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CHILDREN, ARMED CONFLICT, AND GENOCIDE: APPLYING THE LAW OF GENOCIDE TO THE RECRUITMENT AND USE OF CHILDREN IN ARMED CONFLICT

Jeffery R. Ray*

ABSTRACT

This paper shows that the use of child soldiers in armed conflict has the potential to be considered as genocide. A brief background of genocide is presented prior to the analysis. Part I of the analysis will discuss three issues: first, the modern understanding of genocide and the substantive areas of law that govern it; second, the definition of “child” within the international arena as it relates to child soldiering; third, a discussion to determine if children can constitute a “group” in the context of the law of genocide.

Part II provides a discussion elaborating on Part I, then analyzes the five disjunctive elements of genocide. A general rule will be synthesized for each element. General rules are synthesized from judicial decisions interpreting the genocide regime, soft law, and scholarly writings. Each element includes an analysis to determine applicability of the element as it relates to child soldiers.

INTRODUCTION

The use, or recruitment, of child soldiers can potentially be punished under the genocide regime following criteria established by the International Criminal Tribunal for Rwanda in deciding the case of Jean Paul Akayesu. Primarily, the case analysis concludes that females constitute a group, or at least a subgroup, of such import that the genocide regime is applicable,¹ and is the anchor to which this article is moored. Due to the historically unclear age of majority regarding persons in armed conflict, this article provides a substantive analysis dedicated to determining the age of majority for purposes of clarity.

United Nations reports, since 1998, specified that the “changing nature of conflict put children at a higher risk than ever before.”² Previous statistics accentuate the magnitude of the preceding statement. Armed conflicts, from 1987

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1. See *Prosecutor v. Jean Paul Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 731 (Sept. 2, 1998).

2. Special Rep. of the Secretary-General for Children and Armed Conflict, *Report of the Special Rep. of the Secretary-General for Children and Armed Conflict*, ¶ 3, delivered to the General Assembly, U.N. Doc. A/65/219 (Aug. 4, 2010), available at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/65/219.

to 1997, have had devastating effects on children.³ Specifically, children have been killed, maimed, and displaced from their homes in mass numbers: “2 million children have been killed; 6 million children have been maimed, injured, or permanently disabled; 1 million children have been orphaned or separated from their parents.”⁴ The Special Representative for the Secretary-General for Children and Armed Conflict stated in his speech, in 1998, that:

[There were] [m]ore than 300,000 children under the age of 18 . . . fighting in conflicts worldwide; [c]hildren account for one half of the worldwide total of 24 million refugees and internally displaced peoples; [an astounding] 90 per cent of the casualties in today’s conflicts are civilians, including a large and increasing number of children and women. By contrast, that number was only 5 per cent in the First World War, rising to 48 per cent in the Second World War.⁵

The ten-year “strategic review” (“Review”) of the Machel Report (1998) reveals that the features of armed conflicts have changed as a result of technological, political, and other reasons.⁶ Awareness and international concern for children involved in or affected by armed conflict has risen.⁷ Efforts to reduce or eliminate the recruitment and use of children in armed conflict have produced some positive results since the Machel Report.⁸ The Review did not spend a significant portion of its analysis on specific figures. Instead, the Review recognized that the figures from the complex issues revolving around children in armed conflict would yield “inaccurate” results.⁹

Relevant figures mentioned in the Review are staggering. Children around the globe constitute over thirty-three percent of casualties from land mines and unexploded-explosive ordinances.¹⁰ In the Democratic Republic of the Congo,

3. Press Release, Special Rep. of the Secretary-General for Children and Armed Conflict, *Secretary-General’s Special Representative for Children and Armed Conflict Condemns Attacks on Civilians and Use of Child Soldiers*, U.N. Doc. HR/4388 (Nov. 5, 1998) [hereinafter Press Release, Secretary-General for Children and Armed Conflict], available at <http://childrenandarmedconflict.un.org/press-release/9Nov98/>.

4. *Id.*

5. *Id.*

6. See Special Rep. of the Secretary-General for Children and Armed Conflict, *Report of the Special Rep. of the Secretary-General for Children and Armed Conflict*, pt. 2, ¶¶ 9–15, delivered to the General Assembly, U.N. Doc. A/62/228 (Aug. 13, 2007) [hereinafter Report for Children and Armed Conflict], available at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/62/228.

7. See generally *id.*

8. *Id.* Sri Lanka, Sudan, Burundi, Democratic Republic of the Congo, Lebanon, Israel, and the occupied Palestinian territories, and Myanmar have all “committed” to increase their respective recognition of various children’s rights. These results are not the maximum desired result from several of these nations. However, economic and resource limitations play a role within the decisions of countries involved in or recovering from armed conflict, or prolonged poverty. See *id.* at pt. 1, ¶¶ 31–49.

9. *Id.* at pt. 2, ¶ 16.

10. *Id.* at pt. 2, ¶ 18.

children were the victims of over thirty-three percent of acts of sexual violence.¹¹ There were “18.1 million children . . . among populations living with the effects of displacement” surrounding armed conflict.¹²

The Review makes an important parallel with the impact of recent armed conflicts on children, and those during the period preceding the original Machel Report. The parallel is that the “*impact on children remains as brutal as ever*,” with regard to armed conflict.¹³ The Review acknowledges that armed forces, primarily non-state actors, are actively using children in large numbers.¹⁴ Their roles include being used as “fighters, cooks, porters[,] . . . messengers, and [they are also] . . . used for sexual purposes.”¹⁵

Genocide, the ultimate criminal penalty, should be the proper prosecutorial method against those who use child soldiers, when available. Children have been involved in armed conflict as long as mankind has engaged in it.¹⁶ Such can be seen in the Israelite destruction of much of Canaan and the Roman decimation of Carthage.¹⁷ Recent evolution in warfare technology, such as the advent of compact assault rifles, has increased the use of children in armed conflict.¹⁸ The subsequent loss of innocence, deprivation of culture, and the obvious loss of the life of child soldiers are all direct reasons to ensure the highest degree of penalty available against those who use child soldiers.

This paper seeks to prove that the use of child soldiers in armed conflict has the potential to be considered as genocide. Genocide, since World War II, has generally been considered as an offense committed with a special intent or *dolus specialis*.¹⁹ This special “intent to destroy, in whole or in part, a national, ethnic, racial or religious group” that meets any of the five requisite categories of harm under the Convention on the Prevention and Punishment of the Crime of Genocide (“Genocide Convention”), the Rome Statute of the International Criminal Court (“Rome Statute”), or International Criminal Court jurisprudence.²⁰ This factor is

11. *Id.* at pt. 2, ¶ 21 (citing U.N. Secretary General, *Report of the Secretary-General on Children and Armed Conflict in the Democratic Republic of the Congo*, ¶ 40, delivered to the Security Council, U.N. Doc. S/2007/391 (June 28, 2007)).

12. Report for Children and Armed Conflict, *supra* note 6, at pt. 2, ¶ 25.

13. *Id.* at pt. 2, ¶ 16 (emphasis added).

14. *See id.* at pt. 2, ¶ 19.

15. *Id.*

16. *See* UNICEF, STATE OF THE WORLD’S CHILDREN 1996, at 13 (1996), available at <http://www.unicef.org/sowc/archive/ENGLISH/The%20State%20of%20the%20World%27s%20Children%201996.pdf>; MATTHEW HAPPOLD, CHILD SOLDIERS IN INTERNATIONAL LAW 4 (Manchester University Press 2005).

17. *See* ERIC D. WEITZ, A CENTURY OF GENOCIDE: UTOPIAS OF RACE AND NATION 8 (Princeton University Press 2003). The author gives an interesting assertion of modern genocide becoming more “calculated” and “systematic” in the twentieth century. The correlation with this “systematic” termination of populations would be an interesting lens to look at the recent, extensive, use of children in the same time frame. There may indeed be a method of “preemptively destroying” a future opposition by using their children in support of one’s militaristic goals. Indoctrination of the children before they have the “tools” necessary may even provide a substantial argument for the phenomena. *See generally id.*

18. *See* HAPPOLD, *supra* note 16, 4–5.

19. *See* Prosecutor v. Jean Paul Akayesu, Case No. ICTR-96-4-T, ¶¶ 498, 517 (Sept. 2, 1998).

20. *See generally* Convention on the Prevention and Punishment of the Crime of Genocide art. 2, opened for signature Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 [hereinafter The Genocide Convention], available at <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/044/31/IMG/NR004431.pdf?OpenElement>; Rome Statute of the International Criminal Court art. 6, opened for signature July 17, 1998, 2187 U.N.T.S. 3 [hereinafter

case specific and is not necessary, for purposes of determining the plausibility of this thesis, for a full analysis.

A brief background of genocide is presented prior to the analysis in Parts I and II. Part I will discuss three issues: first, the modern understanding of genocide and the substantive areas of law that govern it; second, the definition of “child” within the international arena as it relates to child soldiering; third, a discussion to determine if children can constitute a “group” in the context of the law of genocide.

Although the tactic of genocide is of ancient design, this article primarily addresses the modern concept as it is covered in international law. The Genocide Convention and the Rome Statute are the primary sources for the law of genocide as presented in this analysis. Judicial interpretations of the Genocide Convention and the Rome Statute are key advancements that are relied upon for this analysis.

The legal age of majority has been an issue when discussing child soldiering.²¹ Consensus on the age of fifteen has appeared to crystallize as the age of majority through the supermajority of signatories on the Convention on the Rights of the Child.²² This crystallization, if in fact the age did crystallize, was quickly put into dispute.²³ Ultimately, this analysis will acknowledge the normative shifts on the age of majority and prescribe an age commensurate with the progressive shift in the normative age. The more progressive argument is that Protocol I²⁴ coupled with state practice or declarations by states has established eighteen, or at a minimum seventeen, as the age of majority for recruitment or use in active combat.²⁵ Understanding issues regarding and establishing a normative age for a person to be recruited or serve in active combat provides clarity for the remainder of the analysis. However, it should be noted this is a subsidiary matter of this paper.

Part II provides a discussion elaborating on Part I then analyzing the five disjunctive elements of genocide. A general rule will be synthesized for each element. These general rules are synthesized from judicial interpretations of the Genocide Convention and its subsequent adaptation, the Rome Statute or variations thereof, by International Criminal Tribunals. Each element includes an analysis to determine applicability of the element as it relates to child soldiers.

The Rome Statute], available at [http://legal.un.org/icc/statute/english/rome_statute\(e\).pdf](http://legal.un.org/icc/statute/english/rome_statute(e).pdf); see also Akayesu, Case No. ICTR-96-4-T.

21. See Convention on the Rights of the Child art. 1, opened for signature Nov. 20, 1989, 1577 U.N.T.S. 3, [hereinafter Convention on the Rights of the Child], available at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/44/25 (allowing each State’s law to determine the age of majority for purposes of defining a child under the convention).

22. See generally INTERNATIONAL COMMITTEE OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOLUME II: PRACTICE, PARTS 1 & 2, at 3109–27 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., Cambridge Univ. Press 2005) [hereinafter CUSTOMARY INTERNATIONAL HUMANITARIAN LAW], available at <http://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-ii-icrc-eng.pdf> (outlining the law and practice of various nations in regards to the recruitment of child soldiers).

23. See generally CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 22. For example, upon ratification of the Convention on the Rights of the Child, the Netherlands, Spain, and Uruguay all expressed disagreement with the Convention permitting the recruitment of children at the age of 15. See *id.* at 3110.

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

25. See CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 22, at 3109–27; see also Protocol I, *supra* note 24, at art. 1.

The initial discussion of Part II is required to determine whether the subsequent elements of genocide can be applicable to children as a group. In this part, “[genocidal] intent to destroy, in whole or in part, . . . [members of the] group” is analyzed in context with the intent of the Genocide Convention, Rome Statute, and other international responsibilities.²⁶

The five elements are analyzed to indicate the strength, or weakness, of each element as applied to the law of genocide. First, “[k]illing members of the group” is analyzed to determine applicability to children as a group.²⁷ Second, “[c]ausing serious bodily or mental harm to members of the group” is analyzed while taking attributes of children into account.²⁸ Third, “[d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part” provides opportunity to analyze basic health needs to intentional harm inflicted upon child soldiers.²⁹ Fourth, “[i]mposing measures intended to prevent births within the group” is an aspect that is confidently applied to girl soldiers. Young boy soldiers must also be analyzed for a more complete discussion. Fifth, “[f]orcibly transferring children of the group to another group” is a prominent issue within the use of children, as well as within the Genocide Convention, that requires discussion.³⁰

The Genocide Convention of 1948 was in response to the atrocities committed against Jewish and other minority groups during World War II.³¹ German national trials which prosecuted Nazi soldiers that killed, or were accomplices to killing, over 300,000 people under the crime of murder were superfluous:³² convicting one of murdering 300,000 persons is of little difference, regarding sentencing, than of one who murders thirty persons.³³ Criminal proceedings were limited to murder charges under German law once the statute of limitations ran out on all but the charge of murder.³⁴ The social harm to humanity of the Nazi atrocities required a definition that could adequately describe the harm inflicted during World War II. Raphael Lemkin was a prominent figure in carving out the definition of genocide for the international community.³⁵ This newly chargeable offense, genocide, alleviated the superfluous charges resulting from mass killings under certain circumstances.

26. See The Genocide Convention, *supra* note 20; see also The Rome Statute, *supra* note 20.

27. See *infra* Part II.B. See also The Genocide Convention, *supra* note 20.

28. See *infra* Part II.C. See also The Genocide Convention, *supra* note 20.

29. See *infra* Part II.D. See also The Genocide Convention, *supra* note 20.

30. See *infra* Part II.F. See also The Genocide Convention, *supra* note 20.

31. See TASK FORCE FOR INT’L COOPERATION ON HOLOCAUST EDUC., REMEMBRANCE AND RESEARCH, 2010 EDUCATION WORKING GROUP PAPER ON THE HOLOCAUST AND OTHER GENOCIDES 11 (2010), available at http://www.un.org/en/holocaustremembrance/EWG_Holocaust_and_Other_Genocides.pdf.

32. See generally NATHAN STOLTZFUS & HENRY FRIEDLANDER, NAZI CRIMES AND THE LAW 28–33 (Cambridge University Press 2008) (outlining the issues with prosecuting and sentencing Nazi soldiers in Germany in the 1960s and 1970s).

33. See *id.* at 28–29.

34. *Id.* at 28.

35. See TASK FORCE FOR INT’L COOPERATION ON HOLOCAUST EDUC., REMEMBRANCE AND RESEARCH, *supra* note 31; see also WEITZ, *supra* note 17, at 8–9.

International law has expanded upon the original Genocide Convention due to it being tailored to the events of the Shoah.³⁶ The Rome Statute of the International Criminal Court was one expansion of the Geneva Convention.³⁷ The Preamble of the Rome Statute elucidated, “during [the past] century *millions of children, women, and men* have been victims of unimaginable atrocities that deeply shock the conscience of humanity.”³⁸ An International Criminal Tribunal has produced jurisprudence that interprets the concept of genocide.³⁹

Jurisprudence from the International Criminal Tribunal for Rwanda has established that genocide can be applied more broadly than previously contemplated—specifically relating to acceptable groups under genocide statutes.⁴⁰ The International Criminal Tribunal for Rwanda clearly articulated that women, as a subgroup of Tutsi, were to be recognized as a group under genocide on the basis of the intent of the drafters of the Genocide Convention “which, according to the *travaux préparatoires*, was clearly to protect any stable and permanent group.”⁴¹ This interpretation serves as the springboard for this paper by providing a legal framework to analogize children to women as articulated in *Akayesu*. The circumstances may differ, regarding types of atrocities, but the underlying analysis provides a solid framework for applying genocide to using or recruiting children for use in armed conflict.

“Genocide” is a term derived by international jurist Raphael Lemkin.⁴² Lemkin spent a great deal of effort to articulate the type of extermination, which the Nazi Regime committed against the Jewish people, and others, during the Shoah.⁴³ The term “genocide” quickly received support toward codification, as shown by the enactment of the statutes under the Genocide Convention within four years following the close of World War II.⁴⁴ The 1948 Genocide Convention has been interpreted by codification and jurisprudence since its original establishment in 1948.⁴⁵

The International Criminal Court (“ICC”) codified the definition regarding genocide to be the applicable template that has been adopted by other tribunals.⁴⁶ Initially, the Rome Statute was the result of an initiative to establish an ICC to apply the law as collectively established to the most serious crimes recognized by the international community.⁴⁷ *Ad hoc* tribunals, specifically the International

36. This article addresses what is commonly known as the “Holocaust,” instead of the “Shoah” due to any issues regarding cultural sensitivity.

37. See The Rome Statute, *supra* note 20, at art. 8.

38. See The Rome Statute, *supra* note 20, at pmb1 (emphasis added).

39. See, e.g., Prosecutor v. Jean Paul Akayesu, Case No. ICTR-96-4-T (Sept. 2, 1998).

40. *Id.* at ¶ 701.

41. *Id.*

42. See WEITZ, *supra* note 17, at 8.

43. See *id.*

44. *Id.* at 8–9.

45. See generally *id.* (Weitz’s book discusses the implications of genocide across multiple historical precedents).

46. See generally Mahnouch H. Arsanjani, *The Rome Statute of the International Criminal Court*, 93 AM. J. INT’L L. 22, 30 (1999).

47. See *id.* at 29–30.

Criminal Tribunal for Rwanda, have interpreted the Rome Statute to include groups and forms of acts not previously understood to fall within the purview of the Rome Statute.⁴⁸ The various tribunals adopted versions of the Rome Statute and expanded according to the surrounding circumstances. “Genocide” has been interpreted by *ad hoc* tribunals such as: the ICC; the East Timor Special Panels for Serious Crimes; the Extraordinary Chambers in the Courts of Cambodia; the Supreme Iraqi Criminal Tribunal (“SICT”); the Special Court for Sierra Leone; the International Criminal Tribunal for Rwanda; and the International Criminal Tribunal for Yugoslavia.⁴⁹

An interpretation by the International Criminal Tribunal for Rwanda has established mass rape, of women as a form of genocide.⁵⁰ This interpretation is an expansion on the ideology or conceptualization of what constitutes a group within the meaning of genocide. Further, this opens the door to the consideration that children are harmed as much—if not more—through armed conflict. This paper asserts that this group, children, deserve to be recognized as a group or at least a subgroup of such substantive import to be within the scope of genocide as defined by *Akayesu*.

ANALYSIS

PART I

A. Genocide

The Genocide Convention etched into international law the modern foundation of the crime of genocide.⁵¹ Treaties and customary international law are the sources of international law that govern genocide.⁵² There are currently 144 contracting parties to the Genocide Convention.⁵³ The Convention entered into force on January 12, 1951.⁵⁴ The nearly sixty-year-old convention has shown how the overwhelming majority of the world has formed the basis for this customary international law to be binding upon those that have not become a party to the

48. The purview of the Rome Statute is limited to offenses such as genocide, crimes against humanity, and war crimes, as defined. The International Tribunal for Rwanda adds violations of Article 3 common to the Geneva Conventions and Additional Protocol II, as defined. See *The International Criminal Court and Ad Hoc International Criminal Tribunals*, COALITION FOR THE INTERNATIONAL CRIMINAL COURT, http://www.iccnw.org/documents/FS-CICC-AdHocTribunals_current.pdf (last updated Sept. 9, 2005).

49. See GIDEON BOAS, JAMES L. BISCHOFF, & NATALIE L. REID, INTERNATIONAL CRIMINAL LAW PRACTITIONER LIBRARY, at 136–140. Also noted is the SICT is also known as the Iraqi High Command (IHC), and discussed within *International Criminal Law Practitioner* are the difficulties of translating the Tribunal names into English. *Id.*

50. See, e.g., Prosecutor v. Jean Paul Akayesu, Case No. ICTR-96-4-T (Sept. 2, 1998).

51. See Johan D. van der Vyver, *Prosecution and Punishment of the Crime of Genocide*, 23 FORDHAM INT’L L.J. 286, 288–90 (1999).

52. *Id.* at 290–91.

53. Chapter IV Human Rights, UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-1&chapter=4&lang=en (last visited Mar. 24, 2014).

54. *Id.*

Convention. Genocide is now considered to be *jus cogens*.⁵⁵ The Genocide Convention defines the required elements, *mens rea* and *actus reus*, in order to qualify as genocide.⁵⁶

The Genocide Convention was written to codify principles of law to punish and deter the act of genocide after World War II.⁵⁷ The convention was broad enough to expressly cover the societal needs of the post World War II era. Thus, the Genocide Convention is the modern origin of the law of genocide as it relates to modern rule of law. Similar to most laws, the convention has endured due to its ability to be interpreted, through a loose form of *stare decisis* and sovereign interpretation, to meet the slowly changing needs of humanity.⁵⁸

The Convention was utilized in the formulation of the Rome Statute of the International Criminal Court.⁵⁹ The Rome Statute defined the subject matter jurisdiction of the International Criminal Court.⁶⁰ Subject matter jurisdiction of the ICC specifically includes, and has produced jurisprudence regarding genocide.

Genocide law can also be traced to the International Military Tribunal at Nuremberg under crimes against humanity. The Nuremberg Charter was essentially a furtherance of the Treaty of London, which was signed by the Allied

55. See van der Vyver, *supra* note 51, at 287.

56. The Genocide Convention, *supra* note 20. The Genocide Convention states, in relevant portion:

ARTICLE II; In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) [k]illing members of the group; (b) [c]ausing serious bodily or mental harm to members of the group; (c) [d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) [i]mposing measures intended to prevent births within the group; (e) [f]orcibly transferring children of the group to another group.

ARTICLE III; The following acts shall be punishable: (a) [g]enocide; (b) [c]onspiracy to commit genocide; (c) [d]irect and public incitement to commit genocide; (d) [a]tempt to commit genocide; (e) [c]omplicity in genocide.

Id.

57. See van der Vyver, *supra* note 51, at 286–87.

58. See generally *id.* (van der Vyver states that “[recent genocide] cases are authority for the proposition that the definition and scope of the crime of genocide as a proscription of customary international law have developed well beyond the confines dictated by the wording of the Genocide Convention itself.”).

59. See generally *id.* (describing the evolution from the Genocide Convention to the modern International Criminal Court).

60. THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, A/Conf.183/9, 17 July 1998, (last corrected on January 16, 2002), available at [http://legal.un.org/icc/statute/english/rome_statute\(e\).pdf](http://legal.un.org/icc/statute/english/rome_statute(e).pdf).

“[G]enocide” means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) [k]illing members of the group; (b) [c]ausing serious bodily or mental harm to members of the group; (c) [d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) [i]mposing measures intended to prevent births within the group; (e) [f]orcibly transferring children of the group to another group.

Id.

Powers in August of 1945.⁶¹ Genocide is impliedly found in the “persecution” section of crimes against humanity as written in the Nuremberg Charter.⁶²

B. Eighteen Years of Age Is the Progressively Emerging Age of Majority to Be Recruited or Utilized as a Soldier Under International Treaty and Customary Law of Armed Conflict

Under customary international law, there is a progressive argument that the minimum age for a person to be recruited into or involved in active combat is trending toward eighteen years of age.⁶³ This is derived from the normative shifts in the practices and statements or declarations of nations coupled with treaties that have codified this emergence in international law.⁶⁴ Discussion shall ensue with the concept that the previous international treaty and crystallized customary law that the age of majority is fifteen years, has likely begun to shift toward the normative age of eighteen as the age of majority for use in armed conflict.⁶⁵

Most nations are contracting parties to the United Nations Convention on the Rights of the Child (CRC)⁶⁶ and its Optional Protocol on Children and Armed Conflict (Protocol I).⁶⁷ Protocol I codified the modern prevailing state practice, which has arguably altered the normative age from the established age of fifteen to an age closer to eighteen.⁶⁸ The increase in age for persons to be used in combat in Protocol I is *prima facie* evidence of this shift. The evidence is in the form of a declaration from the international community that the acceptable normative regarding the age of combatants has, at a minimum, begun to shift if it has not already shifted.

This norm has shifted markedly since World War II. The original CRC was a large leap forward in codifying the normative that children were not to be used in armed conflict until reaching the age of fifteen.⁶⁹ The Protocol to the CRC was a codification of the rapid *subsequent* shift in the normative age for participation in armed conflict. This subsequent and swift shift in international law did, however, leave a gap in the protection of children from the age of fifteen to seventeen years of age. The Protocol was quickly framed to address the issue via indicating the shifting norm and codifying the normative shift in a manner that allowed states to

61. See, e.g., ELLIS WASHINGTON, *THE NUREMBERG TRIALS: LAST TRAGEDY OF THE HOLOCAUST* 73–74 (University Press of America, Inc. 2008).

62. See generally *id.*

63. See generally Ann Davison, *Child Soldiers: No Longer a Minor Incident*, 12 WILLAMETTE J. INT’L L. & DISP. RESOL. 124 (2004) (Davidson discusses the age of child combatants in militarized countries, the Convention on the Rights of the Child, and her own recommendations for more clear regulations of child soldiers).

64. See, e.g., *id.*

65. See, e.g., EVE LA HAYE, *WAR CRIMES IN INTERNAL ARMED CONFLICTS* 144–48 (Cambridge University Press 2008).

66. See The Convention on the Rights of the Child, *supra* note 21. The Convention set the age which one can serve in active conflict, or be recruited to serve, in the military as fifteen years of age.

67. See generally Protocol I, *supra* note 24 (Curious enough, the United States has become a party to this treaty while remaining not a party to the parent CRC.).

68. See *id.*

69. The Convention on the Rights of the Child, *supra* note 21, at art. 38, § 2.

derogate from using persons eighteen and older if it was needed, so long as certain criteria were met and not to utilize any child less than fifteen years of age.⁷⁰

This codification has received the express support, via signatory to Protocol I, of the majority of nations around the world. Specifically, the normative shift that states are declaring, and for the majority of states actually practicing, is that children ought not to be used in armed conflict.⁷¹ The original CRC and United Nations declarations establish that children are to be the objects of special interest and protections.⁷² In fact, the Protocol has 152 contracting parties as of January 7, 2014.⁷³ The Protocol entered into force on February 12, 2002.⁷⁴ Such widespread acceptance, in addition to the nearly decade long history of the Protocol and support from the major nations, is indicative of being applicable under customary international law, even to those who have not signed the Protocol. This shows a new humanitarian and human rights evolution, which nations are now just realizing that children ought not to be used in armed conflict, but more importantly, nations are pronouncing, declaring, and establishing new international norms through treaty and practice that children ought not to be used in armed conflict.

Nations have a vested interest in protecting the children within their borders. The children of today are the future of humanity and the leaders, workers, and scholars of their nation's future. As a result, the international community has spoken out to declare eighteen as the accepted age required for one to be utilized in military endeavors.⁷⁵ However, nations have reserved, within Protocol I, the right to utilize children should they not be able to recruit enough persons to maintain an effective military.⁷⁶ This is an expected clause to be placed in the Protocol especially in the initial shift in normative age of combatants. Protocol I "outlaws" the use of child soldiers in participating in active combat and the recruitment of children for such purposes.⁷⁷ The laws regarding armed conflict are decided by nations of the global community; not by warlords, tyrants, and opportunists. Argumentation based on recruitment and use of children in armed conflicts by warlords, tyrants, or any other non-state actors is not relevant with determining international law. However, there are over 300,000 children that are used in conflicts globally.⁷⁸ Therefore, the importance of determining where international

70. Protocol I, *supra* note 24, at Annex I.

71. *See id.*

72. *See, e.g.*, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 22, at 3077; *see also* Protocol I, *supra* note 24, at Annex I; *see also* Press Release, Secretary-General for Children and Armed Conflict, *supra* note 3; *see also* A World Fit For Children, G.A. Res. S-27/2 (Oct. 11, 2002); *see also* G.A. Res. 62/141, U.N. Doc. A/62/435 (Feb. 22, 2008); *see also* G.A. Res. 63/241, U.N. Doc. A/63/426 (Mar. 13, 2009).

73. Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, May 25, 2000, 2173 U.N.T.S. 222.

74. *Id.*

75. Protocol I, *supra* note 24, at Annex I.

76. *See, e.g.*, Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, *supra* note 73.

77. MICHAEL WESSELLS, CHILD SOLDIERS: FROM VIOLENCE TO PROTECTION 2 (Harvard University Press, 2006).

78. Press Release, Secretary-General for Children and Armed Conflict, *supra* note 3.

law is now, regarding children in armed conflict, and where the law is going is of paramount importance.

One could argue that Protocol I is not binding in that it does not require contracting parties to criminalize conduct of state or other actors—it is an optional protocol. This view is either flawed or supports the customary law argument that the majority of nations have decided that the age of majority with regard to military endeavors is eighteen (with reservations mentioned above). The number of nations supporting Protocol I backed by the passage of time and state practice has contributed to establishing a shift, or at a minimum the initiation of a shift, in the normative age of majority regarding soldiers. The age of eighteen has arguably become the international normative, accepted by states, as the age of majority in active combat and in the recruitment of soldiers.⁷⁹

Should a state require recruiting persons under the age of eighteen, then it is necessary to define “active combat” and “recruitment” to ensure communication in this article is accurate. It must be noted that different societies will have domestic norms that differ, perhaps significantly. A fluid interpretation of Protocol I seems to be possible under certain auspices, such as:

[Nations] that permit voluntary recruitment into their national armed forces under the age of 18 shall maintain safeguards to ensure, as a minimum, that: (a) [s]uch recruitment is genuinely voluntary; (b) [s]uch recruitment is done with the informed consent of the person’s parents or legal guardians; (c) [s]uch persons are fully informed of the duties involved in such military service; (d) [s]uch persons provide reliable proof of age prior to acceptance into national military service.⁸⁰

Active combat, as it relates to the CRC and its Protocol I, should be viewed as “job oriented” if the nation affirmatively recruits underage soldiers. The modern battlefield is no longer linear. Thus, it is not possible to ensure that a soldier working in a support role will never see conflict. However, the non-combat arms “jobs” have different roles and purposes within the military.⁸¹ This is significant in light of the intense training one undergoes within the military. It is one thing to possibly be near or observe combat; it is another to be trained to be the killer and participate in combat—both can be extremely traumatizing. Perhaps an acceptable median is a policy that would accept only those that are at least seventeen years of age and allow the training time, subsequent to their *voluntary* enlistment, to elapse the remaining time until the individual turns eighteen years of age. The United

79. Compare Protocol I, *supra* note 24, with African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49, art. 2 (1990) (This treaty encompasses the African region and sets the legal age of majority similar to that of the Optional Protocol I, as eighteen years of age).

80. Protocol I, *supra* note 24 at art. 3.

81. The “combat arms” role in a military is being defined as the portion of the military that is used to attack or defend (to simplify), such as: the infantry, artillery, armor, etc. Non-combat arms in contrast is all other portions of the military whose job is to perform support functions such as mail clerks, legal assistants, veterinarians, etc.

States, for example, allows children over the age of seventeen to enlist in the military with the consent of their parents and provides an intensive and relatively lengthy training regimen that those children must complete in order to serve in the United States military.⁸²

The term “recruitment” under the CRC and its Protocol I is an ambiguous term. “Recruitment” has been defined differently by various nations. One such variation permits seventeen-year-olds to enlist in a volunteer army as operating within Protocol I.⁸³ On the other hand, this interpretation could be argued as a violation of Protocol I; and such a violation may be argued as intentionally misconstruing interpretation of Protocol I. Specifically, Protocol I could be read to indicate that targeted recruitment of persons under the age of eighteen, without reason or need, is prohibited. However, Protocol I bans the use of underage soldiers in active combat, but permits derogation.⁸⁴

The application banning the recruitment of or use of underage soldiers in active combat is superfluous when compared with the complete ban on the active recruitment of persons under the age of eighteen. The more efficient interpretation of Protocol I interacts in harmony with the spirit of both restrictions regarding the active combat and the active recruitment of persons under the age of eighteen. Therefore, the intent of Protocol I is met by ensuring that persons under the age of eighteen are not actively recruited and are not finished with their initial military training until the age of eighteen.

C. Children Meet the Criteria Set Forth in Akayesu to Be a Group Recognized Under the Law of Genocide

National, ethnic, racial, and religious groups are the expressed groups that are identified in the Genocide Convention.⁸⁵ Historically, genocide has been understood to “not necessarily mean the immediate destruction of a nation, except when accomplished by mass killings of all members of a nation.”⁸⁶ The Genocide Convention recognized this and codified four specific groups and five elements that could trigger the enforcement of the Genocide Convention.⁸⁷ The members of the Convention did leave out certain groups. Restricting recognition to members of a nation was in view of the “exclusion of the more ‘mobile’ groups which one joins through individual voluntary commitment, such as political and economic groups.”⁸⁸ However, *Akayesu* showed that there were “qualities” that could be used

82. See 10 U.S.C. § 505(a) (2014).

83. Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, *supra* note 73.

84. See Protocol I, *supra* note 24 at art. 3.

85. The Genocide Convention, *supra* note 20 at art. II.

86. RAPHAEL LEMKIN, WILLIAM A. SCHABAS, & SAMANTHA POWER, *AXIS RULE IN OCCUPIED EUROPE: LAWS OF OCCUPATION, ANALYSIS OF GOVERNMENT, PROPOSALS FOR REDRESS* 79 (Carnegie Endowment for International Peace, 2d ed. 2008).

87. The Genocide Convention, *supra* note 20 at art. II.

88. Prosecutor v. Jean Paul Akayesu, Case No. ICTR-96-4-T, ¶ 511 (Sept. 2, 1998).

to determine if persons constitute a group as intended under the Genocide Convention.⁸⁹

Akayesu articulated “qualities” such as “not challengeable by its members, who belong to it automatically, by birth, in a continuous and often irremediable manner.”⁹⁰ *Akayesu* represents jurisprudence that has established the above qualities and further established that groups not expressly stated in the Genocide Convention may be recognized under the Convention via the qualities that are exhibited by a particular group.⁹¹

It is not viable to argue against a child being born into childhood—a class or group of which the child will be a member until they reach the age of majority. This is an irremediable trait that is exhibited by children and that trait is beyond repute. Alternatively, children are the most important subgroup of any larger group.⁹² This is true with regard to any national, ethnic, racial, religious, or any other group within humanity. International law has repetitively acknowledged the need to protect children.⁹³ The reasoning for this heavy interest in the health, welfare, and psychological well-being of children is sound. Children are the heirs that will undoubtedly continue the legacy of each nation, ethnicity, race, and religion. The destruction of this fragile underpinning of humanity ultimately leads to the destruction of the group to which the children are a part.

The United Nations has identified government armed forces, paramilitary groups, and armed opposition groups that are utilizing child soldiers.⁹⁴ These nations frequently have opposition groups attempting to seize the government of their respective nations.⁹⁵ These opposition groups are notorious for using children

89. *Id.*

90. *Id.*

91. *See id.*

92. *See generally* Protocol I, *supra* note 24.

93. *See generally* CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 22.

94. COALITION TO STOP THE USE OF CHILD SOLDIERS, WORLD MAP OF CHILD SOLDIERS, 2000/2001, available at http://www.mickmaurer.com/files/child_soldiers.pdf. This map is an excellent device to show the use of child soldiers is an issue that is widespread enough to cause concern. Yet, confined to a small enough of a group of countries to show this is not the generally accepted norm. Attention must be placed with the fact that many of the nations indicated within this map have children used by opposition groups and not by the national governments. However, there are some governments that are utilizing child soldiers. Additionally, the purposes for the use of children in these nations vary greatly and require more inquiry than this paper provides in order to comprehend the intricacies involved from historical exploitation, international “willful blindness,” to simple indifference based upon decades or centuries of ethnic or racial ideologies of supremacy.

List of Countries with Child Soldiers Fighting in Recent and Ongoing Conflicts (G: government armed forces, P: paramilitaries, O: armed opposition groups) Colombia (P,O); Mexico (P,O); Peru (O); Russian Federation (O); Turkey (O); Yugoslavia (former Rep. of) (P,O); Algeria (P,O); Angola (G,O); Burundi (G,O); Chad (G); Republic of Congo (G,O); Dem. Rep. of the Congo (G,O); Eritrea (G); Ethiopia (G); Rwanda (G,O); Sierra Leone (G,P,O); Somalia (all groups); Sudan (G,P,O); Uganda (G,O); Iran (G,O); Iraq (G,O); Israel and Occupied Territories (G,O); Lebanon (O); Afghanistan (all groups); India (P,O); Indonesia (P,O); Myanmar (G,O); Nepal (O); Pakistan (O); Philippines (O); Solomon Islands (O); Sri Lanka (O); East Timor (P,O);Tajikistan (O); Papua New Guinea (O); Uzbekistan (O).

Id.

95. *Id.*

in order to further their own interests.⁹⁶ Such destruction of youth is not acceptable for one to commit or the international community to rhetorically scold. With an understanding of the history and modern legal framework of genocide, a determination of the legal age of a child, and that children can and must be considered a group within the meaning of genocide, it is now proper to begin an analysis of the elements of genocide as applied to child soldiering.

PART II

QUALIFICATION OF GENOCIDE, BY THE USE OF CHILDREN IN ARMED CONFLICT, IS SHOWN THROUGH THE INTENT TO DESTROY IN WHOLE OR IN PART ANY GROUP THROUGH ANY ONE OF THE FIVE DISJUNCTIVE ELEMENTS OF GENOCIDE

There is a need to determine whether there is an argument under any of the five disjunctive elements for genocide regarding the use of child soldiers. Each element shall include a general rule guided by jurisprudential judgments that interpreted the Genocide Convention and the Rome Statute. Specifically, *Akayesu* will be the primary jurisprudence from which the general rules are derived in this paper. Under each element, the general rule will be followed by an analysis of whether there is a substantive argument for genocide under each individual element. First, this section provides an analysis as to what is genocidal intent to “destroy, in whole or in part . . . members of the group.”⁹⁷

A. Genocidal Intent to Destroy in Whole or in Part Members of the Group

Genocidal intent is “culpable” when one has committed an offense that is covered by Article 2(a)–(e) of the Genocide Convention, or an equivalent statute enacted in furtherance of the Genocide Convention, “with the clear intent to destroy, in whole or in part, a *particular group*.”⁹⁸ Culpability is established because the offender “knew or should have known” his or her act would “destroy, in whole or in part, *a group*.”⁹⁹ For an act to be charged under the Genocide Convention, or equivalent statute, the act must be against “one or several individuals,” because the individual belongs to a group, and is targeted primarily because of his or her membership to the group.¹⁰⁰ This *dolus specialis*, or special intent, is the key to explaining or defining genocidal intent.¹⁰¹

The limitation in the targeting of the group establishes the intent to “destroy, in whole or in part, the group.”¹⁰² Specific intent can be established through

96. *Id.*

97. The Genocide Convention, *supra* note 20 at art. II.

98. Prosecutor v. Jean Paul Akayesu, Case No. ICTR-96-4-T, ¶ 520 (Sept. 2, 1998) (emphasis added).

99. *Id.* (emphasis added).

100. *See id.* at ¶ 521.

101. *Id.* at ¶ 517.

102. *Id.* at ¶ 522.

“inferring” facts from the offense as they occur in context with other factors.¹⁰³ The other factors can be “the scale of atrocities committed, their general nature, . . . [or] deliberately and systematically targeting victims on account of their membership of a *particular group*.”¹⁰⁴ Additionally, the “exclusion” of other groups can “infer” genocidal intent.¹⁰⁵

Drafters of the Genocide Convention had the intent to deter acts of genocide against any stable and permanent group.¹⁰⁶ This interpretation of the Convention was set forth in *Akayesu*.¹⁰⁷ *Akayesu* determined that “it is particularly important to respect the intention of the drafters of the Genocide Convention, which according to the *travaux préparatoires*, was patently to ensure the protection of any stable and permanent group.”¹⁰⁸ Children are clearly a stable and permanent group. Membership of this group is from birth until one reaches the age of majority. The permanence of the group (i.e., children) will exist until the end of humanity itself. Therefore, the “stable” and “permanent” criteria, as set forth in *Akayesu*, is met.

Children have been recognized repeatedly as a group to whom the world, or “mankind,” owes a debt of recognition and special protection.¹⁰⁹ When children are sought out for recruitment purposes, to be used in armed conflict, those that seek the children often show little intent other than simply choosing children because they are children.¹¹⁰ One may view the perfect soldier as one that follows orders without question. Children can and often are beaten and trained into these very types of soldiers.¹¹¹ Thus, children are targeted specifically for their mental “pliability.”¹¹² On the other hand, one could argue that children may be willing to participate in armed conflict and are even treated as well as their adult counterparts. Perhaps even given a monetary or property interest as compensation paid to either the children or their families.¹¹³ This argument has a facial appeal to it, which initially sounds reasonable. This reasonableness is quickly diminished when one looks into the ability of a child to make sound decisions for him or herself. The child’s family should not be given total authority to send their child to an armed conflict so that they may reap a benefit. On the one hand, this may be viewed as the child supporting his or her family. However, it is also a dominant position, which reaps all the benefits of an agreement and the child is left to suffer *all* detriment, mental and physical, that he or she receives from participating in armed conflict. Children cannot generally make a rational and informed decision to serve in armed

103. *Akayesu*, Case No. ICTR-96-4-T at ¶ 517.

104. *Id.* at ¶ 523 (emphasis added).

105. *Id.*

106. *Id.* at ¶ 517.

107. *See generally id.*

108. *Id.* at ¶ 516.

109. *See generally* A World Fit for Children, G.A. Res. S-27/2f World Fit Fldren, rg Legacyay. om
itted ing the accidents for either of them.howed that the it was what he thought then it was, *supra* note 72; *see also*
Rights of the Child, G.A. Res. 62/141 (Feb. 22, 2008).

110. WESSELLS, *supra* note 77, at 35.

111. f World Fit Fldren, rg Legacyay. om

itted ing the accidents for either of them.howed that the it was what he thought then it was*Id.*

112. *Id.*

113. *Id.* at 55.

conflict and their families should not be permitted to make such a decision in their stead without completely informing the child and gaining his or her complete and genuine assent. Children have a reduced ability to understand the circumstances, specifically, those involved in decisions regarding armed conflict.¹¹⁴ Therefore, formal recognition of children as a group protected by the Genocide Convention is an issue that is ripe within the international community. The judgment of *Akayesu* has provided the jurisprudence needed to bolster the international effort to protect children from being used in armed conflict.

B. Killing Members of the Group

“Killing” is a term that should be addressed due to its ambiguity. The International Criminal Tribunal for Rwanda has produced jurisprudence to interpret the ambiguity of the term “killing.”¹¹⁵ There is a difference in the English and French translations in the Genocide Convention.¹¹⁶ The difference of the two translations is that the French version has additional inferences attached that add an element of intent.¹¹⁷ The French version includes the word *meurtre* which indicates a killing.¹¹⁸ More specifically, *meurtre* indicates an intentional killing,¹¹⁹ whereas the English word “killing” could refer to a death, which was unintentional. The “precision” of the French version is “preferred.”¹²⁰

Children are killed intentionally throughout the world during armed conflict. One such method is to target children to terrorize towns or villages. The National Union for the Total Independence of Angola has used the strategy of murdering infants in order to terrorize locals in villages.¹²¹ Many more children are killed through ordinance, nutritional deprivation, issues surrounding displacement due to armed conflict, as well as poverty brought about due to killing the children’s families.¹²²

Child soldiers are prone to have their lives unnecessarily thrown away because children are “exploitable” and “expendable.”¹²³ In West Africa, the “shock value” of young boys has been utilized by sending them into combat naked to terrorize the opponent.¹²⁴ The “shock value” of child soldiers in West Africa cannot be summarized by only this one method of exploitation, they are also sent to “spearhead” assault operations.¹²⁵ Children are specifically chosen to go on suicide missions because they do not have a “sense of morality” that has developed to a point commensurate with that which is necessary to make sound decisions in

114. *See id.* at 36.

115. Prosecutor v. Jean Paul Akayesu, Case No. ICTR-96-4-T, ¶ 500 (Sept. 2, 1998).

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. WESSELLS, *supra* note 77, at 24.

122. *Id.* at 24–25.

123. *Id.* at 34.

124. *Id.*

125. *Id.*

combat.¹²⁶ This is evidenced through sending child soldiers through minefields to clear the minefield for the adult soldiers.¹²⁷ Terroristic use of children is another form of exploitation of children in armed conflict.

In Afghanistan, multiple groups are recruiting children to carry out terrorist activities.¹²⁸ Groups that recruit children for terroristic activities include the “Taliban, the Haqqani network, Hezb-i-Islami, the Tora Bora Front, and Jamat Sunat al-Dawa Salafia,” and these groups utilize “children as young as 13 and 14 years of age” by using children in “plant[ing] explosives” or by blowing themselves up in “suicide attacks.”¹²⁹

In Iraq, Al-Qaeda seems to be the primary group in recruiting children to perform terrorist actions.¹³⁰ Children have been “tricked, coerced[,] or enticed with financial incentives” to perform “acts of terror” or, more specifically, to be “suicide bombers.”¹³¹ Children in Iraq have been recruited to perform “acts of terror” as young as “14 to 16 years of age.”¹³²

Children are exploited as child soldiers. Children are chosen for their developmental immaturity to perform tasks that they are not expected to live through so that the more seasoned, older troops, that have been trained extensively or have substantial training may be preserved.¹³³ On the other hand, it must be noted that the child soldiers have a greater level of security than those they rape, rob, and pillage.¹³⁴ Additionally, child soldiers may have a better diet than other children in the area because they forcibly take food from others.¹³⁵ In practice, it may be extraordinarily difficult to parse the use of soldiers for the purpose of conducting hostilities and using them for the purpose of exterminating the children because they are children. However, one cannot make a sound argument that by creating a larger evil, one is justified by exploiting a child through means that are a lesser evil. It is clear that children are being intentionally killed in order to further the interests of the groups that exploit them. Additionally, it is also damning that children are specifically targeted for use in armed conflict due to the characteristics of children as a group such as being young, pliable, and able to be indoctrinated easily.

C. Causing Serious Bodily or Mental Harm to Members of the Group

Serious bodily or mental harm does not require the harm to be “permanent” or “irremediable.”¹³⁶ However, the harm does need to be “more than minor or

126. *Id.* at 36.

127. WESSELLS, *supra* note 77, at 37.

128. *Report of the Secretary-General on Children and Armed Conflict*, ¶ 47, G.A. Res. 64/742 (Apr. 13, 2010) [hereinafter *Secretary-General Report on Children 2010*].

129. *Id.*

130. *Id.* at ¶ 81.

131. *Id.*

132. *Id.*

133. WESSELLS, *supra* note 77, at 37.

134. *Id.* at 23.

135. *Id.*

136. *Prosecutor v. Jean Paul Akayesu*, Case No. ICTR-96-4-T, ¶ 502 (Sept. 2, 1998).

temporary impairment.”¹³⁷ This threshold element need not be limited to bodily or mental “acts of torture.”¹³⁸ Nor should this element be limited to “inhumane or degrading treatment” or “persecution” of a group.¹³⁹ *Akayesu* specifically noted that the mental harm inflicted upon rape victims qualifies as being protected under genocide statutes.¹⁴⁰

Serious bodily harm is presented in multiple ways. Battlefield casualties are inherent to armed conflict and must be strategically considered by every commander or leader in preparation of an attack. Military recruitment coerced by physical and/or sexual violence can result in both bodily and mental harm. Superior ranking military members may sexually abuse child subordinates.¹⁴¹ In addition, children are forced or coerced into taking drugs to alter their state of mind.¹⁴²

The mental trauma inflicted upon underage soldiers is massive. Children are vulnerable to manipulation and unaware of the long-term psychological damage being inflicted upon them. Notably, adults experience psychological trauma from armed conflict.¹⁴³ Certainly, adults are better equipped to psychologically deal with the intense stress and gore present on the battlefield.¹⁴⁴ In addition, adults have the maturity to comprehend the magnitude of the decisions that are necessary for one to make when in combat that affect their very ability to live through the engagement. In contrast, children simply cannot appreciate the danger that is presented to them in circumstances of armed conflict where the lack of maturity devalues the significance of life itself.¹⁴⁵

Mental damage resulting from armed conflict is manifested in various ways for different cultures. Posttraumatic stress disorder is one possible result of the “extreme traumatic stressor[s]” inflicted upon those used in armed conflict.¹⁴⁶

137. STEVEN R. RATNER, JASON S. ABRAMS, & JAMES L. BISCHOFF, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 31 (Oxford University Press 2009), (Citing *Semanza Trial Judgment*, ¶ 320–22; *Blagojevic and Jokic Trial Judgment*, ¶ 645.).

138. *Akayesu*, Case No. ICTR-96-4-T at ¶ 504.

139. *Id.*

140. *Id.* at ¶ 508. “For instance, rape can be a measure intended to prevent births when the person raped refuses subsequently to procreate, in the same way that members of a group can be led, through threats or trauma, not to procreate.” *Id.*

141. *See, e.g.*, WESSELLS, *supra* note 77, at 97.

142. *Id.* at 76–77.

143. *Id.* at 129.

144. *Id.* at 74 (stating that adults have more control over their emotions than children do, especially in combat-type situations).

145. *See id.* at 35–36.

146. AMERICAN PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 463–65 (American Psychiatric Ass’n, 4th ed., text rev., 2000). The following passage is illustrative to show only one of many possible forms of psychological damage, and the diagnostic measurements are substantially linked to this topic:

Posttraumatic stress disorder . . . follow[s] exposure to an extreme traumatic stressor involving direct personal experience of an event that involves actual or threatened death or serious injury, or other threat to one’s physical integrity; or witnessing an event that involves death, injury, or a threat to the physical integrity of another person; or learning about unexpected or violent death, serious harm, or threat of death or injury experienced by a family member or other close associate [such as fellow soldiers] (Criterion A1). . . . The characteristic symptoms resulting from the exposure to the extreme trauma include persistent reexperiencing of the traumatic event (Criterion B), persistent avoidance of

African conflicts have caused more mental trauma to children than in other regions of the world.

Girl soldiers, and girls generally, have a “visibly” higher rate of sexual exploitation than their male counterparts.¹⁴⁷ Underage girls are routinely sought, or hunted, to fill the ranks of militaries which use child soldiers.¹⁴⁸ Girl soldiers perform a variety of matriarchal tasks that are additional to their military focus.¹⁴⁹ Young females are brutalized until total obedience is achieved, then continually beaten to ensure continued obedience.¹⁵⁰ The psychological impact of the physical and mental brutality inflicted through sexual exploitation of young females is far reaching.

There is an undeniable link from the use of children in armed conflict to their bodily and mental harm. The children who survive the ordeal of armed conflict may be physically intact, or perhaps not. However, child soldiers are likely to have suffered mental harm that will substantially damage them psychologically in a manner that may be temporary or permanent. Furthermore, the damage inflicted upon these children, due to their mental immaturity, would be analogous to victims of torture and inhumane treatment. The use of children as a whole, or even as a subgroup of another, in armed conflict and the resulting damage that occurs to the children clearly shows that their use in armed conflict is substantial and temporally sufficient to justify a charge of genocide against those who recruit or use them in armed conflict.

D. Deliberately Inflicting upon the Group Conditions of Life Calculated to Bring About its Physical Destruction in Whole or in Part

This element requires an act which is “calculated” to “ultimately” bring about the “physical destruction” of a group through “inflicting on the group conditions . . . to bring about its physical destruction in whole or in part.”¹⁵¹ The conditions are not required to “immediately” destroy the group or to kill persons within the

stimuli associated with the trauma and numbing of general responsiveness (Criterion C), and persistent symptoms of increased arousal (Criterion D). . . . Traumatic events that are experienced directly include, but are not limited to, military combat, violent personal assault (sexual assault, physical attack, robbery, mugging), being kidnapped, being taken hostage, terrorist attack, torture, incarceration as a prisoner of war[.] . . . Witnessed events include . . . observing the serious injury or unnatural death of another person due to violent assault, accident, war, or disaster or unexpectedly witnessing a dead body or body parts. Associated descriptive features . . . [include] impaired affect modulation; self-destructive and impulsive behavior; dissociative symptoms; somatic complaints; . . . shame, despair, or hopelessness; feeling permanently damaged; a loss of previously sustained beliefs; hostility; social withdrawal; feeling constantly threatened; impaired relationships with others; or a change from the individual’s previous personality characteristics.

Id.

147. See WESSELLS, *supra* note 77, at 85–106.

148. See *id.* at 86.

149. *Id.* at 86. Matriarchal duties in this context are such that the female performs because it is her ‘duty’ in the setting. These duties would entail cooking and cleaning, among other duties, for the other male soldiers. *Id.*

150. *Id.* at 88–89, 93–95.

151. Prosecutor v. Jean Paul Akayesu, Case No. ICTR-96-4-T, ¶ 505 (Sept. 2, 1998).

group.¹⁵² “[S]ubjecting a group of people to a subsistence diet, systematic expulsion from homes and the reduction of essential medical services below minimum requirement” are ways in which conditions of life can be controlled to bring about the physical destruction of a group.¹⁵³

There is an argument that the conditions placed upon child soldiers are commensurate to being calculated to bring about their destruction in whole or in part. The children endure hardships from the moment of contact with many armed groups.¹⁵⁴ Child soldiers are forced to perform grueling marches;¹⁵⁵ if not completed, the child is subject to extreme discipline or viciously killed.¹⁵⁶ Often these killings are by fellow child soldiers, who are forced to kill the child that cannot continue on.¹⁵⁷ Heavy labor and famine are especially hard on child soldiers, as they dare not show weakness or defiance.¹⁵⁸ Drugs are given to, and sometimes forced upon, child soldiers.¹⁵⁹ Children are given these pills to be “fearless.”¹⁶⁰ In essence, the children are shaped to be totally physically, psychologically, and chemically dependent upon the armed group to which they are a part. Severity of the above-mentioned conditions should be weighed to determine whether the conditions of life have been inflicted to bring about the destruction of the children. A combination of the above harms may, or just a significant harm that is severe enough could, destroy in part children as a group or as the subgroup of another nation, ethnicity, race, or religion.

E. Imposing Measures Intended to Prevent Births from Within the Group

Measures that are “intended to prevent births within the group” will subject a perpetrator to genocide statutes.¹⁶¹ Examples of “intending” to “prevent births” are “sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages.”¹⁶²

In Afghanistan, young boy soldiers are “at great risk of sexual exploitation.”¹⁶³ Boys make up the “overwhelming majority” of fourteen to eighteen year old children exploited by armed groups in Afghanistan.¹⁶⁴ It is recognized that sexual violence in Afghanistan is a “widespread phenomenon.”¹⁶⁵ The practice of *bacha*

152. *Id.*

153. *Id.* at ¶ 506.

154. *See* WESSELLS, *supra* note 77, at 57.

155. *Id.* at 61, 92.

156. *Id.*

157. *Id.* at 92.

158. *Id.* at 57–84.

159. *Id.* at 76.

160. *See, e.g.*, WESSELLS, *supra* note 77, at 76–77.

161. *See* Prosecutor v. Jean Paul Akayesu, Case No. ICTR-96-4-T, ¶ 507 (Sept. 2, 1998).

162. *Id.*

163. WESSELLS, *supra* note 77, at 97.

164. *Id.*

165. Secretary-General Report on Children 2010, *supra* note 128, at ¶ 49.

bazi, sexual slavery of a young male, is prevalent enough to become a “matter of concern” for the international community.¹⁶⁶

Charging those who rape child soldiers with the crime of genocide is supportable by *Akayesu*.¹⁶⁷ The induction of a female soldier into armed groups is particularly one that has a propensity of sexual violence.¹⁶⁸ The mental harm experienced by a raped child soldier can result in extensive psychological problems to a child. For instance, if the sexual abuse is so severe that the children do not wish to have future sexual relations, then that underscores a reasonable argument that genocide has been committed.¹⁶⁹ There may be difficulty in getting children, or those that eventually reach adulthood, to admit that the sexual violence committed against them occurred,¹⁷⁰ much less, have them explain the rationale behind why they do not want to have sexual relations in the present. These are complex issues. Not only is there sexual violence and shame associated with it, but there are other factors in play as well, such as the stigma of being a “child soldier.” Such stigma can ostracize someone who is a former underage soldier.

Both civilian children and children that are recruited and used in armed conflict have a vulnerability to being raped.¹⁷¹ However, the added stress and pressure from those in authoritative positions in armed groups present an additional set of factors that are not present in civilian children that are raped.

In the Revolutionary Armed Forces of Colombia (“FARC”), young girls are not as prone to physical sexual violence.¹⁷² Instead, commanders use money and power to influence young girls into becoming their “wife” and substitute physical dominance with coercion through influence as a method of exploitation.¹⁷³ In the end, children are subject to psychologically damaging sexual abuse by force or coercion by armed groups.¹⁷⁴ Civilians in areas near armed groups are at risk of being raped by members of those groups. Child soldiers of armed groups that do not ban sexual violence are also constantly in danger of rape, abuse, and humiliation.¹⁷⁵ The impact of this exploitation can cause reluctance or refusal to procreate willingly once the children reach adulthood and acclimate back into the civilian world.¹⁷⁶

The repeated raping of the female soldier may be arguable as designed to prevent births due to many reasons, one of which could be physical damage because the raping of female soldiers is often done to keep her in her “place.”¹⁷⁷

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166. *Id.*
 167. *See generally Akayesu*, Case No. ICTR-96-4-T.
 168. *See WESSELLS*, *supra* note 77, at 89.
 169. *See Akayesu*, Case No. ICTR-96-4-T at ¶ 508.
 170. *See WESSELLS*, *supra* note 77, at 85.
 171. *See generally* Secretary-General Report on Children 2010, *supra* note 128; *see also* WESSELLS, *supra* note 77.
 172. WESSELLS, *supra* note 77, at 95–96.
 173. *See id.*
 174. *See id.*
 175. *See* Secretary-General Report on Children 2010, *supra* note 128, at ¶ 20; WESSELLS, *supra* note 77, at 86–87.
 176. *See* WESSELLS, *supra* note 77, at 94.
 177. *Id.*

Whereas an extended reliance of a young male subject to *bacha bazi* would arguably diminish his ability to perform customary roles required for passing along the traditional rituals for the continuance of their religious or cultural background.¹⁷⁸

Child soldiers are being targeted due to their membership in the group of children because they are pliable, physically incapable of resisting, and because they will be shamed into staying with the armed group out of shame resulting from being raped.¹⁷⁹ Once children are brought into the fold it is easy to see how they could lose hope under the circumstances placed in front of them.

F. Forcibly Transferring Children of the Group to Another Group

One forcibly transfers children of a group to another when there is a “direct act,” “threat” to act, or “trauma which would lead to the forcible transfer of children from one group to another.”¹⁸⁰ There is a strong argument for the charge of genocide in forcible transfer, particularly with children as a group being targeted for their vulnerability to be hunted and forced from their natural or community group to the armed group that takes them.

Somalia, Chad, Democratic Republic of the Congo, Sudan, Uganda, and many other countries have armed groups such as: “Al-Shabaab” in Somalia; the “*armee nationale tchadienne*[.]” known as ANT in Chad; “*Forces armées de la Republique democratique du Congo*[.]” known as the FARDC, “*Mai-Mai factions*,” the “*Patriotes resistants congolais*[.]”... the *Forces democratiques de liberation du Rwanda*[.]” also known as the FDLR, and the “*Congrès national pour la défense du peuple*[.]” known as the CNDP all in the Democratic Republic of the Congo; the “*Sudan People’s Liberation Army*[.]” known as the SPLA in the Sudan; and the “*Lord’s Resistance Army (LRA)* in Uganda.”¹⁸¹ These groups use a variety of tactics to recruit children. Some of the common evasive tactics are to forcibly enter homes, extract children, and forcibly take the children to assimilate into their armed groups.¹⁸² To take a child from its family, tribe, ethnic, national, or religious group and to attempt to force the child to adapt or be brutalized into the armed group is a *prima facie* argument for the forcible transfer of children from one group to another. Once children are assimilated into an armed group and subjected to armed conflict and sexual violence or exploitation, they are likely to have substantial issues acclimating back into their original group, if they ever get the opportunity to return.¹⁸³ The children’s core values, their outlook on life, and respect for individuals are changed from experiencing a life where a child must make “*deci[sions]* for life and death.”¹⁸⁴

178. See Secretary-General Report on Children 2010, *supra* at note 128, at ¶ 21.

179. WESSELLS, *supra* note 77, at 34–37.

180. Prosecutor v. Jean Paul Akayesu, Case No. ICTR-96-4-T, ¶ 509 (Sept. 2, 1998).

181. See generally Secretary-General Report on Children 2010, *supra* note 86; see also WESSELLS, *supra* note 77.

182. See WESSELLS, *supra* note 77, at 37–38.

183. See *id.* at 154–61.

184. *Id.* at 174.

Cultural genocide is a concept that deserves attention. This concept was specifically left out of the Genocide Convention.¹⁸⁵ However, the forcible transfer of children provision, an alternative to the cultural genocide theory, was included in the Genocide Convention at the Sixth Committee.¹⁸⁶ William Schabas put forth a strong theoretical argument for the forcible transfer of children to another group as being cultural genocide.

The mental element of . . . [forcibly transferring children of the group to another group] does not appear to pose any particular difficulties. The offender must have the specific intent to transfer forcibly children of the group to another group. The offender must have knowledge of the fact that children belong to one group, and that they are being transferred to another group. Thus, an individual who perpetrated the transfer of children from a victim group would have to know that the children were in fact members of the group. Similarly, he or she would have to know that what the children were being transferred to was in fact another group. [This provision] . . . is somewhat anomalous, because it contemplates what is in reality a form of cultural genocide, despite the clear decision of the drafters to exclude cultural genocide from the scope of the Convention. As a result, in prosecution of the perpetrator of the crime defined by . . . [the provision], the prosecution would be required to prove the intent “to destroy” the group in a cultural sense rather than in a physical or biological sense.¹⁸⁷

Both *Akayesu* and Schabas provide direction and insight into the context of removing children from their group and implementing them into armed groups. *Akayesu* provides a jurisprudential definition for this provision of genocide.¹⁸⁸ Schabas provides an excellent parallel of reasoning behind the provision.¹⁸⁹

Schabas’s work applied to actions of certain armed groups, such as the LRA, where children are abducted from their families and villages, is a supportive argument when discussing intent.¹⁹⁰ The argument of one abducting a child from a home or village and subsequently indoctrinating that child into a militaristic culture is a small inferential argument.

185. See The Genocide Convention, *supra* note 20.

186. See MACHTELD BOOT, *GENOCIDE, CRIMES AGAINST HUMANITY AND WAR CRIMES: NULLUM CRIMEN SINE LEGE AND THE SUBJECT MATTER JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT* 450 (Intersentia Uitgevers N.V. 2002). Boot includes extensive research pertaining to genocide and is more compendious than this paper need be.

187. WILLIAM A. SCHABAS, *GENOCIDE IN INTERNATIONAL LAW* 294 (Cambridge University Press 2d ed. 2009).

188. See *id.* at 202.

189. See *id.* at 294.

190. WESSELLS, *supra* note 77, at 39.

The meaning of “forcibly” is also a matter in need of discussion. It is not specifically required that the transfer of children need occur as a result of brute force or coercion.¹⁹¹ An entity that governs or has *de facto* control over an area may result in a genocidal act by directing children to transfer groups.¹⁹² The children or their organic group (family, tribe, or community) may “obediently perform” such a direction by the governing body and this could still be an act of genocide.¹⁹³ “Forcing” children to adopt the dominant language, or another culture (such as a militaristic culture), can result in a form of “linguistic and/or cultural genocide,” also referred to as “ethnocide.”¹⁹⁴

The dangers resulting from moving children out of their organic group have, as shown above, been recognized widely. Children that are “forced” into child soldiering may not only lose important opportunities to learn and pass on their culture during the absence from their organic group, but also may be secluded or stigmatized after they are no longer a soldier and decide to try to acclimate back to civilian life.¹⁹⁵ Some children are required to commit egregious acts of violence during their initial induction into an armed group.¹⁹⁶ In order to “cut child recruits off from their former lives,” they were “hardened” by being forced, by the Revolutionary United Front, known as the RUF in Sierra Leone, to kill family members or neighbors.¹⁹⁷ This creates a perpetual cycle that assists, specifically in Africa, a continued cultural deterioration. Child soldiering and the cultural fallout of “forced” transfer stands out, specifically, in Africa due to the multitude of issues surrounding post-colonial Africa. Africa has been on the leading edge in recognizing children’s rights, particularly as they pertain to armed conflict.¹⁹⁸

In summary, many governments and *de facto* governing, or power sharing, military groups such as Al-Shabaab in Somalia and the Sudan People’s Liberation Army in the Sudan “forcibly” transfer children into their armed groups for purposes of providing additional manpower for use in armed conflict.¹⁹⁹ This transfer is tantamount to destroying not only children as a whole, but also the national, ethnic, racial, or religious (and cultural) group they are also a part of. For these reasons, the “forcible” transfer of children by armed groups, for the purpose of using those children in armed conflict, constitutes genocide due to the inherent rupture in the children’s cultural, linguistic, religious, legal, and familial traditions.

191. BOOT, *supra* note 186, at 450.

192. *See id.*

193. *Id.*

194. U.N. Economic and Social Council, ¶ 5, GA/E/C.19/2008/7 (Feb. 8 2008).

195. *See* WESSELLS, *supra* note 77, at 160.

196. *See id.* at 59.

197. *Id.*

198. *See* JEREMY I. LEVITT ET AL., AFRICA: MAPPING NEW BOUNDARIES IN INTERNATIONAL LAW, 155–56 (Jeremy I. Levitt ed., Hart Publishing 2008). Chapter five is particularly on point with Africa’s advancement of children’s rights in the midst of armed conflict.

199. *See generally* WESSELLS, *supra* note 77, at 33–34.

CONCLUSION

The Genocide Convention has been interpreted by International Criminal Tribunals.²⁰⁰ Particularly, *Akayesu* provides the most analogous circumstance for application to define children as a group.²⁰¹ The above discussion shows a substantial argument for children to be defined as people that have not attained eighteen years of age. This paper recognizes the difficulties in establishing an age acceptable to all cultures. Nonetheless, the CRC Protocol I is a viable international “thermometer” on the issue of age.

Children exhibit the qualities defined in *Akayesu* for identification as a group. This paper shows that a substantial argument can be made for each element of genocide. Using interpretations of the Genocide Convention and the Rome Statute, each element and the requirement of genocidal intent were examined independently via instances occurring around the world.

Genocidal intent may possibly occur when children are targeted specifically because of their age and relative mental immaturity when it comes to understanding the consequences of armed conflict. Further, the relative ease of indoctrinating a child through violence or other coercive means implicates that those who would seek to do so had the intent, knowledge, or should have had the knowledge that so doing would incur, for these children, a fate enumerated in one of the genocide elements. The elements of genocide, as shown above, have numerous and substantial arguments in the context of children being the target of genocide via direct use and recruitment to directly participate in armed conflict. Killing members of the group was shown by establishing the recklessness of the lives of children once recruited or through sending children to their deaths because they would obey without question. Causing serious bodily or mental harm was shown mainly through the indoctrination process. Continued violence was a part of the need to establish dominance and thus a continuing physical and/or mental harm. Deliberately inflicting upon the group conditions of life calculated to bring about its destruction in whole or in part was shown through the grotesque conditions children are subjected to when brought into armed groups such as grueling forced marches and hard labor. Imposing measures intended to prevent births from within the group was shown through the extreme sexual violence inflicted upon both young males and females at the will of the commander or members of armed groups in order to provide obedience to the subjects of the sexual violence and morale, pleasure, and feelings of superiority to those inflicting the sexual violence. Forcibly transferring children of the group to another group is shown most distinctly through children being forcibly abducted from their homes from rebel groups such as the LRA.

In summation, children should be afforded the maximum protections available under international law. Children can be established as a group via the criteria set forth in *Akayesu*. Persons less than eighteen years of age is the definition of a child

200. See, e.g., Prosecutor v. Jean Paul Akayesu, Case No. ICTR-96-4-T (Sept. 2, 1998).

201. *Id.* at ¶ 511.

under the CRC Protocol I and international support is rising toward this definition.²⁰² Genocidal intent can be established through the types of activities children are directed to perform and the manner in which children are obtained.

All five elements of the Genocide Convention are occurring in varied degrees through atrocities around the globe.²⁰³ Admittedly, the charge of genocide is not the answer to every situation involving children and armed conflict. However, the international community owes children every protection that can apply to the severity of their situations. Scholarly writings, judicial opinions, and other forms of primary and secondary soft law are the appropriate methods of assistance to help children in these unique and precarious situations (although, perhaps not in that specific order) short of direct humanitarian intervention. This is the proper time to formally recognize this group and afford the support for future deterrence, diplomatic negotiation, and guidance for criminal proceedings. The laws regarding the composition of a group within the meaning of genocide have been shown to directly parallel traits exhibited by children. As such, a group under the definition of genocide should include children.

202. Protocol I, *supra* note 24, at 3.

203. The Genocide Convention, *supra* note 20.