

## Prosecuting Child Soldiers: The Call for an International Minimum Age of Criminal Responsibility

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# PROSECUTING CHILD SOLDIERS: THE CALL FOR AN INTERNATIONAL MINIMUM AGE OF CRIMINAL RESPONSIBILITY

BRITTANY URSINI<sup>†</sup>

## INTRODUCTION

The difficult task of establishing a minimum age of criminal responsibility (“MACR”) has largely been ignored by international courts. Yet, with the persistence of internal conflicts around the world and the growing use of child soldiers in these conflicts, the international community can no longer afford to overlook this issue. To illustrate the dangerous consequences of discrepancies in the MACR, assume that a thirteen-year-old child soldier from the Congo is suspected of participating in genocide in Rwanda. The doctrine of universal jurisdiction provides that any state can assume jurisdiction to prosecute an individual for an international crime without relying on the jurisdictional principles of territoriality or nationality.<sup>1</sup> Because there is no MACR for international crimes, any nation that assumes jurisdiction over the child can apply its

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<sup>1</sup> RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1986). A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as genocide, even though the state has no links of territory with the offense or of nationality with the offender or the victim. *See id.* cmt. a. Under territorial jurisdiction, a state has jurisdiction with respect to conduct that takes place within its territory, the status of person or interests in things present within its territory, and conduct outside its territory that has or is intended to have a substantial effect within its territory. *See id.* § 402(1)(a)–(c). A state also has jurisdiction with respect to the activities, interests, status, or relations of its nationals outside as well as within its territory. *See id.* § 402(2).

domestic MACR.<sup>2</sup> In Rwanda, where the MACR is fourteen,<sup>3</sup> the child soldier would not be deemed criminally responsible. However, the MACR in the Congo is thirteen,<sup>4</sup> obligating the country to prosecute the child pursuant to the Convention on the Prevention and Punishment of the Crime of Genocide<sup>5</sup> ("Genocide Convention"). In the Congo, at least one fourteen-year-old child soldier has been executed and the court has handed down death sentences to four other children.<sup>6</sup> This discrepancy between MACRs creates a troubling situation where a child could be deemed incapable of having criminal intent in one nation, and yet, in another nation, the same child committing the same act could be deemed criminally responsible and sentenced to death.<sup>7</sup>

The contemporary plague of child soldiers makes this problem impossible to ignore. Currently, there are over 250,000 child soldiers engaged in armed conflict around the world.<sup>8</sup> These children are recruited to commit heinous crimes against their communities, including murder and rape.<sup>9</sup> With regard to

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<sup>2</sup> Matthew Happold, *Excluding Children from Refugee Status: Child Soldiers and Article 1F of the Refugee Convention*, 17 AM. U. INT'L L. REV. 1131, 1156 (2002) [hereinafter Happold, *Excluding Children*].

<sup>3</sup> See DON CIPRIANI, CHILDREN'S RIGHTS AND THE MINIMUM AGE OF CRIMINAL RESPONSIBILITY: A GLOBAL PERSPECTIVE 105 (2009).

<sup>4</sup> See *id.* at 99. Since both Rwanda and the Congo are French-based civil law jurisdictions, both ages would seem to roughly comport with the general Roman law rule that legal responsibility attaches at puberty. See ALAN WATSON, ROMAN PRIVATE LAW AROUND 200 BC, at 35 (1971) (stating that persons who had not reached puberty were treated as incompetent to look after their own affairs).

<sup>5</sup> The Genocide Convention obligates nations to prosecute persons who commit genocide, assuming they had achieved the applicable MACR at the time of the offense. See Convention on the Prevention and Punishment of the Crime of Genocide art. I, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention], available at <http://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?action=openDocument&documentId=1507EE9200C58C5EC12563F6005FB3E5>.

<sup>6</sup> See Congo: *Don't Execute Child Soldiers*, HUM. RTS. WATCH (May 2, 2001), <http://www.hrw.org/news/2001/05/02/congo-dont-execute-child-soldiers>; see also Matthew Happold, *The Age of Criminal Responsibility for International Crimes Under International Law*, in INTERNATIONAL CRIMINAL ACCOUNTABILITY AND THE RIGHTS OF THE CHILDREN 69, 69 (Kari Arts & Vesselin Popovski eds., 2006) [hereinafter Happold, *Age of Criminal Responsibility*] (stating that in 2000, the Congolese government executed a fourteen-year-old child soldier).

<sup>7</sup> See Ann Davison, Article, *Child Soldiers: No Longer a Minor Incident*, 12 WILLIAMETTE J. INT'L L. & DISP. RESOL. 124, 134 (2004).

<sup>8</sup> See HENDRIK CREMER, SHADOW REPORT CHILD SOLDIERS 2013, at 4 (2013).

<sup>9</sup> See INT'L SAVE THE CHILDREN ALLIANCE, CHILDREN'S RIGHTS: REALITY OR RHETORIC?—THE UN CONVENTION ON THE RIGHTS OF THE CHILD: THE FIRST TEN YEARS 52 (Sarah Muscroft ed., 1999). Children as young as five were accused of involvement in the Rwandan genocide. See Chen Reis, *Trying the Future, Avenging*

international crimes such as genocide, states are obligated to prosecute those responsible.<sup>10</sup> Article VI of the Genocide Convention states that “[p]ersons charged with genocide . . . shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.”<sup>11</sup> Because the international penal tribunal considered by the Genocide Convention was never created, the duty established by article VI is delegated to the state in which the crimes occur.<sup>12</sup> However, the jurisdiction established by article VI is not exclusive, as judicial bodies and customary law have established universal jurisdiction over genocide.<sup>13</sup> In fact, a state may be in violation of international law for failing to prosecute a child above the MACR who commits a serious international crime.<sup>14</sup> Allowing states to establish their own MACR for such international crimes permits them to significantly influence the extent of their international responsibilities, particularly in the context of child soldiers.<sup>15</sup> Moreover, in the absence of binding customary international law or treaty obligations, states that choose to prosecute child soldiers can apply domestic law to fill in the procedural and substantive gaps left open by international

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*the Past: The Implications of Prosecuting Children for Participation in Internal Armed Conflict*, 28 COLUM. HUM. RTS. L. REV. 629, 629 (1997) (citing UNITED NATIONS CHILDREN'S FUND (UNICEF), RWANDA: SPECIAL REPORT-CHILDREN IN PRISON (1995)).

<sup>10</sup> See Genocide Convention, *supra* note 5 (“The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.”).

<sup>11</sup> *Id.* art. VI.

<sup>12</sup> See Diane F. Orentlicher, *Settling Accounts: The Duty To Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2564 (1991).

<sup>13</sup> See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 reporters' note 1 (1986) (stating that genocide is subject to universal jurisdiction); see also *id.* (“Universal jurisdiction to punish genocide is widely accepted as a principle of customary law.”).

<sup>14</sup> See *id.* § 702 cmt. d (“A state violates customary law if it practices or encourages genocide, fails to make genocide a crime or to punish persons guilty of it, or otherwise condones genocide.”).

<sup>15</sup> See Happold, *Age of Criminal Responsibility*, *supra* note 6, at 71.

law.<sup>16</sup> This practice leads to a potentially dangerous and unjust situation where a child's criminal responsibility depends on the place of prosecution.<sup>17</sup>

This Note discusses the current state of international law on the MACR and proposes a solution that balances the protection of child soldiers with the rights of the victims harmed by their unlawful conduct. Part I of this Note provides a brief background of child soldiers and closely examines the relevant international law addressing the criminal responsibility of child soldiers. Part II illustrates the deficiencies of current international law and describes how the deficiencies affect and contribute to the competing arguments regarding a MACR. Part III discusses the need for an international MACR. Finally, Part IV proposes an international MACR of fifteen and the establishment of an international juvenile criminal tribunal with jurisdiction over children between the ages of fifteen and eighteen.

## I. THE CHILD SOLDIER PROBLEM

### A. *Child Soldiers Around the World*

The last few decades have come to be known as the era of the child soldier.<sup>18</sup> Current estimates suggest that there are 250,000 soldiers in armed conflicts around the world<sup>19</sup> and that child soldiers are used in more than twenty-five countries.<sup>20</sup> Of these twenty-five countries, the government of Myanmar is currently the largest user of child soldiers.<sup>21</sup> In Sierra Leone, armed groups use children to conduct the most dangerous missions

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<sup>16</sup> See Happold, *Excluding Children*, *supra* note 2; see also Paola Konge, *International Crimes & Child Soldiers*, 16 SW. J. INT'L LAW 41, 43–44 (2010).

<sup>17</sup> See Konge, *supra* note 16, at 70.

<sup>18</sup> See Timothy Webster, *Babes With Arms: International Law and Child Soldiers*, 39 GEO. WASH. INT'L L. REV. 227, 229 (2007).

<sup>19</sup> See *supra* Introduction.

<sup>20</sup> See Elizabeth Flock, *Child Soldiers Still Used in More Than 25 Countries Around the World*, WASH. POST (Mar. 14, 2012), [http://www.washingtonpost.com/blogs/blogpost/post/child-soldiers-still-used-in-more-than-25-countries-around-the-world/2012/03/14/gIQAl2FNCS\\_blog.html](http://www.washingtonpost.com/blogs/blogpost/post/child-soldiers-still-used-in-more-than-25-countries-around-the-world/2012/03/14/gIQAl2FNCS_blog.html).

<sup>21</sup> See CARL CONRADI, *CHILD TRAFFICKING, CHILD SOLDIERING: EXPLORING THE RELATIONSHIP BETWEEN TWO WORST FORMS OF CHILD LABOUR* 6 (2013). While the number of cases of recruitment and use of children has decreased because of preventive measures, there still remained concerns in 2012. See UN Secretary-General, *Children and Armed Conflict: Rep. of Secretary-General*, ¶ 100, U.N. Doc. A/67/845–S/2013/245 (May 15, 2013); see *id.* ¶ 100–01.

because they view children as dispensable.<sup>22</sup> In Liberia, children as young as nine have allegedly killed, tortured, and raped.<sup>23</sup> One of the most notorious recruiters of child soldiers, the Lord's Resistance Army of northern Uganda, abducted at least 20,000 children between 1987 and 2006.<sup>24</sup> While these statistics reinforce the idea that the worst violations occur in Africa, the issue is not isolated to one continent.<sup>25</sup> In Colombia, for example, the use of child soldiers is on the rise.<sup>26</sup> Experts estimate that the country has 5,000 to 14,000 child soldiers.<sup>27</sup> The average age of recruitment in Colombia is around twelve,<sup>28</sup> but children have been recruited as young as eight.<sup>29</sup> As seen by the diversity of states with children under arms, the problem of child soldiers reaches all corners of the globe.

### B. *Response by the International Community*

International law has made significant strides to protect child soldiers. The Convention on the Rights of the Child ("CRC") was opened for signature by the United Nations ("UN") in 1989 and has become the most widely ratified treaty in history, with 61 States signing on the first day and 193 States

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<sup>22</sup> See Stephanie H. Bald, Comment, *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, 552 (2002); see also *Hearing on Protocols of Child Soldiers and Sale of Children*, 107th Cong. 61 (2002) (statement of Jo Becker, Advocacy Director, Children's Rights Division, Human Rights Watch) (stating that because children are considered dispensable they are pushed into the most hazardous roles).

<sup>23</sup> See Davison, *supra* note 7, at 142.

<sup>24</sup> See Q&A on *Joseph Kony and the Lord's Resistance Army*, HUM. RTS. WATCH (Mar. 21, 2012), <http://www.hrw.org/news/2012/03/21/qa-joseph-kony-and-lords-resistance-army>.

<sup>25</sup> See Webster, *supra* note 18, at 231 (stating that the problem is more widespread than reports suggest and that it is not solely an African or third world issue).

<sup>26</sup> See Amy Lieberman, *UN Security Council To Study Child Soldier Use in Colombia*, PASSBLUE (June 28, 2012), <http://passblue.com/2012/06/28/un-security-council-to-study-child-soldier-use-in-colombia/>.

<sup>27</sup> See *id.*

<sup>28</sup> See *id.*

<sup>29</sup> See Nienke Grossman, *Rehabilitation or Revenge: Prosecuting Child Soldiers for Human Rights Violations*, 38 GEO. J. INT'L L. 323, 325 (2007). The MACR in Colombia is eighteen, with children subject to the jurisdictions of special juvenile criminal tribunals from the age of twelve. See *Old Enough To Be a Criminal?*, UNICEF, <http://www.unicef.org/pon97/p56a.htm> (last visited Mar. 1, 2016).

current signatories.<sup>30</sup> The CRC was a compromise to establish minimum standards for the recognition of children's rights, combining the rights of the child and obligations of State Parties to protect children.<sup>31</sup> The CRC lays out these rights in fifty-four articles and three Optional Protocols.<sup>32</sup> Article 1 defines a child as any person under the age of eighteen, unless domestic law applicable to that person grants majority at a younger age.<sup>33</sup> Under article 37(a), capital punishment or life imprisonment without release is prohibited for any child who committed an offense while under the age of eighteen.<sup>34</sup> Finally, article 40 calls on State Parties to establish a minimum age below which children shall be presumed not to have the capacity to violate the penal laws.<sup>35</sup>

The Rome Statute of the International Criminal Court ("ICC"), a leading treaty with 123 states party to the agreement,<sup>36</sup> established a court with jurisdiction over international crimes.<sup>37</sup> Article 26 states that "[t]he Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime."<sup>38</sup> In addition, the Rome Statute makes it a war crime to conscript or enlist children under the age of fifteen into the national armed forces or

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<sup>30</sup> See Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC], available at <http://www.ohchr.org/Documents/ProfessionalInterest/crc.pdf>. The United States and Somalia are the only two UN member states that have signed but not yet ratified the treaty. See *id.*; see also Davison, *supra* note 7, at 130.

<sup>31</sup> See Davison, *supra* note 7, at 131.

<sup>32</sup> See CRC, *supra* note 30; see also *Committee on the Rights of the Child*, UNITED NATIONS HUM. RTS., <http://www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIndex.aspx> (last visited Mar. 1, 2016).

<sup>33</sup> See CRC, *supra* note 30, art. 1.

<sup>34</sup> See *id.* art. 37. The Supreme Court of the United States cited article 37 in *Roper v. Simmons*, where the Court held that the death penalty should be prohibited on any child under eighteen. 543 U.S. 551, 575 (2005). The Court stated, "It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime." *Id.* at 578.

<sup>35</sup> See CRC, *supra* note 30, art. 40.

<sup>36</sup> See Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute], available at [https://treaties.un.org/Pages/ViewDetails.aspx?mtdsg\\_no=XVIII10&chapter=18&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=XVIII10&chapter=18&lang=en).

<sup>37</sup> See *id.* art. 1.

<sup>38</sup> *Id.* art. 26.

use them to actively participate in hostilities.<sup>39</sup> While the drafters of the statute contemplated expanding its jurisdiction to minors, they ultimately refrained.<sup>40</sup> The inability to set a specific age range led to the exclusion of children under the age of eighteen from the court's jurisdiction.<sup>41</sup> While the argument that this exclusion should inspire legislators to increase the MACR for crimes under international law, this would only be the case if the ICC were to fix an actual age rather than merely asserting that the court has no jurisdiction.<sup>42</sup> As it is now, the exclusion does not establish an international MACR; rather, it merely suggests that children under eighteen fall outside the scope of the limited personal jurisdiction of the ICC.<sup>43</sup> In addition, the decision to exclude children under eighteen from the court's jurisdiction is attributed more to the court's limited mandates and resources than to the idea that children are incapable of committing international crimes.<sup>44</sup>

In countries where the use of child soldiers is most prevalent, the CRC and the Rome Statute of the ICC have been influential in establishing criminal systems to prosecute international crimes and to protect the rights of children. After the civil war in Sierra Leone, the UN Security Council and the government of Sierra Leone created the Special Court for Sierra Leone ("SCSL") pursuant to a bilateral agreement.<sup>45</sup> The court is

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<sup>39</sup> See *id.* art. 8(2)(b)(xxvi). In drafting the Optional Protocol to the CRC on the involvement of children in armed conflict, the States Parties noted this provision of the ICC although they ultimately decided to set the minimum age for children to partake in hostilities at eighteen. See *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict* art. 2, Feb. 12, 2002, 2173 U.N.T.S. 222, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPACCRC.aspx>.

<sup>40</sup> See WILLIAM A. SCHABAS, *THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE* 444 (2010) (discussing that the Preparatory Committee considered a whole range of options for the age of criminal responsibility, from twelve to twenty-one, but ultimately decided to limit jurisdiction to persons under eighteen at the time of the alleged commission of the crime).

<sup>41</sup> See *id.*

<sup>42</sup> See Cécile Aptel, *International Criminal Justice and Child Protection*, in *CHILDREN AND TRANSITIONAL JUSTICE: TRUTH-TELLING, ACCOUNTABILITY AND RECONCILIATION* 67, 105 (Sharanjeet Parmar et al. eds., 2010).

<sup>43</sup> See *id.*

<sup>44</sup> See *id.*

<sup>45</sup> See U.N. Secretary-General, *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, ¶ 9, U.N. Doc. S/2000/915 (Oct. 4, 2000) [hereinafter *Special Court Report*], available at <http://www.un.org/en/peacekeeping/missions/past/unamsil/spcourt.htm>.



“a domestic-international hybrid that encompasses aspects of both international and domestic law”<sup>46</sup> that aims to end impunity and bring reconciliation by prosecuting those who committed the most serious crimes.<sup>47</sup> The SCSL prohibits conscripting or enlisting children under the age of fifteen in armed forces or groups.<sup>48</sup> The court was created to prosecute those “persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law.”<sup>49</sup>

In its efforts to prosecute those responsible for international crimes, the SCSL was faced with the task of establishing a MACR. Former Secretary-General Kofi Annan declared that the term “most responsible” does not necessarily exclude those children between the ages of fifteen and eighteen, noting that the severity of the crimes they are alleged to have committed may place them under the jurisdiction of the court.<sup>50</sup> Article 7 of the statute of the SCSL states that the court “shall have no jurisdiction over any person who was under the age of 15 at the time of the alleged commission of the crime.”<sup>51</sup> The article further states:

Should any person who was at the time of the alleged commission of the crime between 15 and 18 years of age come before the Court, he or she shall be treated with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration

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<sup>46</sup> See Monique Ramgoolie, *Prosecution of Sierra Leone's Child Soldiers*, 12 J. PUB. & INT'L AFF. 145, 145 (2001).

<sup>47</sup> See Special Court Report, *supra* note 45, ¶ 74.

<sup>48</sup> See Statute of the Special Court for Sierra Leone art. 4, Jan. 16, 2002, 2178 U.N.T.S. 145 [hereinafter SCSL Statute], available at [http://www.issafrica.org/anicj/uploads/SCSL\\_Statute.pdf](http://www.issafrica.org/anicj/uploads/SCSL_Statute.pdf).

<sup>49</sup> *Id.* art. 1.

<sup>50</sup> See Special Court Report, *supra* note 45, ¶ 31.

<sup>51</sup> SCSL Statute, *supra* note 48, art. 7.

into and assumption of a constructive role in society, and in accordance with international human rights standards, in particular the rights of the child.<sup>52</sup>

Thus, the statute retains the possibility that the court could prosecute a child between the ages of fifteen and eighteen.<sup>53</sup>

Despite having jurisdiction over children between the ages of fifteen and eighteen, the Security Council claimed that it was “extremely unlikely” that the court would try juvenile offenders.<sup>54</sup> The Security Council maintained that the other forums, such as the Truth and Reconciliation Commission (“TRC”) for Sierra Leone, would be better suited to address the needs of children.<sup>55</sup> David Crane, the Prosecutor of the SCSL, agreed with the Security Council and announced the decision not to indict child soldiers under the age of eighteen, claiming that such children do not have the specific intent or sufficient legal capacity to commit international crimes.<sup>56</sup> Due to limited resources and the belief that children do not bear the greatest responsibility, the Prosecutor claimed that it was impractical to prosecute children.<sup>57</sup> Rather, he chose to focus on holding commanders responsible for the acts committed by children between the ages of fifteen and eighteen.<sup>58</sup> However, to achieve sustainable peace and to promote rehabilitation, the Prosecutor emphasized the need for a balance between truth and justice. Thus, for juvenile offenders, the court worked together with the TRC, providing a forum for children to express what they had experienced during the armed conflict, and promoting rehabilitation and reconciliation.<sup>59</sup> From 2002 to 2004,<sup>60</sup> the TRC responded to the needs of the victims and promoted healing, and also had authority to make recommendations to the Sierra Leone

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> Letter from the President of the Security Council to the Secretary-General, U.N. DOC. S/2001/95 (Jan. 31, 2001) [hereinafter Jan. 31, 2001 Letter], *available at* <http://www.un.org/en/peacekeeping/missions/past/unamsil/spcourt.htm>.

<sup>55</sup> *See id.*

<sup>56</sup> *See* Telephone Interview with David Crane, Former Prosecutor, Special Court for Sierra Leone (Oct. 21, 2013).

<sup>57</sup> *See id.*

<sup>58</sup> *See id.*

<sup>59</sup> *See id.*

<sup>60</sup> *See Truth Commission: Sierra Leone*, U.S. INST. OF PEACE, <http://www.usip.org/publications/truth-commission-sierra-leone> (last visited Aug. 6, 2015).

government.<sup>61</sup> Together, the TRC and the SCSL attempted to provide justice and healing to both the child soldiers and to the general community of Sierra Leone.

## II. THE MACR DEBATE

### A. *The Role of International Law*

While the CRC, the Rome Statute of the ICC, and the SCSL are laudable and innovative steps in the effort to protect children, each has significant deficiencies. As the leading international treaty, the CRC has failed in establishing a MACR to be adopted by the signatory states.<sup>62</sup> Rather, it merely requires that States Party establish a minimum age below which children are presumed not to possess the capacity to infringe penal laws.<sup>63</sup> Silence regarding an appropriate MACR can have dangerous consequences. For example, if a court in Lebanon chooses to construe the CRC's silence as permission to prosecute a child under eighteen, a court can apply the Lebanese MACR of seven.<sup>64</sup> The ICC's failure to establish a MACR presents a similar problem. During negotiations leading to the establishment of the ICC, suggestions for a MACR ranged between twelve and twenty-one and many believe that the jurisdictional solution was a method of avoiding these disagreements.<sup>65</sup> The lack of a MACR combined with the prohibition on enlisting, conscripting, or using child soldiers under the age of fifteen and the exclusion of children under the age of eighteen from the court's jurisdiction creates a loophole in which children between the ages of fifteen and seventeen are unprotected.<sup>66</sup> This same problem confronts the SCSL, as its

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<sup>61</sup> See Saudamini Siegrist, *Child Participation in International Criminal Accountability Mechanisms: The Case of the Sierra Leone Truth and Reconciliation Commission*, in INTERNATIONAL CRIMINAL ACCOUNTABILITY AND THE RIGHTS OF CHILDREN, *supra* note 6, at 53, 58.

<sup>62</sup> See CRC, *supra* note 30, art. 40.3(a) ("States Parties shall seek to promote . . . [t]he establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law . . .").

<sup>63</sup> See *id.*; see also Happold, *Excluding Children*, *supra* note 2, at 1148 ("[A]ll that the Convention provides is that States should establish a minimum age of criminal responsibility, but that it is a matter for each State as to what that age should be.").

<sup>64</sup> See CIPRIANI, *supra* note 3, at 102.

<sup>65</sup> See SCHABAS, *supra* note 40.

<sup>66</sup> See Davison, *supra* note 7, at 133.

decision not to indict children between the ages of fifteen and eighteen may perversely promote the recruitment of children in this “responsibility free” age group, as the child’s actions will not be subject to prosecution.<sup>67</sup> Further, the possible impunity placed on children in this age group could provide incentives for commanders to issue the most egregious orders to these children.<sup>68</sup>

## B. *Contrasting Approaches to a MACR*

### 1. Prosecution for Children Under Eighteen in Severe Cases

Because these laws and courts have failed to set a uniform international MACR, two main contrasting approaches regarding the determination of an appropriate MACR have emerged. The first approach proposes that those under eighteen may be prosecuted for their crimes, based on interpretations of existing international law.<sup>69</sup> Proponents of this argument point to the CRC, which allows for young people to be prosecuted if the procedures are fair and consider the particular needs and vulnerabilities of children.<sup>70</sup> Additionally, under international law, a state’s failure to prosecute a child above the MACR who commits an international crime may itself be a breach of the law.<sup>71</sup> From a policy standpoint, prosecuting violators of international law will demonstrate that the international community will punish such acts.<sup>72</sup> Prosecution in these situations is based on the recognition of the autonomy of older children to make independent decisions and the obligation to hold those children responsible.<sup>73</sup>

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<sup>67</sup> See Steven Freeland, *Child Soldiers and International Crimes—How Should International Law Be Applied?*, 3 N.Z. J. PUB. & INT’L. L. 303, 324 (2005).

<sup>68</sup> See 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, 544 (2010).

<sup>69</sup> See AMNESTY INT’L, CHILD SOLDIERS: CRIMINALS OR VICTIMS? 7–9 (2000), [hereinafter AMNESTY INT’L], available at <http://www.amnesty.org/en/library/info/IOR50/002/2000>.

<sup>70</sup> See CRC, *supra* note 30, art. 40; see also AMNESTY INT’L, *supra* note 69, at 7.

<sup>71</sup> See *supra* Introduction.

<sup>72</sup> See Sara A. Ward, *Criminalizing the Victim: Why the Legal Community Must Fight To Ensure that Child Soldier Victims Are Not Prosecuted as War Criminals*, 25 GEO. J. LEGAL ETHICS 821, 831 (2012).

<sup>73</sup> See Konge, *supra* note 16, at 64; see also CRC, *supra* note 30, art. 12 (stating that a child may be capable of forming his or her own views and expressing those

Those who believe in some form of prosecution for children under eighteen generally limit prosecution to only the most serious cases. Proponents maintain that the aim of such prosecutions should be to rehabilitate rather than to stigmatize; thus, by focusing only on the most serious cases, prosecution is rare, and stigmatization is unlikely.<sup>74</sup> Though rare, there may be instances where child soldiers above the MACR voluntarily committed mass atrocities and may have coerced other children to do the same.<sup>75</sup> Amnesty International, a prominent nongovernmental organization dedicated to human rights,<sup>76</sup> has stated that “[w]here an individual can be held responsible for their actions, failure to bring them to justice will support impunity and lead to a denial of justice to their victims.”<sup>77</sup> Impunity could have negative consequences for the fight against child soldier recruitment.<sup>78</sup> As mentioned above, an absolute prohibition on the prosecution of children under eighteen would create a responsibility-free age bracket, which would encourage commanders to recruit children between the ages of fifteen to eighteen, knowing that even intentional violent acts will go unpunished.<sup>79</sup> Additionally, failure to prosecute may lead to a denial of justice for victims and their surviving families. In countries dealing with conflicts, it is particularly important for victims of the most serious crimes to see their attackers brought to justice.<sup>80</sup> If no sense of accountability exists, civilians may seek vigilante justice, placing the children in danger of

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views). For example, the UK Government believes children aged ten and older can distinguish between bad behavior and serious wrongdoing and that it is appropriate to hold them accountable for committing an offense to ensure that the communities know a young person who offends will be dealt with appropriately. See SALLY LIPSCOMBE, *THE AGE OF CRIMINAL RESPONSIBILITY IN ENGLAND AND WALES*, PARLIAMENT BRIEFING PAPERS 7 (2012), available at [www.parliament.uk/briefing-papers/SN03001.pdf](http://www.parliament.uk/briefing-papers/SN03001.pdf).

<sup>74</sup> See AMNESTY INT'L, *supra* note 69, at 10.

<sup>75</sup> See *id.* at 7.

<sup>76</sup> See *About Us*, AMNESTY INT'L, <http://www.amnestyusa.org/about-us> (last visited Mar. 1, 2016).

<sup>77</sup> See AMNESTY INT'L, *supra* note 69, at 7.

<sup>78</sup> See Freeland, *supra* note 67, at 324–35.

<sup>79</sup> See *supra* Part II.A.

<sup>80</sup> See Amnesty Int'l, *Sierra Leone: Renewed Commitment Needed to End Impunity* 12 (Sept. 24, 2001), available at <http://www.refworld.org/docid/3c2afe663.html>.

extrajudicial punishment.<sup>81</sup> Proponents claim that failure to prosecute could also impede a country's ability to recover from conflict, as a court must strike a balance between rehabilitation and punishment for a country to move forward and emerge from the horrors of war.<sup>82</sup> Thus, it may be in the best interests of both the child and the nation to hold a child accountable through a fair juvenile criminal process.<sup>83</sup>

## 2. No Prosecution for Any Child Under the Age of Eighteen

On the other hand, advocates of the second approach to determining a MACR strongly support the belief that there should be an absolute prohibition on prosecution of any child under the age of eighteen. Proponents commonly argue that prosecution would violate standards of international protection for children.<sup>84</sup> This argument is based on the idea that, together, the CRC and the ICC have moved towards setting the MACR at eighteen, as the former defines a child as any person under the age of eighteen, and the latter excludes anyone under eighteen from the court's jurisdiction.<sup>85</sup> In addition, the African Charter on the Rights and Welfare of the Child sets eighteen as the minimum age for participation in armed forces,<sup>86</sup> and the International Labor Organization adopted a convention that establishes eighteen as the minimum age for compulsory recruitment.<sup>87</sup> Proponents argue that these declarations and

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<sup>81</sup> See Agence France Presse, *UN Says Sierra Leone War Crimes Court*, GLOBAL POL'Y F. (Oct. 5, 2000), <https://www.globalpolicy.org/component/content/article/203/39432.html>.

<sup>82</sup> See Michael Custer, *Punishing Child Soldiers: The Special Court for Sierra Leone and the Lessons To Be Learned from the United States' Juvenile Justice System*, 19 TEMP. INT'L. & COMP. L.J. 449, 476 (2005).

<sup>83</sup> See AMNESTY INT'L, *supra* note 69, at 7–8.

<sup>84</sup> See Ramgoolie, *supra* note 46, at 154.

<sup>85</sup> See *supra* Part I.B.; see also Ramgoolie, *supra* note 46, at 152–54 (stating that these declarations define a child as being below the age of eighteen).

<sup>86</sup> See African Charter on the Rights and Welfare of the Child art. 22, OAU DOC. CAB/LEG/24.9/49 (1990), entered into force Nov. 29, 1999, available at [http://www.au.int/en/sites/default/files/Charter\\_En\\_African\\_Charter\\_on\\_the\\_Rights\\_and\\_Welfare\\_of\\_the\\_Child\\_AddisAbaba\\_July1990.pdf](http://www.au.int/en/sites/default/files/Charter_En_African_Charter_on_the_Rights_and_Welfare_of_the_Child_AddisAbaba_July1990.pdf) (“States Parties to the present Charter shall take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain in particular, from recruiting any child.”). The Charter states that a child means every human being under the age of eighteen. See *id.* art. 2.

<sup>87</sup> See Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour arts. 2–3, June 17, 1999, 2133 U.N.T.S. 161, available at <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEX>

statutes provide a strong basis for the belief that children under eighteen should be protected from prosecution.<sup>88</sup> Further, in response to the fact that no MACR is actually established by these statutes, some argue that the omission was deliberate and based on the belief that such a provision was not necessary because no prosecutions for anyone under eighteen would take place.<sup>89</sup>

In support of the argument against prosecution for children under eighteen, proponents also rely on moral, psychological, and economical considerations. Primarily, they point to “children’s unique psychological and moral development, the [CRC’s] emphasis on promoting the best interests of the child, and the damaging psychological effects that trials may have on children forced to recount violence done to them and others.”<sup>90</sup> As for the psychological development of the child, proponents claim that children undergo fundamental changes during adolescence that affect their understanding of the world, which suggests that they do not possess the ability to make independent decisions.<sup>91</sup> Thus, because younger children cannot grasp the concepts essential to political thought and are unable to question organized authority, they should not be held criminally liable for following a commander’s orders.<sup>92</sup> These psychological factors are closely related to the emphasis on the best interests of the child. Because of a child’s vulnerability, proponents claim that states should seek to promote rehabilitation, reintegration, and involvement of the child in the peacekeeping process.<sup>93</sup> Many point to the CRC, which states that “recovery and reintegration shall take place in an environment which fosters the health, self-

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PUB:12100:0::NO:12100:P12100\_ILO\_CODE:C182 (prohibiting compulsory recruitment of children under the age of eighteen in armed conflicts).

<sup>88</sup> See Ramgoolie, *supra* note 46, at 154.

<sup>89</sup> See Matthew Happold, *Child Soldiers: Victims or Perpetrators?*, 29 U. LA VERNE L. REV. 56, 84–85 (2008) [hereinafter Happold, *Victims or Perpetrators*].

<sup>90</sup> Grossman, *supra* note 29, at 323–24 (footnotes omitted).

<sup>91</sup> See Joseph Adelson, *The Political Imagination of the Young Adolescent*, 100 DAEDALUS 1013, 1014 (1971) (stating that there is a profound shift in political thought, which seems to begin at the onset of adolescence—twelve to thirteen—and is completed by the time the child reaches fifteen or sixteen); see also Grossman, *supra* note 29, at 347 (arguing that this shift in thought suggests a child does not possess the same ability to act independently or appreciate the rights of others as an adult).

<sup>92</sup> See Grossman, *supra* note 29, at 348.

<sup>93</sup> See Ilene Cohn, *The Protection of Children in Peacemaking and Peacekeeping Processes*, 12 HARV. HUM. RTS. J. 129, 180–81 (1999).



respect and dignity of the child.”<sup>94</sup> Prosecution may create fear and uncertainty in the child, which could inhibit the ability to effectively rehabilitate and reintegrate the child back into society.<sup>95</sup> Proponents also emphasize the element of duress in the crimes allegedly committed by child soldiers and argue that prosecuting children for what they have little control over is not in the interests of justice.<sup>96</sup> Finally, proponents also provide practical and economical reasons for prohibiting prosecution, including the fact that limited judicial resources should be used to prosecute adults rather than children.<sup>97</sup> This point is premised on the idea that it is most economically prudent to focus prosecution efforts on adult leaders of criminal activities because they are the individuals who are most likely to bear the greatest responsibility.<sup>98</sup>

*a. Flaws in the Argument for Absolute Prohibition on Prosecution*

While there are considerable arguments made for an absolute prohibition on criminal prosecution of any child under the age of eighteen, they are not without significant flaws. First, relying on existing international law to support this position may be misguided. While the CRC sets the age of the child at eighteen,<sup>99</sup> a strong argument cannot be made that this also establishes a MACR. Rather, article 1 states that “[f]or the purposes of the present CRC, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.”<sup>100</sup> Thus, the CRC merely sets a default age for the purpose of the Convention and setting the age of majority or the MACR at a lower limit would not violate article 1. The CRC also lacks support from any other international treaties that establish eighteen as the appropriate age for criminal responsibility.<sup>101</sup> For example, while the

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<sup>94</sup> CRC, *supra* note 30, art. 39.

<sup>95</sup> See Ramgoolie, *supra* note 46, at 156.

<sup>96</sup> See AMENSTY INT’L, *supra* note 69, at 2.

<sup>97</sup> See *Letter to the U.N. Security Council Members on the Statute for the Special Court for Sierra Leone*, HUM. RTS. WATCH (Nov. 1, 2000), <http://www.hrw.org/news/2000/11/01/letter-un-security-council-members-statute-special-court-sierra-leone>.

<sup>98</sup> See Konge, *supra* note 16, at 65; see also Telephone Interview with David Crane, *supra* note 56.

<sup>99</sup> See CRC, *supra* note 30, art. 1.

<sup>100</sup> *Id.*

<sup>101</sup> See, e.g., United Nations Standard Minimum Rules for Administration of Juvenile Justice (The Beijing Rules), § 4, U.N. DOC A/RES/40/33 (Nov. 29, 1985)



International Covenant on Political and Civil Rights ("ICCPR") prohibits death sentences for children who commit crimes while under the age of eighteen, it does not establish this age as the MACR.<sup>102</sup> Second, while international law emphasizes the rehabilitation of child soldiers, such emphasis does not unequivocally preclude criminal prosecution for children under eighteen.<sup>103</sup> As stated by the Special Representative of the UN Secretary-General for Children and Armed conflict, children "can benefit from participation in a process that ensures accountability for one's actions, respects the procedural guarantees appropriate in the administration of juvenile justice, and takes into account the desirability of promoting the child's reintegration and capacity to assume a constructive role in society."<sup>104</sup> Finally, proponents' reliance on the exclusion of children under eighteen from the ICC's jurisdiction may be based on an inaccurate interpretation, as the lack of a MACR is not based on the capacity of the child, but rather on the court's organizational and financial limitations.<sup>105</sup>

Those seeking to prohibit criminal responsibility for any child under the age of eighteen have often overlooked the needs of the victim and the general community.<sup>106</sup> In fact, singular emphasis on rehabilitation may undermine a more retributive domestic sentiment.<sup>107</sup> For example, public opinion in Rwanda

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[hereinafter Beijing Rules], available at <http://www.un.org/documents/ga/res/40/a40r033.htm> (calling for efforts to be made to agree on a reasonable international MACR, but not suggesting eighteen as the appropriate age).

<sup>102</sup> See International Covenant on Civil and Political Rights, art. 6, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR], available at <https://treaties.un.org/doc/Publication/UNTS/Volume%20999/v999.pdf> (prohibiting death sentences for children who committed crimes while they were under the age of eighteen but not establishing eighteen as the MACR).

<sup>103</sup> See Ruling on Defense Motion for Dismissal Due to Lack of Jurisdiction Under the MCA in Regard to Juvenile Crimes of a Child Soldier at ¶ 17, United States v. Khadr, 529 F.3d 1112 (D.C. Cir. 2008) (No. D-07-1405), available at <http://www.defense.gov/news/d20080430Motion.pdf>.

<sup>104</sup> U.N. Secretary-General, Protection of Children Affected by Armed Conflict, Report of the Special Representative of the Secretary-General for Children and Armed Conflict, ¶ 26, U.N. Doc. A/56/453 (Oct. 9, 2011), available at <http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/CAC%20A56%20453.pdf>.

<sup>105</sup> See *supra* note 42 and accompanying text.

<sup>106</sup> See Freeland, *supra* note 67, at 322.

<sup>107</sup> See Special Court Report, *supra* note 45, ¶ 35 ("It was said that the people of Sierra Leone would not look kindly upon a court which failed to bring to justice

favors holding children responsible for their actions,<sup>108</sup> and the government and people of Sierra Leone expressed a preference to see a process of judicial accountability for child combatants presumed responsible for crimes.<sup>109</sup> This preference is based on the belief that a child who has the capability and maturity to distinguish between ethnicities in committing crimes, such as genocide, is mature enough to be held criminally responsible.<sup>110</sup> In cases where a child soldier commits a violent crime, the community must consider the position of the victim and the victim's surviving family.<sup>111</sup> Declaring that no child should be tried under the age of eighteen "ignores the tension between the autonomy of older children and the community's need for vindication."<sup>112</sup> Instead of this binary bright-line approach, the international community must recognize that some children under eighteen may be mature enough to form opinions and make autonomous decisions.<sup>113</sup> Consequently, there may be cases where the maturity of the child and severity of the conduct warrant some sort of accountability.<sup>114</sup> As discussed below, the establishment of a special juvenile criminal tribunal for children between the ages of fifteen and eighteen would strike a balance between the autonomy of older children and the community's demands for justice.<sup>115</sup>

### III. THE NEED FOR CHANGE

There are several convincing reasons for the regulation of the MACR at an international level. First, as distinguished from crimes under domestic law, international crimes "transcend national boundaries and are of concern to the international community," and therefore, states' responses to such crimes should be consistent.<sup>116</sup> Large discrepancies in the MACR would

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children who committed crimes of that nature and spared them the judicial process of accountability.").

<sup>108</sup> See Reis, *supra* note 9, at 634–35.

<sup>109</sup> See Special Court Report, *supra* note 45, ¶ 35.

<sup>110</sup> See Joyce Hackel, *When Kids Commit Genocide*, CHRISTIAN SCI. MONITOR (Dec. 5, 1995), <http://www.csmonitor.com/1995/1205/05062.html>.

<sup>111</sup> See Freeland, *supra* note 67, at 322.

<sup>112</sup> See Davison, *supra* note 7, at 155.

<sup>113</sup> See *id.*

<sup>114</sup> See *id.*

<sup>115</sup> See *infra* Part IV.C.

<sup>116</sup> Happold, *Age of Criminal Responsibility*, *supra* note 6, at 70–71 (stating that responses should be the same as national crimes because in prosecuting

create a system where children may be immune from prosecution in their respective domestic or international courts, but can still face prosecution in other countries where the children's age exceeds those countries' domestic MACR.<sup>117</sup> Second, as illustrated in the opening example, the doctrine of universal jurisdiction provides that any state can assume jurisdiction over children who commit war crimes without the existence of any more traditional jurisdictional relationship.<sup>118</sup> This doctrine can place children in the hands of any state that wishes to prosecute them.<sup>119</sup> The state can then permissibly apply its domestic law regarding the MACR.<sup>120</sup> Providing states with this much power can lead to a system where an individual's liability under international law depends upon place of prosecution.<sup>121</sup> Third, with regard to crimes such as genocide and violations of the Geneva Conventions, states are obligated to act on behalf of the international community to prosecute and punish offenders.<sup>122</sup> Leaving the decision of an appropriate MACR to the states would allow them to determine the scope of their international obligations.<sup>123</sup> Thus, responses by states should be substantially similar to prevent adverse consequences from large disparities.

The need for an internationally regulated MACR is bolstered by the relationship between criminal responsibility and other social rights and responsibilities. The modern approach to criminal responsibility is to determine whether a child has developed the moral and psychological components of criminal responsibility to understand the nature of their actions and hold them accountable for their antisocial behavior.<sup>124</sup> The Beijing Rules, adopted pursuant to the General Assembly Resolution to provide guidance to the community in dealing with juvenile criminals, state that there is a close relationship between the

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international crimes, states are not only acting on their own behalf but also as agents of the international community).

<sup>117</sup> See Erin Lafayette, *The Prosecution of Child Soldiers: Balancing Accountability with Justice*, 63 SYRACUSE L. REV. 297, 321 (2013).

<sup>118</sup> See *supra* Introduction.

<sup>119</sup> See Happold, *Excluding Children*, *supra* note 2.

<sup>120</sup> See *id.*

<sup>121</sup> See Happold, *Age of Criminal Responsibility*, *supra* note 6, at 71 (“[I]t would seem wrong for an individual's liability under international law to depend upon the place of prosecution.”).

<sup>122</sup> See *id.*

<sup>123</sup> See *id.*

<sup>124</sup> See Beijing Rules, *supra* note 101.

notion of criminal responsibility and other social rights and responsibilities, such as civil majority and minimum age for matrimony.<sup>125</sup> By establishing an age at which children are able to assume these rights and responsibilities, countries demonstrate that they recognize an age at which a child has sufficient mental development to undertake them.<sup>126</sup> These basic rights are analogous to participation in armed conflict or culpability for criminal acts.<sup>127</sup> Even if a country selects arbitrary age limits on other basic civil rights, these limits can serve as a starting point for determining an appropriate MACR.<sup>128</sup>

#### IV. PROPOSED SOLUTION

To craft a solution to the problems posed by the lack of an international MACR, the international community must find a way to strike a balance between the demands for accountability and the call for rehabilitation.<sup>129</sup> A system must be established that recognizes criminal responsibility as well as the desire to protect children from a legal process that they may be too young to fully understand.<sup>130</sup> This Note proposes an international MACR of fifteen and calls for the establishment of a special international criminal tribunal for children between the ages of fifteen and eighteen that provides special safeguards and promotes rehabilitation and reintegration of those children into society.

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<sup>125</sup> *See id.*

<sup>126</sup> *See Lafayette, supra* note 117, at 323.

<sup>127</sup> *See id.*

<sup>128</sup> *See id.*

<sup>129</sup> This idea is known as the tension between restorative and commutative justice, a concept that has been debated by philosophers for centuries. *See, e.g.*, Thomas Aquinas, *Summa Theologica*, pt. II-II q. 61, available at <http://dhsprory.org/thomas/summa/SS/SS061.html#SSQ61OUTP1> (last visited Aug. 13, 2015).

<sup>130</sup> *See AMNESTY INT'L, supra* note 69, at 15.

### A. *Implementing a MACR of Fifteen*

Although international law requires states to establish a MACR, it offers no specific instruction on what that age should be.<sup>131</sup> However, existing international law does offer some guidance in the form of guidelines and recommendations.<sup>132</sup> First, the Beijing Rules state that the MACR should not be set so low as to allow children to be prosecuted for crimes and consequences that they did not fully comprehend.<sup>133</sup> Not only would an unreasonably low MACR breach international law,<sup>134</sup> but it would also render the notion of responsibility meaningless.<sup>135</sup> Second, there seems to be an emerging trend towards standardizing the MACR in the midteens.<sup>136</sup> For example, although the CRC did not establish a MACR, delegates argued during negotiations that eighteen as the age of majority was "quite late in light of some national legislations."<sup>137</sup> Thus, delegates recommended lower limits, such as fifteen, which was the age that the General Assembly had set in connection with the International Year of the Child, and fourteen, which was the age that marked the end of compulsory education in many countries and the legal marriage age for girls.<sup>138</sup> In addition, the Rome Statute makes it a war crime to conscript or enlist children under the age of fifteen into armed forces or groups.<sup>139</sup> It rationally follows that if children under fifteen are too young to fight, they are also too young to be held responsible for their criminal

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<sup>131</sup> See CRC, *supra* note 30, art. 40(3)(a); see also Beijing Rules, *supra* note 101, § 4 cmt. ("Efforts should therefore be made to agree on a reasonable lowest age limit that is applicable internationally.")

<sup>132</sup> See Beijing Rules, *supra* note 101 (suggesting that criminal responsibility should be imposed where the child has sufficient awareness and linking criminal responsibility to the granting of other civil rights, such as marriage); see also Happold, *Victims or Perpetrators*, *supra* note 89, at 75 (stating that the Beijing Rules provide an indication of the shared thinking of Party States).

<sup>133</sup> See Beijing Rules, *supra* note 101 ("In those legal systems recognizing the concept of the age of criminal responsibility for juveniles, the beginning of that age shall not be fixed at too low an age level . . .").

<sup>134</sup> See Happold, *Victims or Perpetrators*, *supra* note 89, at 73.

<sup>135</sup> See Beijing Rules, *supra* note 101, § 4 cmt.

<sup>136</sup> See Happold, *Age of Criminal Responsibility*, *supra* note 6, at 82 (stating that the UN Secretary-General and Security Council used this approach when drafting the Statute for the Special Court for Sierra Leone).

<sup>137</sup> THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: A GUIDE TO THE "TRAVAUX PRÉPARATOIRES" 115 n.32 (Sharon Detrick ed., 1992).

<sup>138</sup> See *id.*

<sup>139</sup> See Rome Statute, *supra* note 36, art. 8(2)(b)(xxvi).

actions committed during an armed conflict.<sup>140</sup> On the other hand, if children over fifteen are old enough to be enlisted into the armed forces, then they are old enough to understand the nature and consequences of their actions committed during hostilities.<sup>141</sup> Likewise, the SCSL sets the MACR at fifteen, despite the fact that the Prosecutor subsequently made an independent decision not to indict any child under the age of eighteen.<sup>142</sup> The European Court of Human Rights also discussed this issue in *V. v. United Kingdom*.<sup>143</sup> Although the court decided that attributing criminal responsibility to a child at the age of ten did not violate article 3 of the European Convention on Human Rights, five dissenting judges argued that “there is a general standard amongst the member States of the Council of Europe under which there is a system of relative criminal responsibility beginning at the age of thirteen or fourteen.”<sup>144</sup> Based on these guidelines and recommendations, this Note argues that an international MACR of fifteen would be appropriate.

### *B. Children Under Fifteen*

In implementing a MACR of fifteen within the international community, much consideration must be given to adjudicative procedures. Under both domestic and international criminal law, the elements of mens rea and actus reus are required for criminal liability to attach to an accused’s actions.<sup>145</sup> Children under fifteen do not have the mental capacity to understand the nature and consequences of their actions and therefore do not possess

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<sup>140</sup> See Happold, *Age of Criminal Responsibility*, *supra* note 6, at 78.

<sup>141</sup> See Lafayette, *supra* note 117, at 323 (stating that allowing individuals to participate in activities, such as enlistment in armed forces, means that the child has sufficient mental development to understand and safely undertake them).

<sup>142</sup> See *supra* Part I.B.

<sup>143</sup> *V. v. United Kingdom*, App. No. 24888/94, 1999-IX Eur. Ct. H.R. 111 The court tried two eleven-year-olds who abducted and killed a two-year-old boy. See *id.* at 121.

<sup>144</sup> *Id.* at 173 (dissenting opinion).

<sup>145</sup> See JOSHUA DRESSLER & STEPHEN P. GARVEY, *CASES AND MATERIALS ON CRIMINAL LAW* 127 (6th ed. 2012).

the requisite mens rea to be held criminally responsible in a judicial system.<sup>146</sup> In these types of situations, it is not in the interests of justice to hold the child criminally accountable.<sup>147</sup>

While the adult criminal system is not an appropriate place to adjudicate the acts of a child under the age of fifteen, a truth and reconciliation commission may be the most effective way to achieve justice for the victim and community while assuring rehabilitation for the child. The Security Council has pointed out that Truth and Reconciliation Commissions (“TRCs”) play an important role in the case of juvenile offenders.<sup>148</sup> TRCs offer a nonjudicial alternative to pursue accountability by offering children a forum to express their feelings and assist them in becoming active members of the community.<sup>149</sup> Use of TRCs for children under the age of fifteen also aligns with the interests of article 39 of the CRC, which provides that “States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of . . . armed conflicts.”<sup>150</sup> The article further states that “[s]uch recovery and reintegration shall take place in an environment which fosters health, self-respect and dignity of the child.”<sup>151</sup> Participation in these TRCs can help children come to terms with their experiences.<sup>152</sup> Finally, and perhaps most importantly, children can reintegrate into society and learn to contribute in a meaningful way.<sup>153</sup>

### C. *Children Between the Ages of Fifteen and Eighteen*

For child soldiers between the ages of fifteen and eighteen, culpability may be warranted based on their ability to form independent moral judgments. Article 12 of the CRC recognizes the capability of children to form their own views and the right to

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<sup>146</sup> See Lafayette, *supra* note 117, at 303 (stating that children under fifteen cannot be held for crimes committed because they do not possess the requisite mental, physical, or moral development to make logical decisions).

<sup>147</sup> See AMENSTY INT'L, *supra* note 69, at 2.

<sup>148</sup> See Jan. 31, 2001 Letter, *supra* note 54.

<sup>149</sup> See Siegrist, *supra* note 61, at 55.

<sup>150</sup> CRC, *supra* note 30, art. 39.

<sup>151</sup> *Id.*

<sup>152</sup> See Siegrist, *supra* note 61, at 62.

<sup>153</sup> See Luz E. Nagle, *Child Soldiers and the Duty of Nations To Protect Children from Participation in Armed Conflict*, 19 CARDOZO J. INT'L & COMP. L. 1, 48 (2011) (noting that child soldiers must learn how to live in and contribute to society in a meaningful way).

freely express these views.<sup>154</sup> The traditional view is that a right-holder is a rational individual capable of making decisions and is therefore responsible for the consequences of his or her actions.<sup>155</sup> Thus, where a child does act with full awareness of his actions and with intent to commit a violent crime, it would be in the best interests of both the child and society to hold the child criminally liable.<sup>156</sup> In such cases, article 40 of the CRC permits prosecution so long as the best interests of the child serve as the primary consideration.<sup>157</sup>

### 1. Special Juvenile Chamber

During negotiations establishing the Special Court for Sierra Leone, the UN Secretary-General, Kofi Annan, proposed that the statute include a provision to create a special juvenile chamber to prosecute violators between the ages of fifteen and eighteen.<sup>158</sup> He recommended various procedural safeguards to protect the child, including keeping the juvenile's identity anonymous, holding the proceedings in camera, providing legal counsel or social worker assistance, and participation by the child's parent or guardian.<sup>159</sup> Though Annan believed that the TRC could handle cases of juveniles, he maintained that the court also played an important role.<sup>160</sup>

While Annan's recommendations were not ultimately adopted, they provide notable guidance on how a juvenile criminal tribunal should be established. A separate juvenile system should place primary consideration on the fundamental

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<sup>154</sup> See CRC, *supra* note 30, art. 12 ("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.").

<sup>155</sup> See Happold, *Age of Criminal Responsibility*, *supra* note 6, at 83–84.

<sup>156</sup> See Nagle, *supra* note 153, at 39.

<sup>157</sup> See CRC, *supra* note 30.

<sup>158</sup> See Special Court Report, *supra* note 45, at 23.

<sup>159</sup> See *id.*

<sup>160</sup> See Letter from U.N. Secretary-General to President of the Security Council (Jan. 12, 2001) ¶ 9, U.N. Doc. S/2001/40, available at <http://www.un.org/en/peacekeeping/missions/past/unamsil/spcourt.htm> ("I am also of the view that care must be taken to ensure that the Special Court for Sierra Leone and the Truth and Reconciliation Commission will operate in a complementary and mutually supportive manner, fully respectful of their distinct but related functions.").



rights and the best interests of the child.<sup>161</sup> To achieve such a system, there must be full compliance with all international standards of due process and the CRC, particularly article 40, which emphasizes that a child accused of infringing the law should be treated in a manner that promotes a sense of dignity and worth and takes into account the desirability of supporting reintegration into society.<sup>162</sup> Creating an international criminal juvenile tribunal with these factors as primary consideration would meet both the goals of achieving accountability and promoting a child's rehabilitation and reintegration into the community. As a well-established criminal court, the ICC can be a leader by creating a separate juvenile tribunal that has jurisdiction over children between the ages of fifteen and eighteen.<sup>163</sup> However, to ensure that the separate tribunal places primary emphasis on the child's best interests and rehabilitation it must implement additional safeguards beyond those traditionally offered in the ICC.<sup>164</sup>

## 2. Terms of Imprisonment

To ensure that children's interests are fully protected and promoted, juvenile offenders must be treated differently than adults.<sup>165</sup> First and foremost, the death penalty should never be permitted, even for the most extreme cases.<sup>166</sup> Regarding terms of imprisonment, because there are no international criminal tribunals currently prosecuting juveniles, there is no precedent for determining the maximum imprisonment sentence.<sup>167</sup> Emphasizing the focus on rehabilitation and reintegration in an

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<sup>161</sup> See OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS, THE ADMINISTRATION OF JUVENILE JUSTICE 1, available at <http://www.ohchr.org/EN/HRBodies/CRC/Documents/Recommandations/justice.pdf>.

<sup>162</sup> See CRC, *supra* note 30, art. 40.

<sup>163</sup> See Freeland, *supra* note 67, at 324–25 (stating that because it is the only permanent court of its kind, it is important that the ICC be in a position to set standards that play a vital role in the evolution of international criminal law).

<sup>164</sup> See Lafayette, *supra* note 117, at 314.

<sup>165</sup> See Alison Dundes Renteln, *The Child Soldier: The Challenge of Enforcing International Standards*, 21 WHITTIER L. REV. 191, 199–200 (1999).

<sup>166</sup> This is consistent with the ICCPR. See ICCPR, *supra* note 102, at 175; see also *Roper v. Simmons*, 543 U.S. 551, 575 (2005) (Kennedy, J., dissenting).

<sup>167</sup> See Kongs, *supra* note 16, at 41 (stating that child soldiers have never been prosecuted by an international court). Although the Rome Statute of the ICC provides for imprisonment for a specified number of years, not to exceed a maximum of thirty years, the provision only applies to persons aged eighteen and older who fall under the court's jurisdiction. See Rome Statute, *supra* note 36, art. 77.

international criminal juvenile tribunal, the maximum sentence for children prosecuted in a special criminal tribunal should be limited to five years. This would allow the child to be released from prison in his early adult years, a phase in life where he or she can still effectively assume a constructive role in society.<sup>168</sup> This is also consistent with Rule 17 of the Beijing Rules, which states that any punishment of a juvenile should be considered not only in proportion to the severity of the offense, but also to the interests of the child and society.<sup>169</sup>

If a child is sentenced to imprisonment, there must be strict provisions regarding the conditions of that imprisonment. First, children must be completely separated from adult prisoners so that they can be accorded privacy and appropriate treatment. This is consistent with the ICCPR, which states that accused juveniles should be separated from adults and accorded treatment appropriate to their age and legal status.<sup>170</sup> Second, children must have access to education and other services that will help them assume a constructive role in society upon release.<sup>171</sup> These considerations are emphasized in article 40 of the CRC, which states that a variety of services should be provided, such as guidance, supervision, counseling, education, and vocational training programs.<sup>172</sup> In implementing these measures, the court can ensure that the child is treated in a manner that promotes dignity and self-worth and supports rehabilitation and reintegration.

### 3. Available Defenses and Safeguards

As in adult criminal trials, children should be afforded all available defenses and safeguards. The Rome Statute of the ICC provides the most common defenses available in international tribunals, including intoxication and duress, which are most applicable to child soldiers.<sup>173</sup> Further, the ICCPR states: (1) No

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<sup>168</sup> See, e.g., UNICEF, INTERNATIONAL CRIMINAL JUSTICE AND CHILDREN 58 (2002) (stating that imprisonment should be used as a last resort and for the shortest period of time).

<sup>169</sup> See Beijing Rules, *supra* note 101, § 17.

<sup>170</sup> See ICCPR, *supra* note 102, art. 10(2)(b), (3) (“Accused juvenile persons shall be separated from adults . . .”).

<sup>171</sup> See UNICEF, *supra* note 168, at 58–59.

<sup>172</sup> See CRC, *supra* note 30, art. 40.

<sup>173</sup> See Rome Statute, *supra* note 36, art. 31; see also Lafayette, *supra* note 117, at 312.

one shall be subject to arbitrary arrest; (2) anyone who is arrested must be promptly informed of any charges and is entitled to proceedings in court; and (3) all persons deprived of liberty should be treated with humanity and respect.<sup>174</sup> Finally, Rule 7.1 of the Beijing Rules states that protections provided to juveniles should “include the presumption of innocence, the right to be notified of charges, the right to remain silent, the right to counsel, the right to the presence of a parent or guardian, the right to confront and cross-examine witnesses, and the right to appeal.”<sup>175</sup> The existence of these defenses will ensure that the child receives a fair and just trial.

### CONCLUSION

With the current widespread use of child soldiers, the international community is faced with the difficult problem of protecting those children while also addressing the needs of the victims. While children under fifteen do not have the sufficient mental capacity to be criminally culpable, a child between the ages of fifteen and eighteen may be capable of making the decision to commit a war crime and therefore must be held accountable. Implementing an international criminal tribunal for juveniles between the ages of fifteen and eighteen strikes the proper balance between accountability and rehabilitation. While protecting children who are presumed not to have the capacity to infringe the penal laws, a tribunal would also highlight the unacceptable nature of the crimes voluntarily committed by child soldiers above the MACR. The tribunal would provide an element of justice and a sense of closure for the victims while simultaneously promoting a child's rehabilitation and reintegration into society. Such a tribunal would show the international community that unacceptable voluntary behavior will not be tolerated, but more importantly, it will provide protection for children and serve as a significant step in deterring the use of child soldiers in armed conflicts around the world.

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<sup>174</sup> See ICCPR, *supra* note 102, art. 9–10.

<sup>175</sup> See Davison, *supra* note 7, at 151.