these being that all actions should be taken for the child's best interests.[326] This paternalistic stance ensures that children who willingly take part in hostilities will be deemed to have lost control of their possibly limited agency. In this view, fighting is for adults only.

Broadly speaking, international law seeks to protect children from becoming child soldiers. For instance, the recruitment, conscription, enlistment, and use of children in armed conflict are clearly prohibited, but at the same time, international law acknowledges that children can be full participants in hostilities. The current trend in international law, however, is trying to remove all children from the battlefield, thus revealing international law's unwillingness to concede that children might be able to make autonomous decisions; "[r]ecruitment, whether enforced or voluntary, is always against the best interests of the child."[327]

That is not to say that child soldiering is a positive experience or that the fact that they volunteer can be used to justify the appalling treatment that ensues. Whilst children should be allowed to decide their involvement in hostilities on their own, this choice needs to be informed and viable alternatives need to be presented to such children. Experience shows that even children who suffered terribly at the hands of the armed forces often chose, once released or demobilized, to return to the mists of war.[328] Indeed, if they take part, whether directly or indirectly, in the hostilities, it is likely that once the conflict is over, these children will be unable to be regarded "as active agents, as productive people in society"[329] even though it is proven that "children's agency [is] conducive to rehabilitation and dealing with trauma and fear."[330] They will have "to play the part of innocent victims" to benefit from international aid and the pro-

325. *See* Schmidt, *supra* note 116, at 57–58.
326. Freeman, *supra* note 269, at 5.
327. Coomaraswamy, *supra* note 140, at 542.
328. Williams, *supra* note 128, at 1083.
329. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Statement of Witness Elisabeth Schauer, at 33 (Apr. 7, 2009), http://www.icc-cpi.int/iccdocs/doc/doc662611.pdf.
330. Schmidt, *supra* note 116, at 61.

grams set up in the framework of disarmament, demobilization, and reintegration processes.[331] If they fail to do so, the only other viable alternative is to return to what they know: war.

Therefore, "[f]undamental to any effort to address child recruitment is the acquisition of insight into the roles, responsibilities, and competencies of children themselves."[332] Without understanding why children join or become participants in armed conflicts, the international campaign to prevent the recruitment of child soldiers is bound to fail. To ensure that fewer children take part in conflicts, a whole range of measures—"preventive, suppressive, educational and rehabilitative in nature"[333]—must be enacted. More crucially, these measures must be designed under the influence of what children have to say so as to give them a voice in the debate on the recruitment and participation of children in armed conflict.

331. *See* McKnight, *supra* note 54, at 127–28.
332. Hart, *supra* note 10, at 224; *see also* Schmidt, *supra* note 116, at 65.
333. *Guiding Principles*, *supra* note 86, at 5.