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Alice S. Debarre

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## Rehabilitation & Reintegration of Juvenile War Criminals: A De Facto Ban on Their Criminal Prosecution

### Keywords

Criminals, War, Criminal Law, International Criminal Law, Violence

# REHABILITATION & REINTEGRATION OF JUVENILE WAR CRIMINALS: A *DE FACTO* BAN ON THEIR CRIMINAL PROSECUTION?

ALICE S. DEBARRE\*

## I. INTRODUCTION

Although child soldiers that commit acts of atrocity and war crimes constitute a minority<sup>1</sup> of the estimated 250,000 child soldiers worldwide,<sup>2</sup> the question of their prosecution, as yet unsettled in international law, raises complex issues of “culpability, a community’s sense of justice and the ‘best interests of the child’.”<sup>3</sup> International law does not define the term “child soldier,” and, given the lack of a single or discrete instrument specifically concerned with this issue, no consensus exists as to who falls within that category;<sup>4</sup> the main issues being the minimum age of lawful participation in armed conflict, and the level of participation required for the child to be considered a soldier. One operational definition is that which can be extricated from Article 1 of the Optional Protocol on Children in Armed Conflict, which raises the minimum age of lawful participation in armed conflict to eighteen years and refers to child soldiers as those children who take a “*direct part in hostilities*.”<sup>5</sup> Since this paper is concerned with child war criminals, there is no need to define the scope of the notion of taking a direct part in hostilities, as it can be assumed that any child soldier who commits a war crime has, in fact, taken a direct part in the armed conflict.<sup>6</sup>

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\* Alice S. Debarre is a young law graduate, recently admitted to the New York State bar, with a focus on International Human rights and Humanitarian Law. She has studied law at King’s College London, Paris I Panthéon-Sorbonne, and the Georgetown University Law Center. Currently a legal intern with Human Rights First’s National Security Team in Washington D.C., Ms. Debarre will start working for the International Committee of the Red Cross’s International Law and Policy division in Geneva, in March, 2016.

1. MARK A. DRUMBL, REIMAGINING CHILD SOLDIERS IN INTERNATIONAL LAW AND POLICY 85 (2012).

2. Press Release, Ex-Child Soldiers: From Victims of War to Protagonists of Peace, UNICEF (June. 23, 2009), [http://www.unicef.org/media/media\\_50066.html](http://www.unicef.org/media/media_50066.html).

3. U.N. Secretary-General, *Promotion and Protection of the Right of Children: Impact of Armed Conflict on Children*, ¶ 250, U.N. Doc. A/51/306 (Aug. 26, 1996) <http://www.un.org/documents/ga/docs/51/plenary/a51-306.htm>.

4. DRUMBL, *supra* note 1, at 102.

5. Optional Protocol to the United Nations Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, G.A. Res. 54/263, Annex I art. 6(3) U.N. Doc. A/RES/54/263, (May 25, 2000) (entered into force Feb. 12, 2002) [hereinafter Optional Protocol on Children in Armed Conflict].

6. See UNICEF, *The Paris Principles: Principles and Guidelines on Children Associated with Armed Forces or Armed Groups*, (Feb. 2007),

The ban on recruiting or using any individual under the age of fifteen in armed forces or armed groups is settled international law,<sup>7</sup> and, although it is still ambiguous for armed forces, the minimum age is now considered to be eighteen for armed groups.<sup>8</sup> However, the question remains of what is to be done with child soldiers who themselves have committed war crimes. International law provides no explicit guidelines for whether, or at what age, child soldiers should be prosecuted for war crimes.<sup>9</sup> In an international armed conflict (“IAC”), child soldiers are combatants and will therefore benefit from the ‘combatant privilege,’ which ensures that they cannot be prosecuted for actions taken during an armed conflict that comply with the rules of International Humanitarian Law (“IHL”).<sup>10</sup> However, no such concept exists in non-international armed conflicts (“NIACs”), where child soldiers are most often used, and in any case, no child soldier who has committed a war crime, in an IAC or a NIAC, will be immune from prosecution under IHL.<sup>11</sup> The only provisions relating to criminal prosecution of child war criminals are Articles 77(5) of Additional Protocol I to the 1949 Geneva Conventions<sup>12</sup> and 6(4) of Additional Protocol II<sup>13</sup> that ban the death penalty for crimes committed by individuals when under the age of eighteen. IHL, along with International Human Rights Law (“IHRL”) and International Criminal Law (“ICL”), contain little guidance and no express prohibition on the prosecution of child soldiers for war crimes.<sup>14</sup>

Despite the absence of a ban on the criminal prosecution of child soldiers, none have ever been prosecuted by an international court.<sup>15</sup> Much of the reticence to trying child war criminals in criminal courts stems from the fact that, given their young age, they lack the necessary mental and moral development, and are

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<http://www.unicef.org/emerg/files/ParisPrinciples310107English.pdf> [hereinafter *The Paris Principles*].

Principle 2.1 goes beyond the notion of taking a direct part in hostilities and defines the child soldiers as

. . . any person below 18 years of age who is or who has been recruited or used by an armed force or armed group in any capacity, including but not limited to children, boys and girls, used as fighters, cooks, porters, messengers, spies or for sexual purposes. It does not only refer to a child who is taking or has taken a direct part in hostilities.

*Id.* ¶2.1.

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

8. DRUMBL, *supra* note 1, at 5.

9. Nienke Grossman, *Rehabilitation or Revenge: Prosecuting Child Soldiers for Human Rights Violations*, 38 GEO. J. INT'L L. 323, 335 (2007).

10. Erin Lafayette, *The Prosecution of Child Soldiers: Balancing Accountability with Justice*, 63 SYRACUSE L. REV. 297, 302 (2013).

11. Matthew Happold, *Child Prisoners in War*, in PRISONERS IN WAR 237-250, 243 (Sibylle Scheipers ed., 2010).

12. AP I, *supra* note 7, art. 77.

13. Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 6, Jun. 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II].

14. Leena Grover, *Trial of the Child Soldier: Protecting the Rights of the Accused*, 65 HEIDELBERG J. OF INT'L L., 217, 218 (2005).

15. Paola Konge, *International Crimes & Child Soldiers*, 16 SW. J. INT'L L. 41, 41 (2010).

therefore more easily coerced or influenced into committing atrocities.<sup>16</sup> Indeed, they are less socialized, more malleable, and more docile than adults.<sup>17</sup> As the U.S. Supreme Court in *Roper v. Simmons* held, children have a “lack of maturity and an underdeveloped sense of responsibility,” which makes them more susceptible to be influenced by outside pressures.<sup>18</sup> Furthermore, it is common for commanders to give child soldiers either drugs or alcohol,<sup>19</sup> thereby further lowering their inhibitions. Alongside these concerns, the criminal prosecution of child soldiers for war crimes also gives rise to more juridical issues. Directly related to this question of a child’s development is the difficulty of proving the child soldier’s *mens rea*. Does he or she possess the *mens rea* sufficient to be held responsible for his or her war crimes? According to Article 8(2)(a) of the Rome Statute, the *mens rea* required for war crimes is the proof that “[t]he perpetrator was aware of the factual circumstances that established the existence of an armed conflict” and that the victim was a protected person under one or more of the Geneva Conventions,<sup>20</sup> which would have to be proven in addition to the traditional *mens rea* required by the particular crime committed. Further juridical issues arise, even were it to be found that the child soldier met the substantive intent requirements for the commission of a war crime, as the court would likely then have to look at the defenses of duress,<sup>21</sup> intoxication,<sup>22</sup> and superior orders.<sup>23</sup> Finally, the major problem with child soldier prosecution for war crimes is that, while Article 40 of the Convention on the Rights of the Child calls on state parties to set a minimum age of criminal responsibility,<sup>24</sup> the little guidance that international law provides leaves states with a considerable amount of discretion on the question.<sup>25</sup> The current lack of consensus of the different state laws on this issue is an important obstacle, as it is unclear who may or may not be prosecuted for war crimes under international law.

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16. Lafayette, *supra* note 10, at 305.

17. HAPPOLD, *supra* note 11, at 142.

18. *Roper v. Simmons*, 543 U.S. 551, 569 (2005) (quoting *Johnson v. Texas*, 509 U.S. 350, 366 (1993)).

19. HAPPOLD, *supra* note 11, at 142.

20. Elements of the Crimes of the International Criminal Court, Sept. 9, 2002, ICC-ASP/1/3 at 108, U.N. Doc. PCNICC/2000/1/Add.2 (2000), at art. 8(2)(a) [hereinafter Elements of Crimes]. See also Rome Statute of the International Criminal Court, Jul. 17, 1998, 2187 U.N.T.S. 90, at art. 8(a)(2), [hereinafter Rome Statute].

21. Grover, *supra* note 14, at 230 (although the defense of duress was rejected by both the ICTY and the ICTR, it was included in article 31(1)(d) of the Rome statute).

22. Rome Statute, *supra* note 20, art. 31(1)(b).

23. Grover, *supra* note 14, at 230 (this defense was rejected in Nuremberg, the ICTY, the ICTR, and the SCSL Statute but is available under Article 33 of the Rome Statute in limited circumstances).

24. Convention on the Rights of the Child art. 40, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC].

25. HAPPOLD, *supra* note 11, at 246 (discussing the guidelines that can be found in international law—the minimum age of criminal responsibility should not be so low as to result in the punishment of children who were too young at the time of the commission of the offence to understand the consequences; even children above the age of criminal responsibility should be treated differently from adults. He identifies a trend to standardizing the minimum age of criminal responsibility in the mid-teens.).

The reaction of the global community to this judicial uncertainty has been to create and uphold what Mark Drumbl has described as the “*faultless passive victim*” image of the child soldier, one of the goals of which is to curb punitive policies and harsh measures.<sup>26</sup> Despite this, and while it is clear in international law that, when dealing with child soldiers, the standard is the “best interests of the child,”<sup>27</sup> it cannot as yet be said that there exists a customary international law banning the prosecution of child soldiers. The Rome Statute is the only international law instrument precluding the prosecution of an individual under the age of eighteen at the time the offence was committed,<sup>28</sup> and, although the Rome Statute plays a powerful trendsetting role,<sup>29</sup> only a minority consider this to be a substantive, fundamental rule of international law.<sup>30</sup> However, not only is there no precedent in international law for the prosecution of war child criminals, examples of such prosecutions in national courts are also extremely rare.<sup>31</sup> More than exemplifying the reticence to try child soldiers, this seems to point towards an emerging customary ban.

As opposed to the incertitude concerning prosecution, international law is clear on the fact that states have an obligation both to rehabilitate and reintegrate all child soldiers.<sup>32</sup> Reintegration has been defined as a “long-term process which aims to give children a viable alternative to their involvement in armed conflict and help them resume life in the community.”<sup>33</sup> Measures of rehabilitation and reintegration include Truth and Reconciliation Commissions (“TRCs”), Disarmament Demobilization and Reintegration (“DDR”) programs, and local traditional and cultural rites.<sup>34</sup> Although the particular context will determine which measure is the most appropriate, it is clear that both family reunification and education are key aspects of the rehabilitation and reintegration objectives.<sup>35</sup>

Assuming the existence of such a customary international norm obligating states to reintegrate and rehabilitate child soldiers, would this not, in fact, prohibit their criminal prosecution? Considering that the purpose of such an obligation is to reintegrate the child war criminals and other child soldiers into their communities and to help them heal,<sup>36</sup> how does criminal prosecution fit into this

26. DRUMBL, *supra* note 1, at 10.

27. CRC, *supra* note 24, at art. 1.

28. Rome Statute, *supra* note 20, art. 26.

29. DRUMBL, *supra* note 1, at 119.

30. See, e.g., SONJA C. GROVER, CHILD SOLDIER VICTIMS OF GENOCIDAL FORCIBLE TRANSFER – EXONERATING CHILD SOLDIERS CHARGED WITH GRAVE CONFLICT-RELATED INTERNATIONAL CRIMES, 64 (2012).

31. DRUMBL, *supra* note 1, at 117

32. *The Paris Principles*, *supra* note 6, §7.

33. *Coalition to Stop the Use of Child Soldiers, Child Soldiers: Global Report 2008*, at 412 (2008), [http://www.child-soldiers.org/global\\_report\\_reader.php?id=97](http://www.child-soldiers.org/global_report_reader.php?id=97).

34. Lafayette, *supra* note 10, at 309.

35. See UNICEF, Cape Town Principles and Best Practices art. 32, (Apr. 30, 1997), [http://www.unicef.org/emerg/files/Cape\\_Town\\_Principles\(1\).pdf](http://www.unicef.org/emerg/files/Cape_Town_Principles(1).pdf) (covering family reunification); HAPPOLD, *supra* note 11, at 110 (covering education).

36. Lafayette, *supra* note 10, at 309.

process? The existence of international standards and protections for accused juveniles, as well as the possibility, at the sentencing phase, to order purely rehabilitative measures, would seem to argue for the compatibility of criminal prosecution of child soldiers with their rehabilitation and reintegration. However, this is in tension with the idea that a criminal trial undoubtedly leads to the increased stigmatization of child soldiers, while causing them further trauma.<sup>37</sup> Moreover, the nature of the available safeguards and the supposedly rehabilitative nature of a juvenile criminal trial are ill defined and insufficiently provided for in international law.<sup>38</sup> Finally, accountability does not necessarily have to involve criminal responsibility. Therefore, there is a strong argument to be made according to which a state's obligation to rehabilitate and reintegrate child soldiers, who have committed war crimes, is incompatible with their criminal prosecution, thereby creating a *de facto* ban on criminally trying these child soldiers.

## II. THE EMERGING CUSTOMARY INTERNATIONAL NORM BANNING THE PROSECUTION OF CHILD SOLDIERS FOR WAR CRIMES

In conventional international humanitarian, human rights, and criminal law, there is no clear prohibition on the criminal liability of individuals for war crimes committed while they were under the age of eighteen. The 1949 Geneva Conventions and their Additional Protocols (hereinafter AP I and AP II) contemplated both possibilities that minors could commit war crimes,<sup>39</sup> and that they could lawfully be prosecuted for their acts.<sup>40</sup> In the context of an IAC, article 77(5) of AP I prevents the execution of the death penalty on a person who had not yet reached the age of eighteen years at the time the offence related to such an armed conflict was committed.<sup>41</sup> Although Brazil's delegate had sought during the AP I negotiations to include the prohibition on penal prosecution of children under sixteen in article 77, the decision not to address this issue and to leave it to state discretion prevailed.<sup>42</sup> In NIACs, Article 6(4) of AP II similarly prohibits the pronouncement of the death penalty on persons under eighteen.<sup>43</sup> The Geneva Conventions, therefore, do not set a minimum age of criminal responsibility, and apart from excluding the most extreme sentence, do not distinguish between

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37. Megan Nobert, *Children at War: The Criminal Responsibility of Child Soldiers*, 3 PACE INT'L L. REV. ONLINE COMPANION 1, 34-35 (2011). <http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1025&context=pilronline>.

38. See *Analysis: Should Child Soldiers be Prosecuted for Their Crimes?* IRIN NEWS, Oct. 6, 2011, <http://www.irinnews.org/report/93900/analysis-should-child-soldiers-be-prosecuted-for-their-crimes>.

39. Lafayette, *supra* note 10, at 106.

40. Grover, *supra* note 14, at 219.

41. See AP I, *supra* note 7, at art. 77(5). This was an improvement on article 68 of Geneva Convention IV, which prohibited the pronouncement of the death penalty on a protected person who was under eighteen at the time the offence was committed. Indeed, in general, child soldiers are not protected persons. See HAPPOLD, *supra* note 11, at 105.

42. Geneva convention, Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian law Applicable in Armed Conflicts, 307 (1974-1977).

43. AP II, *supra* note 13, at art. 6(4).

prosecuting adults and juveniles.<sup>44</sup> Given that Article 40 of the CRC enumerates the fundamental guarantees of due process that a child alleged as, or accused of, having infringed the penal law is entitled to in judicial proceedings, and that Article 37 bars capital punishment and life imprisonment without parole but not incarceration, the CRC also seems to allow the criminal prosecution of juvenile offenders.<sup>45</sup> Although these articles are not specifically concerned with child soldiers and crimes committed during an armed conflict, nothing in the CRC prohibits child soldier prosecutions for war crimes.<sup>46</sup> Furthermore, the Committee on the Right of the Child has advised states to report on “the criminal liability of children for crimes they may have committed during their stay with armed forces or groups and the judicial procedure applicable [ . . . ].”<sup>47</sup>

Whereas both these conventions therefore suggest that child soldiers may be criminally prosecuted, a consideration of the statutes of the various international, regional, and mixed tribunals does not give rise to an established and consensual position. Indeed, neither the statute of the International Criminal Tribunal for Rwanda (“ICTR”) nor that of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) sets a minimum age of criminal responsibility.<sup>48</sup> For some, this omission was intentional, suggesting that the court would be entitled to prosecute a minor, and, should it decide to do so, that person could raise his or her age as an affirmative defense.<sup>49</sup> The statutes’ silence can however be interpreted differently, for some it does not necessarily preclude the prosecution of children,<sup>50</sup> while others have argued that such a deliberate omission “seems to have been premised on a belief that such a provision was unnecessary as no such prosecutions would take place.”<sup>51</sup> Regardless, these statutes theoretically permit the prosecution of child soldiers for international crimes. The Rome Statute, however, clearly states in Article 26 that the ICC’s jurisdiction does not extend to individuals under eighteen years of age.<sup>52</sup> Although Sonja Grover argues that this jurisdictional exclusion relates to a presumed lack of criminal responsibility of individuals under the age of eighteen,<sup>53</sup> there seems to be a general tendency to interpret Article 26

44. Grover, *supra* note 14, at 2199.

45. *Id.*

46. *Id.*

47. Committee on the Rights of the Child, *Guidelines regarding initial reports to be submitted by States Parties under Article 8(1) of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict*, CRC/OP/AC/1 art. 6(3)(f) (Nov. 14, 2001).

48. 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, 26 (2011).

49. Brief of International Law Scholars as Amici Curiae in Support of Respondent Omar Khadr at 23, *Boumediene v. Bush*, 553 U.S. 723 (2008) (No. 06-1196), [hereinafter Brief of International Law Scholars]

<http://ccrjustice.org/files/Brief%20of%20International%20Law%20Scholars%20as%20Amici%20Curiae%20in%20Support%20of%20Respondent%20Omar%20Khadr.pdf>.

50. Grossman, *supra* note 9, at 338-39.

51. Matthew Happold, *Child Soldiers: Victims or Perpetrators*, 29 U. LA VERNE L. REV. 56, 84-85 (2008).

52. Rome Statute, *supra* note 20, at art. 26.

53. See GROVER, *supra* note 30, at 63.



as a procedural, rather than a normative, provision.<sup>54</sup> Indeed, it is said, given the lack of a consensus on the minimum age of criminal responsibility, that provision was the result of a political compromise, and therefore, not intended to set out a legal principle.<sup>55</sup> As a result, it excludes the ICC's jurisdiction only. It does not formally prohibit other tribunals, whether international, national, or local, from prosecuting children for international crimes.<sup>56</sup> Indeed, Article 26 was arguably not based on the belief that children under eighteen should not be prosecuted for war crimes, but rather on the sense that this decision should be left to state discretion.<sup>57</sup> As for the mixed tribunals, the United Nations Transitional Administration in East Timor ("UNTAET") Regulation 2000/30 Article 45 gave the Special Panels for Serious Crimes ("SPSC") *de jure* jurisdiction over minors from the ages of twelve to eighteen,<sup>58</sup> whereas the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia ("ECCC") does not mention juvenile prosecution and restricts the jurisdiction of the Chambers to those most responsible.<sup>59</sup> Finally, Article 7(1) of the Statute of the Special Court for Sierra Leone (SCSL) permits the prosecution of children aged fifteen and above.<sup>60</sup> No general legal principle can be extricated from these different statutes, which, when they actually provide for it, set different minimum ages of criminal responsibility, and for some, under eighteen years.<sup>61</sup>

Even what can be termed soft law instruments have not denounced a clear prohibition on the prosecution of children for war and other international crimes. Indeed, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), although they favor diversion to community and other services,<sup>62</sup> they do not remove states' ability to prosecute children.<sup>63</sup> Although the Paris Principles assert "children should not be prosecuted by an international court or tribunal,"<sup>64</sup> they simply dissuade national prosecutions

54. Daniel Ryan, *International Law and Laws of War and International Criminal Law – Prosecution of Child Soldiers - United States v. Omar Khadr*, 33 SUFFOLK TRANSNAT'L L. REV. 175, 180 (2010); Konge, *supra* note 15, at 50; DRUMBL, *supra* note 1, at 119.

55. GROVER, *supra* note 14, at 220.

56. DRUMBL, *supra* note 1, at 119.

57. U.N. Office of the Special Representative of the Secretary-General for Children and Armed Conflict, *Children and Justice During and in the Aftermath of Armed Conflict* 37, Working Paper No. 3, Sep. 2011, <http://www.refworld.org/docid/4e6f2f132.html>.

58. U.N. Transitional Administration in East Timor, Regulation No. 2000/30 on the Transitional Rules of Criminal Procedure sec. 45, UNTAET/REG/2000/30 (Sept. 25, 2000).

59. Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea art. 1, (2001), as amended by NS/RKM/1004/006 (Oct. 27, 2004) [hereinafter Cambodia art.1].

60. Statute of the Special Court for Sierra Leone art. 7(1), 2178 U.N.T.S. 138, 145; 97 A.J.I.L. 295; U.N. Doc. S/2002/246, (2002) [hereinafter Statute of the SCSL].

61. *See id.*; Cambodia art. 1, *supra* note 59; Nagle, *supra* note 48.

62. United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") G.A. Res. 40/33, rule 11, U.N. Doc. A/RES/40/33 (Nov. 29, 1985) [hereinafter The Beijing Rules].

63. DRUMBL, *supra* note 1, at 108.

64. *The Paris Principles*, *supra* note 6, ¶ 8.6.

by suggesting that “[a]lternatives to judicial proceedings should be sought for children at the national level.”<sup>65</sup>

An analysis of the relevant international conventions, court and tribunal statutes, and soft laws leads to the conclusion that child soldiers who have committed war crimes may well be legally prosecuted, internationally or nationally, and held criminally responsible for their acts. However, both prosecutorial strategies in international and mixed tribunals, as well as the practice of courts and tribunals, show a clear reluctance to have child soldiers criminally tried, and a move towards a customary ban on the criminal prosecution of persons under the age of eighteen who have committed international crimes.

There is no precedent for the prosecution of a child soldier before an international criminal court.<sup>66</sup> Prosecutorial strategies have excluded such prosecutions in international and *ad hoc* tribunals in which they would be *de jure* possible. Indeed, the ICTR prosecutor decided that children from ages fourteen to eighteen would neither be tried by the tribunal nor be called as witnesses to testify.<sup>67</sup> In the same way, the SCSL prosecutor decided to focus on those most responsible and therefore announced he would not prosecute children.<sup>68</sup> Furthermore, while a seventeen-year-old was initially charged with crimes against humanity and murder in *Prosecutor v. X*,<sup>69</sup> his indictment was eventually modified to state only the murder charge, which is an example of the burgeoning norm according to which juveniles are not prosecuted for extraordinary international crimes.

It has been suggested that there is an expectation by the international community that domestic courts, being the more appropriate forum for such prosecutions, should handle such cases.<sup>70</sup> Although there are no examples of such trials in traditional domestic courts, children have, on rare occasions, been prosecuted for war crimes by military courts, tribunals, or commissions, although mainly under domestic law.<sup>71</sup> Indeed, after World War II, a British Military Court convicted a fifteen-year-old for his involvement in the killing of a prisoner of war,<sup>72</sup> and the Permanent Military Tribunal convicted two juveniles under the French Penal Code for the war crime of receiving stolen goods belonging to French citizens.<sup>73</sup> More recently, the U.S. military commissions tried two

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65. See *The Paris Principles*, *supra* note 6., ¶ 8.9.0.

66. See Brief of International Law Scholars, *supra* note 49, at 18.

67. UNICEF, *Children and Truth Commissions*, 17 (Aug. 2010), [http://www.unicef-irc.org/publications/pdf/truth\\_commissions\\_eng.pdf](http://www.unicef-irc.org/publications/pdf/truth_commissions_eng.pdf).

68. Press Release, Public Affairs Office, Special Court for Sierra Leone, Special Court Prosecutor Says He Will Not Prosecute Children (Nov. 2, 2002).

69. *Prosecutor v. X*, Case No. 04/2002, Judgment (Dili Dist. Court Special Panel for Serious Crimes) (Dec. 2, 2002), <http://wsc.berkeley.edu/wp-content/uploads/ET-Docs/CE-SPSC%20Final%20Decisions/2002/04-2002%20%20X%20%20Judgment.pdf>.

70. See GROVER, *supra* note 30, at 81.

71. *Id.* at 96.

72. Trial of Johannes Oenning and Emil Nix, British Military Court, Borken, Ger., LRTWC 74 (Dec. 1945).

73. Trial of Bommer, Permanent Military Tribunal at Metz, LRTWC 62 (Aug. 1947).

juveniles for acts committed in Afghanistan. In both *Jawad* and *Khadr*, the accused were charged, amongst other things, with attempted murder in violation of the law of war.<sup>74</sup> Although this is an offense under Section 950v(b)(15) of the Military Commissions Act of 2006, it is not, however, an internationally recognized war crime, unless the accused was proved to be both an unprivileged belligerent and to have killed a protected person or used a means, weapon, or technique considered illegal under IHL.<sup>75</sup> Since the charges against *Jawad* were eventually dropped,<sup>76</sup> and the government conceded in *Khadr's* case that there was no evidence that he had violated international law in any way,<sup>77</sup> these two juveniles were not tried for international war crimes. However, the commission in the *Khadr* case found that “neither customary international law nor international treaties binding upon the United States prohibit the trial of a person for alleged violations of the law of nations committed when he was 15 years of age.”<sup>78</sup>

In some states, minors can be prosecuted as adults or in adult venues for particularly serious or violent crimes.<sup>79</sup> In the U.K., two boys, aged eleven, faced an adult public trial for the abduction and murder of a two-year-old in 1993.<sup>80</sup> In 2001, Human Rights Watch intervened to prevent the execution of four child soldiers who had been sentenced to death in the DRC; and in 2002, it urged the Ugandan Government to release two former juvenile LRA fighters who had been charged with treason.<sup>81</sup> There are therefore a few examples of children being tried for domestic offenses other than war crimes in domestic courts. However, the reluctance in both ICL and soft law with regard to child soldier prosecution influences national criminal prosecutions. For war crimes in particular, the U.N. Office of the Special Representative of the Secretary-General for Children and Armed Conflict encourages states to consider excluding children below eighteen from criminal responsibility for crimes committed during an armed conflict.<sup>82</sup>

Although generally not prohibited by international law instruments, the criminal prosecution for war crimes committed by an individual below the age of eighteen is unprecedented in international or internationalized courts and tribunals,

74. Defense Motion to Dismiss for Lack of Personal Jurisdiction Pursuant to R.M.C. 907(b)(1)(A) (Child Soldier); *United States v. Jawad* (Military Comm’n Guantánamo Bay, Cuba June 13, 2008) [hereinafter Defense Motion]; *United States v. Khadr*, 717 F. Supp. 2d.1215, 1220 (C.M.C.R. Sept. 24, 2007).

75. Brief on Behalf of Appellant at 27, *United States v. Khadr*, 717 F.2d 1215, 1220 (C.M.C.R. Nov. 8, 2013) [hereinafter Brief on Behalf of Appellant].

76. David Frakt, *Mohammed Jawad and the Military Commissions of Guantanamo*, 60 DUKE L.J. 1367, 1375 (2011).

77. See Brief on Behalf of Appellant, *supra* note 75, at 17.

78. EUGENE R. FIDELL ET AL., *MILITARY JUSTICE: CASES AND MATERIAL* ¶ 18 (LexisNexis ed., 2nd ed. 2012).

79. DRUMBL, *supra* note 1, at 105.

80. *Id.*

81. See HAPPOLD, *supra* note 11, at 141.

82. DRUMBL, *supra* note 1, at 175 (providing the examples of Colombia, where not a single criminal case has been brought against a child soldier, even within the juvenile justice system; and in the DRC, which enacted a legislation in 2002 prohibiting the military courts’ jurisdiction over children under eighteen).

and extremely rare in domestic fora. Furthermore, it has been argued that the exclusion from prosecution of children under eighteen in the ICC Statute and by the SCSL prosecutor,<sup>83</sup> as well as the failure to set a universal minimum age of criminal responsibility,<sup>84</sup> has led to the general principle according to which the prosecution for war crimes of individuals under eighteen is contrary to international law.<sup>85</sup> Despite this, such a principle does not yet appear to have crystallized into customary international law. Indeed, international law does not prohibit the prosecution for international crimes of children under eighteen, including child soldiers,<sup>86</sup> and there is no *opinio juris* establishing that such prosecution, by an international court or tribunal, or any national court, would be unlawful.<sup>87</sup> The U.S. has even stated that, given the fact that the Geneva Conventions and their Protocols contemplate the prosecution of those under eighteen for violations of IHL, juveniles may “face the possibility of a war crimes trial.”<sup>88</sup> Nonetheless, it is clear that prosecuting child soldiers for war crimes is increasingly seen as inappropriate, and even illegitimate, as reflected in the small number of domestic criminal prosecutions,<sup>89</sup> and that there is a move towards a customary norm of international law, an “emerging standard,” prohibiting the criminal prosecution of minors.<sup>90</sup>

Although there is a clear progression towards the ban on criminal prosecutions of child soldiers who have committed war crimes,<sup>91</sup> both in international and internationalized tribunals, as well as in national courts, that ban is currently not a part of international law. However, it seems that in dealing with individuals who have committed war crimes while they were under the age of eighteen, the requirement to rehabilitate and reintegrate these children has evolved into a norm of customary international law.

### III. THE CUSTOMARY OBLIGATION OF REHABILITATION AND REINTEGRATION

In both the hard and soft law sources that directly concern children and armed

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83. See GROVER, *supra* note 30, at 63.

84. *Id.* at 70.

85. *Id.* at 81.

86. DRUMBL, *supra* note 1, at 126.

87. *Id.* at 133.

88. Bureau of Democracy, Human Rights and Labor, U.S. Dep't of State, *United States Written Response to Questions Asked by the Committee on the Rights of the Child*, U.S. Treaty Reports (May 13, 2008), <http://2001-2009.state.gov/g/drl/rls/105437.htm>.

89. See DRUMBL, *supra* note 1, at 18.

90. *Id.* at 126.

91. Brief for Canadian Parliamentarians & Law Professors et al. as Amici Curiae Supporting Respondent at 16 *United States v. Khadr*, 717 F. Supp. 2d 1215 (C.M.C.R. Jan. 18, 2008), [http://www.barhumanrights.org.uk/sites/default/files/documents/biblio/Amicus\\_Curiae\\_Brief\\_Omar\\_K\\_hadr.pdf](http://www.barhumanrights.org.uk/sites/default/files/documents/biblio/Amicus_Curiae_Brief_Omar_K_hadr.pdf).

conflict, the emphasis is on the child's "best interests."<sup>92</sup> Given the particular context, the vulnerabilities associated with individuals of a young age, but also their potential, there is a general consensus around the notion that a full-fledged adult criminal trial is unhelpful to deal with child soldiers who have committed serious violations of IHL.<sup>93</sup> The efforts of both the international community and individual states need to be focused towards these children's rehabilitation and reintegration.

According to Article 40 of the CRC, which deals with juvenile criminals and not solely war criminals, state parties should promote the establishment of measures for children accused of violating penal law "without resorting to judicial proceedings."<sup>94</sup> Article 40(3)(b) sets out different available dispositions such as counseling, educational, vocational training programs, and other alternatives to institutional care to ensure that "children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence."<sup>95</sup> Indeed, Article 39 requires states to "take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of . . . armed conflicts" and further emphasizes the need for it to "take place in an environment which fosters the health, self-respect and dignity of the child."<sup>96</sup> The Optional Protocol on Children in Armed Conflict also obligates state parties to demobilize child soldiers and ensure their reintegration as well as to prevent any activity contrary to their rehabilitation and reintegration.<sup>97</sup> Although the ICTR and ICTY statutes do not address the issue of child soldiers, and the Rome Statute excludes them from its jurisdiction, Article 15(5) of the SCSL statute requires the prosecutor to seek, where appropriate, alternatives to criminal prosecution and Article 7(1) highlights the "desirability of promoting [a juvenile defender's] rehabilitation, reintegration into and assumption of a constructive role into society."<sup>98</sup>

The language in the relevant soft law instruments is similar and focuses on rehabilitation and reintegration rather than justice and accountability for individuals who were under eighteen years of age when they committed a war crime. In 1997, the Cape Town Principles and Best Practices were already focused on child soldier demobilization and social reintegration programs, with no mention of criminal prosecution.<sup>99</sup> According to the Paris Principles, these children should be "considered primarily as victims of offences against international law"<sup>100</sup> and should therefore not be prosecuted by an international court or tribunal.<sup>101</sup>

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92. CRC, *supra* note 24, at art. 3(1).

93. See DRUMBL, *supra* note 1, at 127.

94. CRC, *supra* note 24, at art. 40(3)(b).

95. *Id.*

96. *Id.* at art. 39.

97. Optional Protocol on Children in Armed Conflict, *supra* note 5, at art. 7(1).

98. Statute of the SCSL, *supra* note 60, at art. 7.

99. See generally Cape Town Principles and Best Practices, *supra* note 35.

100. *The Paris Principles*, *supra* note 6, ¶ 3.6.

101. *Id.* ¶ 8.6.

Furthermore, Principle 8.9.0 advises that alternatives to the judicial prosecution of children should be sought at the national level.<sup>102</sup> The Paris Commitments to Protect Children from Unlawful Recruitment or Use by Armed Forces or Armed Groups also put forward the need to seek alternatives to judicial proceedings wherever appropriate and desirable, and the states entrenched in these Commitments the necessity to treat children accused of crimes against international law “in accordance with international standards of juvenile justice, such as in a framework of restorative justice and social rehabilitation.”<sup>103</sup>

In practice, this has led to the inclusion of provisions regarding disarmament or reintegration in many peace agreements, such as the 2003 Liberian peace agreement.<sup>104</sup> The requirement of dealing with child soldiers through rehabilitation and reintegration has translated into the creation of both Disarmament Demobilization and Reintegration (“DDR”) programs and Truth and Reconciliation Commissions (“TRCs”), and has also manifested itself in the use of endogenous ceremonies or mechanisms.<sup>105</sup> The context and circumstances dictate which approach is most appropriate,<sup>106</sup> and their effectiveness and success will depend on how well tailored the chosen mechanism is to the particular situation at hand.

DDR programs are often part of the formal procedure following a peace agreement, although many are active in countries where ongoing fighting is taking place. They are meant to progressively help combatants return to their civilian lives and, for child soldiers in particular, the three phases of the program aid in “turning a child soldier back into a child.”<sup>107</sup> The first two steps of disarmament and demobilization entail taking child soldiers physically out of the military environment,<sup>108</sup> by collecting or destroying their weapons, disbanding armed forces or groups and discharging individual members.<sup>109</sup> The final and most complicated step, reintegration, is an ongoing process,<sup>110</sup> involving the return to civil life in families and communities, and, hopefully, reinsertion into sustainable employment.<sup>111</sup> The Secretary-General for Children and Armed Conflict has identified several “overreaching considerations” that should inform any DDR program, such as the need for separate and child-specific programs, monitoring

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102. *Id.* ¶ 8.9.0.

103. Free Children from War International Conference, Paris, Fr., Feb 5-6, 2007, The Paris Commitments to Protect Children from Unlawful Recruitment or Use by Armed Forces or Armed Groups, Commitments ¶11, [https://childrenandarmedconflict.un.org/publications/ParisCommitments\\_EN.pdf](https://childrenandarmedconflict.un.org/publications/ParisCommitments_EN.pdf).

104. See HAPPOLD, *supra* note 11, at 114-15.

105. See DRUMBL, *supra* note 1, at 188.

106. See HAPPOLD, *supra* note 11, at 116.

107. Aaron Young, *Preventing, Demobilizing, Rehabilitating, and Reintegrating Child Soldiers in African Conflicts*, 7 J. INT'L POL'Y SOLUTIONS 19, 20 (2007) (quoting PETER WARREN SINGER, CHILDREN AT WAR 188 (Pantheon Books, 2005)).

108. *Id.*

109. See DRUMBL, *supra* note 1, at 168.

110. *Id.*

111. See Young, *supra* note 107, at 20.

and follow-up of demobilized children, and an emphasis on an integrated community approach in order to ensure long-term reintegration.<sup>112</sup> Through Sierra Leone's DDR program, children under the age of fifteen were sent to interim care centers and older children were either placed in group homes or occasionally allowed to live independently.<sup>113</sup> All were given the option to obtain skills training, agricultural training, enter the national armed forces, or go back to school.<sup>114</sup> Although traditionally distinct from transitional justice mechanisms, in 2006, the United Nations published the Integrated Disarmament, Demobilization, and Reintegration Standards,<sup>115</sup> which exhort U.N. DDR programs to include more judicial processes for certain children.<sup>116</sup>

An example of more judicially oriented mechanisms are the TRCs that arguably enable holding children responsible for the crimes they commit as child soldiers, all-the-while facilitating their reintegration into society.<sup>117</sup> Indeed, for some, TRCs serve to find forgiveness, reconciliation, and justice, making them preferable for prosecution.<sup>118</sup> However, it has been argued that TRCs render former child soldiers insufficiently accountable,<sup>119</sup> and that they may lead to stigmatization, despite the lack of criminal prosecution.<sup>120</sup> Depending on the conflict, a TRC may take different forms and have differing mandates. A TRC may be empowered to identify individual perpetrators and assign institutional responsibility; it may be tasked with recommending reform or even simply to provide an abstract description of the conflict. The TRC in Sierra Leone was the first to involve children, although their participation was voluntary, and their individual conduct was not subjected to assessment, evaluation, or critique.<sup>121</sup> In Liberia, the TRC also involved children, although it excluded them from its prosecutorial mandate.<sup>122</sup> Although some have expressed uncertainty as to the actual positive effect of child soldier participation in the Liberian TRC,<sup>123</sup> such mechanisms are now considered to be a viable alternative to trials for former child soldiers, particularly when necessary precautions are taken to ensure their

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112. U.N. Secretary-General, *Children and Armed Conflict*, ¶ 65, U.N. Doc. A/58/546-S/2003/1053 (Nov. 10, 2003).

113. See DRUMBL, *supra* note 1, at 170-71.

114. *Id.*

115. U.N. Inter-agency Working Group on Disarmament, Demobilization and Reintegration, Operational Guide to the Integrated Disarmament, Demobilization, and Reintegration Standards, 15 (2010), <http://www.iddrtg.org/wp-content/uploads/2013/05/Operational-Guide-REV-2010-WEB.pdf>, [hereinafter IDDRS].

116. See DRUMBL, *supra* note 1, at 174.

117. See GROVER, *supra* note 30 at 264.

118. See Ryan, *supra* note 55, at 181.

119. Tanya M. Monforte, *Razing Child Soldiers*, 27 ALIF: J. COMP. POETICS 169 (2007).

120. See GROVER, *supra* note 30 at 266 (underlining the fact that TRCs are not always inherently therapeutic and can, like prosecution, lead to the attribution of legal and moral responsibility by the community).

121. *Id.*

122. See *id.* at 278-79.

123. *Id.*

therapeutic value and when they do not conflict with local methods.<sup>124</sup>

Although child soldiering is a global problem, its challenges are inherently local.<sup>125</sup> Given the many complex issues that child soldier reintegration entail, particularly related to culture and tradition, special attention should also be given to endogenous and traditional mechanisms.<sup>126</sup> These may constitute apologies, reparations, or cleansing processes that will help reluctant communities in welcoming back child soldiers who have committed atrocities in those same communities.<sup>127</sup> In Mozambique, for example, in an adaptation of traditional rituals, child soldiers were declared dead and a new, balanced, and harmonious child was born.<sup>128</sup> Other such ceremonies and rituals have been used in countries such as Sierra Leone and Uganda where they are said to have helped towards reconciliation and community acceptance.<sup>129</sup> The IDDRS also recognize the reintegration potential for child soldiers and are leading the way for their inclusion in DDR programs.<sup>130</sup>

It is clear by looking at the relevant international law and the practices in war-affected countries that have had to deal with child soldiers, that rehabilitation is the main goal of any proceedings involving these children. Different approaches, both centralized or governmental and decentralized or community-based, have been adopted in the effort to rehabilitate and reintegrate child soldiers.<sup>131</sup> In Uganda, the centralized approach assumed that child soldiers required specialized, individual care before returning to their families and they were, therefore, sent to centralized rehabilitation centers.<sup>132</sup> Other NGO strategies took more cultural and social factors into account.<sup>133</sup> Although it is unclear which strategy is the most effective, and post-conflict societies are often divided on the question of how to deal with child soldiers, particularly those that have committed war crimes,<sup>134</sup> the consensus that rehabilitation and reintegration is required remains unchanged. Considering the CRC and its Optional Protocol, extensive state practice, and *opinio juris*,<sup>135</sup> it can be said that there exists a customary international norm that requires child soldiers, including those that have committed war crimes, to be both rehabilitated and reintegrated into their families and communities.<sup>136</sup> The question is, then, what this obligation entails regarding the prosecution of these child soldiers.

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124. Grossman, *supra* note 9, at 351-52.

125. Young, *supra* note 107, at 19.

126. See DRUMBL, *supra* note 1, at 188.

127. See Lafayette, *supra* note 10, at 310.

128. See GROVER, *supra* note 30, at 277.

129. See DRUMBL, *supra* note 1, at 190.

130. *Id.* at 191.

131. See Young, *supra* note 107, at 21.

132. *Id.*

133. *Id.*

134. See GROVER, *supra* note 30, at 283.

135. Ryan, *supra* note 54, at 177.

136. See Grossman, *supra* note 9, at 324. (asserting that states have an affirmative obligation to rehabilitate and reintegrate former child soldiers into society).



#### IV. THE INCOMPATIBILITY OF REHABILITATION AND REINTEGRATION WITH CRIMINAL PROSECUTION

In the *Khadr* case,<sup>137</sup> the Military Commission declined to answer the question of whether or not being tried for alleged crimes committed when under the age of eighteen is rehabilitative. However, if it is accepted, as argued above, that there is a customary international law that requires juveniles responsible for having committed war crimes to be rehabilitated and reintegrated, that customary norm may very well constitute a *de facto* bar to their criminal prosecution.

International law recognizes that children should benefit from a particular treatment, different from that of adults. Article 3 of the CRC requires that in all dealings with children, the “best interests of the child shall be a primary consideration.”<sup>138</sup> For children accused of having committed a crime more particularly, although international law provides no bar to their prosecution, it ensures that, if criminally prosecuted, they benefit from special protections.<sup>139</sup> Article 7 of the SCSL statute provides that if children over fifteen are being tried, that they be treated “with dignity and a sense of worth . . . and in accordance with international human rights standards, in particular the rights of the child.”<sup>140</sup> The CRC also provides for many procedural safeguards such as the right to full information and understanding,<sup>141</sup> the right to legal advice and care according to the age of the accused,<sup>142</sup> the right for the hearing to take place in a setting appropriate to a child’s understanding,<sup>143</sup> and other fair trial guarantees.<sup>144</sup> The Beijing Rules require the juvenile justice system to emphasize the “well-being of the juvenile”<sup>145</sup> and the need for professionalism, training, and appropriate qualifications of the persons working with accused juveniles.<sup>146</sup>

The necessity of having juvenile justice standards is universally accepted. As Amnesty International asserts, criminal action against children must respect international fair trial standards, prioritize the best interests of the children, and recognize their special needs and vulnerabilities.<sup>147</sup> The various national legal systems recognize that, when it comes to criminal responsibility and the criminal process, juveniles should be treated differently than adults.<sup>148</sup> For children accused of war crimes, “compliance with the international standards relating to juvenile justice is a condition with which any law of war tribunal must comply in order to

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137. *United States v. Khadr*, 717 F.2d 1215 (C.M.C.R. Sept. 24, 2007).

138. CRC, *supra* note 24, art. 3(1).

139. Grossman, *supra* note 9, at 343.

140. Statute of the SCSL, *supra* note 60, art. 7(1).

141. *See* CRC, *supra* note 24, art. 12.

142. *Id.* at art. 37(c)-(d).

143. *See id.* at art. 40(3).

144. *See id.* at art. 40(2)(b).

145. The Beijing Rules, *supra* note 62, ¶¶ 5.1, 17.1.

146. *Id.* ¶¶ 6.3, 22.1.

147. Amnesty Int’l, *Child Soldiers: Criminals or Victims*, AI Index IOR 50/002/2000, at 9 (Dec. 22, 2000), <https://www.amnesty.org/en/documents/ior50/002/2000/en/>.

148. Konge, *supra* note 15, at 55.

exercise jurisdiction over child soldiers.”<sup>149</sup> Do these international standards, guarantees and protections make criminal prosecution compatible with the obligation of reintegration and rehabilitation?

Many of the international instruments containing these standards, in their provisions concerning the criminal prosecution of juveniles, mention rehabilitation and reintegration. Article 7 of the SCSL mentions the need to take into account the desirability of promoting the child's rehabilitation and reintegration.<sup>150</sup> Similarly, Article 14(4) of the ICCPR mentions the desirability of “promoting [juvenile] rehabilitation”<sup>151</sup> and Article 40(1) of the CRC of “promoting the child's reintegration and the child's assuming a constructive role in society.”<sup>152</sup> These instruments, and particularly the SCSL Statute, seem to indicate that prosecution does not necessarily preclude rehabilitation.<sup>153</sup> Some argue that while it is possible to be both a victim and a perpetrator, it is also possible to prosecute and rehabilitate.<sup>154</sup> Indeed, the well being of the juvenile, and hence rehabilitation, is one of the primary objectives of most juvenile justice systems.<sup>155</sup>

Although procedural safeguards are an undisputedly important source of protection, it is unclear whether they are rehabilitative and whether they will further reintegration. This doubt is further enhanced by the fact that while the requirement of special protections and different treatment for children in criminal proceedings can be said to constitute a customary international law, in practice it is not clear what exactly is required.<sup>156</sup> Given that there are no strict rules governing the applicable standards, the question of the treatment of juveniles has been settled in very different ways across different jurisdictions.<sup>157</sup> Therefore, until there are both very precise standards governing the treatment that should be accorded to children accused of committing war crimes, as well as explicit and definite rules defining the ways in which that special treatment will participate and benefit the child's rehabilitation and reintegration, it is hard to argue that criminal prosecution of child soldiers for war crimes is compatible with their rehabilitation and reintegration into society, as understood in international law and practice. Indeed, without precise guidelines, a criminal process may be entirely oriented towards the child's welfare, but it can just as much have more punitive objectives.<sup>158</sup>

It seems, from an analysis of the above-mentioned international instruments, that it is mostly in the sentencing phase that criminal prosecution can arguably be

149. Brief of International Law Scholars, *supra* note 49, at 26.

150. Statute of the SCSL, *supra* note 60, at art. 7.

151. International Covenant on Civil and Political Rights art. 14(4), Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

152. CRC, *supra* note 24, at art. 40(1).

153. Konge, *supra* note 15, at 59.

154. *Id.*

155. See The Beijing Rules, *supra* note 62, rule 5 commentary.

156. See Konge, *supra* note 15, at 55-56.

157. *Id.* at 55-56.

158. See *id.* at 56.

oriented towards rehabilitation.<sup>159</sup> As mentioned above, Article 7 of the SCSL Statute gives the Special Court the possibility of ordering counseling, community service, foster care, vocational and educational training programs or DDR programs, and does not authorize incarceration for juvenile offenders.<sup>160</sup> It is also advised that detention of children must be a measure of last resort<sup>161</sup> and both Article 37(a) of the CRC and Article 6(5) of the International Covenant on Civil and Political Rights<sup>162</sup> prevent capital punishment from being imposed on juveniles.<sup>163</sup> Instead of imprisonment, the prescribed sentence resulting from prosecution can therefore consist of different rehabilitative measures.<sup>164</sup> The U.S. Congress itself recognized that “imprisonment is not an appropriate means of promoting correction and rehabilitation,”<sup>165</sup> and this would be particularly true in the context of child soldiering. The rehabilitative intent of such prosecution could therefore be argued to be compatible with the customary norm according to which these children should be rehabilitated and reintegrated. However, some criminologists believe that the aims of the most effective and morally legitimate criminal justice systems are first to shame the offender through punishment before reintegrating him into society.<sup>166</sup> Indeed, some argue that prosecution is “punitive in and of itself,” and that it is illogical to couple it with a wholly rehabilitative sentencing strategy for child soldiers.<sup>167</sup>

If indeed rehabilitative measures such as those proposed in Article 7 of the SCSL Statute may be ordered, the juvenile accused of a war crime is nonetheless subjected to a criminal process, some aspects of which may be difficult to reconcile with the objectives of rehabilitation and reintegration. Indeed, regardless of the special safeguards guaranteed by international law, the child soldier that faces a criminal trial is at high risk of stigmatization and trauma.<sup>168</sup> A criminal trial may be psychologically damaging, as well as humiliating, as the child soldier may be forced to recount the violence he has engaged in and his involvement in atrocities.<sup>169</sup> This forces the child to relive the trauma and also delays the return to any semblance of normalcy.<sup>170</sup> This, as well as the stigma of a criminal trial, can, in turn, create considerable obstacles to the child’s accessing effective community rehabilitative services and in the longer term, his reintegration into society.<sup>171</sup> Indeed, after the conflict in Sierra Leone, both international and local children’s

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159. See GROVER, *supra* note 30, at 72.

160. Statute of the SCSL, *supra* note 60, at art. 7.

161. See CRC, *supra* note 24, art. 37(b).

162. ICCPR, *supra* note 151, art. 6.5.

163. This is considered to be customary law. Konge, *supra* note 15 at 56.

164. Lafayette, *supra* note 10, at 325.

165. 18 U.S.C. § 3582(a) (2012).

166. See JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION (Cambridge University Press 1989); Jean Hampton, *The Moral Education Theory of Punishment*, 13 PHIL. & PUB. AFF. 208 (1984).

167. See GROVER, *supra* note 30, at 74.

168. *Id.* at 72.

169. See Grossman, *supra* note 9, at 350-51.

170. *Id.*

171. *Id.* at 350.

rights organizations were unanimous in their opposition to the prosecution of children under eighteen, as they believed this would undermine their efforts to reintegrate the child soldiers into their communities.<sup>172</sup> It has been asserted that putting a child soldier on trial will endanger his or her reintegration and rehabilitation into society,<sup>173</sup> and that it is inconsistent with the notion that child soldiers should be seen as victims.<sup>174</sup> From a more practical standpoint, many post-conflict governments do not have the necessary resources to prosecute children in a way that will uphold the procedural safeguards required by international law.<sup>175</sup> Indeed, domestic juvenile systems often lack resources and therefore breach international standards for juvenile justice.<sup>176</sup> Such a lack of resources would lead to a criminal process totally unsuited to children, even more traumatizing and stigmatizing, and completely incompatible with the obligation to reintegrate and rehabilitate child war criminals.

On the other hand, it could be argued that the prosecution of child soldiers, were it to uphold the required international standards, actually plays a role in their reintegration. In many post-conflict societies, such as in Sierra Leone, there are calls for justice and for the accountability of children who have committed atrocities. In a previously violent society, prosecuting child soldiers may, in part, facilitate the shift towards peace and forgiveness.<sup>177</sup> Indeed, Amnesty International believes that in some cases, child soldiers must be held accountable for their actions.<sup>178</sup> Furthermore, the Committee on the Rights of the Child advises states to report on the "various measures adopted to ensure the social reintegration of children," including "relevant judicial measures."<sup>179</sup> This shows that judicial measures are not excluded and could signify a belief by the Committee that they may even be helpful to a child soldier's reintegration into society.

The notion that criminal prosecution may help a child's rehabilitation and reintegration, however, is evident neither from all the relevant international documents nor from practice. In Section 7 of the Paris Principles, which contains very detailed provisions concerning the release and reintegration of child soldiers, there is no mention of any justice aspect.<sup>180</sup> This separation could be understood to

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172. U.N. Secretary-General, *Report of the Secretary-General on the establishment of a Special Court for Sierra Leone*, ¶ 35, S/2000/915 (Oct. 4, 2000).

173. Grossman, *supra* note 9, at 351.

174. See HAPPOLD, *supra* note 11, at 5.

175. See Grossman, *supra* note 9, at 350.

176. Amnesty Int'l, *supra* note 147, at 9.

177. See Grover, *supra* note 14, at 236. Indeed, although Grover does not argue for child soldier prosecution, she identifies the positive educative functions it may have (if the identity of the accused is protected), as well as its potential to facilitate national reconciliation and therefore child soldier reintegration.

178. Amnesty Int'l, *supra* note 147, at 2.

179. U.N. Comm. on the Rights of the Child, *Guidelines Regarding Initial Reports of State Parties of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, art. 6(3), U.N. Doc. CRC/OP/AC/1 (Oct. 12, 2001).

180. See DRUMBL, *supra* note 1, at 113.

imply that justice is to operate separately from release and reintegration.<sup>181</sup> This was exemplified in Liberia's TRC, despite its prosecutorial agenda, where the TRC would not recommend for prosecution those who cooperated and admitted their wrongs.<sup>182</sup> Although this did not concern children, it shows that the criminal process was considered to be separate from the objectives of rehabilitation and later reintegration of those who had committed war crimes.

Furthermore, the consequences of trauma and stigmatization do appear as an overriding issue, and considering these, it assuredly seems more appropriate to avoid criminal prosecution and instead to rehabilitate and reintegrate former child soldiers. However, the complete separation of criminal prosecution, rehabilitation, and reintegration does not entail a foregoing of justice and accountability. Indeed, these goals and motivations can be incorporated into rehabilitation and reintegration mechanisms, such as the TRCs or endogenous ceremonies.<sup>183</sup> It is argued that "[t]ransitional justice processes outside of courtrooms and jailhouses can enhance reintegration, reconciliation, restoration, and social repair even in the very toughest cases – such as with child soldiers."<sup>184</sup> Such processes have numerous benefits, both for the community, in which it redresses pain, expiates resentment and restores a center of gravity, and for the children, as it will expose the crimes committed against them, and help dissipate the stigma of their association with armed forces or armed groups.<sup>185</sup>

Child war criminals are ill suited for the criminal process. In the context of an armed conflict, every right of the child is violated;<sup>186</sup> he or she is taken away from their family, and is deprived of their right to a normal physical and emotional development.<sup>187</sup> Even considering the different and protective treatment they are entitled to under international law (when it can be afforded by the forum in which they are being tried), the arguments for the incompatibility of criminal prosecution with the objectives of rehabilitation and reintegration of the child soldier are strong. Indeed, some recognized this incompatibility when the United States decided to put the young Khadr on trial, arguing, "the policy of the United States to detain and prosecute juveniles for war crimes is inconsistent with the United States' obligations to rehabilitate and reintegrate child soldiers."<sup>188</sup> Whatever the form of the criminal trial, and even assuming the existence of a bar on punitive sentencing measures and clear, binding rehabilitative standards, it seems like such a trial would remain an obstacle to an accused juvenile's rehabilitation and reintegration.

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181. *Id.*

182. *Id.*

183. *Id.* at 200.

184. *Id.*

185. *Id.*

186. See Konge, *supra* note 15, at 65.

187. Lafayette, *supra* note 10, at 309.

188. Ryan, *supra* note 54, at 175.

## V. CONCLUSION

The recruitment and use of child soldiers in armed conflict is prohibited in international law. Unfortunately, the scourge of child soldiering remains an endemic problem around the world, and in almost every single armed conflict. While the image of the child soldier as a victim has, in recent years, dominated the international discourse, there have been several examples of juveniles committing wartime atrocities. Although no child soldier has ever been prosecuted in an international court, the question of how to deal with this small minority of juvenile war crime perpetrators remains unsettled.

This paper argues that there is, as yet, no customary international norm banning the prosecution of child soldiers for war crimes. However, as this paper suggested, states do have a customary obligation to rehabilitate and reintegrate children who have been recruited and used in armed conflicts and that this relatively recent norm constitutes, in fact, a bar to the criminal prosecution of juveniles accused of having committed war crimes.

Indeed, Article 26 of the 1998 Rome Statute has been described as “affirming an emerging consensus that international courts and tribunals should not prosecute children under 18 for international crimes,”<sup>189</sup> and as underscoring the “tendency towards an international legal status of minors as exempt from criminal liability and prosecution for war crimes.”<sup>190</sup> Until the prohibition of the prosecution of children for war crimes matures into a customary norm of international law, these children are still susceptible to be put on trial. The above-mentioned international instruments ensure that children benefit from the safeguards that international law provides any accused individual, in addition to more child-specific ones. They further ensure that children will benefit from a different, ideally entirely rehabilitative sentencing regime. It seems undisputed that the best interests of these children be consistently taken into account, with the ultimate goal of rehabilitating and reintegrating them into their societies.

This obligation to rehabilitate and reintegrate can well be said to have matured into a customary international norm. The consequences of this on criminal prosecution are important, and may go so far as to constitute, as argued above, a *de facto* prohibition. Although special consideration is given in international law to children accused of war crimes, these may be insufficiently precise and developed to ensure that all these children benefit from the treatment that will most ensure their rehabilitation and reintegration. Indeed, the trauma and stigma associated with the criminal trial are not small obstacles. Furthermore, the problem of the need for accountability, in the sense that it may help in the reintegration process, can be resolved by the use of transitional justice processes, without the harsh structure of the criminal trial. If the goal is purely to rehabilitate and reintegrate these children, the criminal trial is not the appropriate venue.

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189. See DRUMBL, *supra* note 1, at 121.

190. See Brief of International Law Scholars, *supra* note 49, at 19.